

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

6-1-2008

### Residential Protectionism and the Legal Mythology of Home

Stephanie M. Stern

IIT Chicago-Kent College of Law, [sstern@kentlaw.iit.edu](mailto:sstern@kentlaw.iit.edu)

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [Property Law and Real Estate Commons](#)

---

#### Recommended Citation

Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 Mich. L. Rev. 1093 (2008).

Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/779](https://scholarship.kentlaw.iit.edu/fac_schol/779)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# RESIDENTIAL PROTECTIONISM AND THE LEGAL MYTHOLOGY OF HOME

Stephanie M. Stern\*

*The theory that one's home is a psychologically special form of property has become a cherished principle of property law, cited by legislators and touted extensively in the legal scholarship. Influential scholars, most notably Margaret Radin, have asserted that ongoing control over one's home is necessary for an individual's very personhood and ability to flourish in society. Other commentators have expounded a communitarian vision of the home as rooting e is evidence, as discussed in Part III, that dislocation that results in reduced social interaction and relationships is detrimental. Also, dislocation that separates families or impacts family relations is likely to impose psychmacy of the home has encouraged the overproduction of home-protective legislation and added a gloss of moral legitimacy to rent seeking. In light of the political groundswell to "save homes" and the social costs of residential protectionism, it is time for a critical reexamination of the psychological importance attributed to the home. Drawing on the research literature in psychology, sociology, and demography, this Article argues that there is scant evidence to support the theory that one's home is a special object that constitutes psychological personhood or enables a rich web of territorial relationships. The psychology research illustrates the primacy of social relations, not possessions, to self and flourishing. The sociological and demographic data indicate that closely-knit, low-turnover territorial neighborhoods are the exception, not the norm. In view of the high costs and limited psychological benefits of protectionism, I advance an evidence-based and minimal approach to residential protection.*

---

\* Assistant Professor of Law, Loyola University Chicago School of Law. Beginning in academic year 2009–10, Associate Professor of Law, Chicago-Kent College of Law. I am grateful to Eric Kades, Nicole Garnet, Robert Ellickson, Tom Ulen, Gregory Alexander, Eric Claeys, Sonia Katyal, Eduardo Peñalver, Jide Nzelibe, James Ely, Fred LeBaron, Dan Hamilton, Juliet Moringiello, Joshua Melson, Carol Rose, and Henry Melson-Stern for their helpful suggestions and comments. I have also benefited greatly from presentations at the University of Illinois College of Law; the Georgetown School of Law Workshop on Property, Citizenship, and Social Entrepreneurism; and the William & Mary School of Law Brigham–Kanner Property Rights conference. I thank Jacqueline Kontry for her able research assistance.

## TABLE OF CONTENTS

INTRODUCTION .....	1094
I. RESIDENTIAL PROTECTIONISM:	
THE COSTLY MYTH OF HOME .....	1099
A. <i>Overproduction of Home-Protective Legislation</i> .....	1100
B. <i>The Legal Mythology of Home</i> .....	1105
II. THE HOME AS PROPERTY FOR PERSONHOOD: A REVIEW	
OF THE PSYCHOLOGICAL EVIDENCE .....	1109
A. <i>The Nonprimacy of Home to Self-Constitution</i> .....	1110
B. <i>Relocation and Psychological Flourishing</i> .....	1115
C. <i>Other Correlates of Flourishing: Homeownership,</i>	
<i>Life Satisfaction, and Self-Esteem</i> .....	1119
D. <i>Conclusions</i> .....	1120
III. RESIDENTIAL COMMUNITARIANISM: EVIDENCE FROM	
SOCIOLOGY AND DEMOGRAPHY .....	1120
A. <i>Our Town Revisited: Neighborhoods and Weak Ties</i> .....	1122
B. <i>Demographic Mobility</i> .....	1124
C. <i>Residential Stability, Homeownership,</i>	
<i>and Positive Externalities</i> .....	1125
IV. RETHINKING RESIDENTIAL PROTECTIONISM .....	1127
A. <i>Dismantling the Legal Mythology of Home:</i>	
<i>Implications for Property Theory</i> .....	1127
B. <i>Rent Seeking Masquerading as Moral Conviction</i> .....	1130
C. <i>A Minimal Theory of Home Protection</i> .....	1132
D. <i>Life-Cycle Effects and Home Protection</i> .....	1133
V. REVISING THE LEGAL THEORY OF HOME:	
OBJECTIONS AND CONSIDERATIONS .....	1134
A. <i>Preferences Versus Flourishing</i> .....	1134
B. <i>Castles and Control</i> .....	1136
C. <i>The Fear of Mass Destabilization</i> .....	1138
D. <i>What About Poletown?: Protection for</i>	
<i>Exceptional Communities</i> .....	1138
VI. APPLICATIONS .....	1139
A. <i>Eminent Domain</i> .....	1140
B. <i>Homestead Exemptions</i> .....	1142
CONCLUSION .....	1144

## INTRODUCTION

Residential real estate has achieved an exalted status and privileged position in American property law. In the past century, there has been a proliferation of legislation that protects and privileges homeowners by reducing the risk of dislocation and extracting rents to the detriment of non-owners and lower-income owners. I term this movement “residential protectionism.” The panoply of home-protective legislation includes bankruptcy

protections, property tax relief, and most recently foreclosure reform and state eminent domain legislation. Residential protectionism has imposed social costs by encouraging excessive investment in residential real estate, raising the cost of credit, creating regressive tax subsidies, and frustrating land planning.<sup>1</sup> Despite these costs, protective legislation has attained the stature of moral right. A compelling justification attributed to such legislation is that it safeguards one's (particular) home as a wellspring for psychological flourishing. Involuntary dislocation wreaks psychological devastation and imperils self and identity—one's very personhood.<sup>2</sup> The belief that ongoing control of one's home is a psychological imperative has become a tenet of American property law, discussed and conceded in every first-year property class and touted extensively in the legal scholarship. The legal academy has accepted this theoretical notion as fact and in doing so facilitated the home's illustrious and uncontested reign over American property law.<sup>3</sup>

Property scholarship spins an alluring tale of how the force of law stands as a vigilant guardian over the personal and psychological values of the home. Few articles have enthralled property theorists as Margaret Radin's theory that certain kinds of property, including homes, are constitutive of personhood.<sup>4</sup> Radin argued that ongoing control over objects, such as homes, that are "bound up" with one's self is necessary for proper self-constitution and psychological flourishing.<sup>5</sup> Personhood theory infused a generation of scholarship, engraining the notion that homes are special objects deeply intertwined with psychological functioning. Scholars have cited the personhood value of the home to support constraints on government takings, to justify property redistribution, and more generally to offer a long-awaited reprise to economic theory.<sup>6</sup> In a separate vein, a number of

---

1. See *infra* Section I.A.

2. See, e.g., MINDY THOMPSON FULLILOVE, *ROOT SHOCK* 11–20 (2004) (discussing emotional harms from urban renewal); Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 285 (2006) ("[Home] provides space to develop and express an identity."); Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 434 (2008) ("The impact of losing one's home on an individual occupier's quality of life, social and identity status, personal and family relationships, and for his or her emotional, psychological, and physical health and well-being have been well-established in housing and health literature.").

3. See *infra* Section I.B.

4. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958–59 (1982).

5. See *id.* at 957–59.

6. See, e.g., Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 80, 114 (2006) (suggesting a model of resident participation as decision makers and beneficial owners in the urban redevelopment projects that displace them through community equity shareholding); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 788, 817 (2006) (proposing enhanced compensation schedule for residential takings); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622, 661–62 (1988) (citing Radin's personhood theory and describing how a moral "reliance interest" in property justifies a variety of legal protections and rules).

community-development and communitarian scholars have advocated legal protection of the home based on a theory of territorial social relations rather than individual identity. They argue that home protection furthers important normative interests by situating individuals in strong and meaningful networks of social ties.<sup>7</sup> Astonishingly, no one has questioned whether empirical evidence exists to support these theories.

The widely held belief that homes are psychologically vital to their owners has added a gloss of moral legitimacy to home-protective legislation. One motivation for legal protection is the desire to safeguard the perceived psychological and social value of the home. More often, the impetus is rent seeking by special interest groups, competition between states to attract residents, or grandstanding by politicians anxious to capitalize on the evocative chord of home protection.<sup>8</sup> The legal mythology of the home (and the legal academy's reflexive acceptance of this notion) has disguised rent seeking with rhetoric and recast economic protectionism as a humanistic endeavor.

Moreover, the mythology of home and residential protectionism are self-perpetuating. If property law treats the loss of home as the amputation of one's very identity and ability to thrive, then owners are likely to construe dislocation as a dire event.<sup>9</sup> Thus, residential protectionism creates the very demoralization costs it seeks to redress and increases political demand for home-protective legislation.

In light of the social costs of protectionism and the political groundswell to "save homes," it is time for a critical reexamination of the importance attributed to maintaining one's home. Drawing on the research literature in psychology, sociology, and demography, this Article argues that there is little evidence to support a categorical theory of ongoing control over one's home as a prerequisite to psychological flourishing. Psychology research shows that people may like their homes, imbue their homes with a certain emotional resonance, and utilize their homes to reflect and display identity. But there is scant empirical support for the proposition that homes are requisites of psychological functioning such that object loss imperils the dispossessed owner's self-concept or impedes psychosocial functioning.<sup>10</sup> Indeed, there is little evidence that consumer possessions in general are primary or requisite constituents of self or flourishing.<sup>11</sup> Instead, the empirical

---

7. See, e.g., FULLILOVE, *supra* note 2, at 14; James J. Kelly, Jr., "We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST. JOHN'S L. REV. 923, 960-61 (2006).

8. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4-21 (2001); Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201, 208 (1996).

9. Cf. Gordon K. Farley & Sidney Werkman, *Geographic Change as a Stressor: Developmental Perspectives*, in STRESSORS AND THE ADJUSTMENT DISORDERS 418, 421 (Joseph D. Noshpitz & R. Dean Coddington eds., 1990) (noting psychological resilience to geographic mobility).

10. See *infra* Section II.A.

11. One exception that comes to mind is the loss of possessions that are essential for religious ceremonies or sacred rites. If a specific, irreplaceable object is required for people to engage

research indicates that the prerequisites for human flourishing are social relations and interaction, not ownership of certain types of property.<sup>12</sup>

Community-development and communitarian scholars have long recognized the value of social relations as a normative matter (if not an empirical one).<sup>13</sup> These scholars take a more instrumental view of the benefits of residential stability. However, some of these accounts have romanticized territorial ties and oversimplified neighborhood social networks.<sup>14</sup> Homes do not situate individuals in tight-knit communities marked by deep affective ties. To the contrary, sociological and demographic research shows that neighborhoods are characterized by weak and intermediate ties, and there is evidence that neighborhood sociability is in decline.<sup>15</sup>

An evidence-based theory of home protection is long overdue, particularly in view of the recent upsurge in home-protective legislation and national attention to residential real estate. The humble home has also seized the limelight in property scholarship, with heated debates over the psychological value of the home in the contexts of takings legislation, foreclosure, and affordable-homeownership initiatives. Prominent articles have proposed compensation models for psychological losses from eminent domain,<sup>16</sup> examined how “homevoters” shape land use law,<sup>17</sup> and considered foreclosure reform for residential real estate.<sup>18</sup>

This Article offers a new perspective on these perennial debates in property law by distilling the empirical research on homes. The central claim of this Article is that the psychological and social benefits of remaining in a particular home do not warrant the vast apparatus of categorical protections that pervade American property law. We may opt to retain these protections

---

in important religious or cultural practices, then loss of that property is a loss of culture or spiritual belief. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1220665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1220665).

12. See John T. Cacioppo et al., *Loneliness Within a Nomological Net: An Evolutionary Perspective*, 40 J. RES. PERSONALITY 1054, 1080–82 (2006); L. Elizabeth Crawford et al., *Potential Mechanisms Through Which Loneliness Affects Health*, 37 PSYCHOPHYSIOLOGY S34, S34 (Supp. 2000) (describing health effects of loneliness); Mark Snyder & Nancy Cantor, *Understanding Personality and Social Behavior: A Functionalist Strategy*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 635, 657 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

13. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1104757](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104757); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005).

14. See, e.g., FULLILOVE, *supra* note 2; Kelly, *supra* note 7, at 961; cf. Peñalver, *supra* note 13, at 1948–58 (describing homeownership in nonseparatist communities as a weak form of property as entrance into social life).

15. See *infra* Part III.

16. E.g., Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 871–73 (2007); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83–85 (1986).

17. See FISCHEL, *supra* note 8.

18. E.g., Melissa B. Jacoby, Essay, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2278–83 (2008); Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399 (2004).

for other reasons, but they cannot be justified on a theory of the home as psychologically vital. A corollary is that the legal academy has been unduly deferential to conjecture about homeowners' subjective preferences while neglecting entirely the data on objective psychological outcomes. In light of the psychological evidence, and absent compelling economic or other justifications, I advocate reducing the number and scope of home-protective laws.

This Article focuses on home-protective laws that reduce dislocation and extract rents for owners, not on the case for home buying versus renting. Yet the subtext of my analysis suggests that, although not fabricated, the benefits of home buying have been overstated and oversimplified. Homeownership conveys benefits in the form of transaction cost savings from eliminating negotiations with a third party landlord, efficiency gains in local knowledge acquired during long-term tenure, and modest increases to neighborhood social capital.<sup>19</sup> Yet, ownership imposes costs by limiting mobility in response to changed personal circumstances, professional needs, and neighborhood decline, and by channeling disproportionate investment into an undiversified asset. The research shows moderate, not overwhelming, psychological gains from homeownership; strikingly, for low-income or financially strained owners, there is evidence of psychological harm.<sup>20</sup> On balance, the benefits of homeownership are not as high or invariable as legal scholars have assumed. While it is beyond the scope of this Article to examine in any detail the comparative merits of home buying versus renting, my analysis calls into question the degree of enthusiasm for home buying saturating the legal literature.

Before proceeding, I offer a few clarifications and caveats. My thesis is that the legal scholarship has vastly overstated the primacy of the home, not that homes lack any shard of psychological or non-economic value to their owners. I acknowledge that dislocation, particularly in contexts such as foreclosure, imposes short-term psychological stress. However, I argue that we have been overly attentive to short-term psychological costs and paid no heed to long-term outcomes. I do not argue that homelessness is a psychologically benign condition or contest the claim that in contemporary, capitalist societies private property rights and some quantum of private property ownership (i.e., wealth) is instrumental to personal thriving.<sup>21</sup> Rather, I maintain that the sanctity bestowed by American property law on one

---

19. See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 293–97 (2006).

20. See *infra* Part IV.A.

21. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 12, 75–82 (2000) (describing central “capabilities” or opportunities for human flourishing, including the right and opportunity to hold property, and calling for their use as a moral foundation for constitutional guarantees). Based on the influence of her work in India on her thinking about threshold capabilities for women, Nussbaum notes that the right and opportunity for women to hold property on an equal basis with men “play[s] an important role in self-definition, in bargaining, and in developing a sense of self.” *Id.* at 156; see also AMARTYA SEN, COMMODITIES AND CAPABILITIES 28–32 (1985) (describing a model of functionings and capabilities as an index of well-being).

category of private property, residential real estate, is not warranted based on the psychological and sociological evidence.

To clarify the scope of my analysis, I use the term “home” to refer to owner-occupied residential real estate. I focus on owners rather than renters because most home-protective legislation safeguards ownership interests; however, much of the psychological research applies with equal force to renters. My analysis targets the typical homeowner in the United States, not the comparatively rare instances of multigenerational family dynasty property, uniquely tight-knit enclaves, or extreme separatist communities. Other authors have ably addressed legal reforms to protect these special interests.<sup>22</sup>

The Article proceeds as follows. Part I considers the array of special protections for the home in American property law. The legal mythology of home underpinning residential protectionism—the belief that one’s home is psychologically critical—dominates legal scholarship, legislative debate, and cultural consciousness. Home-protective legislation, justified in significant part by this vision of the home, imposes high social costs in absolute and distributive terms. Part II examines the empirical research on the home’s role in self-concept and psychological functioning. I conclude that there is scant empirical support for some of the logical distillations of personhood theory, namely that homes are primary to self-concept and that dispossession harms long-term psychosocial flourishing. Part III considers an alternative justification for residential protectionism—the theory that homes root individuals in robust networks of strong, territorial relationships. The sociological and demographic literature belies this theory. The research shows that community ties are more transient, weak, and replicable than commonly assumed. Part IV argues that the misplaced belief in the psychological primacy of maintaining one’s home has legitimized rent seeking and increased the number and scope of home-protective laws. To the extent that the justification for protection is psychological, I advocate an evidence-based and minimal approach to home-protective legislation. Part V responds to potential objections to revising the legal theory of home. Part VI considers by way of illustration how an evidence-based approach to residential protection informs current debates in takings law and homestead exemptions.

## I. RESIDENTIAL PROTECTIONISM: THE COSTLY MYTH OF HOME

Residential real estate has become the demagogue of property law. The considerable array of home-protective legislation includes homestead exemptions and tenancy by the entirety, tax benefits, and most recently

---

22. See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 30–31 (1983) (discussing property and contract law protections for separatist communities); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1351–52 (1993) (noting effect of ownership models and exit costs on separatist communities); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 11–22 (2004) (describing how conservation easements protect property with historical, aesthetic, or environmental value, including family ranches and dynasty property).



foreclosure reform and state eminent domain legislation. These protections impose high social costs and encourage regressive income redistribution. Political momentum for home-protective legislation derives in part from the notion, trumpeted by scholars, legislators, judges, and special interests, that residential real estate is a psychologically vital form of property.<sup>23</sup> This ideology has cloaked protectionism in the rhetoric of home and encouraged a self-perpetuating cycle of legal intervention.

### A. Overproduction of Home-Protective Legislation

The goal of this Section is to illustrate the panoply of protections grafted on to American property, bankruptcy, and tax law.<sup>24</sup> These laws enable, or at least increase the likelihood, that an owner can retain her residential real estate despite creditor claims, government eminent domain action, or market fluctuations. Some of these protections, such as homestead exemptions, date back to the agrarian economies of earlier eras when loss of home meant loss of livelihood. Their persistence in property law underscores the influence of rent seeking. Other home-protective laws are modern-day innovations. Piece by legislative piece, we have created a regime of what I term residential protectionism, where homeownership receives greater, categorical protection than ownership of other real property and personal property.<sup>25</sup>

If home is man's castle, then it is a veritable fortress for debtors.<sup>26</sup> Homestead exemptions, tenancy by the entirety, and foreclosure-relief legislation help owners to shield a portion of their personal wealth from creditors and to retain their homes. State homestead exemptions offer creditor protection by exempting some or all of the equity in a personal residence.<sup>27</sup> Five states and the District of Columbia offer unlimited homestead exemptions;<sup>28</sup> in the remainder of states the homestead exemption ranges from a few thousand dollars in Arkansas to a half million in Massachusetts.<sup>29</sup> In many states,

---

23. Some of these laws, such as the Texas homestead exemption, originated in the agrarian economy of the seventeenth and eighteenth century. The failure to update these laws is due to belief in the special nature of home, rent seeking, and competition between states to attract residents. *See infra* Section I.B.

24. Although many of these laws stop short of absolute protection and most are not universally available, they are nonetheless extensive and costly.

25. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255–59 (2006).

26. *See, e.g.*, Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 329–34.

27. *See generally* Ryan P. Rivera, *State Homestead Exemptions and their Effect on the Federal Bankruptcy Laws*, 39 REAL. PROP. PROB. & TR. J. 71, 77–91 (2004) (comparing current and historical applications of several state homestead exemptions).

28. *See, e.g.*, FLA. STAT. § 222; TEX. PROP. CODE ANN. §§ 41.001–.024 (Vernon 2000). Iowa, Kansas, Oklahoma, and the District of Columbia have similar provisions.

29. *See* Homestead Exemption Act of 1981, ARK. CODE ANN. § 16-66-210 (1987); MASS. GEN. LAWS ch. 188, § 1 (2008). For debtors filing bankruptcy, federal law limits the exemption to \$125,000 for debtors who acquired property during the 1215-day period preceding the date of the bankruptcy filing. *See* 11 U.S.C. § 522(p) (2006).

married couples can shield property (frequently the marital residence) from the creditors of one spouse by holding the property as tenants by the entirety.<sup>30</sup> In one-third of the states recognizing tenancy by the entirety, the protection applies only to real estate,<sup>31</sup> and in some states, such as Illinois, it is limited to the family home.<sup>32</sup> On the federal level, the recent Housing and Economic Recovery Act requires mortgage lenders to forgive debt above 90 percent of the appraised value of owner-occupied residential real estate so that homeowners can refinance into FHA-insured mortgages.<sup>33</sup>

Law also extracts rents for owners and housing industry interests through tax benefits. Tax breaks for homeowners include reductions in the assessed value of residential homes, credits, deductions, exemptions, and ceilings on annual property tax increases. The federal home mortgage interest and property tax deductions provide generous benefits to taxpayers who itemize their deductions.<sup>34</sup> At the state level, California's infamous Proposition 13 limits property tax increases to two percent per year until the house is sold,<sup>35</sup> and the "Save Our Homes" amendment to the Florida Constitution caps property tax increases at the lesser of the annual change in the consumer price index or 3 percent.<sup>36</sup> Homebuyers also reap benefits. For example, George Bush's "ownership society" campaign pledged a host of programs to increase the number of homeowners.<sup>37</sup> More recently, in the wake of the subprime mortgage meltdown, new federal legislation provides a first-time buyer tax credit of up to \$7,500, which is repayable over fifteen years interest free.<sup>38</sup>

The impulse of property law to protect and privilege the home has only grown stronger since the recent Supreme Court eminent domain case, *Kelo*

---

30. See John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 48.

31. See Daniel Cho, *Tenancy by Entirety*, June 20, 2008, <http://www.articlesbase.com/finance-articles/tenancy-by-entirety-456469.html>.

32. See 765 ILL. COMP. STAT. 1005/1c (2006).

33. See Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 257(e)(2)(B), 122 Stat. 2654. When the homeowner sells, however, she must pay the FHA at least fifty percent of the appreciation. If the homeowner sells within five years of refinancing the share of the appreciation, she has to pay a higher amount based on the number of years from the refinancing date. One of the rationales for the act is to save the country from economic ruin, but it is unlikely that this is the sole motivation. During the prolonged stock market crash of the mid-1990s, the government did not intervene with massive financial assistance for investors who had lost substantial savings, borrowed on margin, or engaged in reckless day trading.

34. See I.R.C. § 163(h) (2006); I.R.C. 164(a) (2006); Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1384 (2000). The federal alternative minimum tax has reduced the value of these deductions for affected taxpayers.

35. CAL. CONST. art. XIII A, § 2(b); Daniel L. Simmons, *California Tax Collection: Time for Reform*, 48 SANTA CLARA L. REV. 279, 296 (2008).

36. FLA. CONST. art. VII, § 4(d)(1).

37. See Press Release, Office of the Press Sec'y, Fact Sheet: America's Ownership Society: Expanding Opportunities, (Aug. 9, 2004), (on file with the Michigan Law Review).

38. See Pub. L. No. 110-289, 122 Stat. 2654, § 3011 (2008).

v. *City of New London*,<sup>39</sup> incited public outcry. *Kelo* addressed the question of whether the city of New London's condemnation of residential homes for a private redevelopment project met the Fifth Amendment public use requirement. Justice O'Connor's now famous statement that "any single-family home . . . might be razed to make way for an apartment building, or any church . . . might be replaced with a retail store" found its mark with the American public.<sup>40</sup> A flurry of state enactments ensued.<sup>41</sup> California amended its constitution to prohibit state and local governments from "acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person" for economic redevelopment unless the eminent domain was necessary for public health and safety reasons.<sup>42</sup> Indiana mandated compensation at 150 percent of fair-market value for condemnation of an owner-occupied residence.<sup>43</sup> Nineteen states adopted legislation that shields the iconic middle-class, single-family home by limiting eminent domain for private redevelopment or urban renewal to "blighted" areas.<sup>44</sup> Despite the fact that residential takings are a small minority of condemnations,<sup>45</sup> they elicit an impassioned response and are at the heart of calls for strong private property protection.

The array of home protections in property, tax, and bankruptcy law has proven costly. These laws encourage overinvestment in residential real estate, disproportionately burden lower-income households, raise the cost of credit, and frustrate land planning and controlled growth. William Fischel has described how "homevoters" demand local land use laws that protect and benefit their undiversified investments in their homes.<sup>46</sup> A similar dynamic affects state and federal home-protective legislation, with homeowners—joined by business interests—aggressively lobbying for protections against the market, the government, and homeowners' own

39. 545 U.S. 469 (2005).

40. *Id.* at 500–01 (O'Connor, J., dissenting).

41. Perhaps the greatest impact of *Kelo* will be its effect on the discretionary decision making of government officials who must weigh the benefits of condemnation against potential vilification in a *Kelo*-style media frenzy.

42. CAL. CONST. art. 1, § 19(b). Colorado, Connecticut, and New Jersey proposed but did not enact similar legislation.

43. IND. CODE § 32-24-4.5-8(2)(A) (2008). In addition, Connecticut now requires the government to pay 125 percent of the average appraised value of property acquired by eminent domain by a development agency, Act of June 25, 2007, Conn. Pub. Act. No. 07-141, 2007 Conn. Acts 407, and Kansas requires compensation to all landowners whose property is condemned at 200 percent of the appraised value, Act of May 18, 2006, Kan. Chapt. 192, 2006 Kan. Sess. Laws 1345.

44. *See, e.g.*, S.C. CONST. art. 1, § 13(A) (authorizing legislature to enact laws allowing eminent domain to remedy blight with the property put to public or private use); Act of June 25, 2007, 2007 Conn. Acts 407 (eminent domain for urban renewal allowed only in blighted areas); OHIO REV. CODE ANN. § 1.08 (West 2008) (defining blighted areas as those where at least 70 percent of parcels are blighted); Act of Mar. 20, 2007, Utah Chapt. 379, 2007 Utah Laws 2326 (authorizing use of eminent domain in urban renewal if property is blighted).

45. Jennie Jackson Miller, Comment, *Saving Private Development: Rescuing Louisiana from Its Reaction to Kelo*, 68 LA. L. REV. 631, 665 (2008).

46. FISCHEL, *supra* note 8, at 39–97, 207–59. Fischel also describes how homeownership can encourage socially beneficial policies, such as investment in local schools. *Id.* at 129–61.

debts.<sup>47</sup> States in turn embrace home-protective or home-privileging legislation to attract wealthy residents and enhance the state's tax base.<sup>48</sup>

Home-protective laws misallocate resources by encouraging excessive investment in residential real estate. Surveys show enormous public enthusiasm for home buying and widespread awareness of tax benefits and favorable lending policies<sup>49</sup>—an exuberance that is often irrational.<sup>50</sup> Legal authors routinely claim that the home deserves protection as an owner's largest asset;<sup>51</sup> yet it is likely that the home is an owner's largest asset *because* of legislation that protects and privileges residential property. This overinvestment occurs at the expense of diversified investments in the equity and bond markets and investments in education and human capital.<sup>52</sup> Protective legislation and government home buying assistance convey the message that housing is an optimal, low-risk investment. Economists are quick to note this misconception. Paul Krugman contends that the home is a high-risk, undiversified asset that is in essence borrowed on margin.<sup>53</sup> In the legal scholarship, Rashmi Dyal-Chand challenges the efficacy of homeownership for wealth accumulation.<sup>54</sup>

Not only does residential protectionism encourage excessive investment in residential real estate, it does so at the expense of lower-income households. The federal tax deduction on mortgage interest, the nation's third largest tax expenditure at a cost of over seventy-two billion annually,<sup>55</sup> provides larger subsidies to higher-income owners who itemize deductions.<sup>56</sup> State laws capping property taxes until resale benefit owners at the expense of

47. See, e.g., Ruth Simon, *Consumer Groups Push Tax Relief for Homeowners in Bailout*, WALL ST. J., Sept. 27, 2008, at A4.

48. See Brinig & Buckley, *supra* note 8, at 202–03 (describing how the unlimited homestead exemptions in Florida and Texas were enacted and retained to attract wealthy residents and increase the tax base).

49. See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326–27 (1998).

50. See generally ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 3–16 (2d ed. 2005). For example, many tax filers who claim the standard deduction mistakenly overestimate the tax savings from the home-mortgage interest deduction. *Id.*

51. See, e.g., Fee, *supra* note 6, at 786–94; Rick Santorum, *Wealth Creation in the New Millennium: Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 391–92 (2002).

52. In addition, some commentators argue that subsidizing home buying has negative environmental effects and that the home-mortgage deduction exacerbates sprawl by incentivizing buyers to purchase larger and more expensive homes. See Mann, *supra* note 34, at 1384; Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 170–71 (2005).

53. See Paul Krugman, *Home Not-So-Sweet Home*, N.Y. TIMES, June 23, 2008, at A21.

54. Rashmi Dyal-Chand, *Privileging Home Ownership*, Presentation Before the University of Colorado Law School Property Works in Progress Conference (June 13, 2008).

55. Daniel Gross, *Location, Location—Deduction*, SLATE, Apr. 14, 2005, <http://www.slate.com/id/2116731/>.

56. The Housing and Economic Recovery Act ameliorates this by allowing taxpayers that claim the standard deduction to deduct an additional \$500 from their property taxes in 2008. See Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

new buyers—often first-time buyers and young families.<sup>57</sup> These distributional issues might be less severe if tax benefits were fully capitalized into higher home prices, but the research indicates that the tax benefit is only partially capitalized.<sup>58</sup>

Home-protective laws also distort credit markets and increase the cost of credit. Residents of states with unlimited homestead exemptions pay higher interest rates and are at increased risk of credit denial compared to residents of states with lower exemptions.<sup>59</sup> Poor families are the most severely affected by the increased cost of credit and denial of credit, despite their inability to take advantage of unlimited exemptions.<sup>60</sup> At the other end of the economic spectrum, protections may invite fraud and abuse by elites.<sup>61</sup> O.J. Simpson evaded the \$33.4 million civil judgment against him for his ex-wife's death by purchasing a mansion in Florida, and Ken Lay, Enron's former CEO, diverted his assets to his multi-million dollar Houston penthouse.<sup>62</sup> The homestead provisions of the 2005 Bankruptcy Act now limit this behavior by creating a \$136,875 cap for filers who have committed a felony that indicates that filing was an abuse of the bankruptcy process, when the debt arises from violation of federal securities law, or in other specified instances of wrongdoing.<sup>63</sup>

On the local level, residential protectionism slows mobility and frustrates land planning. Some protectionist legislation, such as property tax freezes for owners with tax reassessment upon resale, skews mobility. Own-

---

57. See Josephine W. Thomas, Comment, *Increasing the Homestead Tax Exemption: "Tax Relief" or Burden on Florida Homeowners and Local Governments?*, 35 STETSON L. REV. 509, 551 (2006) (concluding that tax capitalization occurs "to some extent" with the degree of capitalization varying based on households' expectations about future tax changes, information costs for tax information, and housing search costs).

58. See JOHN YINGER ET AL., PROPERTY TAXES AND HOUSE VALUES 143 (1988); David M. Brasington, *Edge versus Center: Finding Common Ground in the Capitalization Debate*, 52 J. URB. ECON. 524, 537 (2002) (showing weaker rates of capitalization in areas where housing supply is more elastic).

59. Reint Gropp et al., *Personal Bankruptcy and Credit Supply and Demand*, 112 Q. J. ECON. 217, 230–31 (1997); see also Richard M. Hynes, *Credit Markets, Exemptions, and Households with Nothing to Exempt*, 7 THEORETICAL INQUIRIES L. 493, 512–15 (2006).

60. See Gropp et al., *supra* note 59, at 220. Researchers have not been able to explain why poor families are so strongly affected despite the fact that they don't have enough assets to profit from unlimited exemptions. See Hynes, *supra* note 59, at 515. Perhaps this occurs because the cost savings of standardizing and bundling loans outweighs the gains from differentiating between households based on their financial ability to benefit from unlimited homestead exemptions.

61. See Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1086–88 (2005). There is some debate about whether home-protective legislation systematically increases fraud and abuse beyond a limited number of well-publicized cases.

62. Cf. Posting of Todd Zywicki to The Volokh Conspiracy, [http://www.volokh.com/archives/archive\\_2005\\_03\\_27-2005\\_04\\_02.shtml](http://www.volokh.com/archives/archive_2005_03_27-2005_04_02.shtml) (Apr. 1, 2005, 13:36 EST).

63. 11 U.S.C. § 522(q)(1)(A)–(B) (2006); Robert J. Aalberts, *From the Editor-in-Chief*, 34 REAL EST. L.J. 3 (2005) (describing bankruptcy reforms to prevent abuse).

ers relocate at lower than optimal levels for employment markets<sup>64</sup> as well as in response to changed family and housing needs. At the community level, constraints on mobility hinder the “Tiebout model,” where municipalities compete to attract residents by providing favorable levels of taxes and services.<sup>65</sup> Municipalities are less likely to compete to efficient outcomes because owners are reluctant to “vote with their feet” and relocate. Other forms of home-protective legislation impede community development and land planning.<sup>66</sup> For example, state legislation restricting eminent domain to blighted areas constrains economic development. These laws may drive governments to situate public projects farther from economic centers, where land is cheaper and more readily acquired—regardless of the potential value of the project to a metropolitan area or the effects on sprawl.

### B. *The Legal Mythology of Home*

The pervasiveness and variety of home protection in U.S. property law suggests that the law reflects (and encourages) a special ethos with respect to the home. The attribution of personal and social values to the home dates back to the nineteenth-century Romantic philosophy of the home as a paradise on earth and a refuge from the corruption and danger of urban life.<sup>67</sup> The legal privileging of homes in the United States, however, did not begin in earnest until the New Deal’s “modernized social compact” introduced government buyouts of defaulted mortgages, attractive direct lending programs, and lengthier mortgage amortization periods.<sup>68</sup> Political rhetoric and business advertising broadcast visions of the “American dream,” “home as castle,” and “home is where the heart is.” These ideological campaigns were disseminated most effectively by those with a financial interest in a robust housing market, such as banks, developers, and real estate companies. The marketing of the home as a powerful symbol, coupled with financial incentives, channeled wealth investment to residential real estate and encouraged attitudes glorifying homeownership.<sup>69</sup>

---

64. See Robert B. Riley, *Attachment to the Ordinary Landscape*, in PLACE ATTACHMENT 13, 25 (Irwin Altman & Setha M. Low eds., 1992). A contrary argument is that employers benefit from homeownership and long-term mortgages because it makes their workforce more stable.

65. See Melissa J. Morrow, Comment, *Twenty-Five Years of Debate: Is Acquisition-Value Property Taxation Constitutional? Is it Fair? Is it Good Policy?*, 53 EMORY L.J. 587, 597 (2004).

66. See generally DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS (2002).

67. See Louise Chawla, *Childhood Place Attachments*, in PLACE ATTACHMENT, *supra* note 64, at 63, 64; Carole Despres, *The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development*, 8 J. ARCHITECTURAL & PLAN. RES. 96, 104 (1991). This view of the home, and the single-family home in particular, dominated the period of the industrial revolution. See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1245 (2008).

68. See Ronald Tobey et al., *Moving Out and Settling In: Residential Mobility, Home Ownership, and the Public Enframing of Citizenship, 1921–1950*, 95 AM. HIST. REV. 1395, 1413–19 (1990).

69. See Alan Zundel, *Policy Frames and Ethical Traditions: The Case of Homeownership for the Poor*, 23 POL’Y STUD. J. 423 (1995) (describing effect of the federal “Own Your Own Home” campaign and New Deal-era legislation on the ideology of homeownership). Increased home buying

A generation later, the concept of the home morphed from social recovery to personal self-development with Margaret Radin's theory of property for personhood.<sup>70</sup> This legal theory of home spins a captivating tale of how the moral force of law safeguards the personal and psychological values of the home. The "personhood" character of one's home has become a tenet of property law, cited ubiquitously and accepted without challenge. Legal scholars, joined by legislators and judges, are the modern narrators of this myth.

Radin constructed personhood theory on the basis of moral philosophy, including Hegel's *Philosophy of Right*. She argued that certain kinds of property are so "bound up with the holder" that they are necessary for "self-constitution" and human flourishing.<sup>71</sup> Personhood theory spans a continuum from fungible property, which is freely traded or held for trade, and personhood property, the loss of which "causes pain that cannot be relieved by the object's replacement."<sup>72</sup> To achieve proper self-development, an individual needs control over resources in the external environment, particularly those objects that fall on the personhood end of the property continuum.<sup>73</sup> Radin did not clarify whether her theory addresses the ability to be a person or the same person, to be a self or the same self, to be a self as defined by the person or a self as constructed by society, or to have a personality in either the psychological sense or the philosophical conception of personality.<sup>74</sup>

Building on her thought-provoking, if amorphous, theory, Radin argued that enhanced legal protection should apply to property for personhood, particularly if loss of that property means that the "claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened."<sup>75</sup> Radin focused on the paradigmatic example of homes. She discussed at length how personhood theory informs the legal treatment of homes under the First and Fourth Amendments, tenant safeguards in landlord-tenant law, and enhanced protection of residential homes from eminent domain.<sup>76</sup>

Following Radin's landmark article, a generation of legal scholars adopted the personhood perspective and focused in particular on the role of the home in human flourishing. The personhood perspective provided the normative basis for proposals to protect the "sanctity of home" from the

---

encouraged pro-ownership attitudes. Psychologists have long observed that people may or may not behave in keeping with their attitudes, but they are very likely to hold attitudes in keeping with their behaviors, including purchasing behaviors. See Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 611–14 (2002) (discussing the psychological research on behavior-attitude consistency).

70. See Radin, *supra* note 4.

71. *Id.* at 959, 967.

72. *Id.* at 959.

73. See *id.* at 957, 971–72.

74. I thank Michael Moore for this point.

75. *Id.* at 978, 1015.

76. *Id.* at 993–1006. Radin offered no empirical evidence to substantiate personhood theory or the home as property for personhood.

alleged misuse of government eminent domain power, the greedy reach of creditors, and the wasteful excess of taxing authorities.<sup>77</sup> Commentators noted that the home warrants enhanced protection as a psychologically vital and archetypal possession—the home is like “an extension of [owners’] selves, or like a part of their family.”<sup>78</sup> In this view, the home is so critical to the maintenance of self and psychological well-being<sup>79</sup> that displacement amounts to an emotional trauma.<sup>80</sup>

In a separate vein, other scholars espoused a theory of residential communitarianism. They focused on harms to residents and their communities from the severing of territorial ties. Relocated individuals are at risk of “traumatic stress reaction to the destruction of all or part of one’s emotional ecosystem” from the loss of social ties and decimation of community.<sup>81</sup> Even those commentators who questioned the American obsession with homeownership conceded that there is an “intuitive sense that rights in our homes are different from other types of property ownership.”<sup>82</sup>

Legislators have been similarly quick to proclaim the transcendent value of the home and of residential stability. The psychological value of home has received top billing in the recent debates over foreclosure relief.<sup>83</sup> Addressing the subprime lending crisis and subsequent foreclosures, legislators have described the loss of home as “emotionally devastating,”<sup>84</sup> because homeownership “is at the heart of who we are and the dreams that people have.”<sup>85</sup> People who lose their homes “will feel as if they have lost everything.”<sup>86</sup> Homeownership confers psychological benefits by “giving people the confidence, self-esteem and the skills” for success in challenging

77. See, e.g., Fee, *supra* note 6, at 787–88; cf. Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1725–26 (2003).

78. Fee, *supra* note 6, at 788; see also Bezdek, *supra* note 6, at 37 (homes are “the anchor . . . to body, soul, and family”).

79. See, e.g., FULLILOVE, *supra* note 2, at 20; Ballard, *supra* note 2, at 285–87 (“[Home] provides space to develop and express an identity.”); Fox, *supra* note 2, at 434 (“The impact of losing one’s home on an individual occupier’s quality of life, social and identity status, personal and family relationships, and for his or her emotional, psychological, and physical health and well-being have been well-established in housing and health literature.”); Kelly, *supra* note 7, at 961 (“The sudden deprivation of [neighborhood] can itself be a threat to the community member’s sense of self.”).

80. See Jeffrey T. Powell, Student Article, *The Psychological Cost of Eminent Domain Takings and Just Compensation*, 30 LAW & PSYCHOL. REV. 215, 220 (2006) (“Displacement from one’s home or property elicits feelings of loss and depression, often generating negative emotional and health reactions.”); see also Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. Soc’y 580, 602 (2002) (describing empirical research as showing that loss of home entails extreme reactions of alienation and grief).

81. FULLILOVE, *supra* note 2, at 11.

82. Williams, *supra* note 49, at 303; see also Barros, *supra* note 25, at 256 (“Homes are different in meaningful ways from other types of property . . .”).

83. See *supra* notes 27–29.

84. 154 CONG. REC. S2842 (daily ed. Apr. 10, 2008) (statement of Sen. Akaka).

85. 154 CONG. REC. S5797 (daily ed. June 19, 2008) (statement of Sen. Dodd).

86. 154 CONG. REC. S2282 (daily ed. Apr. 1, 2008) (statement of Sen. Menendez).



economic times.<sup>87</sup> Similar themes animate the historical record. A report to the 1875 Texas Constitutional Convention on the state's homestead exemption proclaimed that the creditor must know that the home "is sacred and beyond his reach."<sup>88</sup> Ownership encouraged a certain psychological orientation, with the homestead exemption "the grandest foundation yet conceived, upon which to build up in our State an industrious, independent, self-sustaining and land-holding yeomanry."<sup>89</sup>

Legislators, both in the historical record and present-day debates, also maintain that protection of the home safeguards family relations and finances.<sup>90</sup> While this argument may have had merit in the small-scale agrarian economy of the nineteenth century, it is not persuasive today. The modern family can readily reconstitute itself in new residential settings, and minimal levels of asset protection can ensure a fresh start without exempting residential real estate altogether.<sup>91</sup>

Home-protective legislation offers a focal point for analyzing disconnects between legal philosophy and the realities of property ownership. Property law has succumbed to theorizing about the home without a glance at the relevant empirical research. Even the scholarly criticism of personhood theory and residential communitarianism neglects the question of evidence; instead these critiques address economic efficiency, object fetishism, the role of political conflict and power relations,<sup>92</sup> and failure to adequately balance the home interest against competing interests.<sup>93</sup> This inattention to the empirical evidence is troubling. Personhood and

87. 154 CONG. REC. S7449 (daily ed. July 25, 2008) (statement of Sen. Reed). The legislative history of the Housing and Economic Recovery Act also includes statements by dozens of legislators referring to the "American dream." E.g., 154 CONG. REC. S1359-60 (daily ed. Feb. 28, 2008) (statement of Sen. Martinez) ("People are being foreclosed on, and there are families sitting at the kitchen table to see how to save that precious piece of the American Dream they have—their home."). The history also includes statements that legislators must act to stop the "American dream [from turning] into the American nightmare," 154 CONG. REC. S1407 (daily ed. Feb. 29, 2008) (statement of Sen. Menendez), and prevent "people [from] being thrown out of their castles . . . and thrown into the moat," 154 CONG. REC. S5797 (daily ed. June 19, 2008) (statement of Sen. Boxer).

88. Report from N.H. Darnell to Hon. E.B. Pickett (Nov. 5, 1875), in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 569, 569 (1875).

89. *Id.* at 570.

90. This argument stems from the agrarian economy at the country's founding, the dual role of home as enterprise, and the restrictions on women holding property or participating in labor markets. For example, in the Texas Constitutional Convention, committee members were adamant about the need for a homestead exemption to "protect the wife and children in their shelter . . . against the calamities of whatsoever kind, even the death of the husband and father." *Id.* at 569.

91. For a discussion of the interaction between family relations and housing, see GRANT McCracken, CULTURE AND CONSUMPTION II: MARKETS, MEANING, AND BRAND MANAGEMENT 38-46 (2005) (noting that the house is the "stage" for the family and that housing reflects as well as constructs social and familial relationships). On the financial point, a family that is struggling financially may be ill served by retaining a home that they likely cannot afford.

92. See Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 353 (1993).

93. See Barros, *supra* note 25, at 280-90 (asserting that the personhood interest is real and deserving of legal protection, but that Margaret Radin's theory imposes too severe a degree of protection on possessory rights in homes).

communitarian theories of property offer inspiring normative visions to the legal academy—but simultaneously provide ideological fodder for rent-seeking interest groups. The high social costs of protectionism indicate that an evidence-based account is long overdue.

## II. THE HOME AS PROPERTY FOR PERSONHOOD: A REVIEW OF THE PSYCHOLOGICAL EVIDENCE

The personhood theory of the home maintains that an individual constitutes herself as a person through a secure and ongoing relationship with certain property. Loss of personhood property jeopardizes selfhood and impairs psychological flourishing. Radin clarifies that personhood property is more than subjective preferences, but she does not specify whether the loss of such property harms the ability to be a self (or the same self), a person (or the same person), or to have a personality.<sup>94</sup> It is also not clear whether her theory targets internally defined selves or socially created selves (i.e., others' view of oneself).<sup>95</sup> In light of this underspecification problem and the presumably multiconstitutive nature of personhood, the empirical evidence cannot “disprove” property for personhood. But, we can look to the research for evidentiary support for some of the logical distillations of Radin's theory. Specifically, the psychology research bears on the propositions of whether property is a primary constituent of self-concept and whether property loss is likely to impair or radically alter the self, as perceived by the dispossessed owner, or to harm long-term psychosocial functioning.

In psychological terms, the self-constitution described by Radin and subsequent legal theorists implicates the concepts of identity and self. The psychological correlates of flourishing include development, psychosocial functioning, stress, adaptation, and life satisfaction.<sup>96</sup> Personality and social psychologists have studied the formation and maintenance of self and identity extensively,<sup>97</sup> while environmental psychologists have investigated the role of possessions as an “extended self”<sup>98</sup> and dwelling as “place identity.”<sup>99</sup> Psychologists and sociologists have also researched the mental-health

---

94. See *supra* note 74.

95. I thank Heidi Hurd for her helpful comments on this point.

96. Psychologists conceptualize identity as individuation and differentiation from others, a psychological sense of continuity and self-image, and the collected social roles of the individual. See Snyder & Cantor, *supra* note 12, at 651. Self in psychology is a related but broader construct that encompasses the formation of self, the social self in interpersonal relations, and the executive function of the self as agent and decision maker. See Roy F. Baumeister, *The Self*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 12, at 680, 680–81.

97. This work investigates the processes of self-perception, self-inference, self-narration, self-attribution, and self-esteem, as well as the cultural context, social structures, roles, and groups that are the foundations of identity formation and self-knowledge. See Snyder & Cantor, *supra* note 12, at 651.

98. See Russell W. Belk, *Attachment to Possessions*, in PLACE ATTACHMENT, *supra* note 64, at 37, 38.

99. See Harold M. Proshansky et al., *Place-Identity: Physical World Socialization of the Self*, 3 J. ENVTL. PSYCHOL. 57, 61 (1983) (describing dearth of empirical research on place identity).

impacts of relocation and homeownership. This Part shows that contrary to claims in the property scholarship, the home is not a primary construct of self and identity, residential dislocation does not typically harm mental health, and the relationship between homeownership and self-esteem is equivocal.<sup>100</sup> Moreover, in contrast to the object focus of personhood theory, an enormous body of empirical work establishes that social interactions and ties—not possessions—are the bedrocks of psychological thriving.

#### A. *The Nonprimacy of Home to Self-Constitution*

Possessions, even subjectively important ones, do not form the principal tiers of self or identity.<sup>101</sup> Instead, the empirical research shows that personality characteristics, values, social roles, and one's body parts are the conceptual categories most closely linked with self.<sup>102</sup> For example, a study of 1500 American adults asked to "tell me about yourself" found that personality attributes and role categories (e.g., mother) accounted for 60–72 percent of the responses, depending on age and education.<sup>103</sup> The remainder of the responses described activities of the self such as work and hobbies.<sup>104</sup> Another study specifically examined the relative importance of possessions vis-à-vis other possible aspects of selfhood.<sup>105</sup> Body parts were rated as the closest to self, followed by bodily processes and personally identifying characteristics such as name or age.<sup>106</sup> Possessions fell in the middle of the

---

100. Some of the studies described in this section utilize subject samples composed of both homeowners and renters. The similar trend in the findings across the experiments with renters and owners and the experiments comprised solely of owners suggests that the psychological model of homeownership presented in this Article may apply with some force to renters. In addition, recent empirical research indicates that subjective feelings of ownership, not legal title or status, is the critical variable of the psychological relationship to property. For this reason, it is unlikely that the addition of renters in some of the experiments undermines the findings. See Jochen Reb & Terry Connolly, *Possession, Feelings of Ownership, and the Endowment Effect*, 2 JUDGMENT & DECISIONMAKING 107, 110–14 (2007) (finding that subjective feelings of ownership, which were enhanced by physical possession, increased monetary valuation in endowment effect experiments; objective or legal ownership had no effect).

101. Cf. Clare Cooper, *The House as a Symbol of the Self*, in DESIGNING FOR HUMAN BEHAVIOR 130 (Jon Lang et al. eds., 1974) (theoretical work in psychology discussing application of Jungian concepts of collective unconscious, archetype, and symbol to the house).

102. See Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 12, at 915, 927. This finding applies to North American people whereas studies of Chinese, Japanese, and Korean respondents find more flexible and situation-dependent self-concepts. See, e.g., Hazel Rose Markus et al., *Selfways: Diversity in Modes of Cultural Participation*, in THE CONCEPTUAL SELF IN CONTEXT 13, 29, 37 (Ulric Neisser & David A. Jopling eds., 1997).

103. Fiske, *supra* note 102, at 927 (reporting the findings of Diane Holmberg et al., *Self-Making in American Adults: Content, Structure, and Function* (2007) (manuscript on file with the author)).

104. *Id.*

105. See Ernst Prelinger, *Extension and Structure of the Self*, 47 J. PSYCHOL. 13, 15–23 (1959) (asking adult subjects to rate eight categories of items on a scale of whether they were "definitely a part of your own self").

106. *Id.* at 18.

categories rated for relation to self, surpassing only abstract ideas, other people, and objects in the environment.<sup>107</sup>

In studies that specifically investigate dwelling, subjects report that while their homes are important possessions for both instrumental and subjective reasons, other items are more strongly linked to their sense of self. For example, in Belk's 1987 study, subjects rated ninety-six cards, each representing a type of possession (broadly defined to include public places, body organs, people and values as well as physical objects) on a four-point scale of "self" and "not-self."<sup>108</sup> Not only did relatives, friends, and body organs receive higher ratings than own "dwelling," but so did items such as favorite vacation place, hair, and United States.<sup>109</sup> Items that were rated very similarly to "own dwelling" included favorite casual clothes, favorite vehicle now owned, and favorite book.<sup>110</sup> Similarly, in Prentice's 1987 study, fifty college students sorted seventy possessions into as few or as many piles as they wished based on similarities in the source of why someone might value them.<sup>111</sup> The possessions most strongly linked to self were family heirlooms, diaries, photographs, and old letters, while the family house was most frequently grouped with "everyday possessions" such as a bed or telephone.<sup>112</sup> Only one quantitative empirical study has found that homes are more central to self-construct than other types of possessions.<sup>113</sup> In that study, Ball and Tasaki asked subjects to rate a list of ten personal possessions on a relation-to-self scale.<sup>114</sup> They found that subjects rated the family home as most connected to self.<sup>115</sup> The evocative phrasing of "family home," and the conflation in the relation-to-self scale of questions about whether objects expressed the self with questions about whether objects were part of

---

107. *Id.*

108. See Russell W. Belk, *Identity and the Relevance of Market, Personal, and Community Objects*, in *MARKETING AND SEMIOTICS* 151, 154–56 (Jean Umiker-Sebeok ed., 1987). Half of the 248 adult subjects were renters. We cannot be sure whether the addition of renters attenuated the relative ranking of "own dwelling." Recent evidence suggests, however, that subjective feelings of ownership and possession, not legal title, determine the psychological value of property. See Reb & Connolly, *supra* note 103.

109. *Id.*

110. *Id.*

111. See Deborah A. Prentice, *Psychological Correspondence of Possessions, Attitudes, and Values*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 993, 995–96 (1987).

112. *See id.*

113. A. Dwayne Ball & Lori H. Tasaki, *The Role and Measurement of Attachment in Consumer Behavior*, 1 *J. CONSUMER PSYCHOL.* 155, 166 (1992) (analyzing subject sample of 188 university students and 143 adults in the surrounding community). Some researchers claim that qualitative studies of reactions to burglary describing feelings of "violation" and "pollution" demonstrate the linkage between self and dwelling. We cannot draw any conclusions from these studies with respect to residential real estate because the property lost was personal property and the results are confounded by reactions to invasion, trespass, and criminal victimization. See, e.g., Barbara B. Brown & Paul B. Harris, *Residential Burglary Victimization: Reactions to the Invasion of a Primary Territory*, 9 *J. ENVTL. PSYCHOL.* 119, 119–32 (1989).

114. See Ball & Tasaki, *supra* note 113, at 162–63.

115. *Id.* at 166.

the self, temper this finding.<sup>116</sup> As with most research in this area, the experimental design does not clarify whether the home refers solely to the physical housing structure or encompasses personal possessions and mementos within the home, which researchers have found to be highly expressive of self.<sup>117</sup>

The empirical literature also calls into question the utility of Radin's distinction between fungible and personhood property (e.g., homes) and the assumption that people value the latter more.<sup>118</sup> A study of five-hundred randomly selected households found that subjects placed homes at the necessities end of the necessities/recreational dimension (together with items such as money, furniture, and cars) rather than in the category of symbolic possessions representing self or attachments to others.<sup>119</sup> In another study, fifty-five percent of people asked to describe the feelings associated with their dwelling did not offer responses that referenced emotions—contrary to what one might expect if people perceived dwellings as personhood property.<sup>120</sup> Even when property bears a strong relationship to self, people do not necessarily prize personhood property over fungible or instrumental property. Studies report significant variability among subjects, with some owners listing symbolic possessions as their most treasured possession, others favoring instrumental possessions,<sup>121</sup> and a number offering multiple reasons for valuing a possession highly.<sup>122</sup>

There is a considerable difference between the notion that certain objects, such as homes, express and even help maintain our identities and the theory that objects actually *construct* our identities in a prerequisite sense (i.e., “but for” certain property an individual would experience harm to self or to proper self-development). The legal scholarship has conflated these two concepts. Radin notes that property can serve a self-expressive function

116. See *id.* at 162.

117. Csikszentmihalyi and Rochberg-Halton write, “[o]ne of the most important psychological purposes of the home is that those objects that have shaped one’s personality and which are needed to express concretely those aspects of the self that one values are kept within it.” MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS* 139 (1981); see also McCracken, *supra* note 91, at 35 (“These objects are intended to recall the presence of family and friendship relationships, personal achievements, family events, ritual passages, and community associations.”).

118. Radin, *supra* note 4, at 987 (“There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.”).

119. Marsha L. Richins, *Valuing Things: The Public and Private Meanings of Possessions*, 21 J. CONSUMER RES. 504, 508–09 (1994) (mail survey of 500 households). There was no other statistically significant data on houses. Personal Communication with Marsha L. Richins, July 4, 2008.

120. Only 45 percent of the subject sample, which was comprised of owners and renters, gave emotional responses, of which only 36 percent were positive. CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 117, at 127–28.

121. Prentice, *supra* note 111, at 998.

122. CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 117, at 84–85 (reporting a study of the cherished possessions of eighty-two Chicago families); Richins, *supra* note 119, at 507 (“[F]or any particular possession several or even all of the meaning dimensions . . . may influence its value.”).

but she sees that as necessary to self-constitution.<sup>123</sup> The research indicates that residential real estate serves a primarily self-expressive, not self-constructive, function.<sup>124</sup> Homes and other possessions express attitudes, values, personal history, ethnic identity, and self-perceived status, or bolster an image of self we wish to convey to others.<sup>125</sup> There is evidence that self-expression through dwelling is effective. Subjects who rate perceived personality dimensions after viewing an owner's interior dwelling provide ratings that largely correspond to owner's self-ratings<sup>126</sup> and that are more accurate than ratings based on behavioral information such as social activities of the owner.<sup>127</sup> However, to conclude that homes deserve legal protection from creditors, taxing authorities, and government because of their self-expressive capacity seems far-fetched. Citizens of capitalist nations have many ready substitutes for self-expression. Cars, clothes, and jewelry serve similar functions of announcing identity and benefit from broader visibility. Home decorations can be transferred to a new residence. Other alternatives for self-expression, such as group membership, religion, and speech do not depend on property at all.

The legal understanding of personhood property also fails to appreciate that identities are multivariate. Not only do we construct our identities in multiple ways, we construct multiple identities. Our self and identity are comprised from intrapsychic, social, and cultural forces, and we have a multitude of elaborated self-concepts, social self-identities, and even remembered selves.<sup>128</sup> A social identity in one setting may differ markedly from an individual's sense of self, or personality traits, or from a social identity deployed in another situation.<sup>129</sup> Even "territorial" identities have multiple iterations. Individuals may identify not only with their physical

---

123. She writes, "for example, if you express your generosity by giving away fruits that grow in your orchard, then if the orchard ceases to be your property, you are no longer able to express your character." Radin, *supra* note 4, at 968.

124. Even researchers who have devoted their careers to elucidating the psychological function of possessions typically stop short of avowing that possessions construct identity. *See, e.g.*, HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS* 155 (1992) ("[B]road social identity dimensions are reflected in, and probably in part maintained by, individuals' self-reported relationships with their personal possessions."); *cf.* Despres, *supra* note 67, at 98 (describing the research on the role of possessions in the definition and development of self-identity).

125. *See* Belk, *supra* note 98; Cooper, *supra* note 101, at 131 ("The house . . . reflects how man sees himself, with both an intimate interior . . . and a public exterior . . . or the self that we choose to display to others."). The expressive capacity of the housing structure varies depending on the degree to which the owner's housing choice was circumscribed by location, commuting time, or cost. *See* Richins, *supra* note 119, at 518.

126. *See* Edward A. Sadalla et al., *House Form and Social Identity: A Validity Study*, in *OPTIMIZING ENVIRONMENTS: RESEARCH, PRACTICE, AND POLICY* 201 (Roger R. Stough et al. eds., 1980).

127. W. Jeffrey Burroughs et al., *Predicting Personality from Personal Possessions: A Self-Presentational Analysis*, in *TO HAVE POSSESSIONS: A HANDBOOK ON OWNERSHIP AND PROPERTY* 147 (Floyd W. Rudmin ed., 1991).

128. Snyder & Cantor, *supra* note 12, at 651–52 (describing multiple levels of agendas for self and identity).

129. *See* Sadalla et al., *supra* note 126, at 202.

home but with a certain town<sup>130</sup> or type of community settlement (urban, suburban, or rural).<sup>131</sup> If one constituent of identity is threatened, other aspects of identity remain to moor the self. Recent work by Shigehiro Oishi and collaborators found that college students who had moved frequently rated their skills, abilities, and traits (“personal self”) as more central to self-concept than group membership (“collective self”).<sup>132</sup> Nonmovers showed the opposite pattern.<sup>133</sup> This finding highlights the adaptability of self and identity and bears directly on one interpretation of personhood theory—that loss of personhood property negatively affects the self. Multiple moves, at least during childhood and adolescence, alter self-concept, but with no indication of psychological harm.<sup>134</sup>

Personhood theory, with its emphasis on continuity and ongoing control of property, wrongly assumes that change is detrimental and self and identity are best left undisturbed.<sup>135</sup> The importance of dynamism to identity development and self-growth is well established in the diverse fields of social psychology, sociology, and psychoanalytic psychology.<sup>136</sup> The changing environment is not an obstacle to growth but a prerequisite for it. Eric Erickson’s seminal work on identity development describes identity as a dynamic process that balances rootedness and uprootedness throughout the life-span.<sup>137</sup> In the context of residential mobility, psychologists observe that relocation “may offer the opportunity for the development of new skills, new identity configurations, and the possibilities for considerable growth.”<sup>138</sup>

In summary, the weight of the psychological evidence does not support the idea that homes, or possessions in general, are strongly constitutive of psychological personhood. Specifically, the research fails to substantiate the

130. Bonnie Lindstrom, *A Sense of Place: Housing Selection on Chicago’s North Shore*, 38 Soc. Q. 19, 35 (1997).

131. In her survey of 6000 Denver-area residents, Feldman found that respondents described themselves as “city” or “suburb” people, typically lived in the type of settlement they identified with both at the time of the survey and in the past, and intended to reside in that type of settlement in the future if they relocated. Roberta M. Feldman, *Settlement Identity: Psychological Bonds with Home Places in a Mobile Society*, 22 ENV’T & BEHAV. 183, 192 (1990).

132. Shigehiro Oishi et al., *Residential Mobility, Self-Concept and Positive Affect in Social Interactions*, 93 J. PERSONALITY & SOC. PSYCHOL. 131, 134 (2007).

133. See *id.*

134. There is no evidence of negative impact on self-concept from typical levels of mobility. Extremely high mobility of five or six moves across childhood, however, is correlated with behavior problems and worse educational outcomes. See *supra* note 166. The movers in the Oishi study did not fall into this category and reported more modest levels of mobility. See *id.*

135. See Radin, *supra* note 4, at 1004.

136. See Kenneth O. Doyle, *The Symbolic Meaning of House and Home: An Exploration in the Psychology of Goods*, 35 AM. BEHAV. 790, 795–97 (1992) (theorizing about the changing meaning of housing across adult development); Proshansky, *supra* note 99, at 59.

137. See ERIC H. ERIKSON, *IDENTITY AND THE LIFE-CYCLE* 20 (W.W. Norton & Co. 1980) (1959); ERIC H. ERIKSON, *Identity and Uprootedness in our Time*, in *INSIGHT AND RESPONSIBILITY* 81 (1964). An “identity crisis” serves as “a crucial moment, when development must move one way or another, marshaling resources of growth, recovery, and further differentiation.” ERIC H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 16–19 (1968).

138. Farley & Werkman, *supra* note 9, at 419.

theory that loss of “personhood” property impairs self-concept or self-development. At best, possessions and dwellings are lower-tier aspects of self and identity and serve a primarily self-expressive function.

### B. Relocation and Psychological Flourishing

If homes are critical to human flourishing, as personhood theory suggests, we would expect to see psychological studies finding long-term mental health harms from involuntary relocation.<sup>139</sup> The research suggests otherwise. Psychologists and sociologists have studied the mental health impacts of relocation extensively. The weight of the evidence indicates that residential mobility, even forced relocation, causes short-term stress but typically does not affect long-term psychological functioning.<sup>140</sup> In general, people are highly adaptive to geographic change and typically return to pre-mobility levels of satisfaction in relatively short order.<sup>141</sup> Evidence suggests that it takes between six and eighteen months on average to settle and establish new social ties.<sup>142</sup> Migrants actively manage their relocations and create linkages to their former homes by replicating decorating practices,<sup>143</sup>

---

139. This Article addresses forced relocation to another residence, not homelessness. Homelessness has serious mental-health effects due to extreme and chronic stress, insecurity, and disruption of social relationships. See generally Judy A. Hall & Penelope L. Maza, *No Fixed Address: The Effects of Homelessness on Families and Children*, 14 CHILD & YOUTH SERVS. 35, 40–47 (1990).

140. Marc Bolan, *The Mobility Experience and Neighborhood Attachment*, 34 DEMOGRAPHY 225, 226 (1997) (reviewing evidence suggesting few adverse consequences of increased mobility); Peter Steinglass & Ellen Gerrity, *Forced Displacement to a New Environment*, in STRESSORS AND THE ADJUSTMENT DISORDERS, *supra* note 9, at 399, 410 (“[T]he impact of residential mobility is far less severe than is commonly hypothesized . . . . This is true even when it is involuntary in nature.”). The failure to establish significant psychological harm is especially notable because most studies do not control for preexisting mental health or socioeconomic status or other losses suffered in displacement (e.g., loss of family, community or culture, financial losses, etc.). See Steinglass & Gerrity, *supra*, at 413.

141. Lee Cuba’s study of 432 migrants to Cape Cod found that only twenty-five participants reported that they did not feel at home. See Lee Cuba & David M. Hummon, *Constructing a Sense of Home: Place Affiliation and Migration Across the Life Cycle* 8 Soc. F., 547, 552 (1993); see also PETER MARRIS, *LOSS AND CHANGE* 44 (2d ed. 1986) (discussing relocation of residents from the central districts of London to the Dagenham Estate in the London suburbs); Catherine Ward & Irene Styles, *Lost and Found: Reinvention of the Self Following Migration*, 5 J. APPLIED PSYCHOANALYTIC STUD. 349, 353 (2003) (majority of women surveyed about move from United Kingdom to Australia described their migration experience positively).

142. See Pamela Lyn Carlisle-Frank, *The Relocation Experience: Analysis of Factors Thought to Influence Adjustment to Transition*, 70 PSYCHOL. REPS. 835, 835 (1992); see also Bolan, *supra* note 140, at 226 (finding that migrants develop attachments to new locations quickly); Steinglass & Gerrity, *supra* note 140, at 411.

143. See Roderick J. Lawrence, *A Psychological-Spatial Approach for Architectural Design and Research*, 2 J. ENVTL. PSYCHOL. 37, 40–45 (1982). Anthropological studies of nomadic people describe how they create continuity through repetitive use of particular furniture arrangements, orientation of the home or shelter, and rituals. Carol M. Werner et al., *Temporal Aspects of Homes: A Transactional Perspective*, in HOME ENVIRONMENTS 1, 8 (Irwin Altman & Carol M. Werner eds., 1985).



continuing family traditions,<sup>144</sup> recreating social roles in the new location,<sup>145</sup> and personalizing their new homes with “identity displays.”<sup>146</sup>

Forced relocation carries more risk of negative mental health effects than voluntary relocation, but for most people the long-term effects are still benign.<sup>147</sup> Even in cases of severe social disruption most displaced residents make a full psychological recovery. For example, the redevelopment of Boston’s insular, immigrant community of the West End was one of the most severe and unsettling mass relocations in the history of American urban renewal. The property scholarship routinely cites the formerly tight-knit community of the West End, and Marc Fried’s famous study of the displaced West Enders, as evidence of the devastating effect of forced relocation. Yet, even in this acute instance of community eradication, Fried found that two years after their involuntary removal, 75 percent of former West Enders had acclimated to their new homes and only 25 percent reported that they still felt sad or depressed. This impact is modest, especially in view of the fact that approximately 10 percent of the general adult population suffers depression or another form of mood disorder in a given year.<sup>148</sup> Recovery and resilience are also evident in studies of relocation following devastating natural disasters.<sup>149</sup> Although some studies find evidence of durable psychological distress, more recent research that controls for variables related to the disaster and preexisting mental health problems shows either no long-term effects or very small negative effects.<sup>150</sup>

The data on long-term outcomes does not mean that residential dislocation is psychologically costless. Dislocation entails short-term stress, and

144. Mary Gauvain et al., *Homes and Social Change: A Cross-Cultural Analysis*, in ENVIRONMENTAL PSYCHOLOGY: DIRECTIONS AND PERSPECTIVES 180 (Nickolaus R. Feimer & E. Scott S. Geller eds., 1983) (case study of relocation of 50,000 Egyptians to build the Aswan dam); David G. Saile, *The Ritual Establishment of Home*, in HOME ENVIRONMENTS, *supra* note 143, at 87, 92.

145. Feldman, *supra* note 131, at 192; Steinglass & Gerrity, *supra* note 140, at 411.

146. Anne Vinsel et al., *Privacy Regulation, Territorial Displays, and Effectiveness of Individual Functioning*, 39 J. PERSONALITY & SOC. PSYCHOL. 1104, 1110–15 (1980).

147. In their review of research on involuntary relocation, Steinglass and Gerrity conclude that there is “little support for a conclusion that *most* individuals who undergo forced relocation should be considered at risk to develop serious mental health problems.” Steinglass & Gerrity, *supra* note 140, at 413; *see also* CLAUDE S. FISCHER ET AL., NETWORKS AND PLACES: SOCIAL RELATIONS IN THE URBAN SETTING 177–85 (1977) (reviewing research).

148. *See generally* Marc Fried, *Continuities and Discontinuities of Place*, 20 J. ENVTL. PSYCHOL. 193 (2000); *see also* NATIONAL INSTITUTE OF MENTAL HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2008), available at <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml#MajorDepressive>.

149. *See* Ebru Şalcioğlu et al., *Psychosocial Determinants of Relocation in Survivors of the 1999 Earthquake in Turkey*, 196 J. NERVOUS & MENTAL DISEASE 55, 55 (2008); Steinglass & Gerrity, *supra* note 140, at 401.

150. *See* Şalcioğlu et al., *supra* note 149, at 60 (finding that past psychiatric illness and avoiding reminders of the earthquake were the strongest predictors of post-traumatic stress disorder among relocated disaster victims). A few studies have found that forced relocation due to natural disaster can actually lead to increased satisfaction with family life and neighborhood relations. *See, e.g.*, Thomas E. Drabek et al., *The Impact of Disaster on Kin Relationships*, 37 J. MARRIAGE & FAM. 481, 490–92 (1975) (family relations); Harry Estill Moore, *Some Emotional Concomitants of Disaster*, 42 MENTAL HYGIENE 48, 49–50 (1958) (neighborhood relations).

the intensity of that stress varies with the circumstances of the dislocation. For example, a family that must relocate due to creditor action has undoubtedly experienced significant stress, not only from the relocation but from their financial situation. However, the distress from relocation is typically not durable (and may in some situations be reduced by parting with a house that a family can no longer afford).

Contrary to its negative depiction in property scholarship, mobility may improve mental health and psychosocial functioning in some cases.<sup>151</sup> Relocation can offer expanded opportunities for residential satisfaction, employment, and even personal growth.<sup>152</sup> For example, a 1996 study by the U.S. Department of Transportation found that the majority of owners displaced by eminent domain reported that they were able to significantly upgrade their housing.<sup>153</sup> Relocation and its attendant stresses can also be a catalyst for developing coping skills, reaffirming social relationships, and mastering a challenging event.<sup>154</sup> Fried, author of the West End study, makes the provocative argument that low-income individuals' and immigrants' emotional attachments to residence can become "dysfunctional" when they preclude beneficial or necessary life change.<sup>155</sup> The sociological evidence indicates that mobility is most beneficial to individuals who are living in neighborhoods that are in decline or in housing situations that are ill suited to their personal needs. Multiple studies have found that homeownership can entrap low-income individuals (particularly low-income black owners) in unsafe, deteriorating neighborhoods by increasing the cost of exit.<sup>156</sup>

For the average owner, residential stability is not a psychological imperative. But do large-scale studies mask negative effects on groups we might expect to be particularly vulnerable to residential relocation, such as school-age children and the elderly? Turning first to children, the research on the effect of residential mobility is equivocal.<sup>157</sup> Several studies cite detrimental

---

151. On the societal level, migration facilitates cultural diffusion as outmigrants carry their norms, values, and social practices with them to new locales. See David L. Brown, *Migration and Community: Social Networks in a Multilevel World*, 67 RURAL SOC. 1, 11 (2002).

152. See Fried, *supra* note 148, at 202.

153. See OFFICE OF REAL ESTATE SERVS., U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE STUDY (1996) (on file with author).

154. See Farley & Werkman, *supra* note 9, at 421.

155. See Fried, *supra* note 148, at 203.

156. See Douglas S. Massey et al., *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29, 52-54 (1987) (finding that the constraints of homeownership on mobility and residential segregation entrap black owners in neighborhoods with high crime, poor schools, and dilapidated housing); Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AM. J. SOC. 1040, 1080 (1997) ("[I]ncreases [in home ownership in poor neighborhoods] will almost certainly have the unintended consequence of reducing the likelihood that residents of these areas will leave them for better neighborhoods.").

157. In addition to the research on mobility, there are a limited number of studies on the effects of homeownership on children. This research has found better outcomes for children of homeowners, although in some studies the improvement is as modest as 4 to 7 percent. William Rohe concludes that the research, totaling four studies, is too sparse to draw firm conclusions. William R. Rohe et al., *The Social Benefits and Costs of Home Ownership: A Critical Assessment of*

effects on behavior and educational attainment,<sup>158</sup> but recent research calls into question the cause and extent of these effects. A 1999 study found that most of the negative effects of mobility on academic performance are due to preexisting differences in test scores and family sociodemographic characteristics.<sup>159</sup> Other research shows that negative outcomes decrease dramatically when both parents are involved and supportive of their children.<sup>160</sup> Extremely high mobility during childhood (in the ninetieth percentile, or approximately five or six moves across childhood) is highly associated with learning and behavioral problems, although the causal relationship is unclear.<sup>161</sup> Notably, extreme mobility typically affects the children of renters, who are more likely to experience dislocation and other correlates of socioeconomic disadvantage—and who are not the primary beneficiaries of home-protective legislation. In some areas of the country, the frequent relocation of renters has become so severe that school districts are offering parents rental subsidies.<sup>162</sup>

There is stronger evidence of heightened psychological costs to the elderly. Elderly individuals are the least mobile demographic group,<sup>163</sup> and they report the strongest attachments to home and community, even when controlling for residential tenure.<sup>164</sup> Compared with their younger counterparts, the elderly report greater coalescence between home and “self,”<sup>165</sup> and express higher levels of satisfaction with their homes independent of the

---

the Research 21–22 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.12, 2001) available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf>.

158. See, e.g., Anita C. Brown & Dennis K. Orthner, *Relocation and Personal Well-Being Among Early Adolescents*, 10 J. EARLY ADOLESCENCE 366, 366 (1990); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S95 (Supp. 1988).

159. Shana Pribesh & Douglas B. Downey, *Why are Residential and School Moves Associated with Poor School Performance?*, 36 DEMOGRAPHY 521, 527 (1999).

160. John Hagan et al., *New Kid in Town: Social Capital and the Life Course Effects of Family Migration on Children*, 61 AM. SOC. REV. 368, 378, 381 (1996).

161. It is not clear if frequent moving causes these problems or if the frequent moves are a sign of troubled family life. See, e.g., David Wood et al., *Impact of Family Relocation on Children's Growth, Development, School Function, and Behavior*, 270 JAMA 1334, 1336 (1993). This study controlled for preexisting learning and behavior problems in children but did not assess family dysfunction or distress.

162. This year, the Flint, Michigan school district began paying \$100-per-month rental subsidies to needy families after it discovered that on average half of the students were changing schools during the school year. Erik Eckholm, *To Avoid Student Turnover, Parents Get Rent Help*, N.Y. TIMES, June 24, 2008, at A1.

163. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.29 (128th ed. 2009), available at <http://www.census.gov/compendia/statab/2009edition.html>. Sometimes this excessive stability has negative consequences. See also Richard V. Burkhauser et al., *Mobility Patterns of Older Homeowners: Are Older Homeowners Trapped in Distressed Neighborhoods?*, 17 RES. ON AGING 363, 381 (1995) (finding that older homeowners are less likely to exit distressed neighborhoods than younger homeowners).

164. See Robert J. Sampson, *Local Friendship Ties and Community Attachment in Mass Society: A Multilevel Systemic Model*, 53 AM. SOC. REV. 766, 774 (1988) (“[T]he strongest predictor of attachment to community . . . is age . . .”).

165. See Belk, *supra* note 108, at 157–58.

home's physical condition.<sup>166</sup> Rather than deriving satisfaction from housing amenities like the young and middle aged, home satisfaction for the elderly is more strongly tied to family orientation and memories, competence in a familiar environment, the value of independent living, and affordability.<sup>167</sup> The research does not clarify causation: does the psychological importance of home to the elderly reduce mobility or does immobility drive attachment to the home? Also, the studies have not assessed whether the findings indicate attachment to a particular home or the desire to avoid relocation to an institutional setting. When considering the justification for home protection for the elderly, however, cause is less important than effect. Unlike the benign effect of dislocation in the general population, loss of the home poses greater psychological risk to the elderly.

*C. Other Correlates of Flourishing: Homeownership,  
Life Satisfaction, and Self-Esteem*

Home-protective laws shield owners from dispossession and subsidize homeownership on the theory that homeownership yields a variety of psychological, as well as economic, benefits. There is evidence of psychological gains from homeownership, but these findings are not as robust as commonly assumed. For example, homeowners do report greater life satisfaction than renters.<sup>168</sup> However, homeownership is not the primary determinant of life satisfaction; research shows that physical health and the quality of one's marital relationship are much stronger predictors.<sup>169</sup>

There is also an absence of evidence that homeownership increases self-esteem—a surprising finding given that Americans prize homeownership.<sup>170</sup> The evidence is mixed, with four studies indicating only a limited association between homeownership and self-esteem and a fifth, longitudinal study by Rohe and Basolo finding no positive impact on self-esteem.<sup>171</sup> Rohe and Basolo's study of low-income home buyers found no increase in self-esteem at eighteen months post-purchase and a reduction in self-esteem at thirty-six months post-purchase. Although the authors do not address this point, it seems likely that many of the low-income homeowners found homeownership financially stressful and therefore erosive of self-esteem.<sup>172</sup> The

---

166. See *id.*

167. Shirley L. O'Bryant, *The Value of Home to Older Persons: Relationship to Housing Satisfaction*, 4 RES. ON AGING 349 (1982).

168. E.g., Rohe et al., *supra* note 157, at 3.

169. Norval D. Glenn & Charles N. Weaver, *The Contribution of Marital Happiness to Global Happiness*, 43 J. MARRIAGE & FAM. 161, 163–64 (1981).

170. E.g., Williams, *supra* note 49, at 286; Rohe et al., *supra* note 157.

171. William M. Rohe & Victoria Basolo, *Long-Term Effects of Homeownership on the Self-Perceptions and Social Interaction of Low-Income Persons*, 29 ENV'T & BEHAV. 793, 806–07 (1997).

172. See, e.g., John Cairney & Michael H. Boyle, *Home Ownership, Mortgages and Psychological Distress*, 19 HOUSING STUD. 161, 166 (2004) (finding that homeowners with mortgages reported higher stress levels than renters but that renters reported higher levels of

equivocal findings in the self-esteem research suggest that self-esteem does not inhere in homes as objects but rather in personal expectations, social comparisons, and the contextual effects of neighborhoods, domestic situations, and financial pressures.

#### D. Conclusions

The objective of this Part was to assess the empirical support for the psychological claims implicit in the personhood theory of the home, and to cast doubt on the traditional theoretical underpinnings of home-protective legislation. The psychological evidence does not substantiate several logical distillations of personhood theory. Specifically, the evidence supports neither the primacy of the physical home to self-concept nor the asserted impact of home loss on psychosocial functioning. To be clear, I do not claim that the existing research proves that homes lack any shard of psychological value to all classes of owners. More research disaggregating results based on race, income, and equity investment is necessary to clarify whether there are differential effects beyond life cycle. Also, existing research has not assessed all aspects of a potential “home interest” or fully delineated attachment as a psychological construct. Consistent with an evidence-based approach, my analysis acknowledges limitations in the data but proceeds from the (sizeable) body of available evidence. This evidence belies the theory that maintaining one’s home is requisite to self-constitution and human flourishing.

### III. RESIDENTIAL COMMUNITARIANISM: EVIDENCE FROM SOCIOLOGY AND DEMOGRAPHY

Despite its appeal to non-economic, humanistic values, personhood theory is remarkably atomistic and object focused.<sup>173</sup> One claim of this Article is that property for personhood has misfired by attaching such transcendental importance to objects, particularly homes—the true sine qua non of personhood is social relationships. An extensive body of research in social, health, evolutionary, and clinical psychology establishes that social relationships—not possessions—are nonfungible, irreplaceable, and critical to human development.<sup>174</sup> Social relationships create a sense of belonging or

---

depression, anxiety, and negative mood than homeowners with mortgages); Jacoby, *supra* note 18, at 2278–82 (discussing how oversized housing debt and foreclosure impose steep psycho-social costs).

173. Margaret Radin recognized in her later work that personhood theory may adopt a communitarian orientation if the property’s essential personhood value is communitarian in nature. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 368 (1986). Her original article focused on the role of “things” for personhood but noted that it would “on occasion attempt to pay attention to the role of groups both as constituted by persons and constitutive of persons.” Radin, *supra* note 4, at 965.

174. See, e.g., Snyder & Cantor, *supra* note 12, at 654; Fried, *supra* note 148, at 194 (“Community attachment appears rooted in the individual’s involvement in local social relations.”); Setha M. Low & Irwin Altman, *Place Attachment: A Conceptual Inquiry*, in PLACE ATTACHMENT, *supra* note 98, at 1, 7.

being part of a collective, provide interaction and intimacy, increase our understanding of society and others, and help develop social norms and maintain social order.<sup>175</sup> Social relationships also shape the constructs of self and identity<sup>176</sup> and are highly correlated with mental health.<sup>177</sup> Lonely people report higher stress, anxiety, and negative mood; have poorer control over attention; and experience enhanced perceptions of insecurity and sensitivity to threats or rejection.<sup>178</sup> Social interaction even benefits physical health: loneliness decreases health and longevity comparably to smoking, high blood pressure, and obesity.<sup>179</sup>

If social relations are the key to flourishing, shouldn't we protect homes on the theory that neighborhoods provide vital social interaction and ties? Communitarian theory emphasizes the importance of social relations and takes an instrumental view of the benefits of homeownership for residential stability. Some communitarian and community development scholarship is attentive to the research on neighborhood social networks; other strong-form accounts have espoused a far less empirically grounded vision. Specifically, some scholars have advocated home-protective legislation (and argued for its expansion to renters) based on a theory of residential communitarianism—that homes situate individuals in strong, intimate, and close-knit networks of social ties.<sup>180</sup> There is a presumption of quite a lot of community in these accounts.<sup>181</sup>

Legal scholarship has overstated and oversimplified neighborhood social dynamics. Contrary to the vision of the homeowner wrenched from her close-knit community, the sociological and demographic research shows

---

175. See Snyder & Cantor, *supra* note 12, at 657.

176. As Roy Baumeister writes, "[s]elfhood is almost unthinkable outside a social context . . . . Selves are . . . tools for relating to other people." Baumeister, *supra* note 96, at 680. The development of self and identity occurs through reflected appraisal, self-affirmation, and behavioral confirmation, among other social processes. See Arthur Aron et al., *Close Relationships as Including Other in the Self*, 60 J. PERSONALITY & SOC. PSYCHOL. 241, 253 (1991); Snyder & Cantor, *supra* note 12, at 652–53.

177. For example, relocation causes greater initial distress when an entire community is moved, Steinglass & Gerrity, *supra* note 140, at 406; Clare L. Twigger-Ross & David L. Uzzell, *Place and Identity Processes*, 16 J. ENVTL. PSYCHOL. 205, 208 (1996), or when mobility disrupts social support systems. Researchers attribute the West Enders' initial depression and grief from urban renewal to disruptions in their atypically strong and territorially based social support systems (and arguably to the societal condemnation of residents' way of life implied by "slum clearance"). See Steinglass & Gerrity, *supra* note 140, at 404. Peter Marris writes of urban renewal in the West End and Lagos, "[t]he definition of a slum is also a definition of the people who live there." PETER MARRIS, *supra* note 141, at 56 (arguing that grief and bereavement reactions are more likely when relocation is used as an instrument of social control or change, rather than of physical development of land).

178. See Cacioppo et al., *supra* note 12, at 1073; Crawford et al., *supra* note 12, at S34.

179. This study statistically controlled for known health risk factors, socioeconomic status, and prestudy health baselines. See J.S. House et al., *Structures and Processes of Social Support*, 14 ANN. REV. SOC. 293, 297–300 (1988). Lonely individuals experience less social control supporting healthy habits and fewer strong ties to people who encourage them to access medical care when needed, as well as higher rates of suicide. See *id.*

180. See *supra* notes 6–7.

181. See *supra* notes 6–7.

that neighborhoods are characterized by weak ties and residents have high rates of voluntary geographic mobility. The empirical literature also suggests that property scholarship has exaggerated the effects of residential dislocation and homeownership on local social capital.

#### A. *Our Town Revisited: Neighborhoods and Weak Ties*

The myth of home has its counterpart in the myth of community. The archetype of community that pervades legal thought is a robust territorial group with strong, affiliative ties connecting neighbors to one another and to neighborhood institutions.<sup>182</sup> The empirical evidence shows that territorial communities fall far short of the “Our Town” image that animates residential protectionism.<sup>183</sup> Instead, neighborhoods are characterized by weak or intermediate ties, meaning that residents talk once in a while, often recognize each other by face, and exchange favors occasionally.<sup>184</sup> Initiatives to increase social ties in neighborhoods typically succeed in increasing weak ties rather than strong social relationships.<sup>185</sup> There is also evidence that residents, especially higher-income individuals, are content with impersonal interaction with neighbors rather than close friendships or repeated mutual help.<sup>186</sup>

Contrary to legal theories of the intensely social (and socializing) function of residential property, the evidence indicates that people depend on nonterritorial networks to provide the majority of their strong ties as well as sense of community.<sup>187</sup> The average person has approximately one dozen strong social ties, but only two or three of those ties on average are to neighbors.<sup>188</sup> In response to the survey question, “What are the ways in

182. See *supra* Section I.B.

183. See *infra* Section V.D (discussing unusually close-knit communities).

184. See Karen E. Campbell, *Networks Past: A 1939 Bloomington Neighborhood*, 69 Soc. FORCES 139, 139 (1990) (discussing an Indiana neighborhood characterized by weak ties similar to neighborhoods today).

185. See Press Release, ASA News, American Sociological Association, *Encouraging Neighborliness: National Website Encourages Neighborliness on the Local Level; I-Neighbors Project to Strengthen Community* (Sept. 9, 2004), available at [http://www.asanet.org/cs/root/topnav/press/encouraging\\_neighborliness](http://www.asanet.org/cs/root/topnav/press/encouraging_neighborliness).

186. See Avery M. Guest & Susan K. Wierzbicki, *Social Ties at the Neighborhood Level: Two Decades of GSS Evidence*, 35 URB. AFF. REV. 92, 105 (1999) (finding based on responses to how frequently residents spent social evening with a neighbor versus a non-neighbor friend). One notable exception is that residents of rural areas report comparatively stronger neighborhood social ties and the weakest non-neighborhood ties. *Id.* at 103. Satisfaction with community accounted for almost 10 percent of the variance in life satisfaction among the lowest social class subjects, but only 2.7 percent in the highest income group. See Brown, *supra* note 151.

187. Data averaged across the period of 1974–96 reveal that fully one-quarter of respondents never spend a social evening with neighbors, 15% spend a social evening with neighbors once a month, and 12% several times a month. Guest & Wierzbicki, *supra* note 186, at 99 tbl.1. The amount of socializing with friends is nearly double. Ten percent of respondents reported never spending a social evening with friends, 22% reported spending a social evening with friends once per month, and 20% reported spending a social evening with friends several times per month. *Id.* (limiting the category of “friends” to exclude neighbors that are friends).

188. Press Release, *supra* note 185.

which you get a real sense of belonging or a sense of community?" over 70 percent of respondents cited friends and family, while only 25 percent cited neighbors or local community.<sup>189</sup> Moreover, there is some evidence that neighborhood sociability is in decline.<sup>190</sup> Robert Putnam notes that between 1974 and 1998, the frequency with which Americans reported spending a social evening with a neighbor fell by one-third.<sup>191</sup> Also, across the twentieth century, local clubs and organizations remained constant in number, but their activities shifted from socializing to political work.<sup>192</sup>

While communities typically lack the strong ties attributed to them in the legal scholarship, neighborhoods high in collective efficacy boast dense networks of weak and intermediate ties. Dense networks of weak ties are important for developing norms that facilitate cooperation and reciprocal social relations.<sup>193</sup> Because weak ties tend to be more diverse and connect different groups to one another, they also facilitate community organizing, the spread of information and new ideas, informal social control, and the support of children.<sup>194</sup> Sociologists have criticized as outmoded the view that

189. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 274, 275 fig.77 (2000) (surveying respondents born after 1964). Consistent with the decline-of-community thesis as well as theories about enhanced residential attachment among the elderly, respondents born prior to 1964 cited friends and neighbors at slightly higher rates and, notably, almost 50 percent reported that neighbors gave them a real sense of belonging. *Id.* at 275, fig.77. A 1999 study using data from the General Social Survey from 1974 to 1996 found that neighborhood socializing had declined, though only slightly. Guest & Wierzbicki, *supra* note 186, at 102, 109 (arguing that the data show a slight decline in socializing but do not support "community lost" or eclipse-of-community theories). The study also found that the decline in neighborhood sociability was greater than the increase in socializing with friends outside of the neighborhood, which suggests that sociability in general may be decreasing modestly and that individuals were increasingly "specialists" in neighborhood versus non-neighborhood socializing. *Id.* at 102–03, 109.

190. Commentators characterize the globalization era as one of "elective belonging." See MIKE SAVAGE ET AL., *GLOBALIZATION AND BELONGING* 205 (2005) (contending that personal biography and identity have taken center stage and the importance of place associations and residential history has waned). Classical social theorists contend that the traditional *Gemeinschaft* community of strong and highly interconnected social networks has been replaced by *Gesellschaft* ties that are weak and instrumental in nature. Guest & Wierzbicki, *supra* note 186, at 94. If the "decline of community" school is correct that local sociability and social capital have decreased, it is not due to mobility, as mobility, while still substantial, has decreased since the mid-twentieth century. See JAMES M. JASPER, *RESTLESS NATION* 71 (2000); Claude S. Fischer, *Ever-More Rooted Americans*, 1 *CITY & COMMUNITY* 177, 177 (2002).

191. PUTNAM, *supra* note 189, at 105 (noting that in 1974 married Americans reported spending a social evening with neighbors thirty times a year on average versus twenty times a year in 1998).

192. See Barrett A. Lee et al., *Testing the Decline-of-Community Thesis: Neighborhood Organizations in Seattle, 1929 and 1979*, 89 *AM. J. SOC.* 1161, 1161 (1984). Collective efficacy does not necessarily founder despite reductions in social interaction. Nonprofit organizations play an important role in increasing collective action "events" such as fundraisers, blood drives, protests, etc. See Alana Conner Snibbe, *Bowling Alone?: Civil Society May Not Be in Such Bad Shape*, *STAN. SOC. INNOVATION REV.* Summer 2006, at 18.

193. See Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, *AM. PROSPECT*, Spring 1993, at 35, 36; cf. Kai A. Schafft & David L. Brown, *Social Capital, Social Networks, and Social Power*, 17 *SOC. EPISTEMOLOGY* 329, 335, 338 (2003) (arguing that social capital neglects relations of power and should assume a more conflict-oriented approach).

194. See Robert J. Sampson et al., *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 *AM. SOC. REV.* 633, 635 (1999) [hereinafter Sampson et al., *Beyond Social*



“neighborhood is exclusively a primary group and therefore should possess the ‘face-to-face,’ intimate, affective relations which characterize all primary groups.”<sup>195</sup>

The property scholarship has not sufficiently appreciated the importance—or the replicability—of weak ties. Legal commentators charge that the displacement of individuals or communities depletes the accumulated “social capital” of cooperation, trust, and reciprocity.<sup>196</sup> In most instances where home-protective legislation applies, the involuntary relocation of a single household or even a number of households will not have a discernible impact on social networks.<sup>197</sup> For the individual, leaving a community characterized primarily by weak ties does not hinder participation in a similar network of weak ties in the new location. From the neighborhood perspective, weak ties, by their very nature, not only adapt to in- and outmigration but benefit from it by creating “bridging” ties to different groups. The evidence that weak ties predominate and social networks benefit from turnover undermines the strong-form theory of community underpinning residential protectionism.

### B. Demographic Mobility

The demography research shows that homeowners are far less “rooted” than commonly assumed. Home-protective legislation may be shielding from the alleged horrors of dislocation people who were quite likely to move on their own. The typical American moves fourteen times in her lifetime, twice as often as the average British citizen.<sup>198</sup> Approximately 12% of the population relocated between 2006 and 2007; of that number 8% moved within the same county, 3% to a different county within the same state, and 2% to a different state.<sup>199</sup> High mobility is not a recent phenomenon, but a

---

*Capital*]. Weak ties are important in the rapid spread of information, new ideas, and cultural diffusion as well as in linking individuals to jobs. Mark Granovetter, the pioneering researcher on the strength of weak ties, notes that, “[w]hat makes cultural diffusion possible, then, is the fact that small, cohesive groups who are liable to share a culture are not so cohesive that they are entirely closed; rather, ideas may penetrate from other such groups via the connecting medium of weak ties.” Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 215 (1983). But see Robert J. Sampson et al., *Civil Society Reconsidered: The Durable Nature and Community Structure of Collective Civic Action*, 111 AM. J. SOC. 673, 673 (2005) [hereinafter Sampson et al., *Civil Society*] (arguing that the density of nonprofit organizations, rather than the density of social ties or frequency of neighborly exchange, affects collective action).

195. DONALD I. WARREN, *BLACK NEIGHBORHOODS: AN ASSESSMENT OF COMMUNITY POWER* 50 (1975).

196. See, e.g., Michèle Alexandre, “Love Don’t Live Here Anymore”: *Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 30–31 (2008) (“When [urban] renewal plans are implemented, community members are dispersed, and these intangible valuables completely disappear.”).

197. The exception is when a large portion of a community, or even an entire community, is displaced from a large-scale condemnation project or a rash of foreclosures, for example.

198. See Farley & Werkman, *supra* note 9, at 418.

199. U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/tables/09s0031.pdf>. Moreover, demographers note that there is a substantial amount of temporary, seasonal, or circular migration that is not fully captured by census surveys. See Brown, *supra* note 151, at 11.

long-standing American tradition. Historical mobility ranges from a low of 29% in Indianapolis between 1880 and 1890 to a high of 85% in St. Louis from 1840 to 1850.<sup>200</sup> There is a distinctive life cycle to migration: young adults in their twenties are highly likely to have multiple moves, mobility slows in mid life with school-age children, and it drops steeply among the elderly.<sup>201</sup> Homeownership slows mobility significantly with 7% of owners moving between 2005 and 2006 relative to 30% of renters.<sup>202</sup> However, homeowners still evidence significant overall mobility with a median stay of only 8.2 years in one residence.<sup>203</sup>

### C. Residential Stability, Homeownership, and Positive Externalities

Many traditional accounts point to homeownership's role in promoting social capital and residential stability as justification for home-protective legislation. Empirical analysis, however, suggests that these effects have been overstated in the legal literature. The research shows that homeownership increases positive externalities in the form of social capital, but to a smaller degree than commonly assumed. Homeowners are more likely to vote, participate in voluntary organizations, and work to solve local problems.<sup>204</sup> However, the differential between homeowners and renters is modest. A 1999 research study found that homeowners are only 6% more likely to work to solve local problems and 15% more likely to vote in local elections than renters.<sup>205</sup> Further, much of this difference disappears when researchers control for length of residence in the community.<sup>206</sup> Tenure plays a critical role with long-term renters increasing social capital at levels only slightly lower than homeowners. Stable neighborhoods with higher proportions of long-term residents, both owners and renters, have

---

200. Tobey et al., *supra* note 68, at 1398.

201. U.S. Census Bureau data measuring change in residence between 2005 and 2006 reports that approximately 26% of individuals in their twenties relocated, 15% of those age 30–44, 7% of those age 45–64, and 5% or less of those 65 and older. U.S. CENSUS BUREAU, *supra* note 163, tbl.29; *see also* Stefan Rayer & David L. Brown, *Geographic Diversity of Inter-county Migration in the United States, 1980–1995*, 20 POPULATION RES. & POL'Y REV. 229, 242 (2001). In addition, highly educated or skilled individuals have higher mobility, particularly when migrating from rural to urban areas. *See* Brown, *supra* note 151, at 12–14.

202. *See* U.S. CENSUS BUREAU, *supra* note 163, tbl.29.

203. *See* Rohe et al., *supra* note 157, at 13. Even individuals who report satisfaction with their residential living situation are oftentimes not committed to remaining in that locale. *See* Max Lu, *Do People Move When They Say They Will? Inconsistencies in Individual Migration Behavior*, 20 POPULATION & ENV'T. 467, 473–74 & tbl. 2 (1999).

204. *See* Tobey et al., *supra* note 68, at 1409 (“Historians have consistently found that home owning slows residential mobility . . .”).

205. *See* Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354, 367 (1999) (controlling for other variables).

206. *See id.* at 374, 377 (finding that between 4 and 92% of the effect of homeownership on various measures of social capital occurs because homeownership is associated with lower mobility). The authors conclude, “This finding suggests that policies that act to limit mobility would end up having similar effects to homeownership-enhancing policies on increasing the level of investment by individuals in local amenities and social capital.” *Id.* at 377.

increased local participation, greater reciprocated exchange of favors, more linkages between children and adults in the community, increased home values, and higher levels of neighborhood sociability.<sup>207</sup> Of course, there are fewer long-term renters than homeowners due to home-protecting and home-privileging policies; dismantling protectionist legislation may modestly increase the number of renters, including long-term renters.

Other common assumptions about the primacy of homeownership to social capital falter under critical analysis. A frequent refrain in legal scholarship is that low rates of homeownership (and thus reduced exit costs) inflict grave harm by disrupting social relations and decreasing social capital.<sup>208</sup> Undeniably, there are costs to social relations and social capital from increased mobility and declining neighborhood sociability. The research literature on loneliness indicates that transient, low-sociability communities may also inflict individual harms. However, property law has underappreciated that mobility, and even limited sociability, convey benefits. Mobility encourages economic growth and workforce efficiency. It can satisfy changing individual needs and preferences across the life-span. A lack of generalized neighborhood sociability may increase the formation of intentional communities that efficiently target individuals with preferences for high sociability or specific ideological preferences (and filter to some degree nonsociable freeloaders).<sup>209</sup> Perhaps most importantly, the prevailing narrative about social capital and homeownership does not recognize that there are many ways other than homeownership to increase local social capital. The presence of families with children, local non-profits, and even internet-based community-building initiatives significantly enhance social capital.

There is also no indication that home-protective laws (e.g., creditor exemptions, takings restrictions, and tax benefits) are a particularly effective approach to fostering social capital. Isolated, individual incidents of homeowner dislocation typically do not affect neighborhood social capital or sociability. Protectionist measures increase residential tenure and enhance social capital—but only up to a point. Neither homeownership nor home-protective legislation produces high rates of multidecade residential tenure.

---

207. See Barbara Brown et al., *Place Attachment in a Revitalizing Neighborhood: Individual and Block Levels of Analysis*, 23 J. ENVTL. PSYCHOL. 259, 268 (2003) (stating that tenure increases place attachment in declining neighborhoods); Sampson, *supra* note 164, at 774 (stating that tenure increases attachment, social activity, and friendship ties). But see Bolan, *supra* note 140, at 234 (finding that new migrants join comparable numbers of local organizations relative to longer-term residents). As tenure increases, factors such as socioeconomic background and life cycle become less important predictors of social ties and community participation. See Tobey et al., *supra* note 68, at 1412. There is some question about the direction of causality. For example, a 1999 study found that nonmigration was higher in countries with high rates of participation in civic associations, churches, and local economic organizations, but it could not isolate the causal path. See M.C. Irwin et al., *There's No Place Like Home: Nonmigration and Civil Engagement*, 31 ENV'T & PLANNING 2223–38 (1999).

208. See Peñalver, *supra* note 13. For a discussion of balancing autonomy with community through limited constraints on exit, see Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

209. I thank Nicole Garnet for this point as well as for her helpful comments about the social costs of decline of community.

Homeownership can be a double-edged sword with respect to collective efficacy: William Fischel has described how in some instances ownership encourages investment in socially valuable programs, such as education, but in other cases promotes rent seeking and externalities.<sup>210</sup> In addition, more involvement is not always better for local affairs, particularly in consensus-seeking organizations. Neighborhood organizations benefit from a critical mass of participants. The involvement of too many owners with intense preferences may impede agreement and action.<sup>211</sup>

In summary, the research does not support the claims in property scholarship about the strength of social ties, the communal nature of residential neighborhoods, or the degree of importance ascribed to homeownership for fostering social capital. The vision of tight-knit and low-turnover communities that animates home-protective legislation is a far cry from the realities of residential living. This is not to claim that there is no social value to low-turnover, close-knit, or sociable communities. Rather it is to suggest that there are advantages and disadvantages to sociability and stability—and to argue that home-protective legislation is not an effective means to achieve the potential gains from communality.

#### IV. RETHINKING RESIDENTIAL PROTECTIONISM

The notion that one's home is a psychological requisite has profoundly affected American property law. This mythology of home has cloaked rent seeking in the guise of moral compulsion and encouraged the overproduction of home-protective legislation. It has also misallocated protection by creating categorical measures without regard to life-cycle effects. Contrary to the assertions of legal commentators and the intuitions of citizens, maintaining one's home is not critical to self-definition. It is not a primary constituent of identity. It is not even a particularly effective facilitator of our personal happiness. In order to stem the tide of residential protectionism, and perhaps reverse some of the most abusive home protection shelters, it is time to change the way we think about the home.

##### *A. Dismantling the Legal Mythology of Home: Implications for Property Theory*

The legal academy, normally so adamant about rigor, proof, and distilling truth through the adversarial clash of ideas, has been remarkably reluctant to challenge the psychological ideal of home.<sup>212</sup> The implicit paradigm for home

---

210. See FISCHEL, *supra* note 8.

211. This may create a dynamic analogous to the anticommons where numerous property holders and property fragmentation hinder beneficial trades and socially desirable outcomes. See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

212. For example, in eminent-domain cases fair-market value compensation should enable a displaced owner to purchase in the same community. Even individuals or families struggling with

protection has become the gun-toting woman on her porch protecting her property, the perpetually and aggressively tearful plaintiffs in *Kelo*, and the unique cultural enclave that was Poletown. These exceptional cases are the idealized norm that lurks, often unspoken, in the background of legal discourse about the home. Meanwhile, the average citizen who has lived in several different residences, does not have many close ties to her neighbors, and won't experience psychological devastation from relocation has been all but forgotten.

The reflexive acceptance of the mythology of home and its persistent influence in property law result from a conflagration of political coalition, economic self-interest, and popular culture. Residential protectionism has made unlikely bedfellows of conservatives who wish to protect private assets and limit government intervention and liberals who support wealth redistribution and market intervention to advance dignitary concerns.<sup>213</sup> Cultural thought has created a false resonance to the home by conflating the affective meaning of home as social belonging, nurturance, and biography with the bricks-and-mortar housing structure.<sup>214</sup> Robert Riley observes, "The idea of home matches what seem to be our instincts, but how far have these instincts been conditioned by culture and even cliché?"<sup>215</sup> The rhetoric of home has become part of our cultural understanding, in many cases parroted verbatim by owners. A more polished (but arguably no less sophisticated) iteration of the home as psychologically sacrosanct dominates the legal literature.

An evidence-based analysis has important implications for property scholarship. First, although the research cannot "disprove" personhood theory in the sense of direct hypothesis testing, the weight of the evidence does not support the psychological distillations of personhood theory with respect to self-constitution and human flourishing. The unsettling conclusion is that a theory of property protection, and specifically home protection, has dominated legal scholarship for almost three decades without empirical support. Abandoning personhood as the dominant noneconomic justification for legal safeguards promotes a healthy skepticism of protectionist laws and encourages more precise discourse on the values and preferences underlying property protection. It is likely that many people are primarily attached to the home not as a personhood or social asset, but as an economic asset—it is the potential loss of the home's financial value that provokes psychological

---

creditor claims may be able to relocate within the same town depending on housing affordability and the local rental market.

213. See *supra* note 2.

214. This is evident in the legislative history of the recent federal foreclosure legislation. For example, in his statements supporting foreclosure relief, Senator Menendez noted, "Home. Home is where we are brought from the hospital when we are born. It is home we come to. Home is where we are nurtured take as we grow . . . Home is where, in fact, we also share moments of sorrow. Home is where we often take care of a sick or dying loved one. Home is the very essence of the American dream." 154 Cong. Rec. S1406 (Feb. 29, 2008).

215. Riley, *supra* note 64, at 25. Riley further observes, "Home is often identified as *the* archetypal landscape . . . Home is magical." *Id.*

distress. If this is true, it provides further evidence that homes are fungible property, no different from other economic assets. We may decide as a society, after weighing the costs and benefits, to protect economic assets or not—but presumably these assets should be treated equivalently.

Moving beyond the confines of personhood theory, there is no evidence of another form of compelling psychological interest or vital attachment to the physical home.<sup>216</sup> Of course, the lack of evidence does not prove the point. As is always the case in evidence-based analysis, research has not measured all conceivable elements of the problem at hand. There may be a home interest as of yet unidentified in the research literature, or a heightened attachment based on race, income, or gender. For example, home protections may promote security (i.e., the ability to plan one's affairs without the threat of future dislocation) and thus reduce both psychological costs and transaction costs. However, security is neither an inevitable byproduct of ownership (as demonstrated by the recent foreclosure crisis) nor a universally positive attribute (as shown by the finding that homeownership often entraps lower-income owners in declining neighborhoods). Moreover, special protections for ownership are not the only way to provide reasonable security or respect psychological attachments—private contracting for longer rental terms or more favorable lease-renewal options can also provide long-term assurances.

This Article contends that legal theory and reform must move forward based on the best available evidence. In view of the current body of evidence, and the specific finding of benign long-term outcomes from relocation, it seems unlikely that attachment, security, or an alternative psychological interest justifies the degree of home protection in American property law. If subsequent psychological research proves otherwise, then an evidence-based approach not only encourages, but requires, further theoretical revision.

The empirical research also challenges communitarian and community-development theorists who aver a “strong-form” version of territorial community. Dislocated individuals are not ripped from the bosom of close-knit neighborhoods and consigned to dwell in social isolation. To the contrary, individuals who relocate readily adapt and typically form new social ties.<sup>217</sup> Even scholars with more modest goals for neighborhood sociability may be fretting unduly about the effects of dislocation. For example, some scholars are apprehensive that increased mobility from low exit costs, specifically renting rather than owning, will reduce social interaction and relations.<sup>218</sup> In

---

216. There is evidence, as discussed in Part III, that dislocation that results in reduced social interaction and relationships is detrimental. Also, dislocation that separates families or impacts family relations is likely to impose psychological harm.

217. See Carlisle-Frank, *supra* note 142. In cases where owners have atypically strong territorial attachments, they may be able to relocate in the same county or even neighborhood. Census data shows that 60 percent of geographic moves are within the same county. See, e.g., U.S. CENSUS BUREAU, *supra* note 163, tbl.32.

218. See Peñalver, *supra* note 13, at 1948–50.

light of the low level of neighborhood socializing, this does not appear to be a pressing concern.<sup>219</sup>

Last, the research literature exposes the distinctly classist nature of the theories of property for personhood and residential communitarianism. Property theorists equate homeownership and “staying put” with liberty, dignity, and autonomy for poor residents. Sociologists view the same phenomenon as economic entrapment. If the positive effects of homeownership are not sufficient to reverse a declining neighborhood, then homeowners may end up entrapped by the high costs of exit (i.e., selling a house in a declining area or market). The groups most at risk for residential entrapment are black, low-income, and elderly owners.<sup>220</sup> In poor areas, there is evidence that residential stability increases depression and anxiety, despite the fact that it increases sociability and social ties.<sup>221</sup> Residential stability also has a weaker effect on decreasing perceived social disorder in poor neighborhoods compared to more affluent areas.<sup>222</sup> Disturbingly, the evidence suggests that home-protective legislation is not only economically regressive but psychologically regressive as well.

### B. Rent Seeking Masquerading as Moral Conviction

Stripping away the ideological veneer of home reveals that rent seeking, not personhood, lies at the core of residential protectionism. Some proponents maintain a sincere belief in the psychological importance of home. More often the support for home protection comes from business interests and homeowners who seek to extract rents (as well as politicians who wish to appeal to these constituencies). Business interests lobby for legislation that encourages investment in residential property and enhances lending profits; “homevoting” elites demand measures that increase the value of their homes and the financial benefits of homeownership. Notions of self-constitution, human flourishing, and community are used primarily to sway the electorate.<sup>223</sup> If the concern were about residential stability as a psychological requisite, protection would extend to a wide range of dwellings that residents identify as their homes.<sup>224</sup> Not only does the law fail to protect and

---

219. Moreover, the likely outcome of decreased neighborhood sociability or enhanced geographic mobility is that individuals compensate with increased social interaction in other domains, such as religious or recreational activities.

220. Rohe, et al., *supra* note 157, at 14–15.

221. Ross et al., *supra* note 177, (“[Neighborhood stability] does not benefit the mental health of residents of poor neighborhoods, and there is some evidence that it makes it worse.”).

222. *Id.* at 592.

223. See FISCHER, *supra* note 8.

224. See Clare Cooper, *The House As Symbol*, 3 DESIGN & ENV'T 30, 31 (1972) (describing efforts by the city of Berkeley, California to make it illegal to live in a converted truck or van and the unsuccessful efforts of the “Rolling Homes Association,” formed by owners of such homes, to prevent the passage of this local ordinance); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 513, 548 (2007) (noting the reductions in federal funding for public housing and describing generally how the enthusiasm for the virtues of home dwindles when applied to housing for low-income people or people of color).

privilege nontraditional homes, such as vans or truck-bed shelters, it frequently bans them though zoning laws and local ordinances.

The notion that homes are critical to psychological flourishing and communitarian ideals legitimizes legal protection and cloaks rent seeking as a moral right. Residential protections in American property law owe their existence, or at least their maintenance, to interests that have harnessed the persuasive force of home to extract special privileges. Those with a genuine belief in the psychological importance of home have been lulled by this vision to neglect the rent-seeking character and distributional consequences of home-protective legislation.<sup>225</sup>

Attributing psychological exigency to maintaining one's home creates a self-perpetuating cycle of legal protection.<sup>226</sup> Law and social norms mutually reinforce one another and exacerbate protectionism. When property law treats the loss of a home as a profound psychological insult, homeowners are more likely to experience residential dislocation as a disastrous event—or to politically capitalize on the likelihood that others think this way.<sup>227</sup> Elected officials, sensitive to the preferences and attitudes of their constituents, face political incentives to enact home-protective legislation.

The result has been the overproduction of home-protective legislation and an ideological climate of residential protectionism. The growth of home-protective legislation has not followed a linear trajectory. Instead, it is a veritable hydra—cutting off one protectionist law prompts other legislation to sprout in its place. For example, in the past three decades, the prevalence of tenancy by the entirety protection has decreased among the states and rent control has virtually disappeared. Yet, the hefty federal bailout of homeowners and lending institutions in the recent federal foreclosure act gainsays these advances. Indeed, the recent wave of state eminent domain enactments, varying in stringency from symbolic to financially and politically burdensome, suggests that protectionism is on the upswing.

In light of the current political groundswell to “save homes,” it is time to adopt an evidence-based account of the psychological and social value of maintaining one's home. Deconstructing the legal mythology of home will not end rent seeking. However, recognition of the role of rent seeking may reduce the broad base of political support for home protection, at least with respect to liberals seeking an opposite pattern of wealth redistribution. A more realistic vision of the psychological interest in the home can alter

---

225. Or perhaps they have concluded that the ends justify the means and the psychological interest in homeownerships trumps social costs and even distributional concerns.

226. Stephen Schnably criticizes Margaret Radin's emphasis on consensus in defining property for personhood: “The ideal of the home is not one simply constructed by individuals, but is one that has been actively fostered by the state and other ‘private’ actors wielding significant social power. . . . [S]ince the law itself often shapes consensus, purporting to rely on consensus to shape the law is a dangerous exercise in circularity.” Schnably, *supra* note 92, at 373–74.

227. The objective degree of harm may be less important than the cognitive response and meaning assigned to it. See Farley & Werkman, *supra* note 9, at 421.



norms and erode (or at least hold constant) the bulwark of home-protective legislation.<sup>228</sup>

### C. A Minimal Theory of Home Protection

To the extent we have premised residential protectionism on a misguided psychological conception of the home, it is time to revise our legal approach. We may wish to retain home protections for other reasons. But they cannot be justified on a theory of the home as psychologically special, whether advanced on the basis of sincere belief or rent seeking. We must rethink our vision of the home and, absent other justifications, curtail home-protective and home-privileging laws. As a preliminary effort in this direction, I advance in this Section a minimal approach to home protection on psychological and social grounds, sketching the broad outlines of a radically downsized theory. I leave the task of formulating detailed policy prescriptions for individual home-protective laws to scholarship that considers the particularized economic and political context of each law.

As a starting point, the problems associated with residential protectionism underscore the need for reform. In the aggregate, residential protectionism has proven excessive, costly, and regressive.<sup>229</sup> It has also delivered a surprisingly modest psychological payoff.<sup>230</sup> Undeniably, there are political challenges to reform. As a matter of policy, however, it is clearly time to start disassembling the edifice of protectionist legislation.

A minimal approach to residential protection advocates reducing the scope and number of home-protective laws, at least to the extent that such laws are based on psychological and social rationales. This approach also objects to laws that offer categorical protection to owners as an undifferentiated class. For example, absent alternative justifications, we should contemplate eliminating, or at least restricting to vulnerable subgroups, special protections against creditors.<sup>231</sup> Similarly, based on the psychological and sociological evidence, there is little to recommend the privileging of the home for tax purposes or for protection against eminent domain—other than the obvious political momentum for these measures. Government intervention in the mortgage crisis is questionable on both psychological and non-psychological grounds. Foreclosure relief, if it is necessary at all, should be targeted to communities threatened with destabilization.

A major stumbling block to adopting a minimal approach to home protection has been the fear that homeownership will founder on the shoals of

---

228. One point of comparison is how the legal censure of the tobacco industry and lobby altered national attitudes about smoking. The changed ideological climate enabled high cigarette taxes which in turn weakened the tobacco industry and modestly reduced the prevalence of smoking. See David Mendez & Kenneth E. Warner, *Adult Cigarette Smoking Prevalence: Declining as Expected (Not as Desired)*, 94 AM. J. PUB. HEALTH 251, 251 (2004).

229. A large body of economic and legal literature criticizes the cost-benefit calculus and distributional effects of home-protective laws. See *supra* notes 54–71.

230. See *supra* Part II.

231. See *infra* Part VI.B.

the free market. The international evidence suggests, however, that downsizing residential protections will not markedly reduce homeownership. Countries such as Canada, which do not offer comparable tax benefits and protections, have similar rates of homeownership.<sup>232</sup> In most instances, we can minimize or eliminate home-protective laws without decreasing homeownership and its beneficial effects on residential tenure and transaction costs.

#### D. Life-Cycle Effects and Home Protection

If protection for the psychological value of home is needed at all, it should focus on safeguarding vulnerable subgroups rather than protecting homeowners categorically. In some circumstances, there are evidence-based justifications for extending narrowly tailored protections to vulnerable groups. Life-cycle research finds that the elderly experience greater distress and less favorable psychological outcomes from residential dislocation. Compared with other demographic groups, home protection for the elderly confers greater benefits relative to its costs. This research offers a new perspective on existing legal protections in addition to suggesting avenues for reform. For example, the data sheds light on a contentious issue in affordable housing law—special programs for the elderly. Legal commentators have criticized local governments for disproportionately creating special tax benefits and affordable housing for elderly residents who do not strain the local coffers with the expense of educating children.<sup>233</sup> These scholars have questioned the fairness and efficiency of focusing benefits on senior citizens rather than other needy groups such as families with children.<sup>234</sup> It may be that these legal measures respond to the high psychological value many elderly residents attribute to aging in place. This explanation does not preclude the local-wealth maximization rationale but instead raises the possibility that these disparate motivations are operating concurrently.

In addition to tax relief and affordable housing, there may be other contexts where special protection for the elderly is warranted by the economic and psychological cost-benefit calculus. These measures need not take the form of absolute protection; the law can also respond to the special interests of the elderly with enhanced compensation or more intensive relocation assistance.

---

232. See Robert Guy Matthews, *Is it Time to Remodel the Homeowners Tax Break?*, WALL ST. J., Nov. 2, 2005, available at <http://www.realestatejournal.com/buySell/taxesandinsurance/20051102-matthews.html>.

233. See, e.g., Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195, 211–14 (2005).

234. See *id.*

## V. REVISING THE LEGAL THEORY OF HOME: OBJECTIONS AND CONSIDERATIONS

This Part considers potential objections, both normative and positive, to revising the legal theory of the home. Specifically, I consider the issues of subjective preferences, the psychological costs from loss of control, the fear of mass destabilization, and protection of atypically close-knit communities. I conclude that none of these concerns warrant the level of strong, categorical protections for owners currently engrafted on American property law.

### A. *Preferences Versus Flourishing*

If people attach high psychological value and subjective premiums to their homes and hold intense preferences to avoid relocation, are these sufficient justifications for home-protective legislation? The data is limited and does not provide a conclusive account of the prevalence, intensity, or adaptability of preferences for housing. Sixty-eight percent of Americans own their own home,<sup>235</sup> and surveys find a strong preference for homeownership versus renting.<sup>236</sup> Owners frequently, though not universally, report emotional connections with their homes and express satisfaction with their residential situation (if this were not the case many would have moved).<sup>237</sup> However, a significant minority of respondents report that they “don’t feel at home” or express dissatisfaction with their homes.<sup>238</sup> These studies do not address whether the respondents feel that an emotional connection to their current home is transferable to a new location. Also, the research leaves open the question of the relative intensity of preferences for homes versus preferences for relationships, work, status, group membership, or money.

Only one empirical study in the legal scholarship, to my knowledge, examines the subjective valuation of homes in excess of market value. In a study of the psychology of eminent domain, Janice Nadler and Shari Diamond asked participants the amount of money they would require in a hypothetical eminent domain scenario to sell a residence with a \$200,000 market value that had been in the family for two years. The majority of subjects demanded compensation above fair-market value and 5.2 percent

---

235. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP: TABLE 13: HOMEOWNERSHIP RATES BY STATE: 1984–2007, available at <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t13.html> (providing 2006 and 2007 homeownership rates for all states).

236. See Susan Saegert, *The Role of Housing in the Experience of Dwelling*, in HOME ENVIRONMENTS, *supra* note 143, at 287, 297.

237. See Richins, *supra* note 119, at 508–09.

238. See, e.g., Fried, *supra* note 148, at 199 (analyzing 2622 interviews of class-stratified and geographically diverse sample that found “latent dissatisfactions” with home emerging in interviews); Gabriel Moser et al., *Appropriation and Interpersonal Relationships: From Dwelling to City Through the Neighborhood*, 34 ENV’T & BEHAV. 122, 129 (2002). In particular, low- and middle-income residents of multifamily housing, and elderly residents of high-rises report much lower satisfaction levels and affective ties to home. See Sue Weidemann & James R. Anderson, *A Conceptual Framework for Residential Satisfaction*, in HOME ENVIRONMENTS, *supra* note 143, at 153, 165.

refused to sell altogether.<sup>239</sup> The study also assessed responses to a more unusual ownership situation where the property had been in the family for one hundred years; subjects who received this scenario were more likely to refuse to sell and demanded higher compensation premiums.<sup>240</sup>

This evidence suggests that people attach substantial subjective value in excess of market value to their homes, at least in the context of private redevelopment or government projects. In general, we expect that owners ascribe subjective value to their homes; otherwise the home presumably would have changed hands in a market exchange. It is not clear, however, whether people attach more subjective value to homes than other items. Hundreds of experiments have confirmed that people experience “endowment effects” and demand a premium to sell *any* good that they own.<sup>241</sup> Buy-sell experiments using mugs that subjects have owned for less than an hour find that subjects demand twice as much on average to sell their mugs than to buy identical ones.<sup>242</sup> In light of the endowment effect data, it is difficult to discern whether the subjective premiums reported in the Nadler and Diamond experiment are specific to homes.

Even if future empirical research finds that Americans report exceptionally high psychological and subjective value for their homes, there are still important reasons to hesitate before legalizing an array of enhanced protections. First, as a policy matter, it is dubious whether we should accord particularly strong protection to individual preferences for consumer goods. Faced with a moral hazard, there is an incentive for individuals to exaggerate their degree of attachment to goods in order to qualify for legal benefits. Second, in any discussion of preferences, the stickiness of law and norms is problematic. Because government policy, including homebuyers’ programs and the home mortgage interest deduction, has shaped preferences and attachments to home, there is what Stephen Schnably terms a “dangerous circularity” to creating legal protections on the basis of these preferences.<sup>243</sup>

The extent to which we should privilege preferences is drawn most seriously into question by recent research showing that people consistently misestimate the emotional consequences of preference satisfaction or preference frustration. Groundbreaking research in affective forecasting (our ability to predict what will make us happy in the future) and hedonic adaptation (our adaptability to life events or changed circumstances) finds that

---

239. See Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713 (2008) (finding, in addition, that the valuation premium was only moderately sensitive to the purpose or circumstances of the taking).

240. *Id.* A second experiment looked at subjective premiums in a voluntary negotiation with a developer and reactions to a subsequent attempt by the government to take the property by eminent domain and resell it to the developer. *Id.* at 737–42.

241. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, in ADVANCES IN BEHAVIORAL ECONOMICS 55, 55–74 (Colin F. Camerer et al. eds., 2004).

242. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1329–36 (1990).

243. See *supra* note 226.

people systematically overestimate the intensity and duration of the happiness experienced from expensive consumer goods.<sup>244</sup> The same “impact bias” leads people to overestimate the anticipated sadness and upset from negative events and underestimate the speed with which they will recover.<sup>245</sup> Some research suggests that loss aversion, the strong preference to avoid losses rather than acquire gains, occurs because individuals overestimate the hedonic impact of losses and underestimate the hedonic impact of gains.<sup>246</sup> A 2003 study provides evidence that forecasting errors and hedonic adaptation occur specifically in housing. Student participants in a dormitory-housing lottery significantly overestimated the emotional impact of receiving or not receiving their preferred housing choice.<sup>247</sup> This occurred in part because participants placed undue weight on the physical features of their housing and less emphasis on social features that were less variable between housing units.<sup>248</sup>

The disconnect between owners’ perceptions regarding housing and objective outcomes suggests that people either misperceive their preferences or that these preferences are less important than we have assumed for outcomes. We have been overattentive to conjecture about public preferences at the expense of objective, long-term data.<sup>249</sup> Reversing this pattern allows an evidence-based theory of home protection to replace political grandstanding and supposition.

### B. Castles and Control

Another potential objection to my account is that it construes psychological costs too narrowly. Specifically, it may be that the psychological harm from home loss stems from the loss of control that accompanies residential dislocation, not from the unique character of the home.<sup>250</sup> An

---

244. See Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting: Knowing What to Want*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 131, 131 (2005).

245. See *id.* Moreover, once people have made a decision, they selectively search for confirming information in print and media sources, other people, or even their own cognitions and “selective” memory to validate the wisdom of the decision.

246. This occurs because people underestimate their tendency to rationalize losses and overestimate how much they would dwell or ruminate on losses. Deborah A. Kermer et al., *Loss Aversion Is an Affective Forecasting Error*, 17 PSYCHOL. SCI. 649–53 (2006); see also DANIEL GILBERT, STUMBLING ON HAPPINESS 165–67 (2006).

247. See Elizabeth W. Dunn et al., *Location, Location, Location: The Misprediction of Satisfaction in Housing Lotteries*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1421, 1421 (2003).

248. *Id.*

249. If in the future we have better data on subjective preferences and valuation and their relationship to psychological outcomes, it may be troublingly antidemocratic to dismiss preferences altogether. At this juncture, we do not need to reach that point because the evidence on psychological value and subjective preferences is limited. In addition, if people do hold strong preferences, those preferences may be the creation of law, and there is strong evidence of systematic error in our preferences relative to outcomes.

250. Ironically, in some cases home-protective laws may cause, rather than prevent, psychological harm from control deprivation. Procedural reforms that protract, but do not ultimately avoid the loss of home expose owners to repeated, ongoing deprivation of control. Melissa Jacoby has

extensive literature in psychology establishes that exercising control over outcomes and avoiding prolonged exposure to uncontrollable situations are important to mental health.<sup>251</sup> People deploy a variety of strategies and behaviors to assert and maintain control over their environment. For example, researchers in human territoriality observe that people create boundaries, mark territory, and personalize places or objects to enhance actual and perceived control.<sup>252</sup>

Despite the psychological significance of control, it seems unlikely that loss of control over one's residence causes durable psychological harm or justifies residential protectionism. If loss of control predicted negative outcomes, we would expect the long-term data on involuntary relocation to show impacts on mental health. Yet, the research indicates that relocation rarely causes lasting harm.<sup>253</sup> This is likely due to the ability of dislocated individuals to shift the need for control to other domains of life, such as interpersonal relationships, work, religion, and recreation. The research on control deprivation suggests that we have a global need for control over outcomes and mastery of our environment. If we lose control in one situation, we can compensate by asserting control in another domain.<sup>254</sup>

I contend that the home has been falsely constructed in legal consciousness as a looming symbol of our personal control. Notwithstanding voluminous scholarship on the home as a symbol of autonomy,<sup>255</sup> anyone who has lived in a home with other people knows that it is not a bastion of personal control—to the contrary, it is a training ground for negotiating loss of control. In our homes, we are subject to changing family relations, the habits and whims of our neighbors, natural forces including disasters, changes in zoning and other residential laws, and fluctuations in the real estate market. Perhaps the lack of durable harm from involuntary relocation is due to the fact that (despite our protestations of home as castle) we don't truly expect to exercise enhanced control over our homes.

---

advocated streamlining and expediting foreclosure procedures to reduce psychological stress. See Jacoby, *supra* note 18, at 2281–83.

251. See, e.g., Nancy L. Pittman & Thane S. Pittman, *Effects of Helplessness Training and Internal-External Locus of Control on Mood and Performance*, 37 J. PERSONALITY & SOC. PSYCHOL. 39, 44–46 (1979); W. R. Miller & Seligman, *Depression and Learned Helplessness in Man*, 84 J. ABNORMAL PSYCHOL. 228, 228 (1975); see also Mark D. Pagel et al., *Loss of Control, Self-Blame, and Depression: An Investigation of Spouse Caregivers of Alzheimer's Patients*, 94 J. ABNORMAL PSYCHOL. 169, 174–80 (1985).

252. See Despres, *supra* note 67, at 99–100.

253. See *supra* Part II.B.

254. See Pittman & Pittman, *supra* note 251.

255. These accounts discuss strong property rights in the home as protecting autonomy from government intervention. This perspective emphasizes autonomy as a normative value and according to critics fails to appreciate the interrelatedness and social nature of property ownership. See, e.g., Peñalver, *supra* note 13.

### C. *The Fear of Mass Destabilization*

One fear underlying home-protective legislation is that without legal incentives and intervention, homeownership rates will drop. This in turn will prompt mass residential destabilization and a host of social ills. Indeed, there is evidence that low homeownership rates and frequent residential turnover disrupt community institutions, weaken social ties,<sup>256</sup> and increase crime and disorder.<sup>257</sup> However, for these ill effects to occur, residential instability must be extremely high. A 2000 study found that social disorder increased when people lived in census tracts where the *majority* of respondents had moved within five years.<sup>258</sup> Research suggests a tipping point for neighborhoods at 85 percent renter-occupied units.<sup>259</sup>

Contrary to the assumptions in the legal literature, residential stability does not require that residents remain glued to their homes or that the government offer massive subsidies for homeownership. Because neighborhoods are comprised primarily of networks of weak ties, they not only adapt to but benefit from all but the highest levels of residential turnover.<sup>260</sup> In most cases, eliminating home-protective laws will not have a significant effect on neighborhood stability or homeownership.<sup>261</sup> Very high rates of localized home loss, such as foreclosure epidemics in certain areas, are likely to lead to instability and decline. However, home-protective legislation typically fails to address these harms by focusing on individual factors that qualify owners for assistance, not on macro-effects or neighborhood-targeted assistance. Moreover, the communities at highest risk for decline receive the least benefit from home-protective legislation because they are largely renter occupied.

### D. *What About Poletown?: Protection for Exceptional Communities*

Although the focus of this Article is on the typical homeowner, I briefly address here the issue of protection for exceptionally tight-knit communi-

256. *See id.*

257. The causal relationship is not clear. It may be the case that problem-driven neighborhoods lead to large amounts of outmigration and decrease residential stability. *See* Fischer, *supra* note 190, at 180.

258. *See* Ross, *supra* note 177, at 592.

259. *See* Rohe, *supra* note 157, at 14 (tipping point data controls for poverty and other socioeconomic factors).

260. Robert Sampson explains that residential stability does not mean stasis but rather the “social reproduction of neighborhood residential structure, typically when population gains offset losses and home values appreciate.” Sampson et al., *Beyond Social Capital*, *supra* note 194, at 636. Similarly, Coleman’s theory proposes that the continuity of community structure (not specific residents) facilitates social capital. *See* JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); Coleman, *supra* note 158, at S95–105.

261. For example, the gradual reduction of tax benefits for the home should not cause mass residential instability or social unrest when phased in over a long period of time. Condemnation of large parts of a neighborhood or an entire community is an obvious exception that would cause community instability or destruction respectively. However, eminent domain of this type is relatively rare. *See supra* note 246 and accompanying text.

ties. Residents of unique immigrant enclaves, rural areas with multi-generational tenure, and other atypically close-knit communities may experience heightened social and psychological distress from relocation.<sup>262</sup> In many cases, protections for these communities already exist in property law. For example, common-interest communities can reduce the risk of residential instability from creditor claims or other sources by creating contractual rights of first refusal or, in the case of co-ops, financial vetting of owners prior to the purchase of co-op shares.<sup>263</sup> The Uniform Conservation Easement Act, enacted in a majority of states, enables homeowners to retain possessory rights while donating their development rights in exchange for generous tax benefits.<sup>264</sup> Easements frequently protect environmentally valuable property, but they may also be used to “preserv[e] the . . . cultural aspects of real property.”<sup>265</sup> In a similar vein, historical landmarking and cultural registry programs prevent large-scale real estate development and discourage eminent domain.<sup>266</sup> In addition to formal legal protection, customs and norms may protect close-knit communities. For example, there is evidence that government officials avoid condemning residential property and churches.<sup>267</sup> The condemnation of Poletown and subsequent transfer of the land to General Motors was an aberration born of economic exigency—a fact that is often overlooked in accounts of that case.<sup>268</sup>

When existing law does not protect close-knit communities, additional safeguards may be necessary. This Article questions categorical home protection for owners based on high social costs and limited psychological value. I do not claim that home protection is never warranted. As with the elderly, there may be narrow circumstances when, in the face of severe psychological harm, the cost-benefit calculus favors enhanced protection or compensation for idiosyncratically close-knit communities.

## VI. APPLICATIONS

The primary contribution of this Article is to establish that the prevailing legal theories of the home lack empirical support and to advance an evidence-based approach to home protection. I do not aim to provide a comprehensive prescription for legal reform for each of the many

---

262. See Fried, *supra* note 148, at 198 (“Community attachment is certainly most profound when social relations are embedded in the socio-cultural organization of current and past group affiliations and identities based on ethnic- or class-cultural parameters . . .”).

263. See Heller, *supra* note 211.

264. See UNIFORM CONSERVATION EASEMENT ACT, § 1(1) (1981).

265. *Id.*

266. For eminent domain, landmarking or registration would provide evidence that the property is not blighted and would increase political resistance.

267. See *supra* note 246 and accompanying text.

268. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (“The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.”); see also Kelo v. City of New London, 545 U.S. 469 (2005).



home-protective measures animating property law. By way of illustration of my evidence-based model, however, this Part offers some preliminary thoughts on how a revised theory of the home informs current debates in property law. Among the possible applications of this theory, I consider the issues of residential takings and homestead exemptions.

### A. Eminent Domain

In the wake of *Kelo*, states have enacted legislation, both substantive and symbolic, addressing residential takings.<sup>269</sup> These reforms illustrate the dynamic of residential protectionism and the hyperbole regarding the psychological value of the home. This legislative sea change has attracted a great deal of scholarly attention. Commentators have vigorously debated proposals for eminent domain compensation for the subjective value of home.<sup>270</sup> Tom Merrill has suggested that residential owners receive one percentage point above fair market value compensation for each year they have lived in a home.<sup>271</sup> Bell and Parchomovsky advocate a preference-revealing solution where the government may take property for the owners' stated subjective value but owners are taxed on that value and must sell for at least that price.<sup>272</sup>

Presumably, a major component of subjective value is the psychological and social value of a home to its owner.<sup>273</sup> Before answering the normative question of whether or how to privilege subjective value, we should consider the degree to which two of its components, psychological and social value, accrue to the home. My analysis imports an objective element to subjective value that may be objectionable to some readers. However, the alternative of compensating solely on subjective preferences is vulnerable to moral hazard and arguably too narrow a conception of personal value.

An evidence-based theory of the home redirects the perennial debate over subjective compensation to the fundamental question of whether significant psychological value inheres in the home. The empirical research,

---

269. Margaret Radin's article was prescient in its discussion of options for enhanced protection against eminent domain, including a *prima facie* case against government taking of personhood property, property rule protection against eminent domain for "a special class of property like a family home," or a requirement that the government demonstrate a "compelling state interest" or that the taking is the "least intrusive alternative." Radin, *supra* note 4, at 1005–06.

270. See, e.g., Posting of Ilya Somin to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2008\\_06\\_01-2008\\_06\\_07.shtml#1212704224](http://volokh.com/archives/archive_2008_06_01-2008_06_07.shtml#1212704224) (June 5, 2008, 19:17 EST) (explaining Eduardo Peñalver and Ilya Somin's debate on California's Proposition 99).

271. See Merrill, *supra* note 16, at 84.

272. Bell & Parchomovsky, *supra* note 16, at 871. But see Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1274811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274811) (arguing that such schemes penalize people for high value, which undermines the efficiency goal of economics to move property to its highest-valuing user).

273. My discussion of subjective value compensation emphasizes the psychological and social value of home rather than the stress and disruption of moving. Relocation-assistance acts offer some compensation for the psychological and transaction costs of the moving process.

described in detail in Parts II and III, shows that for the general population there is scant psychological value to self-constitution, long-term psychosocial functioning, and social relationships from maintaining one's home. Recent studies also suggest that owners' subjective preferences for their homes may be erroneous—that is, they may systematically overestimate their attachments to their homes and the psychological costs of relocation.<sup>274</sup>

When the other components of subjective value are modest, the psychosocial aspects of home loss may not warrant sizeable compensation premiums or the administrative costs of options approaches.<sup>275</sup> For example, one proposed schedule of compensation for “personal detachment from the home” suggests compensation premiums of 28% for owners who have lived in their homes 14–16 years and as high as 40% for owners with tenure of twenty to twenty-two years.<sup>276</sup> Indiana recently adopted a flat compensation requirement of 150% of fair market value regardless of tenure in the residence.<sup>277</sup> In light of the evidence that people recover rapidly from relocation and the fact that fair market value compensation often enables relocation within the same town or county, these compensation premiums appear dramatically oversized. For the non-elderly owner, the psychosocial component of home loss, on average, merits only a far more modest premium.<sup>278</sup>

The empirical evidence illuminates other weaknesses in current proposals for eminent domain compensation. Tenure-based compensation premiums (and fair-market value) neglect the life-cycle effects of residential attachment.<sup>279</sup> These compensation approaches do not address, for example, the differences between the average thirty-five-year-old couple without children who has lived in their home for fifteen years and the average seventy-five-year-old man who has lived in his home for fifteen years. The research suggests that compensation premiums or enhanced relocation assistance are best directed to elderly residents with long-term tenure.<sup>280</sup>

---

274. See Gilbert, *supra* note 246, at 160–70.

275. See *supra* Parts II & III.

276. Fee, *supra* note 6, at 818.

277. Ind. Code § 32-24-4.5-8 (2008).

278. My account does not preclude a premium for all owners (residential and nonresidential) for nonpsychological subjective value or for inside information as to market value. To the extent that subjective value represents psychological attachments or other psychological interests, however, the research suggests that typically this portion of the premium should be modest.

279. Proposals to allow localities to select the level of compensation that owners will receive are responsive to differences in social ties between communities (e.g., high turnover urban locales versus rural areas with multigenerational tenure), but require further fine-tuning to respond to life-cycle differences. See Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum. L. Rev. 883, 910–11 (2007). Presumably, localities could provide differential compensation or relocation assistance to the elderly under such a scheme although it is not clear if there is sufficient political incentive to do so.

280. There are several options for responding to the heightened psychological costs of displacement for the elderly. We could adopt options schemes that allow individuals to periodically reset the valuation figure for takings. Alternatively, we could modify Merrill's proposal so that it offers additional compensation to the elderly. For example, elderly people who have lived in a home

Unlike tenure-based compensation plans, options schemes can be highly responsive to life-cycle changes and subjective preferences. However, options proposals may unduly burden elderly and other high-valuing owners. Bell and Parchomovsky's plan allows owners with high psychological attachment, such as the elderly, to set above-market subjective value prices at the time of a proposed taking.<sup>281</sup> These prices are then the basis for taxation and a minimum sales price requirement. Daphna Lewinsohn-Zamir has argued persuasively that such plans penalize people for holding high values, contrary to the efficiency goal of value maximization.<sup>282</sup> In addition, research showing that subjective preferences may not track objective psychological losses raises a conundrum for compensation.<sup>283</sup> Provocatively, this suggests that schemes that encourage people to reveal their subjective preferences may not be utility maximizing because people are often wrong-headed in their preferences.<sup>284</sup>

### B. *Homestead Exemptions*

Homestead exemptions impose high costs on society by raising the cost of credit and inviting abuse. As a categorical matter, there is little to recommend these laws. If the concern is that families have sufficient resources for starting over, there are other ways to meet that goal without offering blanket exclusions or hefty protection for homes (which are, after all, an expensive consumer good with ongoing costs to maintain). The modest psychological value of residential stability to individual owners and the high social costs of homestead exemptions, particularly in states such as Florida and Texas with unlimited exemptions, make these laws a classic example of residential protectionism.

The only potentially compelling justification for (limited) homestead exemptions is the needs of vulnerable demographic groups, such as school-age children and the elderly. The case for homestead exemptions for families with school-age children is relatively weak.<sup>285</sup> As discussed previously,

---

for more than a threshold duration of perhaps ten to fifteen years could receive a premium for each year of residence (i.e., above any compensation directed at non-elderly owners). Alternatively, elderly owners who meet the threshold might receive a premium for each year in residence past the age of sixty-five. Tying the premium at least in part to years in residence past the age of sixty-five may help differentiate between the (statistical minority of) elderly who relocate for retirement versus those who elect to remain in place. In light of the significant empirical evidence that elderly individuals are not similarly situated to other owners, none of these proposals should run afoul of equal protection concerns.

281. See Bell & Parchomovsky, *supra* note 16.

282. See Lewinsohn-Zamir, *supra* note 272.

283. See GILBERT, *supra* note 246, at 160–70.

284. For an illuminating and comprehensive discussion of options schemes in property law, see Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401–02 (2005).

285. Cf. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 460–64 (2001) (advocating extending another form of creditor protection, tenancy by the entirety for married couples, not only to same-sex and cohabitating couples but also to single-parent households with children).

the evidence of harm to children from normal levels of relocation is equivocal. There is a stronger case for targeting limited homestead exemptions to the elderly, who experience heightened psychological costs from relocation. Elderly people are more likely than other demographic groups to have territorial attachments and to depend on immediate neighbors to watch out for them or do favors. In addition, the search costs of finding new housing are higher and the physical process of relocation more difficult.<sup>286</sup> Assuming that homestead exemptions are capped at a reasonable level, perhaps the median property value in the county, there may be justification for providing narrowly tailored protection to the elderly (or at least enhanced relocation assistance).<sup>287</sup>

Currently, no state limits eligibility for the homestead exemption based on the life-cycle model. A few states, however, increase the amount of the exemption for the elderly. For example, California varies the amount of homestead exemptions between \$50,000 and \$150,000 based on age and in recognition of elderly debtors' reduced earning potential and heightened need for assets.<sup>288</sup> South Dakota has similar legislation that increases the homestead exemption from \$30,000 to \$170,000 for owners seventy years of age or older.<sup>289</sup>

Given the risk that homestead exemptions will raise the cost of credit, it is an open question whether the psychological benefits to elderly owners outweigh the social costs of exemptions. It may also be the case that the growing availability of private market mechanisms, such as reverse mortgages, reduce the need for legislative protection. Reverse mortgages allow homeowners to extract equity from their homes without selling the house—in other words, to loan themselves money from their housing principal and appreciation. In addition, a life-cycle model of homestead exemptions does not solve the underlying fairness issue of providing heightened asset protection for owners versus renters.<sup>290</sup>

In summary, if there is any case to be made for homestead exemptions, it is for long-term elderly owners. If we decide to retain this type of protection for humanistic reasons, it makes sense to target demographic groups that suffer distinct harms from relocation. Even in this narrow circumstance, however, the social costs and potential for abuse may not justify retaining the homestead exemption. The special case of the elderly highlights the need

---

286. See Bell & Parchomovsky, *supra* note 16, at 902 (“[T]he cost of transition is especially high for elderly owners, meaning they likely face higher transaction costs in replacing property.”).

287. For example, limited homestead exemptions could apply exclusively to homeowners over the age of seventy who have maintained the same residence for at least ten years. Because homestead exemptions offer bankruptcy protection, there are constraints on the frequency of their use. These exemptions may aid an elderly person struggling with an unusual debt or medical bill but should not repeatedly assist elderly homeowners with chronic debt or unaffordable living situations.

288. See CAL. CIV. PROC. CODE § 704.730(a) (West 2009).

289. See S.D. CODIFIED LAWS § 43-45-3 (2009).

290. Perhaps legal reforms could offer comparable levels of financial protection to elderly renters without requiring that the asset take the form of housing.

for more research on the costs and benefits of targeted protection in the context of individual home-protective laws.

#### CONCLUSION

The notion of the home as a psychologically special object deserving heightened protection has dominated property law and theory. Scholars have argued that the home is a paradigmatic form of property for personhood—critical to an individual's very identity and ability to flourish in society. Other commentators have maintained a communitarian vision of the home rooting individuals in tightly knit communities. Contrary to the theoretical claims in property scholarship, the empirical evidence indicates that the psychological and social importance of the home has been vastly overstated. The psychological value attributed to the home has masked rent seeking as moral conviction and greased the wheels of the residential protectionism machine. To the extent we have premised protectionism on the psychological primacy of home, it is time to rethink the protection and privilege accorded to residential property.