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The Property Right to Voice

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Abstract

Should property owners have a unique right to express their opinion just because they own property? While current law recognizes owners' rights to express their voices in certain instances, it does not provide comprehensive and coherent answers to this question. This article provides an analytical framework for recognizing the owners' right to voice as an independent property entitlement within the owners' property bundle of rights and delineates its boundaries. Yet even when the owners' voice is property-dependent, there is a difference between voice that facilitates the realization of another property entitlement (such as the right to exclude, use, or trade) and voice that is constitutive to ownership in and of itself. Only the latter instances justify recognition of the owners' right to a voice as an independent property entitlement. By examining different branches of both tangible and intellectual property law, such as inheritance law, eminent domain, homeowners' association law, zoning law, and copyright law, this article demonstrates the usefulness of the proposed analytical framework in explaining certain parts of the current law and suggests modifications of other parts.

Keywords: *Democratic participation; Freedom of speech; Property rights; Private law theory*

I. Introduction

Property owners, like most people, often have opinions. They might support or oppose policies regarding health insurance, the right to abortion, or climate change and might also like to express their thoughts. Alongside general policy positions, property owners may also have input on how life should be managed in their area. For example, property owners may have a stance on how schoolboards in their county should function, what plans should be implemented in their residential neighborhood, as well as what infrastructure and institutions should be established nearby. It would be proper to say, therefore, that owners may have a position on various issues and that some will appreciate the possibility of expressing their positions as part of a decision-making process. Should their property ownership impact their ability to express their opinions?

In this article, it is argued that while in most cases owners' desires to voice their opinions have nothing to do with their property ownership, in other cases it may be inextricably linked. Thus, while it is difficult to establish a link between property ownership and owners' desires to express political views or positions regarding the proper functioning of the schoolboard, it is much easier to link

property ownership to owners' desires to choose their heirs, or alternatively to be heard before their property is taken through eminent domain. In these later cases, expressing one's voice is not merely linked to formal ownership but also to social relationships, such as family, community, and at times even society at large. It is this sense of social relationship and belonging that lies at the core of recognizing owners' distinct right to voice. In other words, owners' opinions regarding property-related issues should not be considered as merely another incident of exercising one's constitutional freedom of expression but constitute a unique realm within this right. Due to unique characteristics and importance of owners' voice in such cases, it becomes an inherent property entitlement within the owners' bundle of rights. Yet even when the owners' voice is property-dependent, there is a difference between voice that facilitates the realization of another property entitlement (such as the right to exclude, use, or trade) and voice that is constitutive to ownership in and of itself. Thus, it would be correct to distinguish between owners who shout, "Get off my property," or who place a 'Private Property' sign warning strangers against entering their property and owners who demand to have their voices heard before any modifications are made in their homeowners' association's bylaws or copyright owners seeking that their work—and therefore their voices—will not be distorted by others. In this article, it will be argued that while property law protects the owners' ability to use their voices to exercise their rights to exclude others or trade their properties, they do not provide proper protection when the owners' voice is constitutive of their ownership. In this article, the aim is to identify the potential applications of owners' right to voice and, secondly, to examine how this recognition explains some part of the current law and suggests modifications of other parts.

Recognizing owners' right to voice means that in some cases the law should consider the owners' ability to make their voices heard as an independent property right within the greater property bundle. This recognition raises concerns about providing legal protection to owners' voice against others (especially those who do not own property) and society. The main concerns are the differences in power between property owners and those who do not own property and the overriding legal protection for the socially strong at the expense of the socially weak. Another concern involves strengthening the ability of property owners to fend off programs designed to alleviate the housing distress of those who do not own property and expanding discrimination between those who have and those who have not. These concerns must be taken into account when shaping legal arrangements. Widening the class, racial, and economic gaps in society threatens property owners and those who do not own property alike. And yet while these concerns question the social desirability of recognizing owners' right to voice, they nevertheless do not justify its denial, but rather its limitation. Social values should limit the scope of the owners' right to voice, just as they limit the scope of any other property entitlement in the property bundle of rights. Thus, just as the U.S. *Fair Housing Act* restricts the right of owners to exclude—so that this exclusion cannot be made on racial grounds,

religious grounds, or due to disability—the owners' right to voice should also be limited by these essential social values.[1] Moreover, in some instances, the owners' right to voice should not only be restricted, but these social values may even require action on the owners' part. Just as restaurant owners may be required to install accessibility for people with disability at their own expense, owners may be required to speak up in support of establishing affordable housing projects or socially desired institutions in their neighborhoods. Recognizing owners' right to voice, therefore, does not provide an opportunity to exploit social disparities, but on the contrary, it may, in some cases, harness the owner to realize those very values.

This Article proceeds in five parts. Part II reviews the historical affinity between voice, civic participation, and individual autonomy. As this part demonstrates, voice and social power are interconnected, which turns the right to property to a locus of conflicting interests and social concerns. Part III examines the relationship between property and voice and suggests that while in some cases owners' voice is property-independent, in others it may be related to their ownership. Part IV identifies the right to voice among other property entitlements within the property bundle. It then goes on to distinguish between two different roles that voice may play in ownership: voice that facilitates owners' abilities to realize another property entitlement (such as the right to use, exclude, or trade) and voice that is constitutive of ownership. Part V addresses the concerns of recognizing owners' right to voice as an independent property entitlement. It argues that, as any other property entitlement within the property bundle, the right to voice should be limited to accommodate social values and, at times, may even require action on behalf of owners. Part VI aims to demonstrate how owners' right to voice may explain some part of the current law and suggest modifications of other parts. To examine the implications of recognizing owners' right to voice on property law, four property instances are discussed in which owners' voice is constitutive to their ownership: inheritance law, eminent domain, owners' resistance for zoning and development, and copyright law. As these inquiries demonstrate, the owners' right to voice plays an important role in defining ownership and may have practical implications on how the law should be shaped.

II. Voice, Participation, and Autonomy

The ability of people to make their voices heard on various social, political, economic, or cultural issues has not always been guaranteed or self-evident.[2] People all around the world have been denied voice because of their race, gender, social status, or religious affiliation.[3] However, since the beginning of the liberal age,

1. See *Fair Housing Act*, 42 USC §3601 (1968) [*Fair Housing Act*].
2. See e.g. David Bogen, "The Origins of Freedom of Speech and Press" (1983) 42:3 Md L Rev 429; Richard W Davis, ed, *The Origins of Modern Freedom in the West: The Making of Modern Freedom* (Stanford University Press, 1995).
3. See John Hine Mundy, "Medieval Urban Liberty" in Davis, *supra* note 2, 101 at 120-27.

freedom of speech has been recognized by most Western jurisdictions as one of the fundamental liberties guaranteed against oppression.[4] The scope and scale of the legal protection for freedom of speech were debated among lawyers and philosophers, mainly due to the controversies regarding the justifications for this freedom.[5] While some argued that freedom of speech was necessary for discovering the truth,[6] others suggested that it was necessary for human ability to achieve self-fulfillment.[7] Another line of justification views freedom of speech as a means for dealing with the suspicion inherent in the state, and finally, some saw freedom of speech as an engine for civic participation in a viable democracy.[8] Each of these justifications offers a different scope of freedom granted to citizens and, just as importantly, a different scope of legal protection granted to a citizen vis-à-vis the state. Yet all suggest that individuals in a liberal society should be able to express their opinions and beliefs, as part of their fundamental set of human rights.[9]

Since the end of the nineteenth century, the involvement of citizens in governmental decision-making processes had constantly increased. John Dewey argued that technological changes allow for the use of communication to create interaction between people, as well as to increase public involvement of residents in government decision-making.[10] Increasing the involvement of residents in public and governmental decision-making processes will, according to Dewey, lead to a shift from 'communication' to 'community.'[11] Public participation in governmental decision-making processes was argued to be desired because it allows hearing what the public actually thinks, supports the establishment of social capital,[12] reduces objections and allows achieving agreements,[13] reduces costs of collective action, and increases the legitimacy of and trust in the government.[14] In a sense, public participation and the adoption of procedures that allow

4. See Eric M Barendt, *Freedom of Speech*, 2nd ed (Oxford University Press, 2007); Jeremy Waldron, "Liberalism" in Edward Craig, ed, *Routledge Encyclopedia of Philosophy*, 1st ed (Routledge, 2000).
5. See Kent Greenawalt, "Free Speech Justifications" (1989) 89:1 Colum L Rev 119.
6. The 'marketplace of ideas' is usually attributed to John Stuart Mill's political theory. See John Stuart Mill, *On Liberty* (Hackett, 1978) at 18: "Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action." See also Thomas Irwin Emerson, *The System of Freedom of Expression*, 1st ed (Random House, 1970) at 6-7.
7. See e.g. C Edwin Baker, "Autonomy and Free Speech" (2011) 27:2 Const Commentary 251.
8. See Vincent Blasi, "Free Speech and Good Character" (1998) 46:5 UCLA L Rev 1567; C Edwin Baker, "Scope of the First Amendment Freedom of Speech" (1978) 25:5 UCLA L Rev 964.
9. See Baker, *supra* note 8 at 990-91.
10. See John Dewey, "Education and Social Change" (1937) 23:6 Bulletin of the American Association of University Professors 472 at 472-74.
11. *Ibid*. See also John Dewey, *Experience and Nature* (Scholar Select, 2015).
12. See Samuel D Brody, David R Godschalk & Raymond J Burby, "Mandating Citizen Participation in Plan Making: Six Strategic Planning Choices" (2003) 69:3 J American Planning Assoc 245 at 246.
13. See Julia M Wondollek & Steven Lewis Yaffee, *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (Island Press, 2000) at 24.
14. See e.g. Sheila R Foster, "The City as an Ecological Space: Social Capital and Urban Land Use" (2006) 82:2 Notre Dame L Rev 527.

citizens and stakeholders to be heard by decision makers increase the democratic character of decision-making processes. It is also conceived as contributing to the autonomy of individuals.

The affinity between participation and the enhancement of individual autonomy is important for understanding the liberal insistence on voice as an important feature of every institutional design.[15] While neo-liberal economists placed significance on the individual's ability to exit, in politics, as Hirschman argues, voice was considered as the core of political behaviour.[16] The ability of a citizen to be heard and to affect public decision-making, therefore, was important not only to achieve the greater good but also to support the individual. It reinforced the understanding that individuals have an impact, even if a small one, on what is happening in their surroundings; strengthened the recognition of the uniqueness of each individual; and allowed for reflection and rethinking of individuals. All these effects of participation and voice contribute, therefore, to the autonomy of individuals, by including them in decisions that may affect their lives.

One may, of course, point to disadvantages in the participation of individuals in public decision-making processes. Such participation, if mandatory, may cause decision-making processes to be inefficient due to the costs involved in conducting participatory proceedings. Others may argue that individuals may lack the required professional knowledge regarding the execution of public decisions and needs and therefore may impair the optimal realization of the public needs.[17] Yet concerns about public participation are not limited to the inefficiency or lack of professional knowledge of individuals. Providing individuals with a right to voice may lead to a situation in which certain individuals may abuse this right. According to this claim, providing individuals with a right to voice—even if equally allocated to all the individuals in society—may reflect power gaps that exist in our society.[18] Thus, stronger individuals will use their voices more powerfully, *inter alia*, because of their awareness of their rights and their access to representation, while weaker individuals, although having voice, are unlikely to be heard. In this sense, providing individuals with a right to voice may further strengthen those who are strong and further weaken those who are weak. History reveals that providing individuals with the opportunity to have a voice in decision-making processes reflects, and at times even intensifies, the power gaps in society. Since voice and social power are so interconnected, it is not surprising that the right to property has been utilized as an arena for dealing with the legal challenges regarding the exercise of voice by individuals, including women and slaves.

15. See Emerson, *supra* note 6 at 6-7; Baker, *supra* note 7.
16. See Albert O Hirschman, "Exit, Voice, and the State" (1978) 31:1 World Pol 90.
17. See Rod Dacombe, *Rethinking Civic Participation in Democratic Theory and Practice* (Palgrave Macmillan, 2018) at 9-10.
18. *Ibid* at 10.

III. The Connection Between Property and Voice

Property has been historically linked to individuals' abilities to exercise their autonomy and to become the authors of their own life stories.[19] As such, property law provided owners with the power to cope with government regulations as well as with others' interventions that threatened their abilities to exercise their autonomy.[20] However, while property ownership may enhance owners' autonomy, it nevertheless may interfere with the autonomy of those who do not own property.[21] The affinity between property ownership and individual autonomy led, almost naturally, to property owners being allowed to make their voices heard in different social, economic, political, and legal spheres. Those who did not own property, on the other hand, did not always get their voices heard.[22] History reveals that property owners used the natural bond between property ownership, autonomy, and voice to gain advantage over those who did not own property and to silence those whose positions threatened the social status of property owners.[23] The most prominent example of such exploitation of power was the seventeenth-century property qualifications for voting set by the thirteen American colonies, which were later embraced by several states. [24] These qualifications, which survived in some states until the middle of the nineteenth century, tied property ownership with the right to vote and made the explicit connection between property and voice.[25] The decision of all states to abandon these qualifications, even if at different times, stemmed from the understanding of their social and economic discriminatory role toward slaves and women.[26] Similar, though not identical, property qualifications for voting were implemented in Canada, where in 1885 the Parliament established a complicated federal franchise based on property ownership.[27] While these property qualifications eroded over the years, it was not until 1948 that they were completely abolished.[28] These historic examples raise two questions: First, is there a natural

19. See James M Buchanan, *Property as a guarantor of liberty* (Elgar, 1993); Ḥanokh Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Hanoch Dagan, "Inside Property" (2013) 63:1 UTLJ 1; *cf* Laura S Underkuffler, "On Property: An Essay" (1990) 100:1 Yale LJ 127.
20. See Dagan, "Inside Property", *supra* note 19 at 19.
21. See Underkuffler, *supra* note 19.
22. See Rashmi Dyal-Chand, "Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law" (2014) 63:6 Am U L Rev 1683.
23. *Ibid.*
24. See Alexander Tsesis, *For Liberty and Equality: The Life and Times of the Declaration of Independence* (Oxford University Press, 2012) at 79-81.
25. See Robert J Steinfeld, "Property and Suffrage in the Early American Republic" (1989) 41:2 Stan L Rev 335.
26. See D Grier Stephenson Jr, "The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years" (1988) 57:1 UMKC L Rev 47. *Cf* Steinfeld, *supra* note 25 at 367 (suggesting that the reason for abolishing property qualifications for voting was mainly due to working men's demands to separate the public realm from the private one).
27. See *Electoral Franchise Act*, *1885*, SC 1885 (48 & 49 Vict), c 40.
28. See *Dominion Elections Act*, SC 1948, c 46, ss 6, 12. For a review of the history of Canadian voting qualifications, see *A History of the Vote in Canada*, 3rd ed (Elections Canada, 2021) [*History of the Vote*].

connection between property and voice? And second, assuming that such a connection may exist, how should it shape legal arrangements? These two questions, although interrelated, require separate examination. The first question requires investigation of the relationship of voice to property ownership and to owners' realization of their right to property. The second requires both an inner-property examination of the proper balance between different property values and an external balance between the right to property and other rights and social values.

This article suggests a complex answer to the first question, providing that property and voice maintain three different types of relationships. In some cases, the property owners' entitlement to voice has nothing to do with their property ownership. Property ownership in these cases has no role at all in the ability of the owners to express themselves and to make their voices heard. In other cases, the owners' entitlement to voice depends on—and to some extent arises from—their property ownership. In these cases, two different roles of voice in property can be identified: a facilitative role and a constitutive one. When owners raise their voices to support or ensure the fulfilment of other proprietary entitlements, their use of voice is facilitative. However, in other cases, when owners use their voices, they are realizing a constitutive, and therefore independent, proprietary entitlement. In these cases, if property owners are silenced, they lose part of their property rights. In other words, when voice is constitutive to the owners' property rights, the law should recognize their right to voice. Yet, this recognition hardly ends the investigation but rather serves as a beginning of a second one: what are the boundaries of owners' right to voice? How should it be balanced against other property values? And where do one property owner's rights begin and the rights of others end?

A. Property-Independent Voice

Voice is property-independent if the right to property is not part of the considerations for recognizing the legal entitlement to voice. Property qualifications for certain commercial activities provide one illustration among many for the incidental connection between property and voice. The right to express political, religious, or cultural views is another example. All of these incidents of expression are protected under the constitutional right to freedom of expression and should be applied equally to all, regardless of their proprietary status.[29] In this section, the criteria for determining property-independent voice and how such voice maintains no affinity to the owners' property right will be further explained.

29. See e.g. US Const amend I: "Congress shall make no law … abridging the freedom of speech"; *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at § 2: "Everyone has the following fundamental freedoms: … freedom of thought, belief, opinion and expression"; *Basic Law of the Federal Republic of Germany*, Article 5: "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures"; UK's *Human Rights Act 1998* (UK), art 10.1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Historically, there have been several justifications for establishing property qualifications for the right to vote.[30] In fact, by the middle of the eighteenth century, all but one American colony and all Canadian provinces had adopted electoral rules that denied voting to those who owned no property.[31] Limiting voting to property owners was supported by two prominent arguments, both dealing with the valuation of the vote. Restricting voting to property owners alone ensures voters' autonomy and allows the vote to be free from external influences.[32] This argument suggests that only property owners can be free agents capable of expressing their authentic voices. The second argument for restricting voting to property owners suggests that only property owners are deeply enough rooted in the community to seek the good of the community.[33] That said, a pressing question arises: what role does the right to property play in this case? The right to property should be incidental since the considerations that underlie the entitlement of a person to express their position in relation to their community make no essential reference to the right to property. Both justifications for property qualifications for voting prove this argument. Neither the independence argument nor the community argument suggests that property owners have better knowledge or skills in making good decisions for the community. In fact, both arguments sought to combat what was perceived at that time as certain restrictions on the ability of those who do not own property to voice their authentic voices.[34] Property qualifications, therefore, were used to achieve another goal, which has nothing to do with either property or ownership: independent voting without external influences. Thus, what is at stake is a person's ability to express an authentic voice, not ownership. The important question is how can it be ensured that election results reflect an authentic and informed public voice, rather than placing restrictions that would prevent some members of the public from voting at all? The *Twenty-Fourth Amendment*,[35] which denied any tax qualifications on voting in federal elections, and the *Harper v Virginia Board of Elections*,[36] which extended this rule to state elections, reinforced the understanding that property—however important a right—has nothing to do with anyone's right to voice about how their community should evolve and flourish.[37] Therefore, while it is important that the law seek to preserve the purity of elections, as well as their being free from external influences, it has nothing to do with property ownership.

30. See Steinfeld, *supra* note 25 at 340.
31. *Ibid* at 335.
32. See *ibid* at 340: "writers in this period frequently explained the disfranchisement of the propertyless by observing that those without property were not free."
33. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Rowman & Littlefield, 2001) at 211.
34. See Steinfeld, *supra* note 25 at 340.
35. See US Const amend XXIV, § 1 [*Twenty-Fourth Amendment*].
36. 383 US 663 (1966) [*Harper*].
37. For a review of the history of Canadian voting qualifications, see *History of the Vote*, *supra* note 28.

Another case of property-independent voice might be owners' resistance to a particular governmental or municipal action, or to a specific change that occurs near their properties. The story of what had been known as the 'Ground Zero mosque' provides a good example of such a property-independent voice. The Ground Zero mosque is the popular name given to a development that was originally envisioned as an Islamic community center and mosque in Lower Manhattan, New York City.[38] The mosque's proposed location was two blocks from the memorial on the World Trade Center site for the victims of the September 11th attacks, which sparked much public and political criticism.[39] While the proposed location of the mosque played a significant factor in the public resistance, those who opposed the plan were not doing so because their property rights had been violated. Some of the project's loudest opponents were not even New Yorkers.[40] While the arguments against the construction of the mosque may be controversial, they should be considered as part of the opponents' freedom of expression or protest that a liberal society grants to its citizens. They nevertheless have nothing to do with the opponents' right to property.

The important point is that the ownership in these cases is not directly related to the owners' voice. In none of the cases does the right to property have a direct connection to the motives behind the owners' desire to make their voices heard. Voting on the future of the community should not have to do with the question of property ownership, as these restrictions are designed to ensure an authentic and informed vote. In the same way, opposing specific governmental or private plan or action, even if it has spatial implications, is not necessarily related to the property rights of the opponents. Property ownership in these cases plays only an incidental role. Therefore, although opponents may have a right to be heard or to protest, it does not affiliate to their having or not having a property right.

B. Property-Dependent Voice

Freedom of expression protects all citizens', including property owners', right to express their opinion regarding political, religious, cultural, and social issues.[41] In most cases, the right to express an opinion is property independent, as it is not directly connected to the speaker's proprietary status. However, there are instances in which voice and property are inextricably linked: voice cannot be specified apart

38. See Liyakat Takim, "The Ground Zero Mosque Controversy: Implications for American Islam" (2011) 2:2 Religions 132.

39. See Ray Sanchez, "Despite Protests, Mosque Plan Near 9/11 Site Wins Key Vote", *ABC News* (25 May 2010), online: http://abcnews.go.com/US/mosque-plan-clears-hurdleprotests/story?id=10747570; Javier C Hernandez, "Mosque Near Ground Zero Clears Key Hurdle", *The New York Times* (3 August 2010), online: https://archive.nytimes.com/cityroom.blogs.nytimes.com/2010/08/03/mosque-near-ground-zero-clears-key-hurdle/.

40. See Jeff Jacoby, "A mosque at ground zero?", *The Boston Globe* (6 June 2010), online: http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/06/06/a_mosque_at_ground_zero/; Lauren Green, "Plan to Build Mosque Near Ground Zero Riles Families of 9/11 Victims", *Fox News* (3 November 2015), online: https://www.foxnews.com/us/plan-to-build-mosque-near-ground-zero-riles-families-of-9-11-victims.

41. See generally *supra* note 29.

from having a property right. To see that, recall the property qualifications for voting. The ability of community members to raise their voices regarding the future of their communities makes no reference to the owners' property right. As the *Twenty-Fourth Amendment* and the Supreme Court ruling that followed clarified, community members' rights to vote would persist even if they own no property or lack the ability to pay taxes.[42] The understanding that voting is property-independent voice was applied by the courts to federal,[43] state,[44] county,[45] municipal,[46] and school board elections.[47] Now assume that the elections are expected to decide on turning a particular residential neighborhood into a historic preservation district. Many people may have an opinion on these matters. Some may question the historic importance of this district, others may dispute the cultural desirability of preserving specific histories, and others may think that preservation may impede the economic development of the area. All of these opinions, however socially important or significant they may be, are property independent. Owners as well as non-owners may have an opinion on these matters. However, owners of properties within the designated areas have other considerations that make their voice regarding such matters qualitatively different. In some cases, turning a neighborhood into a historic preservation district may impose relatively few restrictions on renovating a building, while other cases may involve extensive regulations that restrict owners' autonomy. Such regulations may include the color of outside paints, authentic fixtures and other hardware, use of appropriate materials like wood instead of plastic, or the style of window treatments. Owners may be required to provide notice of intention to tear down a home and to wait a long period before beginning demolition. Voting to turn a neighborhood into a historic preservation district, therefore, presents a qualitatively different role for the owners' voice: their voice is now formative for their ownership. In this respect, the entitlement of the owners to voice their opinions regarding changes that may affect their properties cannot be specified apart from their right to property.

Eminent domain is another example of the essential role of voice in property. Consider a municipality that decides to confiscate private property for public use. While eminent domain proceedings often include public hearings in which both stakeholders and the public might raise their voices for or against the use of eminent domain for the specific purpose,[48] the owners' voice is of different

42. See *Twenty-Fourth Amendment*, *supra* note 35; *Harper*, *supra* note 36.
43. *Ibid.*
44. See *Harper*, *supra* note 36.
45. See *Avery v Midland County*, 390 U.S. 474 (1968).
46. See *Cipriano v City of Houma*, 395 US 701 (1965); *City of Phoenix v Kolodziejski*, 399 US 204 at 210.
47. See *Kramer v Union Free School District*, 395 US 621 (1969).
48. See e.g. the New York Eminent Domain Procedure Law, NY EM Dom Pro L § 201 (2020): "prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing"; Minn Stat Ann § 117.0412 subd (2)(a):"If the taking is for the mitigation of a blighted area, remediation of an environmentally contaminated area, reducing abandoned property, or removing a public nuisance, a public hearing must be held before a local government or local government

significance. Unlike the possible public objection to the realization of a particular public need—thus exercising their property-independent voice—the owners' objection is formative for their property rights. Thus, while the voice of the public may deal with the desirability of realizing the public need and the environmental, social, and economic consequences of its implementation, the voice of the owners deals with the other side of the coin, i.e., the loss of their private property. The owners' voice, therefore, is qualitatively different from the voice of the public at large. This is an important voice in the public debate about the desirability of the realization of the public need, but it is also radically different from the voice of the public. It is a voice that stems from, and focuses on, the property right of the owner. In this sense, this voice is inextricably linked to the property ownership.

Inheritance law is another example of property-dependent voice. While states in the United States differ in their approaches regarding the property regimes that govern marriage,[49] all share the understanding that property owners have the right to bequeath their property to their heirs.[50] Equally important, American inheritance law recognizes the owners' right to determine their heirs through writing a will. A will is the unilateral disposition of one's property, in whole or in part, that takes effect upon the individual's death.[51] While most wills include technical legal orders, written in legal language by lawyers, they nevertheless serve as a mouthpiece for the voice of the owner. Wills often serve the owners' revenge on those who harmed them on the one hand and heal family wounds on the other. Despite their legal language, wills allow owners to demonstrate to their heirs how much they value them and in some cases even oblige them to a particular lifestyle. As Lawrence Friedman argues, the will is the sole, authentic voice of the dead owner.[52] Individuals that do not own property can also, of course, leave a moral will to their family and friends. In some cases, such wills may have even greater effect on the life of the family who does not own property. However, when property owners speak through their properties, their voices are inextricably linked to their property rights.

All these examples demonstrate that in some cases owners' voice is inextricably linked to their right to property. Owners' opposition to zoning regulations or to eminent domain proceedings arises directly from their ownership of the potentially affected properties. Of course, they may have something to say about

agency"; *Canadian Expropriation Act*, RSC, 1985, c E-21, art 10: "Forthwith after the expiration of the period of thirty days … the Minister shall … order that a public hearing be conducted with respect to the objection and any other objection to the intended expropriation" [*Canadian Expropriation Act*].

49. See Caroline Bermeo Newcombe, "The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women" (2011) 11:1 U Md LJ Race, Religion, Gender & Class 1; Shelly Kreiczer-Levy, "Inheritance Legal Systems and the Intergenerational Bond" (2012) 46:3 Real Prop Tr & Est LJ 495.

50. *Ibid* at 498.

51. See Karen J Sneddon, "Speaking for the Dead: Voice in Last Wills and Testaments" (2011) 85:2 St John's L Rev 683.

52. See Lawrence M Friedman, "The Law of the Living, the Law of the Dead: Property, Succession, and Society" (1966) 1966:2 Wis L Rev 340.

these proceedings even if their assets would not be directly affected. The law provides at times opportunities to hear the voice of the public. But when their property is at stake, the owners' voice gets a qualitatively different role. In such cases, the voice allows owners to fully realize their property rights.

The same is true regarding the owners' voice in inheritance law. While dying people may want to convey messages to their family and friends, regardless of their property status, their allocation of assets has its own unique function in their ability to realize their property ownership. Recognizing that in some cases owners' voice is inextricably linked to their right to property requires further investigation regarding the incorporation of voice within property law, as well as regarding the nature and scope of such incorporation.

IV. The Property Right to Voice

Property-dependent voice questions the understanding of the right to property and the entitlements that it provides to owners. Here, it is argued that property-dependent voice may play two different roles in owners' realization of their right to property: a facilitative role and a constitutive one. The role that the property-dependent voice plays in a specific instance should affect the scope and scale of the owners' right that their voice be heard, as well as the extent of the legal protection that should be given to the owners. As we suggest, this understanding may explain some part of the current law and suggest modifications of other parts. To further understand this distinction, this part begins by contextualizing the property rights theory. This theory allows recognizing some voices as a proprietary entitlement and, equally important, identifies the instances in which they should be conceived as such.

A. The Bundle of Rights Paradigm of Property

The bundle of rights paradigm of property suggests that property ownership consists of several proprietary entitlements. This paradigm, as Penner demonstrates, results from a theoretical combination of Wesley Hohfeld's analysis of rights and A.M. Honoré's description of the incidents of ownership.[53] While Hohfeld suggests that a property right is actually a bundle of "rights" of various kinds (including liberties, claim-rights, powers, and immunities),[54] Honoré specified the different incidents (or characteristics) of ownership to include different entitlements (such as the right to use, the right to possess, the right to capital, etc.).[55] The bundle of rights paradigm of property therefore suggests an indefinable picture of 'property'. It allows different combinations of entitlements to be recognized in different instances while preserving them all under the property

53. See JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 UCLA L Rev 711.
54. David Campbell & Philip Thomas, eds, *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Routledge, 2001) at 61.
55. See AM Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (1961) 107 at 112-24.

umbrella.[56] In this sense, the bundle of rights paradigm is more flexible, with more adjustable and realistic circumstances, than other property paradigms.[57] It suggests that ownership consists of different entitlements, the scope and scale of which are not fixed and, more importantly, it does not undermine the definition of ownership.[58] Honoré identified eleven ownership incidents, the prominent among them—which have become recognized property entitlements—are the right to possess (*or* its better known mirror image: the right to exclude), the right to use, the right to manage, the right to the income, the right to the capital, and the right to security.[59] All of what Honoré calls 'ownership incidents' were recognized as inherent property entitlements. These incidents are what Honoré identified as those entitlements required for owners to realize their property rights. Property owners may be required to exclude others from their property, to sell their property, or to determine how it will be used. However, the realization or non-realization of any of these entitlements in each situation cannot and should not determine ownership. Honoré's ownership incidents, therefore, present an illustrative list of proprietary entitlements available to the owners to realize their ownership. It should not be considered a comprehensive list of entitlements that must be realized in any given case. As Honoré admits, owners' entitlements, however foundational to ownership, are limited. They may be limited by the owners' decision, but they may also be limited by social and public values. For example, while the right to exclude, as Honoré suggests, "is the foundation on which the whole superstructure of ownership rests," it does not mean "that an owner is necessarily entitled to exclude everyone from his property."[60] One prominent example for such limitation is that no owner may use their property to create a nuisance for their neighbors.[61] Another example is the *Fair Housing Act*, which limits owners' rights to exclude, use, and sell by prohibiting discrimination in sales and rentals of housing because of race, religion, gender, national origin, familial status, and disability.[62] In addition, limitations on the owners' right to use their property may be imposed by zoning laws and building codes.[63] Owners, therefore, may have property entitlements as part of their ownership, but these entitlements are not absolute and may be limited by social interests

56. See Barry Hoffmaster, "Between the Sacred and the Profane: Bodies, Property, and Patents in the Moore Case" (1992) 7 IPJ 115 at 128-30.
57. See *ibid* at 129: "The concept of property is … flexible and malleable.… A statement of ownership is a conclusion drawn from comparing a particular combination of the incidents of ownership, existing together in a determinate situation, with the paradigm of ownership."
58. *Ibid*.
59. See Honoré, *supra* note 55.
60. *Ibid* at 114. See also Thomas W Merrill, "Property and the Right to Exclude" (1998) 77:4 Neb L Rev 730 at 737: "Honoré conceded that not all of these incidents are present in all cases in which we speak of property. But they represent the paradigm of full ownership, against which various types of incomplete or partial ownership must be understood."
61. See Richard A Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints" (1979) 8:1 J Leg Stud 49; Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90:4 Va L Rev 965.
62. See *Fair Housing Act*, *supra* note 1.
63. See William A Fischel, "A Property Rights Approach to Municipal Zoning" (1978) 54:1 Land Economics 64.

and needs. Furthermore, not only may the property entitlements of the owners be limited, but they may also include obligations that require action.[64] For example, property ownership requires owners to pay taxes or to accommodate their properties for the proper use of others. Thus, the owner of public accommodations (such as restaurants, hotels, theaters, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers) may be required to pay to provide access to their businesses for people with mobility impairment, even if the increase in business does not fully compensate them for their investment.[65] These affirmative obligations imposed on owners suggest not only that property entitlements may be limited, but they may also require the owners to take actions to ensure the good of others. The understanding that the right of the owners to control, use, or trade their property is subject not only to restrictions due to social values but also to obligations in relation to others, clarifying that property ownership is a social creation designed to express values of liberty and autonomy alongside community and responsibility.[66]

The bundle of rights paradigm of property has been criticized for its inefficiency,[67] lack of institutionalization,[68] and the fact that it subjected property to the determination of the state.[69] Others argue that the fact that "different combinations of the bundle in different circumstances may all count as 'property'"[70] leads to "a weak sense of 'thingness'"[71] and to the collapse of private property. Yet despite these flaws and inadequacies, the bundle of rights is still the dominant paradigm of property in the United States. As such, it allows property ownership to be flexible on the one hand yet comprehensive on the other. The right to voice, or the entitlement of owners to be heard regarding their property rights, had not gained official recognition within the property bundle of rights. This does not mean that the paradigm denies that voice has a role in property law. On the contrary, reviewing the different recognized property entitlements suggests that all rely on the premise that owners should have a voice to be fulfilled. For example, the property right to exclude depends on the owners' ability to say who should be excluded from their properties and who, on the other hand, is welcomed. To provide a right to exclude without a voice is worthless. The same is true for the recognized right to use. Owners' ability to use their properties at their discretion depends largely on their ability to express themselves and their preferences.

64. See Joseph William Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30:2 Harv Envtl L Rev 309.
65. *Ibid*. See also Mark Kelman, "Market Discrimination and Groups" (2001) 53:4 Stan L Rev 833.
66. See Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000); Hanoch Dagan, "The Social Responsibility of Ownership" (2007) 92:6 Cornell L Rev 1255.
67. See Eric R Claeys, "Property 101: Is Property a Thing or a Bundle" (2009) 32:3 Seattle UL Rev 617.
68. See Michael A Heller, "The Boundaries of Private Property" (1999) 108:6 Yale LJ 1163.
69. See Thomas W Merrill & Henry E Smith, "Making Coasean Property More Coasean" (2011) 54:4 JL & Econ S77.
70. Penner, *supra* note 53 at 723.
71. Heller, *supra* note 68 at 1193.

The proprietary entitlement to manage and control the property consists of the same assumption.

This understanding of the role of voice in property suggests that voice is a *facilitator* to the realization of another property entitlement. In this sense, voice is instrumental to property, as it enables the realization of different property entitlements. Yet we suggest that in some instances voice should be regarded as an independent property entitlement. Moreover, it is argued that recognizing voice as an independent property entitlement holds ramifications regarding the legal treatment we should provide in different cases.

B. Facilitative Voice and Constitutive Voice

The bundle of rights paradigm of property allows recognizing different incidents of ownership as distinct owners' entitlements, each providing the owners with the power to realize their property rights. This section argues that the list of ownership incidents presented by Honoré is not a comprehensive one and that it lacks explicit reference to one important ownership incident: the right to voice. The argument in this part is quite simple: the right to property consists of several distinct entitlements that support its realization. The owners' ability to exclude provides owners with the power to exercise their ownership, and so it is their right to determine the use of the property, to consume it, to transfer it to others, and to bequeath it. The right to voice provides owners with the same thing: the ability to exercise their right to property. Although the right to voice is not present in *all* cases in which property is spoken of, it should nevertheless be considered as part of the paradigm of "full ownership, against which various types of incomplete or partial ownership must be understood."[72] Understanding that owners' voice may affect the realization of their ownership requires a more nuanced investigation of these effects. Property-dependent voice may play different roles in the owners' realization of their right to property: a facilitative role and a constitutive one.

1. Facilitative Voice

Owners' voice is facilitative in as much as it supports the owners' ability to realize one or several of their proprietary entitlements. Voice becomes a means for attaining the goal of fully exercising one of the rights within the bundle or protecting one's entitlement against attempts of infringement, interference, or curtailment. For example, if property owners wish to realize their right to exclude others from their properties, they can use their voice to ward off such unwanted entry. Whether they shout, "Get off my property," or place a 'Private Property' sign warning strangers against entering the land, owners often use their voice to prevent strangers from entering their private property. However, the voice does not constitute an independent proprietary entitlement in this case. The use of voice to repel strangers' entry into the owners' properties is a means of

72. Merrill, *supra* note 60 at 737.

exercising another proprietary right: the right to exclude. If a new regulation prohibits the posting of 'no trespass' signs on owners' properties, the owners' claims are not of infringement of their right to voice but allegedly an unlawful curtailment of their property right to exclude.

Another example in which owners may use their voices to facilitate the realization of another property entitlement is a lease agreement between landlords and tenants. Landlords may include all kinds of restrictions limiting tenant use of the rental property and who may stay there in these agreements. These restrictions may include provisions prohibiting the use of specific products or prohibiting certain activities. For example, homeowners can prohibit the use of products that may damage the flooring (e.g., water beds or plants that may damage wooden floors), prohibit the entry of animals into the property, and prohibit tenants from running their businesses in the apartment. In the agreement between landlords and tenants, landlords make their voices heard about the use they agree to be made of their property. However, just like the 'Private Property' signs, the voice of the landlords is intended for the exercise of another property entitlement: the owners' voice is intended to exercise their entitlement to *use* their properties. In this context, the voice is nothing but a means of exercising the property right of use.

The use of voice to enable the exercise of another property entitlement (such as the right to use, exclude, or sell) suggests that voice, in these cases, should not be recognized as an independent proprietary entitlement. Although voice and property are inextricably linked in these instances, the voice is only a means that the owners use to exercise other entitlements of the property bundle. Just as owners sometimes use their hands to build or plow the land, cameras to monitor what is going on in their properties, or their bank app as part of the real estate sale process, voice in these cases is another means designed to allow owners to exercise other property rights. The understanding that the voice in these cases is a means for exercising another proprietary entitlement does not propose to deprive the owners of their voice, just as there is no justification for not allowing them to use their hands, their cameras, or their bank apps. At the same time, this understanding does not require incorporating additional legal mechanisms, beyond those already provided to owners, to protect their right to voice or compensation for the violation of this entitlement. When used to facilitate the exercise of another property entitlement, the voice does not justify unique legal protection in property law, especially when it raises significant concerns, as detailed in the next section.

2. Constitutive Voice

Alongside the facilitative role of voice in ensuring the realization of other property entitlements, there are instances in which owners' voice is constitutive to their property rights. While facilitative voice mainly deals with owners' abilities to exercise various property entitlements within the property bundle of rights, constitutive voice stems from our understanding of property as a site of social and cultural values. Property is not just an aggregation of entitlements but is

fundamentally a manifestation of our social values, such as autonomy, personhood, community belonging, welfare, and social obligations.[73] Although any violation of proprietary entitlement can be translated as a violation of property values, there are cases in which the violation is qualitatively different, so that it changes the essence of the property as well as the relationships in which it is embedded. In these cases, preventing owners from their voice should be considered as an interference with their right to property.

To illustrate the constitutive role that owners' voice may play in the realization of their property rights, consider eminent domain. In eminent domain, the government expropriates private property for public use. In return for the taken property, the government pays the owners 'just compensation,' which is usually translated into the fair market value of the property. While eminent domain is a forced governmental action that by its nature does not require the government to get the owners' consent, all Western jurisdictions provide governments with such power, as part of their commitment to provide for public needs.[74] By taking one's property forcefully, the government harms various owners' property entitlements: the owners lose their right to manage and control the property, their right to use it, and their right to sell the property to whom they decide. However, the forceful acquisition of property by the government involves not only the economic losses of the owners but also the owners' presence, or in other words, their voice. By taking property without getting owners' consent, the government ignores the voice of the owners by setting aside their community belonging, i.e., their unique social and personal attachment to the resource, the sounding, and the people. The role of voice in eminent domain proceedings is not facilitative to allow owners to realize their other property entitlements. Instead, the disregard in these proceedings of owners' voice is harmful in and of itself. The fair market value of the property may compensate owners for the loss of economic value resulting from their loss of control over the property. However, it does not remedy the harm caused to owners who lose their voice and are ignored by the government.

Owners' right to voice should not be limited to land-based or tangible property. Intellectual property law is largely based on justifications and rationales similar to those of tangible property. The property bundle of rights, which includes the right to control and manage, hold, use and trade the property, also applies to intellectual property owners. The law recognizes the right of copyright owners, for example, to manage their property or trade it and, at the same time, the duty of others to refrain from infringing on these proprietary entitlements of the owner.

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73. See Dagan, "Inside Property", *supra* note 19; Shai Stern, "Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities" (2014) 23:1 JL & Pol'y 141; Gregory S Alexander, "Pluralism and Property" (2011) 80:3 Fordham L Rev 1017.

74. For a comprehensive comparative overview, see AJ Van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Juta, 1997); see also Gregory S Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, 2006).

As the case of the 5Pointz site demonstrates, it also recognizes that, in some cases, copyright owners' voice should be protected.[75]

In 2002, real estate developer Jerry Wolkoff undertook installing artwork in a series of dilapidated warehouse buildings that he owned in Long Island, New York City. Wolkoff enlisted a known aerosol artist, Jonathan Cohen, to turn the warehouses into an exhibition space for artists. Cohen and other artists filled the walls with aerosol art and the site, known as 5Pointz, evolved into a major global center for aerosol art. It attracted thousands of daily visitors, numerous celebrities, and extensive media coverage. In May 2013, Cohen learned that Wolkoff had sought municipal approvals seeking to demolish 5Pointz and to build luxury apartments on the site. Cohen and other artists tried to prevent the destruction by applying to the New York City Landmark Preservation Commission, and when the Commission denied their application, they decided to take the case to the court. The court denied the preliminary injunction but ordered monetary damages in the maximum amount of statutory damages: $150,000 for each of the 45 works, for a total of $6.75 million. According to the court, these damages were designed to compensate the artists for the destruction of their artwork, as part of the *Copyright Act* protection on owners' right of integrity.

Intellectual property and copyright law include several economic entitlements of the owner, such as their right to reproduce their work, to prepare derivative works based upon the original work, to distribute copies, and to perform the protected work publicly.[76] Alongside these economic rights, the Canadian *Copyright Act* provides owners with quite different proprietary entitlement that aims to protect owners' "moral rights."[77] The *US Copyright Act* provides moral rights only to creators of visual works. These moral rights include (1) the owners' right of attribution (often termed the right of paternity) and (2) the owners' right of integrity.[78] The right of attribution means that no matter who exploits the economic rights in a copyrighted work, the author still has a right to be named as the author or creator. The right of integrity says that the creator of a work may prevent any action that would destroy the 'integrity' of the work. That is, if the author feels that making certain changes in a creative work would undermine their creative intent or their 'vision'—or in other words, the author's voice—then the author can prevent that change from being made, independent of any economic rights that another person may own by virtue of a license or ownership of the copyright. The purpose of these moral rights, therefore, goes beyond the economic value of the property. These moral rights aim to preserve the owners' voice in their property, and most importantly, they provide owners with legal powers to make their voices heard. They foster the understanding that for authors, voice matters and is sometimes constitutive to their property.

75. See *Cohen v G & M Realty L P,* 320 F Supp 3d 421 (EDNY 2018).
76. See *Copyright Act of 1976*, 17 USC §§ 101-1332 (2012) [*US Copyright Act*].
77. *Copyright Act*, RSC 1985, c C-42, s 14.1 [*Canadian Copyright Act*].
78. See *US Copyright Act*, *supra* note 76 at § 106A.

These examples demonstrate that in some instances not only are voice and property inextricably linked but that voice plays a significant, if not constitutive, role in owners' ability to exercise their right to property. Denial of the owners' ability to be heard during eminent domain proceedings is not merely a denial of means for exercising their other proprietary rights but constitutes an independent violation of the owners' property right. By virtue of being owners, property owners should be entitled to make their voices heard when the government decides to take property away. Although providing owners with a voice in eminent domain proceedings does not necessarily prevent realizing the public needs for which the land is expropriated, ignoring it constitutes a violation of the owners' proprietary entitlement. Similarly, copyright owners who lose their voices, such as Cohen and his co-artists, lose more than the economic value of the work they have created, and it is a qualitative difference, not a quantitative one. Lack of protection of the voice of copyright owners infringes differently on their property right than the economic harm created due to improper use by others. The voice in these cases is not intended to facilitate the exercise of other proprietary entitlements. The copyright owners who seek to preserve their voices while preserving the owners' right of attribution and integrity do not seek to defend their property rights to exclude, use, or sell the right. Clear rules of copyright law protect these rights. Owners' right of attribution and integrity thus express fundamentally different protection of an independent property entitlement: the owners' right to voice.

Recognizing owners' voice as an independent property entitlement, however, does not suggest that owners may use their voices as they please or arbitrarily. As argued in the next part, such unlimited use raises significant concerns regarding harm to other individuals and to society. These concerns, which characterize unlimited use of owners' proprietary rights, need to be addressed in shaping the legal rules.

V. Property Right to Voice: Caveats and Concerns

When Brian Hanlon founded the California YIMBY (yes in my back yard) movement in 2017, he aimed to recruit housing activists to change the common Californian discourse about property ownership and social growth. The main purpose of California YIMBY was to advocate for affordable housing and urban land use reform across the country. "We say 'Yes In My Back Yard'—yes to affordable housing, yes to inclusive, equitable communities, yes to opportunity, and yes to more neighbors!" the movement states, suggesting that the solution to the housing shortage depends on property owners raising their voices in support of increasing the supply of housing, expanding affordable housing, and a willingness to reduce zoning regulation.[79] The California YIMBY movement, with 80,000 members, is just one of several grassroots movements flourishing across the United States that suggest owners should speak up to increase housing

79. California YIMBY, "Yes In My Back Yard" (last visited 31 March 2023), online: *California YIMBY* cayimby.org/ [*CA YIMBY*].

affordability.[80] These groups were established in response to another social phenomenon, NIMBY (not in my back yard), in which property owners opposed development of 'locally unwanted land use' (LULU), and resisted unwanted facilities (such as jails, drug treatment centers, highways, sanitation truck garages, incinerators, and homeless shelters).[81] This opposition grew from a desire to keep populations down and property values up, but also to perpetuate housing segregation.[82] NIMBY was often viewed as "selfish parochialism [that] generates locational conflict that prevents attainment of societal goals."[83] It represents an abuse of the voice granted to property owners for the purpose of maximizing self-interest at the expense of the needs of society and as an exclusionary mechanism. YIMBYs, such as Hanlon's California YIMBY, aimed to change the role of property owners when it comes to housing and inclusion. As written on the movement website, California YIMBY regards itself as "a community of neighbors who welcome more neighbors."[84] YIMBYs therefore urge property owners to speak up to support development, rezoning, and the increase of housing supply. Instead of saying "No," property owners are now urged to say "Yes." Nothing, therefore, prepared Hanlon and his colleagues for what happened in April 2018, during their activist protest to support bill SB-827.

Bill SB-827 proposed permitting more home building near transit-rich areas and rapid, high-frequency bus lines.[85] The California YIMBY movement supported the bill, arguing that it would result in a significant increase in the volume of housing available to California residents. When Hanlon and his colleagues came to San Francisco's city hall on one April morning to speak up for development, they were surprised to find other groups of protesters strongly opposing the bill and its consequences. One such group was Affordable Divis, a group of housing justice activists from San Francisco, who protested the bill for its disregard of middle- and working-class residents.[86] According to the real estate site Zillow, while the bill encouraged construction, it increased supply at the high end but

80. See organizations such as AHM—Abundant Housing Massachusetts, online: abundanthousingma.org; Jamaica Plain YIMBY, online: 6sense.com/company/jp-yimby/5d2dc09b2faa1947420cab5e; Somerville YIMBY (Massachusetts), online: somervilleyimby.org; YIMBY Portland, online: www.facebook.com/YIMBYPortland/; New York YIMBY, online: newyorkyimby.com/.

81. See Rolf Pendall, "Opposition to Housing: NIMBY and Beyond" (1999) 35:1 Urban Affairs Rev 112; Michael Dear, "Understanding and Overcoming the NIMBY Syndrome" (1992) 58:3 J American Planning Association 288; Michael B Gerrard, "The Victims of Nimby" (1994) 21:3 Fordham Urb LJ 495.

82. See Dear, *supra* note 81.

83. Robert W Lake, "Planners' Alchemy Transforming NIMBY to YIMBY: Rethinking NIMBY" (1993) 59:1 J American Planning Assoc 87 at 87. See also Pendall, *supra* note 81.

84. *CA YIMBY*, *supra* note 79.

85. See US, SB-827, *Planning and zoning: transit-rich housing bonus*, 2017-2018, Reg Sess, Cal, 2018.

86. For information on this group, see "Affordable Divis: Advocates for Social and Economic Justice in San Francisco" (last visited 31 March 2023), online: *Affordable Divis* https://affordabledivis.org/. See also Patrick Range McDonald, "Inside Game: California YIMBY, Scott Wiener, and Big Tech's Troubling Housing Push" (13 January 2020), online: *Housing is a Human Right* https://www.housinghumanright.org/inside-game-california-yimby-scott-wiener-and-big-tech-troubling-housing-push/.

did not address the low end.[87] In other words, Affordable Divis activists claimed that YIMBY's activists were using their voices as property owners to encourage further construction, but one that would eventually lead to balm only for the wealthy classes. This use of owners' voice—according to the protesters—is only slightly different from the one attributed by YIMBY players to NIMBY ones.[88]

The Californian example is but one of many disputes involving capital, property, and race worldwide. It also provides important insights about the concerns involved with providing legal significance to owners' voice. These concerns primarily focus on owners' voice implications on other individuals and on society at large. First, providing owners with fully discretionary voice may serve as a mechanism to exclude others and prevent them from becoming property owners in specific areas. As the NIMBY phenomenon (and according to Affordable Divis' activists, most of YIMBY as well) demonstrates, property owners may resist rezoning of their neighborhood to allow the construction of more housing, especially one designated for middle- and working-class residents. Owners' fully discretionary voice in this regard may serve exclusionary and racist spatial tendencies. Providing legal significance to owners' voice may support the preservation of spatial segregation, keeping neighborhoods as enclaves based on religious, class, and racial similarities.[89] A different, though not detachable, concern is using owners' fully discretionary voice as a mechanism for externalizing society's costs on low-income and marginalized communities.[90] This concern suggests that owners use their voices to ward off unavoidable LULUs, therefore pushing them to areas of disadvantaged populations, who are often both legally and socially unequipped to oppose them.[91] These concerns may raise the core of objection to recognizing owners' fully discretionary right to voice through preservation, and perhaps even expansion, of the class gap.[92] Providing the powerful with additional power preserves their status and subsequently prevents others from gaining power. Moreover, while in most cases all property owners have the right to participate in various land use processes, not all of them choose to exercise their right to do so or are able to overcome the barriers of lack of knowledge, expertise, and economic ability that prevent them from taking an active part in such processes. [93]

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87. *Ibid.*

88. See Erin McElroy & Andrew Szeto, "The Racial Contours of YIMBY/NIMBY Bay Area Gentrification" (2017) 29:1 Berkeley Planning J 7, online: https://escholarship.org/uc/item/4sw2g485.

89. See Michael N Danielson, "The Politics of Exclusionary Zoning in Suburbia" (1976) 91:1 Political Science Q 1.

90. Owners' resistance to zoning and increasing housing development in the neighborhood plays a significant role in NIMBY.

91. See Dear, *supra* note 81 at 289.

92. See Vicki Been, "City NIMBYs" (2018) 33:2 J Land Use & Envtl L 217 at 231: "making it even harder for low-income, less educated people to move to where job opportunities are by limiting housing supply may further widen the gap between those who are doing well and those who are left behind." See also Peter Ganong & Daniel Shoag, "Why has regional income convergence in the U.S. declined?" (2017) 102 J Urban Economics 76 at 89-90 (suggesting that land use restrictions are a major culprit in the widening income gap between different regions of the country).

93. See Katherine Levine Einstein, David M Glick & Maxwell Palmer, *Neighborhood Defenders* (Cambridge University Press, 2020) at 36-42.

Einstein, Glick, and Palmer's findings best illuminate this point: Their study of public participation and its politics in land-use processes in Massachusetts clearly show that those who take an active role in public hearings and oppose new housing developments in their neighborhoods are predominantly white, wealthy men.[94]

While these concerns question the social desirability of recognizing owners' fully discretionary right to voice, they nevertheless do not justify its denial, but rather its limitation. To be provocative: there is no substantial difference between the social implications of the owners' right to voice and their other proprietary entitlements, such as their right to control the resource, to manage it, to sell it, or to use it. All these entitlements provide owners with powers not given to those who do not own property. Most of them, if not limited, may become instruments for social exclusion, preservation of the class gap, and further empowering the powerful.[95] Indeed, some argue that property, qua property, is a discriminatory legal instrument.[96] However, all Western jurisdictions, as well as most conservative and progressive scholars alike, deny the Marxian call to abandon private property. Instead, those who are concerned about property's destructive social consequences—or, alternatively, from the discriminatory and restrictive interpretations given to it over the years—work to limit or reshape this legal institution to moderate these consequences.[97] In other words, as long as the call is not to '#CancelProperty,' its potential social harm should be recognized, and it should be subsequently limited to mitigate these harms by incorporating social values. This is true for the property right to exclude, to use, and to sell. It should also be true for the right to voice.

The owners' right to voice, therefore, should not be dismissed completely, but rather limited. As all other property entitlements provided to owners by the merit of their ownership, the scope and scale of the owners' right to voice should be balanced against other social values. The protection of those who do not own property, the prevention of racial, religious, disability, and economic discrimination, as well as considerations of aggregate welfare, should be evaluated when incorporating owners' right to voice into property law. As in the case of other property rights, these essential social values should not only limit the owners' right to voice. In some cases, these social values require affirmative action on the owners' part. In the next part of the article, the theoretical discussion will

94. *Ibid* at 95-114.

95. See Sarah B Schindler, "Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment" (2015) 124:6 Yale LJ 1934.

96. See e.g. Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707; Anne Bonds, "Race and ethnicity I: Property, race, and the carceral state" (2019) 43:3 Progress in Human Geography 574.

97. For example, the *Fair Housing Act*, *supra* note 1, limits owners' right to exclude and trade, and the *Civil Rights Act of 1866*, 42 USC § 1982, states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See also Dagan, "Inside Property", supra note 19; Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property" (1996) 90:4 Nw UL Rev 1283.

move to a more practical one: how the owners' right to voice should be incorporated into property law.

VI. Incorporating Property Right to Voice

Recognizing owners' right to voice may explain some part of the current law and suggest modifications of other parts. To examine the implications of recognizing owners' right to voice in property law four property instances are presented in which owners' voice is constitutive to their ownership: inheritance law, eminent domain,, owners' resistance for zoning and development, and copyright law. As these inquiries demonstrate, the owners' right to voice plays an important role in defining ownership and may have practical implications on how the law should be shaped.

A. Inheritance Law

One part of property law in which owners' right to voice is implemented is inheritance law. Inheritance law is a set of default rules for property succession; however, these rules may be changed according to the preferences of the owner of such property. The most prominent principle of inheritance law is that owners may voice their preferences regarding the allocation of their properties after their death by writing a will.[98] As Professor Lawrence Friedman beautifully described it, "[t]he will is the sole, authentic voice of a man who is dead."[99] Through the will, a person can speak against those who failed them or, alternatively, express thanks to their benefactors. Yet despite the prominent role of owners' voice in inheritance law, the law limits it, therefore incorporating other important social values. One prominent limitation is the right of a deceased's spouse to inherit part of the estate. While American and Canadian inheritance law include two different approaches to spousal rights—i.e., community property and common law—both restrict owners' voice by protecting spouses from being disinherited in the will.[100] While community property provides that each spouse will automatically own half of everything that the couple earned over the course of their marriage, common law suggests that ownership of property acquired during the marriage is not automatically assumed to be split equally. Yet even in the common law approach, the law provides the surviving spouse protection from being disinherited in the will. While every state has different rules, often the surviving spouse has a right to claim one-half or one-third of the deceased spouse's

98. *Cf* DW Haslett, "Is Inheritance Justified?" (1986) 15:2 Philosophy & Public Affairs 122.

99. Lawrence M Friedman, "The Law of the Living, the Law of the Dead: Property, Succession, and Society" (1966) 1966:2 Wis L Rev 340 at 374.

100. In community property states (such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) each spouse automatically owns half of what either one earned during the marriage, unless they have a written agreement to the contrary. In other states, to protect spouses from being disinherited, most give a surviving spouse the right to claim one-third to one-half of the deceased spouse's estate, regardless of the will order. See Frances H Foster, "The Family Paradigm of Inheritance Law" (2001) 80:1 NCL Rev 199. Canadian inheritance laws also provide priority to the will of the deceased. If the deceased did not leave a will, the estate is distributed using provincial laws. See e.g. *Wills, Estates and Succession Act,* SBC 2009, c 13; *Intestate Succession Act*, RSNWT 1988, c I-10.

property.[101] American inheritance law, therefore, recognizes owners' right to voice. It implements this right by providing premier status to the will and its provisions. However, as with any other proprietary entitlement, the owners' right to voice is not unlimited. When the realization of this entitlement carries undesired social implications, such as leaving a surviving spouse destitute, the law limits the owners' right to voice by providing the living spouse a right to part of the property. Inheritance law therefore recognizes owners' right to voice yet limits it by considering other social values.

B. Eminent Domain

Eminent domain refers to the power of the government to take private property and convert it into "public use,"[102] public work, or another public purpose.[103] The *Fifth Amendment* to the United States Constitution provides that the government may only exercise this power if it provides just compensation to the property owner.[104] Eminent domain power consists of forceful action by the government, meaning that the owner's consent is not needed. This forced acquisition of property by the government interferes with owners' proprietary entitlements, such as their rights to manage and control the property, their rights to use it, and their rights to sell it to whom they decide.[105] The literature about eminent domain contains various justifications for forced governmental acquisition of private property, as well as debates regarding the fairness of the fair market value compensation.[106] Most of these debates revolve around the question: does the fair market value compensation standard consider all the losses suffered by owners, therefore providing them with just compensation?[107] Less attention is given in the literature to the question of how property law deals with the fact that in

101. For example, NY State estate law allows the surviving spouse to elect against the estate of the deceased spouse in an amount up to $50,000 or one-third (1/3) of the estate, whichever is greater. See NY Estates, Powers & Trusts (EPT) Ch 17-B, art 5, §5-1.1A.

102. US Const amend V [*Fifth Amendment*].

103. See *Canadian Expropriation Act, supra* note 48 at §4(1)

104. See *Fifth Amendment*, *supra* note 102. Canada also provides compensation to owners; see *Canadian Expropriation Act*, *supra* note 48 at §25(1).

105. See generally Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain*, print ed (Harvard University Press, 1998); William B Stoebuck, "A General Theory of Eminent Domain" (1972) 47:4 Wash L Rev 553; William Baude, "Rethinking the Federal Eminent Domain Power" (2013) 122:7 Yale LJ 1738.

106. See Gregory S Alexander, "Eminent Domain and Secondary Rent-Seeking" (2005) 1:3 NYUJL & Liberty 958; Frank I Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law" (1967) 80:6 Harv L Rev 1165; Lee Anne Fennell, "Taking Eminent Domain Apart" (2004) 2004:4 Mich St L Rev 957.

107. See e.g. Katrina Miriam Wyman, "The Measure of Just Compensation" (2007) 41:1 UC Davis L Rev 239; Brian Angelo Lee, "Just Undercompensation: The Idiosyncratic Premium in Eminent Domain" (2013) 113:3 Colum L Rev 593; Charles T McCormick, "The Measure of Compensation in Eminent Domain" (1933) 17:5 Minn L Rev 461; Gideon Kanner, "Condemnation Blight: Just How Just is Just Compensation" (1973) 48:4 Notre Dame L Rev 765; Saul Levmore, "Just Compensation and Just Politics" (1990) 22:2 Conn L Rev 285; Lee Anne Fennell, "Just Enough" (2013) 113 Colum L Rev Sidebar 109; Shai Stern, "Remodeling Just Compensation: Applying Restorative Justice to Takings Law Doctrine" (2017) 30:2 Can JL & Jur 413.

exercising its eminent domain power the government ignores the owner, or in other words: whether and how the law should address the loss of the owners' voice.

To further understand eminent domain's disregard of owners' voice, voice and autonomy must be distinguished. The literature, though not the courts, recognizes that the fair market value compensation for eminent domain does not include compensation for owners' loss of autonomy.[108] Owners' autonomy is infringed, so goes the argument, as the government exercises its eminent domain power, regardless of the owners' consent.[109] The calls to amend takings law to compensate for loss of autonomy therefore consist of the premise that the owners are being forced to give the property to the government against their will. While loss of autonomy should be compensated, this loss does not coincide with the harm caused to the owners due to the disregard of their voice.[110] Owners' right to voice would provide owners with a right to be present in the process and to be able to speak their opinions regarding their properties, even if at the end they would be forced to give them to the government, which is a protection not currently extended to all situations. Addressing the owners' right to voice, therefore, should not focus on the coercive nature of the action but rather on providing owners the ability to raise their voice against it. In some sense, owners' right to voice does not focus only on the consequence but also on the process.

Is the owners' right to voice incorporated into current eminent domain laws? The answer to this question is complicated and varies from one jurisdiction to another. While the U.S. Supreme Court recognized the constitutional right of owners to be properly informed and heard as part of due process in eminent domain, neither federal nor state case law uniformly recognizes the necessity of applying basic procedural protections in eminent domain.[111] As Zachary Hudson demonstrates, many state courts concluded that the constitutional requirement of due process, which guarantees the owners' right to voice against the forced acquisition of their properties by the government, does not apply to state eminent domain actions.[112] The ambiguity regarding the scope and scale of due process in eminent domain law interferes with owners' right to voice. To properly incorporate owners' right to voice, legislators and courts, on both the federal and state level, should provide owners with both the right to notice and the opportunity to be heard. Establishing mandatory hearings for owners before the execution of eminent domain ensures that the forced acquisition of a property will harm owners' property rights as little as possible. While mandatory hearings for owners are not necessarily expected to prevent the expropriation—and therefore, the violation of the owners'

108. See Lee, *supra* note 107; Fennell, *supra* note 107; Nicole Stelle Garnett, "The Neglected Political Economy of Eminent Domain" (2006) 105:1 Mich L Rev 101; Nestor M Davidson, "Property and Relative Status" (2009) 107:5 Mich L Rev 757.
109. See Fennell, *supra* note 106 at 995-96.
110. See Stern, *supra* note 107 at 433-34; Stern, *supra* note 73.
111. See D Zachary Hudson, "Eminent Domain Due Process" (2010) 119:6 Yale LJ 1280 at 1311, n 124, citing *Walker v City of Hutchinson*, 352 US 112 (1956).
112. See Hudson, *supra* note 111.

right to property—they nevertheless moderate this violation, as they preserve part of the owners' entitlements: the owners' right to voice.[113]

C. The "Yeses" and "Noes" of Our Backyards

Property owners often aim to influence developments in their neighborhoods.[114] Owners' engagement in expected development processes usually stems from their concerns of potential change in their surroundings and the implications of the development on their property's value.[115] While it is understandable that property owners fear changing and devaluing their property values, opposition proceedings often incorporate racist motives or at least an attempt to fend off those who belong to socio-economically different population groups from the neighborhood.[116] These proceedings have been termed 'NIMBY' (not in my backyard) and reflect the negative consequences that legal regulation of the owners' right to voice has.[117] In many ways, the social concerns of the NIMBY phenomenon resemble the concerns from historic property qualifications for certain commercial activities.[118] Attempts by property owners to use their voices to support neighborhood development and increase the supply of affordable housing in their neighborhoods—such as the California YIMBY—have also been criticized for being restrictive or a kind of camouflage for racist actions.[119] These concerns have led many to argue that owners' right to influence the design of their living environment should be restricted, especially concerning their ability to exclude others through opposition to development and construction.[120] Thus, some have called for the reduction of owners' impact on development by denying their participation in the process or providing a particularly low weight to their positions as expressed at these hearings. The potential involvement of racist or economic motives, however, should not call for the denial of the involvement of property owners in what is happening in their neighborhood. The involvement of property owners in what is happening around them is essential both civically and socially, and it also includes proprietary benefits, such as the knowledge that owners have regarding the space and its characteristics.[121] At the very least, these benefits

113. Although a hearing may provide more than just an opportunity for owners to voice against the action. For example, they may provide authorities with information regarding the harm caused to owners, its scope and scale, and its value. See Stern, *supra* note 107 at 434.
114. See Pendall, *supra* note 81.
115. *Ibid* at 114.
116. See *ibid* at 115; Michael N Danielson, "The Politics of Exclusionary Zoning in Suburbia" (1976) 91:1 Political Science Q 1.
117. See Pendall, *supra* note 81; Dear, *supra* note 81; Gerrard, *supra* note 81.
118. See Part II.
119. See Erin McElroy & Andrew Szeto, "The Racial Contours of YIMBY/NIMBY Bay Area Gentrification" (2017) 29:1 Berkeley Planning J 8.
120. See e.g. Barak D Richman, "Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response" (2001) 20:2 UCLA J Envtl L & Pol'y 223.
121. See Anika Singh Lemar, "Overparticipation: Designing Effective Land Use Public Processes" (2021) 90:3 Fordham L Rev 1083 at 1102-03; Alejandro E Camacho, "Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions—Installment One" (2005) 24:1 Stan Envtl LJ 3.

should lead to a rethinking of the complete denial of owner involvement in development processes taking place in their neighborhood. The desire not to throw the baby out with the bathwater requires recognizing the importance of the owners' voice and imposing restrictions on the effect of that voice, while introducing more inclusive mechanisms of public participation in land use decision-making processes.[122]

However, the recognition of the owners' right to voice does not end with finding a balance between the owners' ability to be heard and the social restrictions that should be placed on it to prevent racism and negative social externalities. The importance of property owners' involvement in what is happening around them on the one hand and the prevalence of this involvement due to the ongoing development processes on the other hand requires recognition of property owners' active commitment to speak up in favor of community development and the space in which they live. This obligation derives from the right granted to them as property owners.[123] Just as the right to use may require owners to fund proper access to their property for people with disabilities, so too may property owners be required to make their voices heard to advance worthy social goals. Thus, in cases in which the development of the community involves promoting worthy and desirable social values, lack of the owners' right to voice not only fails to give them a right to oppose the development but may even oblige them to raise their voice to support it. While organizations like the California YIMBY movement use owners' voices to support community development voluntarily, recognizing the owners' right to voice makes this volunteering a legal commitment.

D. Moral Rights in IP Law

Most Western jurisdictions provide authors with legal protection for their work.[124] However, while the legal protection of the economic value of the work is common to all Western jurisdictions, the protection of the work's personal value varies from one jurisdiction to another. Historically, copyright law's protection of personal (or non-economic) value came from France, where the law protects the authors' moral rights or *droit morale*.[125] In Canada and many European countries, authors' moral rights are protected under the law, and in

122. See Lemar, *supra* note 121 at 1137-50; Barbara L Bezdek "Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality" (2013) 33:1 St Louis U Pub L Rev 3; Guido Ferilli, Pier Luigi Sacco & Giorgio Tavano Blessi "Beyond the Rhetoric of Participation: New Challenges and Prospects for Inclusive Urban Regeneration" (2016) 7:2 City, Culture & Society 95.

123. See Lemar, *supra* note 121 at 1102-11.

124. For an overview of copyright in general in common law and civil law countries, with an emphasis on the U.S. and the European Union, see Jane Ginsburg, "Copyright" in Rochelle Dreyfuss & Justine Pila, eds, *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2017) 487.

125. See e.g. Ginsburg, *supra* note 124 at 500; Roberta Rosenthal Kwall, "Copyright and the Moral Right: Is an American Marriage Possible" (1985) 38:1 Vand L Rev 1 at 23-24.

some cases, an author cannot give up their moral rights by contract.[126] The concept of moral rights thus relies on the connection between authors and their creations. Moral rights protect the personal and reputational, rather than purely monetary, value of a work to its creator.[127] They acknowledge the violation of non-economic values caused to the owner due to, among other things, disregard for their desires, positions, and intentions concerning the work. The recognition of the property damage caused to the owner due to the distortion of the work expresses in practice a recognition of the existence of a property right to preserve the owners' voice. Copyright law, which incorporates the owners' right to prevent the distortion of their work, recognizes their right to have their voice heard—through the work—in a manner appropriate to them.

American copyright law provides that owners of copyrights have the exclusive rights to reproduce their work, to prepare derivative works, and to distribute copies of their work.[128] While the *Copyright Act* provides several limitations to these exclusive rights, any infringement not protected by these limitations entitles the owners with claim rights against those who violate their rights.[129] The *Copyright Act*, therefore, protects the owners from economic losses as a result of infringement of their exclusive rights. However, it provides little, if any, protection for owners' loss of their right to voice. The *Visual Artists Rights Act of 1990* (VARA) provides only the authors of a work of *visual art* the rights of attribution and integrity.[130] All other authors wishing to defend their moral rights, or to preserve their voice, will be forced to seek protections through judicial interpretation of several copyright, trademark, privacy, and defamation statues.[131] As the U.S. Copyright Office's report from 2019 reveals, moral rights "are protected in the United States through a patchwork of federal and state laws, as well as industry customs and other forms of private ordering."[132] While the report argues that the "current moral rights patchwork—including copyright law's derivative work right, state moral rights statutes, and contract law—are generally working well and should not be changed," it offers a rethinking of those elements that protect

126. See e.g. Ginsburg, *supra* note 124 at 500. See also Article 6 of the *Berne Convention*: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." *Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979)*, World Intellectual Property Organization, 9 September 1886, TRT/BERNE/001 art 6bis (1) (entered into force 19 November 1984). See also the Canadian *Copyright Act*: "The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous." *Canadian Copyright Act*, supra note 77 at art 14.1(1).

127. See generally *supra* note 126.

128. See *US Copyright Act*, *supra* note 76 at § 106.

129. *Ibid.*

130. *Ibid* at § 106A.

131. See United States Copyright Office, "Authors, Attribution, and Integrity: Examining Moral Rights in the United States" (23 April 2019), online (pdf): *United States Copyright Office* https://www.copyright.gov/policy/moralrights/full-report.pdf.

132. *Ibid* at 3.

the moral rights of copyright owners.[133] In other words, although the American copyright law does not have a designated law that confers protection of moral rights, it recognizes the importance of protecting those rights and the need to extend that protection through existing legal instruments. The controversy over the need for designated legislation to assimilate copyright owners' entitlement to a voice goes beyond the scope of this article. At the same time, it is worth emphasizing two essential principles, which may influence such a decision: First, and as the report itself reveals, the interpretation hitherto given by the courts for the various legal sources that provide copyright owners with protection for violation of their moral rights undermines these fundamental rights of individual authors and artists. Second, and no less critical, recognizing owners' right to voice and protecting this right in law should also consider the concerns that this protection raises and its social effects. The fact that the copyright owners' right to voice is protected through a wide range of legal means—rather than through designated legislation—may make it challenging to strike the right balance between protecting this right and other social values. The use of legal instruments such as defamation laws and a state's right of publicity acts to protect owners' right to voice, may provide disproportionate protection, which will harm critical social values.

One example that may illustrate the need to provide a comprehensive and coherent protection of copyright owners' voice relates to the long-standing disregard for the voice of black artists (whether during or after slavery), and no less important, in recognizing their property right to voice.[134] The history of copyright in America reveals that in many cases African-Americans and works related to their heritage have been exploited by record companies and white artists—without the works being attributed to the original authors or to the cultural heritage from which they grew.[135] While sociologically the ongoing violation of the rights of black artists and of black communities has been recognized and established, legally the law does not recognize the rights of these artists—neither economically nor morally.[136] Thus, for example, in recent years more and more cases have been revealed in which white artists made covers of songs written and performed for the first time by black composers, when the royalties for these songs were given to the white 'composers'.[137] At the same time, cases are revealed in which

133. *Ibid* at 4.

134. See e.g. KJ Greene, "Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection" (1998) 21:2 Hastings Comm & Ent LJ 339; Jimmy A Frazier, "On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law" (1995-1996) 70:1 Tul L Rev 313; Peter Margulies, "Doubting Doubleness, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought" (1997) 51:4 U Miami L Rev 1155.

135. See e.g. Jennifer L Hall, "Blues and the Public Domain—No More Dues to Pay" (1995) 42:3 J Copyright Soc'y USA 215 at 224; Thomas J Hennessey, *From Jazz to Swing: African-American Jazz Musicians and their Music, 1890-1935*, Jazz History, Culture, and Criticism series (Wayne State University Press, 1994) at 149.

136. See e.g. Greene, *supra* note 134 at 340-44; Naomi Mezey, "Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies" (1994) 46:6 Stan L Rev 1835.

137. See David P Szatmary, *Rockin' in Time: A Social History of Rock-and-Roll,* 6th ed (Pearson Prentice Hall, 2007) at 27; Greene, *supra* note 134 at 369.

white 'creators' recorded and documented melodies of black communities (whether during or after slavery), without the memory of these communities gaining recognition, let alone owning those tunes and compositions.[138] These cases substantiate the understanding that avoiding explicit incorporation of the owners' right to voice in the law allows for disregard in some cases and infringement on the heritage and right of disadvantaged communities and individuals in society in other cases. Incorporation of the property right to voice requires a historical recognition of social injustices and social values. These values may demand a proper assimilation of the right to voice, so that it will be used to heal the wounds of the past and return the voice to its original owners.

VII. Concluding Remarks and Future Research

The present article sought to place the owners' right to voice as an inherent part of the property bundle of rights. However, recognizing the owner's right to a voice does not necessarily imply that any expression of position or opinion on the part of whoever owns the property should entitle the owner to unique proprietary protection. On the contrary, as has been demonstrated in this article, in most cases, the desire of owners to express their opinion does not maintain any connection or affiliation with the fact that they own property. However, in those cases in which the owners' voice maintains an affiliation with their being the owners—and when the voice is not used only as a means for exercising another property entitlement—property law should incorporate this right and recognize it as an independent property entitlement.

However, recognizing the owners' right to voice does not conclude the discussion as to the meaning of this right, or its implications on owners, those who do not own property, and society. As this article suggests, this recognition is a starting point for a deeper discussion about the meaning of granting owners a right to voice and, no less importantly, about its boundaries. Drawing the boundaries of legal protection of the owners' right to voice requires recognition of the concerns inherent in such recognition. As history teaches us, binding the right to voice with property ownership can lead to racist, misogynist, and discriminatory consequences. Therefore, the owners' right to voice is bound to be assimilated into property law while being limited in three dimensions: past, present, and future. Recognition of the right to voice and its scope and scale must address past injustices created due to improper affiliation of rights of disadvantaged communities and individuals. It should address the challenges of the present and prevent discrimination and harm to vulnerable individuals in society, and it should serve as a spotlight on which property law will be reshaped in the future.

138. See Toni Lester, "Treating Creative Black Intellectual Property Ownership as a Human Right" (14 July 2020), online: *Social Science Research Network (SSRN)* https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3644691_code2349244.pdf?abstractid=3644691&mirid=1 (telling the story of the famous white musicologist Alan Lomax who collaborated with southern white prison officials in the 1930s to force black prisoners to sing field songs and spirituals from their communities so that he could record them purportedly to preserve American 'folk' music).

The present article is not, of course, intended to address all of the challenges or implications that the recognition and incorporation of the owners' right to voice present. Its essence was an initial presentation of an analytical framework for identifying the property right to voice, as well as a rough sketch of its boundaries. Future studies should further delve into details and ask, among other things, questions regarding: the broad practical significance of recognizing the right to voice on the relationship between property owners and non-property owners; the criteria for granting the right to voice for those who hold a property right that is not necessarily ownership; the right to voice of those who see themselves as belonging to a place, even if they lack property rights; as well as the scope and characteristics of the remedies that must be granted for violation of the right to voice. These and other questions constitute a significant tier for incorporating the analytical framework presented in this paper in property law. All of these, as mentioned, will serve as a basis for future research.

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