

PROPERTY AS ENTRANCE

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INTRODUCTION

THE claims often made on behalf of private property are truly extraordinary. Theorists do not merely make the familiar utilitarian arguments that private ownership is important because it creates incentives for productive activity. They frequently make the far more dramatic claim that property rights must be protected because they constitute the very foundation for many other liberties citizens enjoy.¹ As one commentator characteristically put it:

In the material universe in which we live, it is obvious that this freedom of action—of speaking as we please, of doing as we please, of abstaining as we please, of changing dispositions as we please—can be exercised only on the ground and with regard to the things we own.”²

Property rights enjoy almost mythical status within American political thought in large part because of this commonly accepted connection to individual freedom. But what is the connection between liberty and property, and how precisely does protecting

¹ See, e.g., James M. Buchanan, *Property as a Guarantor of Liberty* 59 (1993); James V. DeLong, *Property Matters* 46–49 (1997); James W. Ely, Jr., *The Guardian of Every Other Right* 17, 26 (1998); Milton Friedman, *Capitalism and Freedom* 7–21 (1962) [hereinafter Friedman, *Capitalism and Freedom*]; F.A. Hayek, *The Constitution of Liberty* 139–41 (1960); Michael Kammen, *Spheres of Liberty* 25–27 (1986); Tibor R. Machan, *The Right to Private Property* 2 (2002); Richard Pipes, *Property and Freedom* 282 (1999); Ayn Rand, *The Virtue of Selfishness* 110 (1964) (“Without property rights, no other rights are possible.”); Bernard H. Siegan, *Property and Freedom* 9 (1997); Robert C. Ellickson, *Property in Land*, 102 *Yale L.J.* 1315, 1352–53 (1993); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 *S. Cal. L. Rev.* 1353, 1359 (1982); Leopold Kohr, *Property and Freedom*, in *Property in a Humane Economy* 47, 50–52 (Samuel L. Blumenfeld ed., 1974); Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 771 (1964).

² Kohr, *supra* note 1, at 51.

property rights secure other sorts of liberty? Several scholars have noted the centrality of exit to individual autonomy within liberal thought. As Hanoch Dagan and Michael Heller have noted, “[e]xit is a bedrock liberal value Exit stands for the right to withdraw or refuse to engage: the ability to dissociate, to cut oneself out of a relationship with other persons.”³ And, as Jennifer Nedelsky has observed, “[p]roperty [is] the ideal symbol for this vision of autonomy, for it [can] both literally and figuratively provide the necessary walls” to erect between oneself and others.⁴

The exit facilitated by private property can be understood in a variety of different ways. In its most ambitious form, exit constitutes the power to reside in self-sufficient isolation within one’s property. In weaker forms, however, exit merely means the power to withdraw into one’s property as a temporary refuge from the stresses of life in society. Many property theorists, particularly those sympathetic to the libertarian tradition, argue that property grants its owners the power to engage in the stronger form of exit, thereby preserving a wide range of individual liberties. James Buchanan, for example, argues that “private property protects the liberties of persons by providing viable exit from, or avoidance of entry into, potentially exploitative economic relationships.”⁵

I call this family of conceptions of the connection between property and liberty “property as exit.”⁶ On this view, a person’s ability

³ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549, 567–68 (2001); see also Nancy L. Rosenblum, *Another Liberalism* 60 (1987); Leslie Green, *Rights of Exit*, 4 *Legal Theory* 165, 166–67 (1998).

⁴ Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 272 (1990).

⁵ Buchanan, *supra* note 1, at 32. This view of property builds upon Buchanan’s identification of maximal independence with complete isolation from social interactions. See *id.* at 2.

⁶ The notion of “property as exit” is similar to Laura Underkuffler’s description of property as protecting individual interests against collective forces. Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* 40 (2003). Belief in the freedom-securing power of property’s exit function must be distinguished from a different argument according to which private property protects liberty by separating political from economic power and by decentralizing private economic power among a number of self-interested entities. See Friedman, *Capitalism and Freedom*, *supra* note 1, at 15–16; Hayek, *supra* note 1, at 136–37. While that argument does present a convincing critique of the centralized property systems characteristic of socialist regimes, it does not provide a compelling reason to prefer a *laissez-faire* system of private ownership

to retreat into his privately owned space enhances and protects his liberty by providing him with the power to disregard the demands of his fellow citizens. In this Article, I will argue that scholars have tended to overstate the power of exit conferred by property ownership. This has in turn caused them to overlook the extent to which property actually serves to facilitate “entrance” into community by tying individuals into social groups.

This conception of property as exit draws a great deal of its allure from its affinity with “a widely held belief that private property ownership does allow one to escape from interdependence with others.”⁷ At the heart of this conception of property as a crucial safeguard of freedom is the notion of an individual ensconced within the safety of his property. Thus, it is unsurprising that theorists frequently employ as their principal image of property a protective boundary or sphere around the individual, a cocoon that shields him from the unwanted demands of others.⁸

The mechanism by which property supposedly facilitates the individual’s exit from the demands of community is therefore a crucial concern of property theory. If that mechanism were to operate less directly than theorists often assume, it would substantially weaken arguments that the surest way to protect individual liberty is to safeguard the prerogatives of private ownership or, conversely, that interfering with property rights endangers individual liberty in a uniquely serious way. If a specific constellation of private property rights were not essential for safeguarding individual freedom, then we would not need to be as troubled as some theorists would have us be by government’s meddling with that constellation.

free from state interference to the modern regulatory state in which private ownership predominates, subject to substantial state regulation and redistribution.

⁷Stephen E. Barton & Carol J. Silverman, *Public Life and Private Property in the Urban Community*, in *Common Interest Communities: Private Governments and the Public Interest* 297, 303 (Stephen E. Barton & Carol J. Silverman eds., 1994).

⁸See, e.g., Gregory S. Alexander, *Commodity and Propriety* 30 (1997); Hayek, *supra* note 1, at 139–40; Nedelsky, *supra* note 4, at 223, 272; Epstein, *supra* note 1, at 1359; Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1678 (1988); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 *Notre Dame L. Rev.* 1033, 1044 (1996).

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Consequently, it is worth exploring in detail the components of property's exit mechanism and its legal implications. In Part I, I will describe more fully the notion of property as exit, its various conceptual underpinnings, and some examples of the ways in which this vision has influenced the law of property. Specifically, property as exit presupposes a conception of freedom as "negative liberty," or the absence of coercion. In addition, property as exit depends on a particular understanding of human beings as largely self-sufficient. The notion that private property safeguards freedom by facilitating exit presupposes that people will in fact be able to exit into the safety of their property. Finally, property as exit employs its assumptions about freedom and the individual to construct a notion of human community as ideally voluntary. Property as exit is by no means the only liberal view of the relationship between property and liberty. Nonetheless, it has been an influential one within American property doctrine. Its wide appeal to thinkers from a variety of political and philosophical traditions, for example, helps to explain a general tendency within American property law to overprotect the right to exclude others from one's property.

In this Article, I will argue that theorists have generally overemphasized the degree to which private property enables owners to escape from communal coercion. As a consequence, they have put too much stock in property's isolating power and failed to acknowledge the many ways in which property actually increases owners' social obligations. My argument will proceed in two broad stages, the first negative and the second positive. In Part II, the negative phase of the argument, I will present two critiques of the conception of property as exit. The first, which I dub the neo-realist approach, focuses on the inherently social nature of the institution of property that has been thoughtfully and eloquently elaborated by a series of property scholars over the past several decades. Despite its important insights, this critique gets its proponents less mileage than they often assume. I will therefore offer an alternative to the neo-realist critique that builds upon an Aristotelian and Thomistic conception of human nature as intrinsically and robustly social.

After setting forth several reasons to think that the social view of human nature is sound, I will explore the implications of this insight for the conception of property as exit. Drawing on the litera-

ture of social norms, I will argue that the deep human need for stable community life exposes individuals to norms that cut directly across the boundaries established by the formal regime of private property. The coercive power of these norms undermines property's ability to act as a barrier between the individual and the community. This private coercion does not mean that property serves no exit function at all, but it does call into question the singular importance theorists often attribute to that function. Instead of a robust exit option, property appears at most to confer a more limited experience of privacy. While such privacy does grant owners a certain freedom of action, this weaker form of exit fails to justify the extravagant claims often made about the connection between property and freedom.

In Part III, I will propose a different conception of the means by which property mediates between the individual and the community: property as entrance. Property as entrance does not view property principally as a boundary separating individuals from one another but rather as a means of joining individuals to each other in community. As with exit, this process of entrance can either be stronger, as it is in utopian, territorially separatist communities, or weaker, as it is in the more loosely bound communities in which most Americans live. On either view, however, the individual's acquisition of property is not so much seen as facilitating acts of defiant exit, but as reinforcing his bonds to the community in which that property is situated.

Conceptualizing property as entrance suggests the desirability of understanding freedom as something more than just the absence of coercion. From the perspective of property as entrance, freedom emerges, at least in part, from the imaginative possibilities fostered by life among a broad range of normative communities and from possessing the material means for attaching ourselves to them. Property as entrance also encourages us to reject the notion of the ideal community as one that is freely chosen and just as easily abandoned. In its place, it favors a richer, stickier notion of community, one capable of satisfying the human need for stable companionship and sociability. These communities will often be given, not chosen, and there are reasons for thinking that they will often be characterized by relatively high costs of exit.

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I will conclude in Part IV by briefly exploring some of the implications of property as entrance for the law of property. I will argue that embracing the notion of property as entrance leads, most significantly, to a reconfiguration of the contours of the right to exclude. It may also shed light on some of the controversies regarding private residential governments.

I. PROPERTY AS EXIT

A. Strong and Weak Exit

Before turning to a more detailed discussion of property as exit, a qualification is in order. When scholars talk about property's facilitation of exit, they often seem to mean very different things. On the one hand, many theorists appear to conceive of the exit facilitated by property as the power to withdraw, permanently if one so chooses, into the safety of his belongings.⁹ This extreme form of exit may operate, as some scholars have suggested, simply as "a cartoon or trope,"¹⁰ but, even if this is the case, it is a trope that theorists and policymakers alike, particularly those of a libertarian bent, have aggressively employed to justify highly individualistic approaches to property rights. In contrast, some theorists view the exit made possible by property ownership as merely a temporary respite from a generally social existence. On this second, more modest view, the occasional territorial privacy made possible by private ownership secures individual freedom in a very direct and literal way: we are more free to do as we please when no one else can see what we are up to.

For reasons that I will discuss below, the argument that private ownership, as such, secures a robust set of individual liberties relies upon an implicit commitment to the *possibility* of the stronger form of exit.¹¹ The limited sphere of liberty protected by the weaker exit mechanism simply does not justify some exit theorists' broad assertions about the dependence of individual liberty on private ownership. My discussion of property's exit mechanism in this Part and the next therefore focuses on the strong exit position. Admittedly,

⁹ See, e.g., Buchanan, *supra* note 1, at 35; Ellickson, *supra* note 1, at 1353.

¹⁰ Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *Yale L.J.* 601, 631 (1998).

¹¹ See *infra* notes 165–69 and accompanying text.

many of these arguments are less compelling when arrayed against its weaker cousin. Accordingly, towards the end of Part II, I will return to the question of weak exit in order to assess what remains of the connection between property and liberty under that less ambitious version of the exit mechanism.

Finally, both the stronger and weaker versions of exit should be distinguished from what has come to be called the civic republican tradition of property thought. At first glance, the civic republican position appears to resemble closely what I am calling property as exit. After all, like exit theorists, civic republicans value private property, or—more accurately—broad private ownership of productive property, because of the economic self-sufficiency it generates.¹² But, unlike those who view property as the power to exit from social life, civic republicans do not understand the economic self-sufficiency generated by property as itself constitutive of, or even directly protective of, individual liberty. Rather, they view the importance of property's conferral of self-sufficiency as affirmatively instrumental to a superior form of social interaction and to the inculcation of a particular set of virtues. Civic republicans value the limited self-sufficiency generated by ownership of certain types of property because it prevents the servility that, in their view, usually accompanies economic dependence and because it fosters the sort of virtue necessary for maintaining a free and healthy republic.¹³ Indeed, civic republicans understand the virtue nurtured by property ownership as a highly social willingness on the part of property-owning citizens to subsume their private interests to the good of the community.¹⁴ Because of this fundamental difference in orientation, the self-sufficiency that civic republicans attribute to property owners is not nearly as broad as that necessary for the operation of property as exit, particularly in its stronger form.

B. Freedom as the Absence of Coercion

Even the most superficial consideration of the notion of property as exit, in both its strong and weak forms, reveals that it views human freedom as fundamentally about negative liberty, or the ab-

¹² See Alexander, *supra* note 8, at 30–31.

¹³ *Id.*

¹⁴ *Id.*

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sence of coercion. From this perspective, the essence of freedom is being left alone, free from compulsion by other human beings.¹⁵ Many liberals, particularly those within the libertarian tradition, focus their attention on preventing coercion by the state.¹⁶ But this preoccupation with state action is not essential to the outlook of property as exit, which is concerned about protecting individuals from coercion more generally.¹⁷

Absent from the negative conception of freedom is any notion that individuals are affirmatively entitled to be property owners. Negative freedom is freedom only from constraints on the acquisition and use of property; it does not include the right to receive any assistance in actually acquiring property to use. Property as exit opposes such assistance not least because the redistributive measures necessary for its provision involve the coercive invasion of the protective sphere of property that is already owned.¹⁸

Typically, proponents of property as exit are not only concerned with the freedom of the property owner to do what he wants in the private confines of his own home. Though they place substantial value on that intimate freedom, they also claim that property ownership enhances individuals' freedom to order their lives as they see fit, even in the public realm. Robert Ellickson captures this

¹⁵ See Buchanan, *supra* note 1, at 1 (“Independence from the effects imposed by the behaviour of others is a desired end objective.”); Radin, *supra* note 8, at 1679 (“The idea that property is a ‘sovereign island’ . . . seems to be an aspect of the liberal ideology of negative liberty. Inside your ‘sovereign island’ your freedom consists in doing anything you want, no matter how irrational or antisocial, as long as you do not harm others—in whatever sense the harm principle is to be construed.” (footnote omitted)).

¹⁶ See, e.g., Rand, *supra* note 1, at 131 (“Potentially, a government is the most dangerous threat to man’s rights.”); Green, *supra* note 3, at 167–70 (“Social groups are said to be both *free* and *purposive* institutions, whereas the state is neither.”); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *Yale L.J.* 1006, 1016 (1987).

¹⁷ Hayek, for example, defines coercion broadly as occurring any time “one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose.” Hayek, *supra* note 1, at 133. Consistent with this all-encompassing definition, Hayek includes as examples of situations ripe with potential coercion “a morose husband” and “a nagging wife.” *Id.* at 138.

¹⁸ See Robert Nozick, *Anarchy, State, and Utopia* 169 (1974) (comparing redistributive taxation to forced labor); Rand, *supra* note 1, at 125 (“The man who produces while others dispose of his product, is a slave.”); William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 *Geo. Wash. L. Rev.* 429, 477 (2005) (likening redistribution to theft).

specifically public component of negative freedom when he describes property as enhancing owners' ability to "thumb[] their noses at the rest of the world."¹⁹ That is, the freedom that is supposed to be secured by property is not confined to the liberty to live out privately those aspects of one's life that can be quietly accomplished behind closed doors with the window shades drawn. Theorists attribute to private property a freedom that is far broader than such a closeted liberty, encompassing freedom from coercion even in the performance of acts carried out where the world can see.²⁰

C. The Individual as Self-Sufficient

Along with this conception of freedom as "freedom from" coercion for both private and public acts, property as exit presupposes that human beings are the sorts of creatures capable of retreating onto their property and living free from external interference. If freedom is defined as the absence of interference or compulsion by other human beings, then it follows that, as Jennifer Nedelsky has put it, "the most perfectly autonomous man is the most perfectly isolated."²¹ Buchanan concurs that "[m]aximal independence is attained only if the individual exists in total isolation from the social nexus, characterized by an absence of even so much as voluntary interaction through trade and exchange."²² The conception of property as exit, particularly in its stronger forms, therefore seems to rest upon a view of the person as "essentially the proprietor of his own person or capacities, owing nothing to society for them" and as a being that is, at its essence, "free[] from dependence on the wills of others."²³

¹⁹ Ellickson, *supra* note 1, at 1352.

²⁰ Property as exit is concerned about any restraint on a person's use of his property, as long as that use does not also infringe on other people's rights to do as they please with their property. See Friedman, *The Machinery of Freedom*, *supra* note 1, at xiv (defining coercion as occurring when people prevent us from using our property in ways that do not violate their own property rights).

²¹ Nedelsky, *supra* note 4, at 272.

²² Buchanan, *supra* note 1, at 2.

²³ C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* 3 (1962); see also Charles Taylor, *Philosophy and the Human Sciences* 189–90 (1985) (asserting that liberals as a whole "[affirm] the self-sufficiency of man alone," a view of human nature that he considers to be "a very questionable thesis"); Gerald E.

The notion that human beings are “social animals” is so widely accepted by theorists of all stripes that it is little more than a cliché. The belief in self-sufficiency I am attributing to property as exit therefore is not the view that most people would in fact want to retreat into their property. Rather, it is a commitment to the notion that we do actually have a choice, however attenuated, about whether or not to retreat. Property as exit leans heavily on the beneficial effects for individual liberty of the *mere possibility* of exit. Accordingly, proponents of property as exit believe that the connection between property’s exit mechanism and negative liberty means that the power to live in isolation merits substantial legal protection. The idea is that people will refrain from imposing on us if they know that we can conceivably withdraw from our relationships into a self-sufficient existence on our property.²⁴ On this view, property safeguards the potentiality of exit, and the looming threat of that act confers a vital check on those with whom individuals might come into conflict.

As Albert Hirschman has pointed out, however, an exit option is most effective at freeing individuals and disciplining social groups when it is relatively inexpensive to exercise.²⁵ As exit becomes more expensive, the threat to opt out of social relations is rendered progressively less credible, and exit becomes less potent as a preemptive check on abuses.²⁶ If the right of the individual to exit by retreating into his property can be exercised only by radically sacrificing his well-being, the power of that right to shield against coercion by third parties will be correspondingly impaired. On the other hand, the more human beings can flourish in isolated existence within the cocoon of their belongings, the greater the ability

Frug, *Cities and Homeowners Associations: A Reply*, 130 U. Pa. L. Rev. 1589, 1598 (1982) (arguing that Ellickson’s “liberal” arguments are “deductions from assumptions about human nature that seem to be at least a caricature of the liberal assumptions about human nature”). The argument that liberal or libertarian approaches to property presuppose an individualistic conception of human nature remains somewhat controversial. See Will Kymlicka, *Liberalism, Community and Culture* 9–19 (1989).

²⁴ See Buchanan, *supra* note 1, at 16, 27, 32; Ellickson, *supra* note 1, at 1353. Some theorists identify commitment to the ultimate possibility of exit as liberalism’s defining feature. See Dagan & Heller, *supra* note 3, at 568.

²⁵ See Albert O. Hirschman, *Exit, Voice, and Loyalty* 85–93 (1970).

²⁶ See *id.* at 85; Green, *supra* note 3, at 171 (“The possibility of exit may itself make the group responsive to the interests of its members.”).

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of property rights to act as a check on third parties. Commitment to the notion that property does provide a powerful, liberty-securing exit mechanism, even if only as a latent potentiality that few people actually exercise, rests on an implicit belief that individuals can ultimately withdraw at a reasonably low cost from the communities to which they belong.

D. Community as Voluntary

Of course, as I discuss below, all but the most die-hard proponents of property as exit admit that property is a social institution that could not survive without the coercive power of some community, typically the state.²⁷ Some may even concede that human beings typically place a great deal of value on social relationships and would be profoundly unhappy without connections to other human beings. What distinguishes property as exit from other accounts of human beings' social nature, however, is its firm insistence on voluntariness in community life.²⁸ That is, property as exit tends to view sociability as a subjective preference and social life as ideally a matter of individual choice.

Property as exit treats community, and the obligations it imposes on the individual, as a potential threat to an individual's negative liberty.²⁹ Only when participation in group life is voluntary are the demands of community fully consistent with individual autonomy.³⁰ The insistence that community life be voluntary manifests itself as a concern with retaining freely chosen entrance into, or unencumbered exit out of, the groups in which the individual participates.³¹ At its limit, property as exit favors a conception of community in which the individual can come and go at will, joining and leaving

²⁷ See *infra* Part II.A.

²⁸ See Buchanan, *supra* note 1, at 16.

²⁹ See Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1089 (1980).

³⁰ See John Locke, *A Letter Concerning Toleration* 28 (James H. Tully ed., Hackett Pub. Co. 1983) (1689) (arguing that "[n]o body is born a member of any Church" and it should be "as free for him to go out as it were to enter"); Rand, *supra* note 1, at 136–37.

³¹ See Locke, *supra* note 30, at 28; Rosenblum, *supra* note 3, at 60.

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particular communities in accord with his own freely chosen (and evolving) life plans and values.³²

Liberals are generally less concerned with barriers to entry than they are with either forced entry or restricted exit.³³ Moreover, involuntary entrance into a community can be less problematic if the option of inexpensive exit is preserved.³⁴ Costly exit, however, can deprive even voluntary entrance of much of its value.³⁵ Some libertarian theorists view voluntary entrance as a complete substitute for easy exit.³⁶ But even those theorists view the absence of exit as, at a minimum, raising serious concerns about individual autonomy.³⁷

Theorists therefore have claimed that exit is a “bedrock liberal value”³⁸ and have treated communities that hinder exit as inherently suspect.³⁹ Such a fluid vision of community life perfectly complements the notion of property as exit. Property, so conceived, permits the self-sufficient owner to remain isolated within his property, participating in community life only on his own terms.

Property as exit often treats the nation as a particularly problematic and dangerous form of community.⁴⁰ After all, it is characteristically an unchosen community, one that is joined at birth.⁴¹

³² See Kymlicka, *supra* note 23, at 48 (arguing that liberalism is defined by the belief that people “should have the freedom to form, revise, and act on [their] plans of life”); Nancy L. Rosenblum, *Membership and Morals* 63–64 (1998) (“What is wanted is the most extensive pluralism combined with chances to exploit it, where men and women can enter and exit groups freely, where new associations are spontaneously formed and where shifting involvements is commonplace.”).

³³ See Dagan & Heller, *supra* note 3, at 571.

³⁴ See Randy E. Barnett, *Restoring the Lost Constitution* 43 (2004); Dagan & Heller, *supra* note 3, at 597.

³⁵ See Nozick, *supra* note 18, at 324; Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519, 1525 (1982).

³⁶ See Charles Fried, *Contract as Promise* 14, 20–21 (1981); Nozick, *supra* note 18, at 331. I discuss this tension within libertarian thought between free entrance and free exit at greater length below. See *infra* Part II.B.3.

³⁷ See Fried, *supra* note 36, at 14 (calling the voluntary binding of our future autonomy a “deep and difficult problem”).

³⁸ Dagan & Heller, *supra* note 3, at 567.

³⁹ See, e.g., Dagan & Heller, *supra* note 3, at 568–69; Ellickson, *supra* note 35, at 1550.

⁴⁰ See Barnett, *supra* note 34, at 43; Frug, *supra* note 29, at 1076; Green, *supra* note 3, at 167; Eric T. Freyfogle, *Property and Liberty* 19 (2004) (unpublished manuscript, on file with the Virginia Law Review Association).

⁴¹ See Green, *supra* note 3, at 168.

Moreover, the option of exiting the land of one's birth is, under most circumstances, an expensive one to exercise.⁴² The problematic nature of the national community for exit theorists only underscores the significance they attach to private property rights. Exit theorists consider these property rights, and the exit mechanism they facilitate, to be an important solution to the unique threat posed by the national community to negative individual liberty.⁴³ Property as exit allows individuals to withdraw into a private sphere beyond the reach of the unchosen national community while still remaining within its physical boundaries.⁴⁴

E. Doctrinal Influence of Property as Exit

A preoccupation with property's ability to safeguard individuals' opportunity to exit from social life generates a series of legal commitments. The incorporation of many of these commitments into established property doctrine is a testament to the powerful influence of the notion of property as exit on Anglo-American property law.⁴⁵

1. The Right to Exclude

Central to the notion of property as exit is the ability to keep unwanted people out of the protective sphere of the owner's prop-

⁴² See Barnett, *supra* note 34, at 43; Hirschman, *supra* note 25, at 112; Green, *supra* note 3, at 167–68 (“[E]xit from the state is not realistically possible . . . [I]t is in social and economic terms enormously difficult for most people to uproot and emigrate . . .”).

⁴³ See Richard A. Epstein, *Takings* 12–14 (1985); Hayek, *supra* note 1, at 140; Calvin M. Hoy, *A Philosophy of Individual Freedom* 16 (1984).

⁴⁴ Scholars have therefore described property as a form of delegated sovereignty. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 12–14 (1927); see also Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes* 1353, 1359 (1982); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1677, 1679 (1988); cf. Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 *Colum. L. Rev.* 1, 4 (1996) (discussing his conception of “permeable sovereignty” as a mechanism by which the state can create room for dissenting communities to exercise quasi-sovereign power while remaining within the state’s boundaries).

⁴⁵ This is not to say that liberal approaches to property law have been the only powerful influence on American property doctrine, or even that liberal approaches have been consistently incorporated into the doctrines they have influenced. See Alexander, *supra* note 8, at 1–2; Underkuffler, *supra* note 6, at 46.

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erty. It is therefore unsurprising that the influence of property as exit on American property thought is most apparent when both courts and commentators discuss the contours of owners' right to exclude. As Thomas Merrill argues, "[m]ost thinkers who have devoted themselves to a sustained analysis of the concept of property have reached the conclusion that the right to exclude, or something like it, is an invariant characteristic of private property."⁴⁶ "Deny someone the exclusion right," Merrill says, "and they do not have property."⁴⁷ Merrill is careful to point out that the essential nature of the right to exclude does not necessarily mean that the right to exclude must be unqualified.⁴⁸ Richard Epstein, however, takes Merrill's observation one step further, arguing that virtually any deviation from an absolute conception of the right to exclude effectively deprives an owner of her property.⁴⁹ According to Epstein, for example, owners should be allowed to slice their invitations to the public to enter their property as thinly as they like without forfeiting their virtually unlimited control over access.⁵⁰

The influence of property as exit appears to be at work in the prevailing common-law rule that the owner of private property may exclude people for any reason or for no reason at all. Indeed, a property owner who has opened his property up to the public is free to exclude individuals even when there is no indication that those he has excluded intend to engage in activity inconsistent with his chosen use of the property.⁵¹ Courts have generally upheld this robust version of the right to exclude, except where qualified by antidiscrimination laws. As a practical matter though, the presumptive right of owners of public accommodations to exclude based on

⁴⁶ Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 970–71 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) [hereinafter Merrill, *Right to Exclude*]; see also Jeremy Waldron, *The Right to Private Property* 39 (1988); Barr et al., *supra* note 18, at 476 ("Property is not 'owned' if the putative owner cannot exclude others.").

⁴⁷ Merrill, *Right to Exclude*, *supra* note 46, at 730.

⁴⁸ See *id.* at 753.

⁴⁹ See Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. Chi. L. Rev. 32, 36–40 (1997).

⁵⁰ See *id.*

⁵¹ See, e.g., *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1216–17 (9th Cir. 1977); *Madden v. Queens County Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y. 1947).

any plausible legal rationale makes it more difficult to enforce those laws.⁵²

Similarly, in a wide array of legal contexts, courts have privileged the individual owner's right to exclude over other rights. In a series of cases, for example, the Supreme Court has upheld the right of private owners to exclude individuals or groups attempting to engage in orderly political speech on private premises. In the well-known case of *Lloyd Corp. v. Tanner*, the Court held that the owner of a shopping mall could exclude people seeking to distribute handbills opposing the war in Vietnam.⁵³ The prerogative of a private owner to exclude was held to be so important that even the attenuated interest of a shopping mall owner in controlling access to his premises trumped the right of citizens to engage their fellows in political discourse. "[P]roperty," the Court asserted, "[does not] lose its private character merely because the public is generally invited to use it for designated purposes."⁵⁴ In other words, the "private" nature of property is secured, and indeed defined, by the owner's right to exclude, even at the extreme margins.

Lloyd Corp. is a particularly interesting decision in part because it is so difficult to understand why an owner who has voluntarily opened up his property to such diverse activities as shopping, eating, strolling, aerobics, sitting, and even teenage loitering, retains much of an interest in excluding anyone from his land.⁵⁵ Despite the owner's apparent indifference to the presence of numerous people engaged in patently noncommercial activity on his property,

⁵² Cf. *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 374 n.4 (N.J. 1982) ("The denial of freedom of reasonable access in some States following passage of the Fourteenth Amendment, and the creation of a common law freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have had less than dignified origins."). The legal protection of a presumptive right to exclude as long as the reason is not specifically prohibited by antidiscrimination statute makes it far more difficult for those excluded on impermissible grounds, such as race or national origin, to prove that their exclusion was for invidious reasons. It is very difficult for a prospective patron, for example, to prove that he was excluded from a store on invidious grounds (for example, race) and not because the store owner did not like the way he was dressed. Cf. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. Miami L. Rev. 127, 127-28 (1987).

⁵³ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-70 (1972); see also *Lechmere v. NLRB*, 502 U.S. 527 (1992); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁵⁴ *Lloyd Corp.*, 407 U.S. at 569.

⁵⁵ See *id.* at 552-56.

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the Court held that his right to exclude was paramount. Moreover, while the broad contours of the right to exclude are often consistent with utilitarian analysis, it is difficult to understand how utility is maximized by protecting an owner's attenuated interest in exclusion in the face of intense countervailing interests in access.

Even the "information costs" model of the right to exclude proposed by Thomas Merrill and Henry Smith arguably does not support the result in *Lloyd Corp.*⁵⁶ While an exceptionless trespass rule minimizes information costs at the extreme ends of the private/open-access spectrum, its effect in situations in which owners narrowly carve up their right to exclude is less obvious. Broad invitations that are pock-marked with exceptions are expensive both for non-owning users, who must spend more time trying to figure out the scope of their invitation to enter, and for owners, who must spend resources crafting and enforcing their possibly quite baroque invitations. Indeed, in the trespass context, information costs would likely be reduced by requiring owners to fit their invitations to the public into a finite number of standard forms instead of allowing the nearly infinite variety favored by current doctrine.⁵⁷ In any event, in discussing how far courts should protect the right to exclude, most people are concerned with more than maximizing efficiency. For example, if it were to turn out that Epstein is correct that permitting racial discrimination in privately owned places of public accommodation maximizes aggregate utility,⁵⁸ there likely still would be a strong consensus in favor of omitting the right to discriminate from commercial property owners' right to exclude.

2. Takings Law

The sacralization of the right to exclude in property law has unsurprisingly exercised a powerful influence on the law of takings,

⁵⁶ See, e.g., Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. Legal Stud. 13, 31–34 (1985); Rose, *supra* note 10, at 621; Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 995–96 (2004).

⁵⁷ Cf. Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 Yale L.J. 1, 3–9 (2000) (explaining the common-law property system of estates as rooted in a desire to minimize information costs).

⁵⁸ See Richard A. Epstein, Forbidden Grounds 59–78 (1992).

particularly on the Court's expansion of the reach of that doctrine over the past few decades.⁵⁹ On a variety of occasions, the Court has enshrined within regulatory takings law the exalted status enjoyed by the right to exclude elsewhere in property law, calling it "one of the most essential sticks in the bundle of rights that are commonly characterized as property"⁶⁰ or "the most fundamental of all property interests."⁶¹ Merrill correctly observes that, in the context of takings jurisprudence, "no other right has been singled out for such extravagant endorsement by the Court."⁶²

Permanent deprivations of that right, the Court has held, always constitute a taking of property that must be compensated by the state, no matter how small or inconsequential the affected parcel. In *Loretto v. Teleprompter Manhattan CATV Corp.*, for example, the Court confronted a challenge to a New York regulation requiring landlords to allow the local cable television franchise to install cable equipment on their buildings so that tenants could receive cable service. The Court held that the regulation permanently deprived landlords of their right to exclude and, as a consequence, constituted a taking of property.⁶³ The *Loretto* Court's focus on preserving property's ability to provide physical boundaries around the owner resonates deeply with the notion of property as exit.

In addition to its protection of the right to exclude through the "liability rule" of the Takings Clause's mandate of "just compensation," property as exit favors an even broader protection of the right to exclude through the "property rule" mechanism of the Takings Clause's "public use" requirement.⁶⁴ While a broad compensation rule still permits the state to deprive an owner of his right to exclude upon the payment of just compensation, a vigorous "public use" requirement empowers the owner to enjoin the state's

⁵⁹ See Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *Ecology L.Q.* 227, 254–55 (2004).

⁶⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

⁶¹ *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005).

⁶² Merrill, *Right to Exclude*, *supra* note 46, at 735; see also Epstein, *supra* note 49, at 30–36.

⁶³ *Loretto*, 458 U.S. at 435–38.

⁶⁴ For the classic exposition of the distinction between property rules and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1106–10 (1972).

intrusive action altogether, in effect excluding the state just as he would a private party. In light of their concern with protecting the property boundaries around the owner against coercive intrusion, particularly by the state, it is unsurprising that adherents of the strongest forms of property as exit generally favor a stringent public-use requirement.⁶⁵ While the Supreme Court and several state courts historically have understood the public-use requirement to be satisfied if an act of eminent domain is undertaken for a “public purpose,”⁶⁶ Richard Epstein has argued that only takings for projects that qualify as “public goods” (such as national defense) or that are open to everyone in the community (such as public parks) should be deemed to satisfy the public-use requirement of the Takings Clause.⁶⁷ Some state courts have embraced similarly strenuous public-use tests.⁶⁸

II. TWO CRITIQUES OF PROPERTY AS EXIT

Although the conception of property as exit has been very influential in American property thought, it has not gone unchallenged. Several critics of libertarian property theory have noted a latent tension intrinsic to a conception of property as exit, a tension generated by the incompatibility between the view of property as an institution that fosters isolation and the undeniably social nature of property itself. Despite its recent revival, however, this argument based on the social nature of property accomplishes less than it seems to. An argument based on a conception of human nature as essentially and robustly social, however, goes much farther to chal-

⁶⁵ See James W. Ely, Jr., Thomas Cooley, “Public Use,” and New Directions in Takings Jurisprudence, 2004 Mich. St. L. Rev. 845, 849 (arguing that, because Thomas Cooley “saw private property as a bulwark for the enjoyment of individual liberty,” he would have approved of a tightening of the public-use requirement).

⁶⁶ See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984); *Berman v. Parker*, 348 U.S. 26, 33–34 (1954); see also *Kelo v. City of New London*, 843 A.2d 500, 522–31 (Conn. 2004), aff’d, 125 S. Ct. 2655 (2005); *Gen. Bldg. Contractors, LLC v. Bd. of Shawnee County Comm’rs*, 66 P.3d 873, 882–83 (Kan. 2003); *Prince George’s County v. Collington Crossroads, Inc.*, 339 A.2d 278, 283–88 (Md. 1975); *City of Deluth v. State*, 390 N.W.2d 757, 762–64 (Minn. 1986); *Cannata v. City of New York*, 182 N.E.2d 395, 397 (N.Y. 1962); *City of Jamestown v. Leever’s Supermarkets*, 552 N.W.2d 365, 369 (N.D. 1996).

⁶⁷ See Epstein, *supra* note 43, at 166–69; Epstein, *supra* note 49, at 34–35.

⁶⁸ See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781–83 (Mich. 2004).

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lunge the widespread faith in the strength of property's exit mechanism.

A. The Neo-Realist Critique of Property as Exit

In what might be called a legal-realist critique of libertarian conceptions of property rights, several contemporary property theorists have argued that property is dependent on the community's coercive regulation for its existence and enforcement.⁶⁹ Applying this observation to the libertarian notion of property, these scholars have argued that the social and regulatory nature of property means that property owners will always be subjected to community regulation, and therefore coercion, even within the safety of their property.⁷⁰ These observations present serious problems for property as exit because it means that the impermeability of the property membrane behind which the individual withdraws depends upon the consent of the very society from which he is ostensibly trying to escape and from which his property is supposed to protect him.⁷¹

The experience of African-American property owners illustrates the radical dependence of property rights on communal recognition. Throughout the early and mid-twentieth century, African Americans who purchased homes in white neighborhoods were frequently driven from their property by white "Neighborhood Association[s]" intent on preserving the all-white character of their communities.⁷² Far from freeing the individual from dependence on the community, formal property rights simply cannot function if

⁶⁹ See, e.g., Eric Freyfogle, *The Land We Share* 17–27 (2003); Carol M. Rose, *Property and Persuasion* 35–39 (1994); Joseph William Singer, *Entitlement: The Paradoxes of Property* 8 (2000); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *Nomos XXIV (Ethics, Economics, and the Law)* 3, 17–20 (J. Roland Pennock & John W. Chapman eds., 1982); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 *Yale J.L. & Feminism* 7, 18–19 (1989); Underkuffler-Freund, *supra* note 8, at 1041–46;

⁷⁰ Moreover, private property rights grant one person the power to make certain decisions about a particular asset, but at the expense of everyone else's freedom. See Freyfogle, *supra* note 40, at 2–3. Thus, the creation of private property rights enhances the liberty of some (property owners) but restricts the liberty of others (non-owners). *Id.*

⁷¹ See Nedelsky, *supra* note 69, at 18–19.

⁷² Paul Harris, *Black Rage Confronts the Law* 170–73 (1997).

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the wider community demonstrates implacable hostility towards their respect and enforcement.

The neo-realists also have pointed towards the inherent conflict between the property owner's interest in being left alone on her property and other owners' interests in being free from constraints in choosing how to use their property.⁷³ There is no room for state neutrality when faced with a dispute between a property owner who wants to use his property intensively, thereby generating negative externalities for his neighbors, and his neighbors' desire to reside quietly on their property free from those externalities.⁷⁴ Accordingly, at every turn, the property owner will be confronted with constraints, either in the form of legal doctrines such as nuisance law that limit the uses to which he can put his property, or of legally sanctioned actions by neighboring property owners whose uses intrude on his quiet enjoyment.⁷⁵

As important and insightful as it is, this neo-realist critique generates less mileage than might initially appear to be the case. Confronted with the observation that property rights are coercive and inherently conflicting, sophisticated libertarians respond simply by conceding that the fact of human coexistence means that people cannot enjoy absolute liberty (either in the form of absolute rights to use resources or absolute rights to be left alone). Nevertheless, in establishing property rights, the state generates "*the most extensive liberty of action possible, compatible with equal liberty of action for everybody else.*"⁷⁶ Even the staunchest defenders of property rights acknowledge that some "minimal state" is necessary to

⁷³ See, e.g., Freyfogle, *supra* note 69, at 37–38; Singer, *supra* note 69, at 78, 210.

⁷⁴ See Freyfogle, *supra* note 69, at 20; Singer, *supra* note 69, at 7–8.

⁷⁵ See Freyfogle, *supra* note 69, at 20; Singer, *supra* note 69, at 7–8. In addition, the need for communities to generate legal resolutions to the conflicts that arise between property uses renders owners vulnerable to shifts within the value system of the society against whom property is supposed to serve as a bulwark. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 31–62 (1977); see also *Pa. Coal Co. v. Sanderson*, 6 A. 453, 459 (1886) ("To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.").

⁷⁶ Waldron, *supra* note 46, at 292. Epstein makes a similar move, but puts his argument in terms of forced exchanges. For Epstein, a just system of property regulation will be one in which forced exchanges away from absolute property rights (and towards coercive regulation) are allowed only when they make everyone better off, including the regulated owner. See Epstein, *supra* note 43, at 14–16.

maintain a system of private property, to mediate disputes among property owners, and to protect against abuse of monopoly power.⁷⁷

Moreover, conflicts between (or among) property owners are just one small subset of the areas in which the neo-realist critics of libertarian private property would like to see the state empowered to regulate owners' use and enjoyment of their property.⁷⁸ Joseph Singer, for example, in an effort to borrow for the civil rights context some of the limits earned by his nuisance argument, attempts to cast the equality interest protected by civil rights laws in property terms. The conflict between the black shopper trying to gain access to a store and a white store-owner who refuses to admit black shoppers is, Singer argues, between the store-owner's (property) right to exclude and the shopper's (property) right to have access to the store.⁷⁹

The clash between the desire of the owner to exclude and the demand of the non-owner to have access, unlike the conflict between use rights and quiet enjoyment, is not intrinsic to the libertarian's conception of property. In conflicts between rights of access and the right to exclude, only one side is claiming a right that libertarians want to include within their bundle. Indeed, the right to exclude (unlike the right of access) is one that is central to the exit mechanism to which libertarians attach particular importance. Singer's characterization of rights of access as "property" rights, while rhetorically useful for exposing the value judgments latent within the libertarian conception of property, does not establish that the libertarian preference for the right to exclude is incoherent on its own terms.

⁷⁷ See, e.g., Epstein, *supra* note 43, at 107–25; Nozick, *supra* note 18, at 10–25, 113–19; Rand, *supra* note 1, at 129–31; Epstein, *supra* note 49, at 33–36.

⁷⁸ See, e.g., Singer, *supra* note 69, at 39–44 (discussing the need to regulate land use in the interests of racial equality); Underkuffler, *supra* note 6, at 100–01 & n.50 (discussing the incompatibility of a concern with "ecological health" and traditional notions of property rights); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 *UCLA L. Rev.* 77, 109–14 (1995) (discussing the need to regulate land use in the interests of ecological health).

⁷⁹ See Singer, *supra* note 69, at 44.

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B. A Social Critique of Property as Exit

Unlike the neo-realist critique, which eats at the edges of the libertarian position, an argument that human beings cannot isolate themselves from community would weaken the conceptual foundations of property as exit. The view of human beings as robustly social animals stands at the center of the ethical theories of both Aristotle and Thomas Aquinas. As Gregory Alexander has observed, this Aristotelian conception of human nature, which he correctly identifies as underlying the civic republican tradition, has coexisted with the dominant liberal view throughout the history of American property thought. This competing understanding, he observes, “has continuously understood the individual human as an inherently social being, inevitably dependent on others not only to thrive but even just to survive. This irreducible interdependency means that individuals owe one another obligations, not by virtue of consent alone but as an inherent incident of the human condition.”⁸⁰

Alexander speaks in terms of obligation, but even setting aside normative considerations, if human beings are in fact bound together by an impulse towards participation in community life that exceeds the minimal cooperation needed to maintain a system of private ownership or a minimal state, property’s ability to provide the sort of protection against external compulsion envisioned by property as exit will be greatly weakened. The focus of this argument is largely descriptive—that is, it addresses itself to the question whether private property can actually perform the exit function with the vigor often attributed to it. In keeping with this fundamentally pragmatic orientation, the arguments I raise on behalf of human sociability will be in a similar spirit.

*1. Arguments for Sociability**a. The Family and Beyond*

Human beings could not survive, let alone flourish, without the assistance of some community responsible for nurturing them be-

⁸⁰ Alexander, *supra* note 8, at 1–2.

yond the dependency of childhood.⁸¹ In virtually all cultures, the primary community responsible for child-rearing is the family.⁸² This universal human participation in the community of family represents a considerable, though underexplored, obstacle to the vision of property as exit.⁸³ In addition, the particular characteristics of family life, conceived as community, are in strong tension with the liberal ideal of community as voluntary. Obviously, we do not voluntarily join our birth families. And both siblings and children can impose “in-laws” on us. Moreover, exit from families is impossible for parents and children and costly (in terms of emotional and social well-being) for everyone. As Claude Fischer has put it,

[t]he differences between kin and nonkin are many and far-reaching. An accident of birth gives us a set of consanguine relations that can never, at least formally, be sundered. An accident of our spouses’ birth gives us affinal relations that are also difficult to break. While friends can be chosen and abandoned, relatives are imposed and presumably forever. What we owe to and what we can expect from relatives involves far more commitment, trust, and sacrifice than is the case with nonrelatives. We are even expected to assist kin whom we dislike or have never met.⁸⁴

Indeed, it is precisely the difficulty of exit from certain family relationships that makes possible many of the unique goods provided by family.⁸⁵

⁸¹ See John Finnis, *Natural Law and Natural Rights* 83 (1980); Cohen, *supra* note 44, at 17 (“Generally . . . human beings start with a stock of tools or information acquired from others . . .”).

⁸² See James Q. Wilson, *The Marriage Problem* 24 (2002) (“In every community and for as far back in time as we can probe, the family exists and children are expected, without exception, to be raised in one.”).

⁸³ See George L. Hicks, *Experimental Americans: Celo and Utopian Community in the Twentieth Century* 19 (2001); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 *Cornell L. Rev.* 1, 26–28 (1989).

⁸⁴ Claude S. Fischer, *To Dwell Among Friends: Personal Networks in Town and City* 80 (1982).

⁸⁵ See Anne L. Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* 16–18 (2004) (discussing the crucial importance of stable relationships between parents and children for childhood development).

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While acknowledging the pervasive existence of family, proponents of property's exit function often subsume the family within the individual, silently characterizing family life as a matter of individual choice or the actions of the family as the mere expression of the individual's autonomous will.⁸⁶ For example, in arguing for parental authority over children, Charles Fried argues that the "right to form one's child's values, one's child's life plan, and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself."⁸⁷ As Amy Gutmann has pointed out, however, this move is problematic because children are, within the liberal tradition, separate individuals from their parents and as such are entitled to certain rights of autonomy.⁸⁸

The communal structure of the family also has implications for familial expressions of consent, such as a decision where to live. Several scholars have argued that the state should defer to the private rulemaking of common-interest communities because the formation of these communities requires the "unanimous" consent of each of the individual property-owning members.⁸⁹ These communities, the argument goes, represent, at least at their inception, ideal liberal communities. The expression of consent on which these scholars focus, however, is the purchase of property burdened by covenant restrictions.⁹⁰ The claim of unanimous consent to this transaction is therefore only possible if one simply ignores

⁸⁶ See Buchanan, *supra* note 1, at 10 (describing self-sufficient "homesteads" as providing maximal liberty while treating the "individual" and "family unit" as largely interchangeable).

⁸⁷ Charles Fried, *Right and Wrong* 152 (1978).

⁸⁸ See Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 *Phil. & Pub. Aff.* 338, 345–46 (1980).

⁸⁹ See, e.g., Barnett, *supra* note 34, at 41 (arguing that in common-interest communities "there is actual unanimous consent to be bound by its rule-making process"); Ellickson, *supra* note 35, at 1522–26; Richard A. Epstein, *Covenants and Constitutions*, 73 *Cornell L. Rev.* 906, 922–25 (1988); Epstein, *supra* note 1, at 1358; see also *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981) (noting that deed restrictions establishing homeowners' association are entitled to greater judicial deference than subsequent rules adopted by the association because "*each individual unit owner* purchases his unit knowing of and accepting the restrictions to be imposed" (emphasis added)); *Breene v. Plaza Towers Ass'n*, 310 N.W.2d 730, 733–34 (N.D. 1981) (prohibiting the retroactive application of declaration amendments).

⁹⁰ See Barnett, *supra* note 34, at 40–41; Ellickson, *supra* note 35, at 1522–23; Epstein, *supra* note 89, at 913–14; Epstein, *supra* note 1, at 1357.

the communal structure of the family that will reside on the property and the inherently collective—and therefore, potentially non-unanimous—nature of its decision to join. Indeed, the existence of strong dissent within the family unit, either from certain provisions of the restrictive covenants or from the decision to join the common-interest community altogether, is fully consistent with the family's outward (collective) expression of consent.

For seventeenth- and eighteenth-century liberals, this lack of consensus within the family was not problematic because, by denying the full personhood of all but adult white males, they could simply ignore the plurality of individuals who made up the domestic community. Locke, for example, could argue without any sense of irony that a person owns the land worked by his servants in the state of nature because he has intermingled his own labor with it.⁹¹ That strategy is not an option for modern theorists, however, who cannot ignore the (often contentious) community of persons residing within the domestic sphere.

Applied to the exit function of property, the interdependence of family members means that the individual, as the member of a family community, can never really cut himself off from involuntary interaction with other human beings. The individual is who he is in no small part because of his family. Even if he chooses to break social ties with his family, he can never fully excise the influence of his upbringing on his patterns of thought and behavior.

The costs of exiting from family relationships, moreover, are typically enormous.⁹² In light of these high exit costs, the power of family members over each other's actions is considerable and, consequently, members of the domestic community are able to place enormous (and coercive) constraints upon one another.⁹³ Accordingly, even within the most sacred confines of his property refuge, the individual will be forced to confront the demands of family life.⁹⁴ Perhaps for this reason, social scientists have found that

⁹¹ See John Locke, *Two Treatises of Government* 306–07 (Peter Laslett ed., Cambridge Univ. Press 1967) (1698).

⁹² See Fischer, *supra* note 84, at 80.

⁹³ *Id.*

⁹⁴ See Finnis, *supra* note 81, at 147–48 (“Family is a very thoroughgoing form of association, controlling or influencing every corner of the lives of its members for a considerable proportion of their lifetime.”); Ellickson, *supra* note 1, at 1396 (“[A]s with

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strong attachment to one's family is associated with a decline in the frequency of deviant behavior.⁹⁵

At first glance, the necessity of family appears to establish the basis for only weak communal life. The number of people within the family is, after all, relatively circumscribed.⁹⁶ But the family itself appears to be simply the thin edge of a larger series of social relationships generated by the demands of family life.⁹⁷ These social relationships are grounded in two aspects of family.

First, as the ongoing debate over same-sex marriage reminds us, the precise form of the "family" is, like property, dependent on social definition.⁹⁸ Individuals depend upon recognition by others for their ability to enjoy many of the goods associated with family.⁹⁹ Second, the mere possibility of family life presupposes a whole host of other social relationships to sustain it. For example, taboos against incest and the biological need for a diverse gene pool mean that the continued creation of healthy new family units requires an extensive network of social relationships that reaches beyond one's immediate family.¹⁰⁰ In addition, the drive to provide for and enrich one's family (in more than just a material sense) requires substantial economic and social exchange beyond the immediate family. Social scientists have noted, for example, that the desire to provide for the social and developmental needs of children is one of the fundamental forces that motivates social activity among the resi-

any other type of commons, the creation of a multimember household impinges on privacy and creates risks of shirking and excess grabbing.").

⁹⁵ See Joseph P. Ryan & Huilan Yang, Family Contact and Recidivism: A Longitudinal Study of Adjudicated Delinquents in Residential Care, 29 Soc. Work Res. 31, 32, 37-38 (2005); Robert J. Sampson & John H. Laub, Crime and Deviance Over the Life Course: The Saliency of Adult Social Bonds, 55 Am. Soc. Rev. 609, 620, 625 (1990); see also Rick Lyman, Prison Marriage Classes Instill Stability, N.Y. Times, Apr. 16, 2005, at A10.

⁹⁶ But see *Moore v. City of East Cleveland*, 431 U.S. 494, 507-10 (1977) (Brennan, J., concurring) (arguing that the definition of family is broader outside of "white suburbia").

⁹⁷ See Finnis, supra note 81, at 83; Taylor, supra note 23, at 206.

⁹⁸ See Thomas Bender, Community and Social Change in America 129-34 (1978).

⁹⁹ See Joseph Raz, The Morality of Freedom 162, 350 (1986); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (upholding against constitutional challenge a New York ordinance that restricted land use to one-family dwellings and narrowly defined the word "family").

¹⁰⁰ See Finnis, supra note 81, at 83, 147.

dents of what otherwise might appear to be highly atomized suburban communities.¹⁰¹

b. Companionship and Isolation

In addition to their universal need for family, human beings also appear to share a generalized thirst for companionship. As Aristotle put it, “[n]o one would choose a friendless existence on condition of having all the other good things in the world.”¹⁰² Indeed, isolation from community is often associated with mental illness, unhappiness, and even physical deterioration. Robert Putnam, for example, has posited that social isolation leads to elevated rates of suicide.¹⁰³ And Amitai Etzioni observes that “[t]he consensus of sociological and psychological work supports the basic notion that isolation—whether the product of urbanization, mass society or other phenomena—erodes the mental stability necessary for individuals to form their own judgments and resist undue external pressure and influence.”¹⁰⁴ The result, he concludes, is that “individuals require community; without it, they are diminished if not incapacitated.”¹⁰⁵ The search for companionship is therefore not so much a choice as an imperative.

Not only have social scientists determined that a lack of community leads to individual deterioration, but they have also found positive correlations between increased community involvement and individual well-being. Psychologists, for example, have observed that the stronger an individual’s “sense of community,” the better his health, self-esteem, satisfaction, and general happiness.¹⁰⁶

¹⁰¹ See Philip Langdon, *A Better Place to Live* 42 (1994); Constance Perrin, *Belonging in America* 44 (1988). In some cases, providing social opportunities for children may simply be an excuse for parents to satisfy their own social needs. See Jennifer Medina, *Housewives, Try This for Desperation: Stay-at-Home Fathers Face Isolation and a Lingering Stigma*, *N.Y. Times*, Dec. 22, 2004, at B1.

¹⁰² See Aristotle, *The Ethics of Aristotle* 227 (J.A.K. Thomson trans., 1953).

¹⁰³ See Robert D. Putnam, *Bowling Alone* 264 (2000); see also Charles C. Branas et al., *Urban-Rural Shifts in Intentional Firearm Death: Different Causes, Same Results*, 94 *Am. J. Pub. Health* 1750, 1752 (2004) (finding increased suicide rates in sparsely populated areas).

¹⁰⁴ Amitai Etzioni, *A Responsive Society: Collective Essays on Guiding Deliberative Social Change* 140 (1991).

¹⁰⁵ *Id.*

¹⁰⁶ See Susan J. Farrell et al., *Neighborhoods and Neighbors: Do They Contribute to Personal Well-Being?*, 32 *J. Community Psychol.* 9, 11 (2004); Miretta Prezza et al.,

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According to Claude Fischer, “[e]vidence rapidly accumulating in the past several years indicates that . . . [p]eople with spouses, friends, and helpful relatives tend to be physically and psychologically healthier than those without.”¹⁰⁷ In short, individuals who are isolated from participation in community life suffer both physical and psychological harm, while individuals who are more strongly tied to community enjoy a wide array of benefits.

It is important to note that social scientists have found that not all communities are equally effective at generating these benefits. Significantly, the communities most likely to provide substantial physical and psychological benefits for their members are stable communities with low rates of membership turnover.¹⁰⁸ Conversely, communities characterized by short-term residency and high rates of turnover appear to provide fewer community benefits to their members.¹⁰⁹ Transience is the enemy of community.¹¹⁰

c. Property as Evidence of Sociability

Finally, as numerous scholars have observed, the institution of property is itself a product of human cooperation.¹¹¹ While the *mere existence* of private property is not enough to call into question the conception of property as exit, the sheer pervasiveness of stable private-property regimes is significant. Carol Rose notes with some feigned puzzlement the persistence of the institution of property, despite a dominant view of human nature that fails to predict substantial cooperation.¹¹² Likewise, game theorists have long fretted over the routine fact of cooperation among strangers engaged in one-time transactions.¹¹³ That very pervasiveness, however, is sub-

Sense of Community Referred to the Whole Town: Its Relations with Neighboring, Loneliness, Life Satisfaction, and Area of Residence, 29 *J. Community Psychol.* 29, 32 (2001).

¹⁰⁷ Fischer, *supra* note 84, at 125–26.

¹⁰⁸ See *id.* at 126; Farrell, *supra* note 106, at 21–22.

¹⁰⁹ See Farrell, *supra* note 106, at 21.

¹¹⁰ See Fischer, *supra* note 84, at 101–02; cf. Jane Jacobs, *The Death and Life of Great American Cities* 3–25 (1961); Michael Walzer, *Spheres of Justice* 39 (1983).

¹¹¹ See Rose, *supra* note 69, at 37; Singer, *supra* note 69, at 13–14; Nedelsky, *supra* note 69, at 18–19.

¹¹² See Carol M. Rose, *Property as the Keystone Right?*, 71 *Notre Dame L. Rev.* 329, 363 (1996).

¹¹³ See Michael W. Macy & John Skvoretz, *The Evolution of Trust and Cooperation Between Strangers: A Computational Model*, 63 *Am. Soc. Rev.* 638, 639 (1998).

stantial evidence of the fundamental error in the assumptions underlying property as exit. If human beings are intrinsically and robustly social, then an overriding predisposition to cooperate in the creation of institutions, such as private-property regimes and markets, is to be expected.

Property as exit views the genesis of a property system, whose creation presupposes the ability of human beings to cooperate, as an embarrassment to be explained away by myth and legend.¹¹⁴ But as Aristotle and Aquinas recognized, the emergence of private property systems is not puzzling at all if one accepts the notion that human beings have a profound need for community life. After all, private-property systems play an essential role in facilitating healthy social life. Private property encourages more productive use of resources and reduces confusion and conflict about who in the community is responsible for what.¹¹⁵ Thus, private ownership does not emerge inexplicably from a starting point of individuals seeking maximum advantage for themselves and suspicious of all others, but rather from communities already in existence, working together to find more just and efficient ways to structure their relationships with each other regarding material goods.¹¹⁶ Far from constituting a puzzle in need of explanation, the nearly universal persistence of private-property systems of various shapes and sizes constitutes additional evidence of the profoundly social nature of human beings.

¹¹⁴ See generally Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *Yale J.L. & Human.* 37, 51 (1990).

¹¹⁵ See Aristotle, 2 *The Politics of Aristotle* 49–50 (Ernst Barker trans., 1946); 2 St. Thomas Aquinas, *Summa Theologica*, Pt. IIa-IIae, Q. 66, Art. 2, at 1476–77 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) (“Two things are competent to man in respect of exterior things. One is the power to procure and dispense them, and in this regard it is lawful for man to possess property. Moreover this is necessary to human life for three reasons. First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.”).

¹¹⁶ See 1 Aquinas, *supra* note 115, Pt. Ia-IIae, Q. 95, Art. 4, at 1016.

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2. Social Norms and Property as Exit

The mechanism by which the foregoing conception of human sociability undermines the strength of property's exit function is given texture by the recent scholarly discussion of social norms. Based on his exploration of informal property norms among the residents of Shasta County, California, for example, Ellickson has recounted how informal practices such as gossip and vandalism can, in effect, override legal entitlements protected by formal property law.¹¹⁷ "For better or worse," Ellickson observes, "informal social forces in fact powerfully constrain the [exercise of formal rights]."¹¹⁸ The connection between human sociability, the power of social norms, and the breakdown of the conception of property as exit requires more detailed exploration.

a. Social Norms

Libertarians typically focus on protecting the individual from state restrictions on his use and enjoyment of property. But as social norms scholars have amply demonstrated, communities can and do exercise substantial coercive power over their members wholly apart from officially sanctioned state coercion. Social norms, and the informal sanctions that back them, are the community's answer to the individual's exit option. Just as the individual can withdraw (against the community's wishes) in response to demands by the community that the individual deems unreasonable, so too can a group withhold the privileges of membership (against the individual's wishes) from an individual who fails to conform to the community's standards of conduct.¹¹⁹

The costs to the dissenter of exiting the community serve as a maximal limit on the informal sanctions the community may impose on the individual. Any sanctions imposing costs beyond that limit are likely to cause the dissenter to leave the community entirely. Thus, the higher the costs to the individual of exiting the

¹¹⁷ See Robert C. Ellickson, *Order Without Law* 79–81 (1991) (discussing the influence of informal norms governing responsibility for fencing costs).

¹¹⁸ *Id.* at 6.

¹¹⁹ See, e.g., Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* 65–72 (2002); Margaret Gruter, *Ostracism on Trial: The Limits of Individual Rights*, 7 *Ethnology & Sociobio.* 271, 273–75 (1986).

community, the more powerful will be the community's ability to sanction.

When community norms are different from those granted by the formal legal system, the ability to impose substantial sanctions on those who resort to the formal legal system can render formal legal rights largely irrelevant.¹²⁰ Ellickson, for example, discusses the pervasive use of what he calls "self-help" by members of the Shasta County ranching community to punish would-be deviants for derogation of their informal obligations. The most commonly employed mechanism for self-help he observed was "truthful negative gossip," which was, according to Ellickson, very effective because only the "extreme deviants" within the community were immune from the threat of harm to their reputations.¹²¹ Because resort to the legal process to enforce certain formal legal entitlements generated its own reputational harm, Ellickson found, few people were willing to seek the assistance of the legal system to do so.¹²² Accordingly, for most members of the Shasta County ranching community, the norms Ellickson observed had the full force of formal property rules. Similar norms against resort to formal legal processes have been observed in other communities as well.¹²³

Human sociability combines with the mechanism of informal norms to undermine the strength of property's exit function. If an individual has an intrinsic desire to participate in community life, and if that desire is best satisfied by participating in stable communities characterized by limited mobility into and out of the community, then the individual's costs of exiting from the groups to which he belongs will be higher than if his participation were a matter of indifference. The high costs of exiting will render him

¹²⁰ See Ellickson, *supra* note 117, at 52–56, 60–64.

¹²¹ See *id.* at 57.

¹²² *Id.* at 60–64.

¹²³ See, e.g., Donald B. Kraybill, *Negotiating with Caesar*, in *The Amish and the State* 3, 10 (Donald B. Kraybill ed., 2d ed. 2003) (noting that the Amish Ordnung, or rule, prohibits the filing of lawsuits); William Shaffir, *Hasidic Jews: Social Boundaries and Institutional Development as Mechanisms of Identity Control*, in *Jewish Survival* 169, 180 (Ernest Krausz & Gitta Tulea eds., 1998) (noting that members of a Hasidic Jewish community in Quebec must submit "any interpersonal conflict to the arbitration of a court established by the Chief Rabbi"); Nadya Labi, *The Gentle People*, *Legal Aff.*, Jan./Feb. 2005, at 26, 29–32 (discussing the excommunication of an Amish woman who went to the police to report sexual abuse and the difficulty local authorities have had prosecuting those who commit crimes among the Amish).

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more willing to accept substantial impositions by those communities before he will exercise his exit option.¹²⁴ As a consequence of these heightened exit costs, the threat of sanctions imposed by the community will represent a powerful tool of social control. These sanctions will often transcend formal property rights and coerce the individual into conforming to the community's system of values.

To summarize, the higher the costs of exit from a community, the greater the demands a community can place on its individual members. Consequently, the higher the exit costs, the greater the social sanctions the community may impose. Finally, the greater the sanctions a community can deploy against its members, the less determinative are formal legal rules that conflict with the community's informal norms and the less property rules will be able to serve as a secure sphere protecting the individual from community coercion.

b. Social Norms and Property as Exit

We have already seen that there is reason to believe that human beings have a robust need for stable community life. If this is the case, people almost always will be part of some social group that can plausibly threaten to impose substantial sanctions on them if they fail to comply with community norms.¹²⁵ Of course, this would not be true if the individual could meet his need for community life by jumping from group to group. Were itinerant membership sufficient to satisfy the human longing for social life, an individual's autonomy would never be endangered by community norms; anytime the community made demands on the individual with which she disagreed, she could simply depart the offending community

¹²⁴ Indeed, far from protecting the individual from coercion, property ownership may actually increase the owner's exposure to the informal sanctions levied by the community in which the property is situated. See *infra* Part III.

¹²⁵ In many cases, the effects of these informal rules on property owners will be invisible because the community member will simply have internalized the community values to such a degree that he would not consider defecting in the first place. See Barton & Silverman, *supra* note 7, at 133 (“[S]o long as neighbors possess similar standards of behavior and exterior forces do not intrude, the public aspects of the neighborhood are not salient.”); see also Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1665 (1996).

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for a more favorable one. Moreover, as Charles Tiebout recognized, in such a world competition among communities to retain members would exert pressure on groups to temper their demands.¹²⁶

But there are at least two reasons to think that the human need for social life is not satisfied by an evanescent experience of community and that, as a consequence, the “market” for communities is not uniformly fluid. First, groups in which membership is constantly shifting do not feel like communities at all. Immobility gives community life a stickiness that, although inconvenient or unpleasant at times for the individual member, is an important ingredient in the overall experience of community that the individual finds so satisfying over the long run.¹²⁷ Obviously, our ability to derive the goods of community from the groups to which we belong is severely hindered if, when we attempt to place demands on our fellow community members, they can simply walk away and join another, less demanding, group.¹²⁸ It therefore makes sense that, as social scientists have found, the groups most effective at providing the goods that individuals derive from membership are those characterized by relatively low levels of mobility into and out of the community.¹²⁹

In addition to depriving the individual (and other community members) of the experience of authentic community, jumping from

¹²⁶ This “competition” among groups for members is the central claim of the so-called “Tiebout Hypothesis,” which posits that local governments will compete among themselves in order to satisfy the diverse preferences of mobile residents for particular mixtures of government services, yielding an optimal outcome. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 419–20 (1956).

¹²⁷ See Farrell et al., *supra* note 106, at 21 (noting the negative correlation between “resident mobility” and community strength); cf. Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 *U. Chi. L. Rev.* 1213, 1229 (1994) (“The ease or difficulty with which a role can be acquired or vacated bears importantly on role distance. Other things being equal, the more enduring and secure a role, the more likely it is to be perceived and enacted in a proximate rather than a distant fashion.”). Claude Fischer likewise observes that long-term and immobile community members tend to have denser social networks than more transient members. See Fischer, *supra* note 84, at 146. Additionally, dense social networks provide their members with a much higher level of subjective satisfaction. See *id.* at 149–51.

¹²⁸ See Fischer, *supra* note 84, at 135 (noting the reciprocal bonds of support and obligation within social networks); Dagan & Heller, *supra* note 3, at 574–76.

¹²⁹ See *supra* notes 108–10 and accompanying text.

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one community to another undermines an individual's sense of himself. Part of the importance of the communities in which we participate springs from our tendency to construct our identities around the groups to which we belong.¹³⁰ Excessively unstable community membership short-circuits this process of self-identification.

These observations do not mean that communities must impose artificial constraints on exit in order to be strong or satisfying. At times some such constraints might be a good idea.¹³¹ Legal restraints on couples' ability to divorce are examples of artificial constraints on exit that could help people to get through difficult times, particularly if those struggles come in the early years of the marriage, before more informal constraints on break-up have kicked in.¹³² Even in the absence of legal constraints, however, high exit costs may well be an unavoidable consequence of long-term participation in a particular community. That is, people will naturally be reluctant to leave a community that they initially find to be intrinsically satisfying. The individual may at first perceive this reluctance to leave as wholly voluntary. But, as several scholars have observed, the longer a person participates in a community, the more her life and her identity will become bound up with that community and, as a consequence, the higher her costs of leaving that community will climb.¹³³ Communities that are initially stable

¹³⁰ See Margaret Jane Radin, *Residential Rent Control*, 15 *Phil. & Pub. Aff.* 350, 362 (1986) [hereinafter Radin, *Residential Rent Control*]; Margaret Jane Radin, *Time, Possession, and Alienation*, 64 *Wash. U. L.Q.* 739, 757 (1986) [hereinafter Radin, *Time*].

¹³¹ See Dagan & Heller, *supra* note 3, at 596–601.

¹³² Divorce rates decline each year that a couple remains married. In Texas, for example, the divorce rate between 1997 and 1999 for couples married less than five years was 1.3 percent. For couples married between ten and fourteen years, it was less than half that rate (0.6 percent) and for couples married between twenty-five and twenty-nine years, it was less than one tenth that rate (0.1 percent). See Expert Health Data Programming, Inc., *Texas Divorce Rates for 1997–1999*, at <http://www.ehdp.com/vn/rw/txu1/dv1/315znnkp-tbl.htm> (last accessed Aug. 24, 2005); see also Dan Hurley, *Divorce Rate: It's Not as High as You Think*, *N.Y. Times*, Apr. 19, 2005, at F7 (observing that sixty percent of divorces occur in the first ten years of marriage).

¹³³ See Nozick, *supra* note 18, at 324; Radin, *Residential Rent Control*, *supra* note 130, at 359–68; cf. D. Mark Austin & Yoko Baba, *Social Determinants of Neighborhood Attachment*, 10 *Soc. Spectrum* 59, 62 (1990) (noting that the longer people remain in a neighborhood, the more attached to it they become).

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because they are intrinsically satisfying will therefore ultimately be characterized by relatively high costs of exit, even when they become substantially less satisfying with the passage of time. This will be true even when they take no affirmative steps to hinder exit. And, of course, all of the foregoing is true a fortiori for people born and raised within a particular community. In short, the high exit costs generated by individual members' increasing identification with the community is a windfall for the community, one on which it can capitalize by placing increasingly heavy demands on its long-term members.

Liberal political philosophers have long noted the implicit tension between the negative conception of freedom and the coercive demands that often arise within private communities. John Stuart Mill, for example, railed against the "tyranny of opinion" and the "despotism of custom," seeing in informal community norms the same (if not a greater) threat to individual liberty as he saw in oppressive government.¹³⁴ "Where not the person's own character but the traditions or customs of other people are the rule of conduct," Mill argued, "there is wanting one of the principal ingredients of human happiness."¹³⁵ Mill went on to lament that

[i]n our times, from the highest class of society down to the lowest, everyone lives as under the eye of a hostile and dreaded censorship. Not only in what concerns others, but in what concerns only themselves, the individual or the family do not ask themselves, what do I prefer? or, what would suit my character and disposition? or, what would allow the best and highest in me to have fair play and enable it to grow and thrive? They ask themselves, what is suitable to my position? what is usually done by persons of my station and pecuniary circumstances? or (worse still) what is usually done by persons of a station and circumstances superior to mine?¹³⁶

¹³⁴ John Stuart Mill, *On Liberty* 64, 67 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859).

¹³⁵ *Id.* at 54.

¹³⁶ *Id.* at 58. Hayek similarly acknowledges that "[t]he conditions of personal domestic service, like all more intimate relations, undoubtedly offer opportunities for coercion of a peculiarly oppressive kind and are, in consequence, felt as restrictions on personal liberty." Hayek, *supra* note 1, at 138.

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Contemporary property scholars operating in the exit tradition, however, largely have failed to address the challenge posed to the strength of property's exit mechanism by the power of informal community norms. This oversight appears to stem from two related beliefs: that private coercion is somehow less harmful to individual liberty than its public counterpart, and that community norms can largely be disregarded outside of small, tightly knit groups, where costs of exit are typically highest.¹³⁷

But a sheer preference for private coercion is unjustifiable on the principles underlying property as exit. If autonomy is understood as the absence of coercion, the most relevant consideration should be the extent of the coercion, not its origins.¹³⁸ It is true that the state's virtual monopoly on legally sanctioned physical force means that state coercion will normally be more severe than the coercion standing behind social norms.¹³⁹ But informal norms are often backed by an implicit threat of (formally illegal) physical violence, a threat that is sometimes realized. Ellickson describes the violent informal sanctions sometimes meted out to flag burners attempting to engage in offensive, though constitutionally protected, expression with their property.¹⁴⁰ James Acheson likewise describes the sometimes violent enforcement of norms among Maine lobstermen.¹⁴¹ The experience of African-American homeowners in the mid-twentieth century is similarly instructive.¹⁴² Violent white resistance to black homeownership in white neighborhoods, and the state's general unwillingness either to protect black property rights or to punish white mobs, belie the claim that the state's monopoly on officially sanctioned physical force is universally respected.¹⁴³ Finally, in the context of tightly knit groups, the community's power over individual members can generate a degree of coercion that in many ways rivals the state's use of physical force.¹⁴⁴

¹³⁷ See M.P. Baumgartner, *The Moral Order of a Suburb* 99–100 (1988) (predicting minimal operation of social norms in “weak” communities).

¹³⁸ See *supra* note 17 and accompanying text.

¹³⁹ But see Dan-Cohen, *supra* note 127, at 1216 (observing that the state does not have a true monopoly on use of force).

¹⁴⁰ See Ellickson, *supra* note 117, at 6.

¹⁴¹ See James M. Acheson, *The Lobster Gangs of Maine* 73–77 (1988).

¹⁴² See *supra* note 72 and accompanying text.

¹⁴³ *Id.*

¹⁴⁴ See *infra* note 206 and accompanying text.

Thus, a desire to maximize negative liberty does not necessarily justify a categorical focus on state coercion. Instead, it lends itself to a wide-ranging effort to reduce coercion as far as possible, irrespective of its origins.¹⁴⁵

Second, people's responsiveness to social norms and the plausibility of the conception of property as exit from the reach of those norms are largely empirical questions whose resolution turns on how powerful and pervasive is the human need for social approval. Indeed, there is evidence that human beings are extremely sensitive to social norms (even outside of tightly knit communities) and that they crave social acceptance. As a consequence, the coercive force of informal norms can be substantial even in what might be considered to be weak communal settings.¹⁴⁶

This is particularly the case with conduct carried out in public. Human beings, for example, display a marked tendency to obey those in apparent positions of authority, even when the authority figure is a stranger, the transaction is a one-shot game, and disobedience would have absolutely no adverse consequences for the individual aside from the disapproval of the authority figure. In a classic study, social psychologist Stanley Milgram found that people were so willing to obey that they would administer powerful, painful, and even dangerous electric shocks to another human being when directed to do so by a university researcher. This was true even though the test subjects "often expressed deep disapproval of shocking a man" and the researcher "ha[d] no special powers to enforce his commands."¹⁴⁷ Subjects were visibly disturbed by the situation, frequently showing physical manifestations of deep distress, such as nervous laughter and even "uncontrollable seizures,"

¹⁴⁵ See Buchanan, *supra* note 1, at 1–3.

¹⁴⁶ See, e.g., Baumgartner, *supra* note 137, at 80, 89–91 (finding high sensitivity to mild social sanctions in a suburban community characterized by weak social ties); Robert D. Cooter, Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 *Or. L. Rev.* 1, 8 (2000); Thomas J. Scheff, Shame and Conformity: The Deference-Emotion System, 53 *Am. Soc. Rev.* 395, 402–03 (1988); Lior Jacob Strahilevitz, Charismatic Code, Social Norms, and the Emergence of Cooperation on File-Swapping Networks, 89 *Va. L. Rev.* 505, 534–47 (2003); Lior Jacob Strahilevitz, Social Norms from Close-Knit Groups to Loose-Knit Groups, 70 *U. Chi. L. Rev.* 359, 363 (2003).

¹⁴⁷ Stanley Milgram, Behavioral Study of Obedience, 67 *J. Abnormal & Soc. Psych.* 371, 376 (1963).

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as they carried out the researchers' instructions.¹⁴⁸ But the overwhelming majority of subjects never refused to administer the increasingly painful shocks.¹⁴⁹

M.P. Baumgartner's anthropological study of social norms in the suburbs revealed that, despite what she observed to be anemic bonds of community, public disorderly behavior was exceedingly rare. Indeed, Baumgartner observed that deviations from this high standard of public conduct were normally corrected after only the mildest of informal confrontations by neighbors.¹⁵⁰ The effectiveness of mild sanctions in what has traditionally been viewed as a weak type of community suggests the power of community values over the conduct of individuals even outside of tightly knit groups.¹⁵¹

Consistent with this view, coercive informal rules of public behavior arise and are widely obeyed even in quintessentially anonymous communities like large cities. Richard Epstein, for example, describes the informal property-like norms that have developed in Chicago around "ownership" of parking places that individuals have taken the time to clear of deep snow.¹⁵² In Boston, similar norms about parking places have survived even in the face of opposition by city officials.¹⁵³ Lior Strahilevitz has observed norms of behavior among commuting motorists.¹⁵⁴

Reporting the results of a study on subway norms, Milgram described his students' extreme, and at times physical, reactions when they were required to violate New York subway etiquette while

¹⁴⁸ Id. at 375.

¹⁴⁹ Id. Most subjects administered shocks, even when directed to set the voltage level two steps beyond the designation: "Danger: Severe Shock." Id. at 376-77.

¹⁵⁰ See Baumgartner, *supra* note 137, at 80 ("Although they may grumble privately about receiving such complaints, most people approached in this way are willing to accommodate the aggrieved parties.").

¹⁵¹ See Carl E. Schneider, *Social Structure and Social Control: On The Moral Order of a Suburb*, 24 *Law & Soc'y Rev.* 875, 882-83 (1990) (book review).

¹⁵² See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 *J. Legal Stud.* S515, S528-33 (2002).

¹⁵³ See Boston Mayor Wants Vehicles, Not Cans, in *Parking Spaces*, *N.Y. Times*, Jan. 3, 2005, at A11.

¹⁵⁴ Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 *Ind. L.J.* 1231, 1274 (2000).

gathering data.¹⁵⁵ Milgram had his students ask people to give up their seats on the subway. More surprising than the unexpectedly high percentage of people who voluntarily relinquished their seats to seemingly healthy, young students were the unexpectedly overpowering feelings of shame and dread felt by the student volunteers at having to violate such an entrenched social taboo.¹⁵⁶ So strong were these feelings that some students felt physical symptoms of illness and nausea.¹⁵⁷

A more fanciful example of social norms at work in the “anonymous” city is provided by the recent story involving a New York luxury cooperative board’s decision to remove the nest of Pale Male, a red-tailed hawk who had made his home for over a decade on a twelfth-floor cornice.¹⁵⁸ Although the building managers may have been within their legal rights to remove the nest, the action sparked an outcry in the New York naturalist community, which had little sympathy for some residents’ complaints about debris falling from the nest onto the building entrance below.¹⁵⁹ When public opposition led to a blizzard of adverse media coverage and daily pickets outside the building, the cooperative’s wealthy board members succumbed to the public pressure and agreed to build a custom-designed stainless steel cradle for a new nest.¹⁶⁰

These observations about the operation of social norms outside of tightly knit groups are not meant to suggest that the norms of loosely bound communities are just as powerful and extensive as those that operate within strong communities. Despite the presence of social norms even in large cities, the norms operative within tightly knit groups are likely to be far more invasive and all-

¹⁵⁵ See Stanley Milgram, *On Maintaining Social Norms: A Field Experiment in the Subway*, in *The Individual in a Social World* 37, 42 (John Sabini & Maury Silver eds., 2d ed. 1992); see also Matthew L. Fried & Victor J. DeFazio, *Territoriality and Boundary Conflicts in the Subway*, 37 *Psychiatry* 47, 55–56 (1974); Michael Luo, *Revisiting a Social Experiment, And the Fear That Goes With It*, N.Y. Times, Sept. 14, 2004, at B1 (replicating Milgram’s experiment thirty years later).

¹⁵⁶ See Milgram, *supra* note 155, at 40, 42.

¹⁵⁷ See *id.* at 42.

¹⁵⁸ See Thomas J. Lueck, *New York Celebrities Evicted on Fifth Ave., Feathers and All*, N.Y. Times, Dec. 8, 2004, at B1.

¹⁵⁹ *Id.*

¹⁶⁰ See Thomas J. Lueck, *Co-op to Help Hawks Rebuild, But the Street Is Still Restless*, N.Y. Times, Dec. 15, 2004, at B1; Thomas J. Lueck, *New Aerie Is Readied for Fifth Avenue Hawks*, N.Y. Times, Dec. 22, 2004, at B3.

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encompassing than those operative within loosely bound groups. The relative strength of social norms in those communities arises from the greater likelihood in small groups of forming a consensus about the wrongness of particular actions and of actually detecting deviant behavior.¹⁶¹

City norms, however, are nonetheless pervasive and coercive, particularly as to conduct performed in public. Moreover, the frequent presence of family members or roommates has a constraining influence on the ability of individuals in otherwise loosely bound communities to live their lives as they see fit, even when they are in private. While family members frequently share values, this is not always the case. Accordingly, the freedom to act as one pleases, even within the private confines of one's home, is frequently overstated, particularly by those who fail to recognize the communal nature of the household.¹⁶²

Finally, setting aside the norms that arise in loosely bound communities, there is reason to think that the satisfaction individuals derive from participation in tightly knit groups leads them to participate in such communities, even in cities. The ability of these nonterritorial normative communities to monitor deviant behavior is necessarily more limited than that of their territorial counterparts. But, as long as the cost to the individual of exiting such communities is sufficiently high, they need not be geographically defined in order to exert substantial, often coercive, influence over their members. Families, churches, ethnic organizations, clubs, workplaces, and neighborhood bars or pubs are examples of the sorts of close-knit groups in which individuals frequently find community (from which may emerge social constraints on their use and enjoyment of property) even in the midst of the relative anonymity of city life.¹⁶³

¹⁶¹ Tightly knit communities are more able to detect deviant behavior, no matter where it occurs, because they can leverage their high exit costs to demand that individual community members forego a degree of privacy. See *infra* note 168 and accompanying text.

¹⁶² See *supra* Part II.B.1.a.

¹⁶³ Cf. Fischer, *supra* note 84, at 196–97 (describing the emergence of subcultures in urban communities).

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3. Implications of the Social Critique

The critique of property as exit based on human sociability yields two important conclusions. First, the deep human need for community life renders implausible the most extreme versions of the view of property as a mechanism for facilitating strong exit from “society.” Because the individual needs to reach out to others in order to flourish, others will be able to reach inside the individual’s sphere of property and threaten him with sanctions if he does not conform to certain informal norms of conduct. The private ownership of property can do little, by itself, to guarantee individual liberty where liberty is understood in the traditional libertarian sense as the utter absence of external compulsion for both private and public acts performed on and with one’s property. The most extreme versions of property as strong exit focus exclusively on legal coercion and ignore the inescapable and often law-like operation of private norms.¹⁶⁴ Even for more sophisticated and nuanced versions of property as exit, however, sensitivity to the pervasive operation of private coercion substantially weakens the claims that theorists make on behalf of private property’s power to free owners from external compulsion.

A degree of weak exit may still often be possible as a natural consequence of the material conditions of certain types of community. Social norms depend on the possibility of detection of deviant behavior for their enforcement.¹⁶⁵ Thus, a high degree of anonymity—as occurs, for example, when communities are large and members highly mobile, or where there is a high degree of territorial privacy—will weaken the force of the norms a community can enforce, thereby increasing the scope of individual autonomy possible through withdrawal into the privacy of one’s property. By definition, however, this weak exit effect is limited, even in loosely bound communities, to conduct that occurs out of the sight of others. This is an important qualification because the property that conceals individuals behind closed doors represents a miniscule fraction of privately owned property.¹⁶⁶

¹⁶⁴ See supra note 123 and accompanying text.

¹⁶⁵ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *Mich. L. Rev.* 338, 358 (1997).

¹⁶⁶ See Peñalver, supra note 59, at 263.

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It is important to ask, moreover, whether it is property ownership, as opposed to personal privacy, that is doing the work in the “weak exit” scenario. Renters, for example, can enjoy substantial privacy without owning the property in which they enjoy it. Indeed, even a socialist state can choose to confer privacy rights on those residing within community-owned housing.¹⁶⁷ Conversely, property that has not been enclosed within walls or high fences, that has been made open to the public for a wide range of activities, or that is owned by artificial persons will often do little or nothing to enhance the privacy of its owners. Finally, in a tightly knit community, norms compelling openness or encouraging nosiness can deprive property owners of much of the territorial privacy commonly associated with private ownership.¹⁶⁸

The fragility of privacy, and therefore of the weak exit mechanism, within tightly knit communities leads directly to a second conclusion to be drawn from the social critique of property as exit: Property as exit, in both its strong and weak forms, must be implicitly hostile to the formation and maintenance of such communities. Proponents of property as exit often are loath to admit their suspicion of community.¹⁶⁹ Some libertarians seek to avoid this tension by shifting the focus away from exit altogether. These theorists have made arguments suggesting that community life would be fully consistent with the libertarian commitment to individual autonomy if the initial decision to join the community were voluntarily undertaken.¹⁷⁰ Once a person has freely chosen to enter into community (assuming full disclosure of the terms of membership, including of the possibility that the rules might change), he cannot complain about the restraints on his freedom of action entailed by community membership, no matter how onerous. Robert Nozick

¹⁶⁷ Cf. Ellickson, *supra* note 1, at 1353 (observing that socialist kibbutzim allow their members to enjoy private dwelling spaces).

¹⁶⁸ See *id.* at 1353–54 (discussing the lack of privacy within Hutterite communities). The widespread belief in an omniscient, omnipresent deity can similarly weaken even the weak exit made possible by such privacy, at least for believers.

¹⁶⁹ See Ellickson, *supra* note 35, at 1565 (denying that liberal thought is characterized by hostility towards intermediary communities); see also Frug, *supra* note 23, at 1593.

¹⁷⁰ See, e.g., Fried, *supra* note 36, at 14, 20–21; Nozick, *supra* note 18, at 323–24, 331.

goes so far as to endorse the notion that a person should be allowed to choose to contract himself into perpetual servitude.¹⁷¹

This strategy, however, may generate more problems than it solves. To begin with, it largely sidesteps the difficulties of determining whether a decision to join a particular community is truly free of coercion, particularly as to children born into the community. As Donald Kraybill, an expert on Amish society, has observed, “[g]roups threatened by cultural extinction must indoctrinate their offspring if they want to preserve their unique heritage. . . . As cultural values slip into the child’s mind, they become personal values—embedded in conscience. . . .”¹⁷² Accordingly, he observes, “the Amish carefully socialize their young.”¹⁷³ Thus, while the Amish practice adult baptism, a custom that supposedly guarantees that the decision to join the church is freely chosen,¹⁷⁴ parents and the community employ a variety of strategies—including primary education oriented strongly towards the inculcation of communal values, withholding higher education, and encouraging intra-community courtship at a young age—to increase the likelihood that children will remain within the community as adults.¹⁷⁵ Other intentional communities exercise similar control over children’s education and marriage to minimize the chances of defection.¹⁷⁶ As a consequence, these groups have been extremely successful at keeping their children within the communi-

¹⁷¹ See Nozick, *supra* note 18, at 331.

¹⁷² Donald B. Kraybill, *The Riddle of Amish Culture* 119 (1989).

¹⁷³ *Id.*

¹⁷⁴ See Kraybill, *supra* note 123, at 10.

¹⁷⁵ See Kraybill, *supra* note 172, at 122–28 (describing the Amish struggle with the state to avoid sending their children to secondary school); Gertrude Enders Huntington, *Persistence and Change in Amish Education*, in *The Amish Struggle with Modernity* 77, 90 tbl.5.3 (Donald B. Kraybill & Marc A. Olshan eds., 1994); Thomas J. Meyers, *Education and Schooling*, in *The Amish and the State*, *supra* note 123, at 87, 102–04; see also Labi, *supra* note 123, at 28 (“A lot of Amish will tell you they don’t want their kids to be educated. . . . The more they know, the more apt they are to leave.”); *id.* at 30 (discussing the Amish practice of “bed courtship,” in which “teenage boys are allowed to steal into the rooms of girls their age” and noting that “[m]any parents encourage bed courtship because it often leads to early marriages, which make young people less likely to leave the church.”).

¹⁷⁶ See Shaffir, *supra* note 123, at 172–78.

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ties.¹⁷⁷ It is difficult to say, however, whether the children's decision to remain upon reaching adulthood is a voluntary one.

In addition to ignoring the involuntary indoctrination often underlying "free choice," the substitution of free joining for free exit appears to reflect an arbitrary privileging of the conception of the good held at the moment of joining over all subsequent conceptions of the good that an individual might adopt over the course of his lifetime.¹⁷⁸ The arbitrariness of this preference becomes more apparent as more time elapses between the individual's decision to join a particular community and his change of heart or circumstances.¹⁷⁹

If freedom is the freedom from coercion, it is not clear that adverting to some decision in the (perhaps distant) past alleviates the importance of exit within the liberal framework as a check on community power. This is particularly the case when it is the com-

¹⁷⁷ See *id.* at 182. Scholars have estimated that roughly eighty percent of Amish children choose to remain within their communities. See Kraybill, *supra* note 172, at 140. That rate compares very favorably with the retention rates among fundamentalist Christian groups, whose members are more engaged with, and embedded in, mainstream society. See Nancy Tatom Ammerman, *Bible Believers 184* (1987) (citing estimates that fundamentalist communities retain less than sixty percent of their children as members). Some might argue that even an eighty-percent retention rate reflects a relatively high degree of voluntariness among those who remain within the community. But the conclusion drawn depends on the baseline chosen for comparison. Certainly the number of youths raised outside of Amish communities who nonetheless choose to live such a lifestyle is miniscule. Cf. Rosenblum, *supra* note 32, at 104 (observing that ninety percent of those who join "totalistic communities" as adults leave within two years).

¹⁷⁸ See Kymlicka, *supra* note 23, at 48.

¹⁷⁹ Charles Fried suggests that common-law contract doctrines like mistake, frustration, and impossibility relieve some of the more draconian results of an otherwise strict adherence to the notion that voluntary entrance eliminates the need for free exit. See Fried, *supra* note 36, at 19–20. He distinguishes, however, between mistakes (at the time of entering into the contract) concerning presently existing or future facts about the world and mistakes (at the time of entering into the contract) about one's likely future preferences. Fried suggests that, while common-law doctrines are right to relieve the burden of complying with contracts in the former circumstances, they should not be applied to relieve the burden when one merely fails accurately to predict the kind of person she will become or the values she will hold. *Id.* It is unclear, however, why, on libertarian grounds, mistakes about one's own future preferences are less worthy of forgiveness than mistakes about any other sorts of future facts, particularly in extreme cases.

munity itself that changes, and not the person.¹⁸⁰ In any event, this justification for community coercion leaves untouched the substantial coercion that can arise within largely unchosen kinship, religious, ethnic, and racial communities.

F.A. Hayek hints at a somewhat different approach. He concedes that a certain amount of coercion will always exist within “private” communities like the family and admits that this coercion is inconsistent with the ideal of negative liberty.¹⁸¹ He does not call for the elimination of such communities, however, noting that any attempt to eliminate private coercion likely would involve even greater coercion.¹⁸² On Hayek’s view, the system of property as exit, while imperfect in light of the coercive power of community, generates the best of all possible libertarian worlds. In other words, as Joseph Raz has observed, autonomy is not an all-or-nothing affair.¹⁸³ Private ownership, Hayek argues, reduces state coercion while leaving private coercion in place. Its net effect, however, is to minimize the aggregate amount of coercion operating on individuals.

Although superficially appealing, this response ultimately fails to grapple in a meaningful way with the implications of social life for the viability of property as exit. As I have already argued above, the distinction between public and private coercion is a difficult one to sustain.¹⁸⁴ The brute fact that this coercion originates from a private entity rather than the state makes little difference to the

¹⁸⁰ See Nozick, *supra* note 18, at 323–24 (“‘If you don’t like it here, don’t join,’ has more force than ‘If you don’t like it here, leave.’”). As Nozick puts it, “[a] community’s establishing a new restriction, or abolishing an old one, or seriously changing its character, will affect its individual members in something like the way in which a nation’s changing its laws will affect its citizens.” *Id.* Nozick attempts to resolve this problem by arguing that people can bargain for the right to receive compensation for changes in community character prior to joining a group. See *id.* But the difficulty of predicting in advance precisely how one will respond to the infinite variety of changes that might occur within a community weaken the effectiveness of that solution.

¹⁸¹ See Hayek, *supra* note 1, at 138.

¹⁸² *Id.*; see also Hoy, *supra* note 43, at 16.

¹⁸³ See Raz, *supra* note 99, at 156.

¹⁸⁴ See *supra* notes 138–45 and accompanying text. In addition, as scholars have long observed, the institution of private ownership creates ample opportunities for coercion of the poor by the wealthy and powerful. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. Rev.* 503, 510–11 (1985); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *Colum. L. Rev.* 603, 625–28 (1943).

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coerced.¹⁸⁵ The goal of Hayek's theory of the second-best should be to minimize the total amount of coercion, irrespective of whether that coercion derives from private or public action.¹⁸⁶

It is certainly true that the complete elimination of certain forms of private coercion would require an extraordinary dose of public coercion. It is not clear, however, that if the state employed coercive means to minimize private coercion, that the state's coercion would necessarily outweigh the intrusiveness of the private coercion that it displaced in all (or even most) cases. In other words, at times, state coercion may well be the overall coercion-minimizing solution.

In the context of social norms there are several steps the state could take to minimize private coercion without necessarily increasing the net coercion experienced by individuals in society. Examples of such steps, in increasing levels of force, include: (1) refusing to allow existing private communities to borrow the power of the state in order to enforce their barriers to exit, (2) affirmatively discouraging individuals from entering into tightly knit communities in the first place by—among other things—increasing the cost of joining or actively subsidizing individual exit, and (3) employing the power of the state affirmatively to protect individual community members from the effect of community norms.

First, the state might refuse to lend its own apparatus to communities seeking to enforce formal rights that enhance the costs of exit. For example, utopian communities in the nineteenth century frequently required their members to contribute property to the commune and to sign contracts agreeing to relinquish any claims to that property if they chose to leave the community in the future.¹⁸⁷ Although the courts routinely enforced these agreements (largely on libertarian grounds),¹⁸⁸ it would not have been “coercive” (in the sense understood by proponents of property as exit) for them to have declined to do so. A rule against enforcing such contracts,

¹⁸⁵ See, e.g., Roberto Mangabeira Unger, *Law in Modern Society* 201–02 (1976) (arguing that the distinction between public and private power is increasingly indefensible); Chemerinsky, *supra* note 184, at 510–11 (same); Charles A. Reich, *The Individual Sector*, 100 *Yale L.J.* 1409, 1429–30 (1991).

¹⁸⁶ See *supra* notes 138–45 and accompanying text.

¹⁸⁷ See Weisbrod, *supra* note 119, at 62–63.

¹⁸⁸ *Id.* at 121–22.

while “coercive” of the individual *ex ante* (in that it diminishes his range of contractual options) would not necessarily increase the net amount of coercion in the long run. Adherents of property as exit should be supportive of state efforts to craft rules of property and contract law that inhibit tightly knit communities from using private law to coerce their individual members.

Second, the state could use a variety of mechanisms to discourage individuals from entering into tightly knit communities, whether marriages or religious enclaves, from which exit is likely to be expensive and within which private coercion will almost inevitably arise. The state might, for example, refuse to grant legal recognition to those communities. Alternatively, it might decline to subsidize them through tax exemptions or public funds that would otherwise be available. The state could even use the public schools to teach large numbers of children about the evils of joining tightly knit communities or offer financial subsidies for individuals who choose to exit. Such actions by the state would not coerce the affected groups but would make it more expensive for individuals to join the groups and for the groups to maintain their existence by recruiting new members.

Finally, the state could affirmatively deploy its coercive power to aid the individual and to weaken strong communities. This direct coercion could take the form of substantive limitations on the demands that private communities can impose on their members.¹⁸⁹ The state might also create causes of action requiring groups to compensate members who suffer harm as a consequence of the group’s limitations on individual exit.

In a series of cases, individuals shunned by their religious communities for violating group norms have sued those communities, arguing that the imposition of shunning sanctions violated their individual rights.¹⁹⁰ Some courts have recognized such a cause of ac-

¹⁸⁹ See, e.g., Green, *supra* note 3, at 177–80 (describing steps that communities must take in order to facilitate individual members’ exits); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 *Va. L. Rev.* 1053, 1097–1106 (1998).

¹⁹⁰ See Weisbrod, *supra* note 119, at 69–79; Gruter, *supra* note 119, at 125–27; see also *Ginerich v. Swartzentruber*, 22 *Ohio N.P. (n.s.)* 1 (1919); *Guinn v. Church of Christ*, 775 P.2d 766, 786 (Okla. 1989) (discussing right of church elders to discipline wayward members during their membership in church and, to a certain extent, after their departure from the church).

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tion, at least under certain limited circumstances.¹⁹¹ A state concerned about the coercive power of tightly knit communities would apply such causes of action broadly and, conversely, would construe any privilege defense on the part of the community very narrowly.

Thus, despite efforts to shunt the issue of private coercion to the side, the notion of property as exit appears to support a commitment by the state (1) to use its resources to discourage entry into tightly knit communities, (2) to refuse to allow its tools of coercion to be used by those communities to increase their costs of exit, and (3) under certain circumstances to make its tools of coercion available to individuals seeking redress against communities that, in the eyes of the state, go too far in imposing sanctions on individual dissenters. A commitment to exit therefore lends itself to support for the state's active and at times coercive discouragement (or regulation) of the formation and maintenance of strong communities. The fact that few people would support this sort of state intervention in community life suggests, among other things, that we value things other than the maximization of individual autonomy.

Whether active state discouragement of community would increase overall coercion or minimize it appears to be a question that cannot be answered through the a priori arguments Hayek and others level against state intervention in the realm of private property and contract. Indeed, this coercive indeterminacy will be true of state regulation that goes well beyond efforts to restrain the hands of tightly knit private communities. The state's regulation of a variety of property-related behavior (such as environmentally destructive activities, racially discriminatory exclusion, and the distribution of economic power) can either increase or decrease the total coercion experienced by individuals as they live out their life plans. Whether the coercion-maximizing or coercion-minimizing effect predominates will virtually always be a question that cannot be answered on the basis of broad assumptions and abstract models.

¹⁹¹ See supra note 190.

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4. Conclusion

In sum, the liberty-securing mechanism of property as exit appears to be substantially weaker than often assumed. Even if they own property (or, as the next Part argues, especially if they own property), individuals will virtually always be subject to the coercive norms of some community. Such community norms make strong exit impossible for most, and while the intermittent privacy necessary for weak exit exists in loosely bound communities, the freedom it guarantees is limited to conduct that occurs behind closed doors. Moreover, even weak exit can be rendered nearly impossible by anti-privacy norms that frequently operate within tightly knit communities. Attempts to fit communal coercion into a libertarian framework by looking to the nature of the decision to join a particular group appear arbitrary in their preference for freedom at one moment in time over freedom at another. Finally, efforts to characterize private property as a second-best, freedom-maximizing institution fail to take seriously the substantial coercion that can occur within the private sphere and the degree to which public regulation might help to minimize it.

III. PROPERTY AS ENTRANCE

The weakened relationship between individual autonomy and property conceived as exit is not the end of the story. It is possible to formulate a vision of property, and its relationship with freedom, in a way that is more cognizant of human beings' robustly social and interdependent nature. This conception, which I call property as entrance, starts with an understanding of ownership, not primarily as a means of separating individuals off from each other, but of tying them together into social groups. On this view, private property does not simply shield individuals from external coercion. It may well do that under circumstances conducive to weak exit; but it can also increase the degree to which the individual is exposed to the social norms of the community in which the property is situated.

The conception of property as entrance does not stand in direct opposition to every aspect of property as exit. Both approaches, for example, affirm the intuitive view of property as a haven from the outside world. Indeed, the civic republican tradition—with which

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property as entrance shares many assumptions—draws heavily on the notion of property as a refuge.¹⁹² But, unlike property as exit, civic republicanism (and property as entrance) treats the refuge provided by property as ultimately in the service of an inescapably social human existence. Like civic republicanism, property as entrance views property “as a means of anchoring the individual in the structure of power and virtue.”¹⁹³ The function of property as a means of binding owners to the larger community within which the property is situated has been obscured, however, by libertarian theorists’ tendency to attribute excessive value to the refuge function of private ownership.

As with exit, we can conceive of the entrance facilitated by property ownership in both strong and weak terms. There is ample evidence, for example, that dissenting groups, particularly culturally radical groups seeking to escape the strictures of the mainstream, can and do use private property havens in very effective ways to create flourishing autonomous enclaves within which they maintain substantial social control over their members.¹⁹⁴ As Laurence Veysey has put it, “from the days of the Anabaptists down to the present, cultural radicals have recurrently been moved to break off from the ordinary flow of life around them and collectively share in a new existence arranged according to a deliberate (‘intentional’) pattern.”¹⁹⁵ And when they have done so, rights of private property have been an essential part of that process.¹⁹⁶ One who buys into a utopian community escapes the norms of mainstream society, but also exposes himself to the values of the dissenting group. Indeed, the use of property in the service of radical dissent

¹⁹² See Alexander, *supra* note 8, at 29–31.

¹⁹³ *Id.* at 31 (internal quotation marks omitted).

¹⁹⁴ See, e.g., Richard T. Ely & George S. Wehrwein, *Land Economics* 101 (Univ. of Wis. Press 1964) (1940); Robert M. Cover, *The Supreme Court*, 1982 Term—Foreword: *Nomos* and Narrative, 97 *Harv. L. Rev.* 4, 30–31 (1983) (discussing the efforts of separatist communities to use property and contract law to form “dedicated nomic refuge[s]”); Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 *J. Contemp. Legal Issues* 897, 899 (2002).

¹⁹⁵ Laurence Veysey, *The Communal Experience: Anarchist and Mystical Communities in Twentieth Century America* 52 (1978); see also Hirschman, *supra* note 25, at 107–08.

¹⁹⁶ See *supra* note 194.

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is far more likely to be a communal, rather than an individual, endeavor.¹⁹⁷

In contrast, the notion of property as weak entrance focuses on the effects of property ownership on individuals outside of territorially separatist communities. For these mainstream individuals, property ownership does not necessarily shield the individual from community norms but often has the opposite effect. Indeed, property tends to give its owners a stake in their communities, broadly understood. It can reduce their mobility and induce them to engage more fully in community life of all sorts, both territorial and otherwise. Moreover, the market transactions necessary to acquire and maintain property have a profound socializing effect on property owners. Accordingly, for both those who reject and those who embrace the mainstream, private ownership can serve as a powerful vehicle for tying individuals more closely to their respective social groups.

A. Strong Entrance

1. The Role of Property in Fostering Normative Communities

Given a profound human need for social connection, private property can be effective at fostering robust forms of group exit even while its power to facilitate individual exit is far more limited.¹⁹⁸ If we assume that individuals have a deeply rooted need for a rich social life, then the more of that social life that can be brought within the boundaries of a particular dissenting community, the less members of that community will look to satisfy their social needs beyond the confines of the group. A territorially concentrated group of private property owners (or a property-owning group) can retain within the collective borders of its property far more of its “economic, political, social, and family life” than can the lone property-owning individual.¹⁹⁹ Moreover, it is worth noting that, as Ellickson has observed, separatist communities can be built

¹⁹⁷ See Veysey, *supra* note 195, at 61–62.

¹⁹⁸ This process of group exit resembles what Abner Greene has referred to as “permeable sovereignty.” Greene, *supra* note 44, at 4.

¹⁹⁹ Rosabeth Moss Kanter, *Commitment and Community* 2 (1972); see also Ellickson, *supra* note 1, at 1344–48; Nomi Maya Stolzenberg, *A Tale of Two Villages (Or, Legal Realism Comes to Town)*, in *Nomos XXXIX (Ethnicity and Group Rights)* 290, 314 (Ian Shapiro & Will Kymlicka eds., 1997).

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up around either communal or individualized ownership models, or any number of gradations between the two.²⁰⁰ In either case, the physical location of members' property within the geographic boundaries of the community tends to reinforce the social bonds among members.

By minimizing the need of individual members to interact with people whose values do not coincide with those of the group, the territorial concentration of the group's (or members') property reduces the susceptibility of its members to informal sanctions imposed by outsiders with different values. Group members therefore become far more impervious to divergent values of the surrounding society than the isolated, dissenting individual. As Laurence Veysey explains,

[i]n radical movements, when this personal commitment occurs in a communal setting, the group becomes most effectively sealed off from the alien influences of the outside world. The members have been taken over by the microcosm in every aspect of daily living and thinking. They are impervious to external suggestion. Rarely do they read literature from beyond the movement, and they find it hard to speak to outsiders except as potential converts.²⁰¹

The creation of a dissenting enclave, with its internalization of virtually all social interactions, means that most of the individual

²⁰⁰ Ellickson discusses efforts by some communes to raise costs of exit by making it impossible for departing members to withdraw the share of community wealth they have helped to build. See Ellickson, *supra* note 1, at 1351–52. Although common, particularly among groups such as the Bruderhof that practice communal ownership, Ellickson notes that other models exist. The Amish, for example, have managed to maintain a high level of solidarity, social control, and membership retention while favoring a system of private, household ownership. See *id.* at 1357; see also *United States v. Lee*, 455 U.S. 252, 255 (1982) (“[T]he Amish believe it sinful not to provide for their own elderly and needy.”); Donald B. Kraybill, Introduction: The Struggle to Be Separate, *in* *The Amish Struggle with Modernity*, *supra* note 175, at 1, 2; Marc A. Olshan, Amish Cottage Industries as Trojan Horse, *in* *The Amish Struggle with Modernity*, *supra* note 175, at 133, 134–35 [hereinafter Olshan, Amish Cottage Industries] (observing that while the Amish do not rely on communal ownership as such, a strong “moral obligation to help one’s neighbor” ties their financial well-being together to a certain extent).

²⁰¹ Veysey, *supra* note 195, at 459.

transactions and conflicts that are unavoidable in day-to-day life will be governed by the group's own norms.²⁰²

These community-reinforcing benefits of private territorial enclaves will be realizable whenever one of two conditions is met. First, if observing people who live according to the dissenting community's values offends or otherwise imposes costs on non-member neighbors, enclave formation will minimize those externalities. A group of polygamists, for example, may well offend fewer people if it were to form an isolated enclave than it would if its members lived dispersed throughout society.²⁰³ Accordingly, forming an enclave minimizes the risk that members will be subjected to the hostile reactions of outsiders as they go about their daily business. Second, if mere exposure to the values of mainstream society would harm members of the dissenting community, enclave formation will reduce the possibility of such exposure.²⁰⁴ As a general matter, the greater the divergence between the values of the community and those of the mainstream, the greater the likely benefit to the community of forming an enclave.

Not only does the creation of an enclave protect individual members from offensive external norms (or non-members from offensive community norms) by relieving members and outsiders of the need to interact with each other, the insulation of group members from the outside world increases over time each member's dependence on the group for the satisfaction of her social needs. Because most of the individual members' social relationships occur within the context of the group, the cost to the individual of exiting the group increases dramatically.²⁰⁵ Raising the cost of exit for indi-

²⁰² As Richard Ely and George Wehrwein put it, "[c]losely settled communities remain impervious to outside influences." Ely & Wehrwein, *supra* note 194, at 101.

²⁰³ Of course, the possibility that concentrated groups might arrogate local political power by voting as a bloc might make enclaves more problematic for their neighbors than a comparably sized group dispersed throughout the population. See Frances FitzGerald, *Cities on a Hill* 259 (1986); Simon Romero, *Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect*, *N.Y. Times*, Nov. 14, 2004, at A20.

²⁰⁴ Romero, *supra* note 203, at A20.

²⁰⁵ This is true even when exit does not entail the confiscation of any of the individual's property. See Gruter, *supra* note 119, at 273-74 (describing the case of an Amish man shunned by his community and noting that, as a result of the shunning, he was "unable to pursue his daily tasks as a farmer. His neighbors, even close members of his family, could not speak with him or eat with him, if they did not want to incur the

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viduals enhances the strength of the group's norms with respect to its members. By isolating individual members from mainstream society, the dissenting community is able to reduce the temptation for individual group members, particularly children, to adopt mainstream values that violate group beliefs.²⁰⁶

This internalization of social life in turn makes groups that form themselves into enclaves better able than geographically dispersed communities to monitor member conduct. In part, this occurs because consolidating its members' residences (and, in many cases, workplaces, play places, and gathering places) within a definite geographic area makes it far easier for the group to identify insiders and outsiders, to observe the conduct of the former, and to limit the interactions between the two groups as the community sees fit. Some scholars who have studied intentional communities have therefore identified geographic proximity as an important feature of those groups.²⁰⁷ In addition, however, the increased costs of exit generated by internalization of virtually all social life within the community, a process made possible by the institution of private property, enables the community to require that individual members submit themselves to extensive and invasive community monitoring of conduct.²⁰⁸

Property as entrance views private ownership, in both communal and individual forms, as facilitating the formation and maintenance of strong communities whose values differ dramatically from the mainstream and as empowering individuals to opt into those com-

ban for themselves, nor could there be the usual interchange of necessary reciprocal services, from shoe repairs to assistance with plowing or harvesting.”).

²⁰⁶ See Veysey, *supra* note 195, at 451. The coercive force that these high exit costs can generate over the individual is quite substantial. See Gruter, *supra* note 119, at 273–74; Rosen, *supra* note 189, at 1098–1106; Stolzenberg, *supra* note 199, at 315. The threat of expulsion can deprive an individual of family, friends, and, under certain circumstances, material possessions. See Gruter, *supra* note 119, at 273–74.

²⁰⁷ See Kanter, *supra* note 199, at 169–70 (“Strong communities tend to have strong boundaries—physical, social, and behavioral.”); 1 Timothy Miller, *The Quest for Utopia in Twentieth-Century America*, at xx (1998) (including “geographic proximity” as an essential ingredient for utopian communities); cf. Robert David Sack, *Human Territoriality* 219 (1986) (“Whatever the goals of a society may be . . . [it] will need territoriality to coordinate efforts.”).

²⁰⁸ See *supra* notes 200–02 and accompanying text; see also Ellickson, *supra* note 1, at 1353–54 (describing the lack of privacy within Hutterite communities); Labi, *supra* note 123, at 31 (discussing the Amish “ethic of confession,” which encourages church members to come forward to reveal their sins to the community).

munities. By joining—or remaining within—tightly knit communities, individuals are subjected to a much more invasive set of social norms than exist in broader society. Such communal norms are reinforced, and not weakened, by the establishment of property ties, whether those be the mere propinquity of members, as among the Amish, or some more formal communal property structure, as among socialist utopians.²⁰⁹ Thus, the strong version of property as entrance suggests an interesting inversion of the dominant conception of private property as primarily about creating room for individual autonomy at the expense of the community. Instead of a barrier shielding the individual's freedom of action from outside interference, property as entrance views the institution of private property as a means of reinforcing community life, by permitting individuals to expose themselves more fully to the values of the particular community in which the property is situated. In other words, property rights provide a shell of negative liberty that protects the freedom of dissenters, but they provide such liberty most effectively for dissenting groups and their members, particularly as to public conduct, rather than for isolated individuals.²¹⁰

2. The Continuing Significance of Geography

In recent years, scholars have increasingly questioned the significance of physical geography to community formation in light of dramatic changes in communications and transportation technology.²¹¹ As communication and travel have become faster and less expensive, the argument goes, it has become possible to enjoy some of the benefits of community even in the absence of geographic proximity. Without denying that improvements in transportation and communications technology have dramatically changed how human beings interact and have facilitated the main-

²⁰⁹ See *supra* note 200.

²¹⁰ See Ely & Wehrwein, *supra* note 194, at 101; cf. Michael Walzer, *Obligations* 4 (1970) (arguing that conscientious disobedience is virtually always a collective act); Stolzenberg, *supra* note 194, at 900–01 (arguing that private rights and relegation of religion to the private sphere can create substantial room for the exercise of communal autonomy within separatist religious groups).

²¹¹ See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 *Stan. L. Rev.* 1365, 1413–14 (1997) (arguing that modern advances in communication have made it possible to form strong communities even in the absence of propinquity). But see Greene, *supra* note 44, at 4.

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tenance of community over large distances, the perspective of property as entrance suggests that the impact of these technological developments on the benefits to dissenting groups of physical separation from the mainstream should not be overstated.

Certainly there are some communities whose principal goal is merely to facilitate verbal or written communications among members sharing a common set of interests or values that may or may not be common (or even acceptable) within the broader society.²¹² Political advocacy groups and clubs for discussing topics such as sports, religion, or literature fit this description. For these groups, face-to-face interaction, while perhaps desirable under certain circumstances (such as periodic conventions or social events), is not strictly necessary for survival, and the enhancements in communications technology represented by Internet chat rooms and e-mail have improved their ability to maintain and reinforce community.²¹³

At the same time, the increased anonymity facilitated by computer-mediated communication has made the exclusion of unwanted outsiders, particularly those who take pleasure in frustrating the group's communicative goals, a more challenging task.²¹⁴ Tellingly, on-line communities are often strongest when they can tie into "real world" social networks, a process that increases the cost of individual deviance from community norms.²¹⁵

Moreover, it is far from clear that the influence of technology is only in the direction of territorial decentralization of community life. Because technology enables people to participate more easily in far-flung communities, it reduces the cost of community formation even as it increases the challenge of maintaining communal

²¹² See, e.g., John A. Bargh & Katelyn Y.A. McKenna, *The Internet and Social Life*, 55 *Ann. Rev. Psychol.* 573, 582 (2004); Chandra Mukerji & Bart Simon, *Out of the Limelight: Discredited Communities and Informal Communication on the Internet*, 68 *Soc. Inquiry* 258, 268–69 (1998).

²¹³ See, e.g., Bargh & McKenna, *supra* note 212, at 582; Mukerji & Simon, *supra* note 212, at 268–69.

²¹⁴ See Rhonda D. Evans, *Examining the Informal Sanctioning of Deviance in a Chat Room Culture*, 22 *Deviant Behav.* 195, 200–01 (2001).

²¹⁵ Cf. Bargh & McKenna, *supra* note 212, at 586–87 (“[W]hen these Internet-formed relationships get close enough (i.e., when sufficient trust has been established), people tend to bring them into their ‘real world’ This means nearly all of the typical person’s close friends will be in touch with them in ‘real life’ . . . and not so much over the Internet . . .”).

boundaries. First, low-cost communications and information technologies make it easier for nascent enclaves to advertise their presence and attract possible recruits from far away and to gather information about strangers. Second, to the extent that technology has increased mobility in modern society, it has increased mobility into (as well as out of) distinctive normative communities.²¹⁶

Accordingly, the cost to an individual of entering a normative enclave has decreased, thus making it easier for such communities to attract new members. It is perhaps for this reason that the past few decades have seen a growing cultural-political divide between so called “red states” and “blue states” (or even “red counties” and “blue counties”).²¹⁷ As place of residence becomes more of a choice and less of a given, and as the cost of re-sorting ourselves continues to decline (thanks in part to the same technology touted by those who predict the demise of territoriality), it is quite possible that territory will in the future take on even more (and not less) normative significance. It is perhaps the case, however, that as technological advances simultaneously reduce the cost of enclave formation and increase the cost of communal isolation, they will increase the normative significance of territoriality while at the same time narrowing the range of normative diversity among territorial communities. That is, even as those who differ with each other find it easier to separate themselves into insular communities, the homogenizing power of modern communications will push those insular communities towards one another.

In any event, the sorts of groups that have historically formed communal enclaves have not typically limited their goals merely to fostering verbal communication about selected topics among their members. Instead, they have sought to put their dissenting world-views into practice. The communities that have physically opted out of mainstream society have traditionally either been groups who have believed that every aspect of human life should conform

²¹⁶ See Bill Bishop, *A Starkly Polarizing U.S. Election*, *Austin Am.-Statesman*, Dec. 5, 2004, at A1 (observing that increased geographic mobility has produced more politically polarized local communities).

²¹⁷ See *id.* (“For almost half of all voters, the close 2004 presidential election wasn’t close at all. It was actually a series of local landslides, as Americans continued a decades-long process of sorting themselves geographically into like-minded communities.”).

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to the group's holistic ethical system or those who have sought to put into practice some strongly held, though unpopular, belief about how society ought to be structured.²¹⁸

Groups that have successfully separated themselves from mainstream to live according to their own holistic visions of the good include the Amish, the Bruderhof, separatist Hasidic Jewish communities—such as those who formed the villages of Kiryas Joel and New Square—the Rashneeshee, the early Mormons, and radical political groups, such as the anarchist separatists who formed communes in Washington State and elsewhere at the turn of the twentieth century.²¹⁹ Groups that have successfully separated themselves in order to implement narrower political or social ideals include the deaf, various single-tax communities that have sprung up to put into practice the teachings of economist Henry George, and groups that have sought to foster small-scale organic farming as a way of life.²²⁰

Dissenting minority groups with powerful normative visions about how life ought to be lived almost always will benefit from physical separation from mainstream society and typically will not be satisfied with the sorts of nonterritorial communities made possible by improvements in communications technology. As long as people need to venture out of their homes for work, play, and to procure the necessities of life, the formation of geographic enclaves will remain the most effective way for these sorts of groups to create the boundaries essential for maintaining their highly distinctive ways of life.²²¹

²¹⁸ See Veysey, *supra* note 195, at 63 (describing utopians as motivated by a desire to put strong belief into practice).

²¹⁹ See, e.g., FitzGerald, *supra* note 203, at 247–382 (discussing the Rashneeshee); Charles Pierce LeWarne, *Utopias on the Puget Sound, 1885–1915* (1975) (discussing anarchist utopian communities in the Pacific Northwest at the turn of the twentieth century); Miller, *supra* note 207, at 87–89, 173–77 (discussing the early Mormons and the Bruderhof); Stolzenberg, *supra* note 210, at 906–08 (discussing the formation of the Hasidic enclave in New Square, New York).

²²⁰ See 1 Miller, *supra* note 207, at 31–32, 107–10 (discussing single-tax communities and small agrarian communes); Monica Davey, *As Town for Deaf Takes Shape, Debate on Isolation Re-Emerges*, N.Y. Times, Mar. 21, 2005, at A1.

²²¹ See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1841, 1889 (1994); Shaffir, *supra* note 123, at 176–81; see also 1 Miller, *supra* note 207, at xx; Sack, *supra* note 207, at 26.

B. Weak Entrance

“Boundaries define a group,”²²² but the relationship between geographic boundaries and normative communities is not identical for separatist and mainstream groups. When members of a dissenting group seek to establish an enclave, coordinating their efforts to live in close proximity, it is very likely that they share an exceptionally strong commitment to the normative vision that binds them together.²²³ For people operating in the residual space left to mainstream culture, however, broadly shared values mean that geography (as it just happens to be) will often be a weak proxy for deep affiliation.²²⁴ Nevertheless, even outside of those communities, property can still act as a mechanism for binding people to one another.

To begin with, for most people, property ownership principally means ownership of a home.²²⁵ Homeownership has a substantial effect on mobility. Owning one’s home, for example, literally ties one to the community in which the home is located. In 2000, renters changed residence at nearly four times the rate of homeowners.²²⁶ This decreased mobility among property owners reflects, at least in part, the higher costs of exiting a community once one has purchased a home.²²⁷ A consequence of this decreased mobility is that property owners are more likely than others to engage in in-

²²² Kanter, *supra* note 199, at 169.

²²³ See Greene, *supra* note 44, at 41.

²²⁴ See Ford, *supra* note 211, at 1404–05.

²²⁵ See Arthur B. Kennickell et al., Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances, 86 Fed. Res. Bull. 1, 15 tbl.7 (2000) (listing “primary residence” as the largest “nonfinancial asset” for American families in 1998).

²²⁶ See U.S. Census Bureau, Historical Census of Housing Tables: Recent Movers (2004), at <http://www.census.gov/hhes/www/housing/census/historic/movers.html>.

²²⁷ See William M. Rohe & Leslie S. Stewart, Homeownership and Neighborhood Stability, 7 Hous. Pol’y Debate 37, 51–52 (1996); William M. Rohe et al., The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research 7 (Research Inst. for Hous. Am., Working Paper No. 00-01, 2000), available at <http://www.housingamerica.org/docs/RIHAwp00-01.pdf>. It is worth noting that in some cases, renters might experience a similar immobility. This could occur when rental markets are extremely tight, when the barriers to ownership are high, or when the legal regime gives renters strong incentives to stay in one place, such as might occur under strong rent control regimes. When renter mobility is diminished, one would expect a decline in the observed differences between renters and owners.

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formal and formal social interactions with their neighbors.²²⁸ “Because the purchase of a home typically involves a more permanent tenure than renting,” Garland White argues, “owners are likely to have stronger motives to become acquainted with their fellow community residents. . . . This in turn again implies stronger and more numerous social attachments in neighborhoods in which higher proportions of residents are homeowners.”²²⁹ Economist William Fischel concurs that evidence supports the idea that “once you buy the house, you are stuck with it.”²³⁰

Owning property ties us to our society in less literal ways as well. The risk of losing property gives owners affirmative reasons to reach out to form relationships with their neighbors and neighborhoods. As Susan Farrell has observed, “[h]omeowners tend to have a greater investment in the neighborhood, thereby encouraging them to have more involvement with their neighbors.”²³¹ Perhaps for this reason, homeowners are more likely than non-owners to be engaged with local and supra-local politics.²³² In their review of the social science literature, William Rohe and Leslie Stewart found that “[t]he empirical evidence indicates that homeowners are indeed more likely than renters to participate in local organizations,

²²⁸ See D. Mark Austin & Yoko Baba, *Social Determinants of Neighborhood Attachment*, 10 *Soc. Spectrum* 59, 63 (1990); Terry C. Baum & Paul William Kingston, *Homeownership and Social Attachment*, 27 *Soc. Persp.* 159, 160, 165 (1984); Albert Hunter, *The Loss of Community: An Empirical Test Through Replication*, 40 *Am. Soc. Rev.* 537, 545 tbl.6 (1975) (finding a statistically significant effect of homeownership on the tendency of community residents to engage in “informal neighboring” behavior); Garland F. White, *Home Ownership: Crime and the Tipping and Trapping Processes*, 33 *Env’t & Behav.* 325, 326 (2001). Other studies, however, have found no evidence of this effect and at least two others have found evidence of a negative effect. See generally William M. Rohe & Victoria Basolo, *Long-Term Effects of Homeownership on the Self-Perceptions and Social Interactions of Low-Income Persons*, 29 *Env’t & Behav.* 793, 809–11 (1997).

²²⁹ White, *supra* note 228, at 326.

²³⁰ William A. Fischel, *The Homevoter Hypothesis* 75–76 (2001).

²³¹ Farrell et al., *supra* note 106, at 12; see also Fischel, *supra* note 230, at 17–18, 75–76; cf. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473, 477 n.21 (1991) (noting the tradeoff between exit and voice as means of influencing local policy and suggesting that, in the absence of an exit option, property owners will increase their investment in exercising their power of voice).

²³² See Peter H. Rossi & Eleanor Weber, *The Social Benefits of Homeownership: Empirical Evidence from National Surveys*, 7 *Hous. Pol’y Debate* 1, 23, 25 (1996).

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even after controlling for income, education, and other socioeconomic characteristics.”²³³

As a result of their increased involvement with neighbors and community, homeowners are susceptible to a greater degree of informal social pressure than renters.²³⁴ The significance of this “buying in” effect is not as powerful in the mainstream as the territorial effects that operate within separatist normative enclaves, but the effect is significant nonetheless, as evidenced by the fact that communities characterized by high rates of homeownership score higher on measures of community cohesion and order.²³⁵ These observations about the behavior of property owners broadly cohere with the predictions of civic republican thinkers about the effects of property ownership on civic virtue.²³⁶ But, in contrast to the analysis of civic republicans, it appears to be the greater vulnerability and responsibility of property owners, and not their financial self-sufficiency, that enhance their involvement in community life.²³⁷

In addition to its effects on mobility and vulnerability, the act of acquiring property binds people to one another by increasing their need to engage in market transactions. The great majority of homeowners, for example, owe substantial debt on their primary residences.²³⁸ Such long-term financial obligations, along with the costs of maintaining property already owned outright, create strong incentives for homeowners to engage in repeated market transactions. This pressure to enter the market in turn exposes property owners (as well as those who aspire to ownership) to the sanction-backed values of the community that hosts the market, whatever those might be.²³⁹ As Carol Rose and others have observed,

²³³ Rohe & Stewart, *supra* note 227, at 46.

²³⁴ See *id.* at 47.

²³⁵ See *id.* at 54–55; see also Richard K. Green & Michelle J. White, *Measuring the Benefits of Homeowning: Effects on Children*, 41 *J. Urb. Econ.* 441, 443 (1996).

²³⁶ See Alexander, *supra* note 8, at 29–31.

²³⁷ This difference in explanations may result from the fact that the dominant form of property ownership is no longer the productive property of the agrarian smallholder society envisioned by civic republican thinkers but rather the more burdensome, and far less economically productive, family dwelling. See Kinnickell et al., *supra* note 225, at 15 tbl.7.

²³⁸ See *id.* at 15–16, 22.

²³⁹ The experience of the Amish is instructive in this regard. Scholars have found that Amish communities have to struggle much harder to fend off the influences of

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“[d]espite its appeal to self-interest, commerce also carries a culture: it inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage. To do business, one must learn the ways and practices of others”²⁴⁰

Scholars who recognize the socializing force of the market justifiably emphasize the market’s transmission of values that relate to the rules, such as honesty and trust, immediately necessary for the market to operate efficiently.²⁴¹ Nevertheless, because individuals need to access the market, the market can also be used to transmit values that lack any essential connection to its economic function. If the society that hosts the market maintains certain widely shared values, however unrelated to the market’s operation, it can, under the right circumstances, punish those who refuse to act according to those values by limiting their ability to participate in market transactions. This is particularly true when the values in question are widely shared among the owners of property. Because the cost to the individual of being excluded from market transactions can be enormous, the values of the society hosting the market can be backed by substantial coercive force.

It is true that heightened mobility and the resulting scarcity of information about strangers make it difficult to identify (and therefore to sanction) deviants and dissenters. The effects of that increased mobility, however, will be muted within segments of the economy, such as the professions, where personal reputation is important or where personal ties make information about others easier to come by. Moreover, improvements in information technology (for example, the Internet and, perhaps even more so, Google) have made it cheaper and easier to obtain information about people’s past actions. In any event, the information needed to enforce many non-market related norms, particularly those associated with visible characteristics such as race, gender, age, and disability, can easily be enforced even in highly mobile communities.

modernity when their members are more strongly tied into broader economic markets. See Olshan, *Amish Cottage Industries*, supra note 200, at 135.

²⁴⁰ Rose, supra note 69, at 147; see also Raz, supra note 99, at 252–53; Daniel Markovits, *Contract and Collaboration*, 113 *Yale L.J.* 1417, 1446–74 (2004).

²⁴¹ See Rose, supra note 69, at 147; Raz, supra note 99, at 252–53; Markovits, supra note 240, at 1448–50.

Friedman, Hayek, and others have argued that competition fostered by private ownership limits the use of market power to enforce norms not directly related to the operation of the market.²⁴² But there is evidence that such non-market norms are routinely enforced through market mechanisms. The persistent, categorical exclusion (until relatively recently) of racial minorities and women from elite professions is an example.²⁴³ Indeed, the elaborate and pervasive system of racial exclusion that existed in the South prior to the civil rights movement rested in large part on the aggregated effects of individual white citizens exercising their rights of private property and freedom of contract.²⁴⁴ Sheryll Cashin has argued persuasively that the aggregated effect of private discrimination against communities of color explains the continuing pervasive racial segregation that characterizes the American housing market.²⁴⁵ The effectiveness of the market as a mechanism of social control, however tenuous the relationship between the social norms enforced and the market's economic purpose, is the impulse that lies behind the widespread use of boycotts and embargoes to express moral outrage about any number of issues.²⁴⁶

It is in part a result of the market's socializing power that property ownership positively correlates with social conformity. Those

²⁴² See Friedman, *Capitalism and Freedom*, supra note 1, at 15–19; Hayek, supra note 1, at 137; see also Buchanan, supra note 1, at 29.

²⁴³ Cf. Eric A. Posner, *Law and Social Norms* 136–42 (2000) (discussing the persistence of inefficient racially discriminatory norms in otherwise competitive markets); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003, 1048, 1051–52 (1995) (describing how the mechanism of the market can be used to foster goals of racial subordination).

²⁴⁴ See *Bell v. Maryland*, 378 U.S. 226, 271–78 (1964) (Douglas, J., concurring); see also Miles Wolff, *Lunch at the Five and Ten* 171 (1970); C. Vann Woodward, *The Strange Career of Jim Crow* 98, 101–02 (1974). Indeed, some national companies with stores in the South felt constrained to conform to local “custom” despite their openness to integrating their operations in other parts of the country. As one company put it: “Companies which operate in sections of the country where segregation exists, whether by law or custom, must comply with the law or custom, whether they believe in it or not. . . . ‘We’d be in an untenable position . . . in Atlanta, for example, if we decided to be heroes.’” See S.S. Kresge Says Its Southern Stores Don’t File “Sit-In” Complaints, *Wall St. J.*, May 16, 1960, at 9.

²⁴⁵ See Sheryll Cashin, [The Failures of] *Integration* 32–38, 119–23 (2004) (“Several researchers believe that discrimination and racial steering in real estate markets are the definitive forces that create segregated neighborhoods.”).

²⁴⁶ See McAdams, supra note 165, at 373–74.

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who own property are, on balance, also more likely to feel the force of society's formal and informal norms of behavior.²⁴⁷ "Owning assets provides a stake in the system and offers a reason for participating in economic and social affairs . . ." ²⁴⁸ Claude Fischer therefore concludes her study of urban social life by noting that people with higher income tend to be more socially involved than those with lower incomes.²⁴⁹ Conceiving of property as entrance helps us understand why it is that the individual property owner, the one who, according to property as exit, should have the greatest degree of (negative) freedom to structure his life as he sees fit, is nonetheless commonly caricatured in popular culture as the greatest conformist.²⁵⁰

Perhaps no community better captures the tension between the notions of property as exit and property as entrance than the American suburb, which has sometimes been celebrated as an expression of middle-class individualism²⁵¹ but far more often condemned as a desert of bourgeois conformity.²⁵² The suburbs, where

²⁴⁷ See Farrell et al., *supra* note 106, at 12–13.

²⁴⁸ Michael Hubbard & Walter Davis, Community Advantage Panel Study: Social Impacts of Homeownership 8 (Ctr. for Cmty. Capitalism, Kenan Inst. of Private Enter. Draft 2002), available at http://www.kenan-flagler.unc.edu/assets/documents/CC_homeownership.pdf.

²⁴⁹ See Fischer, *supra* note 84, at 252.

²⁵⁰ See generally Sinclair Lewis, *Babbitt* 363–88 (Random House 2002) (1922) (describing the abortive rebellion of a middle-class realtor who is punished with ostracism by his personal and business relations and, as a consequence, ultimately returns to conformity with even more zeal than before his rebellion). Sinclair Lewis acutely describes the subtle coercion lurking behind Babbitt's conformity: "He felt that he had been trapped into the very net from which he had with such fury escaped and, supreme jest of all, been made to rejoice in the trapping. 'They've licked me; licked me to a finish!' he whimpered." *Id.* at 387.

²⁵¹ See Peter Hall, *Cities of Tomorrow* 297–304 (1996) (summarizing arguments in favor of and against the suburban lifestyle); cf. Frank Lloyd Wright, *When Democracy Builds* 65–66 (1945) (calling for the creation of a decentralized community that would facilitate individual expression).

²⁵² See Lewis Mumford, *The City in History* 486 (1961) ("In the mass movement into suburban areas a new kind of community was produced, which caricatured both the historic city and the archetypal suburban refuge: a multitude of uniform, unidentifiable houses, lined up inflexibly, at uniform distances, on uniform roads, in a treeless communal waste, inhabited by people of the same class, the same income, the same age group, witnessing the same television performances, eating the same tasteless pre-fabricated foods, from the same freezers, conforming in every outward and inward respect to a common mold, manufactured in the central metropolis. Thus, the ulti-

virtually everyone owns her own home and places some value on her career, are characterized by nothing if not their sensitivity to the judgments of their neighbors.²⁵³ Instead of encouraging nonconformity, property may well have the opposite effect on its owners.²⁵⁴

Indeed, in marked contrast to the high degree of mainstream socialization on display in America's suburbs, the very poor (though perhaps also the exceptionally rich²⁵⁵) more consistently flout social convention. When deprived of access to property, the poor may be cut off from middle-class social life and from the social norms it conveys. "[I]ncome is important," Claude Fischer observes, "because it provides concrete resources that aid in building and keeping a wide [social] network—resources that allow people to telephone and travel easily, to entertain guests, to go out socially, to free time for themselves from household tasks, and so on."²⁵⁶ Unsurprisingly, then, William Julius Wilson attributes the failure of the poorest citizens to conform to mainstream norms to their social isolation.²⁵⁷ Excluded from participation in the socializing institutions of the job market and property ownership, members of the "underclass" often act—even in public—in ways that would not be

mate effect of the suburban escape in our time is, ironically, a low-grade uniform environment from which escape is impossible.").

²⁵³ See Baumgartner, *supra* note 137, at 78–80 (discussing willingness of most suburban neighbors to accede to neighbor's non-confrontational complaints); see also Schneider, *supra* note 151, at 881–83 (discussing Baumgartner's observations of the suburban tendency to shun confrontation and positing that, contrary to Baumgartner's interpretation of the data, it may reflect the presence of powerful social norms).

²⁵⁴ Michael Walzer's work on civil disobedience hints at a slightly different, though complementary, explanation for the conformity of suburban property owners. He argues that, because conscientious disobedience is virtually always a communal act, those who are isolated from strong communities will virtually never rock society's boat. See Walzer, *supra* note 210, at 22. If suburban communities are indeed as atomized as Baumgartner and others have argued, see *supra* note 253, the conformist docility of suburban dwellers may be the result.

²⁵⁵ See Paris Hilton; see also Posner, *supra* note 243, at 28 ("A common modern form of hubris is for increasingly successful people to violate increasingly important norms until they go too far and are finally shunned by anyone whose cooperation they would find desirable."); Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in *The Urban Underclass* 3, 9 (Christopher Jencks & Paul E. Peterson eds., 1991).

²⁵⁶ Fischer, *supra* note 84, at 252.

²⁵⁷ See William Julius Wilson, *The Truly Disadvantaged* 56–60 (1987).

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tolerated within the typical American suburb.²⁵⁸ Rather than the propertied, it appears to be the *propertyless* who are most likely to “thumb their noses” at the world and its values.²⁵⁹

C. Property as Entrance and the Notion of Community

Just as the individualistic conception of human nature and the notion of property as exit reflect an ideal of community in which entrance is voluntary and exit is costless, property as entrance corresponds with its own conception of human community. Within the vision of community implicit in property as exit, the individual holds all the cards. Her voluntary entrance and easy exit eviscerate the community's ability to impose the demands on individual members necessary to carry out unpleasant tasks or maintain internal discipline.

As I have already argued, communities with low exit costs are often neither robust nor deeply satisfying.²⁶⁰ Their members tend to display low levels of commitment, joining and leaving with a great deal of frequency. Unable to rely on the community to enforce its own distinctive norms against other members, community members are reluctant to make significant sacrifices on the community's behalf.²⁶¹ Accordingly, property as entrance affirms the value of the many unchosen communities given to us at birth (for example, nations, religious communities, families, ethnic groups, and cultures) and those chosen communities from which, once we have entered, the costs of exit are often high (for example, marriages, close circles of friends, professions, and neighborhoods).²⁶²

Hanoch Dagan and Michael Heller attempt to bridge the gap between these two models of community with their conception of the liberal commons. While affirming the ultimate importance of the liberal value of exit, they argue in favor of property forms that cre-

²⁵⁸ Id. Of course, this is not true of everyone (or even most people) who live in poor neighborhoods. This caveat is particularly true of the “working poor.” See Elijah Anderson, *Streetwise: Race, Class, and Change in an Urban Community* 66 (1990); Paul A. Jargowsky, *Poverty and Place: Ghettos, Barrios, and the American City* 107 (1997); Elijah Anderson, *The Code of the Streets*, *Atlantic Monthly*, May 1994, at 81, 82–83.

²⁵⁹ Anderson, *supra* note 258, at 82.

²⁶⁰ See *supra* notes 108–10, 127–31 and accompanying text.

²⁶¹ See Dagan & Heller, *supra* note 3, at 575.

²⁶² See Green, *supra* note 3, at 168.

ate incentives for the sorts of cooperation that occur within strong communities, even going so far as to endorse moderate restraints on the ability of individuals to exit from certain communities once they have entered. While Dagan and Heller would permit some restraints on exit in their liberal commons, such as cooling-off periods, limited exit taxes, and rights of first refusal,²⁶³ they are ultimately committed to the state's active preservation of effective rights of exit as a check on community power.²⁶⁴

Although imaginative and insightful, there are two problems with Dagan and Heller's notion of the liberal commons. First, Dagan and Heller appear to accept the notion that formal property rules can themselves provide the safeguards for exit they are concerned with maintaining.²⁶⁵ Charles Reich at times makes a similar mistake of equating formally recognized property rights with the unqualified power to "do what all or most of [one's] neighbors decry."²⁶⁶ But, as argued earlier in Part II, this faith in property's exit power is misplaced. The prevalence of constraints on exit that exist apart from the formal property regime severely undermines the singular importance that Dagan and Heller attach to safeguards for exit built into their system of liberal commons.²⁶⁷

The Amish, for example, impose no artificial property constraints on exit, such as the "exit taxes" of which Dagan and Heller speak.²⁶⁸ Nevertheless, the informal costs of exit by adult community members—the entirety of whose social lives and identity are bound up with the group—are often excruciatingly high.²⁶⁹ A com-

²⁶³ See Dagan & Heller, *supra* note 3, at 598–602.

²⁶⁴ *Id.* at 599.

²⁶⁵ *Id.*

²⁶⁶ See Reich, *supra* note 1, at 771. At other times, however, Reich appears to recognize that protecting individual autonomy sometimes requires state intervention against private property rights. See Reich, *supra* note 185, at 1424, 1429–30 ("Employers should be limited in their ability to regulate the private lives of employees."). Even when he recognizes the power of private actors to constrain individual (negative) liberty, however, Reich focuses on the raw power of concentrated wealth, see *id.*, ignoring the decentralized (but often equally constraining) power of social norms.

²⁶⁷ See Stephen R. Munzer, *The Commons and the Anticommons in the Law and Theory of Property*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 148, 158 (Martin P. Golding & William A. Edmundson eds., 2005).

²⁶⁸ Indeed, the highly communitarian Amish social world is built up largely around a system of individual property ownership. See *supra* note 200 and accompanying text.

²⁶⁹ See *supra* note 205 and accompanying text.

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mitment to the actual possibility of exit therefore requires far more than merely enforcing artificial constraints on exit-inhibiting property rules. To preserve a viable exit option, Dagan and Heller must support either the affirmative subsidization of exit or pervasive public interference in the internal workings of community life.

But any move towards a focus on real costs of exit, whether formal or informal, leads to a second problem. By focusing on actual exit as an intrinsic good, Dagan and Heller sometimes appear to undervalue (as do exit theorists generally) the crucial role played by a relative absence of exit options—whether artificially created through formal property rules or unavoidably fostered by the natural dynamics of community life—in the formation and survival of certain valuable forms of community. Anne Alstott, for example, has discussed the importance of the prohibitively high cost of exiting parental responsibilities for fostering the healthy development of children. As Alstott puts it:

Society expects—and needs—parents to provide their children with *continuity of care*, meaning the intensive, intimate care that human beings need to develop their intellectual, emotional, and moral capabilities. And society expects—and needs—parents to persist in their role for 18 years, or longer if needed. A variety of social and legal institutions convey a common message: do what it takes to give your children the continuing care that they need. Put even more simply: “Do Not Exit.”²⁷⁰

Alstott’s point is that, at least for children, there is an intrinsic good to stability that is only possible when parents are hindered—formally or informally—from exiting their parental role. Facilitation of an effective exit option from parent-child relationships would necessarily weaken the stable bonds that (should) exist between them. Although the value of continuity might be less dramatic outside of the child-rearing context, there is reason to think that stability and continuity are an intrinsic good in a great many types of social relationships, from the life-long marital bond, to the life-long neighborhood bond, to the increasingly endangered life-long employment bond. Commitment to an actual ability to exit

²⁷⁰ Alstott, *supra* note 85, at 4–5. Sociologist James Q. Wilson has made a similar point. See Wilson, *supra* note 82, at 7–11.

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necessarily entails a commitment to discouraging or limiting people's enjoyment of certain valuable types of relationships—such as the one between parent and child—that can only come about with high costs of exit. To the extent that high exit costs facilitate a group's enforcement of its own distinctive norms, a likely side effect of this commitment would be a deep normative homogeneity that would do as much to hinder individual autonomy as to foster it.

D. Property as Entrance and the Notion of Freedom

Challenging the notion that property safeguards freedom by protecting exit does not mean that private property cannot be used to help create a space for individual autonomy. But, to the extent that private ownership facilitates individual autonomy, it does so as a consequence of the values and characteristics of a particular community, not despite them. As Charles Reich has put it, property is a “deliberate construction by society” that must be adjusted to “have the kind of society we wish.”²⁷¹ That is, if property generates individual autonomy, it is not necessarily so because of anything inherent in the institution of property itself, but rather because the particular community in which the property is situated recognizes the value of individual control and institutionalizes that control, not only in a legal regime governing individual ownership, but also by paying attention to the private coercion that supplements legal property rules. Charles Taylor is therefore correct when he observes that “the free individual or autonomous moral agent can only achieve and maintain his identity in a certain type of culture. . . . [T]he free individual of the West is only what he is by virtue of the whole society and civilization which brought him to be and which nourishes him”²⁷²

A crucial difference between the notion of freedom presupposed by property as exit and the version that prevails within property as

²⁷¹ See Reich, *supra* note 1, at 771–72.

²⁷² Taylor, *supra* note 23, at 205–06; see also Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 *Colum. L. Rev.* 2255, 2277–78 (1997). Or, as Frank Lloyd Wright understood, “individuality must have its roots in a stable community whose values the citizen shares and protects.” Robert Fishman, *Urban Utopias in the Twentieth Century: Ebenezer Howard, Frank Lloyd Wright, and Le Corbusier* 157 (1977).

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entrance is captured by the distinction between eccentricity and utopianism. From the point of view of property as exit, a free society is simply one in which there is room for individuals to act according to their particular vision, however idiosyncratic.²⁷³ As discussed above, while property does facilitate a certain degree of individual deviance, the interdependence of human beings means that the range of individual eccentricity facilitated by property ownership will be highly circumscribed. In contrast, the mutually reinforcing nature of group deviance means that cultural variation among groups (utopianism) will likely be more profound than individual variation (eccentricity) *within* groups.

Property as entrance therefore views individual freedom as enhanced by the existence of a genuine diversity of groups pursuing their own fundamentally different conceptions of the good. Consequently, rather than understanding property as securing a liberty that is characterized merely by the absence of external compulsion or government interference, property as entrance suggests that freedom should be understood at least in part as constituted by an ability to imagine and choose among a diversity of conceptions of the good life.²⁷⁴ Autonomy conceived in this way is enhanced when the individual lives in a society made up of a broad range of diverse normative communities. Moreover, if the range of choices presented to him by society is to be meaningful, the menu of options must include a variety of radically dissenting, even illiberal, communities.²⁷⁵

A commitment to this freedom-enhancing possibility of communal deviance means that property as entrance is less committed than property as exit to the subsidization of individual exit from tightly knit communities of all sorts. It may well be the case, as Dagan and Heller argue, that some right of exit is necessary, at least at the extremes, to protect individual liberty from the most severe threats of community abuse. But Dagan and Heller are incorrect in

²⁷³ See Mill, *supra* note 134, at 54–58 (extolling the virtues of eccentricity and deploring society's tendency to enforce conformity on individuals).

²⁷⁴ See Kymlicka, *supra* note 23, at 164–66; Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 *J. Contemp. Legal Issues* 625, 630–34 (2002) [hereinafter Alexander, *Illiberalism*], Alexander, *supra* note 83, at 30.

²⁷⁵ See Alexander, *Illiberalism*, *supra* note 274, at 630–31; Green, *supra* note 3, at 170.

concluding that the state can or should ensure that the right of exit is one that an individual is always actually able to exercise.²⁷⁶ An attempt to foster individual freedom by subsidizing exit probably would have the perverse effect of excessively narrowing the range of normative options among which an individual is free to choose. Moreover, the informal exit costs that simply spring up around long-lived, tightly knit communities mean that any such guarantee of reasonable exit costs would be impossible for the state to honor.

This does not mean, however, that the power of the community over the individual should be unrestrained.²⁷⁷ It simply means that monitoring costs of exit is only one (and not necessarily the most important) part of the equation. A different way to protect the individual is to impose substantive limits on the demands that communities may make on them.²⁷⁸ Constraints rooted in the same sorts of moral considerations often thought to underlie international human rights should apply within private relationships, just as they do to relationships between individuals and the state.

Substantive restraints on community action obviously will diminish normative diversity in ways that are analogous to subsidization of exit. But they will do so without categorically hindering the development of the specific sorts of stable communal relationships that depend for their existence on the relative absence of exit options. How intrusive these substantive restraints on community action become will depend in large part on the particular conception of human rights one employs. But a sufficiently flexible theory of human rights is consistent with a great degree of communal autonomy and diversity.²⁷⁹

²⁷⁶ See Dagan & Heller, *supra* note 3, at 601.

²⁷⁷ See Laura S. Underkuffler, Thoughts on *Smith* and Religious-Group Autonomy, 2004 BYU L. Rev. 1773, 1783, 1787.

²⁷⁸ See Dan-Cohen, *supra* note 127, at 1230.

²⁷⁹ See Green, *supra* note 3, at 181–85; Eduardo Moisés Peñalver, The Persistent Problem of Obligation in International Law, 36 Stan. J. Int'l L. 271, 301–02 (2000). For example, many separatist communities, including the Amish, are extremely patriarchal in their organization. See Marc A. Olshan & Kimberly D. Schmidt, Amish Women and the Feminist Conundrum, *in* The Amish Struggle with Modernity, *supra* note 200, at 215, 215–16. Some might view the Amish social structure as a violation of the rights of Amish women. On the other hand, Amish women have a great deal of influence on household and community decisions and are treated with enormous respect and dignity. *Id.* at 220–23; see also Sue Bender, Plain and Simple: A Woman's Journey to the Amish 76 (1989). Scholars have made similar observations about the

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Ultimately, there is no magic formula that can guarantee maximum individual autonomy. Within a society that values individual freedom, property rules must be crafted so as to balance the freedom-enhancing need for normative diversity against the freedom-threatening tendencies that often develop within private communities, among private communities, and between everyone (including both individuals and private communities) and the state. Nevertheless, the simplistic libertarian faith in the freedom-maximizing power of the negative freedom of unfettered private ownership clearly is inadequate. On the contrary, while the freedom-maximizing regime would likely be one that relies heavily on private ownership, it would be a system of private ownership qualified by active state intervention.

The freedom-maximizing regime also would require some degree of redistribution. Someone without any property at all and without any realistic means of acquiring any property would be virtually incapable of joining himself in community with others no matter how many alternative normative communities her society allowed to flourish.²⁸⁰ Adopting the perspective of property as entrance suggests the importance of distributive considerations to the maintenance of individual freedom and lends itself to support for an affirmative entitlement to a minimum amount of wealth needed to enter into stable and meaningful social relationships.²⁸¹ Accordingly, from the point of view of property as entrance, a society concerned about enhancing individual autonomy would work, as Reich has proposed, to ensure that all individuals have some reasonable opportunity to acquire the property necessary to enable them to enjoy the value of community life.²⁸² Finally, dramatic inequality in wealth, particularly if accompanied by highly concentrated economic power, is likely to facilitate substantial private coercion.²⁸³

role of women in Orthodox Jewish communities. See Lis Harris, *Holy Days: The World of a Hasidic Family* 125–34 (1985); Olshan & Schmidt, *supra*, at 228–29.

²⁸⁰ See Fischer, *supra* note 84, at 252–53.

²⁸¹ Cf. Amartya Sen, *Poor, Relatively Speaking*, 35 *Oxford Econ. Papers* 153, 162 (1983) (arguing that being relatively poor in a wealthy community may affect a child's education and a family's ability to purchase popular food, impeding community participation even if the family's basic needs are met).

²⁸² See Reich, *supra* note 1, at 768–71, 778; see also Thomas Aquinas, *On Kingship: To the King of Cyprus* 64 (Gerald B. Phelan trans. 1949).

²⁸³ See *supra* notes 184–85 and accompanying text.

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By leveling down, a certain amount of redistribution helps to encourage economic decentralization and to reduce potentially oppressive concentrations of private power.²⁸⁴

To summarize, recognizing property's entrance function while maintaining a commitment to individual autonomy necessitates an openness to public intervention (regulation) in the private sphere in order to safeguard that autonomy against private threats. It also requires a willingness to use the state's coercive power to redistribute property in order to make available the affirmative, autonomy-enhancing benefits of property ownership available to the citizenry at large. Property as entrance therefore views property ownership as potentially enhancing individual autonomy when it exists within the context of a well-developed system of public regulation and redistributive entitlements.

IV. SOME DOCTRINAL IMPLICATIONS OF PROPERTY AS ENTRANCE

Conceptualizing property as entrance yields distinctive approaches to a variety of property-related questions. While property as exit concerns itself primarily with protecting the impermeability of the property boundaries surrounding the individual, property as entrance, in contrast, focuses on preserving the ability of communities to employ property as a tool for creating diverse patterns of life. This difference in orientation plays out in a variety of contexts. In this Part, I will sketch out just a few. These examples by no means constitute an exhaustive discussion but rather represent a tentative exploration of some of the ways in which shifting from a view of property as exit to property as entrance might affect our analysis of specific property issues.

For starters, the notion that property is far more effective at fostering collective than individual exit erodes the normative basis for the pervasive tendency of courts to give overriding importance to individual property owners' right to exclude others from their land, particularly in contexts where exclusion will do nothing to enhance owners' interests in privacy or where exclusion undermines widely

²⁸⁴ See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 *Iowa L. Rev.* 1011, 1084-87 (2005).

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shared community norms. Second, in the context of common-interest communities, the value of group formation for individual freedom favors judicial deference to the private ordering of normative communities that have chosen to opt out of the mainstream.

A. The Right to Exclude

Viewing property through the lens of entrance reshapes the importance traditionally accorded the right of individual property owners to exclude others. Property as exit exalts the individual's right to exclude as indispensable to the freedom-guaranteeing function of property. Property as entrance, by contrast, focuses on the connection between property and the substantive values of the society in which the property is situated.

In a society that seeks to foster individual liberty, private ownership can in fact facilitate the protection of certain forms of that liberty. But it does not do so, as assumed by property as exit, by empowering the owner of property to retreat into an existence on his property free from external coercion. Instead, there are two ways in which the right to exclude enhances liberty from the point of view of property as entrance.

First, the scholarship of social norms discussed earlier in this Article suggests that recognition of a robust right to exclude increases the individual property owner's ability to do as he pleases when it enhances the privacy he enjoys on his property.²⁸⁵ Territorial privacy helps to shield the individual from coercion by making deviant behavior undertaken behind the veil of that privacy more difficult to detect. Accordingly, the right to exclude protects individual (and group) liberty most directly when it serves the property-owner's interest in territorial privacy.²⁸⁶ But freedom also requires the ability to engage in certain activities where everyone can see. The territorial privacy protected by the right to exclude does little to enhance this public freedom.

Relying on this model of the significance of the right to exclude, property as entrance is far less troubled than property as exit by marginal abridgements of the right to exclude, particularly when those abridgements do not intrude on individual privacy. In con-

²⁸⁵ See Ellickson, *supra* note 1, at 1352–53.

²⁸⁶ See *supra* notes 165–68 and accompanying text.

trast to Epstein's embrace of a near-absolute right to exclude by private owners, property as entrance is far more likely to approve of the notion that the state may grant individuals the right to engage in political speech on private commercial property when that property already has been made open to the public.²⁸⁷ The Supreme Court's determination in *PruneYard Shopping Center v. Robins*²⁸⁸ that granting a right of public access as a matter of state law did not constitute a taking of property fits very comfortably within the model of property as entrance.

Similarly, conceiving of the right to exclude as the outgrowth of (rather than the antidote to) community values means that property as entrance generally will be more open than property as exit by qualifications on the right to exclude in order to give life to competing values. For example, property as entrance is comfortable with deference to legislative determinations of "public use." Moreover, it would not view it as a serious violation of individual liberty to prohibit property owners from excluding others on the basis of their race, even in relatively intimate settings that are embedded within the mainstream, such as many ostensibly private social clubs. Nor would it necessarily be concerned by rules prohibiting property owners from excluding state officials seeking to provide government services to people residing on their land,²⁸⁹ forcing landowners to accept the conversion of abandoned rail lines running through their property into recreational footpaths,²⁹⁰ or limiting the rights of beachfront owners to hinder the general public's access to the state's waters.²⁹¹

²⁸⁷ See, e.g., *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd* 447 U.S. 74 (1980) (finding a right, under the state constitution, to engage in limited political speech on private property that had been opened to the public for a wide array of both commercial and noncommercial uses); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 591 (Mass. 1983) (same); *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 761 (N.J. 1994) (same); *Alderwood Assoc. v. Washington Env'tl. Council*, 635 P.2d 108, 117 (Wash. 1981) (same). But see Epstein, *supra* note 49, at 35–36.

²⁸⁸ 447 U.S. 74, 83 (1980).

²⁸⁹ See, e.g., *State v. Shack*, 277 A.2d 369, 371–72 (N.J. 1971) (prohibiting a farm-owner from excluding people attempting to provide state-funded services to farm-workers residing on his property).

²⁹⁰ See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 9 (1990).

²⁹¹ See, e.g., *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (holding that the general public has a right to use the dry-sand area of beachfront property in order

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Of course, libertarian justifications are not the only ones that have been deployed in support of a robust right to exclude. Utilitarian arguments also have been made to the effect that bright property lines are essential to create the information and incentives necessary to foster wealth-enhancing commercial activity.²⁹² Since property as entrance is oriented toward the non-consequentialist focus of property as exit, it has little to say for or against utilitarian arguments concerning the right to exclude. It is worth noting, however, that utilitarian theorists may well overstate the economic costs of qualifications of the right to exclude.²⁹³

The second way in which private ownership enhances liberty is by facilitating group, as opposed to individual, deviance from mainstream norms. Focusing on this mechanism of group exit, however, shifts the locus of the importance of boundary exclusion from the boundaries around individual property owners to the distinctively normative communities. Because property as entrance is sensitive to the freedom-securing importance of collective exit, it is solicitous of the right of separatist normative communities to isolate themselves from the mainstream.²⁹⁴

The right of a separatist community to exclude outsiders is constitutive of their property-enhanced communal sovereignty. Accordingly, property as entrance favors rules reinforcing the abilities of dissenting groups to control access to their property. Exemptions from generally applicable prohibitions against religious discrimination in housing for separatist religious groups, for example, make perfect sense from the point of view of property as entrance.²⁹⁵

to enjoy access to the state's coastal waters). But see *Opinion of the Justices*, 313 N.E.2d 561, 568, 571 (Mass. 1974) (statute permitting public to walk along dry-sand area would constitute a taking of property from beachfront property owners). See also *Rose*, supra note 69, at 149–50 (arguing for public access to private beachfront property on the ground that recreation acts as “social glue”).

²⁹² See, e.g., *Merrill*, supra note 56, at 31–32; *Rose*, supra note 10, at 631; *Smith*, supra note 56, at 995–96.

²⁹³ See supra notes 56–58 and accompanying text.

²⁹⁴ Cf. *Cover*, supra note 194, at 31 (“At that point of radical transformation of perspective, the boundary rule—whether it be contract, free exercise of religion, property, or corporation law—becomes more than a rule: it becomes constitutive of a world.”).

²⁹⁵ See, e.g., 42 U.S.C. § 3607(a) (2000).

As the law currently stands, these exemptions only apply when the property in question is actually owned directly by the religious group itself.²⁹⁶ The prohibition on religious discrimination applies with full force, however, to individual community members who own property. This restriction is hard to justify from the point of view of property as entrance, at least when applied to separatist religious communities. Separatist normative communities cannot form if they cannot regulate the boundaries of their enclaves. To the extent that a diversity of religious communities, including separatist religious groups like the Amish and Hasidim, constitute a valuable asset to the community as a whole, the law should—at a minimum—avoid creating obstacles to community formation. Accordingly, individual members of separatist religious communities should be allowed to discriminate on the basis of religion in the use and disposition of their property if doing so will help the community to establish or maintain its distinctive existence.

Of course, allowing members of religious groups to discriminate in housing markets raises the specter of a majority group working in concert to exclude disfavored religious minorities from the community. This problem would be avoided, however, by tailoring any exemption from antidiscrimination laws to groups that (1) will benefit most from being allowed to isolate themselves from others, (2) contribute most to the normative diversity of the overall community, and (3) impose the least harm on those outside of the community. As I discuss in the next Section, separatist minority groups, particularly those organized around religious principles, will sometimes be able to satisfy each of these criteria. Few others will. Because of their relatively small numbers, granting exemptions to these communities presents little threat to other religious (or non-religious) minority communities.²⁹⁷

²⁹⁶ *Id.*

²⁹⁷ See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 *Wash. U. L.Q.* 919, 958–60 (2004). This does not mean, of course, that such groups should be given a blank check to mistreat their members or to impose externalities on non-members. See *supra* notes 277–79 and accompanying text.

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B. Common-Interest Communities

A related question, one that has been frequently debated among property scholars, is the degree to which private groups should be allowed to use the property system to govern themselves according to their own values and priorities.²⁹⁸ Several scholars have argued that courts should determine the level of deference to afford the community's own private ordering by asking how voluntarily the members acted in subjecting themselves to a particular set of community rules or how easy it is for them to exit from the community's jurisdiction.²⁹⁹ This view is fully consistent with the notion of property as exit.

In another context, however, Abner Greene has proposed a different axis for determining the degree to which society should defer to a group's private ordering. He argues that communities that have physically separated themselves from the broader society should be entitled to greater discretion in regulating their internal affairs.³⁰⁰ The greater the degree of separation achieved by a community, Greene argues, the more entitled it is to structure its own affairs.³⁰¹ Property as entrance supports Greene's focus on the degree to which the community has chosen to physically separate itself from mainstream society as a particularly salient factor in determining its entitlement to live according to its own rules.

In an article on the law of common-interest communities, Clayton Gillette expresses puzzlement that progressive scholars like Greene appear to be more sympathetic to claims of autonomy made by radical religious separatists than they are to similar claims

²⁹⁸ See Clayton P. Gillette, *Courts, Covenants and Communities*, 61 U. Chi. L. Rev. 1375, 1380 (1994).

²⁹⁹ See supra notes 89–90 and accompanying text; see also Barnett, supra note 34, at 41–44. A similar line of reasoning appears to be at work in the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In that case, the Court held that it violated the associational rights of the Boy Scouts to compel them to admit gay men to leadership positions. See *id.* at 656; see also Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 *Law & Contemp. Probs.* 27, 30 (2004) (describing the Court's decision in *Dale* as reflecting an antipathy towards "forced association").

³⁰⁰ See Greene, supra note 44, at 8.

³⁰¹ See *id.* at 40–42.

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made by mainstream residential associations and other common-interest communities:³⁰²

[B]oth liberals and communitarians seem to be tolerant of highly distinct subcultures. For the liberal who values individual choice, as for the communitarian who purports not to select among visions of the good, it seems odd to afford substantial protection to communities furthest from the majority culture while affording little protection to those only marginally different from the majority. There seems something anomalous about arguing for protection of groups such as orthodox Jews or the Amish when their cultures conflict with majoritarian norms while opposing similar license for those who seek residence in artificially pastoral settings free from technologies that they deem unsightly or who live in such fear of crime that they literally wall themselves off from the outside world.³⁰³

Gillette goes on to suggest that the deference to separatist groups might stem from a concern with discrimination against insular communities.³⁰⁴

Viewing property as entrance helps to solve Gillette's puzzle without resort to explanations based on concerns about discrimination. Separatist groups should be given more power to structure their own affairs because, as a result of their isolation from broader societal norms, they are far better positioned than individuals or most mainstream common-interest communities to take advantage of property's autonomy-enhancing functions.³⁰⁵ Moreover, separatist intentional communities provide a useful service in substantially broadening the range of lifestyles available to members of the

³⁰² See Gillette, *supra* note 298, at 1380–81.

³⁰³ *Id.* at 1380 (citations omitted).

³⁰⁴ *Id.* at 1381.

³⁰⁵ Not only do such groups do a better job of shielding their members from mainstream norms, they are also more resistant to formal legal regulation. Meir Dan-Cohen has observed that what he calls “integrated communities” are more resistant to state regulation than other forms of association. See Dan-Cohen, *supra* note 127, at 1231–32.

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mainstream.³⁰⁶ Finally, separatist groups have far more to lose than the individual from the intrusion of outside values.³⁰⁷

A group that has gone to the trouble to separate itself from society to live according to its own system of beliefs has an exceptionally strong commitment to that worldview.³⁰⁸ As Laurence Veysey puts it, “[t]he hallmark of ‘strong’ belief is the attempt to put one’s ideas into daily practice.”³⁰⁹ Accordingly, in the typical case, applying outside rules to such a group will harm that group substantially more than will applying those rules to an individual who merely expresses a strong desire to be governed by his own set of beliefs without having taken the trouble to join (or found) a community that lives according to those beliefs.

In contrast to separatist intentional communities, which are united by an all-encompassing set of commitments, the typical homeowners’ association is an agglomeration of individual property owners who have come together (or, more commonly, whom a developer has brought together) for the principal purpose of protecting the property values of each of the individual community members.³¹⁰ Their overriding concern with the preservation of property’s market values leads one common-interest community to look and act very much like another. Moreover, common-interest-community rules typically avoid taking a position on contentious political or social questions not directly related to the preservation

³⁰⁶ This observation need not rest on any romanticism about the quality of life within these communities. Whether separatist communities operate as exemplars of rich community life or cautionary tales about the dangers of excessive insularity, society is arguably enhanced by their example.

³⁰⁷ Property as entrance also lends strength to Greene’s focus on territorial separatism. As I have already argued, within dissenting enclaves, the notion of property as entrance takes on a distinctively territorial flavor. See *supra* Part III.A. For minority separatist communities, private property marks the physical boundaries between the space where the group’s value system ceases to govern and the space where the values of the mainstream operate with greater force. See *supra* notes 208–10 and accompanying text.

³⁰⁸ See Alexander, *supra* note 83, at 50; Greene, *supra* note 44, at 10, 41.

³⁰⁹ Veysey, *supra* note 195, at 63. Veysey continues by arguing that the “cultural radical is someone who is greatly tempted to vote with his body.” *Id.* at 64.

³¹⁰ See, e.g., Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* 11–12, 14, 18–19 (1994); Rosenblum, *supra* note 32, at 147.

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of property values.³¹¹ Most common-interest communities are therefore not mechanisms for escaping from mainstream culture; they are mainstream culture. Indeed, in many parts of the country, virtually all new housing is constructed in the common-interest-community form.³¹²

Most common-interest communities make no effort to separate their residents in any meaningful sense from the values of the broader society.³¹³ That is, residents of common-interest communities typically earn their living outside of their residential community, watch television, go to movies, and otherwise immerse themselves in mainstream culture. In contrast, the residents of separatist intentional communities typically make every effort to separate themselves from the mainstream. They rarely work outside of their communities, and they often shun the instruments of mass culture. Quebec's Hasidic Jewish community, for example, forbids its members to listen to the radio, watch television, listen to records or cassettes, go to the cinema, or read unapproved magazines, newspapers, or books.³¹⁴ And ten percent of the men work in jobs outside of the community.³¹⁵ The Amish make similar efforts to protect themselves from exposure to outside influence. As Kraybill puts it:

Separation from the world is a cardinal tenet of Amish faith. . . . The struggle to be a separate people is translated into

³¹¹ This may be a case where the exception proves the rule. For an example of a common-interest community that is organized around a clear and controversial set of beliefs, see David Neiwert's description of *Almost Heaven*, a common-interest community founded by members of the Patriot Movement. See David A. Neiwert, In *God's Country: The Patriot Movement and the Pacific Northwest* 146–47 (1999). Another interesting, and equally anomalous, example is provided by *Ave Maria*, a common-interest community founded in conjunction with Ave Maria University by Tom Monaghan, the former owner of Domino's Pizza. Monaghan envisions the town as an ultra-conservative, Roman Catholic suburban subdivision from which pornography and contraceptives will be excluded, in which "Mass will be said hourly, seven days a week," and "[a] private chapel will be located within walking distance of each home." See Adam Reilly, *City of God: Tom Monaghan's Coming Catholic Utopia*, *Boston Phoenix*, June 17, 2005, at 17.

³¹² See McKenzie, *supra* note 310, at 11–12.

³¹³ They do, however, make substantial efforts to protect their members from residing near people from different social classes. See Andres Duany et al., *Suburban Nation* 43–44 (2000).

³¹⁴ See Shaffir, *supra* note 123, at 180. The Amish impose similar restrictions on their members. See Labi, *supra* note 123, at 26 (shunning cars and television).

³¹⁵ See Shaffir, *supra* note 123, at 179.

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many areas of life—dress, transportation, marriage to outsiders, the use of mass media, membership in public organizations, and public officeholding, to name a few.³¹⁶

Because common-interest communities and their residents are typically so firmly embedded in the mainstream, granting them autonomy generates fewer of the liberty-securing benefits that accrue from allowing separatist dissenting groups to govern themselves.³¹⁷ Residents' frequent interaction with non-residents means that they will be subject to the conformity-inducing social norms operative in the larger community. In addition, common-interest communities do less than radical separatists to enhance normative diversity.

Finally, imposing mainstream norms on most common-interest communities would be unlikely to harm the community to the degree that would result from applying those norms to true opt-out communities. Because common-interest-community residents are for the most part committed to the same sorts of values that operate outside of the particular residential enclave, reviewing common-interest-community rules for "reasonableness" in light of those values is unlikely to trample on deeply held beliefs of the common-interest-community residents. The intrusiveness of such reasonableness review of common-interest-community rulemaking would be further mitigated and the goals of fostering normative diversity enhanced if, as is sometimes the case, courts understand "reasonableness" in light of the particular community's own stated goals.

³¹⁶ Kraybill, *supra* note 200, at 6.

³¹⁷ The call for deference to the private ordering of separatist normative communities raises obvious line-drawing problems. While certain cases, such as the Amish, will be easy to resolve, it may often be difficult to determine whether a particular community qualifies as sufficiently separatist. But these line-drawing problems seem no more difficult than those commonly encountered in the civil rights context. For example, determining whether a particular community is a separatist normative community does not seem intrinsically more difficult than determining whether a particular group is a private club or a public accommodation. See, e.g., *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1213–17 (N.J. 1999) (discussing whether the Boy Scouts constitute a "distinctly private" club), *rev'd*, 530 U.S. 640 (2000).

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CONCLUSION

The idea that private ownership forms a barrier around the individual, protecting him from outside compulsion, is one that is deeply rooted in the Anglo-American conception of property. Moreover, it is an understanding of property (and the individual) that is implicit in many areas of our property doctrine. It is, however, a conception that is based upon a singularly implausible understanding of human nature and the dynamics of human communities. We should embrace the notion of property as an institution that binds individuals together into normative communities. In so doing, we will find that we best preserve liberty not by reflexively favoring property rights over other sorts of rights, but by striving to become the sort of community that affirmatively values human freedom.