A NEW NEW PROPERTY

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Charles Reich's visionary 1964 article, The New Property, *paved the way for a revolution in procedural due process. It did not, however, accomplish Reich's primary stated goal: providing those dependent on government assistance the same security that property rights long have offered owners of real property.*

As Reich himself predicted, procedural rights have proven largely ineffectual, especially for low-income people. In the half-century since he wrote, growing wealth inequality and repeated cutbacks in antipoverty programs have produced the pervasive disempowerment he predicted, but concentrated in one segment of society. This is incompatible with a healthy democracy.

Reich found that government largesse had become functionally equivalent to more traditional forms of property. Other analogies to property concepts can also protect low-income people, supporting recognition of the most important assets low-income people have, many of which are relational rather than tangible.

Like long-time trespassers obtaining ownership rights through adverse possession, families that have long lived together in this country should be able to continue doing so despite the unlawful immigration status of some of their members. The law should value the communities that offer mutual support to low-income people in much the same way as it does common interest communities. Principles of equity that long shielded less sophisticated people against sharp operators should be revived to protect low-income people's homes against abusive foreclosures. And modern Takings Clause doctrine should recognize subsistence government benefits as property.

A regime of property law that secures that which is most essential to the well-being of a broad swath of society, rather than just those items disproportionately held by the wealthy, will best promote social, economic, and political participation by all people.

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INTRODUCTION

Property is one of the oldest bodies of the common law. As such, it has adjusted to a long succession of social, economic, and political changes. It has maintained its centrality in Anglo-American law through a combination of elasticity and stability. Thus, when civil war disrupted the basic legal order and made "true" ownership extremely difficult and costly to adjudicate, property law resorted to new writs, requiring plaintiffs to show only that they had recently been dispossessed, not trace the chain of title to show ultimate ownership.[1] When those that already had great wealth sought to multiply their advantage by manipulating poorer people, it developed equity.[2] Equity nominally left intact longstanding legal rights, but it forbade sharp operators from taking advantage of them.[3] When property law recognized that the right and the ability to manage property often would lie in separate hands, it developed the trust.[4] As alienation supplanted inheritance as the most important means of transferring property, property law recognized that transferors might have reasons to retain some rights in the land and began to recognize easements.[5] In these and many other ways, property law has adapted to broad changes in social arrangements while protecting individual autonomy.

Property law has been a preserver, but it also has been a destroyer. It identifies and thwarts pathological relationships or powers, such as a decedent's attempts to control her or his property in perpetuity from the grave.[6] In numerous ways, it manages to break up excessive concentrations of wealth that allow a few owners to challenge the power of the sovereign, to oppress less established members of society, or simply to act wastefully. Capitalism, that most prominent child of property law,

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1. See, e.g., S.F.C. Milsom, Historical Foundations of the Common Law 137–40 (2d ed. 1981) (describing origin of "writ of novel disseisin" in early English law).

2. See id. at 83 (explaining equity as recourse for those "too poor to sue").

3. See id. at 93 (noting early understanding that equity "leaves the [legal] Judgment in Peace, and only medleth with the corrupt Conscience of the Party" (internal quotation marks omitted)).

4. See id. at 86–88 (noting prior law only provided "clear rules about the dealings with land that were possible," but did "not accommodate all the things that a landowner might wish to do," including granting right of "use").

5. See, e.g., J.H. Baker, An Introduction to English Legal History 427 (4th ed. 2002) (describing how easements became "distinct property rights in themselves, . . . not merely . . . incidents to the ownership or occupation of property").

6. See, e.g., Jesse Dukeminier, A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867, 1868 (1986) (noting one purpose of rule against perpetuities is "to limit 'dead hand' control over . . . property").

makes many of its claims to efficiency through "creative destruction."[7] Most obviously, this means replacing inefficient uses of property with superior ones. This creative destruction also, however, occurs at the conceptual level. The Industrial Revolution exposed many longstanding doctrines of property law—often expressions of the principle of first in time, first in right—as hindrances to social and economic progress.[8] Property law soon disavowed these principles.

Although this creative destruction still exists in economic life—with particular businesses failing when they cease to be efficient—much less of it remains in the body of property law itself. Modern property law has lost much of the vitality that long kept it at the center of Anglo-American law. Property has overwhelmingly become the law of stability, a drag on change in other areas. And as social and economic change has driven demands for legal change, all too often the legal system has not adapted property law but merely shoved it out of the way.[9] The mustiest, stodgiest aspects of property law have come to dominate the field. Innovation is confined to a few relatively insular areas such as intellectual property. Dynamism is seen as the province of tort, contract, and myriad new statutorily created fields of law.

This desiccation of property law was not accidental. As society urbanized and industrialized, large concentrations of wealth led to a range of abuses.[10] The depersonalization of ownership in the form of corporate shares separated property from its individualistic roots.[11] Affluent corporations became indistinguishable from "private governments," eventually co-opting public governmental institutions.[12] Although some saw these evils as resulting from grossly unequal concentrations of property, the dominant view came to be that property rights were no longer the individual's refuge from government oppression but rather a magnifier of that oppression.[13]

As long as property law single-mindedly emphasizes stability in a dynamic world, it will become increasingly marginalized. Some might wel-

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7. Joseph Schumpeter, Capitalism, Socialism, and Democracy 119–20 (1942) (developing concept from prior economic theory).

8. See Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 32–34 (1977) (describing how "priority" and "natural use" doctrines changed in response to economic demands).

9. See, e.g., David A. Super, The Rise and Fall of the Implied Warranty of Habitability, 99 Calif. L. Rev. 389, 400–02 (2011) [hereinafter Super, Implied Warranty] (describing replacement of property concepts with contract ideas in landlord-tenant law).

10. See Charles A. Reich, The New Property, 73 Yale L.J. 733, 772 (1964) [hereinafter Reich, New Property] ("[A]s private property grew . . . [p]roperty became power over others . . . .").

11. See id. ("Multiple ownership of corporations helped to separate personality from property, and property from power.").

12. Id.

13. See id. ("[I]t is widely thought that property and liberty are separate things . . . . [T]here may, in fact, be conflicts between 'property rights' and 'personal rights.'").

come that prospect. That view, however, is shortsighted. Locke and Madison recognized property law's vital role in preserving individual freedom against the government and other large, powerful forces.[14] Property, de Tocqueville recognized, protects personal autonomy, which is vital to encouraging individuals to participate constructively in civic affairs.[15] And as important as property rights are for society as a whole, they are even more important for particularly vulnerable members of that society. The stagnation of property law has contributed to the stagnation of liberties as property rights fail to advance apace with new economic and technological threats. Policymakers have attempted to fill some of these gaps with other, more vibrant areas of law, such as regulation, tort, and even contract. Each of those fields, however, is explicitly or implicitly majoritarian, reflecting the dominant view of the public good or of what is "reasonable."[16] As a result, none are equipped to serve as bulwarks against the majoritarian state's encroachment on individual liberties. Property is.

Some contemporary reformers have, in very different ways, sought to reinvigorate property law. Progressive property scholars emphasize property's indeterminacy: the plurality of its justifications and the inevitability of conflicts between property rights.[17] Some argue for a capacious definition guided by the belief that property's core purpose is to promote human flourishing.[18] These scholars also would require property's individualistic function to yield to broad societal interests, such as environmental stewardship and maximizing aggregate societal wealth.[19] Their proposals, however, often come at a heavy price to the qualities that make property law special. This vision would expand the distribution of property rights but greatly dilute their historic role as a trump against governmental impositions. Property law would become just another

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14. See infra notes 143–147 (discussing Locke's view of property's role in self-governance).

15. See 2 Alexis de Tocqueville, Democracy in America 266–67 (Phillips Bradley ed., Alfred A. Knopf 1963) (1840) (implying property ownership promotes peace and civic order).

16. See Reich, New Property, supra note 10, at 774 ("Liberty is more than the right to do what the majority wants . . . [and] [t]he great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.").

17. See, e.g., Gregory S. Alexander et al., A Statement of Progressive Property, 94 Cornell L. Rev. 743, 743–44 (2008) (arguing scholars should reconsider property in terms of "underlying human values that [it] serves and the social relationships it shapes and reflects").

18. Gregory S. Alexander & Eduardo M. Peñalver, An Introduction to Property Theory 80–102 (2012).

19. See, e.g., id. at 156–57 (citing eminent domain as example of utilitarian understanding of property law); Alexander et al., supra note 17, at 743 (noting "[p]roperty implicates plural and incommensurable values" and "[s]ome of these . . . promote individual interests, wants, needs, desires and preferences" while others "promote social interests, such as environmental stewardship, civic responsibility, and aggregate wealth").

means of social optimization, methodologically indistinguishable from contract law and tort law.

Richard Epstein argues for "a level of judicial intervention [on behalf of property rights] . . . far greater than we ever have had."[20] He justifies this using what he finds are the "necessary implications derived from the constitutional text and the underlying theory of the state that it embodies," notably the Takings Clause and a Lockean respect for private property.[21] He then proceeds to identify the rights he would protect with reference to tort and other branches of private law developed long after the Constitution.[22] Although he shows property law far more affection than the progressives, in his embrace, too, property law becomes an extension of rationalizing, majoritarian law: Those interests traditionally recognized as property rights would receive protection, but individuals lacking such interests would remain at the mercy of the majority.[23]

Thomas Merrill and Henry Smith reconceptualize property as a means of reducing information costs in society.[24] Designating rights relating to an object as one or another form of property simplifies the task of telling the holder of those rights what she or he may do—and telling others what they may not do.[25] To them, what distinguishes property from other forms of law is that it is in rem.[26] They assert that their view has strong moral as well as efficiency justifications, yet the main arguments they invoke are standard tools of the cost-benefit state like reducing transaction costs to increase aggregate utility.[27] Like other theorists with utilitarian leanings, they would destroy the distinctive characteristic of property as a defender of individual liberty in order to save it.

This Article takes a different approach. It contends that property law's character as a defender of individuals is both inescapable and desir-

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20. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 30–31 (1985). Epstein argues, for example, that government regulation commonly interferes with individuals' ability to make full use of their property and thus meets the common law definition of a tort. Applying that definition, he would find a compensable taking. Id. at 35–56.

21. Id. at 31.

22. Id. at 35–56, 74–92.

23. Epstein tips his hand by arguing that his version of libertarianism generally converges with utilitarianism. Id. at 5.

24. Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 1, 8–11 (2000) (explaining core property principle of limiting number of possible ownership arrangements as cost minimizer).

25. See id. at 38 (describing regime of property rights as "optimal standardization").

26. See generally Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001) (contrasting property law, which is in rem, with contract law, which is in personam).

27. See Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 Wm. & Mary L. Rev. 1849, 1850–66 (2007) (explaining property as "device for coordinating both personal and impersonal interactions over things").

able. Property law's role goes far beyond what any economic model alone can capture. But it can only serve the vital purpose that animated Locke and the Framers of the Constitution—shielding individuality and autonomy from hostile or insensitive outsiders—if it does so for *all* people. The idea of rejuvenating property law as a distinctive force to meet contemporary problems is not novel. In one of the most influential articles of the last century, Charles Reich called for recognition of a "New Property" to respond to the growing importance of the administrative state in American life.[28] Noting that "today more and more of our wealth takes the form of rights or status rather than of tangible goods," Reich proposed that government-created statuses—professional licenses, government employment, public benefits, and the like—should be treated as forms of property.[29] He noted that these often are more valuable to an individual than a house or a bank account (and often are the means of acquiring traditional real and personal property).[30]

Reich criticized the movement to marginalize property rights as an impediment to the pursuit of the public interest.[31] What the reformers failed to recognize, he argued, is the threat to individual liberty that results from excluding many people's interests from the protection of property law.[32] In expanding state power, the architects of the "public interest state" made all the more urgent the need for "the individual . . . to possess, in whatever form, a small but sovereign island of his own."[33]

Reich focused primarily on the distribution of public largesse, which he regarded as the paramount way, at the time, in which functions that had been performed by property rights were being replaced by bureaucracy. When the government "hands out something of value, whether a relief check or a television license, . . . it automatically gains" the power to supervise that grant, bringing a much wider range of individual behavior within its control.[34] This power allows the state to impose its values on individuals.[35] It gains the power not only to delay or withhold largesse but also to investigate and punish recipients who defy its will.[36] Reich found

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28. See Reich, New Property, supra note 10, at 733 (noting "emergence of government as a major source of wealth" and its "impact on the power of private interests, in their relation to each other and to government"). Unless otherwise indicated, this Article will use the phrase "New Property" to refer to the concept Reich introduced.

29. Id. at 738, 778.

30. Id. at 738.

31. Id. at 774.

32. Id. at 771.

33. Id. at 774.

34. Id. at 746.

35. Id. at 747, 750–51; see also, e.g., Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 126 Stat. 156, 162–63 (to be codified at 42 U.S.C. § 503(l)) (allowing states to impose drug testing requirements for some recipients of unemployment insurance).

36. Reich, New Property, supra note 10, at 749–50.

the scope of agencies' power so broad, and their discretion so plenary, that they "can usually find other grounds to accomplish what they cannot do directly."[37] Thus, "[c]aught in the vast network of regulation, the individual has no hiding place."[38]

Reich's article reshaped legal debate to a degree that most scholars can only dream about. Its influence reached its apogee in 1970 when, in *Goldberg v. Kelly*, Justice Brennan relied on it to recognize welfare benefits as property interests protected by the Due Process Clauses.[39] *Goldberg* held that individuals have a right to notice and an opportunity for a hearing prior to the termination of welfare benefits.[40] After *Goldberg*, however, the remainder of Reich's insights into the role of property in protecting individual rights in modern society was largely forgotten. Subsequent Supreme Court decisions[41] and an increasingly hostile political environment[42] sapped *Goldberg* of much of its vitality, arguably leaving arbitrary state power over recipients of government benefits even broader than before.[43] Indeed, *The New Property*'s identification with *Goldberg*'s procedural rules is ironic: Although Reich advocated developing such rules for governments' administration of largesse,[44] he expressed great skepticism that they could rein in arbitrary power.[45]

The half century since Reich wrote has produced a mixed verdict on the concerns animating *The New Property*. His worst fears have not been realized: The country is not approaching the point at which "most private ownership is supplanted by government largess."[46] Yet the steady erosion of independent property rights has continued. The greatest expansion in

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37. Id. at 750.

38. Id. at 760.

39. 397 U.S. 254, 262 n.8 (1970) (adopting Reich's understanding of entitlements as form of property).

40. Id. at 267–68.

41. See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 60–61 (1999) (finding *Goldberg* inapplicable to denial of benefits by private insurer operating under workers' compensation law); Atkins v. Parker, 472 U.S. 115, 128–29 (1985) (refusing to apply *Goldberg* to implementation of legislation reducing food stamp benefits); Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (refusing to apply *Goldberg* to Social Security disability insurance benefits).

42. See, e.g., Thomas Byrne Edsall, The New Politics of Inequality 202–13 (1984) (describing post-World War II trends toward greater equality).

43. See, e.g., Susan T. Gooden, All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients, 4 Harv. J. Afr. Am. Pub. Pol'y 23, 31–32 (1998) (finding eligibility workers' sweeping discretion results in black welfare recipients receiving significantly less discretionary transportation assistance and caseworker support for educational training than their white counterparts in two Virginia counties).

44. Reich, New Property, supra note 10, at 783.

45. Id. at 751–56.

46. Id. at 771.

property rights has been in the form of intellectual property,[47] which rights come as an act of government largesse. Meanwhile, that paragon of the common law, real property, has increasingly become a form of public largesse through the conversion of landlord-tenant law into a branch of contract law and greater government involvement in the home mortgage market.

The intervening decades also have produced a threat to individual liberty that Reich only partially appreciated: the dramatic growth of inequality. Reich recognized that increases in government power have differential impacts on groups within the private sector, with the rich benefiting disproportionately.[48] But he assumed that the rise of the "public interest state" was replacing "misery and injustice" with "prosperity, leisure, knowledge, and rich opportunity open to all."[49] His optimism was understandable: He was writing two decades into the prolonged postwar expansion that achieved one of the most dramatic reductions of inequality in our nation's history.[50] He saw the modern administrative state that blossomed under the New Deal as offering a muted version of the trade-off that contemporary communist regimes presented: greater equality at the cost of individual freedom.[51]

Whereas Reich's primary focus was the subjugation individuals face without property rights, this Article's concern is the consequences of extending property law's protection to one segment of the population but not another. Those without property become marginalized socially and politically, as well as economically.[52] Thus, while Reich worried primarily about individual liberties, this Article is concerned primarily with property's role in stratifying society. To some extent, these are different perspectives on the same problem. Reich saw the public interest

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47. See Lea Shaver, The Right to Science and Culture, 2010 Wis. L. Rev. 121, 124, 132–33 (contending intellectual property "transform[s] creativity, information, science, and technology from public goods into private ones" and describing expansion of IP protections in 1970s and 1980s).

48. Reich, New Property, supra note 10, at 764–65. The rich often can enlist this expanded government power in their conflicts with other private parties. Id. at 764. They also have the sophistication to navigate the increasingly complex processes required to acquire largesse. Id. at 765.

49. Id. at 778, 786.

50. See Chad Stone et al., Ctr. on Budget & Policy Priorities, A Guide to Statistics on Historical Trends in Income Inequality 1 (2012), available at http://www.cbpp.org/files/11-28-11pov.pdf (on file with the *Columbia Law Review*) ("The years from the end of World War II into the 1970s were ones of substantial economic growth and broadly shared prosperity."); see also Edsall, supra note 42, at 202–13 (describing reversal of post-World War II trends toward greater inequality in 1980s).

51. Reich, New Property, supra note 10, at 786; see also id. at 770 (comparing weakening of property rights in United States with limited property individuals could hold in Soviet Union).

52. See A.J. van der Walt, Property and Marginality, *in* Property and Community 81, 82–83 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (discussing property's role in marginalization).

state as an updated form of feudalism, crushing individuals' spirits like latter-day serfs while showering them with unprecedented creature comforts.[53] This Article looks at the same phenomenon and regards the maintenance of a class of serfs—people whose lives are broadly subject to the will of the state—as inimical to a vibrant democratic society. These differences in emphasis no doubt reflect the authors' respective values. They also, however, reflect their times: This Article comes after three decades of rapidly increasing restratification and reconcentration of wealth.[54] Our nation is, again, a house divided, with one segment of the population enjoying the freedom that property rights bring and the other lacking those protections.[55]

The most obvious response to disparities in property rights between the rich and poor is to accept the existing definition of property but redistribute wealth in some manner. The United States has made some efforts to do so, as with Social Security[56]—itself, perhaps ironically, a species of Reich's New Property. Social Security's benefit formula provides higher benefits relative to lifetime earnings for low-wage workers and their families.[57] Although this has significantly reduced poverty among the elderly, this country's electorate has resisted broader efforts to redistribute wealth.[58] And with one major political party deeply hostile to such efforts,[59] and the other ambivalent at best,[60] no substantial moves in that direction seem likely for some time.

The alternative, then, is to follow Reich in arguing that a great deal of the disparity in rights, as opposed to the disparity in wealth, results from arbitrary decisions about which interests U.S. law recognizes as

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53. Reich, New Property, supra note 10, at 768–70 (likening public interest state to feudalism).

54. Stone et al., supra note 50, at 1.

55. Cf. Shelby Foote, The Civil War: A Narrative 30 (1958) (quoting Abraham Lincoln's 1858 speech that famously stated "'[a] house divided against itself cannot stand'").

56. See, e.g., William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 179–80 (2010) (attributing creation of Social Security to traditional institutions' inability to provide financial security).

57. Henry J. Aaron & Robert D. Reischauer, Countdown to Reform: The Great Social Security Debate 92–94 (1998) (describing how benefit formula favors especially vulnerable groups).

58. E.g., Martin Gilens, Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy 24–30 (1999) (finding broad public antipathy for welfare); see also David A. Super, The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism, 66 Stan. L. Rev. (forthcoming 2014) (manuscript at 1–2) [hereinafter Super, Modernization] (on file with the *Columbia Law Review*) (describing intense ongoing resistance to modestly redistributive health care reforms).

59. See, e.g., Reince Priebus, The Future of the GOP: A Party for Everyone, Tampa Trib., Jan. 29, 2013, at 10 (explaining Republican National Committee Chairman's critique of "government's redistribution machine").

60. See, e.g., John Horn, Clooney Plays with Politics On-Screen, L.A. Times, Sept. 25, 2011, at D1 (describing Democrats' aversion to word "redistribution").

property. To succeed, however, any new approach to property must appeal to two quite distinct audiences.[61] First, it must appeal to the legal elite: judges, prominent lawyers, academics, and the like. The legal elite is exceptionally fractured on property issues, with an abundance of theoretical formulations but also a traditionalism that has continued to shape property law long after it became marginalized in other fields. In addition, any effort to rejuvenate property rights must appeal to the general public. Individual nonlawyers feel very strongly about property issues and have confidence in their judgment about what property rights are and should be. Appealing to nonlawyers, as well as to many judges, requires basing arguments in well-entrenched doctrines.

Like Reich, this Article argues that which rights should be recognized as property should depend on the function society wants property rights to play.[62] This Article recognizes that "today more and more of our wealth takes the form of rights or status"[63] rather than traditional forms of realty and personalty. The legal protection of these new status rights, however, has been uneven, favoring some segments of society over others.[64]

This Article proposes a new New Property, relying on the basic analytical methods of Reich's great article. Reich's crucial contribution was to understand a system in which what he called government largesse was increasingly replacing traditional forms of private property as a system of property law. Although he offered some preliminary observations on which kinds of rights should attend these new forms of property, his focus was on expanding the concept of property to match new realities.[65]

This Article reverses that emphasis. In one important respect, it does seek to expand the concept of property.[66] For the most part, however, it seeks to revitalize property law doctrines and apply them to interests that are already seen as property, at least to some degree. It applies familiar, largely unexceptional concepts from property law—prescriptive rights,[67] well-established equitable doctrines,[68] land use principles,[69] and protec-

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61. See Bruce A. Ackerman, Private Property and the Constitution 4–20 (1977) (describing these two audiences as "Scientific Policymaker" and "Ordinary Observer").

62. Reich, New Property, supra note 10, at 779 (noting "real issue is how [property] functions and how it should function").

63. Id. at 738.

64. Id. at 765–67.

65. Subsequent scholars, notably Joseph Singer, also have sought to broaden the definition of property by looking at strong human needs. E.g., Joseph William Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611, 750 (1988) [hereinafter Singer, Reliance] (urging consideration of interpersonal power dynamics in evaluating reliance interests).

66. See infra Part II.C (finding property rights in familial relationships).

67. See infra Part II (arguing reliance interests of families justify recognizing prescriptive right to remain in country for immigrants government has failed to remove).

68. See infra Part IV (arguing for "resuscitation of equity" to protect homes of low-income people).

tion against devastating governmental "takings" of private property[70]—to suggest remedies to some of the most serious problems facing low-income people. Society has clearly treated the interests addressed here as forms of wealth; the question, then, is whether the law should treat them as property.[71] This Article contends that such treatment should depend in significant part on an interest's importance to many of those holding it.[72] Thus, instead of sardonically noting that "the majestic equality of the laws . . . forbid[s] [the] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal . . . bread,"[73] this more nuanced vision would protect a homeless person's right to sleep outdoors while finding no corresponding right for an owner of a conventional home to sleep in public places.

The four major topics examined by this Article are important in their own right but also illustrative. Each involves one of the most important, life-sustaining interests that vulnerable people have. Moreover, between them, these examples cover the four most important relationships to that group: with family, with their community, with powerful strangers, and with the government.[74] These examples also span many of the most important functions of property law: inferring new rights from customary behavior,[75] shifting rights from neglectful to active users (prescriptive rights),[76] augmenting generally applicable legal procedures

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69. See infra Part III (examining effects of dislocation and arguing for recognizing rights in community).

70. See infra Part V (suggesting Takings Clause applies to government subsistence benefits in same way Due Process Clauses do).

71. See Reich, New Property, supra note 10, at 739 (noting government payments are clearly wealth but have not received legal recognition as property).

72. This is a common approach in property law. When society was largely agrarian, most purchasers of land might be imagined to have cared most about its productive capacity rather than any structures upon it. Thus, doctrines like equitable conversion treated damage to houses after the execution of the contract for sale as insufficient justification for failing to close on the sale. See, e.g., Paine v. Meller, (1801) 31 Eng. Rep. 1088 (Ch.) 1089–90; 6 Ves. Jun. 350, 353 (holding contract to purchase land and house bound purchaser even when house burned down prior to completion of sale). As society urbanized and purchasers became more likely to have sought the property for its structure, courts sought ways around this and related doctrines. See, e.g., Libman v. Levenson, 128 N.E. 13, 14–15 (Mass. 1920) (holding conveyances are of "'whole estate'" and thus contract for sale is not binding when structures are destroyed prior to conveyance (quoting Hawkes v. Kehoe, 79 N.E. 766, 767 (Mass. 1907))).

73. Anatole France, The Red Lily 95 (Winifred Stephens trans., John Lane Co. 1922) (1894).

74. These last two relationships are increasingly converging. See David A. Super, Privatization, Policy Paralysis, and the Poor, 96 Calif. L. Rev. 393, 395–98 (2008) (examining trend toward privatization of public subsistence benefits).

75. See, e.g., Ghen v. Rich, 8 F. 159, 161–62 (D. Mass. 1881) (allocating rights to whale carcass according to regional custom).

76. See, e.g., Ray v. Beacon Hudson Mountain Corp., 666 N.E.2d 532, 536–37 (N.Y. 1996) (transferring ownership of property maintained by squatters when owner had allowed all other structures in development to fall to ruin).

where particularly important rights are at stake (equity),[77] and imposing limits on the state's power to subjugate the individual (restricting takings).[78]

This Article thus proceeds in five parts. Part I explores the extent and consequences of increasing stratification in conventionally recognized forms of property. Part II applies familiar concepts of prescriptive rights to argue that vulnerable low-income immigrants can assert the priority of their families' integrity against the state's efforts to break them up. Part III surveys several property doctrines recognizing the importance of communities and their possible application to low-income communities imperiled by government policies. Part IV seeks to resuscitate equity, which developed in part to prevent sharp operators from exploiting others' trust or lack of sophistication in order to dispossess them of realty. Finally, Part V returns full circle to the subject of *The New Property*—government largesse—and suggests that any semblance of political equality for low-income people depends upon entrenching their interests in public policy in a way analogous to law's current protection granted more affluent people against the claim of the public fisc.

This Article goes well beyond the remedies Reich proposed, which he conceded were "far from adequate" to arrest the trends he discerned.[79] The mode of application of the principles set out here likely will vary. In some instances, a simple recognition of property rights will fairly directly lead to greater security for low-income people.[80] In others, recognition of these interests as property may require accommodation with other political and property rights.[81] In still others, these rights may trump others that exist in statute or by common law, operating as an intrinsic limit to the courts' exercise of jurisdiction.[82] The object here, as with Reich's original article, "is to present an overview—a way of looking

77. See, e.g., Murphy v. Fin. Dev. Corp., 495 A.2d 1245, 1249–50 (N.H. 1985) (imposing equitable duty on mortgagees to secure fair value for mortgagor in foreclosure sale).

78. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (reiterating requirement that lower courts consider burden on individual in assessing whether government actions constitute takings).

79. Reich, New Property, supra note 10, at 785.

80. See infra Part II.C (proposing applying principle of adverse possession to undocumented immigrants' residence in United States).

81. See infra Part III.C (suggesting ways to recognize "community" as property within existing legal and social frameworks).

82. See infra Parts IV.C, V (discussing "resuscitation of equity" and expansion of Takings Clause protection); cf. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (declining to permit courts to honor racially restrictive covenants in private deeds). Rooting these concerns in longstanding property law concepts may become particularly important if the Supreme Court follows through on recent suggestions that some doctrinal developments may be considered takings, requiring just compensation. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (finding plausible claim that judicial modifications of common law could constitute takings requiring just compensation).

at many seemingly unrelated problems. Inevitably, such an effort must be incomplete and tentative."[83] But also like Reich's article, this Article seeks to articulate ideas with resonance and present-day relevance to inform the law and the people it ultimately exists to protect.

I. WHITHER THE OWNERSHIP SOCIETY?

Politicians across the ideological spectrum have enthusiastically embraced asset accumulation as a means for low-income people to escape poverty.[84] For many, promoting an "ownership society" represents a rare opportunity for a feel-good response to poverty that is broadly popular with the electorate.[85] Despite the bipartisan enthusiasm, however, actual policy responses have been quite modest, more symbolic than real.

The path to an ownership society is a steep one indeed. Wealth is far more concentrated among the most affluent, and even scarcer at the bottom of the income distribution, than income. In 1988, the top fifth of the population received 43% of all income but held 68% of all new worth and almost 87% of all net financial assets.[86] On the other end of the spectrum, households in the poorest fifth of the income distribution had capital assets averaging just one-sixtieth of those held by the middle fifth of the income distribution.[87] Nearly one-third of all households had zero or negative net financial assets.[88] To the extent that households in the poorest fifth of the income distribution had any positive net worth at all, 70% of it was relatively inaccessible, in the form of home and vehicle equity.[89] Dramatic disparities continue today and indeed are, by many measures, much worse.

Recent years have shown that income and asset poverty are closely related: Families whose incomes frequently dip below the poverty line tend to see their savings wiped out.[90] And residents of high-poverty

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83. Reich, New Property, supra note 10, at 733.

84. See, e.g., Kurt Shillinger, Kemp Will Draw GOP Activists, but Will Voters Follow Too?, Christian Sci. Monitor, Aug. 12, 1996, at 1 (describing former Republican vice presidential candidate Jack Kemp's enthusiasm for asset-based responses to poverty); Susan Baer, Cuomo Strides Outside Housing to Fight Battles, Balt. Sun (June 3, 2000), http://articles.baltimoresun.com/2000-06-03/news/0006030210_1_cuomo-andrew-m-gun-violence (on file with the *Columbia Law Review*) (describing now-Governor Andrew Cuomo's work promoting asset ownership as response to poverty).

85. See, e.g., Inaugural Address, 1 Pub. Papers 66, 68 (Jan. 20, 2005) (announcing plans to build "ownership society").

86. Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 70–71 (2d ed. 2006).

87. Id. at 76.

88. Id. at 72.

89. Id. at 89.

90. Cf. Signe-Mary McKernan et al., Urban Inst., Can the Poor Accumulate Assets? 1–2 (2012), available at http://www.urban.org/UploadedPDF/412624-Can-the-Poor-

neighborhoods—who are disproportionately African American or Hispanic[91]—lost much more of their wealth during the Great Recession than did those in communities with little poverty.[92]

This Part explores this country's striking disparities in property ownership. Part I.A exposes the racial dimension to those disparities, making property rights a crucial, if often-ignored, frontier in the struggle for civil rights. Part I.B surveys the broad range of social impacts resulting from the lack of property. Part I.C reviews the literature on the importance of property rights to maintaining a healthy democracy. Finally, Part I.D discusses the difficulty of implementing public policies that reduce wealth inequality. This makes the remainder of the Article all the more important, as it seeks to invest the most important relationships on which low-income people rely with property protections in the absence of the political will to redistribute to them more conventional property.

A. *Wealth Inequality and Race in the United States*

While the New Property has floundered, social science has expanded awareness of the importance and stratification of property ownership in society. Research has established that racial disparities in wealth far outstrip those in income.[93] According to Melvin Oliver and Thomas Shapiro, wealth, far more than income, "create[s] opportunities, secure[s] a desired stature and standard of living, or pass[es] class status along to one's children."[94] They thus argue that wealth is more important than either income or education in securing access to life's chances.[95]

The post-World War II era saw great progress toward income and asset equality. By the early 1970s, however, progress toward income equality stalled; by 1983, wealth inequality was rising again.[96] Even during the period when overall wealth inequality was declining, the wealth gap between white and African American households continued to widen.[97] This occurred even though evidence suggests African Americans' savings

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Accumulate-Assets.pdf (on file with the *Columbia Law Review*) ("The less often families fell below the poverty level, the more likely they were to accrue larger amounts.").

91. Robert I. Lerman & Sisi Zhang, Urban Inst., Coping with the Great Recession: Disparate Impacts on Economic Well-Being in Poor Neighborhoods 5 tbl.1b (2012), available at http://www.urban.org/UploadedPDF/412728-Coping-with-the-Great-Recession.pdf (on file with the *Columbia Law Review*).

92. Id. at 7 & tbl.3.

93. See, e.g., Oliver & Shapiro, supra note 86, at 7–8 ("Middle-class blacks . . . earn seventy cents for every dollar earned by middle-class whites but they possess only fifteen cents for every dollar of wealth held by middle-class whites.").

94. Id. at 2.

95. Id.

96. Id. at 65.

97. Id. at 101–02 & fig.5.1. Today, Latinos' and Latinas' asset holdings may be even less than those of African Americans. See infra note 119 and accompanying text.

rate was at least as high as that of whites.[98] Nor is a lack of entrepreneurial spirit the explanation: African Americans also show a slightly higher rate of self-employment than whites.[99]

Much of the reason overall inequality began to grow in the 1980s was the Reagan Administration's tax cuts, which disproportionately favored the most affluent, and its budget cuts, which disproportionately reduced the incomes of low- and moderate-income people.[100] In addition, the Reagan Administration's deregulation of the financial sector opened the door for predatory lenders "strip-mining minority neighborhoods of housing equity through unscrupulous backdoor loans for home repairs" and other emergencies at exorbitant interest rates.[101] When mainstream banks refused to make loans in those neighborhoods at standard rates, homeowners—many lacking the educational capital to understand complex financial arrangements—agreed to loans requiring payments they were unlikely to be able to afford. This process was ongoing long before the foreclosure crisis brought it to the headlines: During the 1980s and 1990s, some studies found more than half of the families taking out home equity loans lost their homes.[102] Lenders assumed that residents of minority neighborhoods had a higher likelihood of defaulting; the higher rates they then charged those families made this a self-fulfilling prophecy.[103] By contrast, whites were more successful than African Americans at refinancing their mortgages at lower interest rates.[104]

Racial inequality was far greater in assets than in income. Although the median African American household earned only 62% of the income of the median white household in 1988, white households' median net worth was almost twelve times that of African American households.[105] Although one-quarter of white households had no net financial holdings, 61% of African American households and 54% of Latino/Latina households had no financial assets.[106] Even allowing for other social and economic factors, the racial divide remains enormous.[107] Subsequent re-

98. See Dalton Conley, Being Black, Living in the Red: Race, Wealth, and Social Policy in America 29 (1999) (noting between 1984 and 1989 African Americans saved 11% of annual income while whites saved 10%, and citing research showing similar statistics).

99. Id. at 30.

100. See Oliver & Shapiro, supra note 86, at 65–66.

101. Id. at 20–21.

102. Id. at 21.

103. Id. at 146.

104. See Conley, supra note 98, at 41 (noting 4.4% refinancing rejection rate for African Americans versus 1.1% rate for whites).

105. Oliver & Shapiro, supra note 86, at 88.

106. Id. at 89–90.

107. Middle-class African American households, African Americans with college degrees, African Americans in married households, and African American households with two earners all held a tiny fraction of the financial assets of their white peers. Id. at 96–99. Steady work naturally improved asset accumulation, but the racial gaps among those with comparable employment stability remained immense. Id. at 119–20 & tbl.5.6.

search has suggested that racial disparities in asset ownership are growing.[108]

Between 1992 and 2004, families' mean net worth grew 72% overall after adjusting for inflation.[109] During this same period, however, the net worth of families headed by persons without high school diplomas declined by 16%. Renters' net worth dropped 5%. The net worth of the top fifth of income earners rose 94% from their already far-higher base. The lowest-income fifth of the population saw a modest percentage growth in assets—but from an extremely low base—while the second-lowest fifth of the population actually saw its net worth decline.[110] By contrast, income gains were much more even across the population.[111]

In 2004, the median net worth of white non-Hispanic families was more than five times that of nonwhite and Hispanic families.[112] In 1999, near the close of the longest economic expansion in recent times, asset poverty was 69% among nonwhite families but just 32% among white ones.[113] The median African American household has only about one-tenth the net wealth of the median white household.[114] Excluding home equity, its net financial assets are an even smaller fraction of those of its white counterparts.[115] Sharp disparities exist at all income levels, although they are particularly striking for the lowest income groups.[116]

Yet across races, asset poverty is widespread. In 1999, 8% of white

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Almost 90% of African American children lived in a household lacking the financial assets to subsist at the poverty line for three months. Id. at 91 fig.4.2. To the extent African American households had any net worth, 72% of it was in home or vehicle equity; although white households' homes and cars were worth substantially more, the majority of their net worth was in financial assets. Id. at 108 tbl.5.3. Whites' homes' value appreciated far more than that of African American families' comparably priced homes during the same periods. Id. at 150–52 & tbl.6.3.

108. Gender disparities in control of traditional forms of wealth also are striking. See Sunwha Lee & Lois Shaw, Inst. for Women's Policy Research, Gender and Economic Security in Retirement 20 tbl.4 (2003), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.175.656&rep=rep1&type=pdf (on file with the *Columbia Law Review*) (finding men receive substantially more income from assets in retirement than women).

109. Adam Carasso & Signe-Mary McKernan, Urban Inst., The Balance Sheets of Low-Income Households: What We Know About Their Assets and Liabilities 31 (2007), available at http://www.urban.org/UploadedPDF/411594_low-income_balance_sheets.pdf (on file with the *Columbia Law Review*).

110. Id. at 31–33.

111. Id. at 31.

112. Id. at 25 exh. 12.

113. Id. at 30 exh. 16. Asset poverty is defined as not even having enough liquid assets, excluding home equity, to survive three months at the federal poverty level. Id. at 27.

114. Thomas M. Shapiro & Jessica L. Kenty-Drane, The Racial Wealth Gap, *in* African Americans in the U.S. Economy 175, 177 (Cecilia A. Conrad et al. eds., 2005).

115. See id. (reporting net financial asset ratio of 0.09 to 1).

116. Id. at 177 tbl.19.1.

households were income-poor while one-quarter were asset-poor. Only one-third of African American households were income-poor but 55% were asset-poor. Latino/Latina households fared little better.[117] Asset poverty declined only slightly over the quarter century before the crisis of 2007 despite substantial economic growth.[118]

The Great Recession has greatly exacerbated these problems. Between 2005 and 2009, white households' median wealth dropped just 16% after adjusting for inflation, but Latino/Latina households lost 66% and African American households lost 53%.[119] Average family wealth, too, fell unevenly. Between 2007 and 2010, white families lost 11% of their net worth, while African Americans lost almost one-third and Latinos and Latinas saw their assets decline 44%.[120] This reflects many Latino/Latina and African American households' lack of asset cushions as well as the large fraction of their wealth tied up in their homes, which left them vulnerable to the collapse of the housing market. In 2010, the average white family had six times the wealth of the average African American or Latino/Latina family.[121] And by 2010, about one-third of African American and Latino/Latina families were asset-poor, compared with only 15.2% of white families.[122] These disparities increase with age,[123] leaving the African American and Latino/Latina elderly most vulnerable and least able to pass along wealth to their children. African American and Latino/Latina families are five times less likely than whites

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117. Id. at 178 fig.19.1, 179.

118. Id. at 180 fig.19.2. Median wealth for African American families declined almost two-thirds from 1983 to 2009: Half of African Americans had $2,200 or less. By 2009, white median wealth was more than forty-four times that of African Americans. Lawrence Mishel, Trends in Median Wealth by Race, Econ. Policy Inst. (Sept. 21, 2011), http://www.epi.org/publication/trends-median-wealth-race (on file with the *Columbia Law Review*).

119. Paul Taylor et al., Pew Research Ctr., Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics 1 (2011), available at http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf (on file with the *Columbia Law Review*). Mean net worth declined 10% for white non-Hispanic families from 2007 to 2010 but by 27% among Latino/Latina families and 30% among just African American families. Jesse Bricker et al., Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances, Fed. Res. Bull., June 2012, at 1, 21.

120. Signe-Mary McKernan et al., Urban Inst., Less than Equal: Racial Disparities in Wealth Accumulation 5 fig.5 (2013) [hereinafter McKernan et al., Less than Equal], available at http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf (on file with the *Columbia Law Review*).

121. Id. at 3 fig.2.

122. Caroline Ratcliffe & Sisi Zhang, Urban Inst., U.S. Asset Poverty and the Great Recession 2 (2012), available at http://www.urban.org/UploadedPDF/412692-US-Asset-Poverty-and-the-Great-Recession.pdf (on file with the *Columbia Law Review*).

123. McKernan et al., Less than Equal, supra note 120, at 1–2.

to receive large inheritances.[124]

B. *The Social Consequences of Asset Poverty*

Historic discrimination prevented minority families from owning property, facilitated efforts to dispossess those families, and kept their incomes far lower than those of whites.[125] Not surprisingly, then, their descendants have received far smaller inheritances.[126] New evidence suggests that these historical asset deficiencies explain substantially more of the present-day differences in asset holdings than do contemporary policies.[127]

This research also suggests that asset differences explain a large share of the social difficulties that have widely been attributed to other causes. Notably, controlling for assets eliminates most or all of the difference between African Americans and whites in important economic measures such as the economic returns on educational achievement.[128] Family assets have an overwhelming impact on educational achievement. One of the major purposes to which parents devote their net worth is maintaining a home within the catchment area of a good school. Asset-poor families' inability to do so leaves their children in inferior schools and often exposed to negative neighborhood environments, further distracting them from their studies.[129] Asset-poor families also are likely to live in decaying housing, exposing their children to lead poisoning, asbestos, and disease-bearing vermin, all of which can negatively affect school performance.[130] Families with asset reserves can avoid involuntary moves, utility cut-offs, and other events that disrupt children's education.

Once the effects of family assets are excluded, African American students actually have a slightly higher rate of high school graduation than whites from similarly wealthy families.[131] And, contrary to popular belief, children in single-parent families, the children of teen parents, the children of welfare recipients, and children from large families are no less likely to graduate than other children from families with similar assets.[132] These factors' impact on children's educational success is en-

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124. Signe-Mary McKernan et al., Urban Inst., Do Financial Support and Inheritance Contribute to the Racial Wealth Gap? 1 (2012) [hereinafter McKernan et al., Financial Support], available at http://www.urban.org/UploadedPDF/412644-Do-Financial-Support-and-Inheritance-Contribute-to-the-Racial-Wealth-Gap.pdf (on file with the *Columbia Law Review*).

125. See Michael Sherraden, Assets and the Poor: A New American Welfare Policy 131–35 (1991) (discussing historical record of land ownership by African Americans).

126. McKernan et al., Financial Support, supra note 124, at 1.

127. Conley, supra note 98, at 49.

128. Id.

129. Id. at 61–63.

130. Id. at 67.

131. Id. at 68–69.

132. Id. at 68–74.

tirely a function of the fact that these families are most likely to be asset-poor, not any consequence of the family structure per se.[133]

Workforce attachment, too, appears to be a function of family assets. Once the assets of a young adult's parents are taken into account, race plays no role in predicting whether she or he will be working.[134] More generally, on a range of indicators of career success, "the magnitude of any racial effect is dwarfed by the effects of social class indicators."[135] Taking parental assets into account eliminates racial differences in welfare receipt and drastically shrinks them in out-of-wedlock childbearing.[136]

Assets also are crucial in cushioning the burden of setbacks such as layoffs, health conditions that affect ability to work, or family breakups. Among households with few liquid assets, 44% suffer deprivation following involuntary job loss compared with only 16% of those with liquid reserves.[137] Similarly, twice as many asset-poor families suffer deprivation following a work-limiting health event and almost three times as many are deprived after a parent leaves the family.[138] Assets are particularly important in shielding low- and moderate-income families.[139] Racial disparities in asset ownership produce predictable results: Not only are African Americans and Latinos/Latinas more likely to experience long-term unemployment during the current crisis,[140] but those that do also are more likely to suffer severe hardship as a result.[141]

Taken together, these results suggest that broader access to the security that comes with property rights could go a long way toward addressing many of this country's most salient social problems.[142] Broadening the protection of property rights without redistributing wealth will

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133. Controlling for social class, African American children are 56% less likely to be held back a grade than white children are. Id. at 76. African American children's 61% greater likelihood of being suspended or expelled from school shrinks into statistical insignificance when the results are controlled for wealth. Id. at 78–79. Finally, although African Americans are only 38% as likely as whites to obtain a bachelor's degree, this entire difference disappears once researchers control for asset holdings. Id. at 72.

134. Id. at 96.

135. Id. at 106.

136. Id. at 131.

137. Signe-Mary McKernan et al., Urban Inst., Do Assets Help Families Cope with Adverse Events? 7 fig.3 (2009), available at http://www.urban.org/UploadedPDF/411994_help_family_cope.pdf (on file with the *Columbia Law Review*).

138. Id.

139. Id. at 7–8 & fig.4.

140. Richard W. Johnson & Alice G. Feng, Urban Inst., Financial Consequences of Long-Term Unemployment During the Great Recession and Recovery 3 fig.1 (2013), available at http://www.urban.org/UploadedPDF/412800-Financial-Consequences-of-Long-Term-Unemployment-during-the-Great-Recession-and-Recovery.pdf (on file with the *Columbia Law Review*).

141. Id. at 5 fig.3.

142. This is not to say, of course, that possession of assets would somehow counteract ambient racism, gender hierarchies, and other forms of personalized subordination.

not increase the purchasing power of low-income and low-asset people directly, but it will provide security that allows them to make the most advantageous use of those resources they have. In a sense, property rights are a form of public insurance against certain kinds of threats to what individuals value. To date, however, this country has provided that insurance disproportionately to the things the affluent value. As long as large segments of the population lack the security that property rights provide, many social problems will remain quite intractable.

C. *Property Rights and Political Freedom*

This country has long understood property rights as central to personal autonomy and political participation. John Locke, whose work profoundly influenced the Framers, built his political theory around a theory of property rights.[143] Free individuals would only consent to government, Locke posited, for the purposes of protecting their property rights.[144] Property rights provided Locke a test of whether a government was just;[145] the mark of a tyrant was that he disregarded those rights.[146] Conversely, governments earned their people's loyalty by securing their property rights.[147] By contrast, Jean-Jacques Rousseau's political philosophy, which sought to subordinate private property to state control,[148] never received broad acceptance here.

Inequalities in property holdings also have long been understood to play a crucial political role. In promoting the new national government, Alexander Hamilton declared that landowners had nothing to fear from it because they would likely control it.[149] James Madison saw differing property holdings as the "most common and durable source of factions" and explained how the constitutional structure would protect property owners.[150] For most of this country's history, some states made wealth a qualification for voting;[151] property qualifications still limit the franchise in some important elections.[152] More recently, the Supreme Court rejec-

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143. John Locke, Second Treatise of Government § 36, at 22 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

144. Id. §§ 138–139, at 73–74.

145. Id. §§ 140, 142, at 74–75.

146. Id. § 199, at 101.

147. Id. §§ 73–74, at 40.

148. Jean-Jacques Rousseau, The Social Contract 65–68 (Maurice Cranston trans., Penguin Books 1968) (1762) (describing community recognition of property rights as essential precondition for their legitimacy).

149. The Federalist No. 60, at 370 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

150. Id. No. 10, at 79, 81–84 (James Madison).

151. Breedlove v. Suttles, 302 U.S. 277, 283–84 (1937), overruled by Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966) (striking down poll tax in state elections).

152. Ball v. James, 451 U.S. 355, 371 (1981) (upholding allocation of voting rights in special district according to acreage owned); Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158

ted efforts to restrain the political influence of those controlling large concentrations of wealth,[153] throwing "open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."[154]

Property law is the guardian of the line between individual and state. It is the foundation of individual autonomy and independence.[155] Individuals lacking property rights are left dependent on the state,[156] and "[d]ependence creates a vicious circle of dependence."[157] Individuals whose interests lack the protection of property law lose their ability to resist intrusive, often arbitrary government regulation and may even become abettors of the state's power over them.[158] Their uncertainty over agencies' intentions and fear of challenging those agencies multiplies the state's power.[159] The lack of property rights undermines many other fundamental rights.[160] When many members of society hold their interests only "conditionally, subject to confiscation in the interest of the paramount state," the result is a "new feudalism."[161] Modern theorists have recognized that gross economic inequality can defeat deliberative democracy.[162]

This country operates on a combination of majoritarian and coun-

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F.3d 92, 108 (2d Cir. 1998) (upholding weighted voting for business improvement district board).

153. Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

154. Address Before a Joint Session of the Congress on the State of the Union, 2010 Daily Comp. Pres. Doc. 55, at 8 (Jan. 27, 2010).

155. See Reich, New Property, supra note 10, at 733 (noting "property guards the troubled boundary between individual man and the state" and "the power to control . . . [material] well-being is the very foundation of individuality").

156. See id. at 758 ("If the businessman, the teacher, and the professional man find themselves subject to the power of government largess, the man on public assistance is even more dependent.").

157. Id. at 737.

158. See id. at 749, 751 (noting recipients of government "largess" often add to state powers because they are unwilling to contest state's decisions).

159. See id. at 751 ("The recipients of largess themselves add to the powers of government by their uncertainty over their rights . . . .").

160. See id. at 760–64 (discussing negative effects of "largess" on free speech, and rights against self-incrimination and unreasonable search and seizure).

161. Id. at 768.

162. See Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 142–43 (2004) (concluding conditions that treat free people unequally undermine deliberative processes); see also Bruce Ackerman & James S. Fishkin, Deliberation Day 189–93 (2004) (arguing that deliberative democracy, while nominally egalitarian, may legitimize other inequalities); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 83 (William Rehg trans., MIT Press 1996) (1992) (explaining modern normative expectations of equal legislative processes). Deliberative democracy is an idealized form of popular rule in which decisions are made by the electorate after respectful discourse about the public good. If some members of society face extreme want, they may not dare to oppose more affluent persons.

termajoritarian principles. Some basic rights are deemed sufficiently fundamental that individuals need not rely upon the democratic process to protect them.[163] This frees citizens to pursue their other interests through their voting. Commonly, the same candidates or parties will not serve all of a voter's interests. If many of that voter's more important interests receive countermajoritarian protection, she or he is free to vote more in accordance with her or his other interests.[164] Having the realistic capacity to vote for any candidate enhances voters' ability to influence policy affecting their activities[165] and to dominate government more generally.[166]

Voters whose basic interests lack countermajoritarian protection must spend all of their meager political capital defending those interests in often-humiliating debates.[167] As Reich notes, these protections are essential to preserving minority interests in a democracy:

> The majority cannot be expected, on specific issues, to yield its power to a minority. Only if the minority's will is established as a general principle can it keep the majority at bay in a given instance. Like the Bill of Rights, property represents a general, long range protection of individual and private interests, created by the majority for the ultimate good of all.[168]

Commentators have noted that many low- and moderate-income people consistently vote against their economic self-interest.[169] Others have noted that many low-income Democratic voters are sharply at odds

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163. See, e.g., U.S. Const. art. I, § 9, cl. 6 (prohibiting Congress from favoring any particular state's ports in regulating commerce); id. § 10, cl. 1 (prohibiting states from impairing obligations of contracts).

164. Voters with protected property rights can support candidates that might like to seize their wealth because they know that, if elected, that candidate will be unable to do so.

165. See Reich, New Property, supra note 10, at 768 (discussing private groups' ability to "utilize" government for their own ends).

166. See id. at 767 ("Sometimes private elements are able to take over the vast governmental powers deriving from largess, and use them for their own purposes.").

167. See Susan C. Stokes, Pathologies of Deliberation, *in* Deliberative Democracy 124, 134–35 (Jon Elster ed., 1998) (noting effect public characterizations of welfare recipients have on self-image of those recipients).

168. Reich, New Property, supra note 10, at 772.

169. See Thomas Frank, What's the Matter with Kansas? How Conservatives Won the Heart of America 136–37 (2004) ("All [low-income voters] have to show for their Republican loyalty are lower wages, more dangerous jobs, dirtier air, [and] a new overlord class . . . ."); see also Frances Fox Piven & Richard A. Cloward, The Breaking of the American Social Compact 282 (1997) ("The parties . . . tend to avoid issues which reflect the interests of the poor, preferring to deal in policies that can be interpreted as being to the mutual benefit of a wide array of groups."); Ruy Teixeira & Joel Rogers, America's Forgotten Majority: Why the Working Class Still Matters 21 (2000) (noting "GOP remains wedded to [policies] that [are] out of step" with working class "and fails to provide a compelling vision for [the working class's] economic future").

with their party's social agenda.[170] The paucity of countermajoritarian protections for their basic economic interests forces these voters to make harder choices than their more affluent counterparts and hence dilutes their influence in the democratic process.[171]

Oliver and Shapiro argue that addressing asset inequality is vital to "reforg[ing] the links between achievement, reward, social equality, and democracy."[172] If only a redistribution of conventional forms of wealth will truly suffice, then entrenched resistance to redistribution makes the prospects for American democracy grim indeed. But if what Oliver and Shapiro are truly referring to is the security that goes with property rights, then such security can be had *either* through redistribution of wealth *or* through expanding the U.S. concept of property to secure that which is most important to those with few conventional assets.

D. *Policy Responses to Wealth Disparities*

Current public policy is not only doing little to close these gaps: It is exacerbating them. Successive Congresses have gutted the estate tax, which partially dissipates the accumulated wealth of the affluent, while they and state legislatures have slashed aid to education,[173] which can help low-income families accumulate assets. As a result, "[t]he large intergenerational transfers that the baby boom generation is going to provide may exacerbate racial differences in the absence of an estate tax."[174]

Several kinds of policies could respond to the paucity of property ownership among large numbers of low- and moderate-income people. To the extent that contemporary legal scholarship focuses on addressing

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170. See, e.g., Rick Pearson, Black Lawmakers Hold Key on State Gay Marriage Bill, Chi. Trib., Apr. 4, 2013, at 1 (describing black churches' opposition to legalizing same-sex marriage).

171. Reich places great emphasis on property's role as a safeguard of rights:

> [P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. . . . Political rights presuppose that individuals and private groups have the will and the means to act independently. . . . Civil liberties must have a basis in property, or bills of rights will not preserve them.

Reich, New Property, supra note 10, at 771.

172. Oliver & Shapiro, supra note 86, at 9.

173. See, e.g., Phil Oliff et al., Ctr. on Budget & Policy Priorities, Recent Deep State Higher Education Cuts May Harm Students and the Economy for Years to Come 19 (2013), available at http://www.cbpp.org/files/3-19-13sfp.pdf (on file with the *Columbia Law Review*) ("States have cut higher education funding deeply since the start of the recession . . . [a]nd the federal government allowed emergency aid for states to expire prematurely . . . .").

174. McKernan et al., Financial Support, supra note 124, at 2.

wealth disparities, it is often through proposals for reparations.[175] These proposals raise important moral questions, but they lack political traction. Indeed, the most salient proposal in the political sphere addressing wealth would actually increase disparities: reducing or eliminating the estate tax on very large inheritances.[176] Moreover, even if reparations were provided in their most optimistic form, they would leave substantial wealth disparities unaddressed.[177]

Some students of asset inequality focus on non-race-based policy responses. Oliver and Shapiro attribute much of the asset poverty among African Americans and Latinos/Latinas to "racially based" policies.[178] They conclude, however, that this poverty cannot be remedied without addressing the general inequality in assets in our society. This is only possible through "massive redistributional policies," but winning acceptance of these will be "most difficult."[179] Other scholars have reached similar conclusions, asserting that "merely eliminating remaining discrimination . . . will do little to alleviate the wealth gap" and calling for "radical, progressive, wealth-based policy," which "need not be based on skin color."[180]

Bruce Ackerman and Anne Alstott propose addressing asset inequality by giving each individual a substantial nest egg at the time she or he reaches adulthood.[181] Many would use it to help pay for higher education, but others could buy a home, capitalize a business, or make other investments. On a much smaller scale, Congress, some states, and private foundations have invited low- and moderate-income people to open individual development accounts (IDAs) in which the family receives matching contributions for every dollar it saves, provided that the funds may be

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175. See, e.g., Oliver & Shapiro, supra note 86, at 192–94 (discussing "growing social movement" for racial reparations).

176. See, e.g., Chye-Ching Huang, Ctr. on Budget & Policy Priorities, Senate and House GOP Leaders' Tax Proposals Would Give Windfall to Heirs of Largest Estates but Would Let Child Tax Credit and Earned Income Tax Credit Improvements for 13 Million Working Families Expire 9 (rev. 2012), available at http://www.cbpp.org/files/7-24-12tax.pdf (on file with the *Columbia Law Review*) (describing estate tax cut as "lavish tax windfall to the wealthiest Americans at the same time that [policymakers] are proposing to allow tax credits for struggling working-poor and near-poor families to expire").

177. See Oliver & Shapiro, supra note 86, at 193–94 (discussing potential objections to reparations, including whether reparations would "really improve the economic situation of blacks today").

178. Id. at 9. For example, federal and state tax and spending programs underwrote much of the cost of post-World War II suburbanization, which isolated people of color in decaying central cities. Id. at 16–19. Regulation of the mortgage industry, too, has fostered segregation. Id. at 19–23.

179. Id. at 9. For example, Oliver and Shapiro suggest converting the mortgage interest deduction into a refundable credit to help lower-income people afford homes. Id. at 187–88.

180. E.g., Conley, supra note 98, at 53.

181. Bruce Ackerman & Anne Alstott, The Stakeholder Society 4–5 (1999).

used only for specified asset-building purposes.[182] Researchers have had difficulty finding any impact caused by IDAs, and certainly their potential impact on participants' net worth is vastly smaller than that of the tax-preferred retirement accounts available to more affluent people.[183] In any event, adopting Ackerman and Alstott's proposal or making IDAs generally available would be extremely expensive.[184] The negative political reaction to healthcare reform suggests that such a large new spending program is unlikely to receive serious consideration in the immediate future.

As radical as these proposals may be in some respects, all are nonetheless deeply conventional in their understanding of the nature of property—and property law. Absent the sort of radical leveling that eliminates the categories of rich and poor—something antithetical to this country's political, social, and economic instincts[185]—each proposed solution would therefore leave unaddressed the fundamental problem: that the law values the kinds of interests affluent people typically have far more than those upon which lower-income people depend. Correcting that inequity is crucial to remedying the hardship and political marginalization of low-income people. The remainder of this Article illustrates how property law concepts can be updated to equalize that valuation in ways well beyond those contemplated in *The New Property*.

II. PROPERTY IN FAMILY RELATIONSHIPS: PRESCRIPTIVE RIGHTS

For a vast number of low- and moderate-income people, security begins—and sometimes ends—with family. This is certainly true of children, unable to fend for themselves financially or socially. But this is also true of many adults, for whom family may substitute for banks, childcare providers, emergency housing, employers, matchmaking services, and much more. For them, loss of family is tantamount to loss of security. If a new New Property will bring security to those with few financial assets, protecting family ties is a sensible place to start.

Property law was deeply concerned with "family values" long before the phrase became politically fashionable. Absent clear, formal statements to the contrary, the law conclusively presumes that deceased persons wish their property to go to their relatives; evidence that the decedent was alienated from, or even hostile to, those relatives is generally

182. See Gregory Mills et al., Effects of Individual Development Accounts on Asset Purchases and Saving Behavior: Evidence from a Controlled Experiment, 92 J. Pub. Econ. 1509, 1509–10 (2008) (discussing nature, "growth[,] and popularity" of IDAs).

183. Id. at 1520–22.

184. Ackerman and Alstott estimated that their plan would cost $255 billion per year in 1997. Ackerman & Alstott, supra note 181, at 219–20. Adjusting for inflation and population growth, this would be an estimated $435 billion per year in 2013.

185. See supra Part I.C (discussing centrality of individual property rights to American understanding of liberty).

immaterial absent a formal will.[186] Testators may continue to regulate their families for many years from the grave,[187] although the law will intervene if it finds the substance of that regulation malign.[188] Property law has adapted to address family problems such as spendthrift heirs and irresponsible spouses.[189] It endures considerable complexity and economic inefficiency in the cause of healthy families. The Supreme Court on occasion has treated family-backed property rights as imposing stronger constraints on government action than other ownership interests.[190] This is not by any means to suggest that family ties are an absolute trump against state action. It does suggest, however, that where the state acts in ways that threaten the very survival of families, concepts from property law may suggest some restraining principles. Here again the effort is to derive legal principles from facts on the ground using longstanding property law concepts.[191]

In no area does the state more routinely disrupt family relationships than in immigration enforcement, and often in arbitrary or unpredictable ways. Enforcement poses some of the most difficult dilemmas in all of immigration policy. Virtually no prominent policymakers object when Immigration and Customs Enforcement (ICE) moves to deport a particular immigrant whose presence in this country is unlawful or who committed a crime while here. Yet beneath this seeming unanimity is a widespread realization that the enforcement mission is largely futile, that the

186. See, e.g., Creasman v. Boyle, 196 P.2d 835, 838–39 (Wash. 1948) (en banc) (finding no right for unmarried partners to take property absent a will), overruled by In re Marriage of Lindsey, 678 P.2d 328 (Wash. 1984).

187. See, e.g., In re Estate of Little, 170 A.2d 106, 108 (Pa. 1961) (upholding bequest conditioned on beneficiary surviving his spouse).

188. See, e.g., Lewis v. Searles, 452 S.W.2d 153, 155 (Mo. 1970) (noting conditions on inheritance limiting marriage must have "legitimate purpose").

189. See Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977) (discussing role of Married Women's Property Act in protecting wife's interest in estate from separate debts of husband); George P. Costigan, Jr., Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined, 22 Calif. L. Rev. 471, 472–74 (1934) (describing role of "spendthrift trust" in safeguarding family wealth); see also Charles Donahue, Jr., What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century, 78 Mich. L. Rev. 59, 79–80 (1979) (describing legal developments protecting spouses in French and British marital property systems).

190. Compare Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (refusing to enforce zoning ordinance preventing homeowner from living with her grandchildren), with Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7–8 (1974) (upholding similar rule against living with unrelated individuals).

191. This method is particularly apt for family ties. The centerpiece of volitional family ties—marriage—long has been achievable by heterosexual couples through practice—common law marriage—in the absence of legal or religious formalities.

number of immigrants unlawfully present far exceeds any capacity enforcement agencies are ever likely to have.[192]

Against this backdrop of society-level futility exists enormous family-level insecurity. Newly arrived immigrants commonly have few ties to this country; their deportation may be a hardship to them and to family members in their home country depending on their remittances, but it often will have relatively few externalities here. As an immigrant's stay in this country goes on, however, she or he will develop progressively more ties. The immigrant may move out of areas largely populated by recent immigrants and develop relationships with neighbors. She or he may open a business or go to work for an employer outside the immigrant community. Most importantly, she or he may start a family, possibly with other immigrants, possibly not. Any children the immigrant has will be U.S. citizens and may know only U.S. culture.

The insecurity a family experiences having an immigrant member is very much the kind from which property law seeks to shield people. The members of that family may depend on the immigrant for support and security in the same way that people traditionally depended on their land or, more recently, as Reich described, depend on government largesse. They can never know the security that property rights convey if their world can be upset at any time at the whim of an enforcement official or a neighbor with a grudge. Indeed, undocumented immigration status effectively prevents an immigrant and her or his family from holding any property: Even if they have good title, they will be unable to assert it in court against even the most brazen thieves.[193]

This Part suggests that, once again, longstanding concepts from property law can be applied to protect the ties most important to vulnerable people lacking in financial assets. Just as prescriptive rights eventually protect the possessors of property whose original entry was unlawful, this Part argues that, if the government fails for long enough to remove an immigrant, she or he should acquire the right to remain. Like prescriptive rights, these rights would honor the reliance interests of those that have come to depend on the individual whose original entry was unlawful or who became subject to ejection at some point, as well as reward the entrant's industry over the inaction of those with authority to seek her or his removal. As with other concepts recommended in this Article, this variant on prescriptive rights finds partial support in existing law.[194]

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192. See Michael Martinez, As Border-Control Device, San Diego's Fence Divides, Chi. Trib., Apr. 19, 2006, at 1 (describing criticism of enforcement as mechanism to deter illegal entry).

193. See Nick Miroff, Foreclosure Epidemic Infecting Rental Market, Wash. Post, Dec. 9, 2008, at A1 (describing threats of incarceration used to deprive immigrant tenants of property they have lawfully rented).

194. See 8 U.S.C. §§ 1255(i), 1255a (2012) (allowing certain undocumented immigrants to adjust their status after long residence in this country).

Part II.A surveys the increasing evidence that the current immigration enforcement regime causes severe harm to immigrants' children, many of whom are U.S. citizens. Part II.B weighs both the force and the limitations of the rule of law argument in guiding enforcement policy. Part II.C then identifies familiar concepts from property law that could provide the means to mitigate this harm. These proposals' object is not to gut immigration enforcement, but rather to redirect it toward targets and methods that cause less harm to vulnerable families while achieving the greatest effectiveness for public-enforcement dollars. More broadly, this Part demonstrates how applying protections from property law to undervalued interests on which vulnerable people nonetheless depend can dramatically reduce hardship for them while also benefiting society at large.

A. *Collateral Harm from Immigration Enforcement*

In recent years, ICE has sharply increased its enforcement actions against two politically unpopular groups: undocumented immigrants and legal immigrants that have been convicted of crimes. In both efforts, it has arrested many longtime U.S. residents who have children and spouses that are U.S. citizens. The effects on these family members often have been devastating.

1. *Undocumented Immigrants.* — At least 3.1 million U.S. children who are U.S. citizens by birth have at least one undocumented parent.[195] Courts have long struggled with the realization that an "American citizen child has an absolute right to remain in this country . . . [that], because of his tender age, cannot be exercised meaningfully without allowing his parents to remain here as well."[196] Deporting a U.S. citizen child's parents effectively "thrusts an extremely difficult choice upon the child's parents . . . a choice between the child's greater potential for health and general material welfare in the United States and the parental sustenance and guidance he would receive from his parents in [the parents' home country],"[197] which the child may never have seen.[198] Courts have recog-

195. Randy Capps et al., Urban Inst., Paying the Price: The Impact of Immigration Raids on America's Children 9 (2007), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (on file with the *Columbia Law Review*); Jeffrey S. Passel, Pew Hispanic Ctr., The Size and Characteristics of the Unauthorized Migrant Population in the U.S. 8 (2006), available at http://www.pewhispanic.org/files/reports/61.pdf (on file with the *Columbia Law Review*).

196. Lee v. INS, 550 F.2d 554, 558 (9th Cir. 1977) (Takasugi, J., dissenting), overruled by Wang v. INS, 622 F.2d 1341 (9th Cir. 1980), rev'd on other grounds, 450 U.S. 139 (1981) (per curiam).

197. Id.; see David B. Thronson, Choiceless Choices: Deportation and the Parent-Child Relationship, 6 Nev. L.J. 1165, 1170–72 (2006) (describing parents' potential legal arguments of "hardship to children").

198. See Ramos v. INS, 695 F.2d 181, 188–89 (5th Cir. 1983) (requiring consideration of noneconomic harms, including that child's relocation to Philippines potentially "caus[ing] . . . serious trauma because of the different culture"); Mejia-Carrillo

nized that preventing family separation is a longstanding principle of U.S. immigration law.[199] In practice, however, courts have hesitated to override immigration authorities that refuse to recognize the hardship to a U.S. citizen child of either leaving the country or being separated from her or his parents as grounds for barring those parents' deportation.[200]

In 1996, Congress passed two major laws restricting immigration: the Antiterrorism and Effective Death Penalty Act (AEDPA)[201] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[202] This legislation largely eliminated the grounds on which the hardship to immigrants' family members could be considered.[203] ICE increased enforcement action massively, arresting almost 20,000 undocumented immigrants in the U.S. interior during 2006.[204] In particular, between 2002 and 2006 the number of workplace arrests increased more than sevenfold; ICE then almost equaled its 2006 total in just the first ten months of 2007.[205] ICE also increased the frequency of raids at immigrants' homes. Agents often appear at an immigrant family's door without a warrant and demand admission, counting on immigrants' fear to lead them to "consent" to a search with no legal basis.[206]

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v. INS, 656 F.2d 520, 522 (9th Cir. 1981) (noting deportation of mother would place child in "worst of situations," where return to Mexico would deprive him of "chance to further his education"); Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979) (per curiam) ("Hardship to citizen children must be considered by the Board [of Immigration Appeals] in ruling on applications for suspension of deportation . . . .").

199. See, e.g., Bastidas v. INS, 609 F.2d 101, 105 (3d Cir. 1979) ("[E]xisting case law uniformly emphasizes the importance of the question of the separation of family members from each other for purposes of [an] extreme hardship determination.").

200. See, e.g., *Wang*, 450 U.S. at 144–45 (deferring to Board of Immigration Appeals's finding of insufficient hardship); Oforji v. Ashcroft, 354 F.3d 609, 617–18 (7th Cir. 2003) (denying relief despite likely genital mutilation of child if she accompanied her mother upon deportation).

201. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

202. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

203. See IIRIRA § 301, 110 Stat. at 3009-575 to -579 (codified as amended at 8 U.S.C. §§ 1101(a)(13), 1182(a)(6), (a)(9) (2012)) (making most immigrants who entered without being inspected ineligible for lawful presence in the United States); § 306(b), 110 Stat. at 3009-612 (codified as amended at 8 U.S.C. § 1252 (2012)) (precluding judicial review of most claims for relief from deportation that family members might make).

204. Capps et al., supra note 195, at 10. ICE collects statistics by fiscal year.

205. Id.

206. Although Fifth Amendment case law prohibits the government from using threats of employment termination and other civil sanctions to coerce individuals into surrendering their right against self-incrimination, see Lefkowitz v. Cunningham, 431 U.S. 801, 805–06 (1977) ("[G]overnment cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized."); Lefkowitz v. Turley, 414 U.S. 70, 82–83 (1973) (invalidating under Fifth Amendment threats to contracts and contracting privileges upon refusal to sign immunity waivers), Fourth Amendment case law has not developed that far,

This increase in enforcement action against longtime U.S. residents has devastated immigrants' families. The "loss of a parent creates a more unstable home environment and removes one of the main strengths in immigrant families—the presence of two parents."[207] Caring for children who have suddenly lost their parents to detention or deportation after immigration raids has overwhelmed the resources of public agencies and private social service organizations.[208] Even if the family decides to send the U.S. citizen children out of the country to be with their parents, serious problems can arise as the children struggle to get by using an unfamiliar language in an unfamiliar culture.[209] Child welfare agencies seize some U.S. citizen children;[210] because these agencies may be unwilling to send them to their parents' country and their parents cannot come here to win them back, these families may be separated for extended periods.

The manner of ICE's raids exacerbates the harm children experience and can do lasting damage both to them and to the family unit.[211] Child psychologists report that children suddenly losing their parents without the chance to say "good-bye" feel abandoned; many internalize the "disappearance" of a parent, which can manifest as anger toward the remaining parent or severe anxiety.[212] ICE does not consistently distinguish between those undocumented immigrant workers without children in the United States and the roughly equal number that have children.[213]

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particularly when government agents exploit immigrants' pervasive fear rather than use explicit threats. See Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973) (finding ignorance of right to refuse does not vitiate voluntariness of subject's consent to search).

207. Capps et al., supra note 195, at 41. The "hidden side" of these raids has been "[t]oddlers stranded at day care centers or handed over to ill-equipped relatives . . . [and] [s]iblings suddenly left in charge of younger brothers and sisters." Monica Rhor, Immigration Raids Split Families, 6abc.com (Mar. 11, 2007), http://abclocal.go.com/wpvi/story?section=news/national_world&id=5112073 (on file with the *Columbia Law Review*). After seeing a breastfeeding baby hospitalized for dehydration after ICE refused to release her mother, state officials decried the "humanitarian crisis" that can follow immigration raids. Id.

208. Capps et al., supra note 195, at 83–90 (summarizing case studies of disruption in public and private service provision following raids).

209. See Nina Bernstein, Caught Between Parents and the Law, N.Y. Times, Feb. 17, 2005, at B1 (describing deportees' children's "sudden journey into an alien life").

210. See, e.g., Brian Bennett, Immigration Conundrum: Deport Moms of Minor U.S. Citizens?, L.A. Times (Sept. 1, 2012), http://articles.latimes.com/2012/sep/01/nation/la-na-deport-parents-20120902 (on file with the *Columbia Law Review*) ("More than 5,000 American-born children of deported parents are in foster care around the country . . . ."); see also Capps et al., supra note 195, at 42–44 (examining destabilizing impact of family fragmentation and separation after ICE raids).

211. The "extensive show of force on the part of immigration authorities" results in children "witness[ing] force used against their parents, which can include handcuffing or shackling[,] . . . [potentially] leav[ing] a lasting psychological impact on children and adolescents." Capps et al., supra note 195, at 23. These fears quickly spread to children that do not lose parents in the raids. Id. at 48–49.

212. Id. at 50–51.

213. Id. at 16 tbl.1, 28.

Fear of being arrested as they drop off their children can cause undocumented parents to pull their children out of school.[214] Families with undocumented members may go into seclusion; psychologists report that the resulting social isolation can lead to depression, weight loss, and acting out among their children.[215] Warrantless raids on immigrants' homes spread fear throughout the immigrant community. Immigrants' insecurity attracts criminals, who strike with little fear of being reported to law enforcement; some callous thugs refer to undocumented workers as "walking ATMs."[216] Even those who are lawfully present are at risk; bystanders with undocumented family members are unlikely to render aid or call the police.[217]

The economic hardship for remaining family members of arrested immigrants can also be severe.[218] In addition to losing their breadwinners, they also have to pay attorney's fees and sometimes bonds.[219] Extended family networks mitigate some of these hardships but often are stretched thin to begin with.[220] A recent study found three-quarters of families faced food insecurity after the raids; some lost their homes or had their utilities terminated.[221]

The Obama Administration has quietly deemphasized major, attention-grabbing raids.[222] This change is partly cosmetic: Avoiding publicity about particular raids serves political interests, but the aggregate impact of smaller raids can be similar.[223] Yet even to the extent that ICE has

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214. See id. at 48 (describing how after raid "[m]any families went into hiding out of fear of ongoing household raids and kept their children out of school").

215. Id. at 52–53.

216. Matthew Artz, Oakland Unveils City ID and Debit Card, Contra Costa Times (Feb. 1, 2013), http://www.contracostatimes.com/ci_22499729/oakland-unveils-city-id-and-debit-card (on file with the *Columbia Law Review*).

217. Cf. id. (explaining city identification card would "help assure undocumented residents that they wouldn't risk deportation by reporting crimes or coming forward to police as witnesses").

218. See Capps et al., supra note 195, at 44–46 ("[F]amilies who lost breadwinners as a result of . . . raids faced enormous economic challenges.").

219. Id. at 30.

220. Id. at 36–38.

221. Id. at 47–48.

222. See Mosi Secret & William K. Rashbaum, U.S. Seizes 14 7-Eleven Stores in Immigration Raids, N.Y. Times (June 17, 2013), http://www.nytimes.com/2013/06/18/nyregion/us-seizes-14-7-eleven-stores-in-immigration-raids.html (on file with the *Columbia Law Review*) ("Under the Obama administration, [ICE] has moved away from high-profile workplace raids . . . .").

223. See Has Barack Obama Deported More People than Any Other President in U.S. History?, PolitiFact.com (Aug. 10, 2012, 3:07 PM), http://www.politifact.com/truth-o-meter/statements/2012/aug/10/american-principles-action/has-barack-obama-deported-more-people-any-other-pr/ (on file with the *Columbia Law Review*) (evaluating claims and official statistics and concluding "Obama's [deportation] numbers are significantly higher than Bush's were, even as the estimated population of illegal immigrants was falling"); see

shifted enforcement efforts to target more recent entrants, as this Article urges, the change is a mere exercise of discretion, subject to reversal at any time by this or any future administration. Dependence on this sort of discretionary decision for matters of vital personal importance is precisely the type of governmental largesse that Reich sought to regularize in *The New Property*. Families with immigrant members remain deeply dependent on this particular form of government largesse.

2. *Legal Immigrants Convicted of Nonviolent Crimes.* — For several decades prior to 1996, immigrants could be deported for committing one of a limited list of serious crimes within five years of entering the United States.[224] AEDPA and IIRIRA[225] vastly expanded the range of offenses that trigger deportation and eliminated many procedural safeguards and opportunities for these immigrants to obtain discretionary relief.[226] Just as importantly, the statutes eliminated the five-year limit on legal immigrants' vulnerability to deportation.[227] Finally, the 1996 legislation permanently precludes deported immigrants' lawful return.[228]

In the first nine years of these laws' implementation, the Immigration and Naturalization Service (INS) and ICE deported 672,593 noncitizens for criminal offenses.[229] In 2005, at least 64.6% of those deported on this basis had been convicted only of nonviolent offenses such as drug possession or illegal entry into the United States.[230] Some of the crimes leading to these separations are as modest as possession of two

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also Daniel Malloy & Jeremy Redmon, Immigration's Flashpoint, Atlanta J.-Const., July 14, 2013, at A1 (reporting record number of deportations under Obama).

224. See 8 U.S.C. § 1251(a)(2)–(4) (1994) (current version at 8 U.S.C. § 1227 (2012)) (prescribing five-year period and listing crimes classified as grounds for deportation); Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 Harv. J.L. & Pub. Pol'y 367, 386–87 (1999) (describing law governing offense-based deportations prior to 1996).

225. AEDPA was adopted in extreme haste, leaving Congress's intent in many respects obscure. John H. Blume, AEDPA: The "Hype" and the "Bite," 91 Cornell L. Rev. 259, 261 (1996) (noting "speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance"). IIRIRA's passage was, if anything, even more hurried: It was inserted into an omnibus spending bill enacted hours before a potential government shutdown. Margaret H. Taylor, *Demore v. Kim*: Judicial Deference to Congressional Folly, *in* Immigration Stories 343, 353 (David A. Martin & Peter H. Schuck eds., 2005).

226. See supra note 203 (describing legislative provisions).

227. See 8 U.S.C. § 1227(a)(2) (listing crimes that are grounds for deportation but providing no five-year window).

228. See id. § 1182(a)(2) (listing crimes making aliens inadmissible but providing no exceptions).

229. Human Rights Watch, Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy 5 (2007), available at http://www.hrw.org/sites/default/files/reports/us0707_web.pdf (on file with the *Columbia Law Review*).

230. Id. at 5–6. Some 20.9% were deported for violent offenses; ICE classified the remaining 14.7% as being deported for "other" crimes, likely including some nonviolent crimes as well. Id. at 6.

grams of marijuana; other convictions resulted from guilty pleas arranged by appointed criminal defense lawyers unfamiliar with the immigration consequences of the convictions.[231]

Many of the immigrants had been lawfully residing in the United States for a decade or more.[232] ICE's actions split families, often depriving those left behind in the United States of their primary means of support.[233] Human Rights Watch estimates that these deportations left 1.6 million spouses and children in the United States without a parent, husband, or wife.[234] These deportations have confronted these families with the wrenching choices of remaining divided permanently or reunifying overseas, in a country with a culture and language with which their children may be wholly unfamiliar. Families may also be forced to leave infirm elderly refugees in this country without relatives to care for them.[235]

B. *The Rule of Law and Its Limits*

To date, immigrants' rights advocates have struggled to find a voice on these issues. Some have expressed skepticism about the value of enforcement action or extolled the economic contributions of undocumented immigrants.[236] In the process, they seem indifferent to rule of law concerns.[237] This infuriates significant segments of the progressive, moderate, and conservative political communities. This also undermines the advocates' credibility when urging changes in the underlying immigration laws: Critics of immigration are likely to be reluctant to compromise if they expect foot-dragging on the enforcement of any agreement. As a result, many immigrants' advocates have avoided enforcement issues altogether, leaving these families to fend for themselves.[238]

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231. See id. at 68–69 (describing such cases).

232. See id. at 11 (noting after criminal convictions "[p]eople with lawful permanent resident status (or green card holders), including those who have lived lawfully in the US for decades, are subject to deportation"). ICE's data do not disclose the legal status of those deported; some presumably were unlawfully present, although for most such people that status by itself would have provided a simpler basis for deportation. See id. at 6 (noting lack of ICE data).

233. See id. at 61–62, 69 (describing cases where deportee is sole breadwinner).

234. Id. at 6.

235. See id. at 66–67 (describing case of deportee whose apparently senile mother would be uncared for when he left United States).

236. See generally, e.g., Pilar Marrero, Killing the American Dream: How Anti-Immigration Extremists Are Destroying the Nation (2012) (criticizing efforts to limit immigration).

237. See John F. Rohe, Who's Killing the American Dream?, Pittsburgh Post-Gazette, Oct. 21, 2012, at B-5 (reviewing Marrero, supra note 236) (criticizing Marrero's book for failure to take opponents' positions seriously).

238. See, e.g., The Top 5 Things the Senate Immigration Reform Bill Accomplishes, Ctr. for Am. Progress (June 27, 2013), http://www.americanprogress.org/issues/immigration/news/2013/06/27/68338/the-top-5-things-the-senate-immigration-reform-bill-accomplishes (on file with the *Columbia Law Review*) (applauding tougher enforcement

Although the rule of law is an important consideration, it cannot by itself end the discussion. Even if one believes that rule of law values require vigorous enforcement of the positive law at the moment, enforcement brings information to light that can suggest that a new substantive regime is required. This is particularly true where, as with immigration, full or even substantial compliance with the law is wholly out of reach. Barring a commitment of enforcement resources far beyond any serious proposals and massive intrusions on the civil liberties of U.S. citizens, millions of undocumented immigrants will remain in the United States indefinitely. Extensive violations of economic and social regulations—which are what immigration laws essentially are—increasingly cause members of the public to question the law's efficacy in restraining the forces driving those violations. The reaction to rampant bootlegging, after all, was to repeal Prohibition, not to endlessly redouble enforcement. Today, most conservatives and increasing numbers of liberals react to widespread illegal side payments subverting a rent control law with calls to repeal rent control rather than to "crack down on lawless landlords."[239]

Having a large class of people in society whose very being is treated as unlawful is profoundly corrosive.[240] Valuable insight can be gained from the experience of South Africa's "pass" laws. These laws required nonwhites to have special permission to be in white areas, generally prohibiting overnight stays; the laws effectively criminalized many workers' presence near their jobs. Like restrictions on immigration to the United States, the exclusion of native Africans from land ownership or permanent residence in much of South Africa throughout most of the twentieth century was designed to secure economic advantages to the dominant community.[241] The availability of passes allowing native Africans to work in white areas was controlled by employers,[242] much as U.S. employers play a dominant role in employment-based immigration here. As with U.S. immigration, the issuance of passes was intensely political: Different classes of employers competed to win pass-issuance systems favorable to their interests.[243] The National Party came to power in South Africa in

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provisions in Senate immigration bill but ignoring those provisions' impact on immigrant families).

239. See Richard A. Posner, Economic Analysis of Law §§ 11.1, at 341–44, 16.4, at 499–504 (7th ed. 2007) (criticizing market-distorting systems of rationing things of value).

240. The Supreme Court has implicitly recognized that law is best suited for prohibiting discrete antisocial acts rather than ongoing conditions that raise social or economic concerns. See, e.g., Robinson v. California, 370 U.S. 660, 666–67 (1962) (holding state may not criminalize status of addiction even though it results from legitimately proscribed drugtaking).

241. Leonard Thompson, A History of South Africa 163 (2000) [hereinafter Thompson, South Africa].

242. Id. at 165.

243. Id. at 165–66.

1948 promising to stem the flow of native Africans into white areas.[244] It failed to follow through because of its need for native African labor to fuel economic growth.[245]

Like the U.S. immigration enforcement system, the "pass" laws were broadly insensitive to family values, routinely isolating male African workers from their families.[246] Natural bonds of affection drove these workers to violate the "pass" laws to be with their wives and children. The result was "a vast class of lawbreakers" constantly subject to arbitrary action from the police and extortion from all whom they met.[247] The fiction of temporary presence subjected the immigrants to wide-ranging arbitrary abuse, and thus was generative of much of the worst of apartheid.[248]

To be sure, U.S. immigration rules differ from the South African "pass" laws in important ways, most obviously in the legitimacy of the regimes that installed them. Racism was part and parcel of the "pass" laws; and although racism has intruded repeatedly on U.S. immigration policymaking,[249] one need not be racist to believe that this country needs to establish and enforce reasonable rules controlling immigration. Nonetheless, the notions of criminalizing the very presence of large numbers of people for essentially economic reasons[250] and disregarding the powerful pull of family unite the two arrangements. The sense that such laws are overreaching—and the awareness they have no plausible prospect of success—undermines the rule of law at least as much as so-called "amnesty."

Undocumented immigrants' perpetual fear of the authorities undermines the rule of law by reducing the pool of cooperative witnesses to crimes. To be sure, when a fugitive forger or swindler sees someone assaulted on the streets, he or she is unlikely to become involved for fear of coming to the notice of the authorities. The number of such criminals is so slight, however, that public safety probably does not suffer much. By

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244. John Dugard, Human Rights and the South African Legal Order 73 (1978).

245. Id.

246. Thompson, South Africa, supra note 241, at 166.

247. Id. at 166–67.

248. See Dugard, supra note 244, at 73–78 (describing arbitrary enforcement, including expulsion from "white areas" and prohibition from entering churches, schools, and hospitals, under "pass system").

249. See Alan M. Kraut, Silent Travelers: Germs, Genes, and the "Immigrant Menace" 80–81 (1994) (describing racist attribution of epidemics to immigrants); Juliet Lapidos, Steve King Still Stands by "Cantaloupe" Comments, N.Y. Times: Taking Note (Aug. 12, 2013, 3:09 PM), http://takingnote.blogs.nytimes.com/2013/08/12/steve-king-still-stands-by-cantaloupe-comments (on file with the *Columbia Law Review*) (quoting other Republicans describing as "offensive" Representative Steve King's remarks on immigrant children "hauling . . . marijuana across the desert").

250. See Örn B. Bodvarsson & Hendrik Van den Berg, The Economics of Immigration: Theory and Policy 81–90 (2009) (finding much contemporary opposition to immigration is based on beliefs about many immigrants' low productivity).

contrast, the millions of undocumented immigrants and their family members likely are the sole witnesses to, or victims of, large numbers of crimes.[251] Keeping them in a perpetual state of outlawry significantly increases the vulnerability of all those around them. And because immigrants tend to live in communities with people originating from the same region,[252] that hazard falls disproportionately on people of color.

Just as society broadly embraces the rule of law, it also shares the instinct that the law should respond to acute crises, not intrude as a chronic source of menace into the lives of people who have settled into unobjectionable routines. Sympathetic news stories about former '60s radicals and domestic terrorists exposed after decades of living in suburbia[253] capture some of the disruption that immigrant families feel after raids. If many Americans can muster such sympathy for former bombers and robbers, it is unfortunate that society is still dealing so harshly with longtime peaceful, hardworking undocumented immigrants and nonviolent offenders.

Few if any forms of conventional property are as vital to individual well-being as is family. This is certainly true for children, but little different for many adults as well. The family's positive externalities, too, are enormous: American communities, American society, and the nation's self-image are in large part built around families. Leaving the security of families to the whims of government officials is at least as troubling as any of the problems Reich explored in *The New Property*.

C. *Immigrant Families and Prescriptive Rights*

Addressing the enormous collateral harm resulting from immigration enforcement requires a coherent countervailing principle that would temper, but not debilitate, enforcement of immigration laws. Family values offer that opportunity. Leniency as an end in itself, without a specific motivating principle, is likely to be taken as weakness on the moral principle underlying the law being violated—and hence rejected

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251. See Lynn Tramonte, Immigration Policy Ctr., Debunking the Myth of "Sanctuary Cities": Community Policing Policies Protect American Communities 6 (2011), available at http://immigrationpolicy.org/sites/default/files/docs/Community_Policing_Policies_Protect_American_042611_update.pdf (on file with the *Columbia Law Review*) (quoting numerous senior law enforcement officials on dangers of having immigrants unwilling to report crimes).

252. See, e.g., Marie Price & Audrey Singer, Edge Gateways: Immigrants, Suburbs, and the Politics of Reception in Metropolitan Washington, *in* Twenty-First Century Gateways: Immigrant Incorporation in Suburban America 137, 164–65 (Audrey Singer et al. eds., 2008) (discussing ethnic enclaves and communities in Washington, D.C., area).

253. See, e.g., Robert F. Moore & Leslie Brooks Suzukamo, Soliah Held Without Bail, Saint Paul Pioneer Press, June 18, 1999, at 1A (describing arrest of former Symbionese Liberation Army member and effects on her husband and daughter).

out of hand.[254] This country is not likely to stop enforcement action against undocumented immigrants. Nor will it be eager to allow those convicted of serious crimes to remain within its borders. But it can be plausibly prompted to focus its enforcement efforts on newly arrived immigrants, who are less likely to have families in this country, and on serious felons. To be sure, the fit between recent arrivals and immigrants without family ties here is imperfect. And the removal of many of these immigrants will cause hardship to the immigrants themselves and to the families that they are supporting in their countries of origin. Nonetheless, immigrants whose families are here face all of the same hardships and, in addition, become separated from their families.

Effective enforcement of immigration laws can still be accomplished while avoiding the destruction of family. Immigration authorities long have "recognized that it is much easier and cheaper to apprehend [unlawful entrants] along the southwestern border than to ferret out [unlawful residents] who could be living and working almost anywhere in the United States."[255] The vast majority of the 1.6 million noncitizens the government arrests each year are at or near the Mexican border.[256] Historically, two-thirds of undocumented immigrants that are apprehended are caught at the point of entry. Another quarter is caught within three days of entry. Only one in ten has been in the country for even four days.[257] Even beyond the border areas, a policy targeting relatively recent arrivals whose arrest would not break up a family would leave ICE with plenty to do. Two-fifths of undocumented immigrants have been in the United States five years or less.[258] In addition, almost three-fifths do not have children.[259] Another 10% have only noncitizen children, who presumably would leave with their parents.[260] Still, almost two million families with undocumented members have at least one U.S. citizen child—and in most of those families, all children are U.S. citizens.[261] Instead of disrupting established families of immigrants, then, ICE could focus on the communities and the types of employers that the most recent arrivals

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254. See David A. Super, The New Moralizers: Transforming the Conservative Legal Agenda, 104 Colum. L. Rev. 2032, 2072–75 (2004) (discussing modern social theorists who reject leniency for illegal immigrants based on moral values).

255. Vernon M. Briggs, Jr., Immigration Policy and the American Labor Force 133 (1984) (discussing INS findings).

256. Capps et al., supra note 195, at 10.

257. Thomas J. Espenshade, Undocumented Migration to the United States: Evidence from a Repeated Trials Model, *in* Undocumented Migration to the United States: IRCA and the Experience of the 1980s, at 159, 161 (Frank D. Bean et al. eds., 1990).

258. Passel, supra note 195, at 1.

259. Michael Martinez, Deportations Strand Young U.S. Citizens, Chi. Trib., Apr. 29, 2007, at 24.

260. Id.

261. Id.

tend to seek out.[262]

In seeking to mitigate the harm its enforcement does to vulnerable families, immigration law can draw on a parallel from property law. Advocates of harsh action against undocumented immigrants compare them to trespassers.[263] Recently arrived trespassers may be evicted, sued, or arrested. The new trespasser's need for, or ties to, the land is legally irrelevant.[264] This unflinching adherence to the rule of law fades, however, after the trespasser has held the property for an extended period of time. Eventually, a limitations period is reached, and someone who is a trespasser one day becomes an owner the next. The law does not reconsider the propriety of the original trespass;[265] it merely recognizes that its enforcement interests can be adequately vindicated during the limitations period. Society as a whole is better off if the law permits the trespasser to keep and maintain the web of social and economic connections he or she has accumulated on the land.[266]

In the same way, an approach to immigration enforcement that recognizes well-established family ties as property interests would nonetheless find newly arrived immigrants to have relatively weak interests. It would, however, hold that after some time has passed and the undocumented immigrant has forged family ties here, their ties deserve the same deference accorded adverse possessors' ties to their land. Allowing those immigrants to remain does not negate the rule of law values in enforcing immigration law; it merely recognizes that after some period of time for

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262. To be sure, some new arrivals join families that are already here. If those families are either U.S. citizens or longtime resident immigrants, however, they are less likely to be found in the places where new arrivals without connections congregate. As such, enforcement strategies targeting new arrivals will be less likely to reach them. But to the extent that new arrivals joining preexisting families are apprehended, they likely will lack the special equities that immigrants who arrived years earlier can claim: Their family here will not have been relying on them, they will not have had children here who started to grow up in U.S. culture, and they will not have employers and neighbors who have come to rely upon them (as opposed to the family members they are joining).

263. Peter H. Schuck, Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship 182 (1998).

264. Joseph William Singer, Property § 2.2.1, at 28 (3d ed. 2010) [hereinafter Singer, Property].

265. A minority of the states require the adverse possessor to have acted in "good faith"—a difficult term to define in this context, see, e.g., Halpern v. Lacy Inv. Corp., 379 S.E.2d 519, 520–21 (Ga. 1989)—but the majority do not, see Chaplin v. Sanders, 676 P.2d 431, 435 (Wash. 1984) (surveying states to find majority do not require "good faith"). Some courts also speak of the trespasser having a "claim of right." In practice, that element generally does not entail either a legal claim or a subjective expectation, but merely objective conduct of the kind expected from owners. See, e.g., Grappo v. Blanks, 400 S.E.2d 168, 171 (Va. 1991) (defining claim of right as "possessor's intention to appropriate and use the land as his own to the exclusion of all others").

266. See Thomas W. Merrill, Property Rules, Liability Rules, and Adverse Possession, 79 Nw. U. L. Rev. 1122, 1133 (1985) (summarizing justifications for and benefits of adverse possession).

enforcement, other values become more salient. Similarly, it counsels a different approach to immigrants convicted of crimes depending on the depth of the family ties that a given immigrant has in this country: Relatively minor offenses might justify removing a new entrant, but after immigrants have been in the country an extended time, they, and their families, should face the same punishment for most offenses that U.S. citizens would.

This approach is a significant departure from contemporary immigration debates, yet the parallels between immigration policy and property law are striking. Critics argue that the illegality of undocumented immigrants' entry or continued presence disqualifies them from making any legal claims. In the same vein, "[t]itle by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it."[267] Oliver Wendell Holmes regarded the deprivation of a property owner's rights as "a pure evil as far as it goes."[268] Yet even he supported granting trespassers prescriptive rights[269]—a reflection, no doubt, of his pragmatism.

Pragmatism is every bit as important to a massive, complex undertaking such as immigration law, but all too often it is drowned out by emotion. Undocumented immigrants' continued presence, critics contend, is an ongoing violation of the law.[270] Some might argue that this would make ordinary statutes of limitations inapplicable. Yet a trespasser's continued presence is also an ongoing violation of the property owner's rights. The inefficiency of permanently treating the trespasser's presence as unlawful, however, has led the law to limit the duration of the trespasser's vulnerability to removal. Thus, adverse possession "rests upon social judgments that there should be a restricted duration for the assertion of 'aging claims,' and that the passage of a reasonable time period should assure security to a person claiming to be an owner."[271] If being subject to removal from a particular piece of land engenders insecurity, then vulnerability to removal from the entire country, and all loved ones here, does far more.[272]

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267. Henry W. Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 135 (1918).

268. O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 476 (1897) [hereinafter Holmes, Path].

269. Letter from O.W. Holmes to William James (Apr. 1, 1907), *in* The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions 417, 417–18 (Max Lerner ed., 1989).

270. See Steve Salvi, Sanctuary Cities: What Are They?, Ohio Jobs & Justice PAC, http://www.ojjpac.org/sanctuary.asp (on file with the *Columbia Law Review*) (last updated Mar. 21, 2013) (insisting undocumented people are not immigrants because their presence is unlawful).

271. 16 Richard R. Powell, Powell on Real Property § 91.01[2] (Michael Allan Wolf ed., 2013) [hereinafter Powell on Property].

272. To be sure, some important questions must be addressed to apply traditional adverse possession concepts to immigration. Traditionally, prescriptive rights did not run

Holmes believed that the justification for adverse possession was not the desire for peace or the loss of evidence, but rather in honoring the natural sense of the possessor to treat property as her or his own after the passage of some time.[273] Robert Ellickson finds support for Holmes's view in recent developments in cognitive psychology, particularly prospect theory.[274] Prospect theory holds that people treasure what they already have far more than they value things of equal value that they might acquire in the future.[275] By the same token, destroying the existing familial and social relationships of longtime immigrants is an entirely different matter from preventing new entrants from forming such bonds, however much they may want to do so. If the law can honor adverse possessors' reliance interests in property to which they originally had no right,[276] it surely can recognize the complex web of reliance interests immigrants and their families build up over time.

Courts and commentators defend prescriptive property rights as reflecting disapproval of landowners' delay in asserting property rights; prompt possessory actions not only minimize landowners' losses but also are likely to be simplest for the courts to resolve and minimize disruption of reliance interests for those that have dealt with the trespasser.[277] As the

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against the sovereign. That doctrine appears to be changing as many states, recognizing that most of the same policies justifying prescriptive rights against private landowners may apply with equal force to the state, have waived this traditional immunity by statute. See Paula R. Latovick, Adverse Possession Against the States: The Hornbooks Have It Wrong, 29 U. Mich. J.L. Reform 939, 945–47 (1996) (surveying states' various positions). Certainly when viewed from the perspective of the individual experiencing the insecurity of indefinite vulnerability to forced removal, the identity of the one holding those rights is irrelevant.

One might also question whether a mobile undocumented immigrant's presence is "open and notorious." In some cases, it may well be. Even where an undocumented immigrant has lived quite surreptitiously, however, it is likely she or he is still easier to find than stolen personal property. Yet many courts allow prescriptive rights to vest in personal property where the owner has not taken reasonable steps to recover that property. E.g., O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (noting under state "discovery rule" statute of limitations inquiry focuses on "whether the owner has acted with due diligence in pursuing his or her personal property"); Ashton Hawkins et al., A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 Fordham L. Rev. 49, 79–81 (1995) (discussing states' variations on "discovery rule," which "requires former owners to exercise reasonable diligence in searching for their stolen property").

273. Holmes, Path, supra note 268, at 476–77.

274. Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 Chi.-Kent L. Rev. 23, 38–39 (1989).

275. See id. at 35–37 (describing tenets of prospect theory).

276. See Merrill, supra note 266, at 1131–32 (discussing adverse possessors' and third parties' reliance interests justifying adverse possession doctrine); Singer, Reliance, supra note 65, at 666–69 (comparing adverse possessors' and true owners' interests).

277. The trespasser's presence must be "open and notorious," but the owner need not be subjectively aware of the unlawful presence. The possessor need only use the property as an ordinary owner would, with the illegality of presence ascertainable through reasonable investigation. E.g., William B. Stoebuck & Dale A. Whitman, The Law of

owner fails to act, the trespasser's interest in the land occupied, which was initially nil, rises to become full over time, while the owner's interest, initially full, fades into nothingness.[278] To much the same effect, prompt ICE action against new unlawful entrants minimizes their unwelcome impact on U.S. society. To the extent that enforcement action against undocumented immigrants is motivated by counterterrorism concerns, foreign terrorists are likely to act shortly after arriving. New immigrants, particularly undocumented ones, tend to congregate in communities where others share their language and culture; over time, they tend to assimilate and spread out in response to the same range of factors that guide other longtime residents' locational decisions.[279] An enforcement regime focused on new entrants thus would apply ICE's finite resources efficiently. To be sure, ICE still would miss a considerable number of undocumented immigrants, but diverting personnel away from the pursuit of recent entrants to the far less efficient pursuit of dispersed longtime residents only exacerbates the problem. Apprehensions at or immediately after entry also have the potential of catching terrorists or smugglers; raids on packing plants or family homes lack that extra law enforcement value.

Like a landowner's prompt action to evict a trespasser, an enforcement strategy targeting new entrants would minimize the reliance interests of landlords and others that might have commercial dealings with the immigrants. Much more importantly from a family values perspective, it also minimizes the likelihood that the immigrants will have had children in this country or have built close family ties with other relatives here.

Prescriptive rights also reward trespassers' productive use of property over an extended period of time.[280] Here again, the passage of time

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Property § 11.7, at 856 (3d ed. 2000); see also Lawrence v. Town of Concord, 788 N.E.2d 546, 552 (Mass. 2003) (noting adverse possessor's "possession and use had all the usual indicia of ownership" and "[h]is possession and use provided sufficient notice to support a claim of adverse possession" because there is "no duty to disclose . . . lack of ownership or to enlighten the town as to its interests"). Undocumented immigrants living in the community, going to work, and shopping in public stores act very much the way ordinary lawful residents do. The unlawfulness of their presence could readily be determined with reasonable investigation. The government's failure to have allocated sufficient resources to perform those investigations should be no more relevant than an owner's failure to determine the extent of her or his property interests or the nature of a trespasser's intrusion.

278. Margaret Jane Radin, Time, Possession, and Alienation, 64 Wash. U. L.Q. 739, 748–49 (1986).

279. See Michael J. White & Afaf Omer, Segregation by Ethnicity and Immigrant Status in New Jersey, *in* Keys to Successful Immigration: Implications of the New Jersey Experience 375, 388–90 (Thomas J. Espenshade ed., 1997) (finding most groups of relatively recent immigrants living in highly concentrated communities and less recent immigrants more widely dispersed).

280. See Robert Cooter & Thomas Ulen, Law and Economics 162 (5th ed. 2007) ("Under such a rule [of adverse possession], persons who neglect to monitor their

strengthens the argument for granting undocumented immigrants repose. Would-be immigrants typically must enter the country unlawfully because they lack the job skills or family ties to qualify to enter legally. To survive in this country for several years, an unlawful immigrant must either have worked consistently or formed family bonds with someone who is working. In the latter case, the immigrant likely is providing the kinds of substantial but nonmonetized values typical of families. This suggests that the main policy reasons for excluding would-be immigrants may no longer apply: The immigrant either is contributing to the U.S. economy or has become important to someone who is. In these cases, granting successful immigrants repose after some period of time in this country would yield the same efficiencies that adverse possession does.

Some commentators argue that adverse possession's primary purpose is neither to punish negligent landowners nor to reward diligent trespassers but to reduce transaction costs for the system by "automatically . . . quiet[ing] all titles which are openly and consistently asserted, . . . provid[ing] proof of meritorious titles, and correct[ing] errors in conveyancing."[281] Similar transaction cost issues are present in immigration enforcement: The issues in a deportation proceeding against a new entrant are far simpler than those against a longtime resident. Moreover, deportations of recent entrants are unlikely to burden state and local child welfare agencies with looking after U.S. citizen children left behind.[282]

The proposal here[283] diverges not only from the putative "path to citizenship" in recent immigration bills but also from the amnesties in the Immigration Reform and Control Act of 1986 and similar legislation. Those provisions each made a large cohort of people who had entered this country prior to an arbitrary date suddenly eligible for legal status.[284] Integrating that large cohort suddenly into society posed administrative,

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property boundaries run the risk of losing idle parts of [their land] to someone who makes use of them."); see also Posner, supra note 239, § 3.13, at 83–84 (discussing both adverse possessors' investment in land and economic justifications for doctrine).

281. Ballantine, supra note 267, at 135.

282. See Seth Freed Wessler, Applied Research Ctr., Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System 22–28 (2011), available at http://arc.org/shatteredfamilies (on file with the *Columbia Law Review*) (finding 5,100 children in foster care because of deportation or detention of immigrant parents).

283. For a more literalistic variant, see generally Monica Gomez, Note, Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States, 22 Geo. Immigr. L.J. 105 (2007) (arguing law should recognize immigrants' "adverse possession" of legal status under certain circumstances).

284. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394–404 (codified as amended in scattered sections of 7, 8, 42, and 50 U.S.C.) (providing procedure for legalizing undocumented immigrants who entered the United States before January 1, 1982); see also 8 U.S.C. § 1259 (2012) (allowing immigrants who entered prior to January 1, 1972, to obtain legal status).

economic, and social challenges.[285] Prior amnesties also did not create a permanent change in law that would accept the continued residence of longtime undocumented residents and did not seek to encourage enforcement authorities to focus on new arrivals in the future.

A better approach would be to allow undocumented immigrants to apply for legal status upon proof of continued residence in this country for a certain number of years.[286] Tying legal recognition to the passage of a specific number of years avoids criticism for giving immigrants inappropriate incentives to start families once they arrive.[287] (Simply granting legal status to undocumented members of families with U.S. citizen children, while fitting better with the goal of security for families, would not be feasible because of concerns about such incentives.) Indeed, focusing enforcement on new arrivals might more effectively deter illegal entry, as more unlawful entrants would be forced to leave before their surreptitious entry had paid for itself. The impact on incentives would be very modest because the vast majority of undocumented immigrants fall into one of the two groups this policy would not affect: those who are caught quickly and those who are never caught at all. Complaints about the incentive effects of legalizing longtime residents are analogous to the long-rejected claim that prescriptive rights create incentives for trespassing; adverse possession has been firmly entrenched in American law for generations, and for all of the problems afflicting contemporary society, an epidemic of trespassing does not seem to be one of them.

The parallel with adverse possession does not provide as neat an answer to the problem of longtime resident legal immigrants convicted of relatively minor crimes.[288] Here, too, however, an appreciation of the unusually strong familial interests at stake can support recognizing the

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285. See Betsy Cooper & Kevin O'Neil, Migration Policy Inst., Lessons from the Immigration Reform and Control Act of 1986, at 4–7 (2005), available at http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf (on file with the *Columbia Law Review*) (surveying complications of Act, including mixed-status families, backlog, and ineffective population integration measures).

286. Adverse possession can run within as few as three years in Arizona and Texas. Several other states have five-year rules. William G. Ackerman & Shane T. Johnson, Comment, Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession, 31 Land & Water L. Rev. 79, 111–12 (1996). Those periods are too short to be politically acceptable for these purposes. After ten years, however, the immigrant likely has settled into her or his life here and enforcement efforts clearly have failed.

287. Although common in anti-immigrant rhetoric, this criticism shows a strikingly reductionist vision of economics that denies any emotional content to family ties. The emotional value of family is almost always what makes having children cost-beneficial; the continued population of the earth shows that emotional, not economic, factors dominate childbearing decisions.

288. Among other things, prescriptive rights do not run where the landowner authorized possession. And the law of prescription has little if any applicability to *undocumented* immigrants committing any but the most trivial of crimes.

importance of repose.[289] Such an appreciation could alleviate great hardship—as well as the fiscal burdens of aiding relatives left behind—without significantly impairing the core policies underlying the current enforcement regime. As the Supreme Court has noted, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[290]

Immigration law long has used past criminality as a predictor of future conduct, with likely criminals denied admission. A new entrant's prompt commission of a serious crime suggests that the admitting authority's judgment of her or his character may have been wrong. As pre-1996 law recognized, however, the same is not true of an immigrant committing a crime long after admission.[291] The years of law-abiding behavior suggest that the immigrant's character was suitable at the time of admission but may have deteriorated since. When that crime was relatively minor, it provides even less insight into the merits of the initial admission decision. Congress's ability to make special rules for immigrants in this country is derivative of its power to control their admission.[292] Where the admission decision is not seriously in doubt, Congress has little justification for imposing vastly more severe penalties on immigrants than those visited on U.S. citizens committing the same acts. At a minimum, the reasons for doing so should yield to the interests of innocent family members dependent on the immigrant for support and affection.[293]

The arguments advanced in this section will not transform the immigration enforcement debate overnight. On the other hand, the *Wall Street Journal* has editorialized that the application of discretion to the current, somewhat chaotic, response to illegal immigration likely is preferable to any grand scheme.[294] Also, immigration law already is quite willing to cast aside its antipathy for persons who entered or stayed unlaw-

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289. The occasional warnings about "sleeper cells," suggested as counterarguments to repose, come without any theory as to why Al Qaeda, already in the midst of a pitched battle with the United States, would wait to activate any cells it possessed and risk their detection in the interim.

290. Landon v. Plasencia, 459 U.S. 21, 32 (1982), superseded by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, as recognized in Poveda v. U.S. Att'y Gen., 692 F.3d 1168, 1174 (11th Cir. 2012).

291. See supra notes 224–228 and accompanying text (discussing abolition in 1996 of five-year limitation on immigrants' vulnerability to deportation for certain crimes).

292. See, e.g., Mathews v. Diaz, 426 U.S. 67, 84–87 (1976) (relying on exclusivity of federal power over immigration to support restrictions on welfare benefits for noncitizens).

293. Granting exceptional leniency based on family ties raises some troubling issues, although it is common enough. Here, however, the question is one not of granting exceptional leniency but of withholding weakly justified exceptional harshness.

294. Julian L. Simon, The Economic Consequences of Immigration 341 (Univ. of Mich. Press 2d ed. 1999) (1989).

fully in this country given a substantial countervailing policy, such as criminal law enforcement.[295] Preserving reliance interests in family ties formed over time is at least as important to the individuals involved and to our nation as a whole. Well-established property law principles can offer a workable, pragmatic answer.

III. PROPERTY IN COMMUNITIES: SOCIAL RIGHTS AND STABILITY

Low-income people's lack of financial wealth[296] makes noneconomic wealth proportionately more important. After their families, one of the most valuable assets low-income people have is their ties to their communities. Having neighbors who will be aware of, and warn off, suspicious outsiders may be worth more than a homeowner's insurance policy. A neighbor who can be depended upon to provide spot child care in case of an employment or family emergency is an asset that might require thousands of dollars to replicate on the open market.[297] A neighbor who will make an informal loan so that a child can be taken to the doctor is a precious "Medigap" policy.[298] Noted sociologist William Julius Wilson finds that conditions in many low-income areas began to deteriorate sharply in the 1960s when the sense of community began to disappear.[299]

Beyond these substitutes for tangible assets, communities are also repositories for other things of enduring worth, including reputations, traditions, and values. Property law has long been willing to go to considerable lengths—even keeping the ownership of land uncertain (and hence less economically useful) for a life in being plus twenty-one years—to accommodate desires to preserve the social status of a family.[300] Someone reaching the end of her or his life who lacks substantial tangible property may nonetheless derive considerable comfort from the pro-

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295. See, e.g., 8 U.S.C. § 1101(a)(15)(S)–(U) (2012) (granting legal status to victims and witnesses of several crimes).

296. See supra Part I.A (describing racial disparities in wealth and income in United States).

297. Cf. Mary Jo Gibson & Ari Houser, AARP Pub. Policy Inst., Valuing the Invaluable: A New Look at the Economic Value of Family Caregiving 2–3 (2007), available at http://assets.aarp.org/rgcenter/il/ib82_caregiving.pdf (on file with the *Columbia Law Review*) (estimating economic value of informal care friends and family members provide just to elderly at more than $350 billion per year). In one study, access to informal child care increased a low-income mother's likelihood of working from 60% to 90%. William Julius Wilson, When Work Disappears: The World of the New Urban Poor 93–94 (1996) [hereinafter Wilson, When Work Disappears].

298. Although this term is customarily applied to policies covering costs that Medicare does not, the idea applies to any resource that meets unmet medical needs.

299. Wilson, When Work Disappears, supra note 297, at 3–11.

300. See George L. Haskins, Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 U. Pa. L. Rev. 19, 19–20, 35 (1977) (describing origins of modern rule against perpetuities in case involving protecting family from potential consequences of eldest son's insanity).

spect of her or his descendants growing up in a community where she or he is remembered.

Yet the story of low-income people in this country is in large part one of dislocation. Advancing European settlement repeatedly displaced Native Americans.[301] African Americans held as slaves were commonly transferred and moved away from those they knew.[302] The Industrial Revolution and the collapse of job opportunities in small towns forced migration to urban areas.[303] The Dust Bowl forced the Okies and Arkies onto the road to California.[304] The dispossession of African American tenant farmers sent them to the unfamiliar cities of the North.[305] Many of these same families were uprooted again when urban renewal—widely referred to as "urban removal"[306]—projects attacked inner-city neighborhoods' problems with bulldozers.[307] Migrant farm workers may travel nine or ten months a year.[308] Gentrification on both coasts is exiling low-income people from city centers,[309] while leaders of decaying cities in the interior threaten to terminate municipal services to some of their low-income communities.[310] Under the Orwellian name Homeownership and

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301. Francis Paul Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790–1834, at 224–48 (1962) (describing ascendancy of removal over assimilation in U.S. policy culminating in forced removal of most Native Americans east of the Mississippi).

302. Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 199–200 (1956) (describing routine breakups of African American families as decedent slaveholders' estates were divided among heirs).

303. See Robert H. Wiebe, The Search for Order, 1877–1920, at 44–52 (1967) (describing many causes of eclipse of small-town life).

304. See James T. Patterson, America's Struggle Against Poverty, 1900–1985, at 46, 61–62 (1986) (describing how New Deal agricultural policies forced farmers west and off their land).

305. See Ralph McGill, Preface to Carl Sandburg, The Chicago Race Riots: July, 1919, at ix, xv (reprt. 1969) (1919) (discussing early-twentieth-century African American migration north); Sandburg, supra, at 12–16 (same); William Julius Wilson, The Declining Significance of Race: Blacks and Changing American Institutions 65–70 (3d ed. 2012) (same).

306. See Nadia E. Nedzel, Reviving Protection for Private Property: A Practical Approach to Blight Takings, 2008 Mich. St. L. Rev. 995, 1000 (identifying "urban removal" as term used by "victimized minority owners").

307. See Rebecca M. Blank, It Takes a Nation: A New Agenda for Fighting Poverty 129–30 (1997) ("The urban renewal projects of the 1950s and 1960s often bulldozed entire neighborhoods, displacing many of the residents . . . .").

308. See Ronald B. Taylor, Sweatshops in the Sun: Child Labor on the Farm 59 (1973) (explaining process of migrant farmworkers following crops north during summer).

309. See Editorial, The Baltimore Disparity, Balt. Sun, Dec. 26, 2006, at 14A (discussing effects of gentrification on East Coast); David L. Coddon, Given the Boot: Country-Music Is Out in L.A., San Diego Union-Trib., Aug. 31, 2006, at 39 (same on West Coast).

310. See, e.g., Suzette Hackney & Matt Helms, Public Safety, Transit Among $160 Million in Cuts in Detroit Budget Proposal, Detroit Free Press (Apr. 13, 2012), http://www.freep.com/article/20120413/news01/304130001/public-safety-transit-among-

Opportunity for People Everywhere (HOPE VI), federal, state, and local governments have destroyed numerous public housing projects for low-income people, again scattering former residents to the four winds.[311]

The law's role in this process has been far from laudable. After initially standing established property principles on their heads to facilitate the dispossession of Native Americans,[312] it resumed its rigid defense of orthodoxy to defend the "property rights" of slaveholders.[313] It then resumed its passivity as tenant farmers were dispossessed, ignoring opportunities to conceptualize their status in ways that would allow them to stay.[314] Indeed, from the middle of the twentieth century, U.S. Department of Agriculture (USDA) practices—favoring consolidation of farms and often refusing services to African American farmers standing outside white local elites—expedited their dispossession.[315] The National Labor Relations Act has always exempted agricultural workers,[316] whose transience prevented them from amassing the political power that industrial and trade workers have enjoyed. In recent times, although the state condemnation of a middle-income neighborhood in *Kelo v. City of New London* drew four dissenters[317] and a vast public outcry,[318] the destruction of a low-income community to make the area more "beautiful" in *Berman v. Parker* won the endorsement of the Court, speaking through its leading

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36-160-million-in-cuts-in-detroit-budget-proposal (on file with the *Columbia Law Review*) (describing proposed sweeping service reductions in Detroit); see also Michelle Wilde Anderson, Dissolving Cities, 121 Yale L.J. 1364, 1394–95 (2012) (discussing legislation challenged because of perceived cut in municipal jobs and services).

311. See Michael S. FitzPatrick, Note, A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan, 7 Geo. J. on Poverty L. & Pol'y 421, 448 (2000) (criticizing HOPE VI for dislocating low-income communities).

312. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584–85 (1823) (finding property rights existed only in European countries, and European discoveries of lands conferred power to extinguish indigenous people's sovereignty and control).

313. See Stampp, supra note 302, at 94–95, 192–206 (describing slave's status as "personal property" and "real estate" in various state codes).

314. See Michele L. Landis, Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State, 33 Law & Soc'y Rev. 257, 306 (1999) (describing how U.S. Department of Agriculture helped fund mechanization that caused tenant farmers' dislocation).

315. See U.S. Gen. Accounting Office, GAO-02-942, Department of Agriculture: Improvements in the Operations of the Civil Rights Program Would Benefit Hispanic and Other Minority Farmers 8–10 (2002), available at http://www.gao.gov/assets/240/235664.pdf (on file with the *Columbia Law Review*) (describing range of civil rights claims brought against USDA).

316. 29 U.S.C. § 152(3) (2006).

317. 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia & Thomas, JJ.).

318. See, e.g., Inst. for Justice, Five Years After *Kelo*: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions 1 (2010), available at http:// www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf (on file with the *Columbia Law Review*) (describing "outrage over *Kelo*" and "unprecedented backlash" against decision).

liberal,[319] and brought little protest elsewhere. For most of the United States' history, then, the law has stood passively by as powerful interests dislocated and dispossessed low-income and vulnerable communities.

More broadly, an affluent parent may rely on her or his wallet for child care while a low-income parent may depend on a network of nearby family and friends for the same service. Emptying the affluent parent's bank account and removing the low-income parent from her or his community thus may have equivalent effects in depriving them of this and other important services. The fact that the American regime of property law guards against the former far more zealously than the latter raises serious questions of distributive justice. This Part examines ways in which these relational interests of low-income people might receive greater legal protection. It uses as a case study the plight of tens of thousands of low-income residents of the Gulf Coast who first lost their tangible property in Hurricane Katrina and then lost their communities when government officials declined to help them return to their prior neighborhoods or, in many cases, actively obstructed that return with the goal of changing the use of that land. Part III.A describes the human disaster of dislocation and social isolation that followed the natural disaster. Part III.B discusses the inadequacy of conventional property law concepts to protect the dislocated people's interests in preserving or reclaiming the benefits of an established community. Part III.C then identifies a diverse set of legal principles that could form the basis for recognizing some partial community rights that would impose significant burdens on government officials pursuing policies that destroy the ties low-income people have built up over the years.

A. *Displaced People and Communities*

Katrina wiped out a substantial number of low-income communities across the Gulf region. Mississippi lost 94% of its public housing stock and 45,000 homes.[320] Four in five dwellings in East Biloxi, Mississippi, were destroyed.[321] Two-thirds of East Biloxi homeowners, frequently low-income people, lacked flood insurance.[322] Long after the disaster, officials reported that only one-eighth of the residents of lower Plaquemines Parish and the East Bank had returned.[323]

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319. 348 U.S. 26, 33 (1954) (Douglas, J.) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . .").

320. Sarah Vaill, Women's Funding Network & Ms. Found. for Women, The Calm in the Storm: Women Leaders in Gulf Coast Recovery 4 (2006).

321. Id.

322. Id.

323. Tony Pipa & Steve Greene, Oxfam Am., Forgotten Communities, Unmet Promises: An Unfolding Tragedy on the Gulf Coast 36 (2006), available at http://www.oxfamamerica.org/files/forgotten-communities-unmet-promises.pdf (on file with the *Columbia Law Review*).

The elimination of low-income communities in the Gulf region after Katrina bears some striking resemblances to the dispossession of Native Americans from their lands earlier in this country's history and of the urban poor facing urban renewal in the mid-twentieth century. Low-income communities in the Gulf region faced many serious problems before Katrina.[324] The locations to which the displaced people have been consigned since the disaster, however, have been far, far worse. Like the Native Americans and urban poor of earlier eras, the locations to which they were removed were selected primarily because few others wanted the land. New Orleans and Plaquemines Parish were slow to restore electrical and water service to large low-income areas;[325] under Federal Emergency Management Agency (FEMA) rules, this prevented residents of these areas from having trailers on their land and resulted in residents of these communities becoming the primary residents of FEMA's trailer parks.[326]

The typical FEMA trailer offers just 240 square feet for a family.[327] FEMA established its sites in undesirable areas, such as at the edge of a major commercial airport,[328] and in remote areas with little access to jobs, public transportation, or other important services.[329] The unemployment rate in June 2006 for evacuees that were not living in their pre-Katrina homes was 25.9%, while it was 5.9% for those that had managed to return home.[330]

More than one in five school-age children in these parks were either not in school at all or had missed at least ten days of school in the previ-

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324. For example, New Orleans's Lower Ninth Ward has historically had an elevated crime rate and is physically cut off from the city's prime job centers in the French Quarter, the Central Business District, and other more affluent areas. See Juliette Landphair, "The Forgotten People of New Orleans": Community, Vulnerability, and the Lower Ninth Ward, 94 J. Am. Hist. 837, 839, 842 (2007) (discussing Lower Ninth Ward's "detachment from the rest of New Orleans" and pre-Katrina reputation as "dangerous backwater pockmarked with blight where one's life was always at risk" (emphasis omitted)).

325. See Pipa & Greene, supra note 323, at 36–37 (noting chronic undersupply of services to Plaquemines Parish). The author visited several low-income areas of New Orleans eight months after Katrina and saw little evidence of even preliminary work having been done to restore utility service.

326. See David Abramson & Richard Garfield, Columbia Univ. Mailman Sch. of Pub. Health, On the Edge: Children and Families Displaced by Hurricanes Katrina and Rita Face a Looming Medical and Mental Health Crisis 10 (2006) [hereinafter Abramson & Garfield, On the Edge], available at http://www.preventionweb.net/files/2958_On20the 20Edge20LCAFH20Final20ReportColumbia20University.pdf (on file with the *Columbia Law Review*) (describing regional characteristics of FEMA trailer occupants).

327. Vaill, supra note 320, at 4.

328. Abramson & Garfield, On the Edge, supra note 326, at 5.

329. Id. at 5, 18; see also Mark Waller, Parish Is in No Hurry to Clear Trailer Clusters, Times-Picayune (New Orleans), Jan. 24, 2007, at B-1 (describing trailers located at "commercial or industrial sites" off highways).

330. Karen Kosanovich, The Labor Market Impact of Hurricane Katrina: An Overview, Monthly Lab. Rev., Aug. 2006, at 3, 10.

ous month.[331] Nearly half of these children's parents feared for their safety in the trailer parks; only one in five did in urban Louisiana before the disaster.[332] The incidence of depression and anxiety among children in trailer parks quadrupled from pre-disaster levels, and asthma, developmental delays, and other illnesses showed increases as well.[333] Overcrowding is a probable cause of many of these illnesses.[334] The lack of medical services prevented many of these parents from obtaining treatment for their children.[335] On measures of mental health, too, children in FEMA trailer parks fared worse even than other people in the disaster area.[336] Their parents' health also seriously deteriorated, with 53% of women and 31% of men experiencing clinical psychiatric symptoms.[337] With few predisaster mental health facilities open or accessible, however, less than one in five of these women received counseling.[338] Although many of these conditions had specific proximate causes, the loss of the communities that the evacuees had before the disaster tended to exacerbate the conditions with stress, the depressive effects of social isolation, and the loss of informal support systems.[339]

Columbia University researchers concluded that "those with the least [resources] . . . are increasingly jobless and isolated in dismal trailer parks."[340] This isolation and disempowerment fell quite unequally. Some

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331. Abramson & Garfield, On the Edge, supra note 326, at 3.

332. Id.

333. David Abramson et al., Columbia Univ. Mailman Sch. of Pub. Health, The Recovery Divide: Poverty and the Widening Gap Among Mississippi Children and Families Affected by Hurricane Katrina 8 (2007) [hereinafter Abramson et al., Recovery Divide], available at http://academiccommons.columbia.edu/download/fedora_content/download/ac:148117/CONTENT/Abramson_Mississippi_Recovery_Divide_Full_Report.pdf (on file with the *Columbia Law Review*).

334. See David L. Feinberg, Hurricane Katrina and the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response, 13 Va. J. Soc. Pol'y & L. 596, 604 (2006) (discussing increased risk of disease due to postdisaster overcrowding).

335. See Abramson et al., Recovery Divide, supra note 333, at 9 (discussing barriers to medical treatment).

336. Id. at 10 (illustrating mental health divide).

337. Abramson & Garfield, On the Edge, supra note 326, at 14 (describing postdisaster survey of displaced population).

338. Vaill, supra note 320, at 4.

339. See Katy Reckdahl, Razing a Community, Gambit Wkly. (New Orleans), Oct. 31, 2006, at 9 (chronicling impact of post-Katrina neighborhood deterioration).

340. Abramson et al., Recovery Divide, supra note 333, at 3. Among people that ended up in the FEMA trailer parks, the share with salaried income dropped from 65% to 45%. Abramson & Garfield, On the Edge, supra note 326, at 12. Even among this disadvantaged group, the losses were not evenly shared: Over half of displaced people in Mississippi with predisaster salaries below $10,000 saw their wages drop or disappear, compared with only 15% of those with predisaster incomes of $20,000 or more. Abramson et al., Recovery Divide, supra note 333, at 7; id. app. 1 tbl.A7. The receipt of public assistance, however, did not offset this loss in employment, leaving many displaced families in dire straits. Abramson & Garfield, On the Edge, supra note 326, at 12. (This result was

79% of FEMA trailer park residents were African American, compared with 49% of displaced people in private trailer parks.[341] Virtually all of the public housing residents denied the opportunity to return to their homes in New Orleans were African American. A year after the disaster, two-thirds of all single-mother-headed families had not returned to the New Orleans area.[342] A year after the disaster, half of East Biloxi's population, including most of its low-income Vietnamese immigrant community, was still living in trailers;[343] eventually, they scattered across the country.[344] African American evacuees were almost five times more likely to be unemployed than white evacuees.[345] Anecdotal accounts suggest that these numbers had improved only modestly several years after the hurricane.[346]

About three in five displaced people in FEMA trailer parks hoped to return to their former communities.[347] Nonetheless, in February 2007, a year and a half after the disaster, at least 37,500 people remained in these dismal trailer parks.[348] One to three hundred thousand people, a vastly disproportionate share of whom are African American, are projected to never be able to return.[349]

Those who relocated to other cities fared only modestly better. FEMA's welter of rapidly changing rules restricting aid cut short congressionally authorized housing aid, leaving three-quarters of families without

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obtained even when researchers counted modest benefits under the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), typically worth one hundred dollars or so per month, as public assistance. Id.) Without incomes, these families were wholly dependent on FEMA. When FEMA stopped paying for propane tanks for their trailers, they had to do without heat. Id. at 3.

341. Abramson & Garfield, On the Edge, supra note 326, at 12.

342. Vaill, supra note 320, at 3.

343. Uyen Le, Nat'l Alliance of Vietnamese Am. Serv. Agencies, The Invisible Tide: Vietnamese Americans in Biloxi, MS, at 10 (2006) (on file with the *Columbia Law Review*).

344. See Mary Perez, Coast Vietnamese Have Become a Culture Dispersed, Biloxi Sun Herald, June 7, 2009, at A-1 (reporting former Point Cadet residents stayed in Texas and California after evacuation).

345. Kosanovich, supra note 330, at 10.

346. Interview with Rims Barber, Chairman, Miss. Human Servs. Coal., and Judy Barber, Health Advocate, Miss. Human Servs. Coal., in New Orleans, La. (May 9, 2010).

347. Abramson & Garfield, On the Edge, supra note 326, at 10 tbl.1.

348. Abramson et al., Recovery Divide, supra note 333, at 4.

349. Manuel Pastor et al., Russell Sage Found., In the Wake of the Storm: Environment, Disaster, and Race After Katrina 4, 9 (2006), available at http://katrinareader.org/sites/katrinareader.org/files/wake_of_the_storm.pdf (on file with the *Columbia Law Review*). The permanent displacement from New Orleans is so racially skewed that the city's African American population is projected to shrink from two-thirds of the total to scarcely half that share. Id.; see also Anna Williams Shavers, Katrina's Children: Revealing the Broken Promise of Education, 31 T. Marshall L. Rev. 499, 506 (2006) ("White residents in many of the disaster areas are more likely to be able to return to their neighborhoods.").

their full allotment.[350] Vietnamese-speaking displaced people were unable to understand FEMA's requirements and as a result often did not receive aid.[351] Less than half of the families displaced from public housing projects in New Orleans are receiving housing assistance elsewhere.[352] And a year after the disaster, a quarter-million displaced people were still in Texas, and a hundred thousand were in Georgia.[353] Not long after the disaster, federal and local officials began to speak openly of keeping the displaced people out and converting the land on which they had lived to other uses.[354]

That the government provided evacuees emergency shelter but has been unable to move beyond such assistance to help them rebuild their lives shows the severe limitations of an antipoverty regime that depends on the empathy of elites. Highly visible suffering—families out in the elements—stimulates a response. The physical, psychological, educational, and economic effects of prolonged isolation in remote trailer camps, and the loss of informal networks that supplied numerous goods and services that low-income people cannot afford to purchase, are too subtle, and too far outside policymakers' experience, to resonate. Some "get it," but not enough to bring cloture, or even urgency, to debates over who should take responsibility for recovery efforts. Even seven years after the disaster, the social fabric of New Orleans's former low-income communities remained badly damaged.[355]

B. *The Inadequacy of Current Property Theories*

The dichotomy between discretionary public benefits (those that may be terminated on policymakers' whim) and durable ones (those with strong legal protection) is particularly evident in the aftermath of a disaster. When legislatures and administrations want to lock in the rights of

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350. Spencer S. Hsu, Order Shows FEMA Aid Shortcomings, Wash. Post, Dec. 3, 2006, at A16.

351. See Le, supra note 343, at 16–17 ("The lack of linguistically and culturally competent services on the part of recovery service providers . . . resulted in a systemic exclusion of many in the Vietnamese community.").

352. Reckdahl, supra note 339.

353. Bill Quigley, Robin Hood in Reverse: Corporate and Government Looting of the Gulf Coast, Common Dreams (Nov. 13, 2006), http://www.commondreams.org/views06/1113-25.htm (on file with the *Columbia Law Review*).

354. See Steve Kroll-Smith & Shelly Brown-Jeffy, A Tale of Two American Cities: Disaster, Class and Citizenship in San Francisco 1906 and New Orleans 2005, 26 J. Hist. Soc. (forthcoming 2013) (manuscript at 14–15) (on file with the *Columbia Law Review*) (discussing some officials' view that Katrina was "an opportunity to appropriate valuable urban land and reshape the demographic profile of the city").

355. See generally Bill Quigley & Davida Finger, Katrina Pain Index 2012: Seven Years and Counting . . ., La. Wkly. (Aug. 27, 2012), http://www.louisianaweekly.com/katrina-pain-index-2012-seven-years-and-counting…/ (on file with the *Columbia Law Review*) (presenting statistics showing high prevalence of lingering psychological and physical damage, high rates of incarceration, and deprivation of public services).

the affluent, they can do so by contract. Because affluent people can easily afford to evacuate, their greatest risk in a hurricane is damage to their physical property. Heavily subsidized flood insurance contracts ensure that homeowners need not depend on the political process for help rebuilding. Low-income people, however, face both personal peril and property damage in a disaster, yet neither help evacuating nor restoration of lost homes and property is covered by contracts: Low-income people are entirely dependent on the political process to protect their interests after a disaster. One might argue that low-income people's interests are not the kind the market ordinarily insures. Yet the private market also will not insure homeowners in coastal areas against floods; the political process has decided both to assume much of the cost of their rebuilding and to lock that commitment into contract.

For more than a decade, people concerned about poverty across the political spectrum have been enamored with asset-building strategies as an alternative to income maintenance for fighting poverty. After Hurricane Katrina, President Bush declared that "ownership is a way to counter poverty."[356] These plans' actual accomplishments have been quite modest: Not surprisingly, those poor enough to have trouble affording the basic necessities lack the surplus income to save much,[357] and a great many of those who tried to do so fell victim to abusive mortgages and lost their homes in the foreclosure crisis.[358] Nor do the plans represent the break with public subsidies that many conservatives seek. These schemes' popularity, instead, can be traced to their borrowing the form, and some of the substance, of property rights.

Reich noted, "When the public interest demands that the government take over 'property,' the Constitution requires that just compensation be paid to the owner. But when largess is revoked in the public interest, the holder ordinarily receives no compensation."[359] The same could be said for the intangible but very real benefits of community ties. Reich suggested extending this principle to terminations of government benefits for reasons other than individual misconduct, arguing that "[t]he individual should not bear the entire loss for a remedy primarily intended to benefit the community."[360] When the government decides to destroy a low-income community for the public good, it is also imposing on that community's residents a focused burden to benefit the diffuse interests of greater society.

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356. Remarks at the Department of Energy and an Exchange with Reporters, 2 Pub. Papers 1485, 1488 (Sept. 26, 2005) [hereinafter Bush, Energy Remarks].

357. See supra Part I.A (detailing disparities in wealth).

358. See infra Part IV.B (discussing predatory mortgage practices in context of mortgage foreclosure crisis).

359. Reich, New Property, supra note 10, at 745; see also infra Part V (questioning legitimacy of this legal doctrine).

360. Reich, New Property, supra note 10, at 785.

C. *How Stronger Property Rights Could Preserve Community Values*

Although the rhetoric of property rights is highly individualistic, in fact, property law has gone to considerable lengths to protect community values. A complex network of reciprocal easements, real covenants, and equitable servitudes allows communities to preserve their character and values and to resist changing economic conditions.[361] Indeed, the law's commitment to communities' collective right to preserve their character is so strong that it not only allows them to micromanage the affairs of individual property owners,[362] but it also allows common interest communities and their homeowners' associations to usurp municipal governments' land use control powers.[363] Restrictive covenants favor the very affluent.[364] Although the most detailed private land use controls typically arise by contract, like much else in property law, they also may arise from longstanding custom.[365] Where a low-income community has long enjoyed stability in a particular location, it would not be a radical departure to find implied easements in gross in favor of the residents, transferable upon voluntary departure but requiring compensation should the government wish to repurpose the land.

The same sorts of arguments *Goldberg* relied upon to give low-income people procedural rights more nearly approaching those of the affluent[366] could justify expanding substantive rights to provide more comparable protections in this manner. This section identifies five ways in which concepts already present in property law could be expanded to help low-income people wrenched from their communities in the wake

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361. See, e.g., W. Land Co. v. Truskolaski, 495 P.2d 624, 626 (Nev. 1972) (refusing to invalidate covenants seeking to preserve residential community despite sweeping commercial transformation of surrounding areas).

362. See, e.g., Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1290 (Cal. 1994) ("[T]he reasonableness . . . of a condominium use restriction . . . is to be determined . . . by reference to the common interest development as a whole."); Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1324 (N.Y. 1990) (Titone, J., concurring) (providing "greatest possible degree of deference" to condominium boards in disputes with property owners).

363. See Gregory S. Alexander, Dilemmas of Group Autonomy: Residential Associations and Community, 75 Cornell L. Rev. 1, 50 (1989) (discussing maintenance of residential association communities by "[r]estrictions on use or transfer of their property interests"); Stewart E. Sterk, Minority Protection in Residential Private Governments, 77 B.U. L. Rev. 273, 278–87 (1997) (describing "use restrictions and assessment obligations" arising "[w]ithin the structure of the common interest community").

364. See Timothy Egan, Many Seek Security in Private Communities, N.Y. Times, Sept. 3, 1995, at A1 (discussing extensive benefits available to residents of expensive, restrictive private communities).

365. See, e.g., Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976) (finding easement by estoppel after long use).

366. The Court noted that the loss of subsistence benefits may so disrupt low-income people's lives as to both cause serious hardship and force them to devote themselves so fully to finding alternative support that they could not function effectively. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

of Katrina and similar catastrophes recover some of what they lost. With the possible exception of the final proposal, none of these is subject to the standard objection that recognizing sweeping property rights for low-income people will sap work incentives—they simply are not that sweeping. A second common objection to creating property rights in existing arrangements is that they tend to ossify policy: They obstruct necessary cutbacks in current rules and deter policymakers from creating new ones that they may not be prepared to set into stone. This may be true to a point, but it hardly differs from the common law property regime, which can punish kind-hearted lenience with prescriptive rights and increase the transaction costs of removing a valuable asset from an inefficient user. In both cases, the values of security and stability that the rights protect can fairly be argued to outweigh any problematic incentives.

1. *Recognizing Weak Property Interests.* — In various settings, the law recognizes weak property interests that some parties may be empowered to defeat but that others still must respect. Finders of lost property must yield to the original owner but have rights sufficient to make claims against third parties.[367] Although a party to a contract at will has no right to continue the relationship once the other party wishes to end it, she may nonetheless sue third parties for tortiously interfering with that relationship.[368] Employees at will who may be fired for no reason at all may not be discharged for asserting collective rights;[369] tenants at will similarly may not be evicted in retaliation for asserting their legal rights.[370] Therefore, the fact that tenants at will and those with short leases generally might not have been able to protect their homes against their landlords' desire to evict them for any nondiscriminatory, nonretaliatory reason does not mean that they lack interests that should have sway against third parties, including the government.

Even in procedural due process, defining which property rights are protected has proven continuously problematic. Part of this results from the Supreme Court's difficulty in ridding itself of the distinction between rights and privileges.[371] Perhaps even more importantly, however, the

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367. See Armory v. Delamirie, (1722) 93 Eng. Rep. 664 (K.B.) 664; 1 Strange 505, 505 (holding finder of jewel has right to possession greater than all but true owner's).

368. Restatement (Second) of Torts § 766 (1979); accord Huffmaster v. Exxon Co., 170 F.3d 499, 504 (5th Cir. 1999) (invoking Restatement (Second) language); Imperial Ice Co. v. Rossier, 112 P.2d 631, 632 (Cal. 1941) (en banc) (Traynor, J.) (invoking similar language from Restatement (First)).

369. See NLRB v. Brown, 380 U.S. 278, 288 (1965) (noting "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice" and is thus impermissible).

370. See Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968) ("[W]hile the landlord may evict for any legal reason or for no reason at all, he is not . . . free to evict in retaliation for his tenant's report of housing code violations to the authorities.").

371. See Patricia M. Wald, Government Benefits: A New Look at an Old Gifthorse, 65 N.Y.U. L. Rev. 247, 260 (1990) (discussing Court's development of rights-privilege distinction).

courts have had great difficulty deciding how much of the legal, social, and economic context that gives rights their meaning should be included in the definitions of rights. Although the Court separates procedural constraints from substantive rights when analyzing the property interests of middle-income government employees,[372] lower courts have allowed legislatures to avoid creating property rights in public benefit programs with limitations that are substantive in name only.[373] The courts also have recognized value in relatively fragmentary interests in property when ownership is divided.[374] Yet the law largely ignores the leaseholds of low-income families.

A federal statute in a somewhat related field provides a useful framework for thinking about how property interests in community might be understood. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URARPA) makes most renters eligible for assistance when they move "as a direct result of" a federally funded project involving land acquisition.[375] Certainly, the suffering and ultimately permanent displacement of many Katrina evacuees highlights the need for "fair, uniform, and equitable treatment of all affected persons," one of the Act's key concerns.[376] The Act also rejects federal disaster relief's overwhelming focus on bricks and mortar, valuing a community's fabric as well as its edifices: "[M]inimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities."[377] In stark contrast to the proceduralist model of poverty relief,[378] the Act defines a humanitarian minimum standard for housing:

> (A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public

372. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

373. See, e.g., Holman v. Block, 823 F.2d 56, 59 (4th Cir. 1987) (accepting congressional designation of requirement of periodic reapplications for food stamps as creating distinct entitlements).

374. See City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859, 874 (Cal. Ct. App. 1999) (finding reversionary interest in donated land compensable where city accepted land with express conditions on use); Ink v. City of Canton, 212 N.E.2d 574, 579 (Ohio 1965) (holding public entity must pay compensation when it exercises eminent domain over gift of property with possibility of reverter).

375. 42 U.S.C. § 4601(6)(A)(i)(II) (2006).

376. § 4621(a)(2).

377. § 4621(a)(4).

378. See infra Part V (criticizing excessive reliance on procedural due process to address low-income people's problems).

> utilities, facilities, services, and the displaced person's place of employment.[379]

Whether the Act's literal terms offer a basis of relief for displaced renters is an open question. In New Orleans and other Gulf Coast communities, federally funded rebuilding initiatives did not force most people to move, but those initiatives are preventing low-income tenants from returning.[380] These tenants might argue that the storm caused them to leave temporarily but that they were compelled to "move[] [their] personal property from" their homes due to federally aided rebuilding plans, qualifying on that basis.[381] The Act ordinarily requires that tenants be given sufficient time to find safe, affordable housing, but makes an exception in the case of natural disasters.[382]

One alternative would be simply to abrogate this exception, clarifying that denials of the right to return are equivalent to removals. Another would be a broader requirement that landlords show just cause to evict tenants in major disaster areas until recovery is complete, whether or not URARPA applies. This would reflect the widely embraced norm against exploiting the misfortune of others.

The implications of a special rule protecting tenants' continuity in their homes only after a disaster would differ considerably from a general rule applying in ordinary times. Imposing general restraints on landlords' removal of incumbent tenants likely would face challenges on takings grounds; in the disaster context, acceptance of such a rule could be made a condition of receiving subsidized disaster insurance coverage.[383] In ordinary times, such a rule could create an inefficient market for side payments from those wishing to turn the property to a more lucrative

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379. § 4601(10).

380. See John Arena, Driven from New Orleans: How Nonprofits Betray Public Housing and Promote Privatization 160–70 (2012) (describing government action against community campaigns to save minimally damaged public housing projects in New Orleans); William P. Quigley, Boating out of New Orleans: Who Was Left Behind in Katrina and Who Is Left Behind Now?, 40 Clearinghouse Rev. 149, 156–58 (2006) (criticizing biases in government reconstruction aid).

381. § 4601(6)(A)(i)–(ii). To be sure, the Act is generally tied to acquisition of real property, either the displaced person's former home or some other property. See id. (defining "displaced person" as one who "moves from real property"). Arguably, the rebuilding effort is one large, integrated project involving substantial real estate acquisitions.

382. § 4625(c)(3)(A).

383. Indeed, the federal government could protect tenants in postdisaster areas even absent a tie to insurance subsidies. Although regulating the private residential rental market is traditionally a state function, in the limited case of a major disaster, travel and commerce across state lines is likely and hence federal regulation should be permissible under the Commerce Clause. See United States v. Lopez, 514 U.S. 549, 560 (1995) (focusing Commerce Clause inquiry on "economic activity").

usage.[384] In the disaster context, however, giving tenants such marketable rights might be an efficient way of valuing the interests they have lost. Such a rule might, however, function better as a means of compensating individual tenants than of preserving the inchoate benefits of ongoing communities. Still, if a community has been providing sufficient unmonetized value to its residents, would-be developers may find it infeasible to buy out tenants in the postdisaster period—and could then face concerted political opposition once the community has reconstituted itself.

2. *Reexamining Exclusionary Housing Policies.* — If a low-income community could not reconstitute itself on the same land that it previously occupied, the community still might retain a significant part of its value to its members if many of them could move en masse to another location.[385] Some valued members likely would not follow for one reason or another, and ties to family members, jobs, businesses, and voluntary organizations in surrounding areas might be lost. Yet holding a vital core of community members together may be sufficient to preserve many of the benefits of communal life and to preserve many of the community's most important memories and traditions.

In the case of Katrina, however, this was not to be. Except for temporary residence in squalid trailer parks far removed from economic opportunity, displaced communities lacked realistic opportunities to transplant themselves. Hurricane Katrina's aftermath should give pause to those that reflexively call for a stronger public role in ordering the economy, particularly in land use.

This problem, however, is not limited to the aftermath of disasters. Communities of low-income people that are displaced from one location are rarely able to relocate intact to another because of land use policies designed to exclude them. At most, a few might infiltrate one locality while their former neighbors infiltrate another jurisdiction far away. This is in marked contrast to the many middle-income people who enjoyed continuity of community as they left core cities for the suburbs following World War II.[386] Preserving low-income people's interests in community

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384. See Steven N.S. Cheung, The Theory of Share Tenancy 90–91 (1969) (noting where landowners lease property to workers, because of "transaction costs and risks," such "rearrangements will yield lower values . . . than previously").

385. Louisiana was the site of such a historical migration when the Acadians of Canada's maritime provinces moved there and became Cajuns. See Nigel Richardson, Nova Scotia, Canada: As Bonny as the Homeland, Telegraph (London) (July 20, 2013, 8:00 AM), http://www.telegraph.co.uk/travel/destinations/northamerica/canada/10191234/Nova-Scotia-Canada-as-bonny-as-the-homeland.html (on file with the *Columbia Law Review*). Going forward, as climate change causes sea levels to rise, some low-lying areas may become infeasible for continued habitation.

386. See Michael J. Birkner, Community in the Suburbs, *in* 1 Encyclopedia of American Urban History 177, 177 (David Goldfield ed., 2007) (explaining role of suburban communities in promoting cohesiveness).

ties when those communities cannot stay where they are requires land use policies to give way.

Scholars have warned that land use planning typically is not only inefficient but also regressive.[387] The classic justification for public land use planning is the management of externalities.[388] Political and economic forces tend to commoditize low-income people in a highly negative manner, justifying their exclusion on precisely this principle.[389] Economic theorists have provided the intellectual underpinnings: James Buchanan, for example, conceptualized low-income people primarily as "exploiters" of services and posited that rational localities will focus primarily on retaining high-income people who "contribute most"; as a corollary, the departure of low-income "exploiters" may maximize municipal surplus.[390] Excluding low-income people allows a municipality to increase its consumption in the form of higher services, lower taxes, or both. Thus, standard Euclidean zoning's emphasis on segregating uses also segregates populations.[391]

This vision, of course, considers only the well-being of the locality. Seen from a broader societal perspective, it is the exclusionary policies, not the excluded people, that create externalities. In practice, exclusion is a form of public good that allows each locality to consume without re-

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387. See, e.g., Paul Cheshire & Stephen Sheppard, The Welfare Economics of Land Use Planning, 52 J. Urb. Econ. 242, 259 (2002) ("[T]he combined effect of providing amenities through land use planning is regressive.").

388. See, e.g., A.C. Pigou, The Economics of Welfare 129 (4th ed. 1932) (arguing government limits property owners' rights to maximize general welfare). But see R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 5–6 (1960) (arguing markets can produce optimal allocations of costs).

389. For example, the more affluent may blame low-income people for crime in their neighborhoods—sadly ironic, as low-income people are the primary victims of that crime. See, e.g., Emily Badger, Moving Poor People into a Neighborhood Doesn't Cause Crime, Atlantic Cities (Aug. 5, 2013), http://www.theatlanticcities.com/neighborhoods/2013/08/hard-data-proves-housing-vouchers-dont-cause-crime/6404 (on file with the *Columbia Law Review*) (discussing wealthier communities' "fears . . . that dispers[ing] the poor would also disperse crime associated with them—and straight into more pristine neighborhoods"). The affluent may also claim that low-income children are disruptive in schools (often a consequence of hunger). See, e.g., Jens Manuel Krogstad & Emily Schettler, Special Report: More Iowa Children Go Hungry, Des Moines Register (Oct. 21, 2012), http://www.desmoinesregister.com/article/20121021/NEWS/310210053/Special-report-More-Iowa-children-go-hungry (on file with the *Columbia Law Review*) (noting students' "anxiety, fidgeting, bullying and other disruptive behaviors that can be traced to hunger").

390. James M. Buchanan, Principles of Urban Fiscal Strategy, 11 Pub. Choice 1, 7–8, 13 (1971). For example, low-income people may have several children in school and thus consume educational services worth more than the taxes they pay.

391. See Jane Jacobs, The Death and Life of Great American Cities 4–5 (1961) (arguing zoning displaces and segregates communities).

gard to the costs imposed on others.[392] This is inefficient for the state and nation as a whole.

The Supreme Court has largely kept federal courts away from this problem.[393] State courts that have attempted to fashion remedies for this problem have found it daunting.[394] Even if one accepts that localities have a duty to include a "fair share" of low-income people,[395] quantifying and enforcing that obligation is very difficult.[396] The standard response to overconsumption of public goods is to give someone property rights in that good, allowing a market to develop.[397] The ultimate remedy in New Jersey's *Mount Laurel* litigation, which allowed affluent suburbs to buy out of their "fair share" with payments to disproportionately poor cities, is an example of this approach.[398] In most of the country, however, affluent municipalities remain free to adopt zoning and related rules to shift the costs of services for low-income people onto central cities.[399] All that prevents a complete race to the bottom—and that preserves some place for low-income people to live—is central cities' frequent inability to join in the adoption of exclusionary policies. This may reflect politics: A critical mass of low-income people would oppose efforts to drive them out. In

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392. See Armen A. Alchian & Harold Demsetz, The Property Right Paradigm, 33 J. Econ. Hist. 16, 19–22 (1973) (describing exclusion as "communal right" with often deleterious consequences for general public).

393. See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (finding developer failed to prove city zoning was motivated by discriminatory purpose); James v. Valtierra, 402 U.S. 137, 143 (1971) (upholding as constitutional state procedure requiring community referendum to approve low-income housing).

394. See, e.g., Britton v. Town of Chester, 595 A.2d 492, 496 (N.H. 1991) ("To leave [a] town with no land use controls would be incompatible with the orderly development of the general community, and the [lower] court erred when it ruled the ordinance invalid[,] . . . [but] [i]t is not . . . within the power of this court to act as a super zoning board." (emphasis omitted)); J. Peter Byrne, Are Suburbs Unconstitutional?, 85 Geo. L.J. 2265, 2266–67 (1997) (book review) (describing protracted New Jersey litigation over exclusionary housing policies); Priya S. Gupta, Law's Inscription of Race and Gender in the Regulation of Housing Spaces: A Crisis Foretold 32–44 (Sept. 9, 2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (describing euphemistic rhetoric deployed to justify exclusionary zoning).

395. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724 (N.J. 1975).

396. See S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 421–22 (N.J. 1983) (abandoning unworkable "good faith" standard in favor of more objective criteria).

397. See Alchian & Demsetz, supra note 392, at 22–24 ("[P]rivate rights can be socially useful precisely because they encourage persons to take account of social costs." (emphasis omitted)).

398. See Hills Dev. Co. v. Twp. of Bernards, 510 A.2d 621, 640–41 (N.J. 1986) (discussing New Jersey statute providing opportunity for "regional contribution agreements" to meet "*Mount Laurel* obligations").

399. See, e.g., Johnson v. Town of Edgartown, 680 N.E.2d 37, 38 (Mass. 1997) (upholding three-acre minimum lot sizes for residential zoning, effectively excluding low-income residents from area).

addition, demand for housing in many central cities is too slack to ensure a viable alternative to population by low-income people. And many central cities have too little undeveloped land for zoning to shape much of the physical environment. The result appears stable most places, if barely so.

Major economic or political changes affecting the central city can rapidly destabilize this arrangement. A sudden increase in the demand for land in the central city—like those induced by the federal government in the "Urban Renewal" of the 1960s, by the Olympics in Atlanta in the early 1990s, or by changes in the local economy that give affluent people new incentives to "gentrify" the city—can cause low-income people to be pushed out with few plausible options.

The aftermath of Hurricane Katrina is a far more extreme case. It simultaneously lifted all of the constraints on central cities' exclusionary behavior: It removed most of the low-income voters who would have opposed exclusionary policies before the storm, it destroyed so much housing that it radically increased the demand for land, and it presented the city with a physical blank slate far more susceptible to its zoning powers. The zeal with which city officials have exercised these newfound powers to prevent large numbers of low-income people's return[400] is vivid vindication of Buchanan's model and stark evidence of how little low-income people can rely on the political system to protect their interests. It raises questions about the wisdom of empowering central cities to act for them, as the *Mount Laurel* remedy implicitly does.

From a purely economic perspective, it makes the externality problem significantly more severe. Although Baton Rouge and other northern Louisiana cities absorbed some displaced people, the vast majority went to cities in other states, such as Houston, Memphis, and Atlanta.[401] Whatever the merits of arguments that the inequities of exclusionary policies can be worked out within the state political systems that authorize these policies, those arguments have no application across state lines.[402] Moreover, should cities and states that took in disaster victims suffer long-term fiscal ill effects, people throughout the country can expect more halting welcomes should they need refuge after a disaster.[403]

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400. See Arena, supra note 380, at 158–82 (describing city officials' successful effort to demolish relatively lightly damaged public housing projects in wake of Katrina).

401. See Jeffery E. Groen & Anne E. Polivka, Hurricane Katrina Evacuees: Who They Are, Where They Are, and How They Are Faring, Monthly Lab. Rev., Mar. 2008, at 32, 40, 41 tbl.3 (listing cities and states absorbing evacuee population).

402. Of course, exclusionary policies have long had substantial interstate effects; Mount Laurel's policies likely affected Philadelphia as much as they did Camden.

403. President Bush recognized that the nation has a moral duty "to ensure that States are reimbursed for these extra expenses." Address to the Nation on Hurricane Katrina Recovery from New Orleans, Louisiana, 2 Pub. Papers 1439, 1441 (Sept. 15, 2005) [hereinafter Bush, New Orleans Address].

Courts have been reluctant to intervene in these matters because doing so would take authority from the political bodies. Yet even more literal takings—those of conventional property—generally do not require compensation where they are undertaken to restrain externalities.[404] More broadly, a higher standard of legitimacy may be required for major decisions,[405] particularly for ones setting the very nature of the community.[406]

3. *Vulnerable Communities as Public Trusts.* — In his post-Katrina speech in Jackson Square, President Bush declared, "When communities are rebuilt, they must be even better and stronger than before the storm. Within the gulf region are some of the most beautiful and historic places in America."[407] Elaborating, he identified some physical landmarks, but recognized that human communities are what made the stricken areas truly special:

> The streets of Biloxi and Gulfport will again be filled with lovely homes and the sound of children playing. The churches of Alabama will have their broken steeples mended and their congregations whole. And here in New Orleans, the streetcars will once again rumble down St. Charles, and the passionate soul of a great city will return.[408]

He went on to hold up New Orleans's uplifting funereal traditions as a model to the nation.[409]

This suggests a broad public interest in the affected communities that goes far beyond the private concerns of particular residents and property owners. Courts and commentators have increasingly turned to the public trust doctrine to reconcile such broad public interests with private ownership.

In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court held that grants of property on the shore of Lake Michigan were necessarily revocable because it was unthinkable that "a subject of concern to the whole people of the State . . . [could] be placed elsewhere than in the State it-

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404. See Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 162 (1971) ("Any demand of a right to use property that has spillover effects . . . may constitutionally be restrained, however severe the economic loss on the property owner, without any compensation being required . . . .").

405. See Carol M. Rose, New Models for Local Land Use Decisions, 79 Nw. U. L. Rev. 1155, 1160 (1985) (observing some courts have countered potentially "arbitrary or unfair" outcomes by "ignoring the usual deference" in reviewing large-scale land use decisions, "applying their own views of what is and what is not a 'reasonable' land use").

406. See, e.g., In re Incorporation of Chilton, 646 A.2d 13, 19 (Pa. Commw. Ct. 1994) (rejecting incorporation petition whose sole purpose was to create luxury resort); In re Incorporation of Bridgewater, 488 A.2d 374, 377 (Pa. Commw. Ct. 1985) (rejecting incorporation petition to carve out affluent, predominantly white enclave).

407. Bush, New Orleans Address, supra note 403, at 1442.

408. Id. at 1444.

409. See id. ("Tonight the gulf coast is still coming through the dirge, yet we will live to see the second line.").

self."[410] The Court instead held that "trusts connected with public property, or property of a special character . . . cannot be placed entirely beyond the direction and control of the State."[411] Professor Joseph Sax triggered a modern renaissance of the public trust doctrine by suggesting that public trusts could be impressed on privately owned property to respond to externalities other than the navigable waterways that were its initial object.[412]

Many states, including Louisiana, have responded by expanding the public trust concept to support a wide range of environmental and social regulation.[413] The Louisiana Constitution declares that "the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished" consistent with "health, safety, and welfare of the people."[414] Numerous states have extended the public trust doctrine to cover social needs, notably beach recreation.[415] The public trust concept has also protected native communities' performance of social customs.[416] Thus the doctrine now protects social interests as well as purely natural ones.

Social ties are crucial to cities' prosperity.[417] Interactions over time build social capital that is of value to the community as a whole and very difficult to replace.[418] Other, more affluent communities around the region have an interest in preserving these low-income communities as an alternative to accommodating impoverished refugees with deep needs and few ties to, or desire to join, wealthier communities.

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410. 146 U.S. 387, 455 (1892).

411. Id. at 454.

412. See Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 474 (1970) ("[O]nly the public trust doctrine seems to have the breadth and the substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." (footnote omitted)).

413. See Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1154–56 (La. 1984) (discussing statutes and regulations regarding water control, air quality, solid and hazardous waste, scenic rivers and streams, and radiation).

414. La. Const. art. IX, § 1.

415. E.g., Glass v. Goeckel, 703 N.W.2d 58, 66–73 (Mich. 2005); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363–66 (N.J. 1984); Just v. Marinette Cnty., 201 N.W.2d 761, 768–69 (Wis. 1972). Other courts have accomplished essentially the same thing by finding easements in favor of the public. E.g., State ex rel. Thornton v. Hay, 462 P.2d 671, 674 (Or. 1969); Matcha v. Mattox, 711 S.W.2d 95, 99 (Tex. App. 1986), abrogated by Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

416. E.g., Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246, 1256–58 (Haw. 1995).

417. See Sheila R. Foster, The City as an Ecological Space: Social Capital and Urban Land Use, 82 Notre Dame L. Rev. 527, 529 (2006) ("Scholars from various disciplines have long recognized the centrality of social capital to . . . the governance, health, and sustainability of urban communities.").

418. See James S. Coleman, Social Capital in the Creation of Human Capital, 94 Am. J. Soc. (Supp.) S95, S98–S100 (1988) (describing various examples of social capital).

Finding that irreplaceable communities such as the Lower Ninth Ward and East Biloxi are impressed with a public trust would not affect most incidents of private ownership or owners' ability to profit from their properties.[419] It would not even prevent removal of some properties from the rental market.[420] It would, however, prevent the wholesale replacement of low-income communities with commercial development or housing for the affluent. These restrictions could hardly be seen as a taking: They would allow owners to continue to reap the same returns they did before the disaster but prevent a postdisaster windfall—one financed in large part by taxpayer-subsidized flood insurance and disaster relief.

To be sure, this would represent a major expansion of the public trust concept beyond its origins in natural, as opposed to social, resources.[421] On the other hand, "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[422] More broadly, Carol Rose has argued for the recognition of a type of property so inherently public as to create rights "independent of and indeed superior to the claims of any purported governmental manager."[423] One might imagine, for example, that the government could not wholly bar the public from unique natural treasures, such as the Grand Canyon, or civic ones, such as the U.S. Capitol. "In the absence of the socializing activities that take place on 'inherently public property,'" Rose argues, "the public is a shapeless mob, whose members neither trade nor converse nor play, but only fight."[424] Low-income Gulf Coast residents' diaspora in strange cities and isolated trailer parks fits this dismal image all too well.

4. *Directly Recognizing the Value of Community.* — Soon after Hurricane Katrina, President Bush declared that the "reconstruction vision ought to

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419. See Charles F. Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. Davis L. Rev. 269, 315–16 (1980) (concluding public trust doctrine has historically prohibited some private development but its benefits outweigh these limited consequences).

420. The public trust doctrine does not prohibit all uses by the nominal owners. Towns abutting beaches may, for example, build showers and changing rooms off the beach for their residents' exclusive use. In the same way, landlords could remove some units from the market in the ordinary course of business as long as a sufficient core of housing remained available to sustain the community protected as a public trust.

421. But see Mary W. Blackford, Comment, Putting the Public's Trust Back in Zoning: How the Implementation of the Public Trust Doctrine Will Benefit Land Use Regulation, 43 Hous. L. Rev. 1211, 1223 (2006) (arguing public trust doctrine should apply to zoning and land use regulation); Donna Jalbert Patalano, Note, Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines, 28 B.C. Envtl. Aff. L. Rev. 683, 684–85 (2001) (same).

422. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

423. Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 720 (1986).

424. Id. at 781.

be a local vision,"[425] yet most reconstruction has catered to nonlocal interests. Not only low-income neighborhoods in New Orleans but also areas around Gulfport, Biloxi, and Mobile that had provided low-cost (albeit low-quality) housing are being rebuilt to serve tourists, gamblers, and others able to pay more.[426] The result is likely to be the destruction of former residents' communal ties (including friends, religious congregations, sources of informal child care, and much more) as well as their further displacement from sources of low-skill employment.[427] The economic context of low-income displaced persons' former residences has similarly been ignored: With their former landlords freed from economic dependence on them, these now-displaced former tenants will be forced to double up or otherwise bid up the rents of the remaining stock of lower-cost housing.

Anglo-American property law long has recognized the value of neighborly communities. Through conditions on conveyances of realty, restrictive covenants, reciprocal easements, and other devices, the law allows property owners to preserve valuable characteristics of their immediate communities. Indeed, the breadth of modern zoning law, and its responsiveness to the preferences of local landowners, effectively provide another means for property owners to preserve characteristics of their communities that they value.

Two key factors make these tools largely unavailable to protect communities of low-income people. First, Anglo-American law has limited their use to fee owners of land.[428] And second, they generally depend on formal, written declarations affecting particular people or plots of land.[429] The limitation of rights to fee holders should not have been a serious obstacle to protecting low-income communities. Beginning in the late 1960s, landlord-tenant law began to broaden the concept of enforceable rights.[430] *Goldberg* found property rights in future welfare payments that recipients did not "own" in any traditional sense. And traditional property law dispensed with explicit writings where tradition clearly established relationships.[431] Recognizing new kinds of protected customary relationships does not require any major conceptual leaps; it would

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425. Bush, Energy Remarks, supra note 356, at 1489.

426. See, e.g., Yoosun Park et al., "Everything Has Changed": Narratives of the Vietnamese American Community in Post-Katrina Mississippi, J. Soc. & Soc. Welfare, Sept. 2010, at 79, 96–99 (describing encroachment of casinos on Vietnamese community in Biloxi after Katrina).

427. See Michael Powell, In Miss., Time Now Stands Still, Wash. Post, Nov. 25, 2005, at A1 (discussing impact of "urban renewal by hurricane" on working-class residents).

428. Restatement (Third) of Prop.: Servitudes § 2.1 (2000) (noting requirement that servitudes be created by owners).

429. Id.

430. Super, Implied Warranty, supra note 9, at 399–404.

431. Restatement (Third) of Prop.: Servitudes § 2.10 (describing servitudes created by estoppel).

simply honor multilateral relationships in the same way it has bilateral ones.

International law is well ahead of domestic law in protecting low-income communities. Indigenous communities long have enjoyed protection against displacement, even when their land is acquired in compliance with the country's property law. These are group, not individual, rights. For example, Article 21 of the American Convention on Human Rights protects "'members of [. . .] indigenous communities within the framework of communal property.'"[432] These rights, however, had been limited to groups antedating contact with Europeans and hence had little application to most low-income communities.

In 2005, however, the Inter-American Court of Human Rights ruled in *Moiwana Community v. Suriname* that the N'djuka Maroon—a community originally formed by escaped slaves—could assert rights as an indigenous people.[433] The court noted that the N'djuka were not indigenous to the area, having settled it only in the late nineteenth century, but found "their traditional occupancy of Moiwana Village and its surrounding lands—which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years—should suffice to obtain State recognition of their ownership."[434] As a result, "the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory."[435]

The court did not limit these rights to fee holders: "[I]n the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices—yet who lack real title to the property—mere possession of the land should suffice to obtain official recognition of their communal ownership."[436] The harm the Inter-American Court recognized was identical to that experienced by low-income people uprooted from Gulf Coast communities: "'[T]heir forced displacement has severed . . . fundamental ties'" to the community and family and "'deprived them of a fundamental aspect of their identity and sense of well being.'"[437] The Inter-American Court's jurisdiction caused it to focus on a community with an exceptionally long, shared history and culture. U.S. domestic law affords dignity to ties of much shorter duration.[438]

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432. Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 122 (June 15, 2005) (alteration in original), available at www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf (on file with the *Columbia Law Review*).

433. Id. ¶ 233.

434. Id. ¶ 133.

435. Id. ¶ 134.

436. Id. ¶ 131.

437. Id. ¶ 132 (quoting expert witness).

438. See, e.g., Milliken v. Bradley, 418 U.S. 717, 745 (1974) (overturning school desegregation remedy to preserve right of suburbs, many just a few decades old, to control

D. *Conclusion*

Communities are among humans' oldest and historically most valuable assets. To date, however, they have gone curiously underprotected in traditional property law. Perhaps the law assumed that communities would not face existential threats. Increased commodification and the affluent's ability to substitute other assets for the benefits communities traditionally provided have rendered low-income communities increasingly vulnerable. To preserve the stability and nonmonetized benefits essential to human thriving and autonomous democratic participation, the law should and can adapt existing doctrines to protect communities on which vulnerable people rely.

IV. RELATIONSHIPS WITH POWERFUL STRANGERS: REVIVING EQUITY

As a longtime legal services housing lawyer pointed out, "[n]othing gets people where they live like getting them where they live."[439] The home is both vital in its own right and generative of other defining relationships. Someone who loses her or his home will almost certainly lose her or his neighbors. With greater distance, friendships and numerous informal supports—exchanges of babysitting, help with repairs, and much more—will break down. Worse, losing a home can endanger a family. Parents may find the loss humiliating and withdraw; children may blame the parents for the loss and rebel. If the family secures alternative housing, it may be overcrowded, exacerbating tensions. If not, the parents may send the children to live with relatives, different family members may be forced into different shelters, or the state may place the children in foster care. The lack of stable housing also makes difficult or impossible the retention of other important property, including the clothes that define one's status in society, the mementos that honor one's ancestors, the computers that allow connection with online communities and opportunities to obtain income, and even the basic documents required to establish one's identity.

Property relationships involving the home—whether with grantors, mortgagees, or landlords—thus are typically the most important interaction a low-income person has with strangers. And it is an extremely perilous one, for not only are the stakes extremely high for the home's resident, but the home will also be worth a great deal, albeit much less, to strangers. Thus, grantors, mortgagees, or landlords may have strong incentives to try to pry the home away from the resident that far exceed the

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schools their children attend); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7–8 (1974) (giving suburb right to exclude group homes of college students to preserve its character).

439. This is the insight of Marilyn Mullane, Executive Director of Michigan Legal Services, while she and the author worked at the Landlord-Tenant Legal Aid Clinic in Detroit during the author's law school years.

incentives strangers have to deprive individuals of other vital assets such as family, community, and subsistence public benefits.

The centrality of the home and its crucial role as a point of access to other forms of wealth is not new. Neither, unfortunately, are the efforts of powerful strangers to dispossess vulnerable people. Although statutory consumer protection law is relatively recent, efforts to protect poor people's homes are centuries old. Indeed, a major branch of the English justice system—equity—arose in significant part to do just that.[440] Today, however, much of that original purpose has been lost. Lawyers are familiar with equity in name, with some of its defining jargon, and with some of the remedies and procedural devices it pioneered.[441] For the most part, however, equity's paramount role as the protector of the weak has been lost. The procedures required to invoke equity have become more arduous; statutes have curtailed the relief it may offer to the point that it has come to resemble the formalistic common law doctrines it was created to temper. Those capable of filing relatively complex affirmative litigation and carrying demanding burdens of proof may still invoke some of equity's principles, but rationing these benefits by the ability to surmount these procedural obstacles obstructs targeting those most in need.[442]

This Part argues for the resuscitation of equity.[443] Doing so would have the direct effect of preventing unnecessary hardship and waste when powerful entities unjustly force low-income people from their homes. Its indirect effects on these families would be even more profound: preserving families' ability to participate fully in community, to have other sorts of possessions, and to access other important attributes of membership in society. The indirect social effects, too, would be important: the prevention of economic waste from the destruction of viable housing and the preservation of functioning communities with all of the benefits such communities provide, including informal child care, education, and crime prevention services. Although this discussion takes the mortgage foreclosure crisis as its starting point, the need to revive equity is by no means limited to the current circumstances. Part IV.A traces the rise and subsequent cabining of equity. Part IV.B examines the foreclosure crisis, showing both the transformative impact on the debtors af-

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440. See generally William Q. de Funiak, Handbook of Modern Equity (2d ed. 1956) (summarizing principles of modern equity).

441. See Kevin C. Kennedy, Equitable Remedies and Principled Discretion: The Michigan Experience, 74 U. Det. Mercy L. Rev. 609, 610 (1997) (describing meaning of equity in Anglo-American law).

442. See David A. Super, Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits, 113 Yale L.J. 815, 850–56 (2004) (criticizing inefficiency of relying on procedural obstacles to ration public benefit programs).

443. Portions of this Part are adapted from the author's suggestions for legal services practitioners in a previous article. See generally David A. Super, Defending Mortgage Foreclosures: Seeking a Role for Equity, 43 Clearinghouse Rev. 104 (2009).

fected and the close similarities between the problems that have arisen in the foreclosure crisis and those that equity historically has addressed—and could address again. Part IV.C considers specific doctrinal problems that would arise under the modern, hobbled version of equity.

A. *The Rise and Eclipse of Equity*

The standard understanding is that equity arose to do justice when strict application of common law rules would be against good conscience.[444] This statement is not wrong, but it misses the driving force behind equity's rise. Equity was not a device for utility maximization crafted by architects of some predecessor to Reich's "public interest state"; it was an affirmative intervention to prevent the manipulation of the Crown's courts to strip less sophisticated people of their land.

Equity originated in the fifteenth century. Sharp operators well versed in common law rules became increasingly adept at manipulating them against less sophisticated landowners. The King's Chancellor began to intervene to "mak[e] sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment [through the courts of law]."[445] The common law had become highly formalized. A repeat player, or one with superior literacy or access to counsel, could readily maneuver less sophisticated people into positions where they were dispossessed of their property without recourse to the courts.[446] The common law could never anticipate all of these maneuvers,[447] and when it failed to do so, a generally sound rule became a tool of injustice.[448] Operating outside of the common law courts "enabled chancellors to provide swift and inexpensive justice, especially to the poor and oppressed[,] . . . [and] could ensure that unfair advantage was not taken of the weak and foolish," while not disturbing the clarity and predictability of the common law.[449]

Mortgages long have been vehicles by which some debtors suffered

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444. See de Funiak, supra note 440, § 3, at 5–6 (attributing rise of equity to need for new forms of relief in novel situations).

445. Baker, supra note 5, at 102.

446. See id. at 102–03 (describing instances where courts of law failed to provide relief). For example, because the common law treated a bond as incontrovertible evidence of indebtedness, if a debtor failed to retrieve his bond upon repaying a debt, the common law would require him to pay the same debt again. Id. at 102.

447. See id. at 106 (providing Lord Ellesmere's explanation that equity existed because "men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances" (alterations in Baker) (quoting Earl of Oxford's Case, (1615) 21 Eng. Rep. 485 (Ch.) 486; 1 Ch. Rep. 1, 6)).

448. See de Funiak, supra note 440, § 2, at 2–3 (explaining how "failure . . . of the courts of law in England" to consistently "accomplish a just application" led to rise of equity).

449. Baker, supra note 5, at 104. One of equity's offshoots, the Court of Requests, dispensed charity to the poor on behalf of the King. Id. at 119–20.

catastrophic losses and some creditors reaped windfall profits. They thus have been a major focus of equity's attention since the seventeenth century. Initially, equity courts began ordering mortgagees to reconvey property they had repossessed when mortgagors could show dishonest behavior.[450] Eventually, the scope of the losses that mortgagors suffered in a repossession appeared to offend the chancellor; equity began to order reconveyance whenever the mortgagor made the required payments, even long after they were due.[451] The theory was that the mortgagors' payments had earned them an "equity of redemption" in the property that the mere failure to make subsequent payments could not extinguish.[452] Equity courts had seen enough abusive behavior that they treated all mortgages as suspect because the threat of forfeiture "puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender."[453] On a similar logic, they disregarded any disclaimer of the equity of redemption that the lender had induced the mortgagor to sign: The "right of redemption could not be clogged or fettered in any way; any agreement which had this effect was void."[454]

The only way mortgagees could obtain clear title to repossessed property was to bring an action in equity to foreclose any future possibility for the mortgagor to redeem the property.[455] Thus, rather than waiting for mortgagors to claim injustice, mortgagees could take the initiative and show the chancellor that they had not abused their bargaining power and that they had given the mortgagors a reasonable time after the contractual deadline to make late payments and avoid losing their rights to the property. If the chancellor agreed, he would foreclose the equity of redemption. This procedure, which came to be known as "mortgage foreclosure," made sense for all concerned: Many poor, unsophisti-

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450. See 12 Thompson on Real Property § 101.01(a), at 366–67 (David A. Thomas ed., 2d ed. 1998) [hereinafter Thompson, Real Property] (describing circumstances under which equity would "compel a reconveyance to the mortgagor").

451. 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(3), at 79–80 (2d ed. 1993) (reviewing reasons equity began holding "defaulting mortgagor could get the land back, even though he was in default and title was vested in the lender by the perfectly valid agreement of the parties").

452. The equity of redemption is the mortgagor's right to pay off the debt and reclaim the property. Singer, Property, supra note 264, § 11.5.1, at 559.

453. Thompson, Real Property, supra note 450, § 101.01(a), at 366–67 (quoting Toomes v. Conset, (1745) 26 Eng. Rep. 952 (Ch.) 952–53; 3 Atk. 261, 261).

454. Id.; see also Dobbs, supra note 451, § 2.3(3), at 80 (explaining development of redemption "as a kind of equitable property right" as possible response to perceptions of contractual "unconscionability").

455. See Dobbs, supra note 451, § 2.3(3), at 81 (describing how "[e]quity courts, having created the equity of redemption in favor of the borrower, [were] then compelled to provide [foreclosure actions] to cut it off"); Debra Pogrund Stark, Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws, 51 Okla. L. Rev. 229, 231 (1998) ("The foreclosure process is the lawful process by which a lender can terminate [the] equitable right of redemption . . . .").

cated mortgagors lacked the funds and acumen to bring affirmative cases even when they had been badly abused, while mortgagees who had behaved honorably could prove as much and avoid obstacles crafted for their more unscrupulous colleagues.

Foreclosure "'is peculiarly an equitable action,'" allowing courts to consider whatever "'questions as are necessary to be determined in order that complete justice may be done.'"[456] Because the consequences of foreclosure are so severe for the mortgagor, equity may deny foreclosure for "an inadvertent, inconsequential default in order to prevent unconscionably overreaching conduct by a mortgagee."[457] This leads to a highly adaptive process in which the court "balanc[es] the equities" of a particular case.[458] Equitable defenses may "'address the making, validity or enforcement of the mortgage, the note or both'" and if the mortgagee has behaved inequitably, the court is free to deny relief.[459]

Beginning in the nineteenth century and accelerating through the twentieth, however, this country began to lose touch with the benevolent purposes that gave rise to the mortgage foreclosure proceeding. First and foremost, equity lost most of its dignity and power in its "merger" with law (in fact, very much a hostile takeover) beginning in the middle of the nineteenth century.[460] Then, as the century wore on, the rise of formal-

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456. Morgera v. Chiappardi, 813 A.2d 89, 98 (Conn. App. Ct. 2003) (quoting Hartford Fed. Sav. & Loan Ass'n v. Lenczyk, 217 A.2d 694, 697 (Conn. 1966)); accord New Alliance Bank v. Win Holdings Int'l, Inc., No. KNLCV0750027215, 2008 WL 732036, at *6 (Conn. Super. Ct. Feb. 27, 2008) (quoting Glotzer v. Keyes, 5 A.2d 1, 3 (Conn. 1939)); see also First Fed. Sav. & Loan Ass'n of Englewood v. Lockwood, 385 So. 2d 156, 160 (Fla. Dist. Ct. App. 1980) ("When a foreclosure complaint is filed in a Florida court seeking an equitable remedy, it follows that traditional equitable defenses and considerations, long recognized by these courts, are available to all the litigants."), abrogated by Weiman v. McHaffie, 470 So. 2d 682 (Fla. 1985); Adams v. Citizens Bank of Brevard, 248 So. 2d 682, 684 (Fla. Dist. Ct. App. 1971) (noting law lacks jurisdiction over equitable foreclosure proceedings); Mfrs. Hanover Mortg. Corp. v. Snell, 370 N.W.2d 401, 404 (Mich. Ct. App. 1985) (per curiam) (noting district court has jurisdiction to "hear and determine equitable claims and defenses involving the mortgagor's interest in the property"); Graf v. Hope Bldg. Corp., 171 N.E. 884, 886–87 (N.Y. 1930) (Cardozo, C.J., dissenting) (noting mortgages sound in equity and "[e]quity follows the law, but not slavishly nor always"); CSFB 1998-C2 Park Mill Run, LLC v. Garden Ridge Hilliard Del. Bus. Trust, No. 05AP-746, 2006 WL 827779, at *2 (Ohio Ct. App. Mar. 30, 2006) (discussing foreclosure as equitable remedy); Eric Friedberg, Note, Portfolio Maintenance Use of the Due on Sale Clause in New York, 49 Brook. L. Rev. 79, 87 (1982) ("A mortgage foreclosure is a proceeding in equity and is therefore subject to traditional equitable defenses.").

457. Karas v. Wasserman, 91 A.D.2d 812, 812 (N.Y. App. Div. 1982).

458. LaSalle Nat'l Bank v. Freshfield Meadows, LLC, 798 A.2d 445, 451 (Conn. App. Ct. 2002).

459. Bank of N.Y. v. Conway, 916 A.2d 130, 136 (Conn. Super. Ct. 2006) (quoting Fidelity Bank v. Krenisky, 807 A.2d 968, 974 (Conn. App. Ct. 2002)).

460. Perhaps most significantly, equitable tribunals either disappeared or lost much of their jurisdiction to hidebound common law courts whose traditions valued technical rules over substantive justice. See Ralph A. Newman, Equity and Law: A Comparative Study 50–51 (1961) (describing merger and abolition of equity courts in all but four states).

ism[461] and the greater deference to commercial interests that came with the Industrial Revolution[462] stripped the proceeding of much of its original purpose—averting abuses of poor and unsophisticated debtors—and left only its secondary concern, giving mortgagors additional time. Once it had been shrunk to a ministerial timekeeping function, the need for judicial involvement declined. Many states enacted foreclosure statutes that allowed mortgagees to cut off the equity of redemption themselves, without court order; others kept judicial foreclosures but so tightly constrained the court's authority that these cases became highly routinized.[463]

B. *The Mortgage Foreclosure Crisis*

Foreclosures devastate mortgagors even in the best of times. The mortgage foreclosure crisis that began in 2007—and has persisted with some permutations since then—has wrought all of the usual harms. In some important respects, however, it has been even worse. The nearly simultaneous dispossession of so many people has ravaged neighborhoods and even regions. It also has made visible both hardships that dispossessed families previously had suffered in isolation and creditor abuses that previously may have existed on a less industrial scale.

This section dissects the continuing crisis. Part IV.B.1 considers the ways in which this crisis is distinctive. Part IV.B.2 then explores the evidence of its human cost.

1. *Special Factors Exacerbating the Crisis.* — Four anomalies stand out in the current crisis. First, the scope of fraud underlying it is quite striking. Conventional wisdom assumed that fraud was the behavior of individual deviants or dedicated criminal organizations. Mainstream enterprises, particularly large ones, were thought to have too much to lose to risk dishonest behavior. With its "liar mortgages"[464] and "robo-signers,"[465] the crisis has shown us that large, purportedly respectable financial organizations are so driven by short-term profitability, and so secure in their sense of entitlement to respectability,[466] that they made little effort to avoid even the most obvious forms of fraud. Remarkably, this attitude may have

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461. Horwitz, supra note 8, at 265–66.

462. See id. at 253–56.

463. See, e.g., Cal. Civ. Code § 2924(a) (West 2013) (allowing mortgagee to sell mortgagor's property after giving specified form of notice and waiting three months).

464. See Alan Zibel, "Liar Loans" Threaten to Prolong Mortgage Crisis, Huffington Post (Aug. 18, 2008), http://www.huffingtonpost.com/2008/08/18/liar-loans-threaten-to-po_n_119650.html (on file with the *Columbia Law Review*) (describing "liar loans" granted with no requirement that mortgagor prove sufficient income to repay).

465. See Barry Ritholtz, The Robosigning Deal: A Useless Embarrassment, Wash. Post, Feb. 26, 2012, at G6 (describing practice of hiring people to sign large numbers of false declarations asserting foreclosing party had all required documentation).

466. See David A. Super, The Political Economy of Entitlement, 104 Colum. L. Rev. 633, 640–44 (2004) (discussing criticisms of "entitled" attitudes).

survived even after these organizations were exposed, sued, and fined for these abuses.[467]

Second, a large percentage of current foreclosures are economically wasteful: They destroy large amounts of value for all those holding interests in the property. The mortgagors' losses are obvious, but reclaiming collateral homes in a systemically glutted housing market, with credit for repurchasers all but unavailable, often gives creditors as a group less than they could have obtained from continuing to receive intermittent or reduced payments—or even from allowing the mortgagor to remain in possession, maintaining the property until housing conditions recovered enough to make the collateral marketable.

Third, the highly fractured ownership of mortgages makes extrajudicial settlement impossible. Mortgages have come to be treated as commodities, with the rights divided among various investors with different preferences.[468] One entity may hold the rights to interest payments while another has a claim on principal repayments and still another, the late fees. Some arrangements even divide these interests further by year.[469] With interests so fractured, gaining all parties' consent to workouts is effectively impossible. Moreover, the compensation arrangements for mortgage servicing companies—the point people in any negotiation on foreclosure—produce strong disincentives to negotiate.[470] Thus, the great mass of delinquent mortgages moves like so many lemmings past stopping points that could produce more value for all parties and into the abyss of pointless foreclosure.

Finally, many foreclosures result from extensions of credit that prior public policy had clearly declared undesirable. In some cases, mortgage originators may have defrauded mortgagors; in others, downstream purchasers or insurers of the mortgages may have been the victims. In many cases, both groups suffered. Even where no actual fraud or other legal violations occurred, consumers' inability to understand the terms of adjustable rate mortgages (ARMs) and other complex financing schemes interfered with their ability to make rational economic decisions in both their own interest and that of the economy as a whole. The widespread

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467. See Editorial, Banks Still Behaving Badly, N.Y. Times, May 9, 2013, at A28 (reporting New York Attorney General planned to sue two huge banks for continuing abuses).

468. See Priya S. Gupta, The American Dream, Deferred: Contextualizing Property After The Foreclosure Crisis, 72 Md. L. Rev. (forthcoming 2013) (manuscript at 3) (on file with the *Columbia Law Review*) (finding "federal government chose to treat houses primarily as investments codified in contracts," ignoring "nature of the house as a 'home' as well as the government's decades-long role in enabling house purchases").

469. See Jerry Knight, Criimi Mae's Chapter 11 Filing Puts REITs on Edge, Wash. Post, Nov. 9, 1998 (Business), at 7 (describing division of interests in mortgages).

470. See Gretchen Morgenson, Opening the Bag of Mortgage Tricks, N.Y. Times, Dec. 19, 2010 (Sunday Business), at 1 (discussing division of investor and servicer interests in mortgage securities).

promotion of credit on complex terms to naïve consumers was clearly inconsistent with the goals of numerous consumer protection statutes as well as evolving common law doctrines such as unconscionability.[471]

These four problems are precisely the sort that equity has moved to remedy in the past. Drawing analogies from existing equitable jurisprudence, courts can fashion new equitable defenses—or affirmative claims in jurisdictions that have abandoned judicial foreclosures—to address each of these conditions. Equity is not an all-purpose elixir that can remedy all of the wrongs in the legal system. Its origins as a vehicle for extending royal power belie any such notion. Moreover, at times, low-income people rely heavily on the very sort of technicalities equity sometimes finds unjust to slow an opposing juggernaut.[472] Nonetheless, in circumstances as unusual as those fueling the current crisis, equity offers an ideal means to cushion the effect of legal rules, such as those expediting dispossession of mortgagors, whose unfettered operation would do great damage to the economy and social fabric. Here again, the failure to apply these ancient tools to help preserve the property rights of low-income people must be understood as a choice that narrows the protections of property, not a legal inevitability.

2. *The Human Toll.* — A mortgage foreclosure is an economic catastrophe for any individual or family. Years of sacrifice and hard work to accumulate the funds to purchase a home are lost, along with all of the memories associated with that home. And because substitute lodgings will likely be less spacious, the mortgagor likely will have to give up personal property along with her or his real estate.

But a foreclosure is also at least as much a social catastrophe.[473] The social status accrued as a homeowner is replaced by the humiliation of the exile.[474] Because the rental housing to which the dispossessed mortgagor must retreat is unlikely to be in the same community as the lost home, ties with neighbors are likely to fade. Children's educations are likely to be disrupted.[475] The scars of the experience may demoralize the

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471. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965) (finding sweeping forfeiture in consumer contract potentially unconscionable and remanding for determination).

472. See, e.g., Eder v. Beal, 609 F.2d 695, 701 (3d Cir. 1979) (preventing otherwise lawful reduction in Medicaid benefits for failure to provide beneficiaries advance notice).

473. See supra Parts II, III (describing property interests in continued integrity of family and community).

474. See Donna M.L. Heretick, Clinicians' Reports of the Impact of the 2008 Financial Crisis on Mental Health Clients, 7 J. Soc. Behav. & Health Sci. 1, 11–12 (2013) (finding anxiety, depression, worry, and humiliation associated with financial stress).

475. See, e.g., Matthew Kachura, Balt. Neighborhood Indicators Alliance-Jacob France Inst., Univ. of Balt., Children and Foreclosures: Baltimore City: The Foreclosure Crisis and Student Mobility 19–20 (2012), available at http://www.neighborhoodindicators.org/sites/default/files/publications/children_and_foreclosures_phase_2_full_report.pdf (on file with the *Columbia Law Review*) (finding foreclosures lead to residential and school instability among Baltimore public school students); cf. Adam Voight et al.,

former homeowners to the point that they cannot make another serious attempt at home ownership even if their finances improve.[476] Blame, shame, and embarrassment[477] from the experience may drive families apart,[478] sending waves of harm cascading down the generations.[479]

The costs to society at large are also devastating. Communities with a sudden increase in the number of vacant houses experience declining property values and increases in crime rates.[480] This increases burdens on local governments that are already hard-pressed.[481] For example, "[t]he

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The Longitudinal Effects of Residential Mobility on the Academic Achievement of Urban Elementary and Middle School Students, 41 Educ. Researcher 385, 389 (2012) (finding mobility negatively associated with elementary and middle school reading and math achievement).

476. See Lauren M. Ross & Gregory D. Squires, The Personal Costs of Subprime Lending and the Foreclosure Crisis: A Matter of Trust, Insecurity, and Institutional Deception, 92 Soc. Sci. Q. 140, 156–57 (2011) (describing how people post-foreclosure "avoid[] financial transactions that entail much risk" or even "total[ly] disengage[] from activities that involve[] an extension of credit beyond that of the housing market").

477. See K.A. McLaughlin et al., Home Foreclosure and Risk of Psychiatric Morbidity During the Recent Financial Crisis, 42 Psychol. Med. 1441, 1444 (2012) (finding exacerbation of major depression in people undergoing foreclosures); Craig Evan Pollack & Julia Lynch, Health Status of People Undergoing Foreclosure in the Philadelphia Region, 99 Am. J. Pub. Health 1833, 1835, 1837 (2009) (discussing depression and other medical conditions associated with foreclosures).

478. See Janis Bowdler et al., The Foreclosure Generation: The Long-Term Impact of the Housing Crisis on Latino Children and Families 6 (2010), available at http://issuu.com/nclr/docs/file_foreclosures_final2010 (on file with the *Columbia Law Review*) ("Spouses and partners often reported increased tension and discord in their relationships as a result of [a] foreclosure[,] [which] led to the consideration of divorce or separation . . . ."). But cf. W. Bradford Wilcox, The Nat'l Marriage Project, The Great Recession and Marriage 9 (2011), available at http://nationalmarriageproject.org/wp-content/uploads/2013/05/NMP-GreatRecession.pdf (on file with the *Columbia Law Review*) (asserting recession "led many Americans to deepen their commitment to marriage and, in some cases, to table or cancel their plans to divorce or separate").

479. See Phillip Lovell & Julia Isaacs, First Focus, The Impact of the Mortgage Crisis on Children and Their Education 1 (2008), available at http://www.brookings.edu/~/media/research/files/papers/2008/5/04%20mortgage%20crisis%20isaacs/04_mortgage_crisis_isaacs.pdf (on file with the *Columbia Law Review*) (discussing housing instability's health, behavioral, and educational effects on children); Bulent Anil et al., Housing Uncertainty and Childhood Impatience, 46 Urb. Educ. 1169, 1182–83 (2011) (finding children growing up in families with unstable housing learn behaviors that may lead to them later dropping out of school); Joanne N. Wood et al., Local Macroeconomic Trends and Hospital Admissions for Child Abuse, 2000–2009, 130 Pediatrics e358, e361–e362 (2012) (suggesting foreclosures may be driving increase in hospital admissions for physical child abuse).

480. Miriam Axel-Lute, Living Cities, Communities at Risk: How the Foreclosure Crisis Is Damaging Urban Areas and What Is Being Done About It 12–13 (Matt Pacenza ed., 2009), available at http://www.livingcities.org/knowledge/media/?action=view&id=1 (on file with the *Columbia Law Review*).

481. See, e.g., Cmty. Research Partners & ReBuild Ohio, $60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities, at 3-5 to -6 (2008), available at http://communityresearchpartners.org/uploads/publications/FullReport_

foreclosure and economic crises are contributing to a significant increase in homelessness and the risk of homelessness for individuals and families in cities and counties across the country."[482] Foreclosures also are associated with increased crime rates,[483] in part by breaking down the community ties that otherwise deter crime.[484]

The foreclosure crisis hit some vulnerable groups disproportionately. Some 17% of Latino/Latina and 11% of African American homeowners lost their homes or were in imminent risk of doing so within the first three years of the crisis.[485] This is exacerbating this country's already severe racial disparities in possession of wealth.[486] The crisis also hit the elderly surprisingly hard,[487] causing immediate hardship and preventing them from eventually passing homes on to their children.

C. *Resuscitating Equity*

The current mortgage crisis has brought despair to millions of hardworking people that saw homeownership as a crucial component of the American dream. It has humbled the U.S. financial system and brought the world economy to the brink of depression. No legal theory can come close to remedying a problem so massive and complex. The creative application of equity can, however, stave off further pointless destruction of value that further devastates vulnerable families and threatens to undermine the U.S. economy's halting recovery. This is precisely the sort of rationalizing, conserving role that equity has performed with great effectiveness over the ages. Equity long has prided itself in its

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Nonembargoed.pdf (on file with the *Columbia Law Review*) (describing cumulative impact of foreclosure crisis on small cities in Ohio).

482. Nat'l Law Ctr. on Homelessness & Poverty, Indicators of Increasing Homelessness Due to the Foreclosure and Economic Crises 1 (2011), available at http://www.nlchp.org/content/pubs/Foreclosure%20Factsheet_June%202011.pdf (on file with the *Columbia Law Review*).

483. See, e.g., Thomas D. Stucky et al., The Effect of Foreclosures on Crime in Indianapolis, 2003–2008, 93 Soc. Sci. Q. 602, 621–22 (2012) (concluding foreclosures were robust predictor of crime in Indianapolis); see also Eric P. Baumer et al., A Multicity Neighborhood Analysis of Foreclosure and Crime, 93 Soc. Sci. Q. 577, 578, 598 (2012) (summarizing research from other cities and concluding effects of foreclosure on crime may be mediated by city-level characteristics).

484. See supra Part III (finding property interests in community ties).

485. Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, Foreclosures by Race and Ethnicity: The Demographics of a Crisis 2–3 (2010), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf (on file with the *Columbia Law Review*).

486. See supra Part I.A (establishing racial disparities in wealth dwarf those in income).

487. See Alison Shelton, AARP Pub. Policy Inst., A First Look at Older Americans and the Mortgage Crisis 6 (2008), available at http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf (on file with the *Columbia Law Review*) (concluding Americans fifty and older compose 28% of all delinquencies and foreclosures in mortgage crisis).

adaptability: "Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path."[488]

This section explores how equity could be reinvigorated to respond to the mortgage crisis. Part IV.C.1 inquires whether equity has so thoroughly faded as a component of our legal system that it has lost the legitimacy needed for a task of this magnitude. Part IV.C.2 explores the interactions between equity and the various aspects of statutory and regulatory law touching on mortgages. Part IV.C.3 shows that the features of this crisis make it particularly appropriate for an equitable response. Part IV.C.4 assesses limits on the availability of equitable defenses and finds them inapplicable to most of these cases.

1. *Equity's Legitimacy.* — Equity's current frailty is in large part a result of atrophy from persistent nonuse, springing from the merger of law and equity and relentless pressure from powerful interests for the predictability that the supremacy of formal legal rules provides. To the extent equity's decline has any analytical underpinnings, they reflect a fundamental misunderstanding of its nature and historical role as a check on the oppressive operation of legal rules. Statutes in derogation of common law may be strictly construed,[489] but their authority is generally accepted absent some constitutional entrenchment of a particular principle.[490] Similar reasoning may help explain the neglect of equity in the face of seemingly hostile statutes, such as those permitting nonjudicial mortgage foreclosures. In addition, some simplistic views of equity may regard it as an open-ended license for judicial activism and hence inconsistent with contemporary notions of the separation of powers.[491]

These are not serious arguments. First, as a doctrinal matter, the Supreme Court has recognized a strong presumption against construing legislation to strip courts of their equitable powers.[492] Courts commonly construe state constitutional separation of powers principles as prevent-

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488. Graf v. Hope Bldg. Corp., 171 N.E. 884, 888 (N.Y. 1930) (Cardozo, C.J., dissenting).

489. See, e.g., Sutter v. Kalamazoo Stove & Furnace Co., 297 N.W. 475, 477 (Mich. 1941) ("The . . . statute is in derogation of common law, and is to receive a strict construction by the courts.").

490. See, e.g., Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 444 (N.Y. 1911) (finding, during *Lochner* era, principle of fault liability for tort inherent in Due Process Clause).

491. See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (questioning legitimacy of judiciary making economic and social policy).

492. E.g., Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944) ("[I]f Congress desired to make . . . an abrupt departure from traditional equity practice . . . it would have made its desire plain."); see also Young v. United States, 535 U.S. 43, 53 (2002) (holding statutory provision "*supplements* rather than displaces principles of equitable tolling"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 319–20 (1982) (holding statute allows equitable relief because language, structure, and history did "not suggest . . . Congress intended to deny courts their traditional equitable discretion").

ing legislatures from interfering in how the courts perform their functions.[493]

More broadly, assuming that equity cannot have the same leavening effect on statutory law that it did on the common law reflects a very crude notion of the nature and function of equity. Today's reverence for statutory law rests on its dignity as the product of democratic decisionmaking. In the era when equity arose, the common law was revered even more than statutory law is today; it was seen as a reflection of the ancient customs of a people and, at least in its broad design, as a divinely inspired natural order of things.[494] Equity could never have arisen were it regarded as antithetical to the common law.

Equity did not purport to override common law rules; it merely prevented parties from gaining unjust advantages or suffering unconscionable forfeitures. Just as courts may deny relief to parties that miss filing deadlines or other procedural obligations to the court, equity directs courts to deny relief to parties violating duties of fair dealing with other parties. In neither case is the underlying legal rule abrogated; it is simply denied effect in a particular case.[495]

The basic mechanism by which equity moderated the common law's harsh effects remains viable today. Where a statute allows a mortgagee to retake possession without a court order, or through a proceeding in which the mortgagor's equitable defenses are sharply curtailed, a mortgagee may attempt to do so—just as they could under the English common law. But without an order of foreclosure against the mortgagor's equitable defenses, the title the mortgagee reclaims will be vulnerable to chal-

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493. See, e.g., Evans v. State, 872 A.2d 539, 547–50 (Del. 2005) (holding statute "voiding" prior decision in same case unconstitutional under state separation of powers doctrine); Bush v. Schiavo, 885 So. 2d 321, 331 (Fla. 2004) (statute "revers[ing] a properly rendered final [court] judgment"); Calhoun v. State Highway Dep't, 153 S.E.2d 418, 421 (Ga. 1967) (statute restricting admissible evidence in takings cases); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1079–81 (Ill. 1997) (statute "function[ing] as a 'legislative remittitur'"); People v. Joseph, 495 N.E.2d 501, 503, 505–07 (Ill. 1986) (statute directing postconviction relief proceedings be handled by previously uninvolved judge); People ex rel. Hillel Lodge, No. 72, I.O.B.B. v. Rose, 69 N.E. 762, 765 (Ill. 1904) (statute defining "conclusive evidence"); State v. Hochhausler, 668 N.E.2d 457, 466 (Ohio 1996) (statute preventing any court from granting stay); Phillips v. Byrd, 143 P. 684, 686–87 (Okla. 1914) (statute defining "conclusive evidence"); In re D.W., 249 S.W.3d 625, 636–40 (Tex. App. 2008) (statute limiting issues cognizable on appeal); see also Putman v. Wenatchee Valley Med. Ctr., 216 P.3d 374, 380 (Wash. 2009) ("When the activity of one branch invades the prerogatives of another, there is a violation of the doctrine of separation of powers. The court must strike down this law because it violates the right of access to courts and conflicts with the judiciary's inherent power to set court procedures.").

494. See Baker, supra note 5, at 195 (describing English attitudes toward common law's natural origin and "immutability").

495. See Hanna v. Plumer, 380 U.S. 460, 463–64, 473–74 (1965) (holding *Erie* doctrine does not prevent Federal Rules of Civil Procedure from providing relief or even altering litigation's outcome in diversity cases because such rules do not change substantive rights of parties).

lenge. Separation of powers principles clearly prevent a legislature from granting the equivalent of a court order or mimicking the preclusive effect such an order would enjoy.

2. *Applying Equity to the Foreclosure Crisis.* — Equity seeks to steer law away from a few specific kinds of undesirable results. "Equitable defenses invite the court to consider only the plaintiff's ethical standing and to deny all remedies if the plaintiff does not meet equity's standards."[496] Separately, however, equity also will balance the hardships the parties, other affected persons, and the public would face under various possible outcomes.[497] Good faith financial transactions and reasonable reliance strengthen hardship claims.[498] Equity historically intervened when causing hardship to a defendant was unnecessary to secure a plaintiff's rights, "when the cost or hardship to the defendant far exceed[ed] the benefit to which the plaintiff [was] entitled," or when the harm to the defendant was so great as to suggest that the plaintiff may have acquired the legal claim unfairly.[499] Of particular relevance to the present crisis, equity traditionally has responded to waste, to value lost due to parties' failure to act in good faith, and to the undermining of clearly accepted public policies. Equity requires the courts to consider new defenses because "[i]n an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court."[500]

Applying equitable principles to these cases requires a full appreciation of how equity differs from law. Equity is not just an elaborate means for cross-referencing one law to another: Courts have come to read statutes in pari materia as a matter of course.[501] Instead, equity provides relief from rules of law based on principles of conscience and public policy. It may draw guidance as to contemporary moral sensibilities and public policy from other laws, but because equity is not a literalistic system, the textual limits of those laws have never constrained it.[502] Where a

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496. Dobbs, supra note 451, § 2.4(5), at 108 (emphasis omitted).

497. See de Funiak, supra note 440, § 25, at 42–46 (explaining traditional rule that courts "will weigh the loss, injury, or hardship" of withholding equitable relief against "loss or hardship caused to the defendant if the injunction is granted"); Dobbs, supra note 451, § 2.4(5), at 109–13 (surveying factors courts use in "balancing equities").

498. Dobbs, supra note 451, § 2.4(5), at 110–11.

499. Id. § 2.4(5), at 111.

500. Harbour Landing Dev. Corp. v. Herman, 603 A.2d 779, 781 (Conn. App. Ct. 1992) (citations omitted) (internal quotation marks omitted); accord Deutsche Bank Nat'l Trust Co. v. McClardy, No. CV076000497, 2008 WL 2375838, at *2 (Conn. Super. Ct. May 22, 2008) (quoting same language).

501. See, e.g., Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) (applying remedies from one civil rights statute to other statutes).

502. See Baker, supra note 5, at 106 (discussing English courts' adherence to Aristotelian concept of equity as "means of correcting general laws"); see also Flynn v. Korneffel, 547 N.W.2d 249, 257 (Mich. 1996) (recognizing courts may go beyond terms of

statute has established that a type of conduct contravenes public policy, equity will not limit the victims of that conduct to the remedies the law prescribes.[503] Equity has a broader mission: As one commentator notes, "[c]oncern over [the] risk of forfeiture is said to lie behind almost every major element of mortgage law."[504] Even in states that have, by statute, converted foreclosure to a legal proceeding, equitable defenses remain available.[505]

This subsection suggests three new types of equitable defenses to mortgage foreclosures. Each of these relies on analogies to longstanding equitable doctrines or clearly enunciated public policies to fashion remedies to problems arising out of the current mortgage crisis. In particular, these seek to reform mortgages to reflect the actual current value of the property and interest rates sufficient to compensate lenders for their costs of funds without forcing borrowers into default. This could be achieved through court-facilitated negotiations between the parties on a workout or through a direct judicial reformation of the mortgage.

a. *Foreclosures as Waste.* — When the housing bubble burst, many homes plummeted in value, leaving their owners with negative equity, i.e., owing more on their mortgages than the property is worth. Superficially, this suggests that abandoning the property would be the most advantageous course for many mortgagors. In fact, direct and indirect moving costs, emotional attachment to the property, and a desire to preserve their credit ratings keep mortgagors from pursuing this course.[506]

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statutes in unusual circumstances where equity so demands); John R. Kroger, Supreme Court Equity, 1789–1835, and the History of American Judging, 34 Hous. L. Rev. 1425, 1434–35, 1453 (1998) ("[O]ne of the most important functions of a traditional court of equity was to interpret or 'reform' statutes and legal documents so as to effect a substantially just outcome."); Anne L. Shiff, Note, The Freedom of Information Act—The Use of Equitable Discretion to Modify the Act, 44 Tul. L. Rev. 800, 800–01 (1970) (noting courts' equity jurisdiction allows them to reason by analogy from terms of statutes not covering problems before them); Jeffrey W. Warren & Shane G. Ramsey, Revisiting the Inherent Equitable Powers of the Bankruptcy Court: Does *Marrama v. Citizens Bank of Massachusetts* Signal a Return to Equity?, Am. Bankr. Inst. J., Apr. 2007, at 22, 62–63 (noting Supreme Court has endorsed exercises of equitable discretion to override legal rules that would have unfair results, even in areas with highly detailed codes like bankruptcy).

503. See, e.g., Peoples Trust & Sav. Bank v. Humphrey, 451 N.E.2d 1104, 1114 (Ind. Ct. App. 1983) (permitting mortgagors' recovery beyond statutory remedies, including punitive damages and reformation of loan, in context of foreclosure).

504. Marshall E. Tracht, Renegotiation and Secured Credit: Explaining the Equity of Redemption, 52 Vand. L. Rev. 599, 606 (1999).

505. See, e.g., Union Nat'l Bank of Little Rock v. Cobbs, 567 A.2d 719, 721 (Pa. Super. Ct. 1989) ("Although an action of mortgage foreclosure is an action at law in Pennsylvania, equitable relief is nevertheless available in such an action if it can be granted consistently with principles of law.").

506. See Jamie Smith Hopkins, Zillow: 31% of Mortgaged Homes in Baltimore Region Are Underwater, Balt. Sun (May 25, 2012), http://articles.baltimoresun.com/2012-05-25/business/bal-wonk-zillow-31-of-mortgaged-homes-in-baltimore-region-are-underwater-20120524_1_homes-in-baltimore-region-underwater-borrowers-negative-equity (on file

Nonetheless, the impaired value of the collateral makes foreclosing mortgagees likely to absorb substantial losses. In some of the areas hardest hit by the foreclosure crisis, the market is so glutted that the foreclosed home would have little or no present market value.[507] In that case, not only would the mortgagee not recoup the money lent but it might have to pay for the house's upkeep until it can be sold—or allow vandals to loot it and destroy any chance of a future sale. Long-term vacancies have particularly severe effects on neighboring property values and the vitality of the communities in which the foreclosed houses stand.[508] The most remunerative and economically efficient route for the mortgagee may well be to leave the defaulting mortgagors in possession—obviating the need for security systems and maintenance contracts—in exchange for whatever the mortgagors are in a position to pay. Foreclosure in these situations, on the other hand, epitomizes waste: The mortgagors bear moving costs and forfeit their emotional equity, the mortgagees lose most of their investment, and adjoining property values fall, harming owners and the local and state governments.

One of equity's most important roles has been attacking waste.[509] The law categorizes waste as voluntary or permissive: The former is damage the possessor's affirmative acts cause, while the latter is damage resulting from the possessor's neglect.[510] Equity would enjoin both.[511] Commoditization of mortgages[512] requires conscientious servicing agents to disentangle complex relationships among multiple future interest holders. Agreeing to write down the indebtedness to more fairly approximate the present value of the collateral may appear to open the servicing agent to charges of voluntary waste. The mortgage foreclosure crisis has resulted in significant part from servicing agents responding to this concern and declining to act. Yet allowing a property that is still valuable, and that is still capable of producing a stream of payments while it remains in the hands of the mortgagor, to fall into foreclosure with little

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with the *Columbia Law Review*) (reporting most homeowners with negative equity are continuing to make payments or are not far behind on payments).

507. See Vikas Bajaj & Michael M. Grynbaum, Drumbeat of Grim Reports Sends Markets Tumbling, N.Y. Times, Mar. 1, 2008, at A1 (noting mortgage companies in California held ten times as many foreclosed homes as during previous year because of glutted market).

508. See Marshall Gangel et al., Exploring the Foreclosure Contagion Effect Using Agent-Based Modeling, 46 J. Real Est. Fin. & Econ. 339, 342 (2013) (discussing negative effects of home foreclosure and abandonment, including lower property values and higher crime rates, and "contagion effect" of foreclosures).

509. See de Funiak, supra note 440, §§ 26–27, at 47–51 (explaining development of equitable remedy for waste).

510. Dobbs, supra note 451, § 5.2(8), at 737.

511. See id. § 5.2(8), at 738–39 (discussing availability of injunction for permissive and voluntary waste).

512. See supra notes 468–470 and accompanying text (explaining concept of commoditization).

prospect of remunerative resale can just as easily be understood as permissive waste, with the decay financial rather than physical. Permissive waste may be an even worthier subject for equitable relief than voluntary waste, for which a damages remedy has at least a higher hypothetical chance of success.[513]

Equity also has attacked economic waste, broadly construed.[514] Spiteful use of process, although within the bounds of the law, may nonetheless offend equity.[515] More generally, equity may demand that parties abandon or change the objects of legally well-founded actions that would have unjustifiably destructive ends. This process should be quite familiar to the modern scholar of law: "The balancing of public interest and third person rights is . . . the traditional door which admits a modicum of economic analysis into the equity case."[516] In the current crisis, mortgage foreclosures often destroy value for all of those with ownership interests; only the nonowner servicing agent, who is paid to bring the foreclosure but might not be paid to negotiate a workout, may benefit.[517] Courts' equitable powers allow them to fashion a workout that benefits both mortgagor and the collective interests of the class of mortgagees. More generally, courts will expand, restrict, or redesign their remedies to conform to the hardships or equities that the parties before them face.[518]

Beyond equity's abhorrence of waste, a court can find support in law for this sort of approach. Bankruptcy law reflects a strong public policy against treating debt as secured when it exceeds the value of its security.[519] In individual bankruptcies, the creditor's interest in the property is determined on the basis of what the property would be worth on the retail market.[520] Once the court recognizes part of the note as unsecured debt, the mortgagee cannot expect repayment or appropriately use the equitable procedure of foreclosure to punish nonpayment. Although bankruptcy law obviously has literal application only to formal bank-

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513. See Dobbs, supra note 451, § 5.2(8), at 738–39 ("[M]andatory injunctions against clear permissive waste might be the best solution.").

514. See de Funiak, supra note 440, § 26, at 50 ("[W]aste, from the standpoint of equity would now extend to any injury which impairs or destroys the substance of the estate so as to cause permanent injury.").

515. See id. § 107, at 241 (describing "bill of peace" against such actions).

516. Dobbs, supra note 451, § 2.4(5), at 112.

517. See Morgenson, supra note 470 (describing servicers' self-interested practices in foreclosure process).

518. Dobbs, supra note 451, § 2.4(6), at 113–14.

519. See 11 U.S.C. § 506(a)(1) (2012) (limiting secured claims to amount of creditor's interest in actual value of collateral). But see § 1325(a) (limiting § 506's applicability to certain property purchased shortly before bankruptcy filing).

520. § 506(a)(2); see also Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 960 (1997) (finding value of collateral is what willing buyer would pay to willing seller); William L. Norton, Jr. & William L. Norton III, Norton Bankruptcy Law & Practice § 146:10 (3d ed. 2013) (describing "replacement" value as value willing buyer would pay to willing seller).

ruptcy proceedings undertaken to address all of the debtor's finances, and some of its technical rules may limit its application to particular cases, the broad public policies evident in its scheme can guide a court in fashioning an equitable resolution of a foreclosure proceeding.

b. *The Duty to Bargain in Good Faith in a Securitized World.* — Mortgage securitization has so split ownership interests in mortgages that obtaining all parties' consent to a workout is effectively impossible. Although mortgage securitization is new, the problem of fractured ownership is not. It caused a host of problems that first law and then equity attacked. The venerable Statute of Quia Emptores in 1290 ended the practice of making new possessors subtenants of their predecessors, leaving each past possessor of land with some ongoing connection to that land.[521] Transferring ownership gave the Crown one person with whom to deal. Similarly, the Statute of Uses in 1536 sought to rein in artificial transfers and divisions of land.[522] Ambivalence about split ownership extended to the common law: Although many people simultaneously could have present and future interests in land, common law treated only one person at a time as having the highest form of title—seisin.[523]

Despite these efforts, however, more prosaic present and future interests in realty often remained divided. If those with remainders or executory interests could block life tenants from putting property to its best use, the community would waste valuable economic resources. To prevent this, equity developed its own doctrine of waste separate from whatever damages the courts of law might offer.[524] Similarly, when co-owners, whether joint tenants or tenants in common, could not agree on how to use property, equity forced partition to put the property back into useful commerce.[525]

A court hearing a mortgage foreclosure action could resolve the analogous obstruction to mortgagee decisionmaking by ordering partition of the exotic co-ownership arrangements securitization has yielded. Alternatively, it could establish principles of waste that effectively immunize mortgage servicing agents from actions by those holding interests in the mortgage so long as the servicing agent does not compromise the mortgage to a level substantially below the current market value of the security. The court similarly could equitably reform the contracts setting the servicing agent's fees to eliminate disincentives to negotiate.

Equity has a particular interest in one form of split ownership: the trust. Although the trustee has legal title to the trust's corpus, equitable

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521. Milsom, supra note 1, at 113–14.

522. Id. at 218–19.

523. See id. at 119–22 ("[T]here could be no larger proprietary idea than seisin . . . .").

524. See Stoebuck & Whitman, supra note 277, § 4.5, at 161–64 (describing development of equitable remedies for waste).

525. See id. § 5.11, at 214–17 (explaining origins of equitable actions for partition).

title lies with the beneficiaries.[526] Equity supervises the trustee's use of the property to ensure the trustee carries out its fiduciary responsibilities. Servicing agents for commoditized mortgages are fiduciaries for the absent, and fractured, owners.[527] Although the servicing agents' contracts may give them financial incentives to rigidly pursue foreclosure actions, and the mortgagees may be too fragmented to urge a different course, a court may step in to require the servicing agent to act in the mortgagees' best interests by negotiating effective workouts.

These interventions to promote negotiated workouts are consistent with important public policies that pervade our legal system. That system has become increasingly dependent on giving parties incentives to negotiate arrangements out of court in lieu of litigating. Indeed, this dependence on settlement and prelitigation resolutions has reached the point that some commentators worry that the "disappearing trial" will leave the legal system without sufficient benchmarks to assess the value of various legal rights.[528] The legal system pursues this policy in favor of negotiation in part through incentives, such as the rule requiring even winning parties to bear their own attorney's fees in most cases.[529] Increasingly, however, it also imposes affirmative duties to negotiate.

Nowhere is this norm clearer than in section 8(d) of the National Labor Relations Act, which requires employers and unions to "meet at reasonable times and confer in good faith" over terms of employment and to reduce any agreements reached to a written contract.[530] Section 8(d) cautions that it "does not compel either party to agree to a proposal or require the making of a concession," but it nonetheless represents an affirmative norm against allowing the parties to settle their affairs in the first instance with economic brute force if they so desire.[531] As such, it has reined in a wide range of obstructionist tactics.[532] It goes beyond requir-

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526. See 1 Restatement (Third) of Trusts § 2 cmt. d (2003) (noting "trust beneficiaries have equitable title," and "it is usually true . . . that the trustee has legal title").

527. See Noelle Knox & Sue Kirchhoff, Criticism Rains Down on Mortgage Industry: Frustration Grows over Pace of Help for Homeowners, USA Today, Oct. 23, 2007, at 1B (describing central role of loan servicers in mortgage market).

528. See, e.g., Patrick E. Higginbotham, So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405, 1423 (2002) ("We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs . . . ."); see also Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) (arguing when settlements are norm, "although dockets are trimmed, justice may not be done").

529. See Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 301 (1989) (describing persistence of "American Rule," by which each side pays its own costs regardless of case outcome).

530. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2006).

531. Id.

532. See generally Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law ch. XX (2d ed. 2004) (summarizing tactics like delaying or conditioning bargaining,

ing the mere act of seeming to negotiate, prohibiting either side from managing its bargaining in a way unlikely to reach agreement. For example, if an individual on a negotiating team cannot reasonably be expected to reach an amicable agreement, labor law will recognize the absence of meaningful negotiations regardless of whether or not the parties continue to meet.[533]

The norm in favor of alternative dispute resolution and settlement has spread far more widely. The Alternative Dispute Resolution Act of 1998 declared extrajudicial resolution of disputes at the district and even appellate court levels to be an important public policy priority.[534] Federal judges may require that a party with authority to negotiate participate in pretrial conferences.[535] In addition to scheduling, these conferences may include mandatory settlement negotiations.[536] Contract law imposes a duty to bargain in good faith once two parties have voluntarily linked their fates together.[537] For example, many jurisdictions require parents with custody disputes to attempt to mediate before they can come before a judge. Indeed, prior to securitization, parties commonly negotiated workouts for mortgagors in distress.[538] More generally, government agencies typically must consider concerns voiced by members of the public, even when they are not required to satisfy the public's demands.[539]

A court hearing a foreclosure action could refuse to grant the mortgagee relief until the servicing agent provides convincing evidence of having negotiated in good faith with the mortgagor for a workout. If necessary, the court could reform the contract establishing the servicing agent's compensation to reduce any disincentive to pursue the collective

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reneging, use of "economic weapons," and unreasonable conduct, as well as courts' responses).

533. NLRB v. Ky. Utils. Co., 182 F.2d 810, 813 (6th Cir. 1950); Reisman Bros., 165 N.L.R.B. 390, 392 (1967), enforced sub nom. NLRB v. Reisman Bros., 401 F.2d 770 (2d Cir. 1968); Bausch & Lomb Optical Co., 108 N.L.R.B. 1555, 1559 (1954).

534. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993, 2993 (codified at 28 U.S.C. § 651 (2006)) ("[A]lternative dispute resolution . . . has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.").

535. Fed. R. Civ. P. 16(c)(1).

536. Fed. R. Civ. P. 16(a)(5), (c)(2)(A), (c)(2)(I).

537. See Cyberchron Corp. v. Calldata Sys. Dev., Inc., 47 F.3d 39, 45 (2d Cir. 1995) (recognizing qualified precontractual good faith requirement); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 273 (Wis. 1965) (same); E. Allan Farnsworth, Contracts § 3.26, at 198 (4th ed. 2004) (discussing general duty of contractual good faith and fair dealing imposed by Restatement (Second) of Contracts and Uniform Commercial Code).

538. See 4 Powell on Property, supra note 271, § 37.35 ("When it is clear to the parties that the mortgagor has been unable to fulfill his payment obligations, the parties will often attempt to enter into a workout to prevent foreclosure.").

539. See Massachusetts v. EPA, 549 U.S. 497, 528–35 (2007) (concluding, contrary to statutory command, EPA failed to provide sufficiently detailed "reasoned explanation" for denying petition for rulemaking).

best interests of those holding interests in the mortgage.

c. *Integrating Equity with Fair Credit Regulation.* — Much of the foreclosure crisis resulted not from tumbling home values but from buyers holding mortgages whose terms they had little chance of repaying. Many people are financially illiterate in even the most basic terms, leaving them with little chance of comprehending the proliferation of increasingly complex mortgage instruments.[540] Some failed to appreciate that their ARMs had artificially low initial rates that obscured what a typical interest rate would be over the life of the mortgage[541] and hence did not understand that their payments would soon rise to unaffordable levels. Lenders compounded this confusion by refinancing the mortgages, with new deeply discounted rates, before the full rate became apparent, collecting a new set of fees each time.[542] Some lenders deliberately or recklessly gave buyers mortgages for which they did not qualify;[543] other buyers suffered the reverse problem, getting high-cost subprime mortgages when they qualified for more affordable standard arrangements.[544] In practice, some kinds of ARMs are little more than grants of unilateral authority for creditors to impose terms.[545] Even if creditors do not do so, ARMs "put the entire risk of increased interest rates on the borrower."[546] Time lags may shift some of this risk back to the lender,[547] but those delays are unlikely to do much good for borrowers with fixed or largely constrained incomes.

A considerable body of law has arisen to protect consumers and the integrity of the banking system.[548] Federal and state law have long taken firm positions against predatory lending. For example, the Fair Debt Collection Practices Act (FDCPA) and many state unfair and deceptive acts

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540. See Robyn Blumner, Thugs in Suits: Subprime Mortgage Disaster, Tulsa World, Feb. 3, 2008, at G3 (describing subprime mortgage industry's focus on exploiting unsophisticated homeowners).

541. See 4 Powell on Property, supra note 271, § 37.16[2][d] (discussing practice of lenders offering initially low interest rates).

542. See Carol Hazard, Dream in Distress, Richmond Times-Dispatch, Nov. 18, 2007, at A1 (describing destructive interaction of ARMs' interest rates resetting and mortgage refinancing).

543. See Zibel, supra note 464 (describing high default rate associated with "liar loans," approved without proof of borrower's income or assets, allowing borrowers to purchase more than they could afford).

544. See Christian Berthelsen, Loan Sharks Fatten Up in Golden State, S.F. Chron., Nov. 30, 2001, at B1 (noting some lenders targeted minorities for more expensive loans than their credit scores justified).

545. See 4 Powell on Property, supra note 271, § 37.16[1][a][vii] (describing several types of mortgages, including "change-at-will mortgage [which] permits the lender to change the rate of interest" if lender gives prior notice and waits for specified period).

546. Id. § 37.16[3][a].

547. Id.

548. See generally John Rao et al., Nat'l Consumer Law Ctr., Foreclosures (4th ed. 2012) (compiling and explicating legal defenses against foreclosures and mortgage servicing abuses).

and practices laws prohibit collecting charges not authorized by law.[549] The FDCPA's prohibitions on misrepresenting the character, amount, or legal status of a debt prevent efforts to collect interest not properly disclosed to the borrower.[550] Refinancing mortgages, which some credit companies did several times with the same mortgagors, can be seen as collecting on the prior debts even as the creditors arrange new ones and hence would fall within the FDCPA.[551] The FDCPA reaches foreclosure actions, regulating, among other things, the conduct of lawyers litigating those actions.[552] The Truth in Lending Act (TILA) regulates the granting of credit;[553] although perhaps best known for its notice requirements, it also imposes substantive duties of fairness.[554]

To date, however, relevant federal laws have been insufficiently integrated with equity, whose concerns are quite similar. Equity may bar foreclosure proceedings until the mortgagee has complied with the regulations adopted pursuant to federal housing laws.[555] In some cases, the laws will, on their own terms, provide an adequate remedy. In others, however, rigid application of legal rules will frustrate those laws' purposes, perhaps because the lender has persuaded the mortgagor to refinance the original suspect loan or because the deceptively low introductory rate

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549. 15 U.S.C. § 1692f(1) (2012). See generally Steven J. Hobbs, Fair Debt Collection § 1.5.3, at 38–39 (4th ed. 2000) (explaining FDCPA and analogous state laws).

550. See § 1692e(2)(A), (5) (prohibiting "false representation of . . . the character, amount, or legal status of any debt"); § 1692f(1) (prohibiting "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law"); Patzka v. Viterbo Coll., 917 F. Supp. 654, 658–60 (W.D. Wis. 1996) (construing § 1692e(2)(A) and 1692f(1) and finding violation where collection fee was neither authorized under state law nor known to debtor).

551. See Hobbs, supra note 549, § 4.4.2.1, at 128–29 (noting home foreclosures may be covered by FDCPA).

552. See Heintz v. Jenkins, 514 U.S. 291, 294 (1995) (holding FDCPA applies to lawyers litigating to collect debts).

553. 15 U.S.C. §§ 1601–1681r.

554. See, e.g., § 1639(h) (prohibiting lenders from extending credit without regard for consumers' income).

555. See, e.g., Countrywide Home Loans, Inc. v. Wilkerson, No. 03 C 50391, 2004 WL 539983, at *2 (N.D. Ill. Mar. 12, 2004) (denying summary judgment for mortgagees because they failed to show compliance with Code of Federal Regulations provisions requiring reasonable efforts to contact mortgagors prior to foreclosure); Mortg. Assocs. Inc. v. Smith, No. 86C1, 1986 WL 10384, at *2 (N.D. Ill. Sept. 16, 1986) (same); United States v. Trimble, 86 F.R.D. 435, 436–37 (S.D. Fla. 1980) (dismissing federal complaint seeking foreclosure on Farm Home Administration loan because government failed to show compliance with prior notice regulation); Brown v. Lynn, 392 F. Supp. 559, 563 (N.D. Ill. 1975) (blessing "foreclosure courts . . . allowing mortgagors to raise noncompliance with [a regulatory] Handbook as a defense to a 'quick' foreclosure"); Fleet Real Estate Funding Corp. v. Smith, 530 A.2d 919, 923 (Pa. Super. Ct. 1987) (holding "trial courts in Pennsylvania may exercise . . . equity powers to restrict a mortgagee who has not, within the reasonable expectations of good faith and fair dealing, followed or applied the forbearance provisions of [federal] regulations").

on an ARM took the borrower beyond a limitations period. These are precisely the kinds of situations in which equity has traditionally intervened.

Securitization of mortgages has made assignment of mortgagees' interests quite routine. Although "[t]he general rule of assignments is that the transferee has the same rights as the transferor,"[556] those purchasing mortgages are likely to seek to defeat many defenses mortgagors might have under the "holder in due course" doctrine, which allows third parties to purchase negotiable instruments free of most defenses the bound parties might have against those selling the instrument.[557] This doctrine facilitates transactions in these instruments by freeing buyers from the need to investigate the circumstances of the underlying obligations,[558] but it also removes most of the disincentives for fraud on the part of lenders whose business model calls for rapid sale of their notes.[559]

Courts already hold third parties, such as mortgage insurers, answerable for fraud in securing a mortgage where the mortgage was anomalous under existing market conditions.[560] The same rule should apply to purchasers of mortgages where the abuses were violations of consumer protection statutes rather than traditional fraud. Allowing third-party purchasers to foreclose without regard to the circumstances under which the loans were let would effectively immunize most ARMs, one of the forms of mortgage most vulnerable to lenders' abuses: ARMs were designed in large part to facilitate secondary mortgage markets[561] and hence will usually change hands almost immediately. More generally, courts have limited the "holder in due course" doctrine to prevent it from eviscerating many consumer protection statutes;[562] similar reason-

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556. 4 Powell on Property, supra note 271, § 37.27[5].

557. U.C.C. § 3-305(b) & cmt. 2 (2012); see Gregory E. Maggs, The Holder in Due Course Doctrine as a Default Rule, 32 Ga. L. Rev. 783, 786 (1998) ("[T]he assignee of a negotiable instrument who has the status of a holder in due course generally takes the instrument free of the maker's defenses.").

558. See Bankers Trust Co. v. Litton Sys., Inc., 599 F.2d 488, 494 (2d Cir. 1979) (noting doctrine helps ensure "commercial transactions may be engaged in without elaborate investigation of the process leading up to the contract or instrument and in reliance on the contract rights of one who offers them for sale or to secure a loan").

559. See Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 Creighton L. Rev. 503, 613 (2002) (noting "[i]n the absence of the holder in due course doctrine, the loss should be borne by the assignee of the loan," but "doctrine places the risk of loss for most fraud firmly on the back of the homeowner who signed the note").

560. See, e.g., M&T Mortg. Corp. v. White, No. 04CV4775NGGVVP, 2006 WL 47467, at *8–*9, *14 (E.D.N.Y. Jan. 9, 2006) (denying motion to dismiss of third-party insurer U.S. Department of Housing and Urban Development because it arguably had affirmative obligation to detect mortgagee's predatory lending practices).

561. 4 Powell on Property, supra note 271, § 37.16[2][f].

562. See id. § 37.27[5][b] (surveying courts' routine "refus[al] to apply the holder in due course doctrine" in "consumer finance situations"). In analyzing the complex web of transactions that ultimately led to a foreclosure action, a court is not, of course, bound by

ing could allow equity to provide relief against other abuses. This might modestly increase the risk of mortgage-backed securities, but the market ought to be able to adjust its pricing and its underwriting standards to compensate.

Courts have recognized a wide range of equitable defenses to foreclosure actions. As a result, mortgagors often have an array of closely intertwined legal and equitable defenses.[563] Thus, for example, adequate notice to the mortgagor may be required by law—a statute or the terms of the contract[564]—but also as a matter of equity. Similarly, a court has noted that "[i]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had."[565] In addition, courts have accepted unconscionability, abandonment of security, usury, equitable estoppel, laches, breach of the implied covenant of good faith and fair dealing, refusal to agree to a favorable sale to a third party, violation of consumer protection laws, conspiracy, and other legally sufficient defenses addressing the formation, validity, or enforcement of the mortgage, the note, or both.[566] Violations of the TILA[567] can justify rescission of a mortgage,[568] at least until the mortgagor has paid it off or refinanced it.[569] Other consumer credit protection laws

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the parties' characterization of payments. Where, for example, the lender's business model relies significantly on regular refinancing of its mortgages, the fees associated with that refinancing become de facto periodic payments equivalent to interest. A court applying equitable defenses based on fraud, usury, or violations of consumer protection statutes could determine that equity demands treating those payments as interest, making the effective interest rate considerably higher than the documents might suggest.

563. See, e.g., Hoffman v. Brown (In re Brown), 56 B.R. 487, 490 (Bankr. D. Md. 1985) (discussing "mixture of legal and equitable causes of action in one proceeding").

564. See, e.g., Chase Manhattan Bank v. Puppo, No. 90-1743, 1991 WL 75201, at *2 (E.D. Pa. May 2, 1991) (finding notice insufficient under relevant statute).

565. Norwest Mortg., Inc. v. Clapper, No. CV990060598S, 2002 WL 172627, at *2 (Conn. Super. Ct. Jan. 7, 2002) (quoting New Haven Sav. Bank v. LaPlace, 783 A.2d 1171, 1180 (Conn. App. Ct. 2001)).

566. See Hansford v. Bank of Am., No. 07-4716, 2008 WL 4078460, at *16–*17 (E.D. Pa. Aug. 22, 2008) (recognizing fraud, conspiracy, and aiding and abetting claims); U.S. Bank Nat'l Ass'n v. Reynoso, No. CV075004312, 2008 WL 3307124, at *1 (Conn. Super. Ct. July 17, 2008) (recognizing misrepresentation, fraudulent inducement, unconscionability, equitable estoppel, and unclean hands as equitable defenses), abrogated by City of Hartford v. McKeever, 55 A.3d 787 (Conn. App. Ct. 2012); *Norwest Mortg.*, 2002 WL 172627, at *2 (noting unconscionability, abandonment of security, and usury defenses).

567. 15 U.S.C. § 1635(a) (2012); see also 12 C.F.R. § 226.23(b)(1) (2013) (requiring lender to disclose right to rescind).

568. See Handy v. Anchor Mortg. Corp., 464 F.3d 760, 765–66 (7th Cir. 2006) (holding rescission appropriate remedy for violation of TILA); Barrett v. JP Morgan Chase Bank, N.A., 445 F.3d 874, 881–82 (6th Cir. 2006) (same).

569. See King v. California, 784 F.2d 910, 913 (9th Cir. 1986) (finding loan cannot be rescinded after refinancing); Jenkins v. Mercantile Mortg. Co., 231 F. Supp. 2d 737, 745–46 (N.D. Ill. 2002) (holding if loan is paid off, "there is nothing to rescind").

may similarly provide defenses.[570] Because ARMs are so easily misunderstood—and misrepresented—they have been frequent subjects of fraud claims.[571] Ongoing relationships unlike those typical between debtors and creditors, particularly relationships developed over several mortgages, may create a fiduciary relationship where "'the bank knows or has reason to know that the customer is placing his trust and confidence in the bank.'"[572] More broadly, "an allegation that the implied covenant of good faith and fair dealing has been breached is a valid challenge to a foreclosure action as long as it arises from the same transaction as the pending foreclosure proceeding."[573]

Some equitable defenses apply only to a subset of mortgages. Where the U.S. Department of Housing and Urban Development (HUD) has insured a mortgage,[574] its regulations require mortgagees to take various steps before foreclosing. Subject to limited exceptions, these requirements include sending a certified letter to the mortgagor by the end of the second month of delinquency,[575] holding at least one face-to-face meeting with the mortgagor at the property prior to instituting a foreclosure action,[576] informing the mortgagor of other available assistance and that she or he may seek help from HUD,[577] and refraining from commencing proceedings until the mortgagor is at least three months delinquent.[578] The USDA's Housing and Community Facilities Program, successor to the Farmers Home Administration (FmHA), has broadly similar rules.[579]

3. *Doctrines Restraining Equity.* — Courts have recognized a few limitations on equitable claims and defenses. These seem unlikely to hamper seriously mortgagors' invocation of the defenses discussed above. Although "accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the conse-

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570. See, e.g., Banco Popular N. Am. v. Estate of Smith, No. CV030196646S, 2004 WL 1664236, at *4 (Conn. Super. Ct. June 29, 2004) (allowing defense under Equal Credit Opportunity Act).

571. See, e.g., Greene v. Gibraltar Mortg. Inv. Corp., 488 F. Supp. 177, 179–81 (D.D.C. 1980) (holding failure to disclose material facts satisfied elements of fraud or misrepresentation).

572. Capital Bank v. MVB, Inc., 644 So. 2d 515, 519 (Fla. Dist. Ct. App. 1994) (quoting Klein v. First Edina Nat'l Bank, 196 N.W.2d 619, 623 (Minn. 1972)).

573. See PNC Bank, N.A. v. Slodowitz, No. CV 9701370575, 1999 WL 547455, at *3–*4 (Conn. Super. Ct. July 19, 1999) (recognizing defense in general but finding plaintiff failed to satisfy elements).

574. See generally 12 U.S.C. §§ 1708–1709 (2012) (establishing rules governing Mutual Mortgage Insurance Fund and issuance of mortgages).

575. 24 C.F.R. § 203.602 (2013).

576. Id. § 203.604(b).

577. Id. § 203.604(e)(2).

578. Id. § 203.606(a).

579. See 7 C.F.R. §§ 3550.202(b), 211(c) (2013) (requiring three-month delinquency and notice prior to foreclosure).

quences to be corrected might have been avoided if the victim of the misfortune had ordered his affairs with reasonable diligence," it is also true that "the gravity of the fault must [always] be compared with the gravity of the hardship."[580]

Some courts require that any equitable defenses arise out of the same transaction as the mortgage itself.[581] Most mortgagors' defenses will meet this requirement. Even in those cases where they do not, if "the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles."[582] Moreover, defenses against the note or lien may survive the packaging of the mortgage for resale on the secondary market.[583] The party seeking to repossess the property may argue that, whatever the mortgage's provenance, that party is an innocent holder in due course. Leaving aside the fact that often mortgages do not seem to be in anyone's hands at the time of the foreclosure,[584] the transference of mortgages obtained by others has not been an isolated event, but rather an ongoing business model. Doctrines crafted to protect innocent outsiders who happen onto unfortunate transactions have little applicability to repeat players functioning as ongoing business partners of those perpetrating frauds. Equity long has declined to elevate form over substance where a manifest injustice has occurred. Moreover, assignees who recorded their interests through the private Mortgage Electronic Registration System (MERS) rather than the public title recordation system should be aware that it is out of compliance with state law and that they will have little claim that their hands are clean.[585]

Because an action to foreclose the equity of redemption seeks affirmative relief from the court,[586] the fact that the present holder of the note and mortgage did not engage in the challenged conduct may not matter. Equity allows denying relief that would be against good conscience even if the present mortgagee acquired the note and mortgage

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580. Graf v. Hope Bldg. Corp., 171 N.E. 884, 888 (N.Y. 1930) (Cardozo, C.J., dissenting).

581. See, e.g., Klehm v. Grecian Chalet, Ltd., 518 N.E.2d 187, 190 (Ill. App. Ct. 1987) (noting "well settled exception").

582. Southbridge Assocs. v. Garofalo, 728 A.2d 1114, 1117 (Conn. App. Ct. 1999).

583. See U.S. Bank Nat'l Ass'n v. Reynoso, No. CV075004312, 2008 WL 3307124, at *1 (Conn. Super. Ct. July 17, 2008) (allowing wide range of defenses in such cases).

584. See Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 Wm. & Mary L. Rev. 111, 129–33 (2011) (describing confusion resulting from private title registration system).

585. See Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 168–69 (Kan. 2009) (declining to treat MERS as necessary party to foreclosure action on first mortgage in part for failure to follow public notice procedures); Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1374–406 (2010) (questioning MERS's legality and criticizing its role in mortgage foreclosure crisis).

586. See supra notes 452–455 and accompanying text (explaining equity of redemption and actions to foreclose).

under circumstances that would immunize it from direct liability. Moreover, vindicating some kinds of equitable claims requires that they apply against any assignee.[587]

Bizarrely, some courts have also raised the venerable "clean hands" doctrine as a bar to intervening on behalf of mortgagors:

> It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for advancement of right and justice. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue.[588]

One court held that a party seeking to escape liability under a usurious contract must demonstrate clean hands by tendering payment at the legal interest rate.[589] Few other courts seem likely to follow this view: "Estoppel cannot be used to uphold a fraud. It is an equitable doctrine, and as such can only be used to protect the innocent. One who seeks equity must do equity . . . ."[590]

At a minimum, this strained view of estoppel has little applicability to other equitable defenses besides usury. More fundamentally, this invocation of "clean hands" is wholly irreconcilable with the history of equity's intervention in mortgage dispossessions. Mortgagors' hands are not unclean by virtue of falling behind on their mortgages: If they were, no mortgagor would ever have had an equity of redemption, and no action to foreclose that equity would ever have been necessary. Unless a party's "'conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply.'"[591] Courts consider the broader public interest in determining whether parties' hands are unclean.[592]

Some theories that courts could regard as time-barred in affirmative

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587. See Miranda v. Universal Fin. Grp., 459 F. Supp. 2d 760, 765 (N.D. Ill. 2006) (denying assignees' motion to dismiss claims of rescission under TILA).

588. E.g., Thompson v. Orcutt, 777 A.2d 670, 676 (Conn. 2001) (citations omitted) (internal quotation marks omitted); see also de Funiak, supra note 440, § 24, at 39–42 (describing "clean hands" rule).

589. Mich. Mobile Homeowners Ass'n v. Bank of Commonwealth, 223 N.W.2d 725, 730 (Mich. Ct. App. 1974).

590. Mahaffey v. Investor's Nat'l Sec. Co., 747 P.2d 890, 892 (Nev. 1987) (citations omitted).

591. *Thompson*, 777 A.2d at 676 (quoting Bauer v. Waste Mgmt. of Conn., Inc., 686 A.2d 481, 486 (Conn. 1996)).

592. See, e.g., id. at 679–80 (concluding "fraud committed by . . . plaintiff . . . implicates an important public interest that justifies the application of the doctrine of unclean hands on public policy grounds").

suits nonetheless may be available as equitable defenses or counterclaims.[593] Where, as is commonly the case for mortgagors facing foreclosure in the current crisis, the mortgagee's servicing agent has induced the mortgagor to refinance repeatedly, a court may consider the series of mortgages an ongoing pattern of conduct and run limitations periods for claims or defenses relating to any of those mortgages from the most recent of them.[594] Alternatively, when a mortgagor only discovers the true nature of her or his mortgage years later when the rates adjust upward, a court could run any limitations period from the time of discovery rather than the time of the passing of the mortgage. To do otherwise would reward lenders for designing ARMs that concealed their abusive interest rates until beyond the limitations period, an anathema to equity. In addition, where an ARM's initial interest rate is so low that it results in negative amortization, "the lender is in essence making a further loan to the borrower" each month.[595] That could continually renew the borrower's cause of action. Strong equitable considerations can overcome even such normally dispositive bars as res judicata.[596] To be sure, some courts hesitate to intervene out of deference to the operation of the markets.[597] This makes little sense either in terms of equity or as a matter of economics.[598]

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593. See Campbell v. Machias Sav. Bank, 865 F. Supp. 26, 31–37 (D. Me. 1994) (concluding TILA claims time-barred, but "[t]o the extent that [they] are raised . . . as a defense to [defendant's] counterclaim, they are not barred").

594. Thus, for example, in a jurisdiction with a five-year statute of limitations for fraud claims, a mortgage company might initially give a borrower an ARM with a low teaser rate that resets after three years. Just before the teaser rate expires, the company refinances the mortgage with a new three-year ARM. Once the refinanced mortgage's rate resets, the mortgagor realizes she is in trouble and seeks legal help. At that point, she clearly may challenge any abuses in the refinancing. But if the court finds that the mortgage company contemplated the refinancing in its business model, it can treat both mortgages as part of a single continuing pattern of conduct and allow the mortgagor to raise any claims she has out of either transaction.

595. See 4 Powell on Property, supra note 271, § 37.16[4][d].

596. See, e.g., Daniels v. Funding USA, Inc. (In re Daniels), 350 B.R. 619, 626 (Bankr. S.D. Fla. 2006) ("Even if the state court judgment technically meets all the requirements of res judicata . . . the Court declines, on the basis of equity, to grant the motion for summary judgment . . . .").

597. See Michael H. Schill, An Economic Analysis of Mortgagor Protection Laws, 77 Va. L. Rev. 489, 489 (1991) (summarizing criticism that mortgagor protections increase costs of credit without improving social welfare); Tracht, supra note 504, at 601 (1999) (describing similar criticisms). Such criticisms have been used to justify dispossessions of mortgagors even where the financial institution seeking to foreclose cannot prove that it has title to the property, sometimes after submitting perjured declarations to the contrary. See Ritholtz, supra note 465.

598. Even in ordinary times, lenders and borrowers have highly asymmetrical information about the probability of macroeconomic changes that may make defaults likely; this leads to economically inefficient mortgages and means that the market may not protect borrowers' interests without government intervention. See Schill, supra note 597, at 521–22 (describing information asymmetries between mortgagors and mortgagees). Moreover, the current crisis is fundamentally reshaping both the primary and secondary mortgage markets. Rigid enforcement of mortgages assumed during the housing boom

Finally, some courts—like other policymakers and segments of the public—seem to feel tempted to punish mortgagors for borrowing too heavily or for the consumption such borrowing financed. This is inappropriate. Equity does not seek to enforce wisdom or frugality; to do so would turn it into a tool of the subjective will of a particular judge. Instead, equity seeks to protect innocents from dishonesty and victimization by those with more sophistication. Few if any mortgagors in the recent crisis were more sophisticated than their lenders; their borrowing may have been unwise (assuming it was knowing), but it was not duplicitous. Moreover, public policy set at the highest levels of the federal government encouraged this explosion of borrowing. For example, the 1996 welfare law encouraged welfare recipients—whose incomes are far below the poverty line—to save for down payments on homes.[599] Welfare recipients, and those making wages typical of recent welfare leavers, could not possibly save enough for a conventional down payment even on a very modest home and, even if they could, would face monthly payments consuming almost all of their disposable incomes. By any standard, these would be very high-risk mortgages. Similarly, leading economic policymakers, including then-Chairman of the Federal Reserve Board Alan Greenspan, supported homeowners' leveraging the equity in their homes into cash for consumption.[600] In addition, a wide array of government regulators overcame initial reservations to allow widespread marketing of ARMs.[601]

D. *Conclusion*

Mortgage foreclosures endanger almost all that is most important to low-income people's lives. Foreclosed families often split up, commonly lose connection with their communities, and routinely lose much of their personal property in the move. Some foreclosures are truly inevitable, but all too many are the tragic result of precisely the kind of manipulation and abuse equity was established to confront—and still can. In contrast to other parts of this Article, which call for extending the reach of property law concepts, this Part showed that returning to improvidently

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will not preserve those market practices—even if it were desirable to do so—because the crisis has swept those practices away. Preserving as much value as possible for all parties will best facilitate the resuscitation of the housing and mortgage markets.

599. See 42 U.S.C. § 604(h)(2)(B)(ii) (2006) (describing use of welfare funds for first-time homebuyers).

600. See, e.g., Alan Greenspan, Chairman, Fed. Reserve Bd., Remarks at the Credit Union National Association 2004 Governmental Affairs Conference (Feb. 23, 2004), available at http://www.federalreserve.gov/boarddocs/speeches/2004/20040223 (on file with the *Columbia Law Review*) (noting "surge in mortgage refinancings likely improved rather than worsened the financial condition of the average homeowner" and "increases in home values and the borrowing against home equity likely helped cushion the effects of a declining stock market during 2001 and 2002").

601. See 4 Powell on Property, supra note 271, § 37.16 (describing regulators' increasingly liberal approach beginning in 1980s).

discarded principles can meet needs that have never disappeared and that are crucial to keeping low-income people within the protective world of property rights.

V. RELATIONSHIPS WITH THE STATE: SECURITY IN THE NEW PROPERTY

Although *The New Property* is widely associated with the Due Process Clause—specifically, *Goldberg v. Kelly*'s holding that the state may not terminate subsistence benefits without offering a pretermination evidentiary hearing—Reich actually expressed a much firmer conviction that government largesse should be protected under the Takings Clause. In contrast to procedural protections, which he regarded as easily evaded,[602] Reich saw hope in substantive presumptions that professionals would be "vested" in their licenses and public benefits recipients in their assistance: "If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community."[603]

Writing on *Goldberg*'s twentieth anniversary, Reich found not only that the "road [*The New Property* and *Goldberg*] opened . . . has not been taken" but that "there has been a retreat."[604] Based on doctrinal developments narrowing the right to a predeprivation hearing, he declared that a "moderate, due process, cost-benefit approach . . . does not work" to secure individual security.[605] He called for constitutionalizing an individual property interest in subsistence benefits, arguing that property provides the essential habitat for humans in society: "If the Constitution protects persons, surely it means to protect viability, not persons as specimens in a museum exhibit."[606]

The New Property's doctrinal expression through *Goldberg* and its subsequent line of cases failed to recognize in low-income people more than the barest trace of the rights more affluent people derive from their property. Most obviously, the Court's treatment of public benefits and employment as "property" did not even encompass the whole of the Fifth Amendment: To obtain protection under the Takings Clause, the Court still required that rights be "vested," defining that term so formalistically

602. See Reich, New Property, supra note 10, at 751–56 (describing shortcomings of government tribunals' formal decisionmaking procedures).

603. Id. at 785.

604. Charles A. Reich, Beyond the New Property: An Ecological View of Due Process, 56 Brook. L. Rev. 731, 731 (1990).

605. Id. at 732–33.

606. Id. at 737.

as to exclude most of what came to be known as the New Property.[607] The principle of consistent usage[608] would strongly suggest that the meaning of "property" for purposes of the Due Process Clause has not changed nine words later in the Takings Clause.

This Part takes seriously expanding Takings Clause protection to the New Property. Part V.A considers the benefits of such an expansion. Part V.B explores what protection of the New Property against takings might mean. Part V.C analyzes the several justifications that have been offered for the lack of protection of New Property rights. Finally, Part V.D identifies the renewed attention the Court has given to reliance interests in social legislation, suggesting that a more expansive Takings Clause is more plausible than some might think.

It should be noted at the outset that many of the forms of New Property that accrue to the more affluent already enjoy powerful protection against removal. For example, contracts, enforceable under the Contracts Clause, protect many tax abatements granted to developers;[609] even without a contract, removal of those subsidies might be treated as retroactive taxation in deference to the developer's reliance interests. Removing concessionary zoning—withdrawing permission for a special use—is treated as a taking of the "property" such permission had conferred.[610] The question here is not, therefore, whether the law should substantively restrict the withdrawal of government largesse—it already does that for many kinds of largesse that affluent people enjoy—but rather whether it should extend those restrictions to low-income people.

A. *Takings and Personal Security*

In The Federalist No. 10, Madison describes the Constitution's structure as necessary to protect landowners from having a tempestuous majority seize their property.[611] The Fifth Amendment was subsequently added to strengthen that protection.[612] Absent the Takings Clause,

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607. Cf. Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 331 (1945) ("No licensee obtains any vested interest in any frequency."). The Court appears to characterize a "vested interest" as one sufficiently permanent as to be bought and sold.

608. See Marek v. Chesny, 473 U.S. 1, 21 (1985) ("[W]ords and phrases in the Federal Rules [of Civil Procedure] must be given a consistent usage . . . [because] to do otherwise would 'attribute a schizophrenic intent to the drafters.'" (quoting Delta Airlines, Inc. v. August, 450 U.S. 346, 353 (1981))); see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (applying rule in statutory interpretation context).

609. See Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687, 690 (1915) (enforcing state's agreement to exempt railroad from taxation).

610. E.g., Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd., 584 A.2d 1372, 1375 (Pa. 1991).

611. The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

612. See Posner, supra note 239, § 24.3, at 685 ("By putting [uncompensated] exactions beyond the power of the legislature, the Constitution reduces the risks that political power over the distribution of wealth (broadly defined) creates . . . .").

political minorities could face devastation, and a majority could wield the threat of divestiture of property on which the minority depends to compel the minority to accept other oppressive measures.[613] The Takings Clause also prevents the burden of fiscal crises from being visited disproportionately on a small group rather than through tax increases or service cuts affecting a broader swath of society.[614]

Although particular aspects of takings doctrine remain controversial, the overall effort has been a resounding success: Those owning traditional forms of property need not, and commonly do not, vote based on which candidate or party will refrain from seizing their lands and assets. The affluent are free to vote based on other issues, ideological leanings, or personality preferences. The same cannot, however, be said of those dependent on the New Property. Government employees and recipients of subsistence benefits vote overwhelmingly for Democrats, even while disagreeing with much of the party's platform, because it is more sympathetic to government employment and antipoverty programs than today's Republican Party.[615] Thus, New Property holders cannot afford to be "swing" voters, and their views on other issues of the day are devalued. Their need to spend their votes to protect these property interests makes them excessively vulnerable to the state—precisely the danger animating Reich's work.

Other political forces can exploit this vulnerability. When the government tries to condition landowners' use and enjoyment of their property in some important way on their acceding to government demands, the Court has struck down the conditions as an exaction.[616] Yet current takings doctrine poses no obstacle to imposing most such extortionate conditions on the receipt of New Property.[617] Low-income people, for example, may have little recourse when the administration of programs on which they depend is transferred to a faith-based organiza-

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613. See id. § 3.7, at 58; id. § 24.3, at 684 (discussing this explanation for Takings Clause).

614. See id. § 3.7, at 57 ("Unlike [a] usual tax, which takes a little bite out of many hides, . . . eminent domain . . . takes a big bite out of a few.").

615. See Michael Levenson & Stephanie Ebbert, Only Mass. Sent Out Voter Registrations After Lawsuit, Bos. Globe, Aug. 10, 2012, at A1 (describing Democratic groups' efforts to increase voting among welfare recipients); see also Susan Milligan, Democrats Court Workers' Union, Bos. Globe, June 20, 2007, at A6 (describing public employees' importance to Democrats as voters and campaign workers).

616. See Dolan v. City of Tigard, 512 U.S. 374, 395 (1994) (holding exaction impermissible as taking because city had not sufficiently demonstrated linkage between conditions imposed and property owner's activities); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 840–41 (1987) (holding city could not, without just compensation, condition permission to rebuild house on providing new benefit to surrounding community).

617. See Bowen v. Gilliard, 483 U.S. 587, 605–06 (1987) (compelling welfare recipient to unlawfully divert support payments for one of her children to her or his siblings); Wyman v. James, 400 U.S. 309, 318 (1971) (permitting conditioning receipt of welfare payments on recipients' surrendering their rights against warrantless searches).

tion that advances a creed different from theirs and imposes behavioral requirements according to its moral precepts.

Frank Michelman finds much of the justification of just compensation law in the "demoralization costs" that will occur if members of society suffer uncompensated takings.[618] He defines these costs in terms of lost economic productivity by victims of takings and their sympathizers.[619] He notes that capricious takings by the political majority are more likely to produce these costs than are random events.[620] A similar analysis could be applied to community-building: Low-income people who know that they and their neighbors can be scattered at any time as a result of the termination of a key subsistence benefit program may invest less effort in developing relationships that bind them together.

Courts are not the only policymakers disposed to protect the property interests of the more affluent over those of low-income people despite the latter's greater dependence on that property. This can be seen in the uproar over *Kelo v. City of New London*.[621] *Kelo* allowed the government to seize private property—with compensation—to facilitate economic development activities of other private parties. It thus reaffirmed the similar holding half a century earlier in *Berman v. Parker*,[622] which allowed similar condemnation in support of urban renewal of low-income neighborhoods.[623] A public reaction against the "public interest state" forcibly shifting property from one private actor to another would have been entirely understandable. What resulted, however, was far narrower: Post-*Kelo* legislation and state constitutional amendments only prohibited condemnation of nonblighted properties,[624] implicitly reaffirming *Berman* and leaving even the traditional property holdings of low-income people far more vulnerable than those of the more affluent.

B. *How the Takings Clause Might Protect the New Property*

Recognizing government largesse as property for purposes of the Takings Clause does not mean that all or even a significant number of adverse changes would be blocked. The Court has long accepted that deprivations of much or even most of a property right may not be a com-

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618. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214 (1967) (internal quotation marks omitted).

619. Id.

620. Id. at 1216–17.

621. 545 U.S. 469 (2005).

622. 348 U.S. 26, 33 (1954).

623. See supra notes 317–319 and accompanying text (describing holdings of *Kelo* and *Berman*).

624. See, e.g., Va. Const. art. I, § 11 (making exception from law prohibiting takings to allow takings of private property for private for-profit use if existing property is in disrepair).

pensable taking.[625] Eight years after the Court accepted a New Property view of the Due Process Clause in *Goldberg*, it adopted a broad formula for identifying takings that considers offsetting measures.[626] Thus, an interpretation recognizing such benefits as "property" under both clauses would not necessarily proscribe even deep cuts in entitlement benefits, particularly if the legislature made some alternative provision (even a relatively modest one).[627] The merits of extending the New Property to the Takings Clause therefore should be analyzed in light of the policies underlying that Clause.

Routine modifications to, or even reformulations of, social welfare programs do not implicate these policies. Nor would reallocation of responsibility between levels of government.[628] They may be implicated, however, by the wholesale elimination of an individual's only means of affording life's essentials.[629] *Penn Central* identified "the economic impact . . . on the claimant" as a key factor in determining whether a taking had taken place;[630] this closely parallels the "individual interest" prong of the Court's due process analysis in *Mathews v. Eldridge* two years before.[631] This could have provided the basis for recognizing a very bare humani-

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625. See, e.g., Miller v. Schoene, 276 U.S. 272, 279 (1928) (holding Virginia could, without compensation, "decid[e] upon the destruction of one class of property in order to save another which . . . is of greater value to the public"); Euclid v. Ambler Realty Co., 272 U.S. 365, 395–97 (1926) (upholding zoning laws devaluing property); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (holding exercise of police power depriving owner of land use uncompensable because "there must be progress, and if in its march private interests are in the way, they must yield to the good of the community"); see also Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747–48 (1997) (Scalia, J., concurring) ("[A] regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value."). See generally Epstein, supra note 20, at 118–90 (explicating these and other exemplary cases).

626. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136–38 (1978) (finding no taking where land use regulation sharply reduced value of property when owner received transferable development rights worth less than value lost).

627. For example, the legislature might convert a cash assistance program into in-kind vouchers covering only housing and other necessities, or it might replace welfare for those able to work with an offer of public service employment even if it expected many or most recipients to decline the jobs. The legislature could also change the nature of the aid provided. See, e.g., 7 U.S.C. § 2013(b) (2012) (establishing program of supplemental nutritional assistance vouchers to replace commodity distribution); § 2026(d)(2)(A) (allowing replacement of food stamps with cash for certain households).

628. But see David A. Super, Rethinking Fiscal Federalism, 118 Harv. L. Rev. 2544, 2629–40 (2005) (finding state and local governments systematically incapable of maintaining countercyclical aid to low-income people).

629. See Super, Modernization, supra note 58 (manuscript at 19–47) (discussing complete denial of aid to certain vulnerable populations); cf. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (finding taking in regulation wholly destroying value of property).

630. *Penn Central*, 438 U.S. at 124.

631. 424 U.S. 319, 332 (1976).

tarian minimum; instead, the Court professed its faith in the welter of ad hoc accommodations made for low-income people.[632]

The Takings Clause also ensures that the cost of public activities be widely shared rather than visited upon a political minority. If the government wants to build a post office on your land, that is fine, but it must spread the cost of that choice broadly through raising taxes to buy that land rather than forcing you to bear the whole loss. Presumably, that will cause policymakers to examine the merits of public works projects more closely before proceeding. Recognizing the New Property as property for purposes of the Takings Clause thus would pose no obstacle to broad spending reductions to reduce the size of government or to fund some new priority. It would, however, call for a more searching inquiry when only one group is singled out for elimination of assistance on which it depends.[633]

The Takings Clause also limits the government's ability to single out opponents for punishment. Officials can still deprive those they dislike of their property,[634] but they must soften the blow by paying just compensation. Groups to which the dominant political group is hostile will not fare well in any event, but having the assistance on which they depend downgraded will give them more security than being at risk of complete deprivations.

In other aspects of constitutional law, the Supreme Court has had little difficulty distinguishing between reductions of interests and their complete elimination. In *San Antonio Independent School District v. Rodriguez*, the Court held that education was not a fundamental right and that the Court would give only its most lenient scrutiny to differences in educational funding and quality.[635] Yet in footnote sixty, Justice Powell stated that the Court might intervene if students were completely deprived of an education.[636] Nine years later, *Plyler v. Doe* struck down the complete denial of free education to low-income undocumented immi-

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632. See, e.g., id. at 342 (permitting prehearing terminations of benefits because other aid would presumably be available to terminated recipients); Dandridge v. Williams, 397 U.S. 471, 481 (1970) (allowing state limitation on benefits as long as all members of family effectively received some aid).

633. It would also prevent courts from rejecting challenges to allegedly unconstitutional conditions in benefit programs on the grounds that the legislature could have simply cancelled the program without constitutional question. See cases cited supra note 617. Limiting the government's ability to leverage the largesse it provides to exact submission was a key goal of Reich's *The New Property*.

634. See Robert A. Caro, The Power Broker: Robert Moses and the Fall of New York 887–88 (1974) (describing some reformers' suspicions that swerve in route of Cross-Bronx Expressway represented effort to destroy some particular property).

635. 411 U.S. 1, 37–38, 54–55 (1973) (holding public education not "fundamental right" subject to strict scrutiny and upholding state funding scheme under "rational basis" standard).

636. Id. at 25 n.60.

grant children.[637] States that have welfare rights provisions in their constitutions have invariably construed them to allow major changes in programs, including deep cuts, as long as some minimal subsistence is preserved.[638]

C. *Arguments Against an Expanded Takings Clause*

Three main arguments can be raised against extending New Property concepts from the Due Process Clause to the Takings Clause. First, critics argue that allowing any takings scrutiny would enmesh the Supreme Court in endless disputes about minor details of program design. The Court implies as much when it rejects challenges to restrictions in spending programs by noting that Congress was free to end the program altogether: It finds the power to terminate legitimates any lesser measures.[639] Second, critics claim that allowing takings scrutiny of benefits would freeze into place any social welfare program ever enacted. This obviously would be undesirable, as some programs prove ineffectual, others prove overgenerous, and still others are designed to meet needs that fade. Finally, and relatedly, critics say that a rigid prohibition on the diminution or repeal of social programs might make legislatures reluctant to enact them in the first place.

The first two arguments rely upon a caricature of takings jurisprudence. As described in the previous section, only broad eliminations of crucial assistance—terminating subsistence benefits to vulnerable people without regard to need and without any alternative—would be cognizable as takings of the New Property, just as the Court's existing takings jurisprudence has focused on regulations severely impairing the value of a piece of land. Courts would rapidly dismiss takings challenges to routine revisions of eligibility formulas; challenges would only have a chance on those rare occasions when programs are disbanded or radically shrunk.[640] The prospect of litigation would inhibit ordinary policymaking far less than the prospect of attack ads inhibits routine loophole closing in the tax code and predominantly middle-class entitlements such as

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637. 457 U.S. 202, 230 (1982).

638. See, e.g., Aliessa v. Novello, 754 N.E.2d 1085, 1093 (N.Y. 2001) (interpreting state constitutional guarantee of subsistence assistance as only prohibiting effective denials of aid).

639. See, e.g., Flemming v. Nestor, 363 U.S. 603, 609–11 (1960) (holding Social Security benefits do not carry "property rights" for Fifth Amendment purposes, reflected in Congress's reservation of power to amend or repeal program); see also supra note 617 (describing cases permitting such lesser measures as conditions on benefits).

640. And, indeed, granting some rights to programs' beneficiaries can yield valuable managerial information that leads to more thoughtful policymaking. See David A. Super, Are Rights Efficient? Challenging the Managerial Critique of Individual Rights, 93 Calif. L. Rev. 1051, 1063–65, 1132–33 (2005) (finding procedural due process values create equivalent of audit trail for front-line program administration, which can tell senior policymakers when line officials fail to provide benefits intended).

Social Security and Medicare.

As for the impact on legislators' propensity to enact new programs, the last four decades have shown that substantial new antipoverty programs are not enacted, except as the result of major political upheavals.[641] Only a small handful of lawmakers continue to regard assisting low-income people as a routine aspect of public business. On the rare occasions when poverty achieves high political salience, the prospect of litigation in a future period with different sensibilities seems unlikely to be determinative.[642]

Moreover, events since the late 1970s suggest that antipoverty programs without the kind of entrenchment available to spending programs and tax benefits for the more affluent will not survive long in meaningful form.[643] Against affluent individuals' and organizations' constant, well-funded lobbying for ever more tax cuts, isolated episodes of focused compassion can make little lasting mark. With property rules, contract law, and resistance to retroactive effects in taxation automatically entrenching many of the successes of the affluent, they have little need for defensive political advocacy and may focus single-mindedly on obtaining still more. If low-income people and their allies must constantly defend even their most vital interests, they will have little opportunity to seek advances and eventually will lose the programs that already exist.

D. *The Renaissance in Reliance Interests*

At first blush, it might seem that the Supreme Court is, if anything, widening the gap between its due process and takings analyses.[644] Recently, however, the Court has accepted the principle that longstanding programs create reliance interests that Congress is not free to disturb. In

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641. See David A. Super, Protecting Civil Rights in the Shadows, 123 Yale L.J. (forthcoming 2014) (manuscript at X) (explaining difficulty of defending programs for vulnerable people during periods of public inattention).

642. The one major piece of legislation creating an important new antipoverty program since 1981 is the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C. (Supp. V 2011)). Even that would have had no chance had it not contained sweeping new benefits for middle-income people. Although, to be sure, it passed by the barest of margins, opposition went to its basic core concept rather than any issues with its legislative future. Indeed, both critics and supporters implicitly assumed that its middle-income benefits would become politically entrenched rapidly once it took full effect. See Super, Modernization, supra note 58 (manuscript at 14–19) (describing time frame within which PPACA's fate will be determined).

643. See David A. Super, The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law, 79 N.Y.U. L. Rev. 1271, 1296–301 (2004) (describing lack of opposition to sweeping cuts 1996 welfare law made to antipoverty programs).

644. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540–42 (2005) (criticizing earlier Supreme Court decisions commingling analyses under Due Process and Takings Clauses).

National Federation of Independent Business v. Sebelius, seven Justices found that states had become so reliant on Medicaid's continuation that threatening to terminate funding if states did not expand the program was unconstitutionally coercive.[645] Such threats can only be "a gun to the head" if states have a legally cognizable interest in relying on its continuation.[646] The Court did not attempt to locate that interest of states in any specific provision of the Constitution—indeed, the modern form of cooperative federalism under the Spending Clause was developed long after the Constitution's ratification—but rather in the dire practical effects of the termination. Those effects sprang from states' dependence on federal Medicaid funds for something more than 10% of their budgets;[647] recipients often depend on subsistence benefit programs for virtually all of their budgets.[648] Indeed, the Court may be faulted for insensitivity for describing Affordable Care Act's Medicaid expansion as Congress telling states "[y]our money or your life"[649] when that is precisely the dilemma in which it left large numbers of poor, sick people in the states the Court allowed to limit health coverage.

The specific doctrinal concern the Court was addressing was states' right to be free from federal coercion; individuals, too, are entitled to be free of coercion with respect to their exercise of important rights.[650] Recipients of subsistence benefit programs have no more—or less—constitutional right to have Congress establish those programs than states had to the creation of Medicaid. Recipients' hypothetical ability to obtain alternative sources of funds—with many facing serious obstacles to employment such as illiteracy, disabilities, inability to secure child care or transportation, and a depressed economy—often will be no more plausible than the tax increases that states could enact to replace Medicaid

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645. See 132 S. Ct. 2566, 2604–05 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.); id. at 2662–64 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

646. Id. at 2604–05 (plurality opinion). Chief Justice Roberts dismissed out of hand Congress's reservation of authority to modify Medicaid as justification for imposing new conditions. Id. at 2605.

647. See id. ("[T]hreatened loss of over 10 percent of a State's overall budget . . . is economic dragooning . . . .").

648. See Mark Strayer et al., U.S. Dep't of Agric., Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2011, at 39 tbl.A.3 (2012), available at http://www.fns.usda.gov/ora/MENU/Published/snap/FILES/Participation/2011Characteristics.pdf (on file with the *Columbia Law Review*) (finding 39.4% of Supplemental Nutrition Assistance Program recipients have no net cash income, with another 20.0% having net incomes below one-quarter of federal poverty line).

649. *NFIB*, 132 S. Ct. at 2605 n.12.

650. Like states, "the people" enjoy residual powers reserved under the Tenth Amendment. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." (emphasis added)).

funding, which the Court found practically unrealistic.[651]

Chief Justice Roberts brushed aside Justice Ginsburg's reliance on the Court's prior doctrine that the power to eliminate a program entailed the lesser power to modify it.[652] A quarter-century earlier, the Court had rejected the doctrine that recipients of government largesse "must take the bitter with the sweet" in procedural due process;[653] now, the Court has rejected it with respect to problematic substantive conditions as well.

When the Court rejected comparisons between challenged restrictions and the hypothetical elimination of programs, it undermined the key analytical argument for denying Takings Clause scrutiny to repeals of social welfare laws. States now have a right to payments under a Medicaid program Congress was under no obligation to create and could have designed quite differently. By similar reasoning, then, the fact that Congress need not have created a food stamp program and could have designed a very different one does not rule out claims for continued benefits were Congress to end that program.[654]

The Ninth Circuit's rejection of California's Proposition 8, stripping gay and lesbian couples of the right to marry that they had previously enjoyed, although subsequently vacated for lack of appellate jurisdiction, provides another example of social legislation that, although not initially mandated, cannot be pulled back once granted.[655] More generally, the Court has shown some sympathy for claims that vulnerable groups are forced to spend their votes in self-defense rather than pursuing their

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651. *NFIB*, 132 S. Ct. at 2604 (discussing share of Medicaid funding carried by federal and state governments).

652. See id. at 2606 n.14 (arguing "[p]ractical constraints" on larger changes to Medicaid compel departure from precedent).

653. Compare Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (plurality opinion) (proposing "bitter with the sweet" doctrine to defeat claims for additional process), with Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (rejecting doctrine).

654. See Ed O'Keefe, Farm Bill Passes in House, Without Food Stamp Funding, Wash. Post: Post Politics (July 11, 2013, 3:40 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/house-republicans-drop-food-stamps-from-new-farm-bill (on file with the *Columbia Law Review*) (describing House of Representatives's refusal to renew expiring supplemental nutrition assistance program while renewing subsidies for agribusiness); see also Ron Nixon, House Republicans Pass Deep Cuts in Food Stamps, N.Y. Times (Sept. 19, 2013), http://www.nytimes.com/2013/09/20/us/politics/house-passes-bill-cutting-40-billion-from-food-stamps.html (on file with the *Columbia Law Review*) (describing House of Representatives's vote to "cut $40 billion from the food stamp program over the next 10 years").

655. Perry v. Brown, 671 F.3d 1052, 1076–86 (9th Cir. 2012) ("[W]here a privilege . . . is withdrawn without a legitimate reason from a class of disfavored individuals, even if that right may not have been required by the Constitution . . . a legitimate interest [must] exist[] that justifies . . . taking away [that privilege] . . . ."), vacated and remanded on other grounds sub nom. Hollingsworth v. Perry, 81 U.S.L.W. 4618 (U.S. June 26, 2013).

broader notion of what is good for society.[656]

E. *Conclusion*

The Due Process and Takings Clauses protect individuals from having their vital interests stripped away on the basis of unsupported allegations or societal convenience, respectively. *Goldberg v. Kelly* provided low-income people with a measure of protection against the former. Yet the "public interest state" of which Reich warned is even more prone to cold-hearted maximizing than it is to misguided moralizing. Extending the Takings Clause's shield to vulnerable low-income people could do far more to preserve their autonomy and security than the New Property's initial application did, and doing so can be done without sacrificing the important elements of democratic governance.

CONCLUSION

The legal concept of property has been at the heart of some of the most shameful episodes in U.S. history.[657] Those hoping for a brighter future could be forgiven for wanting to dispense with property as a system of individualistic trumps against the will of the state. Some progressive property scholars do, and would strip property of the mystique that separates it from contract law and tort law. Then again, constitutional law has also played an active role in profound injustice.[658] There, too, the notion of antimajoritarian trumps has come under increasing fire. Yet if Charles Hamilton Houston, Thurgood Marshall, and their colleagues had been deterred by constitutional law's speckled history, the Civil Rights Revolution would surely have been delayed and constrained. In the same way, the troubling aspects of property law's history should not prevent legal scholars from seeing its potential to protect vulnerable people's most important relationships.

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656. See, e.g., Romer v. Evans, 517 U.S. 620, 635–36 (1996) (striking down state constitutional amendment blocking civil rights ordinances benefiting gays and lesbians).

657. See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595–96 (1823) (holding Native American lands equivalent to vacant despite Native American occupancy); Stampp, supra note 302, at 86–140 (describing property law aspects of slavery).

658. See, e.g., Lochner v. New York, 198 U.S. 45, 64 (1905) (voiding protective labor legislation), abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 454 (1857) (holding slaves were not citizens under U.S. Constitution and thus lacked federal standing), superseded by constitutional amendment, U.S. Const. amend. XIV; cf. Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (failing to strike down internment of Japanese Americans); Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (overriding common law to approve segregation on common carriers), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Property rights allow an individual to insist on being treated as an end rather than a means to some goal of the optimizing state.[659] They can provide a measure of shelter from systematic errors of the optimizing state.[660] They can ensure the rightsholders a seat at the table when decisions affecting their well-being are made, rather than subordinating them to the whims of those whose basic interests property law does protect.[661]

This Article has shown that each of the four major interactions in most low-income people's lives—with family, with community, with powerful business interests, and with the government—can be made more secure through the application of well-established property law concepts in new contexts. Through honoring reliance interests (prescriptive rights), recognizing new interests in response to new social patterns (special claims to community), applying distinctive procedures appropriate to the seriousness of the interests at stake and the potential for abuse (equity), and limiting vulnerability to governmental caprice (protection against takings), the law can extend to the most vulnerable people in U.S. society the same security that the rest of society takes for granted.

But this should only be the beginning, just as Reich's article was. Subsequent scholarship and litigation should explore other ways of using property rights to protect what is most important to vulnerable people in U.S. society. Protecting what is essential to independent personhood—family, community, and autonomy—against whatever challenges may threaten these interests will make low-income people more secure and confident participants in America's society, economy, and democracy. All people of good will should welcome that.

Reich's statement of the problem is even truer today than it was half a century ago:

> If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this

659. See David A. Super, Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law, 157 U. Pa. L. Rev. 541, 566–67 (2008) (criticizing elites' ethics in subjecting vulnerable people to ideologically driven experiments).

660. See, e.g., David A. Super, Against Flexibility, 96 Cornell L. Rev. 1375, 1398–409 (2011) (finding preference for reserving discretion in public programs often impairs effectiveness).

661. See David A. Super, From the Greenhouse to the Poorhouse: Carbon-Emissions Control and the Rules of Legislative Joinder, 158 U. Pa. L. Rev. 1093, 1154–55 (2010) (discussing frequency with which policymakers disregard impacts on low-income people).

> work. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today—a Homestead Act for rootless [people]. We must create a new property.[662]

In doing so, however, today's legal reformers should not be limited by what procedural due process can offer, as Reich's successors (although not Reich himself) have been in recognizing property rights in low-income people. Instead, they should draw from the full range of property law's rich tradition of protecting individual autonomy to secure those relationships crucial to preserving vulnerable people's quality of life, and to ensuring vulnerable people's capacity to participate as full members in social and political life.

662. Reich, New Property, supra note 10, at 787.

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