
YALE LAW & POLICY REVIEW

Share, Own, Access

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Millennials are losing interest in ownership. They prefer to access property as needed on a casual, short-term basis. Prompted by the sharing economy, online platforms, and ethical consumerism, access presents a radical alternative to established property forms. This type of property use is popular among younger, technology-savvy generations. It prioritizes use, flexibility, and mobility over the control, stability, and attachment that are associated with traditional property forms. Despite its recent prominence, access has remained surprisingly undertheorized, especially from a property perspective. This Article fleshes out the normative values and the concerns ingrained in this emerging property form. In addition, it critically evaluates the legal and regulatory response to access. It argues that the law continues to steer users towards ownership or other forms of long-term possession, significantly limiting the option of access. Accordingly, it calls for reevaluating insurance, tax, zoning, and antidiscrimination laws.

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INTRODUCTION

Traditional property law, with its emphasis on ownership and possession, is becoming dated.¹ Access, defined as the casual, short-term use of property, con-

1. Daniel Arthursson, *How Millennials Are Defining the Sharing Economy*, ENTREPRENEUR (June 9, 2016), <http://www.entrepreneur.com/article/275802> [<http://perma.cc/RJ4D-76VU>] (“In fact, 57 percent of adults agree that access is the new ownership.”).

tinues to flourish, supported by the sharing economy,² online platforms, and ethical consumerism.³ Instead of buying a drill, a user might choose to rent John's drill today and Jill's drill next month. Instead of buying a car, one might choose to rent Ron's car today and Kate's car next week. The reasons for this shift include technological advances,⁴ the economic downturn,⁵ consumer ideology,⁶ and, no less importantly, generational attitudes. Millennials own less property than previous generations,⁷ and they prefer flexibility, availability, and choice over the stability and permanence associated with ownership.⁸

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2. See generally RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION (2010); Rachel Botsman, *The Case for Collaborative Consumption* (May 2010), http://www.ted.com/talks/rachel_botsman_the_case_for_collaborative_consumption/transcript [<http://perma.cc/H5UM-T8DU>]; see also BETH BUCZYNSKI, SHARING IS GOOD: HOW TO SAVE MONEY, TIME AND RESOURCES THROUGH COLLABORATIVE CONSUMPTION (2013); Alice Witt et al., *Regulating Ride-Sharing in the Peer Economy*, 1 COMM. RES. & PRAC. 174 (2015). Regulation of the sharing economy has been the subject of recent debate. See, e.g., Rashmi Dyal-Chand, *Regulating Sharing*, 90 TUL. L. REV. 241 (2015) (discussing the role of platforms); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413 (2015) (offering an innovative perspective on legal regulation of the sharing economy); Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Governmental Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2015) (discussing local government regulation of the sharing economy); Sarah B. Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016) (providing a taxonomy of sharing economy projects).
 3. See Paolo R. Graziano & Francesca Foreno, *Political Consumerism and New Forms of Political Participation: The Gruppi di Acquisto Solidale in Italy*, 644 ANNALS 121 (2012) (discussing political consumerism as a form of democratic participation).
 4. See Ann Hynek, *How Millennials Are Driving the Sharing Economy*, MKT. REALIST (Mar. 1, 2016), <http://marketrealist.com/2016/03/millennials-driving-sharing-economy/> [<http://perma.cc/NW4V-N4RN>] (explaining that affinity for technology has provided a big boost to the sharing economy).
 5. Cf. Mareike Möhlmann, *Collaborative Consumption: Determinants of Satisfaction and the Likelihood of Using a Sharing Economy Option Again*, 14 J. CONSUMER BEHAV. 193 (2015) (finding that cost saving is among the top reasons for reusing a sharing economy platform).
 6. See *infra* Section II.A.3.
 7. Hynek, *supra* note 4 (“Millennials resonate with the idea of the sharing economy since it perfectly fits their budgets. Millennials took longer than expected to enter the job market—and at lower wages. Servicing huge student debt is another issue straining their already fragile financial situation. No wonder the technology-driven, asset-light, and low-cost consumption model appeals to millennials. They shun asset ownership and prefer sharing.”).
 8. See generally Ruth N. Bolton et al., *Understanding Generation Y and Their Use of Social Media: A Review and Research Agenda*, 24 J. SERV. MGMT. 245 (2013); Richey Piiparinen et al., *The Fifth Migration: A Study of Cleveland Millennials 9-10* (Urban

This Article fleshes out the normative and relational characteristics of access as an alternative property form that reflects detachment, flexibility, and an asset-free lifestyle. It highlights both the values and the concerns ingrained in this emerging property form. In addition, this Article critically evaluates the legal and regulatory response to access. It argues that, despite the normative benefits of access, the law continues to steer users towards ownership or other forms of long-term possession, significantly limiting the option of access.⁹ This is not an accidental policy. It is supported by legal theory that positions ownership and possession as the conceptual core of property.¹⁰

Access allows consumers to bargain for casual short-term use of assets in lieu of purchasing them. Consumers pay per use of a car, bike, or drill only when such use is necessary or convenient. Websites such as Turo,¹¹ NeighborGoods,¹² Peerby¹³ and many others facilitate casual short-term use of assets by significantly lowering transaction costs. Access can be practiced independently or communally. *Share* is a communal form of access. The asset itself is replaceable, but it is consumed in a cooperative manner. Community lending libraries of tools, toys, or clothes are good examples. Such projects encourage efficient forms of consumption and build a sense of community and belonging.¹⁴ These

Publications, Paper No. 1338, 2016) (examining trends of mobility in young adults).

9. Ownership is protected in various legal doctrines. The law protects owners and long-term possessors from trespass, Avihay Dorfman, *The Normativity of the Private Ownership Form*, 75 MOD. L. REV. 981 (2012), takings, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Armstrong v. United States, 364 U.S. 40 (1960), and unauthorized search and seizure, U.S. CONST. amend. IV. Access requires the development of new legal mechanisms for its protection, and in particular, the removal of legal barriers to access-based transactions. These barriers include insurance policies, tax law, and antidiscrimination law. See generally *infra* Section III.B.
10. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 27-28 (2002) (discussing ownership as the core of property); A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 2d series 1961) (discussing the importance and prominence of ownership).
11. TURO, <http://www.turo.com> [<http://perma.cc/FCY7-3L3S>].
12. MG Siegler, *NeighborGoods: Sharing Returns to Its Physical Roots*, TECHCRUNCH (Oct. 7, 2010), <http://techcrunch.com/2009/10/07/neighborgoods-sharing-returns-to-its-physical-roots/> [<http://perma.cc/BZ94-7Q7G>] (discussing a startup that facilitated sharing goods with your neighbors and friends).
13. PEERBY, <http://www.peerby.com> [<http://perma.cc/6AY7-E6N5>].
14. See *infra* Section II.B.2.

new forms of property use remain surprisingly undertheorized, especially from a property perspective.¹⁵

As this Article explains, *access* and *share* contribute to the fulfillment of freedom,¹⁶ personhood,¹⁷ community,¹⁸ and efficiency,¹⁹ which traditionally have been offered as justifications for the institution of private property.²⁰ Yet there is an important twist. Instead of freedom from interference, what access fosters is flexibility and freedom from being tied down to a particular space.²¹ Instead of personhood, access provides the ability to experiment with one's personality and preferences.²² In addition, physical assets are likely to tie people to a particular community that is most often homogenous.²³ Access promotes a different sense of community. It is a platform of multiple connections and interactions, not only with family, friends, and neighbors, but also with

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15. There are relatively few works on property in the sharing economy. *See, e.g.*, Zale, *supra* note 2 (offering a taxonomy of property in the sharing economy without engaging with access and share as forms of property).
 16. *See, e.g.*, JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* (1993) (arguing that private property provides freedom to enter and exit exchange relationships); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999) (describing the role of private property in limiting the power of the state); JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2011) (arguing that property shapes social life, with community being a precondition of individual freedom); TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA* (2006) (describing the connection between property and individual liberty and criticizing the erosion of freedom in American property).
 17. *See, e.g.*, Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982) (arguing that attachment to property fosters self-development and personhood).
 18. *See, e.g.*, Gregory S. Alexander & Eduardo M. Peñalver, *Property and Human Flourishing*, in *PROPERTY AND COMMUNITY* 80 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (arguing that community is necessary for human flourishing); *see also infra* Section I.B.
 19. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 *WM. & MARY L. REV.* 1849 (2007) (arguing that the right to exclude saves information costs and serves as a moral core of property); *see also infra* Section I.A.3.
 20. *See, e.g.*, WALDRON, *supra* note 10 (discussing various justifications for private property); *see also infra* Section I.A.
 21. *See infra* Section III.A.2.
 22. *See infra* Section III.A.1.
 23. *See generally* David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 *YALE L.J.* 761 (1995) (describing homogenous communities and exclusion in private neighborhoods); Eduardo M. Peñalver, *Land Virtues*, 94 *CORNELL L. REV.* 821 (2009) (describing the connection between homeownership and communal ties).

strangers.²⁴ It encourages interactions with others, people who are different from us, and supports a more flexible and open sense of community.

At the same time, access raises significant normative concerns. Because access reflects a casual relation to a thing, it provides less stability and independence than ownership or possession.²⁵ In many cases, flexibility is not simply a preference, but a reality. It follows the lack of stability and security in the job and housing markets in the aftermath of the 2008 financial crisis.²⁶ Users who choose access are therefore more vulnerable to sudden changes in their lives.

For similar reasons, if users do not own the property, they are less likely to be responsible users. Moreover, access is mediated by powerful online platforms, compromising privacy and limiting parties' control over the details of the transaction.²⁷ In addition, access invites commercial activity into a realm traditionally governed by informal reciprocity and neighborly kindness.²⁸ It risks commodifying relationships. This risk is partially mitigated by the option of share, because assets are exchanged within the community.²⁹

Access and share are therefore normatively complex, much like ownership itself.³⁰ Access is so quintessentially different from the way we typically think of property that it represents an alternative, *a choice not to have property* (in the traditional sense).³¹ However, legal regulation currently makes it difficult for users to choose access over ownership or long-term possession.³² In typical access transactions, owners allow short-term use of their car, bike, drill, or ladder to non-owners in exchange for monetary compensation. The possibility of access hinges on owners' willingness to participate in these transactions. For example, insurance policies that deny coverage to owners who rent out their car to casual users ultimately discourage these owners from making short-term transactions

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24. See generally Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61 (2015) (arguing that the sharing economy creates an intermediate space that allows for multiple interactions with friends and strangers).
 25. See *infra* Section III.A.6.
 26. See generally RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009) (describing the economic crisis); Michael Hout et al., *Job Loss and Unemployment*, in *THE GREAT RECESSION* 59 (David B. Grusky et al. eds., 2011) (describing the effect of the recession on the job market).
 27. See *infra* Section III.B.4 (discussing the role of the platform in facilitating access and arguing in favor of access without surveillance).
 28. *Id.*
 29. *Id.*
 30. See *infra* Part I & Section III.B.
 31. An inclusive, broad conception of property will include access as a property form. See *infra* Section I.B. Yet access represents an alternative to the values associated with property and its main characteristics, such as stability and attachment. This Article therefore classifies it as a property form that reflects a choice not to have property in its traditional sense.
 32. See *infra* Section III.B.1.

in their personal property, resulting in very limited options for access for non-owners.³³ Another example concerns discrimination in providing goods and services.³⁴ Public accommodation law prohibits discrimination against protected classes in places that are open to the public, but it currently does not apply to owners renting out their own bike, drill, car, or ladder.³⁵ If owners are free to discriminate, protected classes of non-owners will have few possibilities to access, and will be compelled to purchase assets and become owners themselves. These examples demonstrate how certain legal rules significantly limit the option of access.

Much like other property uses, access requires state support.³⁶ In order to ensure a flow of assets, the state has to create the right incentives for owners who participate in access-based transactions. Although access appears to be booming, it still operates in the shadow of the law.³⁷ Moreover, local governments tend to support access of goods offered by commercial companies and burden peer-to-peer markets with legal barriers.³⁸ This Article discusses specific reforms in insurance codes, local regulation, zoning, and public accommodations laws.³⁹ The nuanced analysis presented in this Article also addresses normative concerns, including advocating access without surveillance, and points to a normative balance both between access and share and between access and ownership. However, the Article mostly brackets third-party effects and negative externalities. It sets out to uncover an important theoretical and normative perspective that has escaped the discussion thus far. Once this assertion is accepted, regulators will need to evaluate other market and community effects.⁴⁰

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33. This problem has prompted important legal reforms in several states. See, e.g., CAL. INS. CODE § 11580.24 (West 2015) (prohibiting insurers from classifying personal vehicle sharing as commercial activity).
34. See generally Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978) (analyzing developments in public accommodations law); Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. C.R. L.J. 111 (1998).
35. See, e.g., N.J. STAT. ANN. § 10:5-5(l) (West 2017) (explaining that “[n]othing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private.”).
36. The state supports ownership and possession in various ways, including expropriation rules, trespass, and search and seizure law. See, e.g., J.W. HARRIS, PROPERTY AND JUSTICE 5 (1996); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454-55, S469 (2002) (explaining that trespass rules are protecting the core of property, i.e., the right to exclude).
37. See *infra* Section III.B.
38. *Id.*
39. *Id.*
40. Cf. Erez Aloni, *Pluralizing the Sharing Economy*, 91 WASH. L. REV. 1397 (2016) (offering a regulatory model for the sharing economy); Bryant Cannon & Hanna

Access and share are central to the study of property.⁴¹ They are alternative property forms that contrast with the familiar focus on stability, independence, and attachment. It is important to note that the argument is not an attack on ownership or property sovereignty per se. It acknowledges the significance of the institution of private property. However, it does challenge ownership's supremacy and the legal disregard of other meaningful alternatives. Property scholarship has yet to consider the role of other models of engagement with property.⁴² In addition, access is refers to the use of personal property. It provides an opportunity to reestablish the long declining scholarly interest in personal, as opposed to real, property.

The Article proceeds as follows. Part I details the modern legal preoccupation with ownership and long-term possession. It explains the values and theories that support ownership, discusses notable critiques of it, and clarifies why current scholarship fails to provide an adequate framework for acknowledging access and share. Part II deals with changes in consumption patterns in the twenty-first century. It first surveys key developments in consumption trends, such as the sharing economy, the rise of intellectual property and intangible assets, and political consumerism; next, it presents the alternatives of access and share, uncovers their underlying motivations, and reviews their predominant features. Part III introduces and advances the main argument. It demonstrates the value of access and share as alternative forms of engaging with property, working closely with property values, and then calls for significant reforms in zoning law, insurance codes, local regulation, antidiscrimination laws, and torts to support access and share as important alternatives to ownership.

Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA COMPUTER & HIGH TECH. L.J. 23, 57 (2014) (suggesting a co-regulatory model to address market blind spots); Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147 (2016) (discussing externalities in the sharing economy and suggesting guidelines for evaluating regulation).

41. Cf. J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) (critically discussing the in rem and bundle of sticks approaches to property).
42. Legal scholarship has discussed forms of common resources, but did not focus on the choice of *individuals* to voluntarily create and sustain different types of legal relations to things. See Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith eds., 2011) (analyzing various types of common property regimes); Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (discussing the inefficiencies of the commons); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (discussing the problem of conflicting property rights within a single resource).

I. THE HEGEMONY OF OWNERSHIP AND POSSESSION

A. *Property as Long-Term Control*

The right to private property is deeply entangled with ownership.⁴³ Whether it is perceived as a bundle of rights⁴⁴ or as a core concept,⁴⁵ when philosophers and legal scholars defend or criticize the right to private property, they most often mean ownership.⁴⁶ At a certain level of generality, ownership represents the highest protection of the law given to a property interest, and it has been philosophically and politically linked to freedom, personhood, and self-development.⁴⁷ When one looks more closely, at least some of the familiar property accounts privilege not only ownership, but also long-term, steady possession.⁴⁸ This Part looks into the structure and reasoning behind the hegemony of ownership, its justifications, and the important critiques raised by progres-

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43. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997) (offering a theory of property and discussing ownership throughout the book as a paradigmatic example); Merrill & Smith, *supra* note 19, at 1850 (describing the key feature of property as “the right of the owner to act as the exclusive gatekeeper of the owned thing”); Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 NOTRE DAME L. REV. 795 (2003) (defending a vision of private law as achieving corrective justice with property and ownership as principle examples).
44. Honoré, *supra* note 10 (describing ownership as including a bundle of rights and liabilities); *see also* Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003) (criticizing the centrality of the bundle of sticks approach to property); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 742-43, 746-47 (1917) (fragmentizing property and other rights into rights, privileges, disabilities, and immunities).
45. Avihay Dorfman, *Private Ownership*, 16 LEGAL THEORY 1 (2010) (arguing that private ownership represents an authority relations between owner and non-owner); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (arguing that an owner’s sovereignty represents the distinguishing element of property); *see also* PENNER, *supra* note 43 (arguing that property is the right to determine how a thing is used).
46. *See* WALDRON, *supra* note 10; Honoré, *supra* note 10.
47. For freedom, *see infra* Section I.A.2. For personhood and self-development, *see infra* Section I.A.1.
48. *See, e.g., supra* note 17 and accompanying text; *see also* Dorfman, *supra* note 45. In addition, Joseph Singer sees informal property rights as property, and recognizes non-ownership connections to property, based on long-term attachment. *See* JOSEPH W. SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* xxxvii (7th ed. 2017) (discussing informal sources of rights, reliance, social customs, and norms); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); *see also* Shelly Kreciczler-Levy, *The Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127 (2014) (arguing that home sharing creates a property community among people who live together).

sive property scholars.⁴⁹ It focuses on the role of control and continuing possession as a cornerstone of property law and theory, and confronts the exclusion of other types of legal relations between a person, a thing, and the rest of the world. This discussion of justifications and property values will also prove significant to the theoretical and normative analysis of access and share as distinct forms of engaging with property.

1. Property and Personhood

One of the prominent justifications for private property is inspired by Hegel's concept of the person.⁵⁰ According to this argument, freedom begins with an abstract being that transcends any contingent traits.⁵¹ It hinges on the individual's capacity for abstraction from any inclination.⁵² This abstract unit then becomes a developed individual through the process of controlling property. By engaging in property, a person deals with something external and becomes real.⁵³ This control has to be recognized by the community. Other people have to recognize one's control over property for one to gain approval as a concrete individual. The property is an external object, by means of which one expresses her will and recognizes others' will, and through the recognition of others, one recognizes herself.⁵⁴ This justification emphasizes control as a critical form of engaging with property. Only through the power embedded in ownership can an individual embody her will in external objects.⁵⁵

Margaret Radin provides a somewhat different perspective on the personhood theory. She argues that people need to hold certain possessions in order to achieve self-development.⁵⁶ Radin's work is sensitive to the type of property, and she distinguishes between fungible assets that do not warrant special protection and personhood property.⁵⁷ For example, the home is closely connected

49. See *infra* Section I.B. This Section critically analyzes central justifications to private property. Labor theory is an exception because it is not as relevant to the analysis of access. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 47 (2012).

50. G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT 47-77 (T.M. Knox trans., 1967) (1820) (providing a personhood theory of property).

51. The Hegelian abstract person has no future plans, no goals, and no relationships. ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE 34-38 (1995).

52. WALDRON, *supra* note 10, at 352-53.

53. *Id.* at 45.

54. Dudley Knowles, *Hegel on Property and Personality*, 33 PHIL. Q. 45, 56-57 (1983).

55. WALDRON, *supra* note 10, at 377-78.

56. Radin, *supra* note 17.

57. *Id.* at 986.

to personhood, because it is a “scene of one’s history and future, one’s life and growth,”⁵⁸ and therefore warrants special legal protection.

Radin’s view is not formalistic. Personhood is not attributable to ownership per se, but to people’s attachment to objects. To illustrate this point, Radin explains that the occupational rights of tenants should be characterized as personhood property, while the ownership rights of landlords should be characterized as fungible property.⁵⁹ Her argument highlights the value of continuing possession as the foundation for personhood.

Whether through ownership or possession, the property as personhood justification is about controlling assets. It captures the entanglement of the self with possessions that is projected to the outside world. It connotes stability, commitment, and attachment manifested through the exclusion of others. In contrast, access and share are purposefully unstable and reflect detachment, flexibility, and mobility.

2. Property as Freedom

Scholars often refer to freedom as the foundation of a system of private property.⁶⁰ Private property creates a zone that is free from the interference of others.⁶¹ This is in part a spatial argument: property is understood as a physical place where one can be truly free, an enclave in modern life where living with other people is the norm.⁶² More broadly understood, however, the argument concerns setting boundaries. As Charles Reich explains, “The institution called property guards the troubled boundary between individual man and the state. . . . in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.”⁶³

The neo-Kantian philosophy of law provides a different version of property as noninterference.⁶⁴ According to Kant, private rights derive from our basic

58. *Id.* at 992.

59. *Id.* at 960, 993.

60. *See supra* note 16 and accompanying text.

61. *See* D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36 (2009) (suggesting a strong relationship between property and freedom). *But see* PURDY, *supra* note 16 (defining freedom as a broader, richer value).

62. Barros, *supra* note 61.

63. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (discussing property as protecting the individual from the power of the state, and arguing for a new definition of property).

64. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009) (presenting a Kantian theory of political theory, and discussing private law theory); Weinrib, *supra* note 43; *see also* Larissa Katz, *Ownership and Social Solidarity: A Kantian Alternative*, 17 LEGAL THEORY 119 (2011) (discussing the principles of Kantian private law).

right to independence and the capacity to set and pursue purposes.⁶⁵ Property, together with other private rights, is about the freedom not to be subject to other people's choices.⁶⁶ It is therefore an expression of purposiveness in relation to the purposiveness of others.⁶⁷ In other words, private property is about exclusion and constraining others as a way of setting purposes.⁶⁸

While Reich is concerned with freedom from the state, Kantians are similarly preoccupied with independence from other people. In contrast, other scholars are more troubled by the common dependency on private power, and argue for protection from the private sector.⁶⁹

Obviously, property rights, and the freedom and control they entail, are far from absolute.⁷⁰ Yet according to the traditional Kantian view, the ideal of property provides a physical or metaphorical safe haven,⁷¹ where one can exert the whimsical, radical, and most individualistic control. For this reason, it is ownership rather than other forms of possession that allows individuals to control property to the exclusion of others.

3. Property and Efficiency

Law and economics scholars are typically not in the business of justifying property on intrinsic grounds.⁷² Yet there are significant voices that call for a

65. RIPSTEIN, *supra* note 64; Katz, *supra* note 64.

66. This is a narrower vision of autonomy than the one set by Joseph Raz, i.e., being an author of one's life. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373 (1986).

67. RIPSTEIN, *supra* note 64, at 93.

68. *Id.* at 91.

69. As Eduardo Peñalver explains, taking Reich seriously requires protection not only from state power but from private power as well. Eduardo M. Peñalver, *Property, Power, and Freedom: Reich's "New Property" at Fifty* 18, 21-22 (2014) (unpublished manuscript) (available at http://law.loyno.edu/sites/law.loyno.edu/files/property_power_and_freedom_1.pdf [<http://perma.cc/9225-6DNA>]). Adolf Berle therefore distinguishes between consumption property, which protects individual freedom, and productive property, which represents corporate power and is a threat to freedom. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* xxiii, xxviii-xxix (rev. ed. 1997); Adolf A. Berle, *Property, Production, and Revolution*, 65 COLUM. L. REV. 1, 4 (1965).

70. See, e.g., WALDRON, *supra* note 10, at 27. For limitations on exclusion, see HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 48-54 (2011) (detailing a list of institutions where exclusion is not the determinant of results); see also Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437 (2014) (describing an affirmative duty of owners to maintain their property).

71. Cf. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (discussing the vision of the home as a safe haven); Robert M. Rakoff, *Ideology in Everyday Life: The Meaning of the House*, 7 POL. & SOC'Y 85 (1977) (describing the home as a shelter).

72. See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005) (criticizing the instrumentalist view of property and arguing that

more conceptual, even a moral, account of property.⁷³ These accounts celebrate exclusion as the core concept of ownership and property. For example, Thomas W. Merrill and Henry E. Smith begin by distinguishing property from other obligations. Contracts only bind the parties to the contract (in personam); property binds the rest of the world (in rem).⁷⁴ They argue that because property is unique in imposing information costs on third parties, it “requires that the parties adopt one of a limited number of standard forms that define the legal dimensions of their relationship.”⁷⁵ They go further to argue, in another article, that the right to exclude lies at the core of the morality of property.⁷⁶ Property has to rest on a simple and accessible foundation that is intuitively comprehensible, and naturally part of everyday morality.⁷⁷ Smith adds another justification for exclusion. According to the argument, the mediation of a “thing” is a platform for the modular structure of property. Exclusion (as “keeping off” a thing) protects the use interests of property, resolves use conflicts, and decreases information costs.⁷⁸ Others argue that the owner’s control and the right to exclude preserve the owner’s idiosyncratic values and bargaining position.⁷⁹

4. Property as Bundle of Sticks

The bundle of sticks approach to the concept of property has been immensely influential in Anglo-American jurisprudence.⁸⁰ Strikingly different from previous theories, it declares itself to be non-essentialist, looking at the ag-

there is no consistent unified theory for property law); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (criticizing the law and economics view of property as a collection of use rights in particular resources).

73. Bell & Parchomovsky, *supra* note 72; Merrill & Smith, *supra* note 72.
74. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (defining property as interests that are built on a list of recognized forms) [hereinafter *Optimal Standardization*]; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV 773 (2001).
75. Merrill & Smith, *The Property/Contract Interface*, *supra* note 74, at 776.
76. Merrill & Smith, *supra* note 19.
77. *Id.* at 1851.
78. Henry E. Smith, *The Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (suggesting property is the law of things, mediating the modular structure of property, and giving it its in rem character). This Article concerns a different take on the “law of things”: physical things as platforms for use, enjoyment, and interactions with others.
79. Bell & Parchomovsky, *supra* note 72.
80. RESTATEMENT (FIRST) OF PROPERTY §§ 1-5 (AM. LAW INST. 1936); Penner, *supra* note 41.

gregated incidents of property instead of searching for its core.⁸¹ Although most accounts begin with less emphasis on ownership and more of a critical edge,⁸² some end up with a hail to exclusion and control as the primary and most important examples of property. Others, who preserve the realist skepticism, provide a useful background for the argument.⁸³

Property as a bundle of sticks is a metaphor for the fragmentation of property into multiple powers, rights, and liabilities, rather than a unified core.⁸⁴ The bundle of sticks metaphor also allows for other forms of property besides ownership.⁸⁵ This type of flexibility has drawn harsh criticism from scholars that claim it obscures the in rem character of property and leads to ad hoc decision making.⁸⁶

Although the bundle of sticks approach fragments the concept of ownership, its application continues to privilege, at least partially, control and exclusion as the highest form of engaging with assets. Take, for example, Anthony Honoré's work on ownership. Honoré argues that "the right to possess, viz. to have exclusive control of a thing or to have such control as the nature of things admits, is the foundation on which the whole superstructure of ownership rests."⁸⁷ This notion of exclusion is not simply one stick in the bundle, but more profoundly attests to the nature of ownership. A review of the bundle of sticks-inspired case law supports this conclusion. In a couple of famous regulatory

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81. See discussion of the intellectual history of the bundle of sticks in Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57 (2014). See also GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 37-42, 381 (1998).
 82. Baron, *supra* note 81, at 63-65; see also Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 374 (2003) (referring to the bundle of sticks metaphor as any bundle of items—say a shopping bag of fruit filled with oranges, apples, bananas, and peaches—that people are free to pack and rearrange in whatever way they see fit).
 83. See *infra* notes 91-93 and accompanying text.
 84. Dagan, *supra* note 44, at 1532-34 (critically evaluating the bundle of sticks approach); Hohfeld, *supra* note 44, at 713-19 (explaining that property rights should not be understood as rights to things, because juridical relations are always between persons).
 85. Because property is a collection of incidents of rights and liabilities, we can recognize less powerful collections of incidents, such as leases, easements, and some licenses. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 23 (1990).
 86. See Dagan, *supra* note 44 (arguing in favor of property institutions as the true realist alternative to the bundle of sticks approach); Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S82 (2011) (reconstructing Coase and arguing in favor of property as a baseline rather than as a bundle of use rights).
 87. Honoré, *supra* note 10, at 113.

taking cases, *Dolan v. City of Tigard*⁸⁸ and *Nollan v. California Coastal Commission*,⁸⁹ the Supreme Court relied on the bundle of rights approach. In both cases, and others, the Court repeatedly held that the “right to exclude . . . [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”⁹⁰

Nonetheless, the bundle of sticks metaphor is less interested with title, and more engaged with substance.⁹¹ Conceptually, it allows for an infinite number of property combinations. People and institutions can continuously create new forms of property uses. Yet, in practice, fragmentation does have its limits. Unlike contract law, property law recognizes only a limited number of property forms, most familiar as the *numerus clausus* principle.⁹² As Nestor Davidson explains, the *numerus clausus* list balances stability and dynamism based on “competing visions of property’s pragmatic function and the aspects of property that deserve greater practical recognition in law.”⁹³ The bundle of sticks is a realist approach that understands property as a public institution rather than simply a private transaction.⁹⁴

88. 512 U.S. 374 (1994).

89. 483 U.S. 825 (1987).

90. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (internal citations omitted); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

91. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1086 (1984) (“[P]roperty is simply a label for whatever ‘bundle of sticks’ the individual has been granted.”); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) (“Labeling something as property does not predetermine what rights an owner does or does not have in it.”).

92. See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005) (discussing the *numerus clausus* principle in the context of federalism); Dagan, *supra* note 44, at 1565-70 (2003) (discussing the *numerus clausus* principle in a list of property institutions); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002) (arguing that the *numerus clausus* principle supports the verification of property rights); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1176-78 (1999) (arguing that the *numerus clausus* principle serves as a legal boundary); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1730-39 (2003) (discussing an objective theory of well-being as a justification for the *numerus clausus* principle); John Henry Merryman, *Policy, Autonomy, and the Numerus Clausus in Italian and American Property Law*, 12 AM. J. COMP. L. 224 (1963); Roderick R.M. Paisley, *Real Rights: Practical Problems and Dogmatic Rigidity*, 9 EDINBURGH L. REV. 267, 267 (2004) (discussing the *numerus clausus* principle in Scottish law).

93. Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1638 (2008).

94. *Id.* at 1649.

In contrast, access and share are forms of casual use. They are not directed towards a specific asset, but rather practice the rapid exchange of goods for use. Even a flexible approach, such as the bundle of sticks, will still find it difficult to conceptualize the use of different, constantly changing assets as property. Moreover, the realist public institution approach requires significant normative work to explain if and why the law should treat access and share as property.

B. Critiques of Ownership

Alongside theories that focus on control, exclusion, and sovereignty, there are notable critiques that emphasize the communal and relational aspects of property,⁹⁵ the importance of use,⁹⁶ and other values, such as human flourishing and community.⁹⁷ These are important accounts of property that counterbalance the focus on exclusion. Working with these critiques, this Part elucidates what is still missing in current debates: a conceptual and normative appreciation of access and share as reflecting a casual relation to a thing.

1. Additional Values

The inclusion of other values into the property paradigm has received a substantial amount of attention following the Statement of Progressive Property published in 2009.⁹⁸ The statement includes a list of values and interests that

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95. See, e.g., DAGAN, *supra* note 70, at 37-57; Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (explaining the benefits of cooperation in property related projects); Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162 (1991) (arguing against an autonomy-based property law on the boundary model); Singer, *The Reliance Interest in Property*, *supra* note 48 (arguing that relationships can create property rights); see also Kreiczer-Levy, *supra* note 48 (arguing that sharing a home creates informal property rights in the home).
96. See, e.g., Rashmi Dyal-Chand, *Useless Property*, 32 CARDOZO L. REV. 1369 (2011) (detailing the risks of focusing on exchange value of property without using it); Peñalver, *supra* note 23 (explaining the importance of the non-monetary values of land).
97. See, e.g., Alexander & Peñalver, *supra* note 18 (presenting an Aristotelian view of property, and positioning human flourishing as a central value); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 774 (2009) (presenting an alternative to the dominant property view that highlights the social obligation norm: “[A]n owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are the benefits necessary to the members’ development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land.”).
98. See generally Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (stating that property is a pluralist and complex value). This statement, made by four prominent property scholars, set a new agenda

property serves, such as dignity, civic responsibility, human flourishing, physical security, wealth, happiness, well-being, and a broad definition of autonomy and freedom.⁹⁹

These values were developed in prior and subsequent literature. Relational and communal approaches to property insist that property constructs relationships and does not just set boundaries,¹⁰⁰ and that sharing property interests serves to protect vulnerable parties.¹⁰¹ Neo-Aristotelian scholars argue that property owners have a responsibility towards their communities as part of a commitment to human flourishing.¹⁰² Others emphasize the plurality of values associated with property, creating distinct forms of property institutions.¹⁰³

This Article joins progressive approaches in arguing that property is more than a right to exclude. These approaches contribute to a well-rounded version of ownership, one that acknowledges obligations and commitment. Nonetheless, they all value long-term attachments and neglect the option of a casual, flexible relation to property.

2. Informal Property Rights

Joseph William Singer stresses the importance of informal sources of rights.¹⁰⁴ Rather than focus simply on formal ownership, Singer insists that the law should incorporate reasonable expectations into its rules because “*when informal expectations diverge from formal rules, standards promote certainty while rules undermine it.*”¹⁰⁵ This approach departs from the mainstream focus on ownership, not only in recognizing obligations, but also in its acceptance of new

for property theory that does not focus on exclusion and promotes a pluralist vision of property values.

99. *Id.*

100. Nedelsky, *supra* note 95; Singer, *The Reliance Interest in Property*, *supra* note 48.

101. Singer, *The Reliance Interest in Property*, *supra* note 48.

102. See, e.g., David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO. L.J. 325 (2003); Alexander & Peñalver, *supra* note 18.

103. See, e.g., DAGAN, *supra* note 70.

104. See generally Singer, *The Reliance Interest in Property*, *supra* note 48; Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

105. Singer, *The Rule of Reason in Property Law*, *supra* note 104, at 1373; see also *id.* at 1375 (“Standards perform systemic functions that shape the infrastructure and the outer contours of the property system by: (1) setting *minimum standards* compatible with the norms of a free and democratic society; (2) *protecting the justified expectations of consumers*; and (3) responding to *externalities* and *systemic effects* of the exercise of property rights. Standards also determine the *scope* of property rights by: (4) *distinguishing cases*; (5) resolving *conflicting norms*; (6) *excusing mistakes*; (7) escaping the ‘*dead hand*’ of the past; and (8) deterring the ‘*bad man*’ from abusing property rights.”).

flexible forms of property. The argument of this Article, however, is quite different. Access is a short-term and casual form of use that is not dependent on previous relationships and attachments. It reflects a detachment and flexibility and is about not having property in the traditional sense.

3. Open Access and the Commons

The final critique of ownership comes from the research on open access to resources. Open access concerns resources that can be claimed and used by everyone, while the commons are jointly owned by a limited and defined group of people.¹⁰⁶ Common ownership and open access are often positioned as alternatives to private property, each with its own benefits and costs.¹⁰⁷

However, both the commons and open access provide very limited alternatives of engaging with property for the individual. Access allows individuals to constantly change assets, use them casually and move on to the next asset;¹⁰⁸ open access is about the use of one common pool of resources. It also typically includes a certain type of resource that is not easily distributed to private individuals, such as beaches, open spaces, water, and so on.¹⁰⁹ In addition, the commons are quite clearly distinct from access, as they provide stable and long-term attachments to an asset or resource.¹¹⁰

There is, however, a certain likeness between the commons and the option of share, as both involve more communal forms of property structure. Yet this

106. See, e.g., Peter Ekbäck, *Private, Common, and Open Access Property Rights in Land – An Investigation of Economic Principles and Legislation*, 6 *NORDIC J. SURVEYING & REAL EST. RES.* 57 (2009) (examining the three institutional regimes in Swedish real property law and their economic implications).

107. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (using institutional analysis to predict the success of common resources); S.V. Ciriacy-Wantrup & Richard C. Bishop, “*Common Property*” as a Concept in Natural Resources Policy, 15 *NAT. RESOURCES J.* 713 (1975); Dagan & Heller, *supra* note 95 (arguing in favor of co-ownership and emphasizing the benefits of cooperation); Þráinn Eggertsson, *Open Access Versus Common Property*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW* 73 (Terry L. Anderson & Fred S. McChesney eds., 2003); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711 (1986) (analyzing the success and virtues of public property).

108. See *infra* Part III.

109. Rose, *supra* note 107, at 714 (“Like the older precedents, the new beach cases usually employ one of three theoretical bases: (1) a ‘public trust’ theory, to the effect that the public has always had rights of access to the property in question, and that any private rights are subordinate to the public’s ‘trust’ rights; (2) a prescriptive or dedicatory theory, by which a period of public usage gives rise to an implied grant or gift from private owners; and (3) a theory of ‘custom,’ where the public asserts ownership of property under some claim so ancient that it antedates any memory to the contrary.”).

110. See OSTROM, *supra* note 107.

Article focuses on the community lending library as its primary example of share, which is a unique type of the commons.¹¹¹ The novelty for property law lies in its separation of communal interaction from attachment to the object. This type of *share* is a form of access, but with a communal spin. While owners are not attached to a particular toy, tool, article of clothing, or book, they are committed to subsequent users and to the sharing project.¹¹²

In sum, the justifications for ownership and its critiques value long-term involvement with property. They do not respond to changes in consumption patterns that open up more options for users. The next Part describes new trends in consumption that call for a new and fuller understanding of property forms.

II. CONSUMPTION IN THE TWENTY-FIRST CENTURY

Engagement with property, with material things and intangible assets, such as books and music, has dramatically changed in the last few decades.¹¹³ Examples include community gardens, food cooperatives, car sharing, bike sharing, seed sharing, tool libraries, open-source communities, and many more.¹¹⁴ Although some of these supposedly new patterns have existed before,¹¹⁵ considered

111. See *infra* Section II.B.2 and Section III.B.2.

112. *Id.*

113. See Paula Bialski et al., “Saving” the City: *Collective Low Budget Organising and Urban Practice*, 15 EPHEMERA 1 (2015) (discussing urban gardening, car sharing, coworking, food cooperatives, ticket sharing, and waste recycling); David Bollier, *The Commons as a Template for Transformation*, GREAT TRANSITION INITIATIVE 1 (2014), <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-bollier.pdf> [<http://perma.cc/299K-PJ77>] (“A robust transnational movement of commoners now consists of such diverse commons as seed-sharing cooperatives; communities of open-source software programmers; localities that use alternative currencies to invigorate their economies; subsistence commons based on forests, fisheries, arable land, and wild game; and local food initiatives such as community-supported agriculture, Slow Food, and permaculture.”).

114. See Bialski et al., *supra* note 113; Bollier, *supra* note 113.

115. Sharing has existed before. People rented rooms in their homes to roomers and shared rides and food. See, e.g., Jun-E Tan, *The Leap of Faith from Online to Offline: An Exploratory Study of Couchsurfing.org*, in TRUST AND TRUSTWORTHY COMPUTING 367, 371 (Alessandro Acquisti et al. eds., 2010) (comparing couchsurfing to previous hospitality exchanges: “Hospitality exchange networks are not a new phenomenon—the oldest such network is Servas International, founded in 1949 by an American named Bob Luitweiler. With the tagline ‘With every true friendship we build the basis for World Peace’, Servas International set a common theme also used by newer hospitality exchange networks, to promote intercultural understanding and to reduce intolerance among people of different cultural backgrounds. Other networks include Hospitality Club (founded in 2000, with about 330,000 members); GlobalFreeloaders.com (founded in 2005, with about 60,000 members). Hospitality exchange is grounded on reciprocity, negoti-

together, these phenomena merit a new take on property. These patterns of use did not just emerge, but rather are embedded in larger processes, including the need to save resources in a time of financial instability and rapid technological advances.¹¹⁶

This Part will begin by surveying the major important patterns—the sharing economy, intellectual property, and political consumerism—and depict the decline of ownership as the most coveted form of consumption. It will continue by introducing the structure, motivations, and legal background of access and share as artifacts of these changing winds of consumption.

A. *New Modalities of Consumption*

1. The Sharing Economy

The sharing economy is a modern form of consumption based on collaboration in the use, production, or creation of products and services.¹¹⁷ Collaborative consumption has been simplified and redefined by technological advances, online communication, and improved reputation mechanisms; people are now able to share, barter, lend, rent, swap, and gift their property online.¹¹⁸ The phenomenon has become so pervasive that it has attracted a huge amount of attention from the media, social networks, and public discourse.¹¹⁹ For example, *Time Magazine* named the sharing economy among its “10 Ideas that Will Change the World.”¹²⁰ The sharing economy is also gradually gaining significant financial momentum.¹²¹ According to PwC, five sharing economy sectors alone could generate \$335 billion in revenues by 2025.¹²² In addition, *Forbes* estimated the revenue flowing through the sharing economy in 2013 at \$3.5 billion.¹²³

ating thin lines between ‘guest’ and ‘parasite’, hospitality and home.” (internal citations omitted)).

116. See *supra* notes 5-6 and accompanying text.

117. See BOTSCHAN & ROGERS, *supra* note 2.

118. *Id.* at xv (organizing collaborative consumption projects into three categories: product service systems, redistribution markets, and collaborative lifestyle).

119. On the sharing economy, see sources cited *supra* note 2.

120. Bryan Walsh, *Today’s Smart Choice: Don’t Own. Share.* TIME (Mar. 17, 2011), http://content.time.com/time/specials/packages/article/0,28804,2059521_2059717,00.html [<http://perma.cc/W37V-M7JW>].

121. Val Skelton, *The Sharing Economy – How Much is it Worth?*, INFO. TODAY EUR. (May 4, 2015), <http://www.infotoday.eu/Articles/News/InfoToday-Europe-Blog/the-sharing-economy-how-much-is-it-worth-103690.aspx> [<http://perma.cc/EC4E-UNTL>].

122. Laura French, *Sharing Economy Shakes up Traditional Business Models*, NEW ECONOMY (Apr. 13, 2015), <http://www.theneweconomy.com/business/the-sharing-economy-shakes-up-traditional-business-models> [<http://perma.cc/V2RV-DDDL>]; Tilly Parke, *Europe’s Five Key Sharing Economy Sectors Could Deliver 570 Billion Euro by 2025*, PwC (June 27, 2016), <http://press.pwc.com/News->

The sharing economy is an umbrella term that consists of a wide range of transactions. First, the sharing economy allows people to make better use of their own property.¹²⁴ The sharing economy allows owners to rent out assets such as a car, their home,¹²⁵ a bicycle, or even pets to strangers, using new forms of peer-to-peer markets.¹²⁶ Sites like RelayRide.com, Getaround.com or JustShareIt.com facilitate renting out your car and sites like Neighborgoods.net and Peerby.com allow people to rent out or share everyday possessions.

The incentives of owners complement those of users. Users prefer to access assets on a casual basis instead of purchasing unnecessary objects. Owning an item has a higher cost for consumers,¹²⁷ does not allow for flexibility of use,¹²⁸

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- releases/europe-s-five-key-sharing-economy-sectors-could-deliver--57-billion-by-2025/s/45858e92-e1a7-4466-a011-a7f6b9bb488f [http://perma.cc/ K8YP-52H9].
123. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 13, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [http://perma.cc/26B8-5DSW].
 124. Cf. Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004) (discussing the idle capacity of lumpy, mid-level assets).
 125. See Georgios Zervas, Davide Proserpio & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 54 J. MARKETING RES. 687 (analyzing Airbnb in Texas and its economic impact on the hotel industry).
 126. Peer-to-peer markets are markets where trade occurs between peers. See, e.g., Anindya Ghose et al., *Reputation Premiums in Electronic Peer-to-Peer Markets: Analyzing Textual Feedback and Network Structure*, in PROCEEDINGS OF THE THIRD WORKSHOP ON ECONOMICS OF PEER-TO-PEER SYSTEMS 150-54 (2005).
 127. See generally Cait Poyner Lamberton & Randall L. Rose, *When Is Ours Better Than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems*, 76 J. MARKETING 109 (2012) (surveying the relevant benefits of sharing transactions as opposed to the model of ownership).
 128. *Id.* at 111. At the same time, there are also costs associated with sharing, in particular the price of a shared product, the cost of learning to use unfamiliar products repeatedly, and the cost of searching for new products. These include:

[O]ne-time system membership fee[s] or periodic access fees. We refer to this as the “price of sharing.” Second, “technical costs” refer to nonmonetary costs associated with coping with and learning how to use unfamiliar products. With purchased products, this is usually a one-time cost. However, with shared products, this cost may be incurred multiple times. For example, in an automobile-sharing system, customers may need to operate unfamiliar vehicles repeatedly as they access different types of vehicles. Third, “search costs” are created through the money or effort needed to determine which product to purchase or which sharing program to enter. In sharing programs, additional search costs may also be incurred after entry, as customers need to identify and access the appropriate version of the shared product for them.

Id.

and carries storage and maintenance costs.¹²⁹ In addition, as will be discussed at length in the next section, certain consumers opt for a more sustainable alternative because of their concern for the environment.¹³⁰

Second, the sharing economy also includes citywide cooperative projects such as bike sharing and car sharing.¹³¹ These projects are considered a “cheap, efficient, and healthy means of navigating dense urban environments.”¹³² Users consist of commuters, utility users who use bikes for shopping and errands, leisure users who bicycle for fun and exercise, and tourists.¹³³

A third type of sharing economy transactions includes lending, bartering, and swapping.¹³⁴ People may swap books or CDs using a barter system.¹³⁵ Peers exchange goods, and the recipients gain and retain ownership of the newly received item. A fourth example concerns cooperative endeavors. Sharing projects are neighborhood-based and designed to foster trust and cooperation. They include, for example, tool libraries that are “neighborhood hubs offering classes, community building spaces, workshops, and a variety of tools ranging from belt sanders to lawnmowers and more.”¹³⁶ Another example is seed libraries that allow farmers and gardeners to borrow and share seed varieties.¹³⁷

Fifth, traditional businesses have capitalized on the sharing economy trend and many are now offering services that are based on use and access rather than

129. *Id.*

130. *Id.*

131. There have been several attempts at bike sharing since the 1960s, but most have proven unsuccessful in the long run, until the new “third generation” of bike sharing. See generally Paul DeMaio, *Bike-Sharing: History, Impacts, Models of Provision, and Future*, 12 J. PUB. TRANS. 41 (2009).

132. Oliver O’Brien et al., *Mining Bicycle Sharing Data for Generating Insights into Sustainable Transport Systems*, 34 J. TRANS. GEOGRAPHY 262, 262 (2014).

133. *Id.*

134. See generally Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS’N INFO. SCI. & TECH. 2047, 2055 (2016). Examples of swapping sites include Swap.com, Swapstyle.com, and ReSecond.com, which allow users to swap unwanted clothes and cosmetics. Other sites, such as BookMooch.com or TitleTrader.com, facilitate the lending and swapping of books and CDs.

135. See, e.g., SWAPTREE, <http://web.archive.org/web/20100627090819/http://www.swaptree.com> [<http://perma.cc/R6X2-Y6KU>].

136. Cat Johnson, *The Tool Library Movement Gains Steam*, SHAREABLE (Jan. 29, 2014), <http://www.shareable.net/blog/the-tool-library-movement-gains-steam> [<http://perma.cc/CKH3-8BED>].

137. Christopher D. Cook, *Seed Libraries Fight for the Right to Share*, SHAREABLE (Feb. 11, 2015), <http://www.shareable.net/blog/seed-libraries-fight-for-the-right-to-share> [<http://perma.cc/BKU3-FRCR>].

ownership and possession.¹³⁸ This is particularly common in the car-sharing business. Automobile manufacturers are buying or starting car-sharing enterprises such as Zipcar (Avis) and Car2Go (Benz).¹³⁹ The reason for this strategy is that young people are gradually losing their interest in car ownership.¹⁴⁰ Owning, maintaining, and parking a car can be expensive and not worth the trouble. Moreover, the flight from the suburbs to the city brings with it new transportation needs.¹⁴¹

This review canvasses in very broad strokes the sheer variety of the sharing economy phenomenon. The sharing economy carries both promise and risk.¹⁴² Nonetheless, it is clear that the sharing economy as a whole shifts the focus from ownership to other forms of consumption.

2. Consumption of Intangible Assets

The consumption of intangible assets, commonly understood as intellectual property—books, art, music, science, and software—is a field dominated by innovation, where forms of engaging with these assets are continuously evolving.¹⁴³ Although many assets are protected by copyright law, and thus fit nicely with the ownership and exclusion model, there are also significant movements that offer sophisticated forms of access and collaboration.¹⁴⁴

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138. See generally Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. BUS. RES. 1595 (2014) (comparing sharing and collaborative consumption with a focus on commercial companies such as Zipcar). Cf. Russell Belk, *Sharing Versus Pseudo Sharing in Web 2.0*, 18 ANTHROPOLOGIST 7 (2014) (criticizing the use of the sharing vocabulary for commercial sharing).
139. Belk, *You Are What You Can Access*, *supra* note 138, at 1597; see also Jörg Firnkorn & Martin Müller, *Selling Mobility Instead of Cars: New Business Strategies of Automakers and the Impact on Private Vehicle Holding*, 21 BUS. STRATEGY & ENV'T 264 (2012) (indicating that the number of private vehicles are reduced due to consumer preferences). Firnkorn & Müller explain that:
- [A]utomakers increasingly face external pressures from governmental institutions, e.g. regulations on end-of-life vehicles and CO2 emissions. Also, the consumer perception of the 'object car' is changing; e.g., a study in Germany found a tendency for the value of cars as a 'status symbol' to be diminishing within the 18–25 years age group.
- Id.* at 266.
140. Belk, *You Are What You Can Access*, *supra* note 138, at 1597-98.
141. *Id.* at 1598.
142. See generally Kreiczler-Levy, *supra* note 24 (arguing for a new framework for property in the sharing economy with its promises and concerns).
143. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO L.J. 287 (1988) (reviewing justifications for intellectual property).
144. See, e.g., Miriam Bitton, *Modernizing Copyright Law*, 20 TEX. INTELL. PROP. L.J. 65 (2011) (arguing in favor of a new, modernized regime for copyright law); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facili-*

These movements are determined to provide open access to innovation, knowledge, and expression.¹⁴⁵ There are different models at work, but they all allow users to enjoy an access-based engagement with the asset without purchasing either a copy or a license for long-term use. These movements include the Creative Commons project,¹⁴⁶ the free software movement,¹⁴⁷ collective creations,¹⁴⁸ and digital libraries.¹⁴⁹ For millennials, the distinctions between crea-

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- tating a Creative Commons*, 74 *FORDHAM L. REV.* 375 (2005) (expressing a skeptical view towards Creative Commons' legal strategy); Lawrence Lessig, *The Creative Commons*, 65 *MONT. L. REV.* 1 (2004) (describing the Creative Commons project).
145. The term "access movements" is borrowed from Jessica Silbey, who argues that access movements are:
- [A] response to the expansion of intellectual-property rights (building fences statutorily or on a case-by-case basis) and a growing digital culture that disseminates information and expression broadly and quickly (breaking down fences). In a networked world where information and expression are only a click away, most users of the Internet recognize how much knowledge and culture (in the form of patented inventions, trademarks, or copyrighted works) are not free to use.
- Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 *CASE W. RES. L. REV.* 195, 197 (2010).
146. Creative Commons is a nonprofit organization that operates a licensing system which allows creators of written, audio, and video content to facilitate sharing of their copyrighted works. It thus promotes the easy and free use of these works. See Elkin-Koren, *supra* note 144; Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 *IDEA* 391 (2006). This system replaces the familiar "all rights reserved" maxim of copyright law with "some rights reserved," supporting an array of flexible license types. See Silbey, *supra* note 145, at 206 (explaining that "[t]hese Access Movement voices contend that *practical accessibility—which might include affordable or free use of otherwise-exclusive rights in intellectual property—is now necessary to promote progress and the useful arts for all, as much as it may also be a matter of dignity and survival for some.*").
147. The free software movement employs a general public license. See *GNU General Public License*, GNU (June 29, 2007), <http://www.gnu.org/licenses/gpl-3.0.en.html> [<http://perma.cc/S4PD-SXNR>]; see also Silbey, *supra* note 145; Mira T. Sundara Rajan, *Creative Commons: America's Moral Rights?*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 905 (2011). The license "is intended to guarantee your freedom to share and change all versions of a program—to make sure it remains free software for all its users." *GNU General Public License, supra*.
148. Collective creations, of which the most famous example is probably Wikipedia, create knowledge built on the participation of the general public that introduces new topics and modifies existing entries. See Sundara Rajan, *supra* note 147, at 946. Wikipedia operates under a free content license and allows general public access. See WIKIPEDIA, *Wikipedia: Ten Things You May Not Know about Wikipedia* (Sept. 12, 2017), http://en.wikipedia.org/wiki/Wikipedia:Ten_things_you_may_not_know_about_Wikipedia [<http://perma.cc/C7T5-L6A3>]. While consumers used to purchase encyclopedias, they can now use specific data and knowledge when needed on a more casual basis. In addition, a consumer can become an author and contribute to the cooperative endeavors.

tor, owner, and consumer are blurring, and in the digital world, the assumption is that information and creations are everyone's property.¹⁵⁰

Consumption of intellectual property goods has shifted in recent decades from the purchase of personal property (books, CDs) to use-right licenses that minimize the user's control. Ownership is no longer relevant in the area of intellectual property.

This type of access is importantly different from a recently significant concern surrounding intellectual property licensing and the first sale doctrine.¹⁵¹ Consumption of intellectual property has shifted in recent decades from the purchase of personal property, such as books and CDs, to use-right licenses.¹⁵² Aaron Perzanowski and Jason Schultz critically evaluate this process and argue for the benefits of personal property because it provides stability and permanence.¹⁵³ But Perzanowski and Schultz do not evaluate ownership against the benefits of short-term access. Licenses are actually a mode of long-term engagement with ownership.¹⁵⁴ However, their critique does point to an important concern: the power of big platforms in constructing elaborate licenses and limiting consumer's control. Part III will return to this concern.

3. Political Consumerism

Political consumerism is a form of political expression through consumer decisions.¹⁵⁵ Typically, this form of expression is linked to the choice of purchas-

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149. Digital libraries, such as the Digital Public Library of America, allow full or limited text view of books and other resources and make those available to the general public. See DIGITAL PUBLIC LIBRARY OF AMERICA, <http://dp.la/info/> [<http://perma.cc/A7BG-SMQ2>] (last visited Oct. 5, 2017); see also Abdulmumin Isah et al., *Analyzing Digital Library Initiatives: 5S Theory Perspective*, 21 NEW REV. ACAD. LIBRARIANSHIP 68 (2015). Digital libraries facilitate the search and consumption of information and art without necessarily purchasing it.
150. Diana Oblinger, *Boomers, Gen-Xers, and Millennials: Understanding the New Students*, EDUCAUSE REV. 37, 41 (2003), <http://www.educause.edu/ir/library/pdf/erm0342.pdf> [<http://perma.cc/T4TS-KQUZ>].
151. See, e.g., AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP* (2016) (explaining the problems of purchasing digital goods through licenses); Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 2014 BYU L. REV. 55 (2014) (discussing the ability of intellectual property owners to opt out of the first sale doctrine).
152. PERZANOWSKI & SCHULTZ, *supra* note 151.
153. *Id.*; see also Aaron Perzanowski & Jason Schultz, *Legislating Digital Exhaustion*, 29 BERKELEY TECH. L.J. 1535 (2015); Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual Property & Personal Property*, 90 NOTRE DAME L. REV. 1211 (2015).
154. Perzanowski & Schultz, *Legislating Digital Exhaustion*, *supra* note 153, at 1537-38.
155. See Dietlind Stolle et al., *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245 (2005); Meredith Ann Katz, *The Politics of Purchasing: Ethical Consumerism, Civic Engagement, and Political Participation in the United States* (2011) (unpublished Ph.D. dissertation,

ing through boycotting (punishing businesses for unfavorable behavior) or “buycotting” (rewarding businesses for favorable behavior).¹⁵⁶ Millennials are generally considered to be more inclined towards ethical consumerism, compared with previous generations.¹⁵⁷ Several scholars have associated more collaborative forms of consumption with political or ethical consumerism.¹⁵⁸ Although the findings are not conclusive,¹⁵⁹ one motivation for engaging in sharing economy transactions is to advocate for environmentalism and sustainability and to protest overconsumption.¹⁶⁰

4. Summary: Consumption and the Decline of Ownership

For many years, ownership has been conceptualized as the “ultimate expression of consumer desire.”¹⁶¹ Indeed, ownership of possessions has been considered part of consumers’ identities and their extended self.¹⁶² Recently, how-

Virginia Polytechnic Institute) (available online at http://scholar.lib.vt.edu/theses/available/etd-11182011-192655/unrestricted/Katz_MA_D_2011.pdf [<http://perma.cc/8KNR-Z58N>]).

156. Lisa A. Neilson, *Boycott or Buycott? Understanding Political Consumerism*, 9 J. CONSUMER BEHAV. 214 (2010); see also Melissa R. Gotlieb & Chris Wells, *From Concerned Shopper to Dutiful Citizen: Implications of Individual and Collective Orientations toward Political Consumerism*, 644 ANNALS 207 (2012) (describing political consumerism as a form of expressive politics); Stolle et al., *supra* note 155, at 246 (distinguishing between boycotters and buycotters).
157. Tania Bucic et al., *Ethical Consumers Among the Millennials: A Cross-National Study*, 110 J. BUS. ETHICS 113, 113 (2012) (“[E]thical consumerism refers to choices based on social, nontraditional components of products and personal and moral beliefs.”).
158. See, e.g., Lucie K. Ozanne & Paul W. Ballantine, *Sharing as a Form of Anti-Consumption? An Examination of Toy Library Users*, 9 J. CONSUMER BEHAV. 485 (2010) (describing the benefits of toy libraries for users, including anti-consumption motivations and market avoidance); Cornelia Grimshorn & Marlene Jordan, *Ownership – A Challenged Consumer Ideal* (2015) (unpublished M.Sc. thesis, Lund University) (available online at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=5468892&fileId=5468905> [<http://perma.cc/T55E-Q3NY>]) (describing ethical consumerism as a motivation for clothing libraries); Katz, *supra* note 155, at 64.
159. See Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 881, 890 (2012) (finding no political consumerism in consumers’ choice to use Zipcar).
160. See Rudy Baum, *The Story of Stuff*, 87 CHEM. & ENG. NEWS 3 (2009); Grimshorn & Jordan, *supra* note 158 (finding that in clothing libraries and clothes swapping there is an expression of political consumerism and, in particular, support for a greener way to consume).
161. Bardhi & Eckhardt, *supra* note 159, at 881.
162. Russell Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139 (1988); cf. Russell Belk, *Extended Self in a Digital World*, 40 J. CONSUMER RES. 477 (2013)

ever, the new patterns of consumption discussed in this Part have begun to challenge this truism. The rise of intellectual property and collaborative consumption has led to a decline in the symbolic significance of ownership.¹⁶³ Alternative forms of consumption, in particular access-based consumption,¹⁶⁴ are becoming a recognizable option with their own unique characteristics. In particular, access-based consumption allows flexibility and adaptability,¹⁶⁵ and creates a different relationship with possession that is termed “liquid.”¹⁶⁶

Nonetheless, the development is not entirely revolutionary, as ownership has yet to lose its centrality in consumers’ lives. A recent study found that consumers who enthusiastically participate in the sharing economy still prefer ownership in four main asset categories: intimate possessions for hygienic reasons, frequently used objects such as a television, objects with emotional attachment, and the home.¹⁶⁷ What we are witnessing is not a paradigm change that overthrows ownership, but the emergence of a more nuanced set of consumer choices that includes diverse forms of attachment to or detachment from assets.¹⁶⁸

(“Nevertheless, it is evident that the current wave of digital technologies is fundamentally changing consumer behavior in ways that have significant implications for the formulation of the extended self.”).

163. See Belk, *You Are What You Can Access*, *supra* note 138; BOTSMAN & ROGERS, *supra* note 2, at 91; cf. Yu Chen, *Possession and Access: Consumer Desires and Value Perceptions Regarding Contemporary Art Collection and Exhibit Visits*, 35 J. CONSUMER RES. 925 (2009).
164. Bardhi & Eckhardt, *supra* note 159 (describing access in car sharing platforms).
165. *Id.* at 883.
166. See Fleura Bardhi et al., *Liquid Relationship to Possessions*, 39 J. CONSUMER RES. 510, 511 (2012) (“We identify and develop the construct of a liquid relationship to possessions to characterize the detached and flexible way consumers relate to objects in contemporary global nomadism. We show that relationships to possessions are temporary and situational; possessions are appreciated for their instrumental use-value and their immateriality.”).
167. Grimshorn & Jordan, *supra* note 158.
168. *Id.* This use of consumption patterns to challenge legal property theory is a bit unorthodox. The intersection of property and consumption has rarely been studied, as consumption is probably understood as one gate through which a person becomes an owner. The path itself is not significant, while the legal relation is. But we are beginning to see that as consumption patterns change, so too do the legal relations between users (owners, possessors, and “accessors”), things, and the rest of the world. Property theory does not need to delve deeply into consumer behavior to realize this simple truth. This Article seeks instead to examine the breadth of legal options and relations. This can be done by *assuming the consumer’s perspective*, the user’s choice, if indeed the law gives credence to the possible methods of engaging with property. In other words, this Article focuses on the way people use and enjoy assets and explains its legal significance.

B. *New Alternatives*

This section explains in depth the new alternative modes of engaging with property—access and share—and discusses the motivations for such activities, the relevant legal framework, and potential difficulties.

1. Access

Instead of buying new things, a person can choose to use a particular item only when needed.¹⁶⁹ You do not have to own a car; instead, you can simply rent one from owners via online platforms such as Turo, Getaround, or JustShareIt, or casually rent a car from a company such as ZipCar or Car2Go. People can also casually use assets such as bikes, drills, ladders, lawn mowers, books, basketballs, and many other items via platforms such as NeighborGoods, Peerby, and RentyThing. If you love dogs, but are afraid of the long-term commitment, you can also casually spend time with a dog by connecting with dog owners via the site BorrowMyDoggy. According to one study, more than 110 million North Americans use at least one of the sharing economy projects.¹⁷⁰ Peer-to-peer markets are expanding rapidly in many ways, including the number of users, areas of trade, and geography.¹⁷¹ Millennials in particular are enthusiastic participants in the sharing economy and are inclined to favor access over ownership.¹⁷²

Because this Article defines access as short-term casual use, it distinctively leaves out other affiliated types of transactions. It brackets swapping and bartering, because users still retain ownership of the swapped goods.¹⁷³ Similarly, this Article does not consider access to services. For example, ride-sharing platforms such as Uber and Lyft offer rides by the owner of the car that drives users to

169. Tobias Schaefer et al., *How the Burdens of Ownership Promote Consumer Usage of Access-Based Services*, 27 *MARKETING LETTERS* 569 (2016) (describing access as an alternative to ownership and its benefits in avoiding the risks and responsibilities associated with ownership).

170. Jeremiah Owyang, *Infographics: Growth of Sharing in the Collaborative Economy*, *WEB STRATEGIST BLOG* (Nov. 19, 2015), <http://www.web-strategist.com/blog/2015/11/19/growth-of-sharing-in-the-collaborative-economy-top-categories-and-forecasts-infographics> [<http://perma.cc/2ENY-JUVF>].

171. Jeremiah Owyang, *Infographic: A Day in the Life of the Collaborative Economy*, *WEB STRATEGIST BLOG* (Sept. 29, 2014), <http://www.web-strategist.com/blog/2014/09/29/a-day-in-the-life-of> [<http://perma.cc/LZA6-Z9YN>].

172. Hynek, *supra* note 4.

173. See, e.g., GETSWISHING, <http://www.getswishing.com> [<http://perma.cc/JLV5-NFED>]; GOSWAP, <http://goswap.org/#moneycrashers> [<http://perma.cc/P4KG-9UFL>].

their desired location. These projects involve more than access to property, in particular labor and workers' rights,¹⁷⁴ and merit a separate discussion.

In addition, access to property as a way to capitalize wealth, such as short-term possession of stocks and bonds, is also a distinctively different form of property relation. First, stocks and bonds emphasize market value instead of actual use, or, in other words, exchange value as opposed to use value.¹⁷⁵ Second, these practices are not designed to replace ownership of a particular item.

Furthermore, access is also distinguishable from leasing and renting. Long-term possession provides the stability associated with ownership, and is still very much within the boundaries of the traditional property paradigm. This Article focuses on short-term use. Nonetheless, short-term rentals were common even before the sharing economy. Business models based on access are not new.¹⁷⁶ Rather, they are gaining momentum and have become more prevalent. Moreover, the short-term market is much more dispersed. Peer-to-peer markets connect small suppliers and consumers. Technological advances have lowered transaction costs, allowing individuals with no business experience or expertise to utilize the excess capacity of their property. The causes for this shift are complex, and implicate the lack of stability for either involuntary reasons, such as the economic crisis, or voluntary reasons, such as generational preferences. Yet, as flexible forms of use become prevalent, the law has to consider their normative status. Although this Article addresses users and their consumption choices, these choices are influenced by the available options in peer-to-peer markets. As the next Part explains, protecting peer-to-peer markets is a crucial step in recognizing access as an alternative to property.

Although business companies are significantly different than peer-to-peer markets, this Part does include commercially based access. ZipCar and Turo

174. See Catherine Lee Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance "Gap," and Why Pennsylvania Should Get on Board*, 15 PITT. J. TECH. L. & POL'Y 81 (2014) (examining ride sharing regulation in Pennsylvania and focusing on labor and insurance regulation); Janelle Orsi, *The Sharing Economy Just Got Real*, SHAREABLE (Sept. 16, 2013), <http://www.shareable.net/blog/the-sharing-economy-just-got-real> [<http://perma.cc/ZQP8-U9GB>].

175. See Karl Marx, *The Grundrisse*, in THE MARX ENGELS READER 221, 256-57 (Robert C. Tucker ed., 2d ed. 1978); Dyal-Chand, *supra* note 96, at 1375-76 (arguing that premature exchange negatively affected the usefulness of the property); Peñalver, *supra* note 23; see also Lee Ann Fennel, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008) (discussing homeownership as consumption and investment); cf. Dorfman, *supra* note 9, at 983 ("[W]hile the owner holds the (arguably) legitimate right to use her object, to the exclusion of others, she can also exclude simply for the sake of excluding others with no necessary reference to use, even potential use, at all.").

176. Home Depot, for example, began renting tools in stores in the 1990. *Renting Tools for 20 Years: How THD Tool Rental Makes Life Easier*, HOME DEPOT (Aug. 21, 2015), <http://corporate.homedepot.com/newsroom/home-depot-tool-rental-20-years> [<http://perma.cc/TY3Y-K8M2>].

both provide creative ways to save on transportation costs. ZipCar offers car-sharing of cars owned by a commercial company. Turo is a peer-to-peer market that allows private owners to rent out their cars. Although the argument considers both types of access, there are important differences between them that will prove important for advancing legal reform. Rental companies usually tend to encourage a brand community and identification with specific cars.¹⁷⁷ In this sense, commercial companies attempt to construct a less casual relation to things and favor a steady business relation with the company. This type of access is somewhat similar to Jeremy Rifkin's projection regarding *The Age of Access* in his influential book.¹⁷⁸

Rifkin claims that in the new economy, ownership of goods becomes outdated as "markets are making ways for networks and ownership is steadily being replaced by access."¹⁷⁹ Instead of buyers and sellers, there are servers and clients who bargain for access through lease, rent, subscriptions, or memberships.¹⁸⁰ Yet Rifkin emphasizes a business strategy that uses access as a form of long-term attachment of consumers to companies. When a dealer sells a car to a buyer, their relationship is limited and short-term. When the consumer gains access in the form of a lease, the relationship becomes ongoing, renewable, and potentially perpetual.¹⁸¹ It becomes what Rifkin terms "a commodifying relationship."¹⁸² Rifkin therefore seems to be discussing a form of access that is essentially a form of long-term engagement with assets and brands, but lacks a formal ownership component and the consumer's control.

The form of access that is the subject of this study is significantly different. It concerns individuals engaging in an alternative type of relation with respect to a thing and to other people. Access connotes flexibility, mobility, and choice. Rather than the flexibility associated with managing an asset that comes with ownership (that is, the ability to use the property whenever the owner desires), access facilitates flexibility associated with mobility and commitment-free choice.

The motivations for choosing access over ownership are twofold. The first type of incentive is economic. Access saves time and money, increases flexibility, and eliminates the costs of storage.¹⁸³ On the other hand, there are also costs

177. See Bardhi & Eckhardt, *supra* note 159, at 888 ("[I]n efforts to encourage personalization of the cars, Zipcar engages users in online forums, such as Facebook, in competitions to name its cars and uses the human names given to the cars in the booking form for the users . . .").

178. See JEREMY RIFKIN, *THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE* (2000).

179. *Id.* at 4.

180. *Id.*

181. *Id.* at 10.

182. *Id.*

183. Lamberton & Rose, *supra* note 127, at 111; see also Hamari et al., *supra* note 134, at 6-7.

associated with sharing, in particular, the price of access, the cost of learning to use unfamiliar products repeatedly, and the cost of searching for new products.¹⁸⁴ Because access saves money, it might be perceived as the choice of the poor, and therefore downplayed as a second-best solution for those who cannot afford to own. This would be a mistake. First of all, in reality, access-based consumption is actually favored by young people and average income households.¹⁸⁵ Moreover, if ownership is not available or made available to all, access can be a reasonable option for certain types of assets. And, as the next Part argues, access is also a valuable normative alternative.

The second type of motivations involves ideological reasons. By choosing access, users express a concern for sustainability and for future generational and environmental goals. In addition, access is associated with the anti-consumption trend and a flexible, modest, assets-free lifestyle.¹⁸⁶

The structure of access and the social reasons for choosing it communicate a choice, the choice *not to have property*, at least in the traditional sense. At the extreme, it professes an alternative vision of self that may include an ecological or political agenda, manifest in a lifestyle of flexibility and availability, and constructs different relations with others.¹⁸⁷

184. Lamberton & Rose, *supra* note 127, at 111.

185. See, e.g., Rajesh Makwana, *Reflections on the Future of the Sharing Economy*, SHARE (Mar. 3, 2015), <http://www.sharing.org/information-centre/blogs/reflections-future-sharing-economy> [<http://perma.cc/B5MW-UAA4>] (“Evidence suggests that most sharing economy activities attract mainly white middle class users.”); Ben Schiller, *The Sharing Economy Isn’t Just for Young Coastal Urbanites Any More*, FAST CO. (June 6, 2014), <http://www.fastcompany.com/3031205/the-sharing-economy-isnt-just-for-young-coastal-urbanites-any-more> [<http://perma.cc/7AY2-8YRZ>] (“The sharing economy has long been associated with certain types and demographics: young, hipster, urban, middle class.”); *The Sharing Economy: Consumer Intelligence Series*, PwC (2015), <http://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> [<http://perma.cc/ZU8B-T5XF>] (identifying three groups as the most excited about the sharing economy: adults aged 18-24, households with \$50,000 to \$75,000 in income, and people with children under 18 living in their homes). Although the study indicates that there is a broad support for the sharing economy across ages, incomes, and geographical location, it seems that most of the supporters are young millennials. The economic downturn and the thinning of the middle class are a possible explanation for this trend. Edward N. Wolff et al., *How Much Wealth Was Destroyed in the Great Recession?*, in *THE GREAT RECESSION* 127, 132 (David B. Grusky et al. eds., 2011).

186. See, e.g., JACOB LUND FISHER, *EARLY RETIREMENT EXTREME: A PHILOSOPHICAL AND PRACTICAL GUIDE TO FINANCIAL INDEPENDENCE* (2010) (advocating simple living and frugality); see also Marcus Phipps et al., *Understanding the Inherent Complexity of Sustainable Consumption: A Social Cognitive Framework*, 66 J. BUS. RES. 1227 (2013) (discussing the dynamic nature of sustainable consumption and the interrelation of environmental and behavioral factors).

187. See Bardhi & Eckhardt, *supra* note 159, at 895.

If ownership is about exclusion and control,¹⁸⁸ and, as Morris Cohen famously put it, about sovereignty,¹⁸⁹ access is a choice not to engage in hierarchical relations. Nonetheless, in real life, most people choose a mixture of ownership and access. The social and conceptual alternative of access is mostly a matter of degree, not an all-or-nothing preference. Moreover, as will be explained in the next Part, access depends on either ownership or some form of public resource. It is not a stand-alone choice, but one that is part of the tapestry of property relations.

Looking from a broader perspective, access affects neighborhoods, transportation, the environment, and housing policy.¹⁹⁰ The efficient level of access is highly disputed, as are its long-term consequences.¹⁹¹ We know too little as of now to correctly measure and address all possible effects on markets.¹⁹² This Article presents a normative argument about access and share as property forms. It brackets other considerations. Once the theoretical contribution is accepted, regulators will have to balance competing considerations in constructing legal rules.

The legal scheme of access is primarily contractual. Facilitated by online platforms, access builds on two legal relations: a private contract between the owner and the user, and the platform's responsibility towards both owners and users.¹⁹³ Users locate an asset that fits their needs, contact the owner, and make a transaction.¹⁹⁴ A fee is paid to the platform by the user, the owner, or both. Both owner and user are reviewed at the end of the transaction, using a reputational mechanism offered by the platform.¹⁹⁵ In addition, certain platforms pro-

188. See *supra* Section I.A.

189. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927) ("The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public service corporation means giving it the right to make certain charges.").

190. Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE (2014), http://greattransition.org/images/GTI_publications/Schor_Debating_the_Sharing_Economy.pdf [<http://perma.cc/ELZ5-C3PP>] (evaluating the broad implications of the sharing economy).

191. *Id.* (identifying various sharing economy consequences, including effects on sustainability, social capital, and labor).

192. See sources cited *supra* note 2.

193. See, e.g., RENTYTHING, <http://web.archive.org/web/20160304152335/http://www.rentything.com/> [<http://perma.cc/XHY2-F56K>] (describing the role of owner, user, and platform).

194. *Id.*

195. See Eyal Ert et al., *Trust and Reputation in the Sharing Economy: The Role of Personal Photos on Airbnb*, 55 TOURISM MGMT. 62 (2015) (discussing trust mecha-

vide insurance for a number of risks involved in the transaction.¹⁹⁶ For example, if a user is involved in a collision, Turo covers the damages by a liability insurance policy.¹⁹⁷ Users can choose to pay for an insurance package that covers physical damage and liability protection.¹⁹⁸

Nonetheless, owners and users experience certain legal obstacles. Obviously, any difficulty for the owner results in fewer owners offering their assets for short-term access. These difficulties include first and foremost insurance problems. In particular, renting out cars for money violates most insurance policies and is cause for denial of coverage.¹⁹⁹ Many state regulators are not satisfied with third-party insurance offered by platforms and require fuller coverage.²⁰⁰ Another problem is a complicated tax system that makes sharing economy transactions cumbersome.²⁰¹ In addition, users face the threat of discrimination

nisms in the sharing economy and finding that photos are an important factor for users); Paolo Parigi & Karen Cook, *Trust and Relationships in the Sharing Economy*, 14 CONTEXTS 18 (2015) (explaining trust among strangers in the sharing economy); Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem”*, 70 U. MIAMI L. REV. 830 (2016).

196. See, e.g., *GetAround Insurance Policy*, GETAROUND, <http://www.getaround.com/insurance> [<http://perma.cc/F32B-P4JX>] (“Our insurance program provides auto insurance to cover renters and vehicles that meet our Eligibility Requirements. Coverage applies for the duration of each rental, from start to finish, and includes liability, collision and comprehensive (e.g., fire, auto theft, vandalism) coverage.”). Platforms that facilitate rentals of personal possessions do not usually provide insurance. See *Terms of Service*, PEERBY, <http://www.peerby.com/terms-and-conditions> [<http://perma.cc/B9GW-AS7B>] (“You are solely responsible for any loss or damage suffered as a result of lending, leasing, distributing, borrowing, renting, selling, or otherwise obtaining and/or using, any good or service via Peerby.”); *Terms and Conditions of Service*, RENTYTHING, <http://web.archive.org/web/20160312095341/https://www.rentything.com/terms> [<http://perma.cc/DTW8-G5DS>].
197. *Insurance & Protection*, TURO, <http://turo.com/insurance> [<http://perma.cc/9SPW-XJN7>].
198. *Id.*
199. Herb Weisbaum, *Car Sharing Hits Some Bumps In the Road*, CNBC (June 5, 2013, 8:11 AM), <http://www.cnn.com/id/100789535> [<http://perma.cc/6PWL-XBW9>] (“Most insurance companies don’t allow policyholders to rent or otherwise use their vehicle for commercial purposes.”); see also M.P. McQueen, *Beware the Liability of Sharing Your Car with Strangers*, FORBES (Oct. 15, 2013, 2:20 PM), <http://www.forbes.com/sites/investopedia/2013/10/15/beware-the-liability-of-sharing-your-car-with-strangers/> [<http://perma.cc/P74U-XWR4>].
200. Weisbaum, *supra* note 199.
201. Annelise Wiens, *Five Tax Tips for Working in the Sharing Economy*, H&R BLOCK (Mar. 23, 2017), <http://www.hrblock.com/tax-center/newsroom/small-business/self-employed/tax-tips-for-working-in-the-sharing-economy> [<http://perma.cc/K3SA-4JTD>].

by owners, as currently public accommodation law does not apply to sharing economy businesses.²⁰² The next Part will address some of these problems.

2. Share

Share is a form of communal access. Many users prefer to use property as part of a group to save costs and to interact with others in the community.²⁰³ There are a number cooperative forms of engaging with personal property that typically do not include ownership.²⁰⁴ This Article focuses specifically on cooperative consumption that is a version of access.²⁰⁵

Share builds on the consumption trend of access, namely casual short-term engagement with property and the choice not to own, but it gives it a communal spin. Community lending libraries²⁰⁶ make a good example. Toy lending libraries, for example, allow children and their parents to borrow toys, games,

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202. See Kreiczer-Levy, *Consumption Property*, *supra* note 24 (discussing fair housing and public accommodation laws in the sharing economy); see also Aaron Belzer & Nancy Leong, *The New Public Accommodations*, 105 GEO. L. REV. 1271 (2017) (arguing in favor of public accommodation reform in the sharing economy).
203. See generally Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1 (2012). Community garden projects are one example. See Efrat Eisenberg, *The Changing Meaning of Community Space: Two Models of NGO Management of Community Gardens in New York City*, 36 INTER. J. URB. & REGIONAL RES. 106 (2012) (discussing the creation of urban spaces and the involvement of NGOs); Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Space*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 351 (2000) ("Despite the prevalence of vacant land and the reality of urban blight, many communities have been successful in transforming these dangerous urban spaces into thriving community gardens."); Joan Twiss et al., *Community Gardens: Lessons Learned from California Healthy Cities and Communities*, 93 AM. J. PUB. HEALTH 1435 (2003). Cooperatives are another example. See JOYCE ROTHSCHILD & J. ALLEN WHITT, *THE COOPERATIVE WORKPLACE: POTENTIALS AND DILEMMAS OF ORGANISATIONAL DEMOCRACY AND PARTICIPATION* (1986); Paulette L. Stenzel, *Connecting the Dots: Synergies Among Grassroots Tools for Authentic Sustainable Development*, 25 FORDHAM ENVTL. L. REV. 393, 424-25 (2014).
204. Kassan & Orsi, *supra* note 203, at 3.
205. This makes share distinct from other forms of the commons. The commons can refer to formal co-ownership. See Dagan & Heller, *supra* note 95. Additionally, the commons can refer to other informal sharing of resources, such as a dormitory room or the home. See ROBERT ELLICKSON ET AL., *PERSPECTIVES ON PROPERTY* xii (2d ed. 1995) (shared dormitory room as common property); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1394-95 (1993) (multi-person households as a form of limited-access "commons"); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132 (1998). Another example is an entire village that shares a meadow. See OSTROM, *supra* note 107, at 16, 64.
206. Not all libraries are community-oriented, but community-based libraries offer the best example of a hybrid between casual use, lack of ownership, and strong ties.

and puzzles.²⁰⁷ In some areas, toy libraries are connected to a program such as a school, library, or hospital, but other libraries are community-based and run by parent volunteers.²⁰⁸ Community-based libraries usually have specific borrowing rules, membership fees,²⁰⁹ and responsibilities shared by members that include “assisting the librarian with issues and returns, helping new members and processing any new toys.”²¹⁰ Toy libraries serve as a hub for the community, engaging isolated families and providing a meeting place for families.²¹¹ According to a recent empirical study, members enjoy the social benefits of active participation and develop a sense of belonging to the library.²¹²

Tool libraries allow people to borrow various tools and, on some occasions, provide a common working space.²¹³ Tool libraries are “neighborhood hubs offering classes, community building spaces, workshops and a variety of tools ranging from belt sanders to lawnmowers and more.”²¹⁴ Clothing libraries are another example, and allow members to borrow clothes for free or for a membership fee.²¹⁵ They satisfy the need for diversity and novelty in fashion without

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207. Ozanne & Ballantine, *supra* note 158, at 486 (“Toy lending libraries provide parents with the opportunity to share communally owned toys in their local neighbourhood and thus reduce their consumption of new toys. Toy sharing may be particularly beneficial as young children often have limited attention spans, growing tired of toys quickly, resulting in them consuming toys on a very short use cycle.”).
208. *Id.*
209. *Id.*
210. *Member Responsibilities*, KARORI TOY LIBRARY, <http://www.karoritoylibrary.org.nz/belonging> [<http://perma.cc/YE4R-3LBC>].
211. *Toy Libraries: Their Benefits for Children, Families and Communities*, NAT’L ASS’N OF TOY AND LEISURE LIBRARIES (2007), http://www.capacityltd.org.uk/docs/Toy_Library_Press_Release.pdf [<http://perma.cc/NZU2-X3P6>]; see also Jane Brodin & Eva Bjorck-Akesson, *Toy Libraries/Lekoteks in an International Perspective*, 2 EUROREHAB 97 (1992).
212. Ozanne & Ballantine, *supra* note 158.
213. Johnson, *supra* note 136.
214. *Id.*
215. See Grimshorn & Jordan, *supra* note 158, at 3 (“The clothing libraries offer consumers access to a certain number of items during a limited period of time in exchange for contact information and most commonly a membership fee. Ownership is thereby replaced with access to a shared pool of clothes.”); Vedra Korobar, *The Interconnection of Sustainability and Collaborative Consumption: A Case Study of Clothing Libraries 1* (2013) (unpublished M.Sc. thesis, Lund University) (available online at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=3800323&fileOId=3800324> [<http://perma.cc/23HX-WK48>]) (“Clothing library is a recently emerged concept based on the same principles as a conventional books library where instead of books one can borrow clothes. Following the example of books libraries, the concept of clothing library has the tendency to satisfy the desire for diversity and novelty in one’s personal dressing style,

overspending and overconsuming.²¹⁶ Studies of clothing libraries in Sweden suggest that members tend to be environmentally conscious, supporters of collaborative consumption goals, and experience a sense of belonging and commitment to other members and the project as a whole.²¹⁷ This last finding stands in stark contrast to the experience of members of Zipcar, a car-sharing enterprise that is a for-profit company.²¹⁸ In Zipcar, members enjoy the benefits of access without having any attachment to the community or to the brand.²¹⁹

It is clear, however, that community lending libraries are not new. Public libraries and social clubs are also examples of community-based access. This Article does not necessarily claim that these examples are novel; rather, it addresses a growing trend that gradually marks a decrease in the importance of ownership.

Community libraries present an idiosyncratic model. Unlike community gardens,²²⁰ for example, the property itself is not the focal point of the community. However, the community is not detached entirely from the property. The focal point is the function and usability of the asset. It is not about the particular toy, it is about playing. It is not about a particular tool, but about renovation and repair. Members can still feel attached to a garment or toy,²²¹ but it is the ability to choose from a pool of toys, tools, or clothes, use them sporadically and casually borrow them when needed that characterizes these projects. Echoing the slow erosion of ownership,²²² these projects are an opportunity to access instead of own.

At the same time, community libraries, as opposed to other types of libraries, offer more than access. While access could be understood in terms of liquid relations to property,²²³ as a choice of nomadism, disassociated from community and possession, share is actually a form of access that ties one to a community. The property is a platform for commitment and ties rather than exclusion and control. Members share responsibilities towards fellow members; they interact with other members in meetings, events, or during the visit to the library

while at the same time maximising the potential of one garment, without necessarily pressuring the need for more production and resource exploitation.”).

216. Korobar, *supra* note 215, at 2, 4.

217. See generally Grimshorn & Jordan, *supra* note 158; Korobar, *supra* note 215.

218. Bardhi & Eckhardt, *supra* note 159, at 890 (providing qualitative research that includes interviews with Zipcar users in Boston).

219. *Id.*

220. See sources cited *supra* note 203.

221. Grimshorn & Jordan, *supra* note 158, at 35 (discussing members' favorite items).

222. See *supra* notes 161-166 and accompanying text.

223. See Bardhi et al., *supra* note 166 (discussing the relation to possession in global nomads).

and volunteer to assist in the day-to-day work.²²⁴ Physical objects, such as toys, clothes, or tools, lie at the core of these communal relations not because there is a strong attachment to the property as a source of identity,²²⁵ not because of a strong legal title, as is the case with co-ownership, but because the use facilitates community ties. This use is at the same time individual (each member enjoys the item personally) and shared.

The combination of casual use and strong communal ties has yet to be considered a valid form of engaging with property. Share involves member participation, access to items, and non-exclusive engagement with the asset. However, the model is different than that for a common resource. The resource itself is changing: assets can be lost and new ones purchased. Moreover, members can leave their library easily, as they have no substantial financial involvement in the project or a meaningful legal relation to the property. These attributes make share a unique case of the commons. The next Part studies the legal background and normative power of share and access.

III. RECOGNIZING ACCESS AND SHARE

Ownership is one of the pillars of modern legal systems.²²⁶ This Part considers alternative ways in which people enjoy and use property and their different economic, relational, and normative attributes. It further criticizes the legal emphasis on ownership and long-term possession as the primary model for property engagement.

Access and share are distinctively different from mainstream property. Access therefore reflects *a choice not to have property* in the traditional sense. As engagements with things are essentially a platform for different engagements with other people,²²⁷ access and share reflect a relational choice as well. Owner-

224. See, e.g., *Member Responsibilities*, *supra* note 210; see also Ozanne & Ballantine, *supra* note 158.

225. See *infra* Section III.A.1; cf. Shelly Krecizer-Levy, *Property Without Personhood*, 47 SETON HALL L. REV. 771 (2017) (discussing the role of property as personhood in the sharing economy).

226. See Honoré, *supra* note 10, at 107 (“Ownership is one of the characteristic institutions of human society”); Katz, *supra* note 45 (discussing the legal theory of ownership); see also PENNER, *supra* note 43; Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997); Weinrib, *supra* note 43; cf. JAMES W. HARRIS, PROPERTY AND JUSTICE 5 (1996).

227. Property is essentially a platform of collaboration and sharing resources. See sources cited *supra* note 95. Some argue that property cannot be adequately understood and theorized without considering the ways people share property and cooperate in property-related projects. See generally Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37 (1990). Among those who see sharing as fundamentally tied up with property, there are many theoretical and normative differences. Some understand sharing as a central feature of ownership that ultimately depends on the owner’s will. See PENNER, *supra* note 43, at 5; see also Daniel B. Kelly, *The Right*

ship creates hierarchical relations between the owner and the rest of the world with respect to the thing owned.²²⁸ Access and share provide alternative models that differ in their relational stance. Access represents detachment and share reflects cohesion. As opposed to recent consumer studies scholarship that documents the decline of ownership, this project does not focus primarily on consumer identity,²²⁹ but equally considers the relational and normative aspects of each particular choice. Both access and share prioritize use over title,²³⁰ and devalue attachment to possession. The functionality of the thing serves as the platform for interaction and not the essential qualities of the object.

The call to recognize access and share as normatively complex and nuanced legal options is not a call to apply traditional property rules to these alternatives. Property in the traditional sense is characterized by its unique in rem features, as it affects a large group of unconnected people.²³¹ Access and share are not meant to mimic these features or enjoy similar protection to ownership or possession. On the contrary, this Article celebrates the uniqueness of alternative forms and avoids the temptation to fit them into an unsuitable category. Accessors do not exert control over assets and traditionally do not affect third parties' interests. They prefer to casually use personal property in a consistent manner.

What makes it property then? I suggest we focus on the ways individuals use, enjoy, and engage with property. In this sense, the argument returns to the thingness of property as a central feature of the institution.²³² This focus on things is not necessarily about promoting use, preventing use conflicts or saving

to Include, 63 EMORY L. J. 857 (2014). Others stress dependency as a core feature of property. See generally Gregory Alexander & Eduardo Peñalver, *Properties of Communities*, 10 THEORETICAL INQ. L. 127 (2009). Relational accounts insist that property constructs relationships and does not just set boundaries. See Nedelsky, *supra* note 95. Dagan and Heller claim that the sharing of property that successfully builds on cooperation with others strengthens interpersonal relations and is a good in and of itself. See Dagan & Heller, *supra* note 95.

228. See Cohen, *supra* note 189; see also Dorfman, *supra* note 45 (arguing that property is a special authority relation between an owner and a nonowner); Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 50-51 (2010) ("An owner authoritatively coordinates uses of an object by setting the agenda for it.").
229. See *supra* note 163 and accompanying text.
230. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that private property is best suited to deal with possible externalities); see also Dyal-Chand, *supra* note 96; Peñalver, *supra* note 23.
231. See sources cited *supra* note 74.
232. See Yunchien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 4 (2012) ("Property serves our interests in using things—this is the reason we have property. Other desirable features of property—its promotion of stability, autonomy, investment incentives, fairness, and efficiency—all trace back to this basic interest in the use of things."); see also Thomas Grey, *The Disintegration of Property*, 22 NOMOS: PROPERTY 69, 70 (1980).

information costs, as Henry Smith has argued.²³³ Rather, the claim is that things function as platforms for achieving personal goals and interacting with others. Furthermore, access is important for the study of property precisely because it provides a normative alternative to ownership and possession, and might be viewed as a choice not to have property. Studying its contribution and risks is important to the study of property. It invites a discussion on the intricate ways property institutions evolve depending on social and economic developments.²³⁴

In addition, access, share and ownership are interconnected. When people choose to access a car but own a home,²³⁵ this choice validates both ownership and its core values and access and its core values at the same time. It reflects a variety of options, and an array of possible engagements with property. When ownership is the only revered option both socially and legally, it becomes the default position, not a distinct choice.

If this characterization is convincing, we are left to wonder why we do not think of access as simply a contractual relationship.²³⁶ Indeed, access is mostly based, at least primarily, on contracts. This is a reasonable and quite efficient choice. Multiple and conflicting property rights may result in the tragedy of the anti-commons.²³⁷ However, contract law alone is not an adequate characterization of access and share for two main reasons. First, contracts do not take into account the public function of property, and its normative value of recognition.²³⁸ Second, contract law cannot address the legal obstacles set by insurance policies or zoning law.²³⁹ Moreover, it is important to consider access within the property discourse because it provides an alternative form of engaging with possessions. It therefore inspires a discussion about the ways that property evolves in response to social and economic changes.

233. Henry Smith argues that “it is the mediation of a thing that helps give property its in rem character—availing against persons generally.” Smith, *supra* note 78, at 1691. It is an information cost perspective that protects use interests. The argument in this Article is different. It does not incentivize use per se, but perceives property as multiple forms of use and enjoyment of things by individuals and communities.

234. Several studies examine the ways property evolves. See, e.g., Stuart Banner, *Transition Between Property Regimes*, 31 J. LEGAL STUD. 359 (2002); Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PENN. L. REV. 102 (2007).

235. See Grimshorn & Jordan, *supra* note 158.

236. On the distinction between property and contract, see generally Merrill & Smith, *The Property/Contract Interface*, *supra* note 74.

237. See generally Heller, *supra* note 42.

238. See Davidson, *supra* note 93, at 1638.

239. See *infra* Section III.B.

A. Property Values

Freedom, personhood, efficiency, and community have all been associated with property.²⁴⁰ This Part demonstrates that these property values support other engagements with property, but with an important twist. While ownership and long-term possession secure control and attachment, access and share support mobility and flexibility. Instead of personhood, access and share support the ability to experiment with one's personality. Instead of freedom from intervention, access provides the freedom from being tied down. This Part also explains that the influential bundle of sticks approach can be reconfigured to support access and share. This Part then considers the normative problems with access. These values and concerns are instrumental in setting forth a normative vision of access and share.

1. Personhood

Personhood as a justification for property emphasizes how controlling assets contributes to self-development and shapes and reflects identity.²⁴¹ There are two main arguments here. Hegelians emphasize communal recognition of one's control over property.²⁴² Radin, on the other hand, emphasizes attachments to possession.²⁴³ Both accounts assume that long-term engagement with property is conducive to personhood. Access and share are potentially also entangled with personality and identity, but in a very different way.

Short-term casual engagement with assets manifests a different form of identity construction.²⁴⁴ Consumer researchers see access as symbolizing mobility, flexibility, and openness to change.²⁴⁵ Accessors focus on the function of the object and its usability, and an experience of use replaces the need for symbolic expression.²⁴⁶ Some scholars argue that access builds an ecological, anti-

240. See *supra* Section I.A.

241. See *supra* note 50-55 and accompanying text.

242. *Id.*

243. See *supra* notes 56-59 and accompanying text.

244. Cf. Belk, *Extended Self in a Digital World*, *supra* note 162, at 494 ("As argued and demonstrated here, the concept of the extended self is alive and well in the digital world, but there are a number of differences. There are many new possessions and technologies through which we present and extend our self, and they operate quite differently than in predigital days. They also create different ways through which we can meet, interact with, and extend our aggregate selves through other people while experiencing a transcendent sense that we are part of something bigger than us alone."); see also Belk, *You Are What You Can Access*, *supra* note 138.

245. Bardhi et al., *supra* note 166, at 513; cf. JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* (1999) (discussing deterritorialization).

246. Bardhi & Eckhardt, *supra* note 159, at 895 ("If not having a car is no longer tied to status loss, since it is a decision made on 'smart' grounds rather than on non-affordability, the necessity of car ownership for symbolic reasons withers."); cf.

consumerist self that shapes personal identity.²⁴⁷ The problem with this description is that it risks idealizing consumer choices, mistakenly conflating consumption and identity.²⁴⁸ Instead of fetishizing possession, one of the dangers of general personhood theories,²⁴⁹ we risk fetishizing consumption.

Yet part of the identity-building role of access and share relies on the current symbolic function of ownership. Whereas ownership connotes stability and attachment, access allows users to experiment.²⁵⁰ When children exchange toys in toy lending libraries, studies show that boys are willing to try toys that are typically associated with girls, and less active children become more physical in their play.²⁵¹ When one purchases toys, there is a financial commitment and an expectation that the toy will fit the taste and character of the child.²⁵² Children and parents may limit themselves to the more conservative choices. Property as identity can limit our options and access has a liberating function. It reopens choices and allows us to experiment with our preferences. Inasmuch as ownership supports personhood, access creates a strikingly different alternative that marks the anti-attachment to possessions.

Nestor Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009) (analyzing property as projecting relative status).

247. Sam Binkley, *Liquid Consumption: Anti-Consumerism and the Fetishized De-fetishization of Commodities*, 22 CULTURAL STUD. 599, 599 (2008) (“Consumers today are increasingly asked to look beyond consumer capitalism’s drab seriality and moral vacuity, to seek deeper meanings to wider life problems in a range of niche-marketed products bearing the stamp of rebellion, authenticity, simplicity, economic justice and ecological responsibility: a development that has led researchers from varied backgrounds to speculate about the political and ethical possibilities afforded by a changing culture of consumption.”).
248. *Id.*
249. Radin, *supra* note 17, at 961. *But see* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 373-74 (1993) (critiquing Radin by emphasizing the connection between property as personhood and social power).
250. Ozanne & Ballantine, *supra* note 158, at 488.
251. *Id.* at 489.
252. *See generally* Donald W. Ball, *Toward a Sociology of Toys: Inanimate Objects, Socialization, and the Demography of the Doll World*, 8 SOC. Q. 447 (1967); *cf.* Joel Best, *Too Much Fun: Toys as Social Problems and the Interpretation of Culture*, 21 SYMBOLIC INTERACTION 197 (1998). Toys also foster gender, *see* Elizabeth Sweet, *Boy Builders and Pink Princesses: Gender, Toys, and Inequality over the Twentieth Century* (2013) (unpublished Ph.D. dissertation, University of California Davis), racial identification, *see* Erika Engstrom, *Toys and Games: Racial Stereotypes and Identity*, in *ENCYCLOPEDIA OF GENDER IN THE MEDIA* 393 (Mary Kosut ed., 2012), and reflect personality traits such as a tendency towards activity, imagination or puzzles, *see* Donna Fisher-Thompson et al., *Toy Selection for Children: Personality and Toy Request Influences*, 33 SEX ROLES 239 (1995).

2. Freedom

Freedom is one of the core values associated with ownership. This Section examines two main freedom-based justifications for property. One of the central justifications for property concerns property's traits as a physical spatiality. Property is a private space that is construed as free from interference of both the state and private actors.²⁵³ This spatial argument emphasizes control and exclusion as a way to draw boundaries between what is mine and what is outside my control.²⁵⁴ Access, on the other hand, emphasizes freedom from being confined to a particular spatiality and defined by it.²⁵⁵ Instead of property being the source of protection, attachment, and commitment, it becomes an opportunity for flexibility and choice. Indeed, the spatial argument tying freedom and property together neglects the domineering nature of ownership and space on the owner. The more property people have, the more tied down they are to a particular time, place, and community.²⁵⁶ Ownership entails stability²⁵⁷ whereas access is a more fluid choice. Both can be associated with freedom, but they are very different forms of freedom. The first, more familiar sense of freedom is about being left alone in a physical space; the second is about freedom from being tied down, and the ability to choose your spatiality and constantly change it. As opposed to access, share is about a connection to the community and inspires less flexibility and fluidity.

These two forms of freedom are, in some sense, codependent. In order for freedom from interference to be meaningful and contribute to a person's autonomy, a person has to choose this type of connection and prefer it to the flexibility access affords. And access is rarely a purist choice, because most people

253. See *supra* notes 63-70 and accompanying text.

254. See, e.g., Barros, *supra* note 71, at 259-76 (discussing safety, freedom, and privacy in the home).

255. See Bardhi & Eckhardt, *supra* note 159, (arguing that access allows consumers to be flexible about lifestyle and identity); Bardhi et al., *supra* note 166, at 511 (discussing nomadic lifestyle and the necessity of mobility: "nomadic people value detachment and flexibility, have diminished interest in ownership, and eschew attachments that inhibit their freedom of movement. A detached relationship to possessions and places is a central feature of nomadic cultures and mentality, and it is one that reinforces their mobility. Materialism in general is seen as producing 'bumps in the road' during mobility").

256. See generally Peñalver, *supra* note 23.

257. Lynda Cheshire et al., *The Politics of Housing Consumption: Renters as Flawed Consumers on a Master Planned Estate*, 47 URB. STUD. 2597, 2599 (2010) (suggesting that ownership promotes ontological security); cf. Shelley Mallett, *Understanding Home: A Critical Review of the Literature*, 52 SOC. REV. 62, 66 (2004) (arguing that governments promote homeownership as creating stability in order to shift the burden of welfare to the family). It has similarly been suggested that home ownership ideology promotes a property-based citizenship, privileging home ownership over public and rental housing. See generally RICHARD RONALD, *THE IDEOLOGY OF HOME OWNERSHIP: HOMEWORKER SOCIETIES AND THE ROLE OF HOUSING* (2008).

choose to own certain assets and access others, and create their own slate of property uses.²⁵⁸

The second justification for property based on freedom concerns unrestrained power.²⁵⁹ Reich explains that property entitlements protect citizens from the power of the state.²⁶⁰ As the state becomes more powerful, individuals need more protection. Reich therefore called for propertization of state benefits, licenses, contracts, and franchises to shield citizens from this particular form of power.²⁶¹ Fifty years after Reich's work, Peñalver explains that private power has become a serious threat to freedom.²⁶² Employers and mortgagees have considerable power over individuals, and this power demands protection as well.²⁶³ Peñalver, following Reich, considers how varying definitions of power change the theoretical and normative foundation of property. I argue that access is another form of property that responds to power, but in a different way.

The power I refer to is corporate power.²⁶⁴ This is much more than simply economic power, as corporations shape the private and public spheres.²⁶⁵ Multinational corporations have immense cultural influence.²⁶⁶ Brands, not simply products, encourage consumption of new items that are meant to shape individuals' identity as consumers.²⁶⁷ Cultural and economic corporate power leads to overconsumption, dilution of resources, and economic difficulties for individuals. The choice of access is in part a reaction to these developments. Access or share can be understood as an anti-market consumption strategy, a way for consumers to diminish the power of brand and consumer identity.²⁶⁸ Instead of buying products in traditional markets, access and share promote the reuse of current supplies. Market avoidance is one of the motivations for participating in share, as a form of communal access.²⁶⁹ Access also promotes the reuse of existing products as an alternative to purchasing new ones. Understood as such,

258. See *supra* note 168 and accompanying text.

259. See *supra* note 63 and accompanying text.

260. Reich, *supra* note 63, at 733.

261. *Id.*

262. See Peñalver, *supra* note 69.

263. *Id.* at 34, 38-40.

264. See Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law, in PRIVATIZATION, VULNERABILITY AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE* 34 (Martha Albertson Fineman et al. eds., 2017).

265. *Id.*

266. See generally NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (2000) (criticizing the central role of corporations and brands in modern society).

267. *Id.* at 7-8.

268. See Bardhi & Eckhardt, *supra* note 159, at 885.

269. Ozanne & Ballantine, *supra* note 158.

access and share can also be a form of freedom, moderately responding to the private power of corporations in shaping social, cultural, and economic codes.

3. Efficiency

The concept of property rights and ownership is also supported by efficiency considerations. One example is the famous work by Harold Demsetz, who claimed that private ownership creates the necessary incentives for wealth maximization and efficient use of property.²⁷⁰ A second example was discussed earlier and concerns the information costs associated with *in rem* rights.²⁷¹ This Article does not set out to dispute the possible advantages of these arguments,²⁷² but argues that other forms of property engagement promote efficiency as well.

Access and share promote efficient use of resources in two important ways. First, some assets have underused excess capacity when they are privately owned and consumed.²⁷³ Because this excess capacity remains unused, these assets are systematically underexploited. Suppose Paul only uses his car on weekdays but never on weekends.²⁷⁴ During the weekend the car is simply parked in the driveway. Private cars typically have limited usage per household. According to one estimate, cars spend about 90 percent of their time parked in parking lots.²⁷⁵ Car sharing allows owners to maximize the utility of the property.²⁷⁶ This rationale is not restricted to cars. Personal items such as drills, ladders, and lawnmowers are individually owned but infrequently used. Many such items are underutilized, and much of their potential economic benefit is wasted.²⁷⁷ Access, as well as certain types of share, exploits the excess capacity of assets. Ra-

270. See generally Demsetz, *supra* note 230; see also James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009).

271. See generally Merrill & Smith, *Optimal Standardization*, *supra* note 74.

272. For select critiques of Demsetz's work, see Dyal-Chand, *supra* note 96; Peñalver, *supra* note 23.

273. Benkler, *supra* note 124, at 276.

274. Kreiczer-Levy, *supra* note 24, at 76.

275. Eun Ji Cho & Liat Rogel, *Urban Social Sustainability Through the Web: Using ICTs To Build a Community for Prospective Neighbors*, in ICT4S 2013: PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON INFORMATION AND COMMUNICATION TECHNOLOGIES FOR SUSTAINABILITY 167, 168 (Lorenz Hilty et al., 2013).

276. *Id.*

277. See Benkler, *supra* note 124, at 276 (defining "shareable goods" as goods that "systematically have excess capacity" and suggesting that "that this excess capacity may better be harnessed through sharing relations than through secondary markets."); see also Anders Fremstad, *Gains from Sharing: Sticky Norms, Endogenous Preferences, and the Economics of Shareable Goods* (U. Mass. Amherst Econ. Dep't Working Paper Series, Working Paper No. 618, 2014), http://scholarworks.umass.edu/econ_workingpaper/168/ [<http://perma.cc/ZTF4-YGFQ>].

ther than being used by the owner and her family alone, the asset is accessible to multiple users on a when-needed basis.

Second, access can be an efficient way to use goods compared to ownership when its benefits exceed its costs. The benefits of access include a lower cost compared to purchasing the object, the flexibility of using items in different locations, and saving storage costs because storage is the owner's responsibility.²⁷⁸ They also include psychological gains, if the user wishes to support sustainability and deny the traditional market ownership model.²⁷⁹ At the same time, there are also costs associated with access. These costs include the price of the object, the cost of learning to use unfamiliar products repeatedly, and the cost of searching for and finding new products.²⁸⁰

While transaction costs for access and share used to be considerable, new technologies, reputation mechanisms, and the role of online platforms have significantly lowered the costs for short-term use of personal assets.²⁸¹ Reduced costs allow owners and users to benefit from excess capacity of the property easily and efficiently.²⁸² The analysis can be further complicated to include externalities and additional costs and benefits. The review provided here demonstrates that access includes significant economic benefits.

4. Bundle of Sticks

The bundle of sticks approach celebrates the fragmentation of property uses.²⁸³ However, it typically focuses on rights, privileges, or liability with regard to a given property. In contrast, access and share are forms of casual use. Suppose an accessor uses John's car today and Jill's car next week. Each use is in fact a short-term license, easily characterized by the law. However, access and share are more than the sum of their respective uses. While renting cars from Zipcar or tools from Home Depot could be characterized as a subscription, peer-to-peer access cannot be similarly conceptualized. They are a form of consistent use that is not dependent on a particular object. As such, access and share do not fit comfortably with the bundle of sticks approach.

In order to consider access within the bundle of sticks approach, a broader look is required. A dynamic approach to the bundle of sticks that acknowledges property's function as a public institution makes room for reevaluation.²⁸⁴ For example, an interest of consistent and dispersed use could be introduced. Yet, this conclusion is problematic. Access is not analytically a right. It is a choice of

278. Lamberton & Rose, *supra* note 127, at 111.

279. *Id.*

280. *Id.*

281. See Benkler, *supra* note 124, at 276.

282. *Id.*

283. See *supra* Section I.A.4.

284. See Davidson, *supra* note 93.

use. In order to protect and secure access, the law has to ensure there are a variety of options, and this goal is far from the standard property protection. Access and share are thus best understood as alternatives to property that are evaluated in light of property's justifications and values.

5. Community

Property and community are inseparably linked. Prominent theories stress the interdependence of property and community, ownership and obligations, individual rights and commitment.²⁸⁵ This interconnection of property and community has a significant spatial component. Property builds, creates, and shapes community, because people who share a space gradually become meshed together.²⁸⁶ Whether people are sharing a home, a condominium, a neighborhood,²⁸⁷ or even a workspace, property's spatiality contributes to communal ties.²⁸⁸ The more property people have, real and personal, the more tied down to a place they become. This physical presence cultivates an attachment to a particular community. Homeownership is a striking example. When one owns a home, she also gains access to social goods such as "schools, parks, sidewalks and neighborhood-based social networks"²⁸⁹ that further connect her to her community. Property ties owners to a space not only physically, but also symbolically. People who migrate to different countries sometimes keep possessions

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285. See generally Alexander, *supra* note 97; Alexander & Peñalver, *supra* note 18; Alexander & Peñalver, *supra* note 227; see also David Lametti, *The Objects of Virtue*, in PROPERTY AND COMMUNITY 1 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005).
286. Krecizer-Levy, *supra* note 48 (arguing that living with others and sharing the intimate spatiality of home creates a property community). For critical accounts of space and society, see IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE, 226-56 (1990); Davina Cooper, *Regard Between Strangers: Diversity, Equality and the Reconstruction of Public Space*, 18 CRITICAL SOC. POL'Y 465 (1998).
287. See ROBERT C. ELICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH (2008) (analyzing decision-making mechanisms in the home); AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY NORMS, INSTITUTIONS, CHALLENGES (2013) (discussing common interest communities); Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L. J. 226 (2006); Krecizer-Levy, *supra* note 48; Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQ. L. 43 (2009); Shai Stern, *Taking Community Seriously: Lessons from the Israeli Disengagement Plan*, 47 ISR. L. REV. 149 (2014).
288. Peñalver, *supra* note 23, at 838 ("[O]wnership of property in a particular community creates and reinforces social ties among neighbors, the maintenance of which provides owners with market-independent reasons for acting.").
289. *Id.*

as a way to maintain a connection to their former community or family.²⁹⁰ Owning property therefore comes with privileges and attachments.

The alternative of share also ties members to a community. Although the objects that are being exchanged and used are not important on their own,²⁹¹ lending facilities and sharing locations support community. They are among the social goods that a neighborhood or city offers.

Access, on the other hand, marks a somewhat mixed form of sociability. At first blush, access can serve to support an existing community within a neighborhood. Drills, bikes, ladders, and other possessions are mostly accessed in nearby locations.²⁹² Access therefore strengthens ties within a community, without the burden of stable ownership. However, access also encapsulates the potential for a different kind of connection. While ownership often connects people to their friends, family, and neighbors, access allows for casual interactions with strangers. The home, car, drill, or bike becomes a platform for interaction with more than just intimate friends, but also with people from different backgrounds.²⁹³ Car sharing and access to available rooms via Airbnb encourage social interaction that includes personal exchanges of goods and money in a way that potentially crosses ages, races, and income levels.²⁹⁴ The sharing economy as a phenomenon allows both owners and accessors to interact with others. Such interactions are casual, short, and often trivial. Yet they facilitate a broad spectrum of social networks. Flexible networks allow for the ability to change location, and be more adaptable and less accountable to others. Finally, sustainability and ecological awareness serve as a marker of belonging to an environmental community.²⁹⁵

There are two contrasting forms of community embedded in access. The first ties the accessor to a physical or ideological community. The second form is characterized by openness to others and a willingness to interact with multi-

290. See generally Soren Askegaard et al., *Postassimilation Ethnic Consumer Research: Qualifications and Extensions*, 32 J. CONSUMER RES. 160 (2005); Russel W. Belk, *Moving Possessions: An Analysis Based on Personal Documents from the 1847–1869 Mormon Migration*, 19 J. CONSUMER RES. 339 (1992); Annamma Joy & Ruby Roy Dholakia, *Remembrances of Things Past: The Meaning of Home and Possessions of Indian Professionals in Canada*, 6 J. SOC. BEHAV. & PERSONALITY 385 (1991). But see Bardhi et al., *supra* note 166 (discussing liquid relations to assets in global nomadism).

291. See *supra* notes 206-225 and accompanying text.

292. See Cho & Rogel, *supra* note 275, at 168; see also PEERBY, <http://www.peerby.com> [<http://perma.cc/L3PL-8N8S>]; Siegler, *supra* note 12.

293. Kreiczler-Levy, *supra* note 24, at 101-03.

294. But see Benjamin G. Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch. Negot., Org. & Mkts. Unit, Working Paper No. 14-054, 2014), <http://ssrn.com/abstract=2377353> [<http://perma.cc/JQ2T-LD6Q>] (finding discrimination against black hosts in Airbnb transactions).

295. See generally Bardhi & Eckhardt, *supra* note 159.

ple groups of people, in an unattached and casual way. Together they create an interesting complexity that marks a unique alternative to ownership.

6. Normative Concerns

Alongside its benefits, access raises significant normative concerns with relation to property values. Although access can support a broad spectrum of networks, there is a concern that it will commodify community ties.²⁹⁶ Neighborly behavior will be replaced by commercial transactions.²⁹⁷ If in the past, people in need could ask their neighbors to give them the occasional ride,²⁹⁸ because of the pervasiveness of taxi or Uber services, it is no longer an appropriate request. Similarly, if people typically rent drills, bikes, and ladders for money,²⁹⁹ they will feel uncomfortable to borrow these items from neighbors free of charge. The existence of prevailing access-based services will change social norms, chipping away at neighborly kindness, piece by piece, and replacing it with monetary transactions.

This is an important concern. It could be partially mitigated by encouraging share as a form of communal access over independent access.³⁰⁰ At the same time, one must keep in mind that neighborly kindness is a matter of luck. Some people enjoy the benefits of reciprocal neighborly assistance more than others do. The more different an individual happens to be, the less able they are to fit in.³⁰¹ Herein lies the tradeoff. Access opens up possibilities but also compromises attachment. For this reason, access is usually mixed with other forms of use such as possession, ownership or communal consumption.

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296. Commodification concerns arise in various legal contexts. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 141 (1993); MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 290-93 (1999); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 137-38 (1996); I. Glenn Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 *HARV. L. REV.* 689 (2003); Tsilly Dagan, *Itemizing Personhood*, 29 *VA. TAX REV.* 93 (2009); Kimberly D. Krawiec, *A Woman's Worth*, 88 *N.C. L. REV.* 1739, 1742-43 (2010); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *L. & CONTEMP. PROBS.* 109 (2009); Katharine Silbaugh, *Testing as Commodification*, 35 *WASH U. J.L. & POL'Y* 309 (2011).
297. Cf. Paul Webley & Stephen E. G. Lea, *The Partial Unacceptability of Money in Repayment for Neighborly Help*, 46 *HUM. BEHAV.* 65 (1993).
298. Cf. Barry Wellman & Scot Wartley, *Different Strokes from Different Folks: Community Ties and Social Support*, 96 *AM. J. SOC.* 558 (1990) (addressing the services provided by physically accessible ties).
299. See *supra* Section II.B.
300. See *supra* Part II (comparing access and share and highlighting the communal attributes of share).
301. Cf. Samuel Bowles & Herbert Gintis, *Social Capital and Community Governance*, 112 *ECON. J.* 419, 427-28 (2002) (discussing communities' tendency to be relatively small and homogenous, to the exclusion of diversity).

There is an additional concern. Access supports mobility and flexibility, but it costs the individual in stability and independence.³⁰² An access-centered lifestyle choice will include living in micro-units with month-to-month leases,³⁰³ using car sharing instead of owning a car,³⁰⁴ and renting personal property when needed.³⁰⁵ Individuals who choose this lifestyle are vulnerable to immediate changes in their health or financial stability. In fact, the choice of access is largely embedded in the current economic climate of insecurity.³⁰⁶ Taken to its extreme, access is a choice for the young and the healthy. Indeed, access is a choice not to have property; an alternative that promotes both vulnerability and freedom. For this reason, it could be chosen on occasion or serve as a lifestyle choice for particular people at specific points in their lives, for example, young people who wish to experiment.

Because access compromises stability and attachment, individuals are less likely to demonstrate the responsibility that usually accompanies ownership.³⁰⁷ Property mistreatment and a disregard for the community are possible byproducts of the access revolution.³⁰⁸ Some of these concerns can be controlled by local regulations, and mistreatment of property is mitigated by a reputational mechanism in peer-to-peer markets.³⁰⁹ Yet the conceptual problem persists in that responsibility derives not from attachment to property and the stability it affords, but from a general sense of duty, if one exists.

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302. Cf. Bell & Parchomovsky, *supra* note 72. A different version of instability in property concerns multiple eviction in low-income housing. This type of instability is fundamentally tied to insecurity and distress. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).
303. David Friedlander, *WeLive Marries Micro-Apartments, Coworking, Magic*, LIFE EDITED (July 28, 2014), <http://www.lifedited.com/welive-marries-micro-apartments-coworking-magic> [<http://perma.cc/J45Q-3GA9>]; Daniel J. Sernovitz, *WeWork Bullish on D.C.'s Tech Outlook*, WASH. BUS. J. (Feb. 26, 2014, 10:45 AM), <http://www.bizjournals.com/washington/blog/techflash/2014/02/wework-bullish-on-dcs-tech-outlook.html> [<http://perma.cc/ELD4-3CUC>].
304. John Infranca, *Spaces for Sharing: Micro Units Amid the Shift from Ownership to Access*, 43 *FORDHAM URB. L.J.* 1 (2016) (discussing developers' expectation that micro-units lessees will not own a car).
305. See, e.g., Siegler, *supra* note 12.
306. See *supra* note 26 and accompanying text.
307. See generally Eduardo M. Peñalver, *The Illusionary Right to Abandon*, 109 *MICH. L. REV.* 191 (2010) (arguing that restrictions on abandoning property demonstrate a vision of ownership that is suffused with obligations to the public).
308. Bardhi & Eckhardt, *supra* note 159, at 891 (showing that Zipcar users demonstrated negative reciprocity towards other users).
309. *Id.* Bardhi & Eckhardt studied a commercial company, Zipcar, and not peer-to-peer markets with a developed reputational mechanism; see also *supra* note 195 and accompanying text.

Finally, platforms are an almost inseparable part of access. They control information, provide guidelines and facilitate the transaction.³¹⁰ The power of online platforms today is overwhelming and the threat of loss of privacy is ever looming.³¹¹ This concern requires regulation of platforms, including securing access without surveillance. Indeed, conceptualizing the role of platforms as legal actors and regulating their power is becoming an important part of supporting access in the future.³¹²

B. Access: The Choice not to Have Property

The previous Section demonstrated that access promotes important values associated with property, namely freedom, personhood, community, and efficiency, and raises concerns for independency, stability, privacy, and neighborly relations. This Section builds upon this argument by developing a legal framework for recognizing and supporting access.

This Article offers a broad perspective of alternatives to use, enjoy, and engage with property, based on the view that property means the law of things.³¹³ If we think of property as not necessarily sovereignty,³¹⁴ or *in rem* rights,³¹⁵ but as forms of engagement with assets, we can begin to see the different alternatives that are out there. Each alternative—share, own, access—has its own benefits and drawbacks. Different alternatives are suitable for different types of assets, and of course, different people have distinct preferences regarding various

310. Cf. Einat Albin, *From Required and Unlimited Intimacy to Troubling Unfree Labor: The Case of Domestic Workers*, 39 TEL AVIV U. L. REV. 369 (2016) (arguing that platforms constitute intimacy in an essentially marketplace transaction); Dyal-Chand, *supra* note 2 (analyzing the role of platforms and characterizing them as creating a different mode of capitalism).

311. See, e.g., Gabriel R. Schlabach, *Privacy in the Cloud: The Mosaic Theory and the Stored Communications Act*, 67 STAN. L. REV. 677, 687 (2015) (“[T]he business strategies of many major Internet service providers, most notably Google, depend on acquiring as much information as possible about their customers from multiple sources and combining these data into centralized records, which these companies can use for a variety of purposes, including targeted advertising.”).

312. See generally Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 117 (2015) (arguing, in the context of platforms, that “self-regulation can form part of a broader innovation-enhancing solution, providing guidelines for sharing-economy regulation that draw from self-regulatory experiences in industries ranging from nuclear power and financial intermediation to chemical production and cotton supply”); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 88 (2016) (describing the rise of the sharing economy as disruptive and arguing for rethinking current regulation in light of the increasing innovative role of platforms).

313. See Grey, *supra* note 232; Penner, *supra* note 41; Smith, *supra* note 78.

314. Katz, *supra* note 45 (discussing owners as agenda setters for a thing); see also Cohen, *supra* note 189.

315. Merrill & Smith, *Optimal Standardization*, *supra* note 74.

assets.³¹⁶ Yet the law currently supports ownership to the exclusion of access.³¹⁷ I argue that the law should support access with a complex set of regulatory rules that address some of its problems.

How could the law support access? The first thing to understand is that access is not an independent form of engagement. It depends on the existence of an owner, either private or public, who is willing to share her property, often in exchange for money.³¹⁸ Because access involves short-term use, it requires an asset that can be used from some pool of resources, often private owners looking to make some extra money.³¹⁹ In order to support and facilitate access, the state has to ensure a reliable and steady flow of assets available for short-term casual use, thus enabling individuals *not to have property*, or at least not to have particular types of property. This can be done in four principal ways that will be explained shortly. First, the law has to consider the incentives for owners wishing to share property with accessors. Specifically, negative externalities notwithstanding, it needs to reevaluate barriers in existing insurance codes or in tax law that burden these owners.³²⁰ Second, the law has to apply antidiscrimination law to owners who share their property with accessors. Third, the law has to continue to protect short-term possession against wrongdoers. Fourth, because access also creates vulnerabilities and concerns, regulations have to address the problems that accompany the support of access. Finally, this Part offers some preliminary thoughts regarding the proportion of share, own, and access (i.e., the portion of each of these options in comparison to one another). These legal steps will fulfill the state's responsibility to support access as an alternative to ownership.

1. Removing Barriers

Owners who wish to utilize their property's excess capacity face various regulatory barriers. Insurance codes, tax law, business permits, and zoning or-

316. See Grimshorn & Jordan, *supra* note 158; *supra* note 160 and accompanying text.

317. The law protects possession from wrongful interference with a possessory interest. See Dorfman, *supra* note 9. It protects owners from takings without due process. See generally *Armstrong v. United States*, 364 U.S. 40 (1960); Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999); Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972). And it protects from unlawful search and seizure. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

318. See Krecizer-Levy, *supra* note 24, at 78-80.

319. *Id.*

320. As explained earlier, the Article presents theoretical and conceptual arguments that contribute important considerations for regulation. It does not include other significant considerations, such as the effect on communities and markets. See *supra* notes 190-191 and accompanying text.

dinances all burden the owner with legal requirements.³²¹ Some of these regulations serve to ensure that owners internalize negative externalities regarding safety, cleanliness, and density.³²² Yet when an agency makes the decision whether or not to enforce a particular regime, or enact a new rule, it has to consider the *normative* benefits and costs of access as an alternative for the use and enjoyment of property. There are examples of regulations that create a chilling effect for owners, who may choose not to share their property as a result.

One of the most pressing problems is insurance for car-sharing enterprises. Personal vehicle insurance policies are generally invalid when a car is rented or leased to others.³²³ Using one's car for commercial purposes often leads to cancellation of insurance coverage in many states.³²⁴ According to Loretta Worters, vice president of communications at the Insurance Information Institute, "some insurers view car-sharing services as a higher risk, so they may cancel or not renew a driver's car insurance policy or increase premiums if a policyholder's vehicle is involved in an accident while it's being rented."³²⁵

The states of California, Oregon, and Washington have passed new laws in recent years to protect car owners who wish to share their vehicles.³²⁶ These laws

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321. See Kreiczler-Levy, *supra* note 24, at 107.
322. See Samuel Nadler, *The Sharing Economy: What is It and Where is It Going?* (unpublished M.B.A. thesis, Massachusetts Institute of Technology 2014), <http://dspace.mit.edu/handle/1721.1/90223> [<http://perma.cc/ET84-C435>].
323. Ingrid Ballús-Armet et al., *Peer-to-Peer Carsharing: Exploring Public Perception and Market Characteristics in the San Francisco Bay Area, California*, 2416 *TRANSP. RES. REC.* 27, 28 (2014).
324. *Id.* See also Ron Lieber, *Share a Car, Risk Your Insurance*, *N.Y. TIMES* (March 16, 2012), <http://www.nytimes.com/2012/03/17/your-money/auto-insurance/enthusiastic-about-car-sharing-your-insurer-isnt.html> [<http://perma.cc/5DXH-WKQH>].
325. Jay MacDonald, *Auto Insurance Risks of Car Sharing*, *BANKRATE* (Nov. 23, 2011), <http://www.bankrate.com/finance/insurance/auto-insurance-risks-car-sharing-1.aspx> [<http://perma.cc/7WF2-PN3Z>].
326. See CAL. INS. CODE § 11580.24 (West 2017) (providing that "[n]o private passenger motor vehicle insured by its owner pursuant to a policy of insurance subject to Section 11580.1 or 11580.2 shall be classified as a commercial vehicle, for-hire vehicle, permissive use vehicle, or livery solely because its owner allows it to be used for personal vehicle sharing," and stating that conditions include that the sharing is conducted according to a personal vehicle sharing program and that the annual revenue does not exceed the annual expenses of owning and operating the vehicle); OR. REV. STAT. § 742.595 (2017) ("An owner's insurance policy for a private passenger motor vehicle may not be canceled, voided, terminated, rescinded or nonrenewed solely on the basis that the vehicle has been made available for personal vehicle sharing pursuant to a personal vehicle sharing program that is in compliance with the provisions of ORS 742.585 to 742.600."); WASH. REV. CODE § 48.175.030 (2017) ("A private passenger motor vehicle insured by the vehicle's registered owner under an owner's insurance policy may not be classified as a commercial motor vehicle or for-hire motor vehicle solely because the vehicle's registered owner allows the vehicle to be used for personal vehicle sharing if: (1)

prohibit insurers from classifying personal vehicles that are shared with accessors as commercial use.³²⁷ In other states, owners who engage in car sharing are at risk that insurance companies may classify their car as altering the owner's risk profile, which may result in insurance premium spikes or cancellation.³²⁸

One alternative solution for users is to access a car owned by a commercial company such as Zipcar or Car2Go instead of cars that are privately owned. The problem with relying on a commercial provider is that rental companies usually encourage a brand community and promote identification with particular cars.³²⁹ Access becomes less casual, and more prone to morph into steady long-term business relations.³³⁰ Commercial companies award less flexibility. Moreover, they retain the familiar business relationships with consumers, and have significant power over users.

In contrast, peer-to-peer markets bring together individuals who lack any real business experience or expertise. They are less sophisticated than commercial suppliers of goods. To support this potential democratization, the law has to provide overall protection to owners, in the form of special insurance programs and more elaborate consumer protection laws that protect not only the owner, but also the user.

Another concern is that people who frequently rent out their possessions to strangers may fall under a home business regulation.³³¹ Some municipalities prohibit home occupations in residential zones, others have a list of prohibited occupations, and yet others distinguish between professionals and nonprofessionals in granting permission to work from home.³³² Additionally, the taxation

The personal vehicle sharing³³³ is conducted under a program; (2) The annual revenue received by the vehicle's registered owner that was generated by the personal vehicle sharing does not exceed the annual expenses of owning and operating the vehicle").

327. *Id.*

328. Ballús-Armet et al., *supra* note 323.

329. See Bardhi & Eckhardt, *supra* note 159, at 886-88.

330. See generally RIFKIN, *supra* note 178 (criticizing the business model of lease, rent, subscriptions, or memberships as a way to create ongoing relations between consumers and businesses).

331. See Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1195 (2001) ("[I]ndividuals who want to work at home face significant legal obstacles, especially municipal zoning laws that severely restrict the operation of home businesses when they do not prohibit them outright.").

332. *Id.* at 1207-08 ("Perhaps in an effort to reduce the uncertainty caused by these vague restrictions, most municipalities have enacted zoning restrictions that more specifically address home-based businesses. Some cities simply prohibit all home occupations in residential zones. Zoning codes in jurisdictions that do not prohibit all home occupations often list permitted occupations, prohibited occupations, or both. Many allow 'professionals' to ply their trade in residential areas, at least if the home office is not their primary one.").

of owners who rent out cars and everyday possessions can be tricky and cumbersome for nonprofessionals, particularly regarding cost deduction and apportionment of expenses between business and personal uses.³³³ Filing taxes can be simplified for sharing owners.

There are also calls for cities to encourage access instead of ownership by improving users' experience.³³⁴ These initiatives suggest provisions for on-street parking, exemptions from parking time limits, creation of car-sharing parking zones, and more.³³⁵ However, parking benefits will presumably contribute to customers of car-sharing businesses who are easily identified rather than peer-to-peer car sharing. Another recommendation to cities is to "more closely align taxes on carsharing with the general sales tax for other goods and services."³³⁶ Other options include city bike sharing that provides bikes to those who need them on a casual short-term basis.³³⁷

This Section focuses on the normative importance of supporting access for the benefit of individual users. Access has benefits and costs for cities as well. Reduced traffic congestion and pollution, and encouraging healthier lifestyles are possible benefits of bike sharing and car sharing.³³⁸ On the other hand, access creates more activity in a given city that its infrastructure is not always able to support.³³⁹ Different cities have different needs, different infrastructures, and organizational structures. This complexity explains the importance of contextual regulations that are sensitive to each city's particular needs. Yet, current local regulations in cities tend to marginalize the theoretical and normative aspects of access. This Section therefore calls for state and local governments to seriously consider the incentives of owners to rent out their assets. Instead of suggesting concrete recommendations, it contributes an important consideration for regulation that has escaped the discussion thus far.

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333. See, e.g., Diane M. Ring & Shu-Yi Oei, *Can Sharing be Taxed?*, 93 WASH. U. L. REV. 989 (2016) (discussing relevant tax laws that apply to various sharing economy projects); Debbie Woscow, *Unlocking the Sharing Economy: An Independent Review*, U.K. DEP'T BUS., INNOVATION & SKILL 9 (2014), <http://www.gov.uk/government/publications/unlocking-the-sharing-economy-independent-review> [<http://perma.cc/S4VC-RZWJ>] (recommending "a guide to tax in the sharing economy, and an online tax calculator to help users of sharing economy services to easily work out how much tax they are liable to pay").
334. See, e.g., Neal Gorenflo et al., *Policies for Shareable Cities: A Sharing Economy Policy Primer for Urban Leaders*, SHAREABLE (Sept. 9, 2013), <https://www.nasco.coop/sites/default/files/srl/Policies%20for%20Shareable%20Cities.pdf> [<http://perma.cc/FE55-64B4>].
335. *Id.* at 9.
336. *Id.* at 11.
337. *Id.* at 13.
338. DeMaio, *supra* note 131.
339. Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215, 239 (2016).

2. Antidiscrimination Laws

Discrimination in providing goods and services is generally prohibited by public accommodation law. Places that are open to the public cannot discriminate against protected classes.³⁴⁰ State and federal public accommodation laws stipulate the list of protected classes, the list of places and markets that count as public accommodations, and the remedies available.³⁴¹ There are, however, exemptions and limitations,³⁴² which include, among other things, an exemption for places that are distinctively private.³⁴³

There is some level of ambiguity regarding the application of these laws to people who rent out their car or personal belongings. Current exemptions make a case that renting out private and personal possessions on occasion is not an instance of public accommodation. This argument builds on the distinction between places that are personal and private, and places that are open to the public.³⁴⁴ People who share their personal possessions can be classified as private and therefore remain unaffected by antidiscrimination laws. Moreover, a possible argument is that enforcing public accommodation laws will deter individuals from engaging in an economic and environmentally friendly activity.³⁴⁵

However, taking access seriously as an alternative form of property engagement requires the application of antidiscrimination laws to these transactions. As the goal of this project is to allow people to choose from among various meaningful ways to use and enjoy property, the state should support a constant flow of assets that can be fairly easily accessed. A recent study about Airbnb practices found that users with African-American sounding names were sixteen percent less likely to be accepted as guests than users with white sounding names.³⁴⁶ There are additional indications of discrimination in the sharing

340. See generally Lerman & Sanderson, *supra* note 34. See, e.g., MASS. GEN. LAWS ch. 272, § 92A (2017) (barring discrimination in places of public accommodation).

341. *Id.*

342. Title II of the Civil Rights Act of 1964 includes an exemption for particular types of hotels. See 42 U.S.C. § 2000a(b) (2012); see also NEV. REV. STAT. § 651.060 (2017) (addressing inapplicability to private clubs and establishments).

343. See, e.g., N.J. STAT. ANN. § 10:5-5(l) (West 2017) (explaining that “[n]othing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private”).

344. Kreiczler-Levy, *supra* note 24, at 107.

345. For a discussion of public accommodations in small business, see Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241 (2014).

346. See Benjamin G. Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1 (2017). Note that this Article does not discuss personal property but rather Airbnb. However, because Airbnb is a prominent sharing enterprise, this example is illustrative.

economy.³⁴⁷ If owners are allowed to discriminate, certain protected classes might be de facto denied a viable, reasonable opportunity to access.³⁴⁸ They will, in a way, be compelled to own property even if it is the less economically, environmentally or socially suitable option for them.

However, applying antidiscrimination rules in peer-to-peer markets is a complex task. In a previous article, I explored the possible tension between intimacy in the home and equality in sharing economy markets.³⁴⁹ The law has to be attentive to the characteristics of the owner, the market, and the transaction. Transactions in intimate property vary considerably. A nuanced approach might consider the frequency of sharing transactions and the level of the interaction in devising new rules.

In addition, reducing discrimination in access-based transactions can potentially be achieved through self-regulation. Airbnb recently commissioned a report that reviews its current policies and suggests ways to address these problems.³⁵⁰ Recommendations include a community commitment declaration signed by users, reducing the prominence of personal photos, and increasing the option of instant booking.³⁵¹ While this report represents an incredibly valuable step in the right direction, some of these recommendations obscure the intimate and personal character of these markets, a character that the parties have come to expect. An alternative solution could be to develop other means of building trusts among strangers that are less susceptible to racial biases.

3. Trespass and Possession

A necessary condition for ensuring enjoyment of property through access is that short-term possession be protected from wrongful interference. If third parties could intervene in an accessor's possession, then enjoyment of access would be impossible. The requirement in this case fits perfectly with current law. Indeed, the law protects possessors of property, real and personal, regard-

347. See generally Belzer & Leong, *supra* note 202; Tamar Kricheli Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets* 2 *SCI. ADV.* 1 (2016) (analyzing all eBay auction transaction of most popular products by private sellers and finding that women sellers received fewer bids and lower final prices than men for the same products).

348. Cf. Kreiczler-Levy, *supra* note 24.

349. *Id.*

350. Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion: A Report Submitted to Airbnb*, Airbnb (Sept. 8, 2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion_09292016.pdf [<http://perma.cc/W3RK-WW9R>].

351. *Id.*

less of title.³⁵² According to the standard rule, a possessor can retain possession against a wrongdoer who is a stranger to the property.³⁵³

4. Problems with Access: Protection Against Vulnerabilities

A shift from ownership to access may also create vulnerabilities and concerns. Two of the concerns discussed in Section III.A.6 are of particular importance. The first concerns the vulnerability to power, both the power of the platform in controlling the conditions for the transaction and the available opportunities to access, and the power of users and owners.

Both owners and users are vulnerable in access transactions. Owners open up their intimate environment,³⁵⁴ and are vulnerable to a violation of their privacy.³⁵⁵ In addition, property mistreatment is a significant concern. Because users do not own the property, they might use it less carefully. Who is responsible for costs that occur from careless use?

Users are equally vulnerable to malfunctioning products and violations of their privacy. An owner could potentially install a camera in the vehicle and track the user's every move. Some of these concerns are mitigated by the internal mechanisms of the platforms, most importantly, reviews. However, the law has to update its consumer protection laws. It has to consider the fact that both owners and users should be considered consumers in these types of transactions.

In addition, many forms of access are mediated by online platforms. Because these platforms are powerful, regulation is required to secure the privacy interests of users.³⁵⁶ A truly casual, flexible use of property requires resistance to surveillance. Platforms also hold considerable power and are able to impede the access of certain users at will. This is a call for regulating platforms.³⁵⁷ Although

352. JESSE DUKEMINIER ET AL., *PROPERTY* 100 (7th ed. 2010).

353. See, e.g., *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892); *Payne v. TK Auto Wholesalers*, 911 A.2d 747 (Conn. App. 2006). But see Richard H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221 (1985) (arguing that courts regularly prefer an honest subsequent possessor to a prior wrongful one). However, Helmholz discusses wrongdoers and accessor use of property with the permission of the owner.

354. Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 *FORDHAM URB. L.J.* 1023, 1026-27 (2016).

355. See, e.g., *Policy Allows Guests to Snoop Your Private Stuff and Write About What They Find*, AIRBNB HELL (Nov. 16, 2015), <http://www.airnbhell.com/policy-allows-guests-to-snoop-your-private-stuff-and-write-about-what-they-find> [<http://perma.cc/LCY6-YF72>].

356. Cf. Michael Birnhack & Niva Elkin-Koren, *Does Law Matter Online? Empirical Evidence on Privacy Law Compliance*, 7 *MICH. TELE. & TECH. L. REV.* 337 (2011) (finding that only a minority of websites comply with informational privacy requirements).

357. See sources cited *supra* note 296.

there have been calls for allowing self-regulation,³⁵⁸ a certain level of legal oversight is necessary considering the sheer power of platforms to regulate, shape, and constitute the possibilities available to users. Equal access to the platform, access without surveillance, and certain responsibility for damages are key examples of the protection of users.

An additional concern is the loss of stability. Access supports flexibility and mobility, but as Section III.A.6 explains, accessors are vulnerable to sudden changes in their lives. The law could instead develop new safeguards to ensure stability that is not based on property ownership, but rather on state support.

5. Share, Own, Access

The new property regime raises two important issues. The first issue concerns the institutional design of access. Property can be accessed in peer-to-peer markets,³⁵⁹ in the community (share),³⁶⁰ from a state-owned resource³⁶¹ or from commercial companies such as Zipcar.³⁶² All these institutions have both benefits and costs. A thorough institutional analysis exceeds the scope of this Article. Nonetheless, this Article focuses primarily on peer-to-peer markets as the best example of access because they maximize the normative advantages of access. Peer-to-peer markets allow for flexibility and choice because they offer a plethora of available options without promoting brand association or consumer loyalty to a specific company.

The second issue concerns the proportion of share, own, and access. Share balances the commodifying concern of access because it works within the community. The proportion of access and ownership is a more complex issue. This Article supports a pluralistic approach that facilitates and supports users' choices. However, the balance of access and ownership has wider implications. There are two possible extreme outcomes. One is that ownership will become more lucrative and consumers will have strong incentives to own and then rent out their personal property. Individuals with more property to rent out will function as a hybrid between commercial companies and peer-to-peer markets.

An opposite possible outcome is that access will become so popular, significantly decreasing ownership and leaving accessors again with no reliable flow of assets to access. This possibility raises serious concerns because individuals will

358. Cohen & Sundararajan, *supra* note 312.

359. See Ghose et al., *supra* note 126.

360. See *infra* Section III.C.

361. One example is a local government owned bike-sharing program. See, e.g., DeMaio, *supra* note 131, at 45 ("In the government model, the locality operates the bike-sharing service as it would any other transit service. The government of Burgos, Spain, purchased and operates an off-the-shelf bike-sharing system called Bicibur. With this model, the government as operator has greater control over the program. On the other hand, it may not have the experience that existing bike-sharing operators have in managing a program." (internal citation omitted)).

362. See *supra* notes 138-141 and accompanying text.

no longer own property. Property will be owned presumably by commercial companies or by the state. If one recognizes the value associated with ownership for civic independence, freedom, and autonomy, then private ownership has to remain a viable option. This does not mean, however, that ownership should remain as privileged as it is today.

In addition, access has to be widespread enough so as not to be considered the second-best choice, catering mostly to the poorer population. The values of flexibility, mobility, and experimentation demand that it remains a valuable option.

The balance between access and ownership requires two significant options that are both legally supported and socially valuable. Regulatory support of access combined with a certain protection of ownership will allow people to choose between these property engagements.

C. Share: Casual Property and Strong Community

An additional form of using, enjoying, and engaging with property is share. Share also carries important normative and relational benefits, as well as unique structural characteristics. First, the choice of share emphasizes the usability and functionality of an asset, rather than the control and exclusion that are associated with ownership.³⁶³ Second, objects are repeatedly exchanged and this changeover is the foundation for strong communal ties.³⁶⁴ Third, share is a manifestation of freedom from corporate power³⁶⁵ and reflects an environmental, social agenda.³⁶⁶ Finally, share allows for the efficient use of certain types of assets, toys, tools and special garments that are more rarely used and systematically underutilized when privately owned.³⁶⁷

The option to share as a form of casual access and communal participation can be generally classified as a special case of the commons.³⁶⁸ Yet, unlike forms of coownership where each owner values the property itself,³⁶⁹ in the case of share, the property is often casually used; the exchange with the community and usability of the object take precedence. These unique characteristics require a fresh and nuanced legal treatment. Legal rules should not only support the option of share, but also provide a better-suited legal framework for the relations

363. See *supra* Section II.B.2 and *supra* notes 178-189 and accompanying text.

364. See *supra* Section II.B.2.

365. See *supra* notes 235-244 and accompanying text.

366. See *supra* notes 250-251.

367. See Benkler, *supra* note 124.

368. See *supra* Section I.B.3.

369. See Dagan & Heller, *supra* note 95 (discussing co-ownership as the liberal commons); Anna di Robilant, *Common Ownership and Equality of Autonomy*, 58 MCGILL L.J. 263 (2012) (arguing that co-ownership can achieve equality of autonomy); Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737 (2013).

between a member, an object, and other members participating in a share activity. Put differently, there are two arguments at play here. First, the state should recognize and support share as a valid alternative to ownership. As explained above, when individuals have a choice to engage with property in different ways, a decision to own a certain object, access another object, and share yet another validates ownership as well. It allows for a more nuanced selection of property engagement. Instead of favoring certain forms, the law needs to offer a menu of possibilities. These possibilities not only add options, but also provide a critical alternative that marks a new vision for property; a vision of flexibility and experimentation instead of stability and permanence. Second, share as a unique hybrid merits a specific set of legal rules that deal with responsibility and liability regarding loss, theft, or damages to the asset shared. These rules should be different from ownership and from the law of coownership.

1. Removing Legal Barriers

There are not many legal barriers to book, tool, clothes or toy libraries.³⁷⁰ Regulation, taxation, insurance, and zoning could be crafted so as to encourage these projects. For example, certain Free Little Lending libraries often do not comply with local ordinances.³⁷¹ The Free Little Lending library movement has spread across America. Book lovers put a crate of books in their front yard for neighbors to borrow, read, and add books.³⁷² There have been several cases, reported in the media, where these libraries have been shut down because they appear to be an illegal detached structure.³⁷³ Without disputing the need for

370. Most guides to setting up a toy library do not address legal obstacles. See, e.g., *Step by Step Guide to Starting a Toy Lending Library: Creating Diverse, Low-Impact Playtime Opportunities for Kids*, CTR. FOR NEW AM. DREAM (Feb. 2016), http://newdream.s3.amazonaws.com/19/24/9/4252/Step_by_Step_Starting_a_Toy_Lending_Library.pdf [<http://perma.cc/4RDC-LHL9>]; Cat Johnson, *How to Start a Toy Library: 12 Quick Tips*, SHAREABLE (March 29, 2016) <http://www.shareable.net/blog/how-to-start-a-toy-library-12-quick-tips> [<http://perma.cc/9ASR-6KHG>] (addressing only the legal structure). Some libraries are registered as charity entities or nonprofit organizations. See, e.g., *About Us*, KARORI TOY LIBRARY, <http://www.karoritoylibrary.org.nz/about-us> [<http://perma.cc/HD4N-PMUH>]; STEPS CHARITY, <http://www.facebook.com/Stepscharity> [<http://perma.cc/5WKM-D8Z7>].

371. Conor Friedersdorf, *The Danger of Being Neighborly Without a Permit*, THE ATLANTIC (Feb. 20, 2015), <http://www.theatlantic.com/national/archive/2015/02/little-free-library-crackdown/385531/> [<http://perma.cc/VW36-NKTZ>].

372. *Id.*

373. *Id.*; see also Xeni Jardin, *Boy, 9, Creates Library in His Front Yard. City, Stupid, Shuts It Down*, BOINGBOING (June 19, 2014, 3:49 PM), <http://boingboing.net/2014/06/19/boy-9-creates-library-in-his.html> [<http://perma.cc/8Q29-X23X>]; Steve Lopez, *Actor's Curbside Library Is a Smash for Most People*, L.A. TIMES (Feb. 3, 2015, 9:48 PM), <http://www.latimes.com/local/california/la-me-0204-lopez-library-20150204-column.html> [<http://perma.cc/FN4E-KV28>].

zoning regulation, local government should be careful not to burden this spontaneous community sharing, which is vulnerable.

2. Loss, Damage, and Theft of Property

The physical integrity of property is protected in both tort and property law. Wrongdoers are liable for negligent use of personal property, resulting in its loss, destruction, or damage.³⁷⁴ When a borrower negligently uses the lender's property, she might have to pay damages.³⁷⁵ In addition to these general rules of law, many lenders and borrowers have a specific contract, or require a deposit to ensure reasonable use.³⁷⁶ These rules and agreements are founded on the premise that the owner extracts value from the property.³⁷⁷ Because ownership manifests the legal deference to an owner's right to her property,³⁷⁸ any misuse of a person's property should be properly compensated.

The unique characteristics of community lending libraries should be reflected in the legal rules in the case of loss, damage, or conversion of the borrowed item. For each member, the object itself is replaceable and meant for short-term use.³⁷⁹ However, it is equally meant to serve subsequent users in the sharing project.³⁸⁰ Loss, damage, or failure to return an item often reflect carelessness and indifference, a lack of commitment to the sharing project. It weakens the group's ability to promote *share* as a form of engaging with property. For this reason, it is important to distinguish between two categories of cases: cases that reflect lack of respect for and indifference to the sharing project, and cases that result from the natural, common, usual use of items.

Consider, first, the loss of property. Typically, when a borrower loses an object owned by the lender, she has to compensate the owner or lose her deposit.³⁸¹ In a sharing project, the loss of casual, moderately priced objects should be excused for the first certain number of times. Because a member of the lending

374. See 22 AM. JUR. 2D *Damages* § 308 (2017); cf. *Parratt et al. v. Taylor* 451 U.S. 527 (1981). See also DAN B. DOBBS, *THE LAW OF TORTS* 120-30, 257 (2001).

375. See generally Christian Witting, *Physical Damage in Negligence*, 61 *CAMBRIDGE L.J.* 189 (2002) (discussing physical damages to property).

376. See, e.g., DEBORAH HUTCHISTON & LYNN TOLER, *PUT IT IN WRITING!: CREATING AGREEMENTS BETWEEN FAMILY AND FRIENDS* 39-41 (2009) (stressing the importance of making lending agreements); see also *Rent/Lend Agreements*, SHAKE (2017), <http://www.shakelaw.com/legal-info/rentlend-agreements/> [<http://perma.cc/N45E-RX2>].

377. On ownership and value, see Bell & Parchomovsky, *supra* note 72.

378. Dorfman, *supra* note 45; Katz, *supra* note 45.

379. See *supra* Section II.B.2.

380. Cf. *supra* note 207 and accompanying text.

381. See, e.g., 22 AM. JUR. 2D *Damages* § 308 (2017); *Terms and Conditions of Service*, RENTYTHING, <http://web.archive.org/web/20160312095341/https://www.rentything.com/terms/> [<http://perma.cc/DC5P-SZDN>].

library participates in the project and contributes to it, and considering that losing items here and there is very common,³⁸² no damage should be paid in these cases. But a member that repeatedly loses items expresses carelessness towards the sharing project and communal enjoyment and therefore undermines the foundations of this form of engagement. This case requires paying a fine. However, this distinction between occasional and repeated loss is not the current policy in certain lending libraries.³⁸³

Another example concerns the failure to return items, which may constitute conversion or even theft.³⁸⁴ Unless the item has been lost or misplaced, failure to return should lead to similar results as in the case of ownership. The justification, however, is different. In the case of community lending libraries, it is not to protect ownership from wrongful interference,³⁸⁵ but in order to deter any indifference to the sharing project that is reflected by a failure to return items.

Finally, any damage to personal property that results from negligent use is subject to liability in tort.³⁸⁶ The object has to be reasonably used. This is also true in the case of community lending libraries. However, the standard of reasonable use should be different.³⁸⁷ Libraries should allow people to experiment more with the item and use it as their own, compared with more traditional one-time borrowers.

These rules should be set as default rules.³⁸⁸ Instead of traditional tort or liability rules, the law should employ rules that are designed specifically for shar-

382. See DUKEMINIER, *supra* note 352, at 97-108 (discussing acquisition of property by finding).

383. See, e.g., *Borrowing*, BOX HILL AREA TOY LIBRARY, <http://boxhillareatoylibrary.org.au/toys/borrowing/> [<http://perma.cc/6SYA-CHX5>] (charging a fine for broken or missing toys); *Borrowing*, KARORI TOY LIBRARY, <http://www.karoritoyleibrary.org.nz/borrowing> [<http://perma.cc/SQ96-5N8S>] (collecting a \$5 fine for all missing, lost, or destroyed pieces).

384. DOBBS, *supra* note 374, at 120-36.

385. *Id.*

386. *Id.* at 257.

387. Cf. R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. KAN. L. REV. 97 (1992) (discussing the standard of reasonable care).

388. Generally, default rules are meant to save transaction costs for the parties to a contract. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 301-04 (2004). However, default rules also have an expressive function. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (offering a philosophical account of default rules). Default rules have considerable effects on behavior. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psy-*

ing enterprises. Libraries will be able to opt out of these rules, allowing each community to choose the rules most appropriate to the type of assets, the nature of use, and the level of group cohesion. The purpose of these new defaults is to provide a point of reference for new projects that is sensitive to the unique features of share.³⁸⁹ The rules offer a framework for practicing, understanding and theorizing share.

3. Participation

In order for a lending library to be understood as a form of share, there must be some level of member involvement. For the sharing project to constitute an alternative form of property engagement, its members must be involved in advancing it and committed to subsequent borrowers. Involvement can include volunteering in day-to-day management, engaging in social events, and participating in decision-making processes.³⁹⁰ Without member participation, lending libraries are no more than a form of collective consumerism.

Participation is an important part of the definition of share as a form of communal access. If the state decides to encourage share, provide tax benefits, and remove barriers, participation should be required as a prerequisite for benefits. In addition, participation is also a guiding principle for establishing the internal rules of new projects.

4. Antidiscrimination Law

Share, much like access, requires the application of antidiscrimination law.³⁹¹ If community lending libraries were to be considered a private club for the purpose of public accommodation law, then the option of share would be normatively at risk.³⁹² In order for individuals to truly be able to choose share,

chological Power of Default Rules and Form Terms, 51 VAND. L. REV. 1583 (1998); see also Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 801 (1997); cf. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1867-68 (1991).

389. Cf. DAGAN, *supra* note 70 (property as the default framework of interpersonal interaction); Dagan, *supra* note 44.

390. *Member*, BOX HILL AREA TOY LIBRARY, <http://boxhillareatoylibrary.org.au/join/member/> [<http://perma.cc/D3SR-JDDN>] (requiring members either to “[v]olunteer at 4 ‘duty’ sessions a year (1 hour per session)” or to “[h]elp out at an annual stocktake or fundraising (2-3 hours)” in addition to paying an annual membership fee); *Member Responsibilities*, KARORI TOY LIBRARY, <http://www.karoritoylibrary.org.nz/belonging> [<http://perma.cc/Z8MG-WW6K>] (necessitating members to perform duties including assisting the librarian with issues and returns, helping new members, and processing any new toys).

391. *Supra* note 330 and accompanying text.

392. On the private club exemption, see Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1420 (1995).

engage in communal projects and exchange casual use of items, libraries cannot discriminate. If libraries are allowed to discriminate, certain protected classes might be *de facto* denied a real opportunity to share.³⁹³ As explained above, they will be pushed towards property ownership even in assets they prefer to share.

CONCLUSION

Property law, supported by prominent works of legal theory, focuses primarily on ownership and long-term possession.³⁹⁴ For years, this model has been the focal point of major scholarship in the field.³⁹⁵ With the rise of legal realism, however, some developments have occurred.³⁹⁶ More forms of property were introduced, sponsored by the property-as-a-bundle-of-rights approach.³⁹⁷ Nonetheless, this array of rights still consists mostly of *in rem* rights or pertains to some form of continuing use.³⁹⁸

This Article presents an alternative vision of property. This legal departure supports two main arguments. First, this Article has argued that the law directs individuals to choose ownership over other alternatives, even when such a choice is less efficient and desirable. Access and share are far inferior options under the current legal reality. The second argument is theoretical. Access and share promote property-associated values. Moreover, the ability to choose access and share also makes the choice of ownership more meaningful, and at the end of the day, validates it as well. This Article returns to the well-known maxim of property as the law of things,³⁹⁹ not to glorify ownership, but in order to compare, discuss, and acknowledge other alternatives to property that have very different features and normative value.

To conclude, this Article is part of a larger project that is examining the ways in which the sharing economy and consumption patterns demand a rethinking of established property law conceptions, rules, and doctrines.

393. See *supra* note 330 and accompanying text.

394. See *supra* Section I.A.

395. *Id.*

396. See *supra* Section I.A.4.

397. *Id.*

398. *Id.*

399. See generally Grey, *supra* note 232; Smith, *supra* note 78; Penner, *supra* note 41.