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Common Ownership & Equality of Autonomy

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COMMON OWNERSHIP & EQUALITY OF AUTONOMY

Anna di Robilant*

In recent years, common ownership is enjoying unprecedented favor among policy-makers and citizens. Conservation land trusts, affordable housing cooperatives, community gardens and neighborhood-managed parks are spreading in U.S. cities. These common ownership regimes are seen as yielding a variety of benefits, such as “community”, i.e. more democratic and responsible management of resources, or “efficiency”, i.e. more efficient use of scarce natural resources. This article makes two contributions to the “new commons” literature. First, it re-orientates the normative focus of the debate. It argues that common ownership regimes can help foster greater “equality of autonomy.” By “equality of autonomy”, I mean equitable access to the means that enable individuals to be autonomous. Second, this article provides a new answer to the central challenge of common ownership design. Can common ownership regimes be both egalitarian and liberal? Some scholars have suggested that an aptly designed default regime, applicable to a wide range of common ownership settings, can be successful in avoiding difficult trade offs between equality and autonomy. By contrast, I argue that this challenge is best dealt with by adopting a “resource-specific” approach to the design of common ownership regimes. In some cases, this resource-specific design helps minimize or avoid difficult trade offs. In hard cases where trade offs cannot be avoided, this approach allows lawmakers to develop normatively appealing justifications for these trade offs.

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INTRODUCTION

For a long time, common ownership had little appeal in Western liberal democracies. In the collective imagination, common ownership was associated with nightmares of Soviet peasants forced into kolkhozes and deprived of their land and with homeowners losing their homes to organizations of tenants. Political and legal culture in the U.S. has been particularly unsympathetic to common ownership. The story of common ownership in America is the story of closing the open rural landscape of early America. It is the story of courts’ reluctance to protect citizens’

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It is the story of the mid-nineteenth century development of a system of property rights in the California gold mines, earlier treated as a commons. And it is the story of the extraordinary flourishing followed by failure of the utopian religious communities committed to communal ownership. The commons were also unpopular among scholars, still influenced by pessimistic accounts, such as Hardin’s allegory of the “tragedy of the commons” and Demsetz’s unidirectional theory of property evolution from the commons to private property regimes.

In recent years, common ownership is enjoying unprecedented favor. The limitations of zoning, taxation and other public land use control measures as means for regulation and redistribution have induced policymakers and citizens to turn to a long neglected private law tool, common property, with new interest. Community land trusts have experimented with distributing the costs and benefits of land development through common ownership rather than through taxation. Conservation land trusts rely on common ownership schemes to preserve open space or protect ecological resources. “Community gardens” and “neighborhood managed parks,” where groups of private citizens reclaim vacant urban open spaces as commons, are spreading in U.S. cities.

Scholars have also dropped their “tragic” views. An “anti-tragedy” view first emerged among political scientists, ecologists and anthropologists who argued that Hardin’s thesis lacks historical, theoretical or cultural veracity. “Anti-tragedy” views have now become popular among legal scholars as well. Numerous “anti-tragedy” articles have appeared in law reviews.

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8 See the symposium on “The New Private Law”, HARV. L. REV (forthcoming). The organizers note that: “Since the rise of Legal Realism and the modern administrative state, the standard academic supposition in this country has been that “all law is public law,” and that any use of the category of private law is unhelpful or pernicious. “The New Private Law” argues that while the Realist critique of private law has been richly generative, it has also caused us to lose sight of entire domains of law and legal study”.
9 Michael Goldman, Customs in Common: The Epistemic World of the Commons Scholars, 26 THEORY & SOC’Y 1, 2 (1997).
10 See infra note 21.
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Law” Conference was called “Commons Core,” and the famous Max Planck Institute has established a department devoted to the research on collective goods. Among supra-national decision-makers, “the World Bank is also deeply engaged in, an on the cutting edge of, commons discourse.”

That common ownership is in vogue in some circles does not show that it is the only or the best form of ownership. Some might suggest that it is only a passing fancy. This article argues that it is much more than that. It addresses the questions of why and when common ownership is a good option.

In the new commons discourse, common ownership regimes provide for a variety of desirable outcomes: democratic and responsible management of natural resources, participatory production of diverse information and cultural artifacts, and efficient use of scarce resources when changes in prices or transaction costs make private property inefficient. However, the idea that common ownership could deliver greater economic equality has been largely absent from this new commons discourse. This is a puzzling absence. The word “commons” has always had a special resonance in political theory, embedded with themes of equality and inclusiveness.

Further, with Occupy Wall Street in the headlines and statistics showing that 20% of Americans control about 85% of American wealth, the concern with equality is gaining new centrality in the public discourse. This article seeks to reorient the commons debate. It argues that common ownership regimes can help foster greater “equality of autonomy.”

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13 Goldman, supra note 9 at 7.
14 See infra the literature discussed in part I.
15 See Gordon, supra note 8, at 754. From Karl Marx’s Rheinische Zeitung articles on the debates on the law on thefts of wood before the Rhineland Assembly to E.P. Thompson’s work on the “moral economy” of the English crowd in the 18th century, the commons have been see as providing the poor with access to necessities or a little surplus income. See Karl Marx, ‘Proceedings of the Sixth Rhine Province Assembly; Third Article; Debates on the Law on Thefts of Wood. Originally written in October 1842; First published in the Supplement to the Rheinische Zeitung, Nos. 298, 300, 303, 305 and 307, October 25, 27 and 30, November 1 and 3,1842. Translated by Clemens Dutt, Transcribed for the Internet by, director@marx.org, November 1996; posted at http://csf.colorado.edu/psn/marx/Archive/1842-RZ/1842-Wood/index.html#n1 See also E. P. Thompson, The Moral Economy of the English Crowd in the 18th Century, in CUSTOMS IN COMMON 185-258 (1993).
16 See the studies by G. William Domhoff at //www2.ucsc.edu/whorulesamerica/power/wealth.html.
By “equality autonomy” I mean equitable access to the means that enable individuals to be autonomous. Autonomy, I argue, is multi-dimensional. To be autonomous we need negative freedom, i.e. the ability to make choices free from external coercion. Further, autonomy requires positive freedom, i.e. the basic material resources (a home, food, education) that enable us to have a meaningful set of options. Finally, to be autonomous we need the ability to communicate and debate ideas in order to make, and take responsibility for, choices we feel are authentically “our own”. Common ownership regimes such as affordable housing cooperatives and community gardens promote greater equality in the latter two dimensions of autonomy. First, they are an important item in any package of policy proposals that ensure equality of access to basic resources such as housing or green space and its related social and health benefits. Second, they provide co-owners with a relational network that facilitates “authentic” choices.

The article also provides a new answer to the central challenge of common ownership design. Can common ownership regimes be both egalitarian and liberal? In other words, can housing cooperatives or community gardens be effective in advancing greater equality in the material and relational dimensions of autonomy while also fully protecting co-owners’ “negative freedom”, in particular their ability to exit? Hanoch Dagan and Michael Heller have made a fresh start in the commons debate by foregrounding the question of an open back door. For common ownership not to be second-class ownership, individual co-owners need to have ample margin for autonomous choice and exit. However, historical and comparative studies show that the experiments with common ownership that were most successful in achieving high levels of equality, such as the Israeli Kibbutzes or the utopian communities in the United States, were so because they limited members’ freedom to dissent and, eventually, exit. Dagan and Heller have designed a default regime applicable to a wide range of common ownership settings that avoids difficult trade offs between co-owners ability to exit and the egalitarian or relational rewards of common ownership.\footnote{Hanoch Dagan & Michael A. Heller, \textit{The Liberal Commons}, 110 \textit{YALE L. J.} 549 (2001);} I argue that this challenge is best dealt with by adopting a resource-specific approach to the design of common ownership regimes.

The approach I propose negotiates the difficult trade offs between greater equality and less autonomy for co-owners in the context of specific resources. It looks at the peculiar characteristics of housing, urban land or water and it weighs the plural values and interests they implicate. In some cases, this resource-specific design helps minimize or avoid difficult trade offs. In hard cases where trade offs cannot be avoided, this approach allows lawmakers to develop normatively appealing justifications for these trade-offs.
offs. Whether common property is a workable form of ownership depends on the resource owned.

The resource-specific approach builds on a mode of reasoning that has long been followed by U.S. courts in cases involving resources considered special, such as water, oil or natural gas. Further, it expands on the insights of an emerging “contextualist” approach in American property law. This approach suggests that there are dramatic differences between the meaning of ownership in different social contexts and that property law, at its best, tailors different configurations of entitlements to different “social settings.”

This article turns, for inspiration, to late nineteenth century and mid-twentieth century Europe where French and Italian policy makers and law professors debated collective ownership and developed ideas similar to the ones I propose. Their debate stands as a rare moment when conservatives and progressives alike talked about property law in a new way, as a means for equalizing rather than maximizing the enjoyment of autonomy. They set aside the focus on protecting the individual owner’s autonomy, which had characterized property debates since the Enlightenment and the rise of liberalism. Instead, they privileged the idea that collective landownership could make the autonomy that derives from owning land available on a more equal basis.

European jurists developed a resource-specific analysis

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18 The acquisition of title to fugitive resources has always been treated by courts as posing special questions; see DUNKEMINIER, KRIER, ALEXANDER SCHILL PROPERTY 6th ed (2006) at 32-35; see also THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES (2007) chapter III.

19 For an earlier example of “contextualism” see Eric T. Freyfogle, Context and Accommodation in Modern Property Law, 41 STAN. L. REV. 1529(1989); Most recently, HANOCH DAGAN, PROPERTY. VALUES AND INSTITUTIONS (2011).

20 HANOCH DAGAN, supra note 19 at 4.

21 A terminological premise is needed. I will use the term “collective ownership” when discussing the European 19th century debate and “common ownership” when referring to present debates. European jurists talked about “collective ownership” and distinguished it from simple co-ownership. Co-ownership, or communio, was the concept European continental jurists had traditionally used to deal with proprietary situations involving more than one owner. The form of collective ownership French and Italians sought to restore and expand in the late 19th century differed from co-ownership in three respects. To start with, while in co-ownership each co-owner’s right was seen as analogous to that of an individual owner and described through the idea of a share, in collective ownership, an organic group of owners exercised a unitary right, unsusceptible to being quantified by shares. Second, while co-ownership was a temporary condition in that each co-owner could, at any moment, ask for the partition, collective ownership was not temporary and could not be divided upon request of a group member. Finally, while in the case of co-ownership each co-owner could freely transfer her share, in collective ownership, the pool of potential transferees was variously limited. See infra note at 132 and, specifically, note 150. As to the present debate in the United States, while, to be technically precise, ownership regimes
of property entitlements to translate their commitment to “equality of autonomy” into actual property law. They named their analysis “one property, many properties.” My claim is not that these ideas, embedded as they were in a European context, are always and everywhere suited to the U.S. But I do think that they provide strong grounds, when combined with economic and philosophical arguments, for reconsidering the case for common ownership in the U.S. and other large post-industrial economies.

This article is structured in three parts. Part I presents the contemporary debate on the commons and illustrates the central dilemmas involved in the design of common ownership regimes. Part II turns to the European late nineteenth and mid-twentieth century debate and salvages two lost key ideas: policymakers’ normative commitment to “equality of autonomy” and law professors’ “one property, many properties” analytical framework. Part III discusses the need for a resource-specific analysis in contemporary American property law and presents sample applications of this approach. It discusses the normative and design decisions posed by two common ownership regimes that have the potential to promote greater “equality of autonomy”: affordable housing cooperatives and community gardens.

can be arranged along a spectrum ranging from open access to individually owned private property, most literature uses, for the sake of simplicity, “commons” or “common ownership”. Among those who classify property regimes on the basis of the number of owners, Margaret McKean distinguishes between: (a) un-owned or open access property, where no one has rights and no potential user can be excluded, for example the high seas or unclaimed lands; (b) public property, property held in trust of the public by the state, the general public has access, for example, national parks; (c) state property: the exclusive and therefore private property of government bodies, for example, government offices; (d) jointly owned private property, where co-owners may sell their shares at will without consulting the other co-owners, for example some agricultural coops, business partnerships or joint stock corporations; (e) common property where all co-owners may simultaneously agree to sell by an agreed upon voting rule but individual co-owners can sell, trade or lease their shares only in accordance with very stringent rules laid down by the group; (f) individually owned private property. See Margaret A. McKeen, Success of the Commons. A Comparative Examination of Institutions for Common Property Resource Management 4 J. OF THEORETICAL POLITICS 247, 248-50 (1992). Stephen Munzer provides a somewhat different classification, distinguishing between (a) open access: anyone may come in and take out units of the resource, no person has an exclusive right to sell or manage the resource, for example, a fishery; (b) common property: the co-owners individually have rights of entry and withdrawal and collectively have the right to manage or sell the resource and to exclude non-members; (c) semicommons; a mix of common and private rights in which each set of rights has a significant impact on the other; (d) anticommons: an asset from which each has a right to exclude and no one a right to use without permission of others. See Stephen R. Munzer, Commons, Anti-Commons and Community in Biotechnological Assets, 10 THEORETICAL INQUIRIES IN L. 1, art 11, (2009).
“Anti-tragedy” views have gained wide consensus among legal scholars, triggering the proliferation of a vast commons literature. The debate is multifaceted. It provides explanations for the frequent reversal of the Demesetzian path from open access to private property rights. It asks which values and goals ought a commons regime promote and facilitate. Finally, it considers which legal rules or design principles would best accomplish these goals. Three “anti-tragedy” views have emerged, centered on community, freedom and efficiency.

A prolific strand of scholarship, inspired by Elinor Ostrom’s work, points to the communitarian rewards of common ownership. Ostrom’s groundbreaking work has triggered a proliferation of methodologically akin literature. The fundamental research question for Ostrom is the governance of natural resources used by many individuals in common, more precisely “common pool resources” (CPR). Ostrom considered two alternative governance models, state-control and privatization, and proposed an alternative theory of self-organizing and self-governing forms of collective action to successfully solve provision problems and appropriation problems. Ostrom examined a variety of case studies of self-governance institutions to understand the design principles that characterize successful, long-enduring, self-organized and self-governed CPRs. See ELINOR OSTROM, GOVERNING THE COMMONS 8-23 and 58-101 (1990). See also Elinor Ostrom, Constituting Social Capital and Collective Action, in LOCAL COMMONS AND GLOBAL INTERDEPENDENCE ROBERT O. KEOHANE & ELINOR OSTROM EDs at 125 (see particularly pp 151-157).
scheme would have to reflect and strengthen the social identity of a close-knit group with shared beliefs, history or needs. Examples of these close-knit groups are the “lobster gangs” of Maine, a Swiss alpine community or the Israeli Kibbutzim. The “ethno-identitarian” claim is that the ideological homogeneity of its members and their continuing interaction generates governance rules that are conducive to efficient resource management while also rewarding other vital concerns, such as community or equality.\(^{24}\)

According to the latter, a well-designed common property regime may create community where community did not previously exist.\(^{25}\) Proponents of the “civic republican” view argue that the interactive problem solving of successful commons is also core aspects of the community development process.\(^{26}\) Common ownership delivers the desired outcomes of a civic-republican ethos, i.e. participation, deliberation, knowledge-production and responsibility. While some proponents of this view focus on robust design principles,\(^{27}\) others excavate historical examples of

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\(^{24}\) Robert Ellickson defines a close-knit group as a social entity within which power is broadly dispersed and members have continuing face to face interactions with one another. By providing members with both the information and the opportunity to engage in informal social control conditions such groups are conducive to cooperation. See Ellickson, *supra* note 22, at 1346-47. Similarly, Singleton & Taylor argue that groups which manage to solve their collective action problems by themselves are those that have “community”. By “community” they mean a group with (1) some shared beliefs, (2) a more or less stable set of members who expect to continue interacting with one another for some time to come and whose relations are direct (unmediated by third parties) and multiplex and (3) mutual vulnerability (i.e. each actor values something which can be contributed or withheld by others in the group and can therefore be used as a sanction against the actor). Community is undermined or weakened by great social and economic differences among its members, differences in income, wealth or class position, in ethnicity, race, caste, language or religion. See Sara Singleton and Michael Taylor, *Common Property, Collective Action and Community*, 4 J. THEORETICAL POLICY 309, 311, 315 (1992).

\(^{25}\) The civic-republican view became prominent among legal scholars in the late 1980s due, largely, to two articles respectively by Frank Michelman and Cass Sunstein. Sunstein claims that the basic republican commitments involve: (a) deliberation in government, (b) political equality, (c) universality and (4) citizenship. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). Both Sunstein and Michelman advocated a modern reconsideration of civic republican thought. Michelman in particular argued that a republican constitutional theory could inspire stronger judicial protection of individual rights than competing theories. See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988). While the heyday of civic republicanism was in the 1980s, it has remained influential in the commons literature.


\(^{27}\) Elinor Ostrom proposes eight principles of good design: (1) the boundaries of the user group and of the resource are clearly defined, (2) the use rules are appropriate to local conditions, (3) most users can participate in modifying operational rules (4) monitoring is done by the users themselves or by monitors accountable to them, (5) sanctions are graduated and are carried out by other users and or officials accountable to them (6) users
community-building that turned out well.  

In contrast to a focus on community, a second strand of commons scholarship sees greater freedom as the reward of common ownership. The idea that open access may yield greater freedom that traditional privatization has been central to the intellectual property debate on the public domain. With the advent of the “networked information economy,” much of the commons debate has moved from land to information. The growth of intellectual property law and the resulting “propertization” of information means enclosing the public domain. This enclosure stifles political and cultural freedom. In response, the public domain movement seeks to protect the commons of information against the encroachment of private property.

For its advocates, protection of the public domain promotes freedom in a variety of ways. It secures availability of information from diverse users have easy access to low cost local arenas to resolve conflicts among users and officials, (7) users have the right to organize their own solutions unchallenged by external government authorities and (8) the institutional mechanisms is organized in multiple layers of nested enterprises. See Elinor Ostrom, Community and the Endogenous Solution of Commons Problems, 4 J. OF THEORETICAL POLITICS 343, 344-45 (1992). See also ELINOR OSTROM, GOVERNING THE COMMONS 90 (1990).

28 For instance, the chief lesson of the thread of 19th century cases and doctrines of “inherently public property” may be that open access to specific resources, such as roads, waterway or beaches, is desirable because it fosters socialization and civic education thereby serving democratic values. See Rose, supra note 21. Similarly, a study of the 18th and 19th century grazing common lands of St. Louis suggests that the commons benefited the residents of St. Louis by performing an important political function. Namely, in a Spanish colonial political system that lacked institutions of self-government, the commons provided a mechanism enabling the residents to make their own decisions on matters most likely to have an economic effect on them. See Banner, supra, note 22, at 64, 88


30 See Chander & Sunder, supra note 8, at 133. For some, we are in the middle of a second enclosure movement, the enclosure of the intangible commons of the mind. James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 LAW & CONTEMP. PROBS. 33, 37 (2003). See also Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 362 (1999). For Benkler, the “public domain” is the range of uses of information that any person is privileged to make, absent individualized facts that make a particular use by a particular person unprivileged. Conversely, the “enclosed domain” is the range of uses of information as to which someone has an exclusive right and that no other person may make, absent individualized facts that indicate permission from the holder of the right or otherwise privilege the specific use under the stated facts.

31 See Jedediah Purdy, A Freedom Promoting Approach to Property, 72 U. CHI. L. Rev. 1237, 1278 (2005), for a discussion of the different ideas of freedom that underlie the debate. More generally, see David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROB. 147, 171 (1981), for an early and visionary formulation of the idea that a robust public domain is conducive to greater freedom.
and antagonistic sources, thereby protecting freedom of speech, which in turn enables individual self-authorship.\textsuperscript{32} It also allows individuals to interact and create without restrictions, thereby sustaining innovation and productivity. The end result is an active, participatory cultural and civic life.\textsuperscript{33}

A third strand of commons scholarship shifts the focus from community or freedom to efficiency. Law and economics scholars argue that, contrary to the Hardinian and Demesetzian narratives, common ownership may be efficient in some instances. They focus on variations in transaction costs to make sense of reversals from private property rights to open access or common property alternatives. In some cases, changes in relative prices due to technological change or other outside causes may explain the reversal. For example, input and output price changes may suddenly make farming in a given locality unprofitable, inducing farmers to cease policing boundaries.\textsuperscript{34} That lack of policing may reinstate a regime of open access for bikers and hunters.\textsuperscript{35}

Other law and economics scholars point to historically significant examples of efficient reversal to semicommon property.\textsuperscript{36} The “open field”

\hspace{1cm} \textsuperscript{32} See Benkler, \textit{supra} note 34, 394. What Benkler has in mind, is what in this article I call a “thick” notion of liberal autonomy. For Yochai Benkler, properly designed commons are capable of yielding desiderata that are central to this thicker notion of individual autonomy: enhanced individual capacity to do more for and by oneself, a more genuinely participatory political system, social justice in the form of increased access to the basic instrumentalities of economic opportunity, as well as a more critical and self-reflective culture. \textit{See} Benkler, \textit{supra} note 16, at 1266.

\hspace{1cm} \textsuperscript{33} Lawrence Lessig, \textit{The Architecture of Innovation}, 51 DUKE L.J. 1783, 1789-90 (2002).

\hspace{1cm} \textsuperscript{34} Levmore, \textit{supra} note 22, at 423-5. Levmore also provides an alternative explanation for the reversal. \textit{Id.} at 425. Most reversals require some capacity on the part of the preexisting property owners or potential beneficiaries to organize in interest groups. For example, after some wilderness has evolved into a state of privately owned plots, citizens with recreational and environmental aims join to advance the cause of a green belt that will form continuous open space in and around the city. They may succeed in gaining legislation or administrative rules that make it difficult for private property owners to do much with certain lands. Such green belt is unlikely to arise spontaneously. Governmental intervention is required and this is unlikely without some interest group activity. This is less of a bright story, it raises suspicions and can easily be described in negative terms. Organized minorities may have brought about the reemergence of a commons regime, even though transaction costs and technological change continues to favor evolution towards closed access. It is possible that the change is inefficient and that it simply reflects the advantage of one interest group over another. Absent a good deal of local evidence, Levmore argues, we will generally be unable to distinguish between these two causes, so we will not know whether to regard rearrangements with favor or disfavor.

\hspace{1cm} \textsuperscript{35} \textit{Id.}

\hspace{1cm} \textsuperscript{36} Smith, \textit{Semicommon Property Rights}, \textit{supra} note 22 at 133; see also Smith, \textit{Exclusion versus Governance}, \textit{supra} note 22, at 478.
system, which displaced earlier individual tenure in medieval and early modern Europe, had significant efficiency benefits. Peasants owned scattered strips of land for grain growing but used the land collectively for grazing. This system allowed them to operate on two scales simultaneously, taking advantage of economies of scale in grazing and private incentives in grain growing.

Still others maintain that the number of owners is, along with the configuration of the asset and the scope of dominion, one of the three dimensions of property rights private actors and policymakers should adjust to maximize property values. Examining these three aspects together shows how the optimal number of owners is not necessarily one. For example, underconsumption and overconsumption costs are a trade-off in large asset management. Large assets may be too large to be consumed by a single owner. However, reconfiguration into smaller units and privatization may be far more costly than the potential for over consumption as a commons. Sometimes the latter is the optimal solution.

This article further shifts the focus to equality. It argues that common ownership has the potential to make individuals more equal in the

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37 Smith also notes that scattering is not an efficiency decreasing cultural artifact but key to achieving efficiency. Scattering is a method of boundary placement that functions as a sanction on the picking and choosing of parcels associated with strategic behavior. See Smith, *Semicommon Property Rights*, supra note 22 at 144.


39 Egalitarians have long discussed the “equalisandum”, i.e. what is it that should be equalized. See Richard J. Arneson, ‘*Equality of What?’ Revisited*, SOCIAL SCIENCE RESEARCH NETWORK (Aug. 6, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653981 (in general, on the debate). Participants in the equality of what debate have expressed a variety of views. John Rawls characterizes the need for equality in terms of “primary social goods”. These are everything that every rational man is presumed to want including rights, liberties and opportunities, income and wealth and the social bases of sel- respect. See JOHN RAWLS, *A THEORY OF JUSTICE* 60-65 (1971). Amartya Sen shifted the focus from goods to what goods do for human beings. He proposes equality of basic capabilities. Justice requires that all members of society have basic capabilities to do and be what they have reason to value at a decent threshold level. See AMARTYA SEN, *INEQUALITY REEXAMINED* 12-28 (1992). Ronald Dworkin argued for equality of resources. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000). Dworkin’s is “a starting-gate theory identifying distributive justice with an equal initial allocation of material resources adjusted by an insurance scheme to compensate individuals for brute luck handicaps and low marketable talent and after that with whatever results from people’s choices in fair framework for interaction including opportunities to ensure against future brute luck misfortunes.” See Arneson, * supra*, at I. G. A. Cohen argued that egalitarians should care about equality of access to advantage. The nature of advantage includes both resources and welfare. See G.A. COHEN, *ON THE CURRENCY OF Egalitarian JUSTICE* 44 (2011).
enjoyment of the autonomy that derives from owning property. Since the Enlightenment, philosophers and legal theorists have argued that property fosters individual autonomy. The general argument is that a system where individuals are granted the full package of property entitlements, comprising the right to exclude, to use and to transfer, and are free to bargain in the market without interference makes individuals autonomous.\footnote{\footnotetext*{40}For contemporary articulations of this argument see Richard Epstein, \textit{Property and Necessity}, 13 HARV. J. L. & PUB. POL’Y 2 (1990). Epstein argues (at 4) that “if possession, use and disposition turn out to be the ideal bundle of property rights” and “voluntary transactions take place between people who are in the position to sell and people who are in the position to buy”, this system would necessarily have a self generating capacity with each successive transfer, it would produce more by way of gains than it would by way of losses and we would move to higher and higher levels of social satisfaction and private gratification. See also, generally, \textsc{Richard Pipes, Property and Freedom} (1999) and \textsc{Milton Friedman, Capitalism and Freedom}. Fortieth Anniversary Edition (2002) chapter I, p 7-22.}

It frees them from the restraints that prevent them from acting on their actual desires. This autonomy involves many abilities: freedom of action, privacy and self-expression. As Adam Smith saw, property rights and markets afford individuals the ability to pursue their projects and to bargain over the terms of their cooperation.\footnote{\footnotetext*{41}See \textsc{Adam Smith, The Theory of Moral Sentiments} (Penguin paperback 2010) and \textsc{Id., Lectures on Jurisprudence} (1982). On Smith’s theory of property, the market and freedom see Purdy, \textit{supra} note 35 at 1251-1258.} Further, property provides, both literally and figuratively, the necessary walls that allow individuals to retreat into their sphere of privacy.\footnote{\footnotetext*{42}On property as privacy see Eduardo Penalver, \textit{Property as Entrance}, 91 VA. L. REV. 1889 (2005).}

Finally, in the Hegelian tradition, ownership allows individuals to constitute themselves as people by extending their will over the objects of the external world.\footnote{\footnotetext*{43}\textsc{Georg Wilhelm Friedrich Hegel, Philosophy of Right} 40-41 (T. Knox trans. 1942). Among US property scholars the Hegelian perspective is most importantly associated with the work of Margaret Radin. See \textsc{Margaret J. Radin, Property and Personhood} 43 STAN. L. REV. 957 (1982).}

In this article, I take the belief in the autonomy benefits of property further. I argue that common ownership can make this autonomy accessible to a larger number of individuals. The position advocated in this article differs from conventional arguments about the autonomy afforded by property rights in two respects. First, I suggest a different notion of autonomy. The autonomy most advocates of full property rights have in mind is traditional liberal autonomy. It requires the cognitive capacity to make settled and consistent life plans and what is know as “negative freedom”, that is the absence of external restraints, imposed by the state or...
By contrast, the autonomy common ownership fosters is a “thicker” or “multi-dimensional” type of autonomy, one that has been proposed by many in recent debates within liberalism. It is a substantive or “positive” type of autonomy. It underscores the material and social conditions for the possibility of autonomy. It recognizes that to be able to form and choose among alternative life plans and to be truly free from coercion, conceived in terms of not only the imposition of state backed power but also economic deprivation, individuals need to have access to basic material resources. Further this autonomy is relational. It rejects the idea that authentic choices come through retreating into an “inner citadel” of detached reflection. It acknowledges that authentic choices are generated and justified within a context of interpersonal relations.

Second, I am concerned with patterns of distribution of autonomy. If this “thicker” autonomy is important for human flourishing, then it should be distributed more equally. This thicker autonomy has instrumental value, leading to greater individual welfare. It also has value in itself. It is the chief characteristic of the model citizen who is the source of legitimacy for democratic political institutions. Further, it is the locus of interpersonal respect in human relations that are neither paternalistic nor manipulative.

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44 JOHN CHRISTMAN, THE MYTH OF PROPERTY. TOWARD AN Egalitarian Theory of Ownership (1994). Christman (at 68-70) notes that arguments defending (liberal) ownership on the basis of liberty rest on a negative notion of liberty as “the relative absence of external physical restraints that prevent agents from acting on their actual desires”. On the cognitive conditions for autonomy, i.e. for individual desires to count as autonomously chosen, see ID., at 162-166.

45 See the essays collected in AUTONOMY AND THE CHALLENGES TO LIBERALISM 1-26 (John Christman & Joel Anderson eds., 2005) which develop a new notion of autonomy that takes into account the critiques of traditional liberal autonomy articulated by communitarians, feminists, postmodern theorists and left/liberal authors.

46 Christman, supra note 47 at 162-1174. Christman argues that for one to have the minimal ability to consider options, gather information and reason normally, one must have had access to education, health care and welfare conditions such as housing. In addition, it must be the case that one’s living conditions are such that she is able to turn her attention to the variety of choices relevant to her self-development, meaning that she is not constantly straining with other elements of survival such as minimal housing and welfare needs. See also Joel Anderson and Axel Honneth, Autonomy, Vulnerability, Recognition, and Justice, in AUTONOMY AND THE CHALLENGES TO LIBERALISM, supra note 47, at 127. Anderson and Honneth suggest that for individuals to be autonomous, we need to minimize their vulnerabilities, hence the emphasis on equality and access to participation in the relations of recognition through which individuals acquire autonomy.


48 Marina A. L. Oshana, Autonomy and Self-Identity, in AUTONOMY AND THE CHALLENGES TO LIBERALISM, supra note 40, at 77, 93-94. See also Anderson & Honneth, supra note 40, at 130.

49 CHRISTMAN, THE POLITICS OF PERSONS supra note 50 at 135.
However, the enforcement of full property rights in a market economy will inevitably result inequalities of income and wealth that result in great inequalities in this thicker autonomy. Taking seriously the liberal egalitarian idea, this article argues that common ownership can help foster equality of autonomy in two ways. It can be an effective means for making basic resources such as housing or land available to a greater number. And it promotes social relations that facilitate authentic choice.

What would a commons regime that promotes “equality of autonomy” look? Can a commons regime effectively promote the good envisioned, be it “community,” efficiency or “equality of autonomy,” while also protecting individual co-owners’ autonomy-related interests to change their minds, pursue new ends and, eventually, leave? Until now, legal scholars and policymakers have relied on design principles that make happy solutions difficult to imagine. By and large, they have favored protection of the interests of co-owners as a group at the expense of liberal exit.50 And historically, the communes that have achieved their goals, are, to liberal eyes, utterly illiberal.51 Their success appears to have depended upon limiting their individual members’ exit options. For example, to achieve a high degree of equality while also preventing adverse selection, the Kibbutz movement has made exit costly by requiring departing members to forfeit all, or almost all, of their claims to the group’s joint assets.52

In a recent article, Hanoch Dagan and Michael Heller have argued that happy solutions are possible and that there is no need for difficult tradeoffs between co-owners’ autonomy and other substantive values. Dagan and Heller have translated their commitment to liberal autonomy into a regime of default rules. Minor fine-tuning makes these rules applicable to a substantial subset of common ownership settings, such as marital property, partnerships, condominiums and close corporations. This regime, the “liberal commons,” facilitates efficient “communitarian” cooperation while also protecting a whole family of autonomy-based rights, such as exit, freedom of dissociation, the right to mobility and the right to a fair share of the common resource.53

50 Dagan & Heller, supra note 22, at 551.
51 Ellickson, supra note 22, at 1344.
52 Ran Abramitz, The Limits of Equality: An Economic Analysis of the Israeli Kibbutz, 67 J. OF ECON. HIST. 495-99 (2007). See also Ellickson, supra note 22, at 1352 (“A commune that succeeds in promoting equality and thick social ties simultaneously impinges upon the classical liberal values of individual liberty, privacy and self-determination.”).
53 Rules in the sphere of individual dominion counteract the potentially devastating effects that individual autonomy may have on the efficiency and viability of the commons. The aim is to deter overuse by setting restrictive limits on exploitation tailored to the specific resource and to prevent underinvestment through investment protection rules.
For example, applied to marital property, the liberal commons regime reinforces commitment to the marital community, where spouses share with each other without reference to individual desert. At the same time, the regime protects the spouses’ individual autonomy. As an illustration, consider the difficult question of the proper division of a spouse’s future earning potential gained during marriage. Those who care about protection of the marital community favor the principle that degrees are marital assets subject to equal division. The main objection to that principle arises from autonomy. The spouse who received the degree during the marriage would be locked into a career after the marriage. For example, a formerly married medical student would be obliged to practice as a physician in order to pay her former spouse half the earning potential they generated together. A liberal commons regime solves the dilemma with the rule that the increased earning capacity is only subject to division after it is exercised and earnings are realized. Division safeguards community by recognizing that the development of careers during marriage is centrally collective. But dividing only what is realized preserves the spouse’s ability to make future autonomous choices.

But happy solutions to apparently tragic trade-offs are not always possible. Particularly if the goal is to make autonomy available on a more equal or widespread basis, tragic trade-offs are, at times, unavoidable. Often, more equality of autonomy means less autonomy for some (those who are better off), for the sake of more autonomy for others (those who are worse off). Take a form of common ownership that has the potential to promote “equality of autonomy”: affordable housing cooperatives. In affordable housing cooperatives, the ability to ensure more equality in the enjoyment of autonomy, by making a scarce resource, housing, available on a continuing basis to those who are homeless or do not have adequate housing (and hence have less autonomy), is secured by placing limits on the autonomy, or better on some components of the autonomy, of current co-

Rules in the sphere of democratic self-governance seek to secure community and autonomy by supporting the commoners’ cooperation and by amplify each co-owner’s voice, i.e. ability to influence management from within. Besides procedural norms relating to disclosure, fair hearing and consultation, Dagan and Heller suggest broad majority rule jurisdiction for decisions that increase the pie and sharp limits on majority rule for decisions that can be characterized as redistributive. Finally, and most importantly, rules regulating exit aim at protecting individual autonomy while preventing opportunistic behavior and enhance cooperation; this is done through three mechanisms: short cooling off periods, reasonable exit taxes and rights of first refusal. See Dagan & Heller, supra note 22, at 581-98.


55 Id. at 110-113.
AFFORDABLE HOUSING COOPERATIVES

Affordable housing cooperatives are a form of common ownership that “has been edging closer to the policy mainstream in recent years.” 56 They occupy “the fertile middle ground between arid dichotomies that have historically dominated American housing policy,” where housing has had to be either publicly or privately owned. 57 Affordable housing cooperatives secure more autonomy to the worse off by promoting goals such as affordability, resident empowerment through self-management, and community responsibility. 58 Typically, ownership is split between a non-profit entity and the residents who own shares in the coop. The residents’ shares give occupancy rights but also come with obligations and limitations concerning aspects of the co-owners’ autonomy, i.e. the right to transfer and the right to use.

The right to transfer gives way to resale restrictions. Often in exchange for favorable public financing, residents must agree to limits in the amount of equity they can retain when they sell their unit. 59 These limits are meant to keep the unit affordable and, hence, available to other low-income buyers. There may also be constraints on who can be buyers. The coop may have a right of first refusal to allow it to buy the unit for resale to buyers that meet the definition of low-income status. Further, there may be limits on the right to pass the property at death.

Use entitlements are limited as well. First, owners are requested to occupy the property. Subletting is regulated or restricted. Second, while residents have the right to manage the property, they may be subject to review by the non-profit entity. A review is intended to prevent goldplating, deterioration or abusive or discriminatory management.

Affordable housing cooperatives present difficult trade-offs between the shape of members’ autonomy and the goal of ensuring greater access to such autonomy. Limits on co-owners’ autonomy vary in nature and in justification. The inability to pass one’s share at death is severe. Others are less invasive. Consent requirements may amount to a mere reasonableness analysis not uncommon in common-interest communities, such as condominiums. Some are driven by concerns that may be criticized as paternalistic. Arguably, these limits are justified by the desire to ensure the

57 Id.
effectiveness and viability of the project. The trade-offs are nevertheless difficult because co-owners’ autonomy interests are extremely weighty. Compelling arguments can be made to support design principles that fully reflect them.

The happier solutions of the “liberal commons” seem convincing in the case of marital property but more difficult to achieve in this case. Marriage delivers unique goods, i.e. intimacy, caring and commitment, that are an important aspect of the individual spouse’s self-fulfillment, but that are also collective in nature. Sacrifices of the spouses’ individual autonomy, such as dividing marital property on the basis of an equal division rule rather than an individual contribution principle, are entirely consistent with and reflective of this vision of marriage.

By contrast, the constraints on members’ individual autonomy typical of affordable housing cooperatives appear more puzzling and harder to justify. These communities differ from the “liberal egalitarian community” that is marriage in several respects. First, they are large and heterogeneous communities. The intimate partial fusion of the marital couple is made possible by a commonality of emotions, interests and projects. But members of an affordable housing cooperative have widely diverse life plans. They belong to different layers of the worse off, entailing differences in aspirations and in prospects for socio-economic success. Some have the desire and ability for social mobility, while others are less upwardly mobile for cultural or socio-economic reasons. Second, while marriage is entirely voluntary, entry into an affordable housing cooperative involves an aspect of coercion due to material insecurity and a limited availability of options. Studies have shown that owners of affordable housing cooperatives typically have a choice between that form of ownership or renting. Their income is too low for them to enter the private homeownership market and too high for them to qualify for subsidized housing. Third, while spouses commit to a long-term marital project, members of these communities envision different time horizons. Changes in a variety of life circumstances may make easy and costless exit options more important. Finally, while the unique goods spouses expect from marriage are inherently collective, members of affordable housing cooperatives seek cooperation and community along with highly

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60 Frantz & Dagan, supra note 53, at 81-88.  
61 See Kennedy, supra note 66, at 103, 110  
62 Diamond, supra note 67, at 105.  
63 Davis, supra note 64, at 94.  
64 See Dagan & Heller, supra note 22, at 596-600 (on the costs of being locked in). For the LEC, the risk is that the seller who, for a change in circumstances needs or wants to move out, will not be able to obtain enough net proceeds to permit her to buy a home in the unsubsidized market. See Diamond, supra note 67, at 90.
individualistic goods such as wealth accumulation and privacy. Housing is an economic good. As a home, it also is a guarantee of privacy, safety and freedom. For many Americans, their house is their single largest investment and one of their largest monthly expenditures.

One could argue that the constraints on individual autonomy typical of affordable housing cooperatives are justified because members have consented to them. Full disclosure is an integral part of the process of entering these commons. Prospective buyers or members learn the rights, responsibilities and limitations that accompany the property that they are buying. Buyers, one could say, are “happy slaves.” They are free agents bound only by their own choices. However, the consent argument presents a number of difficulties.

Consent theory is entangled in substantive concerns about when a choice is actually voluntary. A choice without reasonable alternatives is not voluntary. As mentioned, members of affordable housing cooperatives have limited alternatives. Consent also presupposes that the free agent has chosen her social role. Members of affordable housing cooperatives may be steeped in a specific “culture of poverty” or “culture of property” because of a combination of unchosen factors, including ethnicity, class and income. These determinants of their social role influence the choices they make.

As the examples of affordable housing cooperatives shows, common ownership regimes that seek to promote greater “equality of autonomy” present hard trade-offs. Happy solutions may be difficult to imagine. These forms of common ownership aim to make autonomy available to a larger number of the worse off, but full autonomy and more equally distributed autonomy appear to be mutually exclusive. I agree with Dagan and Heller that happy solutions are possible in cases such as marital property.

66 Iglesias, supra note 73, at 530-38.
67 Davis, Limited Equity Homeownership, supra note 64, at 57.
68 DON HERZOG, HAPPY SLAVES. A CRITIQUE OF CONSENT THEORY ix (1989).
69 Id. at 246.
70 Id. at 225.
71 Kennedy, supra note 66, at 103, 110.
72 Mark Choko and Richard Harris, The Local Culture of Property. A Comparative History of Housing Tenure in Montreal and Toronto, 80 ANNALS OF THE ASSOC. OF AM. GEOGRAPHERS 73, 73 (1990) (arguing that Montreal has long had a peculiar culture of property). “In part Montreal’s experience has been determined by the local form taken by general factors including income class and ethnic composition. The combination of these factors gave rise to a pattern of social institutions and household behavior or culture of property that acquired autonomous importance”. Id.
However, I am interested in the hard cases where “equality of autonomy” seems to come at the expense of full autonomy. Are we doomed to “illiberal commons”? I believe we are not. A resource-specific approach to the design of common ownership regimes can help make and justify these difficult trade-offs. Dagan and Heller suggest that the “liberal commons” default regime may apply, with minor fine-tuning, to “social settings” as different as marital property, business partnerships and common interest residential communities. I believe more than simple fine-tuning is needed. Further, I focus on resources, rather than “social settings”. An approach that focuses on resources is preferable because it emphasizes the “thingness” of the object of property rights. It asks us to consider how the characteristics of the “thing” relate to different values and shape social relations. For example, resources differ in how scarce they are, in whether they are renewable or not, fragile or durable, discrete or interconnected in essential ways to natural or human ecosystems. Further, resources differ in the values and interests they implicate. Housing, commercial real estate, urban green space or water differ in how relevant they are to the different dimensions of autonomy, i.e. negative freedom, equitable access to basic material resources, relational authenticity and responsibility. In other words, resources set the context for a commitment to “equality of autonomy.” In designing common ownership regimes, we need to shape “bundles of entitlements” that reflect these peculiarities. In some cases, this resource-specific approach will help avoid or minimize difficult trade-offs. Where foregoing some degree of autonomy is unavoidable in the commitment to greater “equality of autonomy,” a resource-specific analysis will uncover normatively appealing justifications for legal rules that impinge on individual co-owners’ autonomy. It will show that these sacrifices are not “illiberal.” Rather they are consistent with a thicker, multidimensional notion of autonomy.

In the next section of the article, I retrieve two lost, but key, ideas developed by late nineteenth century European policymakers and law professors in their discussion of collective ownership. First, in Italy in the 1890s, participants in the parliamentary debate on collective ownership sketched the contours of an ideal of “equality of autonomy” similar to the one I have suggested. Second, to translate this ideal into actual property rules, French and Italian law professors developed a resource-specific

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73 In recent years property scholars have increasingly denounced the post-Realist “bundle of rights” approach for promoting an abstract understanding of property that obscures the “thingness” of the thing owned. See Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 Harv. Envtl. L. Rev. 281 (2002).
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analytical approach that partially anticipates the approach I suggest.

PART II.

A. COLLECTIVE PROPERTY AND THE QUEST FOR GREATER “EQUALITY OF AUTONOMY”

The reassessment of Demesetz and Hardin’s “tragic” accounts of common ownership and the proliferation of anti-tragedy views is a déjà vu for historians of European law. In Europe, a similar shift in attitude towards communal proprietary regimes from pessimism and hostility to renewed interest occurred significantly earlier. In the late nineteenth century, for a couple of decades, collective property became a heated topic of research and debate among scholars as well as a viable option for policy makers. 74

In most countries of Western Europe, lands had been held, used and managed in common by groups of owners for centuries. Collectively owned lands and collective use rights were an essential lubricant of the rural economy. 75 They provided the lower strata of the rural population with sustenance and, at times, surplus income. 76 A vital element in the social and

74 In recent years, in France and in Italy, a vast historiographical literature has rediscovered the 19th century debates on common ownership. Earlier historiography emphasized the “destructive frenzy’ that, since the French Revolution, has animated the legislature’s repeated attempts to wipe out existing forms of common landownership. By contrast, recent “revisionist” scholarship foregrounds the existence, in the late 19th century, of a vibrant “collectivist” movement, i.e., a prolific strand of scholarly literature and policy discussions that reassessed the merits of common ownership regimes. The importance of the debate over common ownership, revisionists argue, lies in that successfully disputed the ideological and cultural primacy of private property, fostering new openness towards forms of property alternative to private property. See generally, PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY (1981); NADINE VIVIER, PROPRIETE COLLECTIVE ET IDENTITE COMMUNALE. LES BIENS COMMUNAUX EN FRANCE (1750-1914) (1999). See MARIE-DANIELLE DEMELAS & NADINE VIVIER, EDS LES PROPRIETES COLLECTIVES FACE AUX ATTAQUES LIBERALES (1750-1914) (2003), for a study of collective property in different European countries.

75 See PETER M. JONES, THE PEASANTRY IN THE FRENCH REVOLUTION 124-54 (1988); see also Thompson, supra note 17, at 73-50.

76 For instance, in France, according to a cadastral survey of 1846, communally owned lands or lands burdened with collective use rights amounted to 9% of the French territory, 59% of such lands were grazing lands and approximately 35% were cultivated lands. See VIVIER, supra note 85, at 33. Similarly, in Italy, a widely cited survey of 1947 estimates collective lands to total 10% of national territory. See Nadia Carestiato, Beni comuni e proprieta’ collettiva come attori per lo sviluppo locale, (2008) (doctoral dissertation) available at http://paduaresearch.cab.unipd.it/903/1/Tesi_Carestiato.pdf at 73, for a
economic fabric, these forms of collective landownership differed widely but fell into three main types. The first type consisted of use rights held in common by the inhabitants of a village or town over lands owned either by the town as public property or by a private landowner. These use rights were limited entitlements to specific uses, such as grazing, timber and hunting. In contrast to these limited use rights, the second type of collective property was lands owned in common by an open group, often the inhabitants of a village or town. The entitlement was ampler than a specific use right, each “owner” having the right to use and manage the land, to appropriate its fruits and profit and to exclude non-owners. The group was open. Each and every male individual who resided in the village for a certain period of time became an owner. The third type of communal property was lands owned by a closed group, usually a small number of families and their descendants. These agrarian collectives were centuries old and numerous. They varied in name and organizational structure from region to region. In most cases, they still exist.

While these forms of collective ownership had existed for centuries, it is only in the 18th and nineteenth centuries that they became a matter of concern for the legislature. The development of a “tragic” attitude towards collective ownership, in many respects similar to Hardin’s idea of a “tragedy of the commons,” raised the question of how to regulate collective ownership. In both France and Italy, the question was whether to suppress or to “re-organize” the existing collective landownership regimes. This question fueled passion in the parties involved, i.e. the landowners and the peasantry, attracting a great deal of attention among everyone from

detailed analysis.


78 The origin of collective lands and use rights have been for centuries the object of an intense debate. Proponents of the “immemorial common origins” theory (historians of Roman law and of ancient customary law, in France the coutumes) argue that these lands are original and natural property of the community of inhabitants of the village or town. By contrast, proponents of the “feudalist” theory (scholars of feudal law) argue that they originated as rights of use over feudal land, granted, in medieval times, by a feudal lord to the local population, either as a benevolent concession or as a formal recognition of an actual use by the population dating back to remote, pre-feudal times. With the end of feudalism, these lands became public property of the village or town, and the inhabitants retained their use rights. See Vivier, supra note 85, at 42-43 (on the debate). See ROGER GRAFFIN, LES BIENS COMMUNAUX EN FRANCE 41 (1899) for France. See generally, ROMUALDO TRIFONE, FEUDI E DEMANIA (1909) for Italy.

79 See PERTI, supra note 57, at 17-83, for an analysis of the agrarian collectives in the various Italian regions.

80 This is the case of the Partecipanze of the Emilia region. See LA PARTECIPANZA DI CENTO, http://www.partecipanzacento.it/ente.html (last visited Aug. 18, 2011).
“experts” to the general public.81

The “tragic” attitude prevailed for most of the nineteenth century. It came as no surprise. In Europe, the century between the French Revolution of 1789 and the 1880s was the “Age of (Individual) Property.”82 “Whatever the grand words adorning the Revolution,” wrote Hippolyte Taine, “it was essentially a transformation of property.”83 It was the transformation of a feudal system, based on privileges and prerogatives, into a modern social and legal system based on the individual’s absolute property rights. Before the French Revolution, lands were subject to multiple claims. Property rights were split between a subject and users. The subject, usually a feudal lord, had “direct or eminent ownership,” i.e. title, while users had “utile ownership,” i.e. use rights.84 The major achievement of the Revolution was to reduce or to cancel feudal claims, instead awarding absolute property rights to the individuals who held “utile ownership”.85 Hence, in the post-revolutionary sensibility, the very idea of multiple owners came to be associated with feudalism. It was seen as backward.

By contrast, individual ownership was seen as conducive to progress and happiness. As the French jurist Germain Garnier put it, “the more earth is covered with societies of property owners, the greater the chance for happiness for the whole species.”86 A “tragic” view of collective ownership dominated among lawyers and economists. One proponent of what we could call an early “law and economics” approach87 admonished, “What

81 See JONES, supra note 86, at 124-167 (on the struggle between landless peasants and owners over collective lands and use rights in France at the time of the revolution). The crucial and heated phase of the debate that involved policymakers and law professors happened in the 1880-1890s. See GROSSI, supra note 85, at 196-230 (on the debate in the Italian Parliament). See VIVIER, supra note 85, at 281-291 (on the “expert” debate among economists, lawyers, agronomists and policymakers in France).

82 See Donald R Kelley & Bonnie G Smith, What Was Property? Legal Dimensions of the Social Question in France (1789-1848) in 128 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 200, 201 (1984). The authors argue that the period between 1789 and 1848, between the French Revolution and the revolutions of 1848 was “the age of property”. Never was the alliance between law and property more conspicuous that in this age. The lawyers were the first to define bourgeois property in the wake of the revolution and to translate this law into the positive law of the Napoleonic code of 1804.


84 See Kelley & Smith, supra note 93, at 203-04. See Cornelia Munteanu, Historical Remarks on the Legal Notion of Property, ACTA UNIVERSITATIS LUCIAN BLAGA 54, 62 (2005) (on the doctrine of “split ownership” or double domain).

85 See Kelley & Smith, supra note 93, at 203.

86 Id. at 204.

87 Pio Barsanti describing his methodological commitments talks about “us, humble
love or labor can one invest in these [collective] lands knowing that he will have no return and that the only possible return would come from overusing them at the expense of others?”

The general ideological commitment to individual property and the “tragic” tale of collective ownership were mirrored in legislation. Collective property was virtually absent from the civil codes of the “Age of Property.” In the French Code Civil (1804), collective ownership was relegated to absolute marginality—article 542 barely mentioned collective ownership. The Italian Codice Civile of 1865 omitted any mention of collective ownership. Not only was collective ownership virtually absent from the codes, but also, in both France and Italy, the legislature actively attempted to wipe out the existing forms of collective land tenure. Historians describe these legislative attempts to eradicate collective ownership as animated by a “destructive frenzy.” In France, the most important act of “destructive frenzy” was the law of June 10th 1793, which encouraged the enclosure of the commons. In Italy, in 1888, after a tortuous legislative itinerary where advocates of collective ownership fought vigorously, a law abolishing

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88 Id. at 37 (“Che amore, che cura volete voi che porti il privato a queste terre quando egli sa che a lui non viene da queste nessun vantaggio e questo gli viene tutto dall’usurfiuire più largamente che puo della proprieta collettiva?”).

89 C. civ. art. 542 (Fr.) (1804) (“Les biens communaux sont ceux à la propriété ou au produit desquels les habitants d’une ou plusieurs communes ont un droit acquis” (Common property is that to whose ownership or revenue the inhabitants or one or several communes have a vested right)).

90 This omission reflects the liberal ideology of the Risorgimento, the movement of political and ethical “resurgence” that led to Italy’s unification in 1861. Individual autonomy, i.e. freedom from any prerogative attached to status or tradition and protection from state interference, was seen as the central pillar of the political and economic order of the new country. See generally, LUCY RIALL, THE ITALIAN RISORGIMENTO. STATE, SOCIETY AND NATIONAL UNIFICATION (1994) (on the Italian Risorgimento).

91 Germanò, supra note 88, at 5353 (“smania distruggitrice”). See also GROSSI, supra note 85, at 201 (describing the “destructive frenzy” as a monolithic attitude that, without the slightest sign of sympathy, had uprooted and destroyed these constructions [collective domains] in the name of the superior model of individual property”).

92 The law allowed for the commons to be divided with the favorable vote of at least 1/3 of the inhabitants. While absentee landlords and former feudal lords were excluded from the ballot, any adult, male or female, had the right to vote. Once approved, partition was organized on a per capita basis, irrespective of age or sex, on the condition that the village had settled outstanding debts. Beneficiaries enjoyed full property rights over their parcels, but they could not sell them or transfer them in payment of debts for the years. See generally Noelle L. Plack, Agrarian Individualism, Collective Practices and the French Revolution: The Law of 10 June 1793 and the Partition of Common Land in the Department of the Gard, 35 EUROPEAN HISTORY QUART 39 (2005).
collective use rights in many provinces of central Italy was passed.93

However, by the late 1880s the attitude toward collective ownership changed. The agrarian crisis that struck most of Europe in the 1880s and 1890s raised the question of the unequal distribution of land and made the need for agrarian reform urgent.94 Also, in both France and Italy, the conjuncture of economic crisis, social change and collectivist propaganda brought into existence a rural socialist or anarchist political culture.95 This development generated alarm among moderates and conservatives.

Faced with these challenges, a broad coalition of moderate and progressive policymakers began to reassess to collective ownership. Restoring the commons had long been a priority in the agenda of the socialist left. When, at the beginning of the 1890s, Jules Guesde’s Parti Ouvrier launched a new strategy of alliance with the rural masses, the goal of improving and expanding the commons was among the party’s

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93 GROSSI, supra note 85, at 201. Grossi notes that the efforts of the supporters of collective ownership were not vain: “for the first time a crack appeared” in the “destructive frenzy” that had animated the legislator. Art 9 of the law stated that “in the presence of certain circumstances the Arbitration Commission could allow the entire parcel in question to be left to the users, in the case of the abolition of an encumbrance, in exchange for a yearly payment to the proprietor”.

94 In France, the agrarian depression of the Second Republic (1848-1851) and the phylloxera epidemic of the 1870s and 1880s triggered a cycle marked by overproduction, falling prices, strikes and mass demonstrations. Socialism began to spread. Socialists recruited peasants, many of whom had not been Radicals in the revolutionary period, into local organizations that sponsored cooperatives. For instance, in Provence, small owners embraced the party’s program of total collectivization of the land. Collectivist doctrines mirrored and reinforced the peasants’ own preexisting practice of economic cooperation, especially in the wine industry. See generally NOELLE L. PLACK, COMMON LAND, WINE AND THE FRENCH REVOLUTION 85 (2009). On the rise of socialism among the peasantry See generally TONI JUDT, SOCIALISM IN PROVENCE 1871-1914 A STUDY IN THE ORIGINS OF THE MODERN FRENCH LEFT (1979). Italy was also experiencing a dramatic agrarian crisis that badly hit the Mezzogiorno, i.e. the southern part of country. In the South, land was in the hands of few: the latifundia, large estates, usually in absentee ownership, was the dominant form of land tenure. Land was operated, with minimum investments in improvement and technology, by precarious sharecroppers and share tenants under short-term contracts with the owner. Inimical to agricultural production and explosive for social relations, this situation resulted in endemic violence and periodic insurrections. Peasant anarchism flourished. Bakunin’s short stay in Naples in the 1860s contributed to the rapid spread of his notion of “spontaneous and continual revolution” among southern peasants. The peasant uprisings of the 1870s and 1880s were repressed by the Italian army and guard units of local landowners. However, the legitimacy of the newly formed national state was becoming weaker: remote and powerless, the state started to be identified by many with the usurpations of the bourgeoisie. An effective policy response was needed. See SIDNEY TARROW, PEASANT COMMUNISM IN SOUTHER ITALY 33 (1967) and FRANK M. SNOWDEN, VIOLENCE AND THE GREAT ESTATES IN THE SOUTH OF ITALY (1986).

95 See generally JUDT, supra note 105.
priorities.\(^{96}\) Similarly, in Italy, expropriating lands left idle and assigning them to cooperatives was an important item in the minimum program approved at the 1895 Congress of the Socialist Party.\(^{97}\)

The socialists’ commitment to collective ownership was longstanding. The moderates’ interest in common ownership, however, was a product of the new European intellectual climate. To the moderates, collective ownership did not smack of socialism because it had been “rehabilitated” by the work of European historians and legal scholars.\(^{98}\)

Henry Maine’s “Ancient Law” argued that the institution of private property was not known in the ancient law, and that land was owned by extended families and groups rather than individuals.\(^{99}\) Maine’s work was extremely influential. It sparked debate in intellectual circles in Italy and France. Emile de Laveleye’s “De la propriete et de ses forms primitives” (1874) further developed and spread the idea that collective ownership had been the established mode of ownership for most of Western history.\(^{100}\)

The new cultural openness toward collective ownership was not limited to scholars. The French painter Emile Van Marcke, of the famous Ecole de Barbizon, presented a canvas titled “Common Grazing Field in Normandy” at the Paris Salon of 1875.\(^{101}\) It portrayed a stout healthy cow on a lush green common field, thereby visually portraying the new idea that the commons can be prosperous and productive.

In Italy, collective property, rehabilitated in the eyes of the intellectual and political elite, became an important item in the legislative agenda. For Italian lawyers, the 1890s were a moment of great political and intellectual energy. The idea that property law could be a tool for

\(^{96}\) VIVIER, supra note 85, at 300.


\(^{98}\) Historians debated the historical origins and forms of property. See PAOLO, supra note 85, at 8-19. Participants in the debate were jurists and historians of law who were anti-formalists, i.e. eager to challenge the dominant legal academic culture “that worked and operated […] under the postulate of individual property which it saw as the pillars of Hercules of its consideration of legal problems and as the limit beyond which such consideration would have been illegitimate.” Id. at 5. They also had a “taste for the positive “which had been expressed philosophically alternately in historicist and naturalistic terms, found concrete expression for the jurist and the sociologist in an incessant curiosity, a curiosity which, far from being dilettante, tended toward a purified scientific observation of the totality of surrounding phenomena.” Id. at 12. Animated by such taste for the positive participants in the debate engaged in erudite ground-breaking investigations and data collection. Id. at 15.

\(^{99}\) Id. at 27-52.

\(^{100}\) GROSSI, supra note 85, at 53-70.

\(^{101}\) VIVER, supra note 85, at 298.
experimental social change seemed real. Lawyers and policy makers of different political orientation vigorously backed legislative proposals for the re-organization of the existing land collectives. In March 1892, a large group of moderate/centrist MPs led by Tomaso Tittoni presented a bill on the re-organization of the collective domains in the former Papal States, eventually approved in 1894 with the support of the socialists. The Tittoni bill was a hands-off, “enabling” piece of legislation rather than an ambitious exercise in institutional design. All it did was grant legal personality to the collectives and accord them the power to draw up their regulatory statutes within a year.

However, what is unique about the Tittoni bill is the normative discourse that led to its approval. In the parliamentary debate, conservatives and socialists both agreed that collective landownership could make the autonomy that derives from land ownership available on a more widespread basis. The general sense, among supporters of the bill, was that the late 18th and early nineteenth century enclosures and the transfer of small parcels in full ownership to peasants had failed. The parcels were often too small to support a family. The new owners were released into an agricultural economy plagued by lack of capital, limited access to credit, and inadequate productive technologies. As a result, they lost their land in short time to a rising middle class that was eager to invest in land. Supporters of the bill believed that collective ownership, with its mechanisms for cooperation and coordination, would be more effective in promoting peasants’ self-sufficiency and self-empowerment.

This notion of “equality of autonomy” was new to the normative discourse of European property lawyers. On the left, the idea of “equality of autonomy” was both new and controversial. The very word “autonomy” smacked of bourgeois individualism. Deputy Matteo Imbriani of the...
Radical Party powerfully articulated the new idea. He advanced autonomy and social justice the two great ideals that move radicals. Imbriani appeal to the revolutionary aspirations of the socialists and challenged those who dismissed autonomy as a “bourgeois” ideal. He started his discussion of autonomy by reminding fellow deputies that autonomy is associated with a fundamental sense of human dignity and is the motor of social change.106 “Under feudalism,” he asked, “wasn’t this autonomy that moved the minds, that told the maid, dragged to the lord’s bed, raise, take out the weapon you are hiding in your braids and act?”107 In contemporary parlance, Imbriani’s notion of autonomy is “effective agency,” i.e. the actual material means to pursue one’s life plans. “Our theory,” he declared, “holds that all citizens who are worthy of this name because of their work, their genius and their virtue, should own a parcel of land that makes them independent and able to affirm themselves in the struggle of life, for the benefit of all.”108

Imbriani convinced the socialists with his argument for autonomy as the availability of resources that enable individuals to carry out their projects. When the socialists signed the Tittoni bill, it signaled that they had abandoned their initial discomfort with the individualistic flavor of calls for greater “equality of autonomy.” Then the socialists pushed the idea of “equality of autonomy” further. For socialist MP Enrico Ferri, “equality of autonomy” required more than giving legal personality and self-regulatory power to existing collectives. It required making effective agency available to all, regardless of gender or age.

Ferri argued that collectives would have to expand membership and management to make the resources that enable individuals to be autonomous available on a more widespread basis. In most collectives, access was “closed,” i.e. limited to the descendants of the original members or conditioned upon certain property requirements, such as ownership of a certain number of head of cattle. Membership also was limited to male residents in most cases. Female-headed peasant households were a relatively numerous and particularly disadvantaged segment of the rural poor, but they could not be owners under the Tittoni bill. Accordingly, the socialists proposed two “egalitarian” amendments to the Tittoni bill. The first amendment opened up membership to all residents, male and female, not younger than eighteen nor older than sixty. The second allowed women

106 See Id. at 37 for a reproduction of Imbriani’s speech, where he describes autonomy as “human dignity, human sentiments, human rights”.
107 Id.
108 Id. at 46.
to run for elective offices in the governing bodies. Neither amendment made it into the final legislative text.

While the left had to work through its skepticism about “autonomy,” conservatives had to work through their unease with calls for equality. Count Alberto Cencelli Perti noted in his 1892 book on “Collective Property in Italy” that conservatives had long been committed to political equality but considered social and economic inequality natural and necessary. The agrarian crisis and the peasant uprisings made conservatives realize that “since we proclaimed the principle of political equality, we should have expected that, sooner or later, the people would demand equality of material conditions.” Cencelli and other moderate conservatives came to see greater economic equality as crucial to the stability of the existing social order. Inequality, Cencelli noted, quoting Aristotle, is the source of all revolutions. In his book, Cencelli proposed to re-organize existing collectives along egalitarian lines. Rules regulating entry, i.e. access to the collective lands, were the backbone of Cencelli’s proposal. Cencelli differentiated between grazing lands and agricultural lands. While access to the former would be open to all, agricultural lands would be divided in lots and assigned to individual residents or households, on the basis of need, for a term of twenty years. For Cencelli, the foremost advantage of his proposal was that it would make autonomy accessible to the rural proletariat. It would give the landless access to a parcel of which the assignee can consider herself “owner,” about which she can make informed management and production decisions, and out of which she can work more profitably than as a salaried worker.

Conservatives and socialists advocated greater equality of autonomy for opposite reasons. The former deemed it necessary to stifle peasant unrest and to preserve the existing social and economic order. The latter saw it as the closest they could get to an ideal society where free land would be re-established and a voluntary system of cooperation would establish itself spontaneously. However, this debate is unique in several respects.

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109 FERRI, supra note 116, at 28-32.
110 CENCELLI PERTI, supra note 57, at 89.
111 Id.
112 Id. at 88.
113 Id. at 94-101.
114 Id. at 97-98.
115 CENCELLI PERTI, supra note 57, at 100.
116 Id. at 100 (“the moral effects [of his proposed scheme of collective landownership] are significant. The proletarian, who occasionally may become violent and even worse, is turned into a conservative citizen […] [collective property is] a safety valve against the spread of subversive ideas”).
117 See generally ACHILLE LORIA, THE ECONOMIC FOUNDATIONS OF SOCIETY (trans.
First, this debate had the effect of re-orienting, for a brief moment, the conversation on property law toward the new goal of expanding access to the autonomy afforded by property rights rather. This new goal temporarily displaced the old goal of than maximizing the autonomy of those who already own, i.e. the better off. Second, participants in the debate shared the pragmatic belief that property law could be changed and improved to advance new goals. Earlier calls for equality had often rejected the very institution of property as unjust. Marx and Proudhon obviously come to mind. But Ferri, Cencelli, and Imbriani believed in property. They believed in the possibility of reshaping a system of property rules that, for centuries, had been centered on private property. They defied the conventional view of private property as natural and unshakable. What they had in mind was a hybrid system where private property and common property would complement each other.

B. A NEW APPROACH TO PROPERTY: “ONE PROPERTY, MANY PROPERTIES”

Not only did the debate on collective property re-orient the normative discourse of property lawyers around a new idea of “equality of autonomy,” it also produced a new understanding of the concept of property. The debate on the Tittoni bill was paralleled by a more technical debate among law professors. This debate started in the mid-1890s and carried on until the 1950s. A handful of French and Italian law professors sharing a taste for methodological innovation took up the task of translating the commitment to “equality of autonomy” into actual property law. They developed a disaggregated notion of property, described as “one property, many properties.” This disaggregation resembled the American image of the “bundle of rights” but differed in significant respects.

Greater “equality of autonomy” required correcting some of the fundamental inequalities that arose when private actors with full property

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118 The slogan was “invented” later, in the 1930s by Filippo Vassalli who translated a passage from Josserand (“property is no longer uniform, rather it is multiform, infinitely diverse and varied; there is no longer one property but many properties with different specialized regimes”, Louis Josserand, *Configuration du droit de propriete dans l’ordre juridique noveau*, in MELANGES SUGIYAMA, (1940) at 101). See Filippo Vassalli, *Per una Definizione Legislativa del Diritto di Proprieta*, in LA CONCEZIONE FASCISTA DELLA PROPRIETA PRIVATA 103 (1939). Pugliatti uses the slogan ‘one property, many properties” as the title for chapter 5 of his major work “La Proprieta’ nel Nuovo Diritto”. SALVATORE PUGLIATTI, *LA PROPRIETA’ NEL NUOVO DIRITTO* 145-310 (1954).

119 For an analysis of the differences between the Realist “bundle of rights” concept in the US and the similar efforts at disaggregation by European jurists in the same years see that Anna di Robilant, *The European Bundle of Rights*, (on file with author).
rights interacted in the market. Pursuing greater equality of autonomy through private law required modifying the concepts and rules that structured these interactions. The innovators modified the concept of property to allow for regulation and moderate wealth redistribution. They realized that if property is the enforcement of the individual owner’s monolithic package of full entitlements—the combined rights to use, to gain income, and to transfer—then the propertied individual enjoys the greatest independence, privacy and personal sovereignty allowable in a social order. The government may not invade the owner’s package of entitlements absent some tremendously weighty social goal. On the other hand, if property is a more flexible and looser set of entitlements, some of which may be less than full and distributed among different individuals, then opportunities for government regulatory and redistributive intervention open up.

To be sure, there is no necessary connection between disaggregation and redistribution. Property entitlements are often disaggregated and recombined to maximize the value of the property for the owner. But to lawyers committed to equality of autonomy, it was the regulatory and redistributive potential of a disaggregated concept of property that seemed attractive. Progressive lawyers sought a “plastic” concept of property that nonetheless would protect the owner’s core entitlements. Rights that are crucial for autonomy, such as control rights, would remain robust while others, such as the right to exclude or the right to transfer, would be open to limitation. Any limitation by regulatory or redistributive policies would have to find justification in the general welfare. The debate over collective ownership became the occasion to craft this new concept of property.

How did European jurists go about disaggregating the concept of property? In the United States, we are familiar with Hohfeld’s disaggregation of rights in a table of jural opposites and correlatives and with subsequent efforts to list the entitlements peculiar to property. How

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120 See Amr Shalakany, Between Identity and Redistribution. Sanhuri, Genealogy and the Will to Islamize, in 8 ISLAMIC LAW & SOCIETY 201, 214-17 (2001) (on the politics of the “Juristes Inquiets” and their commitment to a moderately redistributive agenda).

121 See infra at 137. See Bell & Parchomovsky, supra note 26, for a contemporary proposal to disaggregate property entitlements to maximize property value.

122 See Enrico Finzi, Le Moderne Trasformazioni del Diritto di Proprieta’, ARCHIVIO GIURIDICO 52, 72 (1923) (describing this need for flexibility: “(the new property), a magnificent conceptual tool crafter with such technical ability as to make capable of promoting the most various human enterprises and of adapting to the changing political, economic and philosophical needs it is without any doubt the element that allows the development of our modern economy; by protecting it and defending it we secure the most perfect tool developed over the centuries to promote individual enterprise and coordinate it with the common good”).

different is the Europeans’ disaggregation and what is interesting about it?

Louis Josserand in France and Salvatore Pugliatti in Italy were the craftsmen of the new property. Identifying and disaggregating the sticks that make up the bundle of property was only the preliminary step in their effort. Giving a systematic account of the “correlatives” of jural relations, i.e. the fact that one cannot speak of a right without at the same time implying a duty, was only part of their project. In these respects, Hohfeld remains unique. The European innovation was to disaggregate “property” into many “properties.” They showed that while “law in the books” described property as one undifferentiated concept, “law in action” revealed the existence of multiple properties, reflecting the characteristics of and the values implicated by different resources. In Pugliatti’s words, the new property resembled a tree. The “core” minimalist concept of property formed the trunk, and the many proprietary regimes formed the branches.124

Pugliatti’s first step was to identify and disaggregate the owner’s right into different entitlements. While never providing a full list, he mentioned the rights to exclude, to use, to appropriate the income generated by the property, and to transfer.125 He was evasive on the question of the list of entitlements because he was more interested in identifying the “core” stick, i.e. the stick that is essential for the bundle to be characterized as “property.” Pugliatti found this essential “core” in the owner’s “general

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124 PUGLIATTI, supra note 131, at 149, 281. Pugliatti uses, alternatively, the image of the tree and the branches or an “inner core” (nucleo interno”). Pugliatti rejects what we would call today the full disintegration of property pursued by Filippo Vassalli. Vassalli dissolved property into different property regimes regulating different resources. Vassalli, supra note 131, at 103-04. Pugliatti was committed to preserving a “core” concept of property, “the trunk” of the tree, because it served an important analytical function, clarifying the distinction between property and the other absolute rights (i.e. rights in rem) and between absolute rights and relative rights (rights in personam).

125 PUGLIATTI, supra note 131. Pugliatti never explicitly discusses the full list of entitlements. From his discussions it seems that Pugliatti’s list includes not only the right to exclude, to use and transfer, but also the right to retain the income generated by the property as a separate stick. Id. at 159. In particular he mentions the right to retain the products of the land, “frutti naturali” as well as the rents paid by users or leaseholders, “frutti civili”. Id. 262-64. This emphasis on income rights is a corollary of Pugliatti’s special interest in “productive properties”, properties the owner use productively, rather than enjoys statically.
control” over her property, i.e. the owner’s right to use and to exclude.\textsuperscript{126} The combination of these two sticks is the trunk of the property tree and the common denominator that unifies the many possible “properties.”\textsuperscript{127}

Identifying the core was important for two reasons. First it made practically meaningful the idea that property is an “absolute right” (i.e. right in rem) good against the rest of the world by clarifying what, precisely, the entitlements pertaining to the thing every owner has “against the rest of world” are. If there is no “core” notion of property, others, “the rest of the world”, would have a difficult time respecting the owner’s property rights. Second, it gave content to the autonomy that was to be made available to a greater number through “equality of autonomy.” Core entitlements are the entitlements that are crucial for the owner to be autonomous. Hence, it deserves maximum legal protection. Limited is only appropriate for highly weighty social goals. For Pugliatti, the owner’s “general control” was crucial to securing her ability to make decisions concerning the productive use of her property. That ability allowed a sense of security and responsibility to accompany ownership.

Disaggregating the owner’s right into a set of distinct entitlements was only preliminary to the second step, i.e. disaggregating “property” into multiple “properties.” The entitlements could be combined differently, giving rise to different “properties.” Full individual ownership, where one owner had all the sticks, was paradigmatic but simplistic. In real life, there were many other properties, where the owner’s bundle was less than the full bundle and the sticks were split between two or more individuals or limited.

At times, the entitlements might be combined according to the owner’s purposes. The full bundle might be disaggregated and reconfigured to maximize the value of the property for the owner. For example, an owner may want to transfer a parcel of agricultural land for twenty or more years to an individual who cultivates and improves it. Lawyers had long called this arrangement enfiteusis,\textsuperscript{128} a “right in rem” that is more limited than the supreme absolute right of property.\textsuperscript{129} Pugliatti described enfiteusis as one

\textsuperscript{126} Id. at 159 (property is general control […] through the concept of property law protects the owner’s interest in the full use of the thing […] from the generality and the extension of the protection accorded to the owner as well as from the nature of this protection [i.e. against the world, erga omnes] we deduce the exclusivity that characterizes property rights”).

\textsuperscript{127} Id. at 146-49 (“it has been noted that his multiplicity of aspects does not compromise the conceptual unity of property”). “[T]he inner core is the owner’s interest in the full use of the thing to the exclusion of anyone else”. Id. at 302.

\textsuperscript{128} See Jose Pruig Brutau, Realism in Comparative Law, 3 AM. J. OF COMP. L. 42, 48 n.18 (1954) (on the functional equivalents of enfiteusis in the common law).

\textsuperscript{129} See Sief Van Erp, A Numerus Quasi-Clausus of property Rights as a Constitutive Element of a Future European Property Law? available at http://www.ejcl.org/72/art72-
of many properties because it was qualitatively similar to “property.” The user had “general control” and her bundle comprised both the right to use and the right to exclude. More precisely, this was a property where the sticks were split between an owner who had “formal property” and another who had “substantive property.” The “formal” owner had title to the property, the right to transfer the title and, in most cases, the right to retain part of the income generated by the property in the form of an annual rent. The “substantive” owner had the full right to use, the right to exclude, a duty to pay an annual rent, a duty to improve the property and, in most cases, the power to transfer their “substantive property” at death.

At other times, the entitlements might be combined or limited according to the “quality” or “quantity” of the owner, thereby generating other “properties.” As to the quality of the owner, property might be owned by a private individual or by a public entity. In the example of public property, the “quality” of the owner, a governmental entity that holds the property in trust for the public, would mandate a different regulatory regime that likely would entail inalienability and immunity from acquisition by prescription. As to the quantity of the owner, property might be owned by one individual or by many individuals. In the example of co-owners, they would be bound by a “common interest” and hence form a “union.” Each co-owner’s “general control” would reflect, and be limited by, this common interest. Different regulatory regimes were possible. Simple co-ownership would be a temporary “union” where co-owners would use and enjoy the property in common but either might demand the division of the property at any time. This regime could govern co-heirs subsequent to a testamentary succession. Actual collective ownership would be a more stable “union” where co-owners would come together for a common economic purpose,

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2.pdf, for a recent formulation of the typical civilian view. Van Erp writes, “Ownership - the most complete absolute right, in respect to both content and duration, that a subject can have in regard to an object - can only exist in the form a non-fragmented unitary right. All other absolute rights are ‘limited’ real rights. […]According to the numerus clausus doctrine the number of absolute rights is limited, their content is restricted and it is laid down in mandatory rules how absolute rights can be created, transferred and extinguished.” Id. at 4. Then he writes, “The Dutch Civil Code recognises the following absolute rights: ownership, servitudes, emphyteusis, superficies, right of apartment (condominium), pledge and mortgage. Generally speaking, these rights can also be found in other civil law systems. In the civil law, ownership is the most absolute right and it cannot be fragmented: only one person can be the owner, no distinction between legal and economic ownership is accepted” Id. at 7.

130 PUGLIATTI, supra note 131, at 233-34.

131 Id. at 151-56. “[I]t is undeniable that the things owned by a public entity are not subject to the principle of private property but they are subject to a public law regime; but, whatever the characteristics peculiar to this regime there is no doubt that the public entity who owns has “general control” over the thing.” Id. at 152.
establishing rules for management and self-governance and placing limits on the ability to ask for division.\textsuperscript{132}

Still at other times, the bundle might be structured into other “properties” according to the “quality” of the resource owned. Josserand and Pugliatti argued that different resources involve different values and hence call for differently structured bundles of entitlements. Resources such as family assets, agricultural land, an industrial plant, or affordable housing all had different characteristics. Varied characterization as property, industrial property, or agricultural property formed different “properties,” i.e. different branches of the property tree. Here is where they were brilliantly original. They individuated the entire domain of property such that there were multiple subdomains consisting of separate “properties.”

Property law had long treated certain resources as “special.” For example, water law was a distinct subfield of Roman property law with rules reflecting the “fugitive” nature of water. After Josserand and Pugliatti, starting in the 1950s, economists argued that the special characteristics of certain goods, i.e. their rivalrousness and excludability, were important in determining the optimal bundle of property rights. But Josserand and Pugliatti made this resource-specific analytical lens their entry point to property analysis. Further, they focused their analysis of resources on how resources relates to plural and conflicting values. At a time when doctrinal analysis dominated courts’ discussions and academic debates, they championed a robust and pluralistic normative analysis.

Land, for example, had hardly ever been analyzed from a resource-specific perspective. Land was synonymous with real property and little differentiation was made.\textsuperscript{133} Pugliatti approached different types of land as different resources. He was particularly concerned with agricultural land because it was a “productive” resource. In Pugliatti’s analysis, agricultural land implicates two social interests, i.e. productive efficiency aimed at

\textsuperscript{132} Id. at 165-77. Josserand, supra note 131, at 99. Both Pugliatti and Josserand describe actual collective ownership as “Germanic ownership”. They were inspired by the collective property regimes described in the work of experts in ancient Germanic law. “Germanic ownership” described a situation where land is held, used and managed in common by a group of owners. What distinguishes “Germanic ownership” from simple co-ownership is the organic link between co-owners, who come together to pursue a common social or economic goal.

\textsuperscript{133} Josserand, supra note 131, at 102-03 (“[E]ven if we limit our investigation to real property, we find that, within this genre there are multiple species. Agricultural land is treated differently than urban real estate. In France a rural code is being drafted that contains all the rules regulating agricultural life and in most countries, most notably in Italy, an agrarian law is developing; an prominent legal innovation that is attracting the attention of lawmakers and law professors, in universities as well as in the official palaces. And other special regimes have developed within real property, family property has its own regime and so does low income housing.”).
maximizing national economic growth and more equal access to the means of production. Pugliatti was interested in disaggregating and recombining the bundle of entitlements pertaining to agricultural land to achieve the twin goals of productivity and egalitarian redistribution.

Pugliatti’s ideas influenced the legislature. The Italian “provisional legislative decree” n. 89 of 1946 is an example of how this new resource-specific analysis of property entitlements had practical influence. The new approach provided the legislature with an analytical framework that helped to re-shape the bundle of rights pertaining to agricultural land for efficiency and redistributive purposes. The decree was supported by the Christian

134 PUGLIATTI, supra note 131, at 263-64 (“Ownership of land as a productive resource involves the individual’s entrepreneurship and his responsibility and this phenomenon goes beyond the boundaries of the individual’s sphere and concerns society […] when land is at stake, the economic interest of the individual fuses with the interest of society and it generates ethical and social impulses that end up shaping legal norms.”). “Making property available to all is a social goal; the generalization and expansion of access to property, not as an abstract legal concept but as a concrete economic reality is a crucial step toward the realization of the principle of the equal social dignity of all”. Id. at 277.

135 See Id. at 267-70. The decree n.89 was at the center of a political struggle between the Christian Democrats and the Communist Party, a struggle that happened against the background of the debate on the 1947 republican constitution. Through the decree, both the Christian Democrats and the communists wanted to make a larger point about what type of protection property should be afforded in the new constitution. To make things more difficult, this happened at a moment of violent social unrest in the south, in the Calabria region. An earlier version of the decree had been passed with the support of the communist minister of agriculture, Fausto Gullo. It provided that cooperatives of landless peasants or labor unions could apply to obtain in concession lands left idle or not productively cultivated. The decision on the concession would be made by a commission presided by the prefect and including a representative of landowners and of the cooperatives. In the months before the decree, the military section of the communist party had organized the occupation of four thousand hectares land in the Calabria region. The decree was seen by the moderate part of the communist party as a way to enlist the rural proletariat, traditionally more inclined to anarchist ideas, and to channel their action into the sphere of legality. It was also seen as a way to bring about the “revolution” that had never happened. The Risorgimento movement that lead to the unification of the country was seen as a process that had been interrupted by the Fascist regime, a missed opportunity for a more radical social revolution that never happened. Now, after the fall of the Fascist regime, it was the moment to complete the “interrupted” revolutionary process. It was also seen as a way to signal that the protection of private property in the new constitution should be limited, and that property should be qualified with some reference to a social function in the sense of a more equal distribution. The second version, the decree n. 89 of 1946 discussed by Pugliatti, was supported by the Christian Democratic Minister of Agriculture Segni. The Christian Democrats were also interested in enlisting the rural landless peasantry. They organized “white cooperatives”, i.e. catholic cooperatives that competed with red cooperatives, the communists cooperatives. The Christian Democrats also wanted to make a point about property in the new constitution: protection of private property should be limited and qualified by the general interest. See generally EMANUELE BERNARDI, LA RIFORMA AGRARIA IN ITALIA E GLI STATI UNITI (2006), chapter II.
Democratic minister for agriculture as a response to the peasants’ demand for land in the South. According to the decree, cooperatives of agricultural workers could apply to obtain in “concession” from the local government privately owned parcels of land left idle by their owners or not productively cultivated. In other words, failure to cultivate resulted in the owner losing the right to use, which was transferred to a cooperative of landless workers. The owner retained formal title, the right to transfer the formal title, and part of the income rights, i.e. the right to receive an annual rent. The right to use was split between the cooperative and the local government. The cooperative had the right to cultivate the land, a duty to improve the production, and the right to appropriate the product of the land. The local government also had the right to supervise the cooperative’s use and management.

Legislative decree n. 89 was a short-lived experiment in land collectivization. It was a provisional legislative decree subject to yearly renewal. It was dropped in 1950 when the new republican constitution of 1948 and a legislative proposal for land reform eased the social tensions in the South.136

PART III

A. RE-ORIENTING THE COMMONS DEBATE: A RESOURCE-SPECIFIC ANALYSIS OF PROPERTY ENTITLEMENTS

This section turns to contemporary American property law and shows how lost ideas recuperated from the nineteenth century European debate on collective ownership are key for expanding and redirecting the commons debate.

1. Equality of Autonomy

In nineteenth century Europe, the parliamentary debate on the Tittoni bill that reorganized agrarian collectives set the stage for a new set of ideas about how property fosters individual autonomy. Today, we need a similar normative reorientation. Our conversation about the potential of common ownership should be expanded to include a similar notion of “equality of autonomy.” This notion of equality of autonomy should build upon insights from the European late nineteenth century debate on common ownership as well as recent debates in political philosophy. It should

support equitable access to the means for autonomy, defined as the relative absence of restraints and the presence of resources enabling individuals to carry out their critically appraised desires.

The notion of “equality of autonomy” I propose focuses on the means for autonomy rather than on the condition of autonomy. Proponents of egalitarian liberalism have long discussed the question: “Equality of What?” Some have argued for equality of condition. The argument is that one of the fundamental requirements of justice is that social and political institutions be so arranged that people’s condition is as equal as possible. Individuals should be made equal in “subjective happiness”, or “welfare” or the “good life”. However, as many have noted, equality of condition fails as an expression of egalitarian concerns for two reasons. First, it leaves little room for individual responsibility. It requires that we compensate people for having “expensive tastes”. It fails to acknowledge that individuals should take responsibility for their overall life ambitions and discrete preferences and their social costs. Not only does equality of condition obscure individual’s responsibility for their ambitions and preferences, it also minimizes the reward for individual effort. Second, critics have noted, equality of condition fails to recognize “expensive needs”, i.e. some people may not be able to be made equal in any metric of outcome. People who are severely disabled or have expensive medical requirements may simply not be made equal.

The concept of autonomy I embrace is multi-dimensional. It includes negative freedom, positive freedom and “authentic”, relational self-determination. In their discussion of common ownership, Dagan & Heller have focused on the need to protect negative freedom, i.e. freedom to exit. While agreeing that the question of exit is a central one, I place emphasis on the positive and relational dimensions of autonomy dimensions of autonomy.

In their debates, Ferri, Imbriani and Cencelli envisioned a positive or substantive autonomy. They realized that equal access to the possibility of autonomy requires equal access to land. They also realized that positive action is needed to redress the inequalities that result from private property in a market economy. The positive action they had in mind was legislation that would reinvigorate a long neglected private law tool—collective

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139 See literature cited in note 37. See also JOHN E. ROEMER, EQUALITY OF OPPORTUNITY (1998).

ownership. Today, common ownership remains an important tool for expanding access to resources that enable individual autonomy and human flourishing.

Take housing. Distressed and underfunded, the public housing system often fails to deliver decent homes, a safe environment and neighborhood quality. Forms of common ownership such as land trusts and LECs, by limiting equity and promoting self-government, are effective in securing long term, good quality, affordable housing. They are not a substitute for traditional public housing but a crucial complement.

Take land or water. Standard land use regulatory mechanisms, such as zoning, have limited effectiveness in preserving agricultural, open space and other ecologically sensitive lands in sufficiently large quantities. Mechanisms of private land use and open space planning based on common ownership, such as land conservation trusts or water trusts, may be an important complement to standard land use regulation.

Not only does common ownership have the potential to equalize positive autonomy, but also it can foster an autonomy that is thicker because it is relational. Relational autonomy is an idea that was largely foreign to the world of European late nineteenth century policymakers but has gained prominence in contemporary debates. In recent years, some political philosophers arguing within liberalism have rejected the traditional hyper-individualism of liberal autonomy. They argue that traditional liberal autonomy assumes authentic choice happens in an inner citadel of higher reflection and ignores the importance of interdependence and mutual support. These philosophers have responded by broadening the notion of autonomy to include its social or relational preconditions. They suggest that authentic choice can only occur in social conditions that foster certain types of human relationships. Authentic autonomy requires critical reflection on one’s own choices, which is more likely to happen in a social and discursive context. Some individuals require the context of answering for their actions. Others require self-respect and self-trust, which emerge within relations of mutual recognition.

Common ownership schemes can provide this web of relations. Part of their attractiveness, for those who choose them, is co-owner immersion in a self-governance structure that facilitates human relations conducive to

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142 JOHN CHRISTMAN, supra note 46, at 164-186; Paul Benson, Autonomy and Self-Worth, 91 JOURNAL OF PHILOSOPHY 650 (1994); Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J.L. & FEMINISM 7 (1989); MARINA OSHANA, PERSONAL AUTONOMY IN SOCIETY (2006); Anderson & Honneth, supra note 45, at 130-137.

143 Jennifer Nedelsky, supra note 137.

144 Benson, supra note 137; Jennifer Nedelsky, supra note 137.

145 Anderson & Honneth, supra note 45.
authentic choice. For example, there is vast support in the literature for the proposition that members of affordable housing cooperatives value involvement in the community and in management for the sense of self-control it affords. Notwithstanding, common ownership may not be for everyone, and the particular relations of interdependence it involves may not be necessary for authentic choice.

The notion of “equality of autonomy” I propose is grounded in value pluralism.\textsuperscript{146} It suggests that common ownership regimes should promote multiple, equally fundamental, dimensions of autonomy, i.e. negative freedom, equality in access to basic material resources, relational self-determination and responsibility. It also recognizes that these dimensions of autonomy are incommensurable and sometimes conflict with each other.

2. “One Property, Many Properties”

Recognizing that common ownership regimes should promote multiple dimensions of autonomy and that some of these may be in conflict with each other leaves us with the problem of making choices. It leaves us with the problem of making difficult decisions, such as the decisions involved in the design of affordable housing cooperatives discussed in part I, in a non-arbitrary, though contestable, way.\textsuperscript{147} A resource specific approach inspired by the Europeans’ “one property, many properties” lens helps us make these decisions. It is a valuable tool for designing common ownership regimes that are effective in fostering “equality of autonomy.”

Josserand and Pugliatti made resources the entry point to property analysis. They viewed agricultural land, social housing, and industrial plants as different “properties.” They grounded their commitment to equality of autonomy in these different resources. They emphasized the need for a robust discussion of the values and interests implicated by different resources as well as of their social meaning. They argued that each of the different “properties” consisted of a core of entitlements giving the owner “general control” and a set of other entitlements including the right to be immune from loss, the right to transfer and to retain the income generated by the property. Core control entitlements are necessary for the owner to be autonomous. Hence, core entitlements deserve ample protection. Other entitlements may be reshaped, limited or parceled out to promote both equal access and social interests implicated by specific resources. Today, the design of common

\textsuperscript{146} On the question of value pluralism in property theory see Gregory S. Alexander, \textit{Pluralism and Property} (on file with author).

\textsuperscript{147} \textit{Id.}, at 27.
ownership regimes requires a similar approach. It involves translating the commitment to equality of autonomy into bundles of entitlements that are resource-specific.

While inspired by the Europeans’ “one property, many properties” lens, the resource-specific design I propose also builds on an emerging “contextualism” in American property law. Eric Freyfogle’s work on natural resources shows that property law has long been a matter of context, relativity and accommodation. More than twenty years ago, Margaret Radin had been the first to recast certain aspects of existing property doctrine in light of the relationship between types of property and personhood. And recent developments in property theory suggest that a pluralistic and contextualist approach, similar to the one proposed by Josserand and Pugliatti, is gaining new prominence. In his recent book, Hanoch Dagan conceptualizes property as a set of “property institutions” bearing a family resemblance but taking on different forms in different “social settings.” Resources, and their “thingness”, are another axis of this contextualism. One which has remained relatively unexplored.

A resource specific lens has long been applied to water. It has made water law one of the most dynamic and advanced subfields of property law. U.S. courts deciding cases involving water have interrogated the

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148 Eric T. Freyfogle, supra note 2.

149 See generally Margaret Jane Radin, Property and Personhood, 34 Stanford Law Rev 957 (1981-1982) (“The premise underlying the personhood perspective is that to achieve proper self-development-to be a person-an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty. In addition to its power to explain certain aspects of existing schemes of property entitlement, the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law”); see also Margaret Jane Radin, Reinterpreting Property (1993); Hanoch Dagan, Reimagining Takings Law, in Property and Community 39, 49 (Gregory Alexander & Eduardo Penalver eds., 2010) (“The appropriate level of constitutional protection should also depend on the fact that “society regards different resources such as land, chattels, copyright and patents as variously constitutive of their possessor’s identity[ . . . ]Rather than a uniform bulwark of exclusion or a formless bundle of rights, I believe that property should be construed as it actually is in law and life: a set of institutions, each constituted by a particular configuration of rights. More precisely: the meaning of property, the content of an owner’s entitlements, varies according to the categories of social settings in which it is situated, and according to the categories of resources subject to property rights.”).

150 Hanoch Dagan, Property. Values and Institutions (2011); Freyfogle, supra note 19.

151 Freyfogle, supra note 19, at 1530; Jospeh L. Sax, Why I Teach Water Law, 18 U.
special nature of water. Why is water different? What is physically unique about it? What are the social values we attach to water? How do public and private interest relate with respect to water? Courts have periodically reconfigured the bundle of entitlements pertaining to water to reflect changing answers to these questions. These reconfigurations mirror the evolution of the social meaning of water and its associated values.

The early common law’s “natural flow” rule prohibited any interference with the force or flow of the stream. This rule was adopted in an America where water was abundant. The need for water was low and relatively stable. The natural flow rule was also consistent with the social meaning water had in early America. Water was seen as a force of nature within the grand American wilderness. This social meaning of water was reflected in a culture that celebrated the wilderness heritage of America from poetry to painting. It was also expressed in the existing legal materials. In Merrit v. Parker, the court observed that “aqua currit et debet currere”—water flows in its natural channel and ought to be permitted to run there. Chancellor Kent in his Commentaries similarly stated that the owner of land on the banks of a river had no property in the water itself “but a simple use of it while it passed along [because] . . . [a]qua currit et debet currere is the language of the law.” Water was seen as an element of nature that served domestic purposes and husbandry. In Evans v. Merriweather, the court privileged “natural uses,” such as the quenching of thirst, household purposes and water for cattle, over “artificial uses,” such as irrigating or propelling machinery.

By the late nineteenth century, the values implicated by water and its social meaning had changed dramatically. With the building of the railroads, the irrigation of the West, the belching steel mills and the growth of great cities, water came to be seen as a means for development. Courts made arguments about the conflict between the older meaning of water as an element of nature and the new developmental value of water. They

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152 Jospeh L. Sax, Why I Teach, supra note 143, at 274.
155 Id.
156 Evans v. Merriweather 3 Scam. 492 Ill 492 (III.) 1842 WL 3800 (III.)
157 HORWITZ, supra note 145.
associated water with images of America on the march, with an animating sense of progress. They reshuffled the owner’s use rights accordingly.\footnote{Carol M. Rose, \textit{Energy and Efficiency in the Realignment of Common Law Water Rights}, 19 J. LEG. STUD. 261 (1990).} The earlier natural flow rule was replaced with a reasonableness rule.\footnote{Cary v. Daniels, 8 Metcalf 466, 476 (1844) (“It is therefore held, that each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land, on the same stream, above and below. This last limitation of the right must be taken with one qualification, growing out of the nature of the case. The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land.”).}

In Tennessee Coal and Iron Co. v. Hamilton, an 1893 Alabama case, Chief Justice Stone applied the new reasonableness standard and discussed at length the changing social perception of water with its new value.\footnote{Tennessee Coal, Iron & R. Company v. Hamilton, 100 Ala. 252 (1893).} The plaintiff had brought an action against the Tennessee Coal Company to recover damages suffered from the defendant’s pollution of a stream of water caused by the washing of iron ore. The court found in favor of the plaintiff but noted that the old maxim \textit{aqua currit et debet currere} in “these modern times” has been relaxed. In an earlier case, Sanderson v. Pennsylvania Coal Co. case,\footnote{Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 144 (1886) (“It has been stated that 30,000,000 of tons of anthracite and 70,000,000 of bituminous coal are annually produced in Pennsylvania. It is therefore a question of vast importance, and cannot, on that account, be too carefully considered; for, if damages may from time to time be recovered, either in the present form or as for a nuisance, punitive sums may be resorted to prevent repetition, or to compel the abatement of the nuisance. Indeed, if the right to damages in such cases is admitted, equity may, and under the decisions of this court undoubtedly would, at the suit of any riparian owner, take jurisdiction, and, upon the ground of a continuous and irreparable injury, enjoin the operation of the mine altogether. The plaintiff’s grievance is for a mere personal inconvenience; and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, serves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.”).} The court had argued that “to encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the
necessities of a great community.” Chief Justice Stone did not go as far as this earlier case, but he expressed his agreement with its general thrust. Stone argued that “owing to the wants, if not the necessities of the present age, of agriculture, of manufactures, of commerce, of invention, of the arts and sciences, some changes to the natural flow of water must be tolerated.” The temporary detention of water for manufacturing purposes followed by its release in increased volume, Stone explained, is to be tolerated as a necessary consequence of its utilization as a propelling force. At the same time, he continued that we must not shut our eyes to the inevitable tendency of industrial uses to detract somewhat from the normal purity of water. He concluded that modifications of individual rights must be submitted for the greater good of the public to be promoted.

By the 1980s the social meaning of water and the values associated with water had changed once again. As Joseph Sax noted, images of the American wilderness became as powerful as the earlier idealization of America on the march. Water was now seen as implicating values of stability, continuity with our historical past, and preservation of natural systems. Our idea of what water is good for had changed. Non-exclusive, instream and recreational uses were now seen as valuable. Once again, courts reshuffled owner’s use rights. A 1974 Idaho case captures this further shift in the social meaning of water. The court found that the Department of Parks could appropriate the waters of a canyon in trust for the people of the state to preserve aesthetic values and recreational opportunities. Discussing the meaning of “beneficial use,” Chief Justice Shepard noted that “the use of water for providing recreational and aesthetic pleasure represents an emerging recognition in this and other states of social values and benefits from the use of water.”

Nine years later, in the path-breaking Mono Lake case, Justice Broussard solidified the new social meaning of water. The court expanded the scope of the public trust doctrine beyond the confines of navigable waters and transformed it into a general principle of water law. It applied the public trust doctrine to the diversion of water from a river for off-stream use. The court argued that the objective of the public trust doctrine had evolved with the changing public perception of the values and uses of waterways. Hence, the court suggested, the traditional triad of uses,

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164 Id., 165 Id.
166 Joseph L. Sax, Some Thoughts, supra note 150, 489.
168 Id.
i.e. navigation, commerce and fishing, does not limit the public interest in the trust res. Rather, the public trust doctrine allows for the protection of new recreational and ecologic values, the scenic views of the lake, the purity of the air and the use of the lake for nesting and feeding by birds.\textsuperscript{170}

The resource-specific approach has made water the most thoroughly advanced and influential form of property. First, it has placed new emphasis on the “thingness” of property.\textsuperscript{171} The general acceptance of the Realist and post-Realist image of property as relations among individuals concerning a thing has emphasized the relational dimension of property, downplaying the importance and unique characteristics of the “thing” itself. It is with regard to specific resources that the plural and incommensurable values implicated by property gain immediate practical relevance.\textsuperscript{172} And it is with regard to specific resources that the type of social relations property entitlements shape become real, whether exploitative or liberating.\textsuperscript{173} The characteristics of different resources, the way we use them and the values and interests they implicate all call for differently structured bundles of entitlements.

Second, it has induced courts to rethink the concept of property and to cast aside traditional notions of property ownership, which are reassuring but ultimately confining. Courts found the notion that the owner has a unitary package of secure rights to use, exclude, transfer and reap the outcome generated by the property to be wholly inadequate when applied to water. Property rights in water take the form of specific use rights because water is physically unique and has special social values attached to it. Courts have repeatedly noted that the “core” stick in the owner’s bundle is the right to use. As a California case put it, “conceptually, what is meant by a water right is the right to use the water.”\textsuperscript{174} The court then notes that this right of property in water is “usufructuary.” Scholars have suggested that water law gives us a glimpse of the future of property law.\textsuperscript{175} In the future, property may exist mainly in the form of context-specific use rights.\textsuperscript{176}

Third, the resource-specific lens of water law has cast light on the fact that property also comes with duties.\textsuperscript{177} Water law reveals the

\textsuperscript{170} See \textit{id.} at 435.
\textsuperscript{171} Craig Anthony Arnold, \textit{The Reconstitution of Property as a Web of Interests}, 26 HARY. ENVT. L. REV. 281 (2002).
\textsuperscript{173} \textit{id.}
\textsuperscript{175} Eric T. Freyfogle, \textit{Water Justice}, 1986 U. ILL. L. REV. 481 (1986);
\textsuperscript{176} \textit{id.}
\textsuperscript{177} \textit{id.}; Gregory S. Alexander, \textit{The Social Obligation Norm in American Property Law},
interconnectedness of people and the limits and duties that interconnectedness entails. Water rights are limited to beneficial and non-wasteful uses. Further they are subject to prior public claims such as the navigational servitude and the public trust doctrine. These limits suggest that using water is a matter of responsibility, accommodation and community.

Finally, the resource-specific lens has made water law a laboratory of innovation and a highly “plastic” subfield of property. It has led courts to engage in an open and robust conversation about the values and social meanings implicated by water and to reshape water rights accordingly. Courts have steered and ratified changes in the concepts of beneficial use and public trust. Riparian rights may not be eliminated but courts can redefine them. As the demand for water increases or changes, courts reallocate use rights. In this respect, courts’ work has often been directly redistributive of existing uses. This redistribution does not happen in other areas of property law. As a water law expert noted, we don’t require owners of existing homes on large lots to rebuild on smaller lots as a city grows. To be sure, these judicial or legislative redefinitions raise questions of fairness to owners. However, in light of the ongoing robust conversation on values and meaning that has characterized water law, such redefinitions should not upset users’ expectations. The story of water law is a record of continual change. Further, because of its special nature, water’s capacity for full privatization has always been limited. In the major shifts in water law, redefinition of use rights have rarely been compensated.

Taking the cue from Josserand and Pugliatti, we should have the resource-specific discussion of values and interests that we have seen in water cases for other resources that are important for individual autonomy and human flourishing, such as housing and land. More specifically, the design of new experimental commons that have the ability to promote greater “equality of autonomy,” requires a resource-specific lens similar to the one courts have long used in water cases. A default regime that applies to a large subset of common ownership regimes would likely fall short of adequately balancing the plurality of interests implicated by specific resources, even with minor fine tuning. The “liberal commons” are likely to carve out too much space for individual owners’ full autonomy where there are strong reasons to privilege the protection of the project and decisions of

94 CORNELL L. REV. 745 (2008-09) (offering a more general discussion of property as involving duties); JOSEPH W. SINGER, ENTITLEMENT 197 (2000).
179 Id.
180 Id.; Freyfogle, supra note171.
the group, as in the case of affordable housing cooperatives. Conversely, a commons regime that privileges protection of “community” interests is likely to sacrifice autonomy in instances where there are plausible reasons for allowing a wider margin for individual choice, disagreement and exit, as in the case of a business partnership. More than simple fine-tuning for different “social settings” is required.

Designing a common ownership that promotes and accommodates different dimensions of autonomy is a resource-specific design process that involves several steps. First, it requires grounding the commitment to equality of autonomy in the context of the specific resource. Making difficult choices, such as the ones involved in the design of affordable housing cooperatives, where greater access to the positive and relational aspects of autonomy may be secured only by limiting another important dimension of autonomy, i.e. negative freedom, requires Aristotelian “practical reasoning”. Gregory Alexander has described this “practical reasoning” as “fitting and refitting” until a sense of complementarity between the different dimensions of autonomy has been achieved. This “fitting and refitting” is contestable, but not arbitrary, because it is tailored on the specific resource. For example, in the case of affordable housing cooperatives, this “practical reasoning” requires asking concrete questions such as “How scarce is the resource housing?” “What is “decent” housing”? “How absolute should the assurance that housing will be provided to all be? etc. It requires making arguments about the meanings and values implicated by housing and about its just distribution. We will need to produce rival accounts of the purpose and meaning of the resource housing. As water cases suggest, we may look at which account makes better sense of its historical meaning or its current social meaning, reflected in the existing rules regulating it. But ultimately, we are carried onto “contested moral terrain where we can’t remain neutral towards competing conceptions of the good life.”

Second, designing a commons requires the analytical ability to identify which entitlements are “core” for fostering the values we have associated with the specific resource and which can be modified, added or dropped to expand access to it. In takings cases, the U.S. Supreme Court has repeatedly tackled the question of which entitlements are “core” to the meaning of property, and hence deserve special protection, and which are not. But which entitlements are core and which not depends on the nature of

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182 Alexander, Pluralism & Property, supra note 146 at 31.
the specific resource. The Supreme Court itself, without saying it, distinguishes between different resources. ¹⁸⁴ For example, the Court has often reaffirmed Justice Brandeis’ statement that “an essential element of individual property is the legal right to exclude others from enjoying it”¹⁸⁵ and that limitations of the right to exclude are government intrusions of “an unusually serious character.” However, the Court has also repeatedly suggested that the right to exclude is not a core entitlement of owners of certain types of property, i.e. “places of public accommodation.” Innkeepers, common carriers, restaurants and places of entertainment have no right to exclude members of the public on an arbitrary basis such as race.¹⁸⁶ Also, from Marsh v. Alabama to the shopping mall cases,¹⁸⁷ the Court has held that owners of another type of property, i.e. “private property open to the public,” have a limited right to exclude members of the general public who access their property for free speech purposes.

In this section, I have argued that a resource-specific analysis of the owner’s entitlements can help move forward our discussion of the difficult trade offs involved in the design of common ownership regimes. In the next section, I present two applications of this approach. I focus on the design of common ownership regimes for two resources that are important preconditions for equality of autonomy, i.e. affordable housing and urban green space with its social, environmental and health benefits. I show how a resource-specific analysis of property entitlements helps make and justify some of the most difficult design decisions regulators and courts face in outlining the legal regime of affordable housing communities and community gardens.

B. APPLICATIONS

1. A resource-specific analysis of affordable housing cooperatives (shared equity cooperatives).

As discussed in Part I, affordable housing cooperatives share the entitlements typical of homeownership between the owner of residential property and some outside party representing the interests of a larger

community, a public entity or a private non-profit organization. Middle or low-income buyers who meet certain eligibility criteria gain title to residential property. They acquire all the “sticks” of a homeowner: the right to use the property, i.e. to occupy it and to make decisions about its maintenance and improvement, the right to be immune from having their property taken and the right to transfer, i.e. to pass the property to their heirs and to sell it. However, the outside party retains control of both the right to use and the right to transfer. The property is to be occupied by the owner on a continued basis and subletting is restricted. Maintenance and improvements are subject to control by the cooperative’s governing body. The resale price is pre-determined and/or the resale process is controlled. Finally, although the homeowner has the right to pass her property to her heirs, not every heir will have the right to occupy the property.

Affordable housing cooperatives have become an increasingly attractive response to the shortage of good quality affordable housing. New York has historically been at the forefront in the promotion of affordable housing cooperatives. The 1955 Mitchell-Lama Act and then the Urban Homestead Assistance Board, which began in the 1970s during a wave of abandonment and foreclosure of buildings, facilitated the conversion of rental housing into affordable housing cooperatives. In recent years, many U.S. cities have followed the lead. In 2010, the Palmer/Sixth Street Properties v. City of Los Angeles decision invalidated a city ordinance requiring that 20% of the rental units built must be affordable. The city of Berkeley reacted to the loss of the rental housing portion of the city’s inclusionary zoning program by supporting the creation of new limited equity housing. Similarly, the Chicago Housing Department has included the development of shared equity homeownership in its 2004-2008 affordable housing plan.

Shared equity homeownership promotes equality of autonomy by making available to low income individuals and families most of the benefits of homeownership. According to its advocates, it does so better than alternative affordable housing programs, such as public housing or

189 See Allan D. Heskin & Dewey Bandy, Limited Equity Housing Cooperatives in California, Proposals for Legislative Reform, available at http://www.housingforall.org/lteqhousing.pdf; see also the documentation available from the City Council of the city of Berkeley at http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_-_City_Council/2008/06Jun2008-06-10_Item_11_Facilitating_Cooperative_Home_Ownership_Units.pdf
demand-oriented subsidies to low-income households. Design features such as limits on co-owners’ rights to use and to transfer help achieve a variety of objectives. First, shared equity coops perform better than other types of subsidized housing in terms of affordability. Shared equity coops expand access to homeownership for current homebuyers of modest means. The cooperative can use the entire property to secure up to 98% blanket financing because it holds the deed to the property. This arrangement allows down payments as low as 2%. Most importantly, shared equity coops preserve affordability over the long term. The equity formula that specifies the price at which shares can be resold works together with the establishment of income maximums for prospective buyers to keep the units within the financial reach of predetermined income groups. By contrast, programs that use subsidies to sell homes to low-income people at below market prices do not preserve the affordability of the housing for future buyers because the unit may subsequently be sold at its market price.\footnote{Davis, \textit{supra} note 55, at 90-95.}

Second, shared equity coops perform better than other affordable housing tools in terms of housing quality. Limits on use rights, i.e. the cooperative board’s direct control of maintenance decisions, translate in good quality housing. By contrast, public housing has largely failed to deliver decent quality units. The fiscal arrangement for public housing as well as inadequate funding have led to deferred maintenance and building deterioration.\footnote{Michael H. Schill, \textit{Distressed Public Housing: Where Do We Go from Here?} 60 U. Chi. L. Rev. 497 (1993); J. Peter Byrne & Michael Diamond, \textit{Affordable Housing, Land Tenure and Urban Policy: The Matrix Revealed}, 34 Fordham Urb. L.J. 527 (2007).}

Third, advocates suggest that shared equity coops are superior to alternative affordable housing policies in terms of neighborhood quality and social integration. While traditional public housing has often created conditions of social distress by concentrating the most disadvantaged segments of the population in segregated ghettos, shared equity coops have been successful at implementing mixed-income housing.\footnote{Byrne & Diamond, \textit{supra} note 182, at 567-75; Susan Saegert et al., \textit{Limited Equity Cooperatives as Bulwarks Against Gentrification}, \textit{available at http://web.gc.cuny.edu/che/Lim_Equ_Co-ops.pdf}.} The participation of mixed income residents in cooperative governance results in higher levels of social integration and stimulates community involvement and organization. Fourth, low monthly occupancy and operating costs combined with homeownership training prior to purchase and foreclosure prevention assistance ensures security of tenure, which promotes neighborhood stability. Finally, shared equity coops offer ample opportunity for individual development and education. By participating in
management or in democratic cooperative governance, members acquire new skills and higher capacity for personal mobility.\textsuperscript{194}

Limits on the right to use and the right to transfer are crucial to secure these benefits. At the same time, these limits are “tragic” in that they significantly erode certain dimensions of the owner’s individual autonomy. Limits on the right to use force owners to relinquish independence, shrinking their control over their living space. Limits on the right to transfer make exit more costly and curtail owners’ ability to build wealth. In other words, the design of shared equity coops involves a trade off between full autonomy for some and greater equality of autonomy for the worse off. Current co-owners would need to be able to use and transfer their units freely to be fully autonomous, but low income buyers’ need for quality affordable housing is satisfied by limiting the use and transfer rights of current co-owners. A pluralistic discussion of the characteristics and interests implicated by the resource “housing” helps us discern which of these apparently tragic trade-offs may be minimized and which are unavoidable but can be justified with normatively appealing arguments.

Use restrictions are particularly troublesome and should be minimized because of the special characteristics and values implicated by the resource housing. Arguments, or “ethics,” that emphasize the special nature of housing are prominent in law and policy debates.\textsuperscript{195} The “housing as a home” ethic sees the housing as crucial to individuals’ identity and self-expression, serving fundamental interests such as individual liberty, privacy and security. The subjective importance of the home has long pervaded American culture and is reflected in a wide range of legal doctrines that treat the home as “special,” from criminal law, to landlord and tenant law, to family law.\textsuperscript{196} The “housing as a human right” ethic builds upon the idea that having a home is crucial to individual development and flourishing. It posits that each individual has a “legal right” to housing that is decent, affordable and secure. The notion of a “right to housing” is reflected in doctrines such as the implied warranty of habitability and in the Fair Housing Act.\textsuperscript{197} These “ethics” point to housing as a fundamental need. It is required for all humans to have a “decent” life. It satisfies the physiological need for shelter, material safety and stability. Further, it satisfies the subjective/psychological need for emotional stability, privacy and identity or self-expression. These sets of needs are crucial preconditions for “thick” autonomy. Ample use rights serve these fundamental interests and hence are

\begin{footnotesize}
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\item[\textsuperscript{194}] Davis, supra note 55 at 30; Kennedy, supra note 57 at 91.
\item[\textsuperscript{195}] Iglesias, supra note 64, at 514.
\item[\textsuperscript{196}] Id. at 521.
\item[\textsuperscript{197}] Id. at 529; see also Frank I. Michelman, The Advent of a Right to Housing: A Current Appraisal, \textit{5 HARV. CR.-C.L. L. REV.} 207, 210 (1970).
\end{itemize}
\end{footnotesize}
A continued occupancy requirement limits an owner’s ability to make her own “authentic” life plans. A home is a need in that it provides an individual the material stability necessary to make “autonomous” choices regarding one’s career, family, interests and commitments. A unit owner may need to be absent for a prolonged period to assist a family member, to volunteer in a political or charitable project or to nurture her spirituality by retiring for a year in a monastic community. To be free to pursue these options, the owner needs to know that her unit will remain available for her and also will generate a minimum income to help finance these projects.

While occupancy requirements stifle owners’ material ability to form and pursue their life plans, the goal of preserving affordability can be obtained by regulating leasing and subletting. In the scheme I suggest, the leasing or subletting of units is subject to eligibility approval through the same procedure that governs approval of new unit owners. Further, to preserve affordability, there is a cap imposed on the amount of rent owners may charge. Finally, this rent is shared between the unit owner and the sponsor or the cooperative. The former is granted a fair return on her investment in the unit, including the value added by improvements. The latter retains the surplus, if any, that is determined by external social factors. This design enables mobility for the owner, availability of the unit for other low-income applicants during the owner’s absence and allocation of the surplus portion of the rent to the sponsor or the coop. The sponsor or coop then can invest the surplus in the project by subsidizing new units or improving the facilities.

Another set of limits on the owner’s right to use relates to maintenance and improvements. Unit owners are required to maintain their homes in good repair and are subject to control over the improvements they choose to make to increase the use value or the resale value of their units. Maintenance requirements are deemed necessary to preserve the habitability of the unit and to avoid major repair costs for the next low-income buyer who will someday purchase the unit. Standards of good repair may be

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199 What is sacrificed under this scheme is securing the owner the transformative benefits that come from continued residency and involvement in the residents’ community. But emotional stability, the sense of “home” and civic engagement, while transformative, are not something that can be paternalistically imposed on low-income owners. Contrary to the material stability that comes from being able to rely on the continued availability of one’s unit, these are benefits that are highly subjective, are not necessarily linked to a real estate unit, and may be derived from other sources.

“minimalist,” requiring maintenance according to local building codes or insurance specifications. Standards of good repair may also be more demanding according to neighborhood compatibility. In the scheme I propose, owners are required to maintain their property in compliance with the local regulations. This maintenance requirement is preferable to the others in that it simply reflects the duties imposed by legislation on all homeowners. It does not delegate the power to set maintenance standards to private insurance companies, and it does not impose more demanding requirements that might be justified in a condominium or a subdivision but would burdensome for low-income owners.

Limiting the improvements owners may choose to make to avoid “goldplating” is typical of limited shared equity homeownership. Limits usually concern both the type of improvements allowed and the value that these improvements add to the owner’s equity. In the strictest scheme, the sponsor’s prior approval is required to ensure quality control, but once approved, none of these improvements add to the owner’s equity or to the resale price. In the most liberal schemes, prior approval is not required and the sponsor of the coop board determines which improvements will be credited towards the owner’s equity. Critics of shared equity schemes argue that these limits force owners to relinquish their independence, leaving them with “too little choice and too little control over their personal living space.”

The ability to decide improvements free from external control is an important outlet for self-expression that allows the owner to maximize the use value of her home. It is also a means for wealth creation in that the owner’s investment typically is reflected in the appreciated market value of the home. On the other hand, costly improvements or major overhauls might increase the price of the unit beyond affordability for future buyers of modest means.

The trade off in this case need not be a tragic one. The sponsor or the coop can publish a list of pre-approved improvements that do not require prior approval and the value of which is credited towards the owner’s equity. The credit is calculated based on the change in the property value as a result of the improvement. This mechanism preserves the owner’s autonomy in that it allows relatively ample opportunities for self-expression and some degree of wealth creation. Also, it is not more stringent than the limits faced by a great number of owners of market rate residential property. The owner retains the ability to design and control her living space by choosing among a variety of pre-approved functional and aesthetic improvements. What is foregone is the opportunity to receive credit for improvements that are “luxuries,” such as a Jacuzzi or Italian

201 Id. at 90.
202 Iglesias, supra note 64, at 61-63, 6-7.
mosaic tiles. However, the ability to make luxurious improvements is not crucial for self-expression when other reasonable options for “personalizing” the home are available. In addition, limits on the type of improvements unit owners may make are common to condominiums and subdivisions where architectural committees exert a variety of quality and aesthetic controls. The owner also retains some ability to generate wealth by investing in the improvement of her home. The value credited towards the owner’s equity depends not on the investment but rather on the actual increase in the unit’s market value. This arrangement subjects owners of shared equity housing to the same risks that any homeowner faces. Even in market rate housing, homeowners are not guaranteed a return for their investments. It is the market that determines which improvements increase the property’s appraised value and by how much.

These proposed limits on the owner’s right are minimal and do not significantly curtail any dimension of the owner’s autonomy. By contrast, limits on the right to transfer are more difficult to minimize. A resale formula establishes an upper limit on the price for which the unit may be sold, whether it is sold back to the sponsor or the coop or sold directly from one owner to another.\footnote{Davis, supra note 55, at 64.} Resale formulas vary significantly, but they are usually designed to allow owners to recoup their down payment, to recover any payments that have gone toward the amortization of their mortgage and to realize a fair return on their investment.\footnote{Id. at 65.} These limits are the very design feature that makes it possible to preserve affordability over many years. They are unavoidable. Nonetheless, they are tragic. They deprive owners of the full wealth generating benefits of homeownership. Homeownership is a source of wealth in that it builds savings for households that otherwise might not be able to put money aside for the future. Homeownership also creates opportunities for capital gains when real estate markets are rising.

Scholars and policymakers who believe in the potential of shared equity homeownership downplay the tragic nature of these limits with a variety of arguments. First, they argue that most owners do build wealth during their time in shared equity housing despite resale restrictions. A recent study of the Burlington Community Land Trust showed that homeowners realized a very respectable 17% to 20% return over a span of fourteen years when reselling their homes under one resale formula.\footnote{John Emmeus Davis & Amy Demetrowitz, Permanently Affordable Homeownership: Does the Community Land Trust Deliver on its Promises? (2003), available at http://www.community-wealth.org/_pdfs/articles-publications/clts/report-davis.pdf.}

\footnote{Davis, supra note 55, at 64.}
\footnote{Id. at 65.}
Another study found that while owners of market rate homes earned a 33% return under normal conditions, owners of limited equity housing earned 29%. Both studies note that these returns far exceed what owners would have realized had they put their money into a low risk investment like a mutual fund. Second, experts point to the fact that low-income owners of market rate housing often build very little wealth through homeownership. Since the market rate housing that low-income people can afford tends to be old, in need of repair and located in depressed areas, there is little or no market appreciation. Moreover, low-income owners gain wealth from their homes only if they are able to hang on to them for many years and to trade up to better housing over time. Often they do neither. Third, advocates of shared equity homeownership argue that limited equity gained at the time of resale is compensated by a variety of other benefits to owners. Owners still benefit from the “transformative effects” of homeownership. Homeownership helps low-income people improve their social status, the kind of community they live in and the quality of their children’s schools. Further, owners enjoy greater stability of tenure than low income owners of market rate housing, as well as greater opportunities for social life and civic engagement. These aspects are just as important as wealth creation in improving the lives of low-income people.

While these arguments are powerful, a more transparent defense of the limited right to transfer is to admit that restriction a tragic choice but to argue that this choice is justified. Advocates of the “housing as an economic good” ethic point to the fact that housing units are consumer and investment goods to be produced and exchanged on the market. The investment value of a home is derived from both the increase in property value through appreciation and the long-term savings over renting caused by inflation. Appreciation in the market value of the housing may be increased by the owner’s personal contribution of money and labor toward improvement of the property. However, the housing as an economic ethic obscures the fact that much of the appreciation is caused by societal factors outside the owner’s control. Public investment in the city as a whole, private investment in the surrounding neighborhood, changes in the regional economy and changes in the way residential real estate is regulated, financed and taxed are among the main factors.

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206 Davis, supra note 55, at 104.
208 Davis, supra note 55, at 105.
209 Id. at 105.
210 Iglesias, supra note 64, at 514.
211 Davis, supra note 55, at 65.
Who deserves the surplus portion of the property’s market value that reflects external societal factors? Lockean theory has been plagued from the start by the difficulty of justifying a private right to the portion of the market price that reflects societal factors and scarcity rents. How do we get from the Lockean principle that we own what we mix with our labor to the enrichment of the full market value of our property, including rents? The moral appeal of the Lockean theory lies in its promise of proportion between remuneration and exertion. But the price that a house fetches on the market results from market scarcity other societal factors outside owner exertion. Arguably, the owner owns only the value that equals her investment in the property, plus a fair return. Society has a claim on the rest. If a significant portion of the value belongs to society, then limiting the LEC member’s ability to pocket the full equity at the moment of resale appears less difficult to justify.

A limited right to transfer is also justified because housing is a fundamental need. Both the “housing as a human right” and the “housing as a home” ethics highlight the urgency and intensity of this need. Further, the Supreme Court has long been “imbued with the idea of housing as a need of outstanding importance, capable of generating unconventional legal claims.” As early as 1921, the Court said, “housing is a necessity of life.” If housing is a resource of fundamental significance for humans, then it should be provided to all. Securing housing for individuals requires more than simply the negative assurance that housing will be available without arbitrary interference and according to the market rules normally governing access to goods. Rather, securing housing also requires the positive provision of means for the acquisition of housing, be it the provision of specific housing in kind or the provision of rent supplements.

The “right to housing” claim is distributive in essence. Socio-economic rights claims are distributive claims packaged in politically palatable rhetoric. The term “right” implies a correlative duty on the part

213 Id. at 228.
216 Talha Syed, Rights Rhetoric and Analytics (on file with author). Syed notes that “The following is the typical form taken by assertions of positive, socio-economic rights (at least when they are presently lucidly): “X is a fundamental need of all humans, and therefore all persons have a right to X.”” Thus, there are two parts: (1) the identification of some candidate X as being of fundamental significance for all humans, and (2) an assertion that what should follow normatively from (1) is the provision of such goods to all persons “as a matter of right.” Regarding (1), the candidates can be anything from
of another party, the state, to recognize and to provide for what the right entails.\textsuperscript{217} Making a plain distributive argument has advantages over couching the argument in the language of rights. First, it dispels the vagueness of rights claims and forces us to confront a number of more concrete questions. “Right to housing” claims often take the form of simple assertions. By contrast, “housing as a need” engages a series of informative questions: How intense is this need? How much housing is needed? How relative or idiosyncratic should be the standard to determine whether the housing is adequate? And further, how absolute should be the assurance that this need will be satisfied?\textsuperscript{218} Second, it avoids the easy rebuttal that the political-moral claim of a right to housing is only weakly reflected in legal-institutional materials, i.e. that courts and legislatures have stopped short of recognizing a full-blown individual right to housing.\textsuperscript{219}

2. A resource-specific analysis of community gardens

Community gardens are another form of common ownership that has the potential to promote greater equality of autonomy by making green space, and the social, environmental and health benefits it provides, available on a more equal basis to residents of distressed communities. Surprisingly, community gardens have received little attention from property scholars. Community gardens arise when citizens grow greenery, vegetables and fruits or flowers on vacant urban land they do not own.\textsuperscript{220} Community gardens may be considered a form of common ownership in that ownership entitlements are split. A municipality, land reserve agency or land trust holds title as a public entity or private owner. Gardeners hold use rights, often forming a community garden organization, an unincorporated

\begin{itemize}
\item “minimum level of food,” to “basic health care,” to “decent shelter/housing,” to “a job” – what unites them is that they are claimed to be “basic” physical or institutional goods, with “basic” meaning required for all humans to have a “decent” life. The second unifying feature of such claims is that securing the good(s) for individuals is understood to require more than simply the (negative) assurance of the absence of coercive interference in pursuit of such goods; rather, also needed is the (positive) provision of resources or other means for the acquisition of such goods.
\item Iglesias, supra note 64, 541.
\item Michelman, supra note 187, at 207-08.
\item Iglesias, supra note 64, at 549; Michelman, supra note 187, at 209.
\end{itemize}
association or a nonprofit corporation. The broad outline of the ownership arrangement of community gardens is often set forth in state legislation or local ordinances. Typically, the municipality or other public or private titleholder leases the land to the gardeners’ association for a nominal fee or license. The lease is often short term, and it may contain a clause that allows the public or private owner to regain possession of the land at any time. Often, the public entity also assumes the duty of providing material support and assistance to the gardeners.

Gardeners’ use rights are subject to a variety of requirements and duties. Typically, there are entry rules. The gardeners may be required to demonstrate a purpose including agriculture, gardening and/or economic development. They may also be required to prove that the association has operated for at least a year and has history with community gardening, or that the association is sponsored by a recognized community gardening organization. Other entry requirements include need. Local ordinances governing community gardens may assign priority to needy individuals and families in allocating the lots. Gardeners’ income rights, i.e. the right to derive income from the gardening activity, are also limited. Under most local ordinances, produce grown in the community gardens may not be sold. Further, gardeners have duties. Most importantly, most community gardens statutes require property insurance and general liability insurance and to accept liability for injury or damage resulting from the use of the land for community gardening.

Community gardens have become an important and visible feature of American cities since the 1980s. Currently, approximately 18,000 community gardens exist across the U.S. and Canada. The New York

221 Schukoske, supra note 210, at 365-71.
222 Id. at 365 (noting that the duration of garden lot leases is specified in various authorizing laws and ranges from as long as five years in Seattle to two years in Boston to as short as one growing season under New York law. Some of these leases are terminable on short notice. For example the Adopt A Lot program in Baltimore, Maryland, provides renewable one year leases but the city reserves the right to terminate the agreement upon thirty days notice to use the lot for another public purpose and upon five days notice in the event of complaints concerning the use or conditions of the lot.). See also Crow, supra note 210, at 229; Borrelli, supra 210, at 282.
223 Schukoske, supra note 210, at 367, 376 (noting that under the New York statutory scheme, municipal corporations may contribute initial site preparation, water systems, perimeter fencing and other necessary equipment).
224 Id. at 377 (noting that for example, the Tennessee Community Gardening Act gives priority to needy individuals and families in allocating the lots).
225 Id. at 377 (recognizing that under Tennessee law produce grown in community gardens may not be sold).
226 Id. at 370; Crow, supra note 210, at 228.
227 Borrelli, supra note 210, at 274.
City Green Thumb project is probably the most well known example of community gardens, or at least the one that has attracted the greatest media attention.\(^{228}\) Many of the gardens in New York City were created at the time of the fiscal crisis of the 1970s when thousands of housing units scattered around the city were abandoned by their owners and eventually acquired by the city. There was no money to clear the lots because the city was on the verge of bankruptcy. Buildings deteriorated and collapsed, and few lots were sold due to the depressed market. The gardens were formed by local residents reacting to the degeneration of their neighborhoods, often with no city authorization. The city began to legally recognize the gardens and in 1978 it established the Green Thumb project, which offered leases and assistance to the gardeners. The gardens became the object of much public controversy in the late 1990s when the city began a policy of nonrenewal of the leases, instead auctioning off community garden land for housing and development.\(^ {229}\)

Community gardens may be seen as fostering greater equality of autonomy by securing residents of poor and minority neighborhoods access to green space, clean air, healthy food and a thriving community. Advocates note that community gardens lead to the beautification and greening of neighborhoods.\(^ {230}\) In turn, green space reduces the amount of nitrous oxides in the air and reduces heat island effects in urban areas, thereby reducing energy costs.\(^ {231}\) Green space and clean air are scarce and distributed unequally. Civil rights organizations and environmental law experts have raised the question of environmental racism, i.e. concern over the unequal distribution of environmental burdens and benefits.\(^ {232}\) In their effort to prevent the auctioning of the Green Thumb gardens, the New York City gardeners insisted on the unequal distribution of green space. In New York City Environmental Justice Alliance v. Giuliani, the plaintiff argued that the city’s sale of the gardens would have a disproportionately adverse impact.


\(^{229}\) See Elder supra note 218, at 773-77, and Schukoske supra note 210, at 385-88.

\(^{230}\) Schukoske, supra note 210, at 352.

\(^{231}\) Elder, supra note 218, at 792-94.

on the city’s African American, Asian American and Hispanic residents in violations of regulations promulgated by the Environmental Protection Agency to implement Title VI of the Civil Rights Act of 1964.233

Community gardens also provide nutrition and health benefits. Healthy local food is another resource that is unequally distributed. In lower income neighborhoods, community gardens can offer organic, healthy food at low cost.234 The “New Agriculture” and “Food Security” movements have been vocal in emphasizing that community gardens help bring lower income communities healthy food at low cost.235

Finally, community gardens promote the development of vibrant and active communities. Community gardens are crucial triggers of what scholars call a neighborhood’s “social capital.” The term “social capital” describes “features of social organization such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit”.236 Anne Lee Fennel has argued that spatial association is a valuable resource vulnerable to collective action problems, and that just as the problems of pollution and natural resource preservation have been addressed through innovative property mechanisms, so too could certain problems of association.237 Some scholars contend that there are no substitutes for community gardens in terms of community creation and revitalization.238 In the struggle against New York City garden auctions, the city’s greening community argued that the gardens are more than patches of green in the city. They are spaces where the residents of marginalized areas can gather and mobilize. As a green activist put it, the gardens are “a space of democracy with a little ‘d’.”239

Why are these benefits best achieved through common ownership of urban gardens rather than through other means, such as regulation and zoning? First, land use experts note that traditional zoning is often unsuccessful in protecting a community’s social capital. Traditional zoning fails to take into account the consequences of development projects on the

235 Toronto’s community food security movement uses gardens as one strategy to regenerate the local food system and provide access to healthy, affordable food. Lauren E. Baker, Tending Cultural Landscapes and Food Citizenship in Toronto’s Community Gardens, 94 GEOGRAPHICAL REV. 305 (2004).
236 Schukoske, supra note 210, at 354; Foster, supra note 218, at 531.
238 Smith & Kurtz, supra note 218, at 200.
239 Staheli, Mitchell & Gibson, supra note 218, at 201.
social fabric of the surrounding community because land use regulation and decisions often happen in a highly individualized and ad hoc fashion rather than through a public deliberative process.240 The liberal use of zoning amendments and variances situate private developers’ interests as the main influence on land use decisions. This dynamic frustrates efforts by the community to influence the design of new projects in a way that would make them compatible with the social system of the community.241 “Green zoning” provisions that mandate the creation of urban green spaces are also often inadequate. They tend to leave the responsibility for greening to individuals rather than fostering social capital.242 Further, implementation of green zoning often requires but lacks significant funding and strict enforcement.243 Most importantly, environmental justice scholars and activists note that zoning fails to protect low income and minority communities. Zoning often functions as a vehicle for environmental racism rather than as a remedy. Without organizational resources and political visibility, poor minority communities fail to secure zoning protection.244

While community gardening may be seen as a spontaneous and self-organized community action that succeeds where traditional land use regulation has failed, the success of community gardens depends on the design of their ownership structure. The shape and distribution of co-owners’ entitlements has to enable stability for the gardeners and flexibility for the titleholder. Community gardens need permanence to deliver the promised benefits. A garden’s success cannot be measured in one season. Cultivation and the creation of “social capital” happen over time. On the other hand, the municipality or public entity needs to have a substantial degree of flexibility to reassess priorities for the use of scarce vacant urban land. Eventually, it may need to convert gardens into other uses that benefit the community at large or disadvantaged segments of the community. For example, the garden may be the only land available or the most suitable for affordable housing developments.

Once again, the central design question seems to be exit. And exit involves a difficult trade off. In affordable housing coops, exit involved a trade off between full autonomy for some, i.e. current co-owners who, to be fully autonomous, need to be able to use and transfer their units freely, and greater equality of autonomy for the worse off, i.e. low income buyers

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241 Foster, supra note 218, at 547-48.
242 Rob Elder, supra note 218, at 794-95.
243 Id.
244 Dubin, supra note 222, at 764.
whose need for good quality affordable housing is best satisfied by limiting the use rights and transfer rights of current co-owners. In the case of community gardens, exit may often involve a trade off between greater equality of autonomy for some, i.e. residents of a distressed neighborhood who seek greater access to green space and the benefits it delivers, and greater equality of autonomy for low-income people who are homeless or have inadequate housing. Success of community gardens as means for fostering more equal access to clean air, healthy food and an active social life requires limiting the municipality’s ability to exit the common ownership scheme. Specifically, it requires longer leases, renewal or extension clauses, and the absence of clauses allowing the city to regain possession of the gardens upon short notice. But, by making exit for the city more difficult, these design features limit the city’s ability to respond to changing public needs, for example to develop new affordable housing units.

The struggle between New York City and its community gardeners illustrates this tragic trade off. In New York City Environmental Alliance v Giuliani, the city claimed that its plan to develop new housing and facilities for medical and related services on garden land constituted a legitimate justification for its actions. The city noted that it would devote some of the redeveloped land to affordable housing. However, in the course of the litigation it emerged that the city had no concrete plan for the provision of affordable housing. While the city may have overstated its commitment to developing affordable housing, it is generally true that policies favoring environmental protection and the preservation of open green space and affordable housing projects are often assumed to be in conflict with each other. Both affordable housing and green space require the same scarce resource of urban land. Both affordable housing and community green space are important social goods, and access to both is often framed in the language of rights. “Right to housing” arguments have long been part of housing debates and policies, and the idea of a right to green space is gaining prominence in land use debates. For example, New York City gardeners have relied heavily on rights arguments that placed an absolute value on green space. While both goods require the same scarce resource, environmental concerns with green space tend to focus on intergenerational

245 Foster, supra note 210, at 536.
246 Adrienne Lyles-Chockley, Building Livable Places: The Importance of Landscape in Urban Land Use, Planning and Development, 16 BUFF. ENVTL. L.J. 95, 103 (2008-09); see also Brian W. Ohm & Robert J. Sitkowski, Integrating New Urbanism and Affordable Housing, 36 URB. LAW. 857 (2004).
247 Elder, supra note 218, at 800.
248 Id.
249 Id.
distribution, i.e. preserving a healthy environment for future generations, while low-income housing policies concentrate on existing inequities.\textsuperscript{250}

Both the District Court and the Second Circuit insisted on the incompatibility between the goal of providing new housing and the goal of protecting the gardens. In a tragic trade off, they privileged the former over the latter. The District Court denied a preliminary injunction seeking to enjoin the city from selling the gardens. It recognized that the gardening community would suffer irreparable harm and declared itself “sympathetic to the plaintiffs’ needs and concerns.” But it argued that “the city is acting in the public interest in creating affordable housing, market-rate housing units, elderly medical and related care facilities and other community or municipal facilities, including commercial space in neighborhoods which are predominantly minority and low-income.” The Second Circuit affirmed the judgment of the district court. It argued that the city’s plan of building new housing constituted a substantial legitimate justification for the defendants’ action and the plaintiff failed to show a less discriminatory option was available to achieve the city’s legitimate governmental goals.

Is this tragic trade off between equal access to green and equal access to housing inevitable? I believe it is not. If the New York courts had a more pluralistic understanding of the values implicated by the resource urban land, then they could have minimized the tragic trade off. The New York courts could have expanded their discussion of the use of vacant urban land beyond economic or development values to include ecological, social and ethical concerns. That expanded discussion would have drawn on existing legal materials as well as new scholarly work and emerging social movements. Both decisions reflected a narrow vision where land use planning is governed by an “economic ethic.” The gardens were characterized as “vacant land.” This scarce resource had to be developed for the most valuable use, i.e high end and affordable residential use and commercial use. But the meaning and value of urban land has been broadened in recent decades. Courts, scholars and policymakers have developed a plurality of urban land “ethics.” These new land ethics focus on the complexity of the interaction between physical, biological and social processes in urban environments. They emphasize the need to develop urban land by preserving and integrating different uses. The creation of urban green space is a central theme of the new land ethics.\textsuperscript{251}

\textsuperscript{250} Lyles-Chockley, supra note 236, at 103.

An environmental ethic of urban land use emerged as early as the 1970s. The National Environmental Policy Act of 1969 ("NEPA") and its state counterparts required that agencies assess the impact of a proposed land use on the "human environment." Courts rejected a narrow conception of "human environment" as coterminous with natural resources. Rather, they interpreted NEPA as broad protection for the quality of life of citizens. For example, Hanly v. Mitchell concerned an action to enforce compliance with NEPA regarding the erection of a jail and other facilities. The court noted that protection of the quality of life of residents included aspects such as "noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs."

More recently, the environmental ethic of urban land use underlies the wave of “Smart Growth” or “New Urbanism” state and local land use laws that seek to balance urban development with environmental protection and sustainability. The preservation of open space and the development of distinctive attractive communities with a strong sense of place are among the principles advocated by smart growth experts.

While the environmental ethic largely has focused on physical aspects of land use, other ethics are emerging that place emphasis on less palpable aesthetic, ethical and social aspects of urban land use. The ideas that our relationship to land has an ethical dimension, and that owning and using land entails stewardship, are becoming more prominent in debates about urban land use. Aldo Leopold’s “land ethic,” with its emphasis on the interconnectedness of people and their physical environment as well as the importance of the unique characteristics of each natural resource, is increasingly discussed in connection with urban land.

And a social ethic of urban land use is also emerging. It underscores the social significance of city space. The small-scale, every day public life of people who share a space in big cities fosters resident wellbeing and self-respect. A community with sufficient amounts of social capital also can “purchase” many other social and economic resources that create and sustain healthy neighborhoods. Urban land use decisions affect a


252 Foster, *supra* note 210, at 549.
community’s social capital, strengthening it or undermining it. Legal scholars who embrace a social ethic of urban land suggest that courts’ broad interpretations of NEPA and smart growth zoning ordinances haven’t gone far enough. They have failed to fully grapple with the burdens imposed on the social ties and networks within a community arising from land use decisions. These scholars argue that legal doctrine, regulation and policy regarding urban land use should recognize the integration between land use and social relations in urban environments.\(^{256}\)

These emerging plural land ethics suggest a shift in the way urban land is valued. They underscore that equal access to the environmental, aesthetic and social benefits of urban green space is important for human flourishing. It is an important precondition for equality of autonomy. This new approach to urban land use also suggests reassessing the New York courts’ assumptions about the incompatibility of the environmental focus on green space and affordable housing policies. The two are complementary rather than mutually exclusive. The gardeners may have weakened the appeal of their arguments by relying on rights language that placed an absolute value on green space.\(^{257}\) Insistence on a right to green space obscures more concrete questions such as how intense is the need for green space, how much green space is needed, and how to integrate new affordable housing and green space.

The failures of past housing policies suggest that landscaping and green space are crucial to the success of affordable housing projects. In the 1950s, the architects of urban renewal believed that the “surgical excision” of blight would promote urban vitality. Poor people were displaced from blighted areas to new public housing that tended to adopt self-defeating forms of architecture and streetscaping that undermined the safety of public space.\(^{258}\) In New York between the 1940s and the 1960s, zoning encouraged the building of high rise, high density superblock projects with no space for landscaping for low income people. The near-total failure of superblocks is well documented.\(^{259}\)

If the New York courts adopted a pluralistic view of urban land use to integrate both affordable housing and green space, then they could have privileged the use of the disputed lands for affordable housing while also protecting equal access to green space to a significant extent. They could have outlined a different ownership scheme for community gardens that

\(^{256}\) See generally Foster, supra note 210.

\(^{257}\) Elder, supra note 218, at 800.

\(^{258}\) Byrne & Diamond, supra note 182, at 569.

\(^{259}\) Elder, supra note 218, at 771; but see, NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED, (2008) for a different assessment of the New York affordable housing policy.
would minimize the tragic trade off between goods that are all important preconditions for individuals to have equality of autonomy.

A compromise agreement between the city and the gardeners followed a lawsuit by State Attorney General Spitzer in 2002. The agreement gives us a glimpse of how ownership entitlements could be shaped for community gardens to be successful. It could provide a model for local governments seeking to implement common ownership for community gardens. As we have seen the crucial question is exit, i.e. the terms of the lease between the public entity holding title to the land and the gardeners or gardening associations. The agreement outlined a regime where the city has relatively ample exit rights but the gardeners retain a degree of security. First, it granted Green Thumb leases to gardens not yet registered. While cities prefer revocable licenses with gardeners rather than leases, leases give gardeners greater security of tenure. In New York City Coalition for the Preservation of Gardens v. Giuliani, it was easy for the court to find that a license revocable at will did not provide the gardeners with a legally cognizable interest for standing to challenge decisions affecting the use of the gardens. The agreement did not modify the term of the leases, but an ideal ownership scheme would feature terms long enough to elicit commitment by gardeners and to realize the social and health benefits of the gardens. Seattle’s P-Patch Community Garden program is cited as an illustration of the merits of relatively long lease terms. The five-year renewable lease of public lands affords a substantial period of time for the planning and implementation of the gardens. At the same time, a three to five years term would not hinder the governmental lessor’s ability to plan for another use of the land, if needed. For example, some have noted that three years is well within the time span required to get new residential construction approved in New York City. Additionally, a community garden ordinance may provide for the possibility of permanent dedication to the park department after five or three years of continuous use as a community garden.260

The need to achieve a good balance between stability for the gardens and flexibility for the city or other public entity also weighs against renewal or extension clauses. While covenants giving gardeners the power to be tenants for one or more terms beyond the end of the original term would increase the gardeners’ security of tenure, the covenants would be too restrictive a limit on the city’s exit rights. They would limit the city’s ability to respond to new needs. For the same reason, clauses allowing the city to terminate the agreement and repossess the land may be an important flexibility-enhancing feature. Garden advocates have largely viewed such

260 Schukoske, supra note 210, at 391.
clauses unfavorably for severely undermining the stability of the gardens. But it need not be so. Termination clauses should be coupled with duties imposed the city. In case of termination, the city would have the duty to find alternate space for the gardens to the extent possible. For example, section 8 of the agreement compelled the city to provide alternate space for several gardens in the Bronx slated for development. Additionally, the city has the duty to provide cleanup services and assistance with the procurement of alternate sites for the gardens. The city is also obligated to restore any damage caused to garden lots planned for preservation that are disturbed by adjacent construction projects. Easier, flexibility-enhancing exit for the city should also be balanced with a duty to assist new gardeners by providing land preparation and access to water. Studies have shown that access to resources is important to the success of the gardens. For example, installing a water line can be both expensive and time consuming.

A local community garden ordinance allowing easy exit for the local government or public agency coupled with duties to find alternative space as well as duties of assistance would minimize the tragic trade off between green space and affordable housing. It would not avoid completely tragic trade offs. Urban land is a scarce resource and the need for good quality affordable housing is pressing. In many instances, some green space will be lost. Alternative space with similar size and characteristics may not be available. However, allowing easy exit coupled with duties would trigger a conversation among the actors involved, i.e. the city, the gardeners, residents and affordable housing organization, over such fundamental questions as how intense are the competing needs, how access to green space may be assured and adequate by what standard must green space be.

CONCLUSIONS

In this article, I have argued that we should expand the focus of the commons debate to include “equality of autonomy.” In political theory, as well as in the public imaginary, the commons has long been associated with notions of equality and inclusiveness. We should restore this idea to contemporary commons discourse. In times of high inequality and economic instability, common ownership regimes such as land trusts, limited equity housing cooperatives, neighborhood-managed parks and community sustained agriculture have the potential to make resources that are crucial to individuals’ autonomy available on a more equitable basis. Further, I have argued that a resource-specific analysis of property entitlements helps make and justify the difficult choices we often face in
designing common ownership schemes that seek to promote “equality of autonomy.” The two claims I made concern normative orientation and institutional design. I am agnostic on the larger question of whether, as some progressives believe, “a very large extension of the commons framework is the way to resurrect an alternative narrative of social inclusion and direct satisfaction of social rights.” I share the fear some have expressed that the generalized enthusiasm for the commons may hide new forms of social control and exploitation. I believe whether common ownership is desirable and effective depends on the resource, on the characteristics, and also, on the values and interests the resource implicates.

262 Goldman, *supra* note 8, at 3.