

Re-Placing Property

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This Article analyzes the complex relationship between property and placemaking. Our most basic property and land tenure choices—including the design of the fee simple itself—shape people-place relations in powerful ways. By unearthing this important relationship between property and placemaking, this Article also reveals how pervasive—but unorganized—claims about place and place attachment already are across a range of modern land conflicts. Because property theory has not been fully transparent about many of these placemaking effects, our property choices often result in outcomes that are unequal, inconsistent, and opaque, prioritizing some existing place relations while ignoring or rejecting others. By building a more comprehensive placemaking account—with examples from Indigenous pipeline protestors to the absent and now-urban heirs of family farms and the emergence of new build-to-rent suburban housing divisions—this Article introduces a new taxonomy for evaluating the relative protection we afford to various place and place-attachment claims. This new framework separates the individual, collective, and ecological benefits of positive place relations from the risks of either overprotected place attachments (as in the case of hereditary land dynasties and exclusionary wealth) or land ownership without any attachment at all (as in the transformation of land and housing into asset classes for commodification and financialized capture).

This clearer focus on placemaking also puts property law—and land tenure—at the center of core social, economic, and climate challenges, including growing institutional and foreign investment in U.S. farmland (as rural landscapes depopulate and agriculture becomes even more industrialized) and private equity's increasing appetite for single-family housing (as the United States' glaring wealth gap continues to expand). It also forces us to confront property's ongoing role in the dispossession of groups, cultures, and communities that are not (or are no longer) recognized as legal owners and our repeated failure to accommodate the access needs of individuals not born into hereditary land or wealth. Weaving together both rural and urban case studies, this Article ultimately offers novel entry points to some of property's perennial problems, including pervasive distributional inequities, while

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providing new language and a fresh lens for reimagining more just and sustainable property relations for our rapidly changing world. In a final series of property-based personal stories, the article centers new forms of access rights—including some public rights over private properties—as instrumental to reconnecting and collectively reimagining the kinds of places we want to make together.

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“And we will live here,” said Omakayas, “won’t we? For a long time to come?” Nothing would ever take the place of her original home, but Omakayas also loved this place. She loved this lake with its magical islands, each so different “Yes, we will live here,” said Nokomis, “and I’ll make certain that you know everything that I know.”¹

—Louise Erdrich

“Property is a human invention, and one that we must reinvent as conditions change.”²

—Lee Anne Fennell

INTRODUCTION

Property law preoccupies itself with possession. One of the first maxims law students learn is that possession is nine-tenths of the law.³ Property law tends to privilege the first possessor for multiple reasons: Actual possession efficiently communicates one’s claim of ownership and rewards more industrious actors.⁴ The first person to achieve actual possession claims ownership over a more casual (or ineffective) pursuer.⁵ And, valuing first or longstanding possession is part of our collective recognition that deep attachments to places and things matter. Justice Oliver Wendell Holmes, for example, famously justified the possibility of acquiring title by adverse possession—a property law doctrine that rewards *illegal* possession with *legal* title, if a trespasser has been in possession long enough—by explaining “that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.”⁶

¹ LOUISE ERDRICH, *THE PORCUPINE YEAR* 181 (2010).

² Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1516 (2016).

³ See, e.g., JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, MICHAEL H. SCHILL & LIOR STRAHILEVITZ, *PROPERTY* 54 (9th ed. 2017).

⁴ See generally Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (focusing on possession as act of communication).

⁵ See, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

⁶ Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS*

And yet, despite all of this emphasis on possession's primacy as explanatory rationale for property choices, the reality of modern law is quite different. First, we don't recognize all possession equally. The Indigenous inhabitants of this country are treated like a footnote in the story property law tells us about the importance of first possession.⁷ Prior to contact with Europeans, Indigenous peoples inhabited the full expanse of this continent in multiple self-sustaining and interlocking societies, with diverse land-tenure structures, systems of trade, foodways, and community-land relations. The Hopi, for example, spent centuries adapting dryland farming techniques to grow corn in the near-desert terrain around the Hopi Mesas long before any European ventured that far west.⁸ And the trading villages of the Wampanoag and other Indigenous groups in the East were so densely populated that early French explorers turned away at the sight of so many people already living there.⁹ These and other diverse land relations certainly qualified as possession within any reasonable sense, but we tend to erase their history in favor of a simplified story of American expansion that depicts westward settlement with waves of enterprising new owners filling up an otherwise empty landscape.¹⁰

And, even this image of western settlement depicts a form of land relations—and property and possession—that is mostly fantasy, at least today.¹¹ We learn in history that pioneering American settlers populated the West by unfurling a carefully designed

417, 417–18 (Max Lerner ed., 1943) [hereinafter Holmes Letter]; see also Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away.”); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2456–63 (2001) (offering various interpretations of the Holmes quote).

⁷ See K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1995–2004 (2020) (framing property in terms of pervasive erasure of histories of dispossession).

⁸ Rosanda Suetopka Thayer, *Hopi Farmers Continue to Utilize Centuries-Old Dry Farming Methods*, NAVAJO-HOPI OBSERVER NEWS (June 29, 2010), <https://perma.cc/A7EU-2RTT>; see also C. Daryll Forde, *Hopi Agriculture and Land Ownership*, 61 J. ROYAL ANTHROPOLOGICAL INST. GR. BRIT. & IR. 357, 361–63 (1931).

⁹ See, e.g., *The American Experience: We Shall Remain: After the Mayflower* (PBS May 11, 2009) (describing one French explorer's decision not to colonize the East Coast because there were “too many people” already living in populous villages there).

¹⁰ See Jessica A. Shoemaker, *The Truth About Property*, 120 MICH. L. REV. 1143, 1147–52 (2022).

¹¹ See *infra* Part IV.B.1 (outlining modern farmland dynamics); see also Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1712–21 (2021) (describing how one aspect of original land allocation design that has prevailed is the overwhelming predominance of racialized white land ownership).

landownership grid across empty space. Early land distribution policies—including the Homestead Act¹²—incorporated such a plan.¹³ The project was to distribute land rights broadly and progressively across the West, to connect whole generations of new immigrants to the land in an egalitarian way, to reward productive improvement and agrarian stewardship, and to create a democratic society of free, independent, landowning citizens.¹⁴ But scan across most rural landscapes today, and it looks almost nothing like this.¹⁵

Instead, rural land ownership in the United States is now increasingly concentrated and financialized, with pension funds, real estate investment trusts (REITs), billionaires, and other powerful investors (as well as some foreign governments) snapping up wide swaths of agricultural land as part of lucrative investment portfolios.¹⁶ A single family in California owns over 2.4 million acres, the equivalent of more than three Rhode Islands.¹⁷ The top five largest landowners in the United States own more land than all Black Americans combined.¹⁸ At least three hundred private equity funds are specifically oriented to food and agriculture,¹⁹ and Microsoft cofounder Bill Gates is now the largest private owner of farmland in the United States, with over a quarter-million acres in his control—a position he has confirmed is a function of his passive investment objectives, not any social or ecological values or concerns.²⁰ Chinese interests control nearly \$2 billion in farm, ranch, and forestry land in the United

¹² 43 U.S.C. § 161 et seq. (1891) (repealed 1976).

¹³ See generally GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2020).

¹⁴ See RICHARD EDWARDS, JACOB K. FRIEFELD & REBECCA S. WINGO, *HOMESTEADING THE PLAINS: TOWARD A NEW HISTORY* 1–7 (2017).

¹⁵ It is questionable whether it ever did. See *infra* Part II.A (cataloguing pervasive land speculation).

¹⁶ See *infra* Part IV.A. See generally MADELEINE FAIRBAIRN, *FIELDS OF GOLD: FINANCING THE GLOBAL LAND RUSH* (2020) (exploring the financialization of agricultural land and dramatic “land grab” trends in both the United States and Brazil).

¹⁷ Cary Estes, Jeff Etheredge, Lisa Martin & Katy Richardson, *The Land Report 100: Our Comprehensive Survey of the Nation’s Leading Landowners*, *THE LAND REPORT*, Winter 2022, at 114, 116.

¹⁸ Antonio Moore, *Who Owns Almost All America’s Land?*, *INEQUALITY* (Feb. 15, 2016), <https://perma.cc/46EZ-VG9G>.

¹⁹ GRAIN, *Barbarians at the Barn: Private Equity Sinks Its Teeth into Agriculture 2* (2020), <https://perma.cc/VT8Q-BL56>.

²⁰ See Eric O’Keefe, *Farmer Bill*, *THE LAND REPORT* (Jan. 11, 2021), <https://perma.cc/PT33-QGRH>; see also Hannah Packman, *Why Farmers Are Worried About Bill Gates (And Other Non-Farming Land-Owners)*, *NEB. FARMERS UNION* (Mar. 29, 2021), <https://perma.cc/PG4S-KMK5>.

States.²¹ Other sources report foreign investors control, in total, at least 28.3 million acres, encompassing a land mass “about the size of the state of Ohio.”²²

As these ownership patterns change, so do rural landscapes and rural communities. Many rural places are struggling with dwindling populations and declining economic fortunes.²³ These outside investors will never walk these physical spaces—much less enjoy personal attachment to the natural and human communities in which they exist—but property law says they own and control them. This means not only that many of the benefits of increasingly industrialized forms of agriculture are exported to faraway places, but also that the costs of these choices are externalized and borne by local communities and the landscape itself, more directly than any faraway owner.²⁴ This kind of concentrated, commodified landownership flattens land use choices and functions as a form of absentee governance, not just ownership, over vast landscapes and spaces, leaving many rural residents feeling abandoned for extractive ends.²⁵

Similar trends exist in urban and suburban spaces. The *Washington Post* reported that, in 2021, “investors bought nearly one in seven homes sold in America’s top metropolitan areas, the most in at least two decades.”²⁶ Some experts estimate that institutional investors are on track to control 40% of single-family

²¹ Ryan McCrimmon, *China Is Buying Up American Farms. Washington Wants to Crack Down.*, POLITICO (July 19, 2021), <https://perma.cc/7JL2-GZBY>.

²² Johnathan Hettinger, *As Foreign Investment in U.S. Farmland Grows, Efforts to Ban and Limit the Increase Mount*, THE COUNTER (June 6, 2019), <https://perma.cc/7S3A-CF8X>.

²³ See John Cromartie, *Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change*, U.S. DEPT AGRIC. (Sept. 5, 2017), <https://perma.cc/FN5C-FMKS>.

²⁴ See Anthony Schutz, *Agriculture Is (Not) Rural*, THE RURAL REV. (Apr. 14, 2021), <https://perma.cc/5Z3C-G8TK>; see also Lynda L. Butler, *Property, Climate Change and Accountability*, in HANDBOOK OF PROPERTY, LAW, AND SOCIETY 287, 292–94 (Nicole Graham, Margaret Davies & Lee Godden eds., 2022) (discussing changes in rational actor calculations in a globalized world).

²⁵ See LOKA ASHWOOD, FOR-PROFIT DEMOCRACY: WHY THE GOVERNMENT IS LOSING THE TRUST OF RURAL AMERICA 148–52 (2018) (detailing the historical deregulation of corporate firms that own and develop U.S. land); see also *infra* Part III.B.2 (framing land concentration as a defeat of private property designs and purposes).

²⁶ These investor purchases are also disproportionately concentrated in “southern cities and Black neighborhoods.” Kevin Schaul & Jonathan O’Connell, *Investors Bought a Record Share of Homes in 2021. See Where.*, WASH. POST (Feb. 16, 2022), <https://www.washingtonpost.com/business/interactive/2022/housing-market-investors/>.

rental homes by 2030.²⁷ Foreign investors already account for nearly one-third of current institutional investment in single-family homes in the United States.²⁸ On just one block in Nashville, nineteen of thirty-two homes were purchased in a six-year period by a single billion-dollar private equity investment venture called Progressive Residential, which purchases up to two thousand houses a month.²⁹ The 2008 housing crash changed many things: in 2008, approximately three million homes were foreclosed.³⁰ Housing prices plummeted, and many experts began to question whether there had been too much promotion of homeownership when home rental might be more affordable and realistic, at least for some.³¹ Investors swept in, promising to make housing more accessible by renting single-family houses to folks who could not otherwise afford to buy even entry-level homes—whether because they had lost their homes in the crash or because they were no longer eligible for a mortgage under tightened lending standards.³²

In the case of the sample Nashville block now majority-owned by Progressive Residential, the *Washington Post* reports that the venture makes “substantial profits for wealthy investors around the world while outbidding middle-class home buyers and subjecting tenants to what they allege are unfair rent hikes, shoddy maintenance, and excessive fees.”³³ Although the nature and quality of the ensuing landlord-tenant relationships are disputed,

²⁷ Carlos Waters, *Wall Street Has Purchased Hundreds of Thousands of Single-Family Homes Since the Great Recession. Here's What That Means for Rental Prices*, CNBC (Feb. 21, 2023), <https://perma.cc/VJ7F-XT5Q>.

²⁸ See National Security Moratorium on Foreign Purchases of U.S. Land, H.R. 6383, 117th Cong. § 2(1) (2022).

²⁹ Peter Whoriskey, Spencer Woodman & Margot Gibbs, *This Block Used to Be for First-Time Home Buyers. Then Global Investors Bought In*, WASH. POST (Dec. 15, 2021), <https://www.washingtonpost.com/business/interactive/2021/investors-rental-foreclosure/>.

³⁰ *Id.*

³¹ See Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349, 370–71 (2014) (noting that after the 2008 subprime mortgage crisis “society may be reconsidering the importance it has long placed on homeownership—and perhaps even on individuals’ personal attachments to their homes”).

³² Prior to 2008, the moral pull of the American homeownership ideal seemed to keep many investors away from proposals to buy up housing stock. Changing views of homeownership, combined with reduced housing prices and improved rent-management technology, opened a new window for investors. See Brett Christophers, *How and Why U.S. Single-Family Housing Became an Investor Asset Class*, 49 J. URB. HIST. 430, 437–45 (2021).

³³ Whoriskey et al., *supra* note 29.

the finances of Progressive Residential are not. The plan projected 15–20% annualized returns and sought wealthy investors who could contribute at least \$2 million each; ultimately, promoters raised over \$1 billion from the confidential solicitation.³⁴ The project “made legal arrangements so [its] foreign investors would have limited exposure to U.S. taxes.”³⁵ And the plan paid off: “By 2019, according to a news release at the time, the venture had nearly doubled investors’ equity.”³⁶ But in the neighborhood, housing unaffordability became extreme, and the Republican-elected county property assessor described the investment venture as “equity-mining our community—removing generational wealth for an entire demographic of people.”³⁷

All of these issues—whose place attachment (and first possession) counts for ownership and access, whether an owner can control land without ever physically experiencing it or otherwise internalizing the local effects of nonlocal decisions, and even how we balance the relative rights of landlords and tenants (whether that landlord is Progressive Residential or the absent heir of a prior owner)—are property questions that have dramatic effect on how we shape and constitute peoples’ relationships to the communities and spaces they inhabit. These are difficult questions that require difficult tradeoffs. Lease options, for example, can be critical for flexibility and (when done well) housing accessibility, but if property law makes that tenancy too precarious—the rights of tenants too fragile and subordinate to stronger rights of absentee landlords or even other political voices or neighbors—then that status as a tenant will impact the community and the place.³⁸ If we turn the property dial in the other direction and either prefer landlords who hold some loyalty and belonging in the community themselves or give tenants more security in their legal possession, then we may impact the economy for housing, but we may also foster productive and powerful attachments that have other positive effects.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Similar trends occurred in other housing stock. *See infra* Part II.C.2.

³⁸ *See, e.g.,* Kellan Zale & Sarah Schindler, *The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267, 354–55 (critiquing many of the perceived positive externalities of homeownership vis-à-vis long-term renters); *see infra* Part IV.B.3 (discussing use of “preserving neighborhood character” ideas by anti-affordable housing activists).

In some sense, this balancing is not new. In every property choice, we balance property's plural functions. In original property allocations, possession helped us simultaneously achieve multiple ends. Favoring possession allowed us both to promote efficient resource use (the ease of determining a claimant with certainty, the value of industrious production) and, at the same time, respect and honor the place of humans within fragile landscapes and complex communities (acknowledging an attachment to that tree in the cleft of the rock). In the case of original resource and land allocations, both values—efficiency and fostering positive attachments—are often aligned, at least for the folks making the choices. The first person to possess the fox (or other fugitive resource) owned it because that rule served both values *at the time*.³⁹ But, in a well-worn property story, we also soon came to realize the risks of overconsumption that accrued in a world of pure law of first capture rights.⁴⁰ So, property law adjusted, as it does—regulating when and how a person can drill for oil, putting limits on hunting, and metering groundwater rights—in order to temper and manage the incentives and abilities of users to over-extract scarce resources.⁴¹ And we are still, on an ongoing basis, readjusting.⁴²

Can we do the same now for property's role in shaping people-place relations? Should we? In this Article, I seek out to flush out not only *how* default property rules and institutions shape modern place experiences, but also *whether* place-based attachments

³⁹ See Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 115 (2010):

How private property's effects are evaluated overall—what is considered a cost, what a benefit, and how they all sum up—depends on the surrounding society, with its circumstances, values, and hopes. Change the society, change the circumstances and values, and a property system that once made sense might no longer do so.

⁴⁰ See, e.g., Garrett Harden, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968).

⁴¹ See generally Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture – An Oil and Gas Perspective*, 35 ENVTL. L. 899 (2005) (recounting the history of rule modification and the evolution in the sample context of oil and gas extraction and regulation).

⁴² See, e.g., Vanessa Casado Pérez, *Whose Water? Corporatization of a Common Good*, in ENVIRONMENTAL LAW, DISRUPTED 79, 93–99 (Keith Hirokawa & Jessica Owley eds., 2021) (suggesting strategies to address community externalities that arise from the negative consequences of increased commodification of water in a time of growing scarcity); see also *id.* at 88–89 (describing state and local government efforts to regulate the transfer of water rights); Jane Marsh, *10 Overfishing Solutions That Could Save Our Oceans*, ENV'T (Oct. 4, 2019), <https://perma.cc/X2DJ-9WHD> (offering potential solutions to the global crisis of overfishing).

are still valuable and, if so, why and which ones. Sometimes property's commitment to place attachments still surfaces, as seen in uproar after New London resident Suzette Kelo's little pink house was taken to build an office park⁴³ or—more uncomfortably—when existing residents cite something like preserving “neighborhood character” as a reason to exclude new affordable housing or other inclusive developments.⁴⁴ And, we still have some tools based in property doctrine, explored in what follows, that can prioritize the grounded, lived experience of active land relations over more absentee and unattached claims.⁴⁵ But they are thin and tend to be applied only in narrow cases, and usually only after a person already has a valuable property right to protect.

Several generations on from the initial distribution of land rights granted during western expansion, America's racial and economic inequalities are only growing.⁴⁶ Homeownership seems out of reach for millions of Americans.⁴⁷ Rural landscapes are suffering from increasingly industrialized and extractive land uses.⁴⁸ Climate change threatens to disrupt everything we know about the spaces we inhabit.⁴⁹ While these are all complex problems with many features, they are all, also, land-tenure challenges. In this Article, I argue that reorienting our collective attention to the importance of calibrating and recalibrating property's relationship with *place* can yield important dividends—not only to reconstruct more humane and sustainable living landscapes but, importantly, to help us evaluate with fresh eyes and clearer

⁴³ See, e.g., Jeff Jacoby, *Her 'Little Pink House' Was Her Castle—Until the Government Said It Wasn't*, BOSTON GLOBE (Apr. 15, 2018), <https://www.bostonglobe.com/opinion/2018/04/14/her-little-pink-house-was-her-castle-until-government-said-wasn/4dhJRLjs9vA5VBwIIVhpSN/story.html>.

⁴⁴ See Lee Anne Fennell, *Residents Against Housing: A Response to Professor Infranca's 'Differentiating Exclusionary Tendencies'*, 72 FLA. L. REV. F. 171, 171 (2023) (“Incumbent residents routinely oppose residential development.”).

⁴⁵ See *infra* Part II.B.

⁴⁶ See, e.g., Van R. Newkirk II, *The Great Land Robbery*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> (describing how, over the past century, Black landowners have lost twelve million acres of land acquired during Reconstruction).

⁴⁷ Tristan Bove, *Millennials Have Aged into the Housing Market at the Worst Possible Time*, FORTUNE (Mar. 24, 2022), <https://fortune.com/2022/03/24/millennials-biggest-home-buying-demographic-while-home-prices-soar-worst-time-compete-boomers-aged/>.

⁴⁸ See, e.g., Lisa Held, *Dead Bees, Sick Residents from Pesticide Pollution in Nebraska*, CIV. EATS (June 15, 2021), <https://perma.cc/7CCR-PW5C>.

⁴⁹ See generally Adrienne R. Brown, “Homesick for Something That's Never Going to Be Again”: An Exploratory Study of the Sociological Implications of Solastalgia, SOC'Y & NAT'L RES. (2023) (revealing how people who have been impacted by wildfires experience a kind of homesickness for the changed landscape).

standards important issues of sustainability, access, and even inequality.

This Article proceeds in five parts. In Part I, I briefly set the stage for this discussion—defining and adding context to the core concepts of land, property, and place. In Part II, I explore in some detail *how* default property rules and institutions already calibrate place relations, starting with historic examples including intentionally antifeudal homesteading land designs and then extending to modern cases, including the unique ways property rules shape the experiences of both new build-to-rent housing divisions and ongoing sites of Indigenous protest and historic dispossession. Ultimately, I reveal how basic property rules—including the scope of owners’ use and possession rights, the relative stability or transferability of real property rights, and the relative access or exclusion of nonowners—all influence the development of wider people-place relations on an ongoing basis.

In Part III, I turn more directly to deconstructing what values and objectives are at stake when property choices weigh some place relations over others or allow for ownership without any attachment at all. Specifically, connecting to wider property theory about the many functions of a well-designed private property system, I separate the positive case for fostering place-based attachments from the real risks of overprotecting some attachments to the exclusion of others—namely, the risk that some deep place attachments can become ossified, dynastic, or overly exclusionary in a way that impedes access and other important property values. Then, I explore more explicitly some of the consequences of recognizing so many forms of modern ownership that truly are “attachment-less,” emphasizing how commodified and concentrated absentee ownership can defeat core intentions of private property itself, misfiring against property’s original intention to elevate local decision-making, enhance deep and context-specific place knowledge, and efficiently aggregate numerous, small-scaled decisions through multiple flexible market transactions.

Then, in Part IV, I explore via a series of both rural and urban case studies the many ways this more nuanced understanding of what we mean by place attachment—and the different, but related, reasons for fostering at least some aspects of it—can inform future property decision-making. These examples also show how clarity about placemaking values can help resolve longstanding property dilemmas, including the perennial issue of

how to scale and distribute landownership more equitably. Reprioritizing positive place attachments actually creates an essential and necessary *boundary* that limits land hoarding and opens access for new generations. Here, I illustrate these effects through the example of current farmland transitions, dissecting the relative stakes of anonymous investors, the often absent and now-urban heirs of legacy family farm operations, and the many aspiring farmers and ranchers who cite, repeatedly, lack of land access as their number one barrier to transforming our food system and reinvigorating rural communities. A second example in Part IV explores how we mediate stewardship and collective environmental decisions in light of the stickiness of longstanding land use privileges, highlighting the difficult case of western ranchers who repeatedly claim private entitlements to graze public lands, including in a violent occupation of a federal wildlife refuge. A final case study reviews, briefly, the pervasive use of claims of “preserving neighborhood character” to prevent otherwise productive community change, including new housing development. Together, these examples all highlight an important process of co-construction, revealing how property rules influence placemaking and—*at the same time*—how claims of priority based on existing place attachments tend to shape ongoing property choices. Because these place-attachment claims are not currently evaluated through a sufficiently clear and transparent metric, the choices we make privilege some place relation claims over others in ways that can be unwise and inconsistent.

Finally, in Part V, I offer a last set of reflections on the possibility of new and creative property designs—including most predominantly imagining expanded mechanisms to nurture nonowners’ *access* rights—to reshape rural and urban spaces into places of more equity, sustainability, and creativity. Here, I draw from contexts as diverse as Scottish land reform, the land-based reconciliation efforts of modern Indigenous peoples, and my own personal experiences from a sugar shack in Wisconsin to the ice fields of the Arctic. This is not presented as a complete solution or fully realized proposal but, rather, is intended as an invitation to the more creative, deep work needed as we reevaluate property rules for a changing world. Ultimately, focusing on place and place attachment is not nostalgic but rather futuristic. When we refocus property relations to be more personal and grounded—and less commodified and monopolistic—then property gets closer

to fulfilling its aspiration as a tool for human flourishing. The ultimate goal is to identify where ongoing opportunities to recalibrate our people-place relations exist and invite more care and attention to these otherwise overlooked impacts of property choices on the landscapes in which we live.

I. SETTING THE STAGE

To begin, this Part briefly defines core concepts. It puts land, property, and place (and place attachments) into specific, relevant context.⁵⁰

A. Land

Land encompasses the physical elements of the Earth's surface, including fields, forests, soils, waters, plants, and animals. Human beings are but one small piece of this much wider ecological community that exists in and across physical space.⁵¹ Land, as used here, also incorporates human-constructed spaces and built environments. In both scenarios, land connotes the actual, material reality of a physical space.

Land is different than the human-created legal layers—like property law—that rest on top of and purport to govern these physical environments.⁵² Yet, land is of course impacted and, in some cases, irretrievably transformed by humans. The landscapes we inhabit “bear[] the indelible imprint of our forebears, even if we do not always recognize that imprint for what it is.”⁵³

Land is also critical to human survival. Being human requires taking up physical space. A human must have space to exist. Humans also require food and resources drawn from land.

⁵⁰ The subfield of law and geography has long interrogated how the law and legal academics engage with place. See, e.g., Nestor M. Davidson & Alan R. Romero, *Law in Place: Reflections on Rural and Urban Legal Paradigms*, 50 *FORDHAM URB. L.J.* 201, 210–20 (2023). But these concepts retain unique meanings across different contexts and disciplines and so are defined separately here.

⁵¹ See ALDO LEOPOLD, *A SAND COUNTY ALMANAC: AND SKETCHES HERE AND THERE* 192 (2020 ed.) (“[A] land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it.”).

⁵² See generally Tania Murray Li, *What Is Land? Assembling a Resource for Global Investment*, 39 *TRANSACTIONS INST. BRIT. GEOGRAPHERS* 589, 589 (2014) (articulating numerous technologies and regimes of exclusion—boundaries, laws, deeds, fences—that must be assembled in order to convert land, which is otherwise “not like a mat” in that “[y]ou cannot roll it up and take it away,” into a resource for large-scale market exchange and investment).

⁵³ Eduardo M. Peñalver, *Property's Memories*, 80 *FORDHAM L. REV.* 1071, 1080 (2011).

Thus, because of land's central importance to human survival, "the pattern of entitlements to use land is a central issue in social organization."⁵⁴ "Land rules literally set the physical platform for social and political institutions."⁵⁵

Land is also fixed and exists only in finite quantity. It has material limits, which we cannot ignore.⁵⁶ At the same time, because land is part of such a complex, interdependent system, any land use choice can create a cascade of unpredictable consequences across time and space, and this counsels some humility in making choices about land use, recognizing the limits of human knowledge.⁵⁷

B. Property

Property, meanwhile, is the legal system by which we allocate and enforce who has access to what valuable resources and on what terms.⁵⁸ Here, I am concerned mostly with property rights to land—what we call, not insignificantly, "real" property.⁵⁹ The standard Anglo-American private property system functions fundamentally by drawing a legal boundary around physical space and then designating an owner to control and benefit from resources inside those dividing lines, including by excluding others from the space.⁶⁰ There are other options to manage access to and control of valuable resources, including public (or state) ownership and more informal group norms that exist outside (or in the

⁵⁴ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993).

⁵⁵ *Id.* at 1344.

⁵⁶ See NICOLE GRAHAM, *LAWSCAPE: PROPERTY, ENVIRONMENT, LAW* 134–59 (2011) (exploring the dephysicalization of property, and contrasting abstract theories of property with the materiality of land).

⁵⁷ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 877, 884–86 (2009); see also Mulvaney, *supra* note 31, at 361–62 (discussing humility in property).

⁵⁸ Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1472, 1493 (2013).

⁵⁹ Although things and ideas are also subject to property rules, land is a kind of quintessential object of property design. We call property rights in land *real* property at least in part because of centrality of land both as an apex resource and as the model object around which property systems were designed.

⁶⁰ Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1753–56 (2004) (summarizing a fundamental property "exclusion strategy").

shadow of) formal legal regimes.⁶¹ Yet in modern U.S. law, formal private property clearly dominates.⁶²

Importantly, real property is distinct from land. Property is the system of human-created legal lines that sit on top of a physical landscape and govern human relations in and around that space, subject to state enforcement and sanction.⁶³ Property lines do not necessarily match the natural contours of the material land itself. Migration patterns, watersheds, tree roots, and shifting sands all find their own way, and the legal boundaries that carve up physical spaces can be incongruent, disconnected, and dynamic.⁶⁴

Because property's physical boundaries are artificially constructed this way, a lot of property law is focused on managing so-called spillover effects. Spillover effects are the consequences, both positive and negative, of an owner's choices within his or her property boundaries that trickle out and have secondary impacts outside those boundaries.⁶⁵ Because we live in an interconnected and interdependent world, an owner's in-boundary property decisions often "spill over" to impact things outside those legal lines.

⁶¹ See generally Daniel Fitzpatrick, *Fragmented Property Systems*, 38 U. PA. J. INT'L. L. 137 (2016). Long before the U.S. property system seemed so fixed in our collective imagination, political economists were circling the so-called "land question." See Li, *supra* note 52, at 591–92. For example, political theorist Thomas Paine conceived of the Earth as the common property of the human race and thought it "legitimate for people who invested in land improvements to appropriate the additional value they generated, but . . . not own the land itself." *Id.* at 591. He therefore argued in 1797 for a system of collecting and distributing a "ground-rent on the land of England in perpetuity" through a payment to all citizens as they reached the age 21—to compensate for their natural rights to land and relative exclusion from it. *Id.*; see also Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 27 MARCH 1789 TO 30 NOVEMBER 1789, at 392 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (outlining the belief that land is fundamentally a "usufruct to the living").

⁶² See Ellickson, *supra* note 54, at 1317; see also Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2062–76 (2012). One exception may be political economist Elinor Ostrom's numerous examples of some close-knit groups that successfully manage commons—or, really, limited-access commons—resources efficiently, including with means grounded in local norms and customs. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 58–102 (Canto Classics 2015 ed.).

⁶³ See, e.g., Charles F. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 U. COLO. L. REV. 401, 410–23 (1988) (describing artificial line-drawing and subsequent domination over natural contours of landscape).

⁶⁴ Cf. GRAHAM, *supra* note 56, at 83–84, 181. See generally Margaret Davies, Lee Godden & Nicole Graham, *Situating Property Within Habitat: Reintegrating Place, People, and the Law*, J.L. PROP. & SOC'Y (2021) (arguing that property is conceived of as separate from, but should be embedded within, the material world).

⁶⁵ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350–52 (1967).

Some of these effects can be addressed through public law governance or land use regulation, like zoning, but not all can be.⁶⁶ In other cases, we tolerate externalities, or we try to manage them by redrawing property rights or boundaries directly.⁶⁷

Ultimately, these property law choices impact not only resource economics but also other metrics of well-being.⁶⁸ With real property rights, a landowner enjoys a secure refuge, where she not only enjoys a state-enforced buffer against both government and employer overreach, but also reliably enjoys the fruits of her own labor—reaping, literally, what she herself may sow.⁶⁹ Thus, property can be “an essential instrument for promoting political freedom, privacy, and self-determination.”⁷⁰ Property rights can also entrench either equality or inequality.⁷¹ Although debate exists about what the normative focus *should* be, there is little dispute that property designs *do* impact a range of social factors, shaping the relative efficiency of resource use, protecting the independence of individual democratic citizens, creating spaces of autonomy and free expression within a liberal society, and also building stable communities and environments for ongoing flourishing and growth.⁷²

Finally, one other clarification about property. The fact that property is so embedded in our social and economic interactions today can lead to a process of reification, such that our collective property system choices can come to be seen as natural, inevitable, or objective fixed realities when, in fact, these legal choices and systems have been constructed and built gradually over

⁶⁶ See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1703 (2012) (discussing governance strategies as a response to “spillovers and scale problems”).

⁶⁷ See Fennell, *supra* note 58, at 1493–1509.

⁶⁸ See, e.g., Ellickson, *supra* note 54, at 1341–44 (discussing potential productivity impacts of group versus private land ownership); see *infra* Part III.A.4 (summarizing research tying local versus absentee land ownership to variety of community welfare outcomes).

⁶⁹ See, e.g., STEVEN STOLL, RAMP HOLLOW: THE ORDEAL OF APPALACHIA 65–67 (2017).

⁷⁰ Ellickson, *supra* note 54, at 1344; see also Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1308–13 (2014) (discussing how land concentration, in reverse, erodes democratic ideals by exacerbating inequality and limiting true autonomy for all).

⁷¹ Ellickson, *supra* note 54, at 1345 (observing that “[l]and tenure is a major battleground” to resolve conflicts over “individual liberty and privacy on the one hand and community and equality on the other”).

⁷² See *infra* Part III (connecting placemaking analysis to wider property theory).

time.⁷³ Because property systems are human inventions, they are subject to change. Property systems are pluralistic and even dynamic, subject to an ongoing process of change and renegotiation through continued human choices across various scales.⁷⁴

C. Place

Place is another thing altogether, wholly different from—but related to—both property and land. Place here refers broadly to the human layers of meaning that become, over time and lived experience, embedded in a physical space.⁷⁵ Place, therefore, refers to a geographically tethered sense of understanding and connection derived from direct knowledge.⁷⁶ Human experience is the critical thing that transforms abstract “space” into meaningful “place.” Through grounded encounters and often unexamined informal effort, “[a]bstract space, lacking significance other than strangeness, becomes concrete place, filled with meaning.”⁷⁷

To consider the meaning of place in contrast to its opposite, human geographers often talk about “placelessness” as a phenomenon of truly generic and homogenized spaces—perhaps endless fields of mechanically straight commodity crop rows or truly cookie-cutter concrete, corporate self-storage facilities—that exist without any unique place identity or the deep layers of human social networks overlaying it. Placelessness is a “condition of alienation wherein an individual feels little attachment.”⁷⁸

Place attachment, meanwhile, is also another widely studied phenomenon in geography, sociology, and adjacent disciplines. Place attachment refers to a “sense of belonging, loyalty, or affection that a person feels for one or more places.”⁷⁹ This bond can be

⁷³ See, e.g., KENNETH ROBERT OLWIG, *LANDSCAPE, NATURE, AND THE BODY POLITIC: FROM BRITAIN’S RENAISSANCE TO AMERICA’S NEW WORLD* 20–21 (2002).

⁷⁴ See Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531, 1578–84 (2019) (collecting examples of pluralism and dynamism in property law).

⁷⁵ See YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* 136 (1977).

⁷⁶ EDWARD RELPH, *PLACE AND PLACELESSNESS* 6 (1976) (describing place “as a phenomenon of the geography of the lived-world of our everyday experiences”); Pauline McKenzie Aucoin, *Toward an Anthropological Understanding of Space and Place*, in *PLACE, SPACE AND HERMENEUTICS* 395, 396 (B.B. Janz ed., 2007).

⁷⁷ TUAN, *supra* note 75, at 199.

⁷⁸ *Place and Placelessness*, *DICTIONARY OF HUMAN GEOGRAPHY* (2013).

⁷⁹ *Place Attachment*, *DICTIONARY OF HUMAN GEOGRAPHY* (2013). Human geographer Yi-Fu Tuan famously described this affection and bond between people and place as “topophilia.” YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES* 93 (1974).

at different scales, including both groups and individuals, and of different dimensions, from fleeting feelings of joy at an aesthetic view to deeper, lasting connections to a childhood home.⁸⁰ We have a hard time articulating the depth of this kind of place knowledge and attachment. The human experience is rich and deep and can defy abstract, analytical categories and science.⁸¹

Places also change over time and can be embodied in diverse and distinct ways, ranging from more negative and backward-looking sites of exclusion to more progressive and inclusive sites of the present and future.⁸² The contours of a place are unique and rich in important and specific ways. One individual can have many place attachments at one time, sometimes shifting across their own life junctures. Likewise, one physical space can exist as multiple—perhaps distinct, perhaps overlapping—different places to different people. Place is not necessarily “a simple, centred and enduring phenomenon,” but might better be viewed as a process of meaning-making, care, and connection that we—individually and collectively—continually construct and calibrate to our needs and to the spaces in which we exist.⁸³

II. PROPERTY AND PLACEMAKING

This Part turns to an introductory analysis of *how* real property rules and institutions mediate people-place experience and attachment. Real property law, at its core, governs where and how humans experience space. Property rules determine or at least greatly influence how land is used and by whom, including

⁸⁰ See, e.g., TUAN, *supra* note 75, at 144. This issue of scale is important for considering the relationship between property and placemaking. Just as property lines cannot perfectly capture external effects of internal choices on the land itself, property lines do not necessarily capture the full range of place relations or a person’s attachment to that place. This dynamic parallels, in some respects, work done by Professor Henry Smith and others on “semicommons” arrangements—regimes by which resources serve multiple purposes but across different scales, which often requires more collective management for the wider, shared purpose but while still recognizing more discrete, separate individual property rights for specific subpurposes. Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 137–49 (2000); see also Malcolm Lavoie, *Property Law and Collective Self-Government*, 64 MCGILL L.J. 255, 299–306 (2018) (using a similar semicommons metaphor to articulate how Indigenous peoples in Canada work to manage land base as a shared cultural resource while also recognizing more private economic rights within it).

⁸¹ See TUAN, *supra* note 75, at 8–18.

⁸² See Doreen Massey, *A Global Sense of Place*, MARXISM TODAY, June 1991, at 24, 28.

⁸³ Edward Relph, *A Place-Related Autobiography*, PLACENESS, PLACE, PLACELESSNESS, <https://perma.cc/Z4V2-YJ92>.

by balancing the relative stability of existing land relationships and defining access rights, if any, for nonowners. These property variables—who gets to do what where, who benefits, and who is excluded—all impact whether spaces develop as meaningful, vibrant, inclusive places or whether they exist as more abstract spaces of placelessness or other negative iterations.

This Part explores these property-place effects in three sections. First, I survey historic land tenure policies, particularly at the origins of this country, that were explicitly engineered to achieve specific people-place visions. For example, placemaking goals drove early homesteading policies that required both residency and material improvement as a condition of ownership. Second, I turn to more subtle ways modern property institutions continue to shape and reshape people-place relations, exploring property rules that define owners' use and possession rights, the relative stability or transferability of ownership, and the access or exclusion of nonowners. Finally, two brief case studies put property's placemaking function in wider context. The first illustrative example explores, briefly, how underlying property rules shaped—in often obscured ways—recent Indigenous-led pipeline protests across the Great Plains. The second example outlines property law's role in a recent explosion in build-to-rent housing development and how ongoing property choices will continue to impact the kind of emergent places these new rental-only spaces become.

A. Early Engineering: From Feudalism to Homestead to Asset Class

Property is fundamentally built for human attachment. Private property depends, at its core, on stable, secure entitlements to resources. In the context of land, this means a reliable claim to a fixed location rooted on the Earth's surface. Thus, as Professor Lee Fennell has described, there is “embedded in the durable structure of property a rebuttable presumption that possession today is complementary to possession tomorrow, and that if the current possessor is the high valuer today, she is most likely to be the high valuer tomorrow, and tomorrow, and tomorrow.”⁸⁴ Professor Henry Smith describes this as the “persistence” feature of

⁸⁴ Fennell, *supra* note 58, at 1508.

property.⁸⁵ Property's guarantee of secure, stable access, possession, and control also supports the development of personal and collective attachments. Persistence facilitates familiarity, comfort, belonging, and—eventually—placemaking.⁸⁶

But persistence has to be balanced with the demands of a mobile, democratic society. U.S. property law is fundamentally built against feudalism; indeed, the abolition of feudalism has been described as “[t]he defining characteristic of American property law.”⁸⁷ In most basic terms, feudalism involved absolute land ownership by the King of England, with a fixed hierarchy of power flowing from the King and privileged lords down to beholden serfs. Serfs were born into established economic and social status and lacked any ability to relocate or reinvent their place in the world.⁸⁸ These servient serfs were born almost *literally* attached to land—indentured, as it were, and tied to a predestined life in a specific geographic location with a specific identity and a limited range of opportunities. At the opposite end of the spectrum, feudal lords enjoyed concentrated power, wealth, and advantage.⁸⁹ These inherited land-based dynasties privileged only a lucky few.

When Europeans settled America, they sought to build something very different. American property innovators set about imagining a new land system at the same time they worked to build a new government. In order to be democratic and antifeudal, this new property system needed to preserve citizens' mobility, both to encourage entrepreneurial work ethics and to avoid the kind of hereditary land dynasties of Europe's antecedents. But at the same time, the American project very much needed to populate the Western frontier with loyal settlers who would form lasting place attachments in the new landscape, rooting a dispersed citizenry in this challenging new geography while also furthering the project of settler-colonial dominion over the new territory.⁹⁰ Americans dispossessed and displaced the Indigenous inhabitants of this continent—who already had their own myriad place relations, incorporated into and reflected in diverse land tenure and governance systems developed over centuries—not only by treaty

⁸⁵ Smith, *supra* note 66, at 1711–12.

⁸⁶ Encouraging owner investment is regularly cited as one of the justifications for fee simple design. *See infra* Part III.B.

⁸⁷ Joseph W. Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 79, 82 (2011).

⁸⁸ *See id.* at 81–82.

⁸⁹ *See id.*

⁹⁰ *See, e.g.*, ABLAVSKY, *supra* note 13, at 4–5.

and force, but also by the physical act of settlers' occupation.⁹¹ Ultimately, the American goal was to have it both ways: to disperse new citizens to settle the West securely and stably (to create enduring *places* there that reflected American ideals and American governance) while also allowing these new landowners a core set of freedoms and opportunities (to sustain themselves on their own effort and to enjoy the freedom to reap—or suffer—the consequences of their own choices).⁹²

The Homestead Act was one of several methods of allocating first-generation real property rights in the United States, and it struck this dual purpose by imposing a two-step property allocation design.⁹³ First, claimants had to accomplish a period of actual possession and improvement on the land itself (typically five years) before they became landowners.⁹⁴ This requirement of active physical possession of the land served several purposes. It populated the landscape, improved the land for agricultural production, and created a temporal and physical space for new owners to make the place a home—to convert empty spaces into places of meaning and to form attachments there. But then, in order to avoid the kind of indentured future of feudal traditions, the second step in the allocation process rewarded successful claimants with a full fee patent and title to the property, with all the rights of transfer, permanent possession, and control that came with fee simple ownership.⁹⁵ This gave new owners perpetual rights to the property—not just for current users but for all time—and these rights were fully alienable. Landowners enjoyed the freedom to reap, quite literally, what they sowed and also to choose, continually and on an ongoing basis, whether to stay or to go.⁹⁶

⁹¹ *Id.*

⁹² See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 66–69 (1997).

⁹³ Numbers vary somewhat, but official homesteading policies distributed almost 250 million acres of land between 1863 and 1939. Trina R. Williams Shanks, *The Homestead Act of the Nineteenth Century and Its Influence on Rural Lands 3* (Ctr. for Soc. Dev., Working Paper No. 05–52, 2005).

⁹⁴ 43 U.S.C. §§ 161–284 (1862) (repealed 1976).

⁹⁵ See Williams Shanks, *supra* note 93, at 1–2.

⁹⁶ President Thomas Jefferson is commonly credited with the prevailing American vision of land ownership, imagining a landscape of dispersed and egalitarian independent landowners—the yeoman farmer—who would enjoy essential political and economic liberty to achieve a new democratic American social vision. Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 *DRAKE L. REV.* 361, 388–89 (1997). However, President Jefferson himself “owned slaves and planted tobacco in a distinctly feudal fashion.” *Id.* at 387.

It was a clever experiment, really. Because feudalism had gone far too far to the side of forced place attachments, homesteading tried to inculcate some first-generation placemaking incentives but with what was essentially a time-limit on the forced attachment: five years of mandatory physical presence. After that, the place connection became purely voluntary, and the claimant was rewarded with full title, thereby “snapp[ing] the chains of feudal tenure” by maximizing autonomy and flexibility after that initial period.⁹⁷ This offered an opportunity to “several generations of eighteenth- and nineteenth-century immigrants to establish a new life in America, free of their ancestral links.”⁹⁸

Although often lost to history, there were active debates at the time of these homesteading choices about what should come after this initial incubating period of required presence. Some populist movements of farmers and workers themselves would have instead limited the rights homesteaders received to require a continuing “duty to reside on and cultivate the land.”⁹⁹ Professor Anna di Robilant has published a fascinating study of these debates, exploring how farmers and workers were active participants in social movements at the time to imagine new property forms in order to open more equitable access to economic resources, including land, in the new country.¹⁰⁰ Their advocacy for an enduring duty to reside on and cultivate the land, as a condition of maintaining it, did not prevail, but both sides agreed fundamentally about the basic goals: the United States should “ensure that each person has freedom, dignity, and access to the means of a comfortable life” while also avoiding the histories of property concentrations that had otherwise occurred “in the form of company towns, monopolies, or feudal manors.”¹⁰¹

Ironically, the fully alienable, perpetual property rights that did follow from homesteading (and other land patenting systems) have failed to ensure equitably distributed access to resources and, instead, have contributed to a massive amount of land speculation and concentration.¹⁰² The transfer of highly alienable and

⁹⁷ *Id.* at 380.

⁹⁸ *Id.*

⁹⁹ Anna di Robilant, *Populist Property Law*, 49 *CONN. L. REV.* 933, 954 (2017).

¹⁰⁰ *Id.* at 941–72.

¹⁰¹ Singer, *supra* note 87, at 82.

¹⁰² See, e.g., Edward L. Glaeser, *A Nation of Gamblers: Real Estate Speculation and American History*, 103 *AM. ECON. REV. PAPERS & PROCEEDINGS*, no. 3, May 2013, at 1, 8–16 (describing historical instances of American speculation on real estate); see also ROBERT

divisible property rights, divorced from any ongoing requirement of actual physical residence, perversely facilitated the same kind of land consolidation by politically powerful and wealthy elites that antifeudalism efforts sought to reject, a paradox to which many Americans are only beginning to awaken as powerful capital actors are increasingly converting land and housing into asset classes for the extraction of significant profits.¹⁰³ By sanctioning the decoupling of possession from title—to allow commodified and absentee ownership—the fee simple imposes no inherent limit at all on concentrated land ownership.¹⁰⁴ And, in actual experience, land, over time, has become increasingly reimaged as a financial asset.¹⁰⁵ Rather than the progressive ideal of more egalitarian access to land and opportunity for any hardworking newcomer in America, the reality is a very tight and narrow market for land and—increasingly—housing, with opportunities for land and homeownership increasingly foreclosed to anyone not extravagantly wealthy or born into a hereditary land legacy.¹⁰⁶

B. How Modern Property Makes Place

The homesteading era reveals many important things about how our collective property choices continue to shape people-place relations. Even historic choices we may now take for granted—like the fact that homesteads were allocated along ruler-straight grids first imagined on paper and then made real through land surveys, property descriptions, and land titles—have monumental consequences for our current human experience. The decision to fix bounded property rights along a defined geographic grid still shapes many neighborhoods and streetscapes, impacting our daily interactions with neighbors and even strangers. For Indigenous peoples, this change had even more radical effects. Homesteading not only displaced many diverse systems of Indigenous land tenure, but also precluded important Indigenous traditions that emphasized freedom of movement with seasonal and migratory practices that often reflected more flexible and gentle

NICHOLS, THEFT IS PROPERTY!: DISPOSSESSION & CRITICAL THEORY 34–37 (Bruno Bosteels & George Ciccariello-Maher eds., 2019).

¹⁰³ See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 396 (2006); see *infra* Part III.B.2.

¹⁰⁴ See *infra* Part IV.A (suggesting attachment values as a necessary boundary for the future).

¹⁰⁵ See Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 283–95 (2015).

¹⁰⁶ See Shoemaker, *supra* note 11, at 1721–34.

relations across storied landscapes.¹⁰⁷ Indigenous scholars have emphasized how this fixation of people into bounded geographies was experienced as a key aspect of the spatial domination and violence enacted in settler-colonialism.¹⁰⁸

At the same time, for European settlers, homesteading rules inculcated specific social values. The process of proving a claim was difficult and uncertain. Values of entrepreneurialism, hard work, and self-sufficiency were baked into these early U.S. property relations. Indeed, this cultural and social shift to individualistic agrarian production was so powerful that, a few decades later, when federal reformers calling themselves the “Friends of the Indians” sought to “solve the Indian problem” of reservation poverty and perceived desperation, they turned to private property as their solution of choice.¹⁰⁹ With the Indian allotment policy, the federal government reached into tribal reservations, wiped clean residual tribal land-tenure systems, and reallocated land in 40- to 160-acre parcels to individual Indian “allottees” for the express purpose of promoting individualism and converting Indigenous citizens into the “yeoman farmer” ideal.¹¹⁰ The entire idea was that property-system change—and, specifically, imposing Americanized private property within the treaty-reserved territories of Indigenous governments—would powerfully and efficiently encourage assimilation of individual Indians and the erasure of tribal identities.¹¹¹ The policy was a complete failure and caused immeasurable (and ongoing) harms within Indigenous communities, but there is no question that allotment still stands as a stark example of the power of property choices to shape peoples’ experiences of place.¹¹²

¹⁰⁷ Kirsten Anker, *Aboriginal Title and Alternative Cartographies*, 11 ERASMUS L. REV. 14, 19–24 (2018).

¹⁰⁸ Indigenous scholars have often emphasized that *mobility* is the key feature of Indigenous land relations. See, e.g., John Borrows, *Physical Philosophy: Mobility and the Future of Indigenous Rights*, in INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 403, 408–18 (Benjamin J. Richardson et al. eds., 2009) (critiquing efforts to restrict Indigenous rhythms of movement with colonial efforts to fix Indigeneity to ever-diminishing, bounded spaces); see also MISHUANA GOEMAN, MARK MY WORDS: NATIVE WOMEN MAPPING OUR NATIONS 35 (2013).

¹⁰⁹ LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 80 (1981) (“[T]hey were convinced that private property by itself would transform the Indians.”).

¹¹⁰ Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 737.

¹¹¹ See *id.* at 743–44.

¹¹² See Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 KAN. L. REV. 383, 403–14 (2015).

Today, other property choices continue to impact and shape people-place relations. For example, zoning and other public land use regulations certainly shape the evolution of communities and landscapes. In this Article, however, I am more concerned with fundamental private property rights and rules. How do the default assumptions and baselines of private property institutions—like the fee simple itself—share the way that communities and landscapes progress, either as places of significance or as more disconnected (maybe even placeless) spaces over time? This Section highlights numerous examples in U.S. property law of how ongoing choices about property-based rights and responsibilities continually calibrate people-place relations. Here, I offer just a sampling of these property law levers, organized in three general categories: the contours of an owner’s rights to use and possess, the relative stability and transferability of property ownership, and nonowners’ access or exclusion.

1. Parameters of use and possession.

Fee simple title promises an individual owner both perpetual and exclusive possession rights. By guaranteeing an owner the right to be in and make decisions about a physical space for a very long time, fee simple ownership is one of the surest and most direct ways to support the development of place relations and place attachments for that owner. This kind of secure, long-term use and possession right is what facilitates the kind of life-altering experience Justice Holmes described as a person “gradually shap[ing] his roots to his surroundings” in ways that are difficult to undo.¹¹³ But the nature of an individual’s ownership rights impact more than just the personal and social life of that individual owner. An owner’s relative rights to that specific parcel of land results in consequences—spillovers—that impact both the social network that develops in and around that space and the physical realities of the space and its surroundings.¹¹⁴ The nature and scope of an owner’s right to use and possess a specific space of land has both social and ecological impacts.

Consider for example the importance of *how* the use and possession rights of an owner are defined in fee simple ownership today. A robust property literature debates the significance of

¹¹³ Holmes Letter, *supra* note 6, at 417–18.

¹¹⁴ See *supra* notes 65–67 and accompanying text.

renting versus owning for neighborhood vitality, stability, and political participation. But this difference—renting versus owning—is really a difference in the length and quality of residents’ use and possession rights. A tenant’s possession rights are more time-limited and subservient to the rights of a landlord, whereas an owner-occupier has perpetual and more absolute rights (or at least rights not inferior to those of any other titleholder).¹¹⁵

So, likewise, consider the choice—also inherent in fee simple design—to allow ownership without any possession at all. The legal choice to decouple ownership and possession—to allow nearly limitless absentee ownership—also radically shapes our collective experiences of space. A landscape owned entirely by absentee investors looks and feels very different from the agrarian ideals of early homesteading, which looks very different from feudal England. All of these are choices. It is a choice to create a property estate that allows ownership without any duty of residence or active possession. In this modern world, property rights *can* secure possession (and thus attachment) but do not require it at all. To the contrary, one can now own and control land without any physical relationship, direct knowledge, or connection to that land at all. These forms of disconnected or “attachment-less” ownership have a cascade of consequences for communities and landscapes, as discussed in more detail below.¹¹⁶ For now, the key point is this is a choice about owners’ use and possession rights, which are very instrumental in how places are made today.

But there is even more to the complex story of how default property rules and systems impact our collective experiences of space beyond this stark binary of whether ownership rights require possession or not. For example, there are multiple other “levers” even just around an owner’s right to use and possess by which our property system, in large and small ways, continually “recalibrates” place-relations. In many tiebreaking situations, property law still tends to choose the first or more longstanding user or possessor, lending greater protection to longer attachments over more recent entrants in many cases. We tend to think of these examples in terms of original property acquisitions—the first to capture certain natural resources or water, the first creator for copyright—but these preferences also exist in other disputes. For example, in partition actions among co-owners, the

¹¹⁵ See *infra* Part II.C.2.

¹¹⁶ See *infra* Part III.B.2.

default rule is still to favor the rights of in-tenants in possession of property with in-kind or other considerations upon division.¹¹⁷ In nuisance actions, the first user often gets consideration in determining not only whether there is a violation but also what the remedy should be, protecting earlier attachments and connections to that place.¹¹⁸ Even in land use decisions, vested rights doctrines and nonconforming use protections to preserve the validity of current uses all recognize, and value, existing attachments and place-relations.¹¹⁹

Likewise, property systems have several built-in mechanisms to enforce established relationships among neighboring owners. These have different effects in different contexts. Real covenants and servitudes, for example, are enforced only when certain conditions are met, including, historically, only when those covenants would “touch and concern” the land and, more recently, sometimes only as long as they do not violate a more amorphous sense of “public policy.”¹²⁰ But the law has stretched to allow private governance of many aspects of planned developments, private subdivisions, and even condominiums through homeowners associations, which do everything from maintaining public spaces for residents to banning certain pets or residential signage and hiring security to gatekeep community entrance.¹²¹

Several local governments also seek to shape communities and landscapes through mechanisms like historic preservation rules, single-family housing zoning and lot-size requirements, and affordable housing or parking requirements in new developments.¹²² Other communities zone to prohibit things like certain

¹¹⁷ See, e.g., *Delfino v. Vealencis*, 436 A.2d 27, 30 (Conn. 1980); see also Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, 2019 LEGAL REFORM 65, 69.

¹¹⁸ See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972) (en banc).

¹¹⁹ This also reflects the idea, fundamentally, that we sometimes ratify facts on the ground even when they contradict our future vision of the place. Peñalver, *supra* note 53, at 1084–85 (collecting examples).

¹²⁰ See Elizabeth Elia, *Servitudes Done “Proper”ly: Propriety, Not Contract Law*, J. LAND USE & ENVTL. L. 31, 84–87 (2021); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

¹²¹ See, e.g., Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 450–52 (2006) (describing Manhattan cooperative apartment buildings that give residents a significant say in who their neighbors are).

¹²² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 48–51 (2017).

short-term possession in vacation rentals and such.¹²³ These are all, in different ways, aimed at preserving a specific vision of place and protecting certain kinds of place attachments (often, quite controversially—yes to single-family cul-de-sac, no to the apartments with affordable housing, for example). But in private law, these kinds of neighbor-to-neighbor disputes are also addressed, including through nuisance actions.¹²⁴ Sometimes, this includes legislative redefinitions of what qualifies as a nuisance. Every state has a right-to-farm law, for example.¹²⁵ Such laws were originally intended to preserve agricultural landscapes. But in effect they have tended to immunize more powerful farm actors—including large industrial or multinational operations—from responsibility for many agricultural practices that do detrimentally impact rural neighbors via smells, truck traffic, or even air or water quality changes.¹²⁶

Finally, even the contours of doctrines like adverse possession can tip the scales on placemaking. Adverse possession explicitly favors active, direct possessors over absent, passive landowners.¹²⁷ Various scholars have charted the history of adverse possession doctrine to track how courts have “favored the actual occupants of land over absentee owners.”¹²⁸ Initially, this included prodevelopment policies that favored, based on the current state of technologies, active use and improvement over distant landholding and speculation without productive improvement.¹²⁹ On the one hand, this avoids negligent landownership and abandonment, but it also drives land use in a specific direction.

¹²³ See, e.g., *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 453 (9th Cir. 2019) (allowing city to prohibit short-term vacation rentals in residential neighborhood).

¹²⁴ See Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. ENVTL. L. & LITIG. 331, 355–57 (2014).

¹²⁵ See *National Summary*, ONE RURAL, <https://perma.cc/ZT9Z-698Q>; ALEXANDRA LIZANO & RUSTY RUMLEY, NAT'L AGRIC. L. CTR., STATE RIGHT-TO-FARM PROVISIONS 1 (2019).

¹²⁶ See generally Loka Ashwood, Danielle Diamond & Fiona Walker, *Property Rights and Rural Justice: A Study of U.S. Right-to-Farm Laws*, 67 J. RURAL STUD. 120 (2019).

¹²⁷ See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1127–33 (1985).

¹²⁸ Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1110 (2007); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 537 (1996).

¹²⁹ See, e.g., John G. Sprankling, *Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 874–75 (1994) (outlining how adverse possession policies tend to favor productive uses of land).

2. Balancing stability and mobility.

Alienability is another key feature of U.S. property that impacts place relations. Alienability, like possession, can both foster flexible placemaking and create a pathway to estrangement and land commodification. For example, alienability rights are often framed as important to maintain owners' incentives to invest in and improve their properties for the long term.¹³⁰ Even if I may not be able to personally enjoy the fruits of an improvement for its full usable life, I am still encouraged to make the improvement if I know I can cash my value out by sale or pass it on to my heirs. Alienability also allows flexible, direct commercial transitions from one user to another who, presumably, is better suited or more motivated to put it to higher use.¹³¹ Alienability is also valuable for securing credit, which can be essential for expanding and improving certain uses.¹³²

And yet, the very word *alienate*—meaning, generally, to make someone feel isolated or estranged—is peculiar in its application to the transfer of land. Maybe we have baked into our most fundamental legal language at least a subliminal understanding that we consider the transfer of land—and really only land—as “alienating.”¹³³ Indeed, others have noted that, although active land and real estate markets can have advantages, they do in some sense “unquestionably . . . lessen the close-knittedness of residential settlements” by facilitating more frequent and flexible exit options.¹³⁴

So, the fact that U.S. property law is so strenuously proalienability is revealing.¹³⁵ Free alienability fundamentally preserves the function of land markets but also exacerbates the abstraction or financialization of absentee land rights. The fact that land rights can be very freely divided not only physically, but legally as well—as in the case of real estate or other trusts acting as

¹³⁰ See, e.g., Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 63–64 (2017).

¹³¹ See Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971–72 (1985).

¹³² See, e.g., Priest, *supra* note 103, at 401.

¹³³ See generally GRAHAM, *supra* note 56.

¹³⁴ Ellickson, *supra* note 54, at 1378; see also Merrill, *supra* note 62, at 2085–86 (discussing Ostrom).

¹³⁵ See, e.g., Priest, *supra* note 103, at 387 (outlining the development of U.S. property law as decidedly in favor of “greater circulation of land”).

wealth-maximizing tools, for example—also feed these “land as asset” trends.¹³⁶

But, again, even in this very promarket legal landscape, property law still has some pro-attachment levers within alienability rules themselves. For example, at least once someone has accessed property rights, it is almost a given that the law treats their home as something special and worthy of some measure of special protection or concern, even from creditors and other market forces. Homestead exemptions that reduce property taxes and mortgage redemption rights that protect against residential foreclosure are just two examples of property law reflecting a shared understanding that a person’s home is a special place that he or she cannot be unattached from without extraordinary protection.¹³⁷ Homes, of course, are not perfectly protected from eminent domain or otherwise, but they are more protected than other property types in many states.¹³⁸

In other instances, placemaking values are driven not directly by alienation rules but, rather, more indirectly through the *relative* priority of some rights over others. In Appalachia, for example, the priority given mineral rights, even over and above the sanctity of a surface rights’ land access, famously resulted in mountaintop removal practices that drastically changed physical landscapes.¹³⁹ And in other jurisdictions, especially in an age of

¹³⁶ A trust, in general, allows an owner to divide the benefit of asset ownership (wealth in the form of equitable ownership) from the management by a single trustee decision-maker. See generally Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985). Although the trust has been hailed as an example of a property law tool to keep the underlying property “unfragmented and well-scaled for productive use,” Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1178 (1999), the trust also allows for massive wealth concentration and, increasingly, maintenance over generations and even into perpetuity. See Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (And Beyond)*, 60 B.C. L. REV. 145, 174–84 (2019).

¹³⁷ See generally Matthew Kahn, *Nothing Is Certain in Life Except Death and Taxes: Providing Families with Constitutional Rights They Can Depend on Under Florida’s Homestead Taxation Regime*, 42 STETSON L. REV. 823 (2013) (exploring Florida’s homestead tax regime that requires permanent residence by a legal or natural dependent of the owner); David M. Holliday, *Construction and Application of Bankruptcy Abuse Prevention and Consumer Protection Act’s (BAPCPA) Limitation of Homestead Exemption*, 11 U.S.C.A. § 522(p), 52 A.L.R. FED. 2d 541 (2011) (exploring residency requirements in certain bankruptcy exemptions for homesteads); George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950) (evaluating various laws across the United States designed to protect certain family homes from creditors).

¹³⁸ See generally Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82 (2015).

¹³⁹ See, e.g., STOLL, *supra* note 69, at 165.

new fracking technologies, many surface owners find themselves surprised by new roads and other infrastructure development permitted even across their own yards and pastures to access mineral reserves, turning one place (home) into another (extractive mining field).¹⁴⁰ We can also see these effects in the relative security of tenants' rights compared to the right of landlords to recover possession, or in the fact that mobile homeownership is particularly insecure in light of the lack of surface land ownership, despite ownership of the home on top of it.¹⁴¹ All of these rules inform social, economic, and physical relations across landscapes.

Similarly, although absolute alienation restraints are rare and often outright prohibited in standard U.S. property law—at least and uniquely in the specific context of land—there are exceptions that shape place relations. This is particularly stark in the context of American Indian trust lands where, in general, Native rights of occupancy—whether tribally or individually owned—are deemed inalienable, and even many leases or other use agreements must be approved by a bureaucratic system of federal oversight and review.¹⁴² This unique system—not only of relative inalienability, but also in which local tribal governments have limited autonomy to regulate and define their own land relations—dramatically impacts reservation realities.¹⁴³

In other contexts, partial restraints on alienation are sometimes allowed, but typically only along one of three axes that can all support place-based attachments of specific kinds.¹⁴⁴ These include partial alienation restraints that (1) limit transfers to only a small group of potential transferees (family, for example, or

¹⁴⁰ Susan Greene, *Drilling and the American Dream: Your Perfect Home in a Colorado Gas Patch*, COLO. INDEP. (Nov. 2, 2013), <https://perma.cc/E5WL-6RZ4>.

¹⁴¹ See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). See also Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFFS. 350, 359–63 (1986); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 683 (1988) (explaining the rationale for just-cause eviction statutes as the recognition that the tenant “not only needs *some* place to live in, but she needs *this* place” (emphasis in original)).

¹⁴² See Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC'Y 1, 33–51 (2019).

¹⁴³ See Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 503–12 (2017); see also Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 255–62 (1990).

¹⁴⁴ See Ellickson, *supra* note 54, at 1375–76.

members of the same tribe); (2) proscribe allowed means of disposition (permitting gifts or certain leases but not outright sale);¹⁴⁵ and (3) provide for the possibility of some specific oversight—such as by a community or co-ownership vote—of certain transfer decisions.¹⁴⁶ Partial restraints like this generally serve group interests, over individual benefit, and tend to be permitted on those grounds.

Finally, and related to both possession and alienation of real property rights, there are many instances in property law in which courts enforce—or decide whether to enforce—various private choices related to residency requirements (which also, in effect, determine when and if a property can be transferred). For example, homeowner associations regularly impose owner-occupier conditions on condominium owners,¹⁴⁷ and courts often enforce conditions, such as prohibitions on tenants assigning or subleasing their leasehold, which keep existing residents attached to existing occupancies.¹⁴⁸ These mechanisms are all contested and fraught. Residency requirements, for example, have been used in different contexts—from welfare to immigration to public housing and, even more recently, zoning—with mixed constitutional and political success (as well as wisdom).¹⁴⁹ But in the context of these private property transactions, including homeowner associations' restrictions and landlords' leases, they seem much more likely to survive in ways that speak to how we think, implicitly, about balancing property's economic and social dimensions.¹⁵⁰

¹⁴⁵ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853–59 (1987) (analyzing why sales may be prohibited, when other forms of transfer are not); see also Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 933–37 (1985); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1443–51 (2009).

¹⁴⁶ See Ellickson, *supra* note 54, at 1376; see also Lavoie, *supra* note 80, at 269–78.

¹⁴⁷ See, e.g., JAMES C. SMITH & DONALD J. KOCHAN, LAW OF NEIGHBORS § 10:2 (rev. 2023) (discussing residency requirements within homeowner associations).

¹⁴⁸ See, e.g., Robert S. Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 420–26 (1969) (describing residency requirements in public housing).

¹⁴⁹ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (rejecting a durational residency requirement on receipt of public assistance as a violation of the constitutional right to travel).

¹⁵⁰ See Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals & HOAs*, 86 U. CIN. L. REV. 893, 911–22 (2018).

3. Metering nonowners' access and exclusion.

Last, but certainly not least, the contours of property's place-making function are fundamentally shaped by the scope of an owner's power to exclude others from that space. This is the flipside of an owner's own use and possession rights, but it warrants its own emphasis. The interests of nonowners are not adequately conveyed by merely considering an owner's right to exclude. Exclusion is an important right used by owners to ensure they retain relative autonomy within their space. But it is also important to acknowledge the other side of this equation: the absence of property rights can result in strong exclusionary forces, preventing access to even places where deep cultural and social attachments may otherwise lie.

Traditionally, property law has had some (limited) tools to balance at least some nonowner attachments over a legal owner's desire to exclude, at least in exceptional cases. This is still true from some (rare) exceptions to trespass doctrine for emergency or other narrow contexts, and there are doctrines—like easements by prescription or estoppel—that allow longtime users to mature their rights, if not to possession, at least to secure access without regard to an owner's more recent objection or change of mind. And, of course, adverse possession can do this too in the right circumstances.

Property scholars have also often relied on *State v. Shack*,¹⁵¹ a New Jersey state supreme court decision that held that a farmer-landowner had to allow migrant farmworkers living on his property access to attorneys and health service providers because the farmer's property ownership did not confer a right on him to have "dominion over the destiny" of others, especially workers he permitted onto his land.¹⁵² More recently, however, the U.S. Supreme Court in *Cedar Point Nursery v. Hassid*¹⁵³ struck down a California law that allowed union organizers to enter other privately owned agricultural land, reasoning that forcing access in that way violated the landowner's right to maintain control over access and exclusion to his land.¹⁵⁴ Although the exact scope and import of *Cedar Point* remains to be seen, the bottom line is that

¹⁵¹ 277 A.2d 369 (N.J. 1971).

¹⁵² *Id.* at 372.

¹⁵³ 594 U.S. 139 (2021).

¹⁵⁴ *Id.* at 160–61.

an owner's right to exclude—even over those with deep attachments to the owned land or other compelling need to access the property—remains very powerful.¹⁵⁵ But there are exceptions. During COVID-19 lockdowns, for example, many commentators marveled at the ways experiences of public places changed as access rules were modified to allow for more pedestrian access, often to the exclusion of cars, and more flexible spaces for things like outdoor dining.¹⁵⁶ In other instances, public access is fought after and critical to placemaking. We see this in the context of beach access and cases deciding the scope of things like property law's public trust doctrine, and even in the rights of protestors or others to access—reliably and without discrimination—public accommodations.¹⁵⁷

C. Property and Placemaking in Context

This is just a sample of the many levers by which collective place-relations are shaped by private property law choices. In a range of ways—from big structural choices (the use of a fixed grid of bounded private property lots, the definition of a bundle of perpetual and divisible property rights) to more context-specific dispute resolution tools (preferences within a partition action, the enforceability of certain residency requirements)—property rules are continually recalibrating the kinds of places and place attachments that are formed and protected.

This Section highlights these effects with two brief vignettes that exemplify how property decisions *in real time* are shaping actual place-relations. The first highlights how property decisions accommodate (or reject) *persistent* or *existing* place attachments, highlighting the case of Indigenous pipeline protesters denied rights to ancestral lands adjacent to their current reservation. The second focuses on a new form of housing investment—the

¹⁵⁵ Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotism" Gains Ground*, 2021 SUP. CT. REV. 125, 142. And the decision in *Cedar Point* remains controversial. See *Cedar Point*, 594 U.S. at 164–65 (Breyer, J., dissenting).

¹⁵⁶ See Jacob Fenston, *Some Streets Closed During the Pandemic to Allow Pedestrians Will Remain Car-Free*, NPR (Dec. 6, 2022), <https://perma.cc/K5C9-PX38>; see also DOMINIC T. SONKOWSKY & MITCHELL L. MOSS, OPEN RESTAURANTS IN NEW YORK 6 fig.1 (2022).

¹⁵⁷ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1965) (rejecting a takings challenge to a public accommodations rule in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, that prohibited a hotel from excluding hotel guests on the basis of race); Melissa K. Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L. REV. 295, 350–66 (2013) (analyzing the intersection between public beach access rights and private takings cases).

build-to-rent housing division—that highlights how property rules also shape *new* and *changing* places.

1. Standing Rock, pipeline protests, and trespass.

In 2016, the Standing Rock Sioux Tribe drew international attention as a massive protest camp formed along the banks of Lake Oahe, a man-made reservoir at the confluence of the Missouri and Cannonball Rivers in what is now North Dakota.¹⁵⁸ The Standing Rock protestors, joined by hundreds of other Indigenous peoples and allies from around the globe, objected to plans to construct a massive underground pipeline to transport crude oil thousands of miles from North Dakota to Illinois.

In particular, the protestors opposed plans to run the pipeline under Lake Oahe, a place of both important spiritual significance and the source of the Tribe's drinking water.¹⁵⁹ This planned water crossing ran one-half mile outside the formal boundary of the Standing Rock Tribe's federally recognized reservation, and in response to these protests, both the pipeline developer and the North Dakota governor repeatedly stressed that the Tribe no longer "owned" this specific land under which the pipeline would run.¹⁶⁰ The Standing Rock Sioux Tribe, however, did not assert direct ownership of the pipeline-impacted lands *per se*. Instead, the Tribe claimed a connection outside this property logic:

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have

¹⁵⁸ This discussion builds on and draws heavily from Jessica A. Shoemaker, *Invited Essay: Pipelines, Protest, and Property*, 27 GREAT PLAINS RSCH. 69 (2017), and Nicole Graham & Jessica A. Shoemaker, *Property Rights and Power Across Rural Landscapes*, in HANDBOOK OF PROPERTY, LAW, AND SOCIETY 426 (Margaret Davies et al. eds., 2022).

¹⁵⁹ See Shoemaker, *supra* note 142, at 74–77.

¹⁶⁰ See, e.g., *The Facts*, DAKOTA ACCESS PIPELINE, <https://perma.cc/B8G9-3TJY> ("The pipeline *does not encroach or cross* any land owned by the Standing Rock Sioux Tribe." (emphasis in original)); Jack Dalrymple, Opinion, *Dakota Access Pipeline: Mob Rule Triumphed over Law and Common Sense*, STAR TRIB. (Dec. 15, 2016), <https://perma.cc/H67J-8WW6> ("[T]he pipeline's permitted route never crosses tribal land.").

access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.¹⁶¹

Despite this actual connection, the Tribe's lack of recognized property rights has had a range of practical and legal consequences. For example, in one of the most heartbreaking—and still disputed—events of the summer of 2016, the Tribe asserted that one of the private landowners in the pipeline's path agreed, in light of the dispute, to allow the Tribe to survey his land as part of developing its legal case. Because of this survey, the Sioux reported that they reconnected with sacred sites that had otherwise been unrecognized or unobserved for generations—excluded, as it were, by the boundaries of the current owner's private property rights.¹⁶² After the Sioux reported this turn of events in an emergency filing to the federal court, the Sioux alleged that the developer—in the meantime and on a weekend—leapfrogged ahead to target destructive construction work over and through these newly identified sites.¹⁶³ Then, the court denied emergency relief.¹⁶⁴

This is just one of many examples of property law choices shaping in direct and indirect ways the Tribe's present relationship to the pipeline's path *and* the site's evolution into a site of oil delivery infrastructure. Indeed, the Sioux have claimed the land that is now Lake Oahe since time immemorial.¹⁶⁵ Their dispossession and displacement traces to a still-earlier series of property law choices, including, fundamentally, the acceptance in U.S. law of a discovery doctrine that limits original Indigenous property rights to thinly protected rights of occupancy, subject to federal purchase or conquest, and a colonial legal structure that continues to limit most expressions of tribal sovereignty to land and territory within boundaries that the federal government defines.¹⁶⁶

¹⁶¹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) (statement of the Chairman of the Standing Rock Sioux Tribe).

¹⁶² *See id.* at 25.

¹⁶³ *See* Emergency Motion for Injunction Pending Appeal at 8–9, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d (D.D.C. 2016) (No. 1:16-cv-1534).

¹⁶⁴ *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 37.

¹⁶⁵ *See* Danielle Delaney, *Under Coyote's Mask: Environmental Law, Indigenous Identity, and #NODAPL*, 24 MICH. J. RACE & L. 299, 325 n.136 (2019); Nick Estes, *The Supreme Law of the Land: Standing Rock and the Dakota Access Pipeline*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://perma.cc/7HVX-UUUG>.

¹⁶⁶ *See, e.g., Johnson v. M'Intosh*, 21 U.S. 543, 587–88 (1823); *see* Shoemaker, *supra* note 142, at 11–20.

In this case, the Tribe had an even more acute and specifically painful legal relation to the space. The pipeline crossed not only ancestral territories but lands that had been reserved for the Sioux in earlier treaties.¹⁶⁷ The federal government had taken those previously promised reserved spaces in a complex, ugly history that a federal court once described as the most “ripe and rank case of dishonorable dealings” likely to be found in U.S. history.¹⁶⁸ After an unconstitutional taking of the Tribe’s promised property rights, the Supreme Court awarded monetary relief (“just compensation”) in exchange for the taken lands, but the Sioux Tribes collectively—some of the poorest in North America—still refuse to accept this money decades later, with over \$1 billion currently sitting in a Treasury account that the Sioux categorically reject.¹⁶⁹ Indeed, the layers are still more thick: Lake Oahe itself was created in 1957 by a federal Army Corps of Engineers project that dredged the Cannonball River to construct the Oahe Dam, and the flooding that ensued from the condemnation of this land and the building of this dam “destroyed more Indian land than any other single public-works project in the United States.”¹⁷⁰

Property relations here are doing so much work not only in how the landscapes have materially changed (the creation of a reservoir, the building of a pipeline), but also in how the Sioux have been historically excluded and how that exclusion continues to shape social relations around that space. Ultimately, the state’s power to recognize (or deny) formal property rights to the pipeline-impacted lands limited the Tribe to legal objections based mostly on a weaker requirement that the federal government must consult with the Tribe based on “historic” ties to these places and more standard efforts to enforce generally applicable federal environmental statutes.¹⁷¹

¹⁶⁷ See Shoemaker, *supra* note 142, at 77.

¹⁶⁸ *United States v. Sioux Nation of Indians*, 518 F.2d 1298, 1302 (Ct. Cl. 1975).

¹⁶⁹ Tom Legro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011), <https://perma.cc/RU3V-VBA7>; see also NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* 254 (2019); Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 *HARV. C.R.-C.L. L. REV.* 337, 367–70 (2018) (describing land status history).

¹⁷⁰ MICHAEL L. LAWSON, *DAMMED INDIANS REVISITED: THE CONTINUING HISTORY OF THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX* 47, 286 tbl.1 (2009).

¹⁷¹ *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 8–10.

As it became clear the pipeline would be built over tribal objection, the protesters were confronted with military tanks, but in the end, it was another quiet property choice—the issuance of a federal trespass notice—that further emptied the protest site.¹⁷² It was not a typical trespass decision, however, as the camp was located on an allotment of an individual Standing Rock citizen, who had given permission for the protesters to use her land.¹⁷³ This is a complex legal history, and the allotment here was, like many Indian allotments, fractionated, which means it was co-owned in a special form of tenancy in common—in this case with both other Indian citizens and the Tribe itself—in a special federal trust status.¹⁷⁴ In a typical co-ownership arrangement outside of a reservation context, any single co-owner could use and possess all of their undivided interest in jointly owned property as they see fit—subject to other co-owner objections, such as waste or partition, if the co-owners could not agree. But here, because the allotment was subject to special Indian-only property regulations, the federal government requires even co-owners to get a lease signed by their co-owners and approved by the Bureau of Indian Affairs before using and possessing their own land.¹⁷⁵ This owner, LaDonna Brave Bull Allard, failed to do that, and the mechanics of a colonial, undemocratic, and painful property history played out in the requirement that she, as an owner, exclude herself and her guests from her own property.¹⁷⁶ Two years later, in 2019, the State of North Dakota sued the U.S. Army Corps of Engineers for not acting sooner to stop the protest, which it described as a “public nuisance” and “civil trespass.”¹⁷⁷ Allard died in 2021.¹⁷⁸

Ultimately, the Tribe’s lack of recognized property rights over the pipeline path facilitated construction over their objection. The Tribes lost, and protestors were served a federal trespass notice,

¹⁷² See *Bureau of Indian Affairs Issues ‘Trespass’ Notice to #NoDAPL Camp*, INDIANZ (Feb. 17, 2017), <https://perma.cc/T8RD-SDB7>.

¹⁷³ See *id.*

¹⁷⁴ Shoemaker, *supra* note 112, at 385.

¹⁷⁵ See *id.* at 394–95.

¹⁷⁶ Jenni Monet, *After the Razing at Standing Rock*, INDIAN COUNTRY TODAY (Feb. 28, 2017), <https://perma.cc/R2X3-QGDH>.

¹⁷⁷ Complaint at 1, *North Dakota v. United States*, 567 F. Supp. 3d 1111 (D.N.D. 2019) (No. 1:19-cv-00150).

¹⁷⁸ See Aliyah Chavez & Mary Annette Pember, *LaDonna Brave Bull Allard ‘Changed History’*, INDIAN COUNTRY TODAY (Apr. 12, 2021), <https://ictnews.org/obituaries/ladonna-brave-bull-allard-changed-history>.

even on Indian-owned lands on which a camp was erected.¹⁷⁹ On the one hand, this account reminds us that property neither creates nor extinguishes attachment. Attachment is an experience, a connection, and a relationship, and that relationship can continue—practically, emotionally, and in collective memories and cultures—without a legal recognition of it. But, property also dramatically impacts the equation. Many Indigenous groups and other displaced peoples continue to express important connections to places that they do not have—or no longer have—a recognized legal right even to enter. In the Standing Rock case, the legal process largely failed to recognize these longstanding cultural and social attachments to place. Instead, their ongoing exclusion has been enforced and enacted through *current* manifestations of property law, which presently has only the thinnest and most narrow means to preserve access outside of the owner or nonowner binary. The Standing Rock case also failed to acknowledge the important ways in which this entire construct of private property ownership—and the attendant exclusion of the Tribe as owner—was built on a series of imagined legal stories used to achieve expedient ends (western settlement, Indigenous exclusion, the building of a dam).¹⁸⁰ In the end, the pipeline was built. Oil now flows, and the route has already expanded.¹⁸¹

2. Build-to-rent hometown.

Meanwhile, in a very different context—but one that also reveals the power of core property designs to shape the places we inhabit—rapid changes are cascading across the United States' housing markets. Investors increasingly see housing as a profitable investment vehicle, creating not only an appreciable asset (the land and house itself) but also a reliable income stream (the rent).¹⁸² After the 2008 recession, “private equity-backed firms . . . stormed into the multifamily apartment market, snapping up

¹⁷⁹ See Monet, *supra* note 176.

¹⁸⁰ Cf. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 38 *YALE J.L. & HUM.* 37, 43–53 (1990).

¹⁸¹ See *More Oil Shipped as Dakota Access Pipeline Expansion Starts*, AP NEWS (Aug. 6, 2021), <https://perma.cc/TW3B-GUJZ>.

¹⁸² See BRETT CHRISTOPHERS, *OUR LIVES IN THEIR PORTFOLIOS: WHY ASSET MANAGERS OWN THE WORLD* 95–96, 119 (2023).

rentals by the thousands and becoming major landlords in American cities.”¹⁸³ But institutional ownership is not limited to apartments; outside investment in *single-family* residential housing has also skyrocketed.¹⁸⁴ In 2021, roughly “a quarter of all single-family-home sales went to landlords, aspiring Airbnb tycoons, and other types of investors,” a significant growth from prior years.¹⁸⁵ Other reports put this number as high as one-third of houses going to “people who had no intention of living in them.”¹⁸⁶

Investor-owners come in different forms, but housing advocates worry in particular that the largest institutional investors, including private equity firms, can use economies of scale to hike rents, distort prices, neglect upkeep, and reduce services—all before ultimately selling the buildings at profits.¹⁸⁷ Sophisticated investment in housing can have potential benefits, including providing much needed new supply, expediting rehabilitation of distressed properties, improving market liquidity for home sellers, and providing rental opportunities for the large—and possibly increasing—share of the public that desires more flexible and accessible housing options than homeownership can sometimes provide.¹⁸⁸ Yet, many of the worries about investor takeover and capture of housing supply also seem accurate. For example, increasing investor appetite for single-family homes has been connected to both “driving up rents for suburban families” and

¹⁸³ Heather Vogell, *When Private Equity Becomes Your Landlord*, PROPUBLICA (Feb. 7, 2022), <https://perma.cc/C7P5-3LB4> (describing private equity as “now the dominant form of financial backing among the 35 largest owners of multifamily buildings,” increasing from about a third of units held by top owners backed by private equity in 2011, to half in 2021).

¹⁸⁴ Congress is paying attention. See, e.g., Memorandum from the Comm. on Fin. Servs. Majority Staff to the Members of the Comm. on Fin. Servs. 1–2 (June 23, 2022).

¹⁸⁵ Amanda Mull, *The HGTV-ification of America*, ATLANTIC (Aug. 19, 2022), <https://www.theatlantic.com/technology/archive/2022/08/hgtv-flipping-houses-cheap-redesign/671187/>; see also Tim Henderson, *Investors Bought a Quarter of Homes Sold Last Year, Driving Up Rents*, STATELINE (July 22, 2022), <https://perma.cc/K9ZT-2558> (noting that this is a 15–16% increase annually).

¹⁸⁶ Mull, *supra* note 185.

¹⁸⁷ *Where Have All the Houses Gone: Private Equity, Single-Family Rentals, and America's Neighborhoods: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 117th Cong. 2 (2022) (written testimony of Jenny Schuetz, Senior Fellow, Brookings Metro); see also Brandon Weiss, *Corporate Consolidation of Rental Housing & the Case for National Rent Stabilization*, 101 WASH. U. L. REV. 553, 562–66 (2023) (collecting evidence of the unique harms attributed to more profit-seeking, anonymous investor landlords).

¹⁸⁸ Schuetz, *supra* note 187, at 2–3; see also Richard Florida, *The Great Housing Reset*, BLOOMBERG (May 3, 2018), <https://perma.cc/8C8H-85D7>.

inflating housing prices,¹⁸⁹ with the growing investor presence explaining “over half of the increase in real house price appreciation rates between 2006 and 2014.”¹⁹⁰ Although homeownership remains the greatest source of generational wealth for families, these factors together make homeownership even more unattainable for many Americans.¹⁹¹ Many home buyers, for example, report difficulty competing with cash offers or the uniquely speedy purchase pathways of experienced investors.¹⁹²

On that same sample suburban street in Nashville described in the Introduction—the one Progressive Residential purchased nineteen of thirty-two homes in the last several years—an Amazon warehouse worker who lived in one of the rented homes with her husband and daughter complained that “[Progressive Residential] regularly failed to fulfill ordinary maintenance requests.”¹⁹³ And, although the block had historically been a haven for first-time home buyers, including a corrections officer, housekeeper, and electrician who all bought one of the modest homes, the county where the street is located is now “ranked as the fifth-least affordable U.S. county for home buyers when considering wages in the area.”¹⁹⁴ The local assessor explains: “For the average person starting out wanting to start their family, the choice is no longer: Can I purchase a house? It’s instead: Can I afford to rent a house?”¹⁹⁵

¹⁸⁹ Henderson, *supra* note 185.

¹⁹⁰ Lauren Lambie-Hanson, Wenli Li & Michael Slonkosky, *Institutional Investors and the U.S. Housing Recovery* 1 (Fed. Rsrv. Bank of Phila., Working Paper No. 19-45, 2019).

¹⁹¹ *See generally, e.g.*, THOMAS P. BOEHM & ALAN SCHLOTTMANN, U.S. DEP’T OF HOUS. & URB. DEV., WEALTH ACCUMULATION AND HOMEOWNERSHIP: EVIDENCE FOR LOW-INCOME HOUSEHOLDS (2004) (demonstrating that homeownership is a route to wealth accumulation); THOMAS P. BOEHM & ALAN SCHLOTTMANN, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS (2001) (establishing that wealth accumulation has positive intergenerational effects); *Homeownership*, NAT’L EQUITY ATLAS, <https://perma.cc/QS9L-NDRR> (showing that overall homeownership rates declined between 2010 and 2020); Jung Hyun Choi & Laurie Goodman, *What Explains the Homeownership Gap Between Black and White Young Adults?*, URB. INST. (Nov. 20, 2018), <https://perma.cc/XP29-AFWZ> (highlighting racial gaps in homeownership).

¹⁹² *See* Aimee Picchi, *For Most Americans, Owning a Home Is Now a Distant Dream*, CBS NEWS (Feb. 22, 2022), <https://perma.cc/85MW-72L9> (noting that cash offers can out-compete new buyers and proceed more swiftly in purchasing homes).

¹⁹³ Spencer Woodman, Margot Gibbs & Peter Whoriskey, *How a Billion Dollar Housing Bet Upended a Tennessee Neighborhood*, ICIJ (Dec. 15, 2021), <https://perma.cc/P4TU-2WAR>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Property law is everywhere in these dynamics. Property rules decide, as a first principle, to sanction absentee investment. It is a choice to design property rights such that title and possession can be decoupled without limits and that housing portfolios can be concentrated in powerful, large-scale investor-owners like this. Other property rules shape more grounded dynamics, too, including where these investments occur. The Brookings Institute, for example, has shown that investors are more likely to be interested in rental purchases where housing rules are more lax.¹⁹⁶ And, actual rental relationships—including the rights of tenants to demand maintenance from the landlord, the relative rent security, or risk of inflation, even eviction standards—are all set by local property rules. As are the financial incentives for investors, including what gains they can recover, what taxes are owed, and what ownership arrangements are permitted.

So, it is worth thinking about the people-place dynamics that may follow when an existing suburban block shifts from owner-occupants to renters of a giant global investment firm. But, dynamics may be even more important when we also consider that investors are increasingly turning not to single house-by-house purchases, but, rather, to planned, entirely built-to-rent communities. “With bulk and one-off home purchases becoming less attractive as options, a growing number of institutions are employing the [build-to-rent] strategy, which encompasses building homes that are rented rather than sold.”¹⁹⁷ According to the *New York Times*:

The number of built-to-rent homes—single-family homes constructed expressly for the purpose of renting—increased 30 percent from 2019 to 2020. Today, they make up about 6 percent of all new homes being built in the United States, and that number is poised to double in the next 10 years. This is the fastest-growing sector of the American housing market, and it is increasingly master-planned and built on tracts.¹⁹⁸

Like any housing-related investment and rental scenario, the consequences are complex. But the experience in a community of one

¹⁹⁶ Henderson, *supra* note 185.

¹⁹⁷ JEFF ADLER, PAUL FIORILLA, DOUG RESSLER & CASEY COBB, YARDI MATRIX, BUILD-TO-RENT FUELS GROWTH IN INSTITUTIONAL SINGLE-FAMILY RENTAL MARKET 5 (2022).

¹⁹⁸ Debra Kamin, *The Market for Single-Family Rentals Grows as Homeownership Wanes*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/realestate/single-family-rentals.html>.

hundred or two hundred rental-only homes, all controlled by a single professional investment firm, is necessarily different than a more autonomous, organic, and diversified municipality, neighborhood, or street. In addition to cementing an unequal economic structure with profit-focused investors both collecting rent from more precarious (and not equity-building) tenants and benefiting from anticipated appreciation of the house itself, a whole range of other property parameters shape the kinds of communities and environments that are built in these rental-only spaces. Who decides what? How do we define the relative rights of landlord and tenant? Which lease terms are enforceable? Will evictions be speedy or subject to protections for the security and attachments tenants have built—maybe especially in their single-family homes? Can tenants assign or sublease their properties, or, if not, who picks the new neighbors? How long are leases? Can tenants change the property? Paint the house? Garden the yards? Can tenants organize to share power? Is there any democratic voice in future decisions about land use, community development, or neighborhood events? Is there any right to build equity, or an eventual right to buy?

What does it feel like to grow up in a hometown that is completely built for rent? There is more to say about investor-ownership and the tenancy dynamics here,¹⁹⁹ but at least for now, it should be clear that fundamental property choices *will* shape actual relations between people and places in these build-to-rent communities. And like everything about property, it all could change.

The relationship between property and placemaking is much more complex than might be first imagined. In particular, the relationship between property and place attachments is only sometimes congruent.²⁰⁰ Secure property-protected possession supports the creation of stable attachments and place-relations, but modern ownership does not require such a connection. At the same time, these examples reveal how often our current property system is willing to protect ownership without attachment

¹⁹⁹ See *infra* Part III.B.2 (laying out a more complete critique of ownership without place attachment).

²⁰⁰ See *supra* note 80 (discussing that the issue of property and place sometimes operate at different scales).

(absent investors, pipeline developers) over the actual attachments of nonowners without full property title (vulnerable tenants, displaced Indigenous peoples). Both property and places are human-created, social, and subjective. Therefore, we should be more attentive to when place-based claims are given weight in property law, when they are not, and why.

III. EVALUATING PEOPLE-PLACE-PROPERTY RELATIONS

Property theory has worked for a long time to distill the core justifications and purposes of private property. Most scholars would likely organize these theories in three broad categories: (1) a libertarian view of property as an autonomy-reinforcing buffer for a fully actualized individual to be free from at least some government interference;²⁰¹ (2) a utilitarian view that emphasizes property as the currency of the market economy, with private property functioning as a particular collective strategy to encourage efficient resource use and overall welfare maximization;²⁰² and finally, (3) a more pluralistic, sometimes called progressive, approach that emphasizes property as a social institution that, like any other exercise of state authority, should only exist to the extent it serves the public good—defined, frequently, as a broad conception of promoting human flourishing.²⁰³

Within each broad category, there is much nuance and even some disagreement.²⁰⁴ By focusing on placemaking values here, I intend not to replace these theories but rather to provide a different organizing frame to consider the fidelity of current property choices to any or all of these aims. It is clear as a descriptive matter that property does impact placemaking and that property choices are continually recalibrating which place attachments we value and protect, and why. These attachments have a range of consequences, many of which are positive, but some of which cause concern and create risk. Thus, we should think more carefully about this spectrum of attachment-related values, not only

²⁰¹ See, e.g., GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 35–56 (2012).

²⁰² *Id.* at 11–34.

²⁰³ *Id.* at 80–102.

²⁰⁴ Progressive property theorists, for example, emphasize different aspects of a human flourishing insight, whether focused on equality and preserving a functioning democracy, or concerned more directly with the ecological and planetary consequences of property choices around material resources, or more generally focused on human dignity, social obligations, and community. See generally Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

to help make clearer property choices in the future but also to better discern and evaluate the many times that place attachments are asserted as a sword or defense in specific property disputes. This Section aims, primarily, to clear our vision around these claims, whatever our otherwise central theory of property's purpose.

To that end, I offer three specific contributions here. First, I outline the evidence—relying not only on legal scholarship but also work from adjacent fields like sociology, geography, and anthropology—for the positive benefits of place-based attachments (and, ergo, of protecting and nurturing positive placemaking through property choices). Then, I offer a series of counter-cases: (1) the risks of too much attachment, in the form of toxic elite exclusion or the creation of impenetrable, ossified dynasties of ownership, (2) the possibility of property with no attachment at all, as in the case of commodified investment in land as asset class, and finally (3) a brief reminder of the persistence and precarity of land attachments without any property protection at all. With this fuller view of attachment values and risks, we can better evaluate property choices through this placemaking lens, also incorporating and expanding existing property rationales.

A. Benefits: Positive Place Attachments

To begin, this Section catalogs key benefits of positive place attachments, both individually and collectively. Scholars, artists, and activists have all explored numerous dimensions of place values.²⁰⁵ Here, I synthesize four broad categories of benefit: anchoring individual identity to specific places of concern, maintaining complex systems of local knowledge embedded across particular landscapes, fostering important stewardship values over the natural environment, and supporting stable and inclusive communities of reciprocity and care.

1. Forming identities.

Place attachments provide important personal benefits to individuals who experience this sense of belonging, loyalty, and

²⁰⁵ See generally EDWARD S. CASEY, GETTING BACK INTO PLACE: TOWARD A RENEWED UNDERSTANDING OF THE PLACE-WORLD (2d ed. 1993); WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE 17–48 (1977); BELL HOOKS, BELONGING: A CULTURE OF PLACE (2009); Owen Sheers, *Poetry and Place: Some Personal Reflections*, 93 GEOGRAPHY 172 (2008).

connectedness in a specific geographic space. These place-based connections are not the exclusive pathways for developing strong individual and collective identities, of course, but individual experiences of autonomy and dignity can flow from powerfully stable property ownership.²⁰⁶ In particular, Professor Margaret Radin's well-known work on identity property highlights how some relations between individuals and highly personal items—as opposed to more “fungible” assets held mainly for instrumental reasons—play important roles in the process of how we as humans “constitute ourselves as continuing personal entities in the world.”²⁰⁷ This “personhood” theory tends to highlight the unique role of certain irreplaceable items held as property—a wedding ring on a spouse's finger, for example—in supporting an individual's actual development and sense of self.²⁰⁸

This identity-reinforcing benefit extends to places as well. Radin recognized, for example, that the protection due a person's physical home may be different than the protection due a property owned by a commercial landlord.²⁰⁹ Radin, however, identified home as “a moral nexus between liberty, privacy, and freedom of association” and argued that home is even more than this—“a strand of property for personhood”—because one's home is *the*

²⁰⁶ For example, in the context of what constitutes “just compensation” for eminent domain, scholars often identify some uncompensated “subjective premium” or certain “sentimental attachments” to property or its surrounding place (the neighborhood or some special suitability of a specific location for particular needs) that are valuable but not included in objective market consideration. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109 (2006) (emphasizing the more subjective, personal loss experienced when government takes property that previously “really, really” belonged to someone (quoting Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1143 (1996) (book review))); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 963 (“Most property owners value their property above fair market value; if they did not, they likely would have sold it already.”); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 598–99 (2013).

²⁰⁷ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982); see also MARGARET JANE RADIN, REINTERPRETING PROPERTY 35–71 (1993) (describing how certain highly personal, nonfungible property can become closely intertwined with an owner's identity and personhood). Courts have also recognized the importance of possession for certain special identity property. See, e.g., *In re McDowell's Estate*, 345 N.Y.S.2d 828, 830 (N.Y. Sur. Ct. 1973) (ordering fighting siblings to take turns with their deceased father's rocking chair every six months).

²⁰⁸ Radin, *Property and Personhood*, *supra* note 207, at 959.

²⁰⁹ *Id.* at 987.

place where one embodies or constitutes oneself, “the scene of one’s history and future, one’s life and growth.”²¹⁰

There may be some ambiguity about the degree to which an object or a house itself constructs, as opposed to expresses, one’s identity, but individual identity can also be understood as part of wider, embedded group identities.²¹¹ Place attachment and community belonging are deeply connected; property is a tool not only for recognizing individual rights but also for organizing what relations are recognized within a shared space.²¹² Property can, at times, connote an important connection to a place (“my street” or “my town”) and ability to speak for that place,²¹³ but this can also scale to constitute collective identities and group-place-relations (“our street” or “our town”).²¹⁴

In a similar way, Professor Gregory Alexander has called specifically for a “thicker” conception of community in property theory, recognizing community not just as an aggregation of individuals but as a constituted group identity.²¹⁵ And, as Professor Tim Mulvaney explained: “Such an emphasis on identity intimates that property is most appropriately understood as a regime

²¹⁰ *Id.* at 991–92; *see also id.* at 991 n.119 (collecting cases where individuals are protected from criminal prosecution for certain activities, like possession of some obscene materials, conducted exclusively within their home); Radin, *supra* note 141 at 359–62 (using personhood theories to conclude that tenants who have resided in a specific space for an extended time warrant more protection and consideration than new residents); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 747 (1986) (outlining how property protects “people’s control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity” (emphasis added)).

²¹¹ *See, e.g.*, Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1112–14 (2009).

²¹² *See infra* Part III.A.4 (expanding on community structure).

²¹³ *See* Antonia Layard, *Property as Socio-Legal Institution, Practice, Object, Idea*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF LAW 271, 276 (Jiří Přibáň ed., 2022); *see also* Davina Cooper, *Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property*, 32 LAW & SOC. INQUIRY 625, 629–30 (2007); Nestor M. Davidson & David Fagundes, *Law and Neighborhood Names*, 72 VAND. L. REV. 757, 801–02 (2019) (exploring when and how a neighborhood might become a “coherent people” that can claim cultural property over that group identity and, literally, name the place).

²¹⁴ *See* Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 344–63 (2008) (identifying some relations between land and collective groups as essential to group identity and survival); *see also* Singer, *supra* note 141, at 652–63 (scaling “first in time” theories of property beyond individual owners to community-level connection to social networks and physical places).

²¹⁵ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 758–60 (2009). This “thick” versus “thin” distinction derives from earlier work in sociology. *See, e.g.*, Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 275–77 (1997).

that, rather than shielding individuals from their communities, binds individuals to act in their communities' best interests in a way that goes *beyond*, for instance, maximizing that community's aggregate wealth, and *towards* promoting equality."²¹⁶ In this framing, place attachment matters because it helps us form and express both individual identity and our shared humanness—with social relations as instrumental to identity-forming and meaning-making as our claims to any single asset.²¹⁷

2. Embedding knowledge.

Places can also become embedded, over time, with personal and collective memories.²¹⁸ Storing personal memories in relation to physical space is one of the mechanisms Radin explored in thinking about identity-formation through (or with) secure property, and the fact that memories are tied to specific places is also part of the sentimental value that we regularly attach to our own properties.²¹⁹ These individual memories are important. I feel a deep sense of family connection and attachment when I walk to the maple syrup sugar shack where my grandparents boiled sap into syrup and I spent many days as a child.²²⁰ I can also remember some of this when I sit here, hundreds of miles away, at my desk typing this, but it is not the same as when I walk the dirt, smell the specific mix of just-warming maple tree stands, and hear the specific crunch of last year's fallen leaves under my boots.²²¹

²¹⁶ Mulvaney, *supra* note 31, at 368 (emphasis in original); see also Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938–62 (2005) (emphasizing how property operates to introduce an owner into a wide network of community relations). Physical communities are notably different in this regard than other communities, including online groups which may have the opposite effect. See, e.g., FELICIA WU SONG, *VIRTUAL COMMUNITIES: BOWLING ALONE, ONLINE TOGETHER* 6 (2009) (exploring how “the growing ubiquity of the internet in public life lends cultural legitimacy and structural power to particular conceptions of the individual”).

²¹⁷ Stern, *supra* note 211, at 1109–10 (surveying psychological research with skepticism for claims of individual identity formation via object or asset, and rather emphasizing the centrality of social relations to human development and flourishing).

²¹⁸ See Peñalver, *supra* note 53, at 1073–78 (describing ways that the law recognizes and affirms long-standing “memories of property”).

²¹⁹ See Radin, *Property and Personhood*, *supra* note 207, at 967 (exploring how important physical places, like a home, can be “connected with memory and the continuity of self through memory”).

²²⁰ See *infra* Part V.A.

²²¹ Both literature and science have established the connection between our senses and memory. See, e.g., Michael Hopkin, *Link Proved Between Senses and Memory*, NATURE (May 31, 2004), <https://www.nature.com/articles/news040524-12> (discussing brain scan

But, when people experience a place together—over generations or in close physical or cultural proximity within a single timespan—that place can come to hold not only individual memories but a collective kind of meaning, a particular place-based wisdom and knowledge. Anthropologist Keith Basso, for example, explored the relationships between the Western Apache and their surrounding landscape in his extended study, *Wisdom Sits in Places*.²²² Through a detailed interrogation of Apache place-names, Basso revealed how place-names not only describe specific physical attributes of spaces but also reference specific group narratives and traditions, emphasizing ideas of morality and historical continuity in a specific landscape.²²³ These descriptive and symbolic place names connect community members to Apache history and an ongoing relationship between land and Apache society.²²⁴ These unique place-relationships and place identities are also tied to specific Apache ways of knowing—of conceiving of wisdom itself—and Basso emphasized that this wisdom is earned and developed only over a long time. As two reviewers of Basso’s work summarized: “[T]he Apaches are encouraged to ‘drink from places’ since wisdom, like water is deemed essential to survival.”²²⁵

Similar place-based attachments tied to ways of knowing and understanding one’s place in the world are also prevalent in other groups, such as the Standing Rock examples, above.²²⁶ But long-standing collective connection to land can also impact the land itself. As Professor Eduardo Peñalver elaborated in his work on the duality of property’s memories, land can hold and reflect both individual and community memories *of* property and also the

evidence of how sights and smells “evoke the past”); MARCEL PROUST, SWANN’S WAY 61–62 (C.K. Scott Moncrieff trans., 1922) (describing how tasting madeleine crumbs in tea as an adult evoked sudden, vivid memories from childhood).

²²² See generally KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996).

²²³ *Id.* at 77–92.

²²⁴ *Id.* at 86–87, 91–92.

²²⁵ Isabelle Sabau & Mircea Sabau, Book Review, 62 ROCKY MTN. MODERN LANG. REV. 115, 117 (2008) (quoting Basso, *supra* note 222, at 134). Similar connections are explored in the context of the Standing Rock examples described above.

²²⁶ See *supra* Part II.C.1; see also Carpenter, *supra* note 214, at 341–63; M. Alexander Pearl, *Reflections on Place and People from Within*, 52 SW. L. REV. 199, 200–02 (2023) (emphasizing the important meaning-making that occurs through careful, intimate place-based narratives and knowledge).

ways in which there is memory “stored *in* property.”²²⁷ For example, Peñalver noted that there is physical memory *in* property itself, including physical realities (i.e., consequences of a present land-use choice reaching far into the future) and other connections between property and memory, including some people’s deep connections to some land.²²⁸

This helps us understand how, in addition to social and moral histories and traditions, property and place attachments can also foster close local knowledge of the resource itself. This is actually one of the core benefits of private property system designs, as originally imagined. Private property is specifically valued because of its reliance on “decentralized management” and the fact that the system as a whole “draws heavily on local knowledge about resources: where they are, what they are, what they are good for, and what sorts of practices or techniques will extract the most value from them.”²²⁹ In a very utilitarian sense, this local knowledge can lead to better decision-making than more centralized regulation would. “A sole owner of a land parcel is apt to have better knowledge of its immediate environment than virtually anyone else does.”²³⁰ Indeed, this whole concept of elevating the value of local knowledge undergirds arguments about the efficiency of market economies, with individual rational landowners, for example, acting more efficiently, with reduced information costs, compared to large central governments that cannot access the same dynamic knowledge and flexible expertise.²³¹

In agrarian literatures, there is also a long history of elevating “cultural knowledge” that may be transmitted locally and within families over “scientific knowledge” that is “defined by common intellectual ties rather than blood kinship.”²³² Certainly, this definitive better-or-worse classification can be disputed,²³³

²²⁷ Peñalver, *supra* note 53, at 1073–85 (emphasis in original).

²²⁸ *Id.* at 1079–80 (exploring who has the privilege to interpret or decode those memories and whether they can become latent—still there, but not recognized).

²²⁹ Merrill, *supra* note 62, at 2081–83 (applying this consideration to local knowledge of a particular farm—for example if “one portion of the land may be too hilly and rocky for crops, yet still suitable for grazing livestock”); *see also infra* Part III.B.2 (outlining this insight in more detail).

²³⁰ Ellickson, *supra* note 54, at 1331.

²³¹ *See, e.g., id.* at 1331 (concluding that “collectivized agriculture almost always fails” and “family farming is ubiquitous”). *But see* Chen & Adams, *supra* note 96, at 385–87, 395–96 (arguing small family farms are rarely sustainable).

²³² Chen & Adams, *supra* note 96, at 393.

²³³ This statement is especially true as I write from a land-grant institution, charged with scientific inquiry to make agriculture more productive and efficient.

but at least we might acknowledge that there are different kinds of knowledge and that certain kinds of cultural knowledge, perhaps especially in an agrarian context, may come specifically and uniquely from close physical experience and knowledge of the space itself—or, in other words, from the lived experience of a place attachment.

3. Stewarding with care.

If a property attachment helps a person or community acquire some uniquely deep and intimate knowledge of a place, then we also hope that those individuals and community members come to feel protective of that place and are uniquely suited to care for and steward it. Part of this is pure economics. As Fennell has explained, when a property owner enjoys physically rooted rights to real property, the fixed geography of those rights helps ensure the “continuity of possession over the physical attributes of the land,” and this, in turn, encourages owners to internalize the effects of their own acts on that land (and thus, make better choices with these actions).²³⁴

But part of this also relates to an identity-related transformation that can occur when one shifts from the notion that property “belongs” to an owner (as in “this land is mine”) to deeper feelings of belonging and care and affiliation (such that “I am the land” or “we together, in relationships, are the land”).²³⁵ This idea that we care for what we know and what we love is also a broad theme of a lot of land and agrarian philosophy. Conservationist Aldo Leopold famously described land as a community, calling it a basic concept of ecology that land is inherently collective and composed of interlocking soils, waters, plants, and animals.²³⁶ According to Leopold, “[w]e abuse land because we regard it as a commodity belonging to us. When we see land as a community to

²³⁴ Fennell, *supra* note 2, at 1489 (describing the logic of individual land rights “when the land itself is the repository of an owner’s investment efforts and the place where returns from those efforts must be collected”). Fennell has further stated:

Trees are rooted (literally) and present the owner with the choice between chopping now and chopping later. Crops are anchored in space, so owners must reap where they sow. Cattle are not immobile, but their grazing imposes costs that an owner of both pasture and cow is in the best position to trade off against the benefits. Physical mooring seems essential in all of these contexts.

Id.

²³⁵ Layard, *supra* note 213, at 275; *see also* RONALD L. TROSPER, *INDIGENOUS ECONOMICS: SUSTAINING PEOPLES AND THEIR LANDS* 85 (2022).

²³⁶ LEOPOLD, *supra* note 51, at 192; *see also supra* Part I.A.

which we belong, we may begin to use it with love and respect.”²³⁷ Anthropologist Michele Statz has powerfully applied this same sense of intimacy and shared love for community in nonagrarian contexts, including the particular experience of accessing justice within rural courts in northern Minnesota, where litigants and judges share important common place-relations.²³⁸ And in the housing context, much evidence shows it is the length of residency—more than whether a person is an owner or renter—that best predicts their long-term commitment, care, and attachment to a neighborhood.²³⁹

The truth, of course, may be more complicated—or more nuanced—in individual cases. Farmers regularly pollute their own properties, and tenants and homeowners, when under enough stress or with enough distraction, can both equally neglect their spaces.²⁴⁰ Caretaking and stewardship are hard.²⁴¹ But there is still the core belief (or maybe hope) that we treat the people and places that we love with love. That we use our knowledge and intimacy for a place in order for that place to be protected and stewarded in a deeper, closer, more loyal caretaking relationship.

Indeed, it is the absence of these direct, intimate relationships with the object of property rights—land—that many scholars point to as the cause of many ecological harms. Scholars

²³⁷ LEOPOLD, *supra* note 51, at xxii; *see also supra* note 179 and accompanying text.

²³⁸ *See generally* Michele Statz, *On Shared Suffering: Judicial Intimacy in the Rural Northland*, 55 LAW & SOC'Y REV. 5 (2021).

²³⁹ *See, e.g.*, Barbara Brown, Douglas D. Perkins & Graham Brown, *Place Attachment in a Revitalizing Neighborhood: Individual and Block Levels of Analysis*, 23 J. ENVTL. PSYCH. 259, 268 (“[L]ong-term residents and home owners reported more positive overall place attachments.”); Stern, *supra* note 211, at 1109–10 (emphasizing that stable “social interactions and ties” matter more than ownership status within a given community when forming neighborhood-level attachments).

²⁴⁰ *See, e.g.*, *Agriculture: Cause and Victim of Water Pollution, but Change Is Possible*, FOOD & AGRIC. ORG. OF THE U.N., <https://perma.cc/MVY8-TDV9>; *see also* Stern, *supra* note 211, at 1100–05, 1125–26 (critiquing the degree to which various laws may overprotect and overencourage home buying, and exploring how the length of residence, regardless of tenure status, may better account for positive externalities otherwise attributed to homeownership, such as investment in solving local problems).

²⁴¹ There is also interesting research about how landlords tend not to require cover crops, even if they say they want that on their lands. *See, e.g.*, Collin Weigel, Seth Harden, Yuta J. Masuda, Pranay Ranjan, Chloe B. Wardropper, Paul J. Ferraro, Linda Prokopy & Sheila Reddy, *Using a Randomized Controlled Trial to Develop Conservation Strategies on Rented Farmlands*, 14 CONSERVATION LETTERS 1, 2–6 (2011). *But see* Angie Carter, *Changes on the Land: Gender and the Power of Alternative Social Networks*, in LAND JUSTICE: RE-IMAGINING LAND, FOOD, AND THE COMMONS IN THE UNITED STATES 76, 78 (2017) (describing some women farmland owners as challenging gender norms through active management of their farmland).

Nicole Graham and Estair van Wagner, for example, have both argued eloquently that our modern conceptions of property rights as increasingly disembodied and abstract legal rights—disconnected from any physical relations to actual spaces subject to their own material limits—drive many of our modern ecological challenges.²⁴² Private property paradigms without real land relations can more easily become disconnected from the material world and, therefore, fail to acknowledge and respond to the realities of environmental limits and our connections to more-than-human beings.²⁴³ Place attachments, to the contrary, are relations that are lived, embedded, and—by extension—more likely to be deeply aware of our inherent interconnection.

4. Shaping community itself.

Finally, in important ways, property law is always traversing the relationship between individuals and communities; property's primary function is to decide what decisions are the domain of individual owners and what decisions are subject to participation by the community or state.²⁴⁴ To that end, “whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it.”²⁴⁵ This means that property choices that impact placemaking and place attachment necessarily also shape the fabric of the community itself.

Part of this is very direct and practical: Because individual property rights tend to be stable over time, property plays a direct role in knitting similarly situated neighbors together into long-term, stable, and close communities.²⁴⁶ Because land ownership tends to extend over time and change only slowly, neighbors are likely to enjoy “a continuing multiplex relationship—the sort that

²⁴² See Nicole Graham, *Dephysicalised Property and Shadow Lands*, in HANDBOOK ON LAW, SPACE AND PLACE 281, 283–84 (Robyn Bartel et al. eds., 2021); Estair van Wagner, *Putting Property in Its Place: Relational Theory, Environmental Rights and Land Use Planning*, 43 REV. GEN. DR. 275, 283–87 (2013).

²⁴³ See Graham, *supra* note 242, at 284–85; Van Wagner, *supra* note 242, at 279–83.

²⁴⁴ See Gregory S. Alexander & Eduardo M. Peñalver, *Community and Property: Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 128 (2009) (“Property stands so squarely at the intersection between the individual and community because systems of property are always the creation of some community.”); see also Alexander, *supra* note 215, at 758–60.

²⁴⁵ Alexander & Peñalver, *supra* note 244, at 128.

²⁴⁶ Ellickson also theorized that dispersing multiple private landowners within a relatively small or dense landscape operated as “a low-transaction-cost device for knitting these individuals closely together, thereby inclining them toward cooperative behavior.” Ellickson, *supra* note 54, at 1331.

is most likely to engender cooperation.”²⁴⁷ Again, we also often see this in the context of eminent domain literature, with scholars highlighting how condemnation of a single parcel can have extending effects on the patchwork of surrounding properties and residents who may have built, together, thick personal and community relationships and attachments with the people with whom they live or work in close proximity.²⁴⁸

In this sense, community itself is a common, shared asset—not just an amalgamation of individual rational actors behaving in their own individual interests, but rather a group of individuals who come together to share unique contributions and make a common asset that is diminished if any individual exits.²⁴⁹ The value of communities as special forms of local public goods is reproduced across multiple literatures. Within property literature, Professor Gregory Alexander, for example, made the case that belonging to a stable and supportive community group can facilitate living a good life and that property choices should be aimed toward achieving this goal.²⁵⁰ In economics, Professor Elinor Ostrom famously explored how certain *close-knit* communities can come together to efficiently manage, in certain circumstances, shared resources in ways that avoid what would otherwise have been assumed to fail because of collective action challenges.²⁵¹ Communities can—under the right conditions of trust, quality information, and repeat interactions—come together to produce and enforce norms that control for undesirable behaviors outside of (or at least in the shadow of) formal legal systems.²⁵²

But how property choices structure place attachments within and across communities also has a very direct impact on the nature of the community itself. This is best represented in the rural sociology literature, which has demonstrated how absentee landownership, particularly in agricultural communities, has an immediate negative effect on community cohesion and overall

²⁴⁷ *Id.*

²⁴⁸ See, e.g., *id.* at 1357; Garnett, *supra* note 206, at 108–09.

²⁴⁹ See generally Elizabeth Weeks, *One Child Town: The Health Care Exceptionalism Case Against Agglomeration Economies*, 2021 UTAH L. REV. 319 (describing community well-being as part of public health).

²⁵⁰ See, e.g., GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING 75–100 (2018) (discussing the importance of community).

²⁵¹ See, e.g., OSTROM, *supra* note 62, at 58–102; ALEXANDER, *supra* note 250; Garnett, *supra* note 206, at 107–09.

²⁵² See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 15–120 (1991) (accounting for extralegal trespass enforcement practices among ranchers in Shasta County, California).

community welfare.²⁵³ Specifically, rural sociologists have tested the close connection between locally owned and operated farms and rural community welfare. Locally owned and operated farms, for example, are associated with greater community welfare compared to more industrialized counterparts, and active, local farm ownership and operation also corresponds to greater community engagement and a healthier local economy.²⁵⁴ Communities with larger-scale corporate farms demonstrate a loss of local dollars and greater economic and social stratification.²⁵⁵ Increases in absentee ownership also impact rural community health.²⁵⁶ More recent scholarship has extended this to absentee ownership of timberlands and other rural labor market concentration dynamics.²⁵⁷

This makes sense for numerous reasons. Active residence by folks who feel a sense of belonging and loyalty to a place logically supports a wider sense of community that would lead to greater community vitality. When absentee ownership is prevalent instead, the risk is not only that nonresidents are making governance choices that do not directly impact them (that they do not internalize) but also that the wealth and capital being extracted

²⁵³ See, e.g., Linda Lobao & Curtis W. Stofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, 25 AGRIC. & HUM. VALUES 219, 225–26 (2008); Thomas A. Lyson & Charles C. Geisler, *Toward a Second Agricultural Divide: The Restructuring of American Agriculture*, 32 SOCIOLOGIA RURALIS 248, 256–58 (1992); Stephanie A. Malin & Kathryn Teigen DeMaster, *A Devil's Bargain: Rural Environmental Injustices and Hydraulic Fracturing on Pennsylvania's Farms*, 47 J. RURAL STUD. 278, 283–87 (2016).

²⁵⁴ See Malin & DeMaster, *supra* note 253, at 281; Conner Bailey, Abhimanyu Gopaul, Ryan Thomson & Andrew Gunnoe, *Taking Goldschmidt to the Woods: Timberland Ownership and Quality of Life in Alabama*, 86 RURAL SOC. 50, 71–74 (2021); Lyson & Geisler, *supra* note 253, at 259–60.

²⁵⁵ See Lobao & Stofferahn, *supra* note 253, at 225; see also Michael N. Widener, *Populist Placemaking: Grounds for Open Government-Citizen Spatial Regulating Discourse*, 121 W. VA. L. REV. 461, 468–72 (2018); Lynne C. Manzo & Douglas D. Perkins, *Finding Common Ground: The Importance of Place Attachment to Community Participation and Planning*, 20 J. PLAN. LIT. 335, 346 (2006).

²⁵⁶ Weeks, *supra* note 249, at 354–65; Neil D. Hamilton, *Feeding Our Green Future: Legal Responsibilities and Sustainable Agricultural Land Tenure*, 13 DRAKE J. AGRIC. L. 377, 388 (2008).

²⁵⁷ See generally Bailey et al., *supra* note 254 (extending the prior body of sociological work tying absentee and corporate ownership of agricultural operations to poor community welfare outcomes to timberland ownership in the South); J. Tom Mueller, Jesse E. Shircliff & Marshall Steinbaum, *Market Concentration and Natural Resource Development in Rural America*, 87 RURAL SOC. SOC'Y 68 (2021) (exploring the impacts of rural labor market concentration).

or produced from the place is being exported to benefit folks outside of that place.²⁵⁸

B. Risks: Property and Place at Extremes

Clearly, property rules can foster positive individual and collective place attachments that have real social, economic, and even ecological benefits. But the balance or calibration of what property chooses to protect is key. This final Section covers a series of alternative extremes where property and the positive case for protecting place attachments are at their least congruent. In the first case, property rights overprotect certain existing attachments, giving current stakeholders too much credence in a way that limits access and opportunities for new entrants and impedes both social mobility and economic efficiency. The prototypical examples here are landed dynasties, lazy heirs, and other forms of toxic—sometimes racist—exclusion. The second case is the opposite extreme: land ownership without any attachment at all. Here, when land is treated as a disembodied asset, there are risks of this kind of estranged land ownership leading to social, economic, and ecological harms—including a kind of landscape-level capture. And finally, this Section pauses for the third case: humans and groups who exist with precarious attachments, without any property protections at all or without property rights to the places they care most about.

1. Overprotected attachment: land dynasties and exclusion.

Property, in action, always privileges those “inside” the system, as owners, at the expense of nonowners.²⁵⁹ This Section explores the tension between protecting the positive outcomes of existing place attachments and preserving some flexible space for access, opportunity, evolution, and change.²⁶⁰ Because attachment is also a malleable and sometimes hard-to-define concept, it can also be subject to manipulation that skews, in hard-to-read ways, how we allocate the advantages and opportunities of these systems.

²⁵⁸ See *infra* Part III.B.2.

²⁵⁹ Lorna Fox O'Mahony, *Property Outsiders and the Hidden Politics of Doctrinalism*, 67 CURRENT LEGAL PROBS. 409, 418 (2014); see, e.g., Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J. F. 431, 432–39 (2017) (book review).

²⁶⁰ See Massey, *supra* note 82, at 24 (acknowledging the risk of place attachment being “self-enclosing and defensive,” but suggesting that place can be reimaged as progressive, future-looking, and inclusive).

a) *Dynasties and Ossification.* To start, human behavior teaches us that merely the fact that an entitlement has been bestowed—or that an item or place is currently in someone’s possession—by itself causes that owner or possessor to inflate the value of that object (or place).²⁶¹ With this lens, one may question whether attachment is valuable at all. Inertia does feed some of what we may perceive as attachment. “Many households are rooted, and both cultural traditions and transition costs rigidify land regimes.”²⁶² There is a risk that, with property law’s inherent thumb on the scale in favor of stability and perpetual possession—although efficient in the sense that the current possessor does not need to engage in costly guarding behaviors—it also “reduces societal flexibility” in a way the property may not have a response to yet. And too much focus on attachment as an *existing* thing can close the gate to newcomers and foreclose attention toward history rather than the present and future.

In some cases, this kind of stickiness can extend beyond first-generation owners and possessors and also create sticky distributional differences: back to the dynastic wealth our original anti-feudalism measures were thought to avoid.²⁶³ This is a delicate line. The passing of land attachments across generations can, sometimes, serve previously identified positive attachment effects: sharing deep local knowledge across landscapes, fostering relations of care and stewardship, and sometimes building even-thicker community networks and stable relations. Current generation owners and users are also often motivated by a desire to transmit “stuff” to their kids, and this incentive can create an important incentive for productivity and maybe, to some degree, help strengthen some parent-child bonds.²⁶⁴ But, this passing of advantage can also ossify over generations into class hierarchies that are “both unfair and inefficient,” rewarding “the sloth of pampered heirs” and, at worst, create or recreate a “rigid caste system.”²⁶⁵

²⁶¹ See, e.g., Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1231–42 (2002); see also Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 37–39 (1989) (applying the endowment effect theory to the hypothetical landowner).

²⁶² Ellickson, *supra* note 54, at 1358.

²⁶³ See Kades, *supra* note 136, at 174–83.

²⁶⁴ See *id.* at 191–93 (focusing on status over wealth).

²⁶⁵ Peñalver, *supra* note 53, at 1084.

In other words, too much attachment might trigger a kind of closing of the gates—shutting off access for new owners and future generations, and impeding the very goals of equality, free movement, and opportunity that we have tried to balance.²⁶⁶ As the wealth gap between upper-income and middle- and lower-income families in the United States continues to expand,²⁶⁷ many are questioning if the system is rigged and, if so, how to repair it.²⁶⁸ Property rules shape these dynamics directly. One such important contributing cause is that our default property institution, the fee simple, guarantees *perpetual* rights.²⁶⁹ Other choices—such as the offer of stepped-up basis for real property transfers at death (but not during life), other tax benefits like the use of Section 1031²⁷⁰ like-kind exchanges of commercial real property, the elimination or reduction of the estate tax, and even the abolition or drastic weakening of the rule against perpetuities and the recognition of so-called “dynasty trusts”²⁷¹—all facilitate, by choice, this dynastic control of land.²⁷² Importantly, this can be inefficient, too. There is nothing meritocratic about inheriting land, and nothing in this system ensures present owners are, in fact, the highest and best users of that specific property.

b) *Toxic Exclusion*. In addition, even focusing only on the decisions of present-day, existing community members, there are risks to be attuned to under the umbrella that, basically, humans can be selfish and difficult. The idea of rich human communities, connected deeply to place, is somehow universally appealing—but unavoidably difficult to achieve in practice. Cooperation is hard. Communities are not always altruistic and can also be exclusionary and enforce socially undesirable norms, such as racial exclu-

²⁶⁶ See, e.g., John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1279–87 (2020) (outlining the prevalence of current residents’ objections to new housing developments); Ellickson, *supra* note 54, at 1352 n.180.

²⁶⁷ See Juliana M. Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in U.S., But Fewer Than Half Call It A Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), <https://perma.cc/3JQF-NU8A>. Of further concern, the racialized dimensions of this wealth gap in the United States have also stubbornly persisted over several decades. See Benjamin Harris & Sydney S. Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEPT OF THE TREASURY (Sept. 15, 2022), <https://perma.cc/N33J-H5K6>.

²⁶⁸ See, e.g., Shelley Cavalieri & Lua Kamal Yuille, *The White Androcentric Disposition of Capitalist Property*, 2 J.L. & POL. ECON. 252, 257–260 (2022).

²⁶⁹ Shoemaker, *supra* note 11, at 1722–24.

²⁷⁰ I.R.C. § 1031.

²⁷¹ Shoemaker, *supra* note 11, at 1734.

²⁷² *Id.* at 1733–34.

sion and segregation. Thus, we also have to monitor for place-attachment claims that are, in fact, myopic, contrary to shared social values, or otherwise examples of toxic exclusions.

In some sense, a focus on existing attachments might also entrench a sort of “us” and “them” division between community insiders and outsiders.²⁷³ We have seen this historically, including in community efforts to (sometimes unconstitutionally) tie welfare benefits and other social supports to residency and in ways that are particularly harmful to nonowners or unhoused peoples.²⁷⁴ In other unsuccessful ways, others have used a claim of superior attachment as a mechanism to exclude other rights holders from a special place. For example, courts have had to step in to enforce beach access in cases where homeowners sought, unsuccessfully, to restrict access to the public trust spaces to residents only.²⁷⁵

Likewise, there is something inherently vague about a concept as nebulous as place attachment, and this ambiguity can invite manipulation and inequitable distribution of its benefits in other dangerous ways. So, although we might all be equally likely to make a claim of superior personal attachment—and thus privilege—in a dispute about future land use, there are also insidious ways that rhetoric about the positives of place attachment can shadow subliminal antisocial forces. Attachment should be a social good, but examples detailed in the next Section—including the different treatment of Indigenous protestors and the activists who violently took over the Malheur National Wildlife Refuge at the same time, also based on a claim of personal entitlement and attachment—are telling.²⁷⁶

²⁷³ See, e.g., Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1836 n.31 (2003) (reviewing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* (2001)) (“[O]ne of the primary motivations for limitations on multi-family housing: the race or ethnicity of the people who might occupy it.”).

²⁷⁴ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (concluding that a one-year residency requirement for welfare benefits was an unconstitutional impairment of the fundamental rights to interstate migration).

²⁷⁵ See, e.g., *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (enforcing public access to the ocean via otherwise privately owned beach club property).

²⁷⁶ Graham & Shoemaker, *supra* note 158, at 432–35.

2. No attachment: estrangement and land capture.

Just as we might evaluate the benefits of positive placemaking and place attachments, as well as the risks of too much attachment, we should include some pause here to consider explicitly the alternative reality of environments that are placeless or nonplaces without any place attachment at all. Thus, although this may be at least implicit in much of the discussion above, it is important to call out and consider—directly—the opposite end of this spectrum: the consequences of ownership without any attachment. Attachment-less ownership is characterized by absenteeism, concentration, commodification, and often financialization and assetization. Elsewhere, I have characterized this as land estrangement—ownership entirely estranged from the material experience of the land itself.²⁷⁷ Examples include Bill Gates buying farmland through investment layers he has no direct knowledge of; individual investors buying shares in projects like AcreTrader specifically so that they can invest in land without having to know anything about specific parcels;²⁷⁸ private equity moving into rental housing because of advancements in technology and algorithmic management that allow single entities to manage large housing portfolios that previously required a more hands-on approach; and even all of the many teachers and professors and others who, perhaps unbeknownst to them, have farmland and housing assets in their retirement portfolios.²⁷⁹

On the one hand, attachment-less or estranged ownership in this way is a concern precisely because it exists without any of the intended benefits of positive place relations: identity-forming experiences with space, the development of deep and contextual local knowledge about that space, the promotion of stewardship or caretaking relations, stable community connections and—what many would say is the ultimate goal of any functioning property system—shared human flourishing.²⁸⁰ On the other hand, even when an owner is detached or disembodied from the physical property in this way, there may be other land users—especially tenants—building their own positive attachments to that space. But as considered in the context of build-to-rent hometowns

²⁷⁷ See Jessica A. Shoemaker, *Papering Over Place: When Land Becomes Asset Class*, in RESEARCH AGENDA IN PROPERTY LAW 8–11 (Bram Akkermans ed., forthcoming 2024) (characterizing and defining this concept of “land estrangement”).

²⁷⁸ See *infra* note 284.

²⁷⁹ See *supra* Part II.C.2; *infra* Part IV.B.1.

²⁸⁰ See, e.g., Alexander & Peñalver, *supra* note 244, at 134–38.

above, the relative power and wealth of the owner vis-à-vis these tenants is a property choice that can powerfully shape these relations.

More broadly, attachment-less ownership is notable because of the very specific ways it departs from many essential designs or strategies baked into the core structure of private property itself. When Professor Thomas Merrill, for example, sought to distill these key intentions of private property as a social and economic *strategy*, he emphasized the principal animating goal as widely distributing private, individual ownership rights in order to achieve specific collective benefits.²⁸¹ This wide distribution of private rights is intended, logically, to aggregate the wisdom of many local, grounded knowledge holders (in the form of dispersed, resident-owners); to facilitate numerous flexible resource transactions that reflect and act on that local knowledge, allowing efficient and effective management of local resources; and to ensure future generations and other nonowners are accounted for in individual owners' decision-making, encouraging owners to internalize and negotiate around their impacts on their community and even the wider world.²⁸²

Each type of attachment-less ownership (or land estrangement) reflects some failure to meet these key strategies. Absent owners have no immediate local knowledge of the spaces they control. Concentrated ownership limits the number of diversified transactions that actually occur. Local communities lose this essential form of efficient local governance, especially when land use choices are flattened to skewed versions of cost-benefit analyses that care less about future generations within a closely bounded community and natural landscape and worry more about simplified calculations and spreadsheets. This often results in extracting local benefits for the sake of distant accounts and stakeholders without internalizing the local costs of those decisions. The land—the landscape itself and the local people who inhabit it—is captured in a sense, controlled, and used to benefit outsiders, with costs and harms left local. To the extent this landscape capture also results in lack of physical access for local residents or others at large, these landscapes can further become, because of the very absentee and concentrated ownership that

²⁸¹ Merrill, *supra* note 62, at 2063–71.

²⁸² See *id.* at 2081–89; see also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 769–70 (1986) (emphasizing that commerce, generally, benefits from a greater number of aggregated exchanges).

caused them, shadowed from the collective concern that exacerbates sentiments of being sacrificed, abandoned, or left behind.²⁸³

Certainly, not all attachment-less ownership forms are necessarily bad or problematic or a doomsday trigger. Some instances of absentee or investment-oriented landownership can serve important social functions, including market liquidity and economies of scale. Although many investment funds that purchase land require a high degree of investor sophistication and initial capital, there are other more egalitarian and open models of democratized land investment, which could provide ownership access in small shares to a wider swath of the population than might otherwise be able to purchase properties.²⁸⁴ And those entities might reflect collective values other than extraction and project.²⁸⁵ And, in some cases, even sophisticated investor-owners can use economies of scale, technology, and other types of expertise to efficiently offer rental or other nonownership access opportunities to end users of land, whether that be for housing, agriculture, or something else.²⁸⁶ As we have seen, property serves functions other than, or in addition to, promoting attachments—so the question in evaluating these ownership forms is how certain we are about other proclaimed benefits, what the costs are, and how, on balance, landscapes and communities are actually lived in and experienced in relation to these choices.

²⁸³ See, e.g., Graham, *supra* note 242, at 285–88 (emphasizing how the disconnection of property rights from lived, material experience creates constructively forsaken “shadow” lands); Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 228–47 (2020) (outlining the pattern of urban-majoritarian choices that “effectuated a grand sacrifice of rural communities”).

²⁸⁴ See, e.g., *About Agrarian Trust*, AGRARIAN TR., <https://perma.cc/XFF4-VE9A>. The national, 501(c)(3) nonprofit Agrarian Trust provides a model of democratic, commons-oriented land ownership. Although other sorts of crowd-funded models are conceivable—and things like crowd-funded platforms or even publicly traded funds that include some land investments do exist—many active investment vehicles require an immense amount of sophistication and capital. See, e.g., ACRETRADER, INVESTING IN U.S. FARMLAND REPORT 17 (2023) (on file with author) (“Methods to Invest in Farmland”).

²⁸⁵ See, e.g., *About Agrarian Trust*, *supra* note 284.

²⁸⁶ For more on this fraught history of industrializing agriculture with more ecological goals in mind, see generally DEBORAH FITZGERALD, *EVERY FARM A FACTORY: THE INDUSTRIAL IDEAL IN AMERICAN AGRICULTURE* (2003). See also Andrew T. Hayashi & Richard M. Hynes, *Protectionist Property Taxes*, 106 IOWA L. REV. 1091, 1130–47 (2021) (making the case that some foreign real estate investment should be encouraged—or at least not discouraged—because these kinds of external investments can reduce risk in local housing markets in beneficial ways).

3. Ignored attachments: insecurity, invisibility, and loss.

Finally, briefly, there is a third important instance in which property rules lack congruence with the positive benefits of place-based attachments, and this includes a range of instances when a precarious attachment exists without any property protections at all. These property-less attachments can exist for a range of reasons. Sometimes, they are memories of property relations that existed in the past and have either been voluntarily or involuntarily terminated.²⁸⁷ The Standing Rock Tribe's persistent connection to land along and under Lake Oahe despite a refusal of U.S. law to recognize fully that ongoing relationship is one clear example.²⁸⁸

But there are other examples where ownership has never been recognized but an attachment nonetheless exists: a favorite bench in a public park,²⁸⁹ the carved-out place for sleep claimed by an otherwise unhoused person in a technically illegal encampment space,²⁹⁰ or even the ongoing case of descendants of incarcerated Japanese Americans who object to the development of a modern wind farm across a "somber" and "desolate" landscape where their ancestors were once shamefully held in "relocation centers" during World War II.²⁹¹ Even when painful, as in the case of the Japanese American descendants seeking recognition of great trauma and loss, all of these are examples of actual, lived, real attachments to places that are not formally protected through property ownership.

Not all attachments can be fully written and accounted for in formal rights, especially in a complex world with dueling time and

²⁸⁷ I am talking here about place-based attachments, but Peñalver has made a parallel insight about the persistence of land memories that can exist independent of recognized property relations. He identifies three categories where memories of past possession or ownership (attachments) diverge from current ownership: (1) where former owners remember properties voluntarily relinquished; (2) where former owners have been dispossessed by negligence or accident or just legally or illegally dispossessed by another; and (3) memories of places never owned (possibly public lands or public attachments to historic landmarks). Peñalver, *supra* note 53, at 1075–78.

²⁸⁸ See *supra* Part II.C.1.

²⁸⁹ See, e.g., Jonathan Lee, *The Park Bench Is an Endangered Species*, N.Y. TIMES MAG. (Oct. 12, 2021), <https://www.nytimes.com/2021/10/12/magazine/park-benches.html>.

²⁹⁰ See generally Nicholas Blomley, *Homelessness, Rights, and the Delusions of Property*, 30 URB. GEOGRAPHY 577 (2009); Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, *Governing the Belongings of the Precariously Housed: A Critical Legal Geography*, 16 ANN. REV. L. & SOC. SCI. 165 (2020).

²⁹¹ Dino Grandoni, *Biden's Renewable Energy Goals Blow Up Against a Painful WWII Legacy*, WASH. POST (May 3, 2023), <https://www.washingtonpost.com/climate-environment/2023/05/03/biden-wind-farm-opposition/>.

space scales, but we can also at least acknowledge here that forms of dispossession are as much property system choices as are the possessions and attachments that are protected. Dispossession and erasure are also property choices for which we must further account. Place attachments can exist without property rights, but property rights are property choices—renegotiated and remade on an ongoing and active basis. These results are not reflections merely of historic policies but also of current property decisions, with radical consequences under current law for actual experiences of placemaking.

IV. ATTACHMENT AS VISION CLEARING

Where does this leave us? A key insight of this project is to reveal how many persistent challenges that otherwise seem intractable—the arrival of what are essentially “land grab” dynamics in the United States, the ongoing need for reconciliation and repair of complex histories of displacement and dispossession, even the kinds of actual communities and housing real people will be able to access going forward—are all fundamentally property law problems.²⁹² Property rules were originally engineered—from homestead land allocations to modern subdivision structures—to realize very specific visions of desirable places. Now, more than a century on, have we created the places and norms of collective caretaking that we want and need?

Another advantage of thinking more explicitly about property and placemaking—and the relative benefits and risks of various people-place relations in context—is that it makes us more sensitive to the many instances in which place-based claims are already being used as rhetorical swords in property conflicts. Often, these claims are made and reacted to without significant theoretical rigor or analysis. By applying this clearer work on the relative benefits and risks of different types of attachment-based claims, our responses to these assertions can become more intentional, consistent, and transparent.

In the remainder of this Part, I illustrate both of these ideas: the centrality of property concerns to pressing place-based social dilemmas and the value of more careful assessment of existing attachment-based land claims in specific contexts. What is property law choosing to protect? Does it reflect the positive benefits

²⁹² Of course, these are more-than-property problems. Property is not exclusively to blame, but it is a critical lever.

of place-based attachments or the risks of toxic dynastic attachments, attachment-less asset ownership, or unprotected or precarious attachments? More work is needed, but these early examples are intended to inspire further thinking and analysis. This Part begins with a critical analysis of how property and placemaking can offer fresh and important new approaches to inequitable wealth distributions in particular and then highlights three concrete examples, addressing (1) how place-based values and attachments are shaping growing inequality and changing land ownership trajectories, particularly across U.S. farmlands; (2) contested claims of nonowners to public spaces, particularly in the case of public-land grazing disputes driven by conflicting views of what good stewardship even means, and (3) cases of active exclusion based on uncomfortable claims of “neighborhood character” and other efforts to reject integrating affordable housing. Although specific to the contexts in which they are presented, these brief examples together offer important insights about how thinking more critically about placemaking claims and values also opens new pathways for thinking about inequality, ecological sustainability, and democracy.

A. Placemaking and Property’s Pervasive Distribution Problem

To start, this Section unpacks one categorical insight about the ways in which ideas about place attachments are closely tied to issues of economic justice and—more specifically—property distribution. In general, property theory tends to have a quite cautious and uncomfortable relationship with distribution.²⁹³ The original purpose of U.S. property designs—including the highly alienable and widely distributed fee simple absolute—was to ensure distribution of rights and opportunities in a particularly egalitarian and just way (at least to citizens who met a specific racial and gender ideal). This original purpose was to prevent too much wealth concentration, and similar anticoncentration logics

²⁹³ Several scholars have powerfully and importantly critiqued this failure, including in recent work. See, e.g., Rosser, *supra* note 204, at 126–67; Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 888–90 (emphasizing unequal patterns of instability—and dispossession—in racialized communities).

continue to drive many modern property rules.²⁹⁴ And yet, wealth is increasingly concentrated in the United States.²⁹⁵

Instead of focusing on how to make current distributions more equitable, property theory tends to be much more comfortable analyzing how to preserve and maintain existing property rights, whatever their inequities. As Professor Antonia Layard puts it: “Modern legal systems conventionally find it easier to determine how to govern property once allocated than to allocate property fairly.”²⁹⁶ So, for example, Professor Michael Heller comfortably theorizes that “[h]idden within” U.S. property law “is a boundary principle that limits the right to subdivide private property into wasteful fragments.”²⁹⁷ In this framing, property law doctrines strive to “keep resources well-scaled for productive use” and avoid tipping either into commons or anticommons scenarios.²⁹⁸ But, we have not adequately theorized a similar “boundary doctrine” or internal limit within property itself that restricts the size or distribution of one single individual’s property ownership.

Some work skirts these issues, but without any real remedy. Professor Robert Ellickson, for example, created a taxonomy of small, medium, and large events (or, really, land uses with small, medium, or large impacts) that he argued impacts whether land should be held privately or in some other form.²⁹⁹ Merrill, too, has acknowledged that too much land concentration can be problematic and, more to that point, that property-generated inequality is especially troubling because, with such concentrated wealth

²⁹⁴ For example, we prohibit most direct restraints on alienation because we worry that “if such restraints were valid, over time, resources would likely be wasted because they would be taken out of the stream of commerce, improvements would be discouraged, *wealth might become more concentrated*, and creditors potentially could be misled.” 6 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 26.3 (A. James Casner ed., 1952) (emphasis added).

²⁹⁵ See Horowitz et al., *supra* note 267 (“The richest families in the U.S. have experienced greater gains in wealth than other families in recent decades, a trend that reinforces the growing concentration of financial resources at the top.”); see also Christopher Ingraham, *Wealth Concentration Returning to ‘Levels Last Seen During the Roaring Twenties,’ According to New Research*, WASH. POST (Feb. 8, 2019), <https://www.washingtonpost.com/us-policy/2019/02/08/wealth-concentration-returning-levels-last-seen-during-roaring-twenties-according-new-research/>.

²⁹⁶ Layard, *supra* note 213, at 272.

²⁹⁷ Heller, *supra* note 136, at 1165. Note that Heller’s focus is on the number of owners—with a spectrum bookmarked by the extreme of common ownership (i.e., no individual owner, with the risk of overuse of resource tragedies) and anticommons (i.e., too many individual owners with too many rights to exclude, leading to underuse). The focus is not the size or distribution of ownership within private property.

²⁹⁸ *Id.* at 1166.

²⁹⁹ Ellickson, *supra* note 54, at 1323–35.

holding, property “loses its advantage of tapping into dispersed local knowledge,” production incentives become more concentrated in ways that skew markets, and property itself fails to offer “checks and balances against concentrated power.”³⁰⁰ There is also a risk of single owners with too much “extra capacity” letting that extra capacity go to waste, when more numerous owners would better maximize that capacity.³⁰¹ And, Merrill even acknowledges that it is *property itself* that “tends to promote inequality” because “[p]roperty, when well managed, tends to beget more property.”³⁰² An owner gets all of the gain from property, which creates incentives to maximize the resource, but some gains are the product of luck or external market forces out of the control of the owner, such as scarcity or neighbors’ efforts, and these random benefits “represent[] a kind of built-in multiplier, whereby those that have property get more property without regard to their individual effort or desert.”³⁰³

But even with all this scholarship—explaining that concentration is bad, that property was originally intended to avoid concentration, and that modern property actually tips the scales *in favor* of concentration with a baked in “multiplier” effect—we still have no good private property theory or rule that works to recalibrate *property itself* in favor of more equitable distributions, now and into the future. Considering property’s role in calibrating place-based attachments actually opens the door to exactly this

³⁰⁰ Merrill, *supra* note 62, at 2094. Merrill also described this in the context of property creating a monopoly. *Id.* at 2090–91 (noting that property “by its very nature, confers monopoly-like control on the designated owner with respect to the discrete resource,” and thus we should worry—as we do in any monopoly situation—about *too much* power and control). Interestingly, Merrill uses a farmer as the paradigmatic nonproblematic example of individualized property-owner control. According to Merrill, when a farmer has a monopoly on his farm and there are “thousands of farmers producing a substantially identical commodity, like wheat, there will be vigorous competition among the farmers in the wheat market, and the monopoly each farmer has over his own production facilities will have no effect on the price that consumers must pay for wheat.” *Id.* at 2090. Here, of course, we see that this imagination of widespread and dispersed agrarian landowners is increasingly fictional. As land—even farmland—is in fact increasingly concentrated, and agricultural competition is notoriously limited with massive horizontal concentration and vertical integration, this seems time to (beyond time to) worry. See *supra* Part III.B.2 (spelling out these effects in more detail); see also Malcolm Lavoie, *Property and Local Knowledge*, 70 CATH. U. L. REV. 637, 653–66 (2021) (emphasizing further the benefit of local knowledge and local decision-making as a justification for the design of private property rights).

³⁰¹ See Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 301–04 (2004) (discussing the issue of excess capacity).

³⁰² Merrill, *supra* note 62, at 2093.

³⁰³ *Id.*

“boundary.” By favoring, or in some contexts even requiring, the conditions that promote a place-based attachment—whether that be regular presence, active management, or an outright possession or residency requirement—property designs could impose a more natural limit on monopoly and discourage excessive absentee, attachment-less ownership.

Valuing, prioritizing, or even in some instances requiring place attachment as a prerequisite to property ownership imposes a natural boundary on the scale of any owner’s holdings. There is an inherent limit to the scope of one’s place attachments and place experiences. I am attached to the land I walk, the house I live in, the places I experience in my memory or in my day-to-day life. I have no place attachment to hundreds of thousands of acres of land in a pension fund or to the single-family houses I can buy shares of in a faraway city via a crowdfunding site.³⁰⁴ Bill Gates has no attachment to western Nebraska or most of the rural land he owns. If property actively calibrated to favor ownership-with-attachment over attachment-less ownership—or, for that matter, at least prohibited some forms of detached or disembodied ownership—it would limit how much land a single person could own. In that world, I can own the land I live with, walk on, and experience, but Bill Gates cannot own Nebraska.³⁰⁵

This is simplified, of course, and there is no absolute or singular solution. But reconnecting property and possession, *at least in some cases*, could serve multiple values—amplifying the positive identity-forming, knowledge-building, stewarding, and community-supporting place-relations in the best cases and also leveling the field for more equitable, open-ended, and flexible distributions in the future. There are numerous reforms that could get at enforcing this kind of inherent place-connected boundary: adoption of targeted active-use requirements for some land tenures, intentional deployment of specific usufructs in

³⁰⁴ See, e.g., CROWDSTREET, <https://perma.cc/57GG-UN9X> (“An easier way to build a real estate portfolio, no landlording required.”); *\$10 Promotion*, FUNDRISE, <https://perma.cc/L6NU-SQCC> (offering a free \$10 in shares for investment as little as \$10).

³⁰⁵ Some readers may note a possible issue in this framing with some understandings of the Dormant Commerce Clause, which can prohibit certain discrimination against out-of-state actors in interstate commerce and has been applied, with mixed results, to some anticorporate farming laws and some local regulations prohibiting short-term vacation rentals. These Dormant Commerce Clause interpretations are contested, however, and subject to ongoing negotiation. See, e.g., *supra* notes 123 and 274 (examples of potentially conflicting authorities in this area). Moreover, even where Dormant Commerce Clause issues could arise, federal legislation can authorize state preferences of in-state actors. See, e.g., Farmland for Farmers Act of 2023, S. 2583, 118th Cong. (1st Sess. 2023).

certain contexts, and use of even more indirect regulatory approaches to favor owner-occupants or long-term residents while otherwise requiring absentee owners to internalize more of the costs and burdens of their attachment-less ownership. But for now, the point is that these kinds of changes are possible, and these are but a few examples of how clearer, more transparent analysis of attachment values can help clarify perennial property problems.

The following three examples add yet more context and expand this kind of analysis in the context of family farm legacies, fights over sustainable public land use, and ongoing affordable housing controversies.

B. Three Vignettes: What Does Property Choose to Protect?

1. Messy farmland legacies.

In 1977, a group of investors organized a new investment fund called Ag Land Trust, with a plan to capitalize on rapidly increasing farmland values by buying up cropland and leasing it to a new class of tenant-farmers, putting investors in a position to benefit both from land appreciation and to secure secondary income from farmland rent.³⁰⁶ As Professor Madeleine Fairbairn recounted in her fabulous book, *Fields of Gold: Financing the Global Land Rush*, the political response to such a radical proposal at the time was swift and brutal: every witness, except representatives of Ag Land Trust itself, spoke against the idea in three days of congressional hearings.³⁰⁷ And, lawmakers across the political spectrum decried the risk of big investors driving up land prices, outbidding small farmers, and otherwise distorting agricultural markets and destroying rural communities by introducing more absentee landownership.³⁰⁸

Although the investors emphasized their own “reverence for the family farm” and tried to position themselves as “relieving [farmers] of the expensive burden of landownership and freeing up farmers’ capital for operating expenses” in Congress, “[t]hese arguments went over like a lead balloon.”³⁰⁹ The political response nearly universally underlined the importance of farmers owning

³⁰⁶ FAIRBAIRN, *supra* note 16, at 29.

³⁰⁷ *Id.* at 30.

³⁰⁸ *Id.* at 30–31.

³⁰⁹ *Id.* at 31–32.

and stewarding their own land—of maintaining that tight connection between rural landownership and rural place attachment—and shortly after this “congressional storm,” the representatives of Ag Land Trust withdrew and abandoned their proposal to financialize farmland.³¹⁰ The risks of decoupling rural lands from rural livelihoods were too great.

Fast forward to today, and the landscape looks very different. Global land grab dynamics are increasingly coming for the United States, both in farmland and single-family housing. As I sit here typing this, I received an email from AcreTrader, one of several investment funds currently and actively targeting U.S. farmland, offering me (and everyone on their presumably vast mailing list) an opportunity to invest a minimum of \$15,000 in a “farm option with potential outsized appreciation,” for a potential stake in a corn and soybean operation in Hardin County, Ohio, called the “Dunkirk Farm”—a place I otherwise know nothing about.³¹¹ Despite the firestorm created by the Ag Land Trust in 1977, farmland investing is commonplace today.³¹² With outsized institutional and foreign investment, much of rural America also looks nothing like the diversified and bucolic family farm of most of our imaginations. Instead, agriculture is increasingly concentrated and industrialized.³¹³ This concentration of attachment-less ownership is having a cascade of consequences in rural America: declining populations and economies, environmental harms, and cycles of resource extraction.³¹⁴

Yet, we still retain powerful collective ideas about the importance of rural place relationships, and rhetoric and catchphrases about things like “saving the family farm” persist as a space of unique—if, in practice, sometimes superficial—bipartisan agreement.³¹⁵ Even if one accepts the family farm as the ideal

³¹⁰ *Id.* at 32.

³¹¹ Email from AcreTrader to Jessica A. Shoemaker (Aug. 28, 2023) (on file with author).

³¹² See *supra* notes 16–22 and accompanying text.

³¹³ Between 1982 and 2007, for example, the median farm size doubled from 589 acres to 1,105 acres, and these farms have also become more specialized. HOSSEIN AYAZI & ELSADIG ELSHEIKH, HAAS INST. FOR A FAIR & INCLUSIVE SOC’Y, *THE U.S. FARM BILL: CORPORATE POWER AND STRUCTURAL RACIALIZATION IN THE UNITED STATES FOOD SYSTEM* 51 (2015). As of 2014, 49.7% of agricultural production value was attributed to “large-scale family-owned and non-family-owned operations” that make up only 4.7% of U.S. farms. *Id.* at 73.

³¹⁴ See Shoemaker, *supra* note 11, at 1731–34 (collecting data regarding the same).

³¹⁵ See, e.g., FAIRBAIRN, *supra* note 16, at 30; Chen & Adams, *supra* note 96, at 385–87.

to save, there is room for discomfort. U.S. family farms are themselves constructed from histories of racialized dispossession and exclusion,³¹⁶ and it is neither surprising nor accidental that 98% of U.S. farmland is still owned by people who are white.³¹⁷ Moreover, the entire construct of inherited *family* farming retrenches hereditary systems of dispensing professions and land access in a way antifeudal reforms were intended to change.³¹⁸ Today, if someone does not win the farming birth lottery—or is otherwise not connected to a farmland dynasty or extreme wealth—it is nearly impossible to become a farmer. Land access remains the number one obstacle cited by aspiring new farmers as the biggest hurdle preventing more resilient food system innovations and keeping new aspiring farmers from moving into and becoming a part of rural places.³¹⁹

Fundamentally, this is a distribution problem: a lot of farmland is tied up mostly in hereditary family farm dynasties. What land is sold on the open market is increasingly going to these highly competitive and sophisticated farmland investors. And, at the most local and personal level, new farmers and ranchers find themselves almost entirely locked out of any opportunity to innovate, reinvent, or experiment with new land relations, to rebuild rural communities, or to implement more sustainable food and stewardship designs.

Attachment is doing a lot in this messy farmland story, too. Although economists anticipate a massive farmland transition in the next several decades as current farmers age,³²⁰ most (roughly

³¹⁶ See Angela P. Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157, 170–93 (2015) (exploring how American farming ideals have been developed for white households, pushing out communities of color).

³¹⁷ Megan Horst & Amy Marion, *Racial, Ethnic and Gender Inequities in Farmland Ownership and Farming in the U.S.*, 36 AGRIC. & HUM. VALUES 1, 9 (2019).

³¹⁸ See generally Shoemaker, *supra* note 11; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001). See also Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611 (2006).

³¹⁹ SOPHIE ACKOFF, ANDREW BAHRENBURG & LINDSEY LUSHER SHUTE, NAT'L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS II: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 34 (2017).

³²⁰ See ADAM CALO & MARGIANA PETERSEN-ROCKNEY, BERKELEY FOOD INST., WHAT BEGINNING FARMERS NEED MOST IN THE NEXT FARM BILL: LAND 1 (2018); *Land Access*, NAT'L YOUNG FARMERS COAL., <https://perma.cc/PH9A-W79P>; see also ACKOFF ET AL., *supra* note 319, at 18 (“Farmers over the age of 65 outnumber farmers under 35 by a margin of six to one, and nearly two-thirds of our nation’s farmland is set to transition to new ownership within the next two decades.”).

80%) of that land will stay within families while only a smaller portion (roughly 20%) will be made available to a nonrelative.³²¹ The fact that most farmland is still passing within families is in large part evidence that familial, generational place attachments are working. These heirs want to maintain their family's land and historic farm. This choice is also supported by a whole host of law and policy—including private property designs—that actively encourage and protect these kinds of generational landholdings.³²²

In part, these policy choices to protect inherited farmland reflect a collective sense that *family* farming—and the very specific visions of rural place attachments that accompany that ideal—are important and worth protecting through collective policy and property design. This includes ideals about farming as a way of life (an identity, not a career), farming choices made based on unique and intergenerational knowledge of specific farms, values of care and concern to steward lands for future generations, and maybe especially, the image of family farmers as the stalwarts of rural communities and rural life. These same ideas reflect many of the positive aspirations of place attachments outlined here, and indeed, these familial attachments and values are serving as some important buffer to prevent even more land concentration and farmland capture by outside capital. If land stays in families, it is not swept up into global land-grab dynamics.

But are these heirs really themselves family farmers with the kind of ecological stewardship and community support envisioned by that framing? In an increasing number of cases, heirs and beneficiaries are choosing to hold these farmlands in the family, but often while becoming now-urban landlords of their grandparents' former farms. Roughly 40% of farmland is now rented out, and this figure is expected to grow dramatically, especially as this emerging class of now-urban heirs of legacy family farms also expands.³²³ These family heirs hold a personal, identity-reinforcing attachment for themselves and their family legacies, but they become absentee owners, too. They may hold memories of the land

³²¹ DANIEL BIGELOW, ALLISON BORCHERS & TODD HUBBS, U.S. DEPT OF AGRIC., ECON. INFO. BULL. NO. 161, U.S. FARMLAND OWNERSHIP, TENURE, AND TRANSFER 34 tbl.5 (2016); see also Daniel Bigelow & Todd Hubbs, *Land Acquisition and Transfer in U.S. Agriculture*, U.S. DEPT OF AGRIC. (Aug. 25, 2016), <https://perma.cc/6KVZ-MS92>.

³²² Tax, estate, farm policy, and title features all reinforce and tip the scales in favor of keeping this large proportion of farmland within families. Shoemaker, *supra* note 11, at 1721–38 (outlining these policies and effects).

³²³ BIGELOW ET AL., *supra* note 321, at 15.

and family connections to it, but they may not know it physically or care for it on a day-to-day basis now. Instead, though continued ownership is encouraged by property and policy, they actually pull rent from rural communities and export the benefit of appreciating land values without actually living and investing in the present community.

These legacy, individual attachments have value, but is this the best set of property relations to protect for the future of rural places? Especially when land access is *the* obstacle to food system change? It seems likely not, but until we are clearer about *why* we value ideas like family farming and what it is for, our property protections and policies will continue to distort opportunities to build new visions of grounded, peopled, stewarded, and living rural communities and foodways. Instead, in our current muddled rhetoric about rural places and rural property relations, we remain in a space of disconnect, with both extremes—overprotected attachments for some farming dynasties and increasing attachment-less ownership by outside investors—controlling the countryside.

2. Grazing privileges and counterprotest.

In a related but different context, interrogating the character of various place-based attachments in this more careful way also helps us be more transparent about when and why we choose to value some attachments over others.³²⁴ Here, consider a totally different example: the case of certain Western ranching families that have grazed public lands for generations at below-market rates and without any formal, legal property right guaranteeing that they will be able to continue this practice year after year.³²⁵ Federal grazing rights are actually revocable licenses, not vested property rights. But in practice, as Professor Bruce Huber has evocatively explored, these grazing allocations have “remarkable staying power” and are renewed so consistently and durably that “banks customarily capitalize the permits’ value into the ranches

³²⁴ As we have explored, this includes many place-based attachments that exist today without any formal recognition in law or that the law only recognizes some aspects of and often unequally, with examples from Standing Rock protestors to the fragile self-help housing claims of people without property making encampments in parks and other public places as key examples. See, e.g., *supra* Part II.C.1.

³²⁵ See Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1004–05 (2014); see also Alexandra B. Klass, *The Personhood Rationale and Its Impact on the Durability of Private Claims to Public Property*, 103 GEO. L.J. ONLINE 41, 47–49 (2014).

to which they are adjacent.”³²⁶ These are attachments and traditions that we value in practice, year after year, even if that renewal is not legally or technically required.³²⁷ Nonetheless, these ranchers’ personal and familial attachments to these spaces—as translated into recognized grazing privileges—are remarkably sticky.

Around the same time that the Standing Rock Sioux Tribe and other Indigenous groups were forming the protest camp around Lake Oahe to contest plans to build the Dakota Access pipeline, a little farther west, a group of (mostly white, mostly male) Western ranchers started a protest of their own. This took the form of an armed occupation and violent standoff at the Malheur National Wildlife Refuge. These protesters—often called “militiamen” in the news—objected, in general, to federal management of public lands and what they perceived as invasive government limits on their individual grazing “rights.”³²⁸ After the standoff ended, several of these occupiers were acquitted of all charges stemming from the armed takeover, including explicit trespass charges.³²⁹ In contrast, when Sioux tribal members protested land-use on land they did not technically own but to which they claimed a longstanding multigenerational attachment, the pipeline was ultimately permitted over their objection, and a trespass notice was issued over a landowner’s own land. Oil now flows through the contested pipeline, while one of the acquitted leaders of the Malheur occupation recently ran for governor of Idaho.³³⁰

Both the grazing families and the Standing Rock protesters claimed deep identity-connected attachments to the lands in question, including individually and as parts of communities. Why do the public land grazers have such a reliable right of access

³²⁶ Huber, *supra* note 325, at 1004–05.

³²⁷ In important ways, we also tip the scale in favor of these repeated attachments. For example, even grazing rights on public lands require, in most cases, that the permit holder also already own certain adjacent lands privately. These are not in fact built for the public and open to all potential newcomers in the way one might otherwise assume. *See id.* at 1029–30.

³²⁸ Sam Levin, *Oregon Militia Standoff: One Dead After Ammon Bundy and Others Arrested*, THE GUARDIAN (Jan. 27, 2016), <https://perma.cc/64VB-DZQK>.

³²⁹ *See* Tay Wiles, *Acquitted, Convicted, Fined or Free: After the Oregon Standoff*, HIGH COUNTRY NEWS (Apr. 12, 2018), <https://perma.cc/7NGW-832N>. The standoff did end violently, with one protester killed during a shootout with federal agents. *Id.*; *see also* Levin, *supra* note 293.

³³⁰ The very first “plank” in Ammon Bundy’s plan to “Keep Idaho IDAHO” was: “1. Protect Private Property.” Ammon Bundy (@realammonbundy), INSTAGRAM (Nov. 8, 2022), <https://perma.cc/LK56-QEGC>.

and grazing even without actual property entitlements? Why can Indigenous religious practitioners not access sacred sites on private land without special permissions? Why were the grazing protestors given such space—and legal and political acquittals—for a violent occupation, when massive tribal protests failed to make much of a difference on pipeline development plans at all? Simply asking these questions is an advancement on many current accounts of these disputes, and the answers are more difficult than first assumed.

On the one hand, perhaps more sympathy to the attachments of each may be in order—a claim others have also made despite shared disagreement with the method and substance of the Malheur takeover protest.³³¹ But validating genuinely-held place attachments (whatever their value and difference) may also allow more honesty about what is at stake: Who decides what is good stewardship, below-market grazing, or a spiritual connection to an ancient burial site? How do we, collectively, value range management on public lands vis-à-vis demands to build a pipeline for oil transport? Does it matter, too, what the parties claimed? The Standing Rock Sioux Tribe simply sought access to sacred places, not exclusive ownership. The grazing protestors, however, used guns to seize a public wildlife refuge and claimed an exclusive entitlement to use public land to meet their personal needs. The questions are hard, and connections to identity, knowledge-making, stewardship, and community fabric are all complex. But thinking more directly about place and place-attachments in these two cases helps us at least see all that is at stake.

3. Unsettling “neighborhood character.”

Finally, there are countless instances in popular and legal discourse in which “neighborhood character” is used as shorthand for preserving existing conceptions of place. One of the most iconic photos of the 2020 Black Lives Matter protests was of a white couple, Mark and Patricia McCloskey, shouting and waving guns (including an ominous black semiautomatic assault rifle) at protestors from the edge of their opulent front yard—within their privately gated community—as the group marched toward the St.

³³¹ Klass, *supra* note 325, at 48–49; Ann M. Eisenberg, *Alienation and Reconciliation in Social-Ecological Systems*, 47 ENVTL. L. 127, 151–53 (2017).

Louis mayor's house.³³² In response to their felony charges for threatening nonviolent protesters with weapons, the McCloskeys defended themselves as homeowners fearing trespass, but certainly, their actions also seemed to be about protecting the sanctity of their particular brand of white, suburban, and very affluent neighborhood character.³³³

Indeed, "neighborhood character" claims are often used euphemistically to avoid new affordable housing developments—as code to exclude low-income or racialized tenants.³³⁴ On the other hand, low-income neighborhoods experiencing gentrification or, even, condemnation proceedings in light of blight determinations, also claim "neighborhood character" to avoid change.³³⁵ Many property students also learn the plight of the Poletown community fighting (unsuccessfully) their collective condemnation in Detroit for the construction of a new automobile factory,³³⁶ and there are many instances in property literature of scholars weighing how best to value built-up community-level reliance on historic land uses and patterns.³³⁷

Does thinking about placemaking within these conflicts help us sift through these perennially difficult disputes in a clearer way? Do residents of affluent gated communities not also have a

³³² The couple, both lawyers, ultimately pleaded guilty to misdemeanors and were invited to speak at the Republican National Convention while Mark McCloskey also considered a U.S. Senate run. See Vanessa Romo, *The Couple Who Waved Guns at BLM Protesters Plead Guilty to Misdemeanors*, NPR (June 17, 2021), <https://perma.cc/7YLZ-PBEV>; see also Brakkton Booker, *St. Louis Couple Who Waved Guns at Black Lives Matter Protesters to Speak at RNC*, NPR (Aug. 18, 2020), <https://perma.cc/2CBD-L24X>.

³³³ See Associated Press, *Missouri's Governor Pardons the St. Louis Lawyers Who Waved Guns at BLM Protesters*, NPR (Aug. 3, 2021), <https://perma.cc/Y3SD-ZVDS>. The McCloskeys, in particular, had a lengthy history of suing neighbors to enforce what they claimed were rules of their private gated community, including a lawsuit objecting to the neighborhood allowing an unmarried gay couple to live there and to a synagogue raising bees to harvest honey for Rosh Hashanah. J. Edward Moreno, *St. Louis Couple Who Pointed Guns at Protesters Have a History of Suing Neighbors*, THE HILL (July 11, 2020), <https://perma.cc/QV42-WPD2>.

³³⁴ See, e.g., Schragger, *supra* note 273, at 1836 n.31.

³³⁵ *Berman v. Parker*, 348 U.S. 26, 29 (1954); see also Infranca, *supra* note 266, at 1285–87.

³³⁶ See generally *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981) (per curiam).

³³⁷ See generally Singer, *supra* note 141. Historic preservation law, too, regularly struggles with these tensions between honoring past place relations and maintaining flexible space for the present and future. See, e.g., Sara C. Bronin, *Research Directions for Historic Preservation Law*, in *A RESEARCH AGENDA FOR U.S. LAND USE AND PLANNING LAW 203* (John J. Infranca & Sarah Schindler eds., 2023).

place attachment that includes, at least, the benefits of supporting their individual and community identity formation and ensuring some stability within the existing community? These, in many ways, are the same values and place-based attachment benefits that more easily sympathetic actors—like the Poletown neighbors or the low-income families losing their already marginal housing access to condemnation—would make.³³⁸ But, remembering that property and attachment values *also* serve equality and sustainability (or caretaking) values helps clear some of these concerns.³³⁹ Our job, in each context, is to carefully calibrate these relations, avoiding instances of “too much” protection for attachments being deployed in toxic ways—to protect an outsized political or economic monopoly or as an excuse to ultimately reentrench property dynasties or economic castes. There is no promise that this calibration is always easy or clear, but disentangling disparate attachment-related values can help pierce the veil of thin claims that are instead just discriminatory shorthands for desires that do not reflect property’s desired purposes and values.³⁴⁰

V. REIMAGINING ACCESS: FOUR STORIES FROM ROAMING TO REFORM

Thinking about property and placemaking does not, unfortunately, make our social, economic, and ecological challenges easier, but it does help us find a clearer language for sorting out what is at stake. Considering place-based values reveals a whole web of possible relations, and when you look for them, these concerns thread through a whole host of complex land challenges. The task

³³⁸ For a detailed story of the Poletown community’s struggle and ultimate displacement, see generally JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1990).

³³⁹ See Infranca, *supra* note 266, at 1297–1314 (making a parallel argument in the context of zoning that more precariously positioned communities—including communities subject to distinct histories of discrimination and dispossession—may have a more legitimate normative basis for opposing new housing development, in contrast to other wealthier communities). Indeed, property literature frequently supports the legitimacy of treating some land users and owners differently based on status and need. See, e.g., Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL’Y 363, 375–76 (2010) (“‘Property rules’ are not simply ‘property rules’ that should apply regardless of the identities of property owners and property challengers.”); see also Lea Ypi, *Structural Injustice and the Place of Attachment*, 5 J. PRACT. ETHICS 1, 6–13 (2017) (arguing that historic attachment claims have special weight only when accompanied by some present, structural injustice). See generally AJ VAN DER WALT, PROPERTY IN THE MARGINS (2009) (exploring the relevance of “marginality” of certain legal positions).

³⁴⁰ See *Shack*, 277 A.2d at 372 (“Property rights serve human values.”); see also *supra* note 204 and accompanying text.

is really to try to discern which attachments warrant legal protection and why, and then to evaluate whether property law is calibrated correctly to protect the prosocial attachments we desire—and not the possession or property or attachment we may not.

For example, in the context of farming transitions, we saw that attachment is already doing important work by propping up family-tethered landownership in the face of investment and concentration pressure.³⁴¹ All of the property design and policy built to reinforce that family ownership may be doing too much—going too far—to lock too much land within existing farming families and, increasingly, for the now-urban heirs of former farmers. Can loosening these supports—and inventing new property priorities to reconnect local ownership and local possession—benefit a new generation of emerging farmers, produce more equitable distributions, and also reclaim rural spaces as more vibrant places of shared connection and concern?

Ultimately, this Article has shown that there are numerous dials that property law can “turn” to calibrate these property-place relations. There is no shortage of creative ideas to recalibrate property in favor of positive personal, social, and ecological relationships: stronger protections for in-possession co-owners actively using and caring for property (over, or to the exclusion of, more disembodied absentee owners); more robust default lease terms and stability for current tenants; even—in some cases—new property estates with conditional use requirements or usufructs that more directly connect, in some appropriate contexts, possession and land ownership.³⁴² Other ideas would imagine new rights of access for attachment-holders, such as easements or use rights without the need for total control or exclusion. And still, more creative ideas might reimagine land transfers during life or at death, ranging from something like a “most logical heir” intestacy default to encourage more active planning and management to outright alienation limits or incentives to influence next-generation ownership. We could even imagine new rights of community or cooperative purchase. Scotland is actively considering many of these same proposals,³⁴³ and in other contexts—from

³⁴¹ See *infra* Part III.B.1.

³⁴² See *infra* Part III.A.

³⁴³ See generally Carey Doyle, *Rethinking Communities, Land and Governance: Land Reform in Scotland and the Community Ownership Model*, 24 *PLAN. THEORY & PRAC.* 429 (2023).

collective ownership institutions for Alaskan Natives³⁴⁴ to tenants' rights-to-buy in Hawai'i³⁴⁵—the United States has sometimes shown glimmers of similar creativity.

There is no single, cookie-cutter solution.³⁴⁶ Property is dynamic and pluralistic, and all of the historical and sociological evidence confirms that changes are best when local, grounded, and iterative; no singular top-down reform will magically emerge without a more continual process of adaptation, reflection, and correction.³⁴⁷ Conveniently, this call for more local experimentation and context in iterative property system change dovetails perfectly with the demands of placemaking. And yet, all of the lessons about property and placemaking share a central emphasis on the critical role of grounded human experience. Thus, when land is concentrated and commodified, or when longstanding land connections are not recognized or permitted under current law, it is this *inability* to experience space that is the primary roadblock to new place relations, to new property imaginations, and to the requisite care, concern, and attention to our shared human and ecological realities.³⁴⁸

So, instead of cookie-cutter solutions, I end here with a final spark of an idea to help trigger those kinds of local, bottom-up efforts and experiments. This idea is somehow both extremely radical and relatively modest. Starting with the smallest property right—the right of access—may be the most transformative. Indeed, it is this tiny right—a public right of responsible access—that many Scottish scholars have pointed to as the trigger that ultimately set off the cascade of current land reform processes happening in that country.³⁴⁹ In Scotland, the body politic is literally rewriting, through an active and democratic process, the relative rights of absentee or derelict landowners relative to the

³⁴⁴ See *About the Alaska Native Claims Settlement Act*, ANCSA REG'L ASS'N, <https://perma.cc/Y5TD-AW4B>.

³⁴⁵ See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding Hawai'i's Land Reform Act of 1967, HAW. REV. STAT. ANN. § 516 (1976) (making it possible for tenants to buy the rights to the land they lived on)).

³⁴⁶ See, e.g., Singer, *supra* note 141, at 624–25 (emphasizing that law and morality are both more indeterminate than we like to suppose).

³⁴⁷ Shoemaker, *supra* note 74, at 1578–84.

³⁴⁸ See also Helena R. Howe, *Making Wild Law Work-The Role of 'Connection with Nature' and Education in Developing an Ecocentric Property Law*, 29 J. ENVTL. L. 19, 31–32 (2016) (identifying the cultivation of people's connection to nature and attachment to places as instrumental to the project of reforming legal systems in a more ecologically sensitive way).

³⁴⁹ See, e.g., Doyle, *supra* note 343, at 431.

wider community, particularly in the face of extreme land concentration and inequality.³⁵⁰ But, it started with a general right of access. That access right—and *experience of actual access*—led to public concern for these places.³⁵¹ Because the public could and did actually visit and experience these spaces, they also came to care about them.

In what follows, I ultimately suggest a broader vision of the access rights for responsible land users—gentle hikers, Indigenous participants in sacred pilgrimages, families returning to ancestral home places—in the United States, too. There is much to sort in future work about the contours and mechanisms of such a right.³⁵² For now, I simply end with four short examples—stories, really—that might help us begin to reimagine *access* in a way that can help us reorient, collectively, to caring about these spaces as *living places* with meaning. And with meaning comes engagement and—at least in the Scottish example—maybe more creative attention and care.

A. The Loneliness of Some Land Memories

At the beginning of a multiyear project on farmland relations—past, present, and future—I took a road trip with my daughters, Hazel and Annabel, to my family’s land in southwestern Wisconsin. The land, a mix of forest and agricultural fields, is difficult to draw a boundary around in my mind. There is the simple ranch-style house, which my grandpa built for retirement with my grandma, on 80 acres they had remaining after he sold the rest of his original dairy farm and corn and alfalfa operation (some sold voluntarily, some sold—according to family lore—as a forced sale to a cheese factory that elected to exercise their rights to use his fields to cover them with leftover whey). This was long before farmland skyrocketed in value (quite the opposite). Across

³⁵⁰ See *id.* at 431–33.

³⁵¹ See *e.g.*, SCOT. GOV’T, SCOTTISH LAND RIGHTS AND RESPONSIBILITIES STATEMENT 9 (2017).

³⁵² The Supreme Court’s recent decision in *Cedar Point* does make implementing such a right slightly more complicated, but not impossible. Specific efforts might include some form of just compensation (however small), robust recognition of the reciprocity of these rights, or even more work of the kind currently being done by some activists on the historical roots of rights of access (and the limits on the right to exclude) in historic property traditions, too. For a detailed history of this kind of evolution, see generally Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71 (2023), as well as other work cataloging existing rights of nonowner access in U.S. property law. See, *e.g.*, Singer, *supra* note 141, at 678.

the road and surrounding the space are hills and woods, each with their own name specific to my family only, where we often walked, picked berries, or hunted with the permission of neighbors and, often, the comfort of years of past practice.

Now, my grandparents are both gone, and the 80 acres have been split into two forty-acre parcels for the two oldest children. My parents now own the forty-acre subdivided piece that includes the house (now rented to a local family with a young child) and the woods and fields where we picked garden vegetables, grew ginseng, and made maple syrup every spring, riding with cousins in the back of a tiny tractor and wagon, collecting sap from plastic gallon-size ice cream buckets hung on nails from the tree's trunk, catching sap from homemade spigots and then taking it to boil down, over a constantly tended wood fire, to make the jars of maple syrup that my grandma processed and canned in her home kitchen.

On that recent road trip, I walked Hazel and Annie to the sugar shack, which is now truly a shack—unused for years and slowly sliding into forest regrowth and decomposition. We walked past the gardens, where my grandparents grew such prolific potatoes and blueberries; past the hazelnut tree that I thought of when I named my oldest; around the sun-dappled fields that evoked memories of both cross-country skiing behind my aunts and walking and looking for deer and wild ginseng.

It brought back so much for me: feelings of care and familial connection and a strong desire to always maintain, care for, and have this space as our family home. But, to my girls, it did not translate. They grew up in Denver and Nebraska, and this foreign place in Wisconsin—where they had only very occasionally been—was uncomfortable. Their grandparents' house is my parents' home in Iowa. They did not remember my grandparents (their great-grandparents). The sugar shack in Wisconsin looked to them like the shack it actually is, not the syrup-making memories it is to me. They wanted to leave. We walked out, and the renters—a father and son—were picking the last of the raspberries in the bushes by the road where we'd parked our car, using a plastic colander to catch the berries just as we had always done. They did not say hello.

It all meant so much to me, but I could not translate or share it with my daughters in that moment. My family feels strongly about keeping this land in the family. The fields and house are preserved. The woods are left mostly wild. No one makes maple

syrup now. But it occurred to me, clearly, that what I need and want is access—the right to return and do this memory work—but I do not necessarily need ownership. It is just that, in our current property logics and rituals, ownership is the only language we comfortably have for securing and preserving this kind of attachment.

B. Land Back and Land Sovereignty

When Nebraska landowners opposed plans to build the Keystone XL pipeline under their fields and farms, they took their legal battle against pipeline siting decisions and company eminent domain actions to the public as well, building a solar barn in the proposed path and inviting singer-songwriters Willie Nelson and Neil Young to perform a protest concert in the edge of a Nebraska rye field.³⁵³ Some of the protesting (white) landowners also invited representatives of the Ponca Tribe of Nebraska, a tribe with ancestral claims to this same land, to participate in the protests.³⁵⁴ The Ponca were stripped of their federally recognized sovereign status and then compelled to sell their reservation land in northeastern Nebraska in the 1960s.³⁵⁵ Later restored to federal recognition, but still effectively landless, Ponca activists returned to ceremonially replant ancestral Ponca corn along the planned pipeline route.³⁵⁶ The sacred corn was planted both as an act of resistance and as an effort to reclaim the Tribe's seed stock, which had not been planted in ancestral soils for over 130 years.³⁵⁷

³⁵³ Mitch Smith, *Nebraskans Raise Their Voices in Fight Against Keystone XL Pipeline*, N.Y. TIMES (Sept. 29, 2014), <https://perma.cc/L3E2-JJV6>.

³⁵⁴ See *Nebraskan Farm Plants Sacred Corn in Way of Pipeline*, FUELING DISSENT (June 2, 2014), <https://perma.cc/9SUK-T89M>.

³⁵⁵ An Act to Provide for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe, and for Other Purposes, Pub. L. No. 87–629, 76 Stat. 429 (1962). Termination was yet another federal Indian policy seeking to use the power of property law as intentional social engineering, seeking to “free” Ponca people from Indian status and assimilate them. The policy was such a failure—and resulted in such widespread Indigenous land loss—that the Ponca was restored to federal status in 1990 though this time without any recognized legal reservation of territory. Ponca Restoration Act, Pub. L. No. 101–484, 104 Stat. 1167 (1990).

³⁵⁶ Nicholas Bergin, *Ponca Make Spiritual Harvest*, LINCOLN J. STAR (Oct. 29, 2014), https://journalstar.com/news/state-and-regional/nebraska/ponca-make-spiritual-harvest/article_7925ebdb-9069-593e-8978-72699f23368c.html; Natalie Bruzon, *Ponca Corn “Seeds of Resistance” Harvested in Neligh*, ANTELOPE CNTY. NEWS (Oct. 12, 2016), <https://perma.cc/4TRL-SM7W>.

³⁵⁷ See, e.g., Elizabeth M. Hoover, *Planting Ponca Corn in the Path of Keystone XL, Neligh NE*, FROM GARDEN WARRIORS TO GOOD SEEDS: INDIGENIZING THE LOCAL FOOD MOVEMENT (June 5, 2014), <https://perma.cc/G7WQ-JJF2>.

At first, I read the landowners' invitation and seed planting with the Ponca activists as a bit too convenient, maybe even bordering on exploitative, coming as it did only after a pipeline was threatened over their fee title. Of course, the Ponca would have been fully aware—more aware than me—of these dynamics and made their own choice both to resist the pipeline and to restore their critical seed stocks. But later, after several years of this connection, one of the landowners went further and conveyed 1.62 acres of the land where the trench was proposed to the Ponca Nation of Oklahoma.³⁵⁸ In part, this too was clearly strategic: a hope that having a sovereign tribe as owner would at least complicate the energy developers' ability to seize the land for the pipeline via eminent domain.³⁵⁹ But this land transfer also happened after five consecutive years of ceremonial corn planting, where people came together to share layers of relation over a specific place.³⁶⁰ And, even now, after plans to pursue the pipeline have finally been called off by the developer, the plantings have continued, together.³⁶¹ Access led to relationships, and those relationships—in ways big and small—did change almost everything.

C. Rights to Wander and Scottish Land Access

In May 2022, I traveled to Scotland on an invitation to learn about the active process of land reform ongoing there. Scotland is actively grappling with its own experiences of land concentration. Scotland's government acknowledges that Scotland has one of the—if not *the*—most concentrated and unequal land ownership patterns in the developed world.³⁶² Only 432 owners account for more than half of all of Scotland's private land.³⁶³ But, Scotland is

³⁵⁸ See Kevin Abourezk, 'Seeds of Resistance': Ponca Corn Planted in Path of Keystone XL Pipeline, *INDIANZ* (June 10, 2019), <https://perma.cc/6C55-SWW4>.

³⁵⁹ See *id.*

³⁶⁰ See Kevin Abourezk, *Ponca Tribes Reclaim Ancestral Land Along Trail of Tears in Nebraska*, *INDIANZ* (June 12, 2018), <https://perma.cc/HC3B-PE6M>.

³⁶¹ See Tom Genung, *2022 9th Annual Planting of Sacred Ponca Corn in the Path of Keystone XL*, *BOLD NEB.* (Mar. 18, 2022), <https://perma.cc/56VP-KL82>.

³⁶² See ANDY WIGHTMAN, *THE POOR HAD NO LAWYERS: WHO OWNS SCOTLAND (AND HOW THEY GOT IT)* 79 (2010); see also JAYNE GLASS, ROB MCMORRAN & STEVEN G. THOMSON, *SCOT. LAND COMM'N, THE EFFECTS ASSOCIATED WITH CONCENTRATED AND LARGE-SCALE LAND OWNERSHIP IN SCOTLAND: A RESEARCH REVIEW* 8 (2019) ("It is widely accepted that Scotland has the most concentrated pattern of private land ownership in Europe.").

³⁶³ JAMES HUNTER, PETER PEACOCK, ANDY WIGHTMAN & MICHAEL FOXLEY, *H. COMMONS SCOT. AFFS. COMM., TOWARDS A COMPREHENSIVE LAND REFORM AGENDA FOR SCOTLAND* 5 (2013).

also notable internationally for its active process of ongoing land reform.³⁶⁴

Recent property changes in Scotland have recognized new community rights to *purchase* privately owned land, ranging from a registered-first right to buy certain lands when or if an owner elects to sell the land to actual forced rights to buy, even from an unwilling seller.³⁶⁵ These rights vary on how the subject land is classified—including whether the community is trying to stop current harmful land uses or prepare for new future sustainable or public-interest developments.³⁶⁶ In all cases, however, the original owner receives a fair price for their land, and the new owner—a community entity—continues to hold the land within existing property regimes and structures (i.e., it changes *who* owns the land, but not quite as much *what* it means to be that owner).³⁶⁷ Other reforms have given certain tenant-farmers a specific right to buy their own small farms (or “crofts”).³⁶⁸ Reforms have also focused on securing and enhancing the default terms of other agricultural leases³⁶⁹ and creating a more centralized and transparent register of land ownership.³⁷⁰ And, the process of consulting, imagining, and rewriting property relations is very much ongoing. The reforms are complex and do create many information and uncertainty costs, but it is also a radical example of actively rewriting—with public input and democratic accountability—the shared roles of governance and entitlement to the land as a shared resource.

So, where did this start? There are many theories about the spark or particular recipe that facilitates this kind of imaginative property rewriting, and there are certainly particularities that make Scotland well-suited for this: a relatively small and culturally homogenous population, the many concrete ways the historic

³⁶⁴ See generally Casado Pérez, *supra* note 42; John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011).

³⁶⁵ See Doyle, *supra* note 343, at 431–32.

³⁶⁶ See generally LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY (Malcolm M. Combe et al. eds., 2020); Malcolm M. Combe, *Community Rights in Scots Property Law*, in LEGAL STRATEGIES FOR THE DEVELOPMENT AND PROTECTION OF COMMUNAL PROPERTY 79 (Ting Xu & Alison Clarke eds., 2018).

³⁶⁷ See Malcolm Combe, *Rights to Buy: The New Addition*, 65 J.L. SOC'Y SCOT. 34, 34 (2020).

³⁶⁸ See Eilidh I.M. MacLellan, *Crofting Law*, in LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY (Malcolm M. Combe et al. eds., 2020).

³⁶⁹ See, e.g., Agricultural Holdings (Scotland) Act 2003, (ASP 11).

³⁷⁰ See, e.g., The Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations (Draft 2021).

traumas of Highland clearances are very present for many Scottish yet today, and the unique political climate of a country continually renegotiating and reconsidering its relationship to the United Kingdom, with devolution and independence votes regularly discussed. But, in 2003, the reform process kicked off with an often overlooked reform that has been described as “the heart of this regime”: national legislation to recognize and affirm a right of access.³⁷¹ This right of access allows individuals to go “almost anywhere in Scotland, on most land and inland water, whether privately owned or public, without a motorized vehicle, for purposes of recreation, education, and passage.”³⁷² The key condition, however, is that this right of access extends only as long as it is “exercised responsibly.”³⁷³

It is, carefully, a right of *responsible* access. The Scottish Outdoor Access Code sets out rights and responsibilities for both land managers and public users.³⁷⁴ These parameters require context and certainly add levels of complexity to land governance. But, on the landscape, this right of access changes everything. Gates become doors and entry points for public access. Fences are intersected at regular intervals with stiles—often, a distinctive X-shaped wooden set of stairs, allowing walkers to cross up, over, and across fence lines, while holding sheep and other livestock in. Scottish walking culture has a common language and set of practices, including popular tracking and recording of certain hills—called “Munros” if they exceed three thousand feet high—with public maps and guides describing the best routes for each ascent.³⁷⁵

The full system of cause and effect is complex and hard to pin down, but walking (or roaming) across Scottish islands and hills and coastlines, one cannot help but imagine that this open *experience* of accessing *spaces* as shared *places* of common concern is a key part of the reform recipe. People engage in solutions to concentration and land access because they care about—and can know and directly experience—these same lands.

³⁷¹ Lovett, *supra* note 364, at 741.

³⁷² *Id.*; Land Reform (Scotland) Act 2003, (ASP 2), §§ 1(2)–(4).

³⁷³ Land Reform (Scotland) Act 2003, (ASP 2), § 2(1) (“A person has access rights only if they are exercised responsibly.”).

³⁷⁴ SCOT. NAT. HERITAGE, SCOTTISH OUTDOOR ACCESS CODE (2005).

³⁷⁵ See, e.g., The Munros, WALKHIGHLANDS, <https://perma.cc/U5FM-XKVN>.

D. Migratory Birds and Shifting Ice

In Nebraska, where I now live and raise my family, every spring is marked by the migration of the sandhill cranes. Very early or just before dusk on chilly days in mid-March, crowds of visitors drive unmarked gravel roads, park on the side of fields, and walk whisper-quiet to small two-lane bridges and overpasses, overlooking a specific stretch of the Platte River. In the dark of these mornings, I stand beside my daughters and international strangers—often with mittens gripping binoculars or cameras—holding my breath and waiting. Every time, I think: There is nothing there. We have missed them. It is too late.

From that early morning vantage, the sand bars in the middle of the patchy, low riverbed seem completely static, even dead. But then, always, the sun comes up, and from the dark spot I thought was a shadow or a bush, a bird lifts off, followed by another, and then more and more and more until—out of nowhere—the sky is full of a rush of shadowed cranes embarking for the next stop on their migratory path.

In 2019, I spent a year in Canada, learning about and from Indigenous-led land reforms. Part of this experience took me to Iqaluit, the capital city of Nunavut, the newest and northernmost territory in Canada.³⁷⁶ Brightly painted single-story buildings dot a completely ice-covered landscape. On the sea ice, the ground literally moves beneath your feet. City pipes are all above ground because the freeze is so deep. You have never been so cold in your life. The majority-Inuit territory just—in the last several decades—negotiated a land claim agreement with the Canadian government and is in an active process of devolution.³⁷⁷ In just the last several years, the town of Iqaluit (both Inuit and non-Inuit) voted, again, to maintain municipal title to all land, rejecting private ownership of homes in favor of their preserved system of long-term leases and the maintenance of a direct, legal, and perpetual collective title beneath all of the parcels in the town.³⁷⁸ When children get out of school, there are no sidewalks on the ice, and so they walk home—in snow pants and parkas and boots—

³⁷⁶ For more on this experience, see generally Jessica A. Shoemaker, *Embracing Disruption and Other Lessons from Canada*, REG. REV. (Mar. 29, 2021), <https://perma.cc/Y4RW-BWGD>.

³⁷⁷ See Sara Frizzell, *Nunavut Signs Devolution Agreement-in-Principle with Canada*, Inuit Organization, CBC NEWS (Aug. 15, 2019), <https://perma.cc/NU84-796G>.

³⁷⁸ See Sarah Rogers, *Nunavut Communities Deliver a Resounding No to Land Sales*, NUNATSIAQ NEWS (May 10, 2016), <https://perma.cc/8HZR-VNJC>.

across yards and between houses wherever the snow drifts allow them.

In a tiny museum in Iqaluit, learning about both the social and natural histories of the place, I caught my breath at an unexpected exhibit depicting two side-by-side sandhill cranes, the same Nebraska sandhill cranes that migrate from my home each spring. And, I learned for the first time that each year, it is to the Canadian North—to right there in Nunavut—where the sandhill cranes return, to their same nest and ancestral nesting grounds year after year.³⁷⁹

Property is about more than possession. Land relations are more pluralistic and dynamic than popular discourse typically allows. And, we all have important place experiences in spaces that we do not own. We should consider more rigorously the many ways ongoing property choices—calibrations—make and remake these collective place relations. This is especially critical in this time of increasing commodification and concentration of land ownership, but it also allows us to evaluate more fully and carefully the many ways our property choices already value some, but disregard other, experiences of place. And, ultimately, we can be more awake to what surprises may arise from this new conversation.

CONCLUSION

Property plays just one part in the complex and interwoven social, economic, and environmental challenges we face now, but it is an important part. Property currently tries to have it both ways: venerating secure and stable attachments on the one hand while simultaneously facilitating a form of abstract ownership on the other. And the right to access these kinds of secure and stable attachments is increasingly foreclosed to newcomers and folks not born into this kind of landed wealth. This Article has aimed to unpack property law's complex relationship to place and people's

³⁷⁹ See generally Gary L. Krapu, David A. Brandt, Paul J. Kinzel & Aaron T. Pearse, *Spring Migration Ecology of the Mid-Continent Sandhill Crane Population with an Emphasis on Use of the Central Platte River Valley, Nebraska*, 189 WILDLIFE MONOGRAPHS 1 (2014).

place attachments, while also deconstructing, with more specificity, when and how these place-based attachments might matter. Place-based attachments can sometimes shape legal outcomes, but these kinds of attachment values can be recognized unequally and inconsistently, often as a sword to entrench other power differentials and frequently without sufficient transparency about what is really driving these outcomes. This Article tries, primarily, to open that window for fresh consideration of these many tradeoffs and concerns—to re-place property in the most rooted, grounded, and physically embedded sense.