

## Mixing Property

*Amnon Lehavi*\*

### ABSTRACT

Mixed property regimes are on the rise in the United States and in many other countries throughout the world. Yet this fast-growing phenomenon currently lacks a broad-scale scholarly analysis aimed at extracting the shared theoretical principles of these intriguing property configurations. This Article offers an innovative analysis of the various types of mixed property regimes located along the sides of the private-common-public property triangle and within it. This Article re-conceptualizes the property formations of Public-Private Partnerships and Common Interest Communities, and identifies and analyzes phenomena such as the Israeli Renewing Kibbutz, various forms of public-common property mixtures (e.g., the management and maintenance of city-owned parks in New York City), and tri-layered regimes such as Community Land Trusts. In so doing, this Article offers a first of its kind, comprehensive taxonomy of mixed property regimes.

Although these different property patterns vary greatly in the way they create, allocate, and enforce entitlements and responsibilities among the relevant parties, this Article identifies a consolidated theoretical basis for mixed property regimes, pointing as well to the normative advantages that these hybrid forms may have over purer property regimes, thus significantly enriching the property landscape.

INTRODUCTION.....	138
I. THE MARKET FOR MIXED PROPERTY REGIMES .....	143
A. The Limits of Private Property.....	143

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\* Senior Lecturer and Director of Real Estate Studies, Radzyner School of Law, Interdisciplinary Center Herzliya. J.S.D., LL.M., Yale University; LL.B., B.A., Tel-Aviv University. For helpful comments, I thank Ann Carlson, Daniel Cole, Hanoch Dagan, Robert Ellickson, Daniel Farber, Jody Freeman, Doug Kaiser, Richard Lazarus, and Jonathan Weiner, as well as the participants of the 2007 Harvard-Boalt Hall-UCLA Workshop for Young Environmental Scholars at Harvard Law School, and the law faculty workshops at Bar-Ilan University and Tel-Aviv University.

138		
		<i>SETON HALL LAW REVIEW</i>
		[Vol. 38:137
	B.	Mixed Property: Past Experience, Present Potential .....150
II.		PUBLIC-PRIVATE PROPERTY .....151
	A.	Property in Public-Private Partnerships.....151
	B.	Individual Beneficiaries as Property Stakeholders.....155
III.		PRIVATE-COMMON PROPERTY.....160
	A.	The Common Interest Community as Residual Claimant.....160
		1. Controlling Commonly-Owned Assets .....162
		2. and Privately-Owned Ones .....163
	B.	The Renewing Kibbutz: Mixed Ideology, Mixed Property.....166
IV.		PUBLIC-COMMON PROPERTY .....173
	A.	The “Public” in Local Public Spaces.....175
		1. Positive Externalities .....176
		2. Egalitarianism .....177
		3. Publicness and Democracy.....179
	B.	“Public Commons” in Public Spaces .....181
		1. Informal User Groups: McCarren Park Moms .....182
		2. Incorporated User Groups: The Carl Schurz Park Association.....184
		3. Formal Mixed Management: Prospect Park Alliance and ComCom .....185
		4. Formal Sub-Local Structures: Bryant Park and BIDs ..188
		5. Publicly-Authorized, Conditional Commons: Community Gardens.....190
	C.	The Bilateral Incentives Behind Public Commons.....193
	D.	Possible Tensions between “Public” and “Commons” .....195
	E.	The Over- and Under-Inclusiveness of Current Law .....197
	F.	Providing Mixed Solutions for Public Commons .....199
V.		TRI-LAYERED PROPERTY REGIMES.....199
VI.		TOWARD A UNIFYING THEORY OF MIXED PROPERTY REGIMES ...202
	A.	Mixed Optimal Scales and Production Functions .....202
	B.	Mixed Non-Utilitarian Values .....204
	C.	Flexibility in Trial-and-Error .....207
	D.	Integrity of Legal Categories.....209
		CONCLUSION.....211

## INTRODUCTION

The world of property regimes is currently in the midst of a vivid debate involving constant attempts to challenge and reconfigure traditional property patterns. One reason for this is normative. While

private property has been hailed as generally superior by many in Western legal and economic academia throughout large parts of the modern era, recent analysis points to the potential drawbacks of a massive transition toward privatization of publicly-owned resources, as well as to the inefficiencies of over-fragmentation of rights resulting from having “too much” private property. Moreover, the renewed interest in common property regimes,<sup>1</sup> which has revealed the potential economic and social advantages of group ownership and management of resources, further adds to the creation of a more balanced contest between the three vertices of the private-common-public property triangle.<sup>2</sup>

Another driving force for this property turmoil has been analytical, stemming from the observation that the nature of property depends not only on formal ownership, but also on the specific composition of the property “bundle,” especially in the context of externalities and other types of conflicts over specific use rights in the resource. This entitlements literature demonstrates that a single property regime may take numerous sub-forms depending on the type of strategy chosen for delineating rights in the different attributes of the resource at stake. For example, authors have fixed the spectrum of private property demarcation between the “exclusion” and “governance” poles, the former delegating to the formal owner control over a large and indefinite class of uses and attributes, and the latter dispersing decision-making about the resource through extensive public or group governance regimes.<sup>3</sup> Hence, the nature of

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<sup>1</sup> By the term “common property,” I refer to what is also termed “limited common property,” namely an asset which is shared by members of a given group, but is exclusive property with respect to outsiders. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 139 (1998). This distinguishes common property from an “open access” resource, in which everyone has a privilege of use, but correspondingly no one has a right to exclude others. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 23 (1990).

<sup>2</sup> Although one also needs to consider the option of open-access resources, both theoretically and practically (for example, as with literary works following the termination of the designated copyright protection period), so that the property landscape could be portrayed instead as constituting a tetrahedron, I focus in this Article on private, common, and public property regimes, and hence I resort to the image of a triangle.

<sup>3</sup> See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 453–57 (2002) [hereinafter Smith, *Two Strategies*]. Michael Heller locates the governance axis between private despotic dominion on one end and public authority and control on the other, with intermediate forms of “property governance” in between. Michael Heller, *Common Interest Developments at the Crossroads of Legal Theory*, 37 URB. LAW. 329, 331–32 (2005) [hereinafter Heller, *Common*].

the property regime is prescribed not only by the formal rights allocation (chiefly the designation of “ownership”), but also by the question of who is assigned the power to make decisions about the different attributes and components of the resource.

This Article argues that such a careful and contextual analysis of property should also create increasing awareness and normative support for explicit *mixed* types of property regimes, whenever these may prove optimal to obtain society’s goals. Looking at the private-common-public property triangle, one can observe a real-life proliferation of property configurations that are located at interim points along the sides of the triangle and within it, thus largely departing from the traditional trichotomic division which has focused on the three vertices of property. Although a few mixed property regimes have existed historically, contemporary market and public needs and preferences seem to push more than ever before toward the constant creation of new property mixtures. However, this rapidly-growing phenomenon currently lacks a comprehensive, broad-scale analysis of mixed property regimes, aimed at extracting shared theoretical principles. This is exactly what this Article sets out to do.

Whereas certain property configurations along the public-private and the private-common sides of the property triangle have been studied separately (such as Public-Private Partnerships or Common Interest Communities), the very existence of the third side, that of the public-common, has been largely ignored. This Article sheds light on this unilluminated side of the triangle by identifying and analyzing various types of what I term “public commons” and by combining this innovative analysis within the broader framework of mixed property regimes.

Moreover, aiming at a fuller exploration of the property triangle (although one obviously cannot completely cover it, let alone within the scope of a single research project), this Article also looks at the intriguing phenomenon of tri-layered property regimes located at the heart of the triangle, namely, those unique property configurations which explicitly aim at providing a more-or-less equal balance between private, common, and public interests in structuring the ownership and management scheme for a certain resource.

Although the different mixed property regimes vary greatly in the way they create, allocate, and enforce entitlements and responsibilities among the relevant parties, they do share some theoretical features that may also point to the normative advantages that these hybrid forms may have over traditional, purer property regimes. In some cases, however, current doctrines that govern these property

mixtures are unsatisfactory—which is unsurprising given that many of these doctrines were established based on the trichotomic paradigm—and must therefore be amended in order to allow for mixed property regimes to fully flourish and to considerably enrich the property landscape.

At the outset, I find it important to make the following points regarding the scope, methodology, and ambition of this Article.

First, this Article's point of departure in discussing the triangle's vertices (i.e., "pure" property regimes) largely adheres to the conventional typology of private, common, and public property.<sup>4</sup> This means that I identify a certain property regime as pure or nearly pure when both the formal rights allocation and the decisionmaking capacities generally point in the same direction. Obviously, in very few instances, if any, one can expect a perfect match between these two realms, or even a strict "purity" in one of them. Indeed, it would be safe to say that basically all real-life resources exhibit some kind of property mixture.<sup>5</sup> And yet, for a significant number of resources, one can identify substantial prominence for one type of regime, such that it can be located in relative proximity to one of property's vertices. I thus believe that although the conventional typology is unsatisfactory in that it misses out on much of the property landscape, it is neither a theoretically empty concept nor a practically empty group.

Second, as stated, the mixed property forms discussed in this Article do not purport to be an exhaustive list or anything close to it. The examples put forward represent intriguing examples of the evolution and formation of certain types of mixed property regimes. This is done with the hope that the conceptualization and initial analysis in this Article will be of aid in illuminating and understanding other property mixtures that are not overtly discussed here.

Third, this project is not driven by a single normative agenda (such as promotion of efficiency, liberty, or equity), nor does it aim at providing a unified key for choosing between different types of pure or mixed property regimes. The Article does construct, however, a

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<sup>4</sup> See DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 8–14 (2002) (offering a critical discussion of this typology).

<sup>5</sup> In the context of land, all privately-owned lands in modern life, even those not located in dense urban areas, are subject to significant government regulation and other types of external control. See Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Taking Law*, 31 *ECOLOGY L.Q.* 227, 251–53 (2004). Similarly, public lands almost inherently implicate private rights and interests. See Jim Huffman, *The Inevitability of Private Rights in Public Lands*, 65 *U. COLO. L. REV.* 241 (1994).

theoretical framework for the concept of property mixtures and explicates ways in which certain values and goals—as chosen by society’s institutions—can be promoted, or perhaps inhibited, by different concoctions of property forms. This Article’s primary purpose is thus to identify, analyze, and illuminate the theoretical and policy implications of the larger spectrum of institutional property choices. In so doing, it offers some initial tools for normatively evaluating the possible pros and cons of a societal recognition in certain innovative types of property regimes, not only in the sense of enforcing it among the directly involved parties, but also by validating the proprietary characteristics of these regimes vis-à-vis government, third parties and the public at large.<sup>6</sup>

This Article proceeds as follows: Part I examines the contemporary partial disillusionment with the ability of private property to serve as a panacea for the universe of resources, and studies the increasing number of arguments made in favor of the common property and public property options. It then explains why the choice does not have to be narrowed down to these three alternatives by briefly revealing the past experience and present potential of mixed property regimes.

The following parts study these latter types of alternatives in detail. Part II looks at the public-private continuum, focusing attention on the current forms of Public-Private Partnerships and on the greater role that the law needs to play to arrive at a proper balance between the private and public interests in such collaborative schemes.

Part III examines private-common property, looking at two fascinating different configurations of this mixture. It first examines Common Interest Communities, which have become a systematic choice of homebuyers throughout the U.S., and re-conceptualizes these institutions based on the contract-based theory of property as the residual claim to the resource’s attributes. It then looks at the dramatic changes that the Israeli Kibbutz—once the paradigm of pure common property—went through in the past few years by shifting to an interim property model that combines incentives for private productivity alongside the maintenance of a newly-defined core ideology of solidarity and social justice.

Part IV identifies the “public commons” by focusing on the case study of New York City’s publicly-owned spaces. These resources, and

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<sup>6</sup> See Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. (forthcoming 2008) (discussing the characteristics of the institution of property as combining *in rem* and *in personam* traits).

especially the city's nearly 1800 parks, have become the subject of numerous models of systematic local community involvement, both formal and informal, in the maintenance, stewardship, and improvement of these resources, thus locating many of these spaces in an intriguing balance between the interests of the general public and those of the geographically-adjacent local groups of users.

Part V studies tri-layered regimes by looking at the growing phenomenon of Community Land Trusts, an innovative mechanism for the creation of long-lasting affordable housing through a unique formal structure that tries to draw the fine line between the interests of the affordable housing dwellers, as individuals and as a group, and those of the larger community.

Part VI delineates the initial contours of a theory of mixed property regimes. It demonstrates the need for mixed property regimes when utilitarian and non-utilitarian considerations do not conform to pure or nearly-pure property regimes. It also explains the greater flexibility that mixed property regimes possess both in engaging in innovative trial-and-error schemes and in confronting the everlasting challenge of dividing the law, and property law in particular, into distinct categories in a manner that ensures a sufficient level of stability and certainty but that at the same time maintains normative and practical integrity.

## I. THE MARKET FOR MIXED PROPERTY REGIMES

### A. *The Limits of Private Property*

In what is by now a true property classic, Harold Demsetz's *Toward a Theory of Property Rights* offers an evolutionary analysis (accompanied by vigorous normative support) of human society's shift to private property as the pressure on resources increases and technological or organizational innovations enable cost-effective delineation and protection of private property.<sup>7</sup> According to Demsetz's normative analysis, private property creates incentives for socially desirable investment in resources by making the owner internalize both the positive and negative effects of his actions, thus unifying the private cost-benefit analysis with the respective social calculus.<sup>8</sup> Even if cer-

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<sup>7</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) [hereinafter Demsetz, *Theory I*].

<sup>8</sup> *Id.* at 347–50. The origins of this analysis go back to thinkers such as Adam Smith, William Blackstone, and Jeremy Bentham. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–64 (2001).

tain human actions still defy the borders of private property, the better feasibility of a relatively small number of neighboring owners to resolve such residual externalities adds to the superiority of private property over “communal property,” let alone over state ownership.<sup>9</sup>

The argument for private property has not relied merely on economic instrumentality. Significantly, it has been advanced in Western thought as a promoter of individual liberty,<sup>10</sup> political freedom,<sup>11</sup> personhood constitution,<sup>12</sup> the intrinsic virtue of labor,<sup>13</sup> and so forth.<sup>14</sup> The fall of the Soviet bloc in the late 1980s has allegedly made this multi-faceted argument for private property supremacy an open-and-shut case.<sup>15</sup>

However, recent years have seen the development of more modified approaches, which often criticize the tendency toward sweeping privatization of the universe of resources. Three lines of argument are of particular interest here, as they also point to the viability of other property regimes, including hybrids.

*First*, the decision whether to shift to private property is often not motivated by benign entrepreneurship seeking to snatch resource productivity from the jaws of collective action tragedies, but rather by rent-capturing facilitated through superiority in the political process. For example, the enclosure movement’s abolition of traditional communal property forms in Europe and in its colonies was designed in large part, with its distributional outcomes in mind, by employing

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<sup>9</sup> Demsetz, *Theory I*, *supra* note 7, at 354–59. Other authors have discussed later developments of the evolutionary theory of private property rights based on Demsetz’s basic insights. See, e.g., Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 118 (T.L. Anderson & F.S. McChesney eds., 2003); Douglas W. Allen, *The Rhino’s Horn: Incomplete Property Rights and the Optimal Value of an Asset*, 31 J. LEGAL STUD. 339 (2002).

<sup>10</sup> See, e.g., JAMES M. BUCHANAN, PROPERTY AS THE GUARANTOR OF LIBERTY 59 (1993); RICHARD PIPES, PROPERTY AND FREEDOM 279–81 (1999); LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 40 (2003).

<sup>11</sup> See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (1962).

<sup>12</sup> See MARGARET JANE RADIN, REINTERPRETING PROPERTY 36–59 (1993).

<sup>13</sup> See STEPHEN R. MUNZER, A THEORY OF PROPERTY 254–56, 285–87 (1990).

<sup>14</sup> This is obviously not to say that such non-instrumental values are uncontested. See Eduardo Moisés Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1907–38 (2005) (critiquing the liberty argument as promoting the ideal of property as facilitating an exit from society); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996) (offering a critique of the various justifications for elevating private property to the status of *the key right*).

<sup>15</sup> See Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. 653, 653 (2002) [hereinafter Demsetz, *Theory II*] (arguing that the shift to capitalist-style economies in Eastern Europe, Russia, and China has brought private property to a previously unattained level of importance in the world).

allegedly neutral property reorganization techniques aimed at benefiting the rich or politically powerful.<sup>16</sup> Similarly, the propertization of information resources of the West, while instilling open access to information resources that are prevalent in other parts of the world, such as genetic resources and traditional knowledge, has been criticized as a political and distributional enterprise not necessarily loyal to either efficiency or justice.<sup>17</sup>

Conversely, the delay in development of individual transferable quotas in U.S. federal coastal fisheries may be explained by the multiple veto points that are provided by political institutions and exploited by interest groups to slow the pace of change, chiefly because of distributive disputes about the initial allocation of the tradable rights.<sup>18</sup> These criticisms point to the conclusion that in fact neither a change to private property from open-access, common, or public property regimes necessarily promotes society's declared goals, nor does a rejection of privatization of certain resources necessarily indicate that such a regime is inferior under the relevant circumstances.<sup>19</sup>

*Second*, private property may often lead to a scenario of over-fragmentation of rights, in which every one of the multiple owners has a right to exclude others from a resource such that no one has an effective privilege of use.<sup>20</sup> This anticommons dynamics may, inter alia, deter socially desirable innovation (such as when granting patents in isolated gene fragments hampers development of integrative biomedical products),<sup>21</sup> or otherwise prevent the pooling together of

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<sup>16</sup> Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. 359, 365–70 (2002). I do not argue that the enclosure movement had no utilitarian merits. I only wish to remark in this context that the true motives for this phenomenon, and the specific ways in which it was designed, were largely influenced by other implicit but significant types of considerations.

<sup>17</sup> Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1339–57 (2004).

<sup>18</sup> Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 224–26 (2005).

<sup>19</sup> In many developing countries, rising resource values do not necessarily result in the creation of private property rights, but rather in an inefficient regime of open access. This is because the polynormative and multilayered structure of these societies does not enable state agencies to effectively enforce formal property rights against local groups, while at the same time the reliance of these communities on informal norms and self-enforcement is insufficient to exclude outsiders. Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1001 (2006).

<sup>20</sup> Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667–79 (1998).

<sup>21</sup> Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovations? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998); Cynthia D. Lopez-Beverage,

resources for efficient reorganization (for example, when landowners in a rundown urban area fail to agree on a comprehensive redevelopment scheme).<sup>22</sup>

In some cases, the private property bundle can be arranged to mitigate such grave consequences of sub-optimality. For example, the common law of nuisance, which requires the plaintiff to meet a certain threshold of interference, and at times limits his rights to a liability rule protection (court-determined damages) thus allowing the defendant's conflicting activity to continue, can be explained by the desire to prevent paralysis in a world of substantial transaction costs.<sup>23</sup> This is especially so when the benefits of a certain action that physically exceeds property borders far outweighs the damage to the affected property owner, such that a use-specific switch to a "governance" regime at the expense of the "exclusion" default of private property avoids severe deadweight losses.<sup>24</sup>

Beyond such reshaping of private property, the anticommons dilemma may point to the potential advantages of other property regimes. For example, general circulation and commerce routes have been historically supplied publicly (as is still generally the case today), given the high transaction costs of organizing a private system of easements,<sup>25</sup> as well as the positive synergy or network effect of opening such routes to use by the general public.<sup>26</sup> The advantages of the publicness of such conduits, which allows for the development of private activity channeling through them, has prompted calls to extend public ownership or governance to new domains, such as cyberspace.<sup>27</sup> Moreover, the ability of property governance to promote socially beneficial collective action inspired an academic renaissance of common property regimes, with authors pointing, *inter alia*, to the advantages of economies of scale and risk-spreading,<sup>28</sup> enhanced self-

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*Should Congress Do Something about Upstream Clogging Caused by the Deficient Utility of Expressed Sequence Tag Patents?*, 10 J. TECH. L. & POL'Y 35, 78–82 (2005).

<sup>22</sup> Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007).

<sup>23</sup> Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1037–45 (2004).

<sup>24</sup> *Id.* In a classic example, the New York Court of Appeals refused to grant an injunction in favor of several dozen neighboring landowners against a polluting cement factory, and restricted their remedy to the payment of permanent damages. *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870 (N.Y. 1970)

<sup>25</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1381–82 (1993).

<sup>26</sup> Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 96–100 (2003).

<sup>27</sup> *Id.* at 100–02.

<sup>28</sup> Ellickson, *supra* note 25, at 1332–44.

monitoring and enforcement of appropriation and contribution rules through internal norms,<sup>29</sup> and affirmative portioning of the collectively-owned assets from the private holdings of the stakeholders (especially in corporations),<sup>30</sup> alongside social and psychological benefits resulting from joint ownership.<sup>31</sup>

*Third*, recent analysis based on accumulated experience in the U.S. and throughout the world points to the limits of privatization of traditionally public resources. Conventional wisdom specified that because government producers have no high-powered incentives to hold down production costs or to improve the quality of output,<sup>32</sup> increasing involvement of the private sector in the production and financing of such resources would enhance efficiency,<sup>33</sup> given also the stimulating effect of competition between different providers.<sup>34</sup> These assumptions seem to be generally valid for the market provision of private goods for which profit is the main objective.<sup>35</sup> They may also hold true for the heavily-regulated yet private provision of public utilities,<sup>36</sup> or for the outsourced provision of pure or mixed

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<sup>29</sup> OSTROM, *supra* note 1, at 88–102, 185–92.

<sup>30</sup> This shields the corporation's assets from the creditors of shareholders. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393–98 (2000).

<sup>31</sup> Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 573–74 (2001). I definitely do not argue that all property formations usually typified in the literature as “common property” are identical. In Parts III and IV, I reconceptualize some of these dominant forms as either “private-common” or “public-common” mixtures, and I show how commercial corporations, Common Interest Communities, group-managed fisheries, and Kibbutzim—to name but a few examples of regimes often labeled as “commons”—are in effect very different from one another.

<sup>32</sup> Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1426–29 (2003) (attributing this to citizens' rational apathy, the absence of a market for corporate control, and a lack of dependence of public enterprises on capital to survive).

<sup>33</sup> See DONALD F. KETTL, *SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS* 14–17 (1993); E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 111–25 (2000).

<sup>34</sup> One should be careful of equating privatization with competition. A private firm in a certain field of expertise may have no effective competition. On the other hand, it is possible to have several governmental entities competing to supply a service. See Oliver Hart et al., *The Proper Scope of Government: Theory and Application to Prisons*, 112 Q.J. ECON. 1127, 1129 (1997).

<sup>35</sup> See William L. Megginson & Jeffrey M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization*, 39 J. ECON. LIT. 321 (2001) (offering empirical support for this proposition). There have been, however, notable failures. See Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

<sup>36</sup> Public utilities, such as water and electricity, were often portrayed as “natural monopolies,” not only making open competitive provision inordinately costly, but

public goods,<sup>37</sup> whenever the government or the private end-users can effectively evaluate and monitor the quality of output.<sup>38</sup> Nevertheless, there are prominent normative constraints on further extending the scope of reliance on private provision.

These qualifications have special force for goods and services that involve a complex set of objectives aimed at maximizing social welfare rather than merely profit, as is the case with education, social services, managed medical care, police, and prisons. Although in principle the government could promote these various objectives through contracts with private suppliers, this complexity often yields “contract incompleteness,” meaning that the government can neither easily spell out in a contract the determinants of quality nor can it monitor and enforce such conditions during the service provision.<sup>39</sup> Consequently, the private supplier, who is chiefly motivated by profit maximizing, may engage in cost-reducing quality-shading that will often go unobserved or unpunished.<sup>40</sup> This is especially the case with service components such as inmate rehabilitation<sup>41</sup> or promotion of educational values such as democracy and tolerance,<sup>42</sup> or with the

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also creating the problems of a monopoly, which necessitate governmental ownership of the distribution networks, or at least heavy regulation. NEIL BRUCE, PUBLIC FINANCE AND THE AMERICAN ECONOMY 41–43 (2d ed. 2001). This conventional wisdom has been challenged in recent literature. Critics argue that such industries were actually “political monopolies,” as they have historically required legal protection against competition. See generally THE END OF A NATURAL MONOPOLY: DEREGULATION AND COMPETITION IN THE ELECTRIC POWER COMPANY (Peter Z. Grossman & Daniel H. Cole eds., 2003).

<sup>37</sup> See *infra* note 102 and accompanying text (offering a definition of public goods).

<sup>38</sup> Examples for such mixed public goods are cleaning and refuse collection. See Paul H. Jensen & Robin E. Stonecash, *Incentives and the Efficiency of Public Sector Outsourcing Contracts*, 19 J. ECON. SURV. 767, 771–72 (2005). In such cases, private suppliers would be punished for cost-cutting deterioration in quality. Hart et al., *supra* note 34, at 1144.

<sup>39</sup> Oliver Hart, *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*, 113 ECON. J. 69, 70 (2003); Hart et al., *supra* note 34, at 1150–52.

<sup>40</sup> Jensen & Stonecash, *supra* note 38, at 773.

<sup>41</sup> See Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 554 (2005) (arguing that under standard contracts, a for-profit operator has almost no contractual incentives to provide rehabilitation opportunities, and demonstrating that the rate of recidivism for juvenile offenders released from private correctional facilities in Florida is substantially higher than in public facilities).

<sup>42</sup> John R. Lott, *An Explanation for Private Provision of Schooling: The Importance of Indoctrination*, 33 J.L. & ECON. 199, 210–12 (1990). But cf. Andrei Shleifer, *State versus Private Ownership*, 12 J. ECON. PERSP. 133, 146–47 (1998) (doubting the benefits of ideological education).

cost-reduction bias in the exercising of discretion by private suppliers regarding expensive-to-treat patients, welfare recipients with low probability of job placement, or students with special educational needs.<sup>43</sup>

In addition, for even more crystallized components that can be specifically enumerated in the contract, governments often fail to conduct adequate supervision,<sup>44</sup> and may also be “held up” during the term of the contract to improve its provisions in favor of the private supplier.<sup>45</sup> When the government loses its relevant institutional knowledge over time, it may be practically unable to take back the reins, even if it is unsatisfied with the private provision and no viable competition otherwise disciplines the contractor.<sup>46</sup>

Moreover, an excessive delegation of governmental powers to private entities in the implementation of public programs largely undermines the ability to promote a democratic debate about primary social priorities and moral judgments, and fails to adequately reflect changes in such values over time.<sup>47</sup> Most of these public programs are funded publicly—either fully (e.g., welfare) or partially (e.g., educational vouchers)—because they are driven by extra-market values such as vertical equity and the creation of a social “safety net.”<sup>48</sup> Even services that are publicly financed because they possess the economic traits of public goods (such as preservation of public law and order through policing and imprisonment) are often intertwined

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<sup>43</sup> Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003).

<sup>44</sup> See RONALD C. FISHER, STATE AND LOCAL PUBLIC FINANCE 161–62 (3d ed. 2005); David M. Van Slyke, *The Mythology of Privatization in Contracting for Social Services*, 63 PUB. ADMIN. REV. 296, 305–08 (2003).

<sup>45</sup> Jensen & Stonecash, *supra* note 38, at 775–77. *But cf.* Ronald J. Daniels & Michael J. Trebilcock, *An Organizational Analysis of the Public-Private Partnership in the Provision of Public Infrastructure*, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 93, 102 (Pauline Vaillancourt Rosenau ed., 2000) (pointing to government opportunism in abrogating contractual commitments).

<sup>46</sup> Jonathan Walters, *Going Outside*, GOVERNING MAG., May 2004, at 23 (discussing the State of Texas’s plan to pass on to private firms decisionmaking about individual eligibility for welfare, and contentions that the resulting loss of institutional knowledge may not be retrieved by government).

<sup>47</sup> See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1246–55 (2003); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 421–32 (2006).

<sup>48</sup> Stephen H. Linder & Pauline Vaillancourt Rosenau, *Mapping the Terrain of the Public-Private Policy Partnership*, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 1, 3 (Pauline Vaillancourt Rosenau ed., 2000).

with intricate moral considerations that may be inadequately addressed by both for-profit and not-for-profit private agents.<sup>49</sup>

This is not to say that the lack of high-powered incentives for profit maximization in the public sector yields satisfactory results,<sup>50</sup> and one may indeed be skeptical as to what extent public officials and employees are driven by a sense of “mission” that motivates them toward quality enhancement.<sup>51</sup> But this is exactly the point that is learned by growing experience: the public-private dilemma is not a dichotomous struggle in which one side universally prevails. The design of sophisticated public programs, and the identification of the proper allocation of roles in their design and implementation, is not only a highly-contextual endeavor, but one that must often result in the adoption of a mixed regime that seeks to build on the comparative advantages of both types of agents and incentive structures.

*B. Mixed Property: Past Experience, Present Potential*

The empirical and theoretical evaluation of alternative property regimes, especially the qualifications of a wholesale embracing of private property regimes, leads to a growing recognition of the need to craft sophisticated mixed regimes in many contexts. This poses a major challenge to the legal system, which has been very much accustomed to operating in molds that are based on the trilateral distinction between private, common, and public property.

Various mixed property regimes have existed throughout history. One example is the medieval open-field system in northern Europe, in which peasants owned scattered strips of land for grain growing but used the land collectively for grazing.<sup>52</sup> Another instance is the common law custom doctrine, according to which residents of

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<sup>49</sup> Non-profits have been often hailed as combining incentives for efficiency alongside commitment to public values. Recent research, however, points to problems of unaccountability, lack of competition, insufficient administrative capacity, and dependence on public funds which can lead to mission drift and diminished quality. Van Slyke, *supra* note 44, at 298.

<sup>50</sup> See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 446–48, 508–16 (2005) (arguing that both public and private prisons fail to meet the legitimate standards of penal policies and practices in a liberal democracy).

<sup>51</sup> See Timothy Besley & Maitreesh Ghatak, *Competition and Incentives with Motivated Agents*, 95 AM. ECON. REV. 616, 616–18, 628–30 (2005) (offering the “mission” argument, said to apply to both public bureaucracies and private non-profits). *But see* Trebilcock & Iacobucci, *supra* note 32, at 1447–51 (arguing that private accountability mechanisms, such as competition, cause actors to behave as though public-spirited, whereas public decisionmaking may be distorted by public choice mechanisms).

<sup>52</sup> Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 131 (2000).

given localities could claim collective rights to use otherwise private lands in which group activities had customarily existed without dispute for generations.<sup>53</sup> Colonial and early American cities were corporate-like associations that, along with their distinctive member-group status, exercised government-like functions.<sup>54</sup> Privately-owned public utilities and common carriers, holding de facto or de jure monopolistic powers, were traditionally subjected to certain government-like duties given their “public calling.”<sup>55</sup>

However, the multitude of mixed property regimes designed in both theory and practice over the past few decades, especially following the disillusionment with the alleged omnipotence of private property, mandates a distinctive and comprehensive analysis. In the following parts, I set out to identify prominent patterns of mixed resource ownership and management and to address the major difficulties in legally conceptualizing these regimes to create innovative doctrines.

## II. PUBLIC-PRIVATE PROPERTY

### A. *Property in Public-Private Partnerships*

The disadvantages of pure property regimes for the provision of certain services and goods have led to the rise of public-private mixtures. Especially prominent are newly-crafted forms of Public-Private Partnerships, such as the British Private Finance Initiative (PFI) model,<sup>56</sup> which have spread rapidly in many countries.<sup>57</sup>

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<sup>53</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 74–75 (facsimile ed. 1979) (1765). Although many of these rights had vanished by the nineteenth century, some survived beyond that, especially in cases of customary recreational uses. Carol Rose, *The Comedy of Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 739–44 (1986).

<sup>54</sup> During the nineteenth century, American courts developed a public/private distinction to solve the intermediate nature of corporations by dividing them into two categories, placing cities in the sphere of the state and private corporations in the individual sphere. GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 26–27, 36–45 (1999).

<sup>55</sup> CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS: REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY 199–221 (1986).

<sup>56</sup> See generally HER MAJESTY’S TREASURY, PFI: MEETING THE INVESTMENT CHALLENGE (2003); HER MAJESTY’S TREASURY, PFI: STRENGTHENING LONG TERM PARTNERSHIPS (2006) [hereinafter H.M.F., STRENGTHENING LONG TERM].

<sup>57</sup> UNCITRAL, LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS 1–21 (2001) [hereinafter UNCITRAL, LEGISLATIVE GUIDE].

PFI contracts, covering numerous types of public service provision, including health, education, defense, prisons, and roads, have two major features that are distinct from traditional forms of outsourcing or procurement. First, PFIs are long-term contracts that bundle design, building, finance, and operation, and are accordingly performed by a consortium of private firms, unlike the relatively short-term, task-specific outsourcing contracts.<sup>58</sup> Second, in such projects, the government usually uses a system of output specifications by which it describes the required service and some basic standards, but it leaves the consortium with wide discretion over how to deliver the service input-wise.<sup>59</sup>

The PFI contract aims at creating a long-enduring socially optimal division of rights, obligations, and liabilities between the parties.<sup>60</sup> Hence, risks are to be borne by the party best placed to manage them, meaning generally that the government underwrites the continuity of public demand for the service, as well other exogenous risks (such as a rise in inflation), whereas the private consortium typically assumes endogenous risks, such as construction costs and completion timetable, technological uncertainties, and the satisfaction of output requirements.<sup>61</sup> By so doing, the “optimal” contract is designed to properly balance risks and incentives: it seeks to mitigate problems of moral hazard on the part of the private contractor, but avoids allocating to the contractor types of risks it cannot effectively control; otherwise the contractor would charge an overly high risk premium *ex ante* that would largely negate the social benefits of risk-shifting to the private sector.<sup>62</sup>

In similar fashion, the incentive structure design is built into the core rationale of bundling: exploiting synergies between the different stages of the project, by reducing transaction and coordination costs, allowing greater freedom from budget allocation and procurement regulations, and by encouraging innovation in service delivery and adequate maintenance during the contract’s time period.<sup>63</sup> Here, however, one must be cautious of the possible drawbacks of this type

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<sup>58</sup> John Bennett & Elisabetta Lossa, *Building and Managing Facilities for Public Services* 2–3 (CPMO Working Paper Series No. 05/137, Dec. 2005), available at <http://www.bris.ac.uk/cmpo/workingpapers/wp137.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> A.M. Abdel-Aziz & A.D. Russell, *A Structure for Government Requirements in Public-Private Partnerships*, 28 CAN. J. CIV. ENG’G 891 (2001) (mapping the key features of public-private partnerships along these three dimensions).

<sup>61</sup> H.M.F., STRENGTHENING LONG TERM, *supra* note 56, at 38–40.

<sup>62</sup> Jensen & Stonecash, *supra* note 38, at 777–78.

<sup>63</sup> Daniels & Trebilcock, *supra* note 45, at 97–101.

of vertical integration. One such drawback is reduced competition (because few consortia are able to assemble all the relevant input).<sup>64</sup> In some instances, inter-stage bundling will not only create positive cost-reducing externalities for the private consortium, but will also increase the likelihood of unobservable or unverifiable quality-shading regarding the fluid components of the contract,<sup>65</sup> in ways even more dramatic than in cases of traditional outsourcing.<sup>66</sup>

Viewed through this prism, the property structure of current Public-Private Partnerships may be explained by the contract-based concept of the core of property ownership as consisting of the “residual claim” to the resource at stake. As Yoram Barzel explains, a resource consists of multiple attributes, not all of which are necessarily captured by contract, and are hence left in the “public domain”—the party that is able to capture these attributes, in view of such imperfect contractual delineation of the rights, may in fact be viewed as the residual claimant, or as holding the “economic property rights” to these attributes.<sup>67</sup>

To the extent that the government is contractually able to ensure the required quality of the public benefit from the resource, providing the private consortium residual control over the project seems socially desirable, for it allows the consortium to capture benefits such as cost reduction or development of a new technology created through effort or ingenuity without having to renegotiate with the government over this surplus.<sup>68</sup> Conversely, when the consortium might potentially exploit this in order to substantially decrease the level of public benefit, the government should work to minimize the private party’s residual property powers.

One possible way to do so, which follows from the almost inherent incompleteness of many such projects, would be to incorporate legal standards such as “good faith” or “best efforts” into those portions of the contract especially prone to incompleteness and hence to

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<sup>64</sup> *Id.*

<sup>65</sup> See *supra* notes 39–43 and accompanying text.

<sup>66</sup> Bennett & Lossa, *supra* note 58, at 4–6, 26–28. Hence, bundling is appropriate when the quality of the public service’s output can be well-specified in the contract, whereas the quality of the project’s earlier construction stages cannot be so specified. Hart, *supra* note 39, at C74.

<sup>67</sup> YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 90–96 (2d ed. 1997).

<sup>68</sup> Hart et al., *supra* note 34, at 1129–30; Bennett & Lossa, *supra* note 58, at 4–5. *But cf.* Martin P. Sellers, *Privatization Morphs into ‘Publicization’: Businesses Look a Lot Like Government*, 81 PUB. MGMT. 607, 613–16, 618–19 (2003) (arguing that competition for government contracts, and that the considerable governmental control that creates standardization of contracts often causes private corporations to behave like governmental agencies, thus losing the potential benefits of market differentiation).

socially sub-optimal provision.<sup>69</sup> Although an overuse of vague standards may decrease the willingness of private parties to enter into such partnerships or may otherwise affect the contract's pricing and risk allocation, the substantial growth in discretion awarded to private parties in controlling access to governmental resources and benefits should be matched with normatively modest yet generally effective mechanisms aimed at resembling the basic principles of judicial review of administrative decision-making.<sup>70</sup>

Another prominent property issue in Public-Private Partnerships concerns formal ownership of the resource at the end of the contract period. The British position for PFI contracts is that the government should take ownership of assets where the future long-term, public-sector demand is clear or where there is no realistic alternative use, as is the case with roads, schools, hospitals, prisons, and specialist information technology systems.<sup>71</sup> This regime is also highly prevalent for such resources in the U.S. and Canada, where it is typically defined as a Build-Operate-Transfer (BOT) contract,<sup>72</sup> and also for large infrastructure projects throughout the world.<sup>73</sup> Conversely, the residual value of the resource at the end of the PFI contract period is considered to be best transferred to the consortium for assets which have alternative uses—such as office accommodation in areas that have private sector demand or generic information technology systems—and for which there is no clear long-term public need.<sup>74</sup>

Obviously, post-contract governmental ownership of the resource has its price tag, since it adversely influences the consortium's investment incentives *ex ante*, meaning that the government has to compensate the private party initially by setting up a long contract term or by ensuring higher periodic revenues for the consortium.<sup>75</sup>

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<sup>69</sup> See Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 189–91, 196–98 (2005) (arguing that when the parties have incomplete information in the pre-contract negotiations, they should opt for standards in the contract, trading front-end negotiation costs with the back-end, typically lower litigation costs).

<sup>70</sup> See *infra* notes 83–84 and accompanying text.

<sup>71</sup> HER MAJESTY'S TREASURY, STANDARDIZATION OF PFI CONTRACTS 125–27 (2004) [hereinafter H.M.T., STANDARDIZATION].

<sup>72</sup> See PHILIP LANE BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 6.9 (2002) (offering a taxonomy of BOTs and closely related schemes).

<sup>73</sup> See Abdel-Aziz & Russell, *supra* note 60 (reviewing several projects); UNCITRAL, LEGISLATIVE GUIDE, *supra* note 57.

<sup>74</sup> H.M.T., STANDARDIZATION, *supra* note 71, at 125–27. This pattern is generally known in the U.S. as a Build-Own-Operate (BOO) contract. BRUNER & O'CONNOR, *supra* note 72, § 6.10.

<sup>75</sup> Bennett & Lossa, *supra* note 58, at 27.

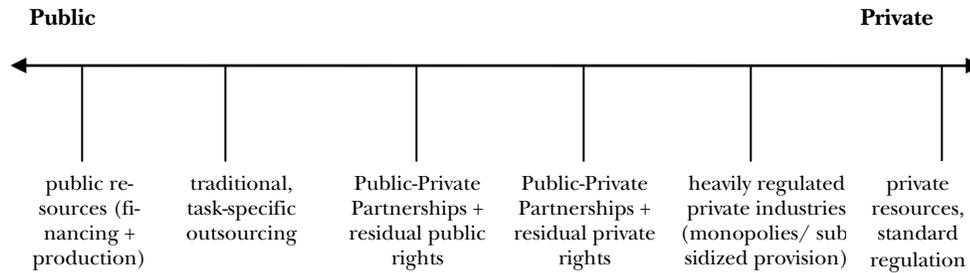
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*MIXING PROPERTY*

155

This facet of the resource's residual value further constrains the government in evaluating the public benefit embedded in the project and in constructing the project's specific property structure.<sup>76</sup>

Current forms of Public-Private Partnerships may therefore be located at the central segments of the public-private continuum, as the following chart suggests:



**Chart 1**  
The Public-Private Continuum

To complete the property framework, however, these hybrid structures cannot be examined solely from the bilateral contract perspective. Rather, the public side of the regime has to be further broken down to distinguish, in appropriate cases, between the government and the individuals who have a distinctive interest in the public program in a way that would shed light on the role that the latter parties may play as potential “residual claimants” to the resource at stake.

*B. Individual Beneficiaries as Property Stakeholders*

Public programs diverge in their implications for individual members of the general public of the relevant jurisdiction. In some cases, the benefits resulting from the public program are generally indivisible and accrue to the members of the public at large. This is the case, for example, with the preservation of law and order through policing and imprisonment.<sup>77</sup>

<sup>76</sup> See Timothy Besley & Mairteesh Ghatak, *Government Versus Private Ownership of Public Goods*, 116 Q.J. ECON. 1343 (2001) (arguing that the party with the highest valuation for the project should be its owner, irrespective of the parties' relative levels of financial investment in it).

<sup>77</sup> FISHER, *supra* note 44, at 46–48.

In many cases, however, the public products of the program are translated into individually-based distinctive benefits. Public utilities serve specific consumers, and public education, welfare, and medical care benefit certain individuals, as does the rehabilitation component of imprisonment services.<sup>78</sup> While in these latter cases, where there also exists a more general public gain (e.g., the societal advantage of having better-educated citizens), one can still discern individual stakeholders whose interest in the program stands out from that of the general public. To understand how such individual interests in the benefits of the public program may implicate mixed property regimes, we must first identify the normative basis of individual entitlements to the public program when provided directly by the government, and then make a second-stage normative analysis of public-private provision of these services.<sup>79</sup>

The spectrum of public programs is obviously too wide in scope to allow for even a brief yet fair taxonomy within this Article. Yet, what generally characterizes governmentally-provided services and goods is the myriad of legal norms governing their provision. Alongside contractual or quasi-contractual individual entitlements and responsibilities that apply to some of the governmental resources (such as common carriers, utilities, or medical care), individual entitlements to governmental resources and to their various attributes are further governed by constitutional, statutory, and administrative norms. Hence, for example, the scope of judicial recognition of procedural due process rights for beneficiaries of certain types of social welfare, in view of their “property” interest in such programs,<sup>80</sup> has

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<sup>78</sup> Beyond services such as rehabilitation or medical treatment, inmates have an obvious interest in other issues pertaining to their imprisonment, such as the physical quality of the facilities, control of violence, and preservation of human dignity. See Dolovich, *supra* note 50, at 471–502. Since privatization may implicate these interests, especially because of the possible de-constitutionalization of prison managerial activities, the debate over privatization extends also to such interests. *Id.*

<sup>79</sup> Although using the public provision benchmark may be controversial whenever there are reasons to think that it is in itself unsatisfactory, it may be still useful for isolating the impact of the transition to public-private provision on the beneficiaries’ entitlements in the program.

<sup>80</sup> The Supreme Court first recognized procedural due process rights for welfare recipients based on the “property” framework in *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in later cases the Court narrowed the application of this right by reasoning that the “property” interest is not created by the Constitution, but is rather created and defined by “existing rules or understandings that stem from an independent source such as state law.” *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This positive law definition of the “property” interest allows the government to statutorily design the program in a way that would deprive its beneficiaries of procedural due process protection. RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 598–615 (4th ed. 2002). The Court has also offered a more recent analy-

obvious implications on the property rights division between the government and the individual beneficiaries.<sup>81</sup> Another prominent issue has been the application of the constitutional equal protection duty regarding, for example, municipal services or common carriers, whenever unequal provision is claimed to systematically adversely affect members of protected classes.<sup>82</sup>

Beyond the application of such norms to drastic cases of explicit termination or systematic deprivation in the provision of governmental goods and services, the property structure of these programs is designed by practices and norms governing the routine provision of such services—and especially those “grey areas” that may substantially implicate the quality and quantity of the services—in a way that indicates who may be viewed as the “residual claimant” to the resource. Thus, for instance, as courts give greater deference to administrative discretion in implementing such services (e.g., quality of inmate rehabilitation programs),<sup>83</sup> and also to administrative interpretation of ambiguous provisions in the statute creating the public program,<sup>84</sup> the “property bundle” that the individual possesses in the resource’s attributes gets smaller. Conversely, the existence of effective mechanisms curbing governmental quality-shading in servicing beneficiaries strengthens individual entitlements to the resource.

Thus, whenever a decision to move to public-private collaboration in the provision of a certain governmental program is not accompa-

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sis of this “property” interest. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (holding that a wife did not have a protected “property” interest in police enforcement of a restraining order against an abusive husband).

<sup>81</sup> See Richard H. Fallon, *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327–55 (1993) (discussing the confused relationships between procedural due process resulting from a “property” interest and substantive due process claims).

<sup>82</sup> In *Hawkins v. Town of Shaw*, the United States Court of Appeals for the Fifth Circuit concluded from statistical evidence that municipal services had been provided to different neighborhoods in a racially discriminatory manner. 437 F.2d 1286, 1288 (5th Cir. 1971). However, following the Supreme Court’s later decision in *Washington v. Davis*, plaintiffs are generally required to prove discriminatory intent beyond merely a disparate impact. 426 U.S. 229, 240 (1976). Compare *Ammons v. Dade City*, 783 F.2d 982, 983 (11th Cir. 1986) (finding “discriminatory intent” in the provision of municipal services based on statistical, circumstantial, and historical evidence), with *N.Y. Urban League v. State of New York*, 71 F.3d 1031, 1033 (2d Cir. 1995) (refusing to reach similar conclusions about the allocation of public funds to mass transit in the New York City area).

<sup>83</sup> See Dolovich, *supra* note 50, at 484–90 (discussing the narrow interpretation of constitutional rights of inmates, even in cases of serious physical harm, let alone in services such as rehabilitation).

<sup>84</sup> See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

nied by an explicit policy choice to affect a change in the individual beneficiaries' general status, the mixed property regime must be adjusted to maintain the individual "legitimate claim of entitlement"<sup>85</sup> within the property framework.

What form should such beneficiaries' rights take in the mixed property setting? While resorting to more generalized mechanisms of "public accountability" aimed at fostering a public discourse about the underlying values of the public program may not give sufficient account to adversely affected interests of individual stakeholders,<sup>86</sup> a universal application of the "state actor" doctrine to private entities contracting with the government,<sup>87</sup> let alone a straightforward extension of public law into realms traditionally thought private,<sup>88</sup> may have undesirable overreaching consequences.<sup>89</sup>

A more promising route is that of a careful development of the contract-based third-party beneficiary doctrine to cases in which public-private provision of goods and services may undermine otherwise recognized individual entitlements. Traditionally, courts have been reluctant to accord individual members of the public rights as third-party beneficiaries of governmental contracts to perform services, unless the specific contract made it clear that this was intended.<sup>90</sup> This approach was driven, inter alia, by the fear of a multitude of claims and a chilling effect on the private party being contractually obligated to a limitless number of third parties.<sup>91</sup> However, as of the 1970s, the judiciary has shown gradual signs of willingness to apply this doctrine to government contracts. Probably not surprisingly, this

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<sup>85</sup> *Roth*, 408 U.S. at 577.

<sup>86</sup> See Minow, *supra* note 47, at 1259–63 (calling for the assurance of "public accountability" in Public-Private Partnerships).

<sup>87</sup> For the narrow application of the "state action" doctrine in such contexts, see Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 208–19 (2001); Metzger, *supra* note 43, at 1421–37.

<sup>88</sup> See, e.g., Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1315–29 (2003) (suggesting that privatization might extend public values to private actors to ensure that Public-Private Partnerships are structured in democracy-enhancing ways).

<sup>89</sup> See Metzger, *supra* note 43, at 1421–37 (suggesting that "constitutional accountability" does not necessitate direct application of constitutional norms to the private party, and can be achieved by judicially requiring the government to create mechanisms protecting against private abuses).

<sup>90</sup> A classic case in point is *H.R. Moch Co. v. Rensselaer Water Co.*, in which the New York Court of Appeals rejected a claim by an owner of a warehouse which was burned down because the water company that contracted with the city failed to maintain adequate water pressure at its hydrants. 159 N.E. 896 (N.Y. 1928).

<sup>91</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* 688–91 (3d ed. 1999).

was done chiefly in the context of contracts for the provision of social assistance programs, of the kind that have been generally recognized as falling within the “new property” framework.<sup>92</sup>

The employment of the third-party beneficiary doctrine seems to have special appeal with the increase in number and complexity of public-private contracts. As more government contracts become substantially incomplete by nature and entrust private entities with considerable discretion over the implementation of complicated public programs, there is growing justification for enabling individual beneficiaries to effectively monitor quality-shading and to capture at least some of the value located in the “grey areas” of the contract. In so doing, individual beneficiaries may also be better motivated to enforce vague standards included in the contract, such standards typically requiring the plaintiff to gather substantial information about both the specific contract’s implementation and general practices in similar programs.<sup>93</sup>

To mitigate the fear of over-fragmentation of the public program’s structure, resulting in an anticommons scenario, the remedies awarded in cases of successful litigation initiated by individual beneficiaries should be collective and nonpecuniary whenever possible, aimed at redirecting both the government and the private partner toward a proper implementation of the public program. Hence, for example, contract-based judgments over issues such as managed medical care, school curriculum, or prison rehabilitation services should be generally oriented toward broad standard-setting that will illuminate the public-private contract based on the public program’s statutory (or other) basis, beyond the individual grievance that may have been the genesis of the litigation.

In conclusion, the broadening reality of public-private property regimes realigns the property rights to such restructured resources. While legally validating the private providers’ residual claim to such

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<sup>92</sup> See, e.g., *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981) (viewing tenants of housing projects that are beneficiaries of the Department of Housing and Urban Development’s (HUD) Section 8 rental assistance programs as direct third-party beneficiaries of the contracts between HUD and the project owners).

<sup>93</sup> See *supra* notes 69–70 and accompanying text (setting forth the justifications to include vague standards in Public-Private Partnerships contracts). However, this tactic might entail potential problems, such as moral hazard, occurring whenever the existence of vague standards would cause a party to strategically second-guess the original contract through ex post litigation. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract*, 113 YALE L.J. 541, 601–03 (2003). This problem might be especially acute in the case of third-party beneficiaries, who can only benefit from ex post challenges to the contract and do not face the direct risk of contract-breaching.

resources may be socially optimal at times, in other instances contractual incompleteness or lax public monitoring may undermine public benefits, resulting in inefficient or unjust outcomes. In such latter cases, the incentives of individual beneficiaries to monitor the new regime given their concentrated interest in the public program should be facilitated by developing procedural and substantive rights aimed at bringing economic and legal reality to terms with the desirable social policy.

### III. PRIVATE-COMMON PROPERTY

Similar to the public-private setting, various forms of mixed private-common regimes have emerged over the past few decades. Interestingly, the movement toward such interim regimes is made from both poles of the private-common continuum. In this Part, I analyze two prominent case studies, which vary substantially in their historical and institutional background and also diverge in the explanation of motives for the shift, as well as in their post-transition results. Nevertheless, both case studies illustrate the potential for mixed regimes to better meet current preferences.

The first case study is the rapidly-growing dominance of Common Interest Communities (CICs) at the expense of traditional residential neighborhoods. The second is the recent growth of the semi-privatized Renewing Kibbutz, alongside the “classic” cooperative Kibbutz. This analysis has potential implications that may aid in reframing and reassessing dilemmas regarding other forms of private-common regimes, including the ever-complicated relationships between the modern private corporation and its individual stakeholders.

#### A. *The Common Interest Community as Residual Claimant*

With more than 286,000 CICs housing fifty-seven million residents in the U.S. nowadays,<sup>94</sup> private developments governed by homeowners associations have come to dominate much of the residential landscape.<sup>95</sup> The core of the community property governance lies in the conditions, covenants, and restrictions (CC&Rs) included in the CIC’s Declaration, which forms a part of the community’s gov-

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<sup>94</sup> Community Associations Institution, Data on U.S. Associations, <http://www.caionline.org/about/facts.cfm> (last visited Feb. 1, 2007).

<sup>95</sup> For works on the evolution of CICs, see COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE COMMON INTEREST (Stephen E. Barton & Carol J. Silverman eds., 1994); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENTS (1994).

erning documents.<sup>96</sup> As will be shown, these servitudes typically control and regulate commonly-owned assets and amenities, as well as the use of privately-owned housing units. Beyond these pre-fixed provisions, the community-based governance of collective and private properties has a dynamic dimension. This is because the CIC's institutions generally have power not only to enforce the terms of the Declaration, but also to make managerial decisions, promulgate rules, and amend the Declaration without a need for unanimous homeowners' consent.<sup>97</sup>

The unique property structure of CICs has many facets, not all of which will be analyzed elaborately here. However, one such issue arousing substantial interest concerns the nature and extent of the powers and practices of CICs vis-à-vis outsiders. This is especially relevant because CICs are often criticized as a "secession of the successful,"<sup>98</sup> "government for the nice,"<sup>99</sup> and so forth, referring to formal and informal exclusionary mechanisms employed by such private communities.<sup>100</sup>

The internal property structure of the CIC, which is the focus of this discussion, aims at solving a host of collective action problems that neighbors typically face in residential neighborhoods. These can be divided roughly into the (1) establishment and management of common amenities, such as streets, parks, and sport facilities, and (2) control of intra-neighborhood externalities resulting from the use of

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<sup>96</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (2000) [hereinafter RESTATEMENT, SERVITUDES].

<sup>97</sup> *Id.* §§ 6.4–6.14.

<sup>98</sup> Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001).

<sup>99</sup> Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of the Government for "The Nice,"* 37 URB. LAW. 335 (2005).

<sup>100</sup> Overt mechanisms may include gates and fences physically isolating the community. See EDWARD J. BLAKELY & MARY G. SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997). Formal sorting of community members is achieved by associational provisions that set up, for example, age restrictions or bans on convicted sex offenders. See, e.g., *Ritchey v. Villa Nueva Condo. Ass'n*, 81 Cal. App. 3d. 688 (1978) (upholding an amendment to a condominium bylaw restricting occupancy to persons age eighteen or older); Brett Jackson Coppage, *Balancing Community Interests and Offenders' Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309 (2006). Other exclusionary measures are informal, operating mainly through the price mechanism, which regularly keeps out low-income families, due both to the typical lack of subsidized affordable housing in such projects, and to the significant premium consumers are willing to pay for homes in CICs. Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 334 (1998); see also Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006) (discussing other informal sorting mechanisms).

privately-owned units. The mixed nature of the CIC property regime manifests itself, therefore, in the close inter-connectivity between group-owned and privately-owned assets within the compounds of the CIC, as well as in the extensive group governance of privately-owned assets, which typically goes well beyond conventional public governance of residential private properties.

### 1. Controlling Commonly-Owned Assets . . .

As for the commonly-owned assets, the collective action challenges which the CIC tackles through the mechanisms of built-in servitudes and group governance can be divided into two phases, which somewhat diverge in their nature.

The first phase is the efficient creation of community-level amenities.<sup>101</sup> For some of these assets, such as inner streets, which more genuinely possess the economic traits of public goods—nonexcludability and nonrivalry<sup>102</sup>—the existence of reciprocal duties of contribution solves the inherent market failure that usually necessitates governmental production and financing through imposition of taxes. As for “club goods” such as sport facilities,<sup>103</sup> which can be usually provided by the market in ordinary residential settings, the internal group provision of such amenities is a significant cost-cutting device for CIC residents.<sup>104</sup>

The second phase of collective action in this context concerns the on-going maintenance, protection, and improvement of the commonly-owned assets. Here, the contractual contribution mechanisms, together with the association’s regulatory powers over the use of these amenities, aim at confronting the “tragic” dynamics of under-investment and over-use in these resources.<sup>105</sup>

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<sup>101</sup> Such amenities therefore constitute local public goods, the effects of which involve a limited, local geographical area. See ARTHUR O’SULLIVAN, *URBAN ECONOMICS* 457–60 (4th ed. 2000); see also *infra* note 102 and accompanying text (defining public goods).

<sup>102</sup> Nonexcludability means that there is no feasible way to prevent people from enjoying the good even if they refuse to pay for it; nonrivalry means that the marginal cost of an additional consumer is zero or close to it. BRUCE, *supra* note 36, at 56–57.

<sup>103</sup> Club goods become congested (hence rival) from a relatively small number of users; they are also typically feasibly excludable. RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS* 347–51 (2d ed. 1996).

<sup>104</sup> Such costs are also influenced by the willingness of the relevant government to adjust the CIC members’ public taxes against services provided by the CIC. Cashin, *supra* note 98, at 1677–78.

<sup>105</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968); see also Lee Anne Fennell, *Common Interest Tragedies*, 98 *NW. U. L. REV.* 907, 913–25, 941–52

The condition of group-owned assets has obvious implications for the “holy grail” of the CIC members’ private interests: their home values. Both assurance of ongoing, stable and cost-saving provision of common amenities and protection against intra-neighborhood externalities play a major role in protecting and enhancing the homeowners’ property values.<sup>106</sup>

## 2. . . . and Privately-Owned Ones

The most unique property feature of planned residential communities is probably the extensive group governance of private property, which typically comes in addition to, and not in lieu of, the applicable public regulation, such as land use controls, nuisance law, or environmental regulations. The community provisions may include aesthetic controls of the external shape, design, and color of the housing units;<sup>107</sup> limits or flat prohibitions on the possession of pets;<sup>108</sup> restrictions on outside storage or display of certain items such as unused cars;<sup>109</sup> or limits on other types of activities which are not regularly prohibited by law.<sup>110</sup>

These restrictions are designed to combat potential adverse spill-over effects which do not conform to the community members’ general tastes or preferences, hence preventing individual members from exercising the effective privilege of use they would have otherwise possessed in these attributes of their resources. The creation of a mixed property regime for the use of privately-owned assets is therefore not (or at least does not purport to be) detached from the reciprocal interests in adjacent privately-owned assets or in the common assets. It is designed to leave to the private owner power over matters, the positive and negative effects of which he fully internalizes, but at the same time it transfers to the group decision-making powers,

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(2004) [hereinafter Fennell, *Tragedies*] (offering a good recent analysis of the commons problem).

<sup>106</sup> In a recent survey, seventy-eight percent of CIC residents said that their CIC’s rules “protect and enhance” property values. Only one percent said these rules “harm” property values. ZOGBY INTERNATIONAL, HOMEOWNERSHIP AND ASSOCIATION LIVING: HOA MEMBERS AND HOMEOWNERS NATIONWIDE 21 (2005), <http://www.cairf.org/research/zogby.pdf>.

<sup>107</sup> See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 593–96 (3d ed. 2005).

<sup>108</sup> See *infra* notes 113–116 and accompanying text.

<sup>109</sup> See, e.g., *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 883 P.2d 1387 (Wash. Ct. App. 1994).

<sup>110</sup> Theoretically, CICs can use the covenant mechanisms also to *allow* certain activities that are otherwise prohibited by law, but this is rarely the case. ELLICKSON & BEEN, *supra* note 107, at 596.

which go substantially beyond the traditional sphere of public intervention in private property and are based on the community's idiosyncratic definition of adverse externalities.<sup>111</sup>

Put differently, the greater the legal latitude granted to CICs in controlling and governing private property, the more we can view the community as the "residual claimant" to the allegedly private assets. Accordingly, the group capture of the rent stemming from various attributes of a certain housing unit enhances the value of other private properties. At least theoretically, this state of affairs aims at having a reciprocal nature, making every member of the community better off than in a no-group-regulation scenario.

The residual nature of group control may manifest itself not only in awarding the association broad-based discretionary powers over matters such as aesthetic approvals,<sup>112</sup> but also in the ability of the association to change the rules of the game during the lifetime of the project, including by promulgation of rules or amendments to the Declaration on a non-unanimous basis. For instance, in *Villa De Las Palmas Homeowners Ass'n v. Terifaj*,<sup>113</sup> the California Supreme Court upheld a majority-approved amendment to the condominium's Declaration, imposing a no-pet restriction. In so doing, the court, viewing use restrictions as "crucial to the stable, planned environment of any shared ownership arrangement,"<sup>114</sup> held that "all homeowners are bound by amendments adopted and recorded subsequent to purchase,"<sup>115</sup> and that the statutory-based deferential standard according to which the covenants and restrictions in the Declaration shall be enforceable "unless unreasonable" applies equally to later amend-

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<sup>111</sup> The Restatement conceptualizes limits on the use of private property as imposing an "indirect restraint on alienation" of the property, which is valid unless it "lacks a rational justification." RESTATEMENT, SERVITUDES, *supra* note 96, § 3.5. This is distinguished from "direct restraints," which include prohibitions or constraints on the transfer of land, which are invalid if the restraint is "unreasonable." *Id.* § 3.4. State jurisdictions vary on the subject. In California, for example, *any* restraint included in a CIC's Declaration is valid "unless unreasonable." CAL. CIV. CODE. § 1354(a) (West 2005); *see also* ELLICKSON & BEEN, *supra* note 107, at 553–62.

<sup>112</sup> This does not mean, however, that aesthetic standards can be wholly vague. *See* Town & Country Estates Ass'n v. Slater, 740 P.2d 668 (Mont. 1987) (striking-down a CIC's aesthetic requirement of "harmony of external design . . . to surrounding structures" as too vague). *But cf.* Oakbrook Civic Ass'n, Inc. v. Sonnier, 481 So. 2d 1008 (La. 1986) (upholding a similar covenant).

<sup>113</sup> 90 P.3d 1223 (Cal. 2004).

<sup>114</sup> *Id.* at 1228.

<sup>115</sup> *Id.* at 1229.

ments.<sup>116</sup> This approach, which is followed in many other jurisdictions,<sup>117</sup> means that even if the original governing documents of the CIC leave grey areas allowing individual privileges of use that adversely affect the neighborhood commons, those gaps may be later non-unanimously narrowed by the community institutions.<sup>118</sup>

Such community-wide rules and regulations may be seen as granting a property rule protection<sup>119</sup> against restricted uses in favor of the community, or more exactly, in favor of the number of residents whose aggregate votes are needed in the association's decision-making process to abolish the restriction or to make an exception to it (that is, a majority of the association's board members when the change is made through regular rulemaking, or a majority—simple or special—of homeowners when an amendment to the Declaration is required).<sup>120</sup>

This property rule protection is, however, problematic from an efficiency viewpoint whenever the value that a certain resident attributes to the enjoined use (e.g., painting the exterior of her house pink in an all-white-paint CIC) outweighs the harm expected to other community members. Should the resident try to collect the consent needed to overturn the restriction, she is likely to face an anticommons scenario, in view of the fact that the legal power to allow it is dispersed among various members.<sup>121</sup> The resulting “one-directional stickiness in the fragmentation process” creates substantial transaction and strategic costs, which hamper consensual correction of an inefficient baseline.<sup>122</sup> Although, as mentioned, the governance struc-

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<sup>116</sup> *Id.* at 1232–34. This means that such amendments to the Declaration are presumptively valid, and the burden of proving otherwise rests upon the challenging homeowner. *Id.*

<sup>117</sup> *See, e.g.,* *Riverside Park Condos. Unit Owners Ass'n v. Lucas*, 691 N.W.2d 862 (N.D. 2005).

<sup>118</sup> One needs, however, to differentiate between amendments to the Declaration and rule promulgating. Rules imposing later use restrictions on private property must be “reasonable” to be valid, thus placing the onus of proof on the CIC. RESTATEMENT, SERVITUDES, *supra* note 96, § 6.7.

<sup>119</sup> Property rule protection means that the entitlement cannot be taken away from the party holding it without her consent. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–17 (1972).

<sup>120</sup> *See* RESTATEMENT, SERVITUDES, *supra* note 96, § 6.10 (giving a survey of the different types of majorities needed to amend the Declaration).

<sup>121</sup> This phenomenon is really unsurprising: an anticommons setting of over-fragmentation of rights often follows an institutional response to a previous commons problem. Fennell, *Tragedies*, *supra* note 105, at 926.

<sup>122</sup> Francesco Parisi et al., *Commons and Anticommons*, 25 INT'L REV. L. & ECON. 578, 585–86 (2006).

ture of the CIC does not normally require unanimous consent to allow such extraordinary use, the process of consent assembly is nevertheless complicated, given also the conservative bias that seems to characterize CIC members for undoing restrictions imposed on private uses.<sup>123</sup>

Suggested solutions to such a limited anticommons scenario, based also on a switch to a liability rule (monetary compensation) regime, are far from simple.<sup>124</sup> One possible way to somewhat mitigate the tension between the need to preserve the overall efficient group-based control of private uses and the fear of case-specific inefficiencies may be based on an analogy from cases of deviations from public regulation following consent among neighbors.<sup>125</sup> Specifically, whenever a resident in a CIC is able to demonstrate that her immediate neighbors do not oppose the extraordinary use, including following contractual side payments, such sub-group consent may serve as a prima facie case against the association's insistence on applying the restriction. In such case, the burden that the restriction is not "unreasonable" or "irrational" as applied to the specific tract would be passed to the community, which should demonstrate a broader effect on the CIC to override the sub-group consent. Such an adaptation of current law may enable CICs to handle some level of heterogeneity in tastes and preferences, an issue which is liable to grow in importance as the number of CICs continues to increase to the point of becoming the default in designing new residential neighborhoods.

*B. The Renewing Kibbutz: Mixed Ideology, Mixed Property*

The Israeli cooperative Kibbutz is often considered the quintessential example of a long-enduring form of secular intentional community maintaining a pure common property regime.<sup>126</sup> Originating in 1910, the agriculture-based Kibbutzim played a major role during

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<sup>123</sup> See *supra* note 110 and accompanying text.

<sup>124</sup> See, e.g., Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1464–68 (2005) (suggesting setting up a "callable call" option regime between the homeowner and the community, which would be based on a periodic self-assessment by the homeowner of the use's value, but admitting that this mechanism may be prone to problems of complexity and strategic evaluations).

<sup>125</sup> See ELLICKSON & BEEN, *supra* note 107, at 393–400 (discussing neighbors' consent requirement in some jurisdictions to allow for certain extraordinary uses which do not conform to the zoning ordinance); *id.* at 534 (discussing neighbors bargaining around nuisance law rules).

<sup>126</sup> This is unlike other types of secular communities that have been generally short-lasting; communities with religious intentions tend to fare better. See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L. J. 226, 271–76 (2006).

the formative years before and after the 1948 establishment of the State of Israel, and were viewed by Israeli leadership as realizing the ultimate Zionist ideal.<sup>127</sup> A cooperative association, the Kibbutz is formally defined as a “settlement which is based on the ideas of collective ownership, self-work, and equal sharing in production, consumption, and education.”<sup>128</sup> The communal and egalitarian nature of the Kibbutz manifested itself in all areas of life, originally implementing a socialist ideology that attributed a central distinctive quality to the collective enterprise going beyond—and often at the expense of—satisfying individual preferences and interests.<sup>129</sup> The cooperative regime has been enforced through various mechanisms of social control, including substantial limits on entry to and exit from membership in the Kibbutz’s association,<sup>130</sup> as well as other types of formal and informal norms.<sup>131</sup>

The Kibbutz movement is currently in the midst of a process of dramatic change, leading to the evolution of a new type of Kibbutz, now formally known as the “Renewing Kibbutz,” alongside the old-style cooperative Kibbutz.<sup>132</sup> The Renewing Kibbutz started out as a spontaneous, informal phenomenon in numerous cooperative Kibbutzim as of the 1980s in response to an on-going crisis.<sup>133</sup> Prominent among the economic and political causes for this crisis were the sharp decline in the profitability of agriculture; internal mismanagement which brought many Kibbutzim to insolvency; loss of governmental favoritism with the rise to power of the right-wing laissez-faire-

<sup>127</sup> See generally HENRY NEAR, 2 THE KIBBUTZ MOVEMENT: A HISTORY (1997).

<sup>128</sup> Cooperative Associations Ordinances (Types of Associations), § 2(5) (a), 1995, KT 5722, 246 [hereinafter Types of Associations].

<sup>129</sup> See YONINA TALMON, FAMILY AND COMMUNITY IN THE KIBBUTZ 207–08 (1972).

<sup>130</sup> Israeli courts have rarely interfered with membership decisions made by Kibbutzim, including decisions to remove members, in view of these cooperative associations’ allegedly voluntary nature and the judicially-recognized importance of maintaining social harmony and collective discipline. See, e.g., HCJ 4222/95 Palatin v. Registrar of Coop. Ass’ns [1998], IsrSC 52(5) 614, 620; CA 8398/00 Katz v. Kibbutz Ein-Tzurim [2002], IsrSC 56(6) 602, 623.

<sup>131</sup> See TALMON, *supra* note 129, at 2–3. The Kibbutz is a classic example of what Robert Ellickson has termed a “close-knit group,” that is, a “social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events.” ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 177–83 (1991). This allowed the Kibbutz members to engage in a complex network of informal norms, which helped to enforce the group’s formal rules.

<sup>132</sup> Amnon Lehavi, *New Residential Communities in Israel: Between Privatization and Exclusion*, 2 HAIFA L. REV. 63, 78–89 (2005) (Hebrew).

<sup>133</sup> See Public Committee on Kibbutzim, A Report on the Kibbutzim 24–39 (Aug. 2003), available at <http://www.globes.co.il/serve/nadlan/tikunim/kibiz.doc> (Hebrew).

oriented Likud party in the late 1970s; and real estate pressures following the rise in demand for land for residential and commercial developments, especially affecting Kibbutzim located at the urban fringe.<sup>134</sup> But not less important were socio-ideological factors: the demise in the fundamental socialist ethos among younger generations; an internal tension due to the growing gaps in productivity among various members (especially after many turned to non-agricultural pursuits outside the Kibbutz, but had to keep passing on their salaries to the collective coffer); and the desire of many middle-age members to bequeath assets to their children in an era of economic uncertainty.<sup>135</sup> This led to substantial rates of member withdrawal and mounting pressures for change.<sup>136</sup>

As a result, numerous Kibbutzim started to carry out grassroots organizational reforms, including setting up a differential personal budget system; partial privatization of certain services such as health, education, and meals; allocation of individual shares in the Kibbutz's productive assets; and the taking of initial steps to change the Kibbutz's land tenure system.<sup>137</sup> These spontaneous changes raised substantial difficulties not only because they were not formally approved beforehand by the Kibbutzim's national organizations, but also because they allegedly conflicted with the formal definition of the Kibbutz in various statutes, ordinances, and agreements made with governmental and other public entities.<sup>138</sup>

To resolve the issue, the Israeli Cabinet appointed a public committee which was asked to review these de facto changes and to offer a new formal policy.<sup>139</sup> In 2004, the Cabinet approved the committee's recommendations, which largely validated the grassroots modes of change.<sup>140</sup> Consequently, the applicable legislation and administrative ordinances were amended to formally incorporate the Renewing Kibbutz as a new type of a cooperative association, alongside the cooperative Kibbutz.<sup>141</sup> Currently, about two-thirds of Israel's 266

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<sup>134</sup> LeHAVI, *supra* note 132, at 78–80.

<sup>135</sup> A Report on the Kibbutzim, *supra* note 133, at 24–25.

<sup>136</sup> See generally ELIEZER BEN-REPHAEEL, CRISIS AND TRANSFORMATION: THE KIBBUTZ AT THE CENTURY'S END (1997); CRISIS IN THE ISRAELI KIBBUTZ: MEETING THE CHALLENGE OF CHANGING TIMES (Uriel Levithan et al. eds., 1998) [hereinafter CRISIS].

<sup>137</sup> A Report on the Kibbutzim, *supra* note 133, at 28–33 (discussing these changes and their implications)

<sup>138</sup> *Id.* at 33–37.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 5–10. The Cabinet approved the recommendations in Decision no. 1736 on March 28, 2004. *Id.*

<sup>141</sup> The definition of the Renewing Kibbutz is now included in the Cooperative Associations Ordinances. Types of Associations, *supra* note 128, § 2(5)(b).

Kibbutzim generally conform to the definition of a Renewing Kibbutz.<sup>142</sup>

The Renewing Kibbutz is characterized by one or more of the following mixed property features, which reflect its updated, mixed-type normative stance:

*First*, the Renewing Kibbutz may allocate individual budgets to its members pursuant to the “extent of their contribution, positions, and [time-based] seniority.”<sup>143</sup> This flexible provision, aimed at motivating individual productivity, is subject to the duty of the Kibbutz to maintain a mechanism of “reciprocal guarantee” in the allocation of funds, ensuring a minimal economic safety net for all members and providing for the needs of the elderly and the disabled.<sup>144</sup> This mixed regime may be seen therefore as shaping rules of allocation combining a “desert” principle, which is characteristic of utilitarian-based groups alongside a “need” criterion, typical of groups with high interpersonal solidarity,<sup>145</sup> hence maintaining the socialist ideology at midway. This compromise is, however, far from easy. Even with the modifying redistributive mechanisms intact, the budget gaps can still be extremely large within a single Kibbutz, creating new causes for internal tension.<sup>146</sup> This departure from the egalitarian principle of the cooperative Kibbutz may therefore also have obvious implications on the communality and solidarity in the life of the Kibbutz, raising doubts about the long-term viability of this version of mixed household management.<sup>147</sup>

*Second*, the Renewing Kibbutz is entitled to privatize its housing units. To briefly explain, the tenure system in agricultural lands in Israel is one of public leasehold.<sup>148</sup> The lands, managed by Israel

<sup>142</sup> See KIBBUTZ MOVEMENT YEARBOOK NO. 3, 45–48 (2006), available at [http://www.kibbutz.org.il/calcala/shnaton/060628\\_shnaton\\_2006.pdf](http://www.kibbutz.org.il/calcala/shnaton/060628_shnaton_2006.pdf) (Hebrew).

<sup>143</sup> Types of Associations, *supra* note 128, § 2(5)(b)(1).

<sup>144</sup> Cooperative Associations Ordinances (Reciprocal Guarantee in a Renewing Kibbutz), 2005, KT 6445, 190.

<sup>145</sup> See DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 25–32 (2001).

<sup>146</sup> See Amiran Cohen & Eli Ashkenazi, *Kibbutz Wage Gaps as High as 700 Percent*, HAARETZ.COM (Eng. ed.), Oct. 25, 2004.

<sup>147</sup> See, e.g., Eli Ashkenazi, *Kibbutzim Worried about Disabled Members*, HAARETZ (Eng. Online ed.), Jan. 15, 2006; Eli Ashkenazi, *To be or not to be Cooperative, Kibbutz Movement Wonders*, HAARETZ.COM (Eng. ed.) May 18, 2006.

<sup>148</sup> Before the establishment of the State of Israel, Jews acquired lands mainly through philanthropic and private corporations. See generally Ruth Kark, *Planning, Housing, and Land Policy 1948-1952: The Formation of Concepts and Governmental Frameworks*, in ISRAEL—THE FIRST DECADE OF INDEPENDENCE 461–94 (Ian Troen & Noah Lucas eds., 1995) (giving a history of the formation of Israel Lands). Most prominent was the Jewish National Fund (JNF), established in 1901. *Id.* Up until 1948, the JNF acquired approximately 933,000 dunams (230,000 acres), with the intention that the

Lands Administration (ILA),<sup>149</sup> are leased for renewable short-term periods (typically three years each), and the use by the lessee is generally restricted to agriculture and accompanying housing.<sup>150</sup> The cooperative Kibbutz has traditionally entered such short-term renewable agreements with the ILA. Because of the collective nature of the Kibbutz, the various members were purposely not a part of the lease agreement, and had no individual rights in the land whatsoever, including in the housing units provided by the Kibbutz.<sup>151</sup> Any conversion of the short-term collective leases into a series of long-term individually-based ones therefore necessitates consent by the public landowner, alongside an internal restructuring in the Kibbutz.

The ILA gave its initial consent for such a transition, according to which individual leases would be entered for the various housing units, whereas the rest of the Kibbutz's area would continue to be leased collectively.<sup>152</sup> However, this 1996 decision had little practical effect, not only because it preceded the formal redefinition of the Kibbutz, but also because it set up substantial capitalization fees (i.e., an up-front payment for the entire lease period), which proved sim-

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land would stay under the Jewish People's common ownership in perpetuity, and that land would be leased to Jewish settlers for a period of forty-nine years. *Id.* After 1948, the Israeli government took various steps to nationalize lands, with the similar intent that State land would not be sold, but only leased—a notion formally entrenched in the Basic Law: Israel Lands, 1960, S.H. 56. *Id.* Currently, ninety-three percent of the entire land in Israel, and nearly 100 percent of agricultural lands, is owned by either the State, the Development Authority (a State-held statutory entity), or the JNF. *Id.* These lands are defined collectively as "Israel Lands." *Id.*

<sup>149</sup> The ILA is the administrative agency charged with managing all Israel Lands, including those owned by JNF. Israel Lands Administration Law, 1960, S.H. 57.

<sup>150</sup> Contrarily, state-held urban lands are leased for long periods, most leases being in the form of a "capitalized leasing," meaning that the lessee pays a single, up-front payment for the entire period. See Gilat Bencheitrit & Daniel Czamanski, *The Gradual Abolition of the Public Leasehold System in Israel and Canberra: What Lessons Can be Learned?*, 21 LAND USE POL'Y 45 (2004). In 2005, the Israeli Cabinet approved the recommendations of a public committee to transfer full ownership in urban lands to the lessees for an additional, relatively small payment. See Tzally Greenberg, *PM Okays Reform to Public Real Estate Sector*, HAARETZ.COM (Eng. ed.), May 17, 2005.

<sup>151</sup> Kibbutzim that were set up prior to 1948 had originally signed collective leases with JNF for a period of 49 years. GIDEON VITKON, ISRAEL LANDS ADMINISTRATION LAW 919-26 (2004) (Hebrew). After the establishment of the State of Israel and the formation of ILA, the Kibbutzim entered collective short-term agreements with ILA. *Id.* at 927-35 Those agreements are either bilateral, in which the Kibbutz is the lessee, or trilateral, in which the Jewish Agency (a nongovernmental development agency established in 1929) is the lessee, and the Kibbutz is the holder of merely a permit to occupy and use the land for agriculture. *Id.* at 971-95 Under each scenario, the individual Kibbutz members had no formal rights in the land. *Id.* at 1129-31

<sup>152</sup> Israel Lands Council, Decision No. 751 (Feb. 27, 1996), available at <http://www.mmi.gov.il> (Hebrew).

ply too high for most Kibbutzim members. In 2005, the Cabinet approved the recommendations of yet another public committee appointed to review the issue.<sup>153</sup> According to the new policy—recently implemented through corresponding decisions by the ILA—each family would be allocated one housing unit for a capitalization fee of 3.75 percent of the tract’s market value.<sup>154</sup>

As far as the internal regime is concerned, the Renewing Kibbutz may allocate the housing units based on “egalitarian criterions, considering the member’s seniority.”<sup>155</sup> To preserve its revised version of communitarianism and group solidarity, the Renewing Kibbutz is required to set-up direct restraints on further alienation of the housing units. This means that the Renewing Kibbutz must make a provision in its by-laws for housing units to be transferred only to members in the Kibbutz’s cooperative association, or at the least, that at any given point in time, more than half of the housing units in the Kibbutz will belong to such full-fledged members.<sup>156</sup> Moreover, in the event of such transfer, the Kibbutz itself has a right of first refusal to purchase the housing unit at its market price.<sup>157</sup>

*Third*, the Renewing Kibbutz is entitled to allocate individual shares in the Kibbutz’s productive assets, provided that the individual members will not be able to jointly gain corporate control of any specific enterprise (meaning, typically, that the Kibbutz will retain more than fifty percent of the shares).<sup>158</sup> The allocation of shares will be

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<sup>153</sup> See Report of the Committee for the Review of Rights in Residential Areas in Agricultural Settlements (Dec. 2005), available at <http://www.mof.gov.il/karka2005-12.htm> (Hebrew).

<sup>154</sup> Israel Lands Council, Decision No. 979 (Mar. 27, 2007); Israel Lands Council, Decision No. 1101 (Mar. 27, 2007). However, should the family wish to receive the full development rights (current and future) for the tract, it would have to pay an additional sum to ILA, equal to 29.25% of the land’s full market value. Israel Lands Council, Decision No. 979 §§ 4.7–4.8. This new policy is a source of public controversy, with some advocacy groups protesting what they deem to be an undeserved governmental giving of state-owned lands (one of which submitted a petition to the Supreme Court of Israel in the matter in July 2007), and Kibbutzim and Moshavim on their part disputing the additional 29.25% payment. Amiram Cohen & Anat Georgy, *ILA Reinstates Land Discount for Kibbutz, Moshav Veterans*, HAARETZ.COM (Eng. ed.), Jan. 12, 2006.

<sup>155</sup> Cooperative Associations Ordinances (Affiliation of Housing Units in a Renewing Kibbutz), § 3, 2005, KT 6445, 195.

<sup>156</sup> The residents who are not Kibbutz members must become members in a broader-based “cooperative association for community settlement” with its own screening process. *Id.* §§ 6–8.

<sup>157</sup> *Id.* § 9.

<sup>158</sup> Cooperative Associations Ordinances (Affiliation of Productive Assets in a Renewing Kibbutz), 2005, KT 6445, 195. The ordinances refer to the definition of the term “control” in Securities Law, § 1, 1968, S.H. 541, 234, which creates a presump-

made by applying “egalitarian criteria and in equal manner, considering the member’s seniority.”<sup>159</sup> The Kibbutz may also set caps on the overall holding of individual members following subsequent transfers, as well as a right of first refusal in favor of the Kibbutz in case of such transfer.<sup>160</sup>

The Renewing Kibbutz faces considerable challenges in its transition from a regime of comprehensive communitarianism and egalitarianism into a structure driven by a mixed ideology, and translated into a mixed property arrangement.

To compare, in CICs, group ownership and governance of private property is a mere instrumentality based on the insights that there are diverging optimal scales governing different assets and uses in a residential neighborhood,<sup>161</sup> and that the value and enjoyment of private assets is largely influenced by a complicated web of neighborhood-level concerns including group composition, intra-neighborhood externalities, and other types of collective action dilemmas. In this respect, CICs have been able to reach a stable equilibrium in designing the property mix, even if at the risk of occasional rigidity. In contrast, in the Renewing Kibbutz, group control is still a constitutive *intrinsic* value, even in its moderate current version. The attempt to combine an incentive structure for individual productivity alongside substantial levels of egalitarianism, communality, and a core of collective ownership as a built-in constraint *per se* has yet to be attained. This is mainly because one of the linchpins of the cooperative Kibbutz, namely, the assumption that collectivism need not necessarily come at the expense of efficiency and productivity, may have been valid for an agriculture-based society that was able to shut itself off from external pressures, but has been largely undermined with the changes in endogenous and exogenous circumstances.<sup>162</sup>

Moreover, the on-going commitment to collectivism, which applies to all aspects of life, including the household management, dif-

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tion of control in a corporation when a stakeholder has more than fifty percent of the voting rights or has the power to appoint more than fifty percent of the board’s directors.

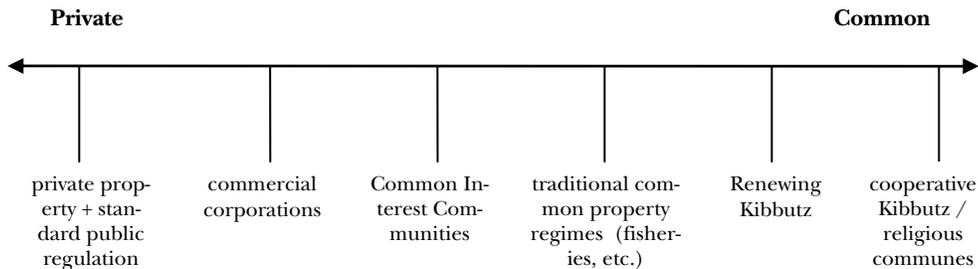
<sup>159</sup> Cooperative Associations Ordinances (Affiliation of Productive Assets in a Renewing Kibbutz), 2005, KT 6445, 195.

<sup>160</sup> *Id.* at 6.

<sup>161</sup> See *infra* notes 337–39 and accompanying text.

<sup>162</sup> As Robert Ellickson predicts, in order to survive, a commune “must maintain homogeneity of interests, establish systematic internal social controls, and stem exodus by controlling information about the outside world and penalizing those who leave.” Ellickson, *supra* note 25, at 1361. With the decay of such elements in the Kibbutz, came also a decline in productivity because of internal free-riding and a “brain drain” of productive members. See CRISIS, *supra* note 136, at 160–61.

ferentiates the Renewing Kibbutz from yet other types of regimes of common property, such as traditional forms of group management of natural resources, which are largely driven by considerations of optimal scale and other instrumental benefits.<sup>163</sup> Thus, while the process of change seems to abide by Demsetz's evolutionary theory of property, it remains to be seen whether the Renewing Kibbutz would be able to contest Demsetz's normative bias in favor of private property,<sup>164</sup> and to position itself in a stable, distinctive point along the private-common continuum, delineated as follows:



**Chart 2**  
The Private-Common Continuum

#### IV. PUBLIC-COMMON PROPERTY

Beyond the Public-Private Partnerships discussed in Part II, the shift in the reality of public provision of goods and services takes place in many other ways, both formal and informal. These various forms have received scant academic attention, with little attempt to conceptualize them and to place them within the broader framework of property regimes.<sup>165</sup> In this part, I analyze mixed-in-fact property regimes, which I entitle "public commons," following an examination of urban local public spaces, such as parks, playgrounds, and squares, the production and management of which combine elements of both

<sup>163</sup> See OSTROM, *supra* note 1, at 58–181 (offering a comprehensive analysis of such actual regimes).

<sup>164</sup> See *supra* notes 7–9 and accompanying text.

<sup>165</sup> There are a few exceptions to this, although in most cases the analysis of such property forms as hybrids is quite implicit. See, e.g., COLE, *supra* note 4, at 126–28 (discussing a quasi-governmental organization called English Nature, which created a kind of commons to protect the chalk cliff and seashore area of England's Thanet Coast in accordance with the European Union legal requirements and British domestic policy); OSTROM, *supra* note 1, at 90, 101–02 (discussing "nested enterprises" in which local commons may be nested within larger governmental systems).

“public” and “common.”<sup>166</sup> Although the various “public commons” along the spectrum—which I will delineate in the context of public spaces in New York City—diverge from one another in their unique mixtures of “public” and “common” elements, they do share broader conceptual and normative aspects.<sup>167</sup>

Whereas the public spaces surveyed are formally owned by the government (usually a city), many are allocated and are regularly operated and maintained in contextual, complicated manners. Of specific interest are the various forms of involvement of the local group of users, which is typically comprised of geographically adjacent residents or businesses. In some cases, the local group of users is formally organized and is a counterpart to an explicit role allocation vis-à-vis the government. In other cases, the local involvement is largely informal yet may be persistent and highly significant in the on-going life of the public space.<sup>168</sup>

This phenomenon is far from being anecdotal both in terms of its scope and of its implications. The level and nature of local involvement may in many cases determine the fate of the resource. Long-enduring cooperation between local users and between the group and the government is often essential to making a publicly-owned space successful, endowing significant direct benefits and positive spillovers. On the contrary, under-investment and neglect by the local users may have the opposite effect of securing resources with net negative value.

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<sup>166</sup> In an earlier work, I identified and analyzed a phenomenon of grassroots, local group cooperation that has brought back many public spaces throughout the country from being sites of dereliction, neglect, and crime into centers of thriving local activity and a source of pride for residents. Amnon Lehari, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1 (2004) [hereinafter Lehari, *Property Rights*]. I focused mainly on informal patterns of such activities that have often been able to grow and stabilize over time, and I pointed to the promises and challenges of this phenomenon. *See generally id.* In this Article, I extend this discussion to offer a fuller taxonomy of the range of formal and informal “public commons.”

<sup>167</sup> Although I focus on the urban setting, such phenomena exist also in suburban and rural areas. *See, e.g.*, BRIAN DONAHUE, RECLAIMING THE COMMONS: COMMUNITY FARMS AND FORESTS IN A NEW ENGLAND TOWN (1999) (describing the establishment of a non-profit community-based farm on town-owned land in Weston, Massachusetts, devoted to environmental and social goals).

<sup>168</sup> The reality of “public commons” exceeds public spaces. One better-known example is the Community Development Corporation (CDC). CDCs are multi-purpose community-controlled corporations that work to develop and improve an area through provision of affordable housing, social services, job training, etc. *See* PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL 65–101 (2000); AVIS C. VIDAL, REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS 33–84 (1992).

This mixed socio-economic reality is not, however, accompanied by an adequate legal regime that looks beyond the formal ownership of the government. Specifically, in cases involving explicit cooperation, the interests of the local group may be protected by contract, whereas more informal patterns of group management do not enjoy legal validation corresponding to the parties' actual form of engagement in the resource. In such cases, the community has to rely on more general doctrines, such as the law of dedication or the public trust doctrine, which at times may under-protect the group, and at other times may over-protect it. This state of affairs stresses the need for an updated legal regime that would fully consider the current landscape of public-common mixtures and would provide the proper incentives for successful resource provision and management. Such a regime would, in appropriate cases, validate what are currently *informal* types of "public commons."

A. *The "Public" in Local Public Spaces*

As discussed in the context of CICs, local public goods that do not possess pure public good traits—meaning that they are subject to problems of congestion and rising marginal costs from a given number of users, and that non-members can be effectively excluded from them—may be generally produced by private firms or institutions.<sup>169</sup> This group of club goods also consists of spaces and amenities such as parks, playgrounds, squares, and sport facilities, which are regularly produced not only in planned communities, but also in ordinary urban settings. Private clubs provide sport facilities (gyms, swimming pools, etc.), whereas shopping malls typically include wide spaces, green areas, and play areas.

Governmentally owned public spaces still comprise, however, a major part of such spaces in cities. New York City has over 1,700 public spaces and recreational facilities.<sup>170</sup> Other major cities also typically own hundreds of such amenities.<sup>171</sup> This is not due merely to the history of government default provision in the pre-CIC or pre-shopping-mall era. Today, cities continue to establish new public spaces, even when they are subject to budgetary constraints, and often subsequently fail to properly maintain them.<sup>172</sup> In an era of priva-

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<sup>169</sup> See *supra* notes 101–05 and accompanying text.

<sup>170</sup> See New York City Department of Parks and Recreation Frequently Asked Questions, [http://www.nycgovparks.org/sub\\_faqs/park\\_faqs.html#g1](http://www.nycgovparks.org/sub_faqs/park_faqs.html#g1) (last visited Feb. 1, 2007).

<sup>171</sup> See Lehavi, *Property Rights*, *supra* note 166, at 29–30 (setting forth representative figures).

<sup>172</sup> *Id.* at 31–33.

tization of the public realm, there still exist several reasons for maintaining a substantial public property layer in such resources.

### 1. Positive Externalities

One justification for governmental provision of public spaces concerns non-use values and other types of positive externalities. Public spaces provide direct benefits for people who visit and use them, such as enjoyment of recreational activities, improved personal health, and child skill development.<sup>173</sup> A private supplier can internalize benefits that it provides to users by charging membership or user fees.<sup>174</sup> However, successful public spaces may often entail significant advantages for residents who do not actively use them. Positive spillover effects stemming from a public space typically include an increase in adjacent real estate prices<sup>175</sup> and a boost to economic and commercial activity.<sup>176</sup> Here, the private provider has no apparent mechanism to collect on these benefits. Courts generally have been reluctant to hold a neighbor liable in restitution following a self-serving activity by a landowner that incidentally improves the neighbor's land, even when the benefit is readily translatable to monetary gain.<sup>177</sup> Transaction and strategic costs may also hamper the possibility of a comprehensive, contractually-based contribution by neighboring beneficiaries, leading again to the fear of sub-optimal

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<sup>173</sup> See SUSAN G. SOLOMON, AMERICAN PLAYGROUNDS: REVITALIZING COMMUNITY SPACE 209–11 (2005) (discussing the benefits of playgrounds, promoting child development and health); Lawrence D. Frank & Peter Engelke, *How Land Use and Transportation Systems Impact Public Health* (ACES: Active Community Environment Initiative Working Paper No. 1) 12–13, 37–40, available at <http://www.cdc.gov/nccdphp/dnpa/pdf/aces-workingpaper1.pdf> (last viewed on Feb. 1, 2007) (discussing the links between public health, physical activity, and urban space design).

<sup>174</sup> Numerous methods have been offered to measure the private demand for resources such as public spaces. See, e.g., ROBERT C. MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 78–79 (1989).

<sup>175</sup> There is a host of empirical evidence indicating a positive link between successful (i.e., safe, well-maintained) urban public parks and other open spaces and adjacent real estate prices. See, e.g., Molly Epsey & Kwame Owuso-Edusei, *Neighborhood Parks and Residential Property Values in Greenville, South Carolina*, 33 J. AGRIC. & APPLIED ECON. 487 (2001); D.W. Hobden et al., *Green Space Borders—A Tangible Benefit? Evidence from Four Neighborhoods in Surrey, British Columbia, 1980–2001*, 21 LAND USE POLY 129 (2004); Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values* (N.Y.U. Law & Econ. Working Paper No. 46, Mar. 2006), available at <http://lsr.nellco.org/nyu/lewp/papers/46>.

<sup>176</sup> The Trust for Public Land, Benefits of Urban Open Space, [http://www.tpl.org/tier3\\_cdil.cfm?content\\_item\\_id=1242&folder\\_id=905](http://www.tpl.org/tier3_cdil.cfm?content_item_id=1242&folder_id=905) (last visited Feb. 1, 2007).

<sup>177</sup> See, e.g., *Ulmer v. Farnsworth*, 15 A. 65 (Me. 1888); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. e, illus. 4 (Discussion Draft 2000).

provision when the provider's use-based revenues are insufficient. Contrarily, a local government whose public spaces confer such derivative benefits could capture a portion of them through increased revenues from property taxes, taxes related to economic activity (such as sales taxes), or by initially imposing project-specific special assessments on neighboring properties.<sup>178</sup>

In a few cases, the very existence of a certain public space that is located in a unique natural surrounding or that has an outstanding aesthetic or historical value may provide additional forms of non-use values that affect much larger, dispersed communities.<sup>179</sup> Put differently, such non-use benefits constitute public goods that may necessitate some type of public intervention to improve the chances for an efficient level of provision.

## 2. Egalitarianism

A second argument in favor of governmental provision of public spaces is the promotion of equity between citizens of different socio-economic classes. Nineteenth century-based urban parks—Frederic Law Olmsted's Central Park being a notable example—were intended to serve as a melting pot for different classes of people that lived in close proximity and as an arena for socializing poor immigrants into the values of the gentry.<sup>180</sup> Somewhat differently, public spaces (playgrounds in particular) designed during the Reform Era were a form of social control aimed at developing a specific set of values in the poor and immigrant urban residents.<sup>181</sup> Despite the decay of such indoctrination and paternalism over time,<sup>182</sup> public parks seem to continue to be generally viewed as an appropriate object of "specific egalitarianism"—the provision of a baseline level of benefits that every individual should enjoy as a matter of social policy.<sup>183</sup>

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<sup>178</sup> Interestingly, when the derivative benefits of the public space expand beyond municipal borders, and in the absence of an intergovernmental contribution mechanism, the fear of sub-optimal provision could re-emerge. See Amnon Lehari, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 984–87 (2006).

<sup>179</sup> See Daphna Lewinsohn-Zamir, *The "Conservation Game": The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 747–49 (1997) (offering a taxonomy of such non-use values).

<sup>180</sup> FREDERIC LAW OLMSTED, *PUBLIC PARKS AND THE ENLARGEMENT OF TOWNS* (1870), reprinted in *THE CITY READER* 302, 306–07 (Richard L. Gates & Frederic Stout eds., 3d ed. 2003).

<sup>181</sup> GALEN CRANZ, *THE POLITICS OF PARK DESIGN: A HISTORY OF URBAN PARKS IN AMERICA* 61–84 (1982).

<sup>182</sup> *Id.* at 101.

<sup>183</sup> James Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON. 263, 264 (1970).

Although egalitarianism could theoretically be achieved by means that avoid governmental ownership, such as by subsidies or incentives to private suppliers,<sup>184</sup> empirical evidence points to very limited success. One example is New York City's "privately owned public spaces," amenities for the public required from a developer in return for other zoning variances, such as floor area ratio bonuses.<sup>185</sup> Because these spaces must maintain an "essential nexus" that physically connects them with the particular commercial development,<sup>186</sup> they are densely concentrated in commercial hubs, while almost nonexistent in other areas. Accordingly, out of the 503 privately owned public spaces, 496 are located in Manhattan and only seven in the other four boroughs.<sup>187</sup>

This is definitely not to say that governmental provision of public spaces adequately achieves the goal of social egalitarianism. Anecdotal evidence indicates that municipal public parks are predominately developed in white, affluent neighborhoods.<sup>188</sup> Formal public ownership of public spaces does, however, maintain at least the possibility of public law accountability, including equal protection litigation, even though its success has been modest in this context.<sup>189</sup>

### 3. Publicness and Democracy

A related argument in favor of governmental ownership concerns publicness and democracy. Utilization of public spaces as centers for urban public life in Western culture dates back at least to the times of

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<sup>184</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 87 (6th ed. 2003).

<sup>185</sup> The 1961 Zoning Resolution in New York City, which regulates the provision of privately owned public spaces, explicitly requires that these spaces be kept open to the public. JEROLD S. KAYDEN ET AL., *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 38 (2000).

<sup>186</sup> Cf. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987) (requiring such mandated contribution to the public be "reasonably related to the public need or burden that the [project] creates or to which it contributes.>").

<sup>187</sup> KAYDEN ET AL., *supra* note 185, at 297.

<sup>188</sup> Michael Gelboter, *The Meaning of Urban Environmental Justice*, 21 *FORDHAM URB. L.J.* 841, 853–54 (1994); Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 *N.Y.U. J. LEGIS. & PUB. POL'Y* 351, 357–59 (2000).

<sup>189</sup> See *supra* note 82 (discussing equal protection litigation on municipal services in general). In *Beal v. Lindsay*, the United States Court of Appeals for the Second Circuit denied relief to black and Puerto Rican residents living in the neighborhood of Crotona Park who alleged that New York City had unconstitutionally discriminated against them by failing to maintain the Park in a condition equivalent to that of other parks in the Bronx. 468 F.2d 287, 288–89, 290–91 (2d Cir. 1972). The court found that "the City ha[d] satisfied its constitutional obligations by equal input even though, because of conditions for which it is not responsible [e.g., vandalism], it ha[d] not achieved the equal results it desire[d]." *Id.* at 290–91.

the Greek Agora and the Roman Forum.<sup>190</sup> These centers served as a meeting place for citizens, in which they handled their common affairs, traded goods, enjoyed dances and games, and exchanged news and opinions.<sup>191</sup> In the New World, settlements and towns were designed around a central public square.<sup>192</sup> In the English Northeast towns, the central Common served governmental functions alongside public life functions, (for example, providing a place to conduct militia drills as well as allowing for the citizenry to assemble), as well as private functions, such as the grazing of cattle.<sup>193</sup> Even with the changes in the conceptualization and design of public spaces during later times,<sup>194</sup> these resources maintained their basic characters not only as places designated to host the diverse general public, but also as forums for embedding civic-democratic functions and values.<sup>195</sup>

A legal manifestation of the vision of public spaces as promoting notions of publicness and democracy is found in the “public forum” doctrine, conceived of in the context of the First Amendment Free Speech Clause.<sup>196</sup> Within the delineation of the various types of public properties for the purpose of reviewing the constitutionality of restrictions imposed on individual and group expressive activities, public spaces such as parks and streets are considered the most quintessential public fora that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>197</sup>

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<sup>190</sup> LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATION, AND ITS PROSPECTS* 149 (1961).

<sup>191</sup> *Id.* at 149–50.

<sup>192</sup> This was also the case with towns established by the Spaniards, in which the main plaza was used as a marketplace as well as for other purposes such as celebrations, tournaments and bullfights. JOHN W. REPS, *THE MAKING OF URBAN AMERICA* 29–30 (1965); MARK GIROUARD, *CITIES AND PEOPLE: A SOCIAL AND ARCHITECTURAL HISTORY* 233–36 (1985).

<sup>193</sup> While in most cities, such as New Haven, Connecticut and Boston, Massachusetts, the Common was designed as a central square, in others, such as in Sharon, Connecticut, the Common was actually a 150 to 200-foot wide strip running through the entire length of the town. MUMFORD, *supra* note 190, at 133.

<sup>194</sup> See *supra* notes 180–82 and accompanying text; CRANZ, *supra* note 181 (offering a comprehensive review of the different phases of American public parks).

<sup>195</sup> FRUG, *supra* note 54, at 60–61.

<sup>196</sup> U.S. CONST. amend. I, cl. 2.

<sup>197</sup> See *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1333–35 (11th Cir. 2001) (offering a recent analysis of the “public forum” spectrum).

Two interrelated developments seem, however, to undermine the practical ability of governmentally-owned public spaces to promote the values of publicness and democracy, but at the same time stress the inherent problems with private alternatives. On the one hand, many traditional centers and other public spaces in cities have been gradually appropriated by drug dealers, homeless people and so forth, driving away other citizens. This trend has been exacerbated by judicial prohibitions of certain types of law and order measures such as anti-loitering legislation, which is considered to unduly limit civil liberties.<sup>198</sup> On the other hand, the “legitimate” public has found shopping malls and other privately-owned spaces as places where sociability, civility, and commerce can once again flourish in an atmosphere of safety and security.<sup>199</sup> To achieve that purpose, these privately owned spaces exercise different forms of formal and informal regulation on functions, activities, and admittance.<sup>200</sup> Although courts have intervened in some cases of exclusionary regulation,<sup>201</sup> most types of such regulation seem to remain intact.<sup>202</sup>

These two trends have been portrayed as creating a divide between the concepts of “community” and “public.”<sup>203</sup> Whereas the latter notion entails confrontation with difference, heterogeneity, and randomness, “community” emphasizes familiarity, security, control, and a conformist identity that smoothes over differences.<sup>204</sup> Consequently, “community” emphasizes exclusion of those who simply do not “fit in.”<sup>205</sup> Hence, to the extent that one views at least some de-

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<sup>198</sup> See *Chicago v. Morales*, 527 U.S. 41, 45–46, 64 (1991) (striking down as unconstitutional a city ordinance barring “criminal street gang members from loitering with one another or with other persons” in public spaces). There is considerable debate among property scholars about public space law and order programs. Compare Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning*, 105 YALE L.J. 1165 (1996), with Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001), and Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075 (2005).

<sup>199</sup> See Lynn A. Staeheli & Don Mitchell, *USA’s Destiny? Regulating Space and Creating Community in American Shopping Malls*, 43 URB. STUD. 977, 977–98 (2006).

<sup>200</sup> *Id.* at 982–89.

<sup>201</sup> In *Pruneyard Shopping Center v. Robbins*, the Supreme Court’s most recent case on the quasi-public nature of private shopping malls, the Court denied a *federal* constitutional right of free speech to hand out political pamphlets in the mall’s common areas. 447 U.S. 74, 80–81 (1980). However, the Court upheld a provision of the California State Constitution protecting such activities and rejected the mall owner’s argument that this violated *his* First Amendment rights. *Id.* at 88.

<sup>202</sup> MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* 9–10, 191–93 (2004).

<sup>203</sup> *Id.* at 74–78.

<sup>204</sup> *Id.* at 193–94.

<sup>205</sup> Staeheli & Mitchell, *supra* note 199, at 978.

gree of publicness, pluralism, and promotion of democratic debate and discourse in public forums as socially desirable,<sup>206</sup> purely private spaces will usually not suffice.<sup>207</sup>

Accordingly, the true challenge in attempting to revive governmentally-owned public spaces is to make them thriving and vibrant again, but without simultaneously mimicking the constraining practices of private spaces. This requires governments and groups to work together to create a new type of public space management—one that works to increase the stakeholding of local groups and utilizes their special affinity for the resource, while, at a minimum, ensuring at least a certain level of genuine publicness and broader democratic values.

B. “Public Commons” in Public Spaces

This Section offers a concise description of different types of actual mixed public spaces in New York City, providing a substantive framework within which the following sections will analyze the three main challenges that apply to all types of spaces along the public-common continuum: (1) identifying the bilateral incentives of the relevant parties, (i.e. the government and the local groups); (2) addressing the possible tensions between the “public” and the “common” elements, and exposing informal or voluntary mechanisms that can be employed to resolve such tensions, thus preventing an explicit legal conflict; and (3) revealing why current law is unsatisfying in dealing with the complexities of public commons and developing ways to reshape it to better promote the socially desirable policy.

New York City’s total acreage of public open space (38,147) is the largest in the U.S. among high-population-density cities, both in absolute area and as a percentage of total city acreage (19.7%).<sup>208</sup> Over 29,000 acres are devoted to the 1770 city-owned parks, around 220 of

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<sup>206</sup> KOHN, *supra* note 202, at 198–205; Staeheli & Mitchell, *supra* note 199, at 989; DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* 130–52 (2003).

<sup>207</sup> See Elizabeth Blackmar, *Appropriating “the Commons”: The Tragedy of Property Rights Discourse*, in *THE POLITICS OF PUBLIC SPACE* 49, 49–50 (Setha Low & Neil Smith eds., 2006) (arguing that the current proliferation of commercial centers and residential subdivisions that include the term “commons” in their names alludes to the romantic concept of Commons in New England towns, but that these spaces are void of genuine values and practices of public discourse).

<sup>208</sup> The Trust for Public Lands, *Total Parkland as Percent of City Land Area FY 2006*, [http://www.tpl.org/content\\_documents/ccpe\\_TotalAcres\\_asPercentofLandArea.pdf](http://www.tpl.org/content_documents/ccpe_TotalAcres_asPercentofLandArea.pdf) (last visited Aug. 1, 2007).

which are defined by the City as “large parks.”<sup>209</sup> The remaining 1550 parks are further broken down into 360 small parks (sitting areas/triangles/malls), ninety neighborhood parks, 960 playgrounds, and forty undeveloped sites serving effectively as small parks.<sup>210</sup> According to Partnerships for Parks, a joint program of the NYC Parks & Recreation Department and the non-profit City Parks Foundation, there are over 3800 grassroots, community-based organizations throughout the City, of which about 2700 are chiefly dedicated to parks.<sup>211</sup> Overall, such “friends of” groups are active in over half of the City’s parks.<sup>212</sup> The nature and size of these groups considerably diverge between the different parks. In the following sub-sections, I offer a rough, non-exhaustive taxonomy of the various types of local group involvement in NYC’s parks, starting with more informal patterns and moving up to more full-fledged types of public commons.

### 1. Informal User Groups: McCarren Park Moms

Close to the “public” end of the public-common continuum, one finds informal and non-institutionalized “friends of” groups working to improve and steward “their” local park. An example is the Park Moms group involved in the Vincent V. Abate playground, located within McCarren Park in Brooklyn.<sup>213</sup>

The informal Park Moms group was initiated in 1996 by Susie Monagan, who was motivated into action when her child demanded outdoor playing space.<sup>214</sup> At the time, the playground was badly neglected; most swings were missing, and the garden was weeded

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<sup>209</sup> Interview with Mr. Jack T. Linn, Assistant Comm’r, and with Mr. Warner Johnston, Dir. of Pub. Affairs, City of New York Parks & Recreation Dep’t (Apr. 23, 2007).

<sup>210</sup> E-mail from Dana Rubinstein, Deputy Director, Office of Public Recreation, NYC Parks & Recreation, to author (Jan. 10, 2006) (on file with author). In addition, there are about 2,100 “Greenstreets”—concrete triangles and traffic islands converted by the City into green spots. *Id.*

<sup>211</sup> Interview with Mr. Jason Schwartz, Dir., and with Ms. Emily Maxwell, Acting Dir., Catalyst Program, Partnerships for Parks (Apr. 24, 2007). Partnerships for Parks provides various services to such groups, including volunteer and permit coordination, technical assistance, outreach activities, and catalyst programs aimed at mobilizing grassroots “social capital.” *Id.*

<sup>212</sup> *Id.* The difference between the number of groups and that of community-active parks derives from the fact that in many cases, there are multiple groups working in the same park. For example, there are around thirty groups involved with the Flushing Meadows Park in Queens. *Id.*

<sup>213</sup> See Lehari, *Property Rights*, *supra* note 166, at 35–37 (describing in more detail the group’s activity in 1996–2003); Telephone Interview with Katherine Naplatarski (Mar. 1, 2006) (updating information after the publication of Lehari, *Property Rights*).

<sup>214</sup> *Id.*

over.<sup>215</sup> Monagan started to establish an informal network of neighbors, most of them young parents who lacked sufficient home playing space.<sup>216</sup> This informal process was carried out through telephone calls, notices posted on-site, and, at a later stage, through a newsletter and an e-mail list.<sup>217</sup>

Because Park Moms is an informal group, it acted from the outset (and still does today) through the City Parks Foundation as a fiscal agent.<sup>218</sup> The group's annual "budget," which is currently around \$7,000, comes chiefly from the local city councilmember's office, with smaller amounts coming from local businesses and other private donors.<sup>219</sup> The group's political clout has shown itself to be useful from early on, when in 1999 the group successfully lobbied the councilmember to have a sprinkler pool built next to the playground at a cost of about \$600,000.<sup>220</sup>

Although Park Moms does not have regular meetings, and the communication is casual in nature, one can always expect a "critical mass" of neighbors to show up for a given project.<sup>221</sup> These dynamics may also help to explain the group's decision-making process. Although there are neither official managers nor a formal voting system, the initiator of a certain project will often gain consensus for her proposed action.<sup>222</sup> Apparently, in such an informal setting, consensus seems necessary to maintain the atmosphere of good will contribution.

Interestingly, the group did not fall apart when Monagan moved outside the City.<sup>223</sup> The current core of the group consists of four activists who meet every few months, with approximately 20–250 locals participating in the various activities.<sup>224</sup> Although the group does not currently apply for special grants and no longer maintains a newsletter, it continues to hold regular activities throughout the year, including a spring concert series, cleanup events, tree-planting, outreach

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> As of November 2000, Susie had a mailing list of 300 people for the Park Moms' Newsletter and forty to fifty addressees on her regular hardcopy mailing list. *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> One donation came from the Exxon Mobil Foundation to finance the bush plantings project, serving probably as an informal measure of compensation for pollution from its nearby factory. *See supra* note 209.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

activities with local schools, and a current campaign to have an ice-skating rink installed nearby.<sup>225</sup> The group continues to collaborate with other groups in McCarren Park, and is accordingly part of an informal thread created between different groups of users.<sup>226</sup>

In sum, although the McCarren Park Moms has stuck to its informal character, and its activities are not anchored in formal agreements with the City's Parks Department, it continues to be a significant force in the ongoing management and improvement of the playground, to have considerable political clout, and to generally maintain harmonious relations with the City and with other user groups.

## 2. Incorporated User Groups: The Carl Schurz Park Association

The Carl Schurz Park Association prides itself on being the "oldest community-based volunteer park association" in New York City.<sup>227</sup> In the late 1960s, a small group of parents joined forces to help upgrade Carl Schurz Park, located in Manhattan's Upper East Side.<sup>228</sup> Though it had initially focused on the playground, after the City's major fiscal crisis in the 1970s which threatened the viability of the entire City and of its open spaces in particular, the group was spurred to broaden its commitment and to take an increasingly active role in maintaining and improving the entire park.<sup>229</sup> The Association incorporated in 1974 as a tax-exempt non-profit organization with volunteer directors and officers, and it enjoys pro bono legal counseling.<sup>230</sup> Its first major restoration project, the replacement of cherry trees that died from a faulty drainage system, came in 1976 and was considered a precedent in the sense that the community group had financed the installation of the trees and sod and provided the drainage pipes in the city-owned park while the Parks Department provided the labor.<sup>231</sup>

Since then, the Association grew in numbers and in its scope of action.<sup>232</sup> It currently has 1,200 active dues-paying members and en-

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<sup>225</sup> See *supra* note 209.

<sup>226</sup> *Id.*

<sup>227</sup> See Carl Schurz Park Association, <http://www.carlschurzparknyc.org/index.html> (last visited Feb. 1, 2007).

<sup>228</sup> See A Brief History of Carl Schurz Park Association, <http://www.carlschurzparknyc.org/history.html> (last visited Feb. 1, 2007).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

gages in multiple activities, including the purchase of plants and gardening supplies; the renovation of dog-runs; the provision of supplies and special programs for kids; and financial and logistic support for annual community events such as art shows, summer concerts, and holiday festivals.<sup>233</sup> Until recently, the Association also funded the cost of a full-time workfare supervisor, a portion of a year-round gardener's salary, and the Association is currently in negotiations with the Park's Department to fund half the salary of a park enforcement officer.<sup>234</sup>

Despite playing an essential role in the maintenance and management of the Park for some time, only recently did the Association start negotiating a Memorandum of Understanding with the Parks Department to formalize the relationship.<sup>235</sup> Until now, it has been the informal ability of the Association to navigate matters vis-à-vis the Parks Department, the police, and elected city and state officials that has led the Association to a successful record of goal accomplishment, whether this was facilitated by public funding or by the Association's own funds, which come primarily from donations, member fees, government grants, and program services.<sup>236</sup>

The Carl Schurz Park Association presents, therefore, a vivid example of both the potential in ongoing grassroots coordination between the Park's local users, and of the severe governmental constraints that may often necessitate the transition to hybrid forms of management and finance in many publicly owned spaces to prevent their deterioration and dereliction.<sup>237</sup>

### 3. Formal Mixed Management: Prospect Park Alliance and ComCom

In a number of parks, New York City has entered into formal cooperation arrangements with non-profit corporations for the full or partial management, maintenance, and improvement of the publicly-owned park.<sup>238</sup> Probably the best known example is the Central Park

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<sup>233</sup> *Id.*

<sup>234</sup> E-mail from David Williams, President, Carl Schurz Park Assoc., to author (Mar. 7, 2006) (on file with author).

<sup>235</sup> *Id.*

<sup>236</sup> In the fiscal year 2003, the Association had overall revenue of \$163,879. *See supra* note 227.

<sup>237</sup> *See* Toni Whitt, *Civic Pride and Volunteerism Bring Allure Back to Riverside Park*, N.Y. TIMES, May 18, 2006, at B4 (telling the similar story of Upper Manhattan's Riverside Park).

<sup>238</sup> Besides Central Park, Prospect Park, and Bryant Park, which will be discussed separately in sub-sections (3) and (4), similar arrangements exist in Battery Park and in Randall's and Ward's Island Parks in Manhattan; in the Bronx River Park in the

Conservancy, a non-profit organization established in 1980, which has been awarded renewing management agreements to “ensure[] the continuing maintenance, public programming, and capital restoration of Central Park.”<sup>239</sup> While these instances of formal partnerships between the city and non-profit organizations may be seen as just another example of Public-Private Partnerships discussed previously, the various park partnerships do seem to possess additional traits that emphasize the role of the local community both in the structure of the non-profit organization and in its relations with the park users, hence constituting a distinctive type of “public commons.”

An interesting example is Prospect Park in Brooklyn.<sup>240</sup> The Park, which serves over six million visitors a year, is managed by the collaboration of the Parks Department and the Prospect Park Alliance, a non-profit established in 1987.<sup>241</sup> Whereas the Prospect Park Alliance’s regular operating budget is about \$5 million (coming chiefly from private and government support, and the rest from fees and other user-based revenues), in 2005 the Alliance completed an unprecedented \$116 million campaign for capital improvements in the Park.<sup>242</sup>

The Park has over 5000 volunteers, some of them individuals and groups who feel a special affinity to the Park, and others who are part of organized programs of schools, religious institutions, corporations,

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Bronx; and in the Greenbelt Park in Staten Island. E-mail from Dana Rubinstein, *supra* note 210. According to city officials, there are around twenty five undeveloped (i.e., largely natural) parks in New York City that have regional appeal and can draw sufficient funds through concessions or private donations, so as to make them candidates for innovative management schemes. Interview with Linn & Johnston, *supra* note 209.

<sup>239</sup> On April 27, 2006, the contract was renewed until 2014. See The Central Park Conservancy, <http://www.centralparknyc.org/abooutcpc/partnership> (last visited Feb. 1, 2007).

<sup>240</sup> The data in the following paragraphs is based primarily on a series of interviews I held between 2000 and 2005 with the following Prospect Park Alliance employees: Rachel Amar, Carol Anastasio, Carol Ann-Church, Danny Cunningham, Pam Fishman, and Dawn Torres; and on interviews with several group members who attended a ComCom meeting in Prospect Park on Nov. 30, 2000.

<sup>241</sup> Although there is no formal agreement between the entities about the overall management of the Park, the relationships are recognized and validated, *inter alia*, in the Alliance’s structure. See *supra* note 240. Tupper Thomas, the President of the Alliance, is an employee of the City’s Parks Department, and was originally hired as the Park’s first administrator in 1980 by then Parks Commissioner Gordon Davis. *Id.* In addition, the Alliance’s board includes *ex officio* the Parks Commissioner, the Brooklyn Borough President, and local city councilmembers, alongside members from the private sector. *Id.*

<sup>242</sup> Prospect Park Alliance, Annual Report 2005, at 2, 6–7, available at [http://www.prospectpark.org/general/annual\\_reports/PPA2005Annual.pdf](http://www.prospectpark.org/general/annual_reports/PPA2005Annual.pdf).

mandated community service, etc.<sup>243</sup> In addition, in 1995, the Prospect Park Alliance formed the Community Committee (informally known as ComCom), aimed at serving “as a conduit for information and feedback.”<sup>244</sup> ComCom includes over eighty groups of park users and other interest holders (such as local businesses and elected officials), with representatives of about thirty to forty of these groups regularly participating in ComCom’s meetings, which are held about six times a year.<sup>245</sup> These meetings are intended primarily to inform and advise the groups of future plans and projects.<sup>246</sup> Besides meetings of general interest, the Alliance also maintains frameworks for community dialogue regarding distinctive portions of the Park. For example, the General Playground Committee meets four times a year to discuss issues pertaining to the seven playgrounds located throughout the Park, with meetings between the Alliance and a certain individual playground group held on an ad hoc basis.<sup>247</sup>

As for the forces driving individuals with a shared specific interest in the Park to organize into a group, it should be noted that some groups, such as the Prospect Park Running Club, were already organized before the establishment of ComCom.<sup>248</sup> Other user groups evolved spontaneously, usually following conflicts about their specific uses.<sup>249</sup> For example, following recurring complaints about dogs digging holes causing people to trip, the Park’s management handed out leaflets to dog owners and summoned them to an open meeting.<sup>250</sup> The result was the establishment of FIDO, an interest group representing dog owners in the Park.<sup>251</sup>

Although ComCom is not intended to be a forum for dispute resolution among different types of users, its structure has often proved efficient in facilitating informal dialogue among groups during conflicts, although it is the Alliance,<sup>252</sup> which, together with the city, has the formal power of resolution over the rules of use in the Park.<sup>253</sup> One example of an unresolved conflict is between FIDO and

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<sup>243</sup> See *supra* note 240.

<sup>244</sup> Prospect Park Alliance, PROSPECT PARK NEWS, Dec. 1999–Feb. 2000, at 3 (on file with author).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* note 240.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> See Prospect Park—Overview, <http://www.prospectpark.org/general/main.cfm?target=home>.

the Brooklyn Bird Club, a group of bird watchers, following the latter's recurring complaints of dogs scaring away the birds.<sup>254</sup> In other cases, however, the inter-group dialogue has facilitated efficient use arrangements in the Park, as was the case with the creation of different lanes for bikers and runners.<sup>255</sup> In this respect also, the ComCom framework proves to be an overall successful conduit for information and coordination both between the Alliance and the groups, and among the different user groups themselves.<sup>256</sup>

#### 4. Formal Sub-Local Structures: Bryant Park and BIDs

Beyond ad hoc partnerships between governments and private non-profits, cities have been experimenting with formal sub-local structures, which combine private, public, and common elements.<sup>257</sup> Of particular interest here are Business Improvement Districts (BIDs), which establish a territorial subdivision of a city in which businesses and residential property owners are subject to additional district-specific taxes reserved to funding services and improvements within the district.<sup>258</sup> BIDs have proven to be generally efficient in both the establishment and the maintenance of amenities at the sub-local level.<sup>259</sup> While a BID does have some public characteristics,<sup>260</sup> the members of this corporation nevertheless enjoy the benefits of smaller-scale governance and improved supply-demand responsiveness.<sup>261</sup>

One BID, which has helped to revolutionize a public space from a place of dereliction and crime into a thriving, economically self-

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<sup>254</sup> See *supra* note 240.

<sup>255</sup> *Id.*

<sup>256</sup> See SETHA LOW ET AL., *RETHINKING URBAN PARKS: PUBLIC SPACE AND CULTURAL DIVERSITY* 37–68 (2005) (identifying distinctive park use patterns among different ethno-cultural groups in an earlier field study of Prospect Park, conducted in 1996–97).

<sup>257</sup> Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503 (1997).

<sup>258</sup> Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368–69 (1999) [hereinafter Briffault, *BIDs*]. There are currently several hundred BIDs in the U.S., and dozens in New York City alone. LAWRENCE O. HOUSTON, JR., *BUSINESS IMPROVEMENT DISTRICTS* 2–3, 150–51 (2d ed. 2003).

<sup>259</sup> *Id.*

<sup>260</sup> This is because the initial consent of the city is required for the BID's establishment (in addition to that of the majority of property owners), and the city is also represented on the BID's board of directors and maintains supervision powers over its activities. Briffault, *BIDs*, *supra* note 258, at 378, 439.

<sup>261</sup> Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 77–78 (1998).

sustaining urban jewel, is the Bryant Park Restoration Corporation (BPRC).<sup>262</sup> Bryant Park, located behind the New York Public Library in the heart of Manhattan, fell into decay in 1960s due to city neglect, and became a haven for drug dealers and muggers while keeping away others.<sup>263</sup> In the late 1970s, when the Rockefeller Brothers Fund was seeking to contribute money to renovate the similarly declining Public Library building, it made mitigating the Park's problems a condition for its support.<sup>264</sup> In 1980, BPRC was set up and started to promote a renovation plan for the Park.<sup>265</sup> After twelve years of professional and public debate over the plan, and the capital expenditure of eighteen million dollars (two-thirds coming from the city, and the rest from the private sector), the Park was renovated and soon became a hub for daily leisure activities—about 5000 local office workers using it to eat their lunch—as well as for events such as open-air concerts and night movies.<sup>266</sup>

The Park's annual budget of about five million dollars is financed chiefly by the levies imposed on the businesses located in the BID's area, concessions from the restaurant, café and kiosks in the Park, and fees for special events.<sup>267</sup> The city donates more than \$250,000 each year.<sup>268</sup> The ongoing success of the Park has fed the neighboring assets by dramatically driving up leasing activities and real estate prices, making the BID a “win-win” setting for its private financiers and its users.<sup>269</sup> While the use of the Park is regulated by BPRC, including restrictions on certain activities such as panhandling and dog running, and limiting late-night closing hours, the Park is generally kept open and inviting to the wide public.<sup>270</sup>

##### 5. Publicly-Authorized, Conditional Commons: Community Gardens

In many cases, the very establishment of a public space is not the fruit of a pre-designated governmental act of land dedication, but the result of dynamic, largely grassroots phenomena that are typical of many cities. One prominent process is the de facto or de jure con-

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<sup>262</sup> See ALEXANDER GARVIN ET AL., URBAN PARKS AND OPEN SPACE 45–54 (1997).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See Pranay Gupte, *Raising Private Funds To Remake a Public Park*, N.Y. SUN, Jan. 26, 2006, at 15.

<sup>268</sup> See GARVIN ET AL., *supra* note 262, at 50, 56–57.

<sup>269</sup> *Id.* at 53–54.

<sup>270</sup> *Id.* at 55.

version of vacant or abandoned lands into community places.<sup>271</sup> In these scenarios, the root causes for the long term vacancy or abandonment of properties often also point to the potential, and even the necessity, of converting the land for such purposes or other beneficial reuses.<sup>272</sup>

The most prominent case of conversion of vacant or abandoned lots into community spaces in the United States is that of New York City's community gardens.<sup>273</sup> These spaces started to evolve spontaneously in vacant or deserted city-owned lots in the mid 1970s,<sup>274</sup> mainly in some of the city's toughest and most poor neighborhoods, through the grassroots work of civic-minded and concerned individuals.<sup>275</sup> Over the years, more than 600 gardens evolved on city lots, serving as models of community pride and ingenuity.<sup>276</sup> Following their creation, the city established the Greenthumb program in 1978 to assist local gardeners with the care and security of the gardens.<sup>277</sup> Yet, during that period, the gardens had no formal status as such,<sup>278</sup> and their use was carried out through either short-term licenses or without any formal permission.<sup>279</sup>

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<sup>271</sup> See, e.g., *Community Gardens are a Growing Trend*, GLEBE & INNER CITY NEWS (N.S.W.-Austl.), Mar. 29, 2000 (describing the proliferation of community gardens in public properties in Sydney and other Australian cities); Schukoske, *supra* note 188, at 355 (depicting a similar phenomenon in Canada).

<sup>272</sup> Two authors offer insight into the prevalence of vacant and abandoned properties stemming from macro trends such as de-industrialization and population shifts to suburban communities alongside site-specific environmental, financial and legal pitfalls. See ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 3-8 (2006); Lavea Brachman, *Vacant and Abandoned Property: Remedies for Acquisition and Redevelopment*, LAND LINES, Oct. 2005, at 1.

<sup>273</sup> See, e.g., RUTH H. LANDMAN, CREATING COMMUNITY IN THE CITY: COOPERATIVES AND COMMUNITY GARDENS IN WASHINGTON D.C. (1993); Kenneth Reich, *Los Angeles Community Garden Takes Root in South Los Angeles*, L.A. TIMES, Apr. 20, 2002, at B4.

<sup>274</sup> The first space established was on a vacant lot at the corner of Bowery and Houston Streets in Manhattan in 1973. See Mary K. Fons, *The Green Guerillas*, THE COOPERATOR, Sep. 2003, available at <http://cooperator.com/articles/914/1/The-Green-Guerillas/Page1.html>. The garden is currently named after its initiator, the late artist Liz Christie. *Id.*

<sup>275</sup> See *Green Guerillas v. City of New York*, as reported in N.Y.L.J., Apr. 22, 2002, at 28.

<sup>276</sup> See generally MALVE VON HASSELL, THE STRUGGLE FOR EDEN: COMMUNITY GARDENS IN NEW YORK CITY (2002) (giving a comprehensive study of community gardens in Manhattan's Lower East Side).

<sup>277</sup> *Id.* at 48, 52.

<sup>278</sup> The then-official maps showed vacant lots where community gardens were located. *Id.* at 18.

<sup>279</sup> According to one report, in 1998, the City leased around 1,000 properties to 700 community groups. Schukoske, *supra* note 188, at 386.

The tension between the de facto community use of the spaces and their formal public ownership erupted in the mid-1990s, when the city decided to auction hundreds of lots to developers for affordable housing projects.<sup>280</sup> The first wave of auctions was avoided when two non-profit organizations purchased 112 gardens in 1999.<sup>281</sup> Following a second wave of litigation over several hundred other lots, which involved the Attorney General of the State of New York,<sup>282</sup> a deal was struck in 2002 between the City and the State.<sup>283</sup> According to the agreement, beyond the ninety-three city-owned gardens that were already under the jurisdiction of the Parks Department and other non-development agencies and one hundred gardens that were under the jurisdiction of the Department of Education, 198 of the city-owned sites that were under the jurisdiction of the Housing Department were offered to the Parks Department.<sup>284</sup> Although the agreement denies the gardens formal parkland status, the city has declared that it has no current development plans for these gardens and that any future development plans would have to undergo review procedures according to the New York State Environmental Quality Review Act<sup>285</sup> and the City's land use review procedure.<sup>286</sup> Additionally, any proposed development plans would require the City to seek an alternate site for the garden.<sup>287</sup>

Although the conflict allegedly ended in community triumph, the routine of the community gardens is laden with continuous obsta-

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<sup>280</sup> This decision was initially unsuccessfully challenged in courts by community groups and the State of New York. *See, e.g.*, *N.Y.C. Coal. for the Pres. of Gardens v. Giuliani*, 670 N.Y.S.2d 654 (N.Y. Sup. Ct. 1997), *aff'd*, 666 N.Y.S.2d 918 (App. Div. 1998).

<sup>281</sup> The Trust for Public Land and the New York Restoration Project acquired 112 lots for a total of \$4.2 million and placed the gardens in permanent land trusts. Dan Barry, *Sudden Deal Saves Gardens Set for Auction*, N.Y. TIMES, May 13, 1999, at B1.

<sup>282</sup> *See State v. City of New York*, 713 N.Y.S.2d 360 (App. Div. 2000) (granting a temporary restraining order). Contrarily, community groups' suits were dismissed for lack of standing. *N.Y.C. Coal. for the Pres. of Gardens*, 666 N.Y.S.2d at 918; *Worley v. Giuliani*, 8 F. App'x. 131 (2d Cir. 2001); *Green Guerillas*, *supra* note 275, at 28.

<sup>283</sup> Jennifer Steinhauer, *Ending a Long Battle, New York Lets Housing and Gardens Grow*, N.Y. TIMES, Sep. 19, 2002, at A1.

<sup>284</sup> Memorandum of Agreement between the State of New York and the City of New York (Sept. 17, 2002) [hereinafter State-City Memorandum] (on file with author).

<sup>285</sup> N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2002) (codified at N.Y. COMP. CODES R. & REGS. tit. 6, § 617.10–20 (2000)).

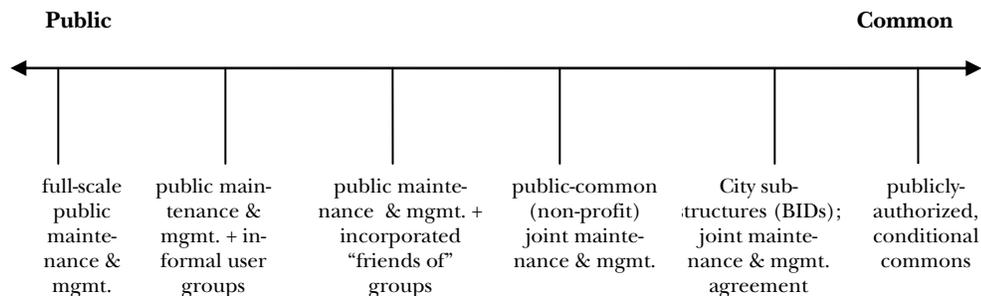
<sup>286</sup> N.Y. City Charter, ch. 8 § 197-c (2001).

<sup>287</sup> State-City Memorandum, *supra* note 284, § 6(B). One hundred ten sites were designated as "subject for development" following a streamlined garden review process, and twenty-eight as eligible for immediate development. *Id.* §§ 6(a), 7.

cles.<sup>288</sup> Two of the agreement's conditions for the prolongation of the Greenthumb program and the protection of the gardens were the continuation of fund allocation through either the federal Community Development Block Grant (CDBG) program or other external sources, and the formal registration and actual use of the various gardens.<sup>289</sup> However, in view of the City's continuous preparedness for the possibility of federal defunding, and as some of the gardens (around fourteen percent as of 2007) are no longer eligible for CDBG funds because of a rise in the neighborhood's socioeconomic status, the City has started allocating funds for the gardens, but may obviously become pressed for dollars should this trend intensify.<sup>290</sup>

Yet, as more responsibilities are shouldered by the commoner-gardeners, their ability to maintain the garden increasingly depends on their organizational, economic, and political capabilities. Somewhat ironically, even though the struggle for the preservation of the gardens was carried out under the flag of "environmental justice," there is currently an abundance of prosperous gardens in Manhattan and affluent areas in Brooklyn, and a lack thereof in impoverished areas such as the South Bronx, into which councilmembers often prefer to direct budgets to affordable housing for local constituents.<sup>291</sup>

In sum, in the context of public spaces in New York City, the public-common spectrum can be roughly portrayed as including the following points:



**Chart 3**

The Public-Common Continuum  
(In New York City Public Spaces)

<sup>288</sup> Interview with Edie Stone, Dir., Greenthumb (Sept. 15, 2004).

<sup>289</sup> *Id.*

<sup>290</sup> Interview with Linn & Johnston, *supra* note 209.

<sup>291</sup> Interview with Stone, *supra* note 288.

C. *The Bilateral Incentives Behind Public Commons*

The evolution of the different types of “public commons” in governmentally-owned public spaces is a result of complex processes, which are often resource-specific, that cannot be attributed to a single set of factors. Yet the gradual shift from traditional full-scale public provision, management, and financing to the various mixed models seems to reflect current forces, potentials, and constraints that drive the chief stakeholders, mostly the cities on one hand, and, on the other hand, the local groups of residents and businesses physically surrounding the public spaces.

The government’s modes of operation in publicly-owned resources, such as its public spaces, naturally combine normative policy setting with practical budgetary constraints. In New York City, during substantial periods since the 1970s, the City faced acute fiscal crises that simply caused it to withdraw from many of its responsibilities in public parks, leaving the parks to the fate of grassroots self-help activities or other private initiatives.<sup>292</sup> When such patterns have existed, as portrayed above, public spaces have managed to thrive. In the other less fortunate instances, City neglect has perpetuated and exacerbated urban decline.<sup>293</sup> While throughout most of this era of fiscal duress the City at least maintained the rhetoric of responsibility for public spaces, the subsequent reign of Mayor Giuliani was often characterized by idealization of overreaching privatization<sup>294</sup> and even by finger pointing at embittered residents.<sup>295</sup>

Recent years have seen a shift in priorities and budget-setting for parks, with the City acquiring almost 300 acres of new parkland since 2002 and substantially increasing both capital investments and oper-

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<sup>292</sup> See Tridib Banerjee, *The Future of Public Spaces: Beyond Invented Streets and Re-invented Places*, 67 J. AM. PLAN. ASS’N 9, 12 (2001).

<sup>293</sup> Fred Siegel, *Reclaiming our Public Spaces*, in METROPOLIS: CENTER AND SYMBOL OF OUR TIMES 369, 374 (Philip Kasinitz et al. eds., 1994). The City’s maintenance staff was cut almost in half during the late 1970s and early 1990s. *Id.* Between 1994 and 2001, the Parks Department’s operating budget was cut by nearly thirty percent. Joanne Wasserman, *Parks Go to Seed for Lack of Green; Many Suffer from Fund Cuts, Neglect*, N.Y. DAILY NEWS, Aug. 13, 2001, at 4.

<sup>294</sup> See E.S. SAVAS, PRIVATIZATION IN THE CITY: SUCCESSES, FAILURES, LESSONS 210–238 (2005) (describing privatization schemes in the Parks Department during this era, including a short-term experiment with competitive outsourcing of park maintenance, and a more durable outsourcing program for maintenance of the Department’s fleet of vehicles and equipment).

<sup>295</sup> Joanne Wasserman, *Let Volunteers Fix Parks, Rudy Says*, N.Y. DAILY NEWS, Aug. 14, 2001, at 4. In one instance, Giuliani challenged New Yorkers to fix seedy city park conditions themselves: “anyplace where a park isn’t what the community wants it to be, they can volunteer to make it better. . . . I would use that as a challenge . . . [that] we don’t have to rely on Big Brother to do everything.” *Id.*

ating budgets for parks.<sup>296</sup> Yet the City does not seem to be simply reverting to traditional public provision. Beyond the fact that maintenance and renovation levels are still unsatisfactory at times,<sup>297</sup> especially in several sites that the City has effectively given up on,<sup>298</sup> current public policy explicitly emphasizes the crucial role that residents and businesses should play in turning what otherwise “would merely be open spaces” into “centerpieces of their communities.”<sup>299</sup> Accordingly, the myriad economic and organizational models combining private capital, community activity, or outsourced management aiming at attaining site-specific self sufficiency are heralded as necessary ingredients in ensuring the success of government-owned public spaces, especially with respect to long term maintenance tasks.<sup>300</sup>

From the viewpoint of local residents and businesses, successful public spaces are instrumental in providing use benefits alongside consequential benefits such as a rise in adjacent real estate prices and a boost to economic and commercial activity.<sup>301</sup> This type of stakeholding is especially dramatic given the potential adverse flip side of neglected and derelict public spaces as harboring crime, disorder, and economic and social decline.<sup>302</sup> These interests typically distinguish neighbors from residents located further away from the public space, who usually use it less frequently because of travel costs or because of the availability of closer-by spaces, consequently being less

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<sup>296</sup> Timothy Williams, *City Says Some Wretched Areas Aren't Worth Fixing*, N.Y. TIMES, July 6, 2006, at B1 [hereinafter Williams, *Wretched Areas*].

<sup>297</sup> Timothy Williams, *Heralded as Parks, but Looking More Like Dumps*, N.Y. TIMES, Aug. 12, 2005, at A1.

<sup>298</sup> Williams, *Wretched Areas*, *supra* note 296 (describing the dereliction of the Bronx's University Woods Park, and quoting Parks Commissioner Adrian Benepe that investment in some spaces is “a waste of money . . . [j]ust because something is in our inventory doesn't mean it's worth taking care of.”).

<sup>299</sup> See CITY OF NEW YORK PARKS & RECREATION, BIENNIAL REPORT 2004–2005 13, available at [http://www.nycgovparks.org/download/biennialReport/parks\\_biennial\\_report\\_2004-2005.pdf](http://www.nycgovparks.org/download/biennialReport/parks_biennial_report_2004-2005.pdf).

<sup>300</sup> See OFFICE OF THE DEPUTY PRIME MINISTER, LIVING PLACES: CLEANER, SAFER, GREENER (2003) (official report on the significant yet limited role that entities such as public-private partnerships, local land trusts, and “friends of” should play in public space stewardship in Britain).

<sup>301</sup> See *supra* notes 173–76 and accompanying text.

<sup>302</sup> Studies have linked the state of a certain public space and the rate of crime and disorder in and around it. See OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN 11–12 (1972); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918–19 (1997).

influenced by the public space,<sup>303</sup> except in the relatively rare cases in which the space has broader-scale non-use values.<sup>304</sup>

The existence of such special interests may explain the emergence of grassroots forms of cooperation and coordination in governmentally owned resources, which are often able to overcome collective action problems even when the local group of users is otherwise unorganized and has no preexisting formal contribution or enforcement mechanisms. In many such cases, the initiators of the group activity are moved to action by the prospects of private gain, but at the same time may have relatively low discount rates and are often able to employ informal monitoring techniques that ensure reciprocity and continuous effort by a sufficient amount of locals to reach a critical level of sustainable cooperation.<sup>305</sup>

*D. Possible Tensions between “Public” and “Commons”*

The common-public mixture can also be, however, a source of friction when the interests of the local group of “commoners” are in tension with those of the general public or other subgroups of it. These conflicts may erupt during each one of the life-stages of the public space: its establishment, its ongoing operation, and its possible conversion or re-designation for a different public purpose.

The community gardens serve as an example for such a possible tension during the establishment stage, or more exactly, in that specific instance, during the process of the formal validation and recognition of the informal vacant-lots-turned-into-public-spaces. Interestingly, as is the case in many impoverished areas in New York City, the contest over the appropriate use of the publicly owned lands—community gardens versus affordable housing—reflected not only a local/general public debate, but also an *internal* conflict among locals themselves.

The ongoing operation of the public spaces may also entail common/public frictions. City supervision may usually be sufficient to ensure that mixed-managed parks such as Bryant Park or Prospect Park would be generally inviting to the public at large, and would even sufficiently tolerate to a certain extent the “undesirables,” such as homeless people. However, more intimate public spaces, and es-

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<sup>303</sup> See, e.g., Been & Voicu, *supra* note 175, at 22 (showing that the positive impact of community gardens on residential property values declines as the distance from the garden grows).

<sup>304</sup> See *supra* note 179 and accompanying text.

<sup>305</sup> See Lehari, *Property Rights*, *supra* note 166, at 42–48 (offering a detailed analysis of this phenomenon).

pecially the community gardens in which the local groups are engaged in communal recreation and in individual plot gardening may experience more frequent problems of exclusionary behavior by the “commoners.” Thus, whereas Greenthumb requires community gardeners to keep the garden open to the general public “for a minimum of ten daylight hours per week between the months of May and October,”<sup>306</sup> the gardeners solely hold the keys to the garden’s gates and employ numerous informal exclusionary practices aimed at ensuring that the garden remains firmly under the control of the local group.<sup>307</sup>

Common/public controversies may also arise when the governmental owner wishes to convert or re-designate the land for a new purpose that will serve the general public or a different subgroup of it, such as when a certain public space is located in the designated path of a highway, or when the government wishes to build a certain public building on the plot, or to sell the land to a private developer and divert the sale revenues for other budgetary purposes.<sup>308</sup> While such potential conflicts may be addressed in advance in cases involving formal mixed management or responsibility-sharing agreements between the city and the sub-local group, in instances involving more informal versions of public commons, the resolution of such conflicts is made by either political power-plays or by the judicial application of general doctrines that do not necessarily take into account the uniquely mixed characteristics of the various types of public commons.

*E. The Over- and Under-Inclusiveness of Current Law*

The legal regime governing issues such as the dedication of lands for public spaces, the permitted uses in these spaces, the relationship between the interests of the abutting neighbors and those of the general public inside and outside the city, and the authority of the city to convert the spaces for other purposes or to alienate the land is mostly a result of state-based common law and legislative enactments. Although diverging between the different states, some principles seem to be generally characteristic of the legal status of public spaces, and particularly parks.

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<sup>306</sup> See Standard “Parks Greenthumb Garden License” Agreement § 8 (on file with author).

<sup>307</sup> See VON HASSELL, *supra* note 276, at 68–74 (describing such inter- and extra-group disputes about the gardens).

<sup>308</sup> See Lehari, *Property Rights*, *supra* note 166, at 3, 48–56 (elaborating on such potential conflicts).

*First*, parkland is either created explicitly through overt provision, such as restrictions set out in a deed of donation or in a specific legislative enactment, or implicitly such as through continuous use by the city of the parcel for park purposes. There is, however, a difference as to which purposes the park may be used based on the nature of the original dedication. Thus, dedication of parkland by private donors (“private dedication”) is construed strictly and generally cannot be overridden even by express legislative authority to the municipality. However, parkland that is created through purchase or condemnation of the land by the city and its dedication for park purposes (“public dedication”) is subject to a more lenient approach when the city later wishes to allow broader uses, such that a general legislative authorization for municipalities to do so will usually suffice.<sup>309</sup>

In a minority of states, New York being the most notable, the courts have developed a public trust doctrine for public parks “to the benefit of the people of the State,” which requires “the direct and specific approval of the State legislature, plainly conferred” to use publicly dedicated parks for any other purpose.<sup>310</sup> Public dedications in such states are thus endowed with an additional layer of legal protection, requiring the city to receive *specific* state authorization.<sup>311</sup>

*Second*, outright alienation of land dedicated for park purposes requires direct legislative approval by the relevant state.<sup>312</sup> The process of state legislative authorization is often lengthy and cumbersome, especially when the park has received state or federal funding.<sup>313</sup> New York State, for example, is generally more willing to allow alienation when the city provides a substitute land for the transferred land.<sup>314</sup> Public re-designation or alienation procedures would usually be accompanied by state or city environmental or land use review procedures.<sup>315</sup>

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<sup>309</sup> See 64 C.J.S. *Mun. Corps.* § 1557 (2006).

<sup>310</sup> See *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1055 (N.Y. 2001) (forbidding the construction of a water treatment plant in the park, absent specific state authority).

<sup>311</sup> See Michael Benn, *Towards Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203 (2006) (critiquing the park/non-park test in New York’s public trust doctrine and a calling for the application a more flexible “public use” test).

<sup>312</sup> See 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28.38 (3d ed. 2005).

<sup>313</sup> See, e.g., NEW YORK STATE OFFICE OF PARKS & RECREATION, *HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKS* 13–14, 21–22 (rev’d ed. 2005).

<sup>314</sup> *Id.* at 21.

<sup>315</sup> See Benn, *supra* note 311, at 217–25 (discussing such requirements in New York State).

*Third*, courts are generally reluctant to recognize the special interests of adjacent residents and businesses in the public space in cases of conflict. In *Reichelderfer v. Quinn*,<sup>316</sup> the Supreme Court of the United States held that although the neighboring owners that filed the suit had enjoyed special benefits by the presence of the Rock Creek Park, such increase in value did not create interests constitutionally protected against diminution in value by the government, even when their properties had been previously assessed for these benefits.<sup>317</sup> More broadly, state courts have emphasized that the beneficiary of the public space is the entire general public of the government, such that the subgroup of adjacent residents is not entitled to special privileges in the public space, let alone to any power of veto over the public park's conversion or alienation.<sup>318</sup>

Current law, which has been shaped against the background of traditional governmental provision and maintenance of public spaces, seems to be both over-inclusive and under-inclusive in dealing with the preservation of public spaces or the regulation of their use. On the one hand, it sets out procedural and institutional barriers to deviation from the public space's original designation. On the other hand, it fails to recognize the evolving reality in which the special affinity of neighbors, alongside more general processes of outsourcing and privatization in cities, fundamentally changes the manner in which many public spaces are regularly maintained and operated. Even if the legal regime were to knowingly advocate the use of steady rules over open-ended, resource-specific standards, it would still need to be reconsidered in order to more appropriately manage the public commons.

#### *F. Providing Mixed Solutions for Public Commons*

As is the case with public-private and private-common property regimes, the growth of mixed public-common regimes requires that the law be readjusted in appropriate cases to create the correct incentives for the protagonists and to properly balance between the "public" and "common" elements. In principle, this revision should apply to the different life stages of public spaces or other resources that are systematically shifting in the direction of mixed property. A full scale development of such a legal regime is outside the scope of this Article.

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<sup>316</sup> 287 U.S. 315 (1932).

<sup>317</sup> *Id.* at 323.

<sup>318</sup> 64 C.J.S. *Mun. Corps.* § 1557 (2006).

One suggestion that I make with respect to otherwise locally uncompensated conversions or alienations of pre-designated public spaces, and which is especially relevant to persistent yet informal models of group stewardship of public resources, is to create a substantive group remedy in favor of the local group of users according to the following principles: *First*, the remedy would be collective and non-pecuniary, focusing primarily on the provision of a nearby substitute facility. *Second*, the remedy would be based on a liability rule principle, meaning that the group would not be entitled to block the public plan until the remedy is assured. *Third*, such a remedy would be awarded only if the affected local group is able to demonstrate the long lasting patterns of significant group stewardship as well as the occurrence of a substantial loss. *Fourth*, the costs of providing the remedy would exceed neither the aggregate social costs of the loss of the public space nor the new project's estimated surplus.<sup>319</sup>

#### V. TRI-LAYERED PROPERTY REGIMES

Some of the dual property regimes portrayed in the previous parts, as well as many other property configurations, involve in fact a tri-layered regime. For example, CICs, which have been depicted as representing a private-common regime, are complemented by significant public regulation that is typical of similar land uses and are naturally subject to other forms of public intervention including property taxation. Indeed, many property regimes in various contexts can be viewed as combining private, common, *and* public traits.

There are, however, several property configurations which are of special interest in the sense that they explicitly seek to balance private, common, and public interests as having more or less equal weight, so that they can be seen as genuine trilateral or tri-layered property regimes. A primary example is "third sector housing," which has been developed in the past few decades as an alternative housing strategy, which seeks to expand homeownership among lower-income households but at the same time to mitigate the increased risks that have brought a high number of such households to mortgage foreclosures and loss of their homes.<sup>320</sup> An interim model

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<sup>319</sup> See Lehavi, *Property Rights*, *supra* note 166, at 85–97 (providing a full elaboration of this suggested remedy).

<sup>320</sup> JOHN EMMEUS DAVIS, SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE RESTRICTED, OWNER OCCUPIED HOUSING 1 (2006), <http://www.nhi.org/pdf/SharedEquityHome.pdf>.

that aims at achieving these goals through a normatively oriented mixed property regime is that of “shared equity housing.”<sup>321</sup>

This basic model, which has been implemented in a number of different versions in the U.S., generally conforms to the following principles: (1) the people who occupy the housing units are homeowners, not tenants; (2) the equity stemming from the property value is shared between the homeowner and the community, meaning that while the homeowner keeps the value of his investments over time on resale, the rise in value stemming largely from community investment both at the initial stage and at later periods remains mostly within the community; and (3) beyond resale revenue allocation, the individual and the community share many other burdens and benefits throughout the different life stages of the housing project.<sup>322</sup>

One particularly intriguing version, briefly noted here, is that of Community Land Trusts (CLTs), currently numbering nearly two hundred throughout the U.S.<sup>323</sup> CLTs, which are community-based non-profit organizations that started to form in the 1970s mainly through the initiative of local activists, have been receiving growing financial and administrative support from municipal and state officials, and as of 1992 also from the federal government, when CLTs became eligible for HOME funding and other forms of HUD assistance.<sup>324</sup> Moreover, in 2001, Fannie Mae, the largest U.S. organization working with lenders to provide affordable loans for families of low and moderate income, approved a Uniform Community Land Trust Rider, which readily facilitates the establishment and expansion of CLTs,<sup>325</sup> although most CLTs in the various cities still include no more than a few dozen housing units.<sup>326</sup>

The basic idea behind the CLT is that a community-based non-profit acquires the land for the purpose of retaining ownership in it

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 2–4.

<sup>323</sup> According to a recent survey, there were 186 CLTs in the U.S. See Rosalind Greenstein & Yesim Sungu-Eryilmaz, *A National Study of Community Land Trusts* (Lincoln Institute of Land Policy, Working Paper WP07YS1, 2007), at 4. Other prominent versions of shared equity housing are Deed-Restricted Homes and Limited Equity Cooperatives. DAVIS, *supra* note 320, at 13–18, 23–31.

<sup>324</sup> *Id.* at 21.

<sup>325</sup> *Id.* at 19–22.

<sup>326</sup> *Id.* at 22. In the past few years, however, local governments have been playing an increasingly dominant role in the creation and financing of CLTs because they view the CLT mechanism as preferable to other forms of governmental activity for ensuring the goals of permanent housing affordability and subsidy retention. This may affect the number of housing units in new CLTs. The City of Irvine, California announced in May 2006 its commitment to fund the creation of nearly 10,000 CLT units within a decade. Greenstein & Sungu-Eryilmaz, *supra* note 323, at 4.

forever for affordable housing purposes. The individual homeowner leases the land for a long period of time (typically ninety-nine years), and is the owner of the *building* that is erected on the land.<sup>327</sup> The lease agreement on the land divides the property bundle between the individual and the CLT both during the tenancy and upon its transfer by inheritance or resale.<sup>328</sup> Thus, for example, the homeowner must occupy the land as his primary residence and may not sublease the land without the CLT's consent.<sup>329</sup> He is required to receive CLT permission for major capital improvements and is obligated to properly maintain the building.<sup>330</sup> If the homeowner fails to pay the mortgage, his interests may be taken over by the CLT.<sup>331</sup>

To keep the land available for affordable housing in perpetuity, even in neighborhoods that enjoy rising values, when the homeowner decides to sell, the CLT repurchases the property itself or monitors and approves the property's direct transfer from seller to buyer. In any case, the resale price is restricted to a formula, which aims at giving the departing homeowner a fair return on his investment, while at the same time giving future income-eligible homebuyers a fair and affordable access to this housing, and so forth for generations to come.<sup>332</sup>

Another intriguing facet of this tri-layered property regime concerns the CLT's board structure. The CLT is an open-membership organization for all those that live within the wider geographic area which the CLT defines as the "community."<sup>333</sup> One-third of the CLT board is comprised of representatives of the leaseholders/homeowners.<sup>334</sup> Another third is elected to represent the interests of other community residents outside the CLT affordable housing units.<sup>335</sup> The final third is elected by the two-thirds who have already been elected, with seats often reserved for the local govern-

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<sup>327</sup> This is the case for a project involving detached housing. When the building is a multi-unit condominium or cooperative, the building's owner may be a CIC or a different non-profit corporation, with individuals owning the different housing units. DAVIS, *supra* note 320, at 18.

<sup>328</sup> *Id.* at 20.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 20–21.

<sup>332</sup> Greenstein & Sungu-Eryilmaz, *supra* note 323, at 29–33.

<sup>333</sup> Whereas in the past the definition of "community" was limited to the boundaries of a single neighborhood, many current CLTs delineate the community's borders more broadly to include multiple neighborhoods, an entire city, or even a whole metropolitan area. DAVIS, *supra* note 320, at 20.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

ment's representatives, private lenders, or other community-based organizations.<sup>336</sup> This tri-layered structure is intended to mediate between the interests of the leaseholders/homeowners as individuals, their interests as a group, and the interests of other stakeholders in the broader "community." Thus, the private, common, and public elements are fascinatingly intertwined in the CLT to implement the constitutive normative goal of sharing entitlements and responsibilities in a mixed-income household community, which is driven by a mixed ideological and social vision.

#### VI. TOWARD A UNIFYING THEORY OF MIXED PROPERTY REGIMES

Though the different regimes portrayed in the previous parts diverge in many respects, I suggest that the systematic growth and expansion of hybrid forms of property regimes can be generally analyzed on a consolidated basis, which would lay out the descriptive and normative underpinnings of mixed regimes with the purpose of delineating a unifying theory for these property configurations.

##### A. *Mixed Optimal Scales and Production Functions*

In his seminal work on property in land, Robert Ellickson identifies the problem of efficient boundaries as implicating the proper choice of a property regime.<sup>337</sup> Illustrating activities in land as falling into the categories of small, medium, and large events, Ellickson suggests that while the regulation of small events conforms to the Demsetzian model of private property parcelization, other simultaneous uses and activities that have a broader effect may necessitate complementary external institutions such as norms of neighborliness, common-law nuisance rules, and government land-use rules.<sup>338</sup> When a significant portion of the uses and activities are large in scale, especially when they are rationally supported by the potential advantages of economies of scale and risk-spreading, efficiency may require the construction of common property regimes containing internal binding institutions for cooperation and coordination.<sup>339</sup>

Later literature, which has built up on Ellickson's insight about the complexity embedded in the simultaneousness of various activities and uses, has conceptually divided property regimes as comprising of distinct, though related, realms of rights allocation and of gov-

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<sup>336</sup> *Id.*

<sup>337</sup> Ellickson, *supra* note 25, at 1332–35.

<sup>338</sup> *Id.* at 1327–34.

<sup>339</sup> *Id.* at 1334–35.

ernance.<sup>340</sup> This approach realized the necessity of occasionally separating between the two realms so that certain bundles of the property sticks relating to specifically important activities and uses that defy formal boundaries would be regulated by substantial group or public governance, although such complexity creates high startup costs for the property system.<sup>341</sup>

While this framework may still be considered as keeping intact a revised yet coherent division between private, common, and public property, market forces and corresponding legal rules have been continuously challenging and shifting these boundaries. As Lee Anne Fennell notes in the context of residential properties in metropolitan areas, there is growing recognition that the value of properties is often determined not only by the onsite attributes, but moreover by people, things, services, and conditions lying beyond what we traditionally refer to as the property's boundaries.<sup>342</sup> Beyond physical externalities which have been long explicitly considered and addressed in the law, the growing prevalence of preferred spatial associations comprising of the "right" neighbors which provide and ensure the maintenance of the "correct" neighborhood ambience,<sup>343</sup> has been a major force behind the creation and legal validation of new property institutions such as CICs that create an explicit mix both in the rights allocation and in the governance structure. In this and other contexts, collective action problems are addressed by the creation of new types of regimes located in interim points along the sides of the private-common-property triangle and inside it. More broadly, the proliferation of legal phenomena such as CICs, although often socially contestable, demonstrates the institutional potential in extending the choices of property regimes so as to attain certain values and goals in light of changing realities or shifting normative conceptions.

Yet there is obviously more to efficiency-based property arrangements than the issue of boundaries and externalities. As Demsetz himself addressed in his own sequel, "*Toward a Theory of Property Rights*

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<sup>340</sup> See Heller, *Common*, *supra* note 3, at 330–32; see also Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479, 479–84 (2000) (offering a slightly different, yet basically similar division).

<sup>341</sup> Smith, *Two Strategies*, *supra* note 3, at 470, 474–79.

<sup>342</sup> Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WILLIAM OATES* 163, 164–68 (William A. Fischel ed., 2006).

<sup>343</sup> Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1228 (2006).

II,”<sup>344</sup> the decision about the preferred mechanisms for control of resources involves a host of other issues such as the ability to obtain certain societal goals through the work of markets, the incentive structure for productivity in different institutions, the nature of the personal relations between members in a given community, and the complexity level of different organizations.<sup>345</sup> Whereas Demsetz still believes that these parameters point toward the private vertex, lessons learned in the U.S. and throughout the world—as presented in this Article, for example in the Public-Private Partnerships context<sup>346</sup>—demonstrate that the correct answer is often to be found at the interim point, and that any property equilibrium may be challenged by the occurrence of endogenous and exogenous changes that Demsetz himself had identified in his original work as necessitating a shift in property regimes.<sup>347</sup>

While my analysis of mixed property is by no means antagonistic to the “bundle of rights” analytic concept of property or to the exclusion/governance literature, and rather may be seen as an extension of them, it is distinctive in that it points to (1) the proliferation of systematic social institutions embracing an explicit mixture in both the rights allocation and the property governance axes; (2) the dissonance between this growing phenomenon and the current doctrinal framework that is still much influenced by the public/private dichotomy (or actually a trichotomy); (3) the potential normative advantages of explicit mixed institutions, past and present, over the more conventional paradigms of property

*B. Mixed Non-Utilitarian Values*

To say that property is not only about efficiency or utility is an axiom (not to say a cliché). As briefly mentioned in Part I, proponents of “pure” private property rights have advocated them also in the name of liberty, autonomy, political freedom, etc. Similarly, the creation of publicly-owned resources has not been restricted to public goods (in the narrow economic sense),<sup>348</sup> but was, and is, also a tool to attain societal goals such as vertical equity, social integration, or preservation of human dignity. Ideologies and moral visions of the world have been playing, and will continue to play, a key role in the way we shape property regimes.

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<sup>344</sup> Demsetz, *Theory II*, *supra* note 15.

<sup>345</sup> *Id.* at 657–65.

<sup>346</sup> See *supra* Part II.A.

<sup>347</sup> Demsetz, *Theory I*, *supra* note 7, at 350.

<sup>348</sup> See *supra* note 38 and accompanying notes.

What seems to typify many of the mixed property regimes is that they are based on explicitly-mixed ideologies, combining, or more exactly compromising, desires for individualism and economic maximization with notions of equity and solidarity. The Renewing Kibbutz explicitly defines itself as located midway between individualism and collectivism, and has correspondingly created a mixed property regime. New York City currently advocates ideas of economic efficiency and self-sustainability alongside its basic commitment to publicness, openness, and democracy in the way it manages its public spaces. CLTs mediate between the desire of the homeowner to enjoy a value gain on the property upon resale and their commitment to the community and to future homeowners who wish to enjoy the same access to affordable housing that the seller had initially enjoyed. Sometimes, the implementation of such a mixed ideology ends up in resounding failure.<sup>349</sup> In such instances, the circle (or actually, the triangle) simply cannot be squared. This does not mean, however, that conscious societal decisions to follow a middle ideological or moral pattern cannot be successfully translated, in appropriate cases, to hybrid property regimes.

Mixed ideologies may not always necessitate the creation of explicitly mixed property regimes. For example, a growing number of authors have challenged private property from within, arguing that private property itself is or should be laden with principles of social responsibility and distributive justice,<sup>350</sup> and calling to reexamine specific exclusionary or self-promoting bundles in the property stick.<sup>351</sup>

I do not argue that private property should be libertarian in nature, and there may be a host of good reasons to limit exclusionary property rights in the name of public or community interests, or otherwise to craft private property regimes with the purpose of attaining goals such as equity. An interesting example is the evolution of private property rights in water in the Western United States. The Colo-

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<sup>349</sup> See NATALIE MEHRA, *FLAWED, FAILED, ABANDONED: 100 P3S—CANADIAN & INTERNATIONAL EVIDENCE 1* (2005), <http://www.healthcoalition.ca/ffaf.pdf> (reporting alleged Public-Private Partnerships failures, which at times made necessary full republicization of resources); see also *infra* Part VI.C.

<sup>350</sup> See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 20–21 (2006); David Lametti, *The (Virtue) Ethics of Private Property: A Framework and Implications*, in *NEW PERSPECTIVES ON PROPERTY LAW, OBLIGATIONS AND RESTITUTION* 39, 44–56 (A. Hudson ed., 2003); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767–78 (1999).

<sup>351</sup> Lior Strahilevitz has critiqued the two traditional pillars of private ownership: the right to destroy and the right to exclude. Lior Jacob Strahilevitz, *Information Asymmetries and the Right to Exclude*, 104 MICH. L. REV. 1835 (2006); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

rado Constitution, along with subsequent legislation, regulation, and case law, created a unique “prior appropriation” system designed to combat monopolization and speculation by riparian or upstream owners, by giving a broader group of stakeholders the chance to appropriate water required for their “beneficial use.”<sup>352</sup> Private rights in water were thus designed with an egalitarian ideology in mind (although one can actually argue that certain features of the regime, such as substantial limits on trade, effectively created a *mixed* regime).

However, such approaches to private property, as they are void of any inherent normative content, have their limits. Designing a private property regime means that individuals are allocated formal rights as well as broad decisionmaking powers with respect to resources. Whereas the initial allocation of rights may change based on a certain normative viewpoint (as the example of water rights indicates), and some limits may be placed on the boundaries of such rights on an ongoing basis while still considering the regime to be “private,” the very decision to place prominent powers in the hands of individuals does have a certain meaning and does bear some foreseeable consequences that cannot simply be dismissed as nonexistent. Not always can certain goals and values be attained through a private property regime for a certain resource, just as the case may be for public or common property regimes.

And this is exactly where institutionalized property mixtures come into play. When the results emanating from a certain property regime are deemed unsatisfactory, society’s collective decisionmaking bodies may very well *change* the property regime, including a switch to a uniquely-crafted property mixture. Thus, it seems that those advocating certain values such as social responsibility or distributive justice should focus their attention on suggesting a systematic property regime that is most suitable for these purposes rather than simply viewing private property as a useless, freely-manipulated legal concept.

### C. *Flexibility in Trial-and-Error*

A change in a property regime regulating a certain resource may often be a daunting task. Beyond the inherent transition costs that typify any sort of legal change,<sup>353</sup> socially desirable changes in property regimes may often be delayed or blocked altogether by politically powerful actors who are anxious mainly about the distributive out-

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<sup>352</sup> David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 *ECOLOGY L.Q.* 3, 41–56 (2005).

<sup>353</sup> See Michael P. Van Alstine, *The Costs of Legal Change*, 49 *UCLA L. REV.* 789, 816–40 (2002).

comes of the proposed change in the legal status-quo.<sup>354</sup> At least in some instances, a switch from a certain “pure” property regime to a mixed regime that combines substantial elements from the previous regime, rather than a wholesale switch to another pure property regime, may prove to be more feasible by mitigating the level of resistance, at least to some degree.

When the mixed property regime is considered optimal regardless of the issue of possible opposition, then such a regime may enjoy the best of both worlds. This is very much the case with the Renewing Kibbutz. The Renewing Kibbutz was designed based on a model which sought to combine partial privatization and rewards for individual productivity alongside the assurance of a redistributive “safety net” for disadvantaged members and the preservation of substantial group control over life in the Renewing Kibbutz. This interim ideological approach also proved instrumental in alleviating the resistance of members who had good reasons to fear the change, especially the elderly generations who had founded the cooperative Kibbutz or lived in it their entire productive adult lives, and thus had no private savings.<sup>355</sup> In other instances, the choice of a mixture may be a conscious compromise, for example, when a deregulatory switch to a market regime is constrained by a “grandfathering” of rights to current stakeholders that threaten to veto the change.<sup>356</sup>

This relative advantage of mixed property regimes may also be manifested when such a regime yields unsatisfactory results, and the policymaker wishes to redesign the regime by either amending it or, in some cases, by reverting back to the original “purer” regime. In such instances, the mixed nature of the property regime may make it easier to correct errors that are revealed following the trial.

The British railway system is a case in point. This industry, which had been nationalized during the 1940s but had been suffering chronic budgetary and infrastructure problems causing a sharp decrease in demand by consumers, underwent a swift process of privatization during the early 1990s under which track maintenance and operation were outsourced and train services to passengers were franchised to private firms, while both functions still remained heavily financed by the public. Within a few years, it became obvious that

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<sup>354</sup> See *supra* notes 16–19 and accompanying text.

<sup>355</sup> See Vered Levi-Barzilay, *At the Top of the Food Chain*, HAARETZ.COM (Eng. ed.), July 2, 2004.

<sup>356</sup> See Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 290–96 (2000) (arguing that switches to regimes of tradable pollution rights in the U.S. took place only when the initial permits were not auctioned, but grandfathered, to existing, politically powerful polluters).

this model of privatization was failing miserably: maintenance levels were poor, as tragically revealed by a deadly accident in Hatfield in 2000; franchised train companies were unable to respond to changing needs especially because of the rigid structure of the franchise agreements; the firms that were supplying and leasing trains and carriages to the operating companies were blamed with over-charging; and the multitude of governmental entities charged with financing and regulating the industry, with unclear division of responsibilities between them, further added to market distortions and to a major waste of public funds.<sup>357</sup>

Following these failures, the British government has taken several steps. It terminated the outsourcing railway maintenance agreements for compensation and currently provides these services in-house by Network Rail, a non-profit body financed by public funds and regulated by the Office of Rail Regulation (ORR).<sup>358</sup> ORR has also recently threatened to start an antitrust inquiry against the train-leasing companies unless they agreed to cut the prices charged from the publicly-subsidized train operators.<sup>359</sup> More broadly, the government has designed a new scheme whereby it will take charge of the railway strategy by setting the level of public expenditure and making decisions on what should be purchased, and ensuring that other governmental agencies will be given clearer mandates and will work closely with private firms to provide a renewed scheme of collaboration.<sup>360</sup>

These changes were made possible, both legally and politically, largely because of the fact that even under the privatization scheme, the formal property regime governing British railways was mixed and maintained sufficient public powers (alongside substantial public funding) over the industry to allow for such changes when the model proved to be flawed. Although in theory the government could have always re-publicized fully privatized resources by using its taking power, there is no doubt that this latter measure would have proven much more burdensome and costly, both financially and politically.

Evidence from other countries about such reorganizations, occasionally taking even the form of wholesale re-publicization, similarly

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<sup>357</sup> See HER MAJESTY'S DEPARTMENT OF TRANSPORTATION, *THE FUTURE OF RAIL—WHITE PAPER 10–18 (2004)* [hereinafter H.M.T., *THE FUTURE OF RAIL*].

<sup>358</sup> For example, one firm, Carillion, was paid £17.6 million for contract termination and transfer of its assets to Network Rail, in a move aimed at saving £100 million of public funds annually. Andrew Clark, *Carillion Receives £17m Rail Payoff*, *THE GUARDIAN*, June 2, 2004, at 18.

<sup>359</sup> See David Teather, *Train-leasing Banks Face Inquiry amid Claims that Public is Being Ripped Off*, *THE GUARDIAN*, June 29, 2006, at 27.

<sup>360</sup> H.M.T., *THE FUTURE OF RAIL*, *supra* note 357, at 6–8, 41–52.

reveals the potential flexibility embedded in mixed regimes in matters facing constant changes in market or public conditions.<sup>361</sup> While there may be cases, for example in the Public-Private Partnerships context, in which the government would neglect to take advantage of this better potential for change due to apathy, political capture by current private stakeholders, or loss of institutional knowledge that practically prevents the government from regaining public control, the formal structure of such partnerships is a significant tool that may facilitate required changes in the property equilibrium.

*D. Integrity of Legal Categories*

The distinction between private law and public law continues to constitute a great challenge and is a source of constant debate in legal scholarship. The rival opinions as to whether an authentic line can be drawn between the two realms—in the sense that each realm maintains a distinct, coherent integrity of underlying principles that does not collapse into mere tautology or into indistinguishable assimilation and diffusion between the two realms—will probably continue to clash in the future, and this Article will not even attempt to fully resolve the matter.<sup>362</sup>

The debate over such line drawing is not of course “the sole and despotic dominion”<sup>363</sup> of law. The public/private distinction is considered one of the “great dichotomies” of Western thought,<sup>364</sup> and is central to many fields in the humanities and the social sciences. As Jeff Weintraub notes, the inherent difficulty in addressing this issue stems largely from the abundance of definitions and types of organizing categories and the lack of a unifying theory, or at least of a conscious dialogue between these different worlds of discourse.<sup>365</sup> Thus,

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<sup>361</sup> See, e.g., Natalie Alcoba, *City Eyes Takeover of Water, Sewer Operations*, THE HAMILTON SPECTATOR (Ontario, Can.), Aug. 31, 2004, at A1 (reporting the republication of water and watershed facilities in the City of Hamilton); Adrian Rollins, *La Trobe Hospital Return to Public Control*, THE AGE (Melbourne, Austl.), Oct. 24, 2000, at 4 (reporting the early termination of a twenty-year contract for the private operation of a regional hospital in the Australian State of Victoria).

<sup>362</sup> See N.E. Simmonds, *Justice, Causation and Private Law*, in PUBLIC & PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 149 (Maurizio Passerin d'Entrèves & Ursula Vogel eds., 2000) (analyzing the debate over the integrity of such a distinction).

<sup>363</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1766).

<sup>364</sup> NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 1–3 (Peter Kennealy trans., 1989).

<sup>365</sup> Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1, 2–4 (Jeff Weintraub & Krishan Kumar eds., 1997).

in the classic liberal tradition, the distinction is largely drawn between the administrative state representing the public sector and the market reflecting the private sector.<sup>366</sup> A different type of taxonomy, advanced by writers such as Hanna Arendt<sup>367</sup> and Jürgen Habermas,<sup>368</sup> designates the “public sphere” as the realm of political community, in which members actively participate in collective decisionmaking, as opposed to matters that are chiefly of private concern. Here, the different arenas may depart from the liberal distinctions. Just as the “public realm” can exist outside the state (such as in voluntary organizations), an administrative state which lacks active participation cannot be regarded as genuinely “public.”<sup>369</sup>

Yet another type of public/private discourse, largely the province of social theory, touches upon the tension between privacy/intimacy and social interaction. Whereas some writers such as Erving Goffman have stressed the importance of separation,<sup>370</sup> others such as Jane Jacobs have seen outside-the-state, unmediated interaction between persons, even if apolitical in nature, as a major positive force of a vibrant human society.<sup>371</sup> The recognition of such different, co-existent forms of sociability has prompted calls for departing from the public/private dichotomy. Sociologist Alan Wolfe has called, for example, to define a new realm of *publics*, distinct from private and public, which would be comprised of families and kinship networks, associations, ethnic and racial groups, and other types of sub-society communities.<sup>372</sup> While such a sociological trichotomic delineation may translate conveniently to the property private-common-public division, the law has broader lessons to learn from the constant efforts in other fields to define and redefine the borders between the different spheres of life, recognizing the essentiality of line-drawing but at the same time understanding that these distinctions are uncertain, changeable, and often misleading.

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<sup>366</sup> *Id.* at 8–10.

<sup>367</sup> HANNA ARENDT, ON REVOLUTION 30–31, 114–20 (1962).

<sup>368</sup> JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 208–27 (Thomas Burger trans., 1989) (1962).

<sup>369</sup> LUKE GOODE, JÜRGEN HABERMAS: DEMOCRACY AND THE PUBLIC SPHERE 3–28 (2005) (offering a recent analysis of Habermas’s concept of the “public sphere”); HABERMAS, *supra* note 368, at 160–61.

<sup>370</sup> ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 115 (1959).

<sup>371</sup> JANE JACOBS, THE LIFE AND DEATH OF GREAT AMERICAN CITIES 71–73 (1961).

<sup>372</sup> Alan Wolfe, *Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 182, 196–201 (Jeff Weintraub & Krishan Kumar eds., 1997).

For property law, which sets out the ways in which we handle resources and the human relationships around them, this means that property regimes may be placed in various points along the sides of the property triangle and within it, and that such placements are meaningful in the sense that they should implicate the legal rules that govern the property regime. Property mixtures, namely those configurations that are located at a relative distance from the triangle's vertices, can be the subject of distinctive legal regimes that properly meet the societal needs at the basis of the mixed regime while at the same time ensuring a sufficient level of stability and certainty that is paramount for a legal system as a whole. The borders between private, common, and public property can be crossed at times without nullifying the underlying importance of such basic divisions. As demonstrated by the different mixed property regimes portrayed in this Article, legal regimes may be built and particular issues can be addressed by combining long lasting traditions with legal innovation to create a tailor-made, socially desirable mixed form of resource allocation and management.

#### CONCLUSION

Pure property regimes are useful classifications and points of departure, but in today's complex and dynamic world, more than ever before, they do not represent a considerable portion of the ways in which property rights are structured, allocated, and enforced. As Carol Rose has demonstrated, even William Blackstone's famous depiction of private property as endowing absolute rights was more wishful thinking than a depiction of the doctrinal reality of his time—an anxiety-relieving rhetoric of clarity uttered against a complex background of overlapping interests and mixed societal values.<sup>373</sup>

At the same time, however, the fact that the current landscape of property regimes is richer, and consists of various configurations that are located along endpoints and interim points on and within the property triangle, is far from viewing property as an inherently empty concept that can be freely manipulated,<sup>374</sup> or which simply collapses into an ad hoc expression of societal values or other types of preferences in the resolution of a specific scenario.<sup>375</sup>

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<sup>373</sup> Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998).

<sup>374</sup> See Merrill & Smith, *supra* note 8, at 364–66, 385–94 (offering a critical review of this line of thought, which is allegedly supported by the post-Hohfeld realist writing, as well as by more contemporary schools such as the economic analysis of law).

<sup>375</sup> See Simmonds, *supra* note 362, at 164–69 (critiquing this position in the more general context of private law rights).

Richness does not mean nihilism. The construction of various property configurations, each with its unique bundle of entitlements and responsibilities, can be made in a way that both better meets the changing needs of society and provides the platform for the possibility of future change, and at the same time maintains a sufficient level of coherence and certainty that validates property law as a meaningful mechanism that stands firmly on its own feet. As this Article has demonstrated, the reality of successful mixed property regimes, alongside the need to legally amend or update other such regimes so as to enable them to more appropriately achieve the normative goals that stand at the basis of their establishment, point both to the continuing integrity of property law and to its potential to address future promises and challenges.