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PROPERTY LAW FOR THE AGES

MICHAEL C. POLLACK* & LIOR JACOB STRAHILEVITZ**

ABSTRACT

Within the next forty years, the number of Americans over age sixty-five is projected to nearly double. This seismic demographic shift will necessitate a reckoning in several areas of law and policy, but property law is especially unprepared. Built primarily for young and middle-aged white men, the common law of property has been critiqued for decades for the ways in which it oppresses or simply leaves behind people based on their race, sex, Native heritage, and more. This Article contributes a new focus on property law's treatment of people based on their advanced age. Burdened by higher relocation costs, more inelastic incomes, and shorter time horizons than those faced by younger people, elderly people encounter a doctrine that often fails to protect their interests.

This Article explores five areas of property law and evaluates how each fits—or, more frequently, fails to fit—the characteristics of many older subjects. From the law of takings to the law of waste, and from tenant protections to homeowners' associations, not only is the law a poor fit, but the consequences for the health, safety, finances, and well-being of elderly people are often dramatic. At the same time,

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one of the rare significant efforts made thus far to protect older people from some of these consequences—the Fair Housing Act’s protection for age-restricted communities—has generated new inequities of its own that raise important questions about competing civil rights priorities. Accordingly, mindful of the dangers of over-correction, this Article offers institutional reforms aimed to better protect the interests of older people in each area without unduly infringing upon those of others.

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INTRODUCTION

The judges who developed the common law of property had a clear vision of their customers. Anglo-American property doctrine was built by and for the benefit of young and middle-aged white men—people who the judges romantically envisioned taming the natural landscape, colonizing territory, tilling the soil, building dwellings, establishing mills, excavating mines, and seamlessly transferring land to each other.¹ Over the past century, some scholars, legislators, and judges have advanced a more inclusive conception of property that embraces the idea of Black Americans and Native Americans as owners, rather than one that subordinates them and treats them as property or mere occupants.² An equally important project in property law has sought to put women on equal footing with men after centuries of second-class status.³ Contemporary Americans continue to work to build a robust property doctrine that serves the needs and respects the humanity of people, regardless of race and sex.

In this Article we ask whether there is room in property doctrine to be attuned to differences related to advanced age, as age operates alongside and intersects with these other salient distinctions.⁴ In

1. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724-25 (1993).

2. See *id.*; see, e.g., Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001); Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

3. See, e.g., Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, 40 L. & SOC. INQUIRY 908 (2015); Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683 (2021); Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

4. In this respect, we join company with a rich theoretical scholarship about elder rights and responsibilities, and age discrimination. See, e.g., MARTHA C. NUSSBAUM & SAUL LEVMORE, *AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET* 181-95 (2017); Alexander A. Boni-Saenz, *Age Diversity*, 94 S. CAL. L. REV. 303 (2021) [hereinafter Boni-Saenz, *Diversity*]; Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 204 (2020); Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 THEORETICAL INQUIRIES L. 161 (2020) [hereinafter

the United States, this question takes on a heightened urgency, for within the next forty years the percentage of Americans over age sixty-five is projected to reach 29 percent, growing from 19 percent today and 13 percent a decade ago.⁵ Countries all over the world, both rich and poor, are coping with aging populations and declining birth rates too.⁶ But, as we shall explain below, many property doctrines are built around the needs of younger people in the prime of their lives. As a result, key aspects of the law do not reflect the needs of the older people who comprise increasingly large segments of the populace in the United States and other developed countries. In this Article, we will focus on ways in which takings law, the law of waste and life tenancies, landlord-tenant law, and the law of common interest communities fail to vindicate interests that are especially important to the flourishing of older Americans. We will suggest several attractive reforms in each arena that would make the law more responsive to the interests of an aging society.⁷ At the same time, we will draw attention to one area of property law—the Fair Housing Act’s exemptions for age-restricted communities—that arguably goes too far in vindicating the interests of an elderly population. In the process, we point to the heretofore unrecognized role of age segregation in promoting racial segregation, and we identify the difficult tradeoffs policymakers must face.

In our analysis there are at least three basic features that, taken together, tend to differentiate older people from younger people. To

Boni-Saenz, *Vulnerability*]; Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845 (2019) [hereinafter Boni-Saenz, *Discrimination*]; Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 71, 74-76 (2012).

5. Patrick Button, *Population Aging, Age Discrimination, and Age Discrimination Protections at the 50th Anniversary of the Age Discrimination in Employment Act 2* (IZA Inst. Lab. Econ., Discussion Paper No. 12265, 2019).

6. See Damien Cave, Emma Bubola & Choe Sang-Hun, *Long Slide Looms for World Population, with Sweeping Ramifications*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/22/world/global-population-shrinking.html> [<https://perma.cc/E7QV-XKBX>].

7. In that sense, this project is congenial to the recent explosion in legal scholarship on the concept of personalized law. See generally ALGORITHMIC REGULATION AND PERSONALIZED LAW: A HANDBOOK (Christoph Busch & Alberto De Franceschi eds., 2021); Omri Ben-Shahar, *Personalized Elder Law*, 28 ELDER L.J. 281 (2020); Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627 (2016); Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1 (2013); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2014).

the extent that property law's generally impersonal, one-size-fits-all approach systematically fails to promote human flourishing, the shortcomings typically can be tied to one or more of these core attributes. First, elderly people tend to face *higher relocation costs*, in large measure because of their greater reliance on community support resources. Second, older people have relatively *inelastic incomes*. That is, they are less able to substantially increase their earnings if their financial needs grow, thanks to retirement, disability, and pervasive age discrimination in employment markets. Third, elderly people will tend to have *shorter time horizons* than their younger counterparts. Or, put in economic terms, they generally have higher discount rates, focusing more on the short- and medium-term than the longer-term.

While "aging is a highly individualized process," which no doubt makes the elderly population heterogeneous,⁸ and while some of the common stereotypes about elderly people turn out to be largely untrue, there is conclusive enough evidence for each of these propositions to warrant taking these features into account as we explore how well property law meets the needs of older people in general. We elaborate on the evidence for each of these characterizations below.

Before doing so, though, it is important to underscore two points. The first is that age is an imperfect proxy for these attributes. But while there are certainly some younger people who face high relocation costs and some older people who do not, or some younger people with income constraints and some older people with fairly elastic incomes, tailoring property law to each of these attributes and assessing people individually would impose extraordinary burdens on law and on actors in the legal system.⁹ Moreover, one can fake short time horizons or attachment to a particular location, but falsifying one's age is a far harder task.

The second is that older people are, like all groups of people, heterogeneous. But subdividing senior citizens into several groups

8. Boni-Saenz, *Vulnerability*, *supra* note 4, at 168. That said, as Boni-Saenz recognizes, "[a]ge is certainly correlated with declines in certain types of physical and mental functioning" and "the proxy becomes stronger when examining the population of the old-old, or those over the age of 85, who more generally experience the types of functional declines that are stereotypically associated with age." *Id.*

9. *See id.* at 167-68.

that have differing rights could start our politics down a slippery slope towards a presently unmanageable number of demands for further legal customization. Turning instead to a category that is easy to identify, that is already stable in American law, and that captures with reasonable reliability the attributes we think are important—a category defined generally as starting at the age of sixty-five—is therefore likely to be the most efficient and defensible way to properly account for those attributes in law and policy.¹⁰

The stability of this category is worth further emphasizing. Various states already have special legal protections for senior citizens that have not been extended to other demographic groups despite the passage of considerable time. For example, Illinois lengthens the mandatory cooling off period for home repair and remodeling contracts from three days to fifteen days for senior citizens.¹¹ Numerous states provide property tax exemptions to senior citizens.¹² The federal Medicare program has protected the sixty-five and over group for decades without expansion to other age groups or vulnerable populations,¹³ and sixty-five and over proved to be a salient and relatively uncontroversial criterion in COVID-19 vaccine allocation.¹⁴ Treating senior citizens as a single group that receives extra protections has not sent society careening down a slippery slope towards carve-outs for everyone.

For skeptics of personalized law, this history should be comforting. This concern both explains why we think lines can be drawn between sixty-four and sixty-five-year-olds, and also explains why we do not propose treating older senior citizens differently than

10. To take just a few examples, the Census uses the age of sixty-five to denote the category of older Americans. See *Older Population and Aging*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/older-aging.html> [<https://perma.cc/KUC7-6YWK>]. Medicare eligibility begins, with some exceptions, at the age of sixty-five. See *Medicare Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/medicare/> [<https://perma.cc/R3QJ-PKBG>]. Full Social Security retirement benefits start between the ages of sixty-six and sixty-seven, depending on one's birth year. See *Retirement Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/agereduction.html> [<https://perma.cc/ME6H-JXWV>].

11. Ben-Shahar, *supra* note 7, at 291-92.

12. See Robert C. Christopherson, Note, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195, 197-98 (2005).

13. See *Medicare Benefits*, *supra* note 10.

14. See Stephanie Soucheray, *US COVID-19 Vaccine Strategy Pivots to Target Those 65 and up*, CIDRAP (Jan. 12, 2021), <https://www.cidrap.umn.edu/news-perspective/2021/01/us-covid-19-vaccine-strategy-pivots-target-those-65-and> [<https://perma.cc/8F8S-FE4P>].

younger senior citizens. Tailoring is a virtue, but providing different rights to different tranches of the elderly population would entail legal and administrative complexity that does not seem cost-justified.¹⁵

Turning now to the three core attributes we identify as distinguishing older people from younger people, the first and most important for property law is that elderly people generally face higher transaction costs with respect to relocation than younger people. In other words, while property law assumes that exit—escaping poor conditions, meeting new needs, and the like—is relatively smooth, opportunities for exit and ease of relocation are in fact substantially constrained for older people relative to younger people. This thread runs through each facet of property law we discuss in this Article, with meaningful consequences for each.

Consider at the outset that Americans over age sixty-five are simply significantly less likely to move than their younger counterparts.¹⁶ According to census data, 12 percent of Americans age fifty-four and under moved residences between 2018 and 2019.¹⁷ But only 4.4 percent of Americans over age fifty-five did the same.¹⁸ The same pattern appears each year going back to at least 2015: younger Americans are about three times more likely to move in a given year than elderly Americans.¹⁹ Moreover, while there are

15. See Boni-Saenz, *Vulnerability*, *supra* note 4, at 167-68.

16. See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., PROJECTIONS & IMPLICATIONS FOR HOUSING A GROWING POPULATION: OLDER HOUSEHOLDS 2015-2035 25 (2016), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_housing_growing_population_2016.pdf [<https://perma.cc/GD7K-G9RP>] [hereinafter JCHS REPORT]. Americans over age sixty-five are also more likely to own their homes, and to do so free of any mortgage obligation, than the national average. See HOUS. ASSISTANCE COUNCIL, HOUSING AN AGING RURAL AMERICA: RURAL SENIORS AND THEIR HOMES 21 (2014), <https://ruralhome.org/wp-content/uploads/storage/documents/publications/rrreports/ruralseniors2014.pdf> [<https://perma.cc/LD9A-NU27>].

17. *Geographic Mobility: 2018 to 2019*, U.S. CENSUS BUREAU, tbl.1, <https://www.census.gov/data/tables/2019/demo/geographic-mobility/cps-2019.html> [<https://perma.cc/ALH4-BD6D>] [hereinafter HAC REPORT],.

18. *Id.*

19. From 2014 to 2015, 14.2 percent of younger Americans moved compared to about 4.97 percent of elderly Americans. *Geographic Mobility: 2014 to 2015*, U.S. CENSUS BUREAU tbl.1, <https://www.census.gov/data/tables/2015/demo/geographic-mobility/cps-2015.html> [<https://perma.cc/AZH2-F95Y>]. From 2015 to 2016, 14 percent of younger Americans moved in comparison to 4.2 percent of elderly Americans. *Geographic Mobility: 2015 to 2016*, U.S. CENSUS BUREAU, at tbl.1, <https://www.census.gov/data/tables/2016/demo/geographic-mobility/cps-2016.html> [<https://perma.cc/AZJ3-MK98>]. From 2016 to 2017, 13.6 percent versus 4.6

small fluctuations over time in the rate at which younger Americans move, the rate of mobility among older Americans tends to be fairly constant. There are, of course, numerous possible explanations for this disparity: perhaps older people want to avoid being taxed on the sale of an appreciated home, perhaps they benefit from rent control or other regimes that privilege longevity,²⁰ perhaps they are less likely to rent and renters are simply more mobile than owners across ages, and so on. But despite these confounding factors, there is data from Spain suggesting both that older homeowners are indeed significantly less willing to sell their homes than younger homeowners and that people under the age of seventy are two to three times more likely to be willing to sell their homes than people over the age of seventy.²¹

We make no strong causal claims based on this data alone. But whatever the mechanism, the data nonetheless suggest that (1) older people are less inclined to relocate, and (2) their level of interest in doing so is fairly stable and not especially responsive to macroeconomic or other such factors.²² This interpretation is bolstered by survey data suggesting that when the oldest Americans—those over age seventy-five—do move, it is primarily because

percent. *Geographic Mobility: 2016 to 2017*, U.S. CENSUS BUREAU tbl.1, <https://www.census.gov/data/tables/2015/demo/geographic-mobility/cps-2017.html> [<https://perma.cc/HY5Y-ZEUA>]. From 2017 to 2018, 12.5 percent versus 4.2 percent. *Geographic Mobility: 2017 to 2018*, U.S. CENSUS BUREAU tbl.1, <https://www.census.gov/data/tables/2018/demo/geographic-mobility/cps-2018.html> [<https://perma.cc/AX5C-CC68>].

20. In California, Proposition 13 encourages longtime homeowners to remain in their homes longer than they otherwise would. See Evelyn Danforth, Note, *Proposition 13, Revisited*, 73 STAN. L. REV. 511, 521-27 (2021). Selling the home would cause a new owner to pay higher property taxes than the previous owner did. *Id.* Many other states enacted similar property tax provisions that cap increases below the rate of inflation. See *id.* at 521.

21. Joan Costa-Font, Joan Gil & Oscar Mascarilla, *Housing Wealth Decisions in Old Age: Sale and Reversion*, 25 HOUS. STUD. 375, 385 & fig.2 (2010).

22. Case studies concur. See, e.g., Russell N. James III, *Residential Satisfaction of Elderly Tenants in Apartment Housing*, 89 SOC. INDICATORS RSCH. 421, 423 (2008) (collecting literature supporting claim that “elderly residents are ... less likely to consider moving”); Carolyn Norris-Baker & Rick J. Scheidt, *From ‘Our Town’ to ‘Ghost Town’?: The Changing Context of Home for Rural Elders*, 38 INT’L J. AGING & HUM. DEV. 181, 191-93 (1994) (presenting findings from a case study of small towns in Kansas and attributing reluctance to relocate on the part of elderly people, even amidst economic distress, to “intensity of attachment to home and community strengthened by length of residence, the high value placed on personal competence and independence, and lack of housing alternatives,” all of which are discussed later in this piece).

changing health needs compel them to do so.²³ Indeed, a noteworthy recent survey revealed that 83 percent of senior citizens wanted to stay in their current homes for as long as possible, and the vast majority strongly preferred to age in place.²⁴

But it is mostly by looking beyond the broad data that we can begin to flesh out some of the reasons why mobility and exit opportunities for older people might be relatively limited and more rarely exercised. For one, the particular amenities and fixtures in one's home become less fungible as one ages. Many people over the age of fifty have made choices about their home so that it will be a residence in which they can safely age in place.²⁵

For example, not all homes have a driveway or parking space immediately outside the home, but according to one survey, 94 percent of respondents over the age of fifty have a home with that particular mobility-enhancing amenity.²⁶ Eighty-five percent have a full bathroom on the main level of their house, and 81 percent have a bedroom on the main level.²⁷ Both of these features can be critical forms of preparation for a future when one cannot safely climb or descend stairs. To be sure, a driveway or parking space outside one's home benefits many younger people too. Our point is that the existence of that sort of feature is likely to be more salient for an older person and more closely related to his or her well-being. That feature, therefore, likely operates as more of a constraint on his or her residential choices. Indeed, people over fifty who feel that their homes meet their needs and will continue to do so as they age report lower levels of isolation, higher levels of optimism, better quality of life, and greater confidence in their ability to tackle their futures.²⁸

23. AARP, BEYOND 50.05: A REPORT TO THE NATION ON LIVABLE COMMUNITIES: CREATING ENVIRONMENTS FOR SUCCESSFUL AGING 66 fig. 15 (2005), https://assets.aarp.org/rgcenter/il/beyond_50_communities.pdf [<https://perma.cc/2EEQ-N5KE>] [hereinafter HACREPORT]; see Gary W. Evans, Elyse Kantrowitz & Paul Eshelman, *Housing Quality and Psychological Well-Being Among the Elderly Population*, 57B J. GERONTOLOGY P381, P382 (2002) (“[E]lderly individuals usually move because of changes in work status or health.”). Tiebout sorting also provides a partial explanation. See Karen Smith Conway & Andrew J. Houtenville, *Do the Elderly “Vote with Their Feet?”*, 97 PUB. CHOICE 663, 683 (1998).

24. See Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence*, 22 ELDER L.J. 381, 385 (2014).

25. See HAC REPORT, *supra* note 16, at 26.

26. AARP REPORT, *supra* note 23, at 53 fig.8.

27. *Id.*

28. *Id.* at 54 fig.9.

The costs of relocation for older people extend beyond the difficulty of locating a similar substitute house with necessary features. Sociological research and survey data indicate that elderly homeowners are more embedded in and attached to their homes and neighborhoods and that they are more reliant on those connections and resources for their physical and mental health and well-being than younger people.²⁹ Indeed, about half of all senior homeowners moved into their homes before 1970, so they have had decades to build up those ties.³⁰ And even among older people, one's level of attachment to one's home and community only increases as one continues to age.³¹ A clear supermajority of older Americans insist that they prefer to "age in place,"³² which reflects the fact that collocation with one's doctors, house of worship, family members, close friends, familiar landmarks, and the like are more than just the subjective attachments that everyone young and old has to their homes.³³ For older people, these can be literal lifelines, the loss of which threatens not only their satisfaction, but their very lives and senses of self.³⁴

Our claim is not that younger people face no relocation costs; of course, they do. But as noted above, younger people's relocation behavior reveals what at least appears to be a higher tolerance for those costs.³⁵ And younger people's relative independence—on

29. See Jeffrey S. Smith & Matthew R. Cartlidge, *Place Attachment Among Retirees in Greensburg, Kansas*, 101 GEOGRAPHICAL REV. 536, 542 (2011); Melinda M. Swenson, *The Meaning of Home to Five Elderly Women*, 19 HEALTH CARE FOR WOMEN INT'L 381, 381, 391 (1998); Craig A. Cookman, *Older People and Attachment to Things, Places, Pets, and Ideas*, 28 J. NURSING SCHOLARSHIP 227, 229 (1996); AARP REPORT, *supra* note 23, at 25; *cf.* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 967 (1982) ("Much of the property we unhesitatingly consider personal—for example, family albums, diaries, photographs, heirlooms, and the home—is connected with memory and the continuity of self through memory.").

30. HAC REPORT, *supra* note 16, at 22; see also Kevin M. Cremin, Note, *The Transition to Section 8 Housing: Will the Elderly Be Left Behind?*, 18 YALE L. & POL'Y REV. 405, 418 (2000).

31. See AARP REPORT, *supra* note 23, at 25 tbl.1 (reporting that 79 percent of respondents aged fifty to sixty-four, 88 percent of respondents aged sixty-five to seventy-four, and 89 percent of respondents over age seventy-five want to live in the same community five years from now).

32. Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW 519, 530 (2013).

33. See Smith & Cartlidge, *supra* note 29, at 542.

34. See Cookman, *supra* note 29, at 228.

35. See *supra* notes 20-27 and accompanying text.

average—provides good reasons why they might better tolerate those costs. After all, community engagement is especially crucial for elderly people because it provides them with direction, purpose, meaningful social roles, and a sense of independence, control, and self-esteem—all things that younger people tend to acquire through jobs and family responsibilities and all things that are easily lost after one retires and after one's children are grown.³⁶ A community also prevents social isolation, which tends to lead to both mental and physical declines, and promotes intellectual stimulation and happiness, both of which can reduce cognitive impairment and increase immune functioning.³⁷ There is even some reason to believe that the loss of community attachments from relocation corresponds to worse health outcomes—including an increased risk of both depression and death from coronary disease—as one ages.³⁸ Self-assessments concur, with higher rates of reported community attachment among older adults who assess themselves to be in good health,³⁹ and longitudinal studies similarly suggest lower mortality among those with more social and community connections.⁴⁰

Finally, what is especially vexing about the heightened relocation costs faced by elderly people is that many of those costs are generally difficult to minimize through *ex ante* policy interventions. That is, many of them flow from personal and emotional connections such as homes tailored to one's needs, community attachments, and interpersonal relationships. There is likely little that government can do cost-effectively to alleviate the harms that come from losing those connections. So, while we certainly think interventions that could minimize these costs would be valuable, we are skeptical that substantial progress could be made from that angle. Instead, we

36. See Smith & Cartlidge, *supra* note 29, at 540-43; Swenson, *supra* note 29, at 381, 391; Cookman, *supra* note 29, at 229; AARP REPORT, *supra* note 23, at 22-23.

37. AARP REPORT, *supra* note 23, at 23.

38. *Id.* at 27; Teresa E. Seeman, *Health Promoting Effects of Friends and Family on Health Outcomes in Older Adults*, 14 AM. J. HEALTH PROMOTION 362, 364 (2000); see Norris-Baker & Scheidt, *supra* note 22, at 185-86; see also David J. O'Brien, Edward W. Hassinger & Larry Dershem, *Community Attachment and Depression Among Residents in Two Rural Midwestern Communities*, 59 RURAL SOCIO. 255, 263 (1994) (finding that, even accounting for economic viability of a given community, feelings of attachment to that community are associated with lower levels of depression).

39. AARP REPORT, *supra* note 23, at 27 tbl.2; see HAC REPORT, *supra* note 16, at 11.

40. See Seeman, *supra* note 38, at 363.

take the existence of these costs largely as a given and explore how property law ought to account for them.

The remaining two attributes of elderly people—inelastic income and shorter time horizons—do not pervade every facet of property law’s distinct impact on older people, but they each recur in some. Consider first the fact that a large portion of elderly Americans live on fixed incomes, often deriving their money from sources that are not indexed to increases in inflation.⁴¹ In 2019, only 28 percent of adults aged sixty-five to seventy-four were employed full-time; that rate falls to 9 percent for adults over age seventy-five.⁴² By contrast, full-time employment rates for younger adults ranged from a low of 65 percent for people aged fifty-five to sixty-four to a high of 83 percent for adults aged thirty-five to forty-four.⁴³ Much of this disparity is of course explained by voluntary retirements, but employment discrimination based on age remains a malignant force for many despite laws formally prohibiting such behavior.⁴⁴ Either way, seniors are limited in their ability to increase their earnings.⁴⁵

41. Benjamin Bridges, Jr. & Michael D. Packard, *Price and Income Changes for the Elderly*, SOC. SEC. BULL., Jan. 1981, at 3, 3.

42. *Civilian Labor Force Participation Rate by Age, Sex, Race, and Ethnicity*, U.S. BUREAU LAB. STAT. (Sept. 1, 2020), <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm> [<https://perma.cc/H6HK-XMGC>].

43. *Id.* To be sure, rates of employment for people over age sixty continue to increase. See Gary Burtless, *The Impact of Population Aging and Delayed Retirement on Workforce Productivity* 4-5 (Ctr. for Ret. Rsch. Bos. Coll., Working Paper No. 2013-11, 2013), https://crr.bc.edu/wp-content/uploads/2013/05/wp_2013-111.pdf [<https://perma.cc/GPU8-ZEZ2>]. Some elderly individuals also earn income through part-time employment. Thomas Hungerford, Matthew Rasette, Howard Iams & Melissa Koenig, *Trends in Economic Status of the Elderly, 1976-2000*, SOC. SEC. BULL., Jan. 2003, at 12, 14. In the aggregate, earned employment income accounts for about one quarter of elderly income. *Id.* at 20.

44. See Cathy Ventrell-Monsees, *It’s Unlawful Age Discrimination—Not the “Natural Order” of the Workplace!*, 40 BERKELEY J. EMP. & LAB. L. 91, 92-93 (2019); Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 J.L. & ECON. 433, 434 (2008); see also Rebecca Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists*, AARP 3 (2018), <https://doi.org/10.26419/res.00177.002> [<https://perma.cc/NV6T-A685>]. The best evidence suggests that age discrimination against older women is more pronounced than age discrimination against older men, and that workers near the retirement age of sixty-five face much more age discrimination than workers in their fifties do. See David Neumark, Ian Burn & Patrick Button, *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, 127 J. POL. ECON. 922, 966 (2019).

45. Lingxiao Zhao & Gregory Burge, *Housing Wealth, Property Taxes, and Labor Supply Among the Elderly*, 35 J. LAB. ECON. 227, 259 (2017) (finding that the labor participation rates of workers seventy-three and older are entirely unresponsive to changes in housing wealth

Without the salary-based income drawn by younger Americans, the retired elderly tend to be more reliant on public programs such as Social Security and on assets like bonds, pensions, and tax-deferred retirement plans to fund their life needs.⁴⁶ And even that may not be enough.⁴⁷ The median total asset value for nonbankrupt people over sixty-five is around \$250,000.⁴⁸ While that may sound like a lot of money, at best it will barely cover their projected medical costs.⁴⁹ The skyrocketing price of health care and a shrinking social safety net are causing the finances of older Americans to deteriorate and are leading an increasing proportion of them to file for bankruptcy.⁵⁰ This problem is not confined to poorer seniors. Most middle-class elderly Americans lack the resources they will need to pay for housing and long-term care.⁵¹

Whether retired or working, then, those older individuals who do own their homes or other real property naturally count on the ability to liquidate that property, use it as collateral, rent it, farm it, or otherwise enjoy its fruits as an important aspect of their financial freedom. Because the equity in one's home often makes up the bulk of one's net worth,⁵² and with employment income sources shrunk

or tax rates but do respond to changes in their health status).

46. Hungerford et al., *supra* note 43, at 18-21. Whereas roughly one-quarter of people over age sixty-five earn employment income, according to 2008 data, 90 percent derive income from retirement benefits and 54 percent derive income from assets. *Income of the Population 55 or Older, 2008*, SOC. SEC. ADMIN. 37 tbl.2.A1 (2010), https://www.ssa.gov/policy/docs/statcomps/income_pop55/2008/index.html [<https://perma.cc/CZT2-9T6M>].

47. For example, when Great Britain raised its pension retirement ages, the result was a substantial decrease in overall income for women who were about to retire: they recouped a little more than half of the income they would have earned from pension through continued labor and other sources of income, but fell short otherwise and needed to reduce their consumption to make ends meet. Jonathan Cribb & Carl Emmerson, *Can't Wait to Get My Pension: The Effect of Raising the Female Early Retirement Age on Income, Poverty, and Deprivation*, 18 J. PENSION ECON. & FIN. 450, 461, 468 (2019).

48. Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIO. INQUIRY 681, 698 tbl.4 (2020).

49. See Darla Mercado, *Retiring This Year? How Much You'll Need for Health-Care Costs*, CNBC, (July 18, 2019, 12:55 PM), <https://www.cnbc.com/2019/07/18/retiring-this-year-how-much-youll-need-for-health-care-costs.html> [<https://perma.cc/7FAE-XXQA>].

50. Thorne et al., *supra* note 48, at 683-86, 692-97.

51. Caroline F. Pearson, Charlene C. Quinn, Sai Loganathan, A. Rupa Datta, Beth Burnham Mace & David C. Grabowski, *The Forgotten Middle: Many Middle-Income Seniors Will Have Insufficient Resources for Housing and Health Care*, 38 HEALTH AFFS. 851, 857 (2019).

52. Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1059 & n.52 (2008).

compared to those of younger people, the security and stability of the home and other real property becomes only more salient for those older individuals.⁵³ The ability to devise that significant asset to one's children or chosen beneficiaries is also a meaningful way in which elderly people can provide for their loved ones at and after their deaths.

Finally, older people, simply by virtue of their age, have shorter time horizons (and higher discount rates) than younger people.⁵⁴ This is not to say that older people have no interest in the future beyond their deaths; of course, their testamentary behavior demonstrates the care they have for their descendants' well-being, and having children may actually lengthen the time horizons of elderly people.⁵⁵ But it ought to be self-evident that their own financial needs, their interests in the state of their living circumstances, and the time available to personally enjoy their property necessarily extend only so far into the future.⁵⁶ That is, it is only natural for people to be more impatient to consume in the short term as their expectations of the long term shrink.⁵⁷ This dynamic helps explain why older people are more focused on the immediate consequences of their choices than the longer-term consequences.⁵⁸ By contrast, the behavior and interests of younger property owners can be

53. See Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 628 (2002) (reviewing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)) (“[I]t is likely that older homeowners are more risk-averse home[owners], due to the declining value of their remaining human capital and their increasing share of personal wealth in home equity.”).

54. Cf. Boni-Saenz, *Diversity*, *supra* note 4, at 329 (arguing that elderly people have “little individual incentive” to address issues like climate change because “they will only see ... the costs and none of the benefits”).

55. See Don Bellante & Carole A. Green, *Relative Risk Aversion Among the Elderly*, 13 REV. FIN. ECON. 269, 273 (2004).

56. Cf. *YOU CAN'T TAKE IT WITH YOU* (Columbia Pictures 1938).

57. See David Huffman, Raimond Maurer & Olivia S. Mitchell, *Time Discounting and Economic Decision-Making Among the Elderly* 9-10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22438, 2016), <http://www.nber.org/papers/w22438> [<https://perma.cc/6Q8X-SVA6>] (finding higher discount rates among elderly people and offering data “suggest[ing] that rates of impatience rise with age”).

58. See Daniel Read & N.L. Read, *Time Discounting over the Lifespan*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 22, 29-31 (2004); see also Heidi Bruderer Enzler, Andreas Diekmann & Reto Meyer, *Subjective Discount Rates in the General Population and Their Predictive Power for Energy Saving Behavior*, 65 ENERGY POL'Y 524, 529 (2014) (also finding that middle-aged people have low discount rates compared to elderly people).

expected to be shaped by the knowledge—or at least the hope—that they have relatively more years to live, to enjoy their property, and to see investments bear fruit.⁵⁹ There is also some recent neurobiological evidence that certain cognitive impairments associated with aging cause older individuals to have higher discount rates.⁶⁰

In the discussion that follows, we will show how these three attributes of elderly people—higher relocation costs, inelastic incomes, and shortened time horizons—underlie the particularly imperfect fit between key property doctrines and an aging population. The implications for older people of all races, sexes, and backgrounds are significant, and they also of course intersect with the consequences of numerous other aspects of property law that, as discussed, have excluded and subordinated people of color, women, and more.⁶¹ To be clear, we do not contend here that property law in its totality is biased against elderly residents, though that may well be the case. And because of space considerations we will not address other relevant aspects of property law. Elsewhere we consider aspects of property law like zoning rules governing the construction of accessory dwelling units and long-term care facilities.⁶² Instead, our claim is more modest, and easier to assess: important parts of property doctrine are insufficiently attentive to differences that strongly correlate with aging, and unnecessary human suffering results from its rigidly one-size-fits-all approach.

59. See Read & Read, *supra* note 58, at 23. This is not to say that younger property owners always behave *responsibly* with their property. Their long time horizons may just as well encourage irresponsible behavior on the theory that they have plenty of time to remedy youthful indiscretions.

60. Bryan D. James, Patricia A. Boyle, Lei Yu, S. Duke Han & David A. Bennett, *Cognitive Decline Is Associated with Risk Aversion and Temporal Discounting in Older Adults Without Dementia*, PLOS ONE, April 2, 2015, at 5; Kameko Halfmann, William Hedgcock & Natalie L. Denburg, *Age-Related Differences in Discounting Future Gains and Losses*, 6 J. NEUROSCIENCE PSYCH. & ECON. 42, 49-50 (2013).

61. See, e.g., Harris, *supra* note 1, at 1715-24.

62. A companion project coauthored by one of us examines housing law's treatment of the elderly, focusing on zoning rules that prohibit the construction of long-term care facilities, and policies designed to help the elderly age in place, such as zoning rules facilitating the construction of accessory dwelling units. See Joanna L. Martin & Lior Jacob Strahilevitz, *Scaling Down Senior Living: The Post-Pandemic Future of Elderly Housing*, in LAW AND THE HUNDRED YEAR LIFE (Anne Alstott & Abbe Gluck eds., forthcoming 2022) (on file with authors).

We begin in Part I with a discussion of just compensation under the Constitution's Takings Clause, focusing on how high relocation costs mean that fair market value systematically undercompensates older people. Part II examines the doctrine of waste and life tenancies. Relocation costs matter here too, but the inelasticity of income and shortened time horizons for elderly life tenants loom particularly large. Part III examines landlord-tenant law, where high relocation costs and inelastic incomes again combine to make elderly tenants especially vulnerable to landlord misbehavior. Part IV revisits a classic question in the law of common interest communities—whether homeowners' associations should be able to prohibit companion animals—and finds that existing contract-based approaches underestimate the problems that arise for older owners because of asymmetric relocation costs and, to a lesser extent, inelastic incomes. In each of these four domains, there is room for institutional reforms that will better vindicate the property interests of older Americans, and we propose several such reforms and identify a handful of jurisdictions that have implemented doctrinal changes that are friendlier to the needs of the aged.

We suspect that some readers will not be swayed by some, or perhaps even all, of the normative proposals in this Article. The Article nonetheless has something to offer those skeptical readers. As America ages, its politics will change. Senior citizens, already well-represented in the electorate, will become more powerful still.⁶³ Readers therefore can take our Article as a descriptive account of where property law may be going thanks to looming demographic changes.

Part V concludes with a body of law, the Fair Housing Act's exemptions for age-restricted communities, that has tried to protect older people from some of the failures of their home communities to provide appealing environments in which to age. In responding to the needs of these elderly homeowners and the real estate developers who have catered to them, however, the law has arguably overcorrected in providing senior citizens with special protections that have produced striking racial segregation in these communities. That conclusion demands nuance, though, as we identify some

63. See generally Nora Super, *Three Trends Shaping the Politics of Aging in America*, 30 PUB. POL'Y & AGING REP. 39, 43-44 (2020).

aspects of aging that might make racial segregation in age-restricted communities a qualitatively different phenomenon than racial segregation in neighborhoods with high workforce participation rates.

I. TAKINGS COMPENSATION AND THE ELDERLY OWNER

Eminent domain is the mechanism by which government can acquire title to—or “take”—privately held real or personal property. The Takings Clause of the Fifth Amendment to the U.S. Constitution and parallel provisions of the states’ constitutions limit the exercise of that power by requiring that the government act for a public use and compensate the person whose property has been “taken.”⁶⁴ For an older homeowner with the misfortune of having their property taken, the measure of compensation is a hugely consequential matter. Often without current employment income, with limited human capital in the form of future earning capacity, and with increasing medical care costs, the family home represents the majority of their accumulated wealth and may make the difference between staying afloat financially or sinking into bankruptcy.⁶⁵

Under current doctrine, compensation in federal takings law “is for the property,” not the person.⁶⁶ And it has become axiomatic in federal takings law that the compensation owed is simply “to be measured by ‘the market value of the property at the time of the taking.’”⁶⁷ Note, however, that “nothing in the Constitution” defines the measure of compensation; it is “purely a matter of judge-made law.”⁶⁸ In turn, the U.S. Supreme Court has tended to justify its compensation standard—one which asks only “what a willing buyer

64. U.S. CONST. amend. V; *e.g.*, ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; FLA. CONST. art. X, § 6; ILL. CONST. art. I, § 15; N.Y. CONST. art. I, § 7(a); TEX. CONST. art. I, § 17.

65. Zhao & Burge, *supra* note 45, at 232; Thorne et al., *supra* note 48, at 697-98.

66. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

67. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001); *United States v. Miller*, 317 U.S. 369, 373-74 (1943).

68. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866. In fact, Wanling Su makes the case that the word “just” in the Takings Clause “was historically understood to ensure *procedural* fairness” and to guarantee homeowners “the right to a jury” in takings cases. Wanling Su, *What Is Just Compensation?*, 105 VA. L. REV. 1483, 1490 (2019) (emphasis added).

would pay in cash to a willing seller' at the time of the taking"—in two ways.⁶⁹

The first is by pointing to the need for a “practical”⁷⁰ and “relatively objective working rule.”⁷¹ While appraisals, tax assessments, and the like give market value a certain predictability and rationality, the argument goes, considering an owner’s subjective attachments or even an objective evaluation of the dislocation an owner might experience lacks the “external validity which makes it a fair measure of public obligation” to pay compensation.⁷² Even still, the Court has admitted that application of the market value standard nonetheless “involves, at best, a guess by informed persons,” particularly where the property at issue or other comparable property in the area “has not in fact been sold within recent times, or in significant amounts.”⁷³

The second justification is a more theoretical one. This argument begins from the premise that the purpose of the compensation requirement is not to make the property owner whole in *every* respect, but rather to put him “in as good a position *pecuniarily* as if his property had not been taken.”⁷⁴ Indeed, the Court has candidly “acknowledged that such an award [based on market value] does not necessarily compensate or all values an owner may derive from his property,” including in particular an owner’s subjective attachments or sources of value.⁷⁵ But, this argument goes, that is by design. Because one of the “burden[s] of common citizenship” is that

69. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *Miller*, 317 U.S. at 374). We focus here on the justifications offered for the market-value *measure* of compensation, and take as settled the justifications offered for the *payment* of compensation itself. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1223 (1967); see also Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 248-49 (2007) (framing takings compensation as “corrective justice”).

70. *Miller*, 317 U.S. at 374.

71. *564.54 Acres of Land*, 441 U.S. at 511.

72. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); see *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 n.15 (1984); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *Olson*, 292 U.S. at 255.

73. *Miller*, 317 U.S. at 374-75. Thomas Merrill has argued that the problem in fact pervades the compensation analysis and renders it largely “an opinion or educated guess.” Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENV’T L.J. 110, 116-17 (2002).

74. *Olson*, 292 U.S. at 255 (emphasis added).

75. *564.54 Acres of Land*, 441 U.S. at 511; see *Petty Motor Co.*, 327 U.S. at 377.

“all property” is liable to “condemnation for the common good,” the public is said to have no broader obligation to account for “loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it.”⁷⁶ But on this justification, too, the Court has demonstrated at times faint-hearted commitment and cautioned that “when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public,” some other standard is warranted.⁷⁷ The Court has therefore emphasized that the overarching question is this: “What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”⁷⁸

While the states are all free to arrive at some higher measure of compensation under their own constitutions or statutes, they have generally mirrored the Court’s approach and held that the measure of compensation for a taking is the fair market value of the property taken.⁷⁹ For example, the California Supreme Court has held, first, that under its state constitution, the measure of just compensation “is often determined by the ‘fair market value’ of what has been lost,” and second, that “there is no rigid or fixed standard that is appropriate in all settings.”⁸⁰ Illinois’ Supreme Court has held that “the owner shall receive the market value of his property at the time of the taking.”⁸¹ And New York’s courts likewise measure the compensation owed under that state’s constitution with reference to “market value,” or “the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell.”⁸²

76. *Kimball Laundry*, 338 U.S. at 5; see *Miller*, 317 U.S. at 375.

77. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

78. *Id.*; *564.54 Acres of Land*, 441 U.S. at 512-13 (ultimately rejecting claim for compensation above market value but discussing this approach favorably); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (observing that market value is “not an absolute standard nor an exclusive method of valuation”).

79. See 29A C.J.S. *Eminent Domain* § 135 (2021) (compiling citations). Some states, as well as the federal government, offer statutory relocation expenses in some circumstances. See *infra* note 128 and accompanying text. Sometimes these relocation expenses have been considered to be constitutionally required. See, e.g., LA. CONST. art. I, § 4(B)(5); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 292 (Fla. 1958). Sometimes they have not been. See, e.g., *Klopping v. City of Whittier*, 500 P.2d 1345, 1357 n.7 (Cal. 1972).

80. *Prop. Rsrv., Inc. v. Super. Ct.*, 375 P.3d 887, 918 (Cal. 2016).

81. *Sanitary Dist. of Chi. v. Chapin*, 80 N.E. 1017, 1019 (Ill. 1907).

82. *Metro. Transp. Auth. v. Longridge Assocs.*, 997 N.Y.S. 2d 461, 463 (App. Div. 2014).

A few states, however, have enacted some form of compensation above market value when the property in question is a family home. Michigan amended its constitution in 2006 to, among other things, guarantee compensation above fair market value when the property being taken is a person's "principal residence."⁸³ In that case, "the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law."⁸⁴ In the same year, Missouri enacted by statute a similar 25 percent premium for primary residences,⁸⁵ along with a 50 percent premium for property of any type that had been "owned within the same family for fifty or more years."⁸⁶ Likewise, Indiana adopted a statute that provides a 25 percent premium for "agricultural land" and a 50 percent premium for "residential property."⁸⁷ And Connecticut and Rhode Island provided by statute for compensation above fair market value—25 percent and 50 percent, respectively—when property, whether residential or not, is taken for economic development purposes.⁸⁸

With these noteworthy exceptions, though, eminent domain law under both federal and state law considers the measure of compensation to be an "objective" inquiry centered—even if at times tweaked—on the market value of the property in question in an arms-length sale between two parties without any distinct characteristics.⁸⁹ It is, however, widely understood by scholars and some judges that this measure of compensation is incomplete because it fails to account for subjective value, loss of autonomy, and more.⁹⁰

83. MICH. CONST. art. X, § 2.

84. *Id.*; MICH. COMP. LAWS § 213.23(5) (2021).

85. MO. REV. STAT. §§ 523.001(3), 523.039(2) (2021).

86. *Id.* §§ 523.001(2), 523.039(3).

87. IND. CODE § 32-24-4.5-8 (2019).

88. CONN. GEN. STAT. § 8-129(a)(2) (2021); 42 R.I. GEN. LAWS § 42-64.12-8(a) (2021). Maine altogether prohibits by statute the nonconsensual taking by a municipality of an owner-occupied residence for road construction purposes. ME. STAT. tit. 30-A, § 3101(1) (2021).

89. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1474 (2008).

90. See, e.g., *Coniston Corp. v. Vill. of Hoffman Ests.*, 844 F.2d 461, 464 (7th Cir. 1988) ("[B]ecause of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, [many owners] value their property at more than its market value (i.e., it is not 'for sale'). Such owners are hurt when the government takes their property and gives them just its market value in return."); Heller &

Margaret Jane Radin, in particular, has famously argued that, when it comes to property that is nonfungible by virtue of its personal value to the owner or that is constitutive of one's personhood, market-value compensation will be "quite wrong" because the property interests in question are simply "incommensurate with money."⁹¹ But even when courts have acknowledged as much, the doctrine generally persists for reasons of administrability and purported fairness to the public at large.⁹²

Our aim here is not to argue that market value is the wrong measure of compensation in general, nor is it our aim to argue that subjective valuation ought to drive the measure of compensation across the board.⁹³ Rather, our aim is more modest: we consider an objective recognition of the actual burdens and lost value that distinctly befall elderly owners, which, as a rough rule, are predictably higher than those befalling younger owners.⁹⁴

After all, a key purpose of the compensation requirement is often said to be deterring government from excessive takings of property and leading government "to make efficient takings decisions—to take property only when the public benefits of the taking outweigh the burdens and costs on the private owner."⁹⁵ Without such a requirement, government might take property based only on an

Hills, *supra* note 89, at 1475; Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 873 (2007); Krier & Serkin, *supra* note 68, at 866; Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-67 (2004); Michelman, *supra* note 69, at 1214; *cf.* Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 87 (2017). *But see* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 111 (2006) (arguing that scholars overstate the undercompensation problem and overlook ways outside of the constitutional process in which governments make owners whole).

91. MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 154 (1993).

92. *See supra* note 72 and accompanying text.

93. The literature is replete with various proposals to increase or change the measure of compensation. *See, e.g.*, Wyman, *supra* note 69, at 242 n.10, 256-61 (collecting sources and proposals); Heller & Hills, *supra* note 89; Bell & Parchomovsky, *supra* note 90; Fennell, *supra* note 90; John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 803-19 (2006).

94. *See* Bell & Parchomovsky, *supra* note 90, at 902 (theorizing that market-value compensation "disproportionately undercompensates elderly owners").

95. Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 121 (2019); *see also* Wyman, *supra* note 69, at 246 (noting that takings compensation is "often described as a mechanism that requires governments to bear the costs of takings, and thereby motivates governments to make efficient decisions about whether to take property").

evaluation of its own benefits and without regard to the costs imposed on the owner,⁹⁶ and “would not feel incentives, created by the price system, to use those resources efficiently.”⁹⁷ To be sure, there are reasons to doubt just how effective the compensation requirement is at making government internalize the costs of takings.⁹⁸ But however effective the compensation requirement is or is not in general, *systematic* distortions with respect to particular groups of property owners mean that government’s eminent domain activity will be especially inadequately or incorrectly deterred with respect to those owners.⁹⁹

Here, the unique costs for elderly people are those associated with relocation. As discussed above, older Americans tend to be less likely to move of their own accord; the relocation rate is three times higher for a person age fifty-four and under than for a person over fifty-five.¹⁰⁰ So even if most people of all ages would not otherwise find themselves moving in a given year, the government taking a person’s home will result in an unplanned and likely unwanted move three times as often when the owner is an older person.¹⁰¹ On average, then, having one’s home taken is likely to be a qualitatively different life event for an elderly person than it would be for a younger person who is relatively more likely to have moved anyway.

96. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 56-57 (7th ed. 2007); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1001 (1999); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. L. REV. 859, 882-83 (1995); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977); Michelman, *supra* note 69, at 1218.

97. Heller & Krier, *supra* note 96, at 999.

98. See Wyman, *supra* note 69, at 247-48 (discussing factors that distort government’s ability to internalize the costs of takings); cf. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 359 (2000) (arguing that there are significant obstacles that prevent government from responding to monetary incentives).

99. Cf. Fee, *supra* note 93, at 790-92 (arguing that, “[b]ecause just compensation law generally undervalues the home” in particular and as compared to business and investment property, “it does not adequately deter government from using eminent domain against homes”); Bell & Parchomovsky, *supra* note 90, at 883 (arguing that compensation measures that fail to account for subjective value “will fail to incentivize the government properly”); Heller & Hills, *supra* note 89, at 1468, 1481 (arguing that compensation measures that fail to account for subjective value skew the government’s incentives).

100. See *supra* notes 10-19 and accompanying text.

101. See JCHS REPORT, *supra* note 16, at 25 (finding the same disparity in mobility rates).

Further, because amenities and fixtures become less fungible as one ages,¹⁰² an older homeowner who loses her home due to eminent domain and receives market value compensation may not be able to find and afford a replacement home with the same necessary features. After all, while those features might objectively be of great value to an older homeowner, they may well not be for a younger or even “average” homeowner and therefore may not be reflected in fair market value compensation.¹⁰³ Younger homeowners who are dispossessed by eminent domain, by contrast, have less “location-specific capital” (in other words, they can move homes without suffering the same degree of welfare losses),¹⁰⁴ and are likely more indifferent when it comes to the need for and value of specific home features. And because, as already discussed, community ties become significantly more salient as one ages,¹⁰⁵ the involuntary loss of a home and its associated community ripples out into significant secondary effects for physical and mental health and well-being.¹⁰⁶

Finally, even if an elderly dispossessed homeowner were able to locate an available substitute home that met her needs and was located in the same community, it is likely that she would be unable to afford it.¹⁰⁷ The reality is that neighborhoods ripe for redevelopment, and therefore targets of eminent domain, are so ripe precisely because the properties are undervalued relative to what they could fetch if put to a different use.¹⁰⁸ They also disproportionately tend

102. See *supra* notes 22-25 and accompanying text.

103. Cf. Bell & Parchomovsky, *supra* note 90, at 883 (noting that fair market value compensation does not include subjective value).

104. Cf. Julie DaVanzo, *Repeat Migration, Information Costs, and Location-Specific Capital*, 4 POPULATION & ENV'T. 45, 47 (1981). The term is adapted from a voluminous literature in economics on firm-specific capital, which is the human capital an employee has that is tied to their continued employment at a particular firm. See generally Boyan Jovanovic, *Firm-Specific Capital and Turnover*, 87 J. POL. ECON. 1246 (1979).

105. See *supra* notes 25-35 and accompanying text.

106. See Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 943; Richard T. LeGates & Chester Hartman, *Displacement*, 15 CLEARINGHOUSE REV. 207, 236 (1981).

107. See LeGates & Hartman, *supra* note 106, at 211. Even the move itself and the process of searching for a replacement home are likely to be taxing. See *Budhu v. Grasso*, 479 N.Y.S.2d 303, 306 (N.Y. Civ. Ct. 1984) (“Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled.”); Cremin, *supra* note 30, at 417 (highlighting “the physical demands of searching for” new housing).

108. See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 185 (2003), https://ij.org/wp-content/uploads/2015/03/ED_report.pdf [<https://perma.cc/JAE9-YQPE>] (similarly observing

to be communities of color,¹⁰⁹ which means that older people of color are particularly subject to and harmed by the practice of eminent domain.

In many of the sorts of communities that might try to improve their fortunes through development assisted by eminent domain, these elderly residents often find that, besides their own home, “few residential options are available.”¹¹⁰ Affordable options are likely to dwindle in the wake of a development project. After all, because the purpose of the taking is often to redevelop the neighborhood and increase the tax base by bringing in new business, creating jobs, raising wages, et cetera, the consequence—often the *intended* consequence—is naturally to make property more expensive there.¹¹¹ But because market value compensation is measured at the time of the taking, not after, it is based on the lower, *pre*-development value.¹¹² This is all, of course, a reason why market value compensation is criticized as being inadequate with respect to condemnees both young and old alike.¹¹³ But the increased reliance on community resources and the increased attachment to the neighborhood that the older condemnee feels—and the more dramatic consequences that attend the older condemnee’s loss— make the inadequacy of market value compensation all the more dramatic.¹¹⁴ The added racial disparity in takings and in the enjoyment of the opportunities made available after the development (or lack thereof) noted above only puts into sharper relief the inadequacy of the compensation.¹¹⁵

that “cities and developers look for areas of older neighborhoods in good locations” and noting they are “less expensive to condemn”). Indeed, there is even some evidence to suggest that low-value properties receive compensation that is *less* than market value, while high-value properties receive more than market value. See Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 488 (1976).

109. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (cataloging racially disparate nature of development takings); Brief for National Ass’n for the Advancement of Colored People et al. as Amici Curiae Supporting Petitioners at 7-15, *Kelo*, 545 U.S. 469 (No. 04-108) [hereinafter NAACP Brief of Amici Curiae] (describing the disproportionate burden of eminent domain on people of color, economically disadvantaged people, and elderly people).

110. Norris-Baker & Scheidt, *supra* note 22, at 184.

111. See *Kelo*, 545 U.S. at 483.

112. See *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

113. See Fennell, *supra* note 90, at 965-66.

114. See *supra* notes 25-35 and accompanying text.

115. See NAACP Brief of Amici Curiae, *supra* note 109, at 13 (“[W]hen an area is taken for ‘economic development,’ the underprivileged, racial and ethnic minorities, and the elderly are

One response is that, even if an elderly condemnee's compensation award is inadequate to purchase another home in the neighborhood, it might be adequate to rent another residence in the neighborhood for the remaining time in his or her life. That response has some force, but rental housing is an imperfect substitute. First, it is not an asset that can appreciate, be devised, or be leveraged as collateral in the case of unexpected health or other costs.¹¹⁶ Second, there is some evidence that homeownership itself is associated with better health outcomes for elderly people. One study published in the *Journal of Gerontology* found that older homeowners were 30 percent less likely to enter a nursing home than those who did not own their home.¹¹⁷ Perhaps even more importantly, those homeowners had 1.3 times the odds of recovering enough to exit the nursing home after entering.¹¹⁸

Of course, drawing causal conclusions here is complicated, and the authors of the study acknowledge that an owned home and the inheritable value it represents might perversely lead one's potential heirs to minimize costs and prematurely terminate nursing home expenses.¹¹⁹ But particularly in light of the data discussed above, it seems plausible that homeownership represents for the older person community assistance, a "sense of attachment[,] ... competence[,] and control," all of which can make one healthier, happier, and more supported in living independently.¹²⁰

So, with all of this in mind, we propose providing older condemnees with a measure of compensation that is not simply the

driven out of their own neighborhoods, unable to afford to live in the 'revitalized' community." See generally John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003) (discussing the dislocation and consequent harms that flow from redevelopment efforts to people of color).

116. Jann Swanson, *Looking for Affordable Housing? UI Says Look to Homeownership*, MORT. NEWS DAILY (May 24, 2021, 12:23 PM), http://www.mortgagenewsdaily.com/05242021_housing_affordability.asp [<https://perma.cc/44YG-4WPP>].

117. See Vernon L. Greene & Jan I. Ondrich, *Risk Factors for Nursing Home Admissions and Exits: A Discrete-Time Hazard Function Approach*, 45 J. GERONTOLOGY S250, S255 (1990).

118. *Id.* at S256.

119. *Id.* at S257.

120. *Id.*; see NAACP Brief of Amici Curiae, *supra* note 109, at 14 (noting that "the elderly strongly prefer independent living in their own homes to other alternatives" and collecting sources); JCHS REPORT, *supra* note 16, at 11, 26.

market value of the property taken. Though our motivation is similar to that of states like Michigan, Missouri, and the others discussed above that award fixed premiums for condemned residential property across the board, we depart from that model for two reasons.¹²¹

First, these premiums are likely to disproportionately benefit younger homeowners with outstanding mortgages. A 20 percent premium on a home with a \$200,000 market value and a \$160,000 mortgage is a bonus equivalent to the homeowner's entire equity. The same premium on the same home owned by an older condemnee who has paid off her mortgage is a bonus equivalent to only 20 percent of her equity.

Second, because our focus is less on the property's status and more on the owner's—a concededly less straightforward question—we suggest that judges adjudicating takings cases and interpreting applicable constitutional commands, or legislatures deciding what sorts of super-constitutional compensation will be offered, should take account of the condemnee's age, length of tenure in the home, vulnerability, community ties, and ability to acquire other suitable housing in the neighborhood. And they should aim to award enough compensation as to empower the elderly condemnee to remain in the neighborhood and preserve her interpersonal and spatial relationships. This measure of compensation would better reflect the actual costs imposed on an older condemnee. It would force the government to internalize the true costs of the taking and thereby more appropriately deter and shape the government's activity.¹²² By rewarding only longtime owners, it would discourage arbitrage whereby land that is slated for eminent domain would be sold to an elderly owner to generate higher compensation.¹²³ Finally, it would ensure fairness and respect for the personhood and independence of older owners.

121. See *supra* notes 80-85 and accompanying text. Similarly, and similarly not speaking about elderly people in particular, John Fee suggests that government be made to pay homeowners "market value plus *X* percent of the home's market value, where *X* depends on how long the owner has lived in the home." Fee, *supra* note 93, at 815. Because more factors besides the property's status as a home are at play here, we do not offer a similar formula, but the motivation is comparable.

122. See *supra* notes 93-97 and accompanying text.

123. See *supra* notes 85-87 and accompanying text.

While it is true that this approach would be less scientific than the Supreme Court insists looking to market value is,¹²⁴ the reality remains that even market value measures are imprecise.¹²⁵ As long as courts are having to make “guess[es],”¹²⁶ we suggest they might at least consider as well a “guess” as to the true costs borne by the older condemnee.¹²⁷ Federal and state law *already* allow for the payment of more than market value in some circumstances—in the form of residential and business relocation expenses and damages for business interruption and loss of customer base.¹²⁸ Our proposal does not require too great a leap from these concessions already made. Thus, regardless of what compensation floor the Supreme Court says is required by the Constitution, or regardless of what Congress decides, nothing stops state courts from interpreting the demands of their own takings clauses along these lines or state legislatures from choosing to award compensation along these lines regardless of what their constitutions demand.¹²⁹ Indeed, as noted above, some states already have colored outside the lines of fair market value.¹³⁰

One objection is that, even given the distinct burdens elderly condemnees face, it would be inappropriate or would engender new unfairness to provide them compensation above market value.¹³¹

124. See *supra* note 69 and accompanying text.

125. See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 683-84 (2005).

126. *United States v. Miller*, 317 U.S. 369, 374-75 (1943).

127. Cf. Krier & Serkin, *supra* note 68, at 866 (suggesting, by way of addressing a different problem in takings law, that, because the Constitution does not define the measure of compensation, “courts can use their power to alter the measure of compensation as a means to guard against” abusive or problematic results).

128. See 42 U.S.C. §§ 4622, 4630 (providing for relocation expenses); Fee, *supra* note 93, at 791-93 (discussing these payments); Garnett, *supra* note 90, at 121-24 (discussing federal and state law relocation and business interruption payment requirements, as well as relocation assistance programs, and collecting state statutes); Serkin, *supra* note 125, at 687-88 & n.47 (noting state law rules that award consequential damages). A number of state constitutions also contain a compensation provision applicable when government “damages” private property. See generally Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 (2018).

129. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (calling for states and advocates to innovate and experiment with rights protections under state constitutions).

130. See *supra* notes 80-85 and accompanying text.

131. As noted earlier, one might contend that a more fair or efficient way to address the burdens elderly condemnees face would be to minimize their relocation costs rather than

There are two important responses. The first is that our proposal does not offer older condemnees a flat premium. Rather, it is meant to enable older condemnees to seek, and judges to award, compensation based on the actual degree of their heightened dislocation. Accordingly, for example, an elderly condemnee who is a newcomer to the neighborhood and has other significant financial resources probably will not receive extra compensation under this proposal. Older condemnees with more limited resources, higher degrees of community ties, or in more rapidly gentrifying real estate markets, by contrast, would be the primary beneficiaries. And while the added compensation would come out of taxpayers' pockets, we submit that these particular burdens of condemnation are not fairly shouldered by elderly condemnees and ought instead to be shouldered broadly by the taxpayers in the form of targeted, heightened compensation.¹³²

The second response is that laws that protect or even privilege older people in ways different from their younger counterparts are not uncommon—consider the Social Security Act and the Medicare Act—and are often justified on the basis that, throughout one's life-cycle, one can expect both to be burdened by these laws (when one is a younger taxpayer) and to be benefited by them (when one is older).¹³³ That is, the unfairness that may appear at a given period of time is mitigated because, across periods of time, everyone can expect to get both the short and long end of the stick. For the same

increase their compensation. But because alleviating many of the burdens faced by elderly condemnees is not especially within the power of the law or would impose significant costs on the government, compensating for these losses may often be the best way to feasibly and efficiently account for them. *See supra* notes 22-40 and accompanying text.

132. *See* *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“[J]ust compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

133. *See, e.g.,* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (per curiam) (subjecting age-based classifications to only rational basis review because old age “marks a stage that each of us will reach if we live out our normal span”); Boni-Saenz, *Discrimination*, *supra* note 4, at 870-75 (discussing temporal equality). Of course, it would hardly be justifiable to require all young people to turn over the entirety of their incomes to elderly people on the theory that the shoe will one day be on the other foot. Moment-to-moment injustices may be softened by later rewards, yet they are rarely erased. *See* Boni-Saenz, *Vulnerability*, *supra* note 4, at 176. But this proposal, like the others in this Article, is meant to be tailored to the source of the harm and the extent of actually differing needs while minimizing collateral consequences.

reason, insofar as one is concerned that laws designed to protect a given class might contribute to the stigmatization of that class—a proposition with which one might well globally take issue in any event—that concern is implicated less saliently where, as here, the law operates to distribute privileges across time rather than across people.

A related objection is that, because the homeownership rate is significantly higher for white Americans than for Black Americans,¹³⁴ one effect of enabling older owners to receive heightened compensation is a redistribution of wealth from Black taxpayers to elderly white homeowners. We readily concede this problem. But rather than proceed to deny the needs of older homeowners—of all races—it strikes us as more appropriate to couple our proposal here with targeted taxing and spending policies designed to increase the rate of Black homeownership and to directly mitigate racial inequities more broadly.¹³⁵

One final concern is that providing above-market compensation has the potential to alter the political dynamics of eminent domain and cause older property owners to support or even invite takings.¹³⁶ To start, it is important not to overstate the political power of elderly people and associated lobbying interests like the AARP. Though there is evidence that older people tend to participate in local government more than younger people,¹³⁷ there is also some evidence suggesting that the political power of older people is more potent at the state level than at the local level, particularly with respect to land use law.¹³⁸ But it is at the local level that specific takings decisions are often made.¹³⁹ There is, therefore, some reason

134. At the end of 2019, the homeownership rate for white non-Hispanic Americans was 73.7 percent, while the rate for Black Americans was 44 percent. *Quarterly Residential Vacancies and Homeownership, First Quarter 2021*, U.S. CENSUS BUREAU (Apr. 27, 2021), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/7BEJ-3FHT>].

135. See generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (noting that redistribution is better accomplished through tax and transfer programs rather than legal rules that are slanted to benefit the less fortunate).

136. See Garnett, *supra* note 90, at 142-43.

137. See Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 29 (2019).

138. See Brinig & Garnett, *supra* note 32, at 539.

139. See, e.g., Michael C. Pollack, *Reallocating Redevelopment Risk*, 73 FLA. L. REV. (forthcoming 2021) (manuscript at 7-18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=37

to wonder about the precise degree to which older property owners are actually altering the landscape of local takings decisions.

Even assuming older owners do exert substantial power in land use decision-making and that our proposal would mean increasing their support for takings, the normative valence of that consequence likely turns to some degree on one's view about the current state of things. That is, if there is currently an optimal amount and distribution of takings, then offering heightened compensation for older owners might engender rent-seeking and the pursuit of projects that are not socially beneficial. But if there is presently too much opposition to socially beneficial projects, then breaking down that opposition with larger compensation awards would be desirable.

Indeed, it is quite possible that the prevailing *failure* to provide above-market compensation to elderly owners inefficiently *deters* otherwise socially beneficial exercises of eminent domain by making socially desirable takings especially politically toxic—either because elderly owners are in fact able to overcome broad local support for exercises of eminent domain or because they are sympathetic symbols around which opponents of eminent domain can rally.

For example, takings opponents of all ages made much of the fact that Wilhelmina Dery, one of the owners dispossessed by the taking at issue in *Kelo v. City of New London*, was an elderly woman (age eighty-seven at the time of the Supreme Court's decision) who had lived in her house for her entire life.¹⁴⁰ An above-market compensation award for Ms. Dery might have helped neutralize the political opposition that eventually helped sink a project that the Supreme Court held could go forward.¹⁴¹ Insofar as some of the most salient obstacles to the efficient use of eminent domain since *Kelo* have similarly been political rather than financial, increased compensation for the most sympathetic and most inconvenienced property owners has the potential to lead to better land use decisions.

97297 [<https://perma.cc/JLE2-WD79>] (collecting examples).

140. See 545 U.S. 469, 475 (2005).

141. See *id.* at 489-90.

II. WASTE, PARTITION, AND THE ELDERLY LIFE TENANT

We showed in Part I how the particularly high relocation costs faced by older people should inform the question of how much compensation they are due if their property is taken. Our next example, involving the powers of life tenants, is one in which high relocation costs are sometimes present but play second fiddle to the relatively inelastic income and shortened time horizons of elderly occupiers of property. Thus, beginning with these two Parts, we can begin to understand the role of all three of the particular attributes of elderly people we identify, and then in the Parts that follow we will see how different mixes of these attributes give rise to divergent policy prescriptions.

A large body of property law has arisen to manage potential conflicts between those who have possessory interests and future interests in land.¹⁴² The law of waste is the key mechanism that common law courts have developed to ensure that the holder of the possessory estate does not squander the land's value, leaving the future interest holder with a diminished asset.¹⁴³ Because so many life tenants are elderly, the problems associated with life estate conflicts often arise in situations involving senior citizens.¹⁴⁴

During the twentieth century, the life estate fell out of fashion as an estate planning tool, so much so that influential legal texts regularly advised against creating a life estate and strongly recommended the use of a trust instead.¹⁴⁵ In recent years, life tenancies have reemerged as a popular estate planning strategy,

142. See, e.g., JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY* 279 (9th ed. 2018).

143. See *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119-20 (2d Cir. 1994). See generally JEDEDIAH PURDY, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 *CORNELL L. REV.* 653 (2006).

144. See, e.g., *Fehringer v. Fehringer*, 367 S.W.2d 781, 782-83 (Tenn. 1963) (involving a seventy-seven-year-old life tenant moving for partition). Life estates are frequently created by a testator in favor of their widow or widower, who will often be of a similar age as the decedent. Testators will rarely create remainder interests that follow estates held by youthful life tenants because the remainders are unlikely to become possessory until several decades after the testator's death.

145. See, e.g., DUKEMINIER ET AL., *supra* note 142, at 279 ("A trust is a more flexible and usually more desirable property arrangement than a legal life estate.").

notwithstanding the concerns of lawyers about the coordination problems that they create.¹⁴⁶ The use of a life estate now has significant tax advantages and benefits for senior citizens who are trying to qualify for Medicaid to pay for long-term care while still transferring some wealth to their children.¹⁴⁷ As a result, the life estate is enjoying a resurgence of popularity.¹⁴⁸

Obviously, older life tenants' shorter time horizons make the potential for conflict between the life tenant and remaindermen relatively significant.¹⁴⁹ As we will show, however, the higher relocation costs and inelastic incomes faced by elderly people loom large in the law of waste as well.¹⁵⁰

Waste cases often follow a predictable pattern. A life tenant wishes to harvest real property resources in order to provide for her pressing contemporary needs, and a future interest holder, who we will refer to as the remainderman here, objects that such utilization of the land will leave him with land that is less valuable.¹⁵¹ Though many of the most famous waste cases date to the nineteenth century, when trusts were less frequently used, these types of disputes remain common in our day and age.¹⁵² Waste doctrine includes instances of voluntary waste (the party in possession affirmatively alters the nature of the property, for example, by chopping down trees or removing minerals) as well as permissive waste (omissions reduce the value of property, for example, when the party in possession fails to maintain a building prudently or lets termites infest a home).¹⁵³ An elderly individual in possession might be tempted to commit either voluntary waste or permissive waste. Consider shorter time horizons, for example. An older life tenant might use land in a non-sustainable way that strips resources from

146. See Jay A. Soled & Letha Sgritta McDowell, *Life Estates Reconsidered*, 33 QUINNIPIAC PROB. L.J. 45, 46-49 (2019).

147. *Id.* at 56; Brian E. Barreira, *Proper Medicaid Planning May Permit Keeping the Home in the Family*, 28 EST. PLAN. 177, 182 (2001).

148. See Soled & McDowell, *supra* note 146, at 56.

149. See *supra* notes 54-58 and accompanying text.

150. See *supra* notes 16-53 and accompanying text.

151. See, e.g., *Modlin v. Kennedy*, 53 Ind. 267, 268-69 (1876).

152. See, e.g., *Jackson v. Don Johnson Forestry, Inc.*, 830 S.E.2d 659, 663-66 (N.C. Ct. App. 2019) (involving an appeal between an elderly life tenant in a nursing home who authorized timber harvesting on the estate despite the objections of the remaindermen).

153. See *id.* at 664.

it because she does not care about the land's residual value (voluntary waste) or an older life tenant might engage in permissive waste, figuring that she cannot be certain to see through a time-intensive project to completion, so she will let the remainderman initiate and complete the necessary renovations that will stop the property's deterioration (permissive waste).¹⁵⁴

We will consider affirmative waste first. Black letter doctrine governing affirmative waste can be harsh.¹⁵⁵ Suppose a life tenant substantially improves the land during his lifetime, building permanent structures on it like houses and barns. Towards the end of his life, he tries to sell the structures to the remainderman, who fails to offer him a price he deems fair, so he removes the structures with plans to reuse the building materials elsewhere. The courts deem this waste, even if the vacant property delivered to the remainderman appreciated in value during the life tenant's occupancy.¹⁵⁶ One might worry that such a rule has bad ex ante effects, discouraging investment. But the law reasons that these "exertions are the voluntary gift of the life-tenant, to the inheritance; he dedicates them to the inheritance, when he has enjoyed the fruits of his labor. A good farmer creates, but does not destroy."¹⁵⁷

There are a few exceptions to basic doctrines that prohibit what would otherwise be affirmative waste by life tenants. The open mines doctrine is the most important exception, and it is nicely illustrated by *Lee & Bradshaw v. Rogers*.¹⁵⁸ In that case, the testator had been tapping his trees, and upon his death he directed that his widow take a life estate in the timberland.¹⁵⁹ The process of draining the sap from the trees to create turpentine appeared to have damaged the trees somewhat, and on this basis the trial court granted the remaindermen an injunction.¹⁶⁰ The Georgia Supreme Court reversed, holding that if the process of extracting sap to make turpentine had begun under its previous owner, then the life

154. Both types of waste are alleged in some of the cases, such as *Dozier v. Gregory*, 46 N.C. 100, 105 (1853).

155. *See, e.g.*, *McCullough v. Irvine's Ex'rs*, 13 Pa. 438, 442 (1850).

156. *See id.*

157. *Id.*

158. 108 S.E. 371 (Ga. 1921).

159. *Id.* at 371-72.

160. *Id.* at 372.

tenant's continuation of those same uses could not constitute waste.¹⁶¹

The court felt this conclusion followed from earlier cases in which timber harvesting that had begun prior to the life tenancy could continue or minerals could continue to be extracted from already existing mines, but the scope of timber harvesting could not expand and new mines could not be opened by the life tenant.¹⁶² Some courts have followed suit,¹⁶³ but other tribunals have acted in a manner that is hard to reconcile with the open mines doctrine.¹⁶⁴

Having so much ride on the happenstance of whether a prior owner got around to using timber or minerals for economic benefit is hard to justify using economic logic. But the doctrine is best understood as a recognition that courts can make mistakes when determining whether a life tenant's productive uses of land crosses the line of non-sustainability.¹⁶⁵ The open mines doctrine presents a bright line rule that lowers the informational burden borne by judges.¹⁶⁶

An arguable second exception to the ordinary rules governing waste is of special interest to us here. It arises when using land in a way that diminishes its residual value for the remaindermen is necessary for the life tenant's comfort and support. Some jurisdictions, such as Georgia in *Wright v. Conner*, deem acts that would otherwise constitute waste to be lawful when the life tenant's conduct was necessary to make "the life tenant[] comfortable."¹⁶⁷

161. *Id.* at 374.

162. *Id.* at 373-74; see M.K. Woodward, *The Open Mine Doctrine in Oil and Gas Cases*, 35 TEX. L. REV. 538, 538 (1957).

163. See, e.g., *Merriman v. Moore*, 600 S.W.2d 720, 724-25 (Tenn. 1980).

164. See, e.g., *Threatt v. Rushing*, 361 So. 2d 329, 331 (Miss. 1978) (holding that the removal of a large portion of a parcel's timber for commercial purposes constituted waste and was not merely "good husbandry"); *Clark v. Holden*, 73 Mass. 8, 10-12 (1856); *McCullough v. Irvine's Ex'rs*, 13 Pa. 438, 443 (1850) (holding that the removal of a "reasonable medium" quantity of timber would not constitute waste if the removal conformed with "the custom of farmers"); *Adams v. Adams*, 371 S.W.2d 637, 639 (Ky. Ct. App. 1963) (implying no "open mines"-like exception for timber). Still other jurisdictions moved away from the common law approach towards a modern economic value test, tolerating forms of timber harvesting that were deemed waste at common law when those actions result in a parcel whose value was enhanced rather than diminished. See, e.g., *Owen v. Hyde*, 14 Tenn. 334, 339-40 (Sup. Ct. Err. & App. 1834).

165. See Woodward, *supra* note 162, at 548.

166. See *id.*

167. 37 S.E.2d 353, 357 (Ga. 1946); see also *Dorsey v. Moore*, 6 S.E. 270, 271 (N.C. 1888)

This understanding arises as a matter of law.¹⁶⁸ Other jurisdictions, such as Florida and Kentucky, have explicitly taken the advanced age of widow life tenants into account in addressing potential ambiguities in wills concerning the scope of the authority conferred upon them.¹⁶⁹ After discussing the widows' ages and circumstances, along with evidence concerning their relationships to the relevant testators, both jurisdictions gave the widows expansive authority to alienate property from the life tenancy, to the obvious detriment of the remaindermen. These cases reflect an admirable sensitivity to the inelastic income problem among elderly life tenants. Indeed, we suspect there are other cases in which judges are naturally sympathetic to the interests of elderly people and that sympathy affects their decisions. If such considerations are going to influence outcomes in cases, judges should be transparent about them. At the same time, this kind of equitable exception is potentially significant enough to swallow the doctrine of waste, at least with respect to life tenants who find themselves in precarious financial straits.

That concern about the logical stopping point of a necessity doctrine explains why some jurisdictions have rejected *Wright's* approach. Consider the Indiana Supreme Court's precedent in *Robertson v. Meadors*, in which a widowed life tenant occupied thirty-one acres of land, only six of which were being cultivated.¹⁷⁰ Hoping to remain on a property she was presumably attached to but facing financial ruin, the life tenant cleared five more acres so they too could be cultivated, using nearly all of the harvested timber for heating fuel or for fence construction purposes on the property.¹⁷¹ The remaindermen sued for waste and won, securing damages and

("[G]enerally the life-tenant may, if need be, clear tillable land to be cultivated for the necessary support of himself and his family; and this he may do, although the ordinary forest timber be destroyed in the course of clearing the land.... But it is waste to cut timber from the land merely for sale.")

168. We can contrast precedents like *Wright* from numerous other cases in which the terms of a will explicitly provide a life tenant with the power to sell the property and use the revenue resulting from the sale for the life tenant's comfort and support. See, e.g., *Kern v. Kern*, 136 N.E.2d 675, 678-79 (Ohio Ct. App. 1955); *In re Britt's Will*, 71 N.Y.S.2d 405, 408 (App. Div. 1947); *Beliveau v. Beliveau*, 14 N.W.2d 360, 362 (Minn. 1944).

169. *Marshall v. Hewett*, 24 So. 2d 1, 3 (Fla. 1945); *Dennis v. Trs. of Choateville Christian Church*, 290 S.W.2d 601, 601-02 (Ky. Ct. App. 1956).

170. *Robertson v. Meadors*, 73 Ind. 43, 44-45 (1880).

171. *Id.*

injunctive relief.¹⁷² The court was entirely unsympathetic to the widow:

The [defendant's] answer seems to have been drawn on the theory that the extent of a life tenant's rights depends on the necessities of such tenant, a proposition which, if authoritatively announced, would be somewhat startling, both to the profession and to the owners of the fee, in such cases. The complaint shows the cutting and removal ... to the irreparable injury of the fee simple estate, and to the plaintiff as the owner thereof, which clearly makes a case of actionable waste, and for injunction.¹⁷³

Equities be damned.

At first approximation, it would seem that balancing the equities is the attractive way to proceed. On one side of the ledger, we have the urgent pleas of aged life tenants trying to sustain themselves off of land they typically inherited from their spouse.¹⁷⁴ On the other hand, we have society's interests in both treating the remaindermen fairly and promoting sustainable uses of land more generally.¹⁷⁵ These are both important interests, difficult—though not impossible—to balance.

There is a deeper problem with *Robertson* and the approach it represents, though. The court gave essentially no thought to what its ruling would mean for the widow's bargaining position vis-à-vis the remaindermen.¹⁷⁶ After the court's ruling, the remaindermen would have all the leverage as the widow attempted to alienate her ownership interest in a nonviable parcel of agricultural land. She possessed an asset that could not sustain her unless its use rights were reconfigured, and she was locked into a bilateral monopoly with remaindermen who (1) could veto nearly anything she might do and (2) had time on their side. In this environment, the actuarial tables might show that a widow with a remaining life expectancy of a dozen years could expect to receive 50 percent of the value of a fee simple interest,¹⁷⁷ but because the remaindermen could block the

172. *Id.* at 45.

173. *Id.*

174. *See, e.g., id.*

175. *See, e.g., id.*

176. *See id.* at 43-45.

177. *See* Paul S. Lee, Comment, *The Common Disaster: The Fifth Circuit's Error in Estate*

sale of fee simple interest in the entirety of the property,¹⁷⁸ the life tenant might be forced to walk away with just a small fraction of that. The widow's shorter time horizon and inelastic income would put her at the mercy of the remaindermen if they bargained.

Next, take permissive waste. Recall that permissive waste refers to omissions rather than acts.¹⁷⁹ It is easy to see how an aging population might result in an increase in permissive waste; as people advance past a certain age their physical vigor often decreases and they become more injury-prone, so a life tenant who was able to provide for the upkeep on a house in her fifties might find doing so harder in her eighties. Contracting with professionals for the upkeep would be a common solution to this problem, but of course that option requires the life tenant to have financial resources. Another potential solution—the life tenant simply abandoning her interest—is also not readily available because abandonment itself can constitute permissive waste.¹⁸⁰

Courts do not have a consistent approach when dealing with elderly life tenants whose advanced age contributes to permissive waste. Some courts view age-associated frailties as a factor that may excuse permissive waste. In *Underwood v. Lowe*, an Ohio court noted that the responsibilities of a life tenant were to engage in reasonable and proper steps to maintain the property, and that “the advanced age of the life tenant,” an older woman, must be taken into account.¹⁸¹ Other jurisdictions implicitly reject context- and age-sensitive inquiries by the courts. As the Connecticut Supreme Court saw it in *Zauner v. Brewer*, or the Court of Appeals of Kentucky indicated in *Prescott v. Grimes*, the apparent advanced age of the defendant did not excuse the life tenant's failure to take objectively

of *Carter v. United States and the Glitch in the “Tax on Prior Transfer” Credit in Valuing Life Estates Created in a Common Disaster*, 40 EMORY L.J. 1269, 1273-74 (1991); DUKEMINIER ET AL., *supra* note 142, at 273-74 (discussing the valuation of a life estate and remainder using actuarial tables).

178. *See, e.g.*, *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972) (refusing to order a complete sale of real property desired by the elderly widow life tenant in light of the objections of the remaindermen).

179. *See supra* notes 153-54 and accompanying text.

180. *See* *Chapman v. Chapman*, 526 So. 2d 131, 135 (Fla. Dist. Ct. App. 1988). For a broader analysis of abandonment of real property, see Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

181. *See Underwood v. Lowe*, No. 83 CV 725, 1985 WL 7505, at *3 (Ohio Ct. App. June 7, 1985).

reasonable steps to maintain the property's condition.¹⁸² The refusal to personalize the legal duty based on the life tenant's advanced age was plausibly outcome determinative in both cases.¹⁸³

When conflicts arise between contemporaneous holders of *concurrent* interests in land, like tenancies in common or joint tenancies, property doctrine has a well-established response. Namely, if two or more co-owners find themselves locked into an unhappy arrangement in which each can veto the land utilization plans of the other, any co-owner can move to partition the property, either by sale (an auction, with the proceeds split) or in kind (subdividing the parcel).¹⁸⁴ Partition in kind is well-suited to co-owners who face high relocation costs, and partition by sale is well-suited to those who do not.¹⁸⁵ It is therefore surprising that no analogous partition remedy exists to deal with the very similar kinds of conflicts that arise between life tenants and remaindermen. The closest tool available to courts is the equitable power to order a sale when doing so is necessary to advance the interests of all parties or to prevent waste, but both the necessity threshold and the requirement built into the doctrine that a sale represent a Pareto improvement for the life tenant and remaindermen make such remedies rare.¹⁸⁶

The law of waste shows how holders of successive interests in land can become as interdependent as contemporaneous co-owners. But the common law and applicable statutes are nearly uniform in prohibiting the life tenant from partitioning the property so as to generate a clean break between the possessor and future interest holders.¹⁸⁷ This differential treatment of co-owners versus present and future interests poses a major puzzle: Why allow one party to obtain a court order dissolving their interdependency in the co-ownership context but not in the future interests context?

182. *Zauner v. Brewer*, 596 A.2d 388, 394 (Conn. 1991); *Prescott v. Grimes*, 136 S.W. 206, 207 (Ky. Ct. App. 1911). In both cases we can find textual clues about the probably advanced age of the life tenant, but the courts do not reference their seniority explicitly. *See Zauner*, 596 A.2d at 394 (defendant acknowledges that vegetation around swimming area had "got the better of [her]" (alteration in original)); *Prescott*, 136 S.W. at 207 (life tenant acquired the property in 1865 and died in 1908).

183. *See Zauner*, 596 A.2d at 394; *Prescott*, 136 S.W. at 207.

184. *See, e.g., Delfino v. Vealencis*, 436 A.2d 27, 29 (Conn. 1980).

185. *See id.*

186. *See, e.g., Baker v. Weedon*, 262 So. 2d 641, 643-44 (Miss. 1972).

187. *See infra* notes 198, 201-02 and accompanying text.

Two responses present themselves but neither is satisfying. The first is that partition between life tenants and the remaindermen is contrary to the intent of the parties that created the future and present interests, whereas parties that establish co-ownership relationships understand that partition exists when they do so. This circular rejoinder is unpersuasive, however, because property law has long recognized that the present and future interest holders, *acting together*, can eliminate both interests and alienate a new fee simple absolute interest in their place.¹⁸⁸ It would require a very high level of sophistication for a testator to understand that in granting a descendant a future interest in land the testator is actually granting a veto right to that remainderman rather than a future possessory interest. Yet that is how current law translates the creation of a remainder interest into doctrine, notwithstanding the lack of evidence that this result is consistent with actual testators' intentions.¹⁸⁹ So the legal question in cases of partition is not whether the life tenant or remainderman can undo the grantor or testator's favored allocation of resources but whether the life tenant can ask the courts to do so unilaterally. Or, put another way, is the remainderman entitled to property rule protection or mere liability rule protection for her future interest?¹⁹⁰

A second possible justification for the law's asymmetric treatment of partition stems from an intuition that co-owners are more interdependent than present and future interest holders, so if the relationship goes sour it is more important for property doctrine to facilitate exit. We believe the difference between co-owners on the one hand, and present and future interest holders on the other, is a difference of degree rather than kind. But here is the critical point: *the older the life tenant, the greater the interdependence problem becomes*. That is, the shorter the life expectancy of the life tenant, the weaker the incentive for the life tenant to improve the property and the greater the temptation for the life tenant to

188. See D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 36 (2009); Merrill Isaac Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30, 49 (1928).

189. See Schnebly, *supra* note 188, at 49.

190. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

commit waste.¹⁹¹ Finally, as the remainderman's anticipation of taking possession soon increases, his incentive to drive a hard bargain and engage in strategic behavior grows.¹⁹² So, particularly with elderly life tenants, the need for them to coordinate with remaindermen becomes particularly acute. Partition actions would help alleviate all these costs.¹⁹³

Of course, while critiquing the asymmetric treatment of partition actions between co-ownership and future interests, we do not mean to suggest that asymmetric rules are never warranted. Providing a life tenant with the right to move for partition by sale over the remainderman's objections does not necessitate giving the remainderman the same rights. After all, life tenants—particularly older ones—will often face higher relocation costs; they are the ones with expectations of present possession.¹⁹⁴ Under these circumstances, enabling the life tenant but not the remainderman to move for partition makes sense. And where a life tenant's use of her property has become so impractical that she endeavors to relocate, the law should be on the lookout for remaindermen who exercise their veto rights strategically.

Though these questions are interesting and important, it has been more than nine decades since any property scholar considered the appropriateness of partition by life tenants at length.¹⁹⁵ Merrill Schnebly's 1928 *Harvard Law Review* article was astute for its time, but it predated the rise of social scientific approaches to the law, not to mention changes in the nature of aging and the increase in the elderly population.¹⁹⁶ Though the property scholarship has essentially ignored this question, it has become a hot topic in courts around the nation. We found a large number of published opinions in which the efforts of life tenants to obtain partitions over the objections of remaindermen were rebuffed by judges.¹⁹⁷

191. Cf. Boni-Saenz, *Diversity*, *supra* note 4, at 328-29.

192. See *supra* notes 176-78 and accompanying text.

193. See Schnebly, *supra* note 188, at 49.

194. See *supra* notes 16-40 and accompanying text.

195. See Schnebly, *supra* note 188, at 30.

196. Compare *id.*, with *supra* notes 29-34.

197. See, e.g., *Maitland v. Allen*, 594 S.E.2d 918, 920 (Va. 2004); *Beach v. Beach*, 74 P.3d 1, 3-5 (Colo. 2003); *Peters v. Robinson*, 636 A.2d 926, 931 (Del. 1994); *Scottish Rite of Indianapolis Found., Inc. v. Adams*, 834 N.E.2d 1024, 1027 (Ind. Ct. App. 2005); *Garcia-Tunon v. Garcia-Tunon*, 472 So. 2d 1378, 1379 (Fla. Dist. Ct. App. 1985).

Judicial resistance to partition by life tenants persists even though it lacks serious policy rationales and creates odd inconsistencies within property law. Indeed, consider the fact that, when a life tenant holds an undivided cotenancy interest in land that is followed by a remainder interest, the life tenant is permitted to move for partition, even though the life tenant who has possession of the whole cannot.¹⁹⁸ This happenstance makes it difficult to justify proscribing life tenancy partitions, at least in those situations where valuing the possessory and remainder interests is straightforward.¹⁹⁹ Further, permitting such partitions would not be impractical, seeing as the law already has mechanisms for determining the economic value of a life estate in instances in which the life tenant and remaindermen alienate the property voluntarily or lose it via eminent domain.²⁰⁰ And still, the literature and case law provide little justification for the rule prohibiting life tenants from moving for partition, short of speculative efforts to minimize the problem²⁰¹ or empty formalism.²⁰²

In recent years, a few jurisdictions have moved away from the common law's rigid resistance to partitions in suits brought by sole life tenants. Rhode Island has permitted a partition by sale when the state of the property was deteriorating and the life tenant lacked the funds to maintain it.²⁰³ New York law permits a life tenant (or a remainderman) to force a sale over the objections of other parties with an interest in the property if the moving party can show that a sale is suitable, practical, and efficient, and that it would further the provisions of the will.²⁰⁴ In at least one such case,

198. See, e.g., *Fehringer v. Fehringer*, 367 S.W.2d 781, 784 (Tenn. 1963); *Hayden v. McNamee*, 63 N.E.2d 876, 882 (Ill. 1945).

199. Partition may be inappropriate in cases involving multiple nonstandard contingent remainders or executory interests that would be difficult to price in a partition by sale.

200. See *supra* note 164 and accompanying text.

201. See, e.g., John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1427 (1974) (noting that if disputes arise between life tenants and remaindermen over the appropriateness of improvements "they will rarely justify the kind of disentangling that is accomplished by a partition suit" without offering additional analysis).

202. *Beach* does provide a persuasive normative defense of the result in that case, though it is limited to the dispute's rather unusual facts, in which the property at issue consisted of a life tenancy in an addition that was attached to the remainderman's home on land the remainderman owned entirely. 74 P.3d at 5.

203. *DeLisi v. Caito*, 463 A.2d 167, 168-70 (R.I. 1983).

204. See N.Y. REAL PROP. ACTS. LAW § 1602 (McKinney 2021); *In re Estate of Sauer*, 753

the New York courts have taken into account the advanced age of the life tenant and his residence in an assisted living facility, ordering a sale.²⁰⁵ A few other jurisdictions have statutes that permit a partition by sale if such partition would make both parties better off,²⁰⁶ but these are generally useless provisions because if a sale would indeed improve both parties' positions, then there should be no disagreement over whether to sell.²⁰⁷ Since the law has long allowed life tenants to get together with remaindermen to sell a fee interest in property by mutual consent,²⁰⁸ the law's resistance to doing so upon one party's motion winds up providing property protections to parties that either (a) engage in strategic behavior or (b) believe that the value of real estate will appreciate more quickly than other investments would. Remaindermen falling into the latter category are often people who erroneously assume they can beat the market.

N.Y.S.2d 318, 322 (Sur. Ct. 2002). But the life tenant must have compelling reasons for a sale, and remaindermen sometimes win these cases, especially in cases where the will does not seem to privilege the interests of the life tenant over that of the remaindermen. *See, e.g., In re Mantineo*, No. 316274, 2007 WL 2076569, at *3 (N.Y. Sur. Ct. July 19, 2007).

205. *See In re Strohe*, No. 331708, 2004 WL 2903616, at *6 (N.Y. Sur. Ct. Dec. 13, 2004), *subsequent determination*, *In re Estate of Strohe*, 791 N.Y.S.2d 818 (Sur. Ct. 2005).

206. *See, e.g., Williams v. Neb. Wesleyan Univ.*, 332 N.W.2d 694, 696 (Neb. 1983); *Scottish Rite of Indianapolis Found., Inc. v. Adams*, 834 N.E.2d 1024, 1027 (Ind. Ct. App. 2005). *Williams* reflects the obtuse way courts sometimes think about a forced sale, with a court unduly focused on the costs of administering a diversified trust and insufficiently attentive to the risks of holding a single, non-diversified piece of real estate in rural Richardson County, Nebraska. *See* 332 N.W.2d at 696. California has a statute that permits "[p]artition as to successive estates in the property ... if it is in the best interest of all the parties." CAL. CIV. PROC. CODE § 872.710(c) (West 2021). The statute further notes that the

court shall consider whether the possessory interest has become unduly burdensome by reason of taxes or other charges, expense of ordinary or extraordinary repairs, character of the property and change in the character of the property since creation of the estates, circumstances under which the estates were created and change in the circumstances since creation of the estates, and all other factors that would be considered by a court of equity having in mind the intent of the creator of the successive estates and the interests and needs of the successive owners.

Id. The provision has not been interpreted in a published California decision, so we cannot know whether a sale that makes a life tenant much better off and the remaindermen neither worse off nor better off would satisfy the statute.

207. Such a provision might point towards a forced sale if one of the parties would be made better off by a sale but is engaged in strategic behavior to extract more revenue from the other. Yet there is no reason to think that courts will be able to identify this strategic behavior accurately when it arises.

208. *See Schnebly, supra* note 188, at 49.

New York and Rhode Island have it right. Permitting partition in situations where a life tenant cannot use land productively helps ensure that a resource is put to its highest and best use, removes the need for life tenants and remaindermen to incur transaction costs negotiating, promotes longterm investments in the property, provides a check on inefficient strategic bargaining behaviors, and likely serves the equitable interests of older life tenants. Liberalizing partition law to promote partitions by sale that represent Kaldor-Hicks improvements strikes us as a doctrinal no-brainer.²⁰⁹ To be clear, this would be a new default rule rather than a mandatory rule. At common law, a testator could specify that a life tenancy was granted without impeachment for waste, which would permit a life tenant the sort of freedom of action normally reserved for a fee simple owner,²¹⁰ and under our proposed regime the testator could instead direct the opposite—that waste remained off limits and/or that unilateral efforts by the life tenant to partition the property were prohibited. This design choice would empower the idiosyncratic testator or grantor who did want to tie the hands of the life tenant or ensure that no sale occurred without the remaindermen's consent.

In short, it seems that the missing ingredient in the way that courts approach these issues is an understanding of how different legal rules may affect the Coasean bargains that could be struck when vulnerable senior citizens are one party to the transaction. A first-best approach to these kinds of disputes would allow life tenants to make a clean break through a partition-like cause of action similar to what we see in co-ownership disputes. In the absence of such doctrinal innovation, a legal standard that imposes on the life tenant a personalized obligation to use her financial and physical resources to maintain the property as best she can—no less, and importantly, no more—seems likely to result in bargains that reflect the high regard that the party that created the life tenancy (a testator, typically, often the life tenant's spouse) had for the life

209. A Kaldor-Hicks improvement is a change in the allocation of resources that benefits those who gain from the change more than it harms those who lose as a result of it. Jonathan Law, *Kaldor-Hicks Efficiency*, in OXFORD DICTIONARY OF FINANCE AND BANKING (6th ed. 2018).

210. See, e.g., *Belt v. Simkins*, 39 S.E. 430, 431 (Ga. 1901); *Stevens v. Rose*, 37 N.W. 205, 209-10 (Mich. 1888).

tenant. Short of that, it seems like the best rationale for the harsher rulings we see in some courts is to serve as a kind of penalty default rule that steers testators away from life tenancies and towards more flexible arrangements such as trusts.²¹¹

We want to address that penalty default argument head-on, because it is a common but pernicious response to our proposal. Essentially, the argument runs that many of the problems we describe above could have been avoided had the lawyers chosen to use a trust instead of a life estate, so the law of waste does not need to change. To be clear, the first part of the argument is correct. A well-designed trust would allow the use of the land held in trust to more closely resemble the use that a fee simple owner would prefer. Of course, trusts introduce problems of their own, such as the need to pay a trustee and the danger that the trustee will engage in unlawful self-dealing. But given the problems that waste can create for life tenants in possession, this is a step we would advise clients to take.

At the same time, lots of clients evidently are not getting that advice from their lawyers, who continue to employ life estates to deal with a problem that often could be solved better via trusts. For these clients, scholars' Monday morning quarterbacking is unlikely to be of much comfort.²¹² If many people are opting for life estates, contrary to the advice of some (but not all) sophisticated trusts and estates counsel, and if the United States is not going to follow the British model of abolishing legal life estates altogether,²¹³ it is hard to justify giving people a package of rights and responsibilities that virtually no testator or grantor would want and that no life tenant would prefer. The kinds of people who wind up creating problematic life estates that disadvantage their surviving spouses often (a) will not have access to the highest quality counsel or the means to afford them, and (b) will be dead by the time the problems become evident. Rather, when a life estate is employed, a majoritarian "what would

211. Cf. Barros, *supra* note 188, at 36-37 (discussing the merits of abolishing the legal life estate and replacing it with an equitable life estate in trust, as England has done).

212. As an alternative to reforming the rules governing waste, the law could subsidize trust administration or the provision of high-quality estate planning lawyers for middle- and lower-income seniors.

213. See Scott Andrew Shepard, *Which the Deader Hand? A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules*, 86 TUL. L. REV. 559, 619 (2012).

most people want” understanding of that arrangement still makes sense, and that is going to be one that provides for greater flexibility than is available under present law. Absent some clear story about how *anybody’s* intentions are consistent with the way life estates are typically constrained today, the continued insistence that the possessory heirs of people who were not savvy enough to create trusts suffer is at the very least regressive.

III. PROTECTION FOR ELDERLY RENTERS

The two Parts that follow share two characteristics. First, in both settings, the high relocation costs faced by older people and their relatively inelastic incomes drive much of the analysis. Second, both settings involve the challenges of communal living arrangements where multiple parties have strong interests in who resides in a community and how it is governed. To begin, we turn our eyes to renters of residential housing and the extent to which the law helps ensure that their housing is safe and habitable.

At common law, leases were understood as conveyances of interests in land that were controlled by the doctrine of caveat lessee: the tenant took possession of the premises in whatever condition they happened to be.²¹⁴ It was only in the 1970s that state courts and legislatures began to recognize an implied warranty of habitability in every residential lease.²¹⁵ These warranties make uninhabitable or dangerous conditions that are not remedied by the landlord breaches of the lease contract that, in turn, free tenants of their obligations under that agreement—including the obligation to pay rent.²¹⁶ But the bar for a landlord is low: renters are entitled only to a minimum level of safe and healthy housing.²¹⁷ And, most

214. See, e.g., *Hilder v. St. Peter*, 478 A.2d 202, 206-07 (Vt. 1984) (explaining history of caveat lessee).

215. See, e.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970); *Lemle v. Breeden*, 462 P.2d 470, 474 (Haw. 1969); cf. *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 273 (N.J. 1969) (finding an implied warranty against latent defects in commercial leases).

216. See, e.g., *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 842 (Mass. 1973); see also David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 441-42 (2011).

217. See UNIF. RESIDENTIAL LANDLORD & TENANT ACT (URLTA) § 2.104 (NAT’L CONF. OF COMM’RS ON UNIF. STATE LS. 1972); Jana-Ault Phillips & Carol J. Miller, *The Implied Warranty of Habitability: Is Rent Escrow the Solution or the Obstacle to Tenant’s Enforcement?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 9 (2018) (counting nineteen states

important for our purposes, alleged violations of the warranty are evaluated based on “the nature of the deficiency or defect[;] its effect on the life, health or safety of the tenant[; the] length of time it has persisted[;] and the age of the structure.”²¹⁸

Notably, the doctrine tends to consider neither a particular tenant’s needs nor expectations. Rather, it generally speaks to what a “reasonable person” would consider to be necessary or fit for habitation.²¹⁹ This results in troubling outcomes in cases involving tenants with disabilities; a landlord’s failure to provide a quadriplegic tenant with a “roll-in’ shower” that allows for wheelchair access has been held not to constitute a breach of the warranty of habitability—even in an apartment billed as a “handicapped” unit—because such an amenity is not one that is expected “in the eyes of a reasonable person.”²²⁰ As we will see, the doctrine also results in troubling outcomes for older tenants.

Existing law strikes the balance it does, however, in part because improving the quality of residential conditions necessarily comes at a cost. Landlords who initially bear that cost—in the form of construction, repairs, hiring additional maintenance staff, et cetera—will naturally be expected to pass some of those costs on to tenants in the form of higher rents.²²¹ This, in turn, risks pricing out

to have adopted the URLTA); Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 807-08 (2013) (discussing content of URLTA).

218. *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973); accord *Glasoe v. Trinkle*, 479 N.E.2d 915, 920 (Ill. 1985); 52 C.J.S. *Landlord & Tenant* § 717 (2021).

219. *Solow v. Wellner*, 658 N.E.2d 1005, 1008 (N.Y. 1995); see, e.g., TEX. PROP. CODE ANN. § 92.052(a)(3)(A) (West 2021) (referring to conditions that “materially affect[] the physical health or safety of an ordinary tenant” (emphasis added)); *Chiodini v. Fox*, 207 S.W.3d 174, 176 (Mo. Ct. App. 2006) (“Habitability is measured by community standards, generally reflected in local housing and property maintenance codes.” (citing *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. 1984))); *Fitzpatrick v. ACF Props. Grp., Inc.*, 595 N.E.2d 1327, 1342 (Ill. App. Ct. 1992) (“The condition complained of must be such as to truly render the premises uninhabitable in the eyes of a reasonable person.” (citing *Glasoe*, 479 N.E.2d at 920)); *DUKEMINIER ET AL.*, *supra* note 142, at 540 (“Generally speaking, an ‘adequate standard of habitability’ has to be met, and a breach occurs when the leased premises are ‘uninhabitable’ in the eyes of a reasonable person.”); *Porat & Strahilevitz*, *supra* note 7, at 1447 (“American law has largely stuck with a one-size-fits-all approach to the implied warranty of habitability.”).

220. *Port Chester Hous. Auth. v. Mobley*, 789 N.Y.S.2d 798, 799-800 (App. Div. 2004).

221. See, e.g., *Chi. Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987) (Posner, J., concurring); Charles J. Meyers, *The Covenant of Habitability and the*

of the market and denying housing of any quality to the same underprivileged tenants that the law aims to help.²²² For some, this is a reason to be skeptical of most tenant protection laws,²²³ but one need not go that far. That is, one might well conclude that *some* floor is necessary regardless of the costs it imposes—that even if poor tenants “want” to rent an apartment covered in mold and infested with rats because it is the only apartment they can afford, the government ought to intervene to prevent them from doing so (and, hopefully, to assist them in affording a suitable residence). But the higher the bar set by the law, the greater the costs, so it behooves society at large to delimit the reach of the warranty of habitability.²²⁴ After all, at some point, the costs of achieving a high standard might be so great that the rental market will not bear them, causing the landlord to cut his losses by ceasing the renting of the property altogether, either by letting it deteriorate or converting it to condominiums that are not subject to the implied warranty.²²⁵ That loss of housing supply, if replicated sufficiently across a city, could in turn drive up the price of the remaining rental housing.²²⁶

We, too, are disinclined to suggest that law ought to forbid all but the ideal residential housing conditions. Nor do we suggest that every tenant’s idiosyncratic definition of “habitable” carry the coercive force of the warranty of habitability. In theory, once minimum standards are set such that no one faces unsafe housing, the market ought to be capable of doing the rest. People who want “better” housing, or housing that fits their individual preferences, can seek it out and decide for themselves how much they are willing to pay for particular amenities. And if enough people want those

American Law Institute, 27 STAN. L. REV. 879, 890-91 (1975); Campbell, *supra* note 217, at 808-09.

222. See *Chi. Bd. of Realtors*, 819 F.2d at 741-42 (Posner, J., concurring); Meyers, *supra* note 221, at 903.

223. See *Chi. Bd. of Realtors*, 819 F.2d at 741-42 (Posner, J., concurring) (criticizing on these grounds a Chicago ordinance that granted tenants a suite of rights against landlords). But see Lior Jacob Strahilevitz, “Don’t Try this at Home”: Posner as Political Economist, 74 U. CHI. L. REV. 1873, 1875-83 (2007) (pointing out that many of Posner’s arguments against the implied warranty in *Chicago Board of Realtors* are inconsistent with both economic theory and the empirical literature).

224. See *Chi. Bd. of Realtors*, 819 F.2d at 741 (Posner, J., concurring).

225. See Meyers, *supra* note 221, at 889; Super, *supra* note 216, at 422.

226. See *Chi. Bd. of Realtors*, 819 F.2d at 741 (Posner, J., concurring).

features, they will vote with their feet and their wallets, and landlords will compete to attract those tenants by offering those features.²²⁷

But foot- and wallet-voting assume sufficient mobility and resources.²²⁸ The more stuck people are, the more they are at the mercy of their current rental conditions—and, consequently, the more they might be said to be in need of amplified legal protection from those conditions.²²⁹ One quite obviously “stuck” renter constituency is poor renters of all ages.²³⁰ They lack the resources to pay more for higher quality, so landlords in turn make little effort to entice them with high-quality features.²³¹ This reality acutely harms Black, Native American, and Hispanic households, which are significantly more likely than white households to be low-income renters.²³² These are reasons why, as just noted, the floor provided by the warranty of habitability is important.²³³ But while there might be good reasons to raise that floor, one must be careful of the dangers discussed above that could attend a warranty that is too strong. To remedy the inability of poor renters to engage in wallet-voting, the superior solution is therefore to fatten their wallets—

227. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 21-24 (1970) (discussing the ways in which exit disciplines organizations and prompts firms to improve quality).

228. Our focus is on differences in mobility *among* renters, but we recognize that renters as a group do tend to be more mobile than homeowners because they lack a financial investment in the residence and need not worry about possibly selling at a loss, nor need they contend with the time and expense of a real estate transaction. See Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 715-16 (2017); Fennell, *supra* note 53, at 626; WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 75 (2001); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 487 (2000); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1126 (1996); Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 154-58 (1992); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 58-59 (2011).

229. Cf. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 84 (2017).

230. Cf. *id.* at 117.

231. Cf. Emily Badger, *A Luxury Apartment Rises in a Poor Neighborhood. What Happens Next?*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/14/upshot/luxury-apartments-poor-neighborhoods.html> [<https://perma.cc/TD72-SUU3>].

232. THE GAP: A SHORTAGE OF AFFORDABLE HOMES, NAT'L LOW INCOME HOUS. COAL. 13-15, https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf [<https://perma.cc/DY7G-KJ2Y>].

233. Of course, as David Super has noted, even with the warranty of habitability, tenants in a tight housing market “may feel they dare not assert the warranty because the likelihood they will end up somewhere worse is high.” Super, *supra* note 216, at 409.

that is, to provide housing vouchers, cash transfers, or other social supports that increase incomes and/or make rents more affordable.²³⁴

Older tenants are often stuck for a different or additional reason. Even if they have the resources to vote with their wallets—and racial disparities coupled with relatively inelastic incomes suggest that may frequently not be the case for many²³⁵—they might be insufficiently mobile to effectively vote with their feet when rental housing quality is inadequate. For one thing, as discussed above, it is simply the case that elderly people *do* move less frequently than younger people.²³⁶ But more to the point, the dynamics of aging, the importance of being able to age in place, and the heightened relocation costs all discussed above speak to at least some of the reasons why simply relocating is often not a realistic option.²³⁷

Because older tenants tend to be less mobile than others, they are especially vulnerable to their housing conditions. And the sorts of fiscal solutions that make sense when it comes to vulnerable poor tenants do not address the source of *this* vulnerability. For that reason, as advocates seek to improve and safeguard tenants' rights, it is crucial to bear in mind the distinct vulnerabilities and needs of many elderly tenants.²³⁸ One option that ought to at least be on the table in that effort is considering whether the warranty of habitability should provide more tailored protection to older tenants by accounting for the age of the tenant, and not merely the age of the building, when determining what conditions render a residence uninhabitable or unsafe.²³⁹

As with our discussion of takings compensation, however, we do not have in mind a shift towards total subjectivity or an unstructured thumb on the scale when the tenant is above a certain age.²⁴⁰

234. See, e.g., *id.* 461 (“[D]irect subsidies have far more potential than regulatory action to improve low-income tenants’ housing conditions.”); Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J.F. 498, 512-14 (2017); Andrea J. Boyack, *Equitably Housing (Almost) Half a Nation of Renters*, 65 BUFF. L. REV. 109, 132-33 (2017).

235. See *supra* notes 41-53 and accompanying text.

236. See *supra* notes 16-24 and accompanying text.

237. See *supra* notes 25-40 and accompanying text.

238. See, e.g., Housing Stability and Tenant Protection Act of 2019, S. 6458, 2019-20 Leg., 242d Sess. (N.Y. 2019).

239. Cf. *supra* note 222 and accompanying text.

240. In any event, implementing the current standard of habitability is hardly an objective task given that it is already “largely socially constructed” by judges who “view the question

Rather, our discussion pivots off a second observation: in addition to being relatively immobile, older tenants also are likely to—as a cohort—have predictable needs in the housing in which they are stuck and to be less able to make repairs or adjustments necessary to meet those needs on their own.²⁴¹

Americans age sixty-five and over are more than three times more likely to have a disability than Americans under the age of sixty-five.²⁴² So, for example, owing to reduced mobility, older people might need stair-lifts, ramps, or other devices to be able to even access and fully live in their residences.²⁴³ Due to decreased balance and increased risk of serious adverse consequences from a fall, they might need features like grab bars in showers and raised toilet seats—without which a shower and a toilet might be said to not be safely operable.²⁴⁴ Losses of dexterity might call for lever-style

of ‘habitability’ through their own cultural lens.” Campbell, *supra* note 217, at 810. Unsatisfactory conditions exist on a continuum ranging from grossly uninhabitable to merely inconvenient, and courts inevitably “must make decisions about where along this continuum to place a particular complaint.” *Id.* at 811.

241. See JCHS REPORT, *supra* note 16, at 67 (“Renters are more likely to have mobility disabilities than owners but have less control over modifying their units.”); James, *supra* note 22, at 434 (observing that, while “[m]any jurisdictions allow tenants the right to make repairs to the unit and deduct these costs from future rent payments”—a reference to the warranty of habitability—“such rights may be more problematic to exercise for elderly residents who may be unable to complete or oversee such repairs”); *cf.* Hilder v. St. Peter, 478 A.2d 202, 207 (Vt. 1984) (concluding that the warranty of habitability is necessary because, among other things, “today’s residential tenant ... is not experienced in performing maintenance work on urban, complex living units”).

242. See *Selected Social Characteristics in the United States: 2019 ACS 5-Year Estimates Data Profiles*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2019.DP02> [<https://perma.cc/Z8QJ-P8WC>] (indicating that 34.5 percent of Americans age sixty-five and over have a disability compared to 10.3 percent of Americans age eighteen to sixty-four and 4.2 percent of Americans under the age of eighteen).

243. See JCHS REPORT, *supra* note 16, at 67; ROBIN PAUL MALLOY, LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES 22 (2015) (noting that people over age sixty-five “have much higher rates of low functional mobility than the general population, with as many as 40 to 50 percent ... having some type of limited mobility”); *cf.* Rodriguez v. Providence Hous. Auth., 824 A.2d 452, 453-54 (R.I. 2003) (tenant who was ninety-five years old fell down the stairs in his apartment and died, but landlord was not liable even though tenant had requested a single-story apartment because landlord “did all that it reasonably could” by placing him on a waiting list for such an apartment).

244. See JCHS REPORT, *supra* note 16, at 36, 67; MALLOY, *supra* note 243, at 215 (“[F]alls are the leading cause of accidental death for the elderly, accounting for about half of all accidental deaths in the home.”); *Important Facts About Falls*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/HomeandRecreationalSafety/falls/adultfalls.html> [<https://>

faucets and handles—and surely doors and sinks that cannot be safely operated at least raise a serious question of habitability.²⁴⁵ And given the increased need for a walker or wheelchair, they might require step-free entryways and hallways, doors, and parking spaces wide enough to accommodate those assistance tools.²⁴⁶ Housing that meets these needs is critical for the health and independence of older people.²⁴⁷ While this is all true for both elderly owners and renters alike, both of whom are more likely to have these needs than younger owners and renters,²⁴⁸ older *renters* are more likely to require assistance than older homeowners.²⁴⁹

Our suggestion is therefore that the warranty of habitability might recognize that some conditions that would not render a residence uninhabitable or unsafe in the mind of the so-called reasonable tenant—like the lack of the features just discussed— might well do so for an older tenant.²⁵⁰ Considering these to be optional luxuries just because the “average” tenant would not need them or consider them necessary for residential safety overlooks both the relative vulnerability and immobility of elderly tenants and the predictable, nonidiosyncratic nature of those individuals’ needs.

perma.cc/F29X-H8VL] (observing a 30 percent increase in the rate of death for older adults from falls from 2007 to 2016 and recommending grab bars in bathrooms); *cf.* *Nepveu v. Rau*, 583 A.2d 1273, 1273-74 (Vt. 1990) (holding that unusable bathroom constitutes breach of warranty of habitability).

245. *See* JCHS REPORT, *supra* note 16, at 9.

246. *Housing for Seniors: Challenges and Solutions*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/periodicals/em/summer17/highlight1.html> [<https://perma.cc/CS4H-TZU4>]; *cf.* Phillips & Miller, *supra* note 217, at 29 (“Finding an accessible unit for someone with physical disabilities, such as accommodating a large wheelchair, can take up to six months.”).

247. It is also important for their mental health and well-being. *See* Evans et al., *supra* note 23, at 381-82 (finding that “housing quality,” including “support for mobility impairment” among other things, “is significantly related to positive affect” among elderly people).

248. *See* JCHS REPORT, *supra* note 16, at 38 (explaining that “the prevalence of disability rises sharply with advancing age” and finding that 41 percent of adults age sixty-five to seventy-nine and 71 percent of adults over eighty “have at least one self-care, household activity, or mobility disability”).

249. *See id.* at 39 (emphasizing that “renter households aged 65 and older are far more likely than owner households of the same age to have a disability, though the gap narrows at more advanced ages”); *id.* at 47 (“Renter households will account for 24 percent of overall growth in households 65 and over through 2025, and for 26 percent of overall growth from 2025 to 2035. However, in each decade, renters will drive at least 30 percent of growth in the number of older households with [disabilities].”).

250. *Cf.* Campbell, *supra* note 217, at 810 (suggesting that, because “the concept of habitability is largely socially constructed,” it “perhaps should evolve” with experience).

The former social facts justify the added protection while the latter minimize the damage done to the doctrine, the risk of unpredictability for landlords, and the burden on courts' dockets.²⁵¹

In states with common law warranties, courts could quite easily shift the doctrine in this area by considering older tenants' allegations from this perspective.²⁵² In states with statutory warranties, legislatures could itemize the features that are required for habitability in the case of an older tenant (just like legislatures already itemize the features generally required for habitability).²⁵³ Whatever the form, these interventions would better account for the unique situation in which elderly renters find themselves.

A few important objections warrant responses. First, to be sure, like any expansion of tenant protection laws, these interventions will increase the cost of rental housing on the margin, with the perverse outcome that older renters might be less able to afford housing at all.²⁵⁴ As discussed above, this concern must be taken seriously. But it also must not be overstated lest it be wielded to the detriment of people's health and welfare. Many of these amenities—grab bars and lever-style handles, for example—are relatively low-cost to begin with, and landlords can effectively spread these low costs across tenants and time such that they occasion little to no perceptible rent increase.²⁵⁵

Second, one might worry that landlords will discriminate against older renters in order to avoid these obligations and costs. This concern about landlord behavior is, again, liable to being overstated if

251. And, as discussed above, the fact that everyone can expect to get both the short and long end of the stick throughout their lives mitigates any perceived unfairness at any particular point in the life cycle. *See supra* note 133 and accompanying text.

252. State courts could also interpret language in statutory warranties in ways that consider the unique circumstances of elderly tenants. For example, Delaware's warranty states that landlords must "[p]rovide a rental unit which shall not endanger the health, welfare or safety of the tenants." DEL. CODE ANN. tit. 25, § 5305(a)(2) (2021). At least one Washington court has held that a breach exists when conditions "pose an actual or potential safety hazard to [the residence's] occupants." *Lian v. Stalick*, 25 P.3d 467, 472 (Wash. Ct. App. 2001) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 799 P.2d 250, 259-60 (1990)). And, as shown here, certain features—or lack thereof—are more likely to endanger the health, welfare, or safety of elderly tenants than that of younger ones. *Id.*

253. *See supra* note 217 and accompanying text.

254. *See supra* notes 221-26 and accompanying text.

255. *See Strahilevitz, supra* note 223, at 1875-76 (pointing out that the empirical literature has found little evidence that expanded habitability laws have significant effects on housing markets).

landlords can spread the cost and recoup the expense. But putting that to the side, landlords in many jurisdictions are already prohibited from engaging in this sort of discrimination. While the federal Fair Housing Act does not prohibit landlord discrimination on the basis of age,²⁵⁶ many state and local laws do so.²⁵⁷ Indeed, the foregoing discussion of the vulnerability of older renters militates in favor of more states and localities enacting similar protections, perhaps alongside a more tailored warranty of habitability.

Third, many scholars believe the warranty of habitability is not up to the task of protecting tenants.²⁵⁸ For example, in her recent study of New York City, Nicole Summers found that less than 2 percent of tenants facing eviction for nonpayment of rent were found in housing court to have been entitled by the warranty of habitability to abate their rent payments.²⁵⁹ Even when looking only at cases in which landlords permitted housing code violations to persist, tenants prevailed on their assertion of the warranty of habitability just 9 percent of the time.²⁶⁰ In short, according to Summers, “[t]he warranty of habitability did not provide any benefit at all to approximately 91 to 97 percent of tenants who appeared to satisfy the elements of the claim.”²⁶¹ Tenants’ lack of representation and sophistication, especially when compared to landlords’ repeat-player status, only exacerbates the power imbalance,²⁶² though Summers’s

256. See 42 U.S.C. § 3604 (2021).

257. See, e.g., AUSTIN, TEX., CODE § 5-1-51; 775 ILL. COMP. STAT. 5/1-103(Q), 5/3-102 (2021); N.Y. EXEC. LAW § 296(5)(a) (McKinney 2021); 43 PA. STAT. AND CONS. STAT. ANN. § 955(h) (West 2021); WIS. STAT. § 106.50(1m)(h), (2) (2021).

258. See Phillips & Miller, *supra* note 217, at 32; Nicole Summers, *The Limits of Good Law: A Study of Outcomes in Housing Court*, 87 U. CHI. L. REV. 145, 167-73 (2020) (reviewing literature). *But see* Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 5 (2016) (presenting results of small study suggesting that the warranty “can function to bring needed repair and improvement to otherwise substandard dwellings” because, “[i]n more than half of the cases surveyed,” landlords remediated housing code violations).

259. Summers, *supra* note 258, at 190.

260. *Id.*

261. *Id.* at 199.

262. See *id.* at 171 (observing that “scholars claim that the ineffectiveness is a function of tenants’ lack of access to counsel”); Phillips & Miller, *supra* note 217, at 32; Super, *supra* note 216, at 414-16; Franzese et al., *supra* note 258, at 6. A number of scholars also blame the ineffectiveness on the obligation in many states that tenants pay their withheld rent into escrow. See Super, *supra* note 216, at 433. *But see* Phillips & Miller, *supra* note 217, at 36 (approving of rent escrow).

findings suggest that these factors only explain some of the “operationalization gap.”²⁶³ If all of this is true, it is fair to ask whether a warranty of habitability that took account of older renters’ needs would in fact do much at all to protect those needs.

We think it could, but even if it would not, the reality of older tenants’ disparate vulnerability is itself an important and underappreciated facet of the scholarly and policy conversation around the warranty of habitability. First, though, we present our tentative case for optimism. Summers’s study only examines cases in which landlords evicted tenants for nonpayment of rent and tenants invoked the warranty of habitability as a defense.²⁶⁴ Those results therefore do not account for any tenants’ successful invocation of the warranty out of court, either as bargaining leverage to secure landlord compliance or reduced rent, or as a basis for making repairs themselves and deducting the cost from their rent payments.²⁶⁵ The results also do not account for any *ex ante* effect of the warranty. That is, Summers’s data do not reveal how many more residences would be uninhabitable but for the existence of the warranty having shaped landlord behavior and tenant expectations. Empowering older tenants and embedding their needs in the law along the lines we lay out here could better enable them to seek necessary improvements out of court and could help foster a rental market more receptive to those needs.

Second, Summers’s dataset reveals that tenants, in fact, win judicial orders compelling landlords to make necessary repairs in over half of the cases.²⁶⁶ This suggests that the warranty is actually a meaningful source of rights. In turn, then, a warranty that better fits the needs of elderly tenants ought to likewise be a meaningful source of rights for them. The problem is that those same courts appear to fail to stand behind their own orders in the majority of those cases.²⁶⁷ That, however, is not a failing of the warranty of

263. Summers, *supra* note 258, at 205-10.

264. *Id.* at 149, 182-83.

265. *Cf.* Hilder v. St. Peter, 478 A.2d 202, 210 (Vt. 1984) (“[W]hen the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent.”).

266. Summers, *supra* note 258, at 199.

267. *See id.* at 201.

habitability, but of the institutions charged with enforcing it.²⁶⁸ Fixing those institutions is critical too, of course, but their flaws should obscure neither the need for a better-crafted underlying law nor the potential of such a law in the hands of more faithful stewards.

But even if our cautious optimism about the potential for a more tailored warranty to protect older renters was misplaced, the fact remains that the existing warranty—as inadequate as it might be in general—is an especially poor fit for those older renters. It is, therefore, critical that any reform project aimed at addressing the shortcomings Summers and others have exposed with respect to the warranty of habitability take account of the distinct vulnerabilities and needs of older renters, whether that means rethinking the doctrine, addressing shortcomings in enforcement, or enacting entirely new sorts of tenant protections.

Indeed, existing law reforms have not adequately filled this niche. Perhaps the most well-known that might come to mind are the Americans with Disabilities Act (ADA)²⁶⁹ and its forerunner, the Rehabilitation Act.²⁷⁰ These federal laws have done much to improve access and safety for people with mobility obstacles and other disabilities—including, but certainly not limited to, older people—and to spur innovation in the methods by which those obstacles can be reduced.²⁷¹ But these laws do next to nothing with respect to tenants in private housing. The Rehabilitation Act only regulates recipients of federal funds,²⁷² and the ADA only applies to public employers above a certain size,²⁷³ public entities,²⁷⁴ and public accommodations such as stores and hotels.²⁷⁵

The federal Fair Housing Act (FHA), as a result of a suite of amendments in 1988, also generally makes unlawful discrimination against tenants with disabilities.²⁷⁶ But the statute does not

268. *Cf. id.* at 217 (suggesting such an explanation).

269. 42 U.S.C. § 12101.

270. 29 U.S.C. § 791.

271. *See, e.g.*, Christopher Buccafusco, *Disability and Design*, 95 N.Y.U. L. REV. 952, 985-1002 (2020).

272. *See* 29 U.S.C. § 794; Buccafusco, *supra* note 271, at 993.

273. 42 U.S.C. § 12111(5).

274. *Id.* § 12131(1).

275. *Id.* § 12182(a).

276. *Id.* § 3604(f)(1)-(2).

affirmatively require many landlords to make premises safe for tenants with disabilities.²⁷⁷ Rather, it requires landlords to allow tenants *at their own expense* to modify premises to suit their needs.²⁷⁸ And it provides that landlords may condition that permission on the tenant restoring the premises to their earlier condition, again at the tenant's expense.²⁷⁹ The most the FHA does is recognize the importance of some of the features like the ones we have highlighted above, as it requires multifamily dwellings with four or more units constructed after 1988 to be built with wheelchair-accessible entryways, hallways, and kitchens, as well as "reinforcements in bathroom walls to allow later installation of grab bars"—though not grab bars themselves.²⁸⁰ This is no doubt important, but it is also of no help to tenants in older buildings, in smaller buildings, or in need of more than these specific structural features.²⁸¹

In fact, the shortcomings of the FHA and the ADA illuminate yet another reason why law should better guarantee the quality of housing for older renters. These protections offered by the FHA and the ADA for tenants with disabilities operate *ex post*.²⁸² That is, suppose an elderly renter who is not disabled falls in the shower because of the absence of a grab bar, and this fall causes a brain hemorrhage or a skeletal injury that renders the tenant disabled. At this point, and only at this point, does the protection of these laws materialize.²⁸³ But it would be far better for tenants and for society if the law helped reduce the *ex ante* likelihood of tenants becoming disabled because of dangers in their homes. Focusing on the needs of relatively medically frail but not legally disabled elderly tenants is a sensible way to achieve this goal. That is what we are advocating for here—recognizing the fact that older renters are at heightened risk of becoming disabled in their homes and in turn providing more robust protections for these vulnerable Americans who fall into the gaps of existing legal protections.

277. *See id.* § 3604(f)(1)-(3).

278. *Id.* § 3604(f)(3)(A).

279. *Id.*

280. 42 U.S.C. § 3604(f)(3)(C), (f)(7).

281. *See* JCHS REPORT, *supra* note 16, at 30 (similarly observing that the FHA and ADA "stop short of ensuring that the interiors of all units are fully accessible").

282. *Cf. id.*

283. *Cf. id.*

Last, though some jurisdictions have made efforts to provide older tenants with greater rights against their landlords, we are aware of none—legislatures and courts alike—that have implemented anything like the proposal we offer here.²⁸⁴ For example, New Jersey has granted to elderly tenants a “protected tenancy status” that applies when rental housing is converted into condominiums or cooperatives.²⁸⁵ This status entitles older tenants to “remain as a tenant in a converted unit for up to forty years beyond any period already authorized” by generally applicable laws.²⁸⁶ It also regulates rents during the protected tenancy period. This statutory protection appropriately recognizes the unique dislocation costs for older tenants,²⁸⁷ but it fails to recognize that protection in occupancy alone is a half-measure when the *conditions* are of such inadequate and unsafe quality that they are not properly suited for an elderly tenant’s living needs.²⁸⁸ Our aim here is to open property law’s eyes to the latter problem and to begin to offer some solutions.

As we move to Part IV, we will stay with the topic of communal living and identify some important similarities between tenants and owners.

IV. NAHRSTEDT REVISITED—PETS AS MEDICAL DEVICES

Nahrstedt v. Lakeside Village Condominium Ass’n is one of the jewels of the 1L Property course.²⁸⁹ It pitted a condominium owner against her neighbors in a heated battle over whether she could keep her strictly indoor cats while she lived in a complex that had

284. See *supra* notes 215-18 and accompanying text (discussing status of warranty of habitability across the country). As discussed above, the URLTA does not account for the age of the tenant. See *supra* note 114 and accompanying text. Even those states with more detailed warranties do not do so. See, e.g., CAL. CIV. CODE § 1941.1 (2021); MD. CODE ANN., REAL PROP., §§ 8-211, 8-211.1 (2021); N.C. GEN. STAT. § 42-42 (2021). The closest any states seem to come to considering the age of the tenant is with respect to *children* in the context of lead-based paint. See, e.g., *Benik v. Hatcher*, 750 A.2d 10, 12, 20 (Md. 2000).

285. See N.J. STAT. ANN. § 2A:18-61.1(k), -61.25, -61.31 (West 2021).

286. *Troy Ltd. v. Renna*, 727 F.2d 287, 289-92 (3d Cir. 1984) (describing state tenancy laws and holding that these provisions do not violate the Contracts and Takings Clauses of the U.S. Constitution); see *Manheim*, *supra* note 106, at 977 (discussing other “eviction protection laws” that afford “elderly tenants ... added protection”).

287. N.J. STAT. ANN. § 2A:18-61.23 (2021) (making such findings).

288. See *id.*

289. See 878 P.2d 1275 (Cal. 1994).

a no-pets policy.²⁹⁰ One reason the case is fun to teach is because pets have enriched the lives of so many law students, and the affection that typical law students in their twenties or thirties express for their companion animals contributes color and levity to class discussion of key doctrines.²⁹¹ Yet, there is another angle to be considered with *Nahrstedt*. For so many elderly Americans, the presence or absence of a pet in their homes becomes not just a question of joy and companionship, but plausibly a matter of life and death.²⁹²

In 1988, Natore Nahrstedt and her three beloved cats moved into a condominium complex whose covenants, conditions, and restrictions prohibited companion animals.²⁹³ Upon discovering the presence of the cats, the condominium association demanded their removal and began fining Nahrstedt when she refused to comply.²⁹⁴ She sued, alleging that the restrictions were unlawful as applied to her felines, which were strictly indoor cats.²⁹⁵ The California Supreme Court held that it would enforce the pet restrictions—and other such condominium restrictions—unless they were “wholly arbitrary, violate[d] a fundamental public policy, or impose[d] a burden on the use of affected land that far outweigh[ed] any benefit.”²⁹⁶ In applying this test, the courts were to focus not on Nahrstedt’s well-behaved cats that seemed to create no negative externalities, but on companion animals in general.²⁹⁷ Thus, it would not be enough for Nahrstedt, or another owner, to show that her felines enriched her life while imposing no costs on the neighbors.²⁹⁸ As long as a pet restriction in general was not irrational, the association could do what it liked and embrace a bright-line prohibition.²⁹⁹ This legal standard encompasses nearly total deference

290. *Id.* at 1278-79.

291. *Cf. id.* at 1278.

292. *Cf. id.* at 1295 (Arabian, J., dissenting).

293. *Id.* at 1278 (majority opinion).

294. *Id.*

295. *Id.*

296. *Id.* at 1287.

297. *Id.* at 1290.

298. *Id.*

299. *Id.* at 1278.

to the decisions of condominium associations to restrict how individual owners can use their property.³⁰⁰

The majority's opinion sparked a pained dissent from Justice Arabian, who accused the majority's handiwork of reflecting "a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency" in a way that "contributes to the fraying of our social fabric."³⁰¹ Arabian extended his criticisms in a law review article published a year later, in which he proposed model legislation to overrule the majority opinion.³⁰² Arabian would have prohibited the enforcement of a rights restriction against a condominium owner in the absence of a reasonable economic, health, safety, or aesthetic justification, and he would have entitled the individual owner to prevail if the restriction was not justified as applied to the owner's particular circumstances.³⁰³

Ultimately, the California legislature came to agree with Justice Arabian, by and large. The state enacted a new law that prohibits associations from banning owners from keeping at least one pet in a common interest community, exotic pets aside.³⁰⁴ But the legislature did not enact Arabian's proposed legislation, which would have sided with the individual rather than the association with respect to any condominium rule that restricted the owner's rights.³⁰⁵ In other words, the legislature kept in place *Nahrstedt's* rule of broad deference to homeowners' associations' decisions while constraining their ability to keep residents from living with a pet.³⁰⁶

300. The California Supreme Court subsequently turbo-charged *Nahrstedt*. Whereas *Nahrstedt* itself seemed to limit the high level of judicial deference to covenants that were imposed at the time of the common interest community's formation, *Villa de las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1234-35 (Cal. 2004), held that *Nahrstedt* deference also applied to new restrictions that were approved by a majority of a homeowners' association board. See DUKEMINIER ET AL., *supra* note 142, at 888.

301. *Nahrstedt*, 878 P.2d at 1292-93 (Arabian, J., dissenting).

302. See Armand Arabian, *Condos, Cats, & CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 24-29 (1995).

303. *Id.* at 29.

304. CAL. CIV. CODE § 4715 (West 2021). The law applies to domesticated birds, cats, dogs, and aquatic animals kept in aquariums. *Id.*

305. *Cf. id.*

306. For an illuminating discussion of why legislatures generally tend to overrule common interest communities narrowly, rather than broadly, see Ryan McCarl, *When Homeowners Associations Go Too Far: Political Responses to Unpopular Rules in Common Interest Communities*, 43 REAL EST. L.J. 453, 455-56 (2015).

We too wish to focus on the particular rather than the general and ask whether the stakes for elderly people are sufficiently high to warrant similar moves in other states to provide older homeowners with special rights to challenge pet prohibitions. Natore Nahrstedt herself was not a senior citizen at the time of the litigation that bears her name.³⁰⁷ Having said that, Justice Arabian flagged in his dissent the especially important companionship a pet can offer to an older person,³⁰⁸ and the scientific literature suggests that the physical health benefits of pet ownership may indeed be significant, especially when it comes to heart diseases that are the leading cause of death among elderly people.³⁰⁹ The evidence supporting the mental health benefits of pet ownership is a little more mixed by comparison, but the weight of the evidence also suggests these benefits are significant, especially during times of stress.³¹⁰ In light of these health considerations, depriving older people of the opportunity to live with companion animals—or forcing them to move to keep a pet and incur dislocation costs systematically more significant than those faced by younger people³¹¹—could present costs that render the rules violative of public policy.³¹²

Before diving into the medical literature on older people and the health effects of interactions with companion animals, it is important to identify the gaps that exist in the medical literature. There are hundreds of papers studying the health implications of pet ownership, but the vast majority of them suffer from selection effect problems.³¹³ Namely, pet owners and nonowners may be different in various other respects, so interactions with companion animals

307. See *DUKEMINIER ET AL.*, *supra* note 142, at 886.

308. *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1295 (Cal. 1994) (Arabian, J., dissenting).

309. See Glenn N. Levine, Karen Allen, Lynne T. Braun, Hayley E. Christian, Erika Friedmann, Kathryn A. Taubert, Sue Ann Thomas, Deborah L. Wells & Richard A. Lange, *Pet Ownership and Cardiovascular Risk: A Scientific Statement from the American Heart Association*, 127 *CIRCULATION* 2353, 2356 (2013).

310. See Sandy M. Branson, Lisa Boss, Stanley Cron & Dennis C. Turner, *Depression, Loneliness, and Pet Attachment in Homebound Older Adult Cat and Dog Owners*, 4 *J. MIND & MED. SCIS.* 38, 40 (2017).

311. See *supra* notes 16-40 and accompanying text.

312. See Rebecca J. Huss, *Re-Evaluating the Role of Companion Animals in the Era of the Aging Boomer*, 47 *AKRON L. REV.* 497, 498 (2014).

313. See Harold Herzog, *The Impact of Pets on Human Health and Psychological Well-Being: Fact, Fiction, or Hypothesis?*, 20 *CURRENT DIRECTIONS PSYCH. SCI.* 236, 238 (2011).

may not explain observed differences in the health of owners and nonowners.³¹⁴ Studies that randomly assign companion animals to people, which removes the selection effect problem, are rare for understandable reasons.³¹⁵ We will summarize this research first and then examine what courts might learn from observational studies.

The two randomized controlled studies we have located of companion animals with elderly populations showed significant health benefits from interactions with dogs, though they had sample sizes and limited designs that should make us take their conclusions with a grain of salt. First, Carl Harper and his coauthors used a randomized controlled trial to study the effects of three fifteen-minute visits with therapy dogs during physical therapy sessions that followed surgery on arthritic joints.³¹⁶ This experiment with seventy-two subjects randomly assigned to a treatment or control group found a highly significant and beneficial effect on post-operative pain in the treatment group compared to the control group.³¹⁷ Second, Caterina Ambrosi and her coauthors studied the effects of providing older people with prolonged exposure to pet dogs over the course of ten weeks during weekly thirty-minute sessions.³¹⁸ This randomized study found that exposure to dogs significantly reduced clinical depression among a sample of elderly patients in a long-term care facility.³¹⁹ There was some evidence that the presence of the dogs improved the patients' moods and enhanced their interactivity,³²⁰

314. Jessica Saunders, Layla Parast, Susan H. Babey & Jeremy V. Miles, *Exploring the Differences Between Pet and Non-Pet Owners: Implications for Human-Animal Interaction Research and Policy*, PLOS ONE 11-12 (June 23, 2017).

315. *Id.* at 2-3. The papers we discuss below generally control for the key demographic differences.

316. Carl M. Harper, Yan Dong, Thomas S. Thornhill, John Wright, John Ready, Gregory W. Brick & George Dyer, *Can Therapy Dogs Improve Pain and Satisfaction After Total Joint Arthroplasty? A Randomized Controlled Trial*, 473 CLINICAL ORTHOPEDICS & RELATED RSCH. 372, 374-75 (2015). Most of the participants in the study were senior citizens, which isn't surprising given that all participants had arthritis. *Id.* at 376 tbl.1.

317. The mean age for the respondents was sixty-seven for the treatment group and sixty-six for the control group. *Id.* at 376-77 & tbl.1.

318. Caterina Ambrosi, Charles Zaiantz, Giuseppe Peragine, Simona Sarchi & Francesca Bona, *Randomized Controlled Study on the Effectiveness of Animal-Assisted Therapy on Depression, Anxiety, and Illness Perception in Institutionalized Elderly*, 19 PSYCHOGERIATRICS 55, 58 (2019).

319. *Id.* at 63.

320. *Id.*

though the latter findings are confounded by the presence of dog handlers who were present during the sessions and also interacted with the patients.³²¹

The most authoritative and meaningful assessment of the effects of pet ownership comes from the American Heart Association (AHA), which concluded, following an extensive literature review, that “[p]et ownership, particularly dog ownership, is probably associated with decreased CVD [cardiovascular disease] risk [and] may have some causal role in reducing CVD risk.”³²² Accordingly, the AHA included pet ownership, and dog ownership in particular, as a reasonable strategy to reduce the risk of cardiovascular disease.³²³ While hedged, this recommendation is significant, as it pertains to the leading cause of death in America.³²⁴

Observational studies generally buttress the AHA’s recommendation, with some showing reductions in cardiovascular mortality of 26 percent among pet owners compared to those who had never owned companion animals.³²⁵ Another twelve-year longitudinal observation study, conducted in a large population of Swedish adults, also found that dog ownership was associated with significant reductions in cardiovascular mortality.³²⁶ The authors hypothesized that the relationship may be causal because having companion animals alleviates “psychosocial stress factors, such as social isolation, depression and loneliness” and also lowers activity in the sympathetic nervous system while improving stress management.³²⁷ Interestingly, the cardiovascular health benefits of having companion animals do not seem to result from pet owners lowering their BMIs through dog walking and other pet-related activities.³²⁸

321. Ambrosi’s study was substantially underpowered, with a sample size of thirty-one patients, so it would be helpful to try the same interventions on a larger group of patients. *Id.* at 57.

322. Levine et al., *supra* note 309, at 2356.

323. *Id.*

324. *Id.* at 2353.

325. Enayet K. Chowdhury, Mark R. Nelson, Garry L.R. Jennings, Lindon M.H. Wing & Christopher M. Reid, *Pet Ownership and Survival in the Elderly Hypertensive Population*, 35 *J. HYPERTENSION* 769, 772 (2017).

326. Mwenya Mubanga, Liisa Byberg, Christoph Nowak, Agneta Egenvall, Patrik K. Magnusson, Erik Ingelsson & Tove Fall, *Dog Ownership and the Risk of Cardiovascular Disease and Death—A Nationwide Cohort Study*, 7 *SCI. REPS.*, Nov. 17, 2017, at 3.

327. *Id.* at 5.

328. Kenta Miyake, Kumiko Kito, Ayaka Kotemori, Kazuto Sasaki, Junpei Yamamoto,

Meta-analyses reveal no significant association between pet ownership and obesity.³²⁹

Regarding other diseases, the evidence for therapeutic benefits is much weaker. For example, an observational study of more than 123,000 postmenopausal participants in the Women's Health Initiative found no association between pet ownership and the incidence of cancer.³³⁰ A good deal of evidence suggests a positive association between pet ownership and older individuals' emotional well-being,³³¹ though again, selection bias confounds some of the analysis. From a health perspective, the primary downside of pet ownership appears to be limited to the potential for dogs to cause older people to fall and injure themselves.³³² So companion animals are not a panacea, but reasonably strong evidence suggests that dogs in particular produce real health benefits for elderly homeowners.³³³

The costs to older people of being unable to live with companionship animals were thrown into especially sharp relief as a result of the COVID-19 pandemic, when, for safety reasons, many elderly individuals, who were at high risk of mortality if they contracted the disease, had to isolate themselves from friends and family.³³⁴ For

Yuko Otagiri, Miho Nagasawa, Sayaka Kuze-Arata, Kazutaka Mogi, Takefumi Kikusui & Junko Ishihara, *Association Between Pet Ownership and Obesity: A Systematic Review and Meta-Analysis*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 3498, 3511-12 (2020).

329. *Id.* at 3512.

330. David O. Garcia, Eric M. Lander, Betsy C. Wertheim, JoAnn E. Manson, Stella L. Volpe, Rowan T. Chlebowski, Marcia L. Stefanick, Lawrence S. Lessin, Lewis H. Kuller & Cynthia A. Thomson, *Pet Ownership and Cancer Risk in the Women's Health Initiative*, 25 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 1311, 1311-12, 1315 (2016).

331. See Branson et al., *supra* note 310, at 40; Huss, *supra* note 312, at 504-05 (summarizing research); Deborah Miller, Sara Staats & Christie Partlo, *Discriminating Positive and Negative Aspects of Pet Interaction: Sex Differences in the Older Population*, 27 SOC. INDICATORS RSCH. 363, 372 (1992); Pat Sable, *Pets, Attachment, and Well-Being Across the Life Cycle*, 40 SOC. WORK 334, 337 (1995). *But see* Herzog, *supra* note 313, at 238.

332. Pets cause approximately eighty-seven thousand nonfatal injuries to humans resulting in ER visits every year, with approximately 88 percent of these injuries resulting from dogs. The most common such injuries are fractures, which occur approximately twenty-six thousand times per year in the United States. Centers for Disease Control, *Nonfatal Fall-Related Injuries Associated with Dogs and Cats—United States, 2001-2006*, 58 MORBIDITY & MORTALITY WKLY. REP. 277, 279 tbl.1 (2009). Cats and dogs were thus associated with approximately 1 percent of the fall injuries that resulted in patients' visits to emergency rooms nationwide. *Id.* at 281.

333. See, e.g., Levine et al., *supra* note 309, at 2356.

334. Mary E. Rauktis & Janet Hoy-Gerlach, *Animal (Non-Human) Companionship for*

many older people living alone during the pandemic, their companion animals became an even more significant source of emotional support and fulfilling interactions than usual.³³⁵ One survey asked 825 elderly Americans what brought them happiness during the pandemic and found that contact with their companion animals was the fourth most frequently mentioned source of joy during the pandemic, behind time spent with families and friends in person, digital social contact, and engagement with hobbies.³³⁶ Pets ranked *above* time spent with partners or spouses, religious faith, and time spent enjoying nature.³³⁷ For seniors in their sixties, companion animals ranked as the second largest source of joy, and they were the third most significant source of joy for female seniors across cohorts.³³⁸ On the other hand, the same study also found that people for whom companion animals provided a significant source of joy reported more stress than those who did not mention companion animals, though the authors noted that it was difficult to establish a causal connection.³³⁹ And another paper reported that for a minority of older respondents (roughly 10 percent), concerns about how to care for a pet in the event of their hospitalization may have contributed to delays in seeking testing or treatment for COVID-19.³⁴⁰ In short, there are some reasons at the margins to think that pet ownership among elderly people has been a largely, but not uniformly, positive development during the recent pandemic.³⁴¹

While millions of Americans of all ages love their companion animals, the weight of the evidence suggests that prohibitions on

Adults Aging in Place During COVID-19: A Critical Support, a Source of Concern and Potential for Social Work Responses, 63 J. GERONTOLOGICAL SOC. WORK 702, 702 (2020).

335. Jessica Lee Oliva & Kim Louise Johnston, *Puppy Love in the Time of Corona: Dog Ownership Protects Against Loneliness for Those Living Alone During the COVID-19 Lockdown*, 67 INT'L J. SOC. PSYCHIATRY 232, 240 (2021); Rautkis & Hoy-Gerlach, *supra* note 334, at 704.

336. Brenda R. Whitehead & Emily Torossian, *Older Adults' Experience of the COVID-19 Pandemic: A Mixed-Methods Analysis of Stresses and Joys*, 61 GERONTOLOGIST 36, 41, 43 (2021).

337. *Id.* at 43.

338. *Id.*

339. *Id.* at 41.

340. Jennifer W. Applebaum, Britni L. Adams, Michelle N. Eliasson, Barbara A. Zsembik & Shelby E. McDonald, *How Pets Factor into Healthcare Decisions for COVID-19: A One Health Perspective*, 11 ONE HEALTH, Dec. 20, 2020, at 3.

341. See Rautkis & Hoy-Gerlach, *supra* note 334, at 704; Applebaum et al., *supra* note 340, at 3.

companion animals in homeowners' associations impose disproportionate burdens on elderly residents.³⁴² Even setting aside jurisdictions such as California that by statute override common interest communities' prohibitions on cats, dogs, and other common companion animals, some older residents who wish to challenge a pet restriction have other options.³⁴³ An important tool in the arsenal of many homeowners is the FHA, which prohibits discrimination in housing on the basis of a disability.³⁴⁴ For example, in *Bhogaita v. Altamonte Heights Condominium Ass'n*, the Eleventh Circuit invalidated a condominium association's twenty-five-pound pet weight policy because it precluded the plaintiff, a veteran who suffered from posttraumatic stress disorder, from residing with his emotional support dog.³⁴⁵ Bhogaita's dog, Kane, exceeded the building's weight limit from the time he was purchased.³⁴⁶ The Eleventh Circuit affirmed a jury verdict that Bhogaita was disabled and that permitting him to live with Kane was a reasonable accommodation required by the FHA.³⁴⁷ Other courts have reached similar results.³⁴⁸

Depending on the definition used, estimates for the percentage of older Americans who are disabled range from approximately 20 percent to a little more than 50 percent,³⁴⁹ so a non-trivial number of older members of homeowners' associations could plausibly overcome their associations' pet prohibitions by using a legitimate service animal to aid their physical or mental health. But what about nondisabled elderly people, or disabled seniors who do not have a plausible claim that a service animal would constitute a reasonable accommodation? Recall our argument in Part III that

342. See Cookman, *supra* note 29, at 229-30.

343. See *supra* note 321 and accompanying text.

344. 42 U.S.C. § 3604(f)(1)-(2).

345. 765 F.3d 1277, 1281 (11th Cir. 2014).

346. *Id.*

347. *Id.* at 1288-89.

348. See, e.g., *Revoock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 110 (3d Cir. 2017); *Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer*, 6 F. Supp. 3d 1272, 1283 (S.D. Fla. 2014); *Sanzaro v. Ardiente Homeowners Ass'n, LLC*, 364 F. Supp. 3d 1158, 1163 (D. Nev. 2019). For an astute discussion of the dynamics of legitimate and illegitimate use of service animals, see Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363.

349. See Brenda C. Spillman, *Changes in Elderly Disability Rates and the Implications for Health Care Utilization and Cost*, 82 MILBANK Q. 157, 163 (2004); Liming Cai & James Lubitz, *Was There Compression of Disability for Older Americans from 1992 to 2003?*, 44 DEMOGRAPHY 479, 485 tbl.1 (2007).

the law should consider expanding its protections to include seniors who are prone to becoming disabled if the law fails to intervene.³⁵⁰ Reducing the risk and severity of chronic heart disease would prevent numerous disabilities, not to mention premature deaths.³⁵¹ So if companion animals could contribute to that effort, the societal benefits would be substantial.

A key question here is whether legal intervention is warranted by the apparent costs of pet restrictions for older people. There are significant downsides to having the courts second guess the countless decisions that are made in homeowners' associations every year, and even narrowing the domain of review to pet prohibitions would involve the courts in a number of disputes that judges might prefer to avoid.³⁵² A pertinent consideration is whether normal democracy is working as it should in homeowners' associations.³⁵³ Are there reasons to believe that the process of imposing rules on a newly created association or enacting rules in an existing association via the democratic process facilitates tyrannies of the majority, agency problems, or rent seeking? A broader literature addresses this question, with a range of responses from interventionist approaches to laissez-faire and to various embraces of moderation.³⁵⁴ Our aim here is not to join that larger debate but to focus specifically on the implications for pet restrictions and elderly pet owners.

On that score, an important point to consider is that homeowners' associations with a higher percentage of older residents appear less likely to experience high levels of violations that result in enforcement actions by the association.³⁵⁵ The scholars who produced this study interpret the enforcement intensity survey data they collected to mean that elderly residents are more likely to follow the rules,³⁵⁶

350. See *supra* notes 250-53 and accompanying text.

351. See *Heart Disease Facts*, CTRS. FOR DISEASE CONTROL (Sept. 8, 2020), <https://www.cdc.gov/heartdisease/facts.htm> [<https://perma.cc/X8JN-GCTS>].

352. See Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 880 (2013).

353. *Id.* at 862.

354. See *id.* at 844-45; Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U.L. REV. 273 (1997); Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

355. Jay Weiser & Ronald Neath, *Private Ordering, Social Cohesion and Value: Residential Community Association Covenant Enforcement*, 19 INT'L REAL EST. REV. 1, 17 (2016).

356. *Id.*

which is plausible, but that is not the only sensible causal inference. For example, if older people are routinely overrepresented in homeowners' associations' decision-making bodies, then it may be that HOAs are less likely to enact rules that elderly residents will violate or more likely to exercise enforcement discretion in a way that benefits other elderly residents. To our dismay, despite extensive searching, we were unable to locate a single reputable source that studies the demographics of homeowners' associations' boards. There is nothing reliable published on the important topic. So while there are popular stereotypes about retirees being overrepresented on these boards, only anecdotes support this possibility.³⁵⁷

There is an important related question about which the social science data sheds a bit more light. Anti-pet restrictions cause condominiums to sell for less than they would with more permissive policies, according to the only good recent empirical analysis of the issue, which drew on MLS data from Fort Lauderdale, Florida, earlier this decade.³⁵⁸ Common-interest communities that restrict companion animals therefore may be leaving money on the table when they do so.³⁵⁹ The question is why. One possibility is that homeowners' associations and their management companies are ignorant about the data or have some reason to doubt the external validity of a study completed in Florida.³⁶⁰ Another is that associations recognize the financial hits their residents are taking by prohibiting companion animals but value the exclusion of companion

357. As noted above, evidence suggests that elderly citizens are much more politically potent at the state government level than at the local level, at least where land use law is concerned. See Brinig & Garnett, *supra* note 32, at 539.

358. Zhenguo Lin, Marcus T. Allen & Charles C. Carter, *Pet Policy and Housing Prices: Evidence from the Condominium Market*, 47 J. REAL EST. FIN. & ECON. 109, 114, 121 (2013).

359. *Id.* at 121.

360. From a market perspective, the right number of communities with pet restrictions is plausibly not zero. That is, if a large number of communities that presently prohibit pets started allowing them, prices in those communities would drop, and prices in communities that barred them would rise. So the Florida data tells us that in the Fort Lauderdale market there was extra demand for condominiums with more permissive policies. See *id.* The equilibrium might be different in other markets or at other moments in time, which is why it is surprising that there has only been one serious look at the question in recent years. More studies of the same question will help scholars evaluate the external validity of the Fort Lauderdale finding.

animals more than they value the higher resale premiums that more relaxed rules would probably facilitate.³⁶¹

Considering this mixed body of evidence, our tentative conclusion is that the externalities associated with older Americans' relationships with their companion animals warrant greater judicial scrutiny of pet restrictions in common interest communities than the deferential *Nahrstedt* standard suggests. The evidence is not voluminous, rigorous, or consistent enough to render a pet restriction unreasonable on its face. But the weight of that evidence and the relatively restricted opportunities for exit by older people suggest that, particularly for those older owners, permitting plaintiffs to challenge these restrictions as unreasonable as applied to them is warranted.³⁶² In short, Justice Arabian had it right.³⁶³ Whereas *Nahrstedt* required the plaintiff to show that no reasonable common interest community could ban any cat, a more appropriate test would have permitted her to prevail upon a showing that it was unreasonable for the association to ban her (strictly indoor) cats, given the associated costs and benefits.³⁶⁴ A showing that the prohibition on pet ownership imposes harms on the individual that substantially outweigh the associated community benefits of enforcing the prohibition ought to be adequate for the pet owner to obtain relief. In cases in which the presence of companion animals imposed real harms on the neighbors, such as severe allergies, a restriction would be upheld.³⁶⁵ This is a hard standard for a pet

361. The considerations in the rental housing market are somewhat different because landlords may fear that pets impose greater wear and tear on units. In a condominium, the unit owner internalizes those costs. Nonetheless, the argument we make here could sensibly be extended to pet restrictions in rental buildings, provided landlords were able to charge the elderly tenants security deposits that reflected the associated costs of repairing pet-related damage. *See, e.g.*, Danielle Mason, *The Best Landlord Pet Policy*, LANDLORD STUDIO (Sept. 12, 2019), <https://www.landlordstudio.com/blog/the-best-landlord-pet-policy/> [<https://perma.cc/J7U7-7N49>].

362. *See* Pollack, *supra* note 352, at 857-60 (arguing that, where exit opportunities are constrained, less deferential review by courts of HOA decision-making is warranted).

363. *See supra* note 303 and accompanying text.

364. *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1289-90 (Cal. 1994) ("In determining whether a restriction is 'unreasonable' under section 1354, and thus not enforceable, the focus is on the restriction's effect on the project as a whole, not on the individual homeowner.").

365. *See, e.g.*, *Cohen v. Clark*, 945 N.W.2d 792, 807 (Iowa 2020) (finding that permitting a service animal for one tenant in a previously no-pets building, which caused severe allergic reactions for another tenant who had lived in the building previously, was not a reasonable

owner to meet but, unlike current law, is not a nearly impossible one.

Of course, for many lawyers and law students who encounter *Nahrstedt* for the first time, the fact that the pet restrictions were in place at the time Ms. Nahrstedt moved into Lakeside Village is a showstopper.³⁶⁶ She consented to abide by the community's rules and should not complain about the application of restrictions about which she was provided notice.³⁶⁷ These ideas have real force as applied to middle-aged residents like Nahrstedt or people who consented to live under a set of rules and then challenged them shortly thereafter.³⁶⁸ But these arguments have less force when pressed against long-time residents who face higher relocation costs, income inelasticity, and are especially well-suited to high-density housing that minimizes staircases and maximizes senior-friendly amenities like doormen or indoor spaces for recreation.³⁶⁹ As we have emphasized throughout this Article, moving is generally harder on older people, and their needs may change over the life cycle in ways that are easier for a condominium board or real estate developer to anticipate than they would be for the home purchaser herself.³⁷⁰ Consider again the case of the elderly condominium dweller who is cut off from all her friends and family for a year or longer because of the need to take safety precautions during a pandemic. A kitten or puppy may provide her with the best face-to-face companionship and affection she can get during a time of crisis. At a time when moving is dangerous, should she really have no recourse to challenge a rigid set of restrictions that produces only abstract benefits?

Forcing the owner of a pet that causes no negative externalities to change residences if she wishes to live with the companion animal is a large ask in the absence of any clear rationale other than "a deal is a deal." To the extent that isolating older people without companion animals imposes greater medical costs on society, and greater burdens on an older individual's relatives to fill a companionship void, it is hard to see why the owner of a well-behaved,

accommodation required by Iowa's state equivalent of the Fair Housing Act).

366. See *Nahrstedt*, 878 P.2d at 1278.

367. See *id.*

368. See *id.*

369. See *Housing for Seniors: Challenges and Solutions*, *supra* note 246.

370. See *supra* notes 16-40 and accompanying text.

conventional pet ought not to have an opportunity to show that a restriction is unenforceable against her. Such a rule would then permit associations to focus their enforcement resources on those companion animals that genuinely interfere with the neighbors' enjoyment of their lives.³⁷¹

V. AGE-RESTRICTED COMMUNITIES

Sometimes the elderly do exit their existing communities, and as the population of senior citizens has swelled, age-restricted communities have become some of the fastest growing cities and towns in the United States and around the world.³⁷² This has not escaped notice from legal scholars, though with a peculiar emphasis, especially where antidiscrimination law is concerned.³⁷³ More precisely, there is a large body of legal scholarship that examines the exception to fair housing laws that Congress granted to age-restricted communities.³⁷⁴ This exception under the federal FHA permits communities in which at least 80 percent of households include someone fifty-five or older to discriminate on the basis of family status.³⁷⁵ As a practical matter this means that such communities can prevent families with young children from residing there.³⁷⁶ Congress initially made this exception to family status discrimination contingent on these communities offering special services or facilities to suit the needs of an older population, but those requirements were watered down in subsequent legislation at the behest of real estate developers, seniors' organizations, and related interest groups.³⁷⁷

371. See, e.g., *Cohen v. Clark*, 945 N.W.2d 792 (Iowa 2020).

372. Robert Osei-Kyei, Ibrahim Y. Wuni, Bo Xia & Trinh Tri Minh, *Research Trend on Retirement Village Development for the Elderly: A Scientometric Analysis*, 34 J. AGING & ENV'T 402, 414 (2020).

373. See Mark D. Bauer, "Peter Pan" as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to Be Exempt from Civil Rights Laws and Substantive Federal Regulation? 21 ELDER L.J. 33, 35 (2013).

374. See, e.g., *id.*

375. 42 U.S.C. § 3607(b)(2).

376. Bauer, *supra* note 373, at 38-39.

377. *Id.* at 39-41; Nicole Napolitano, Note, *The Fair Housing Act Amendments and Age Restrictive Covenants in Condominiums and Cooperatives*, 73 ST. JOHN'S L. REV. 273, 286-87 (1999).

Given the importance for older people of place, kinship, and the support, familiarity, and social and mental stimulation these represent for seniors,³⁷⁸ there is a natural logic to creating and sustaining these communities. In the passage of time, it is quite possible that someone who has lived in an age-integrated community for decades sees his friends and neighbors move away or die, his children relocate, and other social networks break down.³⁷⁹ The pace of gentrification and development, aided at times by the sorts of eminent-domain-driven involuntary relocations discussed above,³⁸⁰ or the need to exit a life tenancy that is impractical because of rigidity in waste law,³⁸¹ only contributes to the potential erosion of these ties. Some older people may also move to communities that offer lower tax burdens, packages of collective amenities that are attractive to aging populations, or more favorable weather.³⁸² In all of these ways, age-restricted communities are one way to replicate the supports and personal society that some older people see taken from them or, at least, jeopardized by the dynamics explored throughout this Article.³⁸³

At the same time, concerns linger. The history of family status discrimination is interesting and important in its own right, but the most troubling aspect of these communities from an FHA perspective is hiding in plain sight, and it involves race rather than family status.

We can dive into the census data to get a sense of the demographics of age-restricted communities. A lot of similarities play out. We will use the five largest age-restricted communities in the United States and the most recent available census data as our data set.

378. *See supra* notes 29-38 and accompanying text.

379. Seeman, *supra* note 38, at 367-68.

380. *See supra* Part I.

381. *See supra* Part II.

382. Bauer, *supra* note 373, at 34.

383. *See* Smith & Carlidge, *supra* note 29, at 552.

Table 1. Resident Demographics in the Nation's Largest Age-Restricted Communities³⁸⁴

	The Villages, FL	Sun City, AZ	Sun City West, AZ	Laguna Woods, CA	Green Valley, AZ
2020 Population	79,077	39,931	25,806	17,644	22,616
% 65+	81.6	75.8	84.1	82.8	79.8
% White	98.0	94.9	97.5	76.3	98.3
% Black	0.4	2.6	0.9	0.7	0.2
% Asian	0.9	1.0	0.6	19.7	0.5
% Multiracial	0.5	0.3	0.7	1.4	0.6
% Hispanic	1.2	4.2	1.2	5.8	5.0
% White Non-Hispanic	96.9	92.4	96.6	72.0	93.6
Median home value (\$)	280,300	159,900	221,500	288,400	175,400
% High school grads	97.3	93.3	95.3	94.7	95.7
% College grads	42.3	23.6	33.7	49.3	42.1
% Disabled	9.3	23.8	17.8	14.2	15.1
% In civilian labor force	13.1	18.8	12.6	19.9	15.4
Median household income (\$)	63,841	40,586	52,196	44,020	49,147

With respect to the demographics, the communities seem quite similar, with Laguna Woods's large Asian American population making it something of an outlier.³⁸⁵ Sun City's nearly 3 percent Black population also makes it an outlier, with all of the other

384. We created this table using data taken from U.S. Census Bureau Quick Facts. *See Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/greenvalleycdparizona,lagunawoodscitycalifornia,suncitywestcdparizona,suncitycdparizona,thevillagescdpflorida,US/PST045219> [https://perma.cc/CUE5-UGSB].

385. *See id.*

communities having a Black population that is below 1 percent.³⁸⁶ In each community, more than 80 percent of residents are not part of the civilian labor force.³⁸⁷ The Villages stands out for its relatively high median income; it and Laguna Woods have substantially higher home prices than the other three communities.³⁸⁸

Among senior citizens nationwide in 2016, 9 percent were Black, 4 percent were Asian American, and another 8 percent were Hispanic.³⁸⁹ Black seniors are thus roughly three to forty-five times as numerous in the nation as a whole as they are in the largest age-restricted communities.³⁹⁰ There is a substantial racial and income gap among seniors, but this gap is inadequate to explain the substantial underrepresentation of minority residents in these communities, as the moderate income levels and generally affordable nature of the housing in these communities suggests.³⁹¹ Other than a book chapter focused on The Villages that one of us wrote a few years ago,³⁹² and another article by Kevin McHugh and Elizabeth Larson-Keagy that examined the demographics of Arizona's Sun City communities,³⁹³ the racially homogenous nature of age-restricted communities has gone unmentioned in the literature. The most any other scholars have mustered was a single sentence in an article by Robert Schwemm and Michael Allen indicating that there was no reason to believe that senior citizen housing developments are not as prone as other parts of the U.S. housing sector to racial segregation.³⁹⁴ The data presented in Table 1 suggests that senior

386. *Id.*

387. *Id.*

388. *Id.*

389. *2017 Profile on Older Americans*, ADMIN. FOR CMTY. LIVING (Apr. 2018), <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf> [<https://perma.cc/SC8P-9S2T>].

390. *See id.*; *Quick Facts*, *supra* note 384.

391. *See Quick Facts*, *supra* note 384.

392. Lior Jacob Strahilevitz, *Historic Preservation and Its Even Less Authentic Alternative*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 108-09* (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

393. Kevin E. McHugh & Elizabeth M. Larson-Keagy, *These White Walls: The Dialectic of Retirement Communities*, 19 *J. AGING STUD.* 241, 245 (2005).

394. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 *IOWA L. REV.* 121, 177-78 (2004).

citizen housing is actually where the country's racial segregation problems are most pronounced.³⁹⁵

Of course, under the FHA, the fact that a community is racially homogenous is not itself adequate to demonstrate that the developer, landlord, or homeowners' association has engaged in unlawful conduct.³⁹⁶ And the question of how, precisely, these age-restricted communities came to be so monochromatic is unresolved. The Villages evidently achieved an extraordinary level of residential racial segregation through a combination of exclusionary amenity and exclusionary vibe strategies, though it would not be surprising if common practices like unlawful steering of Black home seekers by real estate agents also played a role.³⁹⁷ In any event, at least in The Villages, the results are a built environment and a social environment likely to repel most Black homebuyers. An existing community of residents who find the prospect of a nearly all-white community to be a feature rather than a bug is likely to maintain that segregation from one generation of residents to the next.³⁹⁸ Once hyper-segregated communities get going, they can create a kind of momentum that would convince large numbers of minority residents that they would be unwelcome if they elected to move there.³⁹⁹ Unfortunately, we are not aware of any systematic investigation into the behaviors of age-restricted communities that foster extreme racial segregation, so it is presently impossible to say whether unlawful practices have contributed significantly to these troubling demographics.

But even if—indeed, especially if—these demographics are the result of entirely lawful behavior, it is important to evaluate whether and to what extent they ought to trouble us. That is, given the benefits they afford to older people already systematically underserved by numerous other areas of property law, do these patterns of racial segregation undermine the case for the special treatment of age-restricted communities? On that score, we offer

395. See *Quick Facts*, *supra* note 384.

396. A plaintiff suing under the FHA must show either disparate treatment with respect to a protected characteristic, or a disparate impact causally linked to "artificial, arbitrary, and unnecessary" policies. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522-23 (2015).

397. Strahilevitz, *supra* note 392, at 113.

398. See *id.*

399. See *id.*

three preliminary thoughts about why breaking down other patterns and practices of residential segregation perhaps ought to be a higher priority than addressing those patterns in age-restricted communities—along with several important countervailing considerations that make our normative conclusions in this Part relatively more cautious than the others we offered above.

One major argument for policies that promote residential racial integration depends on the contact hypothesis. The contact hypothesis is the idea that when people spend more time with people from an outgroup, this exposure lessens prejudiced feelings.⁴⁰⁰ The notion has a long pedigree, originating in Gordon Allport's 1954 book, *The Nature of Prejudice*.⁴⁰¹ In the decades since, the question of whether familiarity with members of a different racial or ethnic group diminished bias toward members of that group has been explored in hundreds of papers. Given the size of the literature, meta-analyses are particularly helpful, and there have been two ambitious meta-analyses in the last fifteen years. The first, by Thomas Pettigrew and Linda Tropp in 2006, found overwhelming evidence to support the contact hypothesis, with more contact with outgroup members causing people to feel more positive not only about the individuals they met but also about the groups to which those individuals belong.⁴⁰² The second, published in 2019 by Elizabeth Paluck, Seth Green, and Donald Green, provided a more qualified endorsement, concluding that:

the overwhelming majority of studies report positive effects, and a random-effects model suggests that the true underlying effect is substantively quite large. On the other hand, the collection of studies has ... important limitations. First is the gap in coverage. We know little about the effects of contact on adults over 25 years of age. In particular, the meta-analysis furnishes no evidence about contact's effects on adults' racial or ethnic prejudices, which was the original policy-based motivation for this body of work.⁴⁰³

400. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261 (1979).

401. *Id.* at 261-81.

402. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERSONALITY & SOC. PSYCH.* 751, 766 (2006).

403. Elizabeth Levy Paluck, Seth A. Green & Donald P. Green, *The Contact Hypothesis Re-Evaluated*, 3 *BEHAV. PUB. POL'Y* 129, 149-50 (2019).

Along similar lines, Pettigrew and Tropp's earlier review found that the evidence points towards college students being significantly more likely than adults generally to reconsider existing prejudice through contact with members of diverse communities.⁴⁰⁴ In short, these two comprehensive meta-analyses point to a critical question left open despite decades of research—whether the contact hypothesis holds for older people, whose racial prejudices may be relatively ossified.⁴⁰⁵

A key argument for legal interventions that will integrate the housing market is that familiarity breeds empathy. If Black Americans do not live among white Americans, then the two groups may harbor views about each other that are unduly shaped by the most problematic stereotypes. And the evidence supporting the contact hypothesis suggests that positive interactions with members of different racial groups can indeed overcome preexisting prejudice.⁴⁰⁶ But that evidence is largely limited to children, teenagers, and people in their twenties.⁴⁰⁷ There is scant evidence that once people reach adulthood, and particularly once they reach the more advanced ages that permit residence in age-restricted communities, increased contact with members of an outgroup has the capacity to change hearts and minds.

A related benefit of residential integration is that public schools are typically zoned based on the neighborhood, so municipalities that are more residentially integrated will tend to find their schools more integrated as well.⁴⁰⁸ School desegregation is critically

404. Pettigrew & Tropp, *supra* note 402, at 764.

405. People generally become less open to new experiences as they age, see Nikolas Westerhoff, *Set in Our Ways*, SCI. AM. MIND, Dec. 2008, at 44, 46, and political attitudes are generally quite stable over the life cycle. See Johnathon C. Peterson, Kevin B. Smith & John R. Hibbing, *Do People Really Become More Conservative as They Age?*, 82 J. POL. 600, 607-08 (2020). The evidence that elderly people are more broadly set in their ways than middle-aged people is scant, see, e.g., Nicholas L. Danigelis, Melissa Hardy & Stephen J. Cutler, *Population Aging, Intracohort Aging, and Sociopolitical Attitudes*, 72 AM. SOCIO. REV. 812, 823 (2007), though both elderly and middle-aged people appear to have more stable attitudes than adolescents and young adults; see Elias Dinas, *Opening "Openness to Change": Political Events and the Increased Sensitivity of Young Adults*, 66 POL. RSCH. Q. 868, 876 (2013); Jon A. Krosnick & Duane F. Alwin, *Aging and Susceptibility to Attitude Change*, 57 J. PERSONALITY & SOC. PSYCH. 416, 421 (1989).

406. *E.g.*, ALLPORT, *supra* note 400, at 261-81.

407. *See id.*

408. *Cf.* Kate Taylor, *Manhattan School in Zoning Battle Is Struggling, but It Has Fans*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/nyregion/public-school-191->

important for children of all races for a number of reasons. One is the contact hypothesis referenced above, which suggests that when students attend racially integrated schools they will have more positive attitudes towards groups to which they do not belong. Another is that students who attend diverse schools will learn more and better understand the experiences of people who belong to different racial groups, which may help them develop skills that are important to thrive in a diverse world and economy.⁴⁰⁹ A further benefit of integration is that when public schools are racially segregated, schools attended overwhelmingly by Black students are starved for resources, and student achievement suffers.⁴¹⁰ All that said, the case for racially integrating *age-restricted* communities is substantially diminished because children are scarce or even entirely absent in these communities.⁴¹¹ In short, the hyper-segregated nature of age-restricted communities does not meaningfully contribute to the segregation of schools because there are virtually no school-aged children living in these communities.

Another terrible consequence of residential segregation is that it reinforces existing inequalities in the labor market. Word-of-mouth networks are vital in helping people find jobs.⁴¹² Such tips from friends or relatives seem to explain how roughly half of all workers landed in their current jobs.⁴¹³ As one might expect, there are significant racial disparities at play, and there is reason to believe that these social networks work more effectively for white Americans than for Black Americans, though informal networks loom large

manhattan-rezoning-upper-west-side.html [https://perma.cc/X656-8L3G].

409. Jennifer Jellison Holme, Amy Stuart Wells & Anita Tijerina Revilla, *Learning Through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 EQUITY & EXCELLENCE EDUC. 14, 18-19 (2005).

410. See, e.g., Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV. 919, 939-40 (2004); Sarah J. Reber, *School Desegregation and Educational Attainment for Blacks*, 45 J. HUM. RES. 893, 912-13 (2010).

411. For example, the city of Laguna Woods has no public schools, so it uses municipal revenue that otherwise would have gone toward schools to build golf cart trails. Ross Andel & Phoebe S. Liebig, *The City of Laguna Woods: A Case of Senior Power in Local Politics*, 24 RSCH. ON AGING 87, 100 (2002). As it happens, the city approved the expenditure of resources on dog parks after “cit[ing] psychosocial benefits for seniors of owning and interacting with a pet.” *Id.*

412. The canonical source is MARK GRANOVETTER, *GETTING A JOB: A STUDY OF CONTACTS AND CAREERS* (2d ed. 1995).

413. Yannis M. Ioannides & Linda Datcher Lounsbury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. ECON. LITERATURE 1056, 1058 (2004).

regardless of race.⁴¹⁴ By some credible estimates, differences in word-of-mouth networks account for approximately one-fifth of the divergence in employment status between Black and white young men.⁴¹⁵ These problems do not seem prominent at firms where the workforce is racially diverse,⁴¹⁶ but if a firm is itself racially homogenous then it is likely that members of racial groups that are underrepresented will not be referred to jobs at the firm through informal networks.

The empirical research on job searches points to the presence of significant neighborhood effects—in some communities information about economic opportunities is plentiful, whereas in others the information environment is comparatively impoverished.⁴¹⁷ These problems are especially pronounced in neighborhoods characterized by high levels of poverty among Black Americans.⁴¹⁸ In these neighborhoods, high-quality job opportunities are few and far between, and residents are less willing to help their contacts with informal job searches.⁴¹⁹ The segregation of people of color into particular neighborhoods, particularly high-poverty neighborhoods, seems to contribute substantially to pervasive racial income inequality in the United States.

Once again, though, the problems that result from racial segregation and the resulting segregation of informal social networks is a much larger problem for working-age Americans than it is for Americans in their late sixties, seventies, and eighties. In age-restricted communities, less than 20 percent of the population typically works.⁴²⁰ Presumably most of these residents have exited the labor market voluntarily and do not plan to return. Thus, the racial segregation of neighborhoods plays a far larger role in cementing the racial income gap for Americans in their twenties and thirties

414. See David A. Reingold, *Social Networks and the Employment Problem of the Urban Poor*, 36 URB. STUD. 1907, 1925 (1999).

415. Ioannides & Loury, *supra* note 413, at 1059.

416. See, e.g., Roberto M. Fernandez & Isabel Fernandez-Mateo, *Networks, Race, and Hiring*, 71 AM. SOCIO. REV. 42, 58 (2006).

417. Ioannides & Loury, *supra* note 413, at 1071-72.

418. Lindsay Hamm & Steve McDonald, *Helping Hands: Race, Neighborhood Context, and Reluctance in Providing Job-Finding Assistance*, 56 SOCIO. Q. 539, 552 (2015).

419. See *id.*; see also Alexandra M. Curley, *Draining or Gaining? The Social Networks of Public Housing Movers in Boston*, 26 J. SOC. & PERS. RELATIONSHIPS 227, 240-41 (2009).

420. *Quick Facts*, *supra* note 384.

than it does for those in their sixties and seventies. Just like the rise of hyper-segregated, age-restricted communities does little to prompt public school segregation, it seems to be a trivial contributor to the racial inequality in economic opportunities. By the time Americans of any race are moving into an age-restricted community, the die has unfortunately been cast.⁴²¹

Health disparities are another relevant consideration. To the extent that racial segregation resulted in white seniors receiving higher quality medical care than Black seniors, that dynamic would justify aggressive interventions to desegregate age-restricted communities. While Black and white Americans do largely receive their care at different kinds of hospitals, the evidence about significant racial disparities in the quality of medical care that elderly Black and white Americans receive at these institutions is inconclusive.⁴²²

In terms of changing racial attitudes, promoting school integration, reducing the racial gap in income, and ensuring equal quality of medical care, then, the benefits of achieving more racially integrated age-restricted communities would seem to be modest. These are, however, not the only harms that flow from racial segregation, so there remain good reasons not to ignore the racial homogeneity of age-restricted communities.

One important reason to promote the racial integration of age-restricted communities involves the polarization that can arise in communities characterized by marked homogeneity. Examining Sun City, McHugh and Larson-Keagy identified racism as an aspect of life in the community, with residents of retirement communities voting overwhelmingly against designating Martin Luther King Jr. Day as a state holiday in Arizona in a high-profile 1990 ballot initiative.⁴²³ Their account suggests that negative stereotypes about Black people are commonly embraced in Sun City, and may result from the scarcity of Black faces in the community.⁴²⁴ This

421. Younger white Americans are generally more willing than older white Americans to live in neighborhoods with large African American populations. See William A. V. Clark, *Changing Residential Preferences Across Income, Education, and Age*, 44 URB. AFFS. REV. 334, 347 (2009).

422. See, e.g., Ashish K. Jha, E. John Orav, Zhonghe Li & Arnold M. Epstein, *Concentration and Quality of Hospitals That Care for Elderly Black Patients*, 167 ARCHIVES INTERNAL MED. 1177, 1180-82 (2007) (summarizing the literature and analyzing new data).

423. McHugh & Larson-Keagy, *supra* note 393, at 247.

424. See *id.*

claim is subtly distinct from the contact hypothesis—it is the idea that physical separateness may make seniors in age- and race-segregated communities feel that they have nothing in common with outsiders and that they and the state owe these outsiders nothing.⁴²⁵ If extremely segregated communities become cauldrons of racial animosity, then members of protected groups who do come into contact with residents of these communities, either in the service sector or in health care settings, will endure mistreatment.⁴²⁶

A complementary consideration is that the more homogenous the community demographically, the more extreme the group's views become.⁴²⁷ Even having a few more people in the community who look different or think differently may improve the wisdom of collective decision-making in these homogenous communities. Seen from this perspective, the absence of not only young people but also people of color from age-restricted communities creates a kind of groupthink that leads communities astray. This has consequences not only for local political decision-making but also for decision-making in states and the nation as well, especially given the high rates of voter participation among elderly people and their concentration in swing states like Florida and Arizona.⁴²⁸

Indeed, because these age-restricted communities are so homogenous, the law might get a lot of epistemic “bang for its buck” by even taking modest steps to integrate age-restricted communities. That said, much rides on the fortitude and patience of community newcomers to offer perspectives that will be unpopular among their neighbors. The residents of The Villages tell researchers that they are very happy when surveyed about their subjective well-being, and there is some disconcerting evidence to indicate that the community's homogeneity might contribute to the high levels of

425. *See id.*

426. *Cf. Wetzell v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 864 (7th Cir. 2018) (holding that the operator of a senior living community could be liable under the Fair Housing Act for failing to stem pervasive sexual orientation discrimination against a resident about which it has been informed).

427. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 74-75 (2000).

428. Interestingly, it appears that the political clout of senior citizens in affecting policy is largely dependent on the cohesion of senior citizens, as opposed to their sheer turnout numbers in the voting population. *See* Sarah F. Anzia, *When Does a Group of Citizens Influence Policy? Evidence from Senior Citizen Participation in City Politics*, 81 *J. POL.* 1, 11-13 (2019).

satisfaction that its residents express.⁴²⁹ So while hyper-segregated, age-restricted communities may be broken in a fundamental sense, they are broken in a way that, perhaps perversely, seems not to bother most of their current residents.

Efforts to use the FHA and other civil rights laws to promote the racial integration of age-restricted communities further several key priorities. They send signals to members of minority groups that have suffered de facto exclusion that they are free to live wherever they like, and this may in turn create salutary signaling messages for the broader public. These efforts also may help improve the deliberative process within these communities, potentially fostering productive engagement in the political arena. On the other hand, though, several concrete benefits associated with residential racial integration—promoting school and workplace desegregation and fostering friendship, civility, and empathy across racial groups—are dampened in age-restricted communities.⁴³⁰

This state of affairs raises a natural, difficult question about what the government's enforcement priorities ought to be. Should tackling this kind of segregation, to the extent that it violates the FHA, be an enforcement priority for a federal government that is committed to promoting residential racial integration? Of course, if the government has infinite resources, law enforcement should stamp out unlawful discrimination wherever it exists. But, sadly, that is not our world.

Given that the state has finite resources to devote to enforcing civil rights laws, answering this question of enforcement priorities may depend in part on what the government is supposed to be doing when it invokes the FHA. If the government is supposed to be maximizing social welfare and producing positive spillovers such as desegregation in public schools and workplaces, then there may be a weaker case for investigating age-restricted communities, even if those happen to be the most racially segregated communities in the United States. Alternatively, if the purpose of the civil rights laws

429. Sarah Fishleder, Lawrence Schonfeld, Jaime Corvin, Susan Tyler & Carla Vandeweerd, *Drinking Behavior Among Older Adults in a Planned Retirement Community: Results from The Villages Survey*, 31 INT'L J. GERIATRIC PSYCHIATRY 536, 539 (2016); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 147-48 (2007); Strahilevitz, *supra* note 392, at 113-14.

430. *See supra* notes 411, 421 and accompanying text.

is to communicate to the public about what kind of society America wants to be, and what our core values are, then an investigation into what is happening in age-restricted communities will be warranted, even at the expense of investigations in communities that are heterogeneous with respect to age. This would show that no community is above the law.

Regardless of whether one thinks the desegregation of age-restricted communities should be a high civil rights enforcement priority, the persistent racial homogeneity of these communities indicates that they come with serious costs. That is, even though they advance meaningful interests for their elderly residents, it is important to, at a minimum, recognize their racially disparate consequences and consider whether those interests could be achieved in other ways. In this spirit, our calls for reform in takings, waste, tenant protection, and condominium law represent steps toward making ordinary, age-integrated communities better places for older people to live without contributing to residential segregation in the way that age-restricted communities do.

CONCLUSION

In contrast to most other areas of the common law, property law has long taken its subject to be things first, with people entering the conversation mostly by way of their relationships with things—relationships that are assumed to fit an impersonal, transactional, one-size-fits-all model. But pushing to the sidelines of the law the real, varied people who own and live on land results in serious oversights and inequities. Much attention has been rightly paid to the consequences for people of color, Native people, and women. It is time to consider as well the consequences for older people.

Owing to consistently high relocation costs, systematically inelastic incomes, and uniquely short time horizons, important parts of property law offer a decidedly poor fit for older Americans. From takings to waste, and from tenant protection to homeowners' associations, property law's fundamental assumptions can be poor fits for elderly people. And the consequences for their health, safety, finances, and well-being are often quite significant. There is, however, room in all of these doctrines for a fairer, better-tailored law to be made. Because virtually everyone in society hopes to reach old

age one day, providing special protections for older individuals is politically and legally palatable in ways that extra rights for other demographic groups may not be. And even if readers disagree with the normative thrust of our proposals—after all, there are already other aspects of the law that treat elderly individuals better than their younger counterparts—they might understand our Article as a roadmap of where property law might be headed thanks to demographic changes in society and in the composition of the electorate.

Many of the problems we tackle in this Article are problems of excess rigidity that some younger residents also encounter. There are young people whose lives are measurably improved by their relationships with companion animals. There are middle-aged people who are deeply tied to their homes and neighborhoods. There are tenants with disabilities in their thirties who live on fixed incomes. And there are life tenants in their fifties who try in vain to bargain with opportunistic remaindermen. The peculiarities of aging make the circumstances of older Americans in these same situations particularly compelling, but some of the more flexible property doctrines we have proposed here might be justified for other swaths of the population. For example, people of color have historically tended to bear the brunt of urban renewal projects advanced by eminent domain;⁴³¹ perhaps takings doctrine ought to take account of racial inequities like that, too. And perhaps eventually, more flexible property doctrines might be justified for everyone. Experimenting with legal systems that are a little more responsive to the needs of our elders might ultimately reveal the virtues of extending similar breaks to others in our communities or, indeed, to all of us.

431. *See supra* note 109 and accompanying text.