Introduction

Michael Sandel’s theory of justice is attractive and inspirational for a progressive lawyer interested in legal reform. Sandel’s call to go beyond egalitarian liberalism has real and important implications for legal and institutional engineering. For Sandel, to argue for equality of freedom, i.e. of freedom from external coercion, of actual freedom to materially pursue one’s ends and of freedom to form and revise one’s ends in an interpersonal context, independent of any particular conception of the good life is not enough. Progressives need dare and rest their arguments for equality and their policy proposals on their substantive vision of the common good. If we agree with Sandel, then we should be thinking about designing and proposing legal institutions that decidedly advance the substantive goals we care about, solidarity and fraternity for example, rather than endlessly strive to achieve liberal neutrality.

Attractive and inspirational, Sandel’s theory of justice is parsimonious of recommendations for medium level institutional design; it offers little detail guidance to progressive private lawyers called to design background rules for the allocation of scarce resources and necessary burdens. In this essay I will discuss how Sandel’s “thick Republicanism” may help orient the work of lawyers and policymakers interested in a question that is central to recent property debates: the question of the common ownership.

An often misused term, common ownership is best described as institutional arrangements for the cooperative, i.e. shared, joint or collective, use or ownership of resources. In legal terms, it is a catch-all category that includes joint tenancies, tenancies in common, tenancies by the entirety and other forms of marital property, partnership property and corporately owned property. Common ownership is the object of periodical revivals of interest in the legal community. Dismissed by Enlightenment and post-revolutionary thinkers as a medieval relic, common ownership was at the

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2 For more on this characterization of freedom see Talha Syed, Is Welfare the Only Value? pt 2


4 See, for example, Heller and Dagan, The Liberal Commons, Yale Law Journal 2000
center of a heated debate among European jurists in the late 19th century. For it supporters, it held out promises of equality, freedom and meaningful work in conditions of fraternity. More recently, pessimistic accounts such as Hardin’s “tragedy of the commons” or Demesetz unidirectional theory of property evolution from the commons to private property are being revisited. In the US and in Europe, scholars working from different methodological and political perspectives argue that common ownership should have a more central space in the property law of contemporary liberal democracies.

The debate raises both a normative question, i.e., which goals ought common ownership to achieve, as well as one of institutional design, i.e., how could these goals be best accomplished. A variety of benefits may derive from properly designed commons. Some emphasize that finely-tuned adjustments in the number of owners in response to changes in transaction or exclusion costs help maximize the economic value of property rights. By contrast, others note the communitarian ethical rewards of cooperative action, the role of common ownership in preserving ethno-identitarian values, or the benefits of the commons in terms of a more equal distribution of wealth. While the former value autonomy and efficiency, the latter privilege community or equality. Some have noted that common property need not entail a normative tradeoff between autonomy and community. A properly designed collective proprietary regimes should also afford protection to autonomy values by granting strong exit rights.

Sandel’s theory of justice with its emphasis on deliberation, intermediate communities and a substantive notion of the common good seems ideal to cast light on these issues. Aren’t efforts to outline commons regimes that allow for both community and liberal autonomy not only hopelessly doomed to fail but also normatively undesirable and strategically off-target? Aren’t common ownership regimes voluntary intermediate communities committed to substantive values and hence isn’t the need for liberal autonomy and exit secondary? Shouldn’t we draw common property regimes that decidedly embody values such as community, equality and solidarity? This paper addresses these questions. In part 1 I briefly outline Sandel’s theory of justice which I describe as a form of “thick republicanism”. In part 2, I will discuss alternative commons regimes: Heller & Dagan’s “liberal commons” and a regime designed by an imaginary progressive private lawyer and inspired by Sandel’s theory of justice. In part III I will suggest another way of tackling the commons dilemma. I argue that progressive lawyers should combine three insights, i.e. the Hohfeldian/Legal

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6 See Talha, Terry Fisher  
7 G Hardin, The tragedy of the Commons  
8 H Demesetz, Toward a Theory of Property Rights  
10 Bell and Parchomowsky, The evolution of private and open access property, in theoretical inquiries in law (2009), Henry Smith, Semicommon property rights and scattering in the open fields, journal of legal studies 2000  
11 Acheson, The Lobster Gangs of Maine  
12 Benkler, Mattei  
13 Heller and Dagan, Liberal Commons
Realist notion of property as a bundle of entitlements that can be disaggregated, the idea that different types of goods have different nature and characteristics, first highlighted by 19th century European jurists involved in the debate over common ownership and Sandel’s emphasis on commitment to the substantive value and virtues that give meaning to social institutions. A one size-fits all regime will not do. The way out of the commons impasse is to start from the type of resource, its nature and characteristics, argue about the normative purpose or values it honors and shape the bundle of entitlements accordingly. Finally, I will conclude by discussing the broader appeal of Sandel’s call to go beyond egalitarian liberalism for legal engineers.

1. Sandel’s theory of justice: a “thick republicanism”.

Sandel’s theory of justice has been described as a form of republicanism, a neo-Athenian republicanism, that has its sources in Aristotle and Arendt. For Sandel, republicanism is sharing in self-government, sharing in governing a political community that controls its own fate. It requires civic virtues such as concern for the common good, capacity for deliberating effectively, and “practical judgment,” i.e. judgment oriented to action, to identifying the highest human good attainable under the circumstances. These virtues are a matter of practice and habit; we learn them by deliberating, by being steeped in civic life. Three aspects of Sandel’s republicanism are relevant for my discussion of common ownership.

First, Sandel’s republicanism is a “thick republicanism”, as opposed to the thinner republicanism that liberals are willing to endorse. It is thick because it has intrinsic value rather than instrumental value. Sharing in self-government is, for Sandel, an intrinsic good rather than an instrumental one. Political participation and civic virtue are intrinsically important, vital to our nature, something without which we would not be fulfilled human beings, rather than important for the sake of maintaining a just and stable political system of genuinely equal rights. Sandel’s republicanism is thick also because it asks not only what are the procedures for moral reasoning, the means to identify the common good, but also what is the common good. The polis and its institutions, are only a means to an end: the common good, the substantive values that give higher meaning to our life. Hence Sandel’s republicanism goes well beyond the thinner or procedural republicanism embraced by liberals. It goes beyond Joshua Cohen’s ideal of a public deliberation.

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15 Sandel, Justice p 192-195
16 Sandel, Justice 197-199
18 Sandel, Justice pp 257 ff.
among equals that shapes the identity and interests of participants in ways that contribute to the formation of a public conception of the common good. And it goes beyond Habermasian deliberative action theory, where a community of moral agents trying to adopt each other’s perspective arrives at some agreement by giving arguments.

Second, Sandel’s, “localism”, for some not integral to the republican conception but rather an implication of it, is central to a discussion of common property regimes. For Sandel, “from Aristotle’s polis to Jefferson’s agrarian ideal, the civic conception of freedom found its home in small and bound places, largely self-sufficient inhabited by people whose conditions of life afforded the leisure, learning and commonality to deliberate well about public concerns.”

Third and relatedly, Sandel interrogates the relation between economic arrangements and civic virtue. Sandel documents a continuing concern, from the period of the constitution down to the New Deal with the effect of economic arrangements on the citizenry, i.e. the fear that economic arrangements would subjugate workers and render them incapable of achieving civic virtue. Sandel contrasts this early preoccupation for a type of economic production and allocation conducive to self-government with Keynesianism, a version of social planning without any formative conception of persons and society, aiming only at mass consumerism, remote from any ideal of self-government and instead committed to a bureaucratic, expert-oriented, elitist orientation.

This threefold emphasis makes Sandel’s theory of justice particularly relevant to the commons debate. Common property regimes may be seen as legal and economic arrangements where a limited group or community of owners exercises civic virtue by collectively managing a resource to achieve a shared project or according to a shared notion of the common good. Justice, as well as Sandel’s previous work, provide unique inspiration to progressive private lawyers who see common ownership as the vehicle to achieve goals such as greater equality or a sustainable and participatory use of resources.

II. Common Ownership: Liberal Autonomy or Substantive Values?

How can Sandel’s theory of justice help orient the work of private lawyers interested in designing a default legal regime for common ownership? More specifically, how much should we protect the substantive values the community of owners values and rewards? And what space should be left for the autonomous choice of individual owners to revise their values, their goals and to exit?

Liberal autonomy is newcomer to the commons debate, a welcome one. Until recently participants in the debate have focused on “community”. For some community has an ethno-

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19 Joshua Cohen, Deliberation and Democratic Legitimacy, Philosophy, Politics, Democracy. Selected Essays
20 Habermas,
21 Sandel, Reply to Critics p 317
22 Sandel, Democracy’s Discontent. see also, Philip Petit p 76
23 H. Aronovitch, p 637-639
identitarian flavor. In other words, it is possible to design successful common property arrangements that ensure efficient and non-wasteful use of resources as long as co-owners belong to a pre-existing organic community of mutually vulnerable actors, with shared beliefs and more or less stable members. Examples range from the Maine “lobster gangs” to the community of the inhabitants of a small Swiss alpine village who share grazing meadows. For others community has a republican flavor; efficient results are achieved when the common proprietary arrangement is designed in a way that ensures the creation of community, trust, cooperation.

In recent years some have noted that common ownership need not entail a normative trade-off between community and liberal autonomy. Heller and Dagan’s “liberal commons” regime enables a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource while also ensuring autonomy to individual members who retain a secure right to exit. Exit is crucial to liberal autonomy; it enhances the capacity for a self-directed life, it allows mobility in the name of promoting the individual freedom necessary to secure one’s own personal happiness. A regime that makes exit impractical is incompatible with liberalism. Heller & Dagan have translated the commitment to liberal autonomy in medium level guidelines for institutional design, in a regime of default rules regulating 3 spheres. Rules in the sphere of individual dominion: counteract the potentially devastating effects that individual autonomy may have on the efficiency and viability of the commons. The aim is to deter overuse by setting restrictive limits on exploitation tailored to the specific resource and to prevent underinvestment through investment protection rules. Rules in the sphere of democratic self-governance seek to secure community and autonomy by supporting the commoners’ cooperation and by amplify each co-owner’s voice, i.e. ability to influence management from within. Besides procedural norms relating to disclosure, fair hearing and consultation, Heller and Dagan suggest broad majority rule jurisdiction for decisions that increase the pie and sharp limits on majority rule for decisions that can be characterized as redistributive. Finally, and most importantly, rules regulating exit aim at protecting individual autonomy while preventing opportunistic behavior and enhance cooperation; this is done through three mechanisms: short cooling off periods, reasonable exit taxes and rights of first refusal.

While Heller and Dagan’s emphasis on liberal autonomy opens up new vistas on the commons debate, lawyers on the left, wedded to the idea that, in the words of a 19th century advocate, common ownership is “another way of possessing, another system of legislation, another social order” may be reluctant to endorse a regulatory scheme that protects autonomy and facilitates cooperation but leaves too narrow a space for equality and solidarity. Unhappy with the liberal commons, a progressive private lawyer could turn to Sandel’s “thick republicanism” for inspiration. With Sandel, she would ask: what is the purpose of common ownership, as opposed to individual ownership? And, in turn, what are the virtues and values common ownership rewards? She would engage in teleological reasoning and look at forms of common ownership as they currently exist. At this point our progressive private lawyer would be faced with competing interpretations of common

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24 Acheson, Lobster Gangs and Ostrom Governing the commons
25 Carlo Cattaneo, su la bonificazione del piano di magadino. quoted in Paolo Grossi, an alternative to private property.
ownership and would ultimately need to take a substantive position in a difficult normative decision. In Sandel’s words, to decide between rival accounts of the telos of and the virtue honored by cheerleading, golf, university education or marriage we may look at which account makes better sense of the existing rules regulating the practice but we are ultimately carried onto “contested moral terrain where we can’t remain neutral toward competing conceptions of the good life”\textsuperscript{26}.

Our progressive private lawyer would contrast the telos of common ownership with that of individual ownership. Individual property, as historically and currently practiced, rewards a wide set of autonomy values, including both “competency” and “authenticity conditions”, i.e. effective ability act competently and capacity to reflect on and endorse one’s desires and values\textsuperscript{27}. The subject we call “owner” has a relatively wide bundle of entitlements (as opposed to one or few entitlements) comprising, at a minimum, the right to use, to exclude and to transfer.\textsuperscript{28} These entitlements give her the ultimate power to control the scarce and valuable resource. This control power allows the owner to make informed and authentic decisions about the use and transfer of the resource and affords her the sense of responsibility, security and opportunity in planning one’s life that comes from owning as well as the actual ability to actually carry out one’s life plan. It may also yield the comfort and pleasure that comes from emotional and aesthetic identification with one’s property\textsuperscript{29}.

By contrast, common ownership as currently existing in settings such as marital property, condominiums, affordable housing cooperatives, business partnerships, rewards (and should reward) a number of different values. First, owning in common delivers the benefits of collective value-clarification and projectuality. The group of owners comes together to discuss, clarify and realize a vision, a project, or at a minimum, a set of goals for the owned resource. The owners of condominium units gather in the condominium association to “design” their neighborhood, making decisions that involve aesthetic values, issues of public morality, and maximization of their property market value. As often noted, they draw a sort of mini-constitution\textsuperscript{30}. Similarly, in the case of family property, the spouses discuss projects and priorities and plan accordingly the use of their property. Second, common ownership allows better and more informed decision making. For instance, in a business partnership or in an agricultural cooperative, the co-owners have different expertise, business skills and attitudes toward risk translates in better management decisions. Third, participation in collective deliberation and decision-making may translate in individual empowerment. The literature on limited equity coops stresses that the relationships and skills built through cooperation contribute significantly to shareholders quality of life and provide potential resources for the neighborhood. The practice of deliberating in common translates in self-empowerment of the individual owners and a stronger civic sense, which in turn benefits the

\textsuperscript{26} Sandel, Justice p 260.
\textsuperscript{27} John Christman and Joel Anderson eds , Autonomy and the Challenges to Liberalism (2005) p 3.
\textsuperscript{28} for lists of the entitlements see Tony Honore’s classical account and see Stephen Muntzer
\textsuperscript{29} Margaret Radin
Finally, and most importantly for our progressive lawyer, owning in common affords the good of solidarity, i.e. the sense of material/emotional security that comes from being part of the community of co-owners, from sharing a project, and that more impalpable and vague aesthetic thing that is the spirit of community. For instance, family members’ ability rely on family property for individual projects, a child’s degree, reinforces familial bonds of mutual support and common projectuality. In In the context of affordable housing, studies have shown “the spirit of community” may trigger other forms of solidarity including day cares or food cooperatives.

The next question for our progressive private lawyer would be how to design a regime of common ownership that best promotes the goals of collective value-clarification, better decision-making, empowerment and solidarity. Let’s try to imagine how such a regime would look like. The first set of rules to consider is entry rules. Marginal and minimalist in Heller & Dagan’s “liberal commons”, entry rules would be important to a progressive committed to promoting solidarity through property and, more generally, to redressing inequalities of wealth, power and status. But entry entails a difficult trade-off. On the one hand we want to allow the largest number of potential owners to benefit from the virtues of common ownership. Anyone who is ready to commit to these values and sign the “mini constitution” should be allowed to join as a co-owner. This means minimalist entry rules that focus on avoiding discrimination on grounds of race, gender, sexual orientation, religion etc. On the other hand, if the co-owners form a community sharing values and a project, the community should be able to choose its own members, to select those who can best contribute to the goals the community sets for itself. This translates in more detailed entry rules that allow some reasonable and non discriminatory degree of selectivity based on substantive reasons. Minimalist rules regulate entry in condominiums; provisions requiring the consent of the developer before future unit sales are, in the vast majority of cases, held void and the condominium association preemptive right is subject to a strict reasonableness requirement. By contrast, many argue that affordable housing coops should allocate the units to the most qualified applicant according to criteria such as income, education, employment, credit history, ability to contribute to management. Such entry requirements, observers contend, are crucial for the very viability and effectiveness of the project; “creaming” the pool of applicants means minimizing the amount of necessary subsidy per unit and maximizing the number of units for a given subsidy. As these two examples illustrate, effective design of entry rules inevitably involves considering the purpose and nature of the resource owned in common: what, if anything, is required to be good owners and managers of that specific resource.

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31 Kennedy, The limited equity coop as a vehicle, Saegert S & Winkel G Paths to community empowerment. organizing at home american journal of community psychology 1996 24 (4); Van Ryzin G residents’ sense of control and ownership in a mutual housing association, journal of urban affairs 1994 16 (#) 241 Coleman JS social capital in the creation of human capital amercian journal of sociology 94 1988
32 see Northwest real estate co v serio 144 A 245 (Md 1929), Riste v Eastern Washington Bible camp inc 605 P2d 1294 (Wash Ct App 1980), on condo ass see Aquarian foundation inc v Sholom house 448 So 2d 1166 (Fla Dist app 1984) Wolinsky v Kadison 449 NE 2d 151 (Ill App Ct 1983).
33 kennedy, limited equity coop p 103
As to governance rules, our progressive lawyer, would probably rely on Sandel’s republicanism to argue for rules that foster the practice of deliberation and protect the collective project, the substantive values and goals endorsed and pursued by the group of co-owners. This could mean majority rule on every decision, including redistributive ones. In contrast to the liberal commons, the group’s decision to shrink the according to its values and goals would be protected, with less room for minority or individual disagreement. Our progressive lawyer would also privilege equality in the distribution of rights to the flow or income. Income that result from the effort of all commoners, would be divided equally rather than per property share. This would redistribute wealth as to increase material equality, rather than reproduce existing wealth inequalities. However egalitarian division of profits may not work for any commonly owned resource or for any product. Studies show that it has worked for common grazing lands, in contexts as different as Switzerland and India, but it has been rarely adopted in the case of common irrigation systems, where entitlement to water, whether in volume or time-share, is proportional to the size of each co-owner’s fields. As to profits due to individual effort, our progressive lawyer would also opt for an egalitarian criterion. She would give the laborer a return for the labor but distribute equally the rest. This rule would find support in Sandel’s discussion of desert. It would strike a fair balance between egalitarianism and the honorific aspect of justice. Sandel concedes, with Rawls, that effort is partly the result of natural and arbitrary skills or happy social/family background but he also emphasizes that there is something more to effort, a honorific aspect that is vague, difficult to capture but important in giving meaning to our life and practices. However, once again, this idea that there is something to effort can only be translated in rules if we consider the type of resource. For example, family property may be very different, in this respect, from an agricultural cooperative. Individual effort may deserve more recognition within the family, arguably, a “partnership” with a higher degree of socio-economic equality, than in an agricultural cooperative created to foster development in a depressed rural region where co-owners belong to different segments of the needy and this translates in different degrees of skills and ability to contribute efforts.

Finally, while the need to regulate exit in a way that enhances cooperation remains paramount, our progressive lawyer would contemplate limiting exit to protect the achievement of the group’s goals or project. Rather than-delaying exit through longer cooling off periods, which, she would agree with Heller and Dagan, would threaten the cohesion of the group and thwart good governance, she would consider a general rule enabling the group to link exit to the achievement of certain group objectives. Such rule would allow the community of co-owners to delay disruptive exits that could hinder the attainment of a specific productive or business objective or to restrict exit where free exit would impact the very viability and effectiveness of the project. But, once again, the effectiveness and desirability of restricting exit depend on the nature of resource owned in common. It is sensible in the context of affordable housing. In both limited equity coops and community land trusts, exit is restricted in two respects: co-owners can sell only to another low-income buyer or to the community land trust and the resale price is limited. The restrictions are crucial to the very

35 Margaret mc kean success on the commons a comparative examination of institutions for common property resource management in journal of theoretical politics 1992 p 247
36 see family law literature, and case law, for example O Brien v O brien  1985 NY
achievement of the project’s goal, that is, keep housing affordable to multiple generations of low income owners, rather than benefiting only the first buyers. However, limits to exit are less justified in “love it or leave it” relationships\(^\text{37}\), such as family property or business partnerships. Arguably, family emotions and relations are “special” and such that limits on exit from common family property would be intrusive. One of the reasons of the relative decline of the tenancy by the entirety as a form of marital property and of the general preference for joint tenancy is that, in the former, partition is not an available remedy, divorce being the only way to exit. Similarly, in the case of business partnerships, a partner is allowed to dissociate at any time and is entitled to the value of her interest in the partnership, irrespective of any contrary provision in the partnership agreement, although dissociation may be wrongful and trigger liability for damages\(^\text{38}\).

III. A New Approach to the Commons: Goods, Values and Entitlements

Would the commons regime designed by our hypothetical progressive lawyer and inspired by Sandel’s theory of justice, be illiberal? At times yes, the autonomy of the individual co-owner would be compromised. Are we comfortable with this sacrifice because we are honoring and protecting the values that common property as opposed to individual property embodies? I believe not, or better, not always. A collective property regime that sacrifices autonomy becomes a less attractive option. In many instances, even those of us who are most committed to community, equality or solidarity, are not ready to sacrifice autonomy, i.e. the effective ability to act from reasons that are most fully one’s own in a context of interpersonal relations of mutual recognition.\(^\text{39}\) But aren’t in any event efforts to mediate between autonomy and communal values doomed to fail or be unsatisfactory? Yes, I don’t believe a one size fits all model can balance autonomy and community in a satisfactory way. The liberal commons are likely to carve out too much space for autonomy where there are strong reasons to privilege the protection of the project and values of the group, as in the case of an affordable housing coop. The commons regime designed by our progressive lawyer is likely to sacrifice autonomy in instances where there are plausible reasons for allowing a wider margin for individual choice, disagreement and exit, as in the case of on agricultural coop or business partnership.

For progressives, the way out of the commons dilemma may be to abandon the idea of a one-fits-all regime and to design bundles of entitlements that are good specific, i.e. tailored on the type of resource owned in common as well as on the values evoked by and the social meaning typical of that type of resource. Such solution would build on three insights, crucial to 20\(^{\text{th}}\) century property and

\[^{37}\text{Saul Levmore, Love it or Leave it: property rules, liability rules and exclusivity of remedies in partnerships and marriage, in Law & contemporary problems, 1995 p 221.}\]
\[^{38}\text{Bromberg and Ribstein on Limited Liability Partnerships, the Revised Uniform Partnership Act and the Uniform Limited Partnership Act (2010).}\]
\[^{39}\text{see Joel Anderson and Axel Honneth, Autonomy, Vulnerability, recognition and Justice in Christman & Anderson, eds, Autonomy and the Challenges to Liberalism, 2005.}\]
normative theory: the Hohfeldian/Legal Realist image of property as a bundle of entitlements, the European-continental notion of “one property and many properties”, and Sandel’s call to foreground substantive notions of virtue and the common good in normative and policy debates.40

The image of property as a “bundle of rights” has gained wide acceptance both in the United States and in Europe. Hohfeld paved the way by disaggregating the concept of “right” in opposites and correlatives and many after him have specified the “incidents” of property rights.41 In this widely shared Hohfeldian perspective, property consists of a set of entitlements: the owner’s right to exclude, privilege to use, power to transfer, immunity from loss. These entitlements are susceptible of being distributed between different subjects and parcelled along a temporal dimension. Further, they are relative rather than absolute. In various circumstances, the owner’s right to exclude is limited by non-owners’ right of access, her privilege to use by others’ right to be secure from harm. The disaggregation of property has important implications for institutional design. If property is the enforcement of the individual owner’s monolithic package of full entitlements, the individual enjoys the greatest independence, privacy and personal sovereignty allowable in a social order. The government’s power stops at the threshold of the owner’s private sphere of action, which the government may not invade absent some tremendously weighty social goal.42 On the other hand, if property is a more flexible and looser set of entitlements, some of which may be less than full and distributed among different individuals, then opportunities for regulatory and distributive intervention open up. A looser and disaggregated concept of property allows lawmakers to achieve a variety of regulatory, and potentially, re-distributive goals by playing with the number of owners, the package of assets and the scope of the owner’s dominion.43

Crucial for designing the best bundle of property rights to achieve a more equal distribution or a more efficient and sustainable use of a certain resource, is a goods-specific approach that looks at the nature and characteristics of the particular good. Early 20th century Continental European jurists who wrote about common ownership saw this; Josserand in France and Pugliatti in Italy launched the slogan “one property, many properties”.44 While the concept of “property” describes the owner’s general sovereignty over a good, differences in the quality of goods give rise to many “properties”, real property and personal property, urban property, rural property and industrial property. Each of these “properties” requires a different bundle of property rights and a different regulatory regime. In contemporary language, resources differ as to rivalrousness and excludability and hence pose different allocative and regulatory questions.45 Central to economics and social theory, this insight has remained relatively marginal in contemporary private law debates.46 Epstein

40 for an extensive discussion and application of this approach see Talha Syed,
41 Tony Honore and Stephen Munzer but see also Becker.
42 John Christman
43 Bell & Pachomowsky
44 Josserand, Configuration du droit de propriete dans l’ordre juridique nouveau, in melanges sugiyama 1940, Savatre pugliatti, la properieta’ nel nuovo diritto 1954
45 Talha Syed, Resources, Interest and Entitlements: Three Analytic Frameworks for Proeprty”
47 For an approach that centers property analytics around they type of good see Syed supra
has suggested that “any responsible search for a sound system of property rights searches for the net social advantage by minimizing the sum of the rival inconveniences”\(^48\). These inconveniences are coordination and exclusion costs which depend on the nature of the resource in question and the technology available to exploit it.

While Epstein’s normative focus is on efficiency and individual liberty, Sandel’ theory of justice foregrounds a pluralistic focus on values. Resources differ not only in the degree of rivalrousness and excludability but also in the values, interests and social meaning they involve. The idea of goods-specific principles of allocation is central to a strand of contemporary social and normative theory. Michael Walzer’s “Spheres of Justice” and Jon Elster’s “local justice” suggest that different goods should, or are as matter of fact, allocated by different principles. Flutes, Sandel tells us, are meant to be played well: good flutes should be allocated to those who can play them well. In designing common property regimes, for each type of resource, we should ask, with Sandel, which virtues or values does common ownership of this type of good reward and honor? At times, the nature of the resource, i.e. its characteristics and the values or virtues it involves, justifies sacrificing liberal autonomy to the substantive values that give meaning to the life/project of the group of owners. Two cases where autonomy may be sacrificed, where we should dare be, in Tom Nagel’s words “progressive but not liberals”\(^49\), include, in my view, affordable housing cooperatives and common ownership of certain natural resources, such as fisheries.

Housing is a private good characterized by a high degree of rivalrousness and excludability. Further, housing is resource central to liberal autonomy. One’s home is a private refuge, a safe harbor, a source of material security and emotional stability. Housing is crucial to the primary good “self-respect”, for both aspects of self-respect, i.e. the sense that one’s plan of life is worthwhile and confidence in one’s ability to fulfill life plans. If we take liberal autonomy seriously, greater equality in access to housing is paramount. Common ownership has been an important tool for affordable housing projects. However, both limited equity coops and community land trusts often involve restrictive entry rules (interviews, eligibility requirements) as well as restrictive exit rules (limits to the resale price, limits to the reimbursement of improvements, and limits to the pool of prospective buyers). These are significant sacrifices of owners’ autonomy. Observers committed to the “liberal commons” can plausibly argue that these limits hinder the individual’s sense of worth, the authenticity of one’s life plans as well as the confidence in one’s ability to carry them out. Are these limits to liberal autonomy justified? I think yes. I think the case for a bundle of entitlements that privileges community and solidarity over autonomy can be made in a powerful way.

What are the values and virtues honored by common ownership of housing? Why do we choose to have common ownership housing alongside privately owned or over other schemes of affordable housing? Because of two substantive values we deeply care about. First, equality of autonomy, or of self respect. If self respect is a primary good we should secure at any cost, this

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\(^48\) Epstein On the optimal mix of private and common property, in Ellen Frankel Pual Fred D Miller and Jeffrey Paul eds Property Rights 1994.

\(^49\) Tom Nagel, Progressive but not Liberal, NYRB
means eliminating the social conditions and the material obstacles to self respect for the largest number possible. Given the structure and the constraints of the housing market, the best way to make good quality affordable housing available to low income buyer in the long term is limiting entry and exit. We choose common ownership of housing also because we care about a second value, community. We value the sense of empowerment that comes from being part of a community of homeowners sharing values and problems, the sense of agency and creative energy that come from designing one’s neighborhood together. We also cherish the empowerment afforded by collective decision-making, the learning process and the development of new skills. If these are the values honored by common ownership of housing, a regime that sacrifices autonomy in entry, governance and exit rules is justified. Yes, we do forgo some autonomy, but because we care deeply about equality and community. What we sacrifice is, mostly, the ability rely on the surplus in the resale price for other life projects. In other words, what we forfeit is “income rights”. And, one could argue, in imperfect markets, full income rights afford owners a benefit that is equivalent to an economic rent. We loose this aspect of autonomy but we gain on the community and interpersonal side of autonomy. Given the nature of capitalist society and the structure of the housing market we cannot have all, more equality and full autonomy, a sacrifice is required. We choose to have more equality and to forgo some degree of autonomy. The liberal commons would privilege autonomy in all its aspects but, in the case of affordable housing, at the cost of greater equality and community.

A sacrifice of aspects of liberal autonomy may be justified also in common ownership regimes for environmental conservation. Policymakers are increasingly relying on common ownership to prevent the overuse of environmental goods including clean air, water and wildlife by controlling access and use. Common property avoids the tragedy of open access by limiting the number of resource users and by regulating their use. If open access is defined by the lack of constraints on both number of users and the amount that each user may extract, common ownership solves both problems. Group size is limited and the rights and duties to limit extraction are well defined. Historically, the commons have proven successful means for environmental conservation. The “open field” system adopted in England and across northern Europe for a thousand years, the Japanese Iriachi, or, more recently, the consensus based resource management regime for Thanet, on England’s southeast coast are successful examples of common ownership of environmental resources. These regimes are successful because they privilege community governance and, at times, inevitably forgo aspects of the participants’ autonomy. They are successful, Ostrom and others have argued, because structured according to principles of good institutional design that are, in liberal accounts, illiberal. Can we make a plausible case for this

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51 John Christman argues that while control rights serve autonomy-protecting functions, income rights serve an allocative function and that the contrast between each of these pairs is so stark that the principles of distributive justice must deal with them as completely separate normative structures, p 8.
52 Daniel H Cole Pollution & Property 2002.
53 Hnery Smith, The Open Field
54 Margaret McKean, Success on the Commons
“illiberality”? I believe yes. The use and management of fisheries is a recurrent example in the literature. To shape the bundle of entitlements that will best promote efficient and sustainable use, we need to look consider the characteristics of the good “fisheries”, a common good with medium rivalrousness and low excludability, and the values involved. What are the purposes of fisheries and the values we honor through common use rights over fisheries? Sustainability, efficiency and a set of aesthetic values are at stake. Fisheries are a resource system that poses unique assignments problems, assignment of space and technology so as to increase efficiency and equity. Fisheries are also a legacy we, collectively, have a duty to preserve. Geographers discuss the shift from the modernist narrative of human subjugation of nature through knowledge and violent means to less exploitative social relations and less predatory practices toward nature. Further, there is an important aesthetic/spiritual dimension of fisheries and, relatedly, the need to move away from the strictly scientific ethos of conservation to the spiritual and moral dimensions of ecology. Consideration of the characteristics of the resource “fisheries” and argumentation about the set of substantive values involved may enable us to make a powerful case for a commons regime that sacrifices autonomy both in entry rules (entry requirements: entry restricted to residents of certain neighboring villages, excluding large farmers and those who earn wages from employment in other sectors) and in governance rules (majority decision-making, monitoring, graduated sanctions etc…i.e. measures that shrink the space for disagreement).

III. Conclusions

Sandel’s theory of justice, I have argued, offers important insights to progressive private lawyers interested in designing property regimes that advance values such as greater equality, solidarity or sustainability. In order to design the most effective bundle of property rights progressive private lawyers should combine an analysis of the characteristics of the type of resource with a robust discussion of the substantive values and interests peculiar to ownership of that type of resource. Affordable housing coops and common management of environmental resources are instances in which a powerful case may be made for being “progressives but not liberals”, for forgoing some aspects of liberal autonomy/neutrality to privilege substantive values.

For progressives, Sandel’ theory of justice has also a broader appeal, well beyond this “local” relevance. It has heuristic value and an energizing effect. It is a powerful call for daring bring back substantive notions of the common good to policy debates.