PROPERTY AND SECRECY

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Author's Synopsis: Real estate ownership is conventionally viewed as a clear matter of public record. Yet purchasers of real estate are increasingly employing legal techniques to preserve their anonymity by registering their properties through trustees or opaque shell companies. This turn of events calls for delineating the appropriate boundaries of secrecy in property.

This Article identifies primary contexts in which the issue of secrecy comes up in the law, including in financial and proprietary settings, such as secret trusts or undisclosed accumulation of shares in public corporations. It then underscores the unique features of secrecy in real estate. It offers an innovative analysis of the ways in which anonymous property holdings might affect various types of stakeholders, from central and local governments up to neighboring property owners in both their individual and collective capacities, such as in a homeowner association. The analysis establishes normative criteria for requiring property owners to disclose relevant details. It calls, however, to distinguish between a duty to provide information and the operative results of such disclosure in regard to interested parties' capacity to act on such information.

This Article argues that, somewhat counter-intuitively, an elaborate discussion of the proper limits to the interest in secrecy would challenge prevailing forms of exclusion and other types of defensive or offensive tactics against "unwelcomed neighbors," whenever such practices have no normative merit. The discourse on secret real estate holdings would therefore shed broader light on the underlying societal features of ownership.

I. INTRODUCTION 382
II. FOUNDATIONS OF THE RIGHT TO SECRECY 386
III. SECRECY IN PROPRIETARY CONTEXTS 395
A. Secret and Half-Secret Trusts 395
B. Secret Buy-Out of Corporate Shares 401
IV. REAL ESTATE, SECRECY, AND EXTERNALITIES 408
A. Owner's Arguments for Secrecy 410
B. Other Stakeholders' Interest in Disclosure 414
1. National and State Government 415

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2. Local Government 416
3. Neighborhood or Homeowner Association 418
4. Individual Neighbors 424
C. Secret Land Assembly 425
D. Shifting Majorities in Homeowner Associations 431
E. The Boundaries of Secret Ownership and Social Design 434
V. CONCLUSION 436

I. INTRODUCTION

In an extensive report published in 2015, the *New York Times* unveiled the bourgeoning phenomenon of secret ownership in Manhattan's high-end condominiums.[1] The Time Warner Center is highlighted as one such condominium, in which the majority of owners undertake various measures to remain anonymous, hiding their identities behind trusts or shell companies.[2] Such companies may often be registered in the names of accountants, lawyers, or relatives, or may simply remain silent on the identity of its shareholders, an option made available by Limited Liability Companies (LLCs) and other firm structures.[3]

In tracking down the owners' identities, the report identifies a combination of American and foreign wealth. Secrecy is preserved not only in the land register's records but also in the building's internal layout and practices. Thus, for example, there are no door buzzers or mail slots with residents' names. According to the report, the developer often does not inquire in detail into the purchasers' actual identities once payment is guaranteed, and the management company further aids in facilitating

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[1] *See* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), http://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html?_r=1.

[2] *See id.* According to the report, 64 percent of the condominium units are owned by such shell companies.

[3] Delaware, for example, allows LLCs to refrain from disclosing the identity of their shareholders. *See* Kevin Vella, *Anonymity in Delaware*, VELLA WOODS (May 10, 2015), http://velakeller.com/anonymity-in-delaware/; *see also* Brett Melson, *Form a Delaware LLC without Names on the Public Record*, DELAWAREINC.COM (July 7, 2014), https://www.delawareinc.com/blog/form-a-delaware-llc-without-names-on-the-public-record/. For the origins of LLCs, incorporated as of the late 1970s under state enabling statutes to allow for both limited liability (such as in corporations) and "pass-through taxation" (such as in partnerships), see LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010).

such anonymity over time. Moreover, under the building's bylaws, if the board rejects a buyer, existing owners might be liable for purchasing the unit, thus "creating a disincentive" to scrutinize buyers.[4] The end result is one in which all parties operating in the building seem to have a stake in secrecy.

One may question, however, whether secret ownership should become the new norm. The concept of modern real estate public registries is conventionally based on serving the instrumental goal of informing interested parties—in principle, the entire world—about the existence of right holders, thus decreasing the probability of a clash between rival claims. In more traditional societies, based mostly on local transactions, parties could have kept real estate contracts private while binding third parties in retrospect. The development of the modern real estate market, and particularly the proliferation of non-possessory rights, such as mortgages, necessitated new institutional solutions.[5] The public registry system, which enjoys territorial monopoly, has emerged as the mechanism that allows property rights to practically operate as rights in rem, good against the world, and to facilitate an impersonal real estate market. While countries diverge in their systems of registration, terms such as transparency and publicity became focal points for real estate ownership.[6]

The current use of trustees and shell companies in high-end condominiums and elsewhere seeks to unbundle the concept of publicity in real estate ownership. The public registration of the asset in the name of the shielding entity (trustee or a shell company) aims at protecting the formal owners against competing claims, allowing them to exercise the general

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[4] *See* Story & Saul, *supra* note 1.

[5] *See* BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF CONTRACTUAL REGISTRIES: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 43–62 (2012).

[6] *See id.* at 62–75. The current concept of publicity has also reinvigorated debates about some of the fundamental features of property law, such as the *numerus clausus* ("closed list") principle. Some have argued that this principle remains intact for the same "information cost" reasons that justify registry systems, whereas others believe that the act of publicity could also allow for the design of new forms of interests with third party effects beyond such a closed list. *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2001); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

set of rights, powers, and priorities of ownership good against the world.[7] These external features of publicized ownership are allegedly unaffected by the inner, hidden-from-sight content of the shell, and vice versa. Such unbundling of publicity and secrecy may be viewed as relying on a modular approach to property, according to which the "outbound" aspect of exclusion applying vis-à-vis non-owners may be separated from the "inbound" aspect regulating the asset's beneficial ownership.[8] Under this approach, the former aspect of ownership must be public knowledge; the latter can be kept secret.

But is this really the case? May the interior of the shell—in the sense of the property's actual ownership—always remain hidden from the public eye if the owner so wishes? Or should we recognize the fact that such anonymity may also generate externalities for various stakeholders located outside the shell, externalities that need to be taken into account as a matter of legal policy? This Article offers an innovative analysis of the dilemmas posed by the bifurcated model of publicity and secrecy in real estate ownership. It identifies the various reasons that owners may have to keep their identities private, and it balances them against the interests of different stakeholders to learn of relevant details. Stakeholders comprise public entities, such as central and local governments, as well as private parties. These private parties, on their part, may include adjacent landowners—in the case of land secretly designated for future development—or unit owners within a condominium, acting as both individuals and a collective via the homeowner association.

A key point made in this Article is that a principled distinction has to be made between the potential duty to provide details about the actual owner and the operative results of such a disclosure in regard to interested stakeholders' capacity to act on such information. In so doing, this Article focuses on private stakeholders in their individual and collective capacities, such as in the case of condominium unit owners. It calls for drawing the lines between a relatively narrow set of cases in which neighbors in their organized capacity may take measures that act on such information (screening buyers) and the much broader scope of liberty that an individual neighbor should enjoy (deciding to exit).

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[7] *See* AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 39–41 (2013).

[8] For the modular approach to property, by which "[b]oundaries carve up the world into semiautonomous components—modules—that permit private law to manage highly complex interactions among private parties," see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1703 (2012).

Furthermore, this Article argues that the normative principles that should shape the duty of disclosure in real estate ownership and, consequently, the operative results that may follow from the release of such information, should be attuned to "public policy" considerations that entail a broader view of the societal features of ownership. Such an explicit discussion of the proper balance between secrecy and disclosure could actually work to mitigate current practices of exclusion that have no normative merit (for example, covert forms of discrimination against minorities). Moreover, public policy considerations have long been a part of the design of private law, and property in particular, and therefore do not call for the taking over of this private law query by explicit constitutional principles.

This Article is structured as follows. Part II presents prominent contexts in which the question of secrecy comes up in the law and the types of arguments made for and against it. It discusses the legitimacy of anonymous forms of expression in traditional and new media; the scope of such anonymity when the action allegedly infringes on another person's intellectual property; and secret contributions to political campaigns. In all of these cases, the law has to identify the various stakeholders that may be affected by secrecy and to set the proper balance regarding the control over relevant information.

Part III analyzes secrecy and its potential positive and negative externalities in two financial and proprietary contexts, which may be instrumental for the later discussion of anonymity in real estate. The first setting is that of secret and half-secret trusts as alternative mechanisms for intergenerational asset transfer and their apparent tension with the publicity requirements for wills. The second context is that of secret accumulation of securities in public corporations and the regulatory rules for disclosure of "beneficial ownership" once a certain threshold is crossed. While different from one another, both issues highlight the tension between the interest in secrecy and the role for disclosure.

Part IV takes up the main theme of secrecy and externalities in real estate ownership. It starts by outlining potential deontological and instrumentalist arguments for keeping the owner's identity private, and it then moves to study the various circles of stakeholders and their potential interest in disclosure or secrecy. It touches, for example, on how federal or state governments may wish to obtain such information to combat money laundering or tax evasion, but could also have a tacit interest in preserving secrecy if the government is motivated to lure foreign capital. A local government may be interested in disclosure to navigate its fiscal

policy or to better plan for future needs based on the general profile of owners; but it may also seek to streamline capital investments and turn a blind eye.

This part then focuses on identifying the positive and negative externalities that secrecy generates for private parties in their capacity as an association or group and as individuals. To bolster the discussion, Part IV analyzes two such scenarios, in which the issue of externalities plays a key role in establishing the normative boundaries of secrecy.

The first case is that of secret land assembly, in which a would-be developer of a large-scale project buys land from numerous landowners, concealing the developer's identity to prevent potential holdouts and to decrease the consideration paid for the land.

The second setting deals with common interest developments, such as condominiums, in which the homeowner association and its executive board establish rules that regulate the use of common amenities, as well as those of the housing units. In such cases, owners in both their individual and collective capacities may have an interest in knowing the actual identity of buyers, if this may implicate a potential rule change by majority vote. Thus, for example, owners in a condominium, whose rules currently allow for smoking in the housing units and common facilities, may have a legitimate interest in knowing that a unit is about to be bought, through a shell company, by an anti-smoking activist who plans to campaign to change this rule.

The analysis concludes by discussing the broader effects that an overt discussion of the interests in secrecy versus disclosure in real estate ownership may have for shedding a light on the underlying societal features of ownership. Such a discourse would work to challenge prevailing practices of exclusion, which otherwise lack normative merit.

II. FOUNDATIONS OF THE RIGHT TO SECRECY

Issues of anonymity, secrecy, and privacy constantly come up in the law.[9] These terms do not correlate perfectly. Thus, for example, when the police seek a judicial warrant to enter a person's home to investigate her potential affiliation with a terrorist organization, the person's identity is known, but the nature of her actions (or inactions) remains private to that

[9] This part focuses on constitutional law. *See* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 7 (1991).

point.[10] Conversely, when a person whose reputation has been allegedly defamed on the internet by an anonymous speaker demands that the Internet Service Provider (ISP) reveal the speaker's identity, the nature of the action—the defamatory speech—is public knowledge, but the identity of the wrongdoer is as of yet undisclosed.[11]

Moreover, each of the abovementioned terms may have varying meanings in different contexts. Privacy proves to be a particularly complex term. This term may refer, inter alia, to the preservation of an undisturbed physical space ("physical privacy") or to the confidentiality of a piece of information ("informational privacy").[12] Although both aspects may be understood as falling under Samuel Warren and Louis Brandeis's seminal conceptualization of privacy as "the right to be let alone,"[13] the categorization of a certain scenario may carry legal consequences. This is so, for example, because the Fourth Amendment's protections were conventionally associated with the physical invasion of privacy.[14] This doctrine was only partially updated by the Court when it searched for other scenarios in which a person has a "reasonable expectation of privacy."[15] The challenge of defining privacy has been especially dominant in the aftermath of the 9/11 attacks,[16] with the enactment of the USA PATRIOT Act and its authorization for the mass collection of email records and various online searches.[17] The expiration of the Act on

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[10] For the argument that anonymity and privacy are flip sides of each other, see Jeffrey M. Skopek, *Anonymity, The Production of Goods, and Institutional Design*, 82 FORDHAM L. REV. 1751, 1755 (2014).

[11] *See id.*

[12] *See* Kimberly N. Brown, *Anonymity, Faceprints, and the Constitution*, 21 GEO. MASON L. REV. 409, 412–14 (2014).

[13] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[14] *See* Sonia K. Katyal, *The New Surveillance*, 54 CASE WESTERN RES. L. REV. 297, 302–06 (2003).

[15] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). For a review of current case law on privacy protection in the context of the Fourth Amendment, see Brown, *supra* note 12, at 438–49.

[16] *See generally* Gayle Horn, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity, and the New FBI Guidelines*, 60 N.Y.U. ANN. SURV. AM. L. 735 (2005) (addressing online surveillance provisions created under the USA PATRIOT Act).

[17] *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107–56, 115 Stat. 272 (2001) (providing authorities with the ability to collect information such as email records).

June 1, 2015, and the debate about which aspects of it, if any, should be reenacted, reinvigorate core questions about privacy as a civil liberty in an age of offsite searches.[18]

Moreover, contemporary surveillance technologies, such as facial recognition technology (FRT), allow public agencies and private corporations to correlate multiple sources of information—including those collected through social media or commercial transactions.[19] This turn of events makes it virtually impossible to remain an unidentified face lost in the crowd—even when one does not engage in any sort of illegal activity—and it raises hard questions about the current nature of privacy.[20] Moreover, considering the most famous reliance on the right of privacy in a U.S. Supreme Court case—the *Roe v. Wade*[21] validation of a woman's right to choose whether to have an abortion based on her right to privacy as a subset of the Equal Protection Clause's right to personal liberty[22]—it becomes apparent how multifaceted this term is. Finally, privacy is often cited as a normative ground for a claim to remain anonymous or to keep a certain action secret.[23] This means that a concept such as privacy is not only complex on its own terms, but that it also has to be placed in the context of other, partly overlapping, concepts and interests.

With these terminological caveats in mind, this Article focuses on the interest that persons may have in preserving anonymity or secrecy when they take an explicit legal action. This framework generally refers to a person's wish not to be identified with a certain action, or to otherwise keep the true essence of such action hidden from sight, but at the same time, to bind others to the legal consequences of such action, should a conflict arise. The wish to enjoy both secrecy and legal validation must be balanced against the interests of affected stakeholders to either heed such secrecy or, rather, to require disclosure.

This part deals with prominent constitutional law doctrines that deal with the right to secrecy. Obviously, it cannot cover all the settings in which a person may seek to hide a certain action by relying on

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[18] *See* Peter Baker, *In Debate Over Patriot Act, Lawmakers Weigh Risks vs. Liberty*, N.Y. TIMES, June 1, 2015, at A1.

[19] *See* Brown, *supra* note 12, at 411, 426.

[20] *See id.* at 438–49.

[21] 410 U.S. 113 (1973).

[22] *See id.* at 152–54.

[23] *See infra* Part IV.A.

constitutional grounds to validate such secrecy. Some of the cases not analyzed here include the interest of an arrestee or suspect not to have their identity disclosed in order to protect their reputation or that of family members;[24] the interest of whistleblowers or state witnesses to preserve their anonymity, and even more so, to establish a new identity when their exposure would jeopardize them;[25] the privileges of confidential sources of reporters in the printed and digital media;[26] and the potential interest of donors of gametes for in-vitro fertilization to remain anonymous.[27]

The most elaborate discussion to date by the U.S. Supreme Court about secrecy as a legal right—one premised in constitutional liberties—concerns the right to anonymous free speech within the scope of the First Amendment. While anonymous speech has long been an embedded practice since the colonial era and afterwards[28]—one notable example being the signing of the Federalist Papers under the pseudonym "Publius"[29]—the question of whether a person may have a legal right to anonymity in the context of social or political speech began to gain explicit attention in the 1950s and 1960s.[30] During that time, the Court issued a number of decisions invalidating state and city legislation that had required the National Association for the Advancement of Colored People (NAACP) to reveal its membership list.[31] The Court reasoned

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[24] *See, e.g.*, Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, 64 MD. L. REV. 755 (2005) (arguing that the disclosure protection currently awarded to sexual assault complainants, juvenile offenders, or grand jury targets should also be extended to arrestees and suspects).

[25] *See* Skopek, *supra* note 10, at 1761.

[26] *See, e.g.*, Jocelyn V. Hanamirian, *The Right to Remain Anonymous: Anonymous Speakers, Confidential Sources, and the Public Goods*, 35 COLUM. J.L. & ARTS 119, 129–40 (2011).

[27] *See, e.g.*, Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 642 (2012).

[28] For the history of social and political anonymous speech, see Jason A. Martin & Anthony L. Fargo, *Anonymity as a Legal Right: Where and Why it Matters*, 16 N.C. J.L. & TECH. 311, 317–32 (2015).

[29] *See* JAMES MADISON ET AL., THE FEDERALIST PAPERS (Isaac Kramnick ed., 1987).

[30] For an "originalist" account of the right to anonymous speech, see Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 N.Y.U. J.L. & LIBERTY 160 (2015).

[31] *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 558 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296–97 (1961); Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466–67 (1958).

that, in light of the controversial nature of the issue and the potential danger to NAACP activists in the South at the time, "compelled disclosure of affiliation with groups engaged in advocacy" would result in "restraint on freedom of association."[32] Accordingly, immunity from disclosure was considered by the Court to be essential for "the right of the members to pursue their lawful private interests privately and to associate freely with others . . . ."[33]

The explicit recognition of a constitutional right to anonymity while engaging in expression came only later in the 1995 *McIntyre v. Ohio Elections Commission* case.[34] In *McIntyre*, the Court held that Ohio's statutory prohibition against distribution of any anonymous campaign literature violated the petitioner's right to free speech under the Constitution's First Amendment.[35] The Court emphasized that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[36]

The discourse on the right to anonymous free speech has since then taken a number of different paths, attesting both to the growing variety of contexts in which such a right might be implicated, especially in the digital age, and also to the need to balance such a prospective right with the legitimate interests of other, both public and private, stakeholders.

Thus, for example, while the Court held that free speech rights generally apply to the internet,[37] it has not yet addressed the ways in which the greater technological capacity for anonymous speech and immediate mass distribution may require a different kind of balancing with the interests of stakeholders affected by the anonymous online speech. This chore has been left so far for theme-specific rulings by federal and state courts.[38]

One issue that has been quite frequently addressed is that of anonymous online speech that allegedly results in defamation of others. While section 230 of the Communications Decency Act generally shields

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[32] Patterson, 357 U.S. at 462.

[33] *Id.* at 466.

[34] 514 U.S. 334 (1995).

[35] *See id.* at 357.

[36] *Id.*

[37] *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (applying First Amendment principles in reviewing the constitutionality of state restraints on online obscene or indecent communications to persons under age eighteen).

[38] *See, e.g.*, White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2014).

ISPs from direct liability for libelous material posted by third parties on their sites,[39] ISPs are increasingly receiving subpoenas for information that would identify their users and would allow the defamed person to sue for libel.[40] Courts have been trying to strike a balance between the interest of an online speaker to remain anonymous and the interest of the speech's targeted persons to preserve their own privacy and reputation. In some cases, courts try to distinguish between speech that is of "high value" for First Amendment purposes (that is, dealing with political or social issues) and that which is of "low value" (typified by a threatening or harassing behavior).[41]

More generally, however, courts have come up with a multi-factor balancing test. In *Dendrite International, Inc. v. Doe No. 3*,[42] a 2001 New Jersey case that gained currency in other states,[43] the court required the plaintiff to: (1) "undertake efforts to notify the anonymous posters that they are the subject of a subpoena" and that these efforts "should include posting a message of notification . . . on the ISP's pertinent message board"; (2) identify the exact statements that allegedly constitute the actionable speech; and (3) establish a "prima facie cause of action against the . . . anonymous defendants."[44] If these conditions are satisfied, the court then balances the "defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented."[45]

In 2005, the Delaware Supreme Court reasoned that the plaintiff must make a prima facie case for each element of the defamation claim,

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[39] *See* Communications Decency Act, 47 U.S.C. § 230 (c). (All statutory citations in this Article refer to the current statute unless otherwise indicated.)

[40] *See* Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure, and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92, 106 (2012).

[41] For such cases, see Jason A. Martin et al., *Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online*, 16 COMM. L. & POL'Y 89, 102–03 (2011). Some authors have argued that the lack of a clear delineation of types of speech that should enjoy First Amendment protections and those that should not result in lack of sufficient accountability for offending speech. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 136–42 Yale Univ. Press (2007).

[42] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[43] According to the Westlaw database (viewed on Jan. 26, 2016), the *Dendrite* case has been discussed, mostly in a favorable way, in 27 state cases outside of New Jersey.

[44] 775 A.2d at 760.

[45] *Id.* at 760–61.

one that would survive a motion to dismiss, while also making reasonable efforts to notify the defendant about the process.[46]

Taken together, and while subject to a number of variations by later state court decisions, the requirements imposed on the plaintiff and the subsequent balancing act made by the court are considered as establishing a nuanced approach to the right of anonymity.[47] However, some authors doubt whether such procedural requirements and balancing tests offer sufficient protection for victims of cyber-bullying and other abuses of anonymity.[48]

Courts are treating differently claims for anonymity made by internet users who engage in activities, such as file-sharing or other downloads of copyrighted materials, whenever the copyright holder demands ISPs to disclose the users' identities through the subpoena process made available under the Digital Millennium Copyright Act of 1998 (DMCA).[49] While not entirely dismissing First Amendment arguments made by users, the balancing tests offered by state and federal courts reflect a more lenient approach to copyright holders, as compared with the tests for social or political defamatory speech.[50]

In a leading case, *Sony Music Entertainment v. Does 1-40*,[51] the New York court reasoned that file sharing is an action that may enjoy "some level of First Amendment protection."[52] This is so because the very act of downloading copyrighted music and making it available to others without charge may count as making a statement.[53] But, at the same time, such action is entitled only to limited protection, as opposed to cases of political expression. This difference also implicates the factors that courts must weigh in considering whether to disclose the identity of those engaged in such anonymous action. Such factors include a prima facie claim of actionable harm; specificity of the discovery request; the absence of alternative means to obtain the information; a central need for

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[46] *See* Doe v. Cahill, 884 A.2d 451 (Del. 2005).

[47] *See* Shepard & Belmas, *supra* note 40, at 106–15.

[48] *See, e.g.*, Bryant Storm, *Comment, The Man Behind the Mask: Defamed Without a Remedy*, 33 N. ILL. U. L. REV. 393, 402–04 (2013); Rick A. Waltman, *Note & Comment, Veiling Cyberbullies: First Amendment Protection for Anonymity Per Se Strengthens the Voice of Online Predators*, 36 U. LA VERNE L. REV. 145, 164–70 (2014).

[49] *See* 17 U.S.C. § 512(h) (2006).

[50] *See* Shepard & Belmas, *supra* note 40, at 115–23.

[51] 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

[52] *Id.* at 564.

[53] *See id.* at 564–65.

the information to advance the claim; and "the party's expectation of privacy."[54] As for the latter component, the court emphasizes that "defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission."[55] Viewed in comparison with the *McIntyre* ruling in the sociopolitical context of free speech, and the balancing tests of the defamation cases, the right to anonymity is contracted when the type of speech is of little social value and it constitutes a legal wrong against others.

This is not to say, however, that anonymity is necessarily considered a superior interest even if the underlying action is valued as having a public merit beyond the private interest, and it does not otherwise inflict a legally-recognized wrong to others.

A prominent example comes from political speech, the core issue that prompted the *McIntyre* decision.[56] A large number of federal and state laws require persons, who wish to influence elections through contributions or other expenditures, to disclose their identity. Moreover, political advertisements must include a disclaimer, clearly identifying the party responsible for the content of the advertisement.[57] The *Citizens United v. Federal Election Commission*[58] case, while invalidating limits on expenditures made by corporations as violating their First Amendment rights, upheld the federal law's disclosure and disclaimer requirements.[59] The Court reasoned that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'"[60] Focusing on the public interest in "knowing who is speaking about a candidate shortly before an election," the Court rejected the general claim that donors whose identities are disclosed might face "threats or reprisals."[61]

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[54] *Id.* at 565.

[55] *Id.* at 566.

[56] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[57] For a review of such statutes and subsequent case law, see Shepard & Belmas, *supra* note 40, at 123–33.

[58] 558 U.S. 310 (2010).

[59] *See id.* at 370–71.

[60] *Id.* at 366 (citation omitted).

[61] *Id.* at 369–70.

Subsequently, in *Doe v. Reed*,[62] the Court held that the State of Washington's disclosure requirements, as applied to signatories of referendum petitions, were sufficiently related to the State's interest in protecting the integrity of the electoral process to meet the exacting scrutiny standard applicable to First Amendment challenges. Per the Court, disclosure helps "prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and 'bait and switch' fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue."[63] Disclosure would therefore protect not only the general interest in promoting transparency and accountability, but would also guard signers themselves against abuse of their speech.[64]

Referring to *McIntyre*, the Court reasoned that the case at hand "is not 'a regulation of pure speech.'"[65] However, the Court did not dismiss the possibility that under different circumstances, speakers burdened "by the public enmity attending publicity" might win a constitutional claim to remain anonymous in the face of such disclosure requirements.[66] Some critics have argued, however, that the practical erosion by the Court of the right to anonymity in political expression, especially when it applies to rank-and-file citizens who sign petitions or make small contributions, once again imposes various privacy costs,[67] and may also result in the loss of public obscurity that many persons seek to preserve.[68]

Current constitutional law provides a complex picture of the appropriate balancing between the interest in anonymity, including in core cases of political speech, and the costs that such secrecy might inflict on the general public or on specific persons. Importantly, not all actions must result in criminal offences or civil wrongs to count as imposing costs that justify truncating the right to secrecy. There are various types of effects or externalities that do not amount to offences or wrongs, but

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[62] 561 U.S. 186 (2010).

[63] *Id.* at 198–99.

[64] *See id.*

[65] *Id.* at 216 (Stevens, J., concurring) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995)).

[66] *Id.* at 218 (quoting Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 754 U.S. 87, 89 (1982)).

[67] *See* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 16–17 (2003) (pointing to both loss of autonomy and economic costs).

[68] *See* Rebecca Green, *Petitions, Privacy, and Political Obscurity*, 85 TEMP. L. REV. 367, 402 (2013).

may nevertheless matter for balancing between secrecy and disclosure. This is the case, for example, with the public interest in the identity of political donors, even absent a danger of foul play. The grounding of the claim for anonymity in constitutional liberties does not make it absolute. This insight bears key lessons for studying secrecy in the context of property.

III. SECRECY IN PROPRIETARY CONTEXTS

This part moves from the constitutional analysis of the right to privacy or secrecy to the context of private and commercial law. It analyzes two different settings, which are essentially proprietary in nature, in which the secret nature of the legal action may carry substantial implications for a variety of stakeholders. As this part shows, while the underlying normative considerations for and against secrecy may have similarities with the issues discussed in Part II above, the doctrinal foundations of these scenarios rely principally on private law considerations. Accordingly, the nature of the legislative or judicial principles regarding the scope of the right to secrecy would be implicated by concepts such as public policy, reasonableness, or transparency, which have long been a part of private law, without directly applying constitutional law rights of private parties.

A. Secret and Half-Secret Trusts

Over the past few centuries, Anglo-American courts have been dealing with an apparent tension in the law applying to intergenerational transfer of assets. On the one hand, wills are governed by broad principles of publicity.[69] This is so with respect both to the writing and execution of the will and to subsequent judicial proceedings and probate records.[70] For example, section 9 of the English Wills Act 1837 stipulates that "[n]o will shall be valid unless" it is made in writing and signed by the testator, with such a signature being made in the presence of two or more persons present at the same time.[71] Consequently, upon the testator's death, the will's content is made public record because of the "'public's interest in openness and accessibility' of court proceedings

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[69] *See, e.g.*, Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–63 (2008).

[70] *See id.*

[71] Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (U.K.).

and records."[72] U.S. courts typically view this public interest as superior to a testator's privacy interest.[73]

On the other hand, Anglo-American courts have been systematically enforcing functionally equivalent forms of intergenerational asset transfers, which allow for full or partial secrecy. This has been particularly so with the equitable mechanisms of secret and semi-secret trusts. A secret trust is created when a testator bequeaths property to a person in reliance on the legatee's "expressed or implied agreement to hold the property upon a particular trust."[74] This means that the very existence of a trust is hidden from sight for other stakeholders.[75] A semi-secret trust arises when the will or other testamentary instrument "reflects the intent to create a trust, but the agreed upon terms, including the intended beneficiaries, the purposes, or both, do not appear in the agreement."[76]

While both types of instruments seem to run counter to the legislative principles expressed in the English Wills Act, or to the broader policy goals of "openness and accessibility" of probate records, courts have been consistently enforcing such secret arrangements.[77] According to the equitable doctrine that has developed over centuries in England, a secret trust will be considered valid if the testator demonstrates intention to subject the legatee to a trust obligation, and this intention is communicated to and accepted by the secret trustee during the lifetime of the testator.[78] In the case of a half-secret trust, the communication and acceptance have to be made before or simultaneously with the execution of the will.[79] American courts have largely accepted these principles.[80]

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[72] Foster, *Trust Privacy*, *supra* note 69, at 561–62 (quoting *in re* Reisman, CONN. L. TRIB., Jan. 22, 1996, at 78 (Conn. Prob. Ct. Dec. 19, 1995)).

[73] *See id.* at 561–63.

[74] RESTATEMENT (THIRD) OF TRUSTS § 18 (AM. LAW INST. 2003).

[75] *See* JILL E. MARTIN, HANBURY & MARTIN ON MODERN EQUITY 156 (18th ed. 2009).

[76] Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543, 556 (2012).

[77] *But see* Steven R. Evans, *Should Professionally Drafted Half-Secret Trusts be Extinct After Larke v. Nugus?* (Univ. of Leicester School of Law Research Paper No. 14-17, 2014), http://ssrn.com/abstract=2443925.

[78] *See* G.W. Allan, *The Secret Is Out There: Searching for the Legal Justification for the Doctrine of Secret Trusts Through Analysis of the Case Law*, 40 COMMON L. WORLD REV. 311, 312 (2011).

[79] *See id.* The reason for the stricter time requirement in the case of a half-secret trust lies in the English courts' view that a will in such cases might serve as an overt

The enforcement of secret and half-secret trusts has been, however, a matter of much controversy, with court opinions often being inconsistent with one another, and scholars struggling to identify the underlying principles that explain such validation of secrecy.[81]

One theory that has also gained currency in U.S. courts is the *dehors* (outside) the will theory, by which a secret trust should be seen as an *inter vivos* trust that remains unconstituted until the death of the testator.[82] While there is some debate as to whether such an *inter vivos* trust should be considered a constructive or an express trust, the underlying notion is one by which the trust is not constituted by the will and is therefore not subject to the requirements of the Wills Act or to general principles of record publicity.[83] Another prominent account relies on a fraud theory, by which equity will not permit a secret trustee to perpetrate a fraud by relying on the formal requirements for wills to avoid performance of the secret trust.[84] However, both theories lead to the enforcement of a legal action that remains fully or partially secret in the testamentary documents.[85] Accordingly, even the typical "pour-over will" that leaves part or all of the testator's estate to a preexisting trust does not cause the trust to become public record.[86]

Consequently, while the general law of trusts imposes strict duties on trustees to disclose essential information to beneficiaries, including on the existence of the trust, the validation of secret and half-secret trusts respects the settlor's interest in modifying the trustee's duty to disclose information. The right of the settlor to modify the general duties of trustees to inform beneficiaries, in order to preserve the settlor's own interest in privacy, may be subjected to overriding public policy concerns or to the showing of a reasonable and founded legitimate interest in preserving secrecy.[87] The purpose of such potential limits on the secrecy

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statement by the testator that he intends to alter orally the final destination of legacies bequeathed under the will, thus contrasting Parliament's intention. *See id.* at 330–31.

[80] *See* Goffe, *supra* note 76, at 556–57.

[81] *See* MARTIN, *supra* note 75, at 170–75; J.E. PENNER, THE LAW OF TRUSTS 175–79 (9th ed. 2014).

[82] *See* Allan, *supra* note 79, at 332–40.

[83] For the relevance of whether this trust is constructive or express, see MARTIN, *supra* note 75, at 164–65.

[84] *See* Allan, *supra* note 79, at 314–32.

[85] *See id.* at 341–42.

[86] *See* Foster, *Trust Privacy*, *supra* note 69, at 564–65.

[87] *See id.* at 575.

of the trust, as initiated by the settlor, lies principally in the fear that the trustee might abuse such secrecy and deny beneficiaries their rights.[88]

What are the reasons that drive settlors to create a secret or half-secret trust instead of bequeathing assets through testamentary documents such as the publicly-visible will?

Such motives may include the wish of the settlor or testator to preserve a certain persona or reputation that she or he has built over the years and to avoid the potential social repercussions that might result from the postmortem disclosure of details on extramarital intimate relations, unconventional religious or political views, etc. Prevention of intra-family disputes over current or future distribution of property, fear of disincentives for beneficiaries or heirs to invest in human capital, should they be exposed prematurely to the scope of their beneficial ownership in the assets, or simply a wish to keep private the scope of one's capital, may also drive the demand for secrecy.[89] Moreover, in recent years, settlors in the United States have been motivated to make lifetime transfers in the form of an irrevocable trust.[90] This is largely because of increases in the federal gift tax exemption and the enactment of legislation in a majority of states that authorizes settlors to direct trustees not to disclose the existence of a trust, at least for some period of time.[91]

The secrecy of the trust might entail, however, risks to settlors themselves. This is so because the complexity and opaqueness of such trusts may make them vulnerable to trust scams, abuse by trustees, or irreversibility of other actions or choices kept in the dark.[92]

Moving to broader circles of affected stakeholders, what considerations vindicate the preservation of such intergenerational transfers of assets as fully or partially secret? Which arguments may justify the disclosure of these instruments, thus equating, or at the least approximating, the standards for such will-like trusts to publicity rules applying to wills?

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[88] *See id.*

[89] *See id.* at 567–73.

[90] *See* WILLIAM R. BURFORD, AMERICAN LAW INSTITUTE CONTINUING LEGAL EDUCATION, *What the Kids Don't Know – Deconstructing the "Silent Trust,"* in ADVANCED ESTATE PLANNING TECHNIQUES COURSE MATERIALS, 1 (2014), https://www.ali-cle.org/index.cfm?fuseaction=online.chapter_detail&paperid=296303&source=2.

[91] *See id.*

[92] *See* Foster, *Trust Privacy*, *supra* note 69, at 585–98.

Trustees, on their part, may have a legitimate stake in preserving secrecy, at least during the life of the testator, to prevent interference or pressure from beneficiaries or frustrated non-beneficiaries. That said, current legislation and case law seem to be much more concerned with the potential for abuse by trustees toward beneficiaries in view of the secret nature of the trust. Therefore, even if trust law respects the underlying choice of the testator for time-limited secrecy vis-à-vis beneficiaries, the latter are increasingly endowed with rights for information and transparency toward trustees, especially after the testator's passing.[93] This general trend may also benefit prudent trustees, who hitherto had to deal with potential tensions between secrecy and their general fiduciary duties.[94]

These considerations naturally implicate the interests of beneficiaries in secrecy or, rather, disclosure of the various features of the trust. Specifically, beyond the outright ignorance about the existence of the trust, complete or partial secrecy of the details of the trust agreement undermines the ability of beneficiaries to monitor and enforce the trust.[95]

As far as other stakeholders are concerned, a normative analysis of the secret or semi-secret trust has to initially identify whether the adverse (or, rather, positive) effects of secrecy impact what is otherwise a legally valid interest, and if so, whether the prevention of such actual or potential effect outweighs the valid justifications for the trust's secrecy.

Thus, for example, a disappointed relative or friend who had hoped to be included in the estate would not have a good claim against the creation of a secret or semi-secret trust. This would be so even if such a person is named as heir in the public will, but the heir's share in the estate practically decreases as a result of channeling part of the assets to such a trust. The reason for the lack of a legally valid claim against the secrecy of such a trust—subject, of course, to the availability of generally recognized potential claims, such as a retrospective claim for undue influence or coercion in the creation of the trust[96]—would follow

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[93] *See* Goffe, *supra* note 76, at 556–57.

[94] *See* Foster, *Trust Privacy*, *supra* note 69, at 567–73.

[95] *See id.* at 605–10.

[96] For the variety of legal options available to a disappointed heir, inside and outside the probate process, see generally Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004).

the same policy reasons that deny an heir a vested interest in a certain will, so as to limit the testator from later changing her or his will.[97]

The situation might be different, however, with a surviving spouse, whose guaranteed share in the estate under the law—in particular, a spouse's right to a certain share in the spouse's property under an elective share statute[98]—has been practically devalued by the channeling of property to a secret trust. Accordingly, in some settings, state statutes and case law may enable the surviving spouse to set aside gifts or transfers, such as a revocable secret trust in which the donating spouse retained control, which were made with the intent of defeating the spouse's elective share.[99]

Other stakeholders who may be impacted by the secret nature of the trust are actors who engage in transactions or other property dealings vis-à-vis the trust or trustee.[100] These stakeholders may include purchasers of trust property (including real estate), financial institutions, title insurance companies, etc.[101] Prudent stakeholders may require a copy of the trust instrument as a condition for doing business to avoid legal accidents such as a violation of the *nemo dat quod non habet* principle,[102] meaning that the trustee, and the testator, if still alive, might practically have to yield to demands for such disclosure.

In response, legislatures in several states have introduced legal restrictions on third party access to the trust documents, seeking to balance between the settlor's privacy and third party interest in

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[97] *See* ROGER KEERIDGE, PERRY AND CLARK: THE LAW OF SUCCESSION 34 (11th ed. 2002).

[98] All common law states in the United States, with the exception of Georgia, have such a statute. *See* JESSE DUKEMINIER ET AL., PROPERTY 409 (8th ed. 2014). This arrangement generally means that that a surviving spouse can renounce a will, if any, and elect to take a statutory share in the deceased spouse's assets, which is usually one-half or one-third. *See id.* The elective share usually does not apply to property held in joint tenancy or to life insurance proceeds. *See id.* at 410.

[99] The law on such matters varies considerably among different states. *See* THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 366 (5th ed. 2011).

[100] *See* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 726–27 (2006).

[101] *See id.*

[102] *See* Menachem Mautner, *"Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Third Parties*, 90 MICH. L. REV. 95, 97–98 (1991).

information.[103] The balancing method typically chosen by these statutes is one of a "certification of trust," a formal legal document that confirms the existence of the trust and the trustee's powers, while shielding the trust instrument itself from full disclosure.[104] Accordingly, such statutes promise broad legal protections to any third party who acts in good faith in reliance on the certification of trust, but also impose potential penalties on third parties who refuse to settle for the certification and insist on full disclosure.[105]

This balance of secrecy, as far as third parties are concerned, thus seems to follow the concept by which third parties should only be concerned with the outer content of the "shell" and should not seek to intrude into its inner content and unveil the exact structure of beneficial ownership. It thus seems to follow a similar logic to that which drives those who increasingly opt for real estate ownership via trustees or shell companies. Whether this assumption holds true as a matter of policy is a question explored in detail in Part IV.

B. Secret Buy-Out of Corporate Shares

A different proprietary setting in which the interest in secrecy may entail significant externalities—whether negative or positive—for a variety of stakeholders concerns the acquisition of shares in publicly traded companies. In particular, statutory requirements for the disclosure of the identity of purchasers, once a certain threshold of accumulated shareholding is passed, have been the subject of much attention.[106] The analysis here focuses on the United States, although this theme is widely addressed in many other countries.[107]

This subsection addresses two specific dilemmas about the potential tension between secrecy and externalities, ones which also play out in the context of real estate in Part IV. First, do affected stakeholders have a valid interest in getting an early warning about a secret acquirer's future

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[103] *See* Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, *supra* note 100, at 735.

[104] *See id.* at 734–36.

[105] *See id.* at 735–39.

[106] *See* David Daniels, *Note, A Two-Part Disclosure Mandate as a Compromise Solution to the Debate on Section 13(d)'s Disclosure Window*, 4 HARV. BUS. L. REV. 213, 222–25 (2014).

[107] *See, e.g.*, Alexandros Seretakis, *Hedge Fund Activism Coming to Europe: Lessons from the American Experience*, 8 BROOK. J. CORP. FIN. & COM. L. 438, 460–63 (2014) (surveying the situation in Europe).

plans regarding changes to the corporation in case of a takeover? Second, when might affected stakeholders as a group (in this case, public shareholders) be viewed as actually having an interest in preserving the secrecy of the accumulation of shares—that is, when would such a secret action entail positive externalities for others?

At the outset, in 1968, the U.S. Congress passed the Williams Act, which added section 13(d) to the Securities Exchange Act.[108] Enacted in an era typified by a high number of takeovers, especially in the form of cash tender offers, section 13(d) aimed at making shareholders better informed about such takeover practices in order to make appropriate investment decisions.[109] While the bill had originally sought to extend the disclosure requirements also to proxy battles (in which investors seek to take over a corporation by acquiring shares and voting out incumbent board members, replacing them with trusted successors), section 13(d) was eventually confined to takeovers by share accumulation.[110]

In its current version, section 13(d) requires a person who acquires more than five percent of the stock of a publicly traded company to file a Schedule 13D statement with the Securities and Exchange Commission (SEC) within ten days of the acquisition.[111] The statement must include information about the identity of each person considered to be a beneficial owner, the nature and size of such person's interest in the securities, the sources of funds used, and the purpose of acquiring the shares—including changes to the "business or corporate structure" of the target firm, if the purpose is to acquire control.[112] In the event there is "any material change in the facts set forth in prior filings," investors must file an amended Schedule 13D statement.[113]

A duty of disclosure applies to the various methods by which a person may come to acquire shares in a public corporation, whether by

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[108] *See* Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78 (2006).

[109] For a review of the legislative history of Section 13(d), see Jonathan Macey & Jeffrey Netter, *Regulation 13D and the Regulatory Process*, 65 WASH. U. L. REV. 131 (1987).

[110] *See* Daniels, *supra* note 106, at 216–17.

[111] *See* Securities Exchange Act, § 13(d)(1).

[112] *See id.* at § 13(d)(1)(A)-(C).

[113] Macey & Netter, *supra* note 109, at 136; *see also* B. Jeffery Bell, The Acquisition of Control of a United States Public Company, 16–17, (2015 edition), http://media.mofo.com/files/Uploads/Images/1302-The-Acquisition-of-Control-of-a-United-States-Public-Company.pdf.

privately negotiated transactions or through the public markets.[114] Disclosure is aimed at providing "the public with adequate information on which to base intelligent investment decisions, thereby enhancing public confidence in the Nation's securities markets and encouraging the healthy growth and development of those markets."[115]

Under the SEC's Rule 13d-3(a), beneficial ownership is attributed "to 'any person, who, directly or indirectly . . . has' . . . the power to vote or dispose of . . . shares in a class of equity securities"; or "to a person who has the right to acquire such shares within 60 days (e.g., by conversion or the exercise of a derivative security such as a convertible note or an option)."[116]

The main consequence of such a disclosure is that public shareholders—alongside the company's current insiders or controlling shareholders and its board—receive an early warning of the plan of the hitherto-secret purchaser to potentially acquire control. The anticipated result, in the case of an acquisition made through the public market, is that shareholders may seek to charge a premium on their shares, sharing at least partially in the "control premium" that current or future controlling shareholders may enjoy.[117] The disclosure of accumulation at the five percent threshold might practically serve as an anti-takeover mechanism even when the acquisition is made in the open market,[118] or at the least, the disclosure could alter the division of the contractual surplus in such market transactions.

The discourse on section 13(d)'s limits to secrecy in the acquisition of shares in public corporations has been reinvigorated over the past few years due to a number of developments in U.S. corporations and in the overall operation of exchange markets.

First, while companies and their current insiders have been employing alternative anti-takeover mechanisms, such as the mechanism of a "stockholder rights plan" (also known as a "poison pill"),[119] their

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[114] *See* Bell, *supra* note 113, at 1–12, 16–17.

[115] S. REP. NO. 90-550 at 1 (1967).

[116] Bell, *supra* note 113, at 16 n.41.

[117] For the economic concept and the current legal status of the "control premium" in U.S. companies, see Amnon Lehavi, *Concepts of Power: Majority Control and Accountability in Private Legal Organizations*, 8 VA. L. & BUS. REV. 1, 34–35 (2014).

[118] *See* Daniels, *supra* note 106, at 217–18.

[119] This mechanism provides for the issuance to current stockholders of a right to purchase preferred stocks of the target company, with such a right becoming exercisable upon the acquisition by another person of a specified percentage of the target's stock or

relative weight has declined in the past few years, thus focusing renewed attention on the role of section 13(d) in market-based takeovers.[120]

Second, hedge funds and other sophisticated investors are allegedly exploiting gaps in the current disclosure requirements to take over corporations "to their own short-term benefit and to the overall detriment of market transparency and investor confidence."[121] According to a petition submitted to the SEC by the Wachtell, Lipton, Rosen & Katz law firm, and to subsequent posts made by the firm, activist investors exploit the ten-day reporting window to tip each other on their plans "as they coordinate wolf-pack attacks, while ordinary investors and the targeted companies are left in the dark."[122] Such practices are said not only to deny shareholders of potential premiums they would have enjoyed had they received an effective early warning, but also to harm corporations and the market.[123]

As the following paragraphs show, arguments made in favor and against amendments to section 13(d) may have implications that go beyond the debate on corporate takeovers. They shed light on the two policy dilemmas on secrecy and externalities set forth above, namely, the role for early warning of potential changes to a proprietary setting in which the interests of a secret actor are interlocked with the interests of other stakeholders, and whether such secrecy may ever by viewed as entailing positive externalities for others.

Briefly, the petition seeks both to alter the ten-day reporting window and to change the definition of beneficial ownership.[124] As for the reporting window, the ten-day period is said to be an "eternity," especially in an age of online computerized trading.[125] Hedge funds "secretly

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the commencement of a tender. Because the acquirer is not able to exercise such a right, its exercise by current stockholders is highly dilutive, making the takeover costly to the acquirer, even if it has been able to keep its identity secret to that point. *See* Bell, *supra* note 113, at 19.

[120] *See* Daniels, *supra* note 106, at 218–19.

[121] Letter from Wachtell, Lipon, Rosen & Katz to Elizabeth M. Murphy, Sec'y., SEC (Mar. 7, 2011), http://www.sec.gov/rules/petitions/2011/petn4-624.pdf (hereinafter Wachtell).

[122] Theodore Mirvis, Wachtell, Lipton, Rosen & Katz, *Activist Abuses Require SEC Action on Section 13(d) Reporting*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Mar. 31, 2014), http://corpgov.law.harvard.edu/2014/03/31/activist-abuses-require-sec-action-on-section-13d-reporting/.

[123] *See* Wachtell, *supra* note 121, at 2.

[124] *See id.*

[125] *See id.* at 3.

continue to accumulate shares during this period, acquiring substantial influence and potential control . . . without other shareholders . . . having any information about the acquirer or its plans and purposes."[126] Such investors exploit "this period of permissible silence to acquire shares at a discount."[127] The petition calls to shorten the reporting window to one business day, and to prohibit the acquirer from accumulating additional equity securities until two business days after the filing of the section 13(d) report.[128]

As for beneficial ownership, its current definition arguably does not cover the various ways that investors may gain control.[129] It currently focuses on securities in which the acquirer "holds either the 'voting power' or 'investment power,' including the power to dispose of . . . a security," (presently or within the subsequent 60 days).[130] It does not cover other ways that investors may acquire economic exposure to the security, including through case-settled derivatives, or more broadly, by amassing influence or control over voting or disposition of securities "while maintaining the bare legal fiction that a third party holds such rights."[131] The petition thus calls to expand section 13(d) to any instrument "which includes the opportunity, directly or indirectly, to profit or share in any profit derived from any increase in the value of the subject security."[132] More generally, secrecy is viewed as entailing significant negative externalities and an overall societal deadweight loss, requiring regulators to force exposure of the true ownership. Expanding the mechanism of early warning is thus essential to mitigate bad outcomes.

In response, Lucian Bebchuk and Robert Jackson argue against a change to section 13(d),[133] offering potential insights for the broader theme of secrecy and externalities. Their underlying premise is that hedge funds and other investors may bring significant benefits for corporate governance, promoting overall welfare.[134] This is so because

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[126] *Id.*

[127] *See id.*

[128] *See id.* at 5.

[129] *Id.* at 7.

[130] *Id.*

[131] *Id.* at 7–9.

[132] *Id.* at 8.

[133] *See* Lucian A. Bebchuk & Robert J. Jackson Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39 (2012).

[134] *See id.* at 41.

"outside blockholders with a significant stake have stronger incentives to invest in monitoring and engagement," making incumbent managers more accountable and reducing agency costs and slack.[135] They further argue that Congress recognized such benefits when it enacted section 13(d), so that the ten-day period is not merely a technical gap but one that reflects a conscious balance between "the benefits that the holders of large blocks of stock convey upon public investors and the need for disclosure of these blocks."[136] Section 13(d) should thus be viewed as a specific exception to the principle, by which "buyers of shares are not required to disclose their purchases to the market—even when that information would be of interest to others."[137] Secrecy is thus the general norm in the market, and a shareholder has no inherent stake in the identity or future plans of others.

Per Bebchuk and Jackson, secrecy is even more necessary to enable the benefits for corporate governance because a key incentive to become a blockholder lies in its "ability to purchase shares at prices that do not yet fully reflect the expected value of the blockholder's future monitoring and engagement activities."[138] If an investor cannot do so, the returns on becoming an active blockholder fall and other shareholders lose the benefits of its presence.[139] Publicly disclosing the presence of an outside blockholder too early might therefore perpetuate agency problems and managerial slack to the detriment of shareholders as a group.[140] Secrecy therefore creates positive externalities.

While the specific dispute over section 13(d) is far from settled, its conceptual frame offers intriguing insights about the two above-mentioned dilemmas on secrecy and externalities—ones that will bear out significantly in the context of real estate in Part IV.

Generally, the normative case for having an interest in learning about the identity of a legal actor and its future plans is stronger when the interests of the actor are formally interlocked with those of other affected actors. The corporation serves as a clear example. Corporate governance is typified by the handing over of decision-making authority from the individual shareholder to the corporate entity, acting through its

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[135] *Id.* at 47.
[136] *Id.* at 45–46.
[137] *Id.* at 43.
[138] *Id.* at 50.
[139] *See id.*
[140] *See id.* at 52–53.

shareholder meetings, board of directors, and executive management.[141] Decisions are taken by majority vote, with simple majority sufficing for most decisions.[142] This means that controlling shareholders regularly set the agenda for the corporation and its members as an interlocked group. The quantitative difference in stockholding thus has a clear qualitative dimension.

Given such an asymmetry in power, the only way for minority public shareholders to protect their interests is via mechanisms of accountability, such as rules against self-dealing, and information on the general direction the controlling shareholder is taking.[143]

Corporate law thus acknowledges the inherent divergence that exists between different classes of shareholders, with information serving the exit (that is, selling) option. A minority shareholder unhappy with the current trajectory, or with an anticipated future change, may not be able to halt such a policy, but could at least exercise an informed liberty to exit.

The same should generally apply in case of a prospective takeover or another anticipated change in the structure of stockholding. This is exactly the role that an early warning device might serve. Even if a single shareholder is unable to prevent a takeover or the occurrence of a future change, a timely rule of disclosure preserves her liberty to act. Thus, while a public shareholder does not have an inherent interest in knowing the identity of similarly-located owners, matters change when corporate change is at stake.

Whether the public shareholder's interest in disclosure should categorically prevail in such latter cases hinges on the second policy dilemma: namely, might secrecy in the context of share accumulation serve the interests of public shareholders as a group? This is fundamentally an empirical question. The Wachtell petition argues that such secret action would result in a deadweight loss;[144] Bebchuk and Jackson think it will be efficient.[145]

Put in more accurate terms, the favorable approach to secrecy divides the group of public shareholders into two: those who sold to the acquirer during the period of secrecy and those who remain shareholders after

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[141] *See* Lehavi, *supra* note 117, at 14–15.

[142] *See id.* at 15–16.

[143] *See id.* at 13–16, 32–38.

[144] *See* Wachtell, *supra* note 121.

[145] *See* Bebchuk & Jackson, *supra* note 133, at 40–41.

accumulation and disclosure have been made. The argument is that the second group will clearly benefit because the firm's corporate governance will improve and the firm will become more efficient. If this is so, such performance enhancement should also find expression in the future price of the shares. This would be so whether the blockholder will not seek control, or if it will seek control and the remaining public shares will be purchased in a "squeeze-out merger" process or by operation of these shareholders' appraisal rights for a "fair value" of their shares.[146]

What about the first group of public shareholders, who sold their shares under the veil of secrecy? The discount at which they sold their shares can be said to benefit both the blockholder and the remaining public shareholders, whose shares will be appreciated because the firm will become more efficient and attractive to future buyers. If all of the above assumptions are indeed valid, one could argue that the secret phase of share accumulation was a pareto-optimal one. Shareholders who sold their shares did so for a price that adequately reflected the then-market-value of the shares, and could not have sold at a better price in case of an early disclosure, because the blockholder would not have otherwise purchased them. If the Bebchuk-Jackson view is factually correct, secrecy entails only positive (or at least, non-negative) externalities. As Part IV now shows, the exact same dilemmas resonate in the discussion of secret legal actions in real estate.

IV. REAL ESTATE, SECRECY, AND EXTERNALITIES

Real estate offers a key setting in which to study the balance of secrecy and externalities. As this part shows, real estate ownership shares some of the legal policy dilemmas that have been introduced in Parts II and III—though differing in their potential application to real estate—while featuring other considerations that are unique to the context of land.

For example, this part will follow up on the above discussions about grounding the interest in secrecy in both liberty and privacy concerns and utilitarian arguments; viewing normatively-significant externalities as effects that may go beyond otherwise-recognized legal wrongs, offenses, or benefits; identifying the entire array of affected stakeholders; defining the circumstances under which parties may be entitled to an early warning; and exploring when secrecy may entail positive externalities for other stakeholders.

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[146] For these two mechanisms, see Bell, *supra* note 113, at 27–30.

At the same time, this part will extend the discussion to the distinct ways in which real estate challenges the secrecy and externalities framework. One such consideration has to do with the fact that land ownership, probably more than any other type of property holding, implicates both public law and private law.[147] This means that one set of arguments for secrecy may be balanced against the interest of public entities in disclosure to promote public action on issues such as land use controls, planning policy, or tax enforcement. Yet another set of arguments for secrecy—though not entirely detached from the previous one—may be balanced against the interests of private parties in the disclosure of legal actions.

Moreover, the physical nature of the ways in which interests may become interlocked in the case of land, and the implications that this has for the creation of externalities—one need only consider the dominance of land in the academic literature on externalities[148]—have a clear bearing on the discourse on secrecy. Given the intensity of the multi-faceted types of potential effects among physically-proximate neighbors, the interest in upfront disclosure of the identity of the actor and the underlying motives for its actions, may become particularly pressing for other stakeholders. This is especially so when certain secret actions are deemed irreversible so that belated disclosure might be of little value.

As this part shows, stakeholders may be anxious not only about the secret creation of environmental or other effects that diminish the stakeholder's ability to use or enjoy her land, but also about the mere loss of an economic opportunity or value in regard thereto. The former types of externalities are usually defined as "technological externalities," and the latter types as "pecuniary externalities" that operate through the price system.[149] Whether pecuniary externalities should be generally seen as affecting aggregate welfare, and not just the distribution of benefits, is a question that need not be decided here.[150] What matters for current

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[147] For the features of this public and private interface, see LEHAVI, *supra* note 7, at 43–45.

[148] Recall, for example, Ronald Coase's extensive discussion of the reciprocal effects for a polluting factory and its neighbors, ranchers and farmers, neighboring confectioner and doctor, and so forth. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[149] *See* J.J. Laffont, *Externalities*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS 192-194 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

[150] For this discussion, *see, e.g.*, Randall G. Holcombe & Russell S. Sobel, *Public Policy Toward Pecuniary Externalities*, 29 PUB. FIN. REV. 304 (2001).

purposes is whether legal actions that may generate particular externalities by virtue of their secrecy should be subjected to some rule of disclosure.

A. Owner's Arguments for Secrecy

Real estate serves as a quintessential example of an owner's interest in secrecy. As the following paragraphs show, an owner may be motivated to keep her actions secret by both liberty and privacy concerns and utilitarian arguments—mostly, the ability to gain an economic or other advantage over other stakeholders given such information asymmetry. These two sets of motives for secrecy diverge from one another, and they may have a different weight when balanced against the interests of public or private stakeholders in disclosure. The key point made here is that whereas some of the arguments for secrecy may have particular force in the case of real estate—especially those based on liberty and privacy—others may be more tenuous because of the nature of interlocking interests in real estate.

The normative discourse on the goals that property promotes has a long pedigree, with authors debating both the nature of such goals and their relative weight vis-à-vis other ends.[151] Two closely related values that prove particularly dominant in this discourse are autonomy and liberty. While definitions abound, autonomy is usually attributed to the ability "to determine in some way . . . which desires and preferences one wants to be motivated by, and thus what is going to count in one's life."[152] The role of autonomy in allowing a person "to be the author of one's life" is considered essential also among those writers who otherwise promote values such as social responsibility, equality, or community, at least in some interpersonal settings.[153] The latter commentators view autonomy as "nested in webs of social relationships"[154]

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[151] For prominent and normatively diverging accounts of the underlying goals of property, *see, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY (1996); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 40 (2003); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

[152] WALDRON, *supra* note 151, at 305.

[153] Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1412, 1437–45 (2012).

[154] Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1264–65 (2014).

because "[e]veryone to varying degrees depends on others for help in shaping those goals and making those choices."[155]

The conceptualization of autonomy thus becomes closely associated with ideas of liberty. In its classical liberal manifestation, liberty seeks to promote "negative freedom" from interference by others, such that "[t]he wider the area of non-interference the wider my freedom."[156] The "positive" idea of liberty, as developed by Isaiah Berlin, aims more ambitiously at "self-mastery" and may necessitate affirmative control over resources.[157] Throughout this discourse, land proves dominant for testing such goals and their limits. It is often the starting point for delineating the scope of the claim for autonomy or liberty and its manifestation in the exercising of rights, primarily the right to exclude others.[158]

The liberty-autonomy discourse is moreover closely tied to the idea of privacy and its application to real estate. Property and privacy are inherently linked in the sense that humans "need to have a place where they can be assured of being alone, if that is what they want, or assured of the conditions of intimacy with others, where intimacy is called for."[159] According to Jeremy Waldron, "[t]his is not just a matter of having private property in a house, a flat, or a room of one's own; what is required is what might broadly be called 'a household,'" that is, the inner-home resources required to perform tasks that one should be able to do in private.[160] Consequently, as Gregory Alexander observes, "the home is the *locus classicus* linking property, security, and privacy with autonomy (or freedom)."[161]

Therefore, to the extent that ideas of autonomy, liberty, and privacy are interpreted as granting persons the freedom to undertake actions that are shielded from the public eye, one may view the interest in secrecy as an inevitable corollary of real estate ownership, at least with respect to

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[155] *Id.* at 1287–88.

[156] ISAIAH BERLIN, LIBERTY 169–78 (Henry Hardy ed., 2002). For the centrality of property to liberty, see also James M. Buchanan, *Property as the Guarantor of Liberty*, *in* PROPERTY RIGHTS AND THE LIMITS OF DEMOCRACY 59 (Charles K. Rowley ed., 1993); RICHARD PIPES, PROPERTY AND FREEDOM 279–81 (1999).

[157] *See* BERLIN, *supra* note 156, at 178–81.

[158] *See, e.g.*, Alexander, *supra* note 154, at 1284–91 (examining the relationship between autonomy and the value of "self-constitution" in the context of the right to exclude in privately owned land).

[159] WALDRON, *supra* note 151, at 296.

[160] *Id.* at 295–96.

[161] Alexander, *supra* note 154, at 1266.

secret actions that have no discernible impacts on adjacent property owners. Neighbors have no valid interest in disclosing the content of the e-mails one writes on one's home computer; the government may have a valid claim only under the circumstances analyzed in Part II in the context of constitutional liberties.[162]

How about legal actions pertaining to the real estate resource itself? What about the decision of a purchaser to register the property with a trustee or shell company? Assume further that the buyer leaves the property empty or leases it to another person, so that the neighbors are unable to identify the owner, or to learn other details about her, simply by virtue of her possession. To the extent that the owner does not alter the use of the property or otherwise deviate from the current land use regulations applying to the tract, and does not seek to change the regulatory or legal status of adjacent properties—as discussed, for example, in Sections C and D below—the owner might claim that her interest in secrecy falls squarely within the core ideas of liberty, autonomy, and privacy.

Moreover, there are circumstances in which we should clearly rule out the legitimacy of a neighbor's claim against potential effects caused by the secrecy of the legal action. Recall the underlying circumstances of the seminal *Shelley v. Kraemer*[163] decision, in which the U.S. Supreme Court struck down a state judicial decree that upheld a privately-drafted racial covenant forbidding the sale of the property to non-whites.[164] Consider a hypothetical scenario, in which an African-American person or a member of a minority immigrant community wishes to purchase a house, but currently feels uncomfortable to move into the neighborhood because of potential social repercussions from intolerant neighbors. She therefore purchases the property through a shell company and leases it to another person, hoping that in the future the underlying societal circumstances will change. It seems clear that the neighbors have no legitimate stake in knowing the "true" identity of the owner simply because they have certain racial or xenophobic inclinations.

Matters change, however, when the motive for secrecy lies in trying to gain a certain economic advantage over other property owners who are ignorant of a certain fact, or when the secret action gives the actor a head start in creating a legal or regulatory change that will then apply also to

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[162] *See supra* notes 12–20 and accompanying text.

[163] 334 U.S. 1 (1948).

[164] *See id.* at 20.

other neighbors, such as other unit holders in a condominium. It should be emphasized that the analysis here does not concern itself with those actions that might be independently considered illegal, regardless of the action being secret or disclosed, such as the creation of a legally-prohibited nuisance or an action that amounts to "abuse of rights."[165] The query addresses, rather, those actions that would be generally considered valid when done openly, but keeping them secret entails a specific advantage to the person taking the action over other stakeholders.

Generally speaking, in the business world, secrecy is considered legitimate when firms try to be the first movers in the market, internalize the costs and benefits of research and design activity, or otherwise invest in information that would give them a competitive edge in the market.

The law goes further in actively protecting trade secrets, whose commercial or competitive value lies in their secrecy (consider a well-known example: the Coca Cola formula).[166] Trade secrets law grants the holder of the secret information judicial remedies "against unauthorized disclosure of the idea by certain people who are bound not to reveal the secret or who came into possession of the information unlawfully."[167] Needless to say, a court would not order a firm to reveal its trade secret simply because a competitor is curious about it, or is at a commercial disadvantage because of such information gaps. Even if such a setting can be conceptualized as creating a pecuniary externality for competitors,[168] the preservation of a trade secret within the firm is considered normatively legitimate.[169]

One can also think about certain scenarios in the context of real estate where we would find secret actions to be unproblematic, even if these actions are embedded in the wish to gain an economic advantage over others. Consider the hypothetical scenario in which a developer receives private indications that a certain as-of-yet unattractive neighborhood or city might prove to be the "next big thing" in real estate. The

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[165] *See* Larissa Katz, *Spite and Extortion, A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L. J. 1444 (2013) (basing the theory of "abuse of rights" on prohibiting owners under certain circumstances from using a property right to gain leverage over others for some further end); *see also* Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L. J. 81, 134–37 (2010).

[166] *See* RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 76–96 (2013).

[167] *Id.* at 77.

[168] *See supra* notes 149–49 and accompanying text.

[169] *See* CASS & HYLTON, *supra* note 166, at 77–78.

developer may wish to keep this information secret from other developers, who might compete for purchasing real estate in this area once they receive word of this information, thus pushing up prices. Although such an informational asymmetry could be conceptualized as creating some sort of a pecuniary externality for competing developers, it seems safe to say that there is no solid reason to require the developer to share such information with other developers.

Things may change, however, when affected stakeholders might be parties that have a preexisting legal or organizational interest in the properties that are the subject of the secret. Consider again the cases of the secret trust or the quiet acquisition of shares. Whether the type of externality involved is pecuniary or technological in nature, we should consider if similar scenarios may exist in the context of real estate. If so, would such secret actions amount to an unfair advantage or require some sort of an early warning that may not allow stakeholders to prevent the action, but at least endow them with the liberty to take their own timely measures? Section B seeks to identify the general arguments that different stakeholders, both public and private, may make in requiring some form of disclosure of legal actions in real estate. Sections C and D set out to explore, respectively, the contexts of secret land assemblies and secret acquisitions that may lead to an organization-wide change in common interest developments. Section E will discuss the broader policy implications of secrecy versus disclosure in real estate.

B. Other Stakeholders' Interest in Disclosure

The following subsections identify the potential interest in disclosure of four groups of stakeholders: national and state government, local government, neighborhood or homeowner associations in condominiums and other common interest developments (CIDs),[170] and individual neighbors and landowners. The underlying assumption is that each type of stakeholder may seek to act based on such disclosure. However, it is essential to keep in mind at the outset that imposing a duty of disclosure does not necessarily translate into an affirmative right of each

[170] The term common interest development (CID) refers here to various types of shared-interest residential developments, such as condominiums, planned developments, stock cooperatives (co-ops), and community apartment projects. CIDs are also referred to as "common interest communities." *See* DUKEMINIER ET AL., *supra* note 98, at 937–40. Definitions change among countries and states. For this typology in the case of California, see California's amended Davis-Stirling Act, CAL. CIV. CODE § 4100.

stakeholder to act, and in particular, to block or undo the hitherto secret action. *Who* might act, and *how*, is a distinct question of legal policy.

1. National and State Government

The *New York Times*' report on secret ownership in high-end condominiums vividly illustrates the interest that national and state governments have in disclosing the identity of real estate owners, but also the implicit motive to practically collude with such secrecy.[171]

Foreigners are playing an increasing role in the U.S. real estate market, while typically employing strategies of secrecy.[172] Thus, for example, the report reveals that over half of the beneficial owners in the Time Warner Center are foreigners, many of whom have been the subject of government inquiries around the world.[173] Shell companies are instrumental in allowing them to make multi-million dollar purchases of real estate—whether motivated by corruption, tax avoidance, or investment strategy—with few questions asked.[174] This secret practice has also been embraced by wealthy Americans.[175] About $8 billion is spent each year in New York City on residential properties that cost more than $5 million each, with over half of the recent sales made to shell companies.[176] Nationally, nearly half of recent purchases over $5 million are made by such shell companies.[177]

Real estate remains, however, a notable lacuna in current U.S. policy on controlling streams of capital that might be infected with corruption, money laundering, or tax avoidance. Under current federal regulation, banks are required to perform a thorough due diligence for senior ranking foreign officials (termed "politically exposed persons") who hold private bank accounts in the United States, and to verify the identity of all parties transacting with such persons when the account has over $1 million in assets.[178] But the Justice Department's initiative to expand the

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[171] *See* Storey & Saul, *supra* note 1.

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.*

[176] *See id.*

[177] *See id.*

[178] *See* 31 C.F.R. § 1010.620. The underlying assumption is that such persons may be more prone to involvement in bribery or corruption. *See, e.g.*, Michael Anderson, *Note, International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction*, 53 VA. J. INT'L L. 763, 777–78 (2013).

list of industries required to screen such financial activities related to real estate was met with staunch resistance within the industry, and was eventually moved off the table.[179] Moreover, a proposal to extend the due diligence requirements to LLCs and other shell companies that open bank accounts is also stalled.[180] This is so despite the increasing use of shell companies to purchase real estate.[181] As one commentator suggested to the *Times*: "It's that simple. We like the money that comes into our accounts, and we are not nearly as judgmental about it as we should be."[182]

It remains to be seen whether this legal reality will change. One might also consider the constitutional challenges that might be posed if federal or state legislatures were to introduce a sweeping disclosure requirement for real estate registered with trustees or shell companies to combat potential corruption, tax evasion, or money laundering. That said, it is undoubted that secret ownership of real estate has already become a prevalent phenomenon, one that requires an explicit balancing between the government's interest in law enforcement and the legitimate reasons for keeping private the owner's identity.[183]

2. Local Government

The abovementioned report also offers intriguing insights about the interests that a local government has in disclosure or, rather, secrecy, in regard to real estate activity.[184] Former New York City mayor, Michael R. Bloomberg, is quoted in the report saying: "If we could get every billionaire around the world to move here, it would be a godsend."[185] To the extent that secrecy is a precondition for many magnates to purchase assets, the local government can be seen as prioritizing the streamlining of wealth over disclosure.[186] Moreover, because many of the purchasers are non-residents, they do not pay city income taxes and may receive property tax breaks.[187] Also, those who do not occupy the units regularly

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[179] *See* Storey & Saul, *supra* note 1.
[180] *See id.*
[181] *See id.*
[182] *Id.*
[183] *See id.*
[184] *See id.*
[185] *Id.*
[186] *See id.*
[187] *See id.*

do not benefit the local economy by spending on consumer goods and services in the city.[188]

But a local government also has a variety of motives to know the identity of owners, or at the least, their future plans to the extent these could be discerned from the owners' profiles. A city has to plan for the future production of amenities, such as schools, open space, or transportation. While some of the information may be gathered through the political process or forms of community participation, hard data is essential for such planning.[189]

Knowing the identity of a purchaser may also give the city an early indication about future regulatory changes that the owner may seek. Consider, for example, a major hotel chain that buys, through a shell company, a rundown residential building. It seems likely that such a purchase is done with the purpose of converting the building into a hotel. Such a scenario is far from being merely hypothetical. A 2015 report by the Pratt Center for Community Development documents the massive conversion of land uses such as office space, factories, and residential buildings in New York City into hotels, with a dramatic impact on the city's physical landscape and the economic well-being of locals.[190] True, a conversion procedure would have to be done formally and might be open to the public, but at least in some cases, the very act of acquisition by a powerful entity would make such a conversion more likely than not (as the example of the secret land assembly by Walt Disney, discussed in Section C below, might indicate). A city that seeks to engage in long-term planning, or otherwise estimate which types of land use would be in excess and which in short supply in the foreseeable future, may arguably have an interest in getting an early notice about such plans. It thus has a genuine interest in knowing the buyer's identity, even if it would not have the power to block such a sale. In this sense, the city's argument for disclosure can be seen as substantively different from that of a competitor of the hotel chain, who may seek a free ride on this information.

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[188] *See id.*

[189] *See generally* ARTHUR O'SULLIVAN, URBAN ECONOMICS 383–99 (7th ed. 2009) (explaining the role of local government and certain factors that affect its efficiency).

[190] In many cases, such a conversion does not require a rezoning of the lot. *See* PRATT CTR. FOR CMTY. DEV., HOTEL DEVELOPMENT IN NYC: ROOM FOR IMPROVEMENT 5 (2015), *available at* http://prattcenter.net/sites/default/files/hotel_development_in_nyc_report-pratt_center-march_2015.pdf.

3. Neighborhood or Homeowner Association

Moving from public stakeholders to private ones, the interest in disclosure of secret legal actions would lie regularly with neighboring property owners, given the rough correlation that exists between geographical proximity and the nature of externalities. Such practical effects extend beyond technological externalities that deal mostly with environmental or use-related issues to social and economic implications that are of interest to neighbors in their individual capacity (as Subsection 4 below illustrates). However, in some cases, private stakeholders may become affected by secret legal actions—and thus interested in disclosure—in their collective capacity. This is especially the case when both the secret legal actor and the affected parties are part of the same shared-interest organization.[191]

This subsection focuses on CIDs, namely, shared-interest residential developments, such as condominiums, planned unit developments, and housing cooperatives (co-ops).[192] CIDs are constantly engaging in questions of disclosure versus secrecy as part of the broader balance that they seek to strike between group rules and individual pursuits. Such dilemmas present themselves both at the stage of entry—that is, when a person wishes to buy or rent a unit in the CID—and during the ongoing life of the CID. The tension between disclosure and secrecy relates not only to identifying the beneficial owner by name but also to the scope of personal details the owner might have to provide to the organization, especially prior to entry, such as financial statements, marital status, health records, etc.

The co-op is one form of CID that is considered particularly intrusive in requiring comprehensive personal disclosure as part of its screening process.[193] These requirements are arguably grounded in the types of

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[191] An example, not discussed here in detail, concerns the Business Improvement District (BID). A BID refers to a territorial subdivision of a city in which businesses and residential property owners are subject to additional payments reserved to fund services and improvements within the BID. *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999); LAWRENCE O. HOUSTOUN JR., BUSINESS IMPROVEMENT DISTRICTS 2-4, 150–51 (2d ed. 2003) (defining BIDs and offering an example of the hazards of secrecy in a shared-interest organization).

[192] *See* DUKEMINIER, ET AL., *supra* note 98, at 937–40; *see also supra* text accompanying note 170.

[193] *See* Michael H. Schill et al., *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 281–82 (2007).

externalities and interlocking interests that result from the co-op's proprietary and financial structure. Briefly, in a co-op building, the cooperative association is the owner of the building and underlying land. The members are shareholders in the association, and, by virtue of their shareholding, are entitled to exclusively occupy a unit in the building for a long period of time (typically, ninety-nine years).[194]

Most co-ops also borrow money secured by a blanket mortgage on the real property, meaning that each member must make periodic payments for her ratable share of the collective mortgage, in addition to individual payments made for any loan taken by the member to finance the acquisition, which is secured by a pledge on her shares.[195] The co-op board thus has "a strong incentive to screen prospective members to insure that they will carry their share of the collective mortgage."[196] Boards have been scrutinizing applicants' financial records, while receiving judicial tailwind, because courts regularly subject co-ops to the highly deferential "business judgment rule."[197] This rule applies not only to the screening mechanism, but also to ongoing actions taken by the association.[198]

Co-ops have often resorted to a mandate requiring personal disclosure so as to practically screen applicants based on more opaque, social or snobbish grounds, with the market even said to attribute a premium to this expanded power of social screening.[199]

Recent reports indicate, however, that some co-ops are somewhat relaxing their intrusive practices, partly due to growing competition with condominiums over wealthy buyers.[200]

Condominiums and planned-unit developments (PUDs) are conventionally considered more relaxed in requiring disclosure, and more generally, in screening applicants.[201] The fee simple interest in the

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[194] *See id.* at 277.

[195] *See id.* at 281.

[196] Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 31 n.15 (1991).

[197] *See* 40 W. 67th St. v. Pullman, 790 N.E.2d 1174, 1179 (N.Y. 2003) (applying the rule to the co-op board).

[198] *See id.*

[199] *See* Hansmann, *supra* note 196, at 31.

[200] *See* Constance Rosenblum, *Co-ops Chill, Condos Don't*, N.Y. TIMES (Jan. 24, 2014), http://www.nytimes.com/2014/01/26/realEstate/co-ops-chill-condos-dont.html.

[201] *See id.*

housing unit makes unnecessary the use of collective mortgages.[202] From a legal perspective, the state-enabling statutes that apply to such developments subject any restraint on alienation to the stricter review standard of "reasonableness."[203] Moreover, in many condominiums, the board may prevent a sale only by buying the unit itself at the contract price, giving current owners a disincentive to over-burden buyers.[204]

There are, however, some indications that condominiums and PUDs may seek to more vigorously scrutinize buyers or renters, and accordingly, to broaden personal disclosure.

One reason has to do with a more general tendency to tighten rules in such CIDs. As Section D shows, such rules may extend to the possession of pets, guns, or smoking. This means that condominiums now become more interested in the personal habits or traits of owners and renters, and they may seek to reveal such information in advance in order to decrease the possibility of an ex post legal clash, in which eviction might prove an impractical option.[205] Section D addresses in detail the question of disclosure in such dynamic settings.

Second, both high-end and middle-income condominiums become increasingly concerned with the financial stability of residents and their ability to meet the common-charge payments, and some already inspect more closely applicants' financial standing.[206] Such concerns have been heightened, especially since the subprime crisis, in which entire condominiums and PUDs became insolvent and collapsed financially, a problem not originally envisioned in the CIDs' enabling statutes or in their governing documents.[207] Many CIDs thus realize that financial reserves may be necessary to ensure the proper functioning of CIDs, and they become more concerned with residents' financial standing.[208]

Third, condominiums and PUDs are increasingly engaging in screening mechanisms that go beyond scrutinizing a person's financial standing, and therefore become increasingly interested in disclosing personal details of prospective buyers or renters. One notable example

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[202] *See* Schill et al., *supra* note 193, at 281.

[203] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, §§ 3.1, 3.4-3.5 (2000).

[204] *See* Hansmann, *supra* note 196, at 31 n.15.

[205] *See* Rosenblum, *supra* note 200.

[206] *See id.*

[207] *See* Evan McKenzie, *Rethinking Residential Private Governments in the U.S.: Recent Trends in Practices and Policy* 11-15 (2015) (working paper) (on file with author).

[208] *See* Rosenblum, *supra* note 200.

concerns convicted sex offenders. Typically referred to as "Megan's Law," U.S. Congress and nearly all state legislatures have enacted laws that provide for public notification when a convicted sex offender has moved into a certain locality.[209] The underlying purpose of such disclosure is to keep not only the local police updated, but also to inform neighbors of the presence of a convicted sex offender in their vicinity.[210]

In some cases, states and localities also seek to affirmatively act on such information and impose restrictions on residential choices of such felons, especially in proximity to schools or public parks, although the constitutionality of such restrictions is often contested.[211] As Subsection 4 shows, while an individual neighbor cannot prevent the sex offender from moving into the neighborhood, she could at least make an informed choice (for example, exiting).

What about a condominium or PUD in its collective capacity? Might it have a different legal standing, not only for the purpose of receiving information, but also for acting on it? In *Mulligan v. Panther Valley Property Owners Ass'n*,[212] a CID association voted to prohibit individuals registered as Tier-3 sex offenders under New Jersey's Megan's Law from residing within the CID. This decision was challenged by an association member, who argued that the new prohibition violated public policy by infringing the constitutional rights of Tier-3 registrants, and also by de facto deflecting such persons to neighborhoods that have no institutional exclusion mechanisms.[213] The court did not explicitly consider whether the association could be considered a state actor or was otherwise implicated by constitutional law. It focused on the reasonableness standard applying to the governing documents of CIDs.[214] The court reasoned that the question as to whether such provisions "make a large segment of the housing market unavailable" to

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[209] *See* Mark D. Kielsgard & Jack Burke, *Post-Incarceration Supervision of Pedophile Offenders: An International Comparative Study*, 51(1) CRIM. L. BULLETIN (2015), at pt. IV.C.1.

[210] *See id.* at pt. IV.B.1.

[211] *See, e.g.*, *In re* Taylor, 343 P.3d 867, 867, 878–79 (Cal. 2015) (holding that a blanket enforcement of sex offenders' residency restriction, forbidding registered sex offenders "to reside within 2000 feet of any public or private school, or park where children regularly gather . . ." is unconstitutional, even under the more deferential "rational basis" standard of constitutional review).

[212] 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

[213] *See id.* at 1192–93.

[214] *See id.* at 1189–92.

such persons, or exposes those who live in the "remaining corridor to a greater risk of harm than they might otherwise have had to confront" is largely empirical.[215] The court ruled in favor of the association, and held that the burden of proof lay with the plaintiff, who had established no such record.[216]

The ruling in *Mulligan* thus validates the homeowner association's interest not only in requiring disclosure of personal details (a criminal record as provided by Megan's Law), but also in acting upon such disclosure. One could further consider a hypothetical scenario in which a convicted sex offender seeks to purchase a housing unit via a trustee or shell company, but without actually moving into the neighborhood. Should a CID have a valid interest in requiring disclosure of the true owner behind the shell company? Might the CID take steps to thwart the acquisition of such a unit, arguing that such a secret acquisition would make it more difficult to prevent the offender from later moving into the development?

The question of personal disclosure, and its potential operative consequences as far as private collective organizations are concerned, should be analyzed along two axes: first, the types of personal information that would be considered normatively relevant, and second, the legal standard that would be applied in balancing the parties' interests.

As for the disclosure of information, one can delineate a tentative spectrum. At one end are pieces of information that a person should be entitled to keep private, while recognizing that certain traits, such as race or ethnicity, become practically discernible if the person also possesses the housing unit. A person's religion should be considered another personal trait that would not be disclosed if a person wishes to keep it secret. Even if such a trait is of interest to others, its relevance should be ruled out normatively.

At the other end of the spectrum, a person's financial status—and, in a narrower set of cases, criminal record—might be considered relevant information that requires disclosure, if the CID can prove a discernible externality that may result from such personal data or track record, with such a requirement for disclosure tailored to ensure its overall reasonableness.

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[215] *Id.* at 1192–93.

[216] *See id.* at 1193–94 (holding the record was not sufficient for the court to rule one way or another in regard to the Association's First Amendment).

At the spectrum's interim points, one may identify personal habits or preferences that are not otherwise legally prohibited, but have the potential to create substantial externalities. Such habits may include the possession of pets, guns, or smoking. Section D will explore the situations in which a CID may have an interest in the disclosure of such personal traits beyond merely prohibiting, or allowing, the underlying conduct in the CID's governing documents. This interest occurs because of the dynamic nature of collective rules dealing with such types of conduct, for example, the ability to change them by majority vote.

What legal standards should apply to the requirement for disclosure of information and the validity of steps that the CID might take upon such disclosure? It seems that the law of servitudes, together with general principles of property law, might serve as an appropriate framework for balancing the parties' various interests. Such a framework remains within the boundaries of private law, but at the same time, it offers a broader normative view of the societal and economic implications of such a balancing. This is particularly so with the unreasonableness and public policy exceptions to the validity of servitudes and other provisions in the CID's governing documents, with such legal standards embraced both by the Restatement and state courts across the country.[217]

At its core, the public policy exception requires CIDs to ensure that the risks of societal harm do not "outweigh the benefits of validating the servitude."[218] The balancing of interests implicated by the standards of public policy and unreasonableness could feature various considerations. The balancing test might look at whether the provision "unreasonably burdens a fundamental constitutional right" even if constitutional mandates do not apply directly to the parties.[219] It might also consider potential externalities that do not amount to nuisances or other civil wrongs, such as the possession of pets, and their effect on "the stable, planned environment of any shared ownership arrangement."[220] It might further weigh and balance the "freedom of contract, protection of

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[217] *See* Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 J. CONST. L. 1003, 1010–13 (2013).

[218] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. h. (AM. LAW INST. 2000).

[219] *Id.*

[220] Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1228–29 (Cal. 2004) (upholding a majority-approved amendment to a condominium's declaration, imposing a no-pet restriction).

expectation interests, and promotion of socially productive uses of land."[221] These private law mechanisms thus offer a rich framework for balancing the interests of the CID's association as a collective, and those of individual current and future residents. In particular, they may serve as an effective prism to examine the validity of CID rules pertaining to the disclosure of personal information or to the steps that the CID can take following such a disclosure.

4. Individual Neighbors

How can the interests of an individual neighbor or association member in the disclosure of legal actions be distinguished from those of the CID association as a group? What implications might this have for the scope of liberty to act on such information?

First, one should bear in mind that the interests of a current resident in a CID are not necessarily aligned with those of the association.[222] Consider a hypothetical scenario in which residents in a CID learn that the head of the local chapter of the National Rifle Association (NRA) had purchased a unit in the development. Assume that the CID does not have a rule against carrying guns in the common facilities (to the extent that such a rule would ever be considered valid)[223] and most neighbors do not mind such a habit. One neighbor, Jane, may have a different opinion, though. She may be subjectively deterred by the presence of guns displayed openly in the common facilities. Even if Jane cannot block a sale, she may at least consider exercising her liberty to sell and exit the CID.

Second, not all cases of inter-neighbor effects may necessarily involve CIDs or another shared-interest association that has a collective standing in requiring disclosure. Reconsider the previous example. Jane is now a homeowner in a suburban town not organized as a CID, and she learns of the acquisition of the neighboring home by a pro-gun activist. She has no way of preventing that sale, but may nevertheless have an interest in receiving that information upfront, assuming that the information would make her interested in selling and moving out, if the local real estate market is currently at a tide.

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[221] Wahl, *supra* note 217, at 1012.

[222] *See* Hansmann, *supra* note 196, at 34 (discussing a variety of ways that residents of CIDs can disagree regarding decisions to be made for the entire community).

[223] *See* Wahl, *supra* note 217, at 1024–35 (discussing federal and state constitutional law that influences decisions on the validity of HOA bans on handgun possession).

Therefore, what differentiates the individual neighbor from the CID association is that although the individual neighbor may have less standing to require the disclosure of information or to block a legal action upon knowing the actor's identity, she should enjoy the basic liberty to act on disclosed information, even if merely by deciding to exit.

In some cases, we may have strong normative reasons to dislike a neighbor's decision to exit based on her subjective sense of a prospective externality, although there is apparently little the law could do to prevent her from doing so. Probably the most vivid example is what is often termed "white flight," a process in which white residents move out of neighborhoods once more African-Americans or other minority groups move in.[224]

Consider now a less troubling exercise of the liberty to act on such information: Jane and Joe, an elderly couple, receive word that the neighboring lot is about to be bought by a private nonprofit that operates a network of private nursery schools. Even if this couple does not plan to take action against the sale itself or otherwise contest a potential rezoning or variance process to set up the nursery school, they may decide they would rather not bear the noise of toddlers and decide to sell, with the market currently at a tide.

More examples could be given, but the point seems to be clear enough. Knowing the identity of the person who purchases an adjacent lot or housing unit—whether the purchaser will move in or not—might be a valuable piece of information for the individual neighbor. If nothing else, the disclosure of such information allows her to make a better informed choice about her own actions. This seems to make an easy case for a general duty of disclosure. But as the following section shows, this may not always be the case.

C. Secret Land Assembly

Probably the most prominent use of secrecy in the context of real estate is for the purpose of private land assembly, that is, the process in which developers of large-scale projects use buying agents and shell companies to assemble land from multiple owners.

The key advantage of secrecy lies in the fact that because landowners do not know the true identity of the buyer or the purpose for which the

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[224] *See, e.g.*, KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2013) (analyzing this phenomenon in Atlanta in the 1960s and 1970s, and arguing that it was much more than a physical relocation, representing, rather, a major political transformation of the parties involved).

land is bought, they "do not . . . have an incentive to inflate their asking prices and hold out strategically."[225] Moreover, because the transactions are consensual, meaning the price is agreed upon between the parties, the secret land assembly is viewed as eliminating the risk of socially sub-optimal transfers.[226] The secret land assembly may thus prove a more effective alternative than the other key strategy to solve strategic hold-outs in assembling land: the use of eminent domain.[227] While public authorities are generally barred from engaging in such secret practices because of considerations of democratic deliberation, public account-ability, and fear of corruption, private entrepreneurs are not bound by such constraints on secret action.[228]

Is secret land assembly necessarily a socially optimal practice? Might the use of secrecy generate pecuniary or technological external-ities that should be taken into account as a matter of legal policy? The following analysis, based on a brief survey of a number of land assembly case studies, looks at two different groups of affected persons: those who sold to the assembler, and the remaining owners or other stakeholders. It asks whether each of these groups and the two groups taken together may be viewed as benefitting from such secrecy, or whether there are cases in which an early warning is in order.

An intriguing example concerns the early development of Los Angeles: "sit[ting] on a semiarid coastal plain, with desert on three sides and the Pacific Ocean on the fourth," city officials realized early on that the supply of fresh water was essential for its growth.[229] Frederick Eaton, city mayor between 1898 and 1900, proved to play a key role, though a highly controversial one, in secretly purchasing vast amounts of land tracts and water rights around Owens Valley, located two-hundred miles north of the city.[230] In 1904, Eaton started privately acquiring water

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[225] Daniel B. Kelly, *Acquiring Land through Eminent Domain: Justifications, Limitations, and Alternatives*, *in* RESEARCH HANDBOOK ON THE ECONOMIC ANALYSIS OF PROPERTY LAW 344, 368 (Kenneth Ayotte & Henry E. Smith, eds., Edward Elgar 2011) [hereinafter Kelly, *Acquiring*].

[226] *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 25 (2006) [hereinafter Kelly, *Public Use*].

[227] *See* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1714 (2007).

[228] *See* Kelly, *Public Use*, *supra* note 226, at 31–33.

[229] Mark Wheeler, California Scheming, Smithsonian Magazine, Oct. 2002, http://www.smithsonianmag.com/people-places/california-scheming-69592006/?no-ist.

[230] *See id.*

options from Owens Valley ranchers and farmers, bordering the Owens River, without disclosing the city's plans.[231] "He also purchased a 23,000-acre cattle ranch in Long Valley, most of which he hoped to sell to the city . . . for use as an aqueduct reservoir."[232] In 1905, the *Los Angeles Times* revealed the city's plan: diverting the Owens River's water and constructing a two-hundred-mile long downhill aqueduct, leading to the city.[233]

What then transpired was a complicated and often hostile relationship between the city and the Owens Valley locals.[234] According to the conventional account, locals and farmers were furious when they first learned of the plan and tried to pursue legal action while also resorting to violence, with the city gradually purchasing more tracts—often doing so in a checkerboard manner, so as to pit neighbors against each other.[235] More broadly, the Los Angeles aqueduct has been blamed for draining the Owens Valley, destroying the local agricultural economy, and creating an environmental hazard with the salty, dry bed of Owens Lake generating clouds of particles containing nickel, cadmium, and arsenic.[236] Under this version, Eaton's secret action started off a stream of adverse externalities.

Gary Libecap contests this conventional story, arguing that the effects on both those who sold their land and other Owens Valley stakeholders were, overall, quite beneficial.[237] According to Libecap, historical evidence shows that the valley's residents "likely knew" that their agricultural economy was unsustainable in the long run.[238] Los Angeles's quest for water granted locals an opportunity to escape such dilemmas, with post-disclosure sales of land to the city further attesting to the project's reciprocal benefits.[239] Moreover, the city's purchase of land and water rights arguably transformed the valley's economy for the

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[231] *See id.*

[232] *Id.* While the city purchased the water rights from Eaton after voters had approved a $1.5 million bond measure, negotiations between the city and Eaton over the 23,000-acre ranch eventually failed. *See id.*

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See id.*

[237] *See generally* GARY D. LIBECAP, OWENS VALLEY REVISITED: A REASSESSMENT OF THE WEST'S FIRST GREAT WATER TRANSFER 29–65 (2007).

[238] *Id.* at 64.

[239] *See id.* at 99–114.

better—from agriculture to tourism, while also yielding some environmental benefits.[240] Under this account, the secret purchases that paved the way for the project may have been instrumental in enabling an essential development—one that might have otherwise failed.

Another high-profile case of secret land assembly concerns the development of Walt Disney World in Orlando, Florida. Within a period of eighteen months, ending in early 1964, Walt Disney set up shell corporations and hired a network of real estate brokers who pledged secrecy while not knowing the true identity of their clients.[241] "Careful not to let property owners know the extent" of their interest, the brokers "quietly negotiated one deal after another."[242] The job of securing options to buy the properties was regularly performed by telephone calls. Many of the owners were out of state and "were delighted to sell," some of them having received the land through inheritances without ever seeing it, and were happy to receive cash payments (to eliminate a paper trail).[243] Because Disney's lawyers knew that recording the first deeds, even under the shell corporations, would trigger attention, they waited until they had a large number of lands secured by options before filing the paperwork. The first purchases were recorded on May 3, 1965, with dozens of others following soon. Altogether, Walt Disney secretly assembled more than 27,400 acres at an average price of $182 per acre.[244] By the time the *Orlando Sentinel* identified Disney as the mystery land buyer in October 1965, the assembly was done.[245]

A 2013 study examining the overall impact of Disney World on the surrounding area shows mostly positive externalities.[246] The project proved instrumental for the growth of Orlando and adjacent localities, and it has had long-term positive effects on employment rates, average

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[240] *See generally id.* at 99–114.

[241] *See* RICHARD E. FOGLESONG, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO 34–53 (2001).

[242] Mark Andrews, *Disney Assembled Cast of Buyers to Amass Land Stage for Kingdom*, ORLANDO SENTINEL (May 30, 1993), www.articles.orlandosentinel.com/1993-05-30/news/9305280833_1_walt-disney-osceola-land-transactions.

[243] *Id.*

[244] *See id.*

[245] *See id.*

[246] *See* Jessica Falletta et al., *GIS Project: The Impact of the Creation of Disney World* (Dec. 2, 2013), http://geography2318.blogspot.co.il/2013/12/group-eight-impact-of-creation-of.html.

household income, and housing prices (alongside increased congestion).[247]

Finally, consider the secret purchase by Harvard University of fourteen separate parcels in the city of Allston, totaling over fifty-two acres, which were made between 1988 and 1994.[248] Harvard made the purchases, at a total amount of $88 million, without revealing its identity to sellers, residents, or city officials.[249] The university made the news public in 1997. Then-mayor Thomas Menino, alongside other officials, community activists, and residents, reacted furiously.[250] Menino wrote to Harvard's president that the secret acquisitions reflected "the highest level of arrogance seen in our city in many years."[251]

Harvard, on its part, argued that "'[w]e were really driven by the need to get these properties at fair market value' and avoid 'overly inflated acquisition costs,'" and that such secrecy is a "normal" practice, while acknowledging that it did not know how much it saved by concealing its identity.[252] Alongside the angry responses, some locals responded more positively to the news, viewing Harvard's expanded stakeholding in Allston as a blessing.[253] One of the elderly residents noted that "somebody was going to buy that property anyway . . . . I'd rather have an institution of learning than a factory."[254]

After years of planning and delays, Harvard announced in 2015 that it is set to construct numerous developments, from academic facilities to retail and residential buildings.[255] Some of these developments aim explicitly at integrating industry and the local economy, such as the planned thirty-six-acre "innovation district," with an "enterprise research campus."[256] To facilitate this development, Harvard announced that it

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[247] *See id.*

[248] *See* Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth $88m in Allston*, BOSTON GLOBE, Jan. 10, 1997 at A1.

[249] *See id.*

[250] *See* Sara Rimer, *Some Seeing Crimson at Harvard 'Land Grab,'* N.Y. TIMES, June 17, 1997.

[251] *Id.*

[252] *See* Cassidy & Aucoin, *supra* note 248.

[253] *See* Rimer, *supra* note 250.

[254] Matthew W. Granade, *Community Responds Angrily to Purchases*, THE CRIMSON, June 27, 1997.

[255] *See* Jonathan Shaw, *A New Era in Allston*, HARVARD MAGAZINE, March-April 2015, 18.

[256] *Id.*

will donate land to move the current highway and build a new interchange, thus freeing up more developable place, while also providing land for commuter rail lines in exchange for a new railway station.[257] It remains to be seen how these planned projects will affect Allston and its residents.

What do these case studies teach us about the positive and negative effects of secret land assembly? While the advantages for the acquirer seem clear, a normative analysis of the interests of other stakeholders should be done also with an ex ante view in mind, rather than merely an ex post one. In other words, while in every case of secret land assembly one can identify in retrospect the effects of secrecy on the group of owners who sold to the acquirer and the effects of such secrecy on other stakeholders—mostly, remaining neighbors and landowners—one could also offer a prospective analysis of the issue.

Assume that Jane is a landowner in an agricultural area, a rundown industrial district, or anywhere else, for that matter. She is approached by a person who is willing to buy the land and to pay a premium for it on top of her subjective valuation of the land. She might or might not suspect that the person is interested also in other tracts. However, she may also contemplate the possibility that if this is indeed part of a secret land assembly, and the identity of the assembler would become known, other landowners might make their objection to the process public and the buyer will back off the deal. Generally speaking, Jane should realize that as a landowner, the option of secret land assembly has the potential to increase the demand for her land. Moreover, the fact that Jane engages in a transaction does not prevent other owners from similarly contemplating the possibility of secret land assembly and acting in their best interest. In this sense, the transaction itself does not inherently entail a normatively-foul externality. This viewpoint seems to abide by current judicial perspectives on secret land assembly, viewing it as a practice that regularly fosters efficient trades in the real estate market.[258]

Are there nevertheless scenarios in which an early warning is in order, meaning that certain types of acquirers should be legally prohibited from engaging in entire secrecy?

Such a limit might make sense for certain types of projects that entail significant technological externalities, beyond merely pecuniary ones.

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[257] *See id.*

[258] *See* Kelly, *Acquiring*, *supra* note 225, at 367 n.30 (surveying court opinions referring to the use of buying agents as a common practice among developers who assemble land for shopping centers and other urban projects).

When a corporation secretly assembles land to set up a waste disposal facility or another development that involves hazardous materials, the proprietary reality of land assembly may practically dictate the regulatory process of rezoning or requesting a permit. The problem lies not so much in the externality that a seller and buyer impose on other landowners, but rather in the underlying nature of the secretly planned project. A zoning board or any other regulatory agency might find it practically difficult to entirely disregard the new proprietary reality when engaging in the public process of land use regulation. The issuance of environmental assessment reports and other federal, state, or local procedures might lead to considerable waste on the part of both the assembler and sellers if the regulatory agency entirely disregards the sunk costs of land assembly—or oppositely, to inefficiency or unfairness to affected stakeholders, if it does take such costs into account.

While this risk exists for any type of land assembly that would require rezoning or a variance to set up the planned project, some industries or projects could be identified as normatively requiring an early notice during the proprietary stage. This is not to say that polluting industries would not be able to transact openly with affected stakeholders, including by purchasing ownership or easement rights.[259] But this setting does seem to be one in which ex ante secrecy might often entail particularly high ex post societal costs.

D. Shifting Majorities in Homeowner Associations

In a 2013 book, titled *Smoke Free Condos*,[260] the author Dr. Joyce Starr offers a practical guide to amending the governing documents of CIDs to limit smoking within condominium units and to proclaim second-hand smoking a nuisance.[261] The author describes how she led the condominium association through the cumbersome process of passing the amendment—the first of its kind in Florida—that required a majority of three-fourths of the unit owners.[262] While excluding the

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[259] *See, e.g.*, Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75 (2004) (documenting the publicly-disclosed process of land assembly, in which the American Electric Power Company acquired the entire town of Cheshire, Ohio).

[260] DR. JOYCE STARR, SMOKE FREE CONDOS: THE AUTHORITATIVE GUIDE (2013).

[261] *See id.*

[262] *See id.*

condominium's name for privacy reasons, the author also offers private consultations and public speeches on such CID amendments.[263]

This phenomenon has gained currency elsewhere over the past few years, with New York City's condominiums providing some high-profile case studies. One such example is One Grand Army Plaza, a high-end condominium near Prospect Park in Brooklyn, which amended its governing documents in 2013 to prohibit smoking in the building.[264]

The anti-smoking CID amendments were not the first, however, to raise legal and public interest. They were preceded by amendments prohibiting the possession of pets.

In *Villa De Las Palmas Homeowners Ass'n* v. *Terifaj*,[265] the California Supreme Court upheld a majority-approved amendment to a condominium's governing documents, imposing a no-pet restriction. Viewing such a use restriction as "crucial to the stable, planned environment of any shared ownership arrangement," the court held that all homeowners, including those who purchased their units prior to the amendment, are bound by it.[266] The court read section 1355(b) of California's Civil Code as settling for simple majority, reasoning that it is designed to prevent a "small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time."[267] Further, the court ruled that the provision of section 1354(a), by which the "covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable," applies also to amendments.[268] The burden is thus shifted to the challenger, who must show that the restrictions are "wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit."[269]

Many other issues can and do arise with respect to amendments in a CID's governing documents that would apply to all homeowners if otherwise held to be valid. One issue—not yet judicially resolved—concerns amendments that prohibit the possession of guns within a CID's

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[263] *See id.*

[264] *See* Rosenblum, *supra* note 200.

[265] 90 P.3d 1223 (Cal. 2004).

[266] *See id.* at 1228.

[267] *Id.*

[268] *Id.* at 1229.

[269] *Id.* at 1231.

housing units or across its common facilities.[270] Thus, with use restrictions becoming generally more prevalent in CIDs across the United States,[271] homeowners find themselves more exposed to the effects of a CID's changing majority.

What this means is that owners of housing units in CIDs have a growing interest in knowing the identity of current or prospective owners, especially to the extent that such owners have a special inclination toward a rule change that will directly affect all others. Consider a hypothetical scenario in which a unit is bought by a shell corporation, with the beneficial owner being an avid anti-smoking, anti-gun, or anti-pet activist (her reason for anonymity may or may not be related to this inclination). The CID in its collective capacity should probably not be entitled to block such a sale, even if it learns of the true identity of the beneficial owner—unless the buyer via the shell corporation explicitly declines to confirm her undertaking to abide by the current governing documents. A buyer should not be barred from entering a CID when she is legally committed to the CID's current rules, but may later seek to initiate a legitimate motion to change them.

An individual current owner might decide to act on such information and exercise her liberty to sell and exit. Assume that Jane owns a unit in a condominium that currently does not forbid smoking. Jane learns that a unit has just been sold to a beneficial owner, Martha, who is a well-known anti-smoking campaigner. Aware of the possibility that Martha might initiate a non-smoking rule at some stage, and with the real estate market currently being at a tide, Jane decides to sell and skip the controversy that might ensue. Because of the nature of interlocking interests in a housing organization, such as a CID, members in such private collective-action organizations should be seen as having a legitimate interest in knowing the personal identity of current and prospective tenants.

As such, the interest of a unit holder who lives in a housing organization in which use-rights and other property interests are formally interlocked to have the most basic knowledge of the identity of other unit holders—that is, their name—seems solid enough. Even if the situation cannot be fully equated with disclosing the identity of beneficial owners who accumulate shares in a public corporation beyond a certain threshold—because buying a housing unit will not result in a takeover of

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[270] *See* Wahl, *supra* note 217.

[271] *See* Rosenblum, *supra* note 200 (quoting Dennis Sughrue, the president of the One Grand Army Plaza condominium board, as saying that condominiums are likely to adopt "more co-op like rules").

the CID—there is a sense in which all units should be on equal footing for this very fundamental piece of information.

This does not mean that corporations should be prohibited from acquiring residential property in CIDs or similar housing organizations. Beneficial owners may have otherwise legitimate reasons to register the property with a corporation or a trustee. However, granting homeowners the ability to identify the beneficial owner by name, if nothing else, serves an important goal of preserving their liberty to make timely and informed decisions. This right for disclosure should be validated, absent countervailing private law considerations.

This Section cannot detail all the contingencies that might support such countervailing arguments against disclosure. Consider a situation in which a CID unit is registered under a trustee, with the beneficial owner being a minor, whose parents settled an *inter vivos* irrevocable trust, as discussed in Part III.A above. The unit is currently leased to a renter, with the lease payments being invested back in the trust. Revealing the identity of the beneficial owner might create havoc within the settlors' household (for example, one of the beneficial owner's siblings might be furious to learn about it). A potential solution for such a required balancing act might be the issuance of a certification of trust,[272] which would identify the trust's existence and the trustee's powers in managing the unit. Such an act of balancing could merge the private law considerations that guide the law of secret trusts with those that pertain to the institutional framework of CIDs.

E. The Boundaries of Secret Ownership and Social Design

The previous Section might leave the reader with a bit of unease. If those who buy housing units in CIDs cannot generally hide behind trustees or shell companies, meaning that the beneficial owner would be identified, at least by name, would this not exacerbate socially undesirable phenomena of exclusion or elitism by existing owners, acting individually or as a group? Might the disclosure of such information lead, for example, to individual responses, which could quickly develop into herd behavior, amounting to white flight? Isn't society better off in a situation where real estate owners can conceal their identity?

Such potential trepidations may echo the concerns voiced by Lee Anne Fennell in studying potential problems of association and exclusion

[272] *See supra* note 104 and accompanying text.

in localities and neighborhoods.[273] As Fennell observes, in today's metropolitan areas, "homebuyers are often much less interested in the on-site attributes of real estate than in the people, things, services, and conditions lying beyond what we continue to refer to as the property's boundaries."[274] This may result, however, in exclusionary strategies employed both by localities (via their land use regulation powers) and by private communities (via their CID governing documents and other rules) that might prove socially inefficient or unjust.[275] These strategies could often be subtle, but highly effective, in sorting people based on some personal traits that may not necessarily be the most relevant for effective organization. Lior Strahilevitz points to one such phenomenon by which some CIDs may decide to construct golf courses, not necessarily because residents particularly value the game itself, but because of race-based self-sorting mechanisms that may typify golf communities.[276]

In considering the effects that secrecy or, rather, disclosure, may have on the social composition of CIDs or neighborhoods, or on any other issues pertaining to social design, one should realize that informational asymmetries that may currently exist due to secrecy generally have a clear socioeconomic bent. On the one hand, phenomena such as white flight or strategic rule design of golf communities address personal traits that cannot be hidden. They implicate persons who would actually possess the housing units and who have no way of concealing the personal trait that may lead to normatively-troubling acts.

In contrast, the use of secrecy would be effective when the beneficial owner does not possess the apartment, or does so only infrequently—as the Time Warner Center case illustrates—or when the underlying personal preference, which may later affect neighbors in the case of a potential rule change, would not be immediately obvious to other unit holders.

In such a state of events, the secret owner enjoys an informational leverage over other unit holders, who do not take measures to conceal their identities in the real estate registry, and whose personal inclinations are otherwise learned by living in a CID that currently follows certain collective rules. While secret purchasers may not always be the kind of

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[273] *See* LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 123–46 (2009).

[274] *Id.* at 2.

[275] *See id.* at 124–26.

[276] *See, e.g.*, Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 464–76 (2006).

American or foreign magnates that own much of Time Warner Center, they may otherwise be sophisticated enough to harness informational asymmetry for their own good.

In the *New York Times*' report, Princeton historian Hendrik Hartog is quoted as saying: "There's a whole Jeffersonian rhetoric about land ownership. . . . There was a goal to make land transparent, and it was justified by civic values and a whole range of moral judgments like not hiding ownership."[277] The Jeffersonian days are long gone. We may also be skeptical about whether the legal institution of property, and real estate ownership in particular, should inherently entail values such as community or participation—ones that seek to enrich the concept of citizenship and deep engagement with others.[278] However, an explicit discussion of the current role of real estate public registries, the right to access information in institutional settings where property interests are formally interlocked, and the normative identification of the types of information that should be relevant to both public agencies and private actors in their individual and collective capacities may offer a significant social benefit. Normatively differentiating between collective and individual power to act on personal information could actually aid in challenging practices targeted against "unwelcomed neighbors" whenever such practices have no normative merit. Society has much to benefit by publicizing the true virtues of secrecy.

V. CONCLUSION

The growing secrecy within real estate public registries poses a significant challenge for legal policy and may require a reexamination of the underlying premises of property law. While the balancing act of secrecy versus disclosure has long been a part of constitutional law and other settings that follow the paradigm of "The Individual versus Big Brother," it has been largely missing from the study of property, especially in its private law aspects. The study of secret trusts and secret accumulation of shares in public corporations could thus serve as an illuminating starting point for understanding the complex interrelations between secrecy and externalities and their potential implications for property law.

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[277] Story & Saul, *supra* note 1.

[278] *But cf.* Alexander, *supra* note 154, at 1273–76 (describing how the public values of community and participation form a necessary part of human flourishing, which the author argues is the underlying principle of private property).

Real estate is a physical and legal space that has always entertained strong claims for rights and duties. Ideas of liberty, autonomy, and privacy, alongside concepts such as aggregate efficiency, social justice, or equality, have occupied the center stage in the philosophical, economic, and legal analysis of land as a key societal resource. But some of the most prominent issues, and the appropriate ways to balance between competing ideas, have been kept under their radar. This could be the result of deficient empirical assumptions—one of them being that a public registry of real estate would self-resolve the tension between secrecy and disclosure among private parties or vis-à-vis public bodies. However, as the themes featured throughout this Article show, this is far from being the case. Property law must therefore construct a careful framework for identifying the entire array of stakeholders that may be affected by the secrecy or disclosure of legal interests in land, and it must integrate key design tools of private law to properly balance between such interests.

As this Article has shown, the answer to such queries would not result in a categorical rule or in a single metric, such as by distinguishing between technological and pecuniary externalities or between sophisticated developers and rank-and-file owners. The answer should be based, rather, on understanding the complex ways in which various interests become interlocked and distinguishing between the potential duty to disclose and the legal ability of other stakeholders to act on such information. The results may often be truly counterintuitive. Walt Disney may have been absolutely entitled to keep quiet about purchasing 27,400 acres in Orlando. A purchaser of a 1,000-foot condominium unit may not be entitled to such a right vis-à-vis a neighbor anxious about getting to keep her pet.