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The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty

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THE MEANING AND NATURE OF PROPERTY: HOMEOWNERSHIP AND SHARED EQUITY IN THE CONTEXT OF POVERTY

MICHAEL DIAMOND*

I. INTRODUCTION

Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.¹

Blackstone's famous statement, derived from Lockean principals, has come to exemplify the currently popular, largely unquestioned, view of property in American society. The statement, however, is an inaccurate description of what property is in today's American society. It also leaves unexamined how highly contested the definition of property has been throughout our history. Yet the term *property* or the term *ownership* has concerned legal theorists and political philosophers, although not the general public, for centuries. I began to think systematically about the meaning of these terms after a student had written a paper for me that challenged the concept of ownership as applied to shared equity homeownership.²

For some time now, the concept of shared equity ownership has been a major component of programs offering publicly subsidized homeownership to low income Americans.³ The student's claim, however, was that the limitation

* Professor of Law and Director of the Harrison Institute for Housing and Community Development, Georgetown Law. An earlier version of this paper was presented at Georgetown Law in a workshop on the Public Nature of Private Property. I want to thank my friend and colleague, Peter Byrne for his always helpful comments, the participants at the Georgetown workshop and Daniel Park, my research assistant, for his excellent and imaginative work on this project. I would also like to thank the participants in the St. Louis University Law School's Symposium on PROPERTY OWNERSHIP AND ECONOMIC STABILITY: A NECESSARY RELATIONSHIP? and the members of the St. Louis University Public Law Review for their work in putting on the Symposium and for putting out this issue of the Review.

1. J.W. EHRlich, ERLICH'S BLACKSTONE 113 (1959).

2. Benita Jones, The Property Paradox: Limited Equity Housing Cooperatives and the Challenge of African-American Wealth Creation (Apr. 2007) (unpublished paper, Georgetown Law) (on file with author).

3. Shared equity housing is housing in which the increase in value of a home is shared between the home owner and some other party. That party might be an investor, a governmental entity, a community based lender or future, as yet unknown, low income buyers of the property. When used in low income situations, it is a device to preserve the affordability of the property.

on the equity that a low-income homeowner is permitted to take out of the property upon its sale relegated that homeowner to a second class status. I had not previously thought of the problem in these terms but instead had been a proponent of sharing equity as a means of preserving long-term affordability.⁴ Thus, I began rethinking my position on shared equity.

I undertook this re-examination with a working hypothesis-that *property* is a culturally constructed concept. The content of the term depends on the culture in which it is employed and, within any particular culture, very often upon the period in which the concept is being discussed. Joseph Singer has put it quite well when he said that “[p]roperty rights must be understood as both contingent and contextual.”⁵

This essay is the result of my re-considering the idea of property in the context of shared equity for low income homeowners. In the essay, I will examine the meaning of property in cultural, philosophical, and political thought. I will then examine property in the context of the legal and political history of the United States. After tracing an intellectual history of the idea of property in America, I will focus on modern American society and on the widespread and deep public regulation of private property and on the acceptance of this regulation by an overwhelming portion of the American public and its politicians. Finally, I will consider shared equity housing and suggest that the limitations it imposes on the rights of an owner to retain the full equity of property upon its sale is not inconsistent with major strains of legal and political American thought and is not significantly different from many other restrictions on owners of property that are currently accepted as given (even essential) elements of our legal and cultural landscape.

I come to this issue, I must confess, with a longstanding set of beliefs. For decades, I have been interested, both academically and as a practitioner, in the provision (or, more precisely, the lack of provision) by society of decent, affordable housing for low and moderate income residents. There is not enough of such housing and the shortfall has become more pressing over time.⁶ More affordable units leave the housing stock each year than enter it.⁷

See JOHN EMMEUS DAVIS, SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 1–12 (2006), <http://www.nhi.org/pdf/SharedEquityHome.pdf> (providing a comprehensive discussion of shared equity housing).

4. See generally Michael Diamond, *Rehabilitation of Low-Income Housing Through Cooperative Conversion by Tenants*, 25 AM. U. L. REV. 285 (1976).

5. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 10 (Charles Geisler & Gail Daneker eds., 2000).

6. U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, AFFORDABLE HOUSING NEEDS 2005: REPORT TO CONGRESS 1–5 (2007), <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>.

7. See *id.* at 23–25.

Among the approaches to staunch the decline of decent, affordable housing units has been the effort to preserve the existing stock of such units and to improve that stock through moderate rehabilitation. Often, this has taken the form of tenant ownership of affordable units.⁸ The acquisition and rehabilitation of these units by low income residents has in many instances been subsidized through the use of public funds. As a partial *quid pro quo* for the use of such funds, governments often require that the deed or covenants that run with the land include a restraint on the alienability of the subsidized units; that is, there are restrictions placed on the homeowner's ability to sell the unit for its full market value and to retain the proceeds.⁹ Critics suggest that this restriction dampens a major part of the American Dream; the portion in which homeownership is a method to accumulate wealth and, in the case of low income homeowners, to escape poverty.¹⁰

This critique has led to a debate among advocates of affordable housing about what should be the goal of our housing policy; long-term preservation of affordable units through resale restrictions or wealth creation for low income families. While none of the advocates for either of these positions thinks that the other position is unworthy, each believes that his or her own preference ought to have the highest societal priority. Since the two goals—preservation and wealth creation—cannot, in a world of finite resources, be maximized simultaneously, prioritizing one goal substantially negates the ability to

8. Diamond, *supra* note 4, at 285, 295–96; *see also* Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85 (2002); COAL. OF NONPROFIT HOUS. & ECON. DEV., A STUDY OF LIMITED-EQUITY COOPERATIVES IN THE DISTRICT OF COLUMBIA 23–27 (2004), http://www.cnhed.org/image/123800_c_sU127242_s_i189945/Coop%20Study%20PDF.pdf.

9. *See, e.g.*, 24 C.F.R. § 203.41 (2009) (Federal Housing Administration regulation that requires affordable covenants and land leases to have resale restrictions). § 203.41(d)(1):

(1) Except as otherwise provided in the HOME Investment Partnerships (HOME) and the Homeownership and Opportunity for People Everywhere (HOPE) programs, the mortgagor may be prohibited from selling the property at a price greater than the price permitted under the program, or the mortgagor may be required to pay a portion of the sales proceeds to a governmental body or an eligible nonprofit organization, as long as the mortgagor is not prohibited from recovering:

(i) The sum of the mortgagor's original purchase price, the mortgagor's reasonable costs of sale, the reasonable costs of improvements made by the mortgagor, and any negative amortization on a graduated payment mortgage insured under § 203.45 of this part; and

(ii) A reasonable share, as determined by the Secretary, of the appreciation in value which shall be the sale price reduced by the sum determined under paragraph (d)(1)(I) of this section.

10. *See* DAVIS, *supra* note 3, at 9–10 (weighing the claims and criticisms of shared equity housing from the viewpoint of individual versus community wealth creation).

achieve the other. Attempts at some form of “splitting the difference” between them has left each side unsatisfied. This conundrum, what I have called in another paper “the conflict of competing social goods,”¹¹ leaves one pondering how society ought to choose among incommensurable goals.¹²

While that conundrum remains perplexing, I want to move beyond it and continue an exploration of the cultural construction of property that I began in the Cultural Construction of Property paper. In this paper, I want to extend that inquiry and examine the various meanings of property and ownership in American legal and political history. In particular I want to look at whether the resale restraints placed on publicly financed affordable homeownership units really stray very far from the mainstream of our understanding of property and its use.

In Part II of the paper, I describe the nature of the restrictions often placed on the resale of publicly financed housing and describe the contours of the debate over those restrictions. In Part III, I briefly revisit the philosophic and cultural aspects of the concept of property. In Part IV, I discuss the legal and political meaning of property through American history and the complexities of its meaning today. In Part V, I argue that the resale restrictions placed on some subsidized homeowners are appropriate elements of public policy and are in keeping with a major strain of understanding in American legal and political thinking about the meaning of property. Moreover, they are consistent with other restrictions currently placed on private property in order to meet overriding public concerns.

II. RESALE RESTRICTIONS ON PUBLICLY FINANCED AFFORDABLE HOMEOWNERSHIP

Many states and local jurisdictions have created programs for financing and rehabilitating affordable housing units.¹³ Of these, many provide for

11. Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, in *AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS* (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

12. *Id.*

13. *See* Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2001) (giving tenants the opportunity to buy residential rental housing when it is offered for sale); Housing Production Trust Fund, D.C. CODE § 42-2802 (2001) (establishing a dedicated fund for the development of affordable housing); http://www.hud.gov/offices/pih/pihcc/housing_trust_fund_websites.pdf (providing a list of state housing trust funds); First Right to Purchase Program, D.C. MUN. REGS. tit. 14, §§ 2700–2799 (1983) (for the regulations governing one of the District of Columbia’s non-trust fund programs for financing affordable housing). Many other types of programs assist or encourage the development and improvement of affordable housing. *See, e.g.*, N.Y. Affordable Housing Tax Exemption Program, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007); California Housing Element Statute, CAL. GOV’T CODE §§ 65580–65589.8 (West 2007) (requires a “fair share” approach to housing where local government must take into

homeownership opportunities for low income residents.¹⁴ Often, in exchange for very favorable public financing, the borrower must agree to restrictions on the amount of equity the borrower can retain when the unit is sold. The provisions implementing the restrictions are usually found in the deed or in covenants that run with the land. The limitations may be expressed as a formulaic increase in the borrower's permitted equity based on such factors as the amount of the down payment, the cost of improvements made to the property, the amortization of the mortgage and the length of ownership. The borrower/seller may typically recover what he or she put into the property plus some factor that is based on length of tenure. The balance of the equity remains in the property as a subsidy to the next qualified buyer.

A variation on this theme is that the full equity is available at settlement but the amount of equity above what is permissible under the formula is remitted to the lending jurisdiction to replenish its capital for further lending to low income homebuyers. A major drawback of this variation is that by permitting the full equity to be withdrawn at the time of resale, there is a risk that the unit will be forever removed from the affordable stock. On the other hand, it gives the lender additional capital to subsidize further units. In my view, the first method is preferable to the second because it preserves the affordability of the unit. However, in today's economic crisis, the availability of funds to subsidize the next affordable unit is so limited that it might be

consideration accommodation of their local housing needs. Mandates municipalities to tailor their real estate development policies to aid in the production of new housing for all income groups); Massachusetts Low and Moderate Income Housing Act, MASS. GEN. LAWS ch. 40B, §§ 20–23 (2009) (in a municipality where less than 10% of its housing qualifies as affordable a developer can override local zoning rules to build new developments as long as 20% of the new units have long-term affordability restrictions); New Jersey Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301–307 (West 2009) (municipality's land use regulations must be revised to encourage the development of affordable housing and contain measures to keep the low income units affordable).

14. The federal government has programs promoting homeownership. For an example, see the federal First Time Homebuyer Credit, 26 U.S.C. §§ 36(a)–(b)(1)(A) (2006) (providing an income tax credit of up to \$8,000 for first time homebuyers). For state programs, see the California tax credit, CAL. REV. & TAX. CODE § 17059 (West 2009) (offering a credit of \$10,000 or 5% of the home's price, whichever is less for new home buyers). *See also* Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2001) (giving tenants the opportunity to buy residential rental housing when it is offered for sale); First Right to Purchase Program, D.C. MUN. REGS. tit. 14, §§ 2700–2799 (1983) (for the regulations governing one of the District of Columbia's non-trust fund programs for financing affordable housing); City of Buffalo, Urban Homestead Program, http://www.ci.buffalo.ny.us/Home/City_Departments/RealEstate/UrbanHomesteadProgram (last visited Feb. 1, 2010) (describing Buffalo's Urban Homestead Program); *see generally* Mother Earth News, Urban Homesteading, <http://www.motherearthnews.com/Modern-Homesteading/1980-09-01/Community-Homesteading-Programs.aspx> (last visited Feb. 1, 2010).

beneficial to put funds back into the lender's coffers if it could be assured that the lender would make new affordable housing loans.¹⁵

In an alternative form of limitation there is no restriction placed directly on the equity that the borrower/seller can take from the property upon resale. Instead, the constraint lies in to whom the borrower/seller may re-sell the property. This is usually expressed as a limitation in the deed or in covenants that run with the land as to who may be a financially eligible buyer. This is typically a household at or below a fixed percentage of the area median income (AMI). This creates an equity limitation in that the resale price, when calculated as the amount the new buyer would have to pay on a monthly basis to amortize the mortgage (plus certain other specified housing costs, such as utilities, taxes and insurance), would have to be within 30% of the monthly income for someone at the top of the eligible income bracket.¹⁶

With either form of restriction, the original buyer is permitted to secure some degree of benefit from the investment aspect of homeownership. The balance of the equity, however, remains, directly or indirectly for use by future low income home buyers. These restrictions provide obvious benefits to society from the long term preservation of affordable housing but there are also costs. Society might have funds tied up for a considerable period in each building it assists. This would limit, in the aggregate, the number of units or households that could be assisted.

There are costs to the individual borrower as well. When that borrower seeks to sell his or her unit, that seller may not be able to obtain enough net proceeds to permit him or her to buy a home in the unsubsidized market. Thus, not only will the seller potentially remain in poverty, but the society will be faced with the problem of providing another affordable unit, perhaps through a new subsidy, to the low income seller.

Of course, if there were no restrictions on the resale of the unit, the borrower, theoretically, could capture all of the equity through a sale to a market rate buyer. This might aid the seller in escaping poverty but it creates the risk that the unit will be made too expensive for another low income buyer to afford. Thus an affordable unit will have left the market with the great likelihood of not being replaced. This would result in a further shortage of

15. There are other reasons why I believe this variation is inefficient. The amount of equity being withdrawn in any resale will probably not equal the amount of subsidy originally provided. Moreover, it is likely that, over time, the price of housing will increase making the original subsidy potentially inadequate even if the full amount of the subsidy is withdrawn. In addition, there are significant transaction costs associated with the recapture and relending of the funds. Finally, there can be only limited current assurances that the funds recaptured will be re-used in the affordable housing arena. The major inefficiency, of course, is that an affordable unit is likely to leave the housing stock with no likelihood of a replacement entering the market.

16. *See, e.g.*, FAIR HOUSING RHODE ISLAND, TECHNICAL ASSISTANCE GUIDE app. 8, at 40 (2007), http://www.fairhousingri.org/techguide/11_LongtrmAff_ResaleRestQA.pdf.

affordable housing at the expense of future low income individuals and, ultimately, of the society.

III. THE CONCEPT OF PROPERTY ACROSS TIME AND CULTURE

As I have indicated, the concept of property has varied over time and between cultures. In this section, I will give a brief overview of some of the significant variations in meaning. Some of these will be reprised in Part IV as the underpinnings of American legal thought about the meaning and use of property.

A. *Traditional Non Western Views of Land Ownership*

As early as the 6th century BCE, Confucius developed a complex view of property that combined significant elements of what were to become the market economies of capitalist culture along with a more communalist view in which the state was obliged to secure for the people the basic means of their subsistence. He called for an interventionist model and supported, for example, a fair distribution of goods.¹⁷ This view was reiterated by Mensius, a follower of Confucius, who, while affirming the concept of private property, also argued that the government should control the distribution and use of land to assure the subsistence of the people.¹⁸

Similarly, the traditional Islamic view of property rights conceived of a dual ownership of property between a human being and Allah. The land was thought to be a sacred trust that must be used productively but without exploitation or hoarding.¹⁹ Thus, the land owner may benefit from his or her land but only within a circumscribed range. The concept was not one of unlimited dominion. Property rights were essentially either public, state, or private. Private rights depended on use and public lands might be converted to the private realm by productive use of such land. On the other hand, private, unused land might revert to the state. The public nature of the ownership of land in traditional Islamic law was that landowners were required to pay a levy of a part of the earnings from the land for the benefit of the poor. This levy was not viewed as voluntary charity but as a social obligation and, correlatively, as a right of the poor to receive.²⁰

Various Native American Nations have also viewed property rights differently from those of the archetypal western model. While most recognized individual rights in personal property, their view of rights in land

17. Daniel A. Bell, *Confucian Constraints on Property Rights*, in *CONFUCIANISM FOR THE MODERN WORLD* 222–25 (Daniel A. Bell & Hahm Chaibong eds., 2003).

18. *Id.* at 237, 239.

19. SIRAJ SAIT & HILARY LIM, *LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD* 11 (2006).

20. *Id.* at 12–14.

varied widely. Many nations did not recognize individual property interests in land. In some cases this was because tribes were nomadic and such interests were not relevant to their existence or were even adverse to it.²¹ Others had a more communal or even spiritual sense about the land. They viewed the land as belonging to all and no individual could exercise complete dominion over it.²² While individuals who occupied particular land could enjoy the fruits of their labor, they had an obligation to preserve the land for future generations. They merely used the land in trust, an example of tenure from which the stewardship concept developed.²³

B. *The Western Legal Tradition*

For more than two millennia, thinkers have considered the nature and meaning of property. Variants have run the gamut from communal ownership to stewardship to absolute dominion. For example, Plato had rejected the concept of private property and argued instead for commonly owned property. Rulers would have no private property while other property would be held for the common good.²⁴ Thomas More and Karl Marx echoed the call for communally owned property, More espoused a humanist Christian perspective that in order to avoid the otherwise certain oppression of the poor, private property should be abolished and property should be held communally.²⁵

21. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985).

22. PAUL H. CARLSON, *THE PLAINS INDIANS* 111 (1998).

23. See Lynton Keith Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319 (1986) (contrasting the stewardship ethic with the typical American concept of land dominion).

24. PLATO, *THE REPUBLIC* 161–63 (H.D.P. Lee trans., Penguin Books 1962).

25. See THOMAS MORE, *UTOPIA* 30 (PF Collier & Son, Colonial Press 1901) (1516).

Though to speak plainly my real sentiments, I must freely own that as long as there is any property, and while property is the standard of all other things, I cannot think that a nation can be governed either justly or happily: not justly, because the best things will fall to the share of the worst men; nor happily, because all things will be divided among a few and even these are not in all respects happy), the rest being left to be absolutely miserable.

See also Peter W. Salsich Jr., *Property Law Serves Human Society: A First-Year Course Agenda*, 46 ST. LOUIS U. L.J. 617, 617–18 (2002).

The religious concept of stewardship is derived from the belief that all material goods, including land, belonged to God. The earth and everything in it was created by God. Humankind was created in the image and likeness of God and given dominion over material goods of the earth. Since all humans are created in God's likeness, all have a claim to the earth's bounty. Individuals may appropriate what they need for their own sustenance and development but only what they need. Civil title to land, while giving the holder substantial power to possess, use, and dispose of that land, is not absolute. With title comes a responsibility to care for the land and use it wisely for the betterment of the landowner, the landowner's community, and future generations. The landowner, as steward, will ultimately be asked to give an accounting of that use to God, the Master.

Marx believed, as did many of the English economic philosophers, that property involved an interaction between people and things, not, as is a common belief today, a relationship between person and person. He went on to argue, however, that property in private hands tended toward an inequitable power relationship between people, those that had property and those who had not. In order to retain the classical view of property as a relationship between a person and an object, and to avoid the oppression of the propertyless class, property had to be held by the public rather than by private individuals.²⁶

There are among western thinkers, of course, differing views of property. John Locke, for example, is widely viewed as the progenitor of the market sense of property. According to Locke, property rights pre-date the political state and arise from the labor of the first occupier.²⁷ Government, according to Locke, was designed to protect the property rights of its citizens and was not to interfere with their use of their property.²⁸ But even Locke placed restrictions on the use of property. One may only take as much as one can use before it spoils and one must leave “enough and as good” for others. This recognition of the limits of private ownership is as much a part of Locke as the recognition of the right to private ownership.

At about the same time Locke was writing about individual rights of property as a protection against encroachment by others, The Diggers (or Levelers) were arguing for communal ownership to preserve the right to subsistence for all people. Such access to “soil and to subsistence were fundamental to freedom.”²⁹ Levelers such as Gerrard Winstanley protested the enclosures of land by wealthy individuals that deprived the poor of access to life’s necessities. He argued for communal cultivation of the commons as the antidote to the despotic power of the wealthy.³⁰

Of course, Blackstone took a different view. At least rhetorically, he claimed that owners of property had absolute right over its use and disposition.³¹ Even as he was writing, the State had already intervened in

26. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* 52 (Verso 1998) (1848).

The distinguishing feature of communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products that is based on class antagonisms, on the exploitation of the many by the few.

27. JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* §§ 26–29, at 20 (Prometheus Books 1986) (1690). For a discussion of Locke’s views of property, see ITAI SENED, *THE POLITICAL INSTITUTION OF PRIVATE PROPERTY* (1997).

28. See LOCKE, *supra* note 27, §§ 138–140, at 77–79.

29. LAURA BRACE, *THE POLITICS OF PROPERTY: LABOUR, FREEDOM AND BELONGING* 14 (2004).

30. *Id.* at 19.

31. ERLICH, *supra* note 1, at 113.

private property.³² There were restrictions on its use and disposition as well as it being subject to taxation. Moreover, restrictions on the use of property had been in place in England even before Blackstone began writing about “Despotic Dominion.”³³ Nevertheless, his claim has had great purchase among writers about property and its theme has significantly penetrated the common consciousness about property and ownership.

C. *Aspects of Property in Relation to Individuals*

Several theories have been developed about property ownership and the individual. One, the idea of personhood, argues that one’s right to act as a free individual must be supported by elements allowing self expression.³⁴ Among these would be one’s right to possess and use private property. There is a good deal of evidence suggesting that homeownership does, in fact, involve elements of self expression, autonomy and social capital.³⁵

A second theory derives from Adam Smith and utilizes economic efficiency as a basis for property rights. Private ownership promotes efficient use of property in the owner’s self interest. This, in turn, promotes an economically efficient society. Under this theory, private decisions as to one’s self interest, spread over a large universe of owners, will aggregate toward the social good—the invisible hand writ large. Of course, the debate over the ability of the market to order society in a proper manner has been active for years and is prominently featured in the current public discourse.

Morris Cohen criticizes both of these theories. Concerning personhood, he argues that property rights also deny elements of personhood in that they

32. See, e.g., John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996). In discussing the notion of minimal land use regulation during the American Colonial period, Hart states “. . . in fact, colonial governments regulated land use extensively for purposes other than preventing harm.” *Id.* at 1253.

33. For a discussion of the English antecedents to the American system of the regulation of property (among other elements of regulation), see WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

34. See, e.g., MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 35 (1993).

35. See, e.g., William M. Rohe et al., *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research* 16–17 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-0.1.12, 2001), http://www.jchs.harvard.edu/publications/home_ownership/liho01-12.pdf (stating protection of economic interest, transaction costs of moving and identification with one’s home as reasons for increased participation among homeowners); WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 4 (2001); DAVIS, *supra* note 3, at 110 (“Limited equity cooperatives help to create a space to reconnect local activism with the neighborhood by enforcing values of civic participation and creating spaces for interaction. The social and leadership skills that are learned in LECs increase residents’ resources and motivation for civic participation.”) (quoting Saegert et al., *Limited Equity Co-ops as Bulwarks against Gentrification* (2003) (unpublished manuscript) (on file with City University of New York Graduate Center)).

include the right to exclude others, thereby at least potentially depriving those others of their right of self assertion.³⁶ Cohen's criticism of both the personhood and efficiency arguments is that they fail to look out for the overall societal good. Private property cannot, he claims, be sacrosanct and free of any government restriction.

The issue before thoughtful people is therefore not the maintenance or abolition of private property, but the determination of the precise lines along which private enterprise must be given free scope and where it must be restricted in the interests of the common good.³⁷

Tom Bethell, a writer in the market/commodification tradition of property has, nevertheless, struck a similar chord by stating: "Private property is a compromise between our desire for unrestricted liberty and the recognition that others have similar desires and rights."³⁸ Bruce Ackerman, writing in quite a different tradition, has echoed this position. He has stated, more bluntly, that:

[O]nly the ignorant think it meaningful to talk about owning things free and clear of further obligation. . . . More precisely, the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users.³⁹

These admonitions have been regularly heeded by modern societies. Consider the wide range of restrictions that are now accepted by virtually everyone in many industrialized societies. Fair housing and public accommodations laws limit one's ability to exclude others from one's property. Zoning rules tell us how large a building may be and the use to which it may be put. Building and housing codes tell us how buildings must be constructed and what amenities they must contain. Warranties of habitability and rent control laws restrict landlord behavior and income. Environmental laws limit uses and emissions of and from buildings. Taxes deprive the owner of some of the value of land and different uses produce different tax obligations, thereby steering behavior. Finally, the most far-reaching of the limitations on property, the right of the government to take private property for public use, was recently very broadly defined by the Supreme Court.⁴⁰

As has been shown in this section, a wide range of views have been applied to the concept of property. Many of them provide a counterpoint to Blackstone's "despotic dominion" hypothesis. In the following section, I will examine how the concept of property developed in the American legal-political-social context.

36. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 11-12 (1928).

37. *Id.* at 21.

38. TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* 9 (1998).

39. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26 (1977).

40. *See Kelo v. New London*, 545 U.S. 469 (2005).

IV. THE MEANING OF PROPERTY IN AMERICAN LEGAL THOUGHT

Throughout this nation's history, there has been a struggle between those who believe that we have a collective responsibility, through, but not limited to, government, to "promote the general welfare" and those who assert that the general welfare is and should be best achieved by all pursuing their own self-interest via "the Market," with government doing as little as possible, apart from providing for the common defense.⁴¹

Historically, the concept of property has had many meanings and has fulfilled many goals in civil society. This has also been true in American legal and political history, which includes a rich vein to the effect that the idea of property includes a significant social component. To be sure, there is also a significant vein of thought, in fact the prevalent one, which views property as being wholly within the control of an owner. We, as a society, view property as a commodity, a means of exchange that helps to order private interactions and fulfill private preferences.⁴² Yet, as Joseph Singer points out, that domination has always been more theoretical (or mythical) than real.

If we observe the operation of private property systems, we see that full consideration of property rights in the same person is the exception, rather than the rule; most property rights are shared or divided among several persons.⁴³

The way that these interests are divided may tell us something about the nature of property in the United States. Gregory Alexander, for example, has posited that two strains of theoretical discourse have been present in American legal thought throughout our history. The first treats property as a commodity and corresponds to the prevalent view today that property is an item of private exchange that allows individuals to pursue their preferences in the market. This involves a negative sense of liberty in that it assumes individuals are free to order their relationships unfettered by interference from government. The second strain, what Alexander, borrowing from Carol Rose, calls "propriety," addresses the use of property to create and maintain the "good society," whatever that may be.⁴⁴ In this vision, property has a public function beyond any private use.

41. Rachel G. Bratt et al., *Why a Right to Housing Is Needed and Makes Sense: Editors Introduction*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 8 (Rachel G. Bratt et al. eds., 2006).

42. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* 1 (1997).

43. Singer, *supra* note 5, at 6.

44. ALEXANDER, *supra* note 42, at 1.

While several writers have contested this second view,⁴⁵ there has been much American legal writing to the effect that property should serve, at least to some extent, the public good. This strain, however, may not be matched by a societal implementation of its prescriptions. Moreover, even for those who consider public benefit a proper purpose for property, there is a debate about what is a public benefit.

My goal in this section is not to resolve the dispute between those who believe our government was established to protect (and, in fact, has protected) interests of the propertied class and those who believe that the government was established to regulate (and has regulated) property in the public interest. Instead, in this section I want merely to describe some of the major arguments on each side of this issue. I will distinguish normative, theoretical positions from descriptive ones and examine how the government has for generations regulated private property, at least to some extent, in the public interest and against the interests of individual title holders.

A. *Individualism and Commodification*

Any discussion of individual property rights and the commodification of property hearkens back, of course, to John Locke and the primacy of individual liberty. He, and many others, believed that property was a major bulwark against encroachments on such liberty by the state. This belief has become the basis for many of the legal protections and rights that Americans enjoy today.⁴⁶ David Abraham makes an argument that throughout much of American history, concepts such as freedom of contract and private property were protected by the law and the courts with the effect that neither government nor other individuals could intrude on the freedom provided by these devices. Citing *Lochner v. New York*⁴⁷ and similar cases, Abraham argues that:

Never again did the formal equality of contract so fully displace the social realities that produce contract relations. In this view, exchanges of property in the market are not only guaranteed freedom but were indeed the very expression of it.⁴⁸

He goes on to quote Edward Corwin critically commenting that the goal of the Supreme Court seemed to have been to “annex the principles of laissez-faire capitalism to the Constitution and put them beyond the reach of state legislative power.”⁴⁹

45. See, e.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); David Abraham, *Liberty Without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime*, 21 L. & SOC. INQUIRY 1 (1996).

46. See NEDELSKY, *supra* note 45, at 8–9.

47. *Lochner v. New York*, 198 U.S. 45 (1905).

48. Abraham, *supra* note 45, at 18.

49. *Id.* (quoting EDWARD CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 78 (1934)).

Abraham tracks the negative liberty impulse from the founding of the nation to the present. He argues that the few periods when the legislatures and courts broke free from the regnant idea of property as a basis for negative liberty, Reconstruction, the New Deal, and the Civil Rights era, really were just slight and temporary inroads into the primacy of private property as an ordering mechanism for society and a source of rights and power. He quotes Margaret Radin, who he calls the successor to Reich in the age of Rorty, as stating:

[T]he best strategy for making gains for the less well-off. . . [is] to drive a wedge in the ideological justification of property by showing that only a very small portion of private property rights serve the purposes claimed for property in general, rather than attempting to disrupt the ideology of property. . . [I] do not think. . . that the ideology of property can be dislodged.⁵⁰

Jennifer Nedelsky also believes that the nation was founded on the Lockean view of protection of property rights as the means to protect liberty. She claims that “The Framers’ preoccupation with property generated a shallow conception of democracy and a system of institutions that allocates political power unequally and fails to foster political participation.”⁵¹ She goes on to say “For the Framers, the protection of property meant the protection of *unequal* property and thus the insulation of both property and inequality from democratic transformation.”⁵²

While Nedelsky recognizes that the Constitutional Convention proceeded with a great deal of collaboration and compromise, she believes that the Federalists and their Lockean view of property and rights carried the day.⁵³ She argues that the conflict between personal rights and property rights was resolved in favor of property. Her hypothesis is that all people had an interest in, and thus favored, personal rights while only the propertied classes had an interest in property rights. Thus, to protect those rights from the masses of the unpropertied, Constitutional safeguards protecting those rights were created. This was a largely non-democratic position and made the political rights of the masses subservient to the property rights of the few.⁵⁴

Abraham and Nedelsky have developed a descriptive view of how the sense of property has evolved in American legal and political thought. There are, of course, many who view this evolution as the normatively correct path. One, Tom Bethell, has claimed that the “secure, decentralized, private

50. *Id.* at 28 (quoting Margaret Jane Radin, *Lacking a Transformative Social Theory*, 45 STAN. L. REV. 409 (1993)).

51. NEDELSKY, *supra* note 45, at 1.

52. *Id.* at 2.

53. Nedelsky asserts that the Federalist James Wilson “was the only member of the Constitutional Convention to proclaim that property was not the object of government.” *Id.* at 12.

54. *Id.* at 5.

ownership of goods,” is a necessary but not sufficient condition for obtaining the “four great blessings . . . [of] liberty, justice, peace and prosperity.”⁵⁵ But even Bethell recognizes the fact that property does not carry absolute rights but is a compromise of various, often conflicting, interests.⁵⁶

B. *Property as an Instrument of Social Good*

The primacy of private property in American thought can be seen in the number of writers, on both the left and right of the political spectrum, who extol or bemoan its pre-eminent political position. For example, Tony Honoré has written “If under the system of entitlements the interest awarded to owners is greater than can reasonably be justified on moral, as opposed to economic grounds, any resultant distribution of property must be inherently unjust.”⁵⁷ He goes on to say “[T]his western system of property law is neither the only conceivable one, nor the easiest to justify from a moral point of view.”⁵⁸

In fact, Gregory Alexander has argued that two quite different strains of theory have characterized American legal and political thought since colonial times.⁵⁹ The first, the idea of property as a commodity for market exchange is in dialectic opposition to the second, property as propriety.⁶⁰ The proprietarian views of property, as Alexander sees them, have a

“. . . commitment to the basic idea that the core purpose of property is not to satisfy individual preferences or to increase wealth but to fulfill some prior normative vision of how society and the polity that governs it should be structured.”⁶¹

55. BETHELL, *supra* note 38, at 9.

56. *Id.*

57. TONY HONORÉ, MAKING LAW BIND 218 (1987). For a contrary view, see Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

58. See HONORÉ, *supra* note 57, at 218.

59. ALEXANDER, *supra* note 42, at 1.

For too long now, legal scholars have tended to accept uncritically the claim that there has been a single tradition of property throughout American history. Property, according to this mistaken view, has served one core purpose and has had a single constant meaning throughout American history: to define in material terms the legal and political sphere within which individuals are free to pursue their own private agendas and satisfy their own preferences, free from governmental coercion or other forms of external interference. Property, according to this understanding, is the foundation of the categorical separation of the realm of the private and public, individual and collectivity, the market and the polity.

60. Alexander borrows this term from Carol Rose. It denotes property as a foundation for the creation and maintenance of the good society, whatever that may be; the “private basis for the public good.” *Id.*

61. *Id.* at 2.

He argues that such views were already well established in Europe and that the pre-revolutionary American legal intellectuals were heirs to that tradition⁶² and the rest of the book offers evidence of the degree to which these views continued to percolate in our legal and political thought until the late twentieth century. He concludes that

There is no single American traditional meaning of property. . . Rather, there have been multiple meanings and multiple traditions of property throughout our history.⁶³

Joseph William Singer, echoing the legal realists, also criticizes the classical view of property suggesting that we should (and that we do) disaggregate the bundle of property rights and discuss particular entitlements as separate components.⁶⁴ He believes property should be viewed as relations among people rather than between people and things and, in doing so, distinguishes between classical concepts of title and his preferred model of informal relations and moral claims.⁶⁵

C. The Application of the Proprietarian Meaning of Property in American Political History

Throughout history, we have repeatedly seen government intrude upon the classic liberal conception of property in order to further some broader social purpose. What is more, these intrusions have been accepted as reasonable and essential parts of our society by all but the most zealous *Lochnerians*. To take but a few early examples, New York passed a law in the late 1860's prohibiting commercial activities along Frederick Law Olmsted's new Eastern Parkway in Brooklyn, NY.⁶⁶ Such rules became comprehensive in 1916 as New York passed the first citywide zoning ordinance. Within ten years, ordinances such as New York's were upheld by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁶⁷ Zoning ordinances such as these limited what an owner could do with his or her property and, given an acceptable use, limited the size, location and height of improvements on the property.

62. *Id.* at 8, 384–85.

63. ALEXANDER, *supra* note 42, at 7.

64. Singer, *supra* note 5, at 8.

65. *Id.* at 4–5, 8.

66. IRVING D. FISHER, FREDERICK LAW OLMSTED AND THE CITY PLANNING MOVEMENT IN THE UNITED STATES 134 (1986); Keith D. Revell, *Regulating the Landscape: Real Estate Values, City Planning and the 1916 Zoning Ordinance*, in THE LANDSCAPE OF MODERNITY: NEW YORK CITY 1900-1940 19 (David Ward & Olivier Zunz eds., 1997).

67. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Similarly, New York passed the Tenement House Act of 1867 which regulated light, air and facilities in residential buildings.⁶⁸ These laws evolved into modern building and housing codes that regulate building materials, amenities, and general health and safety requirements.⁶⁹ Progressing along the legal continuum of the state protecting citizens from the dangers caused by inadequate or too expensive housing, we have the warranty of habitability⁷⁰ and rent control laws.⁷¹ It takes little imagination to recognize the inroads these provisions have made on the despotic dominion owners have over property. Such rules require landlords of residential rental housing to maintain the property up to the standards of the local housing codes and restrict the amount that can be charged as rent. They affect the value of the property to the owner and the owner's ability to do with his or her property as he or she pleases.⁷²

Another area in which widely accepted government regulation invades one of the central sticks in the classical bundle constituting ownership is the right to exclude. Fair housing and public accommodation laws have made it illegal to exclude individuals from one's property for various demographic reasons such as race, gender, national origin, sexual preference, family status, source of funds, etc. The underlying rationale for these and other such rules is the need for public good to override private rights.

V. THE CONCEPT OF PROPERTY AND SHARED EQUITY HOUSING

There is today a significant shortage of affordable housing units and new affordable units enter the market at a very slow pace.⁷³ At the same time the demand for such units is growing due to an increase in the number of households in need of such units.⁷⁴ In addition to an increased demand for units, the number of affordable units being lost to the overall stock continues to

68. See RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY: DWELLING TYPE AND SOCIAL CHANGE IN THE AMERICAN METROPOLIS 22 (1990). In 1856, the State of New York created a commission to study substandard housing. *Id.* at 21. In 1866, the legislature passed a law setting constructing standards, and in 1867 the first Tenement Housing Act was passed. *Id.* at 22. The Tenement Housing Act was subsequently amended and expanded upon in 1879, 1901, and again in 1919. *Id.* at 24, 85, 123.

69. See, e.g., N.Y. CITY ADMIN. CODE §§ 25-301, 26-405, 27-102, 28-101.2 (2009).

70. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir. 1970); N.Y. GEN. LAWS ch. 334, 1901 (repealed 1909).

71. D.C. CODE ANN. § 42-3501.01 (LexisNexis 2003); N.Y. CITY ADMIN. CODE § 26-501 (2009).

72. Other laws that restrict the economic rights of owners include environmental statutes such as 42 U.S.C. § 7401(a) (2006); 33 U.S.C. § 1251 (2006); D.C. CODE ANN. § 6-1451.01 (LexisNexis Supp. 2009); D.C. CODE ANN. § 42-3404.02 (LexisNexis Supp. 2009); and 42 U.S.C. § 12101 (2006) to name a few.

73. U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note 6, at 36.

74. *Id.* at 37.

grow due to market conditions, owner choice and deterioration.⁷⁵ Since the gap between supply and demand is growing, it is critically important for society to preserve the existing stock of affordable units while increasing the supply of such units. Use restrictions is one method of preserving affordable units. These restrictions have the effect of sharing the equity in any for sale unit with the next buyer or with the society as a whole.

In this section I will pay particular attention to the idea of shared equity as a means of assisting low income buyers to purchase a home and will conclude with a discussion of the ethical validity of use restrictions on subsidized homeowners. I will argue that not only are such restrictions instrumental in achieving a valued social goal but also that the potential reduction of owner equity as a result of the restraint is not a significant departure from generally accepted restrictions on property.

As I stated earlier, the concept of shared equity housing is, essentially, that some investor, private or public, assists a home buyer in the purchase of a home. In exchange, the investor requires a share of the equity. In a private situation, that share is typically distributed directly to the investor at a pre-determined point or upon re-sale of the property. The distribution is the entrepreneurial return for the use of the investor's funds and for his or her risk.

There are many examples of this form of shared equity in today's housing market. Perhaps the most ubiquitous is that of a parent helping a child purchase a home. There has been a long tradition of the parent or other relative or friend making a contribution to a down payment in exchange for a portion of the equity upon resale.⁷⁶ This model has expanded beyond family and friends as financial contributors and has become a form of business investment.⁷⁷ Evidence suggests that many investors and homeowners desire this type of arrangement over currently available mortgage products.⁷⁸ Thus, the concept of shared equity housing has not been limited to the poor homebuyer but has spread to all segments of the market, including homebuyers

75. *Id.*

76. For a discussion of the private shared equity process, see Judy Newman, *Balancing the Cost: Shared Equity Home Ownership Addresses Affordable Housing Needs*, ON COMMON GROUND (Nat'l Ass'n of Realtors, Washington, D.C.), Winter 2008, at 10, 12, [http://www.realtor.org/smart_growth.nsf/docfiles/winter08_balancing_costs.pdf/\\$file/winter08_balancing_costs.pdf](http://www.realtor.org/smart_growth.nsf/docfiles/winter08_balancing_costs.pdf/$file/winter08_balancing_costs.pdf) (discussing the rise of shared equity homeownership and the costs associated with it); *see also* Lending Tree, LLC, *Buying a Home with a Shared-Equity Mortgage*, <http://www.lendingtree.com/smartborrower/first-time-home-buyers/buying/buy-home-shared-equity-mortgage/> (last visited Feb. 1, 2010).

77. ANDREW CAPLIN ET AL., FANNIE MAE FOUND., *SHARED-EQUITY MORTGAGES, HOUSING AFFORDABILITY, AND HOMEOWNERSHIP 3* (2007), <http://cess.nyu.edu/caplin/SEM2007.pdf> (arguing in favor of shared-equity mortgages and suggesting that the financial markets value shares in homeownership more highly than some homeowners).

78. *Id.*

looking for needed and efficient financing and investors looking to capitalize on historic housing returns.

When the investor is the public, however, the goals of shared equity investment change. The goal for the distribution is typically not entrepreneurial. Rather, the distribution is designed to serve some public good, for example, preserving the property as affordable to future low income buyers. Moreover, the public's share of the equity may or may not actually be distributed. The more common scheme is that the public's equity remains in the property making it more affordable to the next low income buyer. The original buyer may take out whatever equity was designated at the outset as his or her share. Subsequent buyers would have to agree to the same arrangement in order to be eligible to purchase the property.

An alternative involves the distribution of the public's share of the equity, together with a payoff of the balance of the underlying mortgage, when the property is sold. While this method may not preserve as affordable the particular unit that is being sold, it does return to the public entity a significant amount of capital that can be used to subsidize another low income buyer.

A. *Homeownership and Preservation*

For generations, the American Dream has included an element of homeownership. From the promise of "forty acres and a mule"⁷⁹ to the original Homestead Acts⁸⁰ to the mortgage interest tax deduction,⁸¹ there has been a national policy of encouraging and supporting ownership. The financial benefits of homeownership have been well documented and run from the obvious element of potential wealth creation due to price appreciation on homes to more opaque forms of increasing overall wealth.⁸² There are, however, other benefits of homeownership that have been identified by commentators.⁸³ They include increased civic participation⁸⁴ emotional

79. "Forty Acres and a Mule" refers to an order made in W.M. Sherman's Special Field Order No. 15 during the Civil War on January 16, 1865.

80. See generally Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392, amended by Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095.

81. See I.R.C. § 163(h)(3) (West 2009).

82. In addition to appreciation, wealth can be generated from building equity by amortizing the mortgage while, at the same time, enjoying the occupancy (and thus the rental value) of the property. It can also be generated through a constant mortgage payment in the face of rising housing (and rental) values. One lives in a property while paying \$X while the rental value is >\$X. The savings over what rent increases would have been as well as the differential between what the homeowner pays and the value of what he or she receives are forms of wealth creation. See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 541-44 (2007).

83. For a general discussion of these benefits, see *id.* at 577-80.

84. Rohe et al., *supra* note 35, at 16-17.

benefits of pride of ownership,⁸⁵ and the potential for increased capacity and social capital.⁸⁶ Homeowners typically have the security of place and, in addition, their normally longer tenure offers them greater potential for creating and maintaining connection and community.⁸⁷

The poor, however, have been largely excluded from these benefits. In many of today's urban housing markets,⁸⁸ the median price of a home is more than can be afforded even by buyers with occupations such as school teacher, fire fighter, police officer or nurse.⁸⁹ Obviously, people with lower paying jobs would have even more difficulty purchasing a home. The concept of shared equity was one method designed to rectify this imbalance and to create greater access to homeownership for the poor. The model preserves affordability for the long term and prevents affordable units from exiting the market.

There are, of course, costs associated with sharing equity. Most conspicuously, the homeowners in a shared equity situation will not realize a portion (often, a significant portion) of the equity built up in their property. For the poor, this could mean the loss of an opportunity to escape poverty. This is the crux of the property issue here. Is the potential loss of that equity a sufficient basis to argue that the shared equity homeowner has lost an essential element of ownership? The remainder of this section will argue that it is not.

85. Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1242 (1989).

86. Byrne & Diamond, *supra* note 82, at 579.

87. Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 585 (2002) (indicating that social interaction builds social capital).

88. I am excluding the effects of the current financial situation. While home prices have fallen, there is both greater unemployment and a much more difficult borrowing environment. I have not seen statistics on the effect of these factors on affordability and the possibility of actually buying a home. In the District of Columbia, a previously booming housing market, lending for low-income buyers, which had been available from both public, nonprofit, and some commercial sources has largely evaporated. The public sector has run out of funds and is making few new loans. The nonprofit sector had depended on take out commitments from other sources in order to make their short-term bridge loans and the commercial sector has, for the most part, abandoned this form of lending. While there are a few commercial exceptions, even with their lowest interest rates in this market, their loans often make projects unaffordable for low-income buyers. See Peter A. Tatian & G. Thomas Kingsley, *Housing Market Update*, DISTRICT OF COLUMBIA HOUSING MONITOR 9-10 (Winter 2008), http://www.neighborhoodinfodc.org/housing/DCHousingMonitor_2008_1.pdf.

89. MARGERY AUSTIN TURNER ET AL., FANNIE MAE FOUND., HOUSING IN THE NATION'S CAPITAL 32 (2005), http://www.urban.org/UploadedPDF/1000853_HNC2005.pdf.

B. The Incongruity of Disparaging Shared Equity Homeownership

The critics of shared equity housing suggest that one of the major property sticks, the ability to increase one's wealth from property appreciation, is lost (or at least impaired) to shared equity homebuyers. They claim that this loss is what relegates such owners to a second class status. This critique has a certain resonance and superficial plausibility. Nevertheless, it is, in my view, misguided for at least two reasons. First, it attempts to compare shared equity homeownership with non-shared-equity homeownership. This comparison might be apt if the poor had the choice between the two and were forced into the shared equity model. This is very unlikely to be the choice actually available to the poor who are more likely to have a choice, if at all, between shared-equity homeownership and tenancy in a rental situation. Typically, housing costs in the unsubsidized market are too high and the underwriting requirements of lenders too stringent for most of the poor to be able to buy in such a market.⁹⁰ Thus, while the poor may be subject to restrictions on equity that are not imposed on non-subsidized buyers, they have the opportunity for equity not available to renters, subsidized or otherwise. Moreover, there are equity restrictions placed on unsubsidized homeowners. For example, the capital gains tax takes a part of an owner's equity upon resale when that equity passes a threshold level.⁹¹

The second reason I believe the criticism of shared equity homeownership is misguided is that it assumes a static definition of homeownership that is neither essential nor even descriptive. The restriction on equity is merely one type of restriction on ownership. All owners endure some limitation on their despotic dominion over property. As I stated at the beginning of this essay, property is a culturally and temporally specific construct. In the United States, the understanding of property has, over time, undergone many changes and continues to spark debate.

1. The Proper Comparison of Tenure Choices

We have already discussed the problem of the shortage of affordable housing for low income residents. There is not enough decent affordable housing to meet the demand and some of the existing stock of such housing leaves the market each year without being replaced. The growing gap will

90. *Map of Misery*, THE ECONOMIST, May 8, 2008, at 82 ("Optimists point out that some measures of housing affordability have dramatically improved. According to NAR figures, monthly payments on a typical house with a 30-year mortgage and 20% down payment were 18.5% of the median family's income in February, down almost 26% at the peak—and close to the historical average. But this measure is misleading, not least because credit standards have tightened. A survey of loan officers conducted by the Fed suggested on May 5th that 60% of banks tightened their lending standards for prime mortgages in the first three months of 2007.").

91. I.R.C. § 121 (West 2008).

continue to cause a variety of social problems ranging from homelessness to poor health to disengagement from civil society.⁹² The concept of shared equity housing must, therefore, be viewed in this context. It is a palliative that slows down the disintegration of the existing affordable stock. Who is likely to choose this form of housing over the other possible tenures? Typically the answer is the poor but that answer leaves far too much unexplained.

Who among the poor are faced with the prospect of sharing equity? In general, they fall into one of two groups: tenants who have the opportunity of homeownership using a program subsidized by a public entity or a social investor; or homeowners who are seeking to refinance their homes using such a program. The need for refinancing is generally due to the owner having encountered financial difficulties during his or her non-shared-equity tenure. I will not say much here about homeowners in financial difficulty. Each had made a choice of tenure and found, for whatever reason, that it was not feasible to continue in that tenure. Each, then, had to choose between a return to renting, which many did, or accept a form of financing that required them to share equity with an investor. The choice confronting renters is quite different. Typically, they do not have the opportunity to acquire non-shared-equity housing. Income, housing prices, lender's requirements and interest rates may make this option unrealistic. Thus, to argue that shared-equity housing imposes an inferior form of homeownership misses the point. In most cases, it is the only form of homeownership reasonably available to them.

While one might argue that government policy ought to allow subsidized homebuyers to keep whatever appreciation might exist, this typically is not what governments do. Moreover, there are sound reasons for the policy as it exists. First, there is not sufficient subsidized funding available to accommodate all of the low income people who would like to purchase a home. Thus, those who get the opportunity to do so are often the beneficiaries of fortuitous circumstances. There is typically no moral basis as to why one potential buyer should be chosen over any other. To allow the windfall of equity appreciation to be removed from the pool of funds available to house the poor compounds the problem. Initially, the subsidized buyer had no particular moral claim on the subsidy yet that buyer now is, at least potentially, allowed to increase his or her wealth with public dollars that might have been used to assist another low income buyer. This converts public funds into a private windfall. Secondly, an affordable unit has left the affordable stock forever and is unlikely to be replaced, thereby permanently reducing the affordable stock.

Another shortcoming of the critique of shared equity homeownership is its implicit assumption that the shared equity model has been imposed on low

92. See Byrne & Diamond, *supra* note 82, at 534–35.

income buyers. Far from being imposed, when it is available it is often sought by tenants as a desirable form of tenure. If it is offered, a tenant may choose it, or not. Just as the tenant has a choice of whether to agree to equity limitations, the lender offering the subsidized financing has its own choices as to how to use its resources. If the lender's choice is to preserve the affordability of a unit by restricting equity, the potential buyer has the opportunity to respond as he or she chooses.

In many cases, buyers choose to pursue the shared equity model of ownership. Ownership of real property offers security of tenure, control over living environment, a stake in community, a sense of identity and, of course, a possibility of wealth creation. Shared equity homeownership offers most of these features in a degree equal to and, in some cases, greater than any other form of ownership. It is the limitation on wealth creation that motivates critics to label shared equity as an inferior form of ownership. They do not examine the other benefits to homeowners and to the surrounding communities.

In a comprehensive study of shared equity housing for the National Housing Institute, John Emmeus Davis examined several performance standards in order to evaluate shared equity housing.⁹³ Davis examined the performance of shared equity housing in the areas of affordability, stability, involvement and improvement as well as wealth.⁹⁴ While in some cases the evidence was mixed or inconclusive, he did find evidence of good performance in these areas, particularly when considering limited equity cooperatives. Other research has shown some of the indirect benefits associated with homeownership; better health of occupants, better achievement in school of the children of homeowners, and more civic involvement.⁹⁵

Even on the issue of wealth creation, Davis has found that owners of shared equity housing do accumulate wealth. The question for him is not whether there is wealth creation but whether the amount of wealth created is sufficient.⁹⁶ The answer depends on what is meant by sufficient. For example, if the limited return is commensurate with what the open market would have provided,⁹⁷ the question has little meaning. If it is less than what the market would have provided, the question is whether the limitations on equity are at least balanced by other gains of the homeowner and the gains of the society. Similarly, if the wealth created by shared equity ownership is measured against

93. DAVIS, *supra* note 3, at 89–114.

94. *Id.*

95. *See* Byrne & Diamond, *supra* note 82, at 602.

96. DAVIS, *supra* note 3, at 103.

97. For example, if the market price of the unit is less than what the equity formula would have given the seller, the seller will have suffered no harm by virtue of the limitation. In poor communities, often realizing slow or no appreciation in home prices, this would not be an uncommon occurrence. *See id.* at 77–78.

the wealth created by renting, the answer weighs heavily in favor of shared equity ownership.

There has also been criticism of the claim that the correct comparison is between shared equity homeowners and renters, not shared equity homeowners and other homeowners.⁹⁸ The critique is that society subsidize all homeowners through the mortgage interest and property tax deductions but we do not ask all homeowners with these subsidies to share their equity.

While this critique seems on point, I believe it is inapt. One might argue generally against the breadth and depth of the mortgage interest and real estate tax deductions for all homeowners, particularly high bracket homeowners. The increased tax revenue from limiting or eliminating the subsidy might be used to subsidize those who truly need the assistance to become homeowners.

For many of the recipients of the tax subsidy, it is not the deciding factor in whether they will buy a home. They would do so anyway. Moreover, if the subsidy were eliminated, the price of housing would likely decline so that the true value of the subsidy is hard to determine. If it is true that home prices would decline if the subsidy were removed, and if there were more funds to subsidize those in need of assistance, more people might be able to afford houses.

Nevertheless, there is a segment of the home buying public for whom the subsidy is the deciding factor in home purchases. But even if one accepts the assumption that the deductions serve a generally beneficial societal purpose, it is not clear that society should not expect a return from these beneficiaries of the subsidy.

In many cases society has extracted specific concessions from beneficiaries. Consider other types of governmental subsidies for homeownership. The United States Department of Housing and Urban Development, for example, offers first-time homebuyer subsidies to certain classes of municipal employees such as police, fire fighters and teachers. Both HUD and local jurisdictions have a desire that such employees live in the locales in which they work and many of these jurisdictions seek to enhance the possibility of fulfilling that desire by offering assistance.⁹⁹ However, because of the government's fear of opportunistic behavior by recipients, and its desire to maximize the general benefit to be derived from the subsidy, some of these

98. Critique raised at Public Nature of Private Property Workshop at Georgetown Law (Nov. 14-15, 2008).

99. See Urban Homesteading, 24 C.F.R. § 590.7 (2009) (concerning the Department of Housing and Urban Development's Program); see also City of Buffalo, Urban Homestead Program, http://www.ci.buffalo.ny.us/Home/City_Departments/RealEstate/UrbanHomesteadProgram (last visited Feb. 2, 2010) (describing Buffalo's Urban Homestead Program); see generally Mother Earth News, Urban Homesteading, <http://www.motherearthnews.com/Modern-Homesteading/1980-09-01/Community-Homesteading-Programs.aspx> (last visited Feb. 2, 2010).

jurisdictions place minimum occupancy requirements on the recipients with a payback of the subsidy and, perhaps some of the equity, if the recipient leaves the property prior to the designated time.¹⁰⁰

Similarly, some jurisdictions have created urban homesteading programs¹⁰¹ through which they give vacant and often derelict properties to buyers for little or no money. In exchange for this subsidy, the jurisdictions often require that buyers bring the building up to code standards within a certain period of time and live in the building as their primary residence for a period of time, often several years, or they forfeit some or all of the equity.¹⁰² To do otherwise in this or other subsidy programs would turn public housing funds into private wealth creation, a housing program into a cash transfer program.¹⁰³

2. The Concept of Property Redux

The second reason I do not accept the argument that shared equity creates an inferior form of ownership brings us back to the beginning of this article. The meaning of property is not fixed and consistent. It is, in Singer's words, contingent and contextual.¹⁰⁴ The bundle of sticks is rarely, if ever, complete. Ownership has become much more complex with many, often competing, interests at work in any particular piece of property. Clearly, Blackstone's view is not now, if it ever was, applicable in practice. Society has needs that must be preserved and the complete dominion by one over his or her property is inconsistent with those needs, if for no other reason than that such dominion likely will interfere with another's use and enjoyment of his or her property.¹⁰⁵ This is not to mention the huge area of the modern commons that needs to be protected against private encroachment and degradation.

Such changing conceptions of property are not limited to land or to public benefits. In another widely recognized area of property there has been a major conceptual variation of the classic model. A good part of the governance literature concerning publicly traded corporations relates to the separation of ownership and management for shareholders. The classical view is that shareholders own the corporation but it is clear that with very limited exceptions (for example, institutional or large bloc-holding individuals) shareholders have little or no ability to influence the policy or finances of

100. See sources cited in *supra* note 99.

101. See sources cited in *supra* note 99.

102. Habitat for Humanity in the District of Columbia requires a buyer to share the equity based on a formula if the property is sold within fifteen years. See Byrne & Diamond, *supra* note 82, at 546.

103. *Id.* at 549.

104. Singer, *supra* note 5, at 4.

105. Thus, the law of nuisance protects against substantial and unreasonable interference with a landowner's use and enjoyment of his or her property. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953).

publicly traded corporations. Even in the aggregate, typical shareholders do not, and, in a practical sense, cannot have such influence. This is because such shareholders have no economic incentive to monitor the corporation's activities, to organize other shareholders to take action against perceived wrongdoing or bad policy, or even to attend shareholder meetings. In fact, the existence of a ready market for the sale of their shares provides a rational alternative for such shareholders to express their dissatisfaction.

The shareholders, similarly to most homeowners, have lost one or more of the major sticks in their ownership bundle. They were offered a different benefit, the protection of limited liability, in exchange for their loss of control. In each case, there was some overriding social good to be achieved by the limitations imposed. This is consistent with both the proprietary view of property taken by writers from colonial times to the present and with the contingent and contextual nature of property as seen across cultures and across time.

VI. CONCLUSION

Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free from public interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the public interest.¹⁰⁶

Today, such regulatory mainstays as the Fair Housing and Public Accommodation laws, environmental protections such as the Clean Air and Clean Water Acts, zoning laws, housing and building codes, and rent controls have reduced the Blackstonian and Lockean views of property to the academic dust bin. Instead of despotic dominion, the regulatory regime has redefined property in Gregory Alexander's proprietary model. What had once been the tension between individual rights and communal rights has been resolved, if not completely, at least substantially, in the direction of protecting the broader society. The interdependence of people, of localities, even of nations, demands that dominion be tempered and the common good be pursued.

The common good can be perceived as preserving affordable housing for the long term. The private market cannot or will not meet the societal need for such housing. Sharing equity is one attempt by the public to meet that need. Society has an interest in the retention of the subsidy it provides to the affordable housing market. The recipient of the subsidy has an interest in the general benefits of homeownership. The limitation on equity retention by the

106. *Nebbia v. New York*, 291 U.S. 502, 523 (1934).

homeowner is a means of accommodating both sets of preferences. Moreover, it is entirely consistent with the restrictions placed on all forms of property to meet societal concerns. A classicist might then argue that property as envisaged today has regressed from Locke and Blackstone's conception (although this would disregard the rich history of differing views of property) but it is much more difficult to single out shared equity housing as a significant departure from the conceptual and regulatory trend of modern society.

