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HOME AS A LEGAL CONCEPT

D. Benjamin Barros*

I. INTRODUCTION

"Home" is a powerful and rich word in the English language. As our cultural cliché "a house is not a home" suggests, "home" means far more than a physical structure. "Home" evokes thoughts of, among many other things, family, safety, privacy, and community. In the United States, home and home ownership are held in high cultural esteem, as American as apple pie and baseball. With our society's evolution beyond its agrarian origins, the home has replaced land as the dominant form of American property.[1] As a result, we have developed something of an ideology of home where the protection of home and all it stands for is an American virtue.[2]

This article is about the legal concept of home and how homes often are treated more favorably by the law than other types of property. Houses are expressly protected by the

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1. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 4 (2001) (noting that for most Americans their home is their most valuable asset).

2. *See, e.g.*, Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326-27 (1998) (discussing the American ideology of home); CONSTANCE PERIN, EVERYTHING IN ITS PLACE 72 (1977) (quoting Calvin Coolidge: "No greater contribution could be made to the stability of the Nation, and the advancement of its ideals, than to make it a Nation of homeowning families.").

This article focuses on home as an American legal concept. For discussion of the concept of home in English law, see Lorna Fox, *The Idea of Home in Law*, 2 HOME CULTURES 25 (2005), and Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. SOC'Y 580 (2002).

Third and Fourth Amendments to the Constitution,[3] and homes are given more protection than other types of property, such as cars, in search and seizure law.[4] The federal tax code strongly favors homeownership over home rental and ownership of other types of property.[5] Post–foreclosure rights of redemption and just cause eviction statutes protect the possession of a home in debtor-creditor law and landlord-tenant law.[6] Other examples abound.

On a general level, special legal treatment of homes is neither surprising nor controversial. Homes are different in meaningful ways from other types of property, and their unique nature justifies a favored legal status in many circumstances. This article, however, seeks to move beyond the intuitive and cultural-ideological sense that homes are unique, and to examine in more detail whether and why homes are deserving of favored treatment in different legal contexts.

To do so, this article breaks the legal concept of home into component parts, organizing legal issues involving the home into two general categories: those relating to safety, freedom, and privacy, and those relating to possession. To gain insight into the interests involved in various legal contexts, this article also draws on materials from the cultural history of home and the psychology of home.[7] Ideas of home, privacy, and family, as currently understood, evolved together in the late Middle Ages, and this cultural history is relevant to

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3. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . . ."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

4. *See infra* Part II.B.

5. *See infra* notes 191-94 and accompanying text.

6. *See infra* notes 129-34 and accompanying text.

7. The literature on the psychology of home is dominated by theoretical essays, and there are relatively few empirical studies that have looked into the psychological relationship of actual people to their homes. *See* Sandy G. Smith, *The Essential Qualities of A Home*, 14 J. ENVTL. PSYCH. 31, 31 (1994) (providing both a review of the theoretical literature and the results of an empirical study); Jerome Tognoli, *Residential Environments*, *in* 1 HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 655 (Daniel Stokols & Irwin Altman eds., 1987) (discussing a theoretical framework for understanding work centering on residential environments). By-and-large, however, the theory and empirical evidence are consistent, and it is possible to identify broad themes about how people relate to their homes on a psychological level. These themes are incorporated into the discussion that follows.

issues in both privacy and family law. Similarly, ideas like privacy, security, family, and continuity are deeply rooted in the psychology of home, which reflects and reinforces the values inherent in the contemporary cultural idea of the home and, unsurprisingly, are reflected in many of the unique legal protections given to the home.

Following the structure outlined above, Part II examines the home as a source of security, liberty, and privacy.[8] These interests, encapsulated in the common-law maxim "A man's home is his castle," are implicated in a group of related areas of law where homes are clearly favored over other types of property. For example, in tort law and criminal law, acts of self-help in the defense of a home are expressly permitted in most jurisdictions. Homes also are given favored treatment in search and seizure law, and their importance to the Founders is reflected in the language of the Fourth Amendment. Consistent with the intimate relationship between the cultural ideas of home and privacy, homes are given favored treatment in privacy law. In all of these areas, the protection given to homes has limits. The government, for example, may intrude into the private sphere of the home in a number of contexts if it has a strong reason to do so. Notwithstanding those limits, the pervasiveness of the special treatment of homes in these contexts suggests the existence of a strong cultural consensus that homes are uniquely important when issues of security, liberty, and privacy are at stake.

Part III discusses the personal connection between individuals and their homes in the context of legal issues involving the possession of homes.[9] It begins with an analysis of the strength of the personal possessory interest in a home—that is, the interest of a person in staying in possession of a particular home in a particular place. This analysis uses, as a starting point, Margaret Jane Radin's personhood theory, which argues that the possession of homes should be favored against competing interests on the basis of an intuitive view that people become personally connected to their homes.[10] Looking in part to the psychology of home,

8. *See infra* Part II.
9. *See infra* Part III.A.
10. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV.

Part III's analysis suggests that while the personal possessory interest in the home is real and deserving of legal protection, it is not as strong as Radin's intuitive view would suggest.

Part III then examines a series of legal issues involving the possession of a home, weighing in each circumstance the relative strength of the possessory interest in the home against competing interests.[11] This part notes that some areas of landlord-tenant law (for example, just cause eviction statutes) and debtor-creditor law (for example, post–foreclosure rights of redemption) strike an appropriate balance between the possessory interest in the home and competing interests.[12] Other areas of law, particularly residential rent control and certain homestead exemptions, tilt the scale too far in favor of the resident's interest in possession.[13] Still other areas of law, notably eminent domain law and the post–divorce property distribution rules applicable in some jurisdictions, under-protect the personal interest in the home.[14]

Part IV focuses on the normative issue of whether homes that do not fit the archetypal single-family, owner-occupied suburban home should be treated differently by the law than homes that do fit the archetype.[15] The obvious answer in most circumstances is "no," and "home" as used in this article, unless otherwise qualified, includes any type of permanent dwelling, whether rented or owned, and whether occupied by one person or by a family or group of any sort. In some circumstances, however, a justifiable distinction may be made between owned and rented homes. For example, disparate treatment makes sense in legal issues that concern the inherent difference between freehold estates and tenancies. In other circumstances, policies favoring ownership, such as the treatment of mortgage interest and capital gains on homes by the Internal Revenue Code, may be justified on the republican ground that homeowners are more involved citizens than home renters. The mere existence of these

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957 (1982) [hereinafter Radin, *Property and Personhood*].

11. *See infra* Part III.B.
12. *See infra* Part III.B.1.
13. *See infra* Part III.B.2.
14. *See infra* Part III.B.3.
15. *See infra* Part IV.

justifications, however, does not mean that favoritism of ownership is warranted in a particular circumstance. Disparate tax treatment of owned and rented homes can have negative consequences that may outweigh the benefits of encouraging ownership.[16]

This article ultimately concludes that while homes are different from other types of property, the unique nature of the home justifies additional legal protection in some, but not all, circumstances. The result for any particular legal issue depends on the relative strength of the interests in the home as measured against competing interests. In many areas of the law, such as those involving freedom and privacy, the additional legal protections given to homes is justified by their unique nature. In other areas, however, a close analysis reveals that the law overprotects or under-protects the home. In each case, striking the correct balance requires consideration of only the interests in the home relevant to the issue at hand, rather than the entirety of a broader intuitive or ideological conception of the home.

II. HOME AS CASTLE: SECURITY, LIBERTY, AND PRIVACY

One of the most pervasive clichés in the common law is that a man's home is his castle. The protection of liberty is a key element generally in Western theories of property,[17] but this doctrine encapsulates the idea that homes are different from other types of property when issues of personal security, freedom, and privacy are at stake. The pervasiveness of the castle doctrine and of the special treatment of homes by the law in these areas are reflective of a cultural consensus to protect homes as unique zones of individual safety, autonomy, and privacy. Indeed, the modern idea of the home developed hand-in-hand with the modern idea of privacy,[18] and interests in safety, freedom, and privacy are strongly reflected in the psychology of home.[19] The existence of this cultural

16. *See infra* notes 191-94 and accompanying text.

17. *See* Eduardo Moisès Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890 n.1 (2005) (collecting examples of liberal theories of property).

18. *See infra* Part II.C.

19. The physical structure of a home provides shelter and physical safety. Smith, *supra* note 7, at 33-34; Karin Zingmark, Astrid Norberg, & Per-Olof Sandman, *The Experience of Being at Home Throughout the Life Span; Investigation of Persons Aged From 2 to 102*, 41 INT'L J. AGING & HUM. DEV. 47,

consensus, however, does not mean that interests in safety, freedom, and privacy always trump competing interests. The following subsections explore the role of these interests and their limits in criminal law, tort law, criminal procedure, and privacy law.

A. *Security Against Other Individuals*

By their physical nature, homes provide their inhabitants with a measure of security against attack or invasion by other individuals. But more important to personal security than locks or alarms is the additional protection given to homes by the law. As Charlotte Perkins Gilman observed, "Our safety is really insured by social law and order, not by any system of home defence. Against the real dangers of modern life the [physical] home is no safeguard."[20]

The legal protection given to the security of homes can be divided into two major categories. First, the law privileges certain acts of self-help made in defense of the home that would in another context be criminal or tortious. Second, the law imposes criminal sanctions upon individuals who invade a home, and these sanctions are significantly greater than those imposed for invasions of other types of property.

The legal doctrine that a man's home is his castle has its common-law origins in cases dating back to at least 1505 involving the right to defend a home against invasion by other private individuals.[21] In *Semayne's Case*, decided in

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50 (1995). The physical space of the home also is a source of privacy and of related feelings of comfort and freedom. Smith, *supra* note 7, at 32 ("[The] feeling of control within the home is salient for most people, and is linked to the satisfaction of basic psychological needs."); Zingmark, Norberg, & Sandman, *supra*, at 50. An empirical study of American attitudes towards privacy reported that invasions of homes generally, and bedrooms in particular, were widely perceived as very significant invasions of privacy. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized By Society"*, 42 DUKE L.J. 727, 738-39 (1993).

20. CHARLOTTE PERKINS GILMAN, THE HOME, ITS WORK AND INFLUENCE 32 (1903).

21. William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602-1791, xciv (1990) (unpublished Ph.D. dissertation, Claremont Graduate School). Similar doctrines recognizing the special status of the home existed in a number of ancient legal traditions. *See id.* at xcii-xciv; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 14-15 (1934). For example, the Code of Hammurabi permitted the killing of housebreakers, as did Anglo-Saxon and

1604, the court held that:

> [T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favoured in law; . . . if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.[22]

The privilege of defense of the home continues to the present, and the castle doctrine has played a significant part in the rule, applicable in many states, that a person need not retreat when attacked in the home.[23] Judge Cardozo explained the reasons for the exception, using language highlighting the unique nature of the home, in *New York v. Tomlins*:

> It is not now, and never been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.[24]

Norman law. *See id.* at 14-19.

22. Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.).

23. *See* PROSSER ON TORTS § 19 (5th Lawyer's ed. 1984) ("In [some] states, the ancient rule that there is no obligation to retreat when the defendant is attacked in his own dwelling house, 'his castle' has been continued. This rule is apparently based on 'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.'").

24. New York v. Tomlins, 213 N.Y. 240, 243 (1914). Another eloquent statement of this rule, made in an advocacy context, comes from Clarence Darrow's closing argument in *People v. Henry Sweet*, where he defended a black man against murder charges arising from the defense of his home against a white mob:

> The first instinct a man has is to save his life. He doesn't need to experiment. He hasn't time to experiment. When he thinks it is time to save his life, he has the right to act. There isn't any question about it. It has been the law of every English speaking country so long as we have had law. Every man's home is his castle, which even the King may not enter. Every man has a right to kill to defend himself or his family, or others, either in the defense of the home or in the defense of themselves.

Closing argument of Clarence Darrow in the case of *People v. Henry Sweet*, http://www.law.umkc.edu/faculty/projects/ftrials/sweet/darrowsummation.html (last visited Dec. 2, 2005).

Cardozo's opinion in *Tomlins* contains a short survey of authority holding that there is no duty to retreat in the home. *Tomlins*, 213 N.Y. at 243-

The importance of homes to personal security also is reflected in the penalties imposed in criminal law as punishment for invasion of a home, which generally exceed the penalties imposed for invasions of other types of property. The additional protection given to homes in criminal law has a long history in the common law—indeed, at common law, the crime of burglary was concerned exclusively with invasions of homes[25]—and is widely reflected in contemporary

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44. Although Cardozo held that the rule was the same when the attacker also is an occupant of the home, *id.* at 244, the analysis of the duty to retreat can be more complicated in intra-domestic disputes because the attacker has the legal right to be in the home. *See generally* Weiand v. State, 732 So. 2d 1044, 1051 nn.8-9 (Fla. 1999) (providing a broad survey of the law in various jurisdictions in the United States on this issue); Linda A. Sharp, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R. 5th 637 (1999); Melissa Wheatcroft, *Duty to Retreat for Cohabitants—In New Jersey A Battered Spouse's Home is Not Her Castle*, 30 RUTGERS L.J. 539 (1999); *see also State v. Gartland*, 694 A.2d 564, 569-71 (N.J. 1997); Beth Bjerregaard & Anita N. Blowers, *Chartering a New Frontier for Self-Defense Claims: The Applicability of the Battered Person Syndrome as a Defense for Parricide Offenders*, 33 U. LOUISVILLE J. FAM. L. 843, 870-71 (1995). The duty to retreat has been particularly controversial in cases involving victims of domestic violence who kill their batterers. The majority of jurisdictions have held that there is no duty to retreat in the home in these cases, in part because a person in her own home has no further place to which to flee. *See, e.g.*, People v. Lenkevich, 229 N.W.2d 298 (Mich. 1975); People v. Emmick, 525 N.Y.2d 77, 78 (N.Y. App. Div. 1988); State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997); Commonwealth v. Derby, 678 A.2d 784, 784-87 (Pa. Super. Ct. 1996); MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (2002). The contrary view is that a person should have to retreat in the home in cases of attack by a cohabitant if retreat can be accomplished safely. *See, e.g.*, *Gartland*, 694 A.2d at 571; State v. Pontery, 117 A.2d 473, 475 (N.J. 1955); *Thomas*, 673 N.E.2d at 1347 (Pfeifer & Cook, JJ., dissenting); State v. Quarles, 504 A.2d 473, 476 (R.I. 1986); *see also* Wheatcroft, *supra*, at 551 & n.52 (discussing jurisdictions following the minority view). In domestic abuse cases, however, the history of violence makes it at best doubtful that safe retreat is possible. *See Thomas*, 673 N.E.2d at 1343; Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN'S RTS. L. REP. 101, 112-13 (1993); *see also Gartland*, 694 A.2d at 571 (criticizing a statute that required a duty to retreat inside the home because retreat is unrealistic and unfair in cases involving a history of abuse). That said, the statement made by the majority in *Thomas* that "[t]here is no rational reason to make . . . a distinction . . . between cases in which the assailant has a right equal to the defendant's to inhabit the residents and cases in which the assailant is an intruder," goes too far. *Thomas*, 673 N.E.2d at 1343. There is an obvious reason to make such a distinction—the cohabitant has an equal right to be in the home. A more accurate statement would have been that there are reasons to make that distinction, but, particularly in cases involving a history of abuse, these reasons do not outweigh the victim's right to defend against an attacker without retreat in the home.

25. *See* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 325, at 251 (15th

criminal statutes.[26]

B. Security Against the Government and the Fourth Amendment

The castle doctrine is a frequent feature in contemporary cases involving governmental searches of a home. Ironically, however, at the time of the origins of the castle doctrine, the home was expressly held not to be impervious to invasions by the government, which was viewed as having virtually "absolute powers of search, arrest, and confiscation."[27] In *Semayne's Case*,[28] the court began by stating that the castle doctrine privileged the killing of thieves invading a home, but then immediately stated, "[i]n all cases where the King is party, the sheriff (if the doors be not open) may break the house, either to arrest or do other execution of the King's process."[29]

Gradually, however, the castle doctrine began to be used as a rhetorical tool by those resisting government invasions of the home. In 1663, three Rhode Islanders told a constable

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ed. 1995) (noting that only invasions of homes were the subject of common-law burglary); WAYNE R. LAFAVE, CRIMINAL LAW § 21.1(c), at 1022 (4th ed. 2003) (same); *see also* Thomas Y. Davies, *Rediscovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642 n.259 (1999) ("The common-law felony of burglary also demonstrated the unique status of the house. As a general rule, attempt offenses (conduct committed "with intent" to inflict a harm) were only misdemeanors at common law; however, breaking into a house at night with intent to commit a felony was a felony."). Similar protection of the home was reflected in Anglo-Saxon law, which "recognized the crime of *hamsocn* (or *hamfare*), an offense solely concerned with an offense the whole gist of which was solely the forcible entry into a man's dwelling, a *'domus invasion.'* Throughout the laws of Anglo-Saxon and Norman times this offense was looked upon with great severity, justifying the killing of the perpetrator in the act without the payment of compensation usual in those days." LASSON, *supra* note 21, at 18-19. Similarly, the common-law crime of arson focused on homes, as opposed to other types of structures. *See* TORCIA, *supra*, § 339, at 333; LAFAVE, *supra*, § 21.3(c), at 1041.

26. *See, e.g.*, MODEL PENAL CODE § 22.1(2) (2002) (providing that invasion of a home is subject to a higher level of punishment than other types of burglary); *accord* CAL. PENAL CODE § 460 (Deering 2005); *accord* N.Y. PENAL LAW §§ 140.20, 140.25 (McKinney 2004); *accord* S.C. CODE ANN. §§ 16-11-311, 16-11-312, 16-11-313 (West 2005); *see also* LAFAVE, *supra* note 25, § 21.1(g), at 1026 (noting that the fact that a home is involved is a common aggravating factor in modern burglary statutes).

27. Cuddihy, *supra* note 21, at xcix (discussing Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.)).

28. *Semayne's Case*, 77 Eng. Rep. 194.

29. *Id.* at 195.

attempting to serve a warrant "that 'they . . . were Resoulffed to knock Down any man that should pry in upon them for their howse was ther Castle.'"[30] By the Revolutionary War era a century later, the castle doctrine was often used in rhetoric against abuses of government power.[31] Two prominent and influential examples of this usage stand out. According to John Adams's notes of James Otis's argument in the 1761 Writs of Assistance Case, Otis argued that the writ at issue was "against the fundamental Principles of Law" because "[a] Man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and civil Process of any kind."[32] Two years later, in a speech to Parliament, William Pitt used the castle doctrine to make a powerful rhetorical statement for the primacy of even the most humble individual at home against the power of the King:

> The poorest man may in his cottage bid defiance to all the

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30. Cuddihy, *supra* note 21, at xcvii (quoting Rhode Island court record dated May 16, 1663).

31. *Id.* at xcvii; *see also* Davies, *supra* note 25, at 642-50; LEONARD W. LEVY, ORIGINAL MEANING AND THE FRAMERS' CONSTITUTION 234-35 (1988).

32. 2 LEGAL PAPERS OF JOHN ADAMS 125-26 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). As Leonard Levy has noted,

> [a]ny fastidious legal historian must acknowledge that Otis's argument compounded mistakes and misinterpretations. In effect, he reconstructed the fragmentary evidence buttressing the rhetorical tradition against general searches, and he advocated that any warrant other than a specific one violated the British constitution. That Otis distorted history is pedantic; he was making history.

LEVY, *supra* note 31, at 227. Adams himself used the castle doctrine in arguments he made as a legal advocate:

> An Englishmans dwelling House is his Castle. The Law has erected a Fortification round it—and as every Man is Party to the Law, i.e. the Law is a Covenant of every Member of society with every other Member, therefore every Member of Society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery . . . .
>
> Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave . . . .

1 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 137 (quoting Adams's notes of his argument in the 1774 case *King v. Stewart*).

> forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![33]

As a result of this type of rhetoric, the castle doctrine radically changed meaning over the course of two centuries, as "'A man's house is his castle (*except* against the government)' yielded to 'A man's house is his castle (*especially* against the government).'"[34]

In this new form, the castle doctrine was an important intellectual foundation of the Fourth Amendment.[35] More generally, the sanctity and special nature of the home were issues of critical importance to the Framers. As Thomas Y. Davies has written, the "historical record . . . reveals that the Framers focused their concerns and complaints [about government searches and seizures] rather precisely on searches of houses under general warrants,"[36] and reference to the importance of home was common in Revolutionary-era rhetoric attacking excessive government searches.[37] The

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33. William Pitt, Earl of Chatham, Speech on the Excise Bill (1763), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 312 (16th ed. 1992).

34. Cuddihy, *supra* note 21, at c.

35. *See* Weeks v. United States, 232 U.S. 383, 390 (1914); LEVY, *supra* note 31, at 222; Davies, *supra* note 25, at 642-50; Cuddihy, *supra* note 21, at xc-c; *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 365 (1868) (stating that the common-law maxim that "every man's house is his castle," which "secures to the citizen immunity in his home against the prying eyes of the government," has been incorporated into the Fourth Amendment); Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 175 (2002) (discussing the relationship of the castle doctrine to the Fourth Amendment).

36. Davies, *supra* note 25, at 601.

37. *Id.* at 601-03. Press accounts of the Wilkesite trials in England, which squarely presented the issue of government power to search a home, were widely disseminated in the Colonies and often featured references to the sanctity of the home. *Id.* at 564, 602. James Otis's arguments against the general warrant, quoted above, focused on the home, *see supra* note 35 and accompanying text, as did a report of a Boston town meeting usually attributed to Samuel Adams, *see* Davies, *supra* note 25, at 603 n.139:

> [O]ur homes and even our bedchambers, are exposed to be ransacked, our boxes, chests & trunks broke open ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they *suspect* there are in the house wares etc. for which the dutys have not been paid.

unique nature and importance of homes is reinforced by the fact that Revolutionary-era critics tended not to object as strongly when other types of property, such as warehouses and ships, were subject to oppressive searches by British authorities.[38] Homes were also treated differently than other types of property in colonial-era search and seizure statutes[39] and in early federal statutes.[40] Express protection of homes was provided in many of the colonial precursors to the Fourth Amendment.[41]

Consistent with this historical record, search and seizure law continues to emphasize the unique nature of homes and to give homes additional protection as compared to other

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> Flagrant instances of wanton exercise of this power, have frequently happened in this and other sea port Towns. By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreable. Those Officers may under colour of law and the cloak of a general warrant, break thro' the sacred rights of the *Domicil*, ransack mens houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horred murders.

See Davies, *supra* note 25, at 603 n.139 (quoting TRACTS OF THE AMERICAN REVOLUTION: 1763–1776, at 243-44 (Merrill Jensen ed., 1967)).

Adams's reference to "wretches, whom no prudent man would venture to employ even as menial servants" is an example of a class issue that contributed to the outrage over general warrants. As Davies explains:

> Indeed, the Framers' perception of the untrustworthiness of the ordinary officer was reinforced by class-consciousness and status concerns. It was disagreeable enough for an elite or middle-class householder to have to open his house to a search in response to a command from a high status magistrate acting under a judicial commission; it was a gross insult to the householder's status as a "free man" to be bossed about by an ordinary officer who was likely drawn from an inferior class. For example, during the 1761 Writs of Assistance Case, James Otis complained that the delegation of authority to a petty officer by a general writ of assistance reduced a householder to being "the servant of servants."

Id. at 577-78.

38. *See* Davies, *supra* note 25, at 602-08. For example, in one newspaper article, James Otis repeatedly complained of violations of homes, but "did not complain of searches of ships, shops, or warehouses." *Id.* at 602 n.136. Ships were generally understood to be treated differently than other types of property because they fell under admiralty law and, therefore, were understood by the framers not to fall under the purview of the Fourth Amendment. *See id.* at 605-08. Contemporary misunderstanding of the Colonial-era legal status of ships has contributed to an unwarranted erosion of the protection given to homes in civil forfeiture cases. *See id.* at 607 & n.156.

39. *See id.* at 681 n.370.

40. *See id.* at 712 n.471.

41. *See id.* at 595-97.

types of property.[42] Prohibition-era cases gave special treatment to homes.[43] Contemporary Fourth Amendment cases contain frequent references to the castle doctrine[44] and the sanctity of the home.[45] The Supreme Court has held that a search of a home can generally only be conducted with a warrant,[46] stating that "the Fourth Amendment draws 'a firm

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42. The additional protection given to homes is consistent with empirical evidence about that which Americans consider "invasive." *See* Slobogin & Schumacher, *supra* note 19, at 738-39 (collecting empirical evidence that searches of homes, and particularly bedrooms, are considered highly invasive in American society).

43. As Jonathan L. Hafetz has explained,

> Federal Prohibition law treated the home with particular deference. The Volstead Act, which implemented Prohibition, not only barred issuance of a warrant to search "any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor," but also provided for criminal sanctions against any officer who conducted such an unlawful search. Many cases invalidating liquor seizures involved "private dwellings," defined by statute to include rooms "occupied not transiently but solely as a residence." Even when courts initially upheld Prohibition searches and seizures against legal challenges, they reaffirmed the sanctity of the home and distinguished searches for illegal liquors in private homes, from those in open fields and automobiles. The majority of state courts that adopted a rule excluding unconstitutionally seized evidence—a rule required under the Constitution only in federal cases at the time—did so in Prohibition cases involving searches of private homes (or businesses).

Hafetz, *supra* note 35, at 200 (footnotes omitted) (quoting Volstead Act, § 25, 41 Stat. 305, 315 (1919) (repealed 1935); citing also United States v. Maggio, 51 F.2d 397 (D.N.Y. 1931)).

44. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 94 (1998); Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

45. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); Payton v. New York, 445 U.S. 573 (1980) ("[An] overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic."); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) ("[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection.") (Powell, J., concurring); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.").

46. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *Payton*, 445 U.S. at 586 ("[A] basic principle of Fourth Amendment law [is that] searches and seizures inside a home without a warrant are presumptively unreasonable." (quotation omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971))); United States v. United States Dist. Court, 407 U.S. 297, 316 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."); Weeks v. United States, 232 U.S. 383, 393 (1914)

line at the entrance to the house,'"[47] and making "clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much . . . ."[48] Searches of other types of property, such as automobiles and open land, often may be conducted without warrants.[49] Similarly, a warrant is required for arrests made in the home,[50] but not for arrests

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(holding that searches of homes require warrants).

47. *Kyllo*, 533 U.S. at 40 (quoting *Payton*, 445 U.S. at 590).

48. *Id.* at 37 (quoting *Silverman*, 365 U.S. at 512).

49. *See, e.g.*, United States v. Dunn, 480 U.S. 294 (1997); Pennsylvania v. Labron, 518 U.S. 938 (1996); California v. Acevedo, 500 U.S. 565, 569-72 (1991); Oliver v. United States, 466 U.S. 170 (1984); United States v. Ross, 456 U.S. 798, 804-09 (1982). Drawing a line between homes and vehicles can be challenging in cases involving hybrids such as motor homes and houseboats. Courts faced with this challenge have used a functional test to decide whether the hybrid qualifies as a home or vehicle. *See* California v. Carney, 471 U.S. 386, 393-94 & n.3 (1985) (categorizing a motor home as a vehicle but leaving open the possibility of a different result if the motor home was "situated in a way or place that objectively indicates that it is being used as a residence"; relevant factors include "location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road"); United States v. Albers, 136 F.3d 670, 673 & n.3 (9th Cir. 1997) (Kozinski, J.) (applying the *Carney* test and categorizing a houseboat as a vehicle, but noting that "in many situations it will be objectively apparent that a houseboat is being used as home and not a vehicle. [For example, a] houseboat not independently mobile or one that is permanently moored would present a different case."); United States v. Hill, 855 F.2d 664, 668 (10th Cir. 1988) (categorizing a houseboat as a vehicle under the *Carney* test).

It may be tempting to advocates, courts, and commentators to argue for the extension of the level of protection given to homes to other contexts in search and seizure law. Broadening the scope of Fourth Amendment protection may generally be intended to increase the protection given to individual liberty in the search-and-seizure arena, but may have an unintended contrary effect by devaluing the idea that homes are unique and deserve a special level of protection. *See* Davies, *supra* note 28, at 739 & n.551 (arguing that broadening the scope of Fourth Amendment protection in other contexts has had the effect of undermining the Fourth Amendment protection of the home). Express analogies of the home to another context can be particularly damaging in this regard. For example, in one case, the Supreme Court expressly analogized commercial property to a home in a search and seizure case. *See* See v. City of Seattle, 387 U.S. 541, 543 (1967) ("[A] businessman, *like the occupant of a residence*, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." (emphasis added)). The Court's analogy was intended to bolster its extension of Fourth Amendment protection to the business context, but it cheapened the unique status of the home by suggesting that it is comparable to commercial property. Arguments about Fourth Amendment issues in other contexts that ignore the unique nature of homes risk devaluing the sanctity of the home that is at the core of the Fourth Amendment.

50. *See* Payton v. New York, 445 U.S. 573, 576 (1980).

made on the street or in other locations.[51]

In *Kyllo v. United States*, the Court held that a thermal imaging scan of a home was an illegal search, rejecting the government's argument that the scan did not reveal "intimate details" and noting that "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[52] In contrast, an aerial photograph of an industrial complex was not an unconstitutional search because the photograph "did not reveal any 'intimate details'"[53] and because the industrial complex did not "share the Fourth Amendment sanctity of the home."[54] In one case, placing a tracing device on a container of chemicals was held not to be a search requiring a warrant,[55] but in another case, monitoring a similar device within a home was a search requiring a warrant.[56]

C. *Privacy*

The importance of home in creating a zone where the individual is paramount over the community is a dominant theme in privacy law. The relationship between home and privacy makes a great deal of intuitive sense. Homes are the primary source of what is known colloquially as personal space. Homes are also the location of bedrooms, along with everything for which "bedroom" has become code in cultural and legal discourse.

Unsurprisingly, privacy cases often feature strong rhetoric about the importance of the home.[57] In one case,

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51. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366 (2003); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); United States v. Watson, 423 U.S. 411 (1976) (no warrant requirement for arrest made on street).

52. Kyllo v. United States, 533 U.S. 27, 37 (2001).

53. *Id.*

54. *Id.* (distinguishing Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986)).

55. United States v. Knotts, 460 U.S. 267, 281-82 (1983).

56. United States v. Karo, 468 U.S. 705, 714-15 (1984).

57. As with search and seizure law, *see supra* notes 42-56, courts and commentators have used the rhetoric of home to advocate for the extension of the privacy protection given to homes to other contexts. For example, Justice Harlan's famous dissent in *Poe v. Ullman* used powerful references to the explicit protections of the home in the Third and Fourth Amendments and to the widely acknowledged privacy interest in the home, to advocate for broader protection of family life outside of the strict context of the home. *See* Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting). Although it may be an effective advocacy tool for increased privacy protection in other contexts, the

Justice Black called the home "the sacred retreat to which families repair for their privacy and their daily way of living."[58] In another case, the Court opined that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[59]

This subsection begins by exploring the simultaneous evolution of the modern conceptions of home and privacy, underscoring the interrelationship of these ideas in Western culture.[60] It then illustrates the profound importance of home to the legal concept of privacy through two lines of cases where otherwise strong social interests are trumped by the privacy interest in the home.[61] The first line of cases involves the right to engage in conduct in the home that would be illegal in another context. The second line involves the primacy of privacy in the home over otherwise strongly-protected First Amendment free speech rights.

1. The Evolution of Home and Privacy

The modern home owes its physical form to the emergence of the bourgeois class in the Middle Ages. As Witold Rybczynski explained, "unlike the aristocrat, who lived in a fortified castle, or the cleric, who lived in a monastery, or the serf, who lived in a hovel, the bourgeois lived in a house."[62]

The early bourgeois house, however, was very different from the modern home. Rooms did not have specialized functions, and the same space served as working, eating, and

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use of the home in this way runs the risk of eroding the privacy protection afforded to homes by devaluing the uniqueness of home as a zone where the individual's right of privacy is paramount.

58. Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring).

59. Carey v. Brown, 447 U.S. 455, 471 (1980). In contrast, scholars writing on privacy tend to neglect the role the home plays in privacy law. One exception is Daniel Solove's *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1137-40 (2002). Even Solove, however, declined to use the context of home as an organizing theme in his *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006). I do not mean to suggest that Solove's *Taxonomy* is deficient in any way. Rather, I suggest that privacy scholars could benefit by considering the unique role home plays in privacy cases.

60. *See infra* Part II.C.1.

61. *See infra* Part II.C.2-3.

62. WITOLD RYBCZYNSKI, HOME: A SHORT HISTORY OF AN IDEA 25 (1986).

sleeping quarters throughout the day.[63] In the absence of public meeting spaces like restaurants, bars, and hotels, the house served as a place to entertain and to transact business.[64] The household itself typically extended beyond the immediate family, and often included apprentices, servants, and friends.[65] With large households living in one or two rooms, and often sleeping in the same bed, privacy within the household did not exist.[66]

The medieval home did not contain a family unit that we would recognize and, as discussed further below in the context of family law, the modern conception of family did not emerge until children of the bourgeois began to live at home during their school years.[67] At the same time that the modern family unit began to develop, the home became a less public space, housing fewer people as many bourgeois began to work outside the home.[68] This shift, combined with the presence of children, resulted in a profound change in the nature of the home, which "was now a place for personal, intimate behavior . . . [and] the setting for a new, compact social unit: the family."[69] A parallel increase in the number of rooms in the home created private spaces for people to act as

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63. *Id.* at 18.

64. *Id.* at 27.

65. *Id.*

66. *Id.* at 24, 27-28; *see also* PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 411 (Robert Baldick trans., 1962) (describing lack of privacy in the medieval household). A lack of privacy and intimacy does not mean, of course, that people were not physically intimate. As Rybczynski notes: "Medieval paintings frequently show a couple in bed or bath, and nearby in the same room friends or servants in untroubled, and apparently unembarrassed, conversation." RYBCZYNSKI, *supra* note 62, at 28. This lack of privacy is obviously different from contemporary norms, though it is important to note that legal issues relating to privacy typically concern privacy in relation to the government or strangers, as opposed to other members of the household. This distinction notwithstanding, Rybczynski's description of bathing medieval couples makes an interesting comparison to one recent case involving police use of thermal-imaging equipment, in which Justice Scalia primly observed that the equipment might reveal "at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate . . . .'" Kyllo v. United States, 533 U.S. 27, 38 (2001); *see supra* note 52 and accompanying text (discussing *Kyllo*).

67. *See* RYBCZYNSKI, *supra* note 62, at 48-49; *infra* Part III.B.3.a (discussing evolution of the modern concept of family in the context of family law issues involving the home).

68. *See* RYBCZYNSKI, *supra* note 62, at 39, 77.

69. *See id.* at 77.

individuals within the family unit. This increase in the number of bedrooms "indicated not only new sleeping arrangements, but a novel distinction between the family and the individual."[70] By the eighteenth century, the desire for privacy became a significant component of Western culture.[71]

Thus, modern conceptions of home, family, and privacy evolved together. As historian John Lukacs explained, "[d]omesticity, privacy, comfort, the concept of the home and of the family: these are, literally, principal achievements of the Bourgeois Age."[72] Parents and children living together in one dwelling became the core of both our conception of home and our conception of family. The evolution of home, in a sense, separated the family and its private life from the larger community. Similarly, the evolution of privacy within the home and of separate bedrooms for the home's inhabitants was instrumental in the development of a sense of individuality. As the home separated the family from community, bedrooms and growing notions of individual privacy allowed individuals to develop separately from both family and the larger community.[73]

2. *Privacy and Prohibited Conduct in the Home*

In *Stanley v. Georgia*,[74] the Supreme Court held that an individual could not be prosecuted for possession of obscene materials in the home. In reaching this holding, the Court recognized the States' "broad power to regulate obscenity," but "that power simply does not extend to mere possession by the individual in the privacy of his own home."[75] In other

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70. *Id.* at 110.

71. *Id.* at 86-87; 1 FERNAND BRAUDEL, THE STRUCTURES OF EVERYDAY LIFE: CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY 308 (Miriam Kochan trans., rev. by Sian Reynolds (1981)).

72. John Lukacs, *The Bourgeois Interior*, 39 AM. SCHOLAR 616, 624 (1969–1970).

73. RYBCZYNSKI, *supra* note 62, at 110-11 ("The desire for a room of one's own was not simply a matter of personal privacy. It demonstrated the growing awareness of individuality—of a growing personal inner life—and the need to express this individuality in physical ways.").

74. Stanley v. Georgia, 394 U.S. 557 (1969).

75. *Id.* at 568; *see also id.* at 565 ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

words, the Court held that conduct that could otherwise be prohibited by the States—possession of obscene materials—could not be prohibited in the home.[76]

Other courts following *Stanley*'s lead have held that certain conduct that could be prohibited in other contexts cannot be prohibited in the home. For example, the Alaska Supreme Court looked to *Stanley* in holding that the State could not prohibit possession of marijuana in the home.[77] The court based its holding in part on *Stanley*'s reasoning that "[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home."[78] Similar use of *Stanley* and the castle doctrine was made by a dissenting judge arguing that the government could not prohibit the possession of handguns in the home, while recognizing the government's power to regulate handgun possession in other contexts.[79]

The result in *Stanley*, that the government cannot prohibit certain conduct in the home that in another context would be subject to criminal sanction, is remarkable, both in the positive sense that it highlights the unique nature of the home as a source of privacy and in the negative sense that it represents an extreme boundary of the castle doctrine. The *Stanley* Court recognized that privacy in the home must have limits, noting that an individual's privacy interest could be trumped by a compelling government interest.[80] As an example, it cited a statute prohibiting possession of defense information harmful to national security.[81] Since *Stanley*, the Court has gone on to hold that the government's interest in preventing child pornography is also sufficiently compelling to justify the criminalization of possession of child pornography in the home.[82]

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76. *See* Radin, *Property and Personhood*, *supra* note 10, at 991-92 (discussing the importance of the concept of home and its relation of privacy, autonomy, and personhood to the Court's analysis in *Stanley*).

77. *See* Ravin v. State, 537 P.2d 494 (Alaska 1975).

78. *Id.* at 503.

79. *See* Quilici v. Vill. of Morton Grove, 695 F.2d 261, 279 (7th Cir. 1982) (Coffey, J., dissenting) ("There is no area of human activity more protected by the right to privacy than the right to be free from unnecessary government intrusion in the confines of the home.").

80. Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969).

81. *See id.*

82. *See* Osborne v. Ohio, 495 U.S. 103, 109-10 (1990).

Modern courts also recognize that the importance of privacy and autonomy in the home does not mean that a person should be able to engage in conduct within the home that is harmful to others.[83] This represents a welcome change from the willingness of some courts in the past to use the idea of home as a private sphere as an excuse to turn a blind eye to domestic abuse.[84] Some critics argue that the ideology of privacy in the home continues to be used to shelter abuse,[85] and the recognition that privacy can have a dark side is critical to striking the correct balance between competing interests.[86] This recognition, however, amounts to a persuasive argument that the private sphere of home should have limits, not a persuasive argument against the private sphere of the home generally. So limited, the role of the home

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83. *See, e.g.*, *id.* at 109 (emphasizing the harm that child pornography inflicts on children in the context of upholding a law criminalizing possession of child pornography); *Ravin*, 537 P.2d at 504 ("No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely.").

84. American courts in the nineteenth century declined to punish husbands for spousal abuse, viewing the home as a private sphere beyond the scope of public concern. *See* Hafetz, *supra* note 38, at 187-89; *see also* Reva B. Siegel, *"The Rule of Love": Wife Beatings as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150-74 (1996) (discussing nineteenth-century courts' use of privacy as a justification for decriminalizing spousal abuse).

85. *See, e.g.*, Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 366-67 (1993); *c.f.* Jeanne Moore, *Placing* Home *in Context*, 20 J. ENVTL. PSYCHOL. 207, 212 (2000) ("[T]here has been an increasing focus on the negative and darker side of *home* experience. *Home* can be a prison and a place of terror as well as a haven or place of love.").

86. As Elizabeth Schneider noted in discussing the feminist critique of privacy, privacy can be both positive and negative:

> Privacy has seemed to rest on a division of public and private that has been oppressive to women and has supported male dominance in the family. Privacy reinforces the idea that the personal is separate from the political; privacy also implies something that should be kept secret . . . . The right of privacy has been viewed as a passive right, one which says that the state cannot intervene.
>
> However, . . . [p]rivacy is important to women in many ways. It provides an opportunity for individual self-development, for individual decisionmaking and for protection against endless caretaking. In addition, there are other related aspects of privacy, such as the notion of autonomy, equality, liberty, and freedom of bodily integrity, that are central to women's independence and well-being.

Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 979 (1991). Where to draw the line between private and public depends on the competing interests involved in each particular case.

as a unique place of privacy and autonomy remains deserving of strong legal protection.

3. Privacy in the Home as a Limit on Free Speech

The unique nature of the home is also reflected in a line of cases holding that the interest of privacy in the home trumps free speech rights that typically are strongly protected by the courts. Restrictions on demonstrations aimed at a particular residence and on the broadcast of political speech using sound trucks were upheld on the basis of protecting privacy in the home, as was a regulation allowing people to force a vendor to remove their names from a vendor's mailing list.[87] In the opposite scenario, speech made from the home is afforded additional protection from municipal time, place, and manner regulation.[88] Taken together, these cases reinforce the unique status of the home as essential to the liberty of the individual, both as a refuge from unwanted speech from other members of the community and as a venue for political speech that in form or content is objectionable to the rest of the community.

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87. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988) (residential demonstrations); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) (mailing list); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (sound trucks); *see also* Carey v. Brown, 447 U.S. 455, 471 (1980) (noting the importance of residential privacy, but striking down a residential picketing ordinance because of the availability of less restrictive means); Martin v. City of Struthers, 319 U.S. 141 (1943) (same); Gregory v. Chicago, 394 U.S. 111, 125-26 (1969) (Black, J., concurring) (discussing the importance of privacy in the home in the context of political speech). For a discussion of these cases and the interrelationship between the home and First Amendment issues, see Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 42-49 (1997).

88. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994). In *Gilleo*, the Court held that:

> A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-by-11 sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.

Id. at 58 (citations omitted). Consistent with the holding in *Gilleo*, the psychology of home reveals that the privacy and freedom created by the home allows for feelings of self-expression and self-actualization. *See* Smith, *supra* note 7, at 32.

D. A Castle, But Not an Impregnable One

The idea of home as castle is a powerful metaphor and is a major component of the ideology of the home. But the metaphor has its limits, and the castle's walls can be breached by a sufficiently strong competing interest. Despite the strong protection given to the home in the search-and-seizure context, the government can still enter and search a home if it can obtain a warrant. Similarly, despite the remarkable treatment of the home in privacy law, where the privacy interest of the home trumps interests that are, in other contexts, treated as paramount by the law, a person should not be able to use the zone of privacy and autonomy created by the home to engage in conduct harmful to others. Homes are unique when interests of safety, freedom, and privacy are at stake and deserve special legal treatment in these contexts. But the ideological view of home as castle only goes so far and should not be dispositive on any legal issue.

III. HOME, SELF, AND POSSESSION

The law generally protects a property owner's possession of property, but recognizes that the right to possession may be overcome by a competing interest. For example, in many circumstances a creditor can overcome an owner's right of possession to satisfy an unpaid debt. Similarly, the government can take possession of property by eminent domain when required for a public purpose so long as just compensation is paid to the owner.

In a number of areas of law, the right to possess a home is given more protection than the right to possess other types of property. Homestead exemptions, rights of redemption in foreclosure, just-cause eviction statutes, and residential rent control are just some of the instances where debtor-creditor laws and landlord-tenant laws give more protection to the possessory interest in the home than the law ordinarily gives to the possession of other types of property.[89]

The additional protection given to possession of homes makes intuitive sense; no one could imagine being happy about being forced to leave their home. The literature on the

89. *See infra* notes 127-47 and accompanying text.

psychology of home reinforces this intuitive view, showing that homes are sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks.[90] As a result, dislocation from a home can have a strong, negative psychological impact on many people.[91] Recognition of the importance of an individual's tie to a home, however, does not mean that the possessory interest in the home should be favored by the law in all cases where it is balanced against a competing interest that is ordinarily given substantial weight.

This part examines the legal system's balance between the possessory interest in the home and competing legal interests.[92] As a starting point, this part assesses the relative strength of the possessory interest in the home in light of Margaret Jane Radin's analysis of this issue in her groundbreaking article *Property and Personhood*.[93] Comparing Radin's analysis to the literature on the psychology of home suggests that the possessory interest in the home, while substantial, may not be as strong as Radin asserts. This part then examines a series of legal issues where the possessory interest in the home is balanced against a competing interest, dividing these issues into three subgroups: areas where the law strikes an appropriate balance, areas where the law overprotects the possession of a home, and areas where the law under-protects the possession of a home.

A. *Evaluating the Personal Interest in the Home*

In *Property and Personhood* and subsequent works,

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90. *See infra* Part III.A.

91. *See infra* note 117 and accompanying text.

92. In many circumstances, this issue will become a choice between favoring the competing interest or forcing a person to move to another home in another location. In other circumstances, the choice may not be between two homes, one perhaps more desirable than the other, but rather be between a home and homelessness. The discussion here is not focused on a person's interest in, or perhaps right to, shelter. Rather, it is focused on the right to possess a particular home in a particular location. Even if one accepts a right to shelter, it does not necessarily include the right to shelter in a particular place. Possession and shelter concern different things—shelter is concerned with the human need for a home generally, while possession is concerned with a person's connection to one particular home.

93. Radin, *Property and Personhood*, *supra* note 10.

Radin developed a "personhood" theory of property.[94] Radin's theory is based nominally on Hegel's theory of the person,[95] but the core of her analysis is the pragmatic observation that people become personally attached to certain types of property.[96] Radin accordingly divides property into two categories: personal and fungible. Personal property cannot be completely replaced by market value compensation; fungible property, in contrast, can be replaced by market value compensation.[97]

Radin's classic example is of a wedding ring.[98] To a jeweler, a wedding ring is fungible. The jeweler would be equally happy with one ring, another similar ring, or the monetary value of the ring. Once wedding rings are exchanged between spouses, the rings take on personal meaning and cannot be freely replaced with their monetary value.[99] Other examples of personal property include personal photographs, heirlooms, and, most relevant here, homes.[100]

Radin observes that on an intuitive level, homes are personal,[101] but does not probe the source of this intuition more deeply. The literature on the psychology of home provides a more detailed picture of people's relationships to their homes.[102] Consistent with Radin's intuition, home is associated with a range of feelings related to a long-term tie to a physical location.[103] Home is the physical center of everyday life and is a source of feelings of rootedness and

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94. *See id. passim*; Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 365 (1986) [hereinafter Radin, *Residential Rent Control*].

95. *See* Radin, *Property and Personhood*, *supra* note 10, at 958-59 (referencing GEORG W.F. HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., 1821)).

96. *See id.* at 959.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.* Put another way, homes are incompletely commodified; that is, the importance of homes cannot be completely described in monetary terms. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 108-12 (1996).

101. *See* Radin, *Property and Personhood*, *supra* note 10, at 959 (listing a house as an example of property for personhood from an intuitive view).

102. *See* sources cited *supra* note 7.

103. *See* Smith, *supra* note 7, at 31-33 (finding the qualities of continuity, privacy, self-expression and personal identity, social relationships, warmth, and a suitable physical structure were associated with home environments).

belonging.[104] Home is the locus of a person's immediate family[105] and can be a source of emotional warmth and personal comfort.[106] For people with long-term tenure in their homes, home is a source of feelings of continuity, stability, and permanence.[107] Home is the center of individual social networks and provides a physical tie to "one's workplace, school, and other points in the geographical[] world . . . ."[108] Home is also associated with personal identity, reflecting both how people see themselves and how they want others to see them.[109]

Many of these lasting psychological ties to the home are related to a particular home in a particular place and, in turn, to legal issues that involve the possession of that home. Being dislocated from the home, either voluntarily or involuntarily, involves the loss or alteration of these psychological ties, and such dislocation can have a negative psychological impact on an individual.[110] Not all people relate

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104. *Id.* at 32 (citing studies dealing with the experience of home to support the idea that home is a primary territory because it provides a physical center for departure and return and a feeling of rootedness and belonging); Zingmark, Norberg & Sandman, *supra* note 19, at 50 (identifying safety, rootedness, harmony, and togetherness, among others, as common aspects of experience of being at home).

105. Smith, *supra* note 7, at 33. Indeed, lack of connection to family can lead the elderly to view their living spaces as non-homes. *See* Zingmark, Norberg & Sandman, *supra* note 19, at 54. On the other hand, negative associations with family can be tied to negative associations with the home, and issues of intra-family abuse can be a counter-weight to the value placed on the privacy provided by the home. *See supra* notes 85-86 and accompanying text.

106. *See* Smith, *supra* note 7, at 33.

107. *See id.* at 32.

108. *See id.* at 33.

109. *See id.* at 32 (noting that subjects in a study described that their homes were closely related to their self identities and that they represented both how they saw themselves and how they wanted others to see them); Roberta M. Feldman, *Settlement-Identity: Psychological Bonds with Home Places in a Mobile Society*, 22 ENV'T & BEHAV. 183, 186 (1990) (stating that individuals often put forth significant time and effort so that a new property will resemble their previous home).

110. *See* Marc Fried, *Grieving for a Lost Home*, *in* THE URBAN CONDITION 151, 151 (Leonard J. Duhl ed., 1963); *see also* Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions from the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516, 1517 (1996) ("The main proposition presented here is that the sense of belonging, which is necessary for psychological well-being, depends on strong, well-developed relationships with nurturing places. A major corollary of this proposition is that disturbance in these essential place relationships leads to psychological disorder.").

to their homes in the same way, however, and dislocation can affect people in different ways.[111] Additionally, many important psychological attachments to the home can move with an individual to a new home. For example, when a person moves, the zone of privacy, freedom, and autonomy also moves. If the home is owned, senses of value and ownership, both components of the psychology of home,[112] also move. The role of the home as the center of family life can also move to a new home. Feelings of personal connectedness can move as an individual personalizes a new home and moves personal effects that have strong personal meanings.[113] Therefore, not all psychological ties are implicated in legal issues related to the possession of a home.[114]

A closer examination suggests that Radin's intuitive view tends to overstate an individual's personal connection to a home in a particular location because many of the important personal values associated with a home are movable. Perhaps most importantly a person will also be able to move the personal belongings that are critical to making a new

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111. *See* Fried, *supra* note 110; *see also* Andrew J. Sixsmith & Judith A. Sixsmith, *Transitions in Home Experience in Later Life*, 8:3 J. ARCHITECTURAL & PLAN. RES. 181, 186-87 (1991) (noting that people who have lived in a home for many years often have strong emotional connections to the home).

112. *See generally infra* note 158.

113. *See* D. Geoffrey Hayward, HOME AS AN ENVIRONMENTAL AND PSYCHOLOGICAL CONCEPT 7-8 (1975); *see also* Sixsmith & Sixsmith, *supra* note 111, at 186-87 (noting the importance of objects inside the home to a person's feeling of connectedness to the home). The subjects of Smith's empirical study often raised the effect of personalization on psychological connection to the home and described environments that could not be personalized (e.g., barracks, nurses' quarters, and migrant hotels) as non-homelike. Smith, *supra* note 7, at 36-41. Rybczyncki notes that Jane Austen's description of her heroine's room in *Mansfield Park* evokes the importance of personal property to the sense of being at home:

> Fanny Price . . . had a room where she could go "after anything unpleasant below, and find immediate consolation in some pursuit, or some train of thought at hand. Her plants, her books—of which she had been a collector from the first hour of her commanding a shilling—her writing desk, and her works of charity and ingenuity, were all within her reach; or if indisposed for employment, if nothing but musing would do, she could scarcely see an object in that room which had not an interesting remembrance connected with it."

RYBCZYNSKI, *supra* note 62, at 111.

114. Conversely, the mobility of many of the psychologically important aspects of the home reinforces the importance of home even in a society where twenty percent of Americans move each year. *See* Feldman, *supra* note 109, at 185-87.

living space feel like home. Each of these movable values are critical components of people's psychological ties to their homes and would, therefore, be significant components of the intuitive notion that homes are special.[115]

There is truth to the intuition that there is a personal connection to home. This connection is experienced in the pang of regret or funny feeling in the stomach felt when moving from one home to another. Many of the important psychological ties to the home, such as feelings of rootedness, permanence, and belonging in the community, are not movable.[116] As a result, many people suffer significant negative psychological impacts from moving. This feeling of loss is greater when the move is not voluntary because the sense of dislocation is more severe and the positive factors that lead to a voluntary move are absent.[117] Not only would an involuntary move dislocate a person from her home, but it could also dislocate her from her community, school, job, or family. The personal interest in home therefore seems to be something that is both real and something that the law should be concerned about, even if the personal interest in the home may be less than a general intuition about the home might lead us to believe.

Radin does not try to strike a balance between the personal interest in the home and competing interests.[118] Rather, Radin makes a broad moral claim that the personal interest of an individual possessing a home should trump competing fungible interests.[119] In the landlord-tenant context, Radin asserts that the personal interest of a tenant should be favored over the fungible interests of a landlord. Similarly, in the debtor-creditor context, she argues that the personal interest of the homeowner should be favored over

115. *See id.* Indeed, the relative strength of the personal connection cannot be too strong because it is often overcome by other personal interests. *See* FISCHEL, *supra* note 1, at 59-60. People move voluntarily all the time for innumerable reasons: to take a new job, to move to a better home or community, because they have children, or because their children grow up and move out of the house. *Id.* In an increasingly mobile American society, people move on average once every four years. *Id.*

116. *See* Radin, *Residential Rent Control*, *supra* note 94, at 363-66.

117. *See generally id.*

118. *See id.* at 359-62.

119. *See id.* at 365-66.

the fungible interests of a lender.[120]

Radin's broad moral claim for favoring the personal interest in possession of a home over competing fungible interests is problematic. This claim is based on a general intuitive view of people's personal connection with their homes, rather than a more nuanced view recognizing that many important ties to the home are movable. Radin's claim is also problematic in its trivialization of the competing interests as merely fungible. The analysis in the remainder of this part, in contrast, tries to balance the relative strength of the personal interest in possessing a home against the competing interests presented by each type of legal issue.

B. Balancing the Personal Interest in the Home Against Competing Interests

This subsection examines a series of legal issues in which courts and, to a lesser extent, legislatures have been forced to balance the right to possess a home against a competing interest. The first section looks at issues, many from debtor-creditor law and landlord-tenant law, where courts and legislatures have generally struck an appropriate balance between the resident's personal interest in the home and competing interests. The second section looks at two areas, homestead exemptions and residential rent control, where the law has overprotected the personal interest in the home. Finally, the third section examines the treatment of homes in eminent domain and equitable distribution law, areas where the personal interest in homes is under-protected.

1. Striking the Right Balance

In the past century, a number of legal reforms in the creditor-debtor and landlord-tenant contexts have tempered the harsh effect of traditional common-law rules that often resulted in the displacement of people from their homes. Many of these reforms have struck an appropriate balance by protecting the homeowner's or tenant's interest in staying in his or her home without substantially harming the competing interest of the creditor or landlord.

Most people who buy a home borrow money from a bank to pay most of the purchase price. If the borrower-

120. *See id.*

homeowner fails to pay back the borrowed money, the lender may enforce the security interest granted by the mortgage and foreclose on the home. All states recognize the debtor's right to purchase the home prior to foreclosure and many states have redemption statutes that allow the homeowner to buy the home back from the foreclosure-sale buyer within a period of time after the foreclosure sale is completed.[121] These rights of redemption limit the creditor's right to sell the property of a defaulting homeowner, but the creditor, or subsequent purchaser, is made whole by the redemption payment of the homeowner.

Similar balances are struck in certain areas of landlord-tenant law. Just-cause eviction statutes limit the right of a landlord to evict tenants.[122] Tenure-rights provisions force landlords to give successive leases to tenants under certain circumstances.[123] Condominium conversion ordinances often give tenants a right of first refusal to purchase their apartment when their rental building is converted into a condominium.[124]

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121. *See* 2 BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE: FORECLOSURE, WORKOUTS, PROCEDURES §§ 20:1-:3 (2004); DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES AND LIENS 132-34 (2004); *see also* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 685-86 (1988).

122. *See, e.g.*, N.J. STAT. ANN. 2A:18-53 (West 2000) (restricting circumstances in which residential tenants can be evicted); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 534-35 (1984) (discussing common types of just-cause eviction statutes); Kenneth K. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 833-35 (1983) (same); *see also* Radin, *Property and Personhood*, *supra* note 10, at 994-95 (discussing the balance between the interests of landlords and tenants struck by just-cause eviction statutes); Singer, *supra* note 121, at 682-84 (same).

123. New York City's Rent Stabilization Law, for example, requires landlords to offer tenants renewal leases. *See* N.Y. UNCONSOL. LAW § 26-511(c)(4) (McKinney 2002 & Supp. 2005); N.Y. COMP. CODES R. & REGS. tit. 9, § 2523.5 (2004). Combined with just-cause eviction statutes, tenure rights allow tenants to stay in their apartments so long as they pay their rent and refrain from engaging in harmful activity. Although tenure rights themselves are unobjectionable if the renewal is at a market rent, the bulk of the Rent Stabilization Law is intended to regulate rent. As with other rent control statutes, these other provisions of the Rent Stabilization Law go too far in protecting the tenant's possessory interest in the home. *See infra* Part III.B.2.b.

124. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 605/30 (West 2001) (giving tenants a right of first refusal to purchase a unit converted to condominium); FLA. STAT. ANN. § 718.612 (West 2005) (same). Condominium conversion ordinances also often place far more substantial restrictions on the landlord's right to convert,

Many of these types of statutes include exemptions for landlords who are renting part of their own home,[125] and are intended to limit the landlords' interests where these interests are fungible. A commercial landlord should not care who is renting an apartment as long as the rent is paid and the apartment properly maintained.[126] Similarly, a landlord converting a rental building to a condominium should not care who is buying the apartment as long as the purchase price is paid. The restrictions placed on the landlord's common-law rights by these types of statutes are real and substantial but, generally speaking, are justified by the tenant's comparatively stronger personal interest in remaining in his or her home.

2. Overprotecting the Personal Interest in the Home

This section discusses two instances where the law overprotects the personal interest in possessing a home: homestead exemptions that absolutely protect homes from foreclosure by creditors and residential rent control measures.

a. Homestead Exemptions

The unlimited homestead exemptions allowed by Florida, Texas, and a few other states protect the homeowner's possessory interest by absolutely prohibiting the foreclosure

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at times preventing conversion entirely. *See* Rabin, *supra* note 122, at 535-37; Baar, *supra* note 122, at 835-38. For example, Brookline and Cambridge, Massachusetts, enacted condominium conversion ordinances that prevented landlords from ever converting apartments held by certain classes of tenants to condominiums. *See* Flynn v. City of Cambridge, 418 N.E.2d 335, 337 (Mass. 1981) ("In essence, what the ordinance does is require that any unit which is a controlled rental unit on August 10, 1979, remain part of the rental housing stock of the city of Cambridge."); Singer, *supra* note 121, at 684 n.250. These more severe condominium conversion ordinances, like the rent control ordinances with which they often are coupled, go too far in favoring the tenant's possessory interest in the home. *See infra* Part III.B.2.b (discussing overprotection of possession of the home in rent control context).

125. *See, e.g.*, N.J. STAT. ANN. 2A:18-61.1 (West 2000) (exempting "owner-occupied premises with not more than two rental units" from the scope of a just-cause eviction statute); *see also* Radin, *Property and Personhood*, *supra* note 10, at 993 (noting that the view of tenants as having a more personal connection than landlords to rental apartments "is overgeneralized. Some landlords live in one half of a duplex and rent the other half, or rent the remodeled basement or attic of their home."); Singer, *supra* note 121, at 684.

126. Singer, *supra* note 121, at 683-84.

of a home by creditors.[127] These exemptions are widely reviled, and it is not controversial to say that they overprotect the possession of the home at the expense of strong creditor interests.[128] The putative justification for homestead exemptions—to allow the debtor family to continue to have shelter[129]—can be accomplished by a type of exemption common in many other states. These exemptions allow a debtor to protect a certain amount of money from creditors, which can then be used to purchase or rent a new home.[130]

b. Residential Rent Control

The attention given to residential rent control by legal academia is perhaps disproportionate to its real-world impact. Relatively few municipalities in the United States have active residential rent control regulations and the recent trend has been to abolish or weaken rent control.[131] But rent

127. FLA. CONST. art. X, § 4; TEX. CONST. art. XVI, § 50; *see also* IOWA CODE ANN. § 561.16 (West 1991); KAN. STAT. ANN. § 60-2301 (1994); S.D. CODIFIED LAWS § 43-45-3 (2004).

128. Business creditors, to a certain extent, are able to protect themselves from the effects of the unlimited homestead exemption. Mortgage creditors are typically unaffected by the exemption, and other business creditors can protect themselves by, among other things, raising prices for all residents of a state with an unlimited homestead exemption. In contrast, tort creditors (e.g., victims of fraud, malpractice, or negligence) do not choose their creditors in advance and therefore are unable to protect themselves from the unlimited homestead exemption. The result has been a sorry parade of actual and potential wrongdoers descending upon Florida and Texas to purchase expensive homes protected by the unlimited homestead exemption. *See generally* G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform,* 74 AM. BANKR. L.J. 227 (2000); Wells M. Engledow, *Cleaning Up the Pigsty: Approaching a Consensus on Exemption Laws,* 74 AM. BANKR. L.J. 275 (2000); Richard M. Lombino, Note, *Uniformity of Exemptions: Assessing the Commission's Proposals,* 6 AM. BANKR. INST. L. REV. 177, 198-202 (1998). The potential for abuse, however, was reduced recently by bankruptcy reform legislation enacted by Congress, which prevents debtors in federal bankruptcy cases from using the unlimited homestead exemptions for homes that have been owned for less than forty months. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 § 322(a), 119 Stat. 23 (to be codified at 11 U.S.C. § 522(p)(1)).

129. *See* Pub. Health Trust v. Lopez, 531 So. 2d 946, 948 (Fla. 1988).

130. *See, e.g.*, CAL. CONST. art. XX, § 1.5 ("The Legislature shall protect, by law, from forced sale *a certain portion* of the homestead and other property of all heads of families." (emphasis added)). Another reasonable approach to the treatment of debtors' homes is found in the tax code, where a taxpayer's residence may only be seized as a last resort, and only after written approval by a U.S. District Court. *See* 26 U.S.C. § 6334(a)(13)(B), (e) (2000).

131. For example, Massachusetts abolished rent control in 1994 and

control does provide a good window into academic thought about how to balance between the property interests of landlords, tenants, and other members of the community.

Radin is among the most prominent defenders of rent control. The centerpiece of her argument in favor of rent control is that the personal interest in the home trumps competing, fungible interests:

> [M]y claim is simply that the private home is a justifiable form of personal property, while a landlord's interest is often fungible. A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority claim over curtailment of merely fungible interests of others.[132]

Radin bolsters her assertion that the tenant's personal interest should control over the landlord's fungible interest by comparing the legal treatment of tenants and homeowners. Just as homeowners are given "special concessions," such as homestead exemptions and rights of redemption in foreclosure that protect their possessory interest in their homes, "it also seems right to safeguard the tenant from losing her home even if it means some curtailment of the landlord's interest."[133] So, too, it makes sense to Radin to favor the interests of current tenants over the interests of tenants who are new to the market and who have not yet become personally connected to their homes.[134]

As discussed above in the context of just-cause eviction statutes, condominium conversion ordinances, and tenure-rights, "some curtailment" of a landlord's interest makes sense to protect a tenant's personal interest in possessing the home.[135] The issue is where to strike the balance between the competing interests. Just as absolute homestead exemptions go too far in favoring a homeowner's possessory interest over a creditor's competing interest,[136] rent control goes too far in

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California substantially reduced the scope of rent control in 1996. *See* MASS. GEN. LAWS ch. 40P, § 4 (2004); CAL. CIV. CODE §§ 1954.50-.535 (West Supp. 2005).

132. Radin, *Residential Rent Control*, *supra* note 94, at 365.

133. *Id.* at 365-66.

134. *See* Radin, *Property and Personhood*, *supra* note 10, at 994.

135. *See supra* notes 122-24 and accompanying text.

136. *See infra* Part III.B.2.a.

favoring a tenant's interest over a host of competing interests that are harmed by rent control.[137]

The price of the benefit conferred by rent control on long-term tenants is born by a wide range of other members of the community. New tenants are harmed by being forced to pay higher rents due to the absence from the housing market of the apartments subject to rent control.[138] The very poor are harmed by a decrease in available housing caused by the negative impact of rent control on the incentive of landlords to maintain or create housing stock.[139] Landlords are harmed by a profound limitation placed on their property rights by rent control.[140] Homeowners in a neighborhood with rent-

137. *See infra* Part III.B.2.b. The fact that homeowners are given excessive protection of their possessory interests does not justify similarly excessive protections being given to tenants. As Richard Epstein noted in refuting the similar argument that the subsidization of homeowners by the tax code justifies rent control subsidization of tenants, two wrongs don't make a right. *See* Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 BROOK. L. REV. 1281, 1294 (1989) [hereinafter Epstein, *Rent Control Revisited*].

138. *See* Radin, *Residential Rent Control*, *supra* note 94, at 366.

139. *See* ANTHONY DOWNS, A REEVALUATION OF RENT CONTROLS 4 (1996); FISCHEL, *supra* note 1, at 82.

140. Rent control allows a tenant to stay in an apartment at a below-market price, not only restricting the landlord's common-law right to rent to someone else at the end of a lease term, but restricting the landlord's right to make market returns on the property. This has a far more substantial effect on the landlord's property rights than simple tenure rights, which allow a tenant to stay in the home so long as he or she is willing to pay market rent. *See infra* Part III.B.2.b. The result of rent control is to transfer to the tenant a portion of the economic benefits of ownership. The law has long made a distinction between ownership and tenancy, and this distinction is not a mere relic of feudal property law. Owners own with all of the benefits and risks that ownership presents. Tenants rent with perhaps fewer benefits and fewer risks. *See infra* Part IV (discussing disparate treatment of freeholds and leaseholds). Curtis Berger argues that "[t]he salient difference between the tenant and homeowner lies in the equity buildup (and possible equity loss) that accompanies ownership." Curtis J. Berger, *Home Is Where The Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1242 (1989). Berger notes that many first-time homebuyers do not have a substantial equity stake when they first buy their homes, and argues that in the amount of time it would take for a homebuyer to develop a substantial amount of equity, both a tenant and a homeowner would have an equivalent personal connection to their homes. *Id.* As a result, Berger argues, ownership should not give homeowners more of a right to stay in their homes than renters. *Id.* Berger's argument, however, is based on a flawed premise. There is far more to the difference between ownership and rental than the amount of equity an owner actually has in a home. Even a homeowner with minimal equity in a home is fully exposed to the gains and losses that result from fluctuations in the housing market. Indeed, it is this undiversified exposure to the housing market that makes homeowners

controlled apartments are harmed by the negative impact that rent control has on home values.[141]

In addition to these unfavorable effects on other members of the community, rent control has been widely criticized as being an ineffective tool for two of its purported policy goals: providing housing to the poor and redistributing wealth to the poor.[142] Although there are some dissenting views, the consensus among economists is that rent control has been ineffective in providing affordable housing to the poor and has had negative effects on housing markets where rent control is present.[143] Rent control is a poor tool for wealth redistribution because its only class of economic winners are long-term tenants who are not necessarily and, indeed, are not typically poor.

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such active citizens in local affairs, providing, among other things, a republican justification for favoring homeowners over renters. *See* FISCHEL, *supra* note 1, at 3-6, 10-12; *infra* notes 192-98 and accompanying text (discussing republican arguments for favoring homeowners); *see also* Epstein, *Rent Control Revisited*, *supra* note 137, at 1293-94 (noting that because a tenant does not have a substantial portion of assets tied up in her home, she is better able to diversify her investments). It is true that long-term tenants and homeowners might have a similar emotional attachment to a home, *see* Berger, *supra*, at 1240-41, but this does not mean that the long-term tenant's personal interest in a home is sufficient to justify a radical transfer of the landlord's property rights to the tenant. Describing his connection to his own rent-controlled apartment, Berger says: "Knowing that I am secure in that attachment, and that the landlord's whim or a stranger's 'higher bid' can not destroy these rooted associations, is essential to my sense of identity." *Id.* Perhaps Berger's personal connection to his home justifies protecting him from his "landlord's whim," but if he wanted to be protected from a 'higher bid' he could have, and should have, purchased, not rented. Like many beneficiaries of rent control, Berger had the opportunity to buy, but decided not to, not because he couldn't afford it, but because his subsidized rent was a better deal than buying. *Id.* at 1240 n.5.

141. *See* FISCHEL, *supra* note 1, at 82 (explaining that rent control negatively impacts home values by reducing the quality of housing stock, which will be reflected in housing prices in neighboring areas, and by increasing the tax burden on homeowners, which will be capitalized into home values).

142. *See* DOWNS, *supra* note 139, at 3-4.

143. *See id.* at 5 (summarizing economic studies on rent control and concluding that "[a]ll rent controls are unjust to owners of existing rental units, inefficient as anti-poverty policies, and damaging to some of the very low-income renters they are supposed to protect. Moreover, most of the benefits produced by rent controls aid moderate-, middle-, and upper-income households, rather than the poor households they may have been adopted to help."). *But see* JOHN I. GILDERBLOOM & RICHARD P. APPELBAUM, RETHINKING RENTAL HOUSING 134, 149 (1987) (questioning the assertion that rent control has a negative impact on the quality or supply of rental housing, but noting that rent control has not reduced rents to affordable levels).

One important aspect of the personal interest in possessing a home is that it provides a tie to the community.[144] A person forced to move may become separated from family, friends, school, and workplace. Radin and others making a moral case for rent control unsurprisingly include a strong appeal to community in their arguments.[145] The case for rent control, however, is an odd communitarian argument, as rent control favors one discrete class of people—long-term tenants—at the expense of the rest of the community. Other tenants, both those in non-rent-controlled apartments and prospective tenants who wish to join the community, the very poor, landlords, and homeowners all suffer because of rent control. The community as a whole suffers because rent control can stifle the organic change that makes cities dynamic places. As Richard Epstein observed in criticizing Radin's position on rent control:

> It is very risky to announce that some persons or some roles count for more than others. Potential entrants to certain markets are real people whose goals, aspirations, and desires matter as much as those of present tenants. . . . It is often very difficult to know whether neighborhood stability is a source of strength or stagnation, and whether mobility is a sign of vitality or decay.[146]

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144. *See supra* note 116 and accompanying text.

145. *See, e.g., id.*

146. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 771 (1989). Epstein goes on to observe that:

> Economic accounts of efficiency have been attacked countless times because they leave out the social equation fundamental concerns with justice and fairness that are thought to be an inseparable part of our social life. How ironic that those tests are the only ones that direct our attention toward the overall effects of the purported regulation—including the losses to landlords and potential tenants, as well as to society at large—that the "communitarian" approaches ignore.

Id. at 772. These are fair points, especially with respect to rent control. But the economic analysis advocated by Epstein does not tell the whole story. The personal interest in possession of a home is not illusory, and economic theory does not seem to be able to fully value possession of a home absent a voluntary transaction. Even in the presence of a voluntary transaction, people tend to act in a manner that appears to be economically irrational about their homes, and this "irrational" overvaluation can be seen as an expression of the individual's personal interest in the home. *See infra* notes 174-81. Radin's argument is a moral one, and fails because it overvalues the personal interest in the home while undervaluing the damage caused to the rest of the community by rent

The community as a whole also suffers because rent control creates incentives that encourage long-term tenants to remain tenants, rather than become owners with a greater stake in community affairs.[147]

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control.

147. Traditional republican political theory supports favoritism of homeownership over renting because the benefits and risks presented by ownership spur owners to be more involved and responsible citizens. *See* William H. Simon, *Social Republican Property*, 38 UCLA L. REV. 1335, 1356-58 (1991). This theoretical position is supported by empirical evidence that homeowners, in fact, are more involved in community affairs than renters. *See infra* notes 184-88 and accompanying text. Rent control provides something of a middle ground between ownership and renting because tenants in a rent-controlled apartment are able to share some of the fruits of community improvement, whereas typical renters may get priced out of their homes as rental prices increase. *See* FISCHEL, *supra* note 1, at 86-87. The rent-controlled tenant, however, shares far less of the risk of community decline because the tenant can move to another location without suffering the financial loss that would face a similarly situated homeowner. Simon, *supra*, at 1356-58. Similarly, the rent-controlled tenant shares less of the potential benefit of community improvement because the tenant does not share the owner's financial upside from such improvement. *See id.* at 1356-57. For example, a tenant in a rent-controlled apartment will be less likely than an owner to participate heavily in local public school issues. If the tenant does become heavily involved in improving the local public schools, the tenant will benefit by being able to send her children to better schools and will be protected from being priced out of her home by the increase in property values caused by school improvement. The tenant, however, will not share in the benefits of those increased values, as would a homeowner, because of the lack of equity ownership in a rented home. The traditional republican interest of encouraging responsible citizenship would therefore continue to favor ownership over renting, whether rent-controlled or not. *See id.* at 1356-58.

Simon adds concerns for social justice and for motivating people to remain in their community to traditional republican theory to develop a social-republican theory of property. *See id.* Simon's social-republican model values ownership because it places the risk of community decline on the owner, but is suspicious of ownership, in part, because it allows the owner to benefit from community improvements and to remove those benefits from the community by selling the property. *See id.* at 1358-59. Simon acknowledges that rent control protects a tenant from losses that his social-republican model would ideally place on members of the community, but argues that rent control encourages community by forcing the tenant to stay in place to share the benefits of community improvement. *See id.* at 1360 ("She can enjoy, without cost, increases in the value of the premises due, for example, to improvements in the community, but she can enjoy them only in kind and must remain in place to do so."). Simon's point about the inability of rent-controlled tenants to take the benefits of community improvement with them when they move is an interesting one. But Simon's social-republican model is an odd amalgam of republican and communitarian ideals, recognizing that self-interest is a powerful motivator, but going only halfway because of a hostility to individual profit. On balance, ownership seems to be a superior motivator for community involvement because the homeowner is exposed to all of the risks of community

3. *Under-Protection of the Personal Interest in the Home*

This sub-part examines areas of the law where the personal interest in the home is in some instances given too little protection. In family law, some jurisdictions do not give sufficient weight to the unique nature of the home when allocating it in divorce cases. In eminent domain law, the home is under-protected both in the level of scrutiny given to government takings of homes and in the amount of compensation paid for those takings.

a. Family Law

As discussed above, the modern conceptions of home, privacy, and family evolved together with the emergence of the bourgeois class in Europe.[148] Prior to that time, the home did not contain a family unit that would be recognizable to the modern eye. During the Middle Ages, children were sent away around age seven to become pages, apprentices, or servants, depending on their parents' social position.[149] Indeed, the concept of childhood did not truly exist in the medieval mind. Rather, age groupings were divided into infants, or those under age seven, who were still dependent on maternal care, and adults.[150] It was not until the development of formal schooling in the sixteenth century that

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decline and more of the benefits of community improvement than a rent-controlled tenant. A more important flaw in Simon's theory, however, is that it fails to confront the very real costs imposed by rent control. Where Radin's theory justifies rent control with a moral claim about an individual's personal connection to the home, Simon's theory justifies rent control with a moral claim about an individual's connection to the community. *See id.* at 1361. But like Radin's theory, Simon's community-based moral claim seems insufficient to outweigh the harm that rent control imposes on the community as a whole and on individual members of the community who are not beneficiaries of rent control. *See supra* notes 137-47 and accompanying text.

148. *See supra* Part II.C.1.

149. RYBCZYNSKI, *supra* note 62, at 48-49.

150. *Id.* at 48-49, 60; ARIÈS, *supra* note 66, at 128. As Ariès explained:

> In medieval society, the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult, even the young adult. In medieval society this awareness was lacking. That is why, as soon as the child could live without the constant solicitude of his mother, his nanny or his cradle-rocker, he belonged to adult society.

ARIÈS, *supra* note 66, at 128.

the concept of childhood as a separate stage of life began to emerge.[151] The modern conception of family then started to emerge as children of the bourgeois began to live at home during their school years.[152]

It is therefore not surprising that home and family are strongly linked as contemporary cultural and psychological ideas.[153] One legal issue that squarely involves the

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151. *See* RYBCZYNSKI, *supra* note 62, at 48-49; ARIÈS, *supra* note 66, at 369.

152. *See* RYBCZYNSKI, *supra* note 62, at 48-49.

153. The link between family and home does not mean that a dwelling inhabited by a single person, or a non-traditional family, is any less of a home. Some critics have attacked the ideology of home as part of a larger ideology of domesticity that has been used as a justification for discrimination against people who do not conform to traditional roles. *See* Williams, *supra* note 2, at 328-29 (arguing that "[i]n its default mode [the ideology of home] reinscribes *traditional* white middle class gender roles"); Schnably, *supra* note 85, at 366-68 (warning against "any simple blessing of the *traditional* home" (emphasis added)). These are valid arguments for broadening our view of home life and gender roles, but are not arguments for changing our legal concept of home. "Non-traditional" families following non-traditional gender roles have homes and should be entitled to the same benefits of home as traditional families. Indeed, one goal of same-sex marriage is to give same-sex couples the same legal rights to their homes as heterosexual couples. *See, e.g.*, Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 395 (1995); Ryan Nishimoto, Book Note, 23 B.C. THIRD WORLD L.J. 379, 390 (2003) (reviewing ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002)); Liz Seaton, *Debate Over Denial of Marriage Rights and Benefits to Same-Sex Couples and their Children*, 4 MARGINS 127, 142-43 (2004).

In an early-twentieth-century critique of the traditional home, Charlotte Perkins Gilman noted, among other things, that the home could survive the absence of a woman who worked outside of the home. *See* GILMAN, *supra* note 20, at 34-35. While critical of those aspects of the traditional ideal of home that relegated women to domestic roles, Gillman was positive about the home generally: "The home *in its essential nature* is pure good, and in its due development is progressively good; but it must change with society's advance; and the kind of home that is wholly beneficial in one century may be largely evil in another." *Id.* at 8. The same holds true today—conceptions of family and domesticity should not remain static, but the importance of home to families, however defined, remains compelling.

A similarly misplaced criticism focuses on the archetypal single-family suburban home, upon which some critics of the American ideology of home have focused their ire. *See* Williams, *supra* note 2, at 328-29; Schnably, *supra* note 85, at 366-68. Because of their focus on suburbia, these criticisms come across, at least in part, as elitist polemics against a 1950s *Leave It To Beaver* caricature of suburban life, where the suburbs are populated exclusively by white, heterosexual families with a working father and stay-at-home mother. *See* Williams, *supra* note 2, at 328-29; Schnably, *supra* note 85, at 366-68. As part of his riff against suburbia, Schnably references that hated institution, the suburban shopping mall. Schnably, *supra* note 85, at 368. Shopping malls have little, if anything, to do with the broad concept of home discussed here. Schnably's reference, however, certainly is an effective academic rhetorical

relationship between family and home is the award of a family home in divorce cases. When minor children are involved, allocation of the family home presents complex issues beyond the simple equitable division of marital property. Unsurprisingly, courts in these situations tend to want to award the home to the custodial parent to minimize the impact of the divorce on children.[154] As one court, using language reflecting the personal possessory interest in the home, explained:

> The value of the family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these non-economic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of the neighborhood.[155]

Many jurisdictions, recognizing the potential negative impact on children, give special treatment to the marital

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device—it is hard to imagine a cultural phenomenon that has provoked more academic scorn than the mall. This caricature of American suburbia is increasingly inaccurate. More importantly, criticism of a caricature of the traditional suburban home fails as a criticism of the larger concept of home. Home as a concept is far broader than a detached suburban home inhabited by a traditional nuclear family. "Home" includes urban apartments, both rented and owned, and many of the legal protections given to homes apply as strongly to rented homes as to owned homes. *See* Radin, *Residential Rent Control*, *supra* note 94, at 365 (arguing that a residential tenancy is a "home" in the same sense as an owned dwelling, and should be given the same moral weight as an owned home). As noted above, "home" also includes the dwellings of individuals, single parents, gays and lesbians, and other "non-traditional" households.

As a result, Schnably's and Williams's arguments against the traditional conception of the home are not compelling arguments against the concept of home generally. Certain conceptions of home deserve criticism and the ideology of home should not stand unquestioned. *See, e.g.*, *supra* note 84 (discussing use of the ideology of home by courts as a basis to decline to impose punishment for domestic abuse). But home as a whole is a powerful and positive institution that is able to withstand criticism and change. It is therefore important to temper criticism of the home with a recognition of its many positive characteristics. *See* Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 423-24 (1993) (taking a sympathetic view of Schnably's critique, but noting the difficulty presented by the tension between the positive and negative aspects of the ideology of home).

154. *See* Martha F. Davis, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089, 1089-91 (1983).

155. *In re* Marriage of Duke, 161 Cal. Rptr. 444, 446 (Cal. Ct. App. 1980).

home in divorce cases.[156] These jurisdictions do not categorically require an award of the marital home to a custodial parent, nor should they. The complexity of property distribution in divorce cases makes categorical rules undesirable.[157] Rather, these jurisdictions appropriately recognize the importance of the possessory interest in the home by giving courts flexibility to consider the interests of children in staying in their homes when awarding marital property.[158]

In other jurisdictions, however, mechanical rules requiring an equal division of marital property may lead to the forced sale of the marital home even in circumstances where a court otherwise believes it appropriate to allocate the home to the custodial parent.[159] While equal division of

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156. *See* Davis, *supra* note 154, at 1104-11 (discussing approaches taken by various jurisdictions to give courts flexibility in awarding the marital home to a custodial spouse). For example, the Uniform Marriage and Divorce Act lays out two approaches for property division that allow the court to consider special circumstances regarding the home. *Id.* at 1104. Great Britain also provides courts with discretion in applying equitable distribution. *Id.* at 1107.

157. *See id.* Some jurisdictions apply something close to a categorical rule, where possession of the marital home usually is given to the spouse who has custody of minor children, though other interests may be considered in exceptional circumstances. *See, e.g.*, *In re* Anderson, 541 P.2d 1274, 1276 (Colo. Ct. App. 1975); Cabrera v. Cabrera, 484 So. 2d 1338, 1339 (Fla. Ct. App. 1986); Goldblum v. Goldblum, 754 N.Y.S.2d 32, 33-34 (N.Y. App. Div. 2003); Sanney v. Sanney, 511 S.E.2d 865, 869 (W. Va. 1998). Courts applying this rule have made it clear that the minor children's interests in remaining in their homes should generally be paramount. *See, e.g.*, *Anderson*, 541 P.2d at 1276 (noting that it was "particularly important" to award custody to "the spouse having custody of the minor children" when the minor child "was under the care of a psychiatrist [and] might be further disturbed by the dislocation if forced to move away from the home, neighborhood school, and friends"); *Cabrera*, 484 So. 2d at 1340 ("[T]he breakup of their parents' marriage is . . . a severe trauma to young children; this additional physical and psychological dislocation [from the family home] should not be imposed upon them unless there is a very good reason indeed for doing so."); *Goldblum*, 754 N.Y.S.2d at 33 (noting that minor children had lived in a marital home all or most of their lives and awarding exclusive possession of the marital home to the custodial parent); *Sanney*, 511 S.E.2d at 869 (holding that the focus of the inquiry "should be what will promote the best interests of the parties' children").

158. *See* Davis, *supra* note 154, at 1104-11.

159. *See id.* at 1097-1101 (discussing the effect of equal division rules on the allocation of the marital home). As the name implies, equal division rules require marital property to be divided equally between the spouses. If, as is typical, the home is the largest marital asset, then equal division will often require its sale to achieve financial equality in the distribution between the two spouses. *See id.*

property between the spouses may, in the abstract, be a laudable goal, it should not categorically outweigh the personal possessory interest of minor children in staying in the marital home. By removing flexibility, mandatory equal division rules under-protect the possessory interest in the home.

b. Eminent Domain Law

Eminent domain gives the government broad power to take private property in return for just compensation. Governments often use the eminent domain power to seize homes and sometimes use it to condemn entire neighborhoods for large-scale development projects. Because the personal interest in the home is a real interest deserving legal protection, current eminent domain doctrine should be modified in two respects. First, courts and legislatures should impose higher levels of judicial scrutiny and additional process protections to better ensure that homes taken by use of eminent domain are in fact required for public use. Second, courts and legislatures should change their approach to just compensation, which currently focuses only on the fair market value of the property, to take into account the personal interest in the home.[160]

The Supreme Court's recent decision in *Kelo v. City of New London*[161] has brought the issue of government takings of homes into widespread public discussion. *Kelo* involved New London's attempt to use eminent domain to seize private homes and, in turn, transfer the property to a private developer.[162] The core legal issue in the case was whether the purported state interest in the taking—spurring economic development—qualified as a "public use" that justified the exercise of eminent domain.[163] The Court answered affirmatively and allowed New London to proceed with the

160. Eduardo Peñalver recently argued that land should not be given favorable treatment over other types of property in the takings context. *See* Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227 (2004). To respond to the rhetorical question in the title of Peñalver's article, land, generally speaking, may or may not be special in the takings context, but homes are special and should be given favorable treatment.

161. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

162. *Id.* at 2658.

163. *Id.*

takings.[164]

In one sense, the Court's holding in *Kelo* was not at all surprising. In two previous cases, the Court had held that eminent domain could be used to take property and transfer it to a private party as long as the taking served a public purpose.[165] The Court also made it clear in those cases that courts should give great deference to legislative determinations of what constitutes a public purpose.[166] *Kelo,* therefore, can be seen as simply following this trend of a flexible interpretation of "public use" and judicial deference to the legislative branch.

In another sense, however, *Kelo* is both surprising and disappointing. Neither of the Court's leading pre–*Kelo* precedents on public use had concerned the involuntary taking of a person's home.[167] *Kelo* therefore offered the Court the opportunity at least to consider applying a higher level of

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164. *Id.* at 2668.

165. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-43 (1984); Berman v. Parker, 348 U.S. 26, 33-35 (1954).

166. *See Midkiff*, 467 U.S. at 241-43; *Berman*, 348 U.S. at 33-35.

167. *Midkiff* involved a unique situation where eminent domain was being used to transfer ownership of a rented home from the landlord to the tenant. *Midkiff*, 467 U.S. at 232-33. As a result, the resident of the home (the tenant) was not being displaced by the exercise of eminent domain. *Berman* involved the taking of a department store as part of an urban renewal program. *Berman*, 348 U.S. at 31. The issue of the taking of homes to transfer to a private developer had been presented in the notorious *Poletown* case. Poletown Neighborhood Counsel v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (allowing Detroit to condemn an entire neighborhood and displace thousands of residents from their homes to clear land for the construction of a General Motors plant). *Poletown* was recently overruled in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), though, like *Kelo*, *Hathcock* did not consider the possibility that homes could be treated differently than other types of property in the eminent domain context. For a pre–*Kelo* discussion of *County of Wayne v. Hathcock*, see Adam Mossoff, *Forward: The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock, 2004 MICH. ST. L. REV. 837; James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845; James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859; Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877; William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929; Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957; Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005; Alan T. Ackerman, *The Changing Landscape and Recognition of the Public Use Limitation: Is* Hathcock *the Precursor of* Kelo*?*, 2004 MICH. ST. L. REV. 1041.

scrutiny in situations involving the taking of homes. The opinion of the Court, however, did not even discuss the possibility that homes could be treated differently than other types of property in the eminent domain context. In light of the litany of areas in which homes are given special legal treatment, as discussed in the earlier portions of this article, the Court's failure to address the unique nature of the home is striking.

Because of substantial public backlash against *Kelo*, state and federal legislators have begun considering statutory responses that would restrict governmental use of eminent domain. Most of the proposed statutes seek to make blanket alterations in the allowable scope of public use, either by expressly prohibiting the kind of economic development taking that was involved in *Kelo* or by prohibiting courts from interpreting "public use" to mean "public purpose."[168] These approaches, however, may paint with too broad a brush. Negative public reaction to *Kelo* appears to be focused on fears that homes could be taken for commercial development, and the taking of homes presents very different interests than the taking of other types of property. In the case of a home, the owner has a strong personal interest in maintaining possession. In the case of commercial property or undeveloped land, the owner's interest is likely to be fungible.[169]

Legislatures should therefore consider focusing their statutory response to *Kelo* on giving additional protection to homes, while maintaining the flexibility of municipalities to use eminent domain more broadly in other contexts. Additional protection for homes could take several forms. Legislatures could restrict the scope of public use by prohibiting the taking of homes for purposes of economic development. The personal possessory interest in homes, however, justifies giving them further protection, even for non-controversial uses such as roads and schools. Legislatures could therefore permit municipalities to take a home only after making a finding that the property could not

168. See Castle Coalition, http://www.castlecoalition.org/legislation/states/index.asp (last visited Feb. 1, 2006), for state-by-state information on proposed eminent domain law reforms.

169. *See supra* notes 96-100 and accompanying text (discussing the distinction between personal and fungible property).

be purchased voluntarily and that there was no reasonable alternative course of action that would achieve the same public goal. Legislatures could take other steps to encourage municipalities to seize homes only as a last resort, such as requiring the payment of a premium above fair market value as compensation for taking a home.[170]

Independent of the issue of discouraging the taking of homes, the current compensation standard for takings warrants reconsideration. American eminent domain law presently limits compensation for takings to fair market value, or "'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[171] This standard, of course, is an artifice in any exercise of eminent domain because the seller is, by definition, not willing to part with the property voluntarily. As Judge Posner has observed,

> market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are "intramarginal" meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not "for sale"). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it "personal") value that they obtain from the property . . . .[172]

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170. *See infra* notes 171-84 and accompanying text. I previously made some of these points in testimony before the Pennsylvania House of Representatives Committee on State Government. *See Weighing* Kelo*; State Lawmakers Should Streamline Eminent Domain Protection for Homes*, 28 PA. L. WKLY., Sept. 12, 2005, at 8 (reprinting testimony).

171. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)); *see also* JACK L. KNETSCH, PROPERTY RIGHTS AND COMPENSATION: COMPULSORY ACQUISITION AND OTHER LOSSES 37 (1983) (noting that in most jurisdictions, owners are not compensated for their full reserve value in their property); *see generally* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation For Regulatory Takings*, 99 NW. U. L. REV. 677, 682-703 (2005) (discussing the operation of the fair market value test and its many hidden variables).

172. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988). Knetsch makes a similar observation:

> When property is taken in this manner, owners cannot hold out for a sum that at least compensates them for what they feel they are giving up, as would be the case in a voluntary sale. . . . Most owners are

Undervaluation of the taken property may be less of a problem when the property in question is undeveloped or commercial because owners of such property are less likely to have a personal interest in it.[173] When the taken property is a home, however, market value compensation fails to compensate the owner for the personal interest in the home.

The Supreme Court has implicitly recognized that market value compensation fails to compensate fully the property owner, but has stuck with the market value standard because of the "serious practical difficulties in assessing the worth an individual places on particular property at a given time."[174] Placing a monetary value on the personal interest in the home is admittedly difficult,[175] though not insurmountable.[176] Objective measures could be added to the fair market value of taken homes by either courts or legislatures. Homeowners could be reimbursed for reasonable moving expenses[177] or reasonable attorney's fees if successful

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> unwilling to sell their holdings at the prevailing market prices, not because they are irrational or unreasonable, but simply because they place a higher value on the particular properties than other people do. . . . As current owners have previously selected their property from among others available to them and have likely increased their degree of preference through familiarity with the neighborhood and emotional attachments, in most cases owners will view their holding as more valuable than any similarly priced but less familiar substitute that could be purchased.

KNETSCH, *supra* note 171, at 36, 39, 40.

173. Even with undeveloped or commercial property, the property at issue may have unique value to the owner. In such a case, the owner is undercompensated by market value compensation.

174. *564.54 Acres of Land*, 441 U.S. at 511.

175. *See* KNETSCH, *supra* note 171, at 38, 49-53 (discussing objections to compensating owners for the personal interest in their property and responses to those objections); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82-85 (1986); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736-37 (1973). As Judge Posner puts it:

> Many people place a value on their homes that exceeds its market price. But a standard of subjective value in eminent domain cases, while the correct standard as a matter of economic principle, would be virtually impossible to administer because of the difficulty of proving . . . that the house was worth more to the owner than the market price.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 531 (6th ed. 2003)

176. For example, Robert Ellickson has suggested that a system of legislatively-defined schedules could be set up to award people additional compensation beyond market value. *See* Ellickson, *supra* note 175, at 736-37.

177. Federal law provides for payment of relocation expenses and other

in contesting the government's valuation of their property. Further, taken homes could be compensated at a fixed premium over fair market value or a premium tied to a sliding scale that increases with the length of residence in the home.[178] Such a premium, admittedly, would be arbitrary, though a premium based on length of residence would be less arbitrary than a flat premium,[179] but would be no more arbitrary than the present system of fair market value compensation. Each of these approaches would come closer to making the homeowner whole. They also would provide incentives for governments to obtain property through voluntary market transactions rather than through eminent domain and to take homes only when truly needed for the public interest.[180]

Alternatively, courts, whether on their own initiative or pursuant to legislative mandate, could tackle the difficulty of subjectively valuing the personal interest in the home. In other legal contexts, such as tort law, courts often confront difficult issues of quantifying the damages necessary to compensate fully an injured person. Because the U.S. Constitution mandates that compensation be just,[181] there is a strong argument that the courts should be willing to accept the difficulties of fully compensating property owners for the personal interest in their homes. That said, the uniqueness of each person's relationship to his or her home may make principled compensation decisions impossible.

IV. FREEHOLDS, LEASEHOLDS, AND CITIZENSHIP

In many of the legal contexts considered in the foregoing sections, there is no apparent reason to treat owned homes differently than rented homes. For all of the issues relating

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replacement costs for people displaced by the acquisition of property for a federal project. *See* 42 U.S.C. §§ 4622, 4623 (2000).

178. English law at one time awarded a customary ten percent premium in all takings cases to "soften the blow of compulsory acquisition." KEITH DAVIES, THE LAW OF COMPULSORY PURCHASE AND COMPENSATION 137 (5th ed. 1984) (quoting Lord Denning in *Harvey v. Crawley Dev. Corp.*, (1957) 1 Q.B. 485).

179. Length of residence is a significant component of a person's connection to a home, but may, in particular circumstances, be outweighed by other factors. *See* Fried, *supra* note 110, at 154-55. Therefore, length of residence is not a perfect measure of personal connection to a home.

180. *See supra* note 170 and accompanying text.

181. *See* U.S. CONST. amend. V.

to security, liberty, and privacy considered in Part II, a resident's interest in the home is the same regardless of whether the home is owned or rented. The landlord-tenant issues discussed in Part III, however, do involve disparate treatment of owners and renters.[182] Implicit in the discussion of just-cause eviction statutes and residential rent control is the fact that ordinarily tenants lose the right to possess their homes at the expiration of their tenancies. In contrast, an owner's right to an owned home expires, absent an unusual circumstance such as an exercise of eminent domain, only when the owner voluntarily transfers ownership of the home.[183] Generally speaking, this disparate treatment makes perfect sense because it simply reflects the inherent difference between a freehold estate of unlimited duration and a leasehold estate of limited duration. An owner owns and a renter rents.

Beyond the inherent differences between freeholds and leaseholds, favoring ownership may be justified by a desire to encourage good citizenship. As William Fischel notes in *The Homevoter Hypothesis*, there is hard evidence that homeowners are "more likely [than renters] to participate in school board meetings, vote in local elections, and otherwise participate in community affairs."[184] Results of national and local surveys show that homeowners vote more often in local elections than renters—in one national survey, by a 77 percent to 52 percent margin.[185] The majority of Americans

182. *See supra* Part III.B.1-2.

183. The loss of a home to a mortgage foreclosure can be seen as involuntary at the time of foreclosure, but the homeowner voluntarily gave up sole ownership of the property when the mortgage was first executed.

184. FISCHEL, *supra* note 1, at 12 ("Even after controlling for other economic and demographic differences between homeowners and renters, [studies have] found that homeowners were more conscientious citizens and were more effective in providing community amenities."). *See also* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1354-57 (2000).

185. FISCHEL, *supra* note 1, at 80-81 ("Nearly every study has shown that renters participate in local affairs in disproportionately low numbers compared to homeowners. In a national survey, 77 percent of homeowners said that they voted in local elections during the period 1984-1992, while only 52 percent of the renters did. Evidence from individual cities confirms the national data. . . . Asset ownership matters."). Beyond their political involvement, homeowners will also tend to make better neighbors because they are less likely to act opportunistically to the detriment of other members of the community. As Fischel notes, "the neighbor they might spite today is the neighbor they might

own homes and, for most of these homeowners, their homes are their single most valuable asset.[186] Fischel's thesis is that the importance of preserving the value of their homes is the key factor that motivates homeowners to be more active citizens, and that homeowners will generally act (and in the political arena, vote) in a manner consistent with preserving the value of their homes.[187] Fischel's invented term, homevoter, reflects this tendency of American homeowners to vote on local matters with the value of their homes in mind.[188]

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need tomorrow." *Id.* at 203. The net effect of homeowner behavior, in the political arena and otherwise, is that having homeowners rather than renters as neighbors has raised home values in various cities. *Id.* at 46.

186. As Fischel has noted,

> The importance of a home for the typical owner can hardly be overstated. Two-thirds of all homes are owner occupied. For the great majority of these homeowners, the equity in their home is the most important savings they have. Data from 1990 surveys show that "median housing equity is more than 11 times as large as median liquid assets among all homeowners; even for homeowners over 65, that ratio was still more than 3 to 1."

FISCHEL, *supra* note 1, at 4 (quoting Gary V. Engelhardt & Christopher J. Mayer, *Intergenerational Transfers, Borrowing Constraints, and Saving Behavior: Evidence from the Housing Market*, 44 J. URB. ECON. 135, 136 (1998)). Homes are not unique in being valuable, and many other types of property hold significant value; but the value of homes is profoundly important to homeowners. Ownership and value are both components of many people's psychological connection with their homes, to the point that some people perceive a dwelling that is not owned as being not home-like. *See* Smith, *supra* note 7, at 42 ("A quarter of the respondents mentioned the lack of ownership, either physical or psychological, as indicative of a non-home."). It is therefore not surprising that most Americans are focused, consciously or unconsciously, on preserving the value of their homes, or that their elected representatives act accordingly. *See generally* FISCHEL, *supra* note 1, *passim* (discussing the political impact of homeownership).

187. *See* FISCHEL, *supra* note 1, at 4. Homeowners behave differently than owners of other types of assets because homeowners have large portions of their wealth—for many Americans, more than half of their net worth—in their homes. As a result, homeowners cannot diversify the risk of loss to their homes as they can with other types of investments, and any loss has the potential to have a very significant impact on the homeowner's financial position. *Id.* at 74-75.

188. *Id.* at 4. Fischel's evidence does not lead to the dogmatic conclusion that homeownership should always be favored over renting or that everyone should be encouraged to own a home. Fischel himself notes that high homeownership rates may lead to higher unemployment rates because the lack of a rental market can interfere with the job market. *Id.* at 86-87. He also notes that homevoters acting in self interest to preserve their home values tend to support land use restrictions that lead to inefficient land use and suburban sprawl. *See id.* at 232. It is also worth keeping in mind the view of one commentator writing at the end of the Great Depression:

Aside from its importance to legal policy issues, the strong effect that homeownership has on local political behavior also reinforces the view that value is a significant component of people's psychological relationship to their homes.[189]

The encouragement of political participation through property ownership has long been a significant strand in American republican thought,[190] and homevoter

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> Much sentimentality has been developed around the idea of home ownership. Civic virtue, the sanctity of the family, the spiritual influence of the old homestead, the lasting value of the family counsel held around the fireside, seem to be the exclusive privilege of the home owner. Nothing is said by political orators, preachers, and crooners about the tragedy of mortgage foreclosures or overdue tax bills.

CAROL ARONOVICI, HOUSING THE MASSES 120 (1939). More recent legal reforms, such as fair lending laws and the right of redemption in foreclosure, *see supra* note 121 and accompanying text, have mitigated some of the concerns expressed by Aronovici, but our enthusiasm for home ownership should at least be tempered by the reminder that housing markets sometimes go down as well as up.

189. *See supra* note 186 (discussing value and ownership in the context of the psychology of the home).

190. *See* Simon, *supra* note 147, at 1356-58 (discussing republican arguments that justify favoritism towards homeowners); *see also supra* notes 144-47 and accompanying text (discussing republican issues in the context of residential rent control). At least since the emergence of a large urban underclass in industrial nineteenth-century America, the home has featured prominently in debates about poverty and social conflict. *See* JAN COHN, THE PALACE OR THE POORHOUSE: THE AMERICAN HOUSE AS A CULTURAL SYMBOL 146-47 (1979). Reformers and politicians in the late nineteenth century focused on the importance of a stable, safe home to the development of children and on the good citizenship that would result from home ownership by the poor. *See id.* at 146 (discussing the necessity of moving children from tenements to private homes); *see also* PERIN, *supra* note 2, at 72 (discussing homeowners as being equivalent to "the ideal of perfected citizenship"). Home ownership by the poor was also seen as a potential antidote for socialism, anarchism, and social disorder, acting as a strong conservative influence by giving the poor a stake in society. *See* COHN, *supra*, at 146-47, 214; *see also* PERIN, *supra* note 2, at 71-72 (discussing the social value of homeownership). Cohn quotes remarks by President Hoover to the Conference on Home Building and Home Ownership that encapsulate the ideal of the home as a source of good citizenship:

> Every one of you here is impelled by the high ideal and aspiration that each family may pass their days in the home which they own; that they may nurture it as theirs; that it may be their castle in all that exquisite sentiment which it surrounds with the sweetness of family life. This aspiration penetrates the heart of our national well-being. It makes for happier married life, it makes for better children, it makes for confidence and security, it makes for the courage to meet the battle of life, it makes for better citizenship. There can be no fear for a democracy or for self-government or for liberty and freedom from home owners no matter how humble they may be.
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> . . . .

republicanism is a strong theoretical justification for government policies that give preference to home ownership over home renting. However, the benefits of political participation and good citizenship do not alone justify policies that favor homeownership. Rather, the benefits of homeownership must be balanced against the social costs of any given policy.

A focus on home ownership and citizenship is reflected in the favorable treatment given to homes in the Internal Revenue Code, most notably by the deduction allowed for interest on home mortgages and by the large exemption given to capital gains realized on the sale of homes.[191] The favorable treatment given to home ownership has been both widely criticized and widely defended on a number of grounds.[192] One defense of the current system is that it

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> . . . Probably nothing creates greater stability in government than a wide distribution of property ownership on the part of the people interested in that government. . . .
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> It is doubtful whether democracy is possible where tenants overwhelmingly outnumber home owners. For democracy is not a privilege; it is a responsibility, and human nature rarely volunteers to shoulder responsibility, but has to be driven by the whip of necessity. The need to protect and guard the home is the whip that has proved, beyond all others, efficacious in driving men to discharge the duties of self-government.

COHN, *supra*, at 237-38 (quoting HOME OWNERSHIP, INCOME AND TYPES OF DWELLINGS, VOL. IV OF THE REPORTS OF THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP 4 (1931)). The desire to facilitate home ownership by the poor, however, ran headlong into America's strong strain of individualism and aversion to devaluing the home as a symbol of honest labor and thrift by making it a subject of charity. *Id.* at 146. As a result, the American ideal "was that not every man deserved a home, but that every man deserved the opportunity to work for a home." *Id.*

191. *See* I.R.C. § 163(h)(3) (2000) (mortgage interest deduction); I.R.C. § 121 (capital gains exclusion for principal residence).

192. *See, e.g.*, Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 406-409 (1994); Mann, *supra* note 184; William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43 (1996); Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157 (2005); Joseph Snoe, *My Home, My Debt: Remodeling the Home Mortgage Interest Deduction*, 80 KY. L.J. 431, 451-79 (1992); Joseph W. Trefzger, *Why Homeownership Deserves Special Tax Treatment*, 26 REAL EST. L.J. 340 (1998). Because a large majority of Americans own their homes, eliminating the mortgage interest deduction entirely seems to be a political impossibility. It may be possible, however, to make the mortgage interest deduction more progressive by reducing the cap on the amount of mortgage

encourages homeownership and, therefore, good citizenship.[193] Conversely, a criticism is that it unjustifiably subsidizes the housing costs of homeowners at the expense of renters.[194]

Resolving the complex tax policy issues presented by the favored treatment of homeownership is beyond the scope of this article. The tax issue, however, is a good illustration of the potential significance of republican arguments for government policies that favor home ownership over home rental. Encouraging active citizenship is a factor that supports favored treatment of ownership over rental, but is not one that should necessarily trump competing arguments. It remains a testament to the importance of homeownership to voter behavior, however, that despite the interest it creates in academia, serious political discussion of the abolition of the mortgage interest deduction remains a practical impossibility.

V. CONCLUSION

Charlotte Perkins Gilman observed that home "in its essential nature is pure good."[195] The positive characteristics of home, however, may be outweighed in specific circumstances by competing interests that also deserve legal protection. Each of the three Parts of this Article discussed ideological conceptions of home and law that lend themselves to absolute application: in Part II, home as castle; in Part III, Radin's suggestion that the personal interest in the home should always trump competing fungible interests; and in Part IV, the republican ideal that homeownership should always be encouraged. The central conclusion of this Article is that while each of these conceptions has strengths, legal issues involving in the home remain contextual and should

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principal for which homeowners can take a deduction. Reducing the cap from its current level of $1.1 million to, say, $400,000, would increase the tax burden on a small number of very wealthy homeowners, while preserving a substantial benefit for all homeowners, including those with mortgages exceeding the cap who would still qualify for the exemption on interest from $400,000 of their mortgage.

193. *See, e.g.*, Forrester, *supra* note 192, at 407 & n.185; Snider, *supra* note 192, at 176; Trefzger, *supra* note 192, at 346.

194. *See, e.g.*, Mathias, *supra* note 192, *passim*; Snoe, *supra* note 192, at 467-71.

195. GILMAN, *supra* note 20, at 8 (emphasis omitted).

not be resolved by blanket application of ideological principles.

In many circumstances, particularly those involving the home as a source of individual autonomy and privacy, the unique nature of home often justifies special legal treatment. In others, such as homestead exemptions and rent control, interests in the home are given too much protection. In still others, notably equal division rules in family law and certain aspects of eminent domain law, the home is given insufficient protection. In all of these legal contexts, striking the correct balance requires looking past the broad idea that homes are unique and special and focusing instead on the particular aspects of home that are relevant to the issue at hand.