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## Land Virtues

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# LAND VIRTUES

Eduardo M. Peñalvert†

*This Article has two goals. First, I explore some of the descriptive and normative limitations of certain law-and-economics discussions of the ownership and use of land. These market-centered approaches struggle in different ways with features of land that distinguish it from other “commodities.” The complexity of land—its intrinsic complexity, but even more importantly the complex ways in which human beings interact with it—undermines the positive claim that owners will focus on a single value, such as market value, in making decisions about their land. Adding to the equation land’s “memory,” by which I mean the combined impact of the durability of land uses and the stabilizing consequences of human sociality, calls into question the normative assessment that rational landowners are likely to be using their land wisely, or at least more wisely than other modes of decision making might hope to accomplish. These observations do not discredit the judicious use of economic analysis as a tool of land-use policymaking, but they do point toward the need for more sophisticated models of landowner behavior and the benefits of a richer normative theory of property, one that is capable of situating the output of that economic analysis within a larger moral framework. Setting forth the broad outlines of one such theory as it applies to the law of land use is the second goal of this Article. An approach to property rooted in the Aristotelian tradition of virtue ethics, I will argue, is capable of incorporating the valuable insights that have made economic analysis so appealing to land-use theorists without distorting our moral vision or treating economic consequences as the only considerations that ought to matter.*

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## INTRODUCTION

*"This used to be real estate, now it's only fields and trees."*

— Talking Heads (1988)

"Law and economics" dominates contemporary legal academic discussions of the ownership and use of land.<sup>1</sup> Its near hegemony in this area, however, belies a number of analytic limitations and normative weaknesses. The irreducible complexity of land and the difficulty that legal economists have in dealing with questions of intergenerational justice that lie at the heart of many land-use debates render economic discussions of land use incomplete in ways that undermine legal economists' frequently normative ambitions. My goal in this Article is twofold. First, I aim to explore some of the limitations of law-and-economics analysis of land-use questions. Second, I begin to lay the groundwork for an approach rooted in the Aristotelian tradition of virtue ethics, one that is able to incorporate the insights of economic analysis without succumbing to the tendency to treat efficiency as the only relevant normative consideration. The goal of this second part of the Article is not to deny the value of economic analysis, but

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<sup>1</sup> See JESSE DUKEMINIER ET AL., PROPERTY 46 (6th ed. 2006) ("Utilitarian theory is, without doubt, the dominant view of property today, at least among lawyers . . ."); cf. Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 536–37 (2007) (calling the economic approach to resource management "near hegemonic").

rather to give that analysis purpose while forestalling its sometimes-imperial ambitions.

Law and economics provides, among other things, “a theory of the purposive behavior of private landowners” to employ in assessing legal structures and rules.<sup>2</sup> Notwithstanding differences among their approaches, legal economists working in the area of land use have traditionally agreed in constructing their behavioral theories around the figure of a “rational” landowner motivated primarily by a desire to maximize her wealth.<sup>3</sup> In addition to deploying this rational-actor model to predict how landowners will respond to legal rules, proponents of law and economics have often gone one step farther and endeavored to evaluate the consequences of the interaction of their behavioral model with particular legal structures and rules.<sup>4</sup>

The literature critiquing law and economics is vast and rich.<sup>5</sup> This Article will neither recount those important discussions in detail nor criticize economic analysis in any comprehensive way. My goals are more modest, and, in a sense, less hostile to the economic analysis of law than these earlier discussions. I aim not to discredit such analysis across the board, but merely to explore several problems raised for the operation of law and economics within the discrete area of land-use scholarship. In particular, I focus my discussion, first, on some legal economists’ over-reliance on land’s market value and owners’ incentives to maximize market returns in crafting their positive mod-

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<sup>2</sup> ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 32 (3d ed. 2005); *see also* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000) (“Law and economics is, at root, a behavioral theory . . .”).

<sup>3</sup> See ELLICKSON & BEEN, *supra* note 2, at 32 (“Economists classically assume that a person is self-interested and makes rational choices among available opportunities.”); Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1460 (2006) (“An economist might take the position that individual persons should act so as to maximize their expected utilities.”); *see also* Christine Jolls, *Behavioral Law and Economics*, in BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 115, 115 (Peter Diamond & Hannu Vartiainen eds., 2007) (“[L]aw and economics . . . often (controversially) employs the normative criterion of ‘wealth maximization.’”).

<sup>4</sup> See Jolls, *supra* note 3, at 115–16; Solum, *supra* note 3, at 1460.

<sup>5</sup> This footnote could go on for pages, but for a few prominent examples, see JULES L. COLEMAN, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980), reprinted in MARKETS, MORALS, AND THE LAW 95 (1988); RONALD DWORKIN, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237 (1985); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); and *see also* Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996) (describing critiques of law and economics from the environmental ethics, civic republicanism, and commodification points of view).

els of landowner behavior,<sup>6</sup> and, second, on highlighting what I see as the limited normative significance of economists' positive findings.

Recent efforts by behavioral economists and certain contemporary proponents of the new institutional economics to introduce more complex behavioral models into economic analysis of individual and communal conduct depart in significant ways from the wealth-maximizing, rational-actor model that continues to inform a great deal of property and land use theorizing.<sup>7</sup> I want to be clear at the outset that I do not understand my exploration of the descriptive and prescriptive problems with the economic property theories I am discussing to reach these more sophisticated behavioral approaches.

In addition to this move toward more subtle and empirically grounded behavioral models, which I applaud, a number of contemporary legal economists, most prominently Louis Kaplow and Steven Shavell, have constructed their legal theories around the maximization of "welfare," a category of value that they understand to be significantly broader than "wealth" and, indeed, to encompass anything and everything that people might desire.<sup>8</sup> As I argue below, it is not clear how either of these new approaches (the more sophisticated behavioral models or the broader definition of value favored by Kaplow and Shavell) fit with the thick normative conclusions about private landownership derived from the earlier wealth-focused arguments, which seem to rely heavily on robust predictions about the likely behavior of rational actors coupled with widely held intuitions about the importance of the wealth they single-mindedly pursue.<sup>9</sup> Setting this observation to the side, however, the targets of my discussion are very narrow. I intend to focus my descriptive critique on the subset of "law and economics" accounts of land ownership that continue to employ a rational-actor model of landowner behavior. My concerns with the normative use of economic theories of land use are somewhat broader. And, thus, to the extent (and *only* to the extent) that proponents (or consumers) of these more sophisticated descriptive models treat the output of these models as possessing its own conclusive normative sig-

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<sup>6</sup> See, e.g., ELICKSON & BEEN, *supra* note 2, at 32, 49; WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4–12 (2001); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–58 (1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993); Jon C. Sonstelie & Paul R. Portney, *Profit Maximizing Communities and the Theory of Local Public Expenditure*, 5 J. URB. ECON. 263, 271 (1978) (assuming that rational homeowners will "seek to maximize the [market] value of their house").

<sup>7</sup> See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 15–18 (1990); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 25–26 (1989).

<sup>8</sup> See LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18 (2002).

<sup>9</sup> See *infra* notes 107–11 and accompanying text.

nificance, I understand my discussion of the *normative* shortcomings of law and economics to have force, even as against scholars employing models based on these recent refinements.

The seminal example of the position I aim to critique is Demsetz's influential argument on behalf of the causes and consequences of individual ownership of land in his classic article, *Toward a Theory of Property Rights*. Arguing that individual land ownership does a better job than collective ownership at encouraging owners to act as responsible stewards, Demsetz asserts that

[i]f a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death. . . .

In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future.<sup>10</sup>

More recent land-use theories have assigned similarly prominent roles to the market value of land within their economic accounts of land-owner behavior.<sup>11</sup>

These discussions of the incentives that land's market value generates for wealth-maximizing landowners (which I will call the "Demsetzian" or, borrowing from Joe Singer,<sup>12</sup> the "investment" model of landowner behavior) comprise two dimensions. The first, which is

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<sup>10</sup> Demsetz, *supra* note 6, at 355. Although Demsetz's specific theory of rational action is left implicit, it seems clear from his focus on wealth in this passage, and from his robust predictions about the impact that land's market value will have on private owners, that he relies on what Russell Korobkin and Thomas Ulen call a "thick" wealth-maximizing theory (as opposed to, say, a "thin" welfare- or utility-maximizing theory) of landowner action. Korobkin & Ulen, *supra* note 2, at 1060–61.

<sup>11</sup> See, e.g., FISCHEL, *supra* note 6, at 5; Richard A. Epstein, *How to Create—Or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 743, 748 (2007) ("While the standard of wealth is not the be all and end all of social welfare, it works especially well with land use transactions, where market values are useful proxies to social welfare."); Sonstelie & Portney, *supra* note 6, at 271. It is worth noting that the market value economic theorists posit landowners will seek to maximize is not necessarily *present* market value of the land. On their view, landowners can rationally act in ways that reduce market value in the short term in the anticipation of increased market value over the long run. See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 982 (2004). It is also rational for owners to sacrifice the market value of their land in exchange for market value in the form of other assets. As the quote from Demsetz above illustrates, the market returns of interest to economic theorists is the present value of immediate or future economic returns from the land.

<sup>12</sup> See generally Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) (distinguishing between conceptions of property as a "castle," as an "investment," and as "citizenship").

primarily descriptive, asserts that private owners predictably act in ways that maximize market returns from their land. The most prominent contemporary example of this approach is the positive theory of homeowner behavior around which William Fischel builds his model of local government.<sup>13</sup>

In addition to this descriptive element, the Demsetzian model also has a normative dimension. From this normative standpoint, private ownership creates the incentive to use the land wisely, conserving it (or consuming it) in response to signals sent by the market about the scarcity and value of the resources embodied within a particular parcel of land.<sup>14</sup> “Conservation,” on this view, is not a descriptive term, referring to the protection of a parcel’s health (and value) no matter what the circumstances. Instead, it constitutes an evaluative judgment that rational private owners will not be *wastefully* (i.e., wrongly) destroy their land, but rather degrade it only when doing so would generate a greater amount of wealth in some other form.<sup>15</sup> This obviously normative stance operates as a means of demarcating the boundaries of owners’ obligations.<sup>16</sup> It deploys the Demsetzian model of landowner behavior to argue that private owners’ decision making about land is, in the absence of demonstrable market failure (and frequently even in the presence of significant market failure), superior to decisions reached through collective or public deliberation.<sup>17</sup>

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<sup>13</sup> See FISCHEL, *supra* note 6, at 5.

<sup>14</sup> Robert Ellickson exemplifies this evaluative use of the Demsetzian framework when he describes individual landownership as an important engine of land conservation. See Ellickson, *supra* note 6, at 1369.

<sup>15</sup> Ellickson argues that a “rational and self-interested fee owner . . . adopts [an] infinite planning horizon when considering how to use his parcel [of land], and is spurred to install *cost-justified* permanent improvements and to avoid *premature* exploitation of resources.” *Id.* (emphasis added).

<sup>16</sup> See Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 650 (2007). The normativity of the Demsetzian argument vis-à-vis regulation was, at least in its original form, only implicit because Demsetz did not really address himself to the question of collective regulation in his 1967 article, choosing to focus instead on a comparison of private ownership and collective ownership. See Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. S653, S658 & n.10 (2002). The implications of his position for regulation, however, were fairly clear, and his later writing has made explicit that Demsetz believes that, by and large, private control is superior to collective regulation. In his 2002 essay, *Toward a Theory of Property Rights II*, Demsetz closes the circle by making the familiar Hayekian point that the “collective control of resources is disadvantaged [relative to private ownership] . . . because central planning depends on acquisition and use of knowledge but has no good method for enabling central planners to acquire it.” *Id.* at S664. He connects this informational argument to his original model of ownership by noting that regulators will not efficiently gather the information needed for wise decision making because they lack the incentives generated by private ownership. See *id.* at S664 n.18.

<sup>17</sup> See, e.g., TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 22–23 (1991); Ellickson, *supra* note 6, at 1369; Richard A. Epstein, *Justice Across the Genera-*

As I argue in Part II, each of these facets of the Demsetzian position struggles in different ways with features of land that distinguish it from other "commodities." The complexity of land—its physical complexity, but more importantly the complex ways in which human beings interact with it—undermines the positive claim that landowners will predictably seek to maximize their land's market returns. Adding to the equation land's "memory"—by which I mean the combined impact of the durability of land uses and the stabilizing consequences of human sociality—calls into question the normative assessment that owners who do act to maximize the value of their land are using their land wisely, or at least more wisely than other modes of decision making might hope to accomplish.

I also offer in Part II some additional reasons for doubting the wisdom of drawing normative conclusions (at least in any straightforward way) from positive economic analysis, even when that analysis is descriptively accurate. When law and economics sticks to its positive project, it is a powerful analytic tool that is helpful in identifying and quantifying some of the costs or benefits of adopting particular means to achieve our land-use policy goals. This is especially true of recent efforts that rely on more realistic models of landowner behavior. But even the most sophisticated and empirically grounded economic analysis is a tool that can offer no conclusive guidance in the crucial task of determining what goals the law ought to pursue and what costs are worth bearing to achieve those goals. Despite this limitation, economically inflected land-use scholarship often slides imperceptibly (or, at times, blatantly) from positive economic analysis that merely describes the costs and benefits of competing courses of action into a normative stance in which efficiency is assumed to be the overriding purpose of lawmaking, or at least of *property* lawmaking.<sup>18</sup> When scholars make this leap from evaluating means to promoting ends, they bypass a number of deep and difficult questions about the function and purpose of property law.<sup>19</sup>

Notwithstanding its limitations, the persistent popularity of economic analysis among land-use scholars presents a challenge to change the parameters of the conversation. Specifically, those who wish to do so should be able to map a path that appropriately honors land's complexity and memory and the normative complications gen-

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tions, 67 TEX. L. REV. 1465, 1466 (1989); cf. Anup Malani, *Valuing Laws as Local Amenities*, 121 HARV. L. REV. 1273, 1274 & n.1 (2008) (contending that the "value of a law" in a jurisdiction is to be measured, in part, by its impact on the "aggregate [market] value of residential land in that jurisdiction").

<sup>18</sup> See Nussbaum, *supra* note 5, at 1198 ("Typically [law and economics] presents itself as explanatory/predictive; but through a certain characteristic use of the concept of rationality, it ends up making normative judgments as well.").

<sup>19</sup> Cf. Solum, *supra* note 3, at 1462.

erated by these features of land's role in human well-being. In addition, alternative approaches should be able to assign a role to well-executed positive economic models as well as to account for the features of the normative use of economic analysis, such as its intuitively appealing insistence on the importance of human welfare, that have made it so attractive to such a broad range of distinguished scholars.

In Part III, I take a first step towards sketching the outlines of one approach to landowner obligation that aims to accomplish both of these tasks—an approach that is rooted in the Aristotelian tradition of virtue ethics. This theory understands the purpose of property law to be the promotion of human flourishing, both of owners and non-owners. I describe how such a theory can express a proper regard for the richness of human and ecological interests at stake in our land-use decisions. Moreover, unlike the normative version of law and economics or the principal alternatives that have garnered significant support among contemporary property theorists, an Aristotelian approach to land use is capable of incorporating the important insights of positive (and even certain features of normative) economic analysis without succumbing to the temptation to treat economic consequences as the only factors to weigh in determining how to evaluate competing land-use regimes.

## I LAND'S PROPERTIES

### A. Land's Complexity

It has long been a commonplace that the “common law of property in its wisdom has regarded each piece of land as unique.”<sup>20</sup> When commentators discuss land’s complexity, they are almost always speaking about the very real way in which individual parcels of land differ from one another in their physical attributes and ecological roles.<sup>21</sup> Even two parcels that are similar in a number of respects can vary dramatically in their topography and soil characteristics, their hydrology and ecology. One parcel may be cleared of all vegetation except for a neatly mowed lawn and the neighboring parcel might be a wetland or home to an endangered species. On the same short stretch of coastline, one parcel might be growing in size from sand accretion while its immediate neighbor erodes into the sea. Given this variability, land, more than most resources, resists generalization.

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<sup>20</sup> Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in ENVIRONMENTAL LAW STORIES 237, 279 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

<sup>21</sup> See *id.*

But land's complexity also extends along another, less tangible axis. Land's status as an essential component in any human activity that requires physical space leads to a second dimension of land's complexity: its relationship to human beings.<sup>22</sup> In Karl Polanyi's words, "The economic function is but one of many vital functions of land."<sup>23</sup> Instead, Polanyi argued, land "invests man's life with stability; it is the site of his habitation; it is a condition of his physical safety; it is the landscape and the seasons."<sup>24</sup> Thus, the variegated patterns of human creativity and sociability complement and compound the land's natural diversity.

On the physical level, human ingenuity can diminish the impact of land's natural variability, or it can enhance it. For better or for worse, human beings can take a steep hillside or a piece of flat grassland or a desert or a swamp and turn each of them into a factory or a home or a farm. On the other hand, human beings can take two identical parcels of land and turn one into a landfill and the other into a church. Once an owner has determined a parcel's use—sometimes through the application of extraordinarily transformative labors—the ways in which human beings relate to that land will vary dramatically in response to that decision.<sup>25</sup>

On a deeper level, land derives its complexity directly from the intricacy of the social activities that take place upon it. Each parcel of land in a city will be unique, in a sense, because of the relationship it bears to the web of human interactions within which it is situated. As sociologists John Logan and Harvey Molotch put it, "[e]very parcel of land is unique in the idiosyncratic access it provides to other parcels and uses, and this quality underscores the specialness of property [in land] as a commodity."<sup>26</sup> In short, a crucial feature of land's complexity is its role as a template for—and a practically necessary ingredient in—the full spectrum of human aspiration and activity.

## B. Land's Memory

In addition to its complexity, land has memory. Changes that human beings make to the land have a tendency to remain in place until they are affirmatively removed. And because the quantity of

<sup>22</sup> See Ellickson, *supra* note 6, at 1317 ("Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization."); see also JOHN R. LOGAN & HARVEY L. MOLOTCHE, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 17 (1987) ("[P]lace is indispensable; all human activity must occur somewhere.").

<sup>23</sup> KARL POLANYI, THE GREAT TRANSFORMATION 178 (1944).

<sup>24</sup> *Id.* Thanks to Doug Kysar for bringing this discussion to my attention.

<sup>25</sup> Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2976 (2006).

<sup>26</sup> LOGAN & MOLOTCHE, *supra* note 22, at 23; *see also id.* at 43–45.

land is fixed, we are fated to live our lives within a landscape that bears the indelible imprint of our forebears, even if we do not always recognize that imprint for what it is.

Like land's complexity, this inertial quality of land uses has both a physical and a human dimension. Physically, land's memory is as variable as the land itself. Some land is so dynamic that its human imprint can be maintained only by constant effort. Left to its own devices, the continuously advancing and retreating sandy seashore is likely to undermine all but the most tenaciously constructed "improvements." Very often, however, land is sufficiently stable that human transformations will remain in place almost indefinitely unless human beings actively restore the land to its prior form. Sometimes, as in the case of extinct species, physically undoing human beings' transformative changes to the land will be impossible. More often, it will merely be prohibitively expensive. In either case, the changes to the landscape made by prior owners qualify and constrain present decision making in dramatic ways.

Reinforcing land's physical memory is the oft-noted temporal dimension to human beings' psychological attachment to property. To use Holmes's evocative image, existing land uses take root in human beings over time.<sup>27</sup> This tendency generates what Joe Singer has called a powerful "reliance interest" that gradually builds up in long-standing land uses.<sup>28</sup> Owners and non-owners alike can form this temporal reliance interest and, as the popularity of historic preservation statutes evinces, both will often seek to preserve the status quo on which they have come to depend. In recognition of this phenomenon, when other factors are in equipoise, property law reflexively favors those who are first in time.<sup>29</sup> Doctrines like adverse possession and prescription provide legal protection to long-established land uses, even those that were initially illegal.<sup>30</sup> These property rules, along with many others, implicitly acknowledge and honor the powerful psychological attachments that build up around existing land uses over time and on which land's memory, in part, depends.

The physical and psychological tenacity of our impacts on the land, however, is not the entire story of land's memory. The collective interdependence of individual land uses reinforces their inertial

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<sup>27</sup> See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

<sup>28</sup> Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622 (1988).

<sup>29</sup> See Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1134–35 (2007) ("When two litigants have more or less equivalent claims, property doctrine almost reflexively favors the prior user, appropriator, or occupant. Likewise, the conclusion that a plaintiff has 'come to a nuisance,' although not an iron-clad defense, often makes it harder (or at least more expensive) for that plaintiff to obtain relief.").

<sup>30</sup> See Singer, *supra* note 28, at 663–701.

power. Once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others.<sup>31</sup> A single house, considered in isolation, is only as stable as its owner, but a neighborhood of homes, businesses, clubs, and churches constitutes an interlocking and interdependent network of relationships and commitments that is, collectively, exponentially more durable than each of its constituent parts.<sup>32</sup>

The interplay of these physical, psychological, and social components of land's memory yields a pervasive path-dependence in land use. After it has been built, a highway cannot be shifted without doing significant harm to the numerous businesses and homeowners who have come to depend on it for access to their properties. A city founded in a particular location to take advantage of access to water-borne transportation will remain in the same place long after cultural change or technological advance have dissipated its locational advantages.<sup>33</sup> Similarly, sprawled out, low-density residential neighborhoods built around automobile use and cheap gasoline will be extremely difficult to dislodge once fuel becomes expensive or the technology of personal transportation shifts away from the car. The constellations of land uses we confront today are the consequences of countless decisions made decades (even generations) ago, and the decisions we make today will reverberate through the same mechanisms far into the future.

The inertia of land's memory, and the path-dependence it engenders, can deepen our understanding of a number of land-use phenomena. An intuitive grasp of its operation likely motivates efforts to rush land uses into place in the hopes that "facts on the ground" will prove difficult to undo.<sup>34</sup> Nomi Stolzenberg describes Jewish settlements in the West Bank as an example of this strategy in action.<sup>35</sup> Sonia Katyal and I have, similarly, written about squatters on the American frontier employing the same strategy to resist restrictions on their use of federal lands.<sup>36</sup> Land's memory, and the attachments on which it depends, also shed light on the ambiguous status of gentrification, helping to explain why communities frequently (and some-

<sup>31</sup> See DOUGLAS W. RAE, CITY: URBANISM AND ITS END 41 (2003); William A. Fischel, *Why Are There NIMBYs?*, 77 LAND ECON. 144, 150 (2001).

<sup>32</sup> See JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 143–77 (1961).

<sup>33</sup> See RAE, *supra* note 31, at 42–72.

<sup>34</sup> See generally Nomi Maya Stolzenberg, *Facts on the Ground*, in PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., forthcoming 2009) (on file with author) (explaining Israel's strategy of establishing civil rather than military communities in the settlements in order to create "de facto if not de jure extensions of the Jewish state" that "would ripen into de jure annexations of the state of Israel, or be used as bargaining chips in the eventual political settlement").

<sup>35</sup> See *id.*

<sup>36</sup> Peñalver & Katyal, *supra* note 29, at 1105–14.

times almost reflexively) resist change, even when they stand to gain financially from the process.<sup>37</sup>

Importantly, the durability of land uses takes on added significance because the quantity of land is fixed.<sup>38</sup> As the old saw goes, land is always a good investment because “God isn’t making any more of it.” Although noting land’s finitude is an unoriginal, even banal, observation, the tendency of economic theory to treat land as a fungible commodity makes it worth remembering that the supply of land is ultimately limited. Land’s finitude amplifies the importance of land-use decisions because, all things being equal, more land put to one use results in less land available for another. Combined with land’s memory, this means that, once in place, existing land uses will frequently limit the scope of our land-use choices for a long time to come. Consequently, land remains the site of numerous conflicting demands, both among human beings (including human beings who have yet to be born) and between humans and other species.<sup>39</sup>

## II

### THE PROBLEM OF LAND WITHIN LAW AND ECONOMICS

Land’s complexity and memory generate significant problems for the simplifying project of the land-use theories I am discussing. As I explain in this Part, land’s complex relationship with virtually every arena of human endeavor means that, for many owners, the way in which land facilitates the direct enjoyment of a variety of non-fungible, and often social, human goods overshadows the motivating force of its investment value.<sup>40</sup> In addition, combining land’s complexity with its memory undermines the Demsetzian case for deferring to owners’ decision making about the uses of their land.<sup>41</sup>

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<sup>37</sup> I will return to the topic of gentrification later in the article. *See infra* Part II.A.1.

<sup>38</sup> *See* LOGAN & MOLOTH, *supra* note 22, at 23.

<sup>39</sup> At least for human beings, the supply of land is even more limited than initially appears to be the case. Less than 15 percent of the earth’s land surface is arable, and nearly half the earth is unsuitable for dense human habitation, being either dessert or mountain. Most importantly, however, as social animals, human beings have a profound need to live near one another for both commerce and social interaction. As a result, human populations are not spread evenly over habitable landmasses, but are instead clustered tightly around rivers, coastlines, and low-lying areas. *See generally* Christopher Small & Joel E. Cohen, *Continental Physiography, Climate, and the Global Distribution of Human Population*, 45 CURRENT ANTHROPOLOGY 269 (2004). The impossibility of living a fully self-sufficient life means that human beings must, for the most part, find a place to live within a certain distance of established population centers. Although the limiting distance this requirement imposes has expanded over time in response to technological change, it has never ceased to operate. Cf. ROBERT BRUEGMANN, SPRAWL: A COMPACT HISTORY 62–63 fig.9 (2005) (charting the population densities of major U.S. cities since 1950).

<sup>40</sup> *See infra* Part II.A.

<sup>41</sup> *See infra* Part II.B.

### A. The Motivating Power of Land's Market Value

Wearing its descriptive hat, the Demsetzian position asserts that landowners will ultimately be motivated by the desire to maximize the market returns on their investment in land, most often by seeking to maximize the value of the land itself. This *land-value* maximizing model is, for example, the one around which William Fischel built his influential theory of homeowner and, by extension, local-government behavior.<sup>42</sup> From an economic standpoint, this particular model is most plausible with respect to those landowners who view their land as a distinctive asset that cannot easily be substituted for other forms of value. For other, less land-focused owners, the rational-actor model predicts that they will be more than happy to degrade their land in order to obtain some other good of greater value when doing so will maximize their overall wealth and less destructive means are not cost-effective.<sup>43</sup>

Of course, land-focused landowners do exist. One obvious example is the American homeowner.<sup>44</sup> Because (typically) homeowners only own one piece of land, which normally constitutes a large portion of their net worth, they tend to devote a great deal of attention to their land, as compared with their other property.<sup>45</sup> Even the way they go about making the decision to purchase a home, rather than, say, to rent or invest their wealth in some other asset, illustrates land's unique significance to them.<sup>46</sup> William Fischel poses the following hypothetical:

Suppose an investment advisor told you to take almost all of your assets and purchase a single firm that produced one product in a single location. She assures you that this firm has in the long term been [sic] had a good rate of return, but, upon your questioning, she does admit that it has had a lot of ups and downs.<sup>47</sup>

Fischel plausibly concludes that, faced with such investment advice, “[m]ost people would decline to pursue such a strategy,” and yet, as

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<sup>42</sup> See sources cited *supra* note 31.

<sup>43</sup> As Lior Strabilevitz (and Felix Cohen before him) have observed, it is conceptually impossible to “destroy” land, or at least land conceived as a parcel of property. See Lior Jacob Strabilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 795 (2005); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 360–61 (1954). But owners of land can destroy land’s utility to human beings and to ecosystems.

<sup>44</sup> Others include the proverbial “family farmer” and Native American tribes. For ease of discussion, I will focus on homeowner behavior, but it is worth acknowledging at the outset that many of the same observations that follow are likely true of other categories of landowners who view their land as a distinctly important asset.

<sup>45</sup> See FISCHEL, *supra* note 6, at 4, 10–12.

<sup>46</sup> See, e.g., John P. Shelton, *The Cost of Renting Versus Owning a Home*, 44 LAND ECON. 59, 62 (1968) (“Considerations other than rational economic cost comparisons may, and probably do, dominate the typical family’s choice to own or rent.”).

<sup>47</sup> Fischel, *supra* note 31, at 146.

he notes, "that is what owning a home is for most American households."<sup>48</sup>

As Fischel's discussion suggests, Americans, for better or for worse, approach the choice to purchase a home differently than other investment decisions and, likewise, attach a unique significance to their homes once they have bought them. It is the singular importance of their land to them that, at first glance, renders Fischel's model plausible for *homeowners* (as compared with landowners for whom land is simply one among many possible and fully interchangeable forms of "market value"). Ironically, however, the unique significance of land to homeowners simultaneously undermines the argument that, as rational owners of valuable land assets, homeowners will be motivated primarily by a desire to maximize the market value of their homes.

Fischel identifies the principal source of the home's special status in the outsized position it holds within the typical owner's investment portfolio.<sup>49</sup> But this move sidesteps the important question of how the home comes to command such a large share of family wealth to begin with. American homeowners choose to concentrate such a large portion of their wealth in a single asset at least in part because, within American culture, the home is not merely an investment. It is also the means by which owners obtain a number of nonfungible (and often social) goods that homeownership makes available to them.<sup>50</sup> There is no reason to think that these goods will cease motivating homeowner decisions once the home is purchased. Consequently, understanding owners' desires to preserve and enhance these nonfungible goods—*independently* of the home's market value—is crucial to making sense of homeowner behavior in a wide range of cases.

An admittedly imperfect analogy to Marx's distinction between "use value" and "exchange value" is helpful for explaining the contrast I am drawing between the logic by which homeowners (and certain other landowners) relate to their land and the legal economists' market-value-mediated model of their behavior.<sup>51</sup> Although most home-

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Of course, as Fischel and others have argued, other factors also contribute to Americans' willingness to pour such a large portion of their wealth into their homes, including favorable tax treatment of homeownership. See FISCHEL, *supra* note 6, at 10; Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 630–34 (2002) (reviewing FISCHEL, *supra* note 6).

<sup>51</sup> See Karl Marx, *The Grundrisse*, in THE MARX-ENGELS READER 221, 256–57 (Robert C. Tucker, ed., 2d ed. 1978); see also JOHN O'NEILL, ECOLOGY, POLICY AND POLITICS 121 (1993); Lee Anne Fennell, *Homeownership 2.0*, 102 Nw. U. L. REV. 1047, 1053–63 (2008); William M. Rohe & Leslie S. Stewart, *Homeownership and Neighborhood Stability*, 7 HOUSING POL'Y DEBATE 37, 47–48 (1996); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1656 (2006) (contrasting market

owners, who typically plan to sell their homes at some point in the future, do care about preserving the “exchange value” of their homes against erosion, the concrete and substantial “use value” they derive directly from the use and enjoyment of the land in the interim makes their relationship to it far more complex than one of simple (exchange) value maximization. To distinguish between “use value” and “exchange value” is not merely to observe that homeowners typically place a subjective value on their home that is substantially higher than its exchange (i.e., market) value.<sup>52</sup> Instead, the point is that a home facilitates owners’ access to a number of (nonfungible) goods that are not experienced as, mediated by, or readily reducible to market value and that often play a primary role in guiding homeowner conduct.<sup>53</sup> The investment model of landowner behavior privileges the motivating power of exchange value to the detriment of “use value,” a move that, as I will discuss below, has substantial consequences for its ability to interpret and evaluate landowner behavior.<sup>54</sup>

What are the in-kind goods (use values) that Americans obtain directly from ownership of their homes? To begin with, homeownership uniquely signifies adulthood and responsibility, as well as the achievement of middle-class status. “In American society,” Constance Perin says, “the form of tenure—whether a household owns or rents its place of residence—is read as a primary social sign, used in categorizing and evaluating people, in much the same way that race, income,

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value with subjective value and arguing that homeowners are driven more by the latter than the former). Adam Smith similarly distinguished between an object’s “value in use” and its “value in exchange.” See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 131–32 (Andrew Skinner ed., Penguin Books 1999) (1776). The terminology of “value” is infelicitous (for my purposes) in its suggestion that the various goods facilitated by homeownership can all be reduced to some unitary metric of “value.” Cf. Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1562 (2003) (discussing the human values served by property as plural); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 988 (1982) (discussing the distinction between “use value” and personhood property).

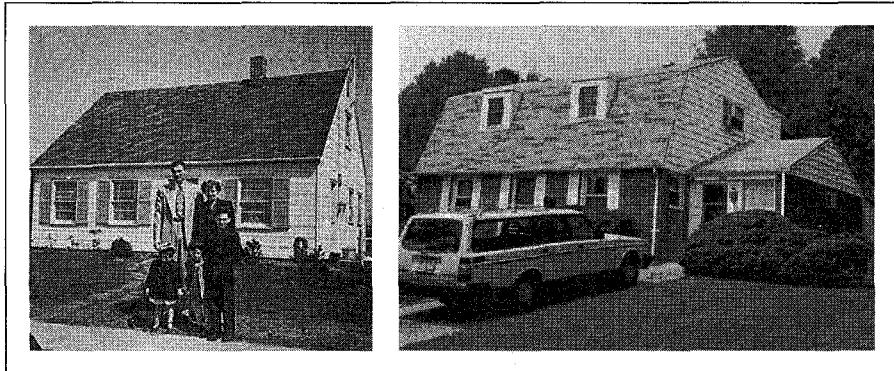
<sup>52</sup> This phenomenon has two related components. One is that people generally demand more to be deprived of something (indeed, almost anything) already in their possession than they would be willing to pay to obtain it from someone else. See Kennedy, *supra* note 5, at 401–03. In addition, however, people predictably form a particularly powerful subjective attachment to their *homes* that goes beyond their attachments to other sorts of assets. Cf. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 963.

<sup>53</sup> See Serkin, *supra* note 51, at 1656.

<sup>54</sup> I do not understand this particular point to apply to a broader economic theory of land use that built its model of the “purposive behavior of private landowners” around an owner who sought to maximize the “value” (or welfare or utility) she derives from her property, as long as “value” is defined capacious enough to include both use and exchange values. The difficulties of measuring such an open-ended conception of value (or welfare or utility), however, make such a theory substantially more cumbersome than the market-value approach. See MARK SAGOFF, PRICE, PRINCIPLE, AND THE ENVIRONMENT 29–56 (2004).

occupation, and education are.”<sup>55</sup> “Being ‘able to own,’ ” she continues, “is a threshold criterion to social personhood that renters, by definition, do not meet . . .”<sup>56</sup> So important is the cultural marker of homeownership that social scientists have found that couples will often refuse to get married until they have saved enough money to buy a home.<sup>57</sup> For most Americans, the question is not so much *whether* to “invest” in a home, but *when* and *how much* to do so.<sup>58</sup>

FIGURE 1



In addition to its singular cultural significance, ownership of a home constitutes a physical space for habitation and socializing that owners can (within limits) tailor to their own particular tastes and plans, something that is much more difficult for renters to do.<sup>59</sup> Owners’ efforts to enjoy their property more fully can lead them to reconfigure their homes dramatically, a process that, over time, can transform even the most homogenous of communities. As an example, Figure 1 shows a 1948 photograph of the original Levittown Cape

<sup>55</sup> CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 32 (1977).

<sup>56</sup> *Id.* at 66; see also Avital Margalit, *The Value of Home Ownership*, 7 THEORETICAL INQUIRIES L. 467, 470–73 (2006).

<sup>57</sup> See Pamela J. Smock et al., “*Everything’s There Except Money*”: How Money Shapes Decisions to Marry Among Cohabitors, 67 J. MARRIAGE & FAM. 680, 687–90 (2005).

<sup>58</sup> Cornell economist Robert H. Frank has presented evidence that, in addition, Americans tend to view homes as “positional” goods, and so have strong desires to purchase homes that place them as high as possible within the homeownership hierarchy. See Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AMER. ECON. REV. 137 (2005). These findings suggest that, in addition to the question of whether to purchase a home, the question of “how much” to invest in a home is not made according to the norms of the typical investment decision.

<sup>59</sup> See Rohe & Stewart, *supra* note 51, at 47–48; see also D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2004) (examining why homes receive special treatment in our legal system). But see Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 532 (2007) (“The substance of [the various meanings of ‘home’] . . . are not determined by the types of legal tenure (homeownership vs. rental) . . .”).

Cod design and a 1990 photo of the same underlying design after years of private ownership.<sup>60</sup>

All of the Levittown houses were initially indistinguishable from one another, but, as one observer noted after driving through the neighborhood, decades later “[n]one of the houses looks like any other house.”<sup>61</sup>

Almost every single one of them has been added on to, extended, built out, remodeled to the max. The roofs have developed so many dormers it seems like they’ve grown dormers on dormers. Fronts have sprouted pergolas and porches, roof lines have been raised, pitched, expanded, corniced and cupolaed. Sides have been carported, breezewayed, broken out, re-covered in redwood, sided in cedar shake, disguised in brick and fieldstone, transformed into ranches, splanches, colonials, and California ramblers. . . .

. . . .

A similar individuating transformation has taken place in the interiors of Levittown homes . . . . The only word to describe the interiors we saw is Dickensian. Like the intricately carved-out, compartmented, cabineted nautical interiors of *Copperfield*, *Dombey*, and *Drood*, the interiors of Levittown—every square inch of them—have been hollowed out, built in, latched, and sprung; rooms have been divided, opened out, closed off, and redivided, realigned, and redefined. Nothing has remained the same, nor do any two interiors resemble each other or the original.<sup>62</sup>

Some physical transformations may—if they appeal to potential buyers—increase a home’s market value; others may decrease it. Some owners no doubt transform their homes primarily (or simultaneously) in order to enhance market value in anticipation of sale, but many (perhaps most) do so in order to express themselves or to live in a space that just suits them better. For this latter category of owner, the impact of their renovations on market value will be a secondary concern. This is not to deny that, as Perin notes, market incentives—which reflect the desires of potential purchasers—place meaningful limits on the freedom with which most owners will attempt to transform their properties.<sup>63</sup>

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<sup>60</sup> The Levittown photographs are from Professor Peter Bacon Hales’ Levittown web collection at the University of Illinois, Chicago, Art Department, <http://tigger.uic.edu/~pbhales/Levittown.html> and <http://tigger.uic.edu/~pbhales/Levittown/oldindex.html>.

<sup>61</sup> Ron Rosenbaum, *The House that Levitt Built*, ESQUIRE, Dec. 1983, at 378, 388 (emphasis omitted).

<sup>62</sup> *Id.*

<sup>63</sup> See PERIN, *supra* note 55, at 64 (“[T]oo much personalization even of an owner-occupied dwelling can blunt its attractions to willing buyers. The costs of painting over an idiosyncratic color scheme, for example, or installing structural modifications that might appeal only to a narrow group of prospective customers are inhibiting to owners.”).

In addition to its provision of a space to (re)make as one's own, homeownership within a particular community conveys or facilitates access to a number of social goods, such as the community's schools, parks, sidewalks and neighborhood-based social networks. It should be uncontroversial to suggest that the typical homeowner values these amenities—at least those she uses—for their own sake, and not simply because of their positive contribution to the market value of her property.

Finally, ownership of property in a particular community creates and reinforces social ties among neighbors, the maintenance of which provides owners with market-independent reasons for acting.<sup>64</sup> In light of owners' broad range of motives, it is no surprise that landlords behave differently than typical owner occupants, and resident landlords behave noticeably differently than absentee landlords, even though they are all "owners." Owner occupants, for example, tend to put more money into their homes and keep their homes in better repair than landlords, and resident landlords tend to spend more on upkeep than absentee landlords, differences that are difficult to understand unless we look beyond the narrow question of market incentives.<sup>65</sup> "Landlords," William Rohe and Leslie Stewart explain, "have *economic* interests, but their everyday domestic experiences may not be directly affected by the condition of their properties or the surrounding neighborhoods."<sup>66</sup>

Owner occupants maintain their properties to higher standards than other owners at least in part because of a desire to be good neighbors and because of social pressure not to have the most poorly maintained house on the street.<sup>67</sup> Similarly, even controlling for homeownership, longtime residents of a community tend to be more likely to vote for higher taxes to fund public schools, not simply because they hope that good schools will increase the market value of their property (although such hopes do not hurt) but also because they are loyal members of the community whose own children graduated from those schools, who take pride in the quality of the community's schools, or who simply feel a special obligation to the community's current generation of schoolchildren.<sup>68</sup>

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<sup>64</sup> See Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1948–55 (2005).

<sup>65</sup> See Rohe & Stewart, *supra* note 51, at 47–48.

<sup>66</sup> *Id.* at 45 (emphasis added).

<sup>67</sup> See *id.* at 47 ("Many people are socially pressured into upkeep spending because they do not want their home to be one of the worst looking on the block." (quoting RICHARD P. TAUB ET AL., PATHS OF NEIGHBORHOOD CHANGE: RACE AND CRIME IN URBAN AMERICA 127 (1984)).

<sup>68</sup> See, e.g., Michael B. Berkman & Eric Plutzer, *Gray Peril or Loyal Support? The Effects of the Elderly on Educational Expenditures*, 85 Soc. Sci. Q. 1178, 1181 (2004) (finding that long-time elderly residents of a community are more likely to vote for school expenditures than are recent arrivals and suggesting that community loyalty explains the difference); Eric

The difficulty in untangling the force of market values from these various in-kind benefits, or from ethical commitments, social pressure, and communal loyalty is that in many cases the behavior of landowners who are not motivated primarily by a desire to enhance the monetary value of their property will resemble the behavior of landowners whose actions are so narrowly motivated. This overlap occurs because land's market value is—as William Fischel persuasively argues in his discussion of capitalization effects—a fairly accurate proxy for the ability of a piece of property to deliver the very goods of homeownership and community membership that homeowners seek out and value for their own sake.<sup>69</sup> Because human beings, particularly those living within the same market for land, share many of the same needs and wants, a home that possesses a greater number of desirable attributes, or that offers access to a certain set of (broadly sought after) goods, or that facilitates participation in a robust neighborhood community, will likely be a home that can command a higher price when it sells.<sup>70</sup>

A property within a community that improves across a number of the variables that are important to most potential homeowners in and of themselves (e.g., reduced neighborhood crime, improved schools, enhanced shopping facilities, etc.) is likely to become more attractive to potential purchasers and, as a result, to increase in market value. Similarly, barring an owner with extremely idiosyncratic taste, homes that are lovingly cared for—not primarily in order to enhance their value but because of the home's relationship to a particular way of life that the owner perceives to be good in itself—are likely to increase in market value relative to homes that are allowed to fall into disrepair. Although landowners who pursue these attributes are not necessarily acting with the primary *intention* of increasing their property's value, their conduct can be difficult to distinguish from that of someone narrowly driven to increase her net worth.

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Brunner & Ed Balsdon, *Intergenerational Conflict and the Political Economy of School Spending*, 56 J. URB. ECON. 369, 381–82 (2004) (finding that elderly voters were more likely to vote for spending on local schools than for state-wide school funding requests); Deborah Fletcher, *It Takes a Village? Intergenerational Conflict and Cooperation in Education Expenditures* 22 (Nov. 2006) (unpublished manuscript, on file with author) (finding that longtime elderly residents are more willing to support education than new elderly residents because of “community-based altruism”).

<sup>69</sup> See, e.g., FISCHEL, *supra* note 6, at 39–71.

<sup>70</sup> To return to Marx's terminology, use value and exchange value are intertwined, since exchange value reflects what non-owners are willing to give up in order to obtain the use value associated with a particular piece of property. Since many people want similar things out of a home, an owner's efforts to increase a property's use value (for himself) are likely to increase its exchange value at the same time by increasing its potential use value for others. See *supra* note 51 and accompanying text.

Again, I am not suggesting that homeowners do not care about the market value of their homes. They certainly do, and Fischel is correct that (all things being equal) we are wise to try to impress self-interest into the service of the common good, at least when the demands of justice permit. But market value is just one factor among many that motivate owners and is often not at the forefront of their decision making.

Because of these correlations between “use value” and “exchange value,” however, using exchange-value-maximization as a theory of homeowners’ intentions will generate a number of false positives, despite the complexity of homeowners’ relationships to their property. That is, a model that assumes the motivational dominance of market value maximization will often accurately predict homeowners’ external conduct, even when it is inaccurate as an account of homeowners’ actual intentional dispositions (or as a “theory of the *purposive* behavior of private landowners” as Ellickson and Been put it).<sup>71</sup> As long as the investment model is accurately predictive most of the time, though, why should we worry about whether it inaccurately describes homeowners’ underlying motives?

We should care for at least three reasons. For starters, if homeowners are consistently driven by a wider range of motives than the land value maximization that the narrow investment theories ascribe to them, we can expect that those theories will at times run into a descriptive and predictive wall.<sup>72</sup> It is true that, as Cass Sunstein has noted, the utility of any simplified conception of human behavior will depend on the precise questions theorists are attempting to answer.<sup>73</sup> Sometimes inaccuracy and oversimplification will be a price worth paying for analytic elegance. The force of this objection is therefore necessarily limited and context specific. But, as a general matter, whenever market values diverge from the in-kind goods that owners derive from their property—and I will discuss two examples of such divergence shortly—the narrow investment model will prove an unreliable guide, even for those interested solely in (external) predictive accuracy. Because such divergence seems particularly likely to crop up around a resource as complex as land, it may be that landownership is an area that stands in need of a more sophisticated behavioral model than the simplified wealth-maximizing rational-actor.

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<sup>71</sup> ELICKSON & BEEN, *supra* note 2, at 32 (emphasis added).

<sup>72</sup> See *infra* Part II.B; see also Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794 (1994) (“[W]ith the assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions, explanations, and recommendations for law.”).

<sup>73</sup> See Cass R. Sunstein, *On Philosophy and Economics*, 19 QUINNIPAC L. REV. 333, 339–44 (2000).

Second, even when it accurately predicts homeowners' external conduct, the investment model increases the chances that theorists will misunderstand owners' actual underlying motivations. This potential for misunderstanding is independently significant because it can result in seriously flawed policy prescriptions. If owners are not, in fact, motivated primarily by concerns about the market value of their land (or even market values more broadly), but rather by a sense of moral obligation or by the desire directly to enjoy certain in-kind goods that are merely *correlated* with that market value, then offering them incentives that act narrowly on the preservation or enhancement of market value will likely prove ineffective and may even turn out to be counterproductive.

Finally, reducing homeowners' motivations to the single-minded pursuit of market value may contribute to a self-fulfilling prophecy, one that, as I argue later in this Article, we may have independent reasons for resisting.<sup>74</sup> As Margaret Radin has correctly observed, market “[r]hetoric is not just shaped by, but shapes, reality.”<sup>75</sup> Radin's assertion finds indirect support from Cornell economist Robert Frank, whose experiments with economics students suggest that repeated exposure to the self-interested, rational-actor model in the undergraduate economics curriculum has the tendency to reduce cooperative behavior among those students.<sup>76</sup>

Policymakers who construct their strategies around the assumption that homeowners are fundamentally motivated to increase the market value of their land communicate to landowners that such behavior is what is expected of them, thereby encouraging the very self-interested behaviors they claim merely to be describing. It is this self-fulfilling quality of assumptions of self-interested landowner behavior that forms the basis of Aldo Leopold's (and Eric Freyfogle's) critique of purchased conservation easements.<sup>77</sup>

To illustrate more concretely the descriptive and prescriptive limitations of the narrow investment model as applied to homeownership, I conclude this subpart by discussing two land-related phenomena from the homeownership context whose complexity it obscures: gentrification and the proper policy responses to the “Not In My Back Yard” (NIMBY) phenomenon.

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<sup>74</sup> See *infra* Part II.A.1–2.

<sup>75</sup> Radin, *supra* note 5, at 1870, 1877–78; see also Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2163 (2005).

<sup>76</sup> Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159, 169–70 (1993).

<sup>77</sup> See ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 225–27 (2003) (discussing Leopold's views and arguing that the “conservation movement has paid too little attention to the ill effects of landowner payments”).

### 1. *Gentrification*

The descriptive divergence between the value-maximizing model and actual homeowner conduct is particularly likely to rear its head when the market value of a property departs from its ability to generate the sorts of nonfungible benefits I have been describing. When market values increase for reasons that have little to do with improvements in the particular property or community, market value and the goods of property may actually begin to work at cross-purposes. If the homeowner's motivations are more complicated than the investment model allows, we would expect that model's analysis to fall short of the mark under those circumstances.

Market value can increase independently of individual property quality or community quality for a number of reasons, including speculative activity that drives up real estate prices on a market-wide basis or, more locally, the large-scale migration into a local real estate market of people from a more expensive market. Rising market values increase costs for homeowners and renters alike,<sup>78</sup> potentially driving income-poor people out of the community and thereby undermining the stable social networks on which communities depend for their health. Residents of a stable community who value the existing characteristics of that community will sometimes view increasing property values as poor compensation for higher carrying costs, community instability, and changed neighborhood character.

In 2003, for example, when developers proposed to convert the Gretsch building—a former musical instrument factory in the southern part of Williamsburg, Brooklyn—into luxury condominiums,<sup>79</sup> the narrow investment theory of landownership would have predicted that property-owning neighbors would welcome the project. After all, the proposed development immediately began to push up the value of homes in the surrounding neighborhood.<sup>80</sup> Instead, residents of the Hasidic community south of the building began vociferously protesting the conversion, picketing its sales office and hanging a banner on the building opposite the Gretsch proclaiming that the new condominiums were not welcome in the neighborhood.<sup>81</sup> Community members *complained* that "real estate agents and would-be buyers have knocked on their doors offering to buy their homes for at least double

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<sup>78</sup> Increased costs for homeowners can be due both to increased tax assessments (when not coupled with decreases in the rate of property taxation) and increased cost of living in the neighborhood as services geared toward lower-income residents are pushed out by those catering to higher-income newcomers.

<sup>79</sup> Tara Bahrampour, "*Plague of Artists*" a Battle Cry for Brooklyn Hasidim, N.Y. TIMES, Feb. 17, 2004, at B1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

the \$200 per square foot they are used to paying.”<sup>82</sup> Their concern, they said, was that “market rates and property taxes will soar, leading to an unraveling of the community’s tightly woven fabric.”<sup>83</sup> The Hasidim are, to be sure, an exceptional case. Few homeowners will attach as *little* importance to market values (or as *much* importance to stability) as they do. But the potential for the same sort of tension between property values and the other goods obtained through property ownership will be present—albeit to varying degrees—for most homeowners confronting similar neighborhood transformation, particularly when those homeowners have low or fixed incomes.

In Long Branch, New Jersey, longtime residents of a waterfront neighborhood of modest, middle-class homes have passionately resisted the city’s attempt to use its power of eminent domain to convert their homes into luxury condominiums, even though some have been offered compensation in the form of units in the new development, units whose value would likely exceed the market value of their existing homes.<sup>84</sup> Owners who rejected these offers observed that the new units could not possibly replace the homes they had lived in for decades.<sup>85</sup> “I stood and watched them tear down the house around the corner,” one elderly resident recalled.<sup>86</sup> “I knew the kids who lived there, I watched them grow up. Then the bulldozer came and it was gone. All I could do was cry.”<sup>87</sup> Anthropologist Mariana Valverde has similarly described opposition by residents of a Toronto neighborhood to the demolition of several postwar bungalows, even though the development that was to take their place would almost certainly have increased the property values of those who remained.<sup>88</sup>

Besides its obvious impact on low-income renters, the controversial status of gentrification derives in part from the fact that increased property values are typically accompanied by changes in neighborhood character (for better and for worse), by higher costs of living for community homeowners, many of whom have low incomes, and by the fact that these costs may or may not be offset by improvements in the original residents’ perceived quality of life.<sup>89</sup> Numerous scholars

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See Bill Handleman, *Path of “Progress” Runs into Her Home*, ASBURY PARK PRESS, June 25, 2006, at A1.

<sup>85</sup> See Larry Higgs, *Eminent Domain Critics Speak Up*, ASBURY PARK PRESS, Oct. 31, 2006, at A1.

<sup>86</sup> Handleman, *supra* note 84.

<sup>87</sup> *Id.*

<sup>88</sup> See Mariana Valverde, *Seeing Like a City and Seeing Like a Neighbour: Ownership and Citizenship at the Urban Level 6* (July 2007) (unpublished manuscript) (on file with author).

<sup>89</sup> See Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, 2002 BROOKINGS-WHARTON PAPERS ON URB. AFF. 133, 146, available at <http://muse.jhu.edu/journals/brookings-wharton>

studying gentrifying neighborhoods have commented on the ambiguous significance of increasing property values, even for homeowners.<sup>90</sup> Whatever the ultimate merits of gentrification in any given instance, the methodology of the narrow investment conception of landownership, focused as it is on the bottom line, obscures the complexity of this story. Instead of drawing our attention to the diverse considerations at work in neighborhood transformation, it reduces the analysis of neighborhood transformation into a simple tallying of property values before and after.

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ton\_papers\_on\_urban\_affairs/v2002/2002.1vigdor.pdf ("[R]ising property values without a countervailing decrease in effective property tax rates could significantly increase housing costs for some households, especially the elderly and others who own their homes free and clear."); Sharon Zukin, *Gentrification: Culture and Capital in the Urban Core*, 13 ANN. REV. SOC. 129, 136 (1987) ("[G]entrifiers carry their less affluent neighbors with them on a rising tide of property tax assessments."). Using data from gentrifying neighborhoods in the Boston area, Vigdor tentatively concludes that, in that case, homeowners were at least partially compensated for their increased costs by improvements in public services or in neighborhood amenities. See Vigdor, *supra*, at 170 ("[T]he majority of respondents reported either an increase in housing quality, neighborhood quality, public service quality, or some combination of the three."). Other studies have found similar increases in long-time resident satisfaction with changes in gentrifying neighborhoods. See, e.g., Lance Freeman & Frank Bracconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39, 48 (2004) ("As neighborhoods gentrify, they also improve in many ways that may be appreciated as much by their disadvantaged residents as by their more affluent ones."); Daniel Monroe Sullivan, *Reassessing Gentrification: Measuring Residents' Opinions Using Survey Data*, 42 URB. AFF. REV. 583 (2007) (using probability sampling and large sample size to examine residents in two gentrifying neighborhoods in Portland, Oregon). More important than the outcome of these studies is their acknowledgement that rising property values can be a double-edged sword for longtime homeowners in gentrifying communities. See Vigdor, *supra*, at 148–49 ("Studies of gentrification and displacement overlook an important means by which escalating land values might adversely affect poor households: by increasing their housing costs without providing sufficient countervailing benefits.").

90 See sources cited *supra* note 89; see also MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 14 (2001), available at <http://www.brookings.edu/reports/2001/04metropolitanpolicy.aspx> (arguing that "some original homeowners may fear rising home prices because of the corresponding tax increases, while others may welcome price appreciation and the increased financial equity it brings"); Rina Ghose, *Big Sky or Big Sprawl? Rural Gentrification and the Changing Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHY 528, 541 (2004) ("Although of all the longterm residents that I interviewed were homeowners and middle-class, [they] also affirmed a need for affordable housing. They were thankful to have bought their homes before prices escalated, and felt that they could not afford to buy the same home today. Older residents felt that their adult children are being locked out of the real estate market and cannot afford to buy even a modest home. As a result, younger native Missoulans are being forced to leave."); Rowland Atkinson, *The Evidence on the Impact of Gentrification: New Lessons for the Urban Renaissance?*, 4 EUR. J. HOUSING POL'Y 107, 118–19 (2004) ("Clearly such [property value] increases represent an opportunity or social cost depending on which particular stakeholders are involved. Even where more deprived owners decide to 'cash-in' they are likely to be faced with high prices elsewhere which at least match such gains. . . . Further, where services are 'improved' significantly this may represent a loss of those services geared up to low-income households in the neighbourhood.") (citation omitted).

## 2. NIMBYs and LULUs

The shortcomings of the investment model of landownership can also help to explain the frequent ineffectiveness of economists' favorite tool for overcoming the NIMBY dysfunction they attribute to homeowner anxiety about property values: monetary compensation.<sup>91</sup> From the economist's perspective, the NIMBY problem is a reasonably simple and predictable one. The benefits of locally undesirable land uses (LULUs) are diffuse, but their costs are concentrated on a handful of neighboring property owners who have strong economic incentives to oppose construction of the offending facility near their property.<sup>92</sup> The answer to this pervasive problem, at least from the perspective of a theory that reduces landowner behavior to a financial cost-benefit analysis, is monetary compensation. Monetary payments, on the investment view, should "reduce the difference in welfare that neighbors expect to experience with and without the project, and thereby reduce their motivation to oppose the project."<sup>93</sup>

But, while monetary compensation is sometimes an important component of a fair and effective response to NIMBY concerns, it will do little to counteract opposition to development that is motivated less by preoccupation with property values than by opposition to the deleterious effects that the proposed use might have on the concrete goods owners obtain from homeownership and residence within a particular community.<sup>94</sup> Indeed, the data on the effectiveness of compensation schemes at overcoming neighborhood opposition to LULUs is underwhelming. According to Vicki Been, "[n]o compensated siting program has been a 'success' in getting LULUs sited."<sup>95</sup> At best, she says, compensation does not hurt, and it seems to work best when combined with other strategies.<sup>96</sup>

Other observers have come to more pessimistic conclusions, arguing that offers of monetary compensation actually *reduce* support for siting LULUs.<sup>97</sup> Offers of money, these scholars suggest, crowd out

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<sup>91</sup> See Vicki Been, *Compensated Siting Proposals: Is it Time To Pay Attention?*, 21 FORDHAM URB. L.J. 787, 787 n.1 (1994) (collecting sources).

<sup>92</sup> *Id.* at 789–90.

<sup>93</sup> MICHAEL O'HARE ET AL., FACILITY SITING AND PUBLIC OPPOSITION 70 (1983); *see also* FISCHEL, *supra* note 6, at 267–70 ("The obvious answer for NIMBY concerns regarding LULUs is compensation, and this is the usual practice.").

<sup>94</sup> See Carissa Schively, *Understanding the NIMBY and LULU Phenomena: Reassessing Our Knowledge Base and Informing Future Research*, 21 J. PLAN. LITERATURE 255, 260 (2007).

<sup>95</sup> Been, *supra* note 91, at 824.

<sup>96</sup> See *id.*; *see also* Schively, *supra* note 94.

<sup>97</sup> See Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 749–50 (1997) (finding Swiss voters were actually *less* willing to accept the construction of a NIMBY project if offered compensation); Bruno S. Frey et al., *The Old Lady Visits Your Backyard: A Tale of Morals and Markets*, 104 J. POL. ECON. 1299, 1299–1301 (1996) (arguing that "[w]here public spirit

any public-spirited willingness to host the facility against one's self-interest and, moreover, are perceived to be an attempted bribe that residents of potential host communities find morally offensive.<sup>98</sup> In addition, residents' perceptions of the site selection process as unfair can lead to increased NIMBYism, and excessive reliance on compensation or auction-based schemes for LULU siting—both of which appear to favor the wealthy—may increase perceptions of unfairness.<sup>99</sup>

Some homeowners oppose a landfill in their neighborhood because they fear its impact on their property values, as the investment model predicts. But others oppose it because of the concrete impact they fear it will have on their health or on the quality of their lives, or because they believe that they are being treated unfairly. Most are probably worried about all of these. Monetary payments may help to overcome concerns about declining property values, but they do little to assuage fears about the in-kind impacts of development or about unfairness. This may help to explain why in-kind compensation offers, efforts to mitigate the actual impact of the facility, and attempts to increase the perceived legitimacy of siting procedures, have proved relatively successful at overcoming local opposition to proposed LULUs.<sup>100</sup> By fixating on the question of market value, the investment model fails adequately to grasp the complex and varied relationship between homeowners and their land, causing its proponents to favor incomplete solutions to the NIMBY problem.

## B. Assessing Private Owners' Cost-Benefit Analysis

I have been discussing the descriptive and predictive shortcomings of a particularly influential account of landowner behavior, in which owners are understood to be motivated primarily by a desire to enhance the market value of their land.<sup>101</sup> The complex and often nonfungible nature of certain landowners' relationship with their land means that many landowners are in fact likely to be motivated by a broad range of concerns, of which market values are just one (albeit important) piece. In my discussion, I have focused on homeowners, but other landowners for whom the land has unique significance, such as small farmers, intentional communities, and certain Native

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prevails, monetary compensation may lower acceptance levels for NIMBY facilities because monetary rewards deprive individuals of the possibility of indulging in altruistic feelings").

<sup>98</sup> See Frey et al., *supra* note 97, at 1299–1301.

<sup>99</sup> Cf. Schively, *supra* note 94, at 260–62 (discussing the impact of transparency and fairness on NIMBY behavior).

<sup>100</sup> See Frey et al., *supra* note 97, at 1300. Frey posits that in-kind compensation schemes reduce the perception that residents are being bribed. But they may also be successful because they more faithfully reflect the way in which owners interact with the goods they derive from their ownership of property in a particular community. *Id.*

<sup>101</sup> See Demsetz, *supra* note 6, at 355.

American tribes, present similar difficulties. The very reasons that the land powerfully guides their behavior also cause them to pay uneven attention to the land's market value.<sup>102</sup> The study of land use and ownership, at least as it touches on such categories of owners, then, is one of those areas within which the gains generated by the rational-actor model's analytic simplicity are likely outweighed by the descriptive and prescriptive confusions to which that simplicity gives rise.

The foregoing discussion is narrow in its aspirations and implications. It does not aim to disqualify or to call into question the value of positive economic analysis, or even (in any number of areas) positive analysis that relies on the traditional wealth-maximizing rational-actor model. But it does counsel caution in the use of that model, particularly when touching upon areas in which human beings are likely to express nonfungible attachments and commitments that resist such simplification. Because of land's intrinsic complexity, and the complexity of its interactions with human well-being, land-use law has as its central subject matter a resource that is rife with such nonfungibilities, and so behavioral theories built around wealth-maximizing rational-actor models seem particularly problematic in the land-use arena.

I will now turn to the normative dimension of the Demsetzian view of the incentives created by land's market value. This aspect of the investment position rests on the judgment that the vantage and incentives of private owners, as compared with those of collective decision makers, leads private decision making (typically) to yield superior consequences.<sup>103</sup> This normative use of the Demsetzian argument is resistant to the sorts of descriptive objections I have been discussing. Confronted with landowner departures from economic rationality, it shifts its focus to those actors for whom the descriptive model holds true or advocates legal mechanisms to bypass the impacts of the sorts of economically opaque, nonfungible relationships that homeowners (and other land-focused owners) form with their land.

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<sup>102</sup> Several Sioux tribes, for example, have for decades refused a land settlement that now totals nearly a billion dollars (and growing) because, on their view, to accept the monetary compensation for their land would be to validate the forced sale of sacred land that should never be sold. What they want is not just compensation—they want the land back. See Tim Giago, *The Black Hills: A Case of Dishonest Dealings*, THE HUFFINGTON POST, June 3, 2007, [http://www.huffingtonpost.com/tim-giago/the-black-hills-a-case-o\\_b\\_50480.html](http://www.huffingtonpost.com/tim-giago/the-black-hills-a-case-o_b_50480.html). Giago recounts:

When I owned Indian Country Today weekly newspaper I took a survey in 1996 that came back with the powerful figures that 96 percent of the people still refused to take the money. How, in a world where everything revolves around money, can the poorest people in America refuse to accept millions of dollars? Because they consider the land that was stolen from them to be sacred and as they say, "One does not sell their Mother."

*Id.*

<sup>103</sup> See Demsetz, *supra* note 16, at S665.

According to the normative Demsetzian position, the incentives of *investment-minded* private owners should (in the absence of market failure) give us confidence that, when those owners do harm their land, they will not do so wastefully.<sup>104</sup> Because planners and regulators lack market incentives to gather the information necessary to make the best decisions and to maximize the land's return, the same cannot be said of their decisions.<sup>105</sup> The implication is that we should generally defer to the decision making of private owners, resorting to regulatory intervention only where market failures are clear and where we have some reason to think that central planners can do better.<sup>106</sup>

Observations of owner irrationality (whether arising from non-fungible attachments or from some other source) do not refute this normative assertion because they simply become additional instances of market failure in possible need of collective correction. It is worth noting, however, that trends in recent economic scholarship at least complicate the most robust normative claims that theorists in the Demsetzian tradition have attempted to make regarding the benefits of private control over land. These newer approaches narrow the domain of the traditional rational-actor model, either by acknowledging instances in which owners act in ways that are inconsistent with self-interest (e.g., because of the influence of culture, deeply embedded behavioral tendencies towards cooperative conduct, or cognitive biases and heuristics) or by broadening the scope of values that owners will predictably seek to maximize (e.g., by shifting from wealth-maximization to a more capacious notion, such as preference satisfaction).<sup>107</sup> For the normative Demsetzian, however, the basis for favoring owners' decisions rests precisely on the presumed tendency of people to respond to the incentives generated by that mode of ownership in predictable ways that generate consequences whose desirability is widely recognized (i.e., increased aggregate wealth).

For example, Demsetz argues that private ownership will, through the signal of land's market value, discourage waste by directly internalizing the consequences of many land-use decisions or by facilitating internalization of the externalities that remain by encouraging self-interested bargaining between neighboring owners. “[P]rivate ownership of land,” he says,

will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with

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<sup>104</sup> See *id.*

<sup>105</sup> See O'HARE ET AL., *supra* note 93, at 28.

<sup>106</sup> See O'NEILL, *supra* note 51, at 2.

<sup>107</sup> See *supra* notes 3–8 and accompanying text.

husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.<sup>108</sup>

If sufficiently widespread, however, deviation of private owners' actual preferences and behavior from rational, self-interested *wealth* maximization renders more difficult the Demsetzian project of embracing the consequences of delegating to owners decisions about how to use a parcel of land. This complication is particularly apparent in the move toward so-called "welfarism," with its thin theory of the values toward which human beings will direct their activities.<sup>109</sup> At least in the context of a resource as flexible as land, without a relatively thick theory about the sorts of values that people are likely to want to pursue, we cannot reach very confident conclusions about whether letting them freely pursue those values through the allocation of private rights embedded within the market is likely to be, on net, harmful or beneficial relative to collective decision making.<sup>110</sup> If, for example, a large enough number of people in a community turn out to be masochistic, merely allocating private rights over a parcel of land might not result in much internalization at all. Rather than bargaining with neighboring owners to minimize their harmful impacts, masochistic owners might just grin and bear their neighbor's externalities, even if they would prefer those impacts to go away.<sup>111</sup> Conversely, if people are self-interested, but seek to amass for themselves some value other than wealth (say, immediate gratification of hedonistic desires, or ascetic purity, or communion with God), giving them private land rights may not do much to ensure that the land's resources are used more productively. The normative appeal (i.e., the goodness) of the efficiency that private ownership generates depends in part on the goodness of the ends toward which Demsetzian theorists imagine that human activity will, for the most part, be directed. Without the normative discipline provided by the relatively thick conception of the *wealth*-maximizing rational actor, the Demsetzian argu-

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<sup>108</sup> Demsetz, *supra* note 6, at 354–56.

<sup>109</sup> See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 122–48 (2000).

<sup>110</sup> This is a different issue from the question of whether it is more efficient to use property rules (as opposed to, say, taxation and transfer payments) to accomplish distributive goals. Instead, it goes to the question of whether a particular set of property rules is likely to be efficient.

<sup>111</sup> Carol Rose's memorable characters, "Mom" and "Hit Me," are good examples of this mindset. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 44–48 (1990). If we asked, "Hit Me" would probably say she would rather not be hit with her neighbor's externality, but if she is hit, she might not object and instead simply assume that she somehow deserved it. Martha Nussbaum makes a similar point in her discussions of adaptive preferences. See NUSSBAUM, *supra* note 109, at 126 (2000).

ment about the apparently good consequences of private landownership starts to come apart.

Setting aside these questions about the difficulty of yoking the normative Demsetzian position to these recent trends in law and economics, there are two broad problems with assigning decisive normative significance to the findings of the investment model of landowner behavior, even when the model is descriptively accurate. The first is that the rational private owner's cost-benefit analysis is predictably incomplete in a number of ways that render it suspect. The second is more conceptual and concerns the questionable status of cost-benefit analysis as an evaluative method: the controversial nature of the assumptions underlying normative economic analysis make it problematic to use efficiency as a basis for justifying deference to private owners' decisions, or by extension, to employ related concepts like market failure as the basis for identifying the boundaries of appropriate deference to owner decisions.

### 1. *The Gaps in Owners' Cost-Benefit Analyses*

#### a. *Nonmarket Goods and the Problem of Plural Values*

Presenting a complication for the normative Demsetzian, one long noted by critics of cost-benefit analysis in the area of environmental policy but too often neglected within discussions of property and land use, are the values that are simply invisible to owners' cost-benefit analyses.<sup>112</sup> The most obvious part of the problem is the pervasiveness of externalities, even for the least-intensive land uses. As Amy Sinden has observed, a great deal of environmental degradation is the aggregated result of actions by private landowners that, considered in isolation, have barely perceptible impacts on environmental quality and therefore fly under the radar of owners' economic analyses.<sup>113</sup> The problem of climate change illustrates the significance of Sinden's point by making externalities arising from the most everyday uses of land ubiquitous.

More conceptually, however, the gaps in owners' cost-benefit analyses stem from the problem that there are a number of important values, such as the health of wetlands and ecosystems, the extinction of species, or housing for the homeless, for which markets simply do not exist. There are two dimensions to this problem. First, there is the absence of market infrastructure, which is the principal focus of Demsetz's article. This dimension concerns the absence of defined and enforceable private property and contract rights necessary for

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<sup>112</sup> See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–63 (2002).

<sup>113</sup> See Sinden, *supra* note 1, at 588–89.

market transactions with respect to certain goods. And his solution is, if feasible *and* cost-effective, to create private property rights where none existed before. In addition, however, there is a second dimension to the problem that is implicit in his analysis but which he passes over without comment: the absence of market demand.<sup>114</sup>

In their normative stance, legal economists frequently treat people's unwillingness to pay for a good as evidence that they do not place substantial value on the good, or even as indicating that the good has no value.<sup>115</sup> Lack of demand, however, can result from a number of different causes that have nothing to do with actual worth. It is of course possible that lack of demand is the result of lack of value, but there are any number of reasons why something of undisputed value, even of immense value, might generate little or no market demand. One frequently noted reason is the maldistribution of wealth. Goods that are of particular interest to the poor are likely to be undervalued according to the "willingness to pay" metric because of the relative inability of the poor to back their preferences with payments.<sup>116</sup> Absence of market demand can also result from people's belief that they are (morally) entitled to enjoy a particular good (such as clean air and water or the preservation of historic landmarks or endangered species) without paying for it or, relatedly, that there are certain goods that are so important that the logic and values of the market cannot do them justice.<sup>117</sup> Finally, preferences

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<sup>114</sup> Demsetz clearly recognizes that market values can come and go. His story about beaver hunting turns on a sudden rise in the market demand for beaver pelts, which leads to an increase in beaver hunting. But he never peers behind market values to see whether the maximization of market value he attributes to private ownership might have harmful consequences for other sorts of value that are worth taking into account. See Demsetz, *supra* note 6, at 352.

<sup>115</sup> See DWORKIN, *supra* note 5, at 237.

<sup>116</sup> See MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 145–46 (2006); John O'Neill, *Property, Care, and Environment*, 19 ENV'T & PLAN. C: GOV'T & POL'Y 695, 709–10 (2001); Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL'Y REV. 303, 309–11 (2007).

<sup>117</sup> See MARK SAGOFF, THE ECONOMY OF THE EARTH 88–95 (1988) (describing many people's unwillingness to attach monetary values to particular goods that they view as infused with moral value). Adler and Posner suggest that such moral responses to the question of value should not be included in attempts to measure aggregate willingness to pay (i.e., demand) because they do not really reflect welfare considerations. See ADLER & POSNER, *supra* note 116, at 133–36. Although their distinction between moral condemnation of a given state of affairs and welfare impacts of that same state of affairs seems valid, at least in some sense, the problem with the Adler and Posner response to that distinction is that it systematically removes from the "laundered" cost-benefit analysis the impacts of certain states of affairs on people who, if forced to provide a realistic valuation of the degree to which they are subjectively affected by a particular outcome (one to which they morally object) might likely (and credibly) give a rather large number. Merely scrubbing their responses from a cost-benefit analysis seems to run the distinct risk of systematically skewing the results of that procedure in a direction away from prevailing moral sentiments.

with respect to the value of a particular good might be (objectively) mistaken.<sup>118</sup>

The problem of absent demand is distinct from the question of spatial externalities, about which property scholars have thought and written a great deal.<sup>119</sup> Although the creation of clear private property rights where none existed before (the Demsetzian solution) can help to encourage self-interested owners to consider the impacts their activities have for which they must pay (or which others are willing to pay to avoid), this mechanism does not work with impacts for which there is little or no corresponding market demand. In the absence of demand, no matter who bears the effects of an owner's land-use decisions, investment-minded owners have no incentive to include them on their ledgers, and investment-minded nonowners have no incentives to bargain with (or sue) owners to minimize their impacts. In a world of rational wealth-maximizers, consequences for which there is no market demand are invisible.<sup>120</sup> Demand-based lacunae therefore form the basis for a *prima facie* case for the state's regulation of land use as it touches on these nonmarket goods.<sup>121</sup>

Proponents of so-called "free market environmentalism" call for—where cost-effective—propertization schemes whose purpose is to create markets for the protection of environmental goods instead of resorting to direct regulatory preservation.<sup>122</sup> But these proposals address themselves only to the infrastructural side of the problem of market lacunae. They ignore the problems with treating market demand as the only measure of value. Moreover, free market environmentalists' arguments presuppose an ability to engage in a holistic cost-benefit analysis that somehow includes values for which there is no present market so as to be able to assess the cost-effectiveness of establishing their propertization schemes.<sup>123</sup> Practitioners of cost-benefit analysis have attempted to supply these nonmarket values by engaging in calculations aimed at deriving them from preferences supposedly revealed indirectly from behavior in *existing* markets<sup>124</sup> or

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<sup>118</sup> See ADLER & POSNER, *supra* note 116, at 129–30; see also Baron & Dunoff, *supra* note 5, at 445–47.

<sup>119</sup> See, e.g., O'Neill, *supra* note 116, at 701–02.

<sup>120</sup> Cf. *id.*

<sup>121</sup> See HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 4–5 (1996); Sinden, *supra* note 1, at 585–99.

<sup>122</sup> See ANDERSON & LEAL, *supra* note 17, at 9–23 ("Free market environmentalism emphasizes the importance of market processes in determining optimal amounts of resource use. Only when rights are well-defined, enforced, and transferable will self-interested individuals confront the trade-offs inherent in a world of scarcity.").

<sup>123</sup> See *id.* at 45 (noting factors used in the valuation of the Great Lakes region timberlands).

<sup>124</sup> For example, they might look to money spent on whale-watching as a way of calculating the benefit to be derived from the continued survival of whales. See, e.g., E.C.M. Parsons et al., *The Value of Conserving Whales: The Impacts of Cetacean-Related Tourism on the*

through the use of “contingent valuation” surveys that simply ask individuals what they would (hypothetically) pay for the preservation or provision of a number of environmental “goods.”<sup>125</sup> In determining the proper scope of privatization, free market environmentalists rely on the same sorts of valuation methods.<sup>126</sup> But these efforts to assign monetary values to nonmarket goods represent alternative means of measuring demand where market infrastructure does not exist; they cannot shed much light on the value of goods for which such demand does not exist or for which existing demand poorly reflects the resource’s actual (objective) value. Unless we are to adopt the dubious position that willingness to pay is the exclusive measure of value, the possibility of market lacunae rooted in absent demand suggests that even the most narrowly rational owners’ cost-benefit analyses can be radically unreliable.

### b. *Land’s Memory and the Problem of Intergenerational Justice*

In addition to the invisibility of nonmarket values for wealth-maximizing owners, deferring to private owners’ cost benefit analyses raises substantial questions of intergenerational justice. This is where the land’s “memory” re-enters the scene. The durability of land-use decisions’ consequences and the finite quantity of land mean that the decisions that current owners make about how to use their land will reverberate for generations. Like other nonmarketable goods, such as environmental interests and the interests of the poor, the interests of future generations are inadequately represented in current owners’ private cost-benefit analyses.<sup>127</sup>

Demsetzian theorists have argued that future generations do not really pose a problem for their theories of landownership because an owner’s wealth will depend on “how well he takes into account the competing claims of the present and the future.”<sup>128</sup> Accordingly, they have suggested, individual ownership provides an adequate (indeed, the best practicable) mechanism for considering the possible uses to which future generations will want to put land. This is because the

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*Economy of Rural West Scotland*, 13 AQUATIC CONSERVATION 397, 404–10 (2003) (empirically determining the value of whale-watching to the local economy).

<sup>125</sup> For example, they might ask people what they would be willing to spend to save the bald eagle from extinction (answer: \$257 per household, or \$25 billion for the country). See Ackerman & Heinzerling, *supra* note 112, at 1558.

<sup>126</sup> See ANDERSON & LEAL, *supra* note 17, at 45.

<sup>127</sup> See O’NEILL, *supra* note 51, at 46–49; O’Neill, *supra* note 116, at 708–10 (“We need to define property rights on goods that allow them to be placed in the market, or to define them as if they were commodities. However, the issue here is about whose preferences count. It is about who has the power and rights to determine the future of the environment. Hence the poor and marginalised can find themselves the object *both* of the developer *and* of national and international conservation bodies.”).

<sup>128</sup> Demsetz, *supra* note 6, at 355; see also Epstein, *supra* note 11, at 745–48.

market for land will reward those owners who guess correctly about the future with greater wealth. In other words, private ownership creates the proper incentives to gather the information necessary to make the most accurate possible guesses about the interests of future generations— incentives that do not exist for public decision makers.

An important question in this context is whether private owners' tendency to discount effects that occur far in the future undermines their ability to stand in for future generations.<sup>129</sup> As Herman Daly has put it, discounting future gains and losses "is a numerical way of expressing the value judgment that beyond a certain point the future is not worth anything to presently living people."<sup>130</sup> The fact that investment-minded private owners engage in discounting means that they will completely disregard the consequences of their decisions beyond a certain point in the future.<sup>131</sup> Applying even a relatively low discount rate over a long enough period of time has an enormous effect on the temporal implications of self-interested owners' private decision making.<sup>132</sup> And there is evidence that private actors employ discount rates that are very high indeed.<sup>133</sup> Within their own private cost-benefit analyses, then, private owners are likely dramatically to underweigh—relative to short-term consequences—costs (or gains) arising from their land-use choices when those effects are projected to occur far into the future. This preference for near-term gains generates intertemporal externalities, which may be enormous and catastrophic, but which are impossible for an unassisted land market to internalize.<sup>134</sup>

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<sup>129</sup> See, e.g., Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 393–94 (2002) (reviewing the large body of literature discussing market participants' tendency to discount future effects).

<sup>130</sup> DALY, *supra* note 121, at 35–36.

<sup>131</sup> This is true no matter what discount rate private owners are using, but the problem becomes more acute the higher the discount rate private owners actually apply.

<sup>132</sup> Derek Parfit gives the following example: at a constant 5 percent rate of discount, economists would value the death of more than 1 billion human beings 500 years from now the same as the loss of one human life next year. See DEREK PARFIT, *REASONS AND PERSONS* 357 (1984); see also Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 1001 (1999). This is not to say that a viable conception of intergenerational justice would require us to place no value on questions of proximity (temporal or spatial). It is the inflexibility of cost-benefit discounting, which yields absurdities like those Revesz points out, that makes it so problematic. We may well be justified in believing that we have greater obligations towards the people (and places) near and dear to us. But the practice of discounting, which ultimately yields judgments that people beyond a certain degree of proximity are worth nothing, and which makes no room for the sort of moral side-constraints that might categorically bar us from taking certain actions even when directed toward those who are distant from us, is not the right tool for operationalizing that belief in land-use decision making.

<sup>133</sup> See Frederick et al., *supra* note 129, at 381.

<sup>134</sup> John O'Neill helpfully compares the potential conflict of intergenerational interests with respect to land with Garrett Hardin's famous "tragedy of the commons." Land is,

Scholars of environmental law and policy have long debated an analogous question arising out of discussions of the proper role, if any, of discount rates for the government's use of environmental cost-benefit analysis.<sup>135</sup> The same arguments they have deployed against the ethical basis for the practice of discounting within environmental policy analysis apply with equal force to property scholars' evaluation of owners' private decisions about land. Just as the government's expression of a preference for near-term gains over long-term costs in the formulation of environmental policy demands some justification consistent with notions of intergenerational justice, market participants' observed tendency to value short-term gains more highly than delayed costs calls into question the fairness of delegating excessive control over land-use decisions to today's market participants.

Some defenders of discounting within environmental policy debates have argued that future generations are more than compensated for losses due to discounting by increases in aggregate economic wealth that the market itself fosters (by, for example, helping to ensure that today's resources are invested productively).<sup>136</sup> In the property context, Richard Epstein has similarly defended deferring to private owners' decisions by arguing that "[a] classical liberal regime of limited government, low taxation, personal liberty, and private property benefits future generations more than an alternative regime that consciously enlists large government to restrain liberty and to limit the present use of property for the benefit of future generations."<sup>137</sup> But, as others have pointed out, there is no guarantee that current owners will actually pass on the economic gains caused by the degradation of their land to future generations (rather than, say, consuming those gains themselves).<sup>138</sup> Moreover, even if these gains are shared with future generations, the finite quantity of land and the many, incommensurable goods that it fosters at least raise the question whether land is sufficiently fungible for gains in some other re-

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he says, a “‘temporal’ commons” for which privatization offers no solution. See O’Neill, *supra* note 116, at 701–02.

<sup>135</sup> See, e.g., O’NEILL, *supra* note 51, at 49–59 (discussing and rebutting the arguments that justify discounting within cost-benefit analysis); Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hind-sight*, 56 DUKE L.J. 179, 228 n.169 (2006) (collecting sources).

<sup>136</sup> See Douglas A. Kysar, *Discounting . . . on Stilts*, 74 U. CHI. L. REV. 119, 124 (2007) (describing, but not endorsing this argument); see also Revesz, *supra* note 132, at 1007–08 (“Even if the objective were to transfer resources to a future generation, it might nonetheless be preferable to leave the problem unattended if alternative investments would yield a higher rate of return. Then, the future generation would have to face the environmental harm but would enjoy, for example, the fruits of greater investments in technological innovation.”).

<sup>137</sup> Epstein, *supra* note 17, at 1466.

<sup>138</sup> See Kysar, *supra* note 136, at 124–31; O’NEILL, *supra* note 51, at 51–52.

source to effectively compensate future generations for the destruction of their landed patrimony.<sup>139</sup>

Land's memory means that the changes we make to the land, once undertaken, will often be very difficult—and at times impossible—to undo. Lost woodlands, derelict brownfields, concentrated poverty, filled wetlands, disappearing topsoil, parched aquifers, and extinct species (or species on the brink of extinction) are the persistent reminders of yesterday's owners' shortsighted land-use decisions. Development decisions that maximize property values today, as is arguably the case with auto-dependent suburban sprawl, destructive farming techniques, and the exploitation of nonrenewable resources, such as fossil groundwater and fuels, may well be shortchanging future generations.

The common law of property already acknowledges, in a limited way, the conflict of interest between current landowners and future generations. Its extensive regulation of dead-hand control suggests a degree of skepticism about the ability or willingness of present owners to fully take into account the costs their decisions impose on distant generations.<sup>140</sup> Analogous concerns for intergenerational equity call into question the Demsetzian deference to owners' substantive decisions about how to use their land.

## 2. *Private Ordering as a Second-Best Solution*

Demsetzian skeptics of government intervention in the land-use arena have suggested that even if the private owner's cost-benefit analysis is deficient in the ways I have described, it is nonetheless likely to be superior to a cost-benefit analysis carried out by a government bureaucrat, who will not suffer the consequences of getting the analysis wrong. In responding to the problem of intergenerational injustice, for example, Robert Ellickson notes that “[c]ritics of private property sometimes assert that private landowners are apt to apply a discount rate that is too high. The standard rebuttal is that politicians have even less reason to give the future its due.”<sup>141</sup> This view of the consequences of imperfect owner control as, at worst, better than the consequences of imperfect statist interventions is an important one that supporters of regulatory solutions too often overlook. But it is equally important to acknowledge its limitations.

For starters, and least interestingly, taking the argument on its own terms, whether the distortions generated by the inherent incom-

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<sup>139</sup> See Kysar, *supra* note 136, at 125–27.

<sup>140</sup> See Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations* 33–34 (Feb. 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=965755>.

<sup>141</sup> Ellickson, *supra* note 6, at 1369 n.268.

pleness of homo economicus's evaluative horizon outweigh those generated by a government bureaucrat's lack of market discipline depends, at root, on empirical questions of daunting, and perhaps insurmountable, complexity. The comparison between state and private decision making requires some way to nonarbitrarily "measure" the values left out of private owners' cost-benefit analyses and to compare them to the error introduced into the government's cost-benefit analysis by the lack of market incentives. The challenge of assembling the evidence necessary to undertake the comprehensive calculation presupposed by the "second-best" argument can make assertions of the private owners' superior vantage seem like mere professions of faith. Given the lack of hard evidence, it remains an open question whether, in any given instance, collective, deliberative alternatives to private decision making can outperform (even on economic grounds) the unaided private market in land.<sup>142</sup>

Apart from the technical difficulty of undertaking the all-encompassing cost-benefit analysis on which the "second-best" argument depends, the assertion that (imperfect) private decision making about land is superior to (imperfect) collective decision making is limited in a more conceptual respect. Assuming the inaccuracy of government cost-benefit analysis relative to private decision making simply cannot, by itself, provide us with a definitive answer to the question of who should decide the uses to which land is put. Which decision-making procedure yields even a second-best outcome depends crucially on how one defines "best." Proponents of the superiority of private owners' decision making typically help themselves to the assumption that, at the end of the day, all we ought to be after is the most technically accurate cost-benefit analysis.

This notion that the wisdom of decisions about land use can and should be judged by reference to a single summation of costs and benefits (however measured) assumes both that it is possible adequately to translate the multitude of values implicated by those decisions into such a universal comparative "currency" and that welfare (most often understood as signifying "preference satisfaction" and usually measured as "willingness to pay," even among contemporary

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<sup>142</sup> Michael Green, for example, argues that institutional decision makers, such as governments, are superior to individuals in a number of respects. "Institutions," he says,

are better than individuals at collecting and processing information about the distant or indirect consequences of their actions. They have multiple sources of information, can use a division of labor to gather and process it, and appoint special officers whose job is to look out for particular problems. Because this is so, institutional agents are more capable of taking the remote effects of their actions into account than individuals are.

Michael Green, *Institutional Responsibility for Moral Problems*, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS? 117, 124 (Andrew Kuper ed., 2005).

welfarists) is the appropriate coin of the realm.<sup>143</sup> As John Finnis has observed, however, before it can get off the ground, this methodology must first overcome the general objection that the “injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book.”<sup>144</sup> While it is central to any normative economic argument, legal economists have not adequately defended the notion that the diverse and seemingly incommensurable values implicated by land-use questions can be reduced to such a unitary measure. Instead, they have treated it, in Bernard Williams’s words, as “just a dogma.”<sup>145</sup>

Matthew Adler and Eric Posner have argued that, although a unitary cost-benefit analysis based on willingness to pay is not a perfect measure of human well-being, it is a useful “rough and ready” proxy, one that is susceptible to reasonably accurate measurement and calculation, and is (if properly undertaken to correct for a number of predictable biases and errors) superior to alternative measures of well-being that have been proposed.<sup>146</sup> It is hard to disagree with Adler and Posner’s pragmatic statement of the normative significance of cost-benefit analysis, primarily because of the modesty of their claims. Most significantly, they are careful to concede that welfare is but one value with which we ought to be concerned.<sup>147</sup> This response takes a great deal of the sting out of Finnis’s objection, but it does so, not by refuting the basic thrust of his argument, but rather by conceding that “welfare” (understood as a unitary value) is not the *summum bonum* that some economic theorists claim it to be.

Adler and Posner’s “weak welfaris[t]” position is the only account of the normative relevance of cost-benefit analysis that might possibly be acceptable for those who reject the notion that a tallying of welfarist costs and benefits (as they are typically understood) exhausts the moral content of land-use decision making.<sup>148</sup> But, viewed from within weak welfarism, the argument that imperfect private owners are

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<sup>143</sup> See Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1378 (1998).

<sup>144</sup> JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 115 (1980). In addition to Finnis, a number of other scholars have raised objections to the notion that the values implicated by human decisions can unproblematically be reduced to some universal metric of comparison. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190–216 (1993); MARTHA C. NUSSBAUM, *Plato on Commensurability and Desire*, in LOVE’S KNOWLEDGE 106 (1990); JOSEPH RAZ, THE MORALITY OF FREEDOM 345–53 (1986); SAGOFF, *supra* note 54; Adler, *supra* note 143, at 1377 n.27, 1383 n.47 (collecting sources); Sunstein, *supra* note 72, at 786–87.

<sup>145</sup> J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR & AGAINST 145 (1973).

<sup>146</sup> See ADLER & POSNER, *supra* note 116, at 25; Sunstein, *supra* note 116, at 304.

<sup>147</sup> See ADLER & POSNER, *supra* note 116, at 25–26.

<sup>148</sup> See *id.*

better positioned than imperfect governments to engage in cost-benefit analysis will still leave many important questions unanswered.<sup>149</sup> In other words, even assuming, first, that the investment model accurately describes most owners' behavior regarding land that is fungible to them and, second, that, the choices of self-interested, rational owners with informational advantages operating in a private market are more likely to maximize aggregate welfare than the choices of planners or regulators, it does not follow that we should defer to private decision making if welfare maximization is not the only end we think we ought to be pursuing. The inferiority of collective decision making about land use as a means of maximizing welfare is simply inconclusive with respect to its relative merits as a means of accomplishing whatever *other* goals we think land-use decisions should aim to achieve.

Indeed, asserting that collective land-use decision making is inferior as a welfare-maximizing device does not even settle the question of whether those means purportedly better suited to maximizing welfare are even morally permissible in the first instance. To be sure, mainstream contemporary theorists accept the moral permissibility of private landownership. This has not always been the case. During the enclosure movement in England, for example, dissenting voices, such as Gerrard Winstanley and the Diggers, objected to the morality of individual landownership, which they viewed as contrary to God's will.<sup>150</sup> More recently, in this country during the 1830s and 1840s, some of the more radical members of the National Reform Association argued on moral grounds that the state should hold land in trust and rent it out to private parties.<sup>151</sup> In mentioning these examples, I am not suggesting that we revisit the question of the morality of private landownership. I am merely emphasizing the point that, independently of questions of efficiency, moral commitments are vitally relevant to our evaluation of different land-use regimes. Even if the moral permissibility of private ownership of land is a settled question

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<sup>149</sup> See *id.* at 23, 52–56; see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1849 (2007) (“[I]n its modern applications, based on price theory and cost-benefit analysis, [utilitarian property theory] adopts a framework largely indifferent to questions of individual rights and distributive justice, which many consider the hallmarks of a moral perspective.”).

<sup>150</sup> See, e.g., GEORGE M. SHULMAN, RADICALISM AND REVERENCE: THE POLITICAL THOUGHT OF GERRARD WINSTANLEY 1–5, 86–89 (1989). Questions raised by medieval philosophers were even broader, and they focused a great deal of attention on the puzzle of whether it was morally licit to exercise exclusive ownership rights over material things at all. See, e.g., 3 THOMAS AQUINAS, SUMMA THEOLOGICA, IIa, IIae, Q. 66, art. 2 (Fathers of the English Dominican Province trans., 2d & rev. ed. 1920) (1265–1273) (discussing whether it is lawful for a person to possess external things as his own).

<sup>151</sup> See Donald J. Pisani, *The Squatter and Natural Law in Nineteenth-Century America*, 81 AGRIC. HIST. 443, 447–48 (2007) (“[I]n the end the National Reform Association had little direct effect on American land policies. But it did affect how people thought about land.”).

for contemporary thinkers, the same does not necessarily follow for each and every sort of land-use decision that might be welfare enhancing.

To assume that wealth or welfare maximization—or, for that matter, maximization of any single value—is the ultimate, or even the most important, goal of land-use decisions is to beg some crucial and contentious questions.<sup>152</sup> Within property and land-use scholarship, the most prominent alternatives to maximization theories include, among many others, Lockean moral entitlement theories, such as Robert Nozick's libertarianism,<sup>153</sup> and Hegelian personhood theories, like the one elaborated by Margaret Radin.<sup>154</sup> (As I argue in Part III, a possibility that has received less attention within property scholarship is an agent-focused virtue-based theory, such as the moral and political theories of Aristotle and Thomas Aquinas.) The habit of simply adopting the maximizing presuppositions of economic theory as their normative framework leads contemporary land-use scholars, immersed in the tradition of law and economics, to neglect the questions these other approaches raise about how best to divide land-use decision-making authority between individuals and the community so as to bring our land-use practices into greater harmony with our moral obligations.

### III

#### VIRTUE AS AN ALTERNATIVE TO ECONOMIC LAND- USE THEORY

##### A. The Continuing Appeal of Economic Analysis

In her essay, *Utilitarianism and the Virtues*, Philippa Foot observes that “[i]t is remarkable how utilitarianism tends to haunt even those of us who will not believe in it. It is as if we for ever feel that it must be right, although we insist that it is wrong.”<sup>155</sup> In the context of land-use scholarship, an analogous mystery arises. Why, despite the descriptive faults of the rational-actor model; the manifest shortcomings of private owners' cost-benefit analyses; and the inadequacy of economic cost-benefit analysis as a decisive evaluative standard for land-use decision making, does law and economics retain such a grip on contemporary land-use discussions?

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<sup>152</sup> As Larry Solum has observed, “[t]here are consequentialists in contemporary moral philosophy and there are utilitarians of various forms, but these theories are controversial and contested.” Solum, *supra* note 3, at 1462.

<sup>153</sup> See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 320–23 (1974).

<sup>154</sup> See generally Radin, *supra* note 51, at 971–78.

<sup>155</sup> Philippa Foot, *Utilitarianism and the Virtues*, 94 MIND 196, 196 (1985).

Apart from the obvious professional pressure to conform,<sup>156</sup> some possibilities seem especially likely. First, economic theory provides a ready-made, elegant, predictive, and evaluative framework.<sup>157</sup> Agreeing to operate within its confines radically simplifies the project of exploring and assessing the contentious and complex moral questions surrounding land-use decision making. More substantively, however, normative economic property theory likely draws such wide support because the notion that effects on material well-being are relevant to legal decision making is intuitively very appealing. The normative application of economic property theory is so alluring, even to its critics, precisely because our moral intuitions strongly affirm the notion that increasing aggregate wealth or welfare is a goal worth pursuing, and that simply disregarding the consequences of our decisions for social welfare is, in some sense, contrary to our moral obligations.

The main alternatives to law and economics within contemporary American property scholarship are difficult to square with this powerful consequentialist intuition. As Richard Epstein has ably shown, for example, the Nozickean libertarian position that respect for individual property rights is all that matters, consequences be damned, is neither appealing nor workable.<sup>158</sup> Amartya Sen concurs:

We can scarcely agree to accept simple procedural rules *irrespective* of consequences—no matter how dreadful and totally unacceptable these consequences might be for the lives of the people involved. Consequential reasoning, in contrast, can attach great importance to the fulfillment or violation of individual liberties (and may even give it a specially favored treatment) without ignoring other considerations, including the actual impact of the respective procedures on the substantive freedoms that people actually have.<sup>159</sup>

Indeed, the rigid libertarian position is not acceptable even to its own practitioners. In defense of his own, utilitarian-inflected “classical liberal” position, Epstein has noted that libertarianism’s foremost modern philosophical proponent, Robert Nozick, departs from strict libertarian principles at crucial moments in his argument where those

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<sup>156</sup> See, e.g., Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. L. & ECON. 485, 506 (2007) (“The regulation of academic appointments, promotion and tenure shape the incentives to participate in the [law and economics] discourse.”).

<sup>157</sup> Cf. O’NEILL, *supra* note 51, at 115 (“Cost-benefit analysis owes its appeal to a particular algorithmic conception of practical rationality.”).

<sup>158</sup> See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 88, 90–94 (1979); Richard A. Epstein, *One Step Beyond Nozick’s Minimal State: The Role of Forced Exchanges in Political Theory*, SOC. PHIL. & POL’Y, Jan. 2005, at 286, 289–96 [hereinafter Epstein, *Nozick*]; see also Eduardo M. Peñalver, *Reconstructing Richard Epstein*, 15 WM. & MARY BILL RTS. J. 429, 429–31 (2006) (noting Professor Epstein’s willingness to limit the reach of individual rights in some cases as a departure from Nozick’s more purely libertarian position).

<sup>159</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 66 (1999).

principles would stand in the way of certain welfare-enhancing, "forced exchanges."<sup>160</sup> "The libertarian approach seeks to avoid consequentialist arguments," Epstein concludes, "but in fact it only buries them out of view."<sup>161</sup>

In a different way, Radin's Hegelian "personhood" theory of property is unable to give aggregate well-being its due. This observation is not really a criticism of her theory, which, unlike libertarianism, does not purport to be an all-encompassing theory of property.<sup>162</sup> But the fact that her theory has little to say about the significance of aggregate welfare undermines its ability to provide needed guidance with respect to the crucial task of weighing how to balance the demands of welfare against the value of personhood when the two come into conflict, as they often do.

For example, in her discussion of rent control and eviction protection laws, Radin argues that such statutes are justified by the powerful attachment that tenants form with their homes and neighborhoods, which she views as morally more worthy of legal protection than the fungible interest landlords have in their rented properties.<sup>163</sup> Economists largely agree that these rent-control statutes come at the cost of somewhat higher housing prices and a smaller housing supply (although they have been less clear about the magnitude of either of those effects).<sup>164</sup> Although Radin makes a convincing case for granting tenants *some* legal protection against sudden increases in rent and arbitrary termination of their leases, her theory provides no framework for assessing *how much* of an economic sacrifice society ought to tolerate (in terms, say, of the efficient provision of housing units to the residential rental market) in order to protect the personhood interests of individual tenants.

On the other side of the coin, a position that assigns overriding or exclusive importance to welfare maximization is no more complete than "personhood" and no less troubling than the radically libertarian position that gives welfare no weight at all. I have already discussed a few of its problems, which range from its descriptive blind spots, to its struggle to give future generations their due, to the apparent invisibility and incommensurability of many of the values implicated by the

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<sup>160</sup> See Epstein, *Nozick*, *supra* note 158, at 300–04.

<sup>161</sup> *Id.* at 299.

<sup>162</sup> See Radin, *supra* note 51, at 958 ("[A] systematic general justification of property rights involves other concerns not within the scope of this article . . .").

<sup>163</sup> See *id.* at 994–96; see also Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 366–67 (1986) (arguing that a tenant's interest is personal, whereas a mortgagee's interest is fungible, and that therefore, there should be safeguards against a tenant losing her home even if it means curtailment of a landlord's interest).

<sup>164</sup> See, e.g., ANTHONY DOWNS, *RESIDENTIAL RENT CONTROLS: AN EVALUATION* 1–2 (1988).

land-use decisions it seeks to evaluate. Although a thorough discussion of its shortcomings is beyond the scope of this Article, suffice it to say that they reach substantially deeper than those on which I have focused. They include, for instance, a troubling willingness to trade on the well-being of individuals in pursuit of increased aggregate measures of well-being.<sup>165</sup> As the public reaction to the *Kelo v. New London* decision reveals, while our intuitions may lead us to place importance on the pursuit of aggregate welfare, they do not counsel its pursuit without limits nor in ways that trample over individual dignity.<sup>166</sup>

The problems I have been discussing concerning the normative economic analysis of landownership, however, do not support the conclusion that careful and sophisticated positive economic analysis is without merit. While these critiques present a serious challenge to the notion that the monistic, aggregative calculus of economics can fully capture the complex moral considerations at work in our decisions about land, they do not mean that welfare, wealth, and utility are irrelevant. In other words, these criticisms do not call into question the value of sound economic analysis within land use but only the value of a careless equation of efficiency with goodness. It rules out only the most imperial normative claims made by certain legal economists.<sup>167</sup>

The challenge for property and land-use theorists is to find a way to put the valuable tools of economic analysis to use while restricting the normative ambition of those tools to their proper domain. Meeting this challenge calls for resort to a broader moral framework, one that is sufficiently capacious to encompass the value of personhood, the demands of liberty, and the important goal of enhanced social welfare. A theory of owner obligation rooted in the Aristotelian tradition provides such an inclusive vision.<sup>168</sup> In the next subpart, I briefly describe virtue theory and discuss how it can enrich contemporary land-use theorizing.

I do not mean to deny that there are other approaches that might similarly be able to situate economic analysis within a broader moral framework. That is, the purpose of this Article is not to present a knock-down case on behalf of a virtue theory of property, but merely

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<sup>165</sup> See, e.g., NUSSBAUM, *supra* note 109, at 60–62 (arguing that average utility is an “imprecise” measurement that “does not indicate enough about different types of people are doing and their relative social placement”).

<sup>166</sup> See Peñalver, *supra* note 25, at 2974–75.

<sup>167</sup> See, e.g., KAPLOW & SHAVELL, *supra* note 8, at 3 (arguing that “welfare” is the only value that ought to matter in public decision making).

<sup>168</sup> Although most contemporary virtue theorists work within the Aristotelian (or the closely related Thomistic) traditions, there are exceptions. For the purposes of this Article, however, when I refer to virtue theory, I am referring to a broadly Aristotelian approach to virtue.

to reintroduce the Aristotelian ethical tradition into discussions of property and land-use as an approach with much to offer, one that has been neglected by contemporary property scholars.

### B. Toward a Virtue Theory of Land Use

Unlike both utilitarian consequentialism and deontological libertarianism, virtue-based ethical theories in the Aristotelian tradition adopt an agent-centered approach to determining right action. Drawing on a substantive conception of the human good or flourishing, they aim, at the level of individual choice, to answer the questions “What sort of person should I be?” and “How will a particular course of action guide me toward or away from becoming that sort of person?”

#### 1. *The Concept of Virtue*

Virtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing.<sup>169</sup> Singling out a stable disposition as a virtue suggests some degree of effort or self-mastery, typically the agent acting against a common inclination or desire to act wrongly in a particular sort of situation.<sup>170</sup> For example, a person who has the virtue of courage possesses a stable disposition to behave in certain characteristically brave ways in a broad range of situations where those lacking the virtue would flee. Likewise, a person who has the virtue of honesty possesses a disposition to tell the truth even in situations where others would be likely to lie. The just person gives to others what is due to them even in the face of temptations to self-deal, and so on.

Virtues do not consist simply of acquired dispositions to engage in certain *external* actions. They are far deeper character traits that, in addition to manifesting themselves in specific actions, are bound up with a person’s reasons for taking a particular action as well as her emotional state as she does so.<sup>171</sup> A person who does the right thing for the wrong reasons is not virtuous. To borrow an example from N.J.H. Dent, “[o]ne who saves a child from drowning solely to enjoy

<sup>169</sup> See PHILIPPA FOOT, *Virtues and Vices*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 1, 2–4 (1978); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 167 (1999). Although the virtues are conducive to human flourishing, their possession is no guarantee that the virtuous individual will in fact flourish. See FOOT, *supra*, at 3–4; HURSTHOUSE, *supra*, at 172.

<sup>170</sup> See, e.g., N.J.H. DENT, *THE MORAL PSYCHOLOGY OF THE VIRTUES* 5 (1984) (“[I]ncorporated into virtues is an endeavour, on their possessor’s part, to moderate feelings, desires, actions etc. by true judgment on the real importance of certain goods.”).

<sup>171</sup> See ROBERT MERRIHEW ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD* 9 (2006) (arguing that virtue is not only a manifestation of action, but a manifestation of appropriate emotions as well); JULIA ANNAS, *THE MORALITY OF HAPPINESS* 53–66 (1993) (explaining different theories of how emotions and virtues interact).

the acclaim and publicity his act would most likely bring" is not acting virtuously.<sup>172</sup> Nor is the person who does the right thing for the right reason, but with the wrong emotional state; for example, a person who engages in acts of charity with a sense of condescension or disgust toward the people he helps.<sup>173</sup>

For the virtue theorist working in the Aristotelian tradition, the moral quality of the actions that evince a person's possession of the virtues is not supplied by compliance with some prior set of rules.<sup>174</sup> An action is "brave" and therefore virtuous, not (ultimately) because it is consistent with a moral rule mandating a particular sort of action under a particular set of circumstances. The action is "brave" because it is the sort of action that a brave person would undertake when confronted by that situation.<sup>175</sup>

This is not to say that knowledge of rules and moral principles have no place within a virtue ethic. The moral (or, perhaps more frequently, immoral) quality of certain sorts of conduct are often sufficiently categorical that their status can be captured by "rules of thumb" of varying degrees of breadth. But it is not conformity to rules (or, on some accounts, not merely conformity to rules) that makes an action virtuous.<sup>176</sup> An action is virtuous because it is the sort of action a virtuous person undertakes; rules merely describe or generalize about what those actions would be under a range of uncontroversial circumstances. The category of virtuous conduct, however, goes well beyond the range of behavior that mechanical rules can adequately describe and calls for the skillful exercise of judgment guided by practical wisdom.<sup>177</sup>

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<sup>172</sup> See DENT, *supra* note 170, at 7.

<sup>173</sup> See HURSTHOUSE, *supra* note 169, at 118–19, 123–26 (noting that to act virtuously, the agent must have the "appropriate feeling(s) or attitude(s) when she acts"). Such flawed approximations of virtue, however, might, over time, lead an actor towards the more perfect possession of true virtue.

<sup>174</sup> Some non-Aristotelian virtue theorists have attempted to attach an account of virtue to an underlying ethical theory that is not itself built around the concept of making the right choice under the circumstances. See, e.g., ADAMS, *supra* note 171, at 9–10 (advocating the view that virtue is a kind of "goodness" rather than the neo-Aristotelian view that virtue is an identification of the "right ends, and the right ways of feeling, choosing, and acting in relation to them as those that are approved by *practical reason*").

<sup>175</sup> See HURSTHOUSE, *supra* note 169, at 28–30 (expounding on the premise that "an action is right if[ ] it is what a virtuous agent would characteristically do in the circumstances").

<sup>176</sup> See Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in 13 MID-WEST STUDIES IN PHILOSOPHY, ETHICAL THEORY: CHARACTER AND VIRTUE 32, 44 (Peter A. French et al. eds., 1988); see also ANNAS, *supra* note 171, at 105 ("We find in several places the claim that rules and principles together form an organic whole, all of which should be considered.").

<sup>177</sup> See HURSTHOUSE, *supra* note 169, at 37–39; see also ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, pt. ix (J.A.K. Thomson trans., Penguin Books 2004).

Although the conduct of the virtuous person is the standard of right action within virtue ethics, there is also an intellectual component to virtue that permits the virtuous person to offer an intelligible explanation of what she is doing. As Julia Annas says, within virtue ethics, a responsible moral agent still needs to be “critically reflective” about the connection between her actions and a larger structure of moral principle that gives those actions their moral content and conceptual unity.<sup>178</sup> The most important intellectual component of virtuous conduct is an understanding of how the conduct and the possession of the virtue contributes to the well-lived life, the good to which virtue is ultimately directed.<sup>179</sup>

Indeed, virtue ethicists typically derive the content of their accounts of the virtues from an objective conception of what it means to live well or flourish in a distinctively human way.<sup>180</sup> A particular, stable disposition is a virtue, rather than a vice or a matter of indifference, because its possession is conducive to, and in part constitutive of, its possessor’s flourishing.<sup>181</sup> Depending on the theorist, the conceptions of the well-lived human life underlying virtue ethics will have varying degrees of thickness and content.<sup>182</sup> Virtue theories agree, however, in this focus on flourishing and in refusing to assign value to some state of affairs merely because an individual happens subjectively to desire or prefer it.<sup>183</sup>

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178 ANNAS, *supra* note 171, at 69–70.

179 See *id.* at 71.

180 See *supra* note 169 and accompanying text. Objectivity here means that a claim about what it means to flourish is true (if at all) independently of the subjective states of any particular individual. See Philippa Foot, *Does Moral Subjectivism Rest on a Mistake?*, 15 OXFORD J. LEGAL STUD. 1, 3 (1995). There is not unanimity among virtue theorists, however, concerning the question of whether there is an “objective” (in this case meaning non-community-relative) account of flourishing in which to ground a theory of the virtues. See Nussbaum, *supra* note 176, at 33. Martha Nussbaum has argued that rejecting such a transcendent foundation for virtues undermines the ability of virtue theorists to engage in “rational criticism of local traditions” or to “articulat[e] an idea of ethical progress.” See *id.* Alasdair MacIntyre, however, has developed a theory that, while rejecting the notion that a conception of human flourishing might be articulated independently of some community’s tradition of thought, makes room for the sort of rational inter-communal debate and criticism that Nussbaum hopes to preserve. See generally ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 349–88 (1988). Because my sympathies are with MacIntyre, I do not perceive the question of whether an account of the virtues is objective in the first (independent of individual subjective states) sense or the second (non-community-relative) sense to have a great deal of practical significance. Accordingly, for the purposes of this Article, I will set this controversial question to the side.

181 See *supra* note 169 and accompanying text; see also O’NEILL, *supra* note 51, at 73.

182 Nussbaum argues, for example, that her conception of flourishing is sufficiently thin that it complies with John Rawls’s liberal requirements of public reason. See NUSSBAUM, *supra* note 109, at 76.

183 See DENT, *supra* note 170, at 7.

## 2. The Virtues of a Virtue Theory of Land Use

While virtue-based theories have in recent years begun to gain attention in a number of other areas of legal theory, they have not, as yet, had much of an impact within property or land-use scholarship.<sup>184</sup> This is unfortunate. Among other things, a virtue theory of land use would allow property theorists to draw upon some of the more attractive features of law and economics, without taking on its normative shortcomings.

For starters, the moral psychology underlying virtue ethics is fully compatible with models of human decision making that are more subtle and inclusive than that of the self-interested rational actor. Law and economics' traditional commitment to a highly simplified model of human behavior is, in many contexts, descriptively unappealing.<sup>185</sup> It treats a tendency toward self-interested behavior as a fixed point in human nature rather than as a trait that, like many others, can be shaped and overridden by culture, character, and even law.<sup>186</sup> Although this simplified model of individual decision making is prone to the sorts of descriptive and prescriptive errors I described above,<sup>187</sup> it is not clear that the normative Demsetzian position can operate successfully without it.<sup>188</sup> Recent trends in positive economic analysis toward more realistic models of human behavior have helped ameliorate the descriptive problems I have been discussing. But this positive economic analysis stands in need of a wider moral framework to give it normative significance. Virtue theory is well suited to perform that task.

In addition to its compatibility with a range of models of human behavior, virtue ethics' recognition of a plurality of values makes it particularly well-adapted to provide a means for acknowledging and balancing an interest in the aggregate welfare or wealth of society with a concern for the full spectrum of the other human goods that land-

<sup>184</sup> See Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 180–81 (2003) (noting the recent emergence of virtue ethics in discussions of moral philosophy in legal theory). Although it has not yet received widespread attention among property scholars, some property theorists have expressed sympathy with the virtue approach. See David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO L.J. 325, 331 n.19 (2003); David Lametti, *The Objects of Virtue* 1–3 (2008) (unpublished manuscript) (on file with author) [hereinafter Lametti, *Virtue*].

<sup>185</sup> See Nussbaum, *supra* note 5, at 1211 (commenting on how the law-and-economics movement's focus on self-interested maximizers is inadequate in explaining the behavior of altruists).

<sup>186</sup> Rose, *supra* note 111, at 44–48.

<sup>187</sup> See *supra* Part II.A; see also Amartya Sen, *Plural Utility*, 81 PROC. ARISTOTELIAN SOC.'Y 193 (1981) (explaining the advantages of viewing utility primarily as a vector and only secondarily as a homogenous magnitude given some of the problems that the latter presents).

<sup>188</sup> See *supra* notes 108–11 and accompanying text.

use decisions implicate. That is, unlike (for example) libertarian property theory, virtue theory is able to explain why consequences for human beings' material well-being ought to matter for land-use decision makers without adopting the position that those consequences are the only important moral considerations.<sup>189</sup> In other words, it picks up where "weak welfarism" leaves off, providing an account of the values beyond welfare that are relevant to the evaluation of land-use decisions, an account without which "weak welfarism" is hopelessly incomplete.

In contrast to various welfare-maximizing normative theories, in which the idea of "maximum welfare" stands, in Foot's words, "outside morality as its foundation and arbiter," within a virtue ethic, welfare maximization exists "*within* morality as the end of one of its virtues."<sup>190</sup> Virtue requires actors to weigh the consequences of their decisions for social wealth. The virtue of benevolence, for example, would seem to mandate that governmental actors consider how their policies will affect the material well-being of the community they serve. But, as Foot points out, benevolence is just one virtue among many.<sup>191</sup> The virtuous decision maker will also consider other factors, such as justice, and will sometimes favor a course of action that does not enhance aggregate welfare.<sup>192</sup> From within a virtue theory of land use, then, what we seek from landowners and government alike is not simply cost-benefit precision, but, also, the capacity to appreciate and assign the proper weight to the many subtle and incommensurable values (including economic values) implicated by their decisions. In other words, we are looking for landowners and government actors who consistently exhibit the virtue of practical wisdom.<sup>193</sup>

Viewed from the perspective of a theory that acknowledges the relevance of a plurality of values at work within land-use decision making, the result of even the most comprehensive and disciplined cost-benefit analyses, while not irrelevant, is normatively inconclusive. It is but one—albeit important—datum that owners and policymakers should consider in a complex moral decision-making process. Other questions, like the sustainability of the owner's use,<sup>194</sup> the possibility of irreversible or catastrophic future consequences,<sup>195</sup> the proper

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<sup>189</sup> See Foot, *supra* note 155, at 206 (arguing that maximum welfare "appears *within* morality as the end of one of the virtues" where "the proper end of benevolence is the good of others").

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 205.

<sup>192</sup> See *id.* at 206.

<sup>193</sup> See HURSTHOUSE, *supra* note 169, at 59–62.

<sup>194</sup> See Kysar, *supra* note 75, at 2114–47 (discussing different conceptions of sustainability).

<sup>195</sup> See ERIC T. FREYFOGLE, WHY CONSERVATION IS FAILING AND HOW IT CAN REGAIN GROUND 154–55 (2006) (discussing the precautionary principle); CASS R. SUNSTEIN,

scope of owners' autonomy,<sup>196</sup> or (most broadly) the relationship between land-use decisions and other aspects of human flourishing,<sup>197</sup> may well trump a technically cost-beneficial course of action. Although the need to consider such diverse values departs from the apparent precision and simplicity of economic cost-benefit analysis, it more faithfully reflects the complexity and high moral stakes of much land-use decision making.

### 3. *The Role of Law in Fostering Virtuous Land Use*

From within a virtue theory of land use, the justification for legal intervention will not be limited to situations of market failure. Rather, the law will have as an important goal affirmatively promoting human virtue and flourishing. A complete virtue theory of property would obviously include (or endorse) a fully elaborated and fully defended account of human flourishing and the proper role of law, legal institutions, and the democratic political process in relation to that account. In the remaining sections of this Article, I do not even attempt that ambitious undertaking. Instead, as the discussion proceeds, I focus on what I hope are less controversial components common to most accounts of human flourishing (and their corresponding virtues), elements that operate within a number of overlapping but disparate conceptions of the good life.

There is an understandable temptation to think of flourishing as a purely individual pursuit, a personal project akin to self-realization. But, on any plausible account, human flourishing is an unavoidably cooperative endeavor.<sup>198</sup> Human beings are social animals whose lives

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WORST-CASE SCENARIOS (2007) (discussing the precautionary principle in the contexts of terrorism and climate change); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U. L. Rev. 1315 (2003) (offering additional discussion on the precautionary principle); Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 J. LAND USE & ENVT'L. L. 1 (2006) (providing further discussion on the need for precautionary measures where activity threatens health or the environment).

<sup>196</sup> See NOZICK, *supra* note 153, at 28–30.

<sup>197</sup> See FREYFOGLE, *supra* note 195, at 113–77 (critiquing the notion of “sustainability” and proposing an alternative basis for assessing land-use decisions rooted in human well-being). A fully developed conception of human flourishing will necessarily consider the importance of individual autonomy within the good life as well as the proper relationship between that autonomy and the state’s power to regulate land-use decision making in the interests of the common good. See Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 748 (2007) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)).

<sup>198</sup> See ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 71–74, 119 (1999); CHARLES TAYLOR, *Atomism*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 187, 205 (1985); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1211&context=TII> (fill out guest registration form and follow the “Download the article now” hyperlink); Foot, *supra* note 180, at 8.

are characterized by protracted periods of dependence. Our ability to flourish requires the presence of a material and communal infrastructure that itself depends upon the contributions of each of us.<sup>199</sup> We cannot value our ability to flourish without at the same time affirming an obligation to cooperate with others in order to sustain the shared infrastructure on which that ability depends.<sup>200</sup>

Of course, these social obligations are not limitless. After all, human beings exist and experience the world as individual human organisms, not as cogs in some hive mind. The powers to reason and to choose are components of any plausible account of the well-lived human life.<sup>201</sup> And so, while the pursuit of flourishing is intrinsically social, it has an individual dimension as well. Accordingly, the cooperative pursuit of human flourishing must give way at crucial moments in order to create the space necessary for individuals to foster the goods of practical reason and autonomy.<sup>202</sup> The key challenge is to strike the right balance between our obligations toward others and our inclination to favor our own interests and the interests of those close to us, an inclination that is healthy—and, indeed, necessary in its own way for flourishing—provided that it remains within the proper bounds.<sup>203</sup>

A virtue theory of property shares with normative economic theories the intuition that collective decision making about land use should be reserved for situations in which legal intervention is likely to yield better (that is, more morally correct) decisions about how the land ought to be used.<sup>204</sup> But knowing how to divide decision making between private owners and collective authority in different contexts becomes a deeper and more difficult challenge than merely determining who is best positioned to engage in cost-benefit analysis. A complete virtue jurisprudence would include an account of the areas in which collective decision making would be expected to generate outcomes superior to individually determined conduct. Although I do not provide a comprehensive theory, my principal goal has been to argue, first, that the proper domain for such collective land-use decision making is not coextensive with the economic concept of market

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<sup>199</sup> See MACINTYRE, *supra* note 198, at 97.

<sup>200</sup> See *id.* at 100–01; Alexander & Peñalver, *supra* note 198, at 138–45. It is likely that this obligation extends beyond our political community, but for the purposes of this Article, I will consider only an obligation to help our fellow citizens.

<sup>201</sup> See Alexander & Peñalver, *supra* note 198, at 138–45.

<sup>202</sup> See *id.*; see also RAZ, *supra* note 144, at 407–08 (discussing duties to secure background conditions enabling a person to be autonomous).

<sup>203</sup> Lametu, *Virtue*, *supra* note 184, at 8.

<sup>204</sup> In this sense, a virtue theory would likely share much with Joseph Raz's so-called "service conception" of legal authority. See RAZ, *supra* note 144, at chs. 3 & 15.

failure and, second, that concepts developed within the tradition of virtue ethics provide some promising tools for finding its boundaries.

In the areas where collective decision making is appropriate, laws that override private decisions and command owners to act in accordance with virtue can accomplish three important goals. First, by enforcing certain specific moral obligations, they directly help to protect those, such as the poor and future generations, whose ability to flourish might be harmed by owners' immoral decisions. This is the goal of legal enforcement of moral norms that Demsetzian theorists are most likely to attempt to assimilate into their model. They will recast harm to third parties as "externalities" that, in the presence of transaction costs, market mechanisms might not internalize. This translation, however, will not fully capture the content of the virtue account. In addition to the conceptual distortions introduced when moral wrongs are converted into "costs,"<sup>205</sup> the reciprocal nature of the economic understanding of externalities means that the internalization of externalities can be accomplished, and the goals of efficiency served, by legal solutions that are, from the point of view of virtue theory, morally obtuse.<sup>206</sup>

The other goals of legally enforced moral norms are less at home within the economic framework insofar as those norms seek to modify, correct, or discourage the preferences that traditional legal economists aim primarily to satisfy. Thus, a second, more indirect, goal of enshrining certain obligations of virtuous conduct into law would be to constrain the behavior of nonvirtuous owners and, over time, to teach them to act virtuously of their own accord.<sup>207</sup> Such a mandate can have consequences that ripple well beyond the confines of a specific legal prohibition or prescription. The notion that legally compelling someone to act as if they possessed a virtue might actually foster virtue is not far-fetched. Consider the impact of Title II of the Civil Rights Act of 1964, which mandates a nondiscrimination norm for private owners of places of public accommodation.<sup>208</sup> A law prohibiting such private discrimination was at first criticized in prominent quarters as a violation of property rights and as a hopeless, pater-

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<sup>205</sup> See Radin, *supra* note 5, at 1867–68.

<sup>206</sup> Cf. Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 121–27 (1995) (describing the courts use of backward-looking analysis to determine harmfulness and advocating instead that courts consider community standards and definitions of harmfulness in deciding land-use cases); Joseph W. Singer, *How Property Norms Construct the Externalities of Ownership*, in PROPERTY AND COMMUNITY, *supra* note 34.

<sup>207</sup> See, e.g., 2 AQUINAS, *supra* note 150, Ia, IIae, Q. 95, art. 1 (discussing how law can gradually lead the vicious to become virtuous by imparting on them the habit of acting well); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 24–31 (1993) (discussing Aristotle's and Aquinas's views on the role of law in fostering the virtues).

<sup>208</sup> 42 U.S.C. § 2000a (2000).

nalistic effort to force people to interact against their wishes.<sup>209</sup> Despite this skepticism, and however incomplete the project of racial justice remains, civil rights laws prohibiting discrimination in restaurants and hotels are now nearly universally accepted and have contributed to dramatic changes in racial attitudes.

Third, even those who are not vicious stand to benefit from laws mandating virtuous conduct: legal specification can help to clarify social obligations and to coordinate collective virtuous actions.<sup>210</sup> Well-crafted environmental statutes or regulations, for example, can help spread the word about best practices to landowners already inclined to act responsibly but lacking information about the remote consequences of their behavior. Civil rights statutes provide another helpful illustration. Scholars have noted that statutes prohibiting discrimination empowered proprietors and employers who did not particularly want to discriminate but who did so out of fear of reprisals for violating social taboos. By ensuring that their less-virtuous competitors would not be able to obtain a competitive advantage by offering a segregated alternative, civil rights statutes reduced the cost of doing the right thing for those already predisposed to do it.<sup>211</sup>

It bears emphasizing that rejecting welfare-maximizing theories of landowner obligation in favor of a virtue-based approach does not lead to an embrace of unrelentingly collective or statist decision making about land use.<sup>212</sup> Even where we reach the conclusion that landowners' self-interested calculations should give way to overriding moral considerations, the question whether to enforce coercively the demands of virtue through the force of law will turn, as virtue theorists have long understood, on a number of considerations.<sup>213</sup> It will turn,

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<sup>209</sup> See, e.g., Editorial, *Some Racial Facts and Fallacies*, WALL ST. J., Mar. 25, 1960, at 8.

<sup>210</sup> See, e.g., MARY M. KEYS, *AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD* 208–16 (2006) (discussing the different ways in which enacting laws enforcing moral obligations can help people of good will within Thomistic legal theory).

<sup>211</sup> See, e.g., John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1639 (1991); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 33 (2007).

<sup>212</sup> Indeed, as Elinor Ostrom has forcefully demonstrated, individual and statist decision making hardly exhaust the menu of regulatory options. For a great many resources, including land, a rich mixture of private and collective governance regimes have, under the right circumstances, proved extremely effective. See generally OSTROM, *supra* note 7, at 58–102 (analyzing specific cases of long-enduring, self-organized, and self-governed common-pool-resource institutions).

<sup>213</sup> See, e.g., JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 149–64 (1960); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 28–30 (2006); Christine Swanton, *Commentary on Michael Slote's "Virtue Ethics and Democratic Values"*, 24 J. SOC. PHIL. 38, 46 (1993); see also, e.g., 2 AQUINAS, *supra* note 150, at Ia, IIae, Q. 96, art. 2 (discussing the circumstances under which the demands of virtue should be enshrined in law).

for example, on our evaluation of the likely behavior of landowners in response to differing forms of legal compulsion and persuasion aimed at ensuring that those obligations are met. This evaluation will itself require an understanding of the character of the typical landowner and of the community in which she is situated. This is an area of virtue jurisprudence in which sophisticated and empirically grounded positive economic analysis (as well as empirical analysis from within other social science disciplines) will have a great deal of value.

The answer will likewise depend on the mechanisms for political decision making at our disposal, and the degree to which we think actors' political behavior within those mechanisms resembles and partakes of the same virtues and pathologies of private decisions or is instead subject to its own context-specific strengths and shortcomings. Although, as Lisa Heinzerling and Frank Ackerman note, contemporary economic analysis of law typically assumes "that narrow personal self-interest explains the behavior of government officials, elected decision-makers, and everyone else involved in the public policy process," other plausible models of public decision making exist.<sup>214</sup> Under the right conditions, there may be a wisdom to collective deliberation that is absent when private actors transact in the market.<sup>215</sup> As Michael Sandel has put it, it is possible that "when politics goes well, we can know a good in common that we cannot know alone."<sup>216</sup>

Even where self-interest seems (as a descriptive matter) to reign in politics, we should not assume that the pattern of collective decision making observed at one time and place is set in stone, and cannot be changed for the better through concerted efforts to reform institutions or to educate and train decision makers to become more virtuous. If, for example, cultural norms intentionally inculcated from a young age tell us that it is fine to look out for ourselves in market affairs but that we must consider more carefully the commonwealth in our civic decisions, we may not seek the same self-serving ends in each of those discrete domains.<sup>217</sup> Moreover, imbued with such public-spirited norms, we may not display the same degree of shortsightedness in our political deliberation as we typically do in our

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<sup>214</sup> Lisa Heinzerling & Frank Ackerman, *Law and Economics for a Warming World*, 1 HARV. L. & POL'Y REV. 331, 356 (2007).

<sup>215</sup> See O'NEILL, *supra* note 51, at 140–41; ARISTOTLE, THE POLITICS bk. III, ch. 11 (Carnes Lord ed.) (1984).

<sup>216</sup> MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 183 (2d ed. 1998).

<sup>217</sup> See, e.g., SAGOFF, *supra* note 117, at 8, 171–72 (contrasting our behavior as consumers with our behavior as citizens); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 71–72 (2002) (distinguishing between "personal" and "political" motivations).

market transactions.<sup>218</sup> Again, attempts to answer these questions will gain a great deal from sophisticated empirical analysis, the sort of work that many contemporary economists are producing.

Finally, the independent value of individual autonomy, which is itself an important component of human flourishing, may require that we accept private decision making in certain contexts, even when we know it is likely to yield inferior results. This is what the federal Fair Housing Act seems to do, for example, by exempting from its antidiscrimination norms small, owner-occupied units,<sup>219</sup> or what Title II of the Civil Rights Act of 1964 arguably does by exempting private clubs.<sup>220</sup> Even in situations where a concern for autonomy overrides other values, the state can still educate owners about their obligations or offer them incentives to voluntarily use their land responsibly.

The task of determining when, how, and in what contexts (if ever) these various considerations control is a difficult puzzle that goes to the very heart of the proper division of labor between the community and private landowners. It is a puzzle, however, that contemporary land-use scholarship too often ignores. Dominated as it has become by economic analysis that frequently doubles as normative argument, discussions of land use within the legal academy are increasingly narrowly focused on such technical questions as which rules will yield economically optimal results and which entities are best situated to engage in the most technically accurate cost-benefit analysis. These questions are significant ones, but they should not (as they sometimes seem to do) crowd out the others. Nor should the answers that scholars provide to the economic questions be mistaken (as they sometimes seem to be) for definitive answers to the others.

#### 4. *The Problem of Indeterminacy*

Although, as I conceded above, a full-fledged defense of virtue ethics against all comers is well beyond the scope of this paper, it is important to consider one objection that is frequently leveled against it and that has special salience in the context of a comparison of a virtue theory of land use with the dominant economic approaches: that, unlike the precision and decisiveness offered by cost-benefit analysis, the pluralist evaluative framework that virtue ethics embraces is too indeterminate to be of much use for legal theorizing.<sup>221</sup> Some-

<sup>218</sup> Elinor Ostrom similarly observes that, as a result of cultural norms, the same person may well exhibit different discount rates in different contexts. See OSTROM, *supra* note 7, at 35.

<sup>219</sup> 42 U.S.C. § 3603(b) (2000).

<sup>220</sup> *Id.* § 2000a(e).

<sup>221</sup> See HURSTHOUSE, *supra* note 169, at 35–39. Louis Kaplow levies a version of this “indeterminacy” objection as a general argument against pluralist theories of value, such as

one employing a utilitarian cost-benefit analysis, the argument goes, has a precise, arithmetic means of weighing competing options and definitive conclusions about the proper course of action. Virtue ethics' values pluralism, however, offers no concrete guidance in determining what action to take, particularly where its diverse values appear to come into conflict.

It is true that, once we agree on the utility values or welfare values of every feature of two competing courses of action, normative economic theories provide a very concise and unambiguous directive: act so as to maximize utility or welfare, or whatever name theorists choose to put on their metric of value. Economic theory, however, buys certainty at the decision-making stage at the cost of considerable uncertainty and arbitrariness at the stage of defining and measuring the values to be maximized. I have already mentioned the substantial literature discussing the measurement problems involved in assigning economic value to nonmarket goods.<sup>222</sup> Those measurement problems are only exacerbated when it comes to evaluating broad legal structures and rules.

Do the costs of discrimination in places of public accommodation or private housing markets outweigh the benefits of permitting discrimination such that the state should intervene to impose antidiscrimination norms? Do the gains of granting title to adverse possessors outweigh the alternatives of dispossessing them or, perhaps, granting them an option to purchase the property they have occupied? Do the benefits of an unqualified right to exclude outweigh the incremental utility gain that we might achieve by permitting people to wander across unimproved land for recreational purposes? Even if it were possible to encompass all of the considerations relevant to answering these questions within a single unit of value at the appropriate levels of legal generality, the cost-benefit calculus would be so unwieldy as to be impossible to undertake with any degree of confidence in the accuracy of its results. In the absence of hard facts, a plausible welfarist justification can easily be manufactured for almost any answer to these questions.

The determinacy of cost-benefit analysis is largely an illusion. In Bernard Williams's words, utilitarianism is appealing because it "offers one of the simplest and most powerful methods possible for eliciting a result," but this method "make[s] enormous demands on supposed empirical information, about peoples' preferences, and that information is not only largely unavailable, but shrouded in conceptual diffi-

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Amartya Sen's Aristotelian, "human capabilities" approach. See Louis Kaplow, *Primary Goods, Capabilities, . . . or Well Being?*, 116 PHIL. REV. 603, 606–08 & n.7 (2007).

<sup>222</sup> See *supra* Part II.B.1.

culty.”<sup>223</sup> At least on the determinacy front, then, virtue theory does no worse than utilitarianism and its cousins; and it is far more forthright about the difficulties and limitations of the conclusions it offers.

The virtue theorist’s best response to the charge of indeterminacy, however, is to turn the critique on its head. Virtue theory’s lack of an algorithm for social decision making, far from being a fatal weakness, is actually a point of strength. Instead of burying the tension among plural values inside homogenizing numerical measures of dubious validity, as single-value-maximizing theories do, virtue theory brings that tension to the foreground and invites reasoned deliberation about an appropriate response to it. That is, it focuses decision makers’ attention exactly where it should be. Traditional economic analysis, in contrast, is deliberation-inhibiting in the sense that it reduces evaluating and decision making to a technical measurement problem that is best left to the experts.<sup>224</sup>

### C. Land Virtues

Because humans are physical beings, land is an essential component of virtually every human activity. Consequently, decisions about land use impact human flourishing in myriad ways and are, therefore, thoroughly suffused with moral content. As I have already observed, virtues are acquired, stable dispositions to engage in characteristic modes of behavior conducive to human flourishing.<sup>225</sup> Applying this definition to behavior relating to land, we can use it to identify virtuous conduct as the behavior that flows from stable dispositions to use land in ways that characteristically promote human flourishing. As in other domains, the law has an important role to play in encouraging virtuous land use and, thereby, the human flourishing that such virtuous land use facilitates.<sup>226</sup>

In this subpart, I discuss three domains of land-use decision making that have particularly important implications for human flourishing. (There are, of course, many others as well.) In each, we observe the same tension between individual entitlement and social obligation. First, on any plausible account, human flourishing depends upon access to a number of physical resources. Those resources are essential not only for human beings’ brute physical survival, but also for the education of the young and for people to be able to participate in the social life of the community.<sup>227</sup> Land is a necessary ingredient in the activities that produce these physical resources.

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<sup>223</sup> SMART & WILLIAMS, *supra* note 145, at 136–37.

<sup>224</sup> See O’NEILL, *supra* note 51, at 92–95; Kysar, *supra* note 195, at 41–42.

<sup>225</sup> See sources cited *supra* note 169.

<sup>226</sup> See Lametti, *Virtue*, *supra* note 184, at 11–12.

<sup>227</sup> See Peñalver, *supra* note 197, at 744–45.

Accordingly, someone interested in promoting human flourishing must also take an interest in encouraging the productive and efficient use of land. Even the most productive use of land would do little to foster human flourishing, however, if all the consumption of the fruits of that productive labor were monopolized by a very small oligarchy. Thus, in addition to the production of physical resources, a proper concern for human flourishing includes an effort to ensure that the fruits of the land's productivity, and, indeed, the land itself, are distributed in a manner consistent with that ultimate goal, even when those distributive (and redistributive) efforts undermine productive efforts. Finally, land's memory means that the consequences of our decisions about land use are fraught with the risk of irreversible harm to the ability of future generations to flourish on the land. So a discussion of land-use ethics must also address the question of intergenerational obligation and, in that context, the proper means of managing the long-term risks to future generations associated with present-day land uses.

I explore ways of encouraging the productive and efficient use of land in relation to the virtue of industry. I then discuss decisions about the distribution of the land and its produce in connection with the virtue of justice. Finally, I elaborate on the concern with risks of irreversible harm to the land and with the limits of our power to understand and control them in connection with the virtue of humility. Along the way, I provide examples of situations in which the law can intervene (and already has) to require or encourage conduct consistent with these virtues. By no means do I intend this brief discussion to constitute a comprehensive account or defense of a virtue theory of land use. A more complete discussion would necessarily include a detailed account of distributive justice, as well as discussions of other property-related virtues like charity, liberality, and moderation.<sup>228</sup> But, I do hope that these initial and somewhat tentative thoughts will shed light on the many helpful conceptual tools that virtue ethics has to offer and the ways in which it differs from competing land-use theories, particularly economic theories.

### 1. *Industry*

Material wealth is crucial to human flourishing. Human beings cannot flourish if they are starving. The efficient production of all material resources ultimately depends upon productive activities conducted on or with land. The obvious examples are agriculture and the extraction of natural resources, but even industry and commerce have indispensable spatial components and therefore also depend on

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<sup>228</sup> For a very insightful discussion of the relationship between liberality and moderation to a virtue-based theory of property, see Lametti, *Virtue*, *supra* note 184, at 11–24.

land to a certain extent.<sup>229</sup> A society that is interested in its members' flourishing will therefore seek, within appropriate limits, to encourage the productive and efficient use of land in order to generate the material wealth necessary for human beings' physical well-being.

Producing wealth requires work, both physical and intellectual. And, because human beings (at least as they exist in the twenty-first-century United States, and, if societies' literature and philosophy are any guide, at many other times and places as well) often perceive work as something to be avoided; communities of all sorts struggle to find ways to encourage their members to perform the labor necessary to generate the resources the community needs and wants. As with collective attempts to use the law to induce virtuous behavior in other areas, the available legal strategies for communities to encourage industry among their members run the gamut from education and exhortation, to the creation of material incentives that seek to entice individuals to work voluntarily, to coercive legal mandates, backed by the power of the state.<sup>230</sup>

In the land-use context, most societies have employed all three strategies at varying times to encourage their citizens to do the right thing. Ours is no exception. One way to understand the institution of private ownership is as an elaborate system of indirect morals legislation, a structure of legal incentives whose principal goal is to encourage people to cultivate the virtue of industry (though perhaps "efficiency" would be a more suitable contemporary term for that traditional virtue) by offering landowners the reward of a privileged claim over the fruits of their labor. When the incentives of private ownership do not suffice to generate the sort of industrious behavior the community is seeking (for example, because of incentives for land speculators to free ride on the productive activity of others<sup>231</sup>), more coercive strategies may be appropriate. In colonial America, for example, communities that placed a particular premium on the development of the continent's abundant wild lands enacted laws commanding owners to put their land to productive use, penalizing passive speculators with forfeiture of their title.<sup>232</sup> Some jurisdictions

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<sup>229</sup> See LOGAN & MOLOTH, *supra* note 22, at 20–21.

<sup>230</sup> In addition, as Elinor Ostrom has observed, certain communities may also employ social norms very effectively to discourage free-riding with respect to commons resources. See OSTROM, *supra* note 7, 35–37. I will limit my discussion, however, to formal legal means of discouraging shirking.

<sup>231</sup> See Peñalver & Katyal, *supra* note 29, at 1109 (discussing the behavior of land speculators in the nineteenth-century American west).

<sup>232</sup> See, e.g., John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1265–66 (1996).

directly penalized absentee owners and made it easier for squatters to adversely possess undeveloped land.<sup>233</sup>

By conceiving of private land ownership as (among other things) a collective attempt to encourage the virtue of industry, virtue theory assimilates many important insights of economic analysis. In considering the propriety of private ownership, for example, Thomas Aquinas sounds practically utilitarian when, following Aristotle, he argues that limited private rights in property are permissible for three reasons:

First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.<sup>234</sup>

The principal difference between the virtue-based account and the traditional utilitarian analysis of landownership is that, as Philippa Foot has observed, for a virtue theorist, encouraging economic productivity and the efficient use of land is just one of a plurality of values with which decision makers ought to be concerned. Thus, Aquinas, again following Aristotle, distinguishes between rights with respect to the “procur[ing] and dispens[ing]” of property, which are permitted to be private, and rights with respect to the consumption of property, which must be understood as ultimately common. As regards the consumption of property, Aquinas says, human beings “ought to possess external things, not as [their] own, but as common, so that, to wit, [they] are ready to communicate them to others in their need.”<sup>235</sup> In short, industry is just one land virtue among many that the law of property aims to cultivate. In addition to industry, private ownership must also be structured around the need to encourage other virtues, and so the economic productivity generated by ownership rights, while important, must at times give way to other values, such as justice. *Pace* libertarian property theorists, however, limiting or altering private property rights in the name of these other values stands in no need of special justification because the limitations are

<sup>233</sup> See Peñalver & Katyal, *supra* note 29, at 1110–13.

<sup>234</sup> See 3 AQUINAS, *supra* note 150, IIa, IIae, Q. 66, art. 2.

<sup>235</sup> *Id.*; see also ARISTOTLE, *supra* note 215, bk. II, ch. 5, §§ 5–6.

rooted in the same instrumental logic of virtue as the creation of exclusive property rights in the first instance.

## 2. *Justice*

Because the system of private property as a whole is established in order to facilitate the ability of members of the community to flourish, owners' rights are qualified by an obligation to share from their surplus property with those who need them in order to satisfy more fundamental needs.<sup>236</sup> Utilitarian property theorists may well concur in this redistributive conclusion. Their overriding commitment to a unitary measure of value, however, frequently leads them to favor redistribution via taxation and cash transfers over in-kind transfers or redistributive property rules.<sup>237</sup> In contrast, the plural values recognized by the virtue theory of land pushes its commitment to redistribution in more complex and expansive directions.

To take the most basic need as an example, a person cannot flourish without the ability to occupy some physical space within which she can carry out activities essential to her existence, such as eating and sleeping.<sup>238</sup> If we owe an obligation to promote human flourishing among those within our political community, we owe an obligation to help those without such a space to obtain it. In many cases, economists are probably correct when they argue that the least wasteful means for fulfilling that obligation is through broad redistributive measures employing the state's power to tax and spend. But the economic focus on aggregate measures of utility or welfare obscures the situations in which the nonfungibility of the goods needed to flourish (or the poor choices people sometimes make for themselves or those within their care) can render monetary redistribution ineffective or even counterproductive.

For the legal economist, a unitary measure of value means that goods are *always* substitutable; the challenge is in determining the proper rate of exchange. The more multivalent concept of human flourishing, however, recognizes that individuals or groups experience the components of that flourishing in ways that defy substitution. As Margaret Radin has correctly noted, human beings form connections

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<sup>236</sup> See Alexander & Peñalver, *supra* note 198, at 147–49 (discussing the role of the state in compelling the wealthy to share their surplus property with the poor).

<sup>237</sup> See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) (“Redistribution is accomplished more efficiently through the income tax system than through the use of legal rules . . .”); Ellickson, *supra* note 6, at 1357 (“To help equalize wealth, land can be periodically reassembled, repartitioned, and reallocated, although this policy is usually inferior to cash redistributions effected through tax and welfare programs.”).

<sup>238</sup> See, e.g., Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 305–06 (1991).

with particular pieces of property such that they become inextricably bound up with their pursuit of the well-lived life.<sup>239</sup> Land constitutes a central locus of this nonfungibility. Once a person (or a community) has sufficiently incorporated a piece of land into his life plans, exchanging that land for some other good (even a good of great economic value) or for some other piece of land can hinder, in some cases irreparably, his ability to flourish by short-circuiting long-term plans, deeply held commitments, and carefully constructed identities.

Because human flourishing is a phenomenon of actual, living human beings and not disembodied collections of utility, there is an organic integrity and coherence to its individual experience that resists disassembly and substitution. The structure of flourishing extends along at least two dimensions.

First, it has “breadth” as an expression of the need simultaneously to enjoy a number of distinct and nonsubstitutable goods. To flourish in a distinctively human way within a given society one must have access to a particular basket of goods. And many of these goods, such as socialization and the material resources necessary for social participation, moral training, language acquisition, and the nutritional resources necessary for physical and mental development, must come in the correct form and at the right time in one’s development, or a person’s prospects for flourishing may be permanently impaired. To be sure, the countless ways of pursuing and enjoying the goods of human flourishing leaves ample scope for human freedom by, say, emphasizing one good (e.g., knowledge) over others.<sup>240</sup> But the scope for such specialization is not limitless. Because in order to flourish an individual requires both political freedom *and* adequate nutrition, for example, we will not be able adequately to compensate a person forced to live under political tyranny by giving her extra units of food.

Second, the coherence of flourishing extends temporally as a pattern of cultivation and enjoyment of particular goods over the course of one’s life. Even though well-lived human lives may take a plurality of individual forms, and even though those forms may themselves vary (even for a particular individual life) over time, well-lived lives are not constituted by a series of disconnected mental states or satisfied preferences, as utilitarian theorists sometimes seem to imagine; instead, they will necessarily have a certain experiential integrity.<sup>241</sup> This in-

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<sup>239</sup> See, e.g., Radin, *supra* note 51, at 993–96 (discussing a hypothetical statute incorporating the normative judgment that tenants should be allowed to become attached to places and that the legal system should encourage them to do so).

<sup>240</sup> See FINNIS, *supra* note 144, at 93–94; O’NEILL, *supra* note 51, at 87–90.

<sup>241</sup> Bernard Williams has famously converted this point about the integrity of the well-lived life into a powerful critique of utilitarian moral theory. See SMART & WILLIAMS, *supra*

tegrity will sometimes make it impossible to substitute one good for another. For example, someone who has committed his life to the good of knowledge cannot flourish if, at the apex of his career, we wipe out his memory. His loss will be tragic and irreparable, no matter how much money or pleasure or preference satisfaction we give him in a misguided effort at compensation.

The nonfungibility of various components of human flourishing across these two dimensions suggests that redistribution of land rights via in-kind transfers of ownership or occupancy will, at times, be the only appropriate way of fostering human flourishing, and that exclusive reliance on an aggregated system of taxation and monetary payments will be inadequate, efficiency considerations notwithstanding.<sup>242</sup> In the context of land, an obligation rooted in justice to share one's property in kind with others might arise, for example, (1) because exclusion (or, more precisely, exclusion on particular grounds) is inconsistent with the dignity of the excluded person; (2) because of the unusually acute and immediate nature of the recipient's need for access to a particular parcel of land; (3) because of the relationships the recipients have formed with the owner's land; or (4) because of the relationships of dependence or reliance that owners have formed with the recipients. In such cases, the law may (and frequently already does) appropriately intervene through the use of redistributive property rules that coercively enforce owners' obligations to share or even cede rights to a particular piece of land.

The need to protect certain crucially important dignitary interests in kind, for example, is reflected in civil rights statutes prohibiting racial discrimination in housing markets and places of public accommodation.<sup>243</sup> A regime permitting racial exclusion from places of public accommodation but requiring owners to pay money to the victims of that exclusion would rightly be accused of misunderstanding the way in which racially discriminatory exclusion inhibits human flourishing. Similarly, the law ensures access to land through the doctrine of necessity, which permits a trespasser to make use of another's land in circumstances of dire need and prevents an owner from inter-

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note 145, at 114–17; see also Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 228–33 (2003).

<sup>242</sup> See Alexander & Peñalver, *supra* note 198, at 159 (“The character of the particular land . . . as nonfungible . . . explains why from the perspective of our theory, monetary redistribution (through the tax system or some other form of transfer payment) would not have provided a satisfactory alternative solution.”). For a similar argument against exclusive reliance on monetary redistribution from a liberal egalitarian perspective, please see Elizabeth S. Anderson’s classic essay, *What Is the Point of Equality*, 109 ETHICS 287, 329 (1999).

<sup>243</sup> See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601–31 (2000); Civil Rights Act of 1964, 42 U.S.C. § 2000a–2000a-6 (2000).

fering with that use.<sup>244</sup> Property law has traditionally protected the longstanding bonds that land users form with land that they do not own through doctrines like adverse possession and prescription. More recently, it has attempted to do the same through newer devices, such as rent control and eviction-protection statutes.<sup>245</sup> Finally, the law sometimes requires the in-kind transfer of interests in land in response to particular relationships of dependence and reliance, either using traditional equitable doctrines like estoppel<sup>246</sup> and constructive trust,<sup>247</sup> or by creating new doctrines, as in the famous case of *State v. Shack*.<sup>248</sup>

I will discuss *State v. Shack* in a bit more detail because the New Jersey Supreme Court's decision in the case exemplifies, in many ways, the rich pluralism of the approach I am advocating. In *Shack*, two defendants who worked for government-funded organizations entered a private farm to aid migrant farmworkers employed and housed on the property. When the owner-employer demanded that the defendants leave his property, they refused and were charged with criminal trespass. On appeal from their conviction, the New Jersey Supreme Court held that, according to New Jersey's common law of property, the owner had no right to exclude the defendants from meeting with the farmworkers residing on his land.

As the court pointed out, migrant farmworkers are a vulnerable and isolated community, often unaware of the opportunities that exist for them to meet their needs for medical, legal, and other forms of care. Recognizing the farmworkers' rights to receive visitors on the farmer's land enhances their ability to flourish by helping them obtain important information about their legal rights as well as opening to them the possibility of forming the sorts of social ties that are essential to any plausible account of the well-lived human life. As long as they remain on the farmer's land, this is a good they can only obtain if some of the right to control access to the farm is allocated to them.<sup>249</sup> Giving the workers money, while at the same time allowing the farmer to continue to prevent them from receiving visitors, would do nothing to remedy their social and informational isolation.

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<sup>244</sup> For an extended discussion of the doctrine of necessity in property law, see Peñalver and Katyal, *supra* note 29, at 1172–77.

<sup>245</sup> For another recent example of such a phenomenon, see the discussion of the South African case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*, 2004 (8) BCLR 821 (SCA) (S. Afr.), *aff'd on other grounds*, 2005 (5) SA 3 (CC) (S. Afr.), in Alexander & Peñalver, *supra* note 198, at 154–60.

<sup>246</sup> See *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976).

<sup>247</sup> See *Rase v. Castle Mountain Ranch, Inc.*, 631 P.2d 680 (Mont. 1981).

<sup>248</sup> 277 A.2d 369 (N.J. 1971).

<sup>249</sup> *Id.* at 373–75.

Nor did the court's decision in *Shack* disregard or unduly intrude on the farmer's autonomy. Even after the court's decision, the farmer retained a substantial degree of freedom to control the entry of strangers onto his land. Visitors would not have been justified, for example, in entering the farmer's home or office. They could only visit the farmworkers in their quarters, and could not interfere with the use to which the farmer chose to put his land.<sup>250</sup> Moreover, if the farmer placed an overriding value on his privacy beyond these limits, he was free to protect that value by not housing farmworkers on his land at all.<sup>251</sup>

In light of these considerations, from the point of view of a virtue theory of land use, the situation in *Shack* represents an easy case for legal intervention to enforce (in kind) the farmer's moral obligations to his workers. The workers were entitled to receive visitors in their place of residence as a matter of justice, and the intrusion of those visitors on the farmer's own privacy and autonomy was minimal. By enforcing the farmer's obligations to act virtuously, the law helped to protect innocent third parties (the farmworkers) from the resulting harm.

### 3. *Humility*

The virtue of humility has a very literal connection to the land. The word "humility" derives from "humus," the Greek word for ground or earth. The humble person, then, is the one who is close to the earth. This has not always been understood to be a compliment. Aristotle, for example, did not consider humility to be a virtue at all, or, if he did, only a virtue among "small, unspirited souls."<sup>252</sup> Considered as a virtue, however, humility denotes someone who is aware of his own limitations. And, as beings who are inherently limited, possessing such an awareness seems likely to be broadly conducive to human flourishing.

The notion that land has a memory that stretches the impact of our current choices far into the future suggests an enormous responsibility on the part of those who make decisions about how to use it.

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<sup>250</sup> See *id.* at 374.

<sup>251</sup> This is the key distinction between the outcome in *Shack* and the decision the court reached in the equally famous case of *Jacques v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997). A virtue theory of property can accommodate both cases with ease. Because of the much more substantial interest homeowners have in controlling the presence of strangers on their land—an autonomy interest that relates to the associational component of human flourishing—the law correctly defends their right to exclude with more vigor. But, because the land in *Shack* was the farmer's place of business, and because the farmer had already opened up his property to a group of strangers (the farmworkers), his interest in excluding other strangers was not plausibly connected with his interest in associational freedom to the same degree as the plaintiffs in *Jacques*.

<sup>252</sup> KEYS, *supra* note 210, at 160 (citing ARISTOTLE, *supra* note 177, bk. IV, pt. iii).

Access to accurate information about the consequences of our land-use decisions is crucial if we are to make wise choices. Legal economists employ these observations about information in order to critique centralized models of land-use decision making, but this argument has even broader import. Although proponents of the law-and-economics approach to land use are correct that we should pay attention to the question of who is more likely to gather the best information about the consequences of our decisions, we should also recognize that even the best information, no matter how diligently gathered, will always be incomplete. Because the supply of land is, ultimately, finite and because the decisions owners (and others) make about land will have consequences, sometimes catastrophic, that stretch far into the future, uncertainty is a serious problem for all land-use decision makers, public and private.

If uncertainty were spread evenly over all possible decisions, it would have little practical significance for virtuous action. But, in the context of our land-use decisions, uncertainty is often more closely associated with one or another course of action. In the climate-change context, for example, the costs of taking action to encourage less automobile-dependent land-use patterns are more easily understood than the long-term costs of continuing on the present course of urban sprawl. Although there may be decisions in which uncertainty hems us in on all sides, requiring us to take actions without a clear grasp of their likely consequences, such uncertainty-laden choices are not the norm.

A concern with uncertainty points toward the value of humility, which encourages us to recognize the limits of our ability to weigh costs and benefits in our decisions about land. Expressing humility in our land-use decisions does not mean that we should never alter the landscape around us, but it does suggest that we would be wise to err on the side of caution and comprehensiveness in our decision making about land. Consequently, the virtue seems to lend itself to a precautionary approach to land-use decisions. Although it comes in a variety of shapes and sizes, in most guises the precautionary principle is understood to recommend special sensitivity even to relatively small or uncertain risks of irreversible harms. The phenomenon of land's memory means that such unknowns and irreversibilities loom particularly large in land-use decisions.

The case for such an approach is sufficiently compelling that in recent years a number of defenders of cost-benefit analysis have endorsed precaution of one sort or another or have acknowledged the need to go beyond a simple cost-benefit calculus in evaluating particu-

lar regulatory programs.<sup>253</sup> These scholars have not, however, explored the crucial question of what is to happen in the normative space beyond the weighing of economic costs and benefits. As Doug Kysar explains, this silence is not wholly accidental; the logic of cost-benefit analysis is, on the one hand, intrinsically incomplete and, on the other, seemingly incapable of acknowledging its own incompleteness.<sup>254</sup> Virtue theory's strength is its ability to provide the framework for exploring the content of that space beyond economics, without rejecting the significance of the information provided by economic analysis.

For his part, Kysar has defended a version of the precautionary principle on grounds that resonate with this discussion of the importance of humility in land-use decision making. His defense is based, in part, on the moral significance of human action and the importance of ensuring that our environmental decision-making procedures adequately reflect that significance. Particularly in the presence of uncertainty or the risk of catastrophic or irreversible harms, Kysar argues (along with other defenders of the precautionary principle), "environmental, health, and safety regulation should become infused with a culture of humility about the sufficiency and accuracy of existing knowledge."<sup>255</sup> As he observes, despite the upsurge in interest in cost-benefit analysis among commentators and policymakers, something like this precautionary approach has informed a great deal of American environmental law as it has developed over the past three decades.<sup>256</sup>

The virtue of humility in land use is just as essential for private as for public decision makers. Although public decision makers may lack incentives to gather the best information to guide land-use decisions, their relative disadvantage does not necessarily extend to the dangers of arrogance in land-use choices. Indeed, since we are all human beings, individual public and private decision makers seem equally at risk in that regard. On the other hand, it is at least plausible that decisions reached through pluralist deliberative processes are less prone to overlook uncertainty and catastrophic risk than decisions reached by individuals whose judgment may, in light of our system of private ownership, be clouded by short-term self-interest.

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<sup>253</sup> See ADLER & POSNER, *supra* note 116, at 39–42; SUNSTEIN, *supra* note 195, at 189.

<sup>254</sup> See Kysar, *supra* note 195, at 56.

<sup>255</sup> *Id.* at 23–24 (internal quotation marks omitted).

<sup>256</sup> *Id.* at 24 ("In several key pollution control areas, for instance, the United States has forsaken optimization in favor of a precautionary practice of requiring installation of the best available pollution abatement technology.").

## CONCLUSION: SEARCHING FOR LAND WISDOM

Virtue theory's plural conception of value raises the obvious question of what to do when two or more values appear to conflict. If, for example, requiring a private landowner to pursue a just course of action would undermine incentives to create social wealth, should the law favor justice or wealth? Legal economists wearing their normative hats resolve these apparent conflicts by reducing both wealth and justice to a single metric of preference satisfaction. They then employ cost-benefit analysis to determine how much of each value people (in the aggregate) prefer. If economic cost-benefit analysis does not provide the basis for selecting the best course of action, what is the alternative?

Virtue ethicists respond with the concept of practical wisdom, or prudence. Confronted with an irreducibly complex moral world populated by a plurality of values, the wise person is the one who is consistently able to reconcile them and discern the correct course of action. But the exercise of wisdom does not involve the arithmetic application of a simple cost-benefit formula. Or, as Rosalind Hursthouse puts it, virtue ethics does not aim at generating an "'algorithm for life' independent of judgment."<sup>257</sup> Instead, judgment, understood as constitutive of the virtue of practical wisdom, plays a central, organizing role.<sup>258</sup>

One of my main goals in writing this Article has been to encourage more reflection among land-use scholars concerning the nature of this crucially important virtue. If a society is to make consistently good decisions about the uses to which land is to be put, it must encourage private owners to exhibit wisdom (and not just, say, industry) in private decision making. In addition to the cultivating of private land-virtue the polity in a democratic society must also concern itself with the citizens' ability to recognize wisdom in others and to place a premium on virtue in their selection of political representatives.<sup>259</sup> This sort of preoccupation with virtue and wisdom in private and public decision making sounds alien to modern ears and is largely absent from contemporary land-use discussions, at least within the academy. It nonetheless remains an important piece of the American political and legal tradition.<sup>260</sup>

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<sup>257</sup> See HURSTHOUSE, *supra* note 169, at 54.

<sup>258</sup> See 3 AQUINAS, *supra* note 150, at IIa, IIae, Q. 47, art. 7 (discussing the virtue of prudence); O'NEILL, *supra* note 51, at 117 (discussing the value of good practical judgment).

<sup>259</sup> Such public promotion of virtue is not inconsistent with a commitment to liberal democracy. See Swanton, *supra* note 213, at 47.

<sup>260</sup> See GREGORY ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT*, 1776–1970, at 29–30 (1997); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 236–37 (2d ed. 1984) (discussing the republican preoc-

A full elaboration of the concept of practical wisdom would require a great deal more discussion than I have provided in this Article. Such an account would need to say more than I have, for example, about how to operationalize virtue ethics in land-use lawmaking within the institutional structure of a democratic society. In other words, it must answer the question of how we, as a democratic society made up of persons with disparate values and commitments, can reach correct conclusions about the wisdom of specific land-use decisions. It must also give an account of the proper roles of legislatures, courts, administrative agencies, and individual citizens in wise land-use decision making.

Finally, it would give a more detailed account of the appropriate domain and limits of cost-benefit analysis. After all, even if they are not always decisive, economic considerations are vitally important to determining how we ought to use the land with which we have been (temporarily) entrusted. My purpose in this Article has not been to argue otherwise. Rather, my goal has been to make the case that academic discussions of land use stand to gain a great deal from broadening their perspectives to encompass not just the questions of economic efficiency on which they are presently focused but also, a fuller sampling of the wide spectrum of values at work in our land-use decisions. A virtue theory of land use offers conceptual tools that can help us to achieve this more comprehensive view.

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cipation with virtue); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 65–70 (1969).