Land Virtues

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Abstract

This article has two goals. First, I explore some of the descriptive and normative shortcomings of traditional 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 notion that owners will focus on a single value, such as wealth, 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 finite quantity of land, calls into question the normative assessment that owners whose behavior is guided by a unitary measure like market value are using their land wisely, or at least more wisely than other modes of decision-making might hope to accomplish. The shortcomings of traditional law and economics theories of land use point toward the benefits of a pluralist theory of property based on the Aristotelian tradition of virtue ethics. Setting forth the broad outlines of such a theory as it applies to the law of land use is the second goal of this article. Virtue theory, 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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I. 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.¹ 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 decisions render economic discussions of land use incomplete in ways that undermine legal economists’ normative ambitions. My goal in this article is twofold.

First, I aim to explore some of the problems with law and economics’ analysis of land use questions. Second, I begin to lay the groundwork for an alternative theory rooted in the Aristotelian tradition of virtue ethics, one that is able to incorporate the more appealing insights of law and economics, without succumbing to the same weaknesses.

Law and economics provides, among other things, “a theory of the purposive behavior of private landowners” to employ in assessing legal structures and rules.\(^2\) Notwithstanding differences in their approaches, legal economists working in the area of land use have largely agreed in constructing their behavioral theories around the figure of the “rational” landowner motivated primarily by a desire to maximize her wealth.\(^3\) In addition to deploying this 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 interaction of their behavioral model with particular legal structures and

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\(^3\) See Lawrence B. Solum, Public Legal Reason, 92 Va. L. Rev. 1449, 1460 (2006); see also Christine Jolls, Behavioral Law and Economics, in BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 115, 115 (Peter Diamond & Hannu Vartiainen eds. 2007). Recent efforts by behavioral economists and by certain contemporary proponents of the “new institutional economics” to introduce more sophisticated behavioral models into economic analysis of individual and communal conduct depart in significant ways from the wealth-maximizing, Demsetzian model that continues to dominate property and land use theorizing. See, e.g., id.; ELINOR OSTROM, GOVERNING THE COMMONS (1990). While my discussion of the descriptive and prescriptive shortcomings of economic property theories in Part III.A will have less purchase against these theorists, to the extent that they continue to rely on wealth maximization as a measure of value for drawing normative conclusions, my critiques in Part III.B retain their force. In addition to a move towards more sophisticated economic models, a number of contemporary legal economists, most prominently Louis Kaplow and Steven Shavell, have constructed their economic 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 desire. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18 (2002). While I intend to focus my discussion on the subset of “law and economics” accounts of landownership that focus on wealth, many of my critiques of wealth-maximizing theories of land use will also have purchase when deployed against these broader, welfarist theories, or, for that matter, any theory built around the maximization of a unity measure of value.
rules as yielding consequences that are either better (wealth enhancing) or worse.4

The literature critiquing law and economics is vast and rich.5 This article will neither recount those discussions in detail nor criticize economic analysis as a whole. My goals are more modest. I aim to explore several problems raised by the operation of law and economics within the discrete area of land use. In particular, I will focus my discussion on legal economists’ descriptive and, at times, normative reliance on land’s market value, and on owners’ incentives to maximize that value.6

The seminal example of this tendency is Harold Demsetz’s famous argument on behalf of the favorable consequences of individual ownership of land in his classic article, Toward a Theory of Property Rights. Arguing that private 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 the 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

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4 See Solum, supra note 3, at 1460; Jolls, supra note 3, at 115.


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.\(^7\)

Other land use theorists have also assigned similarly prominent roles to the market value of land within their economic accounts of landowner behavior.\(^8\)

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,\(^9\) the “investment” model of landowner behavior) come in a variety of flavors. One argument, which is primarily descriptive in its ambitions, asserts that owners will seek to maximize the market value of their land. The most prominent contemporary example of this approach is the theory of homeowner behavior on which William Fischel builds his model of local government.\(^10\)

In addition to this descriptive account, there is also a more normative version of the Demsetzian, investment theory. According to this approach, what private ownership creates is the incentive to use the

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\(^7\) Demsetz, \textit{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, \textit{supra} note 2, at 1065-66.

\(^8\) See, e.g., Fischel, \textit{supra} note 6, at 5; Ellickson, \textit{supra} note 6, at 1369 (discussing how the market for land creates incentives for owners to use the land responsibly); Richard A. Epstein, \textit{How to Create—Or Destroy—Wealth in Real Property}, 58 ALABAMA L. REV. 741, 748 (2007); Sonstelie & Portnoy, \textit{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. 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, \textit{Exclusion and Property Rules in the Law of Nuisance}, 90 Va. L. Rev. 965, 984 (2004). As the quote from Demsetz above illustrates, the market value of interest to economic theorists is the discounted present value of immediate or future economic returns from the land.


\(^10\) See Fischel, \textit{supra} note 6, at 5.
land prudently, conserving it (or damaging it) in response to signals sent by the market about the scarcity and value of the resources embodied within a particular parcel of land. Robert Ellickson exemplifies this evaluative use of the Demsetzian framework when he describes individual land ownership as an important engine of land conservation.11 “Conservation,” on this view, does not mean protection of a parcel’s health (and value) no matter what the circumstances. Instead, it means simply that private land will not be wastefully destroyed but rather degraded only when doing so would generate a greater amount of wealth in some other form.12 In contrast to the descriptive argument, this argument is normative in its orientation in that it operates as a means of determining the scope of owners’ obligations.13 It deploys its economic framework to argue that owners’ private decision-making about land is, in the absence of demonstrable market failure, superior to collective or public decisions.14

As I argue in Part III, each of these positions struggles in different ways with features of land that distinguish it from other

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11 See Ellickson, supra note 6, at 1369
12 Ellickson argues that a “rational and self-interested fee owner . . . adopts a 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).
13 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 with commons property. See Harold Demsetz, Toward a Theory of Property Rights II, 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.
“commodities.” The complexity of land – its physical complexity, but more importantly the complex ways in which human beings interact with it – undermines the narrow notion that even the most land-focused of owners will consistently act 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 finite quantity of land, 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.

If law and economics focuses on its descriptive project, it can be a powerful, albeit limited, 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. But it is a tool that can offer no conclusive guidance in the crucial task of determining what goals the law ought to be pursuing 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. When scholars make this leap from evaluating means to promoting ends, they bypass a number of deep and difficult questions.

Notwithstanding its shortcomings, the persistent popularity of both positive and normative economic argument among land-use scholars presents a challenge to those who wish to propose alternatives. On the positive side, such alternatives should be able to identify a constructive role for economic analysis while at the same time keeping the limitations and dangers of its simplifying assumptions clearly in view. On the normative side, alternative approaches should be able to account for features of normative economic theory, such as its intuitively appealing insistence on the importance of social wealth, that have made

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15 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.”).
16 See Solum, supra note 3, at 1462.
it so attractive to such a broad range of distinguished scholars. But they should also be able to map a path that can take us beyond the single-minded pursuit of wealth maximization in ways that appropriately honor land’s complexity and memory.

In Part IV, I take a first step towards sketching the outlines of a virtue based approach to landowner obligation that is able to accomplish both of these tasks. Unlike either law and economics or its principal alternatives within property theory, a virtue approach to land use is capable of incorporating many of the important insights of positive and 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 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.

II. Land’s Properties

A. Land’s Complexity

It has long been a commonplace that “the law of property in its wisdom has regarded each piece of land as unique.”¹⁷ 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.¹⁸ 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 recedes into the sea. Given this variability, land, more than most resources, resists generalization.

¹⁸ 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. 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. A person’s home will be her castle. A corporate-owned factory-farm will neither claim nor deserve the same status.

But, on an even 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 unique relationship it bears to the web of human interactions within which it is situated. As Sociologists John Logan and Harvey Molotch put it, “Every parcel of land is unique in the idiosyncratic access it provides to other parcels and uses, and this quantity underscores the specialness of property [in land] as a commodity.” 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.

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19 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 land is a central issue in social organization.”); see also John R. Logan & Harvey L. Molotch, Urban Fortunes: The Political Economy of Place 18 (1987) (“[P]lace is indispensable; all human activity must occur somewhere.”).
21 Logan & Molotch, supra note 19, at 23-24; see also id. at 43-45.
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 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 can 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. This tendency generates what Joe Singer has called a powerful “reliance interest” that gradually builds up in long-standing land uses. This temporal reliance interest can be formed by owners and non-owners alike, and both will often seek to preserve the status quo on which they have come to depend, as the popularity of historic preservation statutes evinces. In recognition of this phenomenon, when other factors are in equipoise, property law reflexively favors those who

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22 See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 477 (1897).
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are first in time. 24 Doctrines like adverse possession and prescription provide legal protection to long-established land uses, even those that were initially illegal. 25 These property rules, and 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 inertial power of individual land uses is powerfully reinforced by their collective interdependence. Once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others. 26 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. 27

The interplay of these physical, psychological and social components of land’s memory yields a powerful 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 waterborne transportation will remain in the same place long after its locational advantages have been dissipated by cultural change or technological advance. 28 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

26 See DOUGLAS W. RAE, CITY 41 (2003); William A. Fischel, Why Are There NIMBYs?, 77 Land Econ. 144, 150 (2001) (“Building a house on what was formerly a nice open view is not physically irreversible, but as a social matter, it is pretty close to it.”).
28 See RAE, supra note 26, at 42-72.
countless decisions made decades (even generations) in the past, 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. Nomi Stolzenberg describes Jewish settlements in the West Bank as an example of this strategy in action. 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. 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 sometimes almost reflexively) resist change, even when they stand to gain financially from the process.

Importantly, the durability of land uses takes on added significance because the quantity of land is fixed. As the old saw goes, land is always a good investment because “God isn’t making any more of it.” While noting land’s finitude is an unoriginal, even banal, observation, the tendency of economic theory to treat land as a fungible commodity makes it is 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 means 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

29 See Nomi Maya Stolzenberg, Facts on the Ground (unpublished manuscript on file with author).
30 See id.
31 Peñalver & Katyal, supra note 24, at 1105-14.
32 I will return to the topic of gentrification later in the article. See infra Part III.A.1.
33 See LOGAN AND MOLOTCH, supra note 19, at 23.
human beings (including human beings who have yet to be born) and between humans and other species.\textsuperscript{34}

\section*{III. The Problem with Land for Law and Economics}

Land’s complexity and memory generate 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 the motivating force of land’s investment value is, for many owners, overshadowed by the ways in which it facilitates the direct enjoyment of a variety of non-fungible, and often social, human goods.\textsuperscript{35} In addition, combining land’s complexity with its memory undermines the economic case for deferring to owners’ decision-making about the uses to make of their land.\textsuperscript{36}

\subsection*{A. The Motivating Power of “Market Value”}

The narrow, descriptive version of the “market value” argument asserts that landowners will attempt to maximize the market returns on their investment in land by seeking to maximize the value of the land itself. This is, for example, the model of landowner behavior around which William Fischel has built his influential theory of local government. This model is a nonstarter from the perspective of law and economics, except with respect to those landowners who view their land as a distinctive asset that cannot easily be substituted for other forms of

\begin{footnotesize}
\textsuperscript{34} At least for human beings, the supply of land is even more limited that initially appears to be the case. Less than 15\% of the earth’s land surface is arable and nearly half the earth is unsuitable for dense human habitation, being either desert 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 land masses, but are instead clustered tightly around rivers, coastlines, and low-lying areas. See generally Christopher Small and Joel E. Cohen, \textit{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. \textsc{Robert Bruegmann}, \textit{Sprawl} 62-63, fig. 9 (2005).

\textsuperscript{35} See \textit{infra} Part III.A.

\textsuperscript{36} See \textit{infra} Part III.B.
\end{footnotesize}
value. For other, less land-focused owners, the rational-actor model predicts 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 wealth and less destructive means are not cost-effective.\footnote{As Lior Strahilevitz (and Felix Cohen before him) have observed, it is conceptually impossible to “destroy” land, or at least land conceived as a parcel of property. \vspace{0.5em}See Lior Jacob Strahilevitz, \textit{The Right To Destroy}, 114 Yale L.J. 781, 795 (2005); Felix S. Cohen, \textit{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.}

Of course, land-focused landowners do exist. One obvious example is the American homeowner.\footnote{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 these other categories of landowners who view their land as a distinctly important asset.} 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.\footnote{See FISCHEL, supra note 6, at 4, 10-12 (“The importance of a home for the typical owner can hardly be overstated. Two-thirds of all homes are owner occupied. For the great majority of these homeowners, the equity in their home is the most important savings they have.”).} Even the way they go about making the decisions to purchase a home, rather than, say, to rent or invest their wealth in some other asset, illustrates land’s unique significance to them.\footnote{See, e.g., John P. Shelton, \textit{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 rent or own.”).} William Fischel poses the following hypothetical:

\begin{quote}
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 had a good rate of return, but, upon your questioning, she does admit that it has had a lot of ups and downs.\footnote{Fischel, \textit{supra} note 26, at 146.}
\end{quote}
Fischel plausibly concludes that, faced with such investment advice, “[m]ost people would decline to pursue such a strategy,” and yet, as he notes, “that is what owning a home is for most American households.”42

As Fischel’s discussion suggests, Americans 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 renders more plausible for homeowners (as compared with landowners for whom land is simply one among many possible and fully interchangeable forms of “market value”) the narrow investment argument about the incentives of private owners to cautiously guard their land’s value. Ironically, however, the unique significance of land to homeowners simultaneously undermines the argument that, as rational owners of valuable landed 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 owners’ investment portfolio. But this move side-steps the important question of how the home comes to command such an 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.43 These goods do not cease motivating homeowner decisions once the home is purchased. Consequently, understanding owners’ desires directly 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

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42 Id.
43 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).
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. While most homeowners, who typically plan to sell their home 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 their 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. 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. The narrow investment model of landowner behavior privileges exchange value to the detriment of “use value,” a move that, as I will discuss below, has substantial

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45 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. See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 963 (2004).  
consequences for its ability to interpret and evaluate landowner behavior. 47

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, occupation and education are.” 48 “Being ‘able to own,’” she continues, “is a threshold criterion to social personhood that renters, by definition, do not meet . . . .” 49 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. 50 For most Americans, the question is not so much whether to “invest” in a home, but when and how much to do so. 51

47 I do not understand this particular point to constitute a general criticism of the economic analysis of land ownership. It would not, for example, have much purchase against 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 capacially enough to include both use and exchange values. The difficulties of measuring such an open-ended conception of value (or welfare or utility), however, would make such a theory substantially more cumbersome than the market-value approach. See Mark Sagoff, Price, Principle and the Environment ch. 2 (2004). On the other hand, the objections I raise below in Part III.B concerning the incommensurability of values and the incomplete nature of the owner’s cost-benefit analysis do represent objections even to such broader economic theories. Moreover, to the extent that economists embrace of virtually un-measurable conceptions of “value,” they weaken the appeal of the rational-actor model, whose principal selling point is its facilitation of elegant empirical modeling.

48 Constance Perin, Everything In Its Place: Social Order and Land Use In America 32 (1977).

49 Id. at 66.


51 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 whether to purchase a home, the question
On top of 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. Owners’ efforts to enjoy their property more fully can lead them dramatically to reconfigure their homes, a process that, over time, can transform even the most homogenous of communities. Figure 1 shows a 1948 photograph of the original Levittown Cape Cod design and a 1990 photo of the same underlying design after years of private ownership.

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.”

“how much” to invest in a home is not made according to the norms of the typical investment decision.


53 The Levittown photographs are from Prof. 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.

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, splances, 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.

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 their market values in anticipation of sale, but many (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.55

55 See Perin, supra note 48, 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 provide owners with market-independent reasons for acting. 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. “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 neighborhood.”

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. Similarly, even controlling for homeownership, long time 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,


\[57\] See Rohe & Stewart, *supra* note 52, at 47-48.

\[58\] Id. at 45 (emphasis added).

\[59\] See *id.* at 47.
or who simply feel a special obligation to the community’s current generation of school-children.\textsuperscript{60}

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 those 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.\textsuperscript{61} 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 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.\textsuperscript{62}

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

\textsuperscript{60} See, e.g., Michael B. Berkman & Eric Plutzer, \textit{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), Deborah Fletcher, \textit{It Takes a Village? Intergenerational Conflict and Cooperation in Education Expenditures} (unpublished manuscript on file with author) (2004) (same); Ed Balsdon & Eric Brunner, \textit{Intergenerational Conflict and the Political Economy of School Spending}, 56 J. Urban Econ. 369 (2004) (finding that elderly voters were more likely to vote for spending on local schools than for state-wide school funding requests).

\textsuperscript{61} See, e.g., FISCHEL, supra note 6, at ch. 3.

\textsuperscript{62} 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 values 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.
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.63

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 the question of market value is just one among many that motivates 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 proxy for homeowners’ intentions will generate a number of false positives, despite the complexity of homeowners’ relationships to their property. That is, assuming the motivational dominance of simple market-value maximization will often work as a predictive theory of homeowner behavior even if it is inaccurate as an account of homeowners’ actual intentional dispositions (or as a theory of homeowners “purposive behavior,” as Ellickson and Been put it). As long as the investment model is predictively accurate 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 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

63 But see Rohe & Stewart, supra note 52, at 47-48.
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predictive wall.64 It is true that, as Cass Sunstein has noted, the utility of any simplified conception of human behavior will depend on the precise questions that theorists are attempting to answer, and sometimes inaccuracy and oversimplification will be a price worth paying for analytic elegance.65 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 with 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 rational-actor that predominates within law and economics.

Second, even when it accurately predicts homeowners’ external conduct, the narrow 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, 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, and most importantly, reducing homeowners’ motivations to the single-minded pursuit of market value may create a self-fulfilling prophecy, one that, as I argue later in this article, we have independent reasons for resisting. Doug Kysar contends that “market liberalism seems to give rise to its own forces for reasserting and

64 See infra Part III.A; see also Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 794 (1994).
65 See Cass R. Sunstein, On Philosophy and Economics, 19 Quinnipiac L. Rev. 333, 339-44 (2000). A model that is adequate for predicting the consequences of, say, a wholly socialized system of property may not work to make more fine-grained predictions about the consequences of different regulatory regimes built on top of systems of private ownership.
sustaining the perception of its dominance.”  Kysar’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.  

Policy-makers 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 precisely this self-fulfilling quality of assumptions of self-interested landowner behavior that forms the basis of Aldo Leopold’s (and Eric Freyfogle’s) important critique of purchased conservation easements. As Margaret Radin has correctly observed, market “[r]hetoric is not just shaped by, but shapes, reality.”

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

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

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69 Radin, supra note 5, at 1870, 1877-78.
property may actually begin to work at cross purposes. If the homeowner’s motivations are more complicated than the investment model allows, then we would expect that model’s analysis to fall short of the mark under those circumstances.

Market value can increase independently of individual property 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, driving income-poor people out of the community and thereby undermining the stable social networks on which communities depends 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 guitar factory in the southern part of Williamsburg, Brooklyn, which at the time was occupied by squatting artists – into luxury condominiums, 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. Instead, residents of the Hasidic community to the 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. 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 the $200 per square foot they are used to

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70 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 towards lower-income residents are pushed out by those catering to higher-income newcomers.
paying.” Their concern, they said, was that “market rates and property taxes will soar, leading to an unraveling of the community’s tightly woven fabric.” 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 longtime 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. Owners who have rejected these offers have observed that the new units could not possibly replace the homes they had lived in for decades. “I stood and watched them tear down the house around the corner,” one elderly resident recalled. “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.”

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.

Besides its obvious impact on low-income renters, the controversial status of gentrification derives in part from the fact that

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72 Id.
73 See Bill Handleman, Path of “progress” runs into her home, Asbury Park Press, June 25, 2006, at A1.
75 Handleman, supra note 73, at A1.
76 Id.
77 See Mariana Valverde, Seeing Like a City and Seeing Like a Neighbour, at 6 (unpublished manuscript on file with author).
increased property values are typically accompanied by changes in neighborhood character (for better and for worse), by higher costs of living for longtime 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. 78 Numerous scholars studying gentrifying neighborhoods have commented on the ambiguous significance of increasing property values, even for homeowners. 79 Whatever the ultimate merits of gentrification

78 See Jacob L. Vigdor, Does Gentrification Harm the Poor? Brookings Wharton Papers on Urban Affairs (2002), at 133, 146 (“[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 Annual Rev. of 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. Other studies have found similar increases in long-time resident satisfaction with changes in gentrifying neighborhoods. See, e.g., Lance Freeman & Frank Braconi, Gentrification and Displacement, 70 J. Am. Planning Ass’n 39 (2004); Daniel Monroe Sullivan, Reassessing Gentrification, 42 Urban Affairs Rev. 583 (2007). More important than the outcome of these studies is their acknowledgement that rising property values are a double-edged sword for long-time homeowners in gentrifying communities. See Vigdor, supra, at 148 (“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.”).

79 See sources cited in note 78; see also Maureen Kennedy & Paul Leonard, Dealing with Neighborhood Change (April 2001) (unpublished manuscript on file with author), at 14 (arguing that “some original homeowners may fear rising home prices because of 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 Urban Geo. 528 (2004) (“Although all the long-term 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 Missoulians are being forced to leave.”); Rowland Atkinson, The Evidence on the Impact of Gentrification, 4 European 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 higher 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 neighborhood.”).
in any given instance, the methodology of the narrow investment conception of landownership, focused as it is on the bottom line, completely misses the complexity of this story. Instead, it reduces the analysis of neighborhood transformation into a simple tallying of property values before and after.

2. **NIMBYs and LULUs**

The shortcomings of the investment model of landownership can also help to explain the apparent ineffectiveness of economists’ favorite tool for overcoming the NIMBY dysfunction they attribute to homeowner anxiety about property values: monetary compensation. 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. 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 narrow Demsetzian 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.”

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. Indeed, the data on the effectiveness of compensation schemes at overcoming neighborhood opposition to LULUs is, to say the least, underwhelming. According to Vicki Been,

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81 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.”).
“[n]o compensated siting scheme has been a ‘success’ in getting LULUs sited.”  At best, she says, compensation does not hurt, and it seems to work best when combined with other strategies.\textsuperscript{83}

Other observers have come to more pessimistic conclusions, arguing that offers of monetary compensation actually reduce support for siting LULUs.\textsuperscript{84} Offers of money, these scholars suggest, crowd out 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.\textsuperscript{85} 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.\textsuperscript{86}

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 the quality of their lives, or because they believe that they are being treated unfairly. Most are probably worried about all three. 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 successful at overcoming local opposition to proposed LULUs.\textsuperscript{87} By fixating on the question of market

\textsuperscript{82} Been, supra note 80, at 824.

\textsuperscript{83} See id.; see also Carissa Schively, Understanding the NIMBY and LULU Phenomena, 21 J. of Planning Lit. 255 (2007) (collecting sources that question the effectiveness of monetary compensation schemes on the willingness of host communities to accept LULUs).


\textsuperscript{85} See Frey et al., supra note 84, at 1299-1301.

\textsuperscript{86} Cf. Schively, supra note 83, at 261-62 (discussing the impact of transparency and fairness on NIMBY behavior).

\textsuperscript{87} See Frey et al., supra note 84, 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
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 the Private Owner’s Cost-benefit analysis

I have been discussing the descriptive and prescriptive shortcomings of an account of landowner behavior in which owners are motivated primarily by a desire to enhance the market value of their land. Homeowners at first glance seem like an ideal case for this model because they are focused on their land as a unique asset whose value cannot easily be substituted into other forms. But the complex and often nonfungible nature of their relationship with their land means that homeowners are in fact likely to be motivated by a broad range of concerns, of which the market value of their land is just one (important) piece. The same is likely true of other landowners for whom the land has unique significance, such as small farmers and Native American tribes. The very reasons that the land powerfully guides their behavior also cause them to pay uneven attention to the land’s market value. 88

The study of land use and ownership, at least as it touches on these categories of owners, then, may be one of those areas within which the gains generated by the rational-actor model’s analytic simplicity are more faithfully reflect the way in which owners interact with the goods they derive from their ownership of property in a particular community.

88 My colleague Doug Kysar, who grew up in a rural community in Indiana, shared with me a joke often told among family farmers:

Question: What would a farmer do if he won a million dollars?
Answer: Farm until its gone.

A similar disdain for market values is evinced among at least some Native American landowners. 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, in TULSA NATIVE AMERICAN TIMES, June 4, 2007: 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.”
outweighed by the descriptive and prescriptive confusions to which that simplicity gives rise.

I will now turn to the broader, and more normative, version of the argument about the incentives created by land’s market value. This version of the argument asserts the superior vantage and incentives of private owners as compared with collective decision-makers. Unlike the descriptive account, this argument does not depend on an owner’s tendency to treat her land as a distinct type of asset, and, consequently, it applies to a different sort of landowner: the many landowners for whom the land is little more than a fungible financial investment. Although relatively small in number, such owners account for most of the privately owned land in the United States. Moreover, this argument is resistant to the descriptive shortcomings I have been discussing precisely because it is able to shift its attention away from the economically opaque nonfungible relationships that homeowners (and other land-focused owners) tend to form with their land.

The incentives of narrowly investment-minded private owners to maximize their wealth should give us confidence, the argument goes, that when those owners do harm their land, they will not do so wastefully. 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. The implication is that we should generally defer to the decision-making of private owners, resorting to regulatory intervention only in exceptional circumstances where market failures are clear and where we have some reason to think that central planners can do better.

There are two broad problems with this argument. The first is that the wealth-maximizing private owner’s cost-benefit analysis is incomplete in a number of ways that might, under the right

89 The percentage of land owned by those owners, such as homeowners and family farmers, for the whom land is a uniquely significant asset, is very small. Private homes, for example, account for less than 10% of privately owned land in the United States. And family farms are an increasingly endangered species. Instead, the bulk of land in the United States is owned by a relatively small number of large land owners in agricultural, forest products, and extractive industries. See Eduardo Moises Peñalver, Is Land Special?, 31 Ecology L.Q. 227, 263-64 (2004).

90 See O’NEILL, supra note 44, at 2.
circumstances, be corrected by deliberative modes of decision-making. The second is more fundamental and concerns the controversial status of cost-benefit analysis as an evaluative device. The contested nature of the assumptions underlying the normative use of economic analysis complicates efforts to defend private decision-making on wealth-maximizing grounds. In the pages that follow, I will discuss each of these objections at greater length.

1. The Gaps in Owners’ Cost-benefit analysis

   a) Nonmarket Goods and the Problem of Incommensurability

   Presenting a complication for the normative investment argument, 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 the owner’s cost-benefit analysis. A significant 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 from one another, have barely perceptible impacts on environmental quality and therefore fly under the radar of much economic analysis. More conceptually, the gaps in owners’ cost-benefit analysis 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 several dimensions to this problem. First, there is the question of market infrastructure, the principal focus of Demsetz’s article. This dimension concerns the absence of defined and enforceable private property and contract rights necessary for market transactions with respect to certain goods. And the solution is, if feasible and cost-effective, to create private property rights where none existed before. In

91 See Sinden, supra note 1, at 588-89.
addition, however, there is a second dimension to the problem of market lacunae: the absence of market demand for certain goods. Legal economists often treat people’s unwillingness to pay for a good in market transactions as evidence that they do not place substantial value on the good, or even as indicating that the good has no value. But lack of demand 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 can result from 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 obvious 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. 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. Finally, people’s preferences with

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92 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 peels behind market values to see whether maximization of market value he attributes to private ownership might have harmful consequences for other sorts of value that are worth taking into account.


94 This is why a great many people recoil from the notion of selling babies or establishing markets in organs, refusing to discuss such proposals notwithstanding arguments that they might increase aggregate welfare. See MARK SAGOFF, THE ECONOMY OF THE EARTH 88-95 (1988) (describing many people’s unwillingness to attach monetary values to partial 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 93, at 133-36. While 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
respect to the value of a particular good might be (objectively) mistaken in a number of ways. 95

The problem of absent demand is distinct from the question of externalities, about which property scholars have thought and written a great deal. While the creation of clear private property rights where none existed before (the Demsetzian solution) can help to encourage owners to take into account impacts they 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 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 ledger 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, in effect, invisible. 96 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. 97

Proponents of so-called “free market environmentalism” have resisted calls for state regulation by proposing – where cost-effective – privatization schemes whose purpose is to create markets for the protection of environmental goods instead of resorting to their direct regulatory preservation. 98 But these proposals address themselves only to the infrastructural side of the problem of market lacunae. They just

95 See id. 129-30.
96 Cf. O’Neill, supra note 93, at 701-02 (discussing the failure of property-based solutions in the face of demand lacunae in the specific context of intergenerational externalities).
97 See HERMAN DALY, BEYOND GROWTH 5 (1996); Sinden, supra note 1, at 585-99. This is one of the key problems with Terry Anderson’s theory of “free market environmentalism.” See generally ANDERSON & LEAL, supra note 14. While it is arguably true that we can (and should) harness owners’ incentives in order to safeguard environmental goods, excessive reliance on those interests will inevitably yield outcomes that are distorted by the unavoidable blind spots in the market.
98 See ANDERSON & LEAL, supra note 14, at ch. 2.
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. Practitioners of cost-benefit analysis have attempted to supply such nonmarket values by engaging in calculations aimed at deriving them from preferences supposedly revealed indirectly from behavior in existing markets99 or 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.”100 In determining the proper scope of propertization, free market environmentalists rely on the same sorts of valuation methods. But these efforts to assign monetary values to nonmarket goods represent alternative means of measuring demand where market infrastructure does not exist; they simply 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 lack of demand suggests that even the most narrowly rational owners’ cost-benefit analyses can be radically incomplete.

b) Land’s Memory and the Problem of Intergenerational Justice

In addition to the invisibility for wealth-maximizing owners of certain nonmarket values, deferring to private owners’ cost benefit analyses raises substantial questions of intergenerational justice. This is

99 For example, they 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 Economy of Rural West Scotland, 13 Aquatic Conservation 397 (2003).
100 For example, they 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 Frank Ackerman & Lisa Heinzerling, Pricing the Priceless, 150 U. Pa. L. Rev. 1553, 1558 (2002).
where the land’s “memory” re-enters the scene. The durability of the consequences of land-use decisions and the finite quantity of land mean that the decisions 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 analysis.101

Some property theorists have argued that future generations do not really pose a problem for their theories of land ownership because the (present) value of the owner’s land will depend on “how well he takes into account the competing claims of the present and the future.”102 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 market for land will reward with greater wealth (in the form of increased market value for their land) those owners who guess correctly about the future. 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 the justifiability of having them stand in for future generations.103 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.”104 The fact that investment-minded private owners engage in discounting means that they may completely disregard the consequences of their decisions

102 Demsetz, supra note 6, at 355; see also Ellickson, supra note 6, at 1369 & n.268; Epstein, supra note 8, at 748.
104 DALY, supra note 97, at 36.
beyond a certain point in the future. 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. And there is evidence that in practice private actors actually employ discount rates that are very high indeed. Within their own private cost-benefit analysis, 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. The market’s preference for near-term gains generates intertemporal externalities, which may be enormous and catastrophic, that are impossible for an unassisted land market to internalize.

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. The same arguments they have deployed against the ethical basis for the practice of discounting within environmental policy analysis apply with equal force to the evaluation of private owners’

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105 This is true no matter what discount rate private owners are using, but the problem becomes more acute the higher the rate of discount private owners actually apply.

106 Richard Revesz gives the following example: at a constant 5% rate of discount, economists would value the death of 1 billion human beings 1000 years from now the same as the loss of 500 human lives, 500 years from now. See Richard L. Revesz, Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives, 99 Colum. L. Rev. 941, 1001 (1999).

107 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 towards those who are distant from us, is not the right tool for operationalizing that belief in land-use decision-making.

108 See John O’Neill helpful compares the potential conflict of intergenerational interests with respect to land with Garrett Hardin’s famous “tragedy of the commons.” Land is, he says, a “temporal commons” for which privatization offers no solution. See O’Neill, supra note 93, at 701.

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 private owners.

Some defenders of discounting in cost-benefit analysis within environmental policy debates have responded to these objections by arguing that future generations are more than compensated for their losses by increases in aggregate economic wealth that discounting itself fosters (by, for example, helping to ensure that today’s resources are invested productively).110 In the property context, Richard Epstein has similarly defended deferring to private owners’ decisions by arguing that “[a] classical 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.”111 But, as Doug Kysar and 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).112 Moreover, even if these gains are shared with future generations, the finite quantity of land and the many, sometimes incommensurable, goods that it fosters at least raise the question whether land is sufficiently fungible that gains in some other resource can effectively compensate future generations for the destruction of their landed patrimony.113

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, filled wetlands, disappearing topsoil, parched aquifers, and extinct species (or species on

110 See Douglas A. Kysar, Discounting . . . on Stilts, 74 U. Chi. L. Rev. 119, 124 (2007) (describing but not endorsing the argument); see also Revesz, supra note 106, at 1007-08.
111 Epstein, supra note 14, at 1466.
112 See Kysar, supra note 110, at 124; O’Neill, supra note 44, at 51-52.
113 See Kysar, supra note 110, at 125-27.
the brink of extinction) are the persistent reminders of yesterday’s owners’ short-sighted land-use decisions. Even development decisions that maximize property values today, as is arguably the case with auto-dependent suburban sprawl, destructive farming techniques, and the exploitation of non-renewable resources, such as fossil groundwater and fuels, may similarly be shortchanging future generations.

The common law of property already acknowledges in a limited way the conflict of interest between current owners and future generations. Its extensive regulation of dead hand control suggests a lack of faith in the ability or willingness of present owners to fully take into account the costs imposed by their decisions on distant generations. Analogous concerns for intergenerational equity can justify, ex ante, the regulation of owners’ substantive decisions about how to use their land and, ex post, the government’s exercise of the power of eminent domain to correct poor past decisions.

2. Private Ordering as a Second Best Solution

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 likely nonetheless to be superior to a cost-benefit analysis carried out by government bureaucrats, 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.” This view of the consequences of imperfect owner control as, at worst, better than the consequences of imperfect statist interventions is an important one, and too often overlooked by supporters of regulatory solutions. But it is equally important to acknowledge some of its limitations.

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115 Cf. id. (discussing eminent domain as a partial solution for intergenerational conflicts over dead hand control of land use).
116 Ellickson, supra note 6, at 1369 n.268.
For starters, and least interestingly, taking the argument on its own terms, whether the distortions generated by the inherent incompleteness of homo economicus’s evaluative horizon outweigh those generated by government bureaucrats’ 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 nonarbitrarily to “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 makes 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.

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 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 full wisdom of decisions about land use can and should be judged by reference to a summation of monetary 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 (typically measured as “willingness to pay,” even among contemporary welfarists)
is the appropriate coin of the realm. 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 the 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 . . . .” 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.”

Matthew Adler and Eric Posner have argued that, while 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. It is hard to disagree with Adler and Posner’s pragmatic statement of the 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. 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 point, but rather by conceding that “welfare” is not the sumnum bonum that some economic theorists claim it to be, but rather one among a plurality of values relevant to evaluating a decision.

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118 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, *Values in Ethics and Economics* 190-216 (1993); Martha C. Nussbaum, *Love’s Knowledge* 106 (1990); Joseph Raz, *The Morality of Freedom* 345-53 (1986); Mark Sagoff, *Price, Principle and the Environment* (2004); Sunstein, *supra* note 64, at 786-87; Adler, *supra* note 117, at 1377 n.27, 1383 n.47 (collecting sources).
Adler and Posner’s “weak welfaris[1]” position will prove an acceptable account (indeed, the only account that might possibly be acceptable) of the normative relevance of cost-benefit analysis for those who reject the notion that even the most thoroughgoing and precise tallying of welfarist costs and benefits can exhaust the moral content of land-use decision-making. Viewed from within weak welfarism, that is, from a standpoint that recognizes a plurality of incommensurable values, the argument that (imperfect) private owners are typically better positioned than (imperfect) governments to engage in cost-benefit analysis will still leave many important questions unanswered. In other words, even if we were to assume, first, that the wealth-maximizing model accurately describes how most people will in fact behave with respect to land that is fungible to them and, second, that, due to their informational advantages, self-interested private actors will, by and large, make choices that are more likely to maximize aggregate welfare than will the choices of planners or regulators, it does not follow that we should therefore defer to private decision-making if the maximization of welfare is not the only end 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 – applying our best moral theories – land-use decisions should be aimed at achieving.

Nor, without more, does an assertion of the inferiority of collective land-use decision-making as a welfare-maximizing device settle the question whether those means purportedly better suited to maximize welfare are even morally permissible in the first instance. To be sure, mainstream contemporary theorists accept the moral permissibility of private ownership of (and markets in) land. Of course,

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122 See id. (“Weak welfarism . . . says that overall welfare has moral relevance but that other considerations, such as distributive or rights-based considerations, may have moral relevance as well.”).

123 See id. at 23, 52-56; see also Thomas W. Merrill & Henry E. Smith, Law and Morality, 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 to be hallmarks of a moral perspective.”).
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this has not always been the case.\textsuperscript{124} I am not suggesting that we revisit the question of the moral licitness of private land ownership (or private ownership, tout court), but merely emphasizing the point that moral constraints on our pursuit of welfare are relevant to our evaluation of different land use regimes. Even if the moral permissibility of private ownership of land is a settled question 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 value – is the ultimate goal of land-use decisions is to beg some of the most important and contentious questions within moral and political philosophy.\textsuperscript{125} Alternatives to maximization theories include, among many others, deontological, rights-based theories, such as Robert Nozick’s libertarianism,\textsuperscript{126} Hegelian personhood theories,\textsuperscript{127} as well as agent-focused virtue-based theories, such as the moral and political theories of Aristotle and Thomas Aquinas. The habit of simply adopting as their normative framework the maximizing presuppositions of economic theory 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, whatever they might be.

\textsuperscript{124} During the enclosure movement in England, for example, dissenting voices, like Gerrard Winstanley and the Diggers, objected to the morality of individual land ownership, which they viewed as contrary to God’s will. \textit{See, e.g.}, GEORGE SHULMAN, RADICALISM AND REVERENCE 3-5, 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. \textit{See, e.g.}, THOMAS AQUINAS, \textit{Summa Theologica}, Ila, Iiae, Q. 66, art. 2 (discussing whether it is lawful for a person to possess external things as his own).

\textsuperscript{125} 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, \textit{supra} note 3, at 1462.

\textsuperscript{126} See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

\textsuperscript{127} See generally Radin, \textit{supra} note 44.
IV. Towards 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.” In the context of land-use scholarship, an analogous mystery arises. Why, despite the descriptive failures of the rational-actor model; the manifest shortcomings of private owners’ cost-benefit analysis; and the inadequacy of economic cost-benefit analysis as an evaluative standard for land-use decision-making, does law and economics retain a near monopoly over contemporary land-use discussions?

Apart from the obvious professional pressure to conform, some possibilities seem especially likely. First, economic theory provides a ready-made, and elegant, predictive and evaluative framework. Agreeing to operate within its confines radically simplifies the project of exploring and assessing the complex 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, as long as it is not taken too far. Economic property theories are so alluring, even to their opponents, precisely because our moral intuitions strongly affirm the notion that increasing aggregate welfare (as it is typically understood by legal economists) 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 normative law and economics within contemporary American property scholarship are difficult to square with

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130 Cf. O’Neill, supra note 44, at 115 (“Cost-benefit analysis owes its appeal to a particular algorithmic conception of practical rationality.”).
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this powerful consequentialist intuition. As Richard Epstein has ably shown, for example, the deontological libertarian position that respect for individual property rights is all that matters, consequences be damned, is neither appealing nor workable.\footnote{See, e.g., Richard A. Epstein, \textit{Nuisance Law: Corrective Justice and Its Utilitarian Constraints}, 8 J. Legal Stud. 49 (1979); Richard A. Epstein, \textit{One Step Beyond Nozick's Minimal State}, 22 Soc. Phil. & Pol'y 286, 289-96 (2005); see also Eduardo M. Peñalver, \textit{Reconstructing Richard Epstein}, 15 William & Mary Bill of Rights J. 429, 429-30 (2006).}

Amartya Sen concurs:

\begin{quote}
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.\footnote{AMARTYA SEN, \textit{Development as Freedom} 66 (1999).}
\end{quote}

Indeed, the rigid deontological libertarian position is not acceptable even to its own practitioners. In defense of his own, utilitarian-inflected “classical liberal” position, Epstein has noted that deontological libertarianism’s foremost modern philosophical proponent, Robert Nozick, departs from strict libertarian principles at crucial moments in his argument where those principles would stand in the way of certain welfare-enhancing, “forced exchanges.”\footnote{See Epstein, supra note 131, at 300-04.} “The libertarian approach seeks to avoid consequentialist arguments,” Epstein concludes, “but in fact it only buries them out of view.”\footnote{Id. at 299.}

In a different way, Margaret Radin’s Hegelian “personhood” theory of property is unable to give aggregate well-being its due. Observing this inability is not really a criticism of her theory, which, unlike libertarianism, does not purport to be an all-encompassing theory
of property.\textsuperscript{135} But the fact that her theory has little to say about aggregate welfare undermines its ability to provide needed guidance with respect to the crucial task of weighing how to balance the demands of aggregate 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 personhood attachment that tenants form with their homes, which she views as morally more worthy of legal protection than the fungible interest landlords have in their rented properties.\textsuperscript{136} Economists are largely in agreement that these same 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).\textsuperscript{137} While 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 basis 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 land-use decisions it seeks to evaluate. Although a thorough discussion of its

\textsuperscript{135} See Radin, \textit{supra} note 44, at 958 (“[A] systematic general justification of property rights involves other concerns not within the scope of this article . . . .”).

\textsuperscript{136} See id. at 994-96; see also Margaret J. Radin, \textit{Residential Rent Control}, 15 Phil. & Pub. Affairs 350 (1986).

\textsuperscript{137} See, \textit{e.g.}, \textit{Anthony Downs, Residential Rent Control: An Evaluation} 1-2 (1988).
shortcomings is beyond the scope of this article, suffice it to say that they reach substantially deeper than those on which I have focused.\textsuperscript{138}

The problems I have identified with the economic analysis of landownership, however, do not support the conclusion that such analysis is utterly without merit. While they present a serious challenge to the notion that the monistic, aggregative calculus of economics can fully capture the complex considerations at work in our decisions about land, they do not mean that welfare or wealth or utility is wholly irrelevant. In other words, these criticisms do not call for a total rejection of economic analysis of land use but only for a rejection of the most imperial claims made within law and economics – claims that welfare enhancement is all that ought to matter in legal decision-making.\textsuperscript{139}

The challenge for theorists, then, is to find a way to put the valuable tools of economics to use within land-use discussions while restricting the 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. An Aristotelian, virtue-based theory of owner obligation provides such an inclusive vision.\textsuperscript{140} In the next section, I will briefly describe virtue theory and discuss how it can enrich contemporary land-use theorizing. My aim is not to provide an exhaustive description of either virtue theory or its application within property discussions, but merely to sketch its broad outlines and lay the preliminary groundwork for future elaboration.

\textsuperscript{138} They include, for instance, a troubling willingness to trade on the well being of individuals in pursuit of increased aggregate measures of well-being. See, e.g., Martha C. Nussbaum, \textit{Women and Human Development} 60-62 (2000). As the public reaction to the \textit{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.

\textsuperscript{139} See, e.g., Kaplow & Shavell, supra note 3 (arguing that “welfare” is the only value that ought to matter in public decision-making).

\textsuperscript{140} While 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.
B. A Virtue Theory of Land Use

Unlike both utilitarian consequentialism and rights-focused deontology, 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 towards 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. Singling out a stable disposition in order to classify it as a virtue suggests some degree of effort or self-mastery, typically by acting against an existing inclination or desire to act wrongly in a particular sort of situation. That is, virtuous conduct is conduct that is conducive to flourishing and that, to some extent, overcomes common inclinations to act otherwise. 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 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

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141 See PHILIPPA FOOT, Virtues and Vices, in VIRTUES AND VICES 1, 2-4 (2002); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 167 (1999). While the virtues are conductive to human flourishing, their possession is no guarantee that the virtuous individual will in fact flourish. See FOOT, supra, at 3; HURSTHOUSE, supra, at 172.

142 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.”).
she does so. 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 the acclaim and publicity his act would most likely bring” is not acting virtuously. Nor is the person who does the right thing for the right reason, but with the wrong emotional state, as, for example, with a person who engages in acts of charity with a sense of condescension or disgust towards the people he helps.

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. An action is “brave” and therefore virtuous, not 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. This is not to say that rules and rule-following have no place within a virtue ethic. The moral (or, perhaps more frequently, immoral) quality of certain sorts of conduct are frequently sufficiently categorical that their status can be captured by “rules of thumb” of varying degrees of breadth. These rules have an important place within the pursuit of virtue, particularly within moral education, but it is not conformity to rules that makes an action virtuous. An action is virtuous because it is the sort of action the virtuous person would undertake; 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

143 See ROBERT MERRIWHEW ADAMS, A THEORY OF VIRTUE 9 (2007).
144 See DENT, supra note 142, at 7.
145 See HURSTHOUSE, supra note 141, at 118-19, 123-26. Such flawed approximations of virtue, however, might over time lead an actor towards the more perfect possession of true virtue.
146 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 virtues. See, e.g., ADAMS, supra note 143, at 9-10.
147 See HURSTHOUSE, supra note 135, at 28-30.
that can adequately be described by mechanical rules and calls for the skillful exercise of judgment guided by practical wisdom or prudence.149

Virtue ethicists typically derive the content of the virtues from an objective conception of what it means to flourish in a distinctively human way.150 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.151 Depending on the theorist, the conceptions of the well-lived human life underlying virtue ethics will have varying degrees of thickness and content.152 Virtue theories largely 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.153

2. The benefits of a virtue theory of land use

While virtue-based theories have in recent years begun to gain traction in a number of other areas of legal theory, they have not, as yet,

149 See Hursthouse, supra note 141, at 37-39; see also Aristotle, Nicomachean Ethics V.10 (discussing the need for equity as a corrective for the inevitable over-inclusiveness of legal rules) (J.A.K. Thomson transl. rev. ed. 2004).
150 See supra note 141. 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 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 148, at 33. Martha Nussbaum has argued that rejecting such a transcendental 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 Nussbaum, supra note 148, at 33. Alasdair MacIntyre, however, has developed a theory of rationality that, while rejecting the notion of that a conception of human flourishing might be articulated independently of some community’s tradition of thought, makes room for the sort of rational intercommunal debate and criticism that Nussbaum hopes to preserve. See generally Alasdair MacIntyre, Whose Justice? Which Rationality? chs. 18-19 (1988).
Because my sympathies are with MacIntyre, I do not perceive the question 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.
151 See supra note 141.
152 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 138, at 76.
153 See Dent, supra note 142, at 7.
had much of an impact within property or land-use scholarship. This is unfortunate. Among other things, a virtue theory of land use would allow property theorists to draw upon the more attractive features of law and economics, without taking on its descriptive and normative shortcomings.

For starters, the moral psychology underlying virtue ethics is rooted in a model of human decision-making that is more subtle and inclusive than the self-interested rational actors that predominate within law and economics. In its positive project, law and economics’ traditional commitment to the highly simplified model of human behavior is descriptively unappealing. It treats a tendency towards 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. And, particularly when (as is typically the case within property discussions) the measure of value it actually employs at the end of the day is “wealth,” this simplified model of individual decision-making generates the sorts of descriptive and prescriptive errors I described above in relation to Fischel’s theory of homeowner behavior.

In contrast, at the very heart of the concept of virtue is the notion that the virtuous person recognizes certain moral considerations as powerful reasons for action. The insight leads virtue theorists to elaborate behavioral theories that incorporate, in addition to self-interested wealth maximization or preference satisfaction, such

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155 See Korobkin & Ulen, *supra* note 2, at 1065. Recent trends in law and economics towards more realistic models of human behavior have helped ameliorate the descriptive problems I have been discussing, but they do nothing to address law and economics’ normative weaknesses. See *supra* note 3.

156 See Nussbaum, *supra* note 5, at 1211.


159 See Foot, *supra* note 150, at 5-7.
qualitatively distinct factors as loyalty and ethical commitment. In addition, virtue theory’s focus on the importance of acquired behavioral dispositions allows it to acknowledge the role that forces like moral training, culture and law can play in shaping the motives on which human beings act.

Some theorists have attempted to accommodate a wider variety of human motivations within the model of law and economics by broadening the compass of “value” that rational actors will seek to maximize (by including, for example, other-regarding preferences for commitment or preferences for loyalty). As Martha Nussbaum notes, however, describing concepts like loyalty and commitment as “preferences” to be satisfied misdescribes the way in which human beings actually experience and respond to those values. In addition, treating these considerations as preferences to be satisfied obscures the ways in which human behavior with respect to these phenomena respond to the very legal processes law and economics seeks to evaluate. The law, as I will argue below, has a crucial role to play in forming our character and therefore our “preferences” for other-regarding values, such as justice and loyalty. Indeed, from the point of view of an Aristotelian virtue ethic, preferences are not the bedrock from which legal goals are derived or judged, but are rather themselves the subject of moral assessment and judgment.

In addition to its more sophisticated model 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 implicated by land-use decisions. That is, virtue theory is able to explain why it is that

160 See supra note 3.
161 See Nussbaum, supra note 5, at 1211.
162 Even setting such objections aside, broadening the definition of the value rational actors will seek to maximize beyond a certain point comes at the cost of seriously undermining the much-touted analytic simplicity and empirical superiority of the rational-actor model. See Korobkin & Ulen, supra note 2, at 1055; Robert Hockett, Minding the Gaps, unpublished manuscript on file with author. This is not to say that a virtue ethic could not be coupled with similarly simplistic theories of human behavior.
163 See O’Neill, supra note , at 76-82.
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. In other words, it picks up where “weak welfarism” leaves off, providing an account of the values beyond welfare that matter 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.” Virtue can require 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. Consequently, the virtuous decision-maker will also consider other factors, such as justice, and will sometimes be justified in favoring a course of action that does not enhance aggregate welfare. From within a virtue theory of land use, then, what we seek from landowners and government alike is not simply cost-benefit precision, but, in addition, 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, a virtue to which I will return at the end of this article.

Viewed from the perspective of a theory that acknowledges the relevance of a plurality of values at work within land use decision-making, the results of even the most comprehensive and disciplined cost-benefit analyses, while not irrelevant, are fundamentally inconclusive. They are but one – albeit important – category of factual data owners and policy-makers should consider in a complex moral

\[^{164}\text{See Foot, supra note 128, at 206.}\]
\[^{165}\text{Id.}\]
\[^{166}\text{See id.}\]
\[^{167}\text{See HURSTHOUSE, supra note 141, at 59-62.}\]
decision-making process. Other questions, like the demands of justice, the sustainability of the owner’s use, the possibility of irreversible or catastrophic future consequences, the proper scope of owners’ autonomy, or the relationship between land-use decisions and specific aspects of human flourishing, 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

If we understand that wise land-use decisions frequently involve more than simple tallying of gains and losses, the cost-benefit “discipline” generated by the owner’s interest in the value of his land (or, more accurately, the value he can extract from the land) becomes less obviously a virtue. The temptation of the private landowner (at least the self-interested owner imagined by the Demsetzian model) to maximize his personal wealth at the expense of the common good can be as much a hindrance as a help to wise decision-making. Unrestrained self-interest comes to be recognized as a vice to be overcome, not a virtue to be fostered and simplistically harnessed into public service.

168 See Kysar, supra note 66, at 2114-47 (discussing different conceptions of sustainability).
170 See NOZICK, supra note 126, at 28-30.
171 See FREYFOGLE, supra note 169, at ch. 4-5 (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).
172 A virtue theory of land use is therefore at least broadly consistent with what Adler and Posner dub “weak welfarism.” ADLER & POSNER, supra note 93, at 26.
From within a virtue theory of land use decision-making, the justification for legal intervention will not be limited to situations of market failure. Instead, the law will have an important role to play in fostering human flourishing. There is an understandable temptation to think about flourishing as a purely individual pursuit, a personal project akin to self-realization. But human flourishing is an unavoidably cooperative endeavor. Human beings are social animals, and our ability to flourish requires the presence of a material and communal infrastructure that itself depends upon the contributions of each of us. 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. Moreover, our dependence on others for our own flourishing creates an obligation for us to help others within our political community to flourish as well.

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. And so, while the pursuit of flourishing is intrinsically social, it also 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. The key challenge is to strike the right balance between our obligations towards 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.

174 See Alexander & Peñalver, supra note 173, at ___. 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.
175 See id.
176 See id. at ___. 
Knowing how to divide decision-making between private owners and collective authority in different contexts becomes a deep and difficult challenge, one that cannot be resolved merely by determining who is best positioned to engage in cost-benefit analysis. Laws that override private decisions and command owners to act in accordance with virtue can accomplish three 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’ self-dealing. 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, might not be internalized by market mechanisms. 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” measured by willingness to pay, 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.

The other goals of legally enforced moral norms are even less at home within the economic framework insofar as they seek to modify, correct, or discourage the preferences that traditional legal economists aim merely to satisfy. Thus, a second, and 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

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177 See Radin, supra note 5, at 1867-68.
178 Cf. Eric Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77, 121-27 (1995) (discussing the ambiguity of the harm-benefit distinction when divorced from a framework of communal values). For example, economists might argue that racially restrictive covenants are rightfully condemned because of the externalities they impose on restricted minorities and the difficulty of internalizing those externalities due to high transaction costs. But in a world of zero transaction costs, they would be indifferent between a legal prohibition of such covenants and a rule that required those harmed by the covenants to pay off property owners not to enter into them.
them to act virtuously of their own accord. 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. A law prohibiting such private discrimination was initially criticized in prominent quarters as a violation of property rights and a hopeless effort to force people to interact against their wishes. Despite this skepticism, and however incomplete the project of racial justice remains, civil rights laws prohibiting discrimination in restaurants and hotels contributed to dramatic changes in attitudes among at least some white proprietors and customers who had favored the segregated status quo.

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. Environmental statutes or regulations can help spread the word about best practices to landowners already inclined to act responsibly but lacking information about the consequences of their behavior. Civil rights statutes provide another helpful illustration. Several 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

179 See, e.g., AQUINAS, supra note 124, at 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 24-31 (1993) (discussing Aristotle’s and Aquinas’s views on the role of law in fostering the virtues).
182 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).

It bears emphasizing that rejecting welfare-maximizing theories of landowner obligation in favor of a virtue-based approach does not require embracing unrelentingly collective or statist decision-making about land use.\footnote{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 3.} Even where we reach the conclusion that landowners’ self-interested calculations should give way to overriding moral considerations, the question whether collectively to enforce the demands of virtue through the coercive force of law will turn, as virtue theorists have long understood, on a number of considerations.\footnote{See, e.g., JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 149-64 (1960); Gregory A. 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 (2006); Christine Swanton, Commentary on Michael Slote’s “Virtue Ethics and Democratic Values,” 24 J. OF SOCIAL PHIL. 38, 46 (1993); AQUINAS, supra note 124, at Ia, IIae, Q.96, art. 2 (discussing the circumstances under which the demands of virtue should be enshrined in law).} It will turn, 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.

The answer will likewise depend on our mechanisms for political decision-making, 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.\textsuperscript{186} Under the right conditions, there may be a wisdom to collective deliberation that is absent when private actors transact in the market.\textsuperscript{187} In other words, it is possible that, as Michael Sandel has put it, “when politics goes well, we can know a good in common that we cannot know alone.”\textsuperscript{188}

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 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 commonweal in our civic decisions, we may not seek the same self-serving ends in each of those discrete domains.\textsuperscript{189} Moreover, imbued with such public-spirited norms, we may not display the same degree of short-sightedness in our political deliberation as we typically do in our market transactions.\textsuperscript{190}

Finally, the independent value of individual autonomy, which is itself a 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 or what Title II of the Civil Rights Act of 1964 arguably does by exempting private clubs.\textsuperscript{191} Even in situations where autonomy overrides other values, however, we can still attempt to educate owners about their obligations in order to inculcate in them the virtues of just and wise land use or offer incentives in the hope

\textsuperscript{187} See O’Neill, \textit{supra} note 44, at 140-41; Aristotle, \textit{Politics} bk. III, ch. 11.
\textsuperscript{188} Michael Sandel, \textit{Liberalism and the Limits of Justice} 183 (2d ed. 1998).
\textsuperscript{189} See, \textit{e.g.}, Sagoff, \textit{supra} note 94, at 8, 171-72 (contrasting our behavior as consumers with our behavior as citizens); Liam Murphy & Thomas Nagel, \textit{The Myth of Ownership: Taxes and Justice} 71-72 (2002) (distinguishing between “personal” and “political” motivations).
\textsuperscript{190} Elinor Ostrom, for example, observes that, as a result of cultural norms, the same person may well exhibit different discount rates in different contexts. See Ostrom, \textit{supra} note 3, at 35.
of convincing them voluntarily to use their land responsibly, while leaving the ultimate decision with the private owner.

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 land-owners. It is a puzzle, however, that is all too often ignored within contemporary land-use scholarship. Dominated as it has become by both positive and normative economic analysis, 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 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 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 frequently leveled against it that has special salience in the context of a comparison of a virtue theory of land use with the dominant economic approaches. This is the objection that, unlike the precision and decisiveness offered by cost-benefit analysis, the pluralist evaluative framework embraced by virtue ethics is too indeterminate to be of much use for legal theorizing. Someone 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 real, concrete guidance in determining what action to take, particularly where its diverse values appear to come into conflict.

192 See Hursthouse, supra note 139, at 35-39. Louis Kaplow levies a version of this “indeterminacy” objection as a general argument against pluralist theories of value, such as Amartya Sen’s Aristotelian, “human capabilities” approach. See Louis Kaplow, Primary Goods, Capabilities . . . or Well Being?, Discussion Paper No. 602 (available for download at http://papers.ssrn.com/abstract_id=1031302), manuscript at 4-5 & n.7.
It is true that, once we are agreed on the utility 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 they choose to put on their unitary measure of value. But economic theory buys certainty at the decision-making stage at the cost of considerable uncertainty and indeterminacy 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. Those measurement problems are only exacerbated when it comes to evaluating broad legal structures and rules.

Do the costs of discrimination in places of publication 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 information-cost benefits of an unqualified right to exclude outweigh the utility gain that we might achieve by permitting people to wander across unenclosed 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 either answer to these questions.

The determinacy of cost-benefit analysis is 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 people’s preferences, and that information is

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193 See supra Part III.B.1.
In other words, garbage in, garbage out. 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. Indeed, the virtue theorist’s best response to the charge of indeterminacy 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, becomes a point of strength. Instead of burying the tension among plural values inside homogenizing numerical measures of dubious validity, as utilitarian theories do, it brings that tension to the foreground and invites reasoned deliberation about the appropriate way to reconcile those tensions. That is, it focuses decision-makers’ attention exactly where it should be.

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. 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 foster human flourishing. As in other domains, the law has a role to play in fostering virtuous land use and, thereby, the human flourishing that such virtuous land use facilitates.

In this section, I will 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, human flourishing depends upon access to a number of physical resources. Those resources are essential not only for human

194 SMART & WILLIAMS, supra note 119, at 137.
195 See supra note 141.
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.\textsuperscript{196} Land is a necessary ingredient in the activities that produce these physical resources. Accordingly, someone interested in fostering 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 are distributed in a manner consistent with that ultimate goal, sometimes even when those distributive (and redistributive) efforts undermine productive efforts to a certain extent. 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 justice.

I will explore ways of encouraging the productive and efficient use of land in relation to the virtue of industry. I will then discuss decisions about the distribution of physical resources in connection with the virtue of justice. Finally, I will 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 will provide examples of situations in which the law can (and already has) intervened 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, 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 the economic theories that dominate contemporary academic thinking on the subject.

\textsuperscript{196} See Peñalver, \textit{supra} note 171, at 744-45.
1. Industry

Social wealth is crucial to human flourishing. Human beings cannot flourish if they are starving. The efficient production of all material resources depends ultimately 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 land to a certain extent. A society that is interested in fostering 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 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 strategies for communities to encourage industry among their members run the gamut from education and simple exhortation, to the creation of material incentives that seek to entice individuals to work voluntarily, to coercive legal mandate, backed by the power of the state.

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 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,

197 See LOGAN & MOLOTCH, supra note 19, at 20-21.
198 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 3. I will limit my discussion, however, to formal legal means of discouraging shirking.
because of incentives for land speculators to free ride on the productive activity of others\textsuperscript{199}), 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.\textsuperscript{200} For similar reasons, some jurisdictions directly penalized absentee owners or made it easier for squatters to adversely possess undeveloped land.\textsuperscript{201}

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 the utilitarian/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 that 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 when there is a great number of servants. Secondly, because human affairs are conducted in a 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.\textsuperscript{202}

\textsuperscript{199} See Peñalver & Katyal, supra note 24, at 1109 (discussing the behavior of land speculators in the nineteenth-century American west).


\textsuperscript{201} See Peñalver & Katyal, supra note 24, at 1110-13.

\textsuperscript{202} See AQUINAS, supra note 124, at II,II, Q. 66, a. 2.
The principal difference between the virtue-based account and standard Demsetzian analysis is that, as Phillippa Foot has observed, for a virtue theorist, encouraging economic productivity and the efficient use of land is just one of a plurality of (incommensurable) values with which decision-makers are concerned. Thus, Aquinas, again following Aristotle, distinguishes between rights with respect to the “procuring and dispensing” of property, which are permitted to be private, and rights with respect to the consumption of property, which must be understood as ultimately communal. As regards the consumption of property, Aquinas says, human beings “ought to possess things, not as [their] own, but as common, so that, to wit, [they] are ready to communicate to others in their need.” 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 fostered 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 rooted in the same deep logic of virtue as the creation of private property rights in the first instance.

2. **Justice**

The virtue of justice is the habit of giving people their due. Since 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. Utilitarian property theorists may concur in this redistributive conclusion. Their overriding commitment to a unitary measure of value, however, frequently leads them to favor redistribution via taxation and

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203 *Id.; see also* *ARISTOTLE, POLITICS*, bk. II, ch. V, §§ 5–6.
204 See, *e.g.*, *AQUINAS, supra* note 124, at I-II q. 58 a.1.
205 See *Alexander & Peñalver, supra* note 173, at ___.

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cash transfers over in-kind transfers or redistributive property rules.\textsuperscript{206} 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 physical existence, such as eating and sleeping.\textsuperscript{207} If we owe an obligation to foster human flourishing among those within our political community, we owe an obligation to those without such a place to help them 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 \textit{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 frequently experience the components of that flourishing in ways that defy substitution. As Margaret Radin has correctly noted, human beings form connections with particular pieces of property such that they become inextricably bound up with their pursuit of the well-lived life.\textsuperscript{208} Land constitutes a central case of this nonfungibility. Once a person (or group of people) has sufficiently incorporated a piece of land into his life plans in the relevant way, exchanging that land for some other good (even a good of very great economic value) or for some other piece of land can hinder, in some cases irreparably, his ability to flourish by short-circuiting long-


\textsuperscript{208} See, e.g., Radin, \textit{supra} note 44, at 994-96.
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 integrity and coherence to its individual experience that resists disassembly and substitution. The coherence 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 one must have access to a particular basket of goods. To be sure, the countless ways of pursuing and enjoying these goods leaves ample scope for human freedom by, say, emphasizing one good (e.g., knowledge) over others. But the scope for such specialization is not limitless. Since both political freedom and adequate nutrition are required to flourish, 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 “vertically” as a pattern of cultivation and enjoyment of particular goods through time. 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, but will necessarily have a certain narrative integrity, and this integrity 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 of another good we give him in a misguided effort at compensation.

The nonfungibility of various components of human flourishing across these two dimensions suggests that redistribution via in-kind

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209 See FINNIS, supra note 118, at 93-94; O’NEILL, supra note 44, at 87-90.
210 Bernard Williams converts this point about the narrative integrity of the well-lived life into a powerful critique of utilitarian moral theory. See SMART & WILLIAMS, supra note 115, at 114-17.
transfers of ownership or occupancy rights will at times be the only appropriate way of fostering flourishing, and that exclusive reliance on an aggregated system of taxation and monetary payments will be inadequate, efficiency considerations notwithstanding.\textsuperscript{211} 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 one’s land, (3) because of the nonfungible relationships third parties have formed with the owner’s land, or (4) because of particular relationships of dependence that owners have formed with the third parties. In such cases, the law may appropriately intervene through the use of redistributive property rules to 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.\textsuperscript{212} A regime permitting racial discrimination but redistributing money to its victims would rightly be accused of misunderstanding the way in which racially discriminatory exclusion inhibits human flourishing. Similarly, the law ensures access in situations of dire need 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 interfering with that use.\textsuperscript{213} The law protects longstanding bonds land-users form with land they do not own through doctrines like adverse possession and prescription, as well as through rent control statutes.\textsuperscript{214} Finally, the law sometimes requires the

\textsuperscript{211} See Alexander & Peñalver, supra note 173, at ____.


\textsuperscript{213} For an extended discussion of the doctrine of necessity in property law, see Peñalver and Katyal, supra note 24, at 1172-77.

\textsuperscript{214} See also the discussion of the South African case of Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd., 2004(8) BCLR 821 (SCA), aff’d on other grounds 2005 (5) SA 3 (CC), in Alexander & Peñalver, supra note 173, at ____.
in-kind transfer of interests in land in response to particular relationships of dependence, as exemplified in the famous case of State v. Shack.\textsuperscript{215} I will discuss State v. Shack in a bit more detail because the New Jersey Supreme Court’s reasoning 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, the defendants refused and were charged with criminal trespass. On appeal from their conviction, the New Jersey Supreme Court held that the owner had no right to exclude the defendants from meeting with the farmworkers residing on his land.

As the court pointed out, migrant farm workers are a vulnerable and isolated community, often unaware of the opportunities that exist for them to meet their needs to medical, legal, and other forms of care. Recognizing the rights of farm workers to receive visitors on the farmers’ land fosters 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 by allocating to them some of the right to control access to the farm.\textsuperscript{216} 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.

Nor did the court’s decision in Shack unduly intrude on the farmer’s own ability to flourish. The court’s decision, for example, respected the farmer’s autonomy. Even after the Court’s decision, the farmer retained a substantial degree of freedom with respect to the entry of strangers onto his land. Visitors would not have been justified, for example, in entering into the farmer’s home or office. They could only visit the farmworkers in their quarters and could not interfere with the

\textsuperscript{215} 277 A.2d 369 (N.J. 1971).
\textsuperscript{216} 277 A.2d at 373-75.
use to which the farmer chose to put his land.\textsuperscript{217} And, 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.\textsuperscript{218}

In light of these considerations, from the point of view of a virtue theory of land use, the situation in \emph{Shack} represents an easy case for (limited) legal intervention to enforce (in kind) the farmer’s moral obligations towards his workers. The workers were entitled to receive visitors 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. Moreover, far from injuring the farmer, requiring him to conform his behavior to his moral obligations towards the workers he had invited onto his land may over time affirmatively have helped him (and others) to find the path towards a more virtuous way to use his land.

3. \textbf{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 ground or 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.”\textsuperscript{219} Considered as a virtue, however, humility denotes someone who is aware of his own

\textsuperscript{217} See id. at 374.
\textsuperscript{218} This is the key distinction between the outcome in \emph{Shack} and the decision the court reached in the equally famous case of \emph{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 \emph{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 was not plausibly connected with his interest in associational freedom to the same degree as the plaintiffs in \emph{Jacques}.
\textsuperscript{219} \textsuperscript{\textsuperscript{219}} Keys, supra note 182, at 160 (citing \textsuperscript{\textsuperscript{219}}Aristotle, \textsuperscript{\textsuperscript{219}}Nichomachean Ethics, IV.3).
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 awesome responsibility on the part of those who make decisions about how to use it. 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. While 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, this ineradicable uncertainty is a serious problem for all land use decision-makers, public and private.

If the risk of introducing unintended and unforeseen harms were evenly distributed across possible decisions, however, this uncertainty, while lamentable, would not have much relevance for land-use decision-making. There would be nothing we could do about it and no way to avoid its effects. But it is not clear that land-use decisions are symmetrical with respect to uncertainty. In order to flourish, human beings require material resources. But they also require the ability to set long term goals towards which they can aim and around which they can construct their identities. In order to engage in such long-term planning, however, individuals and the communities in which they participate require a degree of stability.

It is true that even the most stable natural systems are constantly in flux at the local level. Human beings, however, have proved remarkably capable of adapting to this localized, but bounded, range of instability in order to survive, and even flourish, despite it. Nevertheless, human beings’ ability to flourish depends on some minimal degree of macro-stability and predictability in the operation of the natural systems
within which they live. Actions that interfere with these natural systems and, as a consequence, increase the risk of abrupt disruptions or discontinuities therefore pose unique and asymmetrical threats to human flourishing.

Generalized to cover other sorts of land-use decisions that interfere with the operation of natural systems, this concern with stability points towards the value of humility in our treatment of the 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 in favor of treading lightly. Thus, the virtue seems to lend itself to a precautionary approach to land-use decisions. It recommends, in particular, extra sensitivity even to relatively small risks of irreversible harms. Land’s memory means that such irreversibilities loom particularly large in land-use decisions. The risks presented by these irreversibilities point towards the need to temper our reliance on cost-benefit calculations, even under circumstances where efficiency is our central consideration.

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 extend to the dangers of arrogance in land-use choices. Public and private decision-makers seem equally at risk in that regard.

As with other virtues, we can employ the law in ways that encourage land use decision-makers, both public and private, to cultivate humility. The Wisconsin Supreme Court’s 1972 landmark decision in Just v. Marinette County can be read as example of such an effort. In that case, the Justs had purchased thirty-six acres of lakefront land, which they proceeded to subdivide and sell. When Marinette County sought to protect the lake’s wetlands by prohibiting the deposit of fill material without a permit, the owners first ignored the law, dumping fill without permission, and then filed suit arguing that the permit requirement was a regulatory taking of their land. The Wisconsin

\[220\text{See supra note 169.}\]
\[221\text{201 N.W.2d 761 (Wis. 1972).}\]
Supreme Court rejected their claim. That, in itself, is not particularly significant, since the Justs’ takings claim was a weak one. What was notable about Court’s decision, however, was its reasoning. According to the Court, the Justs had no claim in part because “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state.”

The notion that owners have no inherent right to transform land from its “natural state” raises a number of difficult questions. How, for example, do we know what the land’s “natural” state is in a world that has already been pervasively altered by human activity? Although this definitional difficulty calls into question the propriety of attempting to legally enforce such an obligation in any comprehensive way, the Just Court’s bias against disrupting the operation of natural systems did not itself seek to coerce. By rejecting the Justs’ claim for compensation, it simply refused to constitutionalize a conception of ownership rights that gives free reign to owners’ desires to fundamentally alter the character of their land.

Eric Freyfogle sees in Just an attempt by the Wisconsin Supreme Court to roll back an arrogant, “industrial” conception of land ownership, a conception that Freyfogle attributes to nineteenth century economic imperatives. That conception gave wide latitude to the power and rights of individual private owners to “change, intensify, and take risks” with their land without regard to the values of the community in which the owner was situated. In its place, the Just Court sought to foster an understanding of landownership stripped of its most ambitious assertions of dominion, one that would leave room within the democratic political process for collective deliberation about the best ways for owners to accomplish their land use goals with as little disruption of the land’s existing ecological functions as possible. Whether or not the notion of land’s “natural state” could be made to bear the weight the Just Court hoped it would, the deeper significance of the case lies not in the Court’s

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222 201 N.W. 2d at 768.
223 See FREYFOGLE, supra note 68, at 94-97.
224 Id. at 77.
particular doctrinal rubric, but in its recognition of the need to adjust our cultural understanding of land ownership in ways that encourage owners to cultivate a greater humility in their pretensions of mastery over the land and the ecological processes it hosts.

4. Wisdom

Virtue theory’s plural conception of value raises the obvious question of what to do when two or more values appear to come into 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 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?225

Virtue ethicists respond with the concept of practical wisdom, or prudence. Confronted with an irreducibly complex moral world populated by a plurality of incommensurable values, the wise person is the one who is consistently able to reconcile them and recognize 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.”226 Instead, judgment, understood as constitutive of the virtue of practical wisdom, plays a central, organizing role.227

If a community is to make consistently good decisions about the uses to which land is to be put, it must encourage private owners to exhibit wisdom in private decision-making. This may have been at least part of what Aldo Leopold had in mind when, in his famous call for the formation of a “land ethic” and the development of an “ecological

225 See supra note 192.
226 See HURSTHOUSE, supra note 138, at 54.
227 See O’NEILL, supra note 44, at 117; AQUINAS, supra note 124, at 1a, IIae, Q. 47, art. 7 (discussing the virtue of prudence).
conscience,” he exhorted owners to understand our moral community “to include soils, waters, plants, and animals, or collectively: the land.”

In addition to this private land virtue, in a democratic polity the community must also concern itself with the ability of its citizens to recognize wisdom in others and to place a premium on virtue in their selection of political representatives. 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 scholarship. It is nonetheless deeply embedded within the American political and legal tradition.

V. Conclusion

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. Nevertheless, contemporary 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, in addition to those, a fuller sampling of the wide spectrum of values at work in our land-use decisions. A virtue theory of land use, with its sophisticated moral psychology and its pluralist conception of value, offers the conceptual tools for achieving this more comprehensive view.


229 Such public promotion of virtue is not inconsistent with a commitment to liberal democracy. See Swanton, supra note 185, at 47.