

2014

Takings, Community, and Value: Reforming Takings Law To Fairly Compensate Common Interest Communities

Shai Stern

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Shai Stern, *Takings, Community, and Value: Reforming Takings Law To Fairly Compensate Common Interest Communities*, 23 J. L. & Pol'y (2014).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol23/iss1/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**TAKINGS, COMMUNITY, AND VALUE:
REFORMING TAKINGS LAW TO FAIRLY
COMPENSATE COMMON INTEREST COMMUNITIES**

*Shai Stern**

This Article argues that individuals who live in highly cooperative common interest communities should, in certain instances, be entitled to additional compensation or other remedies when their property is taken through eminent domain. The exclusive takings remedy of monetary compensation equal to the fair market value of the property cannot always account for loss of communality. This Article offers guidelines for allocation of additional remedies (monetary and in-kind) that recognize such loss. This proposal is grounded in a pluralistic conception of property, which holds that the state should support individuals' use of property as a social instrument to fulfill diverse values and beliefs. To that end, the state should balance several factors to determine whether a member of a community, or a community as a whole, should be entitled to remedies for communal loss: (1) the size and scope of the taking within the community; (2) the role, if any, of the community's cooperation in its members' realization of a shared conception of the good; (3) the community's social legitimacy as determined primarily by its structural openness, that is, its members' ability to simultaneously belong to other communities; and (4) the community's ability to self-rehabilitate as determined by its political and economic strength. The state should also consider these factors in determining which of several types of remedies for communality loss would be most appropriate.

* Faculty of Law, Bar Ilan University. I am grateful to Gregory S. Alexander, Elizabeth Anderson, Hanoch Dagan, Tsilli Dagan, Avital Margalit, Ayelet Shachar, Jeff Spinner-Halev, Joseph W. Singer and Laura S. Underkuffler on their perceptive comments and suggestions on earlier drafts, as well as to participants of the Tel Aviv University Law School Doctoral Colloquium (2013) and the "Human Rights and Judaism" workshop at the Israel Democracy Institute (2013).

INTRODUCTION

I. ONE SIZE DOES NOT FIT ALL: VARIATION AMONG COMMON INTEREST COMMUNITIES

- A. *Common Interest Communities and the Law*
- B. *The Problem of Measuring a CIC's Level of Communalities*
 - 1. The Ritz Tower, New York, NY
 - 2. Acorn Community, Mineral, VA
 - 3. Woodcrest, Rifton, NY

II. GUIDELINES FOR A REFORM: WHICH COMMUNITIES AND INDIVIDUALS SHOULD BE ENTITLED TO ADDITIONAL REMEDIES?

- A. *The Nature of a Community's Cooperation*
 - 1. Stage One: Verifying a Shared Conception of the Good
 - 2. Stage Two: Classifying the Role of a Community's Cooperation
- B. *Social Legitimacy*
- C. *Community Strength*

III. WHO GETS WHAT? DETERMINING THE PROPER ALLOCATION OF REMEDIES

- A. *New Remedies Tailored to Community Needs*
- B. *Tying Remedies to a Community's Conception of the Good, Social Legitimacy, and Community Strength*

IV. COUNTERARGUMENTS ADDRESSED

- A. *Subjective Values Argument*
- B. *Anti-Commodification Concerns*
- C. *Maintaining State Neutrality*

CONCLUSION

INTRODUCTION

Recent decades have witnessed increases in cultural diversity, social polarization, and residential segregation, all of which have altered the forms and functions of property ownership in the United States.¹ One prominent expression of these changes is the growth of residential common interest communities (CICs) (alternatively called common interest developments) as a dominant form of housing in many metropolitan areas. These developments are characterized by at least a certain degree of cooperation among members. With more than 323,000 common interest communities housing 63.4 million residents in the United States,² it is no wonder that they have attracted so much attention from legal scholars.³ Much of the research focuses on these communities' internal governance regimes⁴ and these regimes' externalities.⁵

¹ Michael Pacione, *Proprietary Residential Communities in the United States*, 96 GEOGRAPHICAL REV. 543, 543 (2006).

² See *Industry Data*, CMTY. ASS'NS INST., <http://www.caionline.org/about/facts.cfm> (last visited Sept. 15, 2014).

³ See Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 5–6 (1999) (“Whether one focuses on the housing pattern in large cities or upon suburbia, one is led inexorably to the conclusion that the age of community association living, as opposed to renting or owning a one-family home, is upon us. The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into condominium or cooperative housing.”).

⁴ See, e.g., WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNERS ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* (2d ed. 1988); Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995); Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3 (1999); Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359 (2005); Norman Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 REAL PROP. PROB. & TR. J. 757 (1982); Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1997); Evan McKenzie, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POL'Y DEBATE 203 (2003) [hereinafter McKenzie, *Common-Interest Housing*]; Evan McKenzie, *Reinventing Common Interest*

This Article focuses on another property law issue that this growing phenomenon raises, which has so far been neglected in the literature: the intersection of takings law and CICs. Monetary compensation equal to the fair market value of the property is typically the exclusive remedy for individuals when the government takes their property through eminent domain.⁶ In most circumstances, this compensation is fair and sufficient. Yet, for many individuals who reside in highly cooperative CICs, market value compensation hardly places them in the same position they would have been in had their property not been taken. This is because the loss of the property also damages the community in and of itself.

This Article therefore argues that, in certain instances, individuals and even communities as a whole should be entitled to additional remedies for loss of communality. Mere membership in a CIC, however, is not necessarily a reliable indicator of communal loss. CICs vary greatly in purpose and level of cooperation, ranging from hyper-individualist to ultra-collectivist.⁷

Developments: Reflections on a Policy Role for the Judiciary, 31 J. MARSHALL L. REV. 397 (1997) [hereinafter McKenzie, *Common Interest Developments*].

⁵ See, e.g., NAN ELLIN, *ARCHITECTURE OF FEAR* (1997); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989); Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2000); Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice"*, 37 URB. LAW. 335 (2005); Amnon Lehari, *Mixing Property*, 38 SETON HALL L. REV. 137 (2008); Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811 (2013).

⁶ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking.").

⁷ Alexander, *supra* note 5, at 3–4.

Furthermore, while the law recognizes several forms of CICs, the actual differences among them do not always correspond to these legal distinctions. Takings law should reflect true differences in communality. While the sole remedy of market value payment may provide adequate compensation for members of individualistic communities, it may not do so for members of communities characterized by a greater degree of cooperation. This Article argues that, insofar as we conceive of these communities as legitimate, we should design our legal rules to allow them to function properly.⁸

The issue of how takings law should treat CICs relates to an ongoing debate about the role of community and cooperation in property. As I demonstrate below, none of the most popular conceptions of property support differential treatment of CICs in takings law. This is because these conceptions are all structured around a single, all-encompassing meaning of “community” that fails to recognize important differences between CICs and other residential configurations, as well as differences among various kinds of CICs. A different conception is therefore necessary.

Drawing on Elizabeth Anderson’s conception of foundational value pluralism,⁹ this Article argues that a differential treatment of CICs in takings law is indeed normatively justified, and can be grounded in a pluralistic conception of property. A foundational pluralistic conception of property holds that property should be viewed as a social instrument, which different individuals can use to fulfill their basic values and beliefs.¹⁰ This understanding turns

⁸ HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 106 (2011).

⁹ Foundational pluralism is the view that “there are plural values at the most basic level—that is to say, there is no one value that subsumes all other values, no one property of goodness, and no overarching principle of action.” See Elinor Mason, *Value Pluralism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (first published June 20, 2006; substantive revision July 29, 2011), <http://plato.stanford.edu/entries/value-pluralism/#FouNorPlu>. Elizabeth Anderson embraces the foundational pluralistic view and argues that “people experience the world as infused with many different values.” ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 1, 149 (1995). The state, according to Anderson, should accommodate its institutions to social diversity, allowing each person to live according to his or her values and beliefs. *See id.*

¹⁰ Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L.*

property into a locus of competing values, which justifies different legal arrangements tailored to specific communities. Many individuals seek to fulfill their notion of the good by residing in a particular community where they cooperate with others who share those same values.¹¹ This Article proposes guidelines for reforming takings law's compensation scheme to include additional monetary and in-kind remedies for communal loss that CIC members may incur when the government takes their property. Policymakers should balance several factors in determining the proper remedy when the government takes property from a CIC.

This Article proceeds in four parts. Part I illustrates the great extent to which CICs may differ in their underlying values and the nature and extent of cooperation among their members. It explains how the existing takings remedy scheme uniquely harms highly cooperative CICs at both the individual and the community level. This Part also explains why, despite the normative appeal of distinguishing among CICs in takings law, current law poses a practical barrier to such a policy. Part II proposes guidelines for implementing a new takings remedy scheme. It argues that three factors are important in determining whether, and to what extent, a community, or individual within a community, should be entitled to additional remedies in the face of expropriation. Those factors are: (1) the role, if any, of the community's cooperation in its members' realization of a shared conception of the good; (2) the community's social legitimacy as determined primarily by its structural openness, that is, its members' ability to simultaneously belong to other communities; and (3) the community's political and economic strength. Part III introduces additional takings remedies and discusses how the interplay of the three factors discussed in Part II should affect the selection of a remedy (or remedies) for a given taking. Finally, Part IV addresses three main

REV. 1017, 1036 (2011).

¹¹ For the purposes of this article, John Rawls's definition of a conception of the good may be best. According to Rawls, a definition of the good should consist "of a more or less determined scheme of final ends, that is, ends we want to realize for their own sake." JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION* 19 (2011).

arguments against deviating from market value compensation in certain circumstances: (1) the subjective nature of communal loss; (2) heightened commodification effects; and (3) the undermining of state neutrality; and concludes that these objections do not significantly weaken the case for recognizing loss of communality in the law of takings.

I. ONE SIZE DOES NOT FIT ALL: VARIATION AMONG COMMON INTEREST COMMUNITIES

CICs may differ in their underlying values as well as in their nature and the extent of cooperation among their members. The current takings remedy scheme uniquely harms highly cooperative CICs at the level of both the individual and the community at large. This Part explains why, despite the normative appeal of distinguishing among CICs in takings law, current law poses a practical barrier to the establishment of such a policy.

A. *Common Interest Communities and the Law*

Common interest communities take numerous forms, but the three¹² most common are: (1) condominiums, in which every unit

¹² A fourth legal framework for community formation is through state legislation that enables groups of property owners to incorporate as highly autonomous local communities. This legal framework allows the operation of one of the most controversial communities in the U.S., namely, the Satmar Hasidic community of Kiryas Joel, New York. The Supreme Court criticized this framework, but did not invalidate it. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 712 (1994) (“Fortunately for the Satmars, New York state law had a way of accommodating their concerns. New York allows virtually any group of residents to incorporate their own village, with broad powers of self-government. The Satmars followed this course, incorporating their community as the village of Kiryas Joel, and their zoning problems, at least, were solved.”); *see also* Nomi Maya Stolzenberg, *The Puzzling Persistence of Community: The Cases of Airmont and Kiryas Joel*, in *FROM GHETTO TO EMANCIPATION: HISTORICAL AND CONTEMPORARY RECONSIDERATIONS OF THE JEWISH COMMUNITY* 75 (David N. Myers & William V. Rowe eds., 1997). For the exercising of this legal framework by other communities as well, *see* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations Municipalities and Indian Country:*

is owned in fee simple by a particular owner, while the common areas are owned by all unit owners jointly;¹³ (2) homeowners associations, in which individual homeowners within a housing subdivision become members of an association that owns the common property;¹⁴ and (3) housing cooperatives, in which a cooperative housing corporation owns all of the real property and issues stock and proprietary leases to tenant-stockholders.¹⁵

The law has played an important role in allowing CICs to flourish.¹⁶ Since the New York Court of Appeals' 1938 decision in *Neponsit Prop. Owners' Ass'n v. Emigrant Industrial Savings Bank*,¹⁷ courts across the United States have developed a legal framework that enables CICs to function.¹⁸ The framework established in *Neponsit*—which several uniform laws¹⁹ and the

A Liberal Theory, 84 VA. L. REV. 1053, 1082–86 (1998).

¹³ JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 825 (1997); HYATT, *supra* note 4, at 13–14; Geis, *supra* note 4, at 760–61.

¹⁴ HYATT, *supra* note 4, at 204–05; Geis, *supra* note 4, at 765.

¹⁵ PATRICK J. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 9.01, .02 (1998) (setting forth the governing structure of residential cooperatives); HYATT, *supra* note 4, at 21; SINGER, *supra* note 13, at 826; Fenster, *supra* note 4, at 19; Geis, *supra* note 4, at 760; Phillip N. Smith, Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305, 305–17 (1961) (outlining various species of residential cooperatives' structures).

¹⁶ For the historical and jurisprudential foundations of common interest developments, see Sharmeen C. Bamarni, Note, *Residential Associations and the Concept of Consensual Governance*, 9 GEO. MASON L. REV. 91, 92 (1986) and Todd Brower, *Communities within the Community: Consent, Constitutionalism, and other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 208–16 (1992).

¹⁷ 15 N.E.2d 793 (N.Y. 1938).

¹⁸ See, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1290 (Cal. 1994); *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981); *Perry v. Bridgetown Cmty. Ass'n, Inc.*, 486 So. 2d 1230, 1233 (Miss. 1986).

¹⁹ The Uniform Condominium Act project led to three other related acts: MODEL REAL ESTATE COOPERATION ACT, 7B U.L.A. 225 (1981), UNIF. PLANNED CMTY ACT, 7B U.L.A. 1 (1980), and UNIF. COMMON INTEREST OWNERSHIP ACT, 7 U.L.A. 231 (1982), *superseded by* 7 U.L.A. 171 (1994 & Supp. 1995).

Restatement of Property embrace²⁰—consists of a web of servitudes that ties certain rights and obligations to property ownership.²¹ No owner in a CIC can unilaterally terminate servitudes burdening the property or transfer the property free of such servitudes without the consent of other beneficiaries.²² Practically, most CICs are established through documents that set forth the web of obligations imposed on the members. These documents are typically comprised of “declarations” containing a set of conditions, covenants, and restrictions (CC&Rs),²³ which primarily regulate the governing framework of the development, but also impose restrictions on the development’s members’ use of private property.²⁴ These restrictions significantly constrain individuals’ use of their property.²⁵

²⁰ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000).

²¹ *Id.* at intro. note (“Servitudes underlie all common-interest communities, regardless of the ownership and organizational forms used. They provide the mechanism by which the obligations to share financial responsibility for common property and services and to submit to the management and enforcement powers of the community association are imposed on present and future owners of the property in the community.”).

²² *See* Cullen v. Tarini, 15 A.3d 968 (R.I. 2011) (holding that an injunction can be granted to stop an owner from deliberately and knowingly violating a restrictive covenant).

²³ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000) (“‘Declaration’ means the recorded document or documents containing the servitudes that create and govern the common-interest community.”); *id.* § 6.2.6 (“‘Governing documents’ means the declaration and other documents, such as the articles of incorporation or articles of association, bylaws, and rules and regulations, that govern the operation of a common-interest association, or determine the rights and obligations of the members of the common-interest community.”).

²⁴ *See, e.g.,* Franzese, *supra* note 5, at 336–37 (“Covenants have been devised to regulate everything from whether pets are permitted, what the maximum weight of an allowed pet must be, the permissibility and, if permitted, the design of one’s doghouse and birdhouse, the precise contours of landscaping content and style, the architectural style of one’s home, the color of one’s home, the color of one’s shutters, the color of one’s interior drapes, the permissibility of screen doors, the posting of signs, and even the propriety of wok-cooking.”).

²⁵ RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. note (2000). *See also* Arabian, *supra* note 4, at 1–4; Franzese, *supra* note 5, at 336–37; Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of*

American property law is generally deferential to the obligations that CC&Rs impose on property owners. Except when CC&Rs clash directly with other laws,²⁶ judicial intervention in an association's enforcement of its CC&Rs is usually limited to applying a reasonableness standard.²⁷ In this way, property law recognizes distinctions among different forms of property ownership.²⁸ Unlike fee simple ownership, ownership within a CIC may be subject to restrictions that other owners impose. The law's recognition and acceptance of this distinction led property scholar

Standards, 3 WASH. U. J.L. & POL'Y 663, 771–75 (2000).

²⁶ Courts tend to distinguish between regulations appearing in the original documents, which will not be invalidated unless they are wholly arbitrary or when they violate public policy or fundamental constitutional rights, and those put into effect by the board of directors, which are subject to a more stringent standard of reasonableness. *See, e.g.*, *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981) (“Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.”). *See also* *Arabian*, *supra* note 4, at 12–13; *Franzese*, *supra* note 25, at 685–93.

²⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) (“A servitude created as provided in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy.”); *id.* § 6.7 (“Except as limited by statute or the governing documents, a common-interest community has an implied power to adopt reasonable rules to: (a) govern the use of the common property, and (b) govern the use of individually owned property to protect the common property.”). *See also* *Seagate Condo. Ass'n v. Duffy*, 330 So. 2d 484, 486 (Fla. Dist. Ct. App. 1976) (“The test which our courts have adopted and applied with respect to restraints on alienation and use is reasonableness.”); *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So. 2d 63, 66 (Fla. Dist. Ct. App. 1973) (Mager, J., dissenting) (“The individual condominium unit owner should be permitted to freely alienate or use his condominium property subject to the reasonable limitations imposed by condominium ownership and as otherwise allowable by law.”).

²⁸ *See Perry v. Bridgetown Cmty. Ass'n, Inc.*, 486 So. 2d 1230, 1233 (Miss. 1986) (“More recently, however, our society has become more complex, and land use has become more diversified. The more populous areas use land not only for single or multiple residences in subdivision developments, but for new arrangements of homeowners associations and planned unit developments. The latter have given rise to a new body of law. This Court is called upon to address the unique roles and functions in the special relationship of the homeowner, the association, and third parties that deal with the association.”).

Gregory Alexander to state that courts regard CICs “as new forms of residency, fundamentally different from both traditional fee ownership of the detached house and apartment living.”²⁹ These new forms of ownership, which subordinate an individual’s property rights to the collective judgment of the owners association, “comprise the chief attributes of owning property in a common interest development.”³⁰

Notwithstanding the above, takings law has not evolved with the rapid growth of CICs. While CICs vary greatly in their purposes and levels of cooperation, takings law offers only one remedy—fair market value monetary compensation—to an owner whose property is condemned through eminent domain, whether he owns a house in fee simple, a condominium, or a share in a highly communal housing cooperative.³¹

This “one-size-fits-all” policy is problematic insofar as we conceive of property as a pluralistic institution, through which owners may express different values. The theoretical debate over property’s characteristics is the subject of an enormous amount of literature and therefore goes far beyond the scope of this Article. Nevertheless, in order to explain the incompatibility of takings law’s “one-size-fits-all” policy with the wide range of CICs, it is sufficient to recognize the contributions of several property scholars who have highlighted the importance of the ways in which communities facilitate the expression of human values through property ownership. For example, from a law and economics perspective, Gideon Parchomovsky and Peter Siegelman argue that takings should be compensated differently for certain residential communities because of the additional loss of communality.³² Gregory Alexander and Eduardo Peñalver developed another, more robust conception of community in the context of property

²⁹ Alexander, *supra* note 5, at 11.

³⁰ *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1282 (Cal. 1994).

³¹ See *supra* note 4 and accompanying sources.

³² Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 136 (2004).

ownership.³³ According to Alexander and Peñalver, “[t]he communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations and the scope of our aspirations”³⁴ and therefore, owners should be under an obligation to “participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.”³⁵ Joseph Singer argues for increased obligations of owners toward society (or the community) in which they live,³⁶ while Hanoch Dagan suggests a comprehensive liberal conception of property, in which the government must consider community when establishing property institutions.³⁷

Although each of these scholars subscribes to a different school of thought, they all recognize the pluralistic nature of property. More concretely, they recognize conceptions of property that permit the consideration of personal values. Elizabeth Anderson’s pluralistic theory takes this understanding a step further. Anderson argues that since “people experience the world as infused with many different values,” the state should be obligated to allow all people to live by their values through establishment of diverse social institutions that people can use to promote these values.³⁸ Anderson therefore argues that the state should be obligated to “expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of good.”³⁹

Applying Anderson’s insights to takings law, the state should be required not only to *allow* people to live in accordance with

³³ Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 134 (2008).

³⁴ *Id.* at 140.

³⁵ *Id.* at 143.

³⁶ JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2001); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2001).

³⁷ DAGAN, *supra* note 8, at xvii.

³⁸ ANDERSON, *supra* note 9, at 1, 149.

³⁹ *Id.*

their values and beliefs, but also to provide them with the *practical possibility* of doing so.⁴⁰ This pluralistic obligation, as set out below, should guide us in determining the proper treatment of residential communities in takings law. In particular, the state's pluralistic obligation justifies expanding the range of takings compensation mechanisms and remedies. In view of the state's pluralistic obligation, the current remedy scheme in takings law is problematic for two overarching reasons: 1) it leads to discriminatory outcomes and 2) it prevents the growth of highly cooperative CICs.

First, the one-size-fits-all approach actually leads to discriminatory outcomes by violating the property rights of certain members of CICs. This is because it fails to recognize the harm caused by what Parchomovsky and Siegelman term "loss of communality," which represents the loss of interpersonal ties that "are not fully captured by the market value of the properties."⁴¹ Individuals who are displaced from their communities due to eminent domain proceedings may no longer be able to realize a conception of the good that depends on cooperation with other community members. Consider a member of a religious community who—to comply with his religious conception of the good—is required to cooperate with others who hold the same religious beliefs. When this person's property is taken, he may lose not only land or a physical dwelling, but also his ability to cooperate with fellow community members to realize a shared

⁴⁰ As will be demonstrated in Part III below, this obligation is primarily in place to ensure citizens' ability to realize and maintain their conceptions of the good. Therefore, in the case of communities, the state may be obligated to not only provide a one-time monetary compensation for expropriation, but assist with a community's resettlement. And in cases where the community's conception of the good is not threatened (since the expropriation does not uproot the entire community, for example), this obligation may still require the state, in some instances, to pay the individual property owner who loses her individual ability to cooperate with others additional compensation. In this sense, the state's pluralistic obligation has two dimensions: a collective one (in cases where the realization of community members' shared conception of the good is threatened) and an individualistic one (where an individual is no longer able to cooperate with her community to realize her conception of the good).

⁴¹ Parchomovsky & Siegelman, *supra* note 32, at 136.

conception of the good. Compensation that merely provides him with a payment equal to the market value of the confiscated property ignores this type of loss. Moreover, individuals often submit to significant restrictions on their individual rights in order to live in these communities, which makes the failure to recognize loss of communality even more acute.

Second, because of the way in which takings (in particular, large-scale takings) can tear apart a community's social fabric, they are especially harmful to the ability of more cooperative CICs to flourish. Due to the absence of remedies for communal harm, these communities' ability to continue functioning post-expropriation is jeopardized. Thus the current takings scheme harms cooperative communities more than individualistic ones (which by nature do not suffer the same extent of communal harm, and whose members may be made whole through market value compensation). Even among cooperative communities, some are harmed more than others depending on how central cooperation is to the community's functioning and its members' realization of a shared conception of the good.⁴² These consequences are unjustifiable to the extent we accept these communities as legitimate.

B. The Problem of Measuring a CIC's Level of Communality

A CIC's legal form is a poor proxy for its actual nature. Current property law is devoid of legal structures that relate to the characteristics of CICs. This may be explained by the state's desire to maintain neutrality with respect to an owner's choice of residential arrangement. This neutrality, however, prevents us from using a CIC's legal structure to assess whether it or its members should be compensated differently. While all CICs are characterized by some degree of cooperation, the structure of the CIC does not—in and of itself—reveal much about the communal or individualistic nature of the community. Consider the following three CICs, all of which operate as residential cooperatives.

⁴² For a discussion of the different roles of cooperation in a community's members' realization of a shared conception of the good, see *infra* Part II.

1. The Ritz Tower, New York, NY

The Ritz Tower (hereinafter The Ritz) was built in Manhattan in 1925 as an elegant apartment hotel.⁴³ In 1952, after a bank took over the property due to discontinued mortgage payments, the Sonnabend hotel chain bought the Ritz and converted the building into a housing cooperative.⁴⁴ The Ritz cooperative is operated in accordance with its enumerated bylaws, and the board of directors publishes, from time to time, various guidelines and notices that bind all shareholders.⁴⁵ The Ritz does not attempt to establish a tightly bound community of residents. Rather, it offers its residents “the privacy and security of a truly luxury residence.”⁴⁶ And yet, it is incorporated as a residential cooperative.

2. Acorn Community, Mineral, VA

Acorn Community is a secular, egalitarian community that was founded in Virginia in 1993. It is “committed to income-sharing, sustainable living, and creating a vibrant, eclectic culture.”⁴⁷ In Acorn, the members live on the same plot of land and manage the community’s seed business together.⁴⁸ According to Acorn’s mission statement, the community members are expected to share their “land, labor, income, and other resources equally or according to need.”⁴⁹ Another one of Acorn’s main goals is to keep its

⁴³ See VIRGINIA KURSHAN, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, *Landmarks Commission Report* (Oct. 29, 2002), available at <http://www.theritztower.com/unprotected/pdf/ritztower-landmark.pdf>.

⁴⁴ *Id.* at 7.

⁴⁵ See, e.g., *Notice from Ritz Tower Board of Directors to Shareholders* (Oct. 26, 2010), available at <http://www.theritztower.com/unprotected/pdf/alteration-agreement.pdf>; *Ritz Tower, Apartment Decoration Agreement* (July 2010), available at <http://www.theritztower.com/unprotected/pdf/decorating-agreement.pdf>.

⁴⁶ See RITZ TOWER, <http://www.theritztower.com/about-amenities.htm> (last visited Sept. 19, 2014).

⁴⁷ *About Us*, ACORN COMMUNITY, <http://www.acorncommunity.org/> (last visited Sept. 15, 2014).

⁴⁸ *Id.*

⁴⁹ A.C.O.R.N., ECOVILLAGE CHARLOTTESVILLE, <http://www.>

members safe from violence and threats. The community “encourages personal responsibility, supports queer and alternative lifestyles, and strives to create a stimulating social, political, feminist, and intellectual environment.”⁵⁰ Community members meet twice a week in order to discuss community issues and check in with each other.⁵¹ Decisions in Acorn Community are made by formal consensus.⁵² Legally, Acorn is the same as the Ritz—a residential cooperative.

3. Woodcrest, Rifton, NY

The Woodcrest is a community founded by the Bruderhof—an international communal movement that seeks to “put into action Christ’s command to love God and neighbor.”⁵³ Woodcrest, the first Bruderhof community in the United States, opened in 1954 on a property near the Walkill River in Rifton, New York.⁵⁴ As part of the Bruderhof movement, Woodcrest members believe that community life gives them daily opportunities to put their beliefs into action.⁵⁵ The community members take lifetime vows of obedience and poverty. Anyone who wishes to become a member of any Bruderhof community gives away his or her personal property before joining, and “contributes his or her talents to stand on an equal footing with all brothers and sisters.”⁵⁶ The Bruderhof communities ascribe great importance to the institution of family and regard marriage as a “lifelong, sacred commitment between one man and one woman.”⁵⁷ “Parents have the primary

greaterstonehenge.org/author/lgadmin/ (last visited Sept. 15, 2014).

⁵⁰ *Acorn Community*, FELLOWSHIP FOR INTENTIONAL COMMUNITY, http://directory.ic.org/1933/Acorn_Community (last visited Sept. 15, 2014).

⁵¹ *About Us*, *supra* note 47.

⁵² *Id.*

⁵³ BRUDERHOF, <http://www.bruderhof.com/> (last visited Sept. 15, 2014).

⁵⁴ YAACOV OVED, *THE WITNESS OF THE BROTHERS: A HISTORY OF THE BRUDERHOF 180–85* (Anthony Berris trans., Transaction Publishers) (2013).

⁵⁵ BRUDERHOF, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ OVED, *supra* note 54, at 51 (“We keep strict discipline in our family life. Family does not suffer from the communal life, on the contrary; the joy of a married couple in each other and in their children is especially strong and

responsibility to raise their children, although the community provides childcare and schooling from an early age.”⁵⁸ Yet, the Woodcrest is legally a residential cooperative, just like the Ritz and Acorn.

These three communities illustrate the broad range of interests and objectives that CICs pursue. They also demonstrate the form-substance gap that characterizes CICs. The individualistic and exclusive character of the Ritz contrasts starkly with the strong communal characteristics of the Acorn Community and the holistic spiritual worldview that binds members of Woodcrest together. Likewise, the secular nature of Acorn Community is at odds with Woodcrest’s deeply religious foundation.

Despite these substantive differences—some of which go to the root of each CIC’s existence—each community is free to establish itself as either a homeowners’ association, condominium, or cooperative. These three types of developments are in some ways distinct.⁵⁹ The internal governance of these developments might be influenced by their different financial structures,⁶⁰ but they all

deep.”).

⁵⁸ BRUDERHOF, *supra* note 53.

⁵⁹ See McKenzie, *Common-Interest Housing*, *supra* note 4, at 205 (“There are also significant differences among the three types of CIDs. Condominium developments are typically multifamily construction resembling one or more apartment or townhouse buildings. Each home buyer acquires ownership of an individual unit, consisting of the airspace within the walls, coupled with a fractional interest in the ownership of the entire building. The condominium association manages and maintains the building. Cooperatives give each owner a share interest in the building or buildings, along with the exclusive right to occupy a particular unit. The cooperative association often has the right to approve the sale of units and may interview prospective owners before granting them the right to purchase. Planned communities may include mixes of housing types but typically feature detached single-family homes with their own lawns and driveways, along with common areas such as private streets; recreation facilities such as golf courses, swimming pools, and lakes; and other facilities such as sewer and drainage systems, and parking areas. In such developments, the purchaser acquires ownership of one of the homes, as well as an interest in the association that owns and maintains the common areas.”).

⁶⁰ See Michael H. Schill, Ioan Voicu & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 281 (2007).

share a prominent feature: the governing body has wide leeway to shape and restrict members' property rights.⁶¹ While the choice of legal form affects the scope of private ownership, it does not reveal much about the characteristics of the community. The legal structures do not dictate the form of cooperation in which members must engage. Instead, each one may accommodate forms of cooperation that vary in purpose and scope.

As discussed, CICs take numerous forms, with condominiums, homeowners associations and housing cooperatives being the most prevalent. A decision to purchase property in any CIC is likely to subject the purchaser to a set of obligations toward other members and the association, which may shape the contours of the owner's property rights in different ways.⁶² However, none of the recognized forms of CICs have inherent sets of obligations.⁶³

⁶¹ See, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1282 (Cal. 1994) (“[S]ubordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development.”); *Brower*, *supra* note 16, at 211 (“[R]egardless of the legal form of the residential association, the associations govern their residents by private law mechanisms premised on a contractual, bargain-based paradigm, such as covenants, equitable servitudes, corporate by-laws and charters, and trust declarations.”); *Schill et al.*, *supra* note 60, at 281 (“Both condominium associations and cooperative corporations enact rules that govern the behavior of their residents.”).

⁶² See *Brower*, *supra* note 16, at 210–11.

⁶³ Michael H. Schill, Ioan Voicu, and Jonathan Miller argue the opposite, at least in regard to cooperatives and condominiums: “[U]nlike the case of cooperative apartments, condominium owners do not effectively share liability on mortgage debt, they are free to transfer their apartments to whomever they choose, they are subject to fewer rules than cooperative apartment owners and, correspondingly, they need spend less time in internal governance.” *Schill et al.*, *supra* note 60, at 276. However, while differences in financial governance may affect the scope of owners' property rights, such differences are not the result of any legal requirements. Thus, even though they claim that cooperatives have a stricter regime for the alienation of property, the alienation of property in condominiums may also be contingent upon the approval of the admissions committee or other conditions laid out in the CC&Rs. *Id.* at 313. See also *Brower*, *supra* note 16, at 210 (arguing that the form of residential property ownership is of minimal importance); Jonathan D. Ross-Harrington, *Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of*

Considered in isolation, an individual's choice of a condominium, homeowners association, or housing cooperative tells us little about the contours of her property rights or obligations to the community.

The Ritz example may best illustrate this problem. The Ritz, as mentioned, is a residential cooperative. While cooperatives have long been recognized as a means of providing affordable housing,⁶⁴ the Ritz proves that they are used for other purposes as well. Among the types of CICs mentioned above, cooperatives are often seen as the most collaborative.⁶⁵ And yet, cooperation among residents of the Ritz does not run any deeper than sharing operating costs and respecting each other's use and enjoyment of their living spaces and common amenities. The Ritz residents do not share a deep or collective conception of the good—they do not live together for the purpose of realizing certain fundamental values. Indeed, many of the Ritz's residents probably do not even know each other.

The use of the legal structure of a cooperative, therefore, carries little, if any, substantive meaning. The choice of a certain type of CIC does not necessarily imply anything about the extent of the cooperation, its purposes or its degree of importance for members of the CIC. While the law offers property owners a

Notice in the Modern Condominium, 28 YALE L. & POL'Y REV. 187, 192 (2009) (“Condominiums, like all common-interest communities, are distinguished by their complex system of servitudes and the governance structure designed to amend and enforce the applicable covenants. Condominiums are governed by an association, membership in which is a mandatory condition of purchasing a unit in the condominium community. Unlike a single-family homeowner who exercises complete control over her real property, owners in a condominium are subject in many respects to the collective will of the association. Condominium associations have the power to assess fees, set restrictions on the use and enjoyment of property, and enforce community rules and standards.”).

⁶⁴ See Gerald W. Sazama, *Lessons from the History of Affordable Housing Cooperatives in the United States: A Case Study in American Affordable Housing Policy*, 59 AM. J. ECON. & SOC. 573, 573–74 (2000).

⁶⁵ See SINGER, *supra* note 13, at 826; Fenster, *supra* note 4, at 21 (“In some ways, the cooperative form would seem more ideologically amenable to cohousing because it combines the common ownership of the land and improvements (including the common house and residential units) with a shareholder ownership interest and proprietary leases for residents.”).

variety of legal structures, these structures are quite hollow. Thus, within takings law, these legal structures cannot be relied upon to determine when additional remedies that redress loss of communality should apply. The following Parts will therefore outline a different way of making this assessment.

II. GUIDELINES FOR A REFORM: WHICH COMMUNITIES AND INDIVIDUALS SHOULD BE ENTITLED TO ADDITIONAL REMEDIES?

In fulfilling its pluralistic obligation, the state should enable its citizens to realize their own conceptions of the good by offering them a sufficiently wide range of meaningful legal institutions. Insofar as we believe that “structuring our geographic localities into . . . local communities fulfills an important human need and facilitates the pursuit of worthy civic virtues, we need to incorporate this vision into our legal rules.”⁶⁶ The aim of this Part is to offer guidelines for implementing a reform in takings law that is tied to this vision and recognizes the value of community in property.

The application of a state’s pluralistic obligation to a given community should depend on that community’s characteristics. This Part therefore argues that the state should take into account three factors in determining the treatment of CICs in takings law: (1) the nature of community members’ cooperation, *i.e.*, its relationship with members’ realization of a shared conception of the good; (2) the community’s “social legitimacy”; and (3) the community’s need for state support to stay intact. In assessing these factors, the state should ensure that the benefits of the reform are limited to socially legitimate communities that engage in sufficiently meaningful cooperation.

A. *The Nature of a Community’s Cooperation*

Strictly speaking, community as a property value represents cooperation of two or more persons who are jointly involved in an asset. However, not all cooperation should be recognized as

⁶⁶ DAGAN, *supra* note 8, at 106.

expressing the value of community in property. Instead, for a community's cooperation to be sufficiently meaningful, it must be founded upon a conception of the good that promotes norms of cooperation rather than separation, exclusion, or individualism. Property owners interact in different ways and to reach different goals. Yet, not all types of cooperation among neighboring property owners should be regarded as expressing the value of community in property for the purposes of a reformed takings regime.

Recognition of cooperation in property law should not be dependent on the cooperators' motivations, but rather on the *role* such cooperation plays in ensuring pluralism. Gregory Alexander argues that a foundational pluralistic conception of property⁶⁷ actually entails multiple levels of pluralism in our approach to values and goods—a “pluralism of pluralisms.”⁶⁸ One level entails recognition of the legitimacy of a variety of different conceptions of the good. The second level refers to the methods by which individuals may realize their conceptions of the good. On this level, while cooperation may not be an inherent feature of a conception of the good, people who adhere to that conception may still need to cooperate in order to effectively realize it. For example, American Jews often prefer to live in neighborhoods where there are at least a few other Jews, since the presence of other Jews ensures the existence of common religious institutions.⁶⁹ Although cooperation itself may not be a religious commandment, religious people may find that cooperating with others of the same faith facilitates their ability to realize their conception of the good. Should such cooperation be regarded as expressing the value of community in property? If we embrace foundational pluralism, the answer is yes. Foundational pluralism

⁶⁷ ANDERSON, *supra* note 9, at 14–15.

⁶⁸ Alexander, *supra* note 10, at 1036.

⁶⁹ See Amitai Etzioni, *The Ghetto—A Re-Evaluation*, 37 SOC. FORCES 255, 259 (1958) (“The reasons for the lower limit [of Jews within an area] may be that [Jews] prefer to not live in an area in which there is no synagogue, no Jewish Sunday school, no opportunity to have Jewish friends and potential Jewish marriage partners for their children.”).

posits that pluralism exists all the way down.⁷⁰ Accordingly, property law, and takings law in particular, should accommodate the value of community both in cases where cooperation is inherent to the cooperators' shared conception of the good⁷¹ and in cases where cooperation is extrinsic, that is, only a means for realizing a conception of the good.

However, recognition of even extrinsic cooperation as expressing the value of the community in property may lead to the conclusion that *any* loss of cooperation between neighbors should be compensable in takings law. Such broad recognition of neighborly collaboration leaves us in the current scenario where no distinctions exist between communities based on the forms and functions of their cooperation. Therefore, this Part offers a two-stage analysis in order to determine whether a specific form of cooperation should be recognized as expressing the value of community in property, and to what extent this should affect the legal treatment it receives.

1. Stage One: Verifying a Shared Conception of the Good

Under the proposed regime, the first step is to decide whether cooperation exists, which is very likely the case for any CIC. The next step is to determine if that cooperation is meaningful. Cooperation is "meaningful" if (1) it is directed toward the realization of a shared conception of the good; and (2) it is not founded on individualistic and exclusionary norms or values that fail to contribute to a sense of community.

Although there are differing views with respect to the proper content of a conception of the good,⁷² for the purposes of this

⁷⁰ Alexander, *supra* note 10, at 1020–21. *See also* Mason, *supra* note 9.

⁷¹ Consider, for example, the Israeli kibbutz, in which the shared conception of the good calls for ongoing cooperation.

⁷² *See, e.g.*, JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 81–97 (1982) (presenting a list of the basic aspects of human well-being); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4–15, 76–96 (2001) (presenting a list of central human capabilities and their relation to humans' conceptions of the good); ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 31–36 (2011) (reviewing several

proposal, there is no need to choose one in particular. John Rawls's definition may be best: a definition of the good should consist "of a more or less determined scheme of final ends, that is, ends we want to realize for their own sake."⁷³ Therefore, for the purposes of this first-stage examination, a conception of the good need only have the ultimate goal of fulfilling the conditions deemed necessary for a valuable and worthwhile life.⁷⁴ Such conceptions are many and diverse.⁷⁵ They may have different characteristics: economic, social, cultural, religious, and may also differ in their comprehensiveness. While some might infuse every aspect of life, others may be less sweeping.⁷⁶ At this stage, no normative judgments regarding conceptions of good are required.

But if we accept any conception of the good as a legitimate end, what cooperation would *not* be recognized as meaningful? The answer is twofold: first, cooperation that does not promote a conception of the good, and second, cooperation that promotes a conception of the good but does not express or promote the value of community.

To illustrate, consider gated communities. Scott E. Nonnemaker conducted thorough research about life in three gated communities in New Tampa, Florida.⁷⁷ Nonnemaker's findings show that the owners in the Arbor Greene, Hunter's Green, and Grand Hampton gated communities were motivated to purchase property in these communities not because of their search for social interaction with their neighbors, but rather because of their

approaches to the definition of "the good" and concluding that all approaches alike rely on a description of human nature, of the human experience and of human universality in formulating their respective lists of goods); Joseph Chan, *Legitimacy, Unanimity, and Perfectionism*, 29 PHIL. & PUB. AFF. 5, 10–16 (2000) (arguing that a conception of "the good" may refer to judgments not only of a person's life, but also specific activities, values, experiences and states of affairs).

⁷³ See RAWLS, *supra* note 11, at 19.

⁷⁴ JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 2 (2011).

⁷⁵ RAWLS, *supra* note 11, at 19–20.

⁷⁶ *Id.* at 13–14, 19–20. See also QUONG, *supra* note 74, at 13–14.

⁷⁷ Scott E. Nonnemaker, *Living Behind Bars?: An Investigation of Gated Communities in New Tampa, Florida* (Apr. 6, 2009) (unpublished M.A. thesis, University of South Florida) (on file with University of South Florida).

desire for security and high property values.⁷⁸ Searching for some evidence of communality, Nonnemaker asked these gated communities' members whether they perceive their relationship with their co-members as cohabitation or as a community.⁷⁹ An owner in Hunter's Green answered:

I can't even tell you what my neighbor look like barely [sic]. Talk to one guy across the street once in a while . . . we tried the 'neighbor' thing in other areas, but it wasn't for us. We prefer our home and keeping to ourselves . . . it's a cohabitation . . . simply just an economic arrangement between me and them.⁸⁰

Arbor Greene, Hunter's Green, and Grand Hampton are far from unique. Empirical studies reveal that the search for communality is often a secondary, if not tertiary, consideration for owners in gated communities.⁸¹ Blakely and Snyder argue that gated community owners often seek to cooperate to maintain their high home values and to reduce crime in the surrounding area, but for little else.⁸²

⁷⁸ *Id.* at ix.

⁷⁹ *Id.* at 129.

⁸⁰ *Id.* at 129–30.

⁸¹ See SARAH BLANDY ET AL., GATED COMMUNITIES: A SYSTEMATIC REVIEW OF THE RESEARCH EVIDENCE, 24–27 (ESRC Centre for Neighborhood Research, U.K. 2003) (summarizing several empirical studies which were conducted in gated communities in the United State showing that the community life and interaction with neighbors in such communities were low); Edward J. Blakely & Mary Gail Snyder, *Divided We Fall: Gated and Walled Communities in the United States*, in ARCHITECTURE OF FEAR 85, 89–90 (Nan Ellin, ed., 1997) (classifying gated communities into three categories: lifestyle, elite, and security zone, and arguing that in all three types the search for communality plays only a secondary or tertiary role in owners' decision of purchase).

⁸² See, e.g., EDWARD JAMES BLAKELEY, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 15–18 (1999); Blakely & Snyder, *supra* note 81, at 90; BLANDY ET AL., *supra* note 81, at 2 (“It would appear that gated communities are not self-evidently attractive places to live. Existing research showed that motivations for living in a gated community are primarily driven by the need for security and a more generalized fear of crime.”); Gary T. Marx, *The Engineering of Social Control: The Search for the Silver Bullet*, in CRIME AND INEQUALITY 225, 231–39 (John G. Hagan & Ruth D. Peterson eds., 1995).

Should such cooperation be entitled to different legal treatment than that applied to fee simple ownership? The answer is no, for two reasons. First, such gated communities do not promote any distinct conception of the good insofar as security and monetary property values are commonplace ideals. And second, even if we are to assume that such gated communities do cooperate in pursuit of a conception of the good, the conception should not be entitled to different legal treatment because it fails to express the community's distinct value.

Gated communities are primarily a locus of seclusion and segregation for the wealthy.⁸³ Membership in such communities does not depend on a commitment to a shared notion of the good, but rather on members' ability to pay for the services provided to them, services that are generally supposed to be of higher quality than those local governments provide to the general population.⁸⁴ It should come as no surprise then that "[c]ontrary to popular claims, studies show that [gated communities] are associated with low community participation and cohesion."⁸⁵ The difference, then, between life inside the gates of such communities and that of the population at large is a difference of degree, not of kind.⁸⁶ Cooperation among members is designed to reduce the costs

⁸³ BLAKELEY, *supra* note 82, at 8. *See also* Blandy et al, *supra* note 81, at 2 ("Importantly there was no apparent desire to come into contact with the 'community' within the gated or walled area."); Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQUIRIES L. 43, 58–59 (2009) (questioning the existence of a shared conception of the good in such communities); Evan McKenzie, *Constructing the Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities*, 20 HOUSING STUD. 187, 187–92 (2005).

⁸⁴ *See* Elena Vesselinov & William Falk, *Gated Communities and Spatial Inequality*, 29 J. URB. AFF. 109, 110–112, 118–19 (2007).

⁸⁵ *Id.* at 119.

⁸⁶ The distinction between qualitative and quantitative differences suggests that the things valued by gated communities' members are not unique but, instead, are shared by the entire population. People who live outside the gates of such communities also regard personal security as an important feature of a valued life and, just like gated communities' members, will also seek to maintain their assets' value. Therefore, personal security or the will to preserve an asset's value should not be considered as part of a conception of the good that requires cooperation.

associated with obtaining high quality services by pooling members' financial resources together. There is no shared conception of the good that is unique to gated community owners.

But even if we assume that a gated community shares a conception of the good, the ultimate outcome of the analysis would be no different. Gated communities are generally designed to be a "villa in the jungle," offering their members a peaceful and trouble-free life.⁸⁷ In order to realize this conception of the good, members of gated communities cooperate only in order to exclude non-members and ensure their own independence, safety, and property values. In other words, a gated community's shared conception of the good is centered on isolation and low social cohesion. Such a conception of the good—even if it can be established as a genuine conception of the good—should not be entitled to remedies for communal loss.⁸⁸

2. Stage Two: Classifying the Role of a Community's Cooperation

Assuming a legitimate conception of the good is identified in the first stage of the examination—be it religious, economic, cultural or otherwise—the next step is to determine the role of cooperation in the community's ability to realize that good. Simply put, the more significant the role cooperation plays in community members' ability to realize their shared conception of the good, the greater the justification for deviating from takings law's existing remedy formula. When cooperation plays only a marginal or

⁸⁷ BLAKELEY, *supra* note 82, at 15–18.

⁸⁸ It is important, however, to emphasize that denying gated communities remedies for loss of communality in the law of takings does not deny their right to exist; a foundational pluralistic conception of property legitimizes individualistic conceptions of the good no less than it legitimizes conceptions that are built on cooperation. However, members of the type of gated community described above do not see the community as having value in itself, but rather seek to ensure that the internal governance of the community causes as little harm as possible to their individual property rights, and would likely refuse to subject themselves to a demanding set of obligations during their membership in the community. They should therefore not be entitled to additional compensation if the state expropriates their land.

secondary role, the law should only be sensitive to the existence of such cooperation or moderately support it. On the other hand, if the cooperation is crucial to a community's realization of its conception of the good, remedies should be available that are oriented towards its preservation.

In order to identify the role of cooperation in a community's realization of its conception of the good, this Part proposes three distinct categories: (1) constitutive cooperation; (2) value-adding cooperation; and (3) facilitative cooperation. Cooperation is constitutive if it is an inherent and vital feature of the conception of the good—not only an instrument for the realization of the conception of the good, but as an end unto itself. An example of constitutive cooperation can be found in the historic Israeli kibbutz. Within this setting, cooperation serves both as an aspect of the desired good and as an instrument for its achievement. Israeli law defines a kibbutz as “a free association of people for the purposes of settlement, absorption of new immigrants, maintenance of a cooperative society based on community ownership of property, self-sufficiency in labor, equality and *cooperation* in all areas of production, consumption and education.”⁸⁹ Property scholar Avital Margalit explains that “the kibbutz is an exemplary and equitable way of communal living for people who believe in the ideals of equality, brotherhood and mutual assistance.”⁹⁰ Cooperation, then, not only enables the community to function properly, but is one of the essential elements of the good itself.

Other instances of cooperation may simply facilitate a group's ability to realize its shared conception of the good without being an indispensable part of the conception. Consider the House of Commons community in Austin, Texas. The House of Commons community is a residential cooperative and part of the University of Texas Inter-Cooperative Council, a non-profit student housing

⁸⁹ Cooperative Societies Ordinance (Types of Societies), 5756–1995, 5722 LSI 244 (1995) (Isr.) (emphasis added).

⁹⁰ Avital Margalit, *Commons and Legality*, in PROPERTY AND COMMUNITY 141, 159 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

organization, which focuses on vegan and vegetarian lifestyles.⁹¹ The community only serves meals that are vegan or vegetarian.⁹² The house purchases almost nothing except organic food, and meat is not allowed on the property.⁹³ Although veganism has become a common way of life for many people who live outside a defined geographic communal setting,⁹⁴ vegans may still encounter difficulties as they seek to live according to their beliefs. For instance, they may discover that local grocery stores do not sell many products they can eat. They may find themselves forced to work in businesses that do not respect their way of life, and they may have to ask restaurant staff to accommodate their dietary restrictions. If a group of vegans unite in order to form a vegan community, a significant portion of these difficulties are likely to be resolved. It would be easier for vegans to live in a community where the shops and businesses cater to their lifestyles, relieving them of the burden of finding acceptable foods and of the need to ask about the ingredients in the food they consume. Accordingly, though it may be possible for the members of the House of Commons to live as vegans while living next to non-vegans, the supportive surroundings they gain within the community facilitate each individual's ability to practice veganism.

Finally, cooperation may be neither constitutive nor facilitative, but "value-adding." This type of cooperation, although not an essential element of the good itself, is nevertheless much more than an instrument to assist in its realization. Such "value-adding" cooperation may bring about a qualitative change in a community's realization of its shared conception of the good. Cooperation should be regarded as value-adding if, considering the group's values, joint activity has more value than individual activity. For example, ultra-Orthodox Jewish communities promote

⁹¹ *House of Commons*, HOUS. OF COMMONS STUDENT HOUSING COOP., <http://www.iccaustin.coop/hoc/> (last visited Sept. 15, 2014).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ A 2012 Gallup poll discovered that five percent of American adults consider themselves to be vegetarians and two percent consider themselves to be vegans. Frank Newport, *In U.S., 5% Consider Themselves Vegetarians*, GALLUP (July 26, 2012), <http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx>.

their vision of the good through observance of Judaism's commandments and laws.⁹⁵ Members of such communities cooperate on different levels, such as ensuring the existence of synagogues and establishing educational institutions that promote religious studies. While cooperation plays a significant role in the functioning of ultra-Orthodox Jewish communities, however, it nevertheless cannot be regarded as constitutive. Jews can fulfill their religion's commandments and laws without being a member of a geographic religious community. But, as provided by Jewish law, cooperation not only makes it easier for individuals to realize their conception of the good, but adds significant value and meaning to its realization. For example, a Jewish person is commanded to pray three times on an average day. A Jewish person may fulfill this religious commandment by praying alone, but Jewish law urges men to always pray in a quorum of at least ten.⁹⁶ Thus, Orthodox Jewish Communities derive a very tangible

⁹⁵ Jewish ultra-Orthodox communities are common within the New York area. Communities such as Kiryas Joel (a village within the town of Monroe in Orange County, New York, where the great majority of residents are Hasidic Jews who strictly observe the Torah and its commandments, and belong to the worldwide Satmar Hasidic dynasty) and the ultra-Orthodox communities of Williamsburg in Brooklyn maintain a lively community life and offer their residents a variety of religious institutions, religious services and networks of mutual support. For more on the Kiryas Joel community, see Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996); Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996). Also see the Kiryas Joel community's website, KIRYAS JOEL VOICE, <http://www.kjvoice.com/default.asp> (last visited Sept. 15, 2014). For more on the ultra-Orthodox Jewish communities of Williamsburg, generally see GEORGE KRANZLER, *HASIDIC WILLIAMSBURG: A CONTEMPORARY AMERICAN HASIDIC COMMUNITY* (1995).

⁹⁶ I would like to demonstrate the additional value of joint action according to the Jewish religion with two short (and non-exhaustive) examples. The first involves the commandment of praying—a Jewish person is commanded to pray three times a day (except on the Sabbath and religious holidays, when there are additional prayers). A Jewish person may fulfill the religious commandment of praying by praying alone (except for specific prayers which are subject to a quorum of 10 men). However, the code of Jewish law urges people to always pray in a quorum of at least 10 men (*Minyan*). According to the code of Jewish law, by joining nine other Jewish men, the value of the prayer increases and it now contains a different, and more valuable, set of

benefit in relation to their conception of the good if the community is geographically concentrated.

In light of this classification of the roles that cooperation can play in community members' ability to realize conceptions of the good, reconsider the three communities discussed in Part I. Cooperation plays a constitutive role in the Bruderhof community's ability to realize its members' shared conception of the good. In order to fulfill the Bruderhof movement's ideals, a member in each of the Bruderhof communities should "take lifetime vows of obedience and poverty and [] contribute his or her talents to stand on an equal footing with all brothers and sisters."⁹⁷ The same is true for the Acorn community. While the Acorn members do not share a religious conception of the good, they nevertheless share an economic one. Quite similar to the Israeli historic kibbutz, the Acorn community members believe in income-sharing, where their members are expected to share their land, labor, income and other resources equally or according to need.⁹⁸ As in the case of the historic Israeli Kibbutz, an individual cannot fulfill such an economic conception of the good alone.

features and virtues. See SHULCHAN ARUCH 90:9 ("One should attempt to pray at a synagogue with the public. And if he cannot, he should pray at the time that the public prays."). Rabbi Moses of Coucy (one of the Shulchan Aruch's interpreters) argues that this also applies to communities in which there is no Minyan. The second example involves the commandment of reading the book of Esther (*Megillah*) on the Jewish holiday of Purim. The code of Jewish law states that a Jewish person is obligated to read the book of Esther on the eve of the Purim holiday and to reread it the next day. However, the code also states that "[t]he most desirable way to fulfill the commandment" is to perform the reading in public. Therefore, while a Jewish person *can* fulfill their religious commandments privately, such fulfillment has a different, elevated value when they cooperate with others. For a summary of the code of Jewish law on this matter, see KITZUR SHULCHAN ARUCH 141:9 ("The most desirable way to fulfill the commandment is to hear the reading of the Megillah in a synagogue, where there are many people, because 'within the multitude of the people is the glory of the King.' At the very least, one should take care to hear it in a 'Minyan' of ten. If it is impossible to read it with a 'Minyan,' each individual should read it from a kosher scroll, with the saying of the blessings beforehand.").

⁹⁷ BRUDERHOF, *supra* note 53.

⁹⁸ See *About Us*, *supra* note 47.

But what about the Ritz? Does the cooperation between members of this housing cooperative fit within any one of the above-mentioned roles of cooperation? The answer, unsurprisingly, is no. As mentioned earlier, the Ritz residents, similar to the Hunter's Green gated community members, seek only the least amount of cooperation necessary with their co-members.⁹⁹ Therefore, the Ritz fails the first stage examination. Yet, even if we were to acknowledge that the Ritz community's search for a luxurious and private lifestyle embodies a conception of the good, we might still question whether realization of this lifestyle requires cooperation. As in Tampa's gated communities,¹⁰⁰ members themselves would probably answer in the negative.

This classification of the potential roles of cooperation in a community's members' realization of their shared conception of the good provides us with an instrument for distinguishing among CICs based upon their actual characteristics. Therefore, it can be used as a basis for determining the type of legal remedies a community should receive when the government takes its property through eminent domain.

B. *Social Legitimacy*

Embracing a foundational pluralistic conception of property runs the risk of enabling—or signaling state endorsement of—communities that abide by norms that explicitly or implicitly enforce racial, socio-economic or religious discrimination, or other illiberal norms.¹⁰¹ Because a foundational pluralistic conception of property regards property as a social instrument that should enable people to fulfill diverse views of what constitutes a valuable and meaningful life, an assessment of any property arrangement cannot

⁹⁹ See *supra* notes 72–76 and accompanying text.

¹⁰⁰ See *supra* notes 77–82 and accompanying text.

¹⁰¹ See, e.g., Alexander, *supra* note 10, at 1126; Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1431–33 (2012); Nomi Maya Stolzenberg, *Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897 (2001-2002).

be detached from prevailing social norms that promote diversity.¹⁰² After all, the core assertion of foundational pluralism is that diversity generally promotes human flourishing.¹⁰³

The previous section discussed general categories of cooperation that may entitle members of a community to additional legal remedies when the government takes their property, consistent with the state's pluralistic obligation to allow diverse communities (and not only individualistic communities) to survive and flourish. This first stage looks only at whether a community's members share a conception of the good and, if so, how they cooperate to achieve that good. The inquiry, however, does not end there. The next stage—an assessment of a community's social legitimacy—entails a normative evaluation of the community. Foundational pluralism imposes on the state an obligation to embrace diversity *with the goal of promoting human flourishing*. Thus, the social legitimacy test operates as a check on the unintended harmful effects that may result from compensating a loss of communality in communities whose existence is antithetical to this goal. As demonstrated below, however, this normative evaluation is limited—it is designed to avoid judgment of a community's internal practices and to instead focus on a community's structural openness.

Consider the Woodcrest community for example. As part of the international Bruderhof movement, the Woodcrest community is a Christian community that strictly regulates all forms of conduct, belief, appearance, dress and demeanor, with particular emphasis upon the repression of premarital or extramarital sexual expression.¹⁰⁴ Some might consider these regulations to be violations of conventional liberal norms.¹⁰⁵ Julius H. Rubin, for

¹⁰² See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 757 (2009).

¹⁰³ See Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992).

¹⁰⁴ Julius H. Rubin, *Contested Narratives: A Case Study of the Conflict between a New Religious Movement and its Critics*, in MISUNDERSTANDING CULTS: SEARCHING FOR OBJECTIVITY IN A CONTROVERSIAL FIELD 452, 454 (Benjamin Zablocki & Thomas Robbins eds., 2001).

¹⁰⁵ See, e.g., Gerald Renner, *Bruderhof Leader Defends Close-knit Community Against Outside Critics*, THE HARTFORD COURANT, Nov. 12, 1995,

example, points to the community's gender inequality practices, arguing that "[y]oung women confront the issues of powerlessness and gender inequality in spiritual and temporal roles, and severe limits are placed upon their aspirations and participation in the community."¹⁰⁶ Yet, should a liberal state deny such a community the right to exist or provide it less support? Or should such a community—which fosters and even enforces illiberal norms within its boundaries—be entitled to additional remedies in takings law for the loss of communality?

A liberal state may respond in three ways. First, it may deny illiberal communities any state support. Second, it may condition its support on the community's compliance with a state's defined liberal minimum requirements (LMRs).¹⁰⁷ Finally, the state, if it takes its pluralistic obligation seriously, may seek to use another, less normatively charged method of inquiry to determine a community's social legitimacy.

This third approach is available—and even superior to—the two alternate options. Instead of determining compliance with LMRs or cutting off all support, the state should inquire into how open a community is to allowing its members to join other communities simultaneously, referred to here as multiple community belonging (MCB), and should inquire into LMRs only as a last resort if the MCB inquiry is inconclusive. This solution is based on a sociological redefinition of community that occurred in the last century, which highlighted most communities' loss of exclusive dominion over all aspects of members' lives.¹⁰⁸ A

available at http://articles.courant.com/1995-11-12/news/9511120143_1_bruderhof-communes-mennonites ("The movement has also been garnering a growing chorus of critics in recent years, including academics who say the leaders shut them out, and former members who complain they are not allowed to visit their relatives").

¹⁰⁶ Rubin, *supra* note 104, at 457.

¹⁰⁷ See STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 188–211 (2000).

¹⁰⁸ See, e.g., BARRY WELLMAN, NETWORKS IN THE GLOBAL VILLAGE: LIFE IN CONTEMPORARY COMMUNITIES 2–3 (1999); Barry Wellman, *The Community Question*, 84 AM. J. SOC. 1201 (1979); Barry Wellman et al., *Networks as Personal Communities*, in, SOCIAL STRUCTURES: A NETWORK APPROACH 130, 133–35 (Barry Wellman & Stephen D. Berkowitz eds., 1988).

sociological inquiry into community and its role in the last century is the subject of an enormous amount of sociological literature and is beyond the scope of this Article.¹⁰⁹ It is sufficient, however, to recognize German sociologist Georg Simmel's observation that modern society functions as a web of group affiliations, in which every person becomes a member of several social groups simultaneously.¹¹⁰ This multiple belonging ensures a space of freedom for the individual, since one is no longer restricted to one all-encompassing community.¹¹¹ Instead, the individual is allowed to maintain her participation in multiple groups, to preserve her connections with other individuals, and to participate in different modes of cooperation.¹¹²

¹⁰⁹ See, e.g., ANTHONY PAUL COHEN, *BELONGING: IDENTITY AND SOCIAL ORGANIZATION IN BRITISH RURAL CULTURES* 1–4 (1982); COLIN BELL & HOWARD NEWBY, *COMMUNITY STUDIES: AN INTRODUCTION TO THE SOCIOLOGY OF THE LOCAL COMMUNITY* 252 (1971); ROBERT NISBET, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* 47 (2010); George A. Hillery, *Definitions of Community: Areas of Agreement*, 20 *RURAL SOC'Y* 111 (1955).

¹¹⁰ GEORGE SIMMEL, *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* 150 (1955) (“The modern pattern differs sharply from the concentric pattern of group affiliation as far as a person's achievements are concerned. Today someone may belong, aside from his occupational position, to a scientific association, he may sit on a board of directors of a corporation and occupy an honorific position in the city government.”).

¹¹¹ *Id.* at 130 (“In general, this type of development tends to enlarge the sphere of freedom: not because the affiliation with, and the dependence on groups, has been abandoned, but because it has become a matter of choice with whom one affiliates and upon whom one is dependent.”).

¹¹² *Id.* Morris Janowitz followed Simmel's notion of multiple community belonging. In what he termed “communities of limited liability,” Janowitz argues that the communities of the modern age are characterized by their partial role in their members' lives and by the relatively low commitment of their members. Therefore, Janowitz argues that “in a highly mobile society[,] people may participate extensively in local institutions and develop community attachments”; yet, due to its modern conception, the individual's search for the support of others is constrained by his resistance to being controlled by others. These conflicting tendencies are the basis of contemporary communities, which are, according to Janowitz, of “limited liability.” See John D. Kasarda and Morris Janowitz, *Community Attachment in Mass Society*, 39 *AM. SOC. REV.* 328, 329 (1974).

The ability of community members to engage with people from outside their home community exposes them to different values and norms. These unmediated encounters help facilitate individuals' abilities to reflect on their communities' prevailing norms. This situation leaves individuals with three possible responses. Those who have been exposed to different sets of norms than those prevailing in their community may decide to leave their community since they no longer share its values; they may decide to stay within the community and try to change it from the inside; or, they may decide to stay and conform to community norms. Since, in each case, an informed individual has made a choice, a liberal state should respect the decision. The current social reality, in which a person may belong simultaneously to more than one community, thus significantly reduces the risk that an individual will be oppressed by any particular community of which she is a member.¹¹³ Furthermore, by engaging simultaneously in several communities, individuals are no longer confined to a single, all-encompassing community and enjoy a greater degree of freedom.¹¹⁴ In the context of the modern diverse state, this condition is normal and should be encouraged.

By focusing on communities' structural openness, which allows members to simultaneously belong to other communities, the state may establish a policy for addressing illiberal communities that is both liberal and pluralistic. An MCB test simply asks whether an individual is allowed to occupy different positions in different communities at the same time. If the answer is yes, the community may be entitled to enhanced takings remedies despite being superficially illiberal. While not entirely eliminating questions concerning norms and values, the MCB test sidesteps them to focus attention instead on community structure and boundaries.

The MCB test is superior to the two alternatives presented above for several reasons. First, in comparison with denying illiberal communities additional takings remedies, the MCB test commits the state to its pluralistic obligation to ensure a diverse society in which different—sometimes radically different—

¹¹³ See SIMMEL, *supra* note 110, at 130.

¹¹⁴ *Id.*

conceptions of the good may co-exist. Second, the MCB test will reduce clashes between the liberal state and illiberal communities. Such clashes are often a result of communities' resistance to state intervention into internal ethical conduct,¹¹⁵ and the MCB test sidesteps any such direct intervention. The MCB's structural demand does not impinge on the community's internal conduct, and instead only requires it to give up the use of seclusion and isolation as instruments for ensuring the preservation of its conception of the good. Furthermore, protecting a community's internal conduct from state intervention may temper an illiberal community's tendency to block members from engaging with outsiders.

Finally, the MCB test avoids the ambiguity inherent in LMR-based determinations. LMRs are determined by the government, may be vague, and do not necessarily have identical content and scope from jurisdiction to jurisdiction. For example, while most liberal governments use LMRs in setting children's education policy (usually by establishing an official core curriculum), the scope of these requirements varies greatly across jurisdictions, as do the implications of a community's rejection of the state's requirements.¹¹⁶ This ambiguity leads to a lack of uniformity and

¹¹⁵ A recent legal clash involving the legitimacy of educational LMRs occurred in Canada, where the Quebec education authorities ordered the transfer of thirteen children from the Lev Tahor Jewish Ultra-Orthodox community to foster care. *See Lev Tahor Child Removal Order Upheld by Ontario Judge*, CBC NEWS, (Feb. 3, 2014, 3:05 PM), <http://www.cbc.ca/news/canada/montreal/lev-tahor-child-removal-order-upheld-by-ontario-judge-1.2521639>. The government alleged that the children—who are homeschooled—did not know basic math, and some could not speak either English or French. *Id.* In November 2014, approximately 250 Lev Tahor adherents fled to Ontario from Quebec just ahead of the order to seize the children. *Id.* The community's move to Ontario was the result of the Quebec government's continuous intervention in the community's internal conduct, especially the educational authorities' efforts to force the community to use a secular curriculum for teaching its home-schooled children. *Id.* By moving to Ontario, a province which is more tolerant of faith-based schooling and has been a lure for other religious communities, the Lev Tahor community attempted to regain control of its inner space. *Id.*

¹¹⁶ As the Lev Tahor case demonstrates, different jurisdictions may embrace entirely different intervention policies, which affect the incentives of

makes it difficult for states to monitor communities and enforce their requirements.¹¹⁷ The MCB test overcomes these obstacles by creating a simple and uniform test. In most situations, the characteristics of the community in question will provide answers. This is because all-encompassing communities rarely hide their characteristics; on the contrary, they highlight their distinctiveness. In more ambiguous cases, when the community may not hold itself out as all-encompassing (perhaps out of a desire to avoid state interference), the state may require the community to prove its compliance with the MCB model by requiring presentation of evidence and data as to its members' participation in other communities.

In the context of takings law reform, a conclusion about a community's social legitimacy should affect the community's entitlement to additional remedies for communal loss. As long as a community allows MCB, it remains entitled to whatever benefits it would receive otherwise. When a community does not allow MCB, however, the state should investigate the reasons for the absence of MCB. The state should determine whether the absence of community members' participation in other communities is the result of (1) a decision by community authorities (or significantly encouraged by those authorities); (2) community members' free choice; (3) geographic distance or other physical factors;¹¹⁸ or (4) other lack of opportunity.¹¹⁹

communities to reside within a specific jurisdiction. *See id.* This is not the first time that a religious minority has fled Quebec because of the provincial government's enforcement of its secular curriculum. In 2007, members of Quebec's only Mennonite community would not send their children to government-approved schools, balking at the teaching of evolution, the acceptance of gays and lesbians and low "morality standards." Even if parents in the community home-schooled their children, they would have had to follow the official Quebec curriculum and make arrangements with the local school board, whereas in Ontario and New Brunswick, parents who home-school their children are not required to abide by an official government curriculum. Thus, the Mennonite group fled to New Brunswick and Ontario. *See Townsfolk Sad to see Mennonites Move Away*, *Montreal Gazette* (Aug. 16, 2007), <http://www.canada.com/montrealgazette/news/story.html?id=8aa6f3f4-45fd-42d3-ad45-38b1106bddfc>.

¹¹⁷ *See id.*

¹¹⁸ Allowing state intervention in geographically remote communities,

Then, if a community disallows MCB, the state should determine if the community complies with the state's LMRs. While communities that comply with LMRs (and do not comply with MCB) should not be entirely denied alternative takings remedies, their refusal to comply with MCB should affect the scope and scale of their entitlement to these remedies. Finally, communities that reject both social legitimization tests—MCB and LMRs—should be denied additional remedies when their property is expropriated by the state. This assertion implies nothing about these communities' conceptions of the good or the role cooperation plays in their realization. It is simply that these communities' refusal to comply with either one of the social legitimacy standards exempts the state from its pluralistic obligation to compensate such communities for their loss of communality.

Based upon this two-part social legitimacy test, reconsider the Woodcrest community's entitlement to additional remedies for loss of communality.¹²⁰ As demonstrated in the previous Parts, Woodcrest clearly has a defined, shared conception of the good, and cooperation clearly plays a constitutive role in realizing that good. At first glance, then, the Woodcrest community should receive additional remedies for communal loss if expropriation occurs. Nevertheless, some may question the social legitimacy of the Woodcrest community, arguing that by realizing its shared conception of the good, the community over-regulates its members

based solely on their remoteness, would unreasonably discriminate against such communities without properly taking into account whether the community's norms are contrary to MCB. In cases where external reasons prevent the community's members from simultaneously belonging to several communities, the community should be able to choose from two alternative paths. The first alternative is for the community to prove that it allows its members to belong to other communities. An example of this would be to demonstrate that the community's norms encourage such multiple belonging among its members. The second (and more practical) alternative requires the community to subject itself to an examination of whether it complies with liberal minimum requirements.

¹¹⁹ See, e.g., Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 134 (1992) ("The most important condition which makes possible a substantive freedom to exit from a community is the existence of a wider society that is open to individuals wishing to leave their local groups.")

¹²⁰ See *supra* notes 53–57 and accompanying text.

and violates conventional liberal norms, in particular by relegating women to subsidiary roles. Therefore, should the Woodcrest community lose its entitlement to additional remedies for the loss of communality?

In order to answer this question the state should start by determining whether the Woodcrest community passes the MCB test. If asked, members of the Woodcrest community would probably answer in the affirmative. The Bruderhof movement does not prohibit its members from becoming involved with their local neighborhoods and allows young community members to attend colleges and universities.¹²¹ Some (though not most) of the community members work outside the community and join other leisure time interest communities, such as book clubs.¹²² In short, Woodcrest members are exposed to outside groups and may freely choose to exit the community or remain within it. Therefore, though the Woodcrest community might not fit everyone's definition of liberalism, it should still trigger the state's pluralistic obligation, entitling the community to additional remedies for the loss of communality. In concluding that the community meets the MCB requirement, the state obviates any need for further investigation into the community's compliance with LMRs. On the other hand, if the state concludes that a community's members do not belong to multiple communities, it should further investigate the reasons for this isolation, as well as the community's

¹²¹ *FAQ: Do Bruderhof Young People Go to College or University?*, BRUDERHOF, <http://www.bruderhof.com/en/about/faq> (last visited Sept. 15, 2014). When asked whether college-age members of the Bruderhof community attend college or University, Tim, a teacher in the community responded:

Yes. Many of the Bruderhof's young people go to college. We don't want young people who grew up in the community to stay in the community because they think this is the only place where they can make it. We want them to feel that if they wanted to, they can go out to the world and earn money and be a success but to choose life in community because of a calling from God.

Id.

¹²² *FAQ: Do You Get Involved In Your Local Neighborhood?*, BRUDERHOF, <http://www.bruderhof.com/en/about/faq> (last visited Sept. 15, 2014).

compliance with state-determined LMRs. Fortunately, as the Woodcrest example proves, many of these investigations should be unnecessary.

C. Community Strength

This Article has thus far discussed how, in the context of the law's treatment of CICs, the contours of the state's pluralistic obligation should depend on two factors: (1) whether the community cooperates toward realizing a shared conception of the good; and (2) whether the community complies with MCB and LMRs. This section further limits the scope of the state's pluralistic obligation by arguing that it should also be contingent on a community's political or economic strength. I argue that stronger communities generally should be treated differently than weaker, but similarly situated, communities. In the takings law context, tailoring the remedy in this way best tracks the state's pluralistic obligation because it recognizes that some communities are better situated to continue to flourish post-taking than others.

All kinds of people live in CICs and socioeconomic diversity can be found in all forms of cooperative ownership. The question then arises: should takings law distinguish among CICs based on their economic or political strength? On paper, takings law is blind to economic or political differences among individuals and communities. It is generally acknowledged, however, that such considerations often affect eminent domain decisions. Blight condemnations, urban renewal programs, and redevelopment projects—which often serve as the “public use” justification for eminent domain—all affect, not coincidentally, assets belonging to poor property owners.¹²³ The current takings law compensation

¹²³ See, e.g., Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 300 (2001) (“A concern for the distribution of societal burdens may trump administrative efficiency considerations, and as we showed, the problem of derivative takings disproportionately harms the poor.”); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365, 375–76 (2007) (“As a practical matter, however, I suspect this change means that authorities can continue to use blight condemnations in poor areas and will face a real challenge only if they attempt to stretch the blight category to include solidly working-class or (even more so)

formula, which requires compensating the owner with the fair market value of the condemned property, incentivizes government authorities to target the property of poor and politically marginalized owners rather than property belonging to the rich and influential.¹²⁴ As Justice Thomas wrote in his dissent in *Kelo v. City of New London*, it is always the economically and politically weak communities that are expected to bear disproportionately the burden of realizing public projects.¹²⁵ Nevertheless, takings law, given its uniform remedy scheme, fails to take into account the political or economic wealth of parties subject to takings.

Nevertheless, the contention that takings law should recognize community strength is based on properly limiting the scope of the state's pluralistic obligation. As discussed, foundational pluralism does not require the state to actively support or promote *any* conception of the good. The state's obligation is limited to

middle-class areas"); Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007).

¹²⁴ See, e.g., Bell & Parchomovsky, *supra* note 123, at 283 ("Roads and undesirable public facilities are usually built in poor areas because the value of property in such areas is lower."); William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 Int'l Rev. L. & Econ. 115, 122 (1989) ("A common historical account of the rationale for including the just compensation requirement in the U.S. Constitution is that it was designed to curb the inclinations of political majorities to impose excessive burdens on politically isolated minorities."); Konstantin Sonin, *Why the Rich May Favor Poor Protection of Property Rights*, 31 J. COMP. ECON. 715 (2003); Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 346–47 n.81 (2000) ("While the human nature of government officials is a potential source of abuse in any legislative decision, the condemnation decision is particularly susceptible to abuse. First, there is a strong incentive for interest groups to attempt to influence government officials and a correspondingly strong incentive for government officials to comply with their demands. Second, taking property provides an effective means of subjugating a disfavored group.").

¹²⁵ *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) ("Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.").

establishing conditions that *allow* the existence of diverse conceptions of the good that comply with the LMR and MCB model requirements. Such an obligation may require distinguishing among communities based on certain characteristics for the purpose of allocating takings remedies, but the state should only seek to ensure pluralism by rectifying inadequacies in the law that make it extremely difficult or impossible for certain communities to continue flourishing post-taking.

Ensuring that takings law fulfills the state's pluralistic obligation justifies taking into account communities' political or economic strength and compensating strong communities less than similarly situated, but weaker, communities. Stronger communities are more likely to have the resources and influence to avoid the damaging effects of eminent domain without government assistance.¹²⁶ Politically strong communities may use their political ties and influence to fend off expropriation, and economically strong communities may be safe because of the high costs that the state would incur by taking their land.¹²⁷ Moreover, members of these communities are less likely to lose their ability to realize their shared notion of the good—whether jointly or separately—if their land is in fact condemned. Members of politically strong communities usually share the same sense of the good as the majority of the public. Therefore, even if expropriation affects such a community's functioning, community members are expected to be able to continue realizing their shared conception of good by joining other similar communities. In addition, even if a politically strong community does not share the majority's conception of the good, it may still use its political influence to bypass bureaucratic barriers in reestablishing itself. Members of

¹²⁶ Naturally, communities that enjoy political or economic strength are less likely to be subject to eminent domain in the first place. *See, e.g.*, Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130 (1992) (“[I]f public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process. Thus, landowners have some political advantages in seeking compensation.”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 863–65 (1995).

¹²⁷ *See* Bell & Parchomovsky, *supra* note 123, at 283.

economically strong communities also are more likely to preserve their conception of the good than those in weaker communities since they are more likely to have the resources to independently reestablish the community.

Therefore, belonging to a politically or economically strong community reduces the concern that community members will lose their ability to realize their conception of the good, even when the community's ability to function is affected by the government's exercise of eminent domain. Accordingly, the need for the state to actively intervene to help these communities is reduced, and may in fact be a waste of government resources. At the same time, it is entirely possible that members of these communities will sometimes encounter difficulties in the face of expropriation. Therefore, politically or economically strong communities should not be completely excluded from an alternative remedy scheme. However, keeping in mind the purpose of the reform and the state's pluralistic obligation, these communities should receive reduced benefits.

III. WHO GETS WHAT? DETERMINING THE PROPER ALLOCATION OF REMEDIES

In practice, how should the principles and guidelines discussed above shape a reform of takings law? How should the government actually allocate alternative takings remedies and what form should these remedies take? This Article proposes reforming takings law not only through the explicit recognition of various conceptions of the good, but also by recognizing that the state may use diverse mechanisms to fulfill its pluralistic obligations. Any reform should enhance the ability of people to live in accordance with their values and beliefs, while at the same time acknowledging other social values (such as autonomy, efficiency, and distributive justice). Expanding the range of potential takings remedies gives meaning to an individual's choice of residential configuration. Alternative takings remedies should include non-monetary or in-kind benefits, and should be allocated based upon the needs of the affected community in relation to the three considerations outlined previously: the community's conception of the good, social legitimacy, and political and economic strength. This approach

strikes the right balance between the pluralistic principle that supports various communities' continued functioning and other competing considerations, such as efficiency and liberty.

A. New Remedies Tailored to Community Needs

For the state to fulfill its pluralistic obligation, the selection of remedies should begin by determining the nature of the taking and its influence on the community members' ability to continue realizing a shared conception of the good. Parchomovsky and Siegelman split expropriations into three categories.¹²⁸ First, "Isolated" expropriations are those that affect only one or a few community members.¹²⁹ Second, "Tipping" expropriations are those where the government condemns multiple properties in a given residential community, and in doing so, potentially threatens the community's ability to continue functioning.¹³⁰ Third, "Clearing" expropriations are those that uproot the entire community.¹³¹

For certain small-scale takings, a market-value mechanism may still be appropriate. However, it is likely only to fulfill the individualistic dimension of the state's pluralistic obligation.¹³² Therefore, for Isolated and small-scale Tipping condemnations that do not threaten a community's shared conception of the good, but only result in the private loss of one or a few individuals, simple fair-market value compensation may remain preferable. In large-scale expropriations, however, particularly where the community engages in constitutive cooperation, the market value mechanism may not protect the community's future cooperation toward the realization of a shared conception of the good. Providing fair market value compensation to individual owners in these cases does not account for this loss of communality, and therefore is by itself an inadequate means for the state to fulfill its pluralistic obligation.

¹²⁸ Parchomovsky & Siegelman, *supra* note 32, at 84.

¹²⁹ *Id.* at 137.

¹³⁰ *Id.*

¹³¹ *Id.* at 138.

¹³² *See supra* note 40.

Legal scholars have proposed other takings remedies that compensate individuals for losses that go beyond the property's market value. Property scholar Robert Ellickson, has argued for a fixed premium in cases where a property's fair market value fails to cover the owner's subjective losses, by "award[ing] damages for the drop in market value plus a bonus award to compensate for loss of the commonly held irreplaceable consumer surplus."¹³³ For efficiency reasons, commentators generally seek to establish this additional compensation at a fixed rate, without any distinction made between different community members.¹³⁴ However, a fixed premium that uniformly indemnifies owners for personal losses may have little advantage over market value compensation in terms of redressing loss of communality. This is because a fixed premium does not distinguish among community members according to their involvement in the community, their contribution to maintaining cooperation, or their commitment to a shared conception of the good.

When a substantial number of community members are affected, as in Tipping expropriations, a variable premium could overcome the difficulties facing the fixed premium mechanism. A variable premium is more capable of recognizing the salient differences among members' contributions to cooperation and commitment to the community.¹³⁵ While it does not have the advantage of cost certainty attendant to market value or fixed premium compensation, this concern can be somewhat mitigated through the adoption of rules of thumb in lieu of calculating the actual loss suffered by each community member. For example, one such rule of thumb might concern the nature of the community member's property rights (owning versus renting) or provide proportionate increases in compensation to individuals based on the length of time they have lived in the community.¹³⁶

¹³³ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736 (1973).

¹³⁴ *Id.*; Parchomovsky & Siegelman, *supra* note 32, at 139.

¹³⁵ See Ellickson, *supra* note 133, at 737.

¹³⁶ Another assumption is that the longer one lives in a community, the more significant the role she plays in the community's continuation of cooperation, and the more she is affected by the loss of that cooperation.

Direct community resettlement is another potential remedy.¹³⁷ Application of a direct resettlement remedy requires the state to reestablish the community in a new location. Such application may range from complete resettlement, in which the state builds new homes for the expropriated property owners, to cases in which the government funds the building of the owners' new homes. Direct resettlement of a community may additionally require the state to fund (or to establish) common property (such as roads, playgrounds and social institutions). Like other takings remedies, resettlement seeks to put the owner in the same position she was in before her property was condemned, but shifts most of the burden from the owner to the state and challenges the implicit assumption of takings law that all property is fungible. The resettlement mechanism is also unique in that it creates an ongoing relationship between the government and property owner, rather than a one-time exchange of money and property. Breaking the link between money and property might placate critics concerned with commodification of property and community,¹³⁸ increase efficiency (especially because it saves the costs of evaluating subjective losses), and more importantly, fulfill the collective dimension of the state's pluralistic obligation.¹³⁹ On the other hand, the establishment of an ongoing relationship between the state and individuals who have been subject to expropriation creates financial uncertainty and entails significant negotiation and monitoring costs that exceed those associated with one-shot compensation. Therefore, the use of a direct resettlement remedy should be limited only to instances where the collective dimension of the state's pluralistic obligation arises. This would usually only be the case in Clearing and large-scale Tipping expropriations.

Finally, the government may provide indirect resettlement remedies that foster community rehabilitation. These indirect remedies are most likely to take the form of financial assistance or removal of bureaucratic barriers. For example, the government may provide tax benefits, exemptions from zoning regulations, special condition loans, or financial grants. Like direct

¹³⁷ See Parchomovsky & Siegelman, *supra* note 31, at 138.

¹³⁸ See discussion on anti-commodification in Part IV.B.

¹³⁹ See *supra* note 39.

resettlement, these remedies do not explicitly equate property with money and may reduce commodifying effects and evaluation costs for subjective losses. They also offer the community customized solutions without overstressing the state's resources. Moreover, indirect resettlement remedies may fulfill both the individualistic and collective dimension of the state's pluralistic obligation.¹⁴⁰

Indirect remedies, however, provide only limited and partial assistance—they do not offer a comprehensive solution for loss of communality. They do not guarantee any particular result. Along with uncertainty regarding property owners' abilities to use these forms of assistance, the state cannot easily monitor how a community uses these tools, leaving them prone to improper use.¹⁴¹ Moreover, the broadly applicable nature of indirect resettlement remedies raises concerns that the state may abuse these remedies by granting them in an unequal manner. Nevertheless, such remedies may provide a balanced solution for Tipping expropriations, which impair but do not completely prevent community members from realizing their shared conception of the good.

The allocation of these additional remedies should depend on the scope and scale of the government's exercise of eminent domain within the community as well as the three factors discussed in Part II. The overarching goal is to restrict the availability of additional compensation or in-kind remedies to communities whose members engage in cooperation that expresses the value of community in property and who stand to lose their ability to cooperate after their land is taken.

¹⁴⁰ *Id.*

¹⁴¹ One example of such an improper use may be trading in such benefits. For example, an owner who is entitled to a loan under special conditions (substantially better than those prevailing in the market) might trade the loan to profit from the interest rate differentials. Owners may also misuse planning easements, which allow them to deviate from certain construction restrictions. They may trade these benefits (for example, by selling their houses) for economic gain. While the state may restrict the trade in such benefits, such restrictions may hold only for a short period of time, before turning into a too heavy burden on individuals' autonomy to use their property rights.

B. Tying Remedies to a Community's Conception of the Good, Social Legitimacy, and Community Strength

The remedies outlined above should be applied in direct relation to the community's characteristics as outlined in Part II. With respect to the first factor—the role of cooperation in the community's ability to realize its members' shared conception of the good—the more significant the role of cooperation in the community's ability to realize its conception of the good, the greater the need for remedies that would allow the continuation of that cooperation. Thus, for example, communities that engage in constitutive cooperation are most likely to require remedies that facilitate the community's continued existence such as direct resettlement assistance. When, on the other hand, cooperation plays a relatively marginal role, monetary compensation is likely to be a satisfactory remedy, with the size of the premium contingent upon how marginal that role is. An examination of the role of cooperation should inquire into the extent to which the community has established communal institutions and customs in furtherance of its beliefs.¹⁴²

A community's social legitimacy also should impact the remedies it receives.¹⁴³ The availability of remedies should be contingent on either the extent to which the community is structurally open through MCB, or whether the community complies with the state's LMRs. If the community does neither, the state's pluralistic obligation is not triggered and the community's

¹⁴² See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 134-60 (1993) (“[C]ommunities form around institutions such as schools and community policing stations.”); David M. Chavis & J.R. Newbrough, *The Meaning of “Community” in Community Psychology*, 14 *J. CMTY PSYCHOL.* 335, 338 (2006); Robin S. Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 *YALE L. & POL’Y REV.* 527, 530 (1998) (“These institutions represent the efforts of individual neighborhood residents to identify and solve their own problems. They are, I contend, the voices of the community.”); William Sewell, *The Concept(s) of Culture, in BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE* 37, 55-57 (Victoria E. Bonnell and Lynn Hunt eds., 1999).

¹⁴³ See *supra* Part II.B.

members should not be entitled to any alternative takings remedies. A community ideally satisfies the social legitimacy requirement by allowing MCB, and in such cases should be entitled to a remedy designed to enable the community's continued functioning. Communities that comply only with state LMRs do not exhibit the same level of social legitimacy, and so the state should only be required to indirectly assist in their reestablishment.

The third factor, community strength, recognizes that the state's pluralistic obligation does not require intervention when the goal of this obligation—to allow all citizens to live in accordance with their values and beliefs—is not in jeopardy.¹⁴⁴ The selection of remedies, therefore, should depend on the community's ability to continuously realize its conception of the good post-expropriation without state assistance. Politically and economically strong communities are more likely to be able to rehabilitate themselves post-expropriation.¹⁴⁵ Because weaker communities are less able to counter the threat that expropriation poses to their realization of the good, the state's obligation should include a remedy that will foster the community's continued cooperation.

To summarize, the selection of remedies should primarily depend on the three factors discussed in Part II: the role of cooperation in the community's realization of a shared conception of the good, the community's social legitimacy, and the community's political and economic strength. Additionally, the scale and scope of the expropriation should be taken into account. Fair market value compensation is likely an adequate remedy in cases of Isolated takings that are not expected to significantly alter the community fabric. The additional remedies of fixed premiums and indirect resettlement assistance may be appropriate for Isolated and Tipping expropriations to remedy any loss of the affected members' ability to cooperate. These remedies, as well as variable premiums, should also be used for certain Clearing expropriations

¹⁴⁴ See *supra* Part II.C.

¹⁴⁵ These politically and economically strong communities are also less likely to be the target of condemnation. See *supra* notes 122–24 and accompanying text. Further, even when they become the subject of condemnation, these communities are more likely to fend off government takings at the outset.

where cooperation plays a less central role in the community's realization of its conception of the good, or the community is politically or economically strong or does not allow MCB. The level of assistance and size of the premiums should also vary depending on the extent of the community's fulfillment of the three factors. Finally, direct resettlement should also be available to certain communities subject to Tipping and Clearing expropriations depending on the interplay of the three factors discussed in Part II. For instance, direct resettlement would be appropriate for weak, MCB-compliant communities that engage in constitutive cooperation.¹⁴⁶

IV. COUNTERARGUMENTS ADDRESSED

This Part will address three potential counterarguments to the reform proposed in this article: (1) the subjective value argument, which questions the need of the state to compensate owners for the loss of subjective values embodied in their property rights; (2) the anti-commodification argument, which questions the desirability of distinct treatment of CICs in takings law, due to concerns about placing a price on communality; and (3) the neutrality argument, founded on a concern over the state's equal treatment of similarly situated actors and the possible abuse of benefits. These objections may explain why, despite the normative appeal of pluralism, alternative treatment of certain CICs has not yet been implemented. As I explain, however, none of these arguments

¹⁴⁶ Even direct resettlement may prove ineffective in certain scenarios, however, such as when the geographic location of a community is essential to its conception of the good. *See, e.g.*, BRIAN EDWARD BROWN, *RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND* 13 (1999) (“[B]ut if the reserve of their ancestors and the preservation of and access to Chota and other village sites of historical and cultural significance were dimensions of the religion that the Cherokees sought to protect, the heart of their complaint was the notion that the waters and land of the river valley were themselves sacred, holy realities that would be destroyed by the impending Tellico project.”). The use of such a remedy should be contingent upon the consent of the number of members needed for the community to continue realizing its conception of the good, which would vary from case to case.

justifies a uniform treatment of residential configurations in takings law.

A. Subjective Values Argument

The use of a single comprehensive remedy for all residential takings might be justified if differences among configurations are seen as dependent merely on owners' subjective preferences. According to this view, an owner's choice of residential configuration at least partially reflects her personal preference for particular values or ways of living. While expropriation may cost the owner more than just physical property, this additional loss is not compensable because of its subjective nature. While courts do not reject the possibility that such losses may occur and have acknowledged that property owners are not fully compensated in such cases, they reject additional compensation on the ground that it is too difficult to evaluate subjective losses.¹⁴⁷ Property scholar Brian Lee goes even further. He recently argued that the market value standard almost fully compensates for subjective losses.¹⁴⁸ According to Lee, the subjective losses that the market value standard does not cover are idiosyncratic, and there is reason to doubt whether people should in fact be compensated for such losses at all.¹⁴⁹

¹⁴⁷ See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule.").

¹⁴⁸ Brian A. Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 607–17 (2013) (Lee argues that owners' "subjective value" can be divided into several distinct types of values, such as sentimental value, alterations to the property made by the owner, location benefits, out of pocket expenses, information costs, potential gains from trade, and autonomy. Lee concludes that fair market value compensation does not neglect entire categories of condemnees' subjective value in their property—aside from the value of each condemnee's own autonomy—but instead provides at least partial compensation for a significant amount of that value).

¹⁴⁹ See *id.* at 616, 635–49. Lee also argues that market value does not include the loss of autonomy suffered by property owners as a result of their forced evictions. *Id.* at 615–16. However, this loss, to the extent it exists, is shared equally by all property owners who are subject to expropriation, and

The subjective nature of these additional losses, however, does not justify the existing takings remedy scheme. First, Lee's core principle, that society should not bear the costs of certain individuals' idiosyncratic losses, is of dubious validity. A state's obligation to ensure a pluralistic society may indeed require it to take into account, at least to some extent, its citizens' idiosyncrasies.¹⁵⁰ The obligation does not demand automatic recognition of any and all idiosyncratic values, but does require a careful evaluation of the connection between such values and an individual's choice of residential configuration.¹⁵¹ Second, the availability of in-kind remedies can overcome the difficulty of measuring the monetary value of subjective losses.¹⁵²

Finally, changing the treatment CICs receive in takings law is justified even accepting Lee's argument that subjective values are for the most part accounted for in a property's fair market value. This is because a property's fair market value is not always easily ascertained and additional compensation through in-kind remedies could alleviate this problem. As Lee demonstrates, calculating

therefore, as Lee argues, there is no reason to compensate any individual condemnees differently on this basis. *Id.* at 636–45.

¹⁵⁰ This, I argue, is especially important with respect to cooperation that is constitutive of a community's ability to realize its conception of the good. *See supra* Part II.A. Commitment to foundational pluralism as a source of the state's obligation to recognize differences between residential configurations in takings law differs from establishing such a claim on a social capital basis. Justifying differential treatment of residential configurations out of a commitment to pluralism is not dependent on these configurations' contributions to the social capital of society, but rather on the ability of owners to realize their conceptions of the good. Thus, such a justification avoids most concerns regarding the contribution of residential communities to social capital. *Cf.* Stern, *supra* note 5 (arguing that residential "micro-institutions", such as CICs, do play a role in increasing or decreasing social capital).

¹⁵¹ Such recognition should also be supported by autonomy-enhancing pluralists, who believe that a person's autonomous choices should be respected by the state. *See, e.g.,* Dagan, *supra* note 8, at xvii; Dagan, *supra* note 101, at 1412. Regarding a person's choice of a specific residential configuration as an expression of her autonomy raises questions for Lee as well, since he recognizes the loss of autonomy due to expropriation as compensable. *See* Lee, *supra* note 148, at 615.

¹⁵² *See supra* Part III.A.

takings compensation based on previous transactions involving identically configured properties indeed entails an implicit assessment of subjective losses, as the other owners would presumably have considered such losses when selling.¹⁵³ However, this assumption does not hold if there are few or no transactions involving other similarly situated properties.¹⁵⁴ Lee's argument against compensating for certain subjective losses calls for categorizing properties on the basis of whether there exists a sufficiently large market for identically configured properties and therefore encounters difficulties when, for example, an entire community is uprooted. In-kind remedies that would allow the continued existence and functioning of the community may be especially appropriate in these circumstances.

The existing comprehensive takings compensation formula, therefore, cannot be justified on the ground that the values underlying differences between residential configurations are merely subjective in nature. This standard disregards differences among residential configurations in a way that violates individual owners' property rights and, equally important, interferes with the ability of certain CICs to flourish.¹⁵⁵ A person's choice of residential configuration reflects her deeper commitment to certain fundamental values by which she desires to live. In a pluralistic society, the law should not ignore the different values informing such choices, even those which might be described as idiosyncratic.

B. Anti-Commodification Concerns

Commodification has become a focal point in delineating market boundaries and in the division of labor between the market

¹⁵³ *But see* Lee A. Fennell, *Just Enough*, 113 COLUM. L. REV. SIDEBAR 109, 112 (2013), http://columbialawreview.org/just-enough_fennell/ (“[T]here is reason to doubt that typical amounts of sentimental value and other individualized costs wind up in FMV.”).

¹⁵⁴ *See id.* at 113–14 (questioning Lee's logic even in the context of identical properties).

¹⁵⁵ *See supra* Part I.B.

and the state.¹⁵⁶ Using several different rationales, anti-commodification proponents object to substantial permeation of market norms into spheres, institutions, and relationships that traditionally are not open to sale. The two most prominent of these rationales are based upon concerns of corruption of values and economic coercion.¹⁵⁷ The commodification concern is found in

¹⁵⁶ Tsilly Dagan & Talia Fisher, *The State and the Market—A Parable: On the State's Commodifying Effects*, 3 PUB. REASON 44, 44 (2011).

¹⁵⁷ Michael Sandel first recognized two broad categories of anti-commodification arguments: corruption and coercion. See Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in 21 THE TANNER LECTURES ON HUMAN VALUES 89, 94–96 (Grethe B. Peterson ed., 2000). The corruption rationale essentially accords with a pluralistic understanding of society. As Elizabeth argues, “If different spheres of social life, such as the market, the family and the state, are structured by norms that express fundamentally different ways of valuing people and things, then there can be some ways we ought to value people and things that can't be expressed through market norms.” See ANDERSON, *supra* note 9, at xiii. The corruption rationale has both practical and normative aspects. The practical aspect posits that when values are cognitively incommensurable, people are unable to make certain value comparisons because they have no basis for determining how much of X to give up in exchange for Y. In other words, X and Y are measured on different scales, frustrating our ability to make any comparison between them. The normative aspect suggests that not only is it not practically possible to compare things that are evaluated on different scales, but any attempt to do so, in itself, corrupts the intrinsic meaning we give to these things, i.e., “certain moral and civic goods are diminished or corrupted if bought and sold for money.” Sandel, *supra* at 122. Indeed, such an attempt “points to the degrading effect of market valuation and exchange on certain goods and practices.” *Id.* Out of a commitment to foundational pluralism, this understanding assumes the existence of different spheres, wherein people are able to use different modes of evaluation. Given the existence of different spheres, valuations or exchanges, metrics from one sphere will necessarily invade or crowd out other modes of evaluation or comparison. Such an exchange is corrupting when it ignores the differences between these spheres of valuation and forces us to value all goods in the same manner.

Quite a different rationale for objecting to the adoption of market mechanisms in non-market spheres involves the fear that people will be forced to act in a way that they naturally oppose. Glenn Cohen splits Sandel's coercion argument into two sub-arguments, which differ in the type of harm caused by the transaction that is emphasized. The first, which Cohen terms the “voluntariness” argument, asks whether consent to the transaction was truly voluntary given the seller's socioeconomic status. For instance, the poor may be

many areas of research such as inter-personal relationships,¹⁵⁸ personal gestures,¹⁵⁹ education,¹⁶⁰ health,¹⁶¹ and culture.¹⁶² Our

forced to sell their valuable assets, only because they will not be able to resist the monetary reward. The second sub-argument Cohen raises, the “access” argument, differs from the first one in that it does not examine the seller’s condition but rather that of the purchaser. Here, the focus is on unequal access to the goods, given an unfair background distribution of those goods. The concern is that only some will be able to afford the good if it is commodified, “that surrogacy will be used for the benefit of the rich at the expense of the poor.” This is quite a different argument and expands the meaning of coercion to encompass the economic improbability of certain individuals purchasing goods. Although these two arguments differ from each other, they both are based on the existence of fundamental economic inequality in society. For each argument, the concern over market expansion into spheres of life generally perceived to be outside the reach of the market reflects the will to avoid spreading economic inequality into these spheres. See Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 690-91 (2003).

¹⁵⁸ See, e.g., MARGARET J. RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS 3-4, 97-98 (1996).

¹⁵⁹ See, e.g., Nancy Folbre & Julie A. Nelson, *For Love or Money—Or Both?*, 14 J. ECON. PERSPS. 123 (2000); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907 (1986); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000).

¹⁶⁰ See, e.g., Rajani Naidoo & Ian Jamieson, *Knowledge in the Marketplace: The Global Commodification of Teaching and Learning in Higher Education*, in 16 INTERNATIONALIZING HIGHER EDUCATION: CERC STUDIES IN COMPARATIVE EDUCATION 37 (Peter Ninnes & Meeri Hellstén eds., 2005); Rajani Naidoo, *Repositioning Higher Education as a Global Commodity: Opportunities and Challenges for Future Sociology of Education Work*, 24 BRIT. J. SOC. EDUC. 249 (2003); Anthony R. Welch, *For Sale, by Degrees: Overseas Students and the Commodification of Higher Education in Australia and the United Kingdom*, 34 INT’L REV. EDUC. 387, 388 (1988); Hugh Willmott, *Managing the Academics: Commodification and Control in the Development of University Education in the U.K.*, 48 HUM. RELS. 993 (1995).

¹⁶¹ See, e.g., Ronald L. Caplan, *The Commodification of American Health Care*, 28 SOC. SCI. & MED. 1139 (1989); Arthur W. Frank, *What’s Wrong with Medical Consumerism?*, in CONSUMING HEALTH: THE COMMODIFICATION OF HEALTH CARE 13 (Saras Henderson & Alan R. Petersen eds., 2002).

¹⁶² See, e.g., Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in RETHINKING COMMODIFICATION: CASES AND READING IN LAW AND

handling of these relationships and institutions should therefore be sensitive to commodifying effects, which can harm the meaning we attach to them.

The thrust of the anti-commodification corruption argument is that when the government takes an individual's property for the public's benefit and monetarily compensates the individual, the property in question is commodified, since it indicates that the property is interchangeable with a fixed amount of money.¹⁶³ In this regard, "[t]he notion of eminent domain constitutionalizes fungibility."¹⁶⁴ If we accept the pluralistic conception of property ownership—that property ownership can reflect several different values (such as community, autonomy, and personhood), then treating property and money as interchangeable is particularly problematic. Eminent domain thus commodifies not just the physical property taken, but also commodifies and thus corrupts the values owners wish to express through it.

Moreover, according to the anti-commodification argument, the corrupting effects of takings are not limited to the specific act of condemnation. Current takings remedies, which declare that property, any property, is interchangeable with money, affect society's perception of property. Anti-commodification proponents argue that it is only reasonable to assume that if the state treats property as a commodity, regardless of its meaning to the owner's personhood or identity, the public will view property the same way and act accordingly. According to a pluralistic conception of property, such an understanding of property is problematic, since it robs property of whatever deeper values its owners (and society) might attribute to it.

CULTURE 178 (Martha M. Ertman & Joan C. Williams eds., 2005); Bruce Prideaux, *Commodifying Heritage: Loss of Authenticity and Meaning or an Appropriate Response to Difficult Circumstances?*, 3 INT'L J. TOURISM SCI. 1 (2003).

¹⁶³ See MARGARET JANE RADIN, REINTERPRETING PROPERTY 136 (1993) ("In assuming that compensation is an appropriate corrective measure, that it can be 'just' or make owners whole, the current idea of eminent domain assumes that *all* property is fungible—that property by nature or by definition consists of commodities fully interchangeable with money.").

¹⁶⁴ *Id.*

By increasing the number of variables to which a government should attach value when it expropriates private property, the proposed takings regime might at first blush seem to increase the commodification of property. But a closer examination of the situation reveals that the reform would not exacerbate, but instead blunt commodification effects.

First, establishing a range of remedies beyond fixed monetary compensation would allow the state to appropriately tailor the remedy to the affected individual or community based on the community's distinct characteristics. The availability of in-kind remedies would actually *reduce* the commodifying effects of government takings. By rejecting the premise of market value compensation—that all property is interchangeable with money—and taking into account the different characteristics and underlying values of CICs, an alternative remedies scheme would allay commodification concerns. While unraveling the relationship between money and property would not completely eliminate the commodifying effects inherent in government takings, it would curtail the corrupting effects of the existing legal regime.

Nor would compensation for loss of communality exacerbate the second concern related to commodification: coercion arising from economic inequality. Distinguishing among communities involves the use of various compensation mechanisms and other remedies to address the additional losses that a community's members might suffer due to expropriation. Some of these remedies are likely to take the form of compensation in excess of a property's fair market value, or alternatively, non-monetary benefits that may be translated into actual or potential economic gains. One could make an anti-commodification argument that these "surpluses" will incentivize both property owners and expropriating authorities to participate in eminent domain proceedings that involve special remedies. A race to the bottom may occur where economically disadvantaged communities compete with each other to transfer their property to the state in exchange for an attractive surplus of monetary compensation. In addition, providing remedies that compensate property owners beyond market value may also remove the significant, if not insurmountable, cognitive barrier that state actors face when they seek to condemn properties, and the removal of this barrier could

potentially lead to more, and larger, expropriations.¹⁶⁵ Providing the state with multiple remedies for expropriation—some of which exceed the property's market value—could break this barrier, incentivizing the state to further expropriate residential communities' property. Thus, ironically, incorporation of the significance of CICs into takings law may lead to more expropriation in such communities. Yet, these concerns are also mitigated by the expansion of the range of remedies' and by the reforms sensitive to the characteristics of given communities.

A race to the bottom, however, should occur only when property owners can reliably expect to receive surplus compensation. Under the proposed reform, each community would be granted different, individually-tailored remedies. Thus, a community or property owner would have no guarantee of extra monetary compensation, alleviating concerns over a race to the bottom. Furthermore, the higher cost of implementing these tailored remedies should allay concerns that the proposal incentivizes the state to more readily expropriate property. As discussed in Part III, differential treatment of residential communities in takings law entails additional costs that exceed those imposed on the state under current law. While these additional costs may be justified to fulfill the state's pluralistic obligation, they nevertheless serve as a new barrier to expropriation. Therefore, while the proposed reform may break the behavioral barrier to expropriations that under-compensation creates, a new economic barrier—based on the higher costs of the proposed reform's remedies—should diminish fears of increased expropriation.

¹⁶⁵ This cognitive barrier may be explained both in behavioral terms and in economic terms. Assume that a state is planning to build a hospital and has located two potential plots to build on. Plot A serves a residential community that we may assume, for the sake of this example, maintains constitutive cooperation. Plot B, on the other hand, is home to an abandoned factory. In both cases, the market value of the property equals \$500,000. The cognitive barrier is expected to lead the government actor to prefer to expropriate plot B since full compensation will be possible. Although a decision to expropriate plot A would also require payment of only \$500,000, it would leave the owners undercompensated. For such a cognitive barrier, see Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

C. Maintaining State Neutrality

According to the neutrality argument, the state, within certain limits, should remain neutral in regard to how people choose to live their lives, including how people decide to own and use their property. Consequently, the state should be reluctant to compensate differently individuals in various CICs because such distinctions might be interpreted as the state favoring one residential configuration over another.

The neutrality argument has deep roots in American political tradition, culture, and property law, and so cannot be easily dismissed.¹⁶⁶ Most proponents of the neutrality argument hold that neutrality means the state should not involve itself in subjective or idiosyncratic measures of value. Yet establishing a takings remedy scheme that redresses additional harms that CICs incur would actually preserve state neutrality rather than undermine it. This proposal rejects the interpretation of neutrality as a complete withdrawal of the state from involvement in the determination of ownership forms or from its obligation to allow such forms to exist. Instead, neutrality should be reinterpreted as an opportunity for the state to fulfill its pluralistic obligation and to allow citizens to freely choose their desired property arrangements.

A government's attempt to remain neutral by adopting a completely passive role may actually disfavor certain conceptions of the good by making their pursuit difficult or impossible. Thus, in order to fulfill its pluralistic obligation, the state should be required to actively ensure the existence and survival of various residential configurations. But can a state that actively supports a diversity of residential configurations remain neutral? Joseph Raz argues that political neutrality is best interpreted as a state's disinclination to either promote one conception of the good or to direct a person to choose one conception of the good over another.¹⁶⁷ Accounting for loss of communality in takings law is consistent with both of these interpretations of political neutrality.

¹⁶⁶ See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 239–40 (2002); RAWLS, *supra* note 11, at 19–92.

¹⁶⁷ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 114–15 (1986).

The proposal offered in this Article would not promote a particular conception of the good. If anything, it would push against the impression that individualistic residential configurations are the only means of achieving the good life. By incorporating the distinct characteristics of CICs into takings law, the state would actually restore the balance between different residential configurations, putting all of them on equal footing. Such an approach does not change the likelihood that a person will endorse one conception of the good over another. The availability of alternative remedies would probably not inordinately increase the number of people living in highly cooperative communities as living in those communities would still involve significant restrictions on individual property rights. Rather, it would promote neutrality by removing the structural bias against such communities which, under the current scheme, are uniquely at risk of under-compensation for community-related losses.

Finally, the individualistic nature of the existing compensation scheme in takings law does not ensure all citizens' ability to live by their values and beliefs. An alternative remedy scheme that gives meaning to individuals' choices of residential configurations would promote state neutrality. By disregarding the unique characteristics of more cooperative communities, current takings law sends a clear message concerning the state's preference for individualistic forms of ownership. This message may have a twofold effect on individual owners. First, it may prevent them from choosing to reside in CICs in the first place. Second, and equally troubling from the standpoint of foundational pluralism, it may affect the way in which owners manage these communities, threatening the communities' cooperative nature.¹⁶⁸ In order for the state to become truly neutral—to “ensure for all persons an equal

¹⁶⁸ When the law conceives of property in purely individualistic terms, it hinders people's ability to treat or think of property any differently. Many people may be discouraged from trying to live in accordance with views of property ownership that are at odds with the monistic individualist understanding of property that underlies existing property law. For example, the conditions, covenants, and restrictions (CC&Rs) of a CIC may not include any demand for sacrifice on behalf of owners for the sake of community, or even reciprocal relationship, as such demand may harm the individualistic understanding of property ownership.

ability to pursue in their lives and promote in their societies any ideal of the good of their choosing”¹⁶⁹—the law should take into account the distinct characteristics of less individualistic forms of ownership. The concept of state neutrality thus actually supports accounting for communal loss.

CONCLUSION

When the government takes property, individuals who live in highly cooperative common interest communities face an especially large risk of being short-changed under the existing takings scheme, which merely provides them with the fair market value of the condemned property. This Article proposes guidelines for reforming takings law to provide additional remedies to members of these communities to compensate them for their loss of communality. The guidelines involve consideration of three important factors, namely, the role of cooperation in a community’s realization of a conception of the good; the community’s social legitimacy as determined primarily by its structural openness; and the political and economic strength of the community. Alternative remedies may take the form of fixed and variable monetary premiums that compensate individuals beyond the fair market value of the condemned property, and in-kind remedies, such as direct community resettlement and indirect assistance with resettlement.

The proposed guidelines are sensitive to the characteristics of each community in question, recognizing that there is great variation even among common interest communities. Insofar as we accept that an individual’s choice of residential configuration tells us something about her values, preferences, and relationships with others, we need to incorporate this vision into our laws. The proposed guidelines further the state’s obligation to ensure a pluralistic society.

Property law is a social instrument. It should not be detached from our social values, but should facilitate individuals’ ability to pursue their vision of the good life through cooperation. The law in general, and property law in particular, plays a critical role in

¹⁶⁹ RAZ, *supra* note 167, at 115.

enabling social diversity. The proposed guidelines contribute to that effort.