Property as Entrance
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One of the central values of private ownership in liberal property thought is its freedom-guaranteeing function. The precise mechanism by which private property rights accomplish this guarantee, however, is frequently left unexplored. When theorists discuss the issue, they often identify property’s liberty-securing quality with the power that property confers upon its owner to exit from society into the protective cocoon of his stuff. In its most ambitious forms, this mechanism of “property as exit” draws strength from an implicit assumption that people are the sorts of beings that can withdraw from social relations into the isolation of their property. But there are reasons to think that withdrawal would be very costly for most people. As a consequence, the power of property to facilitate exit may be substantially weaker than is often assumed. Moreover, scholars’ affinity for property’s isolating function has obscured the degree to which property facilitates “entrance” by tying individuals together into social groups.

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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 virtually all other liberties citizens enjoy. As Leopold Kohr characteristically puts it, "[i]n the material universe in which we live, it is obvious that the freedom of action – of speaking as we please, of doing as we please, of abstaining as we please, or changing dispositions as we please – can be exercised only on the ground and with regard to the things we own."


2 Kohr, supra note 1, at 51.
Property rights enjoy almost mythical status within American political thought in large part because of this commonly accepted connection to liberty. But what is the connection between liberty and property and how precisely does protecting property rights secure other sorts of liberty? Several scholars have noted the centrality of exit to individual autonomy within liberal thought. As Dagan and 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.” And, as Jennifer Nedelsky has observed, “property [is] the ideal symbol for this vision of autonomy because it [can] both literally and figuratively provide the necessary walls” to erect between oneself and others.

The exit facilitated by private property can be understood in a variety of different ways. In its most ambitious forms, the exit that private ownership supposedly makes possible constitutes the power to reside in self-sufficient isolation within one’s property. In weaker forms, however, exit constitutes merely 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 with the libertarian tradition of property thought, 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 liberty of persons by providing the viable exit from, or avoidance of entry into, potentially exploitative economic relationships.”

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

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6 See, e.g., Buchanan, supra note 1, at 32, 35.

7 The notion of “property as exit” is similar to what Laura Underkuffler has called the notion of “property as protection.” Laura Underkuffler, *The Idea of Property: Its Meaning and Power* 40 (2003).

8 See Buchanan, supra note 1, at 32; Ellickson, supra note 1, at 1353; Carol Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345-48 (1996). In Robert Ellickson’s words, the self-sufficiency created by private ownership “embolden[s] owners to risk thumbing their
that scholars have generally overstated the power of exit conferred by property ownership. This tendency 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.

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, first, by separating political from economic power, and, second, by decentralizing private economic power among a number of self-interested entities. On this view, most famously advanced by Milton Friedman and F.A. Hayek, a capitalist system of private ownership guarantees a multiplicity of power centers whose competition with each other will prevent any one of them from imposing too much on individual autonomy.\(^9\) As Hayek argues, quoting Leon Trotsky, “[i]n a country where the sole employer is the state, opposition means death by slow starvation.”\(^10\) While this argument does represent 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 free from state interference to the modern regulatory state in which private ownership predominates, subject to substantial state regulation and redistribution. Although the commercial competition fostered by private ownership may alleviate some of the coercive power of the market, substantial private coercion is still possible.\(^11\) For example, the owners of concentrated wealth can readily act in concert in ways that hamper individual freedom. Similarly, a broad cross-section of the property-owning community can use the private rights granted by the market as a means to coerce others into acting according to certain widely shared values.\(^12\) Accordingly, there is reason to think that the separation of powers argument gets its proponents much less than they believe. My focus in this Article, however, is on the argument linking individual liberty with private property’s conferral of the power to exit.

This conception of property as exit draws a great deal of its allure from its affinity with “a widely held belief that property ownership does allow one to escape from interdependence with others.”\(^13\) At the heart of this conception of

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\(^9\) See M. Friedman, \textit{supra} note 1, at 15-16; Hayek, \textit{supra} note 1, at 137.
\(^10\) Hayek, \textit{supra} note 1, at 137.
\(^11\) See \textit{infra} notes 261-265 and accompanying text.
\(^12\) See \textit{id}.
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.\(^{14}\)

The mechanism by which property facilitates the individual’s exit from the demands of community is therefore a crucial concern of property theory. If that mechanism turns out to operate less directly than theorists often assume, 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, would be substantially weakened. If a specific constellation of private property rights is not essential for safeguarding individual freedom, we need not be as troubled (at least not as troubled as some theorists would have us be) by government meddling with that constellation.\(^{15}\)

Consequently, it is worth exploring in detail the components of property’s exit mechanism and its legal implications. In Part I, I 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.\(^{16}\) In addition, property as exit depends on a particular understanding of human beings as largely self-sufficient.\(^{17}\) 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

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\(^{14}\) See Gregory S. Alexander, Commodity and Property 1 (1997); Nedelsky, supra note 5, at 223, 272; Hayek, supra note 1, at 139; Underkuffler, supra note 6, at 40 (“The core idea of property, under this conception, is property as a ‘bounded sphere’ which represents and protects an area of individual autonomy.”); Epstein, supra note 3, at 1359 (arguing that private property and freedom of contract “define domains in which individuals may establish both the means and ends for themselves to pursue as they see fit”); Laura Underkuffler-Freund, Property: A Special Right, 71 Notre Dame L. Rev. 1033, 1044 (1996) (“Property, as an American constitutional idea, is a bulwark surrounding the sphere of individual liberty.”).

\(^{15}\) There might be other reasons, unrelated to their liberty-securing function, to grant property rights (or particular arrangements of property rights) privileged status. Of course, one’s reason for privileging property rights will have a profound effect on the precise shape one thinks those property rights should take.

\(^{16}\) See infra Part I.B.

\(^{17}\) See infra Part I.C.
construct a notion of human community as ideally voluntary.\textsuperscript{18} Property as exit is by no means the only liberal (or even the only libertarian) view of the relationship between property and liberty. Nonetheless, it has been an influential one within American property doctrine.\textsuperscript{19} 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 over-protect the right to exclude others from one’s property.\textsuperscript{20}

In this Article, I argue that theorists have generally overemphasized the degree to which private property enables owners to escape from coercion. As a consequence, they have put too much stock in property's isolating power and failed to acknowledge the ways in which property actually increases owners' social obligations. My argument proceeds in two broad stages, the first negative and the second positive. In Part II, the negative phase of the argument, I 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 and 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 therefore offer an alternative to the neo-realist critique, one that builds upon an Aristotelian 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 explore the implications of this insight for the conception of property as exit. Drawing on the literature of informal social norms, I argue that the deep human need for community 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 right of exit, 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 many of the claims often made about the connection between property and freedom.

Accordingly, I propose in Part III 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

\textsuperscript{18} See infra Part I.D.
\textsuperscript{19} See infra Part I.E.
\textsuperscript{20} See infra note 71 and accompanying text.
individuals to each other in community. As with exit, this process of entrance can be either strong, as it is in utopian, territorially separatist communities, or weak, as it is in the more loosely-bound communities in which most of us live. On either view, however, the individual’s acquisition of property is never (simply) an act of defiant exit but always (at the same time) one of joining himself 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 more fulfilling communities will often be given, not chosen, and there are reasons for thinking that such communities will typically be characterized by relatively high costs of exit.

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

I. PROPERTY AS EXIT

A. Strong Exit 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 stuff.21 This extreme form of exit may operate, as some scholars have suggested, simply as “a cartoon or trope,”22 but, even if this is the case, it is a trope that theorists, particularly those of a libertarian bent, have aggressively employed to justify their highly individualistic approaches to property rights.

21 See, e.g., BUCHANAN, supra note 1, at 32, 35; Ellickson, supra note 1, at 1353.
In contrast, some theorists view the exit made possible by property ownership as merely a temporary respite from a generally social existence. Ellickson, though he at times speaks of property as fostering exit in the stronger sense, also speaks about the possibility of exit in this second, more limited sense. He argues, for example, that property in land helps to secure individual liberty by enhancing the individual’s privacy. 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 free to do as we please when no one else can see us.

These two forms of exit share many assumptions. When it is necessary to distinguish between the two versions, however, I will refer to the more robust and permanent version of exit as “strong exit,” and the more transitory form of exit “weak exit.” For reasons that I will discuss below, the argument that private ownership, as such, secures a robust set of individual liberties relies upon a commitment, at times only implicit, to possibility of the stronger form of exit. This observation is not intended to minimize the role that weak exit, which corresponds roughly to the notion of territorial privacy, plays within scholarly discussions of property and freedom. The limited sphere of liberty protected by the weak exit mechanism, however, simply does not justify 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 will focus on the strong exit position. Admittedly, 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.

**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 the absence of coercion, or so-called “negative liberty.” From this perspective, the essence of freedom is the right to be left alone, free

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24 See id.
25 See *infra* notes 182-186 and accompanying text.
26 See id.
from compulsion by other human beings.28 Many liberals, particularly those in the libertarian tradition, focus their attention on preventing coercion by the state.29 But this tendency toward preoccupation with state action is not essential to the outlook of property as exit, which is concerned about protecting individuals from coercion more generally.30

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.31 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.32

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

28 See Buchanan, supra note 1, at 1 ("Independence from the effects imposed by the behavior of others is a desired end objective.").
29 See, e.g., Rand, supra note 1, at 112, 115 ("Potentially, a government is the most dangerous threat to man's rights."); Eric T. Freyfogle, Property and Liberty, at 19 (2004) (unpublished manuscript on file with author) ("Liberty is also defined narrowly . . . in terms of freedom from government action, rather than freedom from private interference."); Green, supra note 4, 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, 96 Yale L.J. 1006, 1016 (1987). Erwin Chemerinsky has argued that this traditional focus on the threat to liberty posed by government may be anachronistic holdover from a time when natural rights theorists assumed that private law perfectly reflected the demands of natural law. See Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 511-19 (1985).
30 For example, 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; see also Buchanan, supra note 1, at 1.
31 See, e.g., Rand, supra note 1, at 114 ("The right to property means that a man has the right to take economic actions necessary to earn property, to use it, and to dispose of it; it does not mean that others must provide him with property."). Because of its overridingly negative quality, this negative conception of freedom differs from personhood approaches to property, which have been associated with Hegelian thought. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982). Although equally individualistic, the notion that property ownership is essential to the formation of an autonomous will suggests an affirmative entitlement to the property necessary to engage in self-development. See Eduardo Moises Penalver, Is Land Special?, 31 ECOLOGY L.Q. 227, 254-55 (2004).
32 See Richard A. Epstein, Takings 216-19 (1985); Robert Nozick, Anarchy, State, and Utopia 168-74 (1974) (comparing redistributive taxation to forced labor); Rand, supra note 1, at 110 ("The man who produces while others dispose of his product is a slave.").
also claim that property ownership enhances individuals’ freedom to order their lives as they see fit, even in the public realm that is open for all to see. Robert Ellickson captures this specifically public component of negative freedom when he describes property as enhancing owners’ ability to “thumb their noses at the world.”\textsuperscript{33} That is, the freedom that is supposed to be secured by property is not confined to the liberty privately to live out those aspects of one’s life that can be quietly accomplished behind closed doors with the window shades drawn. The freedom whose protection theorists attribute to private property is far broader than such a closeted liberty and encompasses freedom from coercion even in the performance of acts carried out where the world can see.\textsuperscript{34}

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 retracting 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, “[t]he most perfectly autonomous man is the most perfectly isolated.”\textsuperscript{35} 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.”\textsuperscript{36} The conception of property as exit, particularly in its stronger forms, 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 will of others.”\textsuperscript{37}

\begin{footnotes}
\footnote{Ellickson, supra note 1, at 1353.}
\footnote{See G.A. Cohen, Capitalism, Freedom, and the Proletariat, in THE IDEA OF FREEDOM 9, 15 (Alan Ryan ed. 1979) (discussing the range of freedoms whose security is attributed to the protection of private property). Property as exit is therefore 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, e.g., D. Friedman, supra note 1, at xiv (1973) (defining coercion as occurring when people prevent us from doing what we want with our property under circumstances in which our proposed use of property is not itself coercive of other people’s exercise of property rights); Kohr, supra note 1, at 51-52 (arguing that the only legitimate limitations on one’s use of property are those imposed by other people’s rights to use their own property as they see fit).}
\footnote{Nedelsky, supra note 5, at 272.}
\footnote{Buchanan, supra note 1, at 2.}
\footnote{C.B. MacPherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 3 (1962); see also Taylor, supra note 27, at 188-90. Taylor asserts that liberals as a whole “confirm[] the self-sufficiency of man alone,” a view of human nature that he considers to be “a very questionable thesis.” Id.; see also Gerald Frug, Cities and Homeowners’ Associations: A Reply, 130 U. Pa. L. Rev. 1589, 1598-99 (1982) (arguing that Ellickson’s “liberal” arguments are “deductions from assumptions about human nature that seem to be a caricature of liberal assumptions about human
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Proponents of property as exit therefore 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 relatively easily withdraw from a relationship into a self-sufficient existence on our property. On this view, property constitutes the power to exit, and the sheer possibility of exit 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. 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. 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 stuff, the greater the ability 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 rests on an implicit belief that individuals can in fact withdraw from the communities to which they belong at a reasonably low cost.

nature”). The argument that liberal/libertarian approaches to property presuppose an individualistic conception of human nature remains somewhat controversial. See WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 9-19 (1989) (arguing that communitarian critiques of liberalism are actually attacking crude caricatures of the liberal position). Indeed, many theorists argue that the defining feature of liberalism is its general neutrality among values, ends, or conceptions of human nature. See ROBERT P. GEORGE, MAKING MEN MORAL 129-60 (1993) (discussing anti-perfectionist liberalism); JOSEPH RAZ, THE MORALITY OF FREEDOM 107-09 (1986) (same); Stanley Fish, Mission Impossible: Settling the Just Bounds Between Church and State, 97 COLUM. L. REV. 2255, 2276-79 (1997) (discussing and criticizing the liberal view that liberalism is neutral between different conceptions of the good life); cf. Dagan & Heller, supra note 4, at 568; Epstein, supra note 3, at 1359 (arguing for a private domain in which people "establish both the means and the ends for themselves”). Charles Taylor has persuasively argued, however, that the notion that the individual safeguards his freedom by isolating himself within a sphere of negative liberty makes the most sense if one’s conception of human nature allows the individual human being to flourish in isolation from others. TAYLOR, supra, at 197.

38 See BUCHANAN, supra note 1, at 16, 27, 32 (“The autonomous self-sufficient existence is presumed to exist as a back-up prospect . . . ”); Eличикson, supra note 1, at 1552-53 (discussing the disciplining effect of the mere possibility of self-sufficient exit). Some theorists identify commitment to exit as liberalism’s defining feature. See Dagan & Heller, supra note 4, at 568.


40 See HIRSCHMAN, supra note 39, at 85-93; Green, supra note 4, at 171 (“The possibility of exit may itself make the group responsive to the interests of its members.”).

41 See TAYLOR, supra note 27, at 191-97.
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. 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 is its insistence on voluntariness in community life. Property as exit views community, and the obligations it imposes on the individual, as a potential threat to an individual’s negative liberty. Only when participation in community life is voluntary are the demands of community fully consistent with individual autonomy. The insistence that community life be voluntary manifests itself as a concern with retaining freely chosen entrance into or unencumbered exit out of the communities in which the individual participates. At its limit, property as exit favors a conception of community in which the individual can come and go at will, joining and leaving particular communities in accord with his own freely chosen (and evolving) life plans and values.

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42 See infra Part II.A.
43 See, e.g., BUCHANAN, supra note 1, at 16 (entry into community does not decrease liberty when it is voluntary and exit remains a viable option).
44 See Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059, 1088-89, 1121-22 (1980) (discussing liberalism’s discomfort with community, which it views as a potential threat to individual liberty); Frug, supra note 37, at 1593 (same). Frug argues that liberals view all community as a threat to individual liberty. But his argument goes too far. There is nothing intrinsically threatening about community to liberal values. Rather, liberals are concerned with the ability of communities to impose demands upon the individual against the individual’s will. Consequently, they are fundamentally concerned, not with community as such, but with communities from which individual exit is (or can be made to be) expensive. See ROSENBLUM, supra note 4, at 60; Dagan & Heller, supra note 4, at 568; Robert C. Ellickson, Cities and Homeowners Associations, 130 U. PA. L. REV. 1519, 1550 (1982) (noting that the cost of exit from homeowners’ associations might provide a reason to scrutinize rules made by associations after members have joined).
45 See, e.g., JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (J.H. Tully ed. 1983) (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 114 (“An undertaking that involves more than one man, requires the voluntary consent of every participant.”).
46 See LOCKE, supra note 45, at 28; ROSENBLUM, supra note 4, at 60.
47 See KYMMLICKA, supra note 37, 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 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.”).
Liberals are generally less concerned with barriers to entry than they are with either forced entry or restricted exit. Moreover, involuntary entrance into a community can be less problematic to liberals if the option of inexpensive exit is preserved. Costly exit, however, can deprive even voluntary entrance of much of its value. Some libertarian theorists view voluntary entrance as a complete substitute for easy exit. But even those theorists view the absence of exit, as, at a minimum, raising serious concerns about individual autonomy.

Theorists have therefore claimed that exit is a "bedrock liberal value" and have treated communities that hinder exit as inherently suspect. 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. After all, it is characteristically an unchosen community, one that is joined at birth. Moreover, the option of exiting the land

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48 See RANDY E. BARNETT; RESTORING THE LOST CONSTITUTION 43 (2004); Dagan & Heller, supra note 4, at 571-72; Andrew Koppelman, Should Noncommercial Associations Have an Absolute Right To Discriminate?, 67 L. & CONTEMP. PROBLEMS 27, 33 (2004) (discussing the traditional liberal argument that "[n]o one has a right to compel others to associate with another").
49 See BARNETT, supra note 48, at 41-44; cf. Robert C. Ellickson, New Institutions for Old Neighborhoods, 48 DUKE L.J. 75, 107 (1998) (arguing that libertarians should embrace the notion of neighborhood associations created by supermajority vote, even though this means that some members will be inducted into the association against their will).
50 See NOZICK, supra note 32, at 324; Ellickson, supra note 1, at 1505.
51 See, e.g., CHARLES FRIED, CONTRACT AS PROMISE 14, 20-21 (1981) ("If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor’s prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person."); NOZICK, supra note 32, at 331 ("The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would."). I discuss this tension within libertarian thought between free entrance and free exit at greater length below. See infra Part II.B.3.
52 See, e.g., FRIED, supra note 51, at 14 (calling the binding of our future autonomy a “deep and difficult problem”).
53 Dagan & Heller, supra note 4, at 568.
54 See, e.g., Ellickson, supra note 37, at 1550 (justifying heightened judicial scrutiny of homeowners’ association rules on the ground of possibly high costs of exit from communities); Dagan & Heller, supra note 4, at 568-69 ("[A] regime that makes exit impractical through outright prohibitions or via rules that de facto prohibit exit (including rules that impose prohibitive exit costs) or that unreasonably delay exit, is incompatible with the most fundamental liberal tenets.").
55 See BARNETT, supra note 48, at 43; Freyfogle, supra note 29, at 19, Frug, supra note 44, at 1076; Green, supra note 4, at 167.
56 See Green, supra note 4, at 167.
of one’s birth is, under most circumstances, an expensive one to exercise.\textsuperscript{57} The problematic nature of the national community only underscores the significance of private property rights. Those rights, and the exit mechanism they facilitate, constitute an important solution to the unique threat posed to negative individual liberty by the national community.\textsuperscript{58} Property as exit allows individuals to withdraw into a private sphere beyond the reach of the unchosen national community while remaining within its physical boundaries.\textsuperscript{59}

E. Doctrinal Influence of Property as Exit

A preoccupation with the ability of property to safeguard individuals’ ability to exit from social life generates a host 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.\textsuperscript{60}

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 stuff. 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.”\textsuperscript{61} “Deny someone the exclusion

\textsuperscript{57} See Barnett, supra note 48, at 43; Hirschman, supra note 39, at 112; Green, supra note 4, at 167-68 (“[E]xit from the state is not realistically possible . . . . [T]he exit is in social and economic terms enormously difficult for most people to uproot and emigrate . . . .”).

\textsuperscript{58} See Hayek, supra note 1, at 140; Hoy, supra note 27, at 15; Epstein, supra note 32, at 13-14.

\textsuperscript{59} Scholars have therefore described property as a form of delegated sovereignty. See Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12-14 (1927); see also Epstein, supra note 3, at 1359; cf. Abner S. Greene, Kiryas Joel and Two Mistakes About Equality, 96 Colum. L. Rev. 1, 4-5 (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).

\textsuperscript{60} 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 14, at 1-2; Underkuffler, supra note 6, at 46.

right,” Merrill says, “and they do not have property.” Richard Epstein takes Merrill’s observation one step further, arguing that virtually any deviation from an absolute conception of the right to exclude deprives an owner of her property. 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.

The influence of property as exit appears to be at work in the prevailing rule that the owner of private property may exclude people for any reason (with the exception of reasons prohibited by civil rights statutes) or for no reason at all. Indeed, a property owner who has opened his property up to the public is free to exclude individuals willy-nilly even when there is no indication that those he has excluded intend to engage in activity inconsistent with his chosen use of the property. Courts have upheld this robust right to exclude even though, as a practical matter, it makes it far more difficult to accomplish other important social goals, such as the enforcement of antidiscrimination law.

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

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62 Merrill, Right to Exclude, supra note 61, at 730. 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. *See id.* at 753.

63 *See* Richard A. Epstein, Taxings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins, 64 U. Chi. L. Rev. 21, 33-36 (1997). Consequently, Epstein argues, deviations must either satisfy the narrow requirements of private necessity or be justified (and compensated) as an exercise of the State’s power of eminent domain. *See id.* Epstein makes an exception to his rule for situations in which property owners exercise monopoly power. *See id.* at 47. But his approach would invalidate (or require compensation for) much civil rights law. *See id.*

64 See id. at 33-36.

65 *See*, e.g., *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (Nevada law); *Madden v. Queens County Jockey Club, Inc.*, 72 N.E.2d 697 (N.Y. 1947).

66 Protecting a presumptive right to exclude for any non-prohibited reason or for no reason at all makes it harder for those excluded on impermissible grounds, such as race or national origin, to prove that their exclusion was for invidious reasons. *Cf. Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370, 374 n.4, (N.J. 1982) (“The denial 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 less than dignified origins.”).

opposing the war in Vietnam. The prerogative of a private owner to exclude was 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.” 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 it is that 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. Despite the owner’s apparent indifference to the presence of a numerous people engaged in patently noncommercial activity on his property, 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. 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 to enter 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. In any event, in discussing how far courts should protect the right to exclude, most people are concerned with more

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68 See Lloyd Corp., 407 U.S. at 569.
69 407 U.S. at 569-70.
70 See 407 U.S. at 552-56.
than maximizing efficiency. For example, if it were to turn out that Epstein is
correct that permitting racial discrimination maximizes aggregate utility,\textsuperscript{73} there
would likely still be a strong consensus in favor of omitting the right to
discriminate from commercial property-owners' right to exclude.

2. \textit{Takings Law}

The sacralization of the right to exclude in property law has unsurprisingly
exercised a powerful influence on the law of takings, particularly on the Court's
expansion of the reach of that doctrine over the past few decades.\textsuperscript{74} 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."\textsuperscript{75} Merrill correctly observes that, in the context of its
takings jurisprudence, "no other right has been singled out for such extravagant
endorsement by the Court."\textsuperscript{76}

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 \textit{Loretto v. Teleprompter Manhattan
CATV Corp.},\textsuperscript{77} 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. The
\textit{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.\textsuperscript{78} 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 permits the owner to enjoin the state's intrusive action altogether, in
effect excluding the state just as he would a private party. In light of their

\textsuperscript{73} See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 59-78 (1992) (arguing that antidiscrimination
laws are inefficient).

\textsuperscript{74} See Peñalver, supra note 31, at 282-83 \& n.306.

\textsuperscript{75} Loretto, 458 U.S. at 433 (quoting \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 176 (1979)).

\textsuperscript{76} Merrill, Right to Exclude, supra note 61, at 735; see also Epstein, supra note 63, at 35-36.

\textsuperscript{77} 458 U.S. 419 (1982).

\textsuperscript{78} For the classic exposition of the distinction between property rules and liability rules, see Guido
Calabresi \& A. Douglas Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View
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. While the Supreme Court and several state courts have historically understood the public use requirement to be satisfied if an act of eminent domain is undertaken for a "public purpose," 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. Some state courts have embraced similarly strenuous "public use" tests.

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 liberal property thought 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 initially appears to be the case. A different argument, however, one based on a conception of human nature as essentially and robustly social, goes much farther to challenge 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 a form of coercive regulation that depends upon the community for its existence

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80 See Epstein, supra note 32, at 166-81; Epstein, supra note 63, at 34-35.


82 Cf. Nedelsky, supra note 5, at 257-60 (discussing the influence of liberal property thought on academic property discourse); Joseph William Singer, Entitlement: The Paradoxes of Property 3 (2000) (calling the "ownership" model of property "pervasive").

83 See Alexander, supra note 14, at 1-2, 7.
and enforcement. Applying this observation to the libertarian notion of property, these scholars have argued that property cannot provide the individual with a bulwark against coercion. 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. 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.

The experience of African-American property owners illustrates this radical dependence of property rights on communal recognition. Throughout the early 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. These groups often succeeded in removing black residents from their homes, despite the legal rights guaranteed to owners of private property. Far from freeing the individual from dependence on the community, formal property rights simply cannot function if the wider community demonstrates implacable hostility towards their respect and enforcement.

The neo-realists have also 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.

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84 See, e.g., ERIC FREYFOGLE, THE LAND WE SHARE 17-27 (2003) (arguing that notion of absolute ownership "makes no sense" because of the need for the state to mediate among conflicting property uses); CAROL M. ROSE, PROPERTY AND PERSUASION 35-39 (1994) (discussing the system of private property as itself a form of commons property whose existence depends upon cooperation); SINGER, supra note 82, at 8 (arguing that private property cannot exist without regulation); Jennifer Nedelsky, RECONCEIVING AUTONOMY, 1 YALE J. L. & FEM. 7, 18-19 (1989) (arguing that property rights by themselves cannot protect individuals from the state because they are created by the state); Underkoffler-Freund, supra note 14, at 1041, 1044-46; Frank I. Michelman, Ethics, Economics and the Law of Property, in NOMOS XXIV (ETHICS, ECONOMICS, AND THE LAW) at 3, 17-20 (J. Roland Pennock & John W. Chapman eds. 1982).

85 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 29, at 3. Thus, the creation of private property rights enhances the liberty of some (property owners) but restricts the liberty of others (non-owners). See id.

86 See Nedelsky, supra note 84, at 18-19.


88 See id. at 181.

89 See, e.g., FREYFOGLE, supra note 84, at 37-38; SINGER, supra note 82, at 78, 210 ("Absolute property rights cannot exist in the real world, because when they conflict, at least one of the rights
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. Accordingly, at every turn, the property-owner will be confronted with constraints, either in the form of legal doctrines, such as nuisance, 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.

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.”

The interdependence and limitations created by the need to sustain a system of co-extensive rights is not so substantial as to call into question the basic underpinnings of the conception of property as exit. After all, even the staunchest defenders of property rights acknowledge that some “minimal state” is necessary

must give ground. The classical model of property, based on an image of complete control of an object is a mirage. . .”).

90 See SINGER, supra note 82, at 7; FREYFOGLE, supra note 84, at 20.
91 See SINGER, supra note 82, at 7; FREYFOGLE, supra note 84, at 20. In addition, the specific solutions that the formal property regime chooses to adopt in response to this unavoidable conflict among property users will themselves reflect the prevailing values of society. See Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. REV. 77, 95-106 (1995); Joseph L. Sax, Property Rights and the Economy of Nature, 45 STAN. L. REV. 1433, 1446-47 (1993). Morton Horowitz’s description of the shift in the law of nuisance over the course of the eighteenth and nineteenth centuries illustrates this phenomenon. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 31-62 (1977). The need for communities to generate legal resolutions to the conflicts that will inevitably arise between competing property uses renders private owners vulnerable to shifts within the value system of the broader society against whom property is supposed to serve as a bulwark. See, e.g., Sanderson v. Pennsylvania Coal Co., 86 Pa. 401, 408 (1878) (“We are of the opinion that mere personal inconvenience . . . must yield to the necessities of a great public industry . . . 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.”).
92 WALDRON, supra note 61, 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 32, at 14-16.
to maintain a system of private property, to mediate disputes among property-
owners, and to protect against abuse of monopoly power.\textsuperscript{93}

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.\textsuperscript{94} In an effort to borrow for the civil rights context some of the limits earned by his nuisance argument, for example, Joseph Singer 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, one between the store-owner’s (property) right to exclude and the shopper’s (property) right to have access to the store.\textsuperscript{95} “[I]n the end,” he says, “we are presented with a conflict among sticks in the property bundle.”\textsuperscript{96}

The clash between the desire of the owner to exclude and the demand of the non-owner to have access, however, is not one intrinsic to the libertarian’s conception of property in the same way that is true of the contradiction between one owner’s right to use his property as he sees fit and another owner’s right to be left alone. The latter involves an unavoidable tension between two “sticks” in the bundle of property rights that libertarians deem essential to their own notion of private property. As a consequence, pointing out the impossibility of protecting (absolutely) both rights at once generates an important justification for limitations on property rights that libertarians are compelled to (and generally do) accept. Conflicts between rights of access and the right to exclude, however, are different because only one of them is a right that libertarians want to include within their bundle. Moreover, the right to exclude 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 smuggled within the libertarian conception of property, does not establish that the libertarian preference for the right to exclude is incoherent on its own terms.

B. A Social Critique of Property as Exit

\textsuperscript{93} See, e.g., Epstein, supra note 32, at 107-25; Nozick, supra note 32, at 10-25, 88-119; Rand, supra note 1, at 129; Epstein, supra note 63, at 33-36.

\textsuperscript{94} See, e.g., Freyfogle, supra note 91, at 109-114 (discussing the need to regulate land use in the interests of ecological health); Singer, supra note 82, 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 between a concern with “ecological health” and traditional notions of property rights).

\textsuperscript{95} See Singer, supra note 82, at 44.

\textsuperscript{96} Id.
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. Such irreducible interdependency means that individuals owe one another obligations, not by virtue of consent alone but as an inherent incident of the human condition.”

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, a community life that exceeds the minimal cooperation needed to maintain a system of private ownership or minimal state, the ability of property 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.

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97 ALEXANDER, supra note 14, at 1-2.
98 Some theorists who place themselves in the Thomistic tradition, such as John Finnis and Robert George, claim to avoid reliance on observed facts about human nature and believe that the goods that constitute the distinctively human life are self-evident. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85-86 (1988); see also GEORGE, supra note 37, at 178-79, 221 (defining a “basic human good” as “an intrinsic and irreducible aspect of the well being and flourishing of human persons”). Others, however, argue that Aristotelian (and, by extension, Thomistic) ethics are characterized by their derivation of behavioral norms from observed facts about human nature. See, e.g., ANTHONY J. LISSKA, AQUINAS’S THEORY OF NATURAL LAW 148-50 (1996); MARTHA C. NUSSBAUM, ARISTOTLE’S DE MOTU ANIMALIUM 102 (1978) (“Aristotle appears to be saying that if we know what man is, we will know how he should behave; he seems to be deriving behavioral norms from factual observations concerning human nature.”); Alan Gewirth, Natural Law, Human Action, and Morality, THE GEORGETOWN SYMPOSIUM ON ETHICS 68 (Rocco Porroco ed. 1984) (“[It is the . . . ontological feature [i.e., human nature] that especially differentiates the Aristotelian-Thomist version of natural law theory from alternative versions.”). My argument takes no side in this debate, and focuses instead on whether, based on observed facts about the world, individuals can (or do) in fact use property to exit social life in the way required by property as exit. That is, it focuses on whether the exit mechanism by which property supposedly protects individual freedom of action can in fact work, leaving more subtle questions about the metaphysics of morals to the side.
1. Arguments for Sociability
   a) The Family and Beyond

For starters, human beings could not survive, let alone flourish, without the assistance of some community responsible for nurturing them beyond the dependency of childhood.99 In virtually all cultures, the primary community responsible for child-rearing is the family. This universal human participation in the community of family represents a considerable, though under-explored, obstacle to the vision of property as exit.100 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 their birth families. And our siblings and children can impose "in laws" on us. Moreover, exit from families is virtually impossible for children and costly (in terms of emotional and social well-being) for everyone else. As Claude Fischer has put it,

[t]he differences between kin and non-kin 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.101

While acknowledging the pervasive existence of family, proponents of property's exit function often subsume the family within the individual, silently characterizing the actions of the family as the mere expression of the individual's autonomous will.102 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 the child are extensions of the basic right

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99 See Finnis, supra note 98, at 83; Cohen, supra note 59, at 17 ("Generally . . . human beings start with a stock of tools or information acquired from others . . . ").
101 Claude S. Fischer, To Dwell Among Friends: Personal Networks in Town and City 80 (1982).
102 See, e.g., Buchanan, supra note 1, at 10 (describing self-sufficient "homesteads" as providing maximal liberty while treating the "individual" and "family unit" as largely interchangeable).
not to be interfered with in doing these things for oneself. As Amy Gutmann has pointed out, however, within the liberal tradition, this move is problematic because children are themselves separate individuals from their parents and as such are entitled to certain rights of autonomy.

In a similar vein, 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. 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 the property burdened by covenant restrictions. The claim of unanimous consent to this transaction is therefore only possible if one simply ignores 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 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. That strategy is not an option for modern theorists, however, who cannot ignore the (often contentious) community of persons residing within the domestic sphere.

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103 Charles Fried, Right and Wrong 152 (1978).
105 See, e.g., Barnett, supra note 48, at 40-41 (arguing that in common-interest communities “there is actual unanimous consent to be bound by its rule-making process”); Ellickson, supra note 44, at 1522-25; Richard A. Epstein, Covenants and Constitutions, 73 Cornell L. Rev. 906, 914 (1988); Epstein, supra note 3, at 1357; see also Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 640 (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 and accepting the restrictions to be imposed” (emphasis added)); Breene v. Plaza Towers Ass’ n, 310 N.W.2d 730 (N.D. 1981) (prohibiting the retroactive application of declaration amendments).
106 See Ellickson, supra note 44, at 1522-25; Epstein, supra note 105, at 914; Epstein, supra note 3, at 1357.
107 See John Locke, Two Treatises of Government § 28 (Peter Laslett ed. 1967) (1698).
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 fully cut himself off from involuntary interaction with other human beings. Even within the most sacred confines of his property refuge, the individual will always be forced to confront the demands of community (family) life. \footnote{See Finnis, supra note 98, 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 portion of their lifetime."). Of course, the demands of family will vary over the course of one’s life.} The costs of exiting from family relationships are typically enormous. \footnote{See Fischer, supra note 101, at 80-81.} 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. \footnote{See id.} Perhaps for this reason, social scientists have found that strong attachment to one’s family is associated with a decline in the frequency of deviant behavior. \footnote{See, e.g., John H. Laub & Robert J. Simpson, Crime and Deviance over the Life Course, 55 Am. Soc. Rev. 609, 620, 625 (1990) ("The stronger the adult ties to work and family, the less crime and deviance.").}

At first glance, the necessity of family life appears to establish the basis for only a weak communal life. The number of people within the family is, after all, relatively circumscribed. \footnote{But see, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 506-13 (1977) (Brennan, J., concurring) (discussing the predominance of the “extended” unit as the dominant family structure within certain American communities).} But the family appears to be simply the thin edge of a larger series of social relationships generated by the demands of family life. \footnote{See Finnis, supra note 98, at 83 ("Human beings, who can survive infancy only by nurture, live in or on the margins of some society which invariably extends beyond the nuclear family . . . ."); Taylor, supra note 27, at 206.} 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. \footnote{See Thomas Bender, Community and Social Change in America 129-34 (1978).} Individuals depend upon recognition by others for their ability to enjoy many of the goods associated with family. \footnote{See Raz, supra note 37, at 162, 350; Seidman, supra note 29, at 1044-45; see also Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (upholding against constitutional challenge a New York ordinance restricting land use to one-family dwellings and defining the word “family” to mean “one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit”).} 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.\textsuperscript{116} 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 residents of what otherwise might appear to be highly atomized suburban communities.\textsuperscript{117}

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.”\textsuperscript{118} 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.\textsuperscript{119} And Philip Langdon 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.”\textsuperscript{120} Based on his survey of the social science literature, Langdon concludes that “individuals require community. Without it, they are diminished, if not incapacitated.”\textsuperscript{121}

Not only have social scientists determined that a lack of community leads to individual deterioration, 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,”

\textsuperscript{116} See FINNIS, supra note 98, at 83, 147 (“[T]he family is incomplete and inadequate. Indeed, it cannot even properly provide for the unimpaired transmission of its own genetic basis; a family that breeds within itself is headed for physical self-destruction.”).

\textsuperscript{117} See PHILIP LANGDON, A BETTER PLACE TO LIVE 42 (1994); CONSTANCE PERRIN, BELONGING IN AMERICA 44 (1988) (“You know everybody on the block and for blocks around when you have young children.”). Indeed, 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 Lingerin Stigma, N.Y. TIMES, Dec. 22, 2004, at B1 (“In the unspoken rules of suburbia, mothers broker the play dates with an exacting calculus, weeks and even months in advance. For some moms, socializing with each other while their offspring crawl around is as essential as whether or not the children get along.”).


\textsuperscript{120} LANGDON, supra note 117, at 19, 21.

\textsuperscript{121} Id.
the better his health, self-esteem, satisfaction, and general happiness. 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.” 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 comparably 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, there is reason to think that the communities most likely to provide substantial physical and psychological benefits for their members are stable communities with low rates of membership turnover. Conversely, communities characterized by short-term residency and high rates of turnover appear to provide fewer community benefits to their members. Transience is the enemy of community.

c) Property as Evidence of Sociability

Finally, as numerous scholars have observed, the institution of property is itself the product of human cooperation. 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. And game theorists have long fretted over the routine fact of cooperation among strangers engaged in one-time transactions. That very pervasiveness, however, is substantial evidence of the fundamental error of the

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124 See id.; Farrell, supra note 122, at 21; see also MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY 104-29 (1982).
125 See Farrell, supra note 122, at 21.
126 See FISCHER, supra note 101, at 101-02, 149-51; MICHAEL WALZER, SPHERES OF JUSTICE 39 (1983) (arguing that without borders to keep people from roaming freely, human beings would become “radically deracinated men and women” living in a world without cultural variation).
127 See FREYFOGLE (2003), supra note 1, at 219-225; ROSE, supra note 84, at 37; SINGER, supra note 82, at 13-14; Nedelsky, supra note 84, at 18-19; Underkuffler-Freund, supra note 14, at 1044.
128 See Rose, supra note 8, at 363.
129 See Michael W. Macy & John Skvoretz, Evolution of Trust and Cooperation Among Strangers, 63 AM. SOC. REV. 638, 639 (1998) (calling the persistence of cooperation and trust between strangers in one-shot games “a puzzle that has perplexed game theorists for over 40 years”).
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 birth presupposes the ability of human beings to cooperate, as an embarrassment to be explained away by myth and legend.\textsuperscript{130} As both Aristotle and Thomas Aquinas recognized, however, 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.\textsuperscript{131} 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 as regards material goods.\textsuperscript{132} 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.

2. Informal Norms and Property as Exit

\textsuperscript{130} See generally Carol M. Rose, \textit{Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory}, 2 YALE J.L. & HUMAN. 37 (1990) ("A property regime, in short, presupposes a kind of character who is not predicted in the standard story about property. And that, I suggest, is why the classic theories of property turned to narrative at crucial moments, particularly in explaining the origin of property regimes, where the need for cooperation is the most obvious: Their narrative stories allowed them to slide smoothly over the cooperative gap in their systematic analyses of self-interest.").

\textsuperscript{131} See \textsc{Aristotle}, \textit{The Politics of Aristotle} \textsc{bk. II}, ch. V, §§ 5-8, at 49-50 (Ernst Barker trans. 1946); \textsc{St. Thomas Aquinas}, \textit{Summa Theologica}, Ila Iiae, Q. 66, art. 2 (Fathers of the English Dominican Province trans. 1948):

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.

\textsuperscript{132} See \textsc{Aquinas}, \textit{supra} note 131, at Ia Iiae, Q. 95, art. 4.
The mechanism by which 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.\(^{133}\) “For better of worse,” Ellickson observes, “informal social forces in fact powerfully constrain the [exercise of formal rights].”\(^{134}\) 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) Informal Norms

Libertarians typically focus on protecting the individual from state restrictions of his use and enjoyment of property.\(^{135}\) 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.\(^{136}\) 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 a group can withhold the privileges of membership (against the individual’s wishes) from an individual who fails to conform to the community’s standards of conduct.\(^{137}\)

\(^{133}\) See, e.g., ROBERT ELICKSON, ORDER WITHOUT LAW 65-81 (discussing the influence of informal norms governing responsibility for fencing costs) (1991); Steven N.S. Cheung, The Fable of the Bees: An Economic Investigation, 16 J.L. & ECON. 11 (1973) (discussing the emergence of an informal norm in favor of keeping bees on apple orchards in Washington State).

\(^{134}\) ELICKSON, supra note 133, at 6.

\(^{135}\) See supra notes 55-59 and accompanying text.

\(^{136}\) For the purposes of this Article, I understand social norms to mean “behavioral remedies supported at least in part by normative attitudes.” Richard H. McAdams & Eric B. Rasmussen, Norms in Law and Economics, in HANDBOOK OF LAW AND ECONOMICS, at 3 (A. Mitchell Polinsky & Steven Shavell eds., forthcoming 2005) (on file with author).

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 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 against those who resort to the formal legal system can render formal legal rights largely irrelevant. 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. 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. 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.

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

("[N]orms are not enacted and enforced like statutes. It is more plausible to say that when people observe some behavior, they more or less spontaneously approve or disapprove of it (or fail to react), and then reward, penalize, or ignore the actor.").

138 See ELICKSON, supra note 133, at 52-56, 60-64 (noting that entitlements with regard to cattle trespass in Shasta County are based on community norms, not legal rules).

139 See ELICKSON, supra note 133, at 57.

140 See id. at 60-64.

141 See id.

142 See, e.g., Donald B. Kraybill, Negotiating with Caesar, in THE AMISH AND THE STATE at 3, 10, 13 (Donald B. Kraybill ed., 2d ed. 2003) (noting that the Amish Ordnung, or rule, prohibits the filing of lawsuits); Nadya Labi, The Gentle People, LEGAL AFF., Jan./Feb. 2005, at 26, 29 (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); 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").
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 more willing to accept substantial impositions by those communities before he will exercise his exit option. 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 be able to 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. And 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 coercive community norms.

b) Informal Norms and Property as Exit

We have already seen that there is reason to believe that human beings possess a robust need for community life. If this is the case, people will virtually always be part of some social group that can plausibly threaten to impose substantial sanctions on them if they fail to comply with community norms. 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, the individual’s autonomy would never be endangered by community norms because, anytime the community made demands on the individual with which she disagreed, she could simply depart the offending community for a more favorable one. Moreover, as Charles Tiebout recognized, in such a world, competition among communities to retain footloose members would exert pressure on groups to temper their demands.

143 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.

144 In many cases, the effects of these informal rules on property-owners will be completely 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 and Silverman, supra note 13, at 133 (“So 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 Cooter, supra note 137, at 1665; Christine Horne, Sociological Perspectives on the Emergence of Social Norms, in SOCIAL NORMS 3, 19-21 (Michael Hechter & Karl-Dieter Opp eds. 2001); Michael Hechter & Karl-Dieter Opp, Introduction, in SOCIAL NORMS, supra, at xi, xiii.

145 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
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 very fluid. First, groups in which membership is constantly shifting do not feel like communities at all. Immobility gives community life a stickiness that, although at times inconvenient or unpleasant for the individual member, is an important ingredient in the overall experience of community that the individual finds so satisfying over the long run.  

Obviously, our ability to derive the goods of community from the groups to which we belong will be 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. It therefore makes good sense that, as social scientists have found, the groups most effective at providing the goods that individuals derive from membership are those characterized by low levels of mobility into and out of the community.

This observation does not mean that communities must impose artificial constraints on exit in order to be strong or satisfying, although at times some such constraints might be a good idea. Instead, 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. Communities that are initially

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satisfy the diverse preferences of mobile residents for particular mixes of government services, yielding an optimal outcome. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956).

146 Claude Fischer, for example, observes that long-term and immobile community members tend to have denser social networks than more transient members. See FISCHER, supra note 101, at 146. And dense social networks provide their members with a much higher level of subjective satisfaction. See id. at 149-51 (“The denser respondents’ networks — up to a point — the less likely they were to wish they knew more people to talk to or to have fun with, and the more likely some were to score high on our measure of ‘psychological mood.’”).

147 See id. at 135 (noting the reciprocal bonds of support and obligation within social networks).

148 See supra notes 124-126 and accompanying text.

149 Legal restraints on couples’ ability to divorce is an example of an artificial constraint on exit that may help people to get through difficult times in their marriage, particularly if those difficult times come in the early years of the marriage, when more informal constraints on break-up have not yet kicked in.

stable because they are intrinsically satisfying will therefore ultimately be characterized by relatively high costs of exit. And this will be true even when they take no affirmative steps to hinder exit or become substantially less satisfying with the passage of time. In short, the high exit costs generated by individual members’ increasing identification with the community is a windfall for the community, but one on which it can capitalize by placing increasingly heavy demands on its long-term members.

In addition to depriving the individual (and other community members) of the experience of authentic community, jumping from one community to another undermines an individual’s sense of himself. Part of the importance to us of the communities in which we are involved springs from our tendency to construct our identities around the groups to which we belong.151 Excessively unstable community membership short-circuits this process of self-identification.

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.152 “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.”153 Mill went on the lament that

[i]n our times, from the highest class of society down to the lowest, everyone lives 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 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

61 (1990) (noting that the longer people remain in a neighborhood, the more attached to it they become).
151 See Radin, Time, supra note 150, at 748-49, 757; Radin, Rent Control, supra note 150, at 362-63, 369-70 (“[P]ersons are not merely abstract disembodied rational units, but rather concrete selves whose situation in an environment of objects and other persons is constitutive.”).
152 JOHN STUART MILL, ON LIBERTY 64, 67 (Elizabeth Rapaport ed. 1979) (1858).
153 Id. at 54.
is usually done by persons of a station and circumstance superior to mine?\textsuperscript{154}

Contemporary property scholars, however, have largely 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 are effective primarily in small, tightly knit groups, where costs of exit are typically highest.\textsuperscript{155}

But a sheer preference for private coercion is unjustifiable on the liberal 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.\textsuperscript{156} It is true that the state's monopoly on legally sanctioned physical force means that state coercion will often be more severe than the coercion behind social norms. But informal norms are often backed by the threat of (formally illegal) physical violence, a threat that is frequently realized.\textsuperscript{157}

Again, the experience of African-American homeowners in the early half of the twentieth century is instructive.\textsuperscript{158} 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.\textsuperscript{159} Moreover, in the context of tightly knit groups, the community's threat to shun those who violate group norms can generate a degree of coercion that in many ways rivals the state's use of physical force.\textsuperscript{160} Thus, a desire to

\textsuperscript{154} Id. at 58. Hayek similarly acknowledges that "[t]he conditions of domestic service, like all more intimate relations, undoubtedly offer opportunities for coercion of a particularly oppressive kind and are, in consequence, felt as restrictions on personal liberty." HAYEK, supra note 1, at 138.

\textsuperscript{155} See, e.g., M.P. BAUMGARTNER, THE MORAL ORDER OF A SUBURB 99-100 (1988) (predicting minimal operation of social norms in "weak" communities); ELICKSON, supra note 133, at 177-83 (predicting that social norms will operate with most force in "close-knit groups").

\textsuperscript{156} See supra note 30 and accompanying text.

\textsuperscript{157} See, e.g., ELICKSON, supra note 133, at 6 (describing the violent informal sanctions imposed on people attempting to exercise their constitutionally recognized right to burn an American flag); see generally JAMES ACHESON, THE LOBSTER GANGS OF MAINE (1988) (discussing the sometimes violent means used by Maine lobstermen to police informal property rights in territorial lobster fishing grounds).

\textsuperscript{158} See supra notes 87-88 and accompanying text.

\textsuperscript{159} See id. Also emblematic of this phenomenon is the substantial violence and property-destruction that was inflicted on black property owners with impunity in the race riots across the South following the end of World War One. See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 114-15 (3d. ed. 1974).

\textsuperscript{160} See infra note 222 and accompanying text.
maximize negative liberty does not necessarily justify a categorical focus on state coercion. Instead, it lends itself to a wide-ranging effort to eliminate coercion as far as possible, irrespective of its origins.\textsuperscript{161}

Second, how responsive human beings are to informal social norms and how plausible is the conception of property as exit from the reach of those norms are largely empirical questions whose resolution will turn on how powerful and pervasive is the human need for social approval.\textsuperscript{162} Indeed, there is evidence that human beings are sensitive to informal 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.\textsuperscript{163} This is particularly the case with conduct carried out in public, for all to see.

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 “had no special powers to enforce his commands.”\textsuperscript{164} Subjects were visibly disturbed by the situation, showing physical manifestations of deep distress, such as nervous laughter and even “uncontrollable seizures,” as they carried out the researchers’

\textsuperscript{161}See, e.g., BUCHANAN, supra note 1, at 1-3.
\textsuperscript{162}The question whether informal norms developed outside of tightly knit communities are utility-maximizing, see, e.g., ELICKSON, supra note 133, at 181-82 (“The hypothesis predicts that departures from conditions of reciprocal power, ready sanctioning opportunities, and adequate information are likely to impair the emergence of welfare-maximizing norms), is a wholly separate question from whether social norms operate (efficiently or otherwise) outside of that context.
\textsuperscript{163}See, e.g., BAUMGARTNER, supra note 155, at 80, 90 (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) (“People are notoriously susceptible to group pressures, which are variously described as conformity, herd effects, or social solidarity.”); McAdams, supra note 137, at 355-56 (arguing that people crave esteem from others); Thomas J. Scheff, Shame and Conformity, 53 AM. SOC. REV. 395, 402-03 (1988) (arguing that human beings have a natural tendency to conform to the conduct and expectations of the groups around them); Lior Strahilevitz, Social Norms From Close-Knit Groups to Loose-Knit Groups, 70 U. CHI. L. REV. 359, 361-64 (2003) (hereinafter “Close Knit Groups”); Lior Strahilevitz, Charismatic Code, Social Norms, and the Emergence of Cooperation on File Swapping Networks, 89 VA. L. REV. 505 (2003).
instructions, but the overwhelming majority of subjects never refused to administer the increasingly painful shocks.\textsuperscript{165}

M.P. Baumgartner's anthropological study of informal social norms in the suburbs reveals that, despite what she claims to be anemic bonds of community, public disorderly behavior is exceedingly rare. Indeed, Baumgartner observes that deviations from this high standard of conduct are normally corrected after only the mildest informal confrontations by neighbors.\textsuperscript{166} 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.\textsuperscript{167}

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 individuals have taken the time to clear of deep snow.\textsuperscript{168} In Boston, similar norms about parking places have survived even in the face of opposition by city officials.\textsuperscript{169} Lior Strahilevitz has observed norms of behavior among commuting motorists.\textsuperscript{170} And psychologist Stanley Milgram describes his students' extreme, and at times physical, reactions when they were required to violate New York subway etiquette as part of a psychology experiment he was conducting.\textsuperscript{171} Milgram had his students ask people to give up their seats on the subway. More surprising than the unexpectedly high number of people who voluntarily gave up their seats to seemingly healthy, young students were the overpowering feelings of shame and dread felt by the student volunteers at having to violate such an entrenched social

\textsuperscript{165} Id. at 375. Most subjects administered shocks, even when directed to set the voltage level two steps beyond the designation: "Danger: Severe Shock." Id. at 376-77.

\textsuperscript{166} See BAUMGARTNER, supra note 155, at 80, 89-90 ("Although they may grumble privately about receiving such complaints, most people approached in this way are willing to accommodate the aggrieved parties.").


\textsuperscript{171} See Stanley Milgram, On Maintaining Social Norms: A Field Experiment in the Subway, in THE INDIVIDUAL IN A SOCIAL WORLD 37, 42-44 (John Sabini ed. 1992); see also Michael Luo, Revisiting a Social Experiment, And the Fear That Goes With It, N.Y. TIMES, Sept. 14, 2004, at B1 (replicating the same experiment 30 years later); Strahilevitz, Close Knit Groups, supra note 163, at 362 (discussing the existence of social norms on subways) (citing Matthew L. Fried & Victor J. DeFazio, Territoriality and Boundary Conflicts in the Subway, 37 PSYCH. 47, 55 (1974)).
taboo. So strong were these feelings that some students felt physical symptoms of illness and nausea.

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-tail hawk who had made his home for over a decade on a 12th floor cornice. Although the building was within its legal rights to remove the nest, the action sparked an outcry in the New York naturalist community, which had little sympathy with the building managers’ complaints about sticks and branches falling from the nest onto the building entrance below. When public opposition led to a blizzard of adverse media coverage and daily pickets outside the building, the cooperative’s wealthy residents succumbed to the public pressure and agreed to build a custom-designed stainless steel cradle for a new nest.

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 informal norms operative within tightly knit groups are likely to be far more invasive and all-encompassing. 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.

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 (individually) see fit, even when they are in private. While family members frequently share values, this will not always be the case. Accordingly, the freedom to act as one pleases, even within the private confines of one’s home, is frequently overstated,

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172 See Milgram, supra note 171, at 42-44.
173 See id.
175 See id.
177 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 185 and accompanying text.
particularly by those who fail to recognize the communal nature of the household.\textsuperscript{178} 

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 will lead them to participate in such communities, even in the cities. The ability of these non-territorial normative communities to monitor deviant behavior will necessarily be 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 be able to exert substantial, and often coercive, influence over their members.\textsuperscript{179} 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 even in the midst of the relative anonymity of city life.\textsuperscript{180}

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 always 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 a particular set of informal norms. The ownership of private property cannot, by itself, guarantee individual liberty where liberty is understood in the traditional libertarian sense as the absence of external compulsion for both private and public acts.

The most extreme versions of property as (strong) exit, which argue that private ownership (liberated from the constraints of coercive state regulation) completely frees individuals from coercion within the sphere of their property, only work if we focus exclusively on legal coercion and ignore the inescapable operation of informal norms. As norms scholars have long pointed out, however, informal norms can, under certain circumstances, be just as coercive as law.\textsuperscript{181} Even for more sophisticated and nuanced versions of property as exit, however, sensitivity to the pervasive operation of informal norms about how property may be used and how people should behave substantially weakens the claims that

\textsuperscript{178} See supra Part II.B.1.a.
\textsuperscript{179} See Green, supra note 4, at 170-73.
\textsuperscript{180} Cf. Fischer, supra note 101, at 197-201 (describing the emergence of strong subcultures in urban communities).
\textsuperscript{181} See supra note 142 and accompanying text.
theorists make on behalf of private property's ability to free owners from external coercion.

This observation about the limitations of property's exit mechanism does not mean that private ownership does not facilitate any individual exit at all. 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.\textsuperscript{182} Thus, a high degree of anonymity, as occurs, for example, when communities are large and members highly mobile, will weaken the force of the norms a community can enforce, thereby increasing the scope of individual autonomy possible when one withdraws from the presence of others 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 sight of others. This is an important qualification, because the property that conceals individuals behind closed doors represents a miniscule fraction of privately owned land.\textsuperscript{183}

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: The distinction between property and privacy is a meaningful one because privacy can arise without property ownership, and property ownership can exist without any meaningful privacy. 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.\textsuperscript{184} 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.\textsuperscript{185}

This last observation about 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, is implicitly hostile to the formation and maintenance of such communities. Proponents of property as exit are often loath

\textsuperscript{182} See McAdams, supra note 137, at 358.

\textsuperscript{183} See Peñalver, supra note 31, at 263-64.

\textsuperscript{184} Cf. Elickson, supra note 1, at 1353-54 (observing that socialist kibbutzim allow their members to enjoy private dwelling spaces).

\textsuperscript{185} See id. (discussing the lack of privacy within Hutterite communities); McAdams, supra note 137, at 358; Posner, supra note 137, at 140. Obviously, the widespread belief in an omniscient, omnipresent deity similarly weakens, at least for believers, even the weak exit made possible by such privacy.
to admit their suspicion of community. Some libertarians seek to avoid this tension by shifting the focus away from exit altogether. These theorists have argued that strong community is fully consistent with the libertarian commitment to individual autonomy as long as the initial decision to join the community is voluntarily undertaken. Once a person has freely chosen to enter into community, the argument goes, he cannot complain about the restraints on his freedom of action entailed by community membership, no matter how onerous. Nozick goes so far as to endorse the notion that a person should be allowed (freely) to choose to contract himself into perpetual servitude.

This move, however, may generate more problems than it solves. To begin with, it largely sidesteps the difficulties of determining whether a decision to enter 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 with 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.” Accordingly, he observes, “the Amish carefully socialize their young.” Thus, while the Amish practice adult baptism, a custom that supposedly guarantees that the choice to join the church is freely chosen, parents and the community employ a variety of strategies, including withholding higher education and encouraging intra-community courtship at a young age, to increase the likelihood that children will choose to remain within the community as adults. Other intentional communities exercise similar control over children’s education and

186 See, e.g., Ellickson, supra note 44, at 1565 (denying that liberal thought is characterized by hostility towards intermediary communities); Frug, supra note 37, at 1593 (“Professor Ellickson in fact suffers from the typical liberal schizophrenia about the role of any form of group power that is intermediate between a centralized state and the individual.”).
187 See, e.g., FRIED, supra note 51, at 14, 20-21; NOZICK, supra note 32, at 331.
188 See NOZICK, supra note 32, at 331.
190 Id.
191 See Kraybill, supra note 142, at 10.
192 See KRAYBILL, supra note 189, at 122-28 (describing the Amish struggle with the state to avoid sending their children to secondary school); Thomas J. Meyers, Education and Schooling, in THE AMISH AND THE STATE, supra note 142, at 87, 102-04; see also Labi, supra note 142, at 28 (“A lot of Amish will tell you that 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.”). Liberals often reject attempts to influence the moral decisionmaking of young people as antithetical to their individual autonomy. See, e.g., Ronald Dworkin, Foundations of Liberal Equality, in 11 TANNER LECTURES ON HUMAN VALUES at 84 (1989).
marriage to minimize the chances of defection. As a consequence, these groups have been extremely successful at keeping their children within the community. It is difficult to say, however, whether the children's decision to remain is a voluntary one.

In addition, and perhaps more fundamentally, the substitution of free entrance for free exit appears to reflect an arbitrary privileging of the conception of the good held at the moment of entrance over all subsequent conceptions of the good that individual might adopt over the course of his lifetime. The arbitrariness of this preference becomes more apparent the more time elapses between the individual's decision to join a particular community and his change of heart or circumstances.

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193 See, e.g., Shaffir, supra note 142, at 172-76 (discussing attempts by Hasidic Jewish communities to control their children's education); see id. at 178 (noting that Hasidic women are expected to be engaged or married by the time they finish high school).

194 See, e.g., id. at 182 (“[T]he facts are that Hasidic communities are increasing in numbers, they experience relatively few defections, and, perhaps most surprisingly, they are skillfully transmitting their values and traditions to successive generations.”). Scholars have estimated that roughly 80% of Amish children choose to remain within their communities. See Kraybill, supra note 189, 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 60% of their children as members). Some might argue that even an 80% retention rate reflects a relatively high degree of voluntariness among those who remain within the community. But the conclusion one draws depends on the baseline one chooses 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 47, at 104 (observing that 90% of those who join “totalistic communities” as adults leave within two years). Accordingly, an 80% retention rate reflects substantial communal influence on the individual's choice to live the Amish life. Whether this influence deprives that choice of the voluntariness necessary to assuage libertarian concerns is a deep and difficult question to which there may well be no good answer.

195 See Kymlicka, supra note 37, at 48 (arguing that the freedom to revise one's chosen life plan is a crucial component of liberal freedom).

196 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 51, at 19-21. 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. See 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.
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 community itself that changes, and not the person.\textsuperscript{197} 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.

Hayek suggests 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.\textsuperscript{198} He does not call for the elimination of such communities, however, because, he says, any attempt to eliminate private coercion would involve even greater coercion by the state.\textsuperscript{199} 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 Raz has observed, autonomy is not an all-or-nothing affair.\textsuperscript{200} Private ownership 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 property as exit for social life. As I have already argued above, the distinction between public and private coercion is a difficult one to sustain.\textsuperscript{201} The brute fact that this coercion originates from a

\textsuperscript{197} See NOZICK, supra note 32, 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.

\textsuperscript{198} See HAYEK, supra note 1, at 138.

\textsuperscript{199} See id.; see also HOY, supra note 27, at 15.

\textsuperscript{200} See RAZ, supra note 37, at 156.

\textsuperscript{201} See supra notes 156-161 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., ROBERTO UNGER, LAW IN MODERN SOCIETY 201-02 (1976); Robert Hale, Bargaining, Duress, and Economic Liberty, 43 COLUM. L. REV. 603, 625-28 (1943) ("Those who own enough property have sufficient liberty to consume, without yielding any of their liberty to be idle. Their property rights enable them to exert pressure of great effectiveness to induce people to enter into bargains to pay them money. The law endows them with the power to call on the governmental authorities to keep others from using what they own."); Chemerinsky, supra note 29, at 510-11.
private entity rather than the state makes little difference to the coerced.\textsuperscript{202} The goal of this 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.\textsuperscript{203}

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 other words, at times, state coercion may well be the (overall) coercion-minimizing solution.

In the context of informal norms, there are several steps the state could take to minimize private coercion, without necessarily increasing the net coercion experienced by individuals in society. In increasing levels of force, those steps are: (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 community in the first place by – among other things – increasing the cost of initial entrance; 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.\textsuperscript{204} Although the courts routinely enforced these agreements (largely on libertarian grounds),\textsuperscript{205} 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, while “coercive” of the individual ex ante (in that it diminished 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

\textsuperscript{202} See, e.g., UNGER, supra note 201, at 201-02 (arguing that the distinction between public and private power is increasingly indefensible); Chemerinsky, supra note 29, at 510-11 (“[T]he concentration of wealth and power in private hands . . . in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct.”); Seidman, supra note 29, at 1017 (“Once the decision to do nothing was, itself, seen as government ‘action’ for which the government bore responsibility, it became difficult to understand how people could be treated as ‘free’ when coerced by forces in the private sphere . . . .”).

\textsuperscript{203} See supra notes 156-161 and accompanying text.

\textsuperscript{204} See WEISBROD, supra note 137, at 61-67, 72-73.

\textsuperscript{205} See id. at 121.
supportive of state efforts to craft rules of property and contract law that inhibit tightly-knit communities from coercing their individual members.\textsuperscript{206}

Second, the state could also use a variety of mechanisms affirmatively to discourage individuals from entering into tightly knit communities, such as marriages or religious enclaves, from which exit will be predictably 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. Or it could use the public schools to teach large numbers of children about the evils of joining tightly knit communities. Such actions by the state would not coerce the affected groups and yet 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.\textsuperscript{207} 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.\textsuperscript{208} Some courts have recognized such a cause of action, at least under certain limited circumstances.\textsuperscript{209} 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

\textsuperscript{206} See Green, \textit{supra} note 4, at 176-77; cf. Radin, \textit{Time, supra} note 150, at 751-55 (libertarian considerations require some limitation on the ability of property owners to restrain alienation or create servitudes).

\textsuperscript{207} See, e.g., Green, \textit{supra} note 4, at 177-80 (describing steps that communities must take in order to facilitate individual members' exit); Mark D. Rosen, \textit{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).

\textsuperscript{208} See WEISBROD, \textit{supra} note 137, at 69-79; Gruter, \textit{supra} note 137; see also Ginerich v. Swartzentruber, 22 Ohio N.P. 2 (1913); 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 after their departure from the church).

\textsuperscript{209} See \textit{supra} note 208.
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 property as 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.

In other words, whether state regulation increases overall coercion or minimizes it is an empirical 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 hand 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 an individual as she lives out her 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 the broad assumptions and abstract models favored by proponents of property as exit. The overall coercive effects of each regulatory act will have to be considered in light of the particular facts on the ground it is designed to address.
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 section argues, especially if they own property), individuals will always be subject to the coercive norms of some community. Such community norms make strong exit an impossibility for virtually all human beings. 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 private communities 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 conceive 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, views 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 property at the same time exposes the individual 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, particularly when exit is conceived in its weaker form. Both approaches, for example, draw strength from and affirm the intuitive view of property as a refuge from the outside world. But property as entrance employs as the paradigmatic case of the use of property as a refuge not the dissenting individual retreating onto his land to live his life as he sees fit but a dissenting group forming an insular enclave. This idea of property as a means of binding people to one another in community has been obscured by liberal theorists’ assumption that the entity best positioned to take advantage of property’s refuge is the individual person.
As with exit, we can conceive of the entrance facilitated by property ownership in both strong and weak terms. Strong entrance is often substantially territorial in its orientation. 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 in very effective ways to create flourishing autonomous enclaves.\(^{210}\) 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 pattern.”\(^{211}\) And when they have done so, the rights of private property have been an essential part of that process.\(^{212}\) At the same time, however, one who buys into a utopian community escapes the norms of mainstream society only by radically exposing himself to the values of the dissenting group. This is because the act of radical exit is far more often communal than individual.\(^{213}\)

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 shield the individual from community norms but rather appears to have the opposite effect. Property gives its owners a stake in their communities, reducing their mobility and inducing them to engage more fully in community life of all sorts. Moreover, the market transactions necessary to acquire and maintain property has a profound socializing effect on property owners. Accordingly, for both those who reject and those who embrace the mainstream, property serves as a vehicle for tying individuals more closely to their respective social groups.

\(^{210}\) See, e.g., Richard T. Ely & George S. Wehrwein, Land Economics 101 (1964); Robert M. Cover, 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 enclave[s]”); Nomi Maya Stolzenberg, The Return of the Repressed: Illiberal Groups in a Liberal State, 12 J. Contemp. Legal Issues 897, 900 (2001) (arguing that private rights and relegation of religion to the private sphere can create substantial room for the exercise of religious power within separatist religious groups).

\(^{211}\) Laurence Veysey, The Communal Experience: Anarchist and Mystical Communities in Twentieth Century America 52, 61-62 (1978); see Hirschman, supra note 39, at 107. Indeed, so common is this tendency that not a single decade has passed in U.S. history in which some group has not broken off from society to found its own enclave. See Hicks, supra note 100, at 3; Timothy Miller, The Quest for Utopia in Twentieth-Century America xii (1998) (“At no point since the early 18th century . . . has America been without communes.”); Veysey, supra, at 61-62.

\(^{212}\) See supra note 210.

\(^{213}\) See Veysey, supra note 211, at 61-62 (“Cultural radicalism,” Veysey observes, “is usually related to a communitarian impulse . . .”).
A. Strong Entrance

1. The Role of Property In Fostering Normative Communities

It is clear why, given a profound human need for social connection, private property is effective at fostering group exit even while its power to facilitate individual exit is more limited.214 If we assume a deeply-rooted need for a rich social life in order to sustain a healthy human existence, then the more of that social life that can be brought within the boundaries of a particular dissenting community, the less need there will be for members of that community to satisfy their social needs beyond the confines of the group. A territorially concentrated group of property-owners (or a property-owning group) can therefore 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.215

By minimizing the need of individual members to interact with people whose values do not coincide with those of the group, the group 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. “In radical movements,” Veysey explains, “when the personal commitment occurs in a communal setting, the group becomes most effectively sealed off from the alien influences of the outside world.”216 “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

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214 This process of group exit is closely related to what Abner Greene has referred to as “permeable sovereignty.” Greene, supra note 59, at 4. The principal difference is that Greene’s focus is on the sovereign’s overt exemption of certain dissenting religious groups from generally applicable public laws. The process of group exit facilitated by territorial separatism, however, operates independently of public law doctrine. In other words, as several scholars have observed, dissenting groups can get a great deal of the way to Greene’s permeable sovereignty (though perhaps not all the way), by making coordinated use of private law mechanisms such as property and contract. See infra note 227 and accompanying text.

215 ROSABETH MOSS KANTER, COMMITMENT AND COMMUNITY 2 (1972); MILLER, supra note 211, at xx-xxi; 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) (“The existence of Kiryas Joel as a homogenous, exclusive, religious community depends crucially on the existence of private rights, on the rights of private property and contract by which real estate is obtained and controlled and also on the rights of ‘family privacy’ and private education.”).

216 VEYSEY, supra note 211, at 459.
potential converts."\textsuperscript{217} The creation of a dissenting enclave, with its internalization of virtually all social interactions, means that most of the individual transactions and conflicts that are unavoidable in day-to-day life will be governed by the group's own norms.\textsuperscript{218}

The benefits of collective exit will be realizable whenever one of two conditions is met. First, if exposure to 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 a concentrated enclave than it would if its members lived according to their values while dispersed throughout society.\textsuperscript{219} Second, if mere exposure to the values of mainstream society would harm members of the dissenting community, either by subjecting them to hostile reactions of outsiders or to conflicting community values, enclave formation will reduce the cost associated with such exposure by allowing members to accomplish more of their day-to-day tasks within the community.\textsuperscript{220} 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 enclave formation.

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 each member's dependence on the group for the satisfaction of her social needs. Because most of the individual members' social relationships will occur within the context of the group, the cost to the individual of exiting the group will increase dramatically.\textsuperscript{221}

\textsuperscript{217} See id. at 451.

\textsuperscript{218} As Richard Ely and George Wehrwein put it, "[c]losely settled communities remain impervious to outside influences." ELY & WEHRWEIN, supra note 210, at 101.

\textsuperscript{219} 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 247-382 (1986) (discussing tensions between the Rashneeshee and their neighbors as a result of Rashneeshee attempts to take over the local government by voting as a bloc); Simon Romero, Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect, N.Y. TIMES, Nov. 14, 2004, at A20 (noting local concerns about the potential political influence of a polygamous sect were its members to vote as a bloc).

\textsuperscript{220} See Romero, supra note 219, at A20 (noting that residents of a polygamous enclave prefer not to interact with non-members).

\textsuperscript{221} See Gruter, supra note 137, 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 ban for themselves, nor could they there by the usual interchange
Raising the cost for individuals to exit the group enhances the strength of the group’s norms with respect to its members. And that strength in turn allows the group to place greater demands on the individual without risking individual exit. By isolating individual members from mainstream society, the dissenting community is able to reduce the temptation for individual group members, particularly their children, to adopt mainstream values that violate group beliefs.\textsuperscript{222}

This internalization of social life in turn makes groups that form themselves into enclaves better able than geographically dispersed communities to monitor member conduct.\textsuperscript{223} In part, this occurs because consolidating its members’ residences within a definite geographic area makes it far easier for the group to identify insiders and outsiders and to limit the interactions between the two groups as the community sees fit. Scholars who have studied intentional communities have therefore frequently identified “geographic proximity” as an essential feature of those groups.\textsuperscript{224} In addition, however, the increased costs of exit generated by internalization of virtually all social life within the community

of necessary reciprocal services, from shoe repairs to assistance with plowing or harvesting.”); see also WEISBROD, supra note 137, at 69-76 (describing the same case).

\textsuperscript{222} See supra notes 216-218 and accompanying text; VEYSEY, supra note 211, at 451. The coercive force that these high exit costs can generate over the individual is quite substantial. Several scholars of intentional communities have observed that the threat of expulsion is a powerful tool by which the group can control the conduct of individual members. See WEISBROD, supra note 137, at 99-100 (discussing sanction of expulsion among nineteenth century utopians); Gruter, supra note 137, at 273-74 (discussing sanction of shunning among Amish); Rosen, supra note 207, at 1098-1106 (1998); Stolzenberg, supra note 215, at 315 (discussing sanction of shunning among Satmar Hasidim). The sanction can deprive an individual of home, family, and, under certain circumstances, material possessions. See Gruter, supra, at 273-74. Thus, the isolated, tightly knit group has far more powerful means to bend an individual to its will than a group in which members routinely interact with others who do not share their values.

\textsuperscript{223} Anything that increases dependency or intercourse between the dissenting community and the broader society weakens the boundaries between the two groups and therefore weakens the autonomy of the dissenting group. As Kanter has put it, “[m]any of the difficulties that successful groups later encountered stemmed in part from a weakening of the boundaries.” KANTER, supra note 215, at 169-70. Thus, advances in communications technology may make it more difficult for them to achieve their goals. See id. Because these groups are able to survive, at least in part, by socially isolating their members from mainstream society, improved communications, particularly those that make it more difficult for the group to monitor communications between members and outsiders, represent a threat to their integrity.

\textsuperscript{224} ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 158 (1986); James W. Nickel, Group Agency and Group Rights, in NOMOS XXXIX (ETHNICITY AND GROUP RIGHTS) 235, 235-36 (Ian Shapiro and Will Kymlicka eds. 1997).
enables the community to require that members submit themselves to extensive
and invasive community monitoring of individual conduct.225

Property as entrance views private ownership as facilitating the ability of
individuals to opt into communities whose value systems differ from those of the
mainstream. By joining (or remaining in) tightly knit communities, individuals
impose on themselves a much more invasive (at least from the outsiders’ point of
view) set of social norms than exist in the broader society.226 Thus, the strong
version of property as entrance suggests an interesting inversion of the traditional
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 facilitating individual
efforts to join themselves to the values of the particular community in which the
property is situated. In other words, if property rights protect the freedom of
dissenters, particularly as to public conduct, they do far more for dissenting
groups and their members than for isolated individuals.227

225 See supra note 216-218 and accompanying text; see also Ellickson, supra note 1, at 1353-54
(describing the lack of privacy within Hutterite communities); Labi, supra note 142, at 31
(discussing the Amish “ethic of confession,” which encourages church members to come forward
to reveal their sins to the community).

226 While this notion of “buying in” to a community is certainly far stronger for those joining
minority separatist communities, it operates within the mainstream as well. See infra Part III.B.
After all, the choice not to purchase property within a separatist community is a choice to enter the
mainstream, thereby allowing oneself to be exposed to and influenced by its values, such as they
are.

227 See, e.g., ELY & WEHRWEIN, supra note 210, at 100; Nomi Maya Stolzenberg, The Return of
the Repressed: Illiberal Groups in a Liberal State, 12 J. CONTEMP. LEGAL ISSUES 897, 900 (2001)
(arguing that private rights and relegation of religion to the private sphere can create substantial
room for the exercise of religious power within separatist religious groups).

Of course, even collective exit is itself circumscribed by mainstream culture. There is
more at work here than an observation that those who decide to form dissenting communities are
themselves – at least in part – products of the mainstream culture. See Hicks, supra note 100, at
12-13 (“Utopian communitarians are dedicated participants in American culture, regardless of
their apparent desire to secede from it.”). In addition to influence by the mainstream through the
vector of individual members, mainstream society exercises direct power over dissenting groups
through two mechanisms. First, the majority exercises substantial power over dissenting groups
through the rules of the formal legal system by which the mainstream sets the boundaries beyond
which dissenting communities may not stray. This mechanism operates any time the state or non-
community member uses the formal legal system to apply generally applicable public laws to the
dissenting community. The application of drug laws to the members of the Native American
Church, see Employment Div., Dep’t of Hum. Res. v. Smith, 494 U.S. 872 (1990), the enforcement
of constitutional norms on tribal lands, see Indian Civil Rights Act, Pub. L. No. 90-284, Title II
(Apr. 11, 1968) (codified at 25 U.S.C. §§ 1301-41), and the elimination of the tax exemption for
Bob Jones University, see Bob Jones University v. United States, 461 U.S. 574 (1983), are
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. As communication and travel have become faster and more inexpensive, 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 maintenance 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 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. Political advocacy groups and clubs for discussing topics such as sports, religion, or literature would 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 examples. *See generally* Greene, *supra* note 59 (discussing the extent to which separatist communities should be exempted from generally applicable public laws). Second, because no normative community will be wholly self-sufficient, dissenting communities will be susceptible to pressure from the mainstream through the same informal sanctioning mechanisms that operate upon individual dissenters. When the values of the dissenting community conflict sufficiently with those of the mainstream, the majority may impose substantial sanctions on the dissenting group by boycotting transactions with that group and sanctioning its individual members. The reactions of mainstream society to racial hate groups illustrate such informal sanctioning mechanisms in action. *See, e.g.*, DAVID A. NEIWERT, *In God's Country: The Patriot Movement and the Pacific Northwest* 19-21 (1999) (discussing the reaction of local residents to the Montana Freemen).


229 It is perhaps a testimony of the continued need for such interaction that the most successful on-line relationships typically flower at some point into face-to-face friendships. *See, e.g.*, John A. Baugh & Katelyn Y.A. McKenna, *The Internet and Social Life*, 55 ANN. REV. OF PSYCH. 573, 586-87 (2003); cf. Debra Nussbaum Cohen, *When a Spiritual and Romantic Quest Leads to the Web*, N.Y. TIMES, July 31, 2004, at A14 (describing the progression of a successful on-line relationship from exchanging e-mail, to speaking on the phone, to meeting in person).

survival, and the enhancements in communications technology represented by Internet chat rooms and e-mail have improved their ability to maintain and reinforce community.\textsuperscript{231}

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.\textsuperscript{232} Tellingly, on-line communities are strongest when they can tie into “real world” social networks, a process that increases the cost of individual deviance from community norms.\textsuperscript{233}

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 enclave formation even as it increases the challenge of maintaining enclaves. First, low-cost communications make it easier for nascent enclaves to advertise their presence and attract possible recruits from far away. 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.\textsuperscript{234}

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 political divide between town and country, and between so called “red states” and “blue states.”\textsuperscript{235} 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

\textsuperscript{231} See, e.g., Baugh & McKenna, supra note 229, at 582; Mukerji & Simon, supra note 230, at 268-69.
\textsuperscript{233} Cf. Baugh & McKenna, supra note 229, at 586-87 (When Internet relationships “get close enough (i.e., when sufficient trust has been established), people tend to bring them into their ‘real world’ . . . . This means that 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.”).
\textsuperscript{234} See, e.g., 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).
\textsuperscript{235} See, e.g., id. at A1 (“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.”).
quite possible that territory will in the future take on even more (and not less) normative significance.  

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 worldviews into practice. The communities that have physically opted out from society have traditionally been either groups who have believed that every aspect of human life should conform to the group’s holistic ethical system or groups that have sought to put into practice some strongly held, though unpopular, belief about how society ought to be structured.

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 20th century. Groups that have successfully separated themselves in order to implement narrower political or social ideals include the 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.

Dissenting minority groups with powerful normative visions about how life ought to be lived will often benefit from physical separation from society and 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 certain

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236 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 each other.

237 See Veysey, supra note 211, at 63 (describing utopians as motivated by a desire to put strong belief into practice).

238 See, e.g., Fitzgerald, supra note 219, at 247-382 (discussing the Rashneeshees); Charles Pierce LeWarne, Utopias on the Puget Sound, 1885-1915 (discussing anarchist utopian communities in the Pacific Northwest at the turn of the twentieth century); Miller, supra note 211, at 87-89, 172-76 (discussing the Broderhof and early Mormons); Stolzenberg, supra note 227, at 906-08 (discussing the formation of the Hasidic enclave in New Square, New York).

239 See Miller, supra note 211, at 31-32, 107-10 (discussing single-tax communities and small, agrarian communes).
sorts of groups to create the boundaries necessary to maintain their distinctive ways of life.  

B. Weak Entrance

"Boundaries define a group," 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. 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 poor proxy for deep affiliation.

Thus, property’s socializing function operates with less intensity outside of tightly-knit communities. Nevertheless, even outside of tightly-knit, territorial communities, property still acts as a mechanism for binding people to one another. This connection between property ownership and social norms outside of territorially defined normative communities occurs through a variety of mechanisms.

To begin with, property ownership has a profound 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. This decreased mobility among property owners reflects,  

240 See Shaffir, supra note 142, at 176-81 (discussing the importance of geographic concentration for community identity among Hasidic Jews); Richard Thompson Ford, The Boundaries of Race, 107 HARV. L. REV. 1841, 1889 (1994); see also Miller, supra note 211, at xx-xxi (including “geographic proximity” as an essential ingredient for utopian communities); Sack, supra note 224, at 219 (proximity is “[o]ften an essential means of defining social relationships”). When members of a geographically isolated community go to the corner store, the people with whom they interact on the way will be people who share their particular system of values. When their children go to play in the local park or at the neighbor’s house, they will be playing with children who have been raised according to similar values and supervised by adults who share the group’s point of view. Under these conditions, the chance that community members or their children will be inadvertently exposed to a differing point of view is correspondingly reduced. See Veyssey, supra note 211, at 459; Shaffir, supra, at 177. The result is that geographically-based dissenting communities are far more effective than geographically dispersed communities at maintaining a strong sense of community and, consequently, strong adherence to their beliefs. See Kanter, supra note 215, at 169-70.

241 See id. at 169-70.

242 See Greene, supra note 59, at 40-42, 56.

243 See Ford, supra note 228, at 1404-05.

244 Cf. Fischer, supra note 101, at 101-02 (observing that less mobile community residents were more likely to be socially involved with their neighbors).

at least in part, the higher costs of exiting a community once one has purchased a home.\footnote{See William H. Rohe & Leslie S. Stewart, Homeownership and Neighborhood Stability, 7 Housing Policy Debate 51-52 (1996); William H. Rohe et al., The Social Benefits and Costs of Homeownership, Research Institute for Housing America, Working Paper No. 00-01, at 7 (2000) (on file with author).} A consequence of this decreased mobility is that property owners are more likely than others to engage in informal and formal social interactions with their neighbors.\footnote{See id. at 99; D. Mark Austin and Yoko Baba, Social Determinants of Neighborhood Attachments, 10 Sociological Spectrum 59, 63 (1990); T. Baum & P. Kingston, Homeownership and Social Attachment, 27 Sociological Perspectives 159 (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 Onwership: Crime and the Tipping and Trapping Processes, 33 Environment and Behavior 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 William M. Rohe & Victoria Basolo, Long-term effects of homeownership on the self-perceptions and social interactions of low-income persons, 29 Envt. & Behavior 793 (1997).} "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."\footnote{White, supra note 247, at 326.}

Owning property ties us to our neighbors in less literal ways as well. Property gives owners affirmative reasons to reach out to form relationships with their neighbors and with their 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."\footnote{Farrell, supra note 122, at 12; see also William A. Fischel, The Homevoter Hypothesis I-18 (2001) (arguing that owners’ concerns about their home values is a central motivator of local politics); Thomas W. Merrill, Private Property and the Politics of the Environmental Movement, 28 Harv. J. L. & Pub. Pol’y 69, 71-76 (2004) (arguing that property increases owners’ incentives to work to improve the environment around their property and increases owners’ susceptibility to both formal and informal sanctions); William M. Rohe & Victoria Basolo, Long-term Effects of Homeownership on the Self-Perceptions and Social Interaction of Low-Income Persons, 29 Environment and Behavior 793 (1997) (noting connection between homeownership and interaction with neighbors); S. Saegert and G. Winkel, Social Capital and the Revitalization of New York’s Distressed Inner-City Housing, 9 Housing Policy Debate 17 (1998) (same); cf. Vicki Been, Exit as a Constraint on Land-Use Exactions, 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).} Perhaps for this reason, homeowners are more likely than non-owners to be engaged with
local and supra-local politics. In their review of the social science literature, William Rohe and Leslie Stewart found that "the empirical evidence indicates that homeowners are indeed more likely than renters to participate in local organizations, even after controlling for income, education, and other socioeconomic characteristics."251

As a result of their increased involvement with neighbors and community, homeowners are susceptible to a greater degree of informal social pressure than renters.252 Admittedly, this "buying in" effect is not as powerful in the mainstream as the territorial effects within separatist enclaves because of the lower level of moral consensus outside of territorial enclaves. Nevertheless, in light of this substantial effect, it should come as no surprise that communities characterized by high rates of homeownership score higher on measures of community cohesion and order.253

In addition to its effects on mobility and community involvement, the act of acquiring property binds people to one another by increasing their need to engage in market transactions. For the majority of people, the most significant piece of property they own is their home.254 The great majority of homeowners, moreover, owe substantial debt on their primary residences.255 These long-term financial obligations create enormous incentives for homeowners to engage in repeated market transactions. This need to enter the market in turn exposes property owners to the sanction-backed values of the community that hosts the market, whatever those might be.256

250 "Owners are almost consistently more engaged in local politics than renters are. More owners believe that local elections are important. . . . Clearly, owners are more likely to be involved in community improvement activities. . . . [O]ners are more likely to have participated as voters or activists in national elections . . ., lobbied state and federal officials, and given money to support candidates. . . . More often than renters, owners can correctly name their congressional representative, the governor of their state, and the school superintendent." Peter H. Rossi & Eleanor Weber, The Social Benefits of Homeownership, 7 HOUSING POL’Y DEBATE 1, 23-24 (1995).
251 Rohe & Stewart, supra note 246, at 37, 46; see also STUART M. BUTLER, PRIVATIZING FEDERAL SPENDING (1985) (noting connection between homeownership and community involvement).
252 See Rohe & Stewart, supra note 246, at 47.
253 See id. at 54; see also Richard K. Green & Michelle White, Measuring the Benefits of Homeowning’s Effect on Children (1994) (working paper on file with author).
255 See id. at 15-16, 22.
256 Of course, even the owners of productive property must rely on market transactions to convert the potential value of that property into income they can use. Accordingly, even owners of productive property will be far less self-sufficient than libertarian-leaning property scholars often assume. See Ellickson, supra note 1, at 1352-53.
While conceding the need for even "self-sufficient" individuals to have recourse to the market, proponents of property as exit typically ignore the substantial (and often coercive) social relationships generated when individuals (or households) engage in economic transactions with others. Nevertheless, as Carol Rose and others have observed, "[d]espite its appeal to self-interest, commerce also carries culture: it inculcates rules, understandings, and standards of enforced reciprocity of advantage. To do business, one must learn the ways and practices of others...."

Scholars who recognize the socializing force of the market, however, often emphasize only the market’s transmission of values that relate to the rules, such as honesty and trust, immediately necessary for the market to operate efficiently. But people’s need to access the market means that, under the right circumstances, 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 unrelated to the market’s operation, that society can 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.

Hayek, Friedman, and others have argued that competition fostered by private ownership prevents the use of market power to enforce non-market-related norms. But there is evidence that such 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 of the use of the market to enforce values unrelated to the market’s ability to

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257 See, e.g., id. at 1353-54 (describing the self-sufficiency created by private land-ownership as one in which the property-owner is still involved in market transactions in which he utilizes his "human capital").

258 See, e.g. id. at 1353.

259 See ROSE, supra note 84, at 147; Daniel Markovits, Contract and Collaboration, 113 YALE L.J. 1417, 1446-74 (2004); RAZ, supra note 37, at 252-53 (describing the market as a normative institution).

260 See ROSE, supra note 84, at 147; Markovits, supra note 259, at 1448-50 (describing the community established by contract as one centered around the practice of "promissory morality"); RAZ, supra note 37, at 252-53 (describing the values inculcated by the market as relating to "the conduct of negotiations, the communication of information, the avoidance of actions in restraint of trade, etc.").

261 See HAYEK, supra note 1, at 137; M. FRIEDMAN, supra note 1, at 15-19; see also BUCHANAN, supra note 1, at 29.
function efficiently.\textsuperscript{262} Indeed, the elaborate and pervasive system of racial exclusion that existed in the South prior to the civil rights movement rested in no small part on the aggregated effects of individual white citizens exercising their rights of private property and freedom of contract.\textsuperscript{263} In a similar vein, Constance Perrin discusses how insurance companies in the mid-twentieth century used value-judgments about “immoral” sexual practices to deny people insurance, without any evidence of increased risk.\textsuperscript{264} Indeed, 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.\textsuperscript{265}

It is perhaps in part a result of the market’s socializing power that property ownership positively correlates with social conformity. Those who own property, are, on balance, also more likely to accede to the force of society’s formal and informal norms of behavior.\textsuperscript{266} “Owning assets provides a stake in the system and offers a reason for participating in economic and social affairs.”\textsuperscript{267} And Claude Fischer concludes her study of urban social life by noting that people with higher income tend to be more socially involved than people with lower incomes.\textsuperscript{268} Conceiving of property as entrance explains why it is that the individual property

\textsuperscript{262} Cf. Posner, supra note 137, at 136-42 (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 (1995) (describing how the mechanism of the market can be used to foster goals of racial subordination); Richard H. McAdams, Relative Preferences, 102 Yale L.J. 1, 91-103 (1992) (same).

\textsuperscript{263} See Woodward, supra note 159, at 98 (“Many [“Whites Only” signs] appeared without requirement by law – over entrances and exits, at theaters and boarding houses, toilets and water fountains, waiting room and ticket windows.”); see id. (“In most instances segregation in employment was established without the aid of statute.”); see id. at 101 (“The most prevalent and widespread segregation of living areas was accomplished without need for legal sanction.”); see id. at 102 (“Right here it is well to admit and even to emphasize, that laws are not an adequate index of the extent and prevalence of segregation and discriminatory practices in the South.” (emphasis in original)).

\textsuperscript{264} See Perrin, supra note 117, at 87-89; see also McAdams, supra note 137, at 410-19 (discussing the evolution of inefficient “nosy” norms); Posner, supra note 137, at 1720-21 (discussing the emergence of inefficient norms based on people’s nonconsequentialist moral beliefs).

\textsuperscript{265} See McAdams, supra note 137, at 373-74.

\textsuperscript{266} See, e.g., Laub & Simpson, supra note 111, at 620-25; Farrell, supra note 122, at 12-13.


\textsuperscript{268} See Fischer, supra note 101, at 252.
owner, the one who, on the conception of property as exit should have the greatest degree of freedom to structure his life as he sees fit, is often caricatured in popular culture as the greatest conformist.

Perhaps no community better captures the tension between the notions of property as exit and property as entrance than the American suburb, which has been celebrated as an expression of middle-class individualism and condemned as a stifling dungeon of bourgeois conformity. Residents of the suburbs, where 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. It appears then, that instead of encouraging nonconformity, property may well have the opposite effect on its owners.

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 rich) more consistently flout social convention. Without

269 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).

270 See, e.g., 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 ultimate effort of the suburban escape in our time is, ironically, a low-grade uniform environment from which escape is impossible.”); see also Robert Fishman, Bourgeois Utopias: The Rise and Fall of Suburbia 8-9 (1987) (suburbs are a “cultural creation, a conscious choice based on the economic structure and cultural values of the Anglo-American bourgeoisie”); Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 4 (1985) (describing suburban lifestyle as a reflection of dominant culture in the United States).

271 See Baumgartner, supra note 155, at 79-80 (discussing willingness of most suburban neighbors to accede to neighbor’s non-confrontational complaints); Schneider, supra note 167, at 881-83 (discussing the apparent strength of social control in the suburbs).

272 See, e.g., Paris Hilton; see also Posner, supra note 137, 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.”).

273 An example of the tendency of the very rich and very poor to flout informal social norms is provided by the much analyzed survival statistics of the Titanic disaster. There is a strong, though informal, norm that, in situations of nearly certain death, women and children should be given the first opportunity to survive. Interestingly, the lowest survival rate of adult male passengers on Titanic was among the men holding Second Class tickets. See Lord Mersey, Report on the Loss of the Titanic, July 30, 1912 (observing that 33% of the First Class adult men, 16% of the Third Class adult men, but only 8% of the Second Class adult men survived the sinking, compared to an
access to property, they are cut off from 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 travel easily, to entertain guests, to go out socially, to free time for themselves from household tasks, and so on." 274 William Julius Wilson likewise attributes the failure of the poorest citizens to conform to mainstream norms to their social isolation. 275 Excluded from participation in the socializing institutions of the job market and property ownership, members of the "underclass" routinely act – even in public – in ways that would not be tolerated within the typical American suburb. 276 Rather than the propertied, as Ellickson predicts, it appears to be the property-less who are most likely to "thumb their noses" at the world and its values.

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 cost-less, the notion of property as entrance corresponds with its own ideal form of human community. Within the conception of community favored by property as exit, the individual holds all the cards. Her voluntary entrance and easy exit eviscerates the community's ability to impose the demands on individual members necessary to carry out unpleasant tasks or maintain internal discipline.

The model community from the point of view of property as exit is the Internet chat room, voluntarily (perhaps even anonymously) joined and just as easily abandoned. 277 The low cost of exit from these communities, however, makes it virtually impossible for them to effectively enforce their norms against their own members. Social scientists have observed, for example, that open-access Internet chat rooms have a great deal of difficulty preventing unwanted behavior because there is virtually no cost to users of deviating from accepted

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274 Fischer, supra note 101, at 252.
275 See William Julius Wilson, The Truly Disadvantaged 56-60 (1990) (discussing high degree of deviant behavior among the underclass).
276 See id.
277 This is not to say that some individuals will not attach substantial importance to their on-line identities such that the costs to them of exiting particular on-line communities will be exceptionally high. See, e.g., Jack M. Balkin, Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds, 90 Va. L. Rev. 2043, 2066 (2004).
norms and departing the community (only to return with a new identity). \(^{278}\)
Similarly, neighborhoods with high rates of resident mobility (i.e., low costs of exit) are characterized by a diminished sense of community. \(^{279}\)

Communities with low exit costs are neither robust nor deeply satisfying to their members. \(^{280}\) They are characterized by low levels of commitment and constantly shifting membership. 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. In contrast with this ideal of evanescent community, the model communities from the perspective of property as entrance are those unchosen communities given to us at birth (e.g., nations, churches, families, ethnic groups, cultures) and those chosen communities from which, once we have entered, the costs of exit are typically high (e.g., professions, marriages, close circles of friends, avocations, neighborhoods). These are the very communities that are most important in people's lives. \(^{281}\)

**D. Property as Entrance and the Notion of Freedom**

Rejecting the model of property as exit does not mean that private property cannot be used to create a space for individual autonomy understood as freedom from external constraint. But, to the extent that private ownership facilitates individual autonomy it does so as a consequence of the values of a particular community. That is, property creates individual autonomy not because of anything inherent in the institution of property itself, but rather because the particular community in which the property is situated chooses to recognize the value of individual control. \(^{282}\) As Charles Taylor has put it, "the free individual or autonomous moral agent can only achieve and maintain his identity in a certain type of culture. . . . The free individual of the West is only what he is by virtue of the whole society and civilization that brought him to be and which nourishes him." \(^{283}\)

\(^{278}\) See, e.g., Evans, supra note 232, at 200-01.

\(^{279}\) See, e.g., Farrell et al., supra note 122, at 12-13, 21 (noting the negative correlation between "resident mobility" and community strength).

\(^{280}\) See, e.g., id. at 11-13, 21 (noting that positive psychological benefits are associated with a strong sense of community and that a sense of community is negatively correlated with ease of exit).

\(^{281}\) See Green, supra note 4, at 168 ("[T]hese are the things that make most people's lives valuable.").

\(^{282}\) See TAYLOR, supra note 27, at 205-06; Fish, supra note 37, at 2277-78.

\(^{283}\) TAYLOR, supra note 27, at 205-06; see Fish, supra note 37, at 2277-78. Or, as Frank Lloyd Wright somewhat paradoxically said, individuality "must have its roots in a stable community whose values the citizen shares and protects." ROBERT FISCHMAN, URBAN UTOPIAS IN THE TWENTIETH CENTURY: EBENEZER HOWARD, FRANK LLOYD WRIGHT, AND LE CORBUSIER 157 (1977).
This observation suggests that combining the model of property as entrance with a concern for individual autonomy yields a fundamentally different understanding of individual liberty than the one associated with property as exit. Rather than understanding individual freedom as the absence of external compulsion, property as entrance suggests that it should be understood at least in part as an affirmative freedom, fostered by society, to choose among a diversity of reasonably healthy (i.e., well-functioning) normative communities. Autonomy conceived in this way is enhanced when the individual has a broad menu of communities from which to choose. Moreover, if that choice is to be meaningful, this menu must include a variety of radically dissenting, even illiberal, communities.

The difference between the notion of freedom presupposed by property as exit and the version that prevails within property as 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. As discussed above, while property does facilitate a certain degree of individual exit, the interdependence of human beings means that the degrees of individual eccentricity facilitated by property ownership will be highly circumscribed. In contrast, the communal enclave formation envisioned by property as entrance permits a far broader range of lifestyles to take shape. Property as entrance therefore views individual freedom as most enhanced when a genuine diversity of groups are free to coalesce around their own fundamentally differing conceptions of the good.

This commitment to the possibility of communal deviance means that property as entrance is less committed than property as exit to the subsidization of individual exit from separatist communities. While some right of exit is necessary to protect the individual from community abuse, it is not clear that the state should ensure that the right of exit is an easy one to exercise. Over-

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284 See KYMLICKA, supra note 37, at 165; Alexander, supra note 100, at 30 (role of the state is to preserve communitarian pluralism); Larry Alexander, *Illiberalism All the Way Down*, 12 J. CONTEMP. LEGAL ISSUES 625, 630-34 (2001); Joseph L. Sax, *Do Communities Have Rights?*, 45 U. PITT. L. REV. 499, 509 (1984) (“Diversity is a good thing, in human settlements as well as nature . . . because it reveals differences, variety and the range of the human spirit. . . . [W]e all benefit by the maintenance of such distinctive structures and life styles.”).

285 See NOZICK, supra note 32, at 320 (“[M]any particular communities internally may have restrictions unjustifiable on libertarian grounds”); Alexander, supra note 284, at 630-31; Green, supra note 4, at 170 (“I]f real diversity is to flourish, we need a social union of social unions that are not themselves cosmopolitan, that embody and defend their distinctive ideals and purposes, even when that requires restrictions on the rights of their members.”).

286 See, e.g., MILL, supra note 152, at 54-58 (extolling the virtues of eccentricity and deplored society’s tendency to enforce conformity on individuals).
facilitation of exit weakens tightly knit communities, resulting in a normative homogeneity that waters down the patterns of life among which individuals can choose. Moreover, given the tendency of high exit costs simply to spring up around successful communities, the guarantee of reasonable costs of exit would be an impossible one for the state to honor.

This does not mean that the power of the community over the individual should be unrestrained.\(^{287}\) It simply means that monitoring costs of exit is only one (and not necessarily the most important) part of the equation. Substantive limits on the demands that communities may make on individuals, for example, the sorts of constraints thought to underlie the notion of international human rights, should apply within dissenting communities, just as they do to relationships between individuals and the state. How intrusive restraints on community action are depends in large part on the particular conception of human rights one employs. But a sufficiently flexible and indeterminate theory of human rights is consistent with a great degree of communal autonomy and diversity.\(^{288}\)

Finally, adopting the perspective of property as entrance suggests the importance of distributive considerations and favors an affirmative entitlement to a minimum amount of wealth needed to be able to enter in to some normative community. Someone without any property at all, and without any realistic means of acquiring any property, cannot join himself in community with others, no matter how many alternative normative communities a society allows to flourish.\(^{289}\) Accordingly, from the point of view of property as entrance, a society concerned about enhancing individual liberty will work to ensure that all individuals have some reasonable opportunity to acquire the property necessary to enable them to enjoy the value of community life.\(^{290}\)

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


\(^{289}\) See FISCHER, supra note 101, at 252.

\(^{290}\) See, e.g., ST. THOMAS AQUINAS, *De Regno* iv. (i. 15) (Gerald B. Phelan trans. 1949) (arguing that a good king must procure the material resources necessary for his people to lead virtuous lives).
diverse patterns of life. This fundamental difference in orientation plays out in a variety of contexts. In this section, I will sketch out just a few. These examples by no means constitute an exhaustive list 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 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 as entrance rather than (or in addition to) exit 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.\textsuperscript{291} Property as entrance, however, 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 within 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.\textsuperscript{292} 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.\textsuperscript{293} But private freedom of action is only a part of what it means to be free, even on the view of freedom as the absence of coercion. Freedom also requires the ability to engage in certain activities where everyone can see. The

\textsuperscript{291} See Epstein, \textit{supra} note 63, at 33-36.
\textsuperscript{292} See Ellickson, \textit{supra} note 1, at 1352-53.
\textsuperscript{293} See \textit{supra} notes 182-185 and accompanying text.
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 contrast to Epstein's embrace of a nearly absolute right to exclude by private owners, viewing property as entrance makes one 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 has already been made open to the public.\footnote{294} The Supreme Court's determination in \textit{PruneYard Shopping Center v. Robins}\footnote{295} that granting a right of public access as a matter of state law did not constitute a taking of property, therefore 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 will generally be less troubled than property as exit by qualifications on the right to exclude in order to give life to competing values. For example, property as entrance 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, like private 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\footnote{296} or limiting the rights of beachfront owners to hinder the general public's access to the state's waters.\footnote{297}

\footnote{294} See, e.g., \textit{New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.}, 650 A.2d 757 (N.J. 1994) (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); \textit{Robins v. PruneYard Shopping Center}, 592 P.2d 341 (Cal. 1979) (same); \textit{Batchelder v. Allied Stores Int'l, Inc.}, 445 N.E.2d 590 (Mass. 1983) (same); \textit{Alderwood Associates v. Washington Envtl. Council}, 635 P.2d 108 (Wash. 1981) (same). \textit{But see} Epstein, \textit{supra} note 63, at 35-36 (arguing that requiring private owners to admit protesters, even when that property has otherwise been opened up to the public, constitutes a taking of property).

\footnote{295} 447 U.S. 74 (1980).

\footnote{296} See, e.g., \textit{State v. Shack}, 277 A.2d 369 (N.J. 1971) (prohibiting a farm-owner from excluding people attempting to provide state-funded services to farm-workers residing on his property).

\footnote{297} See, e.g., \textit{State ex rel. Thornton v. Hay}, 462 P.2d 671 (Or. 1969) (holding that the general public has a right to use the dry sand area of beach-front property in order to enjoy access to the state's coastal waters). \textit{But see Opinion of the Justices}, 313 N.E.2d 561 (Mass. 1974) (statute permitting public to walk along dry sand area would constitute a taking of property from beach-front property owners); \textit{see also} ROSE, \textit{supra} note 84, at 149-50 (arguing for public access to private beachfront property on the ground that recreation acts as "social glue").
Of course, libertarian justifications are not the only ones that have been deployed in support of a robust right to exclude. Utilitarian arguments have also been made to the effect that bright property lines are essential in order to create the information and incentives necessary to foster wealth-enhancing commercial activity.\textsuperscript{298} Oriented as it is towards the non-consequentialist focus of property as exit, property as entrance 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.\textsuperscript{299} Moreover, property as entrance calls into question the fetishization of efficiency typical of many utilitarian approaches. For property as entrance, efficiency is simply one value among many others. As such, communities are perfectly justified in opting to trade off a degree of efficiency in order to protect goods, such as equality and fairness, that they deem important.

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 exclusion from the boundaries around individual property owners to the boundaries around distinctively normative communities. Because property as entrance is sensitive to the freedom-secureing importance of collective exit, it is solicitous of the right of separatist normative communities to isolate themselves from the mainstream.\textsuperscript{300}

The right of a separatist community to exclude outsiders is constitutive of their property-enhanced communal sovereignty. Accordingly, property as entrance would favor rules enhancing the abilities of dissenting groups to control access to their property. For example, exemptions from generally applicable prohibitions against religious discrimination in housing for separatist religious groups make perfect sense from the point of view of property as entrance.\textsuperscript{301}

As the law currently stands, these exemptions only apply when the property in question is actually owned by a religious institution.\textsuperscript{302} The

\textsuperscript{298} See, e.g., Merrill, supra note 71, at 31-34; Smith, supra note 71, at 995-96; Rose, supra note 22, at 631.

\textsuperscript{299} See supra notes 71-73 and accompanying text.

\textsuperscript{300} Cf. Cover, supra note 210, 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.").

\textsuperscript{301} See, e.g., 42 U.S.C. § 3607 ("Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.").

\textsuperscript{302} See id.
prohibition on religious discrimination applies with full force, however, to individual community members. This restriction is hard to justify from 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, constitutes 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 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 the exemption from antidiscrimination laws to those groups that (1) will benefit most from being allowed to isolate themselves from others and (2) will contribute most to the normative diversity of the overall community. As I discuss in the next section, separatist minority communities typically satisfy both of these criteria. Because of their relatively small numbers, granting exemptions to these communities presents little threat to other religious (or non-religious) minority communities.303

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.304 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.305 This view is fully consistent with the notion of property as exit.

303 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 287-288 and accompanying text.
305 See supra notes 105-106 and accompanying text; see also Barnett, supra note 48, 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, 550 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 "avowedly gay" men to leadership positions. See id. at 560; see also Koppelman, supra note 48, at 30 (describing the Court's decision in Dale as reflecting an antipathy towards "forced association").
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. The greater the degree of separation achieved by a community, Greene argues, the more entitled it is to structure its own affairs. Property as entrance supports Greene’s focus on degree to which the community has chosen to physically separate itself off 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 Gilette 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 made by mainstream residential associations and other common-interest communities:

[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.

Gilette goes on to suggest that the deference to separatist groups might stem from a concern with discrimination against insular communities. Viewing property as entrance helps to solve Gilette’s puzzle. 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 even mainstream common-interest communities to take

306 See Greene, supra note 59, at 8.
307 See id. at 40-42.
308 See Gillette, supra note 304, at 1380.
309 Id. (citations omitted).
310 See id.
advantage of property’s autonomy-enhancing functions. Moreover, separatist intentional communities provide a useful service in substantially broadening the range of lifestyles available to members of the mainstream.\footnote{311} Finally, separatist groups have far more to lose than the individual from the intrusion of outside values.\footnote{312}

A group that has gone to the trouble to separate itself off from society to live according to its own system of belief has an exceptionally strong commitment to that worldview.\footnote{313} As Veysey puts it, “[t]he hallmark of ‘strong’ belief is the attempt to put one’s ideas into practice.”\footnote{314} 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.\footnote{315}

\footnote{311} 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.

\footnote{312} 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 id.

\footnote{313} See Alexander, supra note 100, at 50; Greene, supra note 59, at 10, 40-42.

\footnote{314} See Veysey, supra note 211, at 63-64. Veysey continues by arguing that the “cultural radical is someone who is greatly tempted to vote with his body.” Id. The liberal, by contrast, “always works within the system and in practice tends to focus on a somewhat different range of concerns.” Id.

\footnote{315} This analysis suggests that the Court should have reached a different decision in Dale. See Koppelman, supra note 48, at 47 (“The position in society of the Boy Scouts of America is not that of one small booth in a pluralist bazaar. It is more like that of Anglicanism in England. The BSA is enormous. It is deeply intertwined with the state, to a degree unmatched by any other youth organization.”). This analysis may also shed light on the court’s decision in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1028 (6th Cir. 1987). As Stephen Macedo has observed, “[f]undamentalists are not sectarians living apart, but are . . . increasingly politicized and hostile to liberal values and practices.” Stephen Macedo, Liberal Civic Education and Religious Fundamentalism: The Case of God vs. John Rawls?, 105 ETHICS 468, 489 (1995); see also FITZGERALD, supra note 219, at 160 (noting that evangelicals hope to attain, among other things, “power in society”). Although fundamentalist Christians make efforts to separate themselves from the society around them, they generally live intermingled within the mainstream. They typically work in non-fundamentalist-owned businesses and often maintain both family and friendship ties with non-Church members. See AMMERMAN, supra note , at 28-29, 85, 91, 98, 169, 173, 185 (describing how fundamentalists live and work in mainstream communities and occupations, watch TV, and maintain relationships with non-fundamentalists). But see id. at 105, 174-77 (describing the efforts that some fundamentalists take to physically and socially isolate themselves from mainstream culture). Accordingly, the Mozert plaintiffs’ claim that their children suffered
In contrast to separatist minority communities, which are united by an all-encompassing set of normative commitments, the typical homeowners’ association is an agglomeration of individual property owners who have come together (or, more commonly, who a developer has brought together) for the principal purpose of protecting the property values of each of the individual community members. 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 of property values. 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.

Moreover, most common-interest communities make no effort to separate their residents in any meaningful sense from the values of the broader society. 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.\textsuperscript{320} And fewer than 10\% of the men work in jobs outside of the community.\textsuperscript{321}

Because common-interest communities and their residents are typically so firmly embedded in the mainstream, granting them autonomy generates few of the liberty-securing benefits that accrue from allowing separatist dissenting groups to govern themselves.\textsuperscript{322} Residents’ frequent interaction with non-residents means that they will be subject to the coercion of the 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.\textsuperscript{323}

\textsuperscript{320} See Shaffir, supra note 142, at 180. The Amish impose similar restrictions on their members. See Labi, supra note 142, at 26.

\textsuperscript{321} See Shaffir, supra note 142, at 179.

\textsuperscript{322} But see Ellickson, supra note 44, at 1528. 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 (N.J. 1999) (discussing whether the Boy Scouts constitute a “distinctly private” club).

\textsuperscript{323} This determination, however, immediately raises the question why the rules of common-interest communities should be subjected to heightened scrutiny when the rules enacted by public government entities are typically granted a great deal of judicial deference. The suspicion of common-interest communities appears to arise from their unique blending of values and practices typically associated with the public and private sphere. As several scholars have noted, common-interest communities are virtually indistinguishable from governments in terms of their powers and functions. See Ellickson, supra note 44, at 1522-23; Stewart E. Sterk, Minority Protection in Residential Private Governments, 77 B.U. L. REV. 273, 273 (1997) (describing homeowners associations as “privately created residential governments”). Despite this functional similarity, common-interest communities have largely rejected the one-person-one-vote rule of governance that applies almost universally in the public sphere. See ROBERT C. ELICKSON & VICKI L. BEEN, LAND USE CONTROLS 703-04 (2d ed. 2000). It is because of their deviation from this deeply rooted norm of governance that it seems appropriate not only to subject common-interest community rules to a higher degree of scrutiny than is applied to rules generated by more democratic governments, but also to allow judges to do the scrutinizing. See, e.g., JOHN HART
CONCLUSION

The idea that private property 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.

ELY, DEMOCRACY AND DISTRUST 116-25 (1980) ("[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.").