

## LABOR, EXCLUSION, AND FLOURISHING IN PROPERTY LAW\*

ERIC R. CLAEYS\*\*

*This Article presents a natural rights justification for property rights in a theory called “productive labor theory.” Productive labor theory sets forth a Lockean, labor-based case for property. It links property to human interests in flourishing—specifically in interests in using ownable resources to produce constituent elements of survival or rational improvement. On this foundation, “labor” means intelligent and purposeful activity producing goods that contribute to survival or rational improvement.*

*This Article presents productive labor theory as an alternative to the two families of normative theories that currently loom large in contemporary property scholarship—economic theories of exclusion and progressive theories. Each of these theory-families unsettles property in an important respect; productive labor theory shores up each of the foundations unsettled by exclusion and progressive theories. Like progressive theories, productive labor theory links property on a satisfying moral foundation, namely human flourishing. Unlike progressive theories, productive labor theory does not denigrate or undermine the role that exclusive control plays in property. Like leading economic theories, productive labor theory justifies strong rights of exclusive control and possession. Yet it avoids standard criticisms about normative foundations of law and economic analysis, and it identifies moral boundaries within which efficiency analyses might be normatively defensible.*

*The Article illustrates productive labor theory using the prima facie case for trespass to land; the common law privilege for*

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*necessity and the defense for adverse possession; Allemansrätt and statutory rights to roam; state and local landmark schemes, as exemplified in Penn Central Transportation Co. v. City of New York; and regulatory schemes authorizing the use of eminent domain to condemn and reassign private land for commercial redevelopment, as exemplified in Kelo v. City of New London.*

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## INTRODUCTION

To many scholars, property seems counterintuitive. In his *Commentaries on the Laws of England*, Sir William Blackstone famously described property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>1</sup> Although Blackstone was almost surely indulging in rhetorical excess,<sup>2</sup> it is no accident that his description has become a sound bite in recent scholarship. The most familiar property rights confer on owners powers to exclude others from their possessions. Property confers such an exclusive power even when non-owners really need to use the object of property and will not damage it. “Sole . . . dominion” captures that normative structure; “despotic” captures how ominous and problematic that structure seems to many scholars.<sup>3</sup>

That impression makes property rights hard to justify. An adequate theory needs to explain why property rights might confer broad authority on owners, and yet such breadth seems indefensible.

1. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

2. For a collection of ten sources acknowledging as much, see David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 105 n.6 (2009).

3. See 2 BLACKSTONE, *supra* note 1, at \*2.

The tensions created by these demands may be seen in the two main families of contemporary property theories.

Consider the first family of theories, “exclusion theories.” Exclusion theories justify property rights as Blackstonian rights to exclude on various economic grounds: incentivizing investment and improvement, protecting subjective owner value, and minimizing third parties’ information costs in dealing with resources.<sup>4</sup> Although these accounts capture property’s exclusive character, they are nagged by philosophical doubts. If exclusive property creates wealth, why does wealth creation justify excluding non-owners from a resource they desperately need?<sup>5</sup> Questions like these have not yet been addressed satisfactorily in property scholarship.

The second prominent theory-family covers self-styled “progressive” property theories. Progressive property theories resist giving economic analysis pride of place in property theory—especially because of the concern just mentioned, the gap between economic efficiency and philosophical legitimacy. Progressive theories portray property as being justified not by efficiency but by moral interests in well-being or flourishing. Property is messy and context-dependent, such theories maintain, because it balances “plural and incommensurable” interests.<sup>6</sup> Although these theories avoid the problems from which exclusion theories suffer, they make it difficult to justify exclusive property. When property is cast as a right to use a resource consistent with a range of relevant and plural values, non-owners may claim that they need to use owners’ resources and that owners have no rights to privilege their own intended uses over the non-owners’ incommensurable uses. When a judge arbitrates such claims, property ceases to seem a right; it seems instead a privilege to use an ownable resource as the judge finds valuable for the entire community.

Taken together, exclusion and progressive theories seem to leave property on uneasy foundations. This Article aims to provide a more

4. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 358 (1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1352–53 (1993); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2096–103 (1997); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001); Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2182–85 (1997).

5. See, e.g., Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 3 (J. Roland Pennock & John W. Chapman eds., 1982).

6. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

solid foundation. To do so, this Article steps outside these current debates and presents them from a different perspective—that of John Locke. There are two reasons for focusing on Locke here. First, Locke is a fine subject for an article in the *North Carolina Law Review* because Locke was involved in preparing *The Fundamental Constitutions of Carolina of 1669*.<sup>7</sup> Second, and more generally, Locke’s chapter “Of Property” in his *Second Treatise of Government* deserves pride of place in the western legal tradition for making property a dominant category in legal and political thought.<sup>8</sup> Legal historians acknowledge that it “is difficult to overstate the impact of the Lockean concept of property” on American property law.<sup>9</sup> Property scholars also recognize that Locke “still today [supplies] the point of departure for most philosophical discussions of property.”<sup>10</sup>

Of course, as Locke’s theory of property continues to resonate, it also continues to attract considerable resistance. In many quarters, Locke’s theory seems “fraught with difficulties,”<sup>11</sup> or it “appears in several versions, most of them deficient in one respect or another.”<sup>12</sup> Yet now may be a good time to explore whether these perceptions are accurate. Outside the legal academy over the last generation, scholars have begun to rehabilitate labor theory. The key insight from this philosophical work is that “labor” is most defensible when it refers to activity in pursuit of a low, solid, and sociable form of human flourishing—“rational (or purposeful), value-creating activity . . . directed toward the preservation or comfort of our being.”<sup>13</sup> This Article refers to flourishing-based labor theory as “productive labor theory.” Productive labor theory is just now gaining recognition in contemporary legal scholarship.<sup>14</sup> Since progressive

7. See JOHN LOCKE, *The Fundamental Constitutions of Carolina*, in LOCKE: POLITICAL ESSAYS 160, 160–61 (Mark Goldie ed., 1997) (1669).

8. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ II.25–.52, at 285–302 (Peter Laslett ed., 1988) (1698).

9. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (3d ed. 2008).

10. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 497 (2009) (citations omitted).

11. Hanoch Dagan, *The Public Dimension of Private Property*, 24 KING’S L.J. 260, 260 (2013).

12. JESSE DUKEMINIER ET AL., PROPERTY 14 (8th ed. 2014).

13. STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 151 (1991).

14. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 35–51 (2012); Eric R. Claey, *Productive Use in Acquisition, Accession, and Labour Theory*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 13, 13–46 (James Penner & Henry E. Smith eds., 2013). For an earlier work anticipating

theories of property have raised deep questions about the link between property and flourishing, that political philosophy work is extremely relevant to the most urgent questions in legal property scholarship.

To explain why, this Article makes three specific claims. First, this Article shows how productive labor theory conceives of and justifies a property right. Productive labor theory justifies property in relation to land and tangible personal articles as a presumptive right of exclusive possession, control, and enjoyment.<sup>15</sup> Many scholars believe that a rights-based theory of property must mandate a right to exclude non-owners under any circumstances and with no qualifications.<sup>16</sup> Productive labor theory works more subtly and indirectly. It permits, justifies, and encourages exclusive rights when such rights seem practically likely to facilitate concurrent labor by different citizens for different goals.<sup>17</sup> Productive labor theory thus justifies exceptions to exclusive property—when the link between labor and exclusive control seems very weak, or when the needs of non-owners seem particularly strong. The two-tiered normative structure that emerges resembles Henry Smith’s two-tiered portrait of exclusion and governance.<sup>18</sup> Exclusive control supplies the working template for property in simple resources; property law then incorporates various use- and need-based “governance” limitations when proprietors forfeit their rights to labor or when non-owners have particularly strong claims to use resources. This Article illustrates with basic doctrines associated with ownership of land—trespass, necessity, adverse possession, and various common law and statutory easements limiting exclusive possession.

This two-tiered rights structure addresses the main problems from which exclusion and progressive property theories suffer. This Article’s second claim takes up the contrast between productive labor theory and progressive property: the former anticipates and avoids the downsides already noted in the latter. Like progressive property theories, productive labor theory grounds property in moral interests in flourishing. As admirable as flourishing is in theory, however, it provides a troublesome grounding in practice. When property is

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this possibility, see also Carol M. Rose, “*Enough and as Good*” of What?, 81 NW. U. L. REV. 417, 423–33 (1987).

15. See *infra* Part IV.

16. See *infra* Section I.C.

17. See *infra* Parts II–IV.

18. See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S453–55 (2002).

linked to flourishing, that linkage makes it easy to weaken property theoretically, by reducing it to a right to use one's property in the manner that public authorities decree will help everyone flourish. That theoretical possibility provides a powerful temptation in practice, because special interests and idealistic partisans may be interested in asserting public control over the use of property. Although these dangers cannot totally be avoided in legal practice, productive labor theory anticipates and avoids them more effectively than progressive theories do. To illustrate this claim, this Article discusses European statutory easements of passage or "rights to roam"; historic preservation or "landmarking" laws associated with the U.S. Supreme Court's landmark regulatory takings case, *Penn Central Transportation Co. v. City of New York*;<sup>19</sup> and controversies over eminent domain and redevelopment, associated most recently with the Court's landmark decision in *Kelo v. City of New London*.<sup>20</sup>

This Article's third claim contrasts productive labor theory with exclusion theories. Productive labor theory anticipates the philosophical criticisms from which exclusion theories suffer and supplies answers to them. Exclusive property is philosophically defensible if, and to the extent that, it helps citizens satisfy their labor-based moral rights more effectively than simpler systems. In practice, exclusive property satisfies these expectations if it affords more people security to use their own resources than an open-access system would, if it encourages citizens to produce more useful goods, and if these goods circulate widely through commerce. Not only does that justification make exclusive property more defensible, but it also helps clarify the place of economic analysis of property. Exclusive property can be efficient—as long as people may clearly bargain and transact with money and property only within the parameters in which free, equal, and well-socialized citizens would.

Although this Article focuses considerably on one philosophical theory of property, I hope it stimulates thinking among all property scholars who incline toward rights-based theories of property. In current property scholarship, many scholars assume a specialization—and the exclusion/progressive property debate illustrates it perfectly. Moral or rights-based theories make strong claims about rights or normative interests within narrow parameters and only weak claims or no claims about policy consequences, it is assumed, while economic theories make broad claims about consequences and few claims about

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19. 438 U.S. 104 (1978).

20. 545 U.S. 469 (2005).

normative goals. As Joseph Singer has noticed, when rights-based theories are portrayed in this manner, the portrait makes property scholars seem “tongue-tied when asked to talk about fairness and justice” and needing a vocabulary “reviving the notion of practical reason.”<sup>21</sup> Singer is correct, and productive labor theory provides a counterexample correcting the trends that concern him. To be sure, scholars may find some of the basic claims or operational details of productive labor theory less than fully satisfying. If these readers can look past the details of “labor,” “sufficiency,” “survival,” and “improvement,” however, even they may find productive labor theory’s approach to practical reasoning generative as an example of how a moral theory of rights might facilitate and focus practical reasoning about law. In that respect, I hope this Article offers possible lessons not only for progressive theories but also for Rawlsian property theories,<sup>22</sup> traditional natural law theories,<sup>23</sup> corrective justice theories,<sup>24</sup> and pluralist rights-based theories.<sup>25</sup> These same basic insights may even interest readers who find consequentialist theories of property more satisfying. After all, if a theory of individual rights can reconcile rights to social consequences, a welfarist theory should be able to reconcile social consequences to freedom, equality, and individual opportunity.<sup>26</sup>

This Article’s argument proceeds as follows. Part I surveys contemporary property scholarship to recount exclusion theories, progressive theories, and the strengths and limitations of each. Parts II through V explicate this Article’s first claim, that productive labor theory justifies property understood as a presumptive right of

21. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 905–06 (2009).

22. See JOHN RAWLS, A THEORY OF JUSTICE 272–74 (1971) (advocating for the development of a “property-owning democracy” that conforms with his two principles of “equal liberties and fair equality of opportunity”).

23. See generally ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON (2015) (arguing that the common law institutions and norms of private property ownership are morally justified based on equal respect for humans as practically reasonable agents).

24. See generally PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY (2014) (proposing a theory of property based on social recognition, which imposes implicit constraints on the owner’s decision-making authority); ERNEST J. WEINRIB, CORRECTIVE JUSTICE (Timothy Endicott et al. eds., 2012) (applying a theory of corrective justice to various areas of private law).

25. See generally HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011) (arguing for a property theory that reflects pluralistic liberal values); J.W. HARRIS, PROPERTY AND JUSTICE (1996) (advocating a theory of property reflecting the complex elements which comprise property as an institution).

26. See, e.g., Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1673 (2003).



exclusive control and possession capable of being overridden. Part II starts with flourishing and shows how a moral right to labor follows from flourishing, and Part III shows how property follows from flourishing-based labor. Part IV shows how productive labor justifies property in the form of a right of exclusive control, while Part V highlights important fairness- or “governance-” based limitations productive labor establishes on exclusive control.

Parts VI and VII demonstrate, respectively, the Article’s second and third claims; they show how productive labor theory anticipates the problems associated with progressive and exclusion theories. Part VI elaborates on some of the downsides with open-ended conceptions of “flourishing.” It shows how these downsides may be contained: by recognizing in citizens moral *rights* to choose their own paths to flourishing, and by vesting in owners broadly exclusive rights of control. Part VII shows how productive labor theory confirms and broadens progressive criticisms of exclusion theories. Yet productive labor theory can shore up the normative foundations beneath economic analysis of property, by clarifying the moral parameters within which economic analysis is defensible.

#### I. EXCLUSION AND PROGRESSIVE VALUES IN CONTEMPORARY PROPERTY THEORY

Since Locke himself acknowledged that people appreciate what is “familiar and more particular” than what is remote and more theoretical,<sup>27</sup> this Part begins by tracing how contemporary property scholarship is backing into Lockean themes.

##### A. *The Uneasy Place of Exclusion in Property*

As the Introduction explained, property rights seem to leave a logical gap between justifications and their operating structures.<sup>28</sup> The tort of trespass to land illustrates that gap better than any other property doctrine. The *prima facie* action for trespass grants an owner a cause of action whenever someone else enters her land without her

27. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. I, ch. ii, § 14, at 54 (Peter H. Nidditch ed., 1975) (4th ed. 1700).

28. For examples of how property law tolerates significant gaps between moral justifications and the legal rules institutionalizing and implementing them, see generally Adam MacLeod, *Bridging the Gaps in Property Theory*, 77 MODERN L. REV. 1009 (2014); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

consent.<sup>29</sup> The entrant need not cause any actual harm to the land; the harm arises from the entrance itself.<sup>30</sup> An action accrues even if the entrant enters in the mistaken belief that he has a right to go on the land he enters.<sup>31</sup> If property rights are supposed to encourage investment by guaranteeing owners that they will reap where they sow, then why are owners entitled to property rights when they have not improved their lots?

This basic tension runs throughout property law. Consider *Jacque v. Steenberg Homes, Inc.*<sup>32</sup> Steenberg Homes employees cleared a snow path across a field on the Jacques' 170-acre lot, over the Jacques' objections, in order to deliver a mobile home to a customer because the nearest road was covered in snow.<sup>33</sup> Although the Steenberg Homes assistant manager who ordered the delivery treated the Jacques contemptuously,<sup>34</sup> the employees who towed the home did not leave any damage on the Jacques' property.<sup>35</sup> The Jacques refused to approve a crossing in part because they mistakenly believed that they would have exposed themselves to adverse possession liability by licensing a crossing and in part simply because "it was not a question of money . . . [they] just did not want Steenberg to cross their land."<sup>36</sup>

*Jacque* illustrates both sides of property's justificatory gap. On one hand, the case confirms that property rights entitle owners to

29. *Heller v. N.Y., N.H. & H.R. Co.*, 265 F. 192, 194 (2d Cir. 1920) ("Every unauthorized entry on another's property is a trespass and any person who makes such an entry is a trespasser."); *Dougherty v. Stepp*, 18 N.C. 371, 372 (1835) ("[E]very unauthorised, and therefore unlawful entry . . . is a trespass."). Further, property includes intrusions into the subsurface and (within limits set for overflights) the airspace above the lot. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898) ("The general rule of the common law was that whoever had the fee of the soil owned all below the surface . . ."); see also *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 759 (9th Cir. 1936) (limiting a landowner's right to sue in trespass against an overflight without "alleging a case of actual and substantial damage"); RESTATEMENT (SECOND) OF TORTS § 158 cmt. g (AM. LAW INST. 1979). Trespass protects not only "owners" but also all legitimate "possessors." See RESTATEMENT (SECOND) OF TORTS, *supra*, at § 158.

30. See *Longenecker v. Zimmerman*, 267 P.2d 543, 545 (Kan. 1954); WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 70–71 (5th ed. 1984).

31. See RESTATEMENT (SECOND) OF TORTS, *supra* note 29, § 164.

32. 563 N.W.2d 154 (Wis. 1997).

33. See *id.* at 156–57 ¶¶ 1–9.

34. See *id.* at 157 ¶¶ 7–8 (reporting that employees testified at trial that the assistant manager didn't "give a — what [Mr. Jacque] said," ordered the crossing anyway, and then giggled after he got notification that the mobile home had been towed across their lot (alteration in original)).

35. See *id.* at 158–59 ¶¶ 14, 20.

36. *Id.* at 157 ¶ 6.

broad protection, of the sort associated with a right to exclude. The jury found that Steenberg Homes had committed a trespass, awarded the Jacques \$1 in nominal damages, and awarded them another \$100,000 in punitive damages.<sup>37</sup> The Wisconsin Supreme Court upheld both the trespass judgment and the award of punitive damages. The Jacques did not need to prove actual harm to deserve punitive damages, the court reasoned, because in cases of intentional trespass “the actual harm is not in the damage done to the land . . . but in the loss of the individual’s right to exclude others from his or her property.”<sup>38</sup>

However, the court’s justification for this holding was less than satisfying. Although the Wisconsin Supreme Court insisted that “the private landowner’s right to exclude others from his or her land is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property,’ ”<sup>39</sup> that and other statements to the same effect seem not arguments but conclusory assertions. At one point, the court argued that property protects the right to exclude in order to protect owner privacy.<sup>40</sup> Yet the court did not explain why the Jacques’ interest in privacy warranted excluding Steenberg Homes from all of their 160 acres. The court argued that a cause of action was necessary to prevent the Jacques from suffering annoyance from intentional trespasses, and to reinforce social expectations that “wrongdoers who trespass upon [owners’] land will be appropriately punished.”<sup>41</sup> Yet those arguments begged the relevant questions: Why should intentional entries be deemed trespasses when they are harmless? And even if entries create some annoyance, should non-owners not have opportunities to excuse their entries—as Steenberg Homes tried to do when it argued that the road it wanted to use was blocked by snow?

### *B. Early Law and Economic Analyses of Property*

Although this justificatory gap exists in *Jacque* and other practical materials, it is even more pronounced in scholarship. Important here, early law and economic analyses called the right to exclude model of property into significant doubt. That scholarship will be referred to here as “early” or “post-Coasean transaction-cost

37. *Id.* at 156 ¶¶ 10.

38. *Id.* at 159 ¶ 19.

39. *Id.* at 159–60 ¶ 21 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)).

40. *See id.* at 159 ¶ 17–19 (discussing *Merest v. Harvey* (1814) 128 Eng. Rep. 761 (C.P. 1814)).

41. *Id.* at 159–60 ¶ 26.

analysis.” Such scholarship is “post-Coasean” because it follows and builds on the analysis of property disputes developed in Ronald Coase’s 1960 article *The Problem of Social Cost*.<sup>42</sup> Coase’s innovation was to portray property disputes as incompatible use disputes, in which parties rationally bargain to maximize net joint product.<sup>43</sup> Following Coase, Richard Posner, Guido Calabresi, and many other law and economics scholars concluded that the best way to study property is to inquire which pairings of uses would maximize joint product in an ideal world, identify transaction costs, and then assign legal entitlements in the manner that seems most likely to maximize net joint product after discounting for transaction costs.<sup>44</sup>

For better or worse, that framework makes property’s exclusive structure seem even stranger. Take *Jacque* again. It seems extremely formalistic to give the Jacques a legal right to exclude Steenberg Homes without any showing of cause or harm. Any decision that allows Steenberg Homes to cross the Jacques’ field without liability seems to avoid two obvious welfare losses: inconveniences to Steenberg Homes’s customer, and any contractual penalties Steenberg Homes would have incurred by delivering the mobile home late. Moreover, the Jacques were not using the plowed field in any active sense and Steenberg Homes did not actually damage the field. The Jacques also seemed to be excluding Steenberg Homes for irrational reasons, especially their mistaken belief that a crossing license might ripen into an adverse possession claim.<sup>45</sup> From this economic perspective, it might seem sensible to require the Jacques to prove harm before receiving any relief beyond their nominal dollar,

42. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–4, 8–16 (1960); see also GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 155–70 (1996); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.1, at 10 (8th ed. 2011); Merrill & Smith, *supra* note 4, at 375–83.

43. Coase, *supra* note 42, at 2–4, 8–16.

44. See, e.g., MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 16–22 (2008); POSNER, *supra* note 42, § 3.6–7, at 67–71; Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 713–15 (1996); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1017–20 (2008); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–93 (1972); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 1–2 (1985); Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1473–75 (2013); Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 16–19 (1988); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1076–80 (1980).

45. See *Jacque*, 563 N.W.2d at 157 ¶ 3.

and in the process tacitly recognize that Steenberg Homes could exercise a license good for one crossing only. Or, one might follow Calabresi and Melamed's "cathedral" approach and concede that the Jacques did suffer a trespass, but then limit their remedy to a liability rule, like a fee approximating the reasonable value of a crossing license.<sup>46</sup>

### C. *Exclusion Theories*

Post-Coasean transaction cost analysis helps property theory by reminding scholars to consider and contrast the possible consequences of different assignments of property rights. Nevertheless, indirectly, such analysis may abstract from the constraints that make property exclusive. In its simplest forms, post-Coasean analysis focuses on use conflicts between two neighbors,<sup>47</sup> and it assumes that the parties and all onlookers can agree on the values and property damage generated by affected activities. Yet property rights involve not just neighbors but also a wide range of strangers. Parties may disagree sharply about how valuable a property's uses are, and outsiders and public officials may know far less than the parties about how and why parties value these uses. These and other complicating factors justify keeping property rights simple and exception-free—not subject to context-specific balancing, as early transaction cost analyses tended to suggest.<sup>48</sup> Concerns like these led Robert Ellickson to observe that dogs "are superb boundary defenders . . . [but] quite useless in enforcing a group's internal rules of conduct."<sup>49</sup> Gradually, some law and economics scholars came to worry that earlier law and economic analyses of property had been applying "graduate studies" methods to "elementary school" problems,<sup>50</sup> or that earlier scholarship had neglected "the problem of order" to focus too much on "the refined problems of concern in advanced economies."<sup>51</sup>

Exclusion theories elaborate on these concerns. Although exclusion theories do not insist that exclusion is logically necessary in property,<sup>52</sup> they do maintain that a right of exclusive control is

46. See Calabresi & Melamed, *supra* note 44, at 1106–10.

47. See, e.g., Merrill & Smith, *supra* note 4, at 370–71, 375.

48. See *supra* Section I.B.

49. Ellickson, *supra* note 4, at 1329.

50. Epstein, *supra* note 4, at 2096.

51. Merrill & Smith, *supra* note 4, at 398.

52. See Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 229–30 (2011).

practically necessary, a presumptive starting strategy that should be overridden only for good cause.<sup>53</sup> For example, following Ellickson's suggestions about dogs and boundaries, Thomas Merrill and Henry Smith defended exclusive property as "a device that must coordinate the actions of a large and anonymous group of people."<sup>54</sup> Although Merrill and Smith acknowledge that the exclusive model may be overridden, they stress that exclusion makes sense only as a starting strategy.<sup>55</sup> Merrill and Smith read *Jacque* as a case confirming their view; in their opinion, Steenberg Homes was culpable because its agents deliberately flouted a design model for property that "must be simple and accessible to all members of the community."<sup>56</sup>

Similarly, in a defense of injunctive relief in property, Richard Epstein argued that such relief protects owner subjective value more often than other, weaker remedies.<sup>57</sup> That argument also helps justify the result in *Jacque*. After all, the Jacques seem to have placed a high subjective premium on being left alone, or on avoiding haggling with neighbors or companies who might exploit them.<sup>58</sup> Of course, *Jacque* also tests the limits of the presumption Epstein is willing to make in favor of subjective value. Epstein acknowledges that the preference for injunctive relief should be overridden for "momentary crises (private necessity) or . . . large-scale social arrangements (common carriers),"<sup>59</sup> and one could reasonably argue that the winter blizzard that precipitated *Jacque* counted as one of the "momentary crises" justifying liability rules.<sup>60</sup> Even so, Epstein's account explains why, if an exception were going to be made for Steenberg Homes, it would be made from a more general strategy giving the Jacques exclusive control.

53. See, e.g., Epstein, *supra* note 4, at 2106 n.38 (stressing the importance of a proprietor's right to "hold" property).

54. Merrill & Smith, *supra* note 4, at 394–95.

55. See Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2063 (2012); Smith, *supra* note 18, at S453–55.

56. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850, 1871–74 (2007).

57. Epstein, *supra* note 4, at 2092–102.

58. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 ¶ 3–6 (Wis. 1997).

59. See Epstein, *supra* note 4, at 2092–93, 2120.

60. See, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) ("A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity."); Epstein, *supra* note 4, at 2108 n.47, 2109–10 (citing *Ploof*, 71 A. at 189).

*D. Progressive Theories*

Although exclusion theories have helped explain the exclusion in property, they have not addressed the justificatory gap completely. Like all other economic analyses of legal rules, exclusion theories assume that economic analysis can supply adequate normative justifications for legal rules. This assumption was challenged vigorously in the 1970s and 1980s, as economic analysis became prominent throughout American legal scholarship.<sup>61</sup> From the fact that a given rule is efficient, non-economists argued, it does not follow that the rule is philosophically legitimate, to the point that it could be enforced under threat of coercion and penalty.<sup>62</sup> Progressive theories of property have renewed these concerns about economic analysis.

Although “[p]rogressive property is more an orientation than a fully defined set of values or intellectual commitments,”<sup>63</sup> one of its constitutive features is concern about the normative pretensions of economic analysis. In 2009, Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler jointly signed *A Statement of Progressive Property*.<sup>64</sup> The co-signers warned against making property law “solely a matter of satisfying personal preferences,” and warned that reducing the normative values property serves “to one common currency distorts their intrinsic worth.”<sup>65</sup> In their individual works, Singer has marked off what he calls “severe limitations” in efficiency analysis,<sup>66</sup> Alexander has warned that law and economic analysis suffers from “poverty of its analysis of moral values and moral issues[.]”<sup>67</sup> and Peñalver devoted half of a recent article to critiquing normative justifications for wealth maximization in property.<sup>68</sup>

61. See *infra* Part VII.

62. See *infra* Part VII.A.

63. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 115 (2013). The rest of this Section relies considerably on previous summaries by Rosser, *id.* at 115–27, and John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739, 743–46 (2011).

64. Alexander et al., *supra* note 6.

65. *Id.* at 743–44.

66. Singer, *supra* note 21, at 904, 915–21.

67. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 750 (2009).

68. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 832–60 (2009). Progressive works tend not to distinguish between post-Coasean transaction cost analyses and exclusion theories in this regard; they suggest that works in both groups leave unaddressed hard questions about the relationship between economic analysis and legal legitimacy. See, e.g., *id.* at 823–24 & n.6 (criticizing five different law and economic scholarly works for their “over-reliance on land’s market value . . . in crafting their positive

Works in the progressive property movement have offered alternative justifications for property, and two recurring features loom large in these justifications. First, progressive justifications ground property in normative interests in flourishing, specifically in pluralistic understandings of flourishing. Here, the progressive movement echoes in American legal theory themes prominent in law and property scholarship in Europe and the developing world.<sup>69</sup> In continental European law, property has been understood to have a social function, which “evokes a plurality of values: equitable distribution of resources, participatory management of resources, and productive efficiency,” and leads to specific balances of different values for different “resource-specific property regimes.”<sup>70</sup> Similarly, *A Statement of Progressive Property* grounds property in “plural and incommensurable values” covering life, security, freedom to live life on one’s chosen terms, and flourishing.<sup>71</sup>

Second, because they ground property in pluralistic understandings of flourishing, progressive property theories also tend to oppose the Blackstonian right to exclude portrait of property. Property is often portrayed as a triangular relation between an owner, a thing, and non-owners.<sup>72</sup> Blackstone’s “despotic dominion” image, and cases like *Jacque*, stress the side between the owner and the thing.<sup>73</sup> An account of property cannot make primary the thing-owner side, progressive works argue, without unduly deprecating the other two metaphorical sides.<sup>74</sup> Hence, *A Statement of Progressive Property*

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models of landowner behavior” and stressing the “limited normative significance of economists’ positive findings”).

69. Lovett, *supra* note 63, at 776 n.203; Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 872 (2013).

70. Di Robilant, *supra* note 69, at 872; see Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003, 1004–08 (2011).

71. Alexander et al., *supra* note 6, at 743; see Alexander, *supra* note 67, at 751 (“[H]uman flourishing is a multivariable concept and . . . the multiple relevant components of human flourishing are incommensurable.”); Peñalver, *supra* note 68, at 867 (praising virtue ethics for its “recognition of a plurality of values”); Singer, *supra* note 21, at 944 (“[W]e have plural, incommensurable values and . . . we generally hold to a form of practical reason to decide hard cases in a pragmatic manner.”).

72. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1928) (“Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things.”).

73. See *infra* Section I.A.

74. See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 131 (2000) (“Individuals achieve autonomy not by complete separation from others but by a combination of independence and dependence . . . [or] interdependence . . .”).



warns that the right to exclude is “inadequate as the sole basis for resolving property conflicts or for designing property institutions.”<sup>75</sup> In the same spirit, Eric Freyfogle criticizes conceptions of ownership whereby “landowners possess inherent rights to use their lands intentionally, free of restraint, so long as they avoid visibly harming anyone else.”<sup>76</sup>

As with earlier transaction cost and exclusion theories, the moniker “progressive” does not determine all of the details needed to settle a difficult case such as *Jacque*. Even so, because progressive theories relate property to flourishing and pluralistic values, they have a tendency to encourage legal officials to intervene closely in property disputes. Assume that a plaintiff insists that exclusion from her lot protects one cherished value and that a defendant insists that access to the plaintiff-owner’s lot will facilitate a different and incommensurable cherished value. That conflict seems to force the court to decide which party’s interest is more valuable to the community at large. Thus, when Alexander defends the result in *Jacque*, he does not do so by justifying exclusion as a general strategy, but instead by asking whether the Jacques’ interest in home residence or Steenberg Homes’ commercial interests contribute more to flourishing.<sup>77</sup> Even though Freyfogle disagrees with Alexander about *Jacque*’s outcome, he portrays the stakes in a similar manner: “[E]xactly why did the Jacques . . . possess a legal right to be so uncooperative? No question of privacy was involved, Steenberg Homes was not knocking down crops or otherwise interfering with a land use, and it offered to pay rent.”<sup>78</sup>

#### *E. Lockean Theory*

In short, exclusion theories can explain the function that exclusion serves in property, but they leave doubts about the legitimacy of economic analysis. Progressive property theorists are right to raise those doubts, and they put property on more solid foundations by connecting property to human flourishing. However, progressive property works do not give a satisfactory account of why exclusion might play a role in property law.

75. Alexander et al., *supra* note 6, at 743.

76. ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 2 (2003).

77. See Alexander, *supra* note 67, at 816–17.

78. Eric T. Freyfogle, *The Enclosure of America* 53–54 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07–10, 2007), <http://ssrn.com/abstract=1024846> [<https://perma.cc/F5LU-52GP>].

When faced with an impasse like this, it may be time to step outside the confines of current debates and search for a different perspective. Here, readers should wonder whether any theories of property manage to justify exclusion while reconciling it to flourishing.

This is why this Article takes a longer look at the teachings of John Locke. Many classical liberal justifications for rights take property and flourishing seriously. For example, following the U.S. Declaration of Independence,<sup>79</sup> the North Carolina Constitution declares that it is “self-evident that all persons . . . are endowed by their Creator with certain inalienable rights,” including both “the enjoyment of the fruits of their own labor, and the pursuit of happiness.”<sup>80</sup> Even so, Locke provides a lengthier defense of property than Blackstone and other classical liberal theorists and jurists, he is well known and respected among contemporary scholars, and his justification for property may reasonably be linked to human flourishing.

This last suggestion may sound surprising. Scholars on all sides assume that classical liberal theories of rights can justify the right to exclude—but cannot link property to flourishing. Classical liberal or natural rights theories are assumed to focus on negative rights, autonomy-based rights, or “will”<sup>81</sup> theories of rights.<sup>82</sup> Robert Nozick’s libertarian book *Anarchy, State, and Utopia*<sup>83</sup> is often portrayed in property scholarship as the definitive justification for classical liberal theories of rights.<sup>84</sup> In progressive property works, it is often assumed that classical liberal theories “provide[] a strikingly thin understanding of the social obligations of private ownership”—at which point they cite Nozick.<sup>85</sup> Yet these impressions simply confirm

79. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

80. N.C. CONST. art. I, § 1.

81. On the differences between will- and interest-based theories of rights, see, for example, Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/fall2015/entries/rights/> [https://perma.cc/RWN4-XCNT].

82. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851–52 (1987) (contrasting “traditional liberal” rights to life, liberty, and property with a theory of “human flourishing”); see also *id.* at 1897–903 (portraying traditional liberalism as being preoccupied with negative liberty and portraying Mill’s and Kant’s political theories as exemplary); Singer, *supra* note 21, at 922 (assuming that “classical liberalism” means “separation of the right and the good”).

83. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

84. See, e.g., SINGER, *supra* note 74, at 168; see also Merrill, *supra* note 10, at 497–98 (comparing Locke’s theory of property with Nozick’s).

85. Alexander, *supra* note 67, at 753 n.17; see, e.g., Hanoch Dagan, *The Utopian Promise of Private Law*, 66 U. TORONTO L.J. 392, 393 (2016) (singling out and criticizing

how helpful it would be to take a closer and longer look at Locke. As the Declaration of Independence and the North Carolina Constitution both suggest, many classical liberal actors valued flourishing. Although modern scholars anachronistically read these works to propound primarily-negative theories of rights, classical liberal jurists and theorists actually propounded affirmative, interest-based theories of rights, where the “interests” in question were moral interests in rational flourishing.<sup>86</sup> Philosophical work over the last generation has revealed that linkage, especially in relation to property.<sup>87</sup> That work is getting noticed in the legal academy, as witnessed by Alexander and Peñalver’s observation that Locke’s theory differs substantially from the libertarian “position . . . typically ascribed to him within contemporary property scholarship.”<sup>88</sup>

If Lockean labor theory can be understood in a manner that connects exclusive property rights to flourishing, that understanding may provide a robust alternative to property theories prevalent today. On one hand, if Lockean labor theory is grounded in flourishing,<sup>89</sup> it can help progressive scholars by clarifying the case for exclusive property and reconciling such property to the values exclusion sometimes impedes. On the other hand, if a flourishing-based account of property can justify exclusion, it may offer a foundation for

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Nozick’s entitlement theory as the prime candidate for justifying robust theories of property); Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 448 (2014) (treating Locke’s labor theory as closely resembling Robert Nozick’s entitlement theory and other libertarian theories).

86. See, e.g., BUCKLE, *supra* note 13, at 149–90; PETER C. MYERS, OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY 190–96 (1998); A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 68–120 (1992); GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 135–37 (1995); MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY 220–24 (2002); Thomas G. West, *The Ground of Locke’s Law of Nature*, 29 SOC. PHIL. & POL’Y 1, 1–2 (2012).

87. See, e.g., BUCKLE, *supra* note 13, at 149–90; MYERS, *supra* note 86, at 190–96; SIMMONS, *supra* note 86, at 135–37; ZUCKERT, *supra* note 86, at 220–24; West, *supra* note 86, at 1–2.

88. ALEXANDER & PEÑALVER, *supra* note 14, at 56; see also Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL’Y 283, 284 (2012) (arguing, as a matter of hermeneutics and intellectual history, that Locke’s theory of labor “refers to production, which has intellectual as well as physical characteristics, and his concept of value serves his moral ideal of human flourishing”).

89. Or, in the alternative, Lockean political and property theory can be reconstructed so as to be compatible with flourishing-based foundations. I am persuaded that Locke was a eudaemonist or a flourishing-based theorist. In case I am wrong as a matter of hermeneutics and intellectual history, however, I have structured the presentation of productive labor theory that follows so that the theory rests on flourishing-based foundations anyway.

property rights currently lacking in economically-based exclusion theories. To explore this possibility, the next four Parts of this Article connect labor to flourishing and exclusive property rights. The next Part starts with the linkages between flourishing and labor.

## II. PRODUCTIVE LABOR

### A. *Flourishing*

It is perfectly understandable why Locke has been portrayed as a libertarian and not a flourishing-based natural lawyer. As Blackstone is remembered for his “despotic dominion” passage early in Book II of his *Commentaries*,<sup>90</sup> so Locke is remembered for this claim very early in his second treatise: “[A]ll Men are naturally in . . . a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons, as they think fit within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.”<sup>91</sup> This passage makes Locke’s program sound like one of negative liberty and autonomy-based rights, and Nozick cites this passage as a point of departure.<sup>92</sup>

Even so, Locke does rely on a flourishing-based approach to morality. The phrase “within the bounds of the Law of Nature” limits the freedom Locke describes within the bounds of the natural law.<sup>93</sup> Although this passage may not seem significant to libertarians, it limits and focuses the freedom Locke justifies—as Locke shows when he criticizes suicide.<sup>94</sup> More relevant to property, although people do not need to take “leave” from neighbors to enjoy their rights, their rights need to be structured with due and sociable respect for the rights of others. Deeper in the recesses of the *Two Treatises*, Locke also intimates that “Law, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest,” and is always implicitly measured by whether its subjects “[c]ould . . . be happier without it.”<sup>95</sup> And in his *Essay Concerning Human Understanding*, which “establish[es] secure rational

90. 2 BLACKSTONE, *supra* note 1, at \*2.

91. LOCKE, *supra* note 8, § II.4, at 269.

92. See, e.g., NOZICK, *supra* note 83, at 10.

93. LOCKE, *supra* note 8, § II.4, at 269.

94. See *id.* §§ II.6, II.135, at 271, 357 (stating that no one should destroy “himself” or “his own Life”); see also George Windstrup, *Locke on Suicide*, 8 POL. THEORY 169, 175 (1980).

95. LOCKE, *supra* note 8, § II.57, at 305.

foundations for morality” assumed in the *Two Treatises*,<sup>96</sup> Locke suggests that “*Morality is the proper Science, and Business of Mankind in general*; (who are both concerned, and fitted to search out their *Summum Bonum*).”<sup>97</sup>

These passages reflect the main hallmarks of a flourishing-based morality. *Summum bonum* refers to a highest or complete good, i.e. the happiness of a mature and rational actor.<sup>98</sup> In contrast with deontological and consequentialist metaethical groundings, which ground morality (respectively) in the logical structure of the obligations that arise from moral agency, or in good consequences, flourishing-based theories (often called “eudaimonist” theories) make “primitive” or “morally fundamental”<sup>99</sup> a complete, rational, and objective understanding of happiness.

### B. *Rights*

Yet if Locke grounds political rights in “happiness,” a *summum bonum*, and other concepts associated with flourishing, why do rights loom so large in his political theory? In short, there are two ideal strategies for promoting flourishing. In one, the government or community leaders determine which conditions will help each person flourish, and they design laws and government policies to pursue those conditions. In the other, the government declares and protects individual rights in the hope and expectation that people will use their rights to pursue forms of flourishing they find particularly gratifying. Although Locke relies on the former strategy to a limited degree, he relies considerably more on the latter.<sup>100</sup> He also makes the latter strategy central in his arguments and imagery.<sup>101</sup>

96. See JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY* 94 (2002).

97. LOCKE, *supra* note 27, bk. I, ch. xii, § 11, at 646; accord JOHN LOCKE, *Some Thoughts Concerning Education* (1963), in *SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE HUMAN UNDERSTANDING* 10 (Ruth W. Grant & Nathan Tarcov eds., 1996) (proposing that children be educated to be content, civil, and useful toward others, capable of discerning what will make them objectively happy, and capable of attaining such happiness).

98. See West, *supra* note 86, at 30–31, 36–37.

99. See Jonathan Wolff, *Scanlon on Well-Being*, in *ON WHAT WE OWE TO EACH OTHER* 32, 33–34 (Philip Stratton-Lake ed., 2004); Rosalind Hursthouse, *Virtue Ethics*, *STAN. ENCYCLOPEDIA OF PHIL.* (Edward N. Zalta ed., 2016), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [<https://perma.cc/2YFG-XXRQ>] (explaining further the concepts of flourishing-based morality and eudaimonia).

100. See *supra* Section I.E.

101. See *supra* Section I.E.

Although Part VI will recount the reasons for this preference at greater length,<sup>102</sup> one justification should suffice for the time being—what might be called “epistemological mediocrity.” A natural rights political program tries to be realistic and sober about what government can do. In post-Coasean transaction cost scholarship, scholars optimistically assumed that “[judges] may be able to approximate the [economically] optimum definition of property rights.”<sup>103</sup> Many political philosophers are not nearly as optimistic. As Singer recently explained, “Long ago Aristotle argued that we cannot expect exactitude in the realm of moral reasoning . . . . He began his *Nicomachean Ethics* by noting that ‘[o]ur discussion will be adequate if it has as much clarity as the subject-matter allows . . . .’ ”<sup>104</sup> Notwithstanding their differences on many other important matters, Locke agrees with Aristotle in this respect. Although Locke concedes that “Knowledge and Certainty” can be attained in math and some parts of the physical sciences, human affairs are stuck in a “State of *Mediocrity*” in which actors can only attain to “Judgment and Opinion.”<sup>105</sup>

At the same time, Locke worries far more than Aristotle seemed to worry about epistemological mediocrity in designing political theories and institutions. Because people’s knowledge and wisdom are bounded, classical liberals suspect, government promotes flourishing best when it acts indirectly.<sup>106</sup> Often enough, government is incompetent at ascertaining what uses and activities best promote flourishing. Government is least incompetent at securing the low-common-denominator elements of flourishing—life, health, security, and the capacity to enjoy love and friendship in families and simple associations. Because “these generic goods constitute a natural

102. Part VI does not cover one other factor relevant to Locke’s theory of politics—a political program of duties has a tendency to make citizens submissive and expectant that the political sovereign will take care of their problems for them. Buckle, *supra* note 13, at 149–50 (stressing that “self-preservation enjoys a priority” in the Two Treatises); SIMMONS, *supra* note 86, at 95–102 (explaining how Locke’s theory of politics shifts from a theory centered on duties and obedience to God to one centered on rights and self-reliance in the protection of those rights). A political program of rights encourages citizens to be spirited and use self-help to take care of their own problems. See SIMMONS, *supra* note 86, at 68–86.

103. POSNER, *supra* note 42, § 3.6, at 67.

104. Singer, *supra* note 21, at 930–31 (alteration in original) (quoting ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 3, at 5 (John Warrington ed. & trans., M.M. Dent & Sons Limited 1963) (350 B.C.E.)).

105. LOCKE, *supra* note 27, bk. IV, ch. xii, § 10, at 645.

106. LARRY ARNHART, *POLITICAL QUESTIONS: POLITICAL PHILOSOPHY FROM PLATO TO PINKER* 490 (4th ed. 2016).

standard for the human good,” government promotes flourishing as best it can when it “properly enforce[s] the conditions for people to have the liberty to pursue their *summum bonum* in the natural and voluntary associations of civil society.”<sup>107</sup> Although Nozick does not embrace this approach himself, he fairly describes it as a serious alternative to libertarian thought. Even though “there is a kind of life that objectively is the best for [each person,] . . . [p]eople are different, so that there is *not* one kind of life which objectively is the best for everyone . . . .”<sup>108</sup> In such a regime, a just community should define basic rights, to life, liberty, property, and basic association, and then let people seek their own preferred forms of rational flourishing in the free exercise of their rights.

Before we study intricate details of property law, consider how this strategy applies in simpler settings, involving relatively basic legal rules protecting the integrity of the human person. The *prima facie* action for battery resembles closely the *prima facie* action for trespass to land: an unauthorized touching of the plaintiff’s person is a battery.<sup>109</sup> Although secure control of one’s body does not lead directly to any one way of life, it is a necessary precondition for all rational and flourishing lives. Now, if battery were the only doctrine specifying the extent of bodily liberty, some people might sell themselves into slavery or engage in prostitution. Yet those activities are not consistent with rational understandings of human happiness for their participants, and they also threaten the rights of other members of the community insofar as the existence of those institutions encourage others to view their neighbors as potential tools for their economic projects or sexual gratification.<sup>110</sup> Some supporters of natural rights might argue that mature actors should be free to enter into consensual slave-master or prostitute-client relations.<sup>111</sup> Yet the differences between those positions reinforce

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107. *Id.*

108. NOZICK, *supra* note 83, at 310.

109. See, e.g., *Wishnatsky v. Huey*, 584 N.W.2d 859, 860 (N.D. Ct. App. 1998); see also RESTATEMENT (SECOND) OF TORTS, *supra* note 29, §§ 18–19 (stating that battery results when there is an unauthorized touching, intended to cause harm, that would offend “a reasonable sense of personal dignity”).

110. See Julia O’Connell Davidson, *The Rights and Wrongs of Prostitution*, HYPATIA, May 2002, at 84, 85–86 (2002) (describing how bargaining for labor—sexual or not—theoretically requires “seller[s] to temporarily surrender or suspend aspects of [their] will[s]”).

111. See NOZICK, *supra* note 83, at 331 (arguing that a free system should allow for consensual slave-master relationships); CHRIS MATTHEW SCIABARRA, TOTAL FREEDOM: TOWARD A DIALECTICAL LIBERTARIANISM 6 (2000) (explaining that some libertarians

broader contrasts between libertarian understandings of rights and classical liberal, flourishing-based alternatives. Even though both approaches value rights highly, in the latter approach rights need to be justified by the extent to which they facilitate rational flourishing within a common moral and social order supporting everyone's efforts to flourish. The classical liberal approach marks off a few outer-limit prohibitions on what people may do with their bodies.<sup>112</sup> It entrusts authorities with responsibility to institute and enforce public morals restrictions supporting those prohibitions.<sup>113</sup> Otherwise, it bets that most people have enough self-interest and motivation to use broad freedom to pursue rationally defensible forms of human flourishing.

### C. Labor

This background gives "labor" its justification and focus. Since labor is justified in relation to flourishing, labor constitutes intelligent, purposeful activity contributing to rational flourishing in some respect. Yet a rights-based regime focuses on life, security, and other low and solid preconditions for flourishing. People may bracket their disagreements about the best ways of life, and agree to respect one another's rights to engage in activities contributing to "the Subsistence and Comfort of [an actor's] Life,"<sup>114</sup> or "the best advantage of Life, and convenience."<sup>115</sup>

In that context, "labor" comes to mean the right to engage in activity pursuing survival or legitimate forms of thriving. That is why Australian philosopher Stephen Buckle defines "labor" as "rational (or purposeful), value-creating activity...directed toward the preservation or comfort of our being."<sup>116</sup> Similarly, American philosopher John Simmons defines it as "free, intentional, purposive action aimed at satisfying needs or supplying the conveniences of life."<sup>117</sup>

So construed, a right to labor stands in a middle ground between autonomy-based libertarian theories on one side and progressive property theories on the other. On one hand, a labor-based approach

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strongly defend people's rights to engage in any social activities and relationships, including prostitution).

112. LOCKE, *supra* note 8, §§ II.6, II.135, at 271, 357.

113. See Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, 25 SOC. PHIL. & POL'Y 201, 223–24 (2008).

114. LOCKE, *supra* note 8, § II.92, at 209.

115. *Id.* § II.26, at 286.

116. BUCKLE, *supra* note 13, at 151.

117. A. John Simmons, *Makers' Rights*, 2 J. ETHICS 197, 210 (1998).



imposes responsibilities on property use and ownership not implied in libertarian theories. As a flourishing-based right to life bars suicide, so a flourishing-based right to labor entails a responsibility to use property productively.<sup>118</sup> That responsibility automatically rules out “acts of destruction or mere amusement.”<sup>119</sup> Nozick famously asked whether someone can appropriate a sea by pouring Carbon-14 radioactive tomato juice in it,<sup>120</sup> and Jeremy Waldron asked whether someone could appropriate a vat of cement by placing a ham sandwich in it before the cement hardened.<sup>121</sup> These hypotheticals test several features of labor, including whether the concept covers activity that exerts positive effort of no or negative moral value. It does not. In neither hypothetical does the actor contribute to anyone’s well-being; the juice and sandwich are instead made useless to human survival or improvement.<sup>122</sup>

On the other hand, once it is shown that someone engages in some non-trivial and rational labor, productive labor theory takes a tack sharply different from progressive property theories. As Section I.D explained, those theories often resolve such choices by comparing or balancing the disputants’ use claims. Because productive labor theory is part of a theory of rights, it defers such comparisons as long as is practically feasible. If one party has priority in relation to a resource and deploys it to *some* non-trivial, beneficial life use, that dedicated use should not be balanced against the needs or wishes of others without a clear justification. *Jacque* provides an excellent illustration as well. The road-blocking blizzard might create a situation in which interest balancing might be unavoidable.<sup>123</sup> Ordinarily, however, it is preferable to give parties clear authority over their own resources and to warn them to refrain from disrupting others’ management of *their* own resources. Because the *Jacques* held title to their lot,<sup>124</sup> their use plans deserved presumptive priority and respect.

118. See *supra* note 94 and accompanying text.

119. BUCKLE, *supra* note 13, at 151.

120. See NOZICK, *supra* note 83, at 175.

121. See Jeremy Waldron, *Two Worries About Mixing One’s Labour*, 33 PHIL. Q. 37, 43 (1983).

122. See BUCKLE, *supra* note 13, at 152–53; see also Claey, *supra* note 14, at 23–24; Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 159–60 (2002).

123. See *supra* notes 28–35 and accompanying text; *infra* Section IV.D.2 (explaining further the character of exclusive property and property rights).

124. *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154, 156 ¶ 2 (Wis. 1997)

## III. PRODUCTIVE LABOR AND PROPERTY

A. *The Social Dimensions of Property*

In the portrait just given of *Jacque*, the decisive factor is that the Jacques already owned their lot. By giving conventional property rights great weight, that portrait may reinforce the impression that so concerns progressive property scholars: that property consists of a normative relation in which an “owner has a right to exclude others and owes no further obligation to them.”<sup>125</sup> Productive labor theory does not create such a normative relation. To explain why, however, we must consider how labor rights justify property.

A *Statement of Progressive Property* claims that property rights must “look to the underlying human values that property serves and the social relationships it shapes and reflects.”<sup>126</sup> But progressive property theories are not the only ones to justify property rights as social relations,<sup>127</sup> and productive labor theory has its own distinct account of those relations. One can see as much from the problem Locke takes as his point of departure: “[H]ow Labour could at first begin a title of Property *in the common things of Nature . . .*”<sup>128</sup> In a community without organized government, all resources are open for use by all. This presumption for open access represents not only a “mere starting place” but also “a concrete expression of the equal standing of, and the community relationship between, all people.”<sup>129</sup> To appropriate a usable thing and exclude others from accessing it, a prospective appropriator must show that private property respects the claims of all the people interested in that resource better than open access does.

Productive labor theory makes four different considerations relevant to that showing. Two considerations are prerequisites that a prospective appropriator must demonstrate to justify appropriation: productive use and claim-marking, discussed in Section III.B and Section III.C below, respectively. The other two considerations are overrides, considerations that non-proprietors may invoke to limit

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125. Alexander, *supra* note 67, at 747.

126. Alexander et al., *supra* note 6, at 743.

127. See, e.g., MACLEOD, *supra* note 23, at 173–215 (justifying correlative property rights on the basis of perfectionist political theory).

128. LOCKE, *supra* note 8, § II.51, at 302 (emphases removed and added).

129. Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138, 167 (Stephen R. Munzer ed., 2001).

claims to resources already appropriated. These overrides, sufficiency and necessity, are discussed in Section III.D below.

### *B. Productive Use*

The first prerequisite—productive use—should be easy to appreciate. If a person discovers and starts using a resource in a manner that improves that person’s well being, he has engaged in commendable conduct. His effective “expansion of the available social resources” entitles him to continue his use, manage the resource, and enjoy the benefits that follow from it.<sup>130</sup> Because labor and property are both justified in a rights-based framework, the productive use requirement is relatively easy to satisfy. In Western prior appropriation law, it is only the occasional extreme case, like using water to flood gopher holes, where an actual use of water fails to count as a “beneficial use” establishing an appropriative right.<sup>131</sup> With productive labor, if a resource contributes to any intelligible degree to someone’s survival or improvement, that contribution satisfies productive use.

Yet productive use also limits property rights. As nonuse can lead to the abandonment or forfeiture of an usufructuary right in appropriation doctrine, nonuse also causes a property right to expire in a labor-based morality.<sup>132</sup> A laborer acquires only as much property “as any one can make use of [the resource] to any advantage of life before it spoils. . . . whatever is beyond this, is more than [the proprietor’s] share”<sup>133</sup> and remains open to others’ discovery and beneficial use.

So structured, the productive use requirement anticipates and encompasses many social obligations or limitations on property rights recently discussed elsewhere. Some portraits of Lockean labor theory include a waste proviso; spoliation is one of many ways in which a proprietor may violate the productive use requirement.<sup>134</sup> Recent works have stressed several social duties for owners: to maintain their

130. See BUCKLE, *supra* note 13, at 154.

131. See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. 1935) (gopher holes); see also Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today’s Western Water Law*, 83 U. COLO. L. REV. 675, 676–77 (2012) (providing a general background to “beneficial use” and appropriative rights).

132. See, e.g., *E. Twin Lakes Ditches & Water Works, Inc. v. Bd. of Cty. Comm’rs of Lake Cty.*, 76 P.3d 918, 921 (Colo. 2003).

133. LOCKE, *supra* note 8, § II.31, at 290.

134. See *id.* §§ II.38, II.46, at 295, 300 (respectively); SIMMONS, *supra* note 86, at 285–88; JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 207–09 (1988).

property in good condition,<sup>135</sup> not to destroy their property needlessly,<sup>136</sup> or to use their property solely or primarily with spite or malice.<sup>137</sup> In productive labor theory, all of these various obligations are penumbras emanating from a more fundamental imperative of productive use.

### C. *Claim-Marking*

The second prerequisite for labor-based property is an element called here “claim-marking.” When claimants use resources, they must stake claims to them and maintain those claims in ways that other members of the same community are reasonably likely to understand and respect. In law, this standard often generates requirements for appropriation, clear possession, or diversion.<sup>138</sup> To avoid confusion with any particular legal term, the requirement will be referred to here as a responsibility of “claim-marking.”

Claim-marking is a major adaption to property’s social character. Many basic moral rights relating to life and liberty can be fairly simply: by the private law rules on battery<sup>139</sup> or public law “prohibitions against killing, raping, and maiming.”<sup>140</sup> Property rights and obligations should not be so simple because all individuals in a community deserve equal opportunities to use resources for their own life goals. When anyone intends to appropriate a resource, that person owes fellow community members a duty to make her appropriation reasonably clear. As Simmons explains, “Labor must show enough seriousness of purpose to ‘overbalance’ the community of things. . . . One’s labor need not be completed to ‘begin a property,’ but it must (to abuse legal language) constitute a real ‘attempt’ and not ‘mere preparation.’”<sup>141</sup> Property claimants respect their neighbors when they engage in “real attempts” to appropriate and use resources; claimants do not respect their neighbors’ equal

135. See generally Shoked, *supra* note 85 (chronicling various settings in which a “duty to maintain” has been imposed).

136. See generally Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005) (discussing the evolution of the right to destroy one’s own property).

137. See generally Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444 (2013) (describing limitations on a property right when the owner’s objective is to cause harm).

138. See generally Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (analyzing the means by which property becomes “possessed” in classic American case law).

139. See *supra* text accompanying notes 109–13.

140. MACLEOD, *supra* note 23, at 1.

141. SIMMONS, *supra* note 86, at 272 (quoting LOCKE, *supra* note 8, §§ II.40, II.51, at 296, 302 (respectively)).

opportunities to appropriate resources for *their* own purposes when they claim resources on the basis of “mere preparation.” In Locke’s terminology, appropriative effort does not constitute morally-deserving labor unless it “put[s] a distinction between [appropriated resources] and common.”<sup>142</sup>

In easy cases, the conduct that establishes productive use simultaneously marks the relevant claims. The labor that tills land simultaneously, “as it were, inclose[s] it from the Common.”<sup>143</sup> In hard cases, however, productive use and claim-marking can diverge. Thus, if a land prospector discovers new land in an airplane survey, the discovery by itself does not appropriate the land. Even if someone pours Nozick’s Carbon-14 laced tomato juice into a sea for what clearly seems a productive use (for example, to feed fish), the pouring does not stake boundaries clear enough to demarcate what part of the sea has been appropriated.<sup>144</sup> In neither case is the claimant respectful of others’ equal opportunities to use land or sea water.

#### *D. Provisos: Necessity and Sufficiency*

Morally, productive use and clear claim-marking establish a moral property right. When a claimant acquires property, however, that property does not entitle the proprietor to exclude others with no further obligation. Analytically, labor-based moral rights include a liberty, or Hohfeldian privilege, to use the resource, and a claim-right to be free from interference while using it.<sup>145</sup> But the liberty and claim-right may both be overridden if and when others in society can prove that their preservation- or improvement-related needs are more urgent than the owner’s property. The other two elements of labor—the necessity and sufficiency provisos—describe these overrides. Analytically, and from the perspective of the owner, these provisos describe exposures (Hohfeldian no-rights) to the possibility that non-owners may use the objects of their property without their

142. LOCKE, *supra* note 8, § II.28, at 288.

143. *Id.* § II.32, at 291.

144. See NOZICK, *supra* note 83, at 174–75.

145. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913) (proposing an analytical taxonomy of obligations encompassing claim-rights and duties, no-rights and privileges, powers and liabilities, and disabilities and immunities). Stephen Munzer suggests that the liberty comes with a Hohfeldian power to convert what had been an unowned resource into an owned resource. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 263–64 (1990). Munzer focuses on the jural relations before a prospective owner appropriates a resource, *id.*; this Article’s text focuses on the relations in effect after appropriation.

consent, and duties to refrain from interfering with proviso-exercisers' legitimate activities.

These two provisos operate in morality as limits on riparian water use do in traditional riparian law. In riparian law, riparians may divert water, subject to exposures when their neighbors need water for essential life uses or claim equal opportunities to consume water for their own wants.<sup>146</sup> In productive labor theory, the necessity (or charity) proviso reflects the limit protecting non-owners with basic life needs. Even though Lockean natural rights theory is structured to avoid picking and choosing between different forms of flourishing,<sup>147</sup> that preference may be overridden in extreme cases. If a non-owner's "pressing Wants . . . where he has no means to subsist otherwise" turn on access to an owner's good, the owner may not "justly make use of another's necessity."<sup>148</sup>

The other proviso is the sufficiency proviso. The same capacities and interests that entitle any one person to appropriate and labor on resources entitle others to appropriate similar portions of those resources for their own life goals.<sup>149</sup> Accordingly, a farmer may acquire property in relation to farmland by fencing and farming it. But if he appropriates more land initially than was consistent with others' appropriating similar areas for their own uses, the excluded non-owners may cite the sufficiency proviso to force the farmer to give up land to the point that they have "enough, and as good" as the farmer.<sup>150</sup>

#### IV. PRODUCTIVE LABOR'S JUSTIFICATION FOR EXCLUSIVE PROPERTY

In short, when "labor" is justified in relation to survival and rational improvement, it yields a social account of property. Proprietors are linked to non-owners by four correlative moral obligations: duties to use their property productively, duties to keep declaring claims to it, exposures to others' urgent needs, and exposures to others' liberties to acquire and use resources sufficient

146. See, e.g., *Evans v. Merriweather*, 4 Ill. 492, 492 (3 Scam) (1842) (depicting a dispute between two mill owners operating their businesses at different points on the same stream during a drought).

147. See *supra* Section II.B.

148. LOCKE, *supra* note 8, § I.42, at 170. See generally Steven Forde, *The Charitable John Locke*, 71 REV. POL. 428 (2009) (arguing that Locke's view of property contains, at its core, a concern for the common welfare).

149. LOCKE, *supra* note 8, § II.33, at 291.

150. *Id.*, §§ II.27, II.33, at 288, 291 (respectively); see also BUCKLE, *supra* note 13, at 159–60; SIMMONS, *supra* note 86, at 288–98.

for their own equal opportunities.<sup>151</sup> Those linkages make labor-based moral property rights usufructs, rights to use and consume resources, limited by others' having rights to access, use, and consume them on similar terms. If moral property rights have this usufructuary character, however, labor-based property rights seem to have the same problem as all the other justifications recounted in Part I. Labor seems incapable of justifying the exclusive and trespassory character of property rights. As Eric Freyfogle has asked, should we not expect usufructuary moral rights to justify "private owners holding something akin to use rights, tailored to respect the common good"?<sup>152</sup> Part IV and Part V take up these questions. This Part explains how labor justifies exclusive legal rights, and the next Part shows how the sufficiency proviso institutes important limitations on those rights.

#### A. *Practical Reasoning About Substantive Property Rights*

When scholars wonder whether property rights should limit "private owners [to] something akin to use rights," they make a demanding expectation on a moral theory of rights. If legal rules do not track closely the elements of the justifying theory, the expectation holds, they violate the theory's principles.<sup>153</sup> Although this expectation is understandable, it seems unrealistic and uncharitable in many settings. Many moral theories, and especially flourishing-based theories, tolerate a considerable amount of slippage between moral foundations and practical reasoning.<sup>154</sup>

The expectation mistakenly suggests that productive labor theory is supposed to supply a specific template for law and politics. Not so. Productive labor theory provides general standards by which specific laws and practices may be judged legitimate or unsatisfactory. Moral philosophers commonly use speed limits and side-of-the-road driving restrictions to illustrate the relation between moral rights and legal rules.<sup>155</sup> Conventional property rights and regulations relate to labor as traffic rules relate to personal interests in safety and liberty to travel. The elements of productive labor supply a "great Foundation" for property rights,<sup>156</sup> which is to say they lay down fundamental goals

151. See *supra* Part III.

152. FREYFOGLE, *supra* note 76, at 239.

153. See Smith, *supra* note 28, at 963–71 (critiquing this tendency in Alexander, *supra* note 67).

154. See text accompanying *supra* notes 105–06.

155. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 285–86 (2d ed. 2011).

156. LOCKE, *supra* note 8, § II.44, at 298; see *supra* Part III.

by which conventional property rules should be judged legitimate or illegitimate. The elements may and often do fill in middle-level concepts and working strategies in different property doctrines, such as the general presumption that any non-trivial and beneficial use of a resource establishes a good property claim.<sup>157</sup> Yet conventional rules need not track the elements of labor directly—not if they facilitate those elements more effectively through indirect strategies.

As a result, it is not automatically self-contradictory or unjust for a labor- and use-based system of property law to recommend rights to exclude without express use, claim-marking, or sufficiency requirements. Productive labor moral norms may justify instituting two- or multi-level strategies in positive law. Presumptive rules may be instituted for easy situations when proprietors clearly seem to deserve property or to be disentitled from having property, and exceptions or balancing tests may be reserved for borderline cases. When labor-based norms do justify multi-level reasoning, all the relevant property rules should be judged in totality as applied across a representative range of recurring disputes. The standard of judgment is whether the rules seem to facilitate, require, and protect the free opportunities of owners to labor for different goals and respect the claims of non-owners, as a practical and reasonable hypothetical onlooker would find appropriate. This is the habit of “practical reason” so lacking in recent property scholarship<sup>158</sup>—and the mode of reasoning that welfarists and theorists interested in non-Lockean theories of rights should consider more closely.

#### *B. The Practical Case for Rights of Exclusive Control*

Once this confusion about practical reasoning is dispelled, exclusive control becomes easier to justify. Legal officials should institute usufructs in some situations, rights of exclusive control in others, and combinations of those two basic alternatives in others. Each system should be instituted when it seems reasonably likely to facilitate the free and concurrent exercise of different labor-based interests—by an owner, by neighbors, and by non-owners with needs to use the resources in question. Different systems may apply better to different resources, economies, and communities. In a community in which fresh water is fairly plentiful for private uses, it may be appropriate to keep riparian water rights limited, both to conserve

157. See *supra* Section III.B.

158. See *supra* notes 21–25 and accompanying text.



river water for public uses and to protect riparian land.<sup>159</sup> For land and tangible personal articles, however, exclusive control makes considerable sense.

Three reinforcing arguments justify exclusive property from a labor theory. First, exclusive control expands people's freedom, their autonomy, and their capacity to be self-governing agents. As Simmons explains, "Self-government is only possible . . . if the external things necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require. Use rights will not suffice for any even moderately elaborate plans or projects."<sup>160</sup> In a system of use rights, every user's plans may conflict with and require coordination with the plans of others. In a system with strong control within clear boundaries, people are freed from needing to coordinate with others. That freedom empowers them then to dedicate their resources to ever more individuated and specialized uses—for residential or commercial goals, for utilitarian or idealistic and expressive goals, and so on.

Next, exclusive control also serves virtue-theoretic functions. In Locke's terms, exclusive control discourages "the Fancy or Covetousness of the Quarrelsome and Contentious" and encourages "the use of the Industrious and Rational."<sup>161</sup> In commonsense terms, control encourages the form of sociability embodied in the phrase, "good fences make good neighbors." In a regime with usufructs and open access, there are plenty of incentives to consume more than one's fair share of the resources currently available. There are no incentives to be self-restrained and to produce more resources; there are instead incentives to complain when other parties consume more than their fair shares. Separately, industriousness toward property encourages important republican civic virtues as well. When people live in communes or open-access regimes, the communities often develop family or status hierarchies to settle conflicts.<sup>162</sup> Those hierarchies make leaders bossy and followers passive and servile.<sup>163</sup> By contrast, when people manage their own land, they become habituated to think about managing their own families, jobs, and life

159. See generally Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990) (discussing the evolution of proprietary water rights in English and American law as applied to various resource availability scenarios).

160. SIMMONS, *supra* note 86, at 275.

161. LOCKE, *supra* note 8, § II.34, at 291.

162. See Ellickson, *supra* note 4, at 1346–62. Ellickson documented these tendencies in Israeli kibbutzim, Hutterite colonies, and Woodstock era communes. *Id.*

163. *Id.*

goals generally. As such, they are more likely to react in a spirited fashion when someone else presumes to tell them what they may or may not do on their own lots.

Exclusive ownership has these virtue-inculcating tendencies because of a third factor: productivity. Quite often, under exclusive property, “the *Property of labour* should be able to over-balance the Community of Land” and other resources unowned and subject to open access, because “*Labour . . . puts the difference of value* on every thing.”<sup>164</sup> For the right resources and conditions (again, land or chattels, in a community with a commercial economy) exclusionary rights serve several overlapping functions. Because rights to exclude others reduce conflicts between different usufruct-holders, they increase security and facilitate investment and long-range planning. Because such rights are simpler to administer, they make it easier for owners to coordinate the uses of their land with other people’s labor or non-land property. Security, flexibility, and other similar advantages encourage owners to produce from land what Locke colorfully estimated as being one hundred or one thousand times as many conveniences of life as could be produced without property and intensive cultivation.<sup>165</sup>

To be sure, all of these justifications are implicitly at least partly empirical. Yet general knowledge about human behavior also has an empirical dimension. Since law and politics operate in epistemological mediocrity, legal officials may legislate relying on these generalizations and justifications until someone produces more reliable empirical evidence. Another of the functions of a flourishing-based moral theory is to help develop a presumptive framework for understanding how people may be predicted to behave in response to different legal rules. This framework helps identify criteria of “relevancy” or “salience” to test the framework and its quasi-empirical predictions. Here, even if Locke’s multipliers are a bit hyperbolic, his basic point has empirical support. From the years 1700 to 2000, the average incomes of the peoples in the United States, Japan, and Western Europe increased roughly fifty-fold,<sup>166</sup> and in these same countries objective metrics of lifespan and health improved similarly.<sup>167</sup> By contrast, the usufructuary property that

164. LOCKE, *supra* note 8, § II.40, at 296.

165. *See id.* §§ II.40, II.43, at 296, 298 (respectively).

166. *See* ROBERT WILLIAM FOGEL, *THE ESCAPE FROM HUNGER AND PREMATURE DEATH, 1700–2100*, at xv (2004). It is unclear whether or not this source accounts for inflation in this calculation.

167. *Id.*

Native Americans maintained in game animals limited their economic activity, the fur trade, to available habitat.<sup>168</sup> Anthony Bottomley discovered a case study in the province of Tripolitania, Libya. Approximately three percent of land in that province was privately held, but experts believed that a substantial portion of the land held in common was as productive as the privately owned land.<sup>169</sup> The property status of the land correlated with the choices of uses, with the private land being dedicated toward labor-intensive and high-value products (like almonds) and the common land being used for *non*-labor-intensive and lower-value uses (such as grazing and growing barley).<sup>170</sup> Hernando de Soto's work has shown how conventional title increases security and growth significantly over non-conventional, use-based prescriptive claims.<sup>171</sup>

Of course, these justifications for exclusive property may still be over-inclusive. Owners may, and in practice some will, use their land in ways that contravene the expectations just sketched. Still, practical officials may reasonably bet that selfish priorities will motivate most owners to defend their lots and use them productively. If and when they do, officials will need to ask the question created by any consequentialist system of reasoning: How overinclusive or underinclusive can a specific legal rule be before its justification ceases to justify it?

In addition, overinclusivity may not undermine a presumptive right of exclusive property; it may instead justify limits. Productive labor theory supplies a conceptual structure and normative vocabulary for narrowing and settling disagreements over property. Here is where productive labor theory resembles Smith's two-tiered portrait of exclusion and governance.<sup>172</sup> Exclusive rights apply presumptively when clear boundaries and strong delineations of managerial authority facilitate different people's labor more

168. See ANN M. CARLOS & FRANK D. LEWIS, *COMMERCE BY A FROZEN SEA: NATIVE AMERICANS AND THE EUROPEAN FUR TRADE 182–83* (2010).

169. Anthony Bottomley, *The Effect of the Common Ownership of Land Upon Resource Allocation in Tripolitania*, 39 LAND ECON. 91, 91 n.2 (1963).

170. *Id.* at 92–93. See generally Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 90 (Terry L. Anderson & Fred S. McChesney eds., 2003) (presenting examples of other similar studies, most of which involve the husbanding and production of animals).

171. See generally HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott trans., Harper & Row 1989) (chronicling the phenomenon of Peru's black market economy in the late 1970s through the early 1980s).

172. See Smith, *supra* note 18, at 453–55; see also text accompanying *supra* note 18.

effectively than use-based property systems.<sup>173</sup> When clear and convincing proof suggests that owners are not using exclusive rights as productively or as vigilantly as they ought, the system may institute “governance” overrides divesting owners of their rights.<sup>174</sup> Furthermore, use-based “governance” overrides may also be appropriate when non-owners have unusually strong sufficiency or necessity claims on owned resources.<sup>175</sup>

### C. *The Conceptual Character of Exclusive Property*

This multi-tiered approach to property is not appreciated sufficiently, largely because contemporary theorists assume that a classical liberal theory of property must justify property understood as a normative relation in which an “owner has a right to exclude others and owes no further obligation to them.”<sup>176</sup> As shown, statements like these assume that classical liberal property has no relation to interests in flourishing or social relations. Statements like these are troubling in two conceptual respects as well.

One conceptual issue relates to the character of “property.” Property rights can be strong without being unqualified rights to exclude. Historically, in Anglo-American law, property has not been understood as an unqualified right to exclude.<sup>177</sup> One encyclopedia defined property as “that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others.”<sup>178</sup> Analytically, this understanding is better conceived of as a right of exclusive use. “Rights” of “exclusive use” give proprietors presumptive priority to possess, control, and manage their things for a wide range of goals (hence, in the encyclopedia definition, “indefinite” “user and disposition”). Yet such rights are limited (only “*generally* to the exclusion” of others), and they are limited specifically to reconcile the use-interests that owners and non-owners have in relation to ownable

173. See Smith, *supra* note 18, at 453–55.

174. *Id.*

175. *Id.*

176. See Alexander, *supra* note 67, at 747.

177. See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) (“A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity.”); see also Epstein, *supra* note 4, at 2108 n.47, 2109–10 (citing *Ploof*, 71 A. at 189).

178. *Property*, THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 284 (John Houston Merrill ed., 1892).

things.<sup>179</sup> Rights of exclusive use can expire when owners do not deserve broad managerial control, or when non-owners have particularly strong claims to access or use others' resources.<sup>180</sup> Thus, when scholars criticize the Anglo-American legal tradition for enforcing an unqualified or overly strong right to exclude,<sup>181</sup> they criticize it for a commitment alien to the sources.

Although this criticism is misplaced, it is understandable, because the *prima facie* claim for trespass does seem to embody an unqualified right to exclude.<sup>182</sup> Yet this perception reveals the second misconception—that the analytical content of property lies in the *prima facie* cause of action for trespass to land. Property rights, like all other substantive rights protected in tort (and by contract, or in remedies), have a complex relation to the torts (and other corrective private law doctrines) by which they are protected. Different *prima facie* torts, defenses, and remedial doctrines are all structured to implement the norms prescribed by the substantive property rights a community finds agreeable. By the same token, however, to identify the analytical property rights protected in a legal system, one cannot look solely to a tort like trespass. One must instead perform the legal equivalent of a subtraction operation. The *prima facie* cause of action supplies the minuend. Subtrahends come from relevant defenses, remedy limitations, and extra requirements to the *prima facie* action for special situations. The difference in this operation is the analytical “property” that owners have in positive law.<sup>183</sup>

179. See Eric R. Claeys, *The Concept Property, from a Practical Point of View* 5 (Jan. 5, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2406052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406052) [https://perma.cc/X6FR-XWF8]; see also MACLEOD, *supra* note 23, at 36–49 (presenting the concept “property” as a sphere of dominion in relation to a resource mediated by use interests); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 380–93 (2003) (presenting the legal concept “property” as a right of exclusive use as portrayed in the writings of Grotius, Pufendorf, and Locke). Recent works conceiving property as a right to exclude do not differ materially. See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997); Merrill & Smith, *supra* note 4, at 359. Although these works describe the right to exclude as core to property, they construe that exclusionary core to allow for limited rights of use or access in individuated contexts.

180. Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 17–26 (2011) (book review) (presenting the concept “property” as a right of exclusive use).

181. See Alexander, *supra* note 67, at 747.

182. See *Heller v. N.Y., N.H. & H.R. Co.*, 265 F. 192, 194 (2d Cir. 1920) (“Every unauthorized entry on another’s property is a trespass and any person who makes such an entry is a trespasser.”); *Dougherty v. Stepp*, 18 N.C. 371, 372 (1835) (“[E]very unauthorized entry, and therefore unlawful entry, is a trespass . . .”).

183. See Eric R. Claeys, *On the “Property” and the “Tort” in Trespass*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 122–47 (John Oberdiek ed., 2014); see also JULES L. COLEMAN, *RISKS AND WRONGS* 215–16 (1992); Richard A.

*D. Illustrations*

## 1. Trespass

In common law, trespass to land institutes a rough and ready presumption implementing all the goals explained in Section IV.B. Because trespass is organized around a simple “don’t cross without permission” norm,<sup>184</sup> it embodies and promotes claim-marking.

Separately, trespass’s clear legal structure facilitates heterogeneous uses of land. The Nature Conservancy and other environmental groups acquire land to conserve it for conservationist or aesthetic environmental goals.<sup>185</sup> Trespass rules protect these more passive “uses” of land on the same plane as more active uses. First Amendment “compelled speech” doctrines protect landowners from being forced to let non-owners enter and use their lots as platforms to propagate ideological messages with which they disagree.<sup>186</sup> The First Amendment reiterates what trespass already embodies. When an owner has a right to exclude unconsented entries, that structure makes part of the owner’s presumptive legitimate “control” and “uses” the right to manage the ideological goals with which her land is associated.<sup>187</sup> Recent political theory and property scholarship has taken an interest in common-ownership regimes, on the ground that they create the “community” apparently lacking in a liberal political order.<sup>188</sup> Yet it is much harder for communal groups to practice communal ways of life if outsiders challenge their control over their land on the ground that the groups are not using the land productively enough. Even if it sounds paradoxical, exclusive control provides security for heterodox communal ways of life.

This same understanding helps address another possible question: whether an owner deserves “property” in the control and

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Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 165–69 (1974). Although this text focuses on torts, similar processes occur with public law. There, common law substantive rights are often limited by public law prohibitions—and then enhanced by public law permits or waivers.

184. See *supra* Section II.A.

185. See, e.g., *Land Conservation: Balancing the Needs of People and Nature*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/urgentissues/land-conservation/index.htm> [<https://perma.cc/Y5EQ-47VC>].

186. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–70 (1972).

187. See *id.*

188. See generally, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (introducing a justification for communal property that facilitates cooperation among proprietors); Anna di Robilant, *The Virtues of Common Ownership*, 91 B.U. L. REV. 1359 (2011) (explaining that common ownership can lead to more cooperative, active, and solidaristic communities).

use of a lot that is not being improved and is instead being held speculatively.<sup>189</sup> In a simple, prelegal sense, the speculator who does not improve land is not using it productively. Once the community has money and exchange, however, that speculator's conduct may be justifiable. If the speculator sees development potential in a lot, the speculator labors by discovering that potential, acquiring the lot, and managing it until he can find a higher-valuing user and complete a sale. When the speculator pays the original owner a price she finds agreeable, he contributes to her survival or comfort. If he finds a higher-value user and resells to that user, he indirectly hastens the process by which the land is used productively. At least in principle, then, someone who holds onto land speculatively in the short term can contribute indirectly to greater productive labor in the long term.

Additionally, if a trespassory structure can facilitate beneficial uses in all these respects, the decision in *Jacque* seems more defensible. *Jacque* is a hard case in part because the Jacques were using the disputed land for passive uses—peace and quiet, aesthetic enjoyment, or perhaps even just as a buffer between their residential uses of their house and their neighbors' land uses.<sup>190</sup> To that extent, the Jacques' uses were defensible, and not very different from other passive—but no less legitimate—uses, like those of the Nature Conservancy or someone making a compelled speech argument. *Jacque* is also a close case because the Jacques may have been acting irrationally due to their mistaken understanding of adverse possession.<sup>191</sup> Here, however, trespass justified not by whether it is overinclusive in any single dispute but by whether, in the range of situations to which it applies, it facilitates productive labor by all owners and non-owners. Other owners in the Jacques' shoes might have had good-faith desires and rational grounds to keep the field in dispute undisturbed. These considerations do not flatly require that the Jacques prevail, but they do make the judgment in *Jacque* seem far more sensible than it seems in post-Coasean transaction-cost or progressive scholarship.

189. Similar issues arise in intellectual property about the role played by intermediaries that acquire patents and resell or license them to higher-valuing users. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390–93 (2006).

190. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154, 157 ¶ 6 (1997); see also text accompanying *supra* note 36.

191. *Jacque*, 563 N.W. 2d at 157 ¶ 3; see text accompanying *supra* note 36.

## 2. Necessity

Again, however, the presumption for exclusive control is subject to limitations, including the privilege of necessity.<sup>192</sup> In some situations, someone may be able to show clearly and convincingly that her need for a resource is graver and more urgent than a conventional owner's intentions—as in cases in which the necessity proviso arises.<sup>193</sup> The necessity privilege institutes in tort doctrine a moral limitation approximating the necessity proviso in morality.<sup>194</sup> This privilege (in the nature of a defense) entitles a person to enter and commandeer someone else's property when doing so seems reasonably necessary to avoid a serious threat to life or destruction of one's own property.<sup>195</sup>

Now, within any legal system, people may argue where to draw the lines between the presumption for exclusive control and the exceptional circumstances where “necessities” privilege entries that would otherwise be trespasses. *Jacque* also illustrates this point: perhaps the scope of “necessity” should be broadened to cover not only emergencies where people and property face serious harm, but also problems like the blizzard in *Jacque*, in which lack of access threatens non-dangerous but serious inconvenience. Here too, the role of productive labor theory is not to determine a specific result for a hard case, but to set up the normative framework in which that result is reasoned. Productive labor theory creates a general starting presumption for the Jacques and other owners' having a right to exclude, because exclusive control ordinarily encourages productivity and clear ownership claims. If Steenberg Homes or some other non-owner wants to plead an exception, they must show that the exception will not undermine those goals. In that spirit, the Jacques could ask why Steenberg Homes promised to deliver a mobile home to a Wisconsin customer in February, or whether Steenberg Homes deserved the benefit of a necessity exception when its assistant manager was witnessed not to have “give[n] a —” why the Jacques

192. See *supra* notes 59–60 and accompanying text.

193. See *supra* Section III.D.

194. *Benamon v. Soo Line R. Co.*, 689 N.E.2d 366, 370 (Ill. App. Ct. 1997) (“The private necessity privilege allows one to enter the premises of another without permission in an emergency situation when such entry is reasonably necessary to avoid serious harm.” (citing RESTATEMENT (SECOND) OF TORTS §§ 345, 197 (AM. LAW INST. 1965))).

195. *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908); see also RESTATEMENT (SECOND) OF TORTS, *supra* note 29, § 197.



protested and to have giggled after being told that the mobile home had crossed their lot.<sup>196</sup>

### 3. Adverse Possession

Trespass facilitates labor on the basis of another assumption: even if an exclusionary property right does not expressly require owners to use their lots productively and vigilantly, self-interest will motivate most owners to use their lots in those ways anyway. In some repeat class of cases, however, there may be clear and convincing proof that a class of owners are neglecting their productive use and claim-marking responsibilities. In those cases, productive labor theory permits overrides.

In common law, adverse possession seems well suited to institute such an override. Adverse possession entitles an adverse occupant to repel a suit for trespass—and divest the title owner of title—if she occupies the owner’s land exclusively, openly, continuously, and adversely for the local jurisdiction’s limitations period for trespass.<sup>197</sup> Adverse possession is a vexing doctrine to justify. Some leading accounts justify the defense on the ground that it rewards “the productive use of land” by the adverse possessor.<sup>198</sup> Other accounts maintain that it quiets title to properties burdened by stale land claims.<sup>199</sup>

Although adverse possession serves both of these functions, in a labor-based framework both are subsidiary to a third function: to disentitle title owners who violate the two prerequisites of labor. By definition, any owner who does not repel an adverse occupancy for several years is violating her responsibility to mark her claims to her lot.<sup>200</sup> As nineteenth-century squatters rights disputes confirm, claim neglect breeds conflict.<sup>201</sup> Squatters come to believe they have good

196. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 (Wis. 1997).

197. *See, e.g.*, *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 309 (Alaska 1990); *Mahoney v. Tara, L.L.C.*, 107 A.3d 887, 890–91 (Vt. 2014).

198. *Canjar v. Cole*, 770 N.W.2d 449, 454 (Mich. Ct. App. 2009); *see, e.g.*, Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1064–66 (2006); Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 77–78 (2010).

199. *See, e.g.*, Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 674–80 (1986).

200. *See supra* Section III.C.

201. *See, e.g.*, PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 145–48, 161–64, 225–27 (1968); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE LAND OWNERSHIP* 55–63 (2010).

claims to the land they occupy and use, neighbors and other onlookers come to sympathize with squatters, and those claims and sympathies undermine respect for the rule of law.<sup>202</sup> The conduct that supplies direct proof of claim neglect provides strong circumstantial evidence of unproductiveness. Now, when I say that this neglect-punishing function is adverse possession's most fundamental function, I do not mean to suggest that adverse possession disregards the labor of adverse possessors. Taken together, the requirements of occupancy, exclusivity, and openness assign title in the individual who *has* staked a clear claim to the lot in dispute, and it is reasonable to presume that such an individual uses the land more productively than anyone else. Nor do I mean to deny that adverse possession quiets title; the doctrine does avoid title disputes, by establishing title on possession when evidence seems likely to be stale. Nevertheless, the neglect-punishing function precedes the other two logically; the other two do not come into play until a title owner forfeits his claim of title. As Carol Rose explains, adverse possession is not so much "a reward to the useful laborer at the expense of the sluggard" as it is a recognition of the "useful labor [in] the very act of speaking clearly and distinctly about one's claims to property."<sup>203</sup>

Of course, adverse possession generates further overinclusivity and underinclusivity problems. If a neglectful owner evicts an adverse occupant just one month short of the limitations period, she seems to escape on a technicality. The rules that apply to wholesale squatting cases may not apply well to backyard boundary disputes.<sup>204</sup> Here too, however, a system of trespass plus adverse possession needs to be judged by how well it facilitates productive labor, within clear property claims, in totality. Any discretion used to deal with opportunistic neglectful owners could also be used by opportunistic squatters and could destabilize the functions of exclusive control. A prudent official might still build more discretion into adverse possession doctrine, but he would need to consider the pros *and* the cons of discretion, using rough consequentialist forecasts, before deciding whether to do so.

Similarly, even if a system of trespass-plus-adverse-possession is imperfect, the alternatives could be worse. If common law land-based

202. See, e.g., GATES, *supra* note 201, at 225–27; PEÑALVER & KATYAL, *supra* note 201, at 55–63.

203. Rose, *supra* note 138, at 79, 82.

204. For a helpful survey of the ways in which courts apply the same black-letter rules differently to different cases, see generally R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L. Q. 331 (1983).

torts built in use limits, as common law appropriative water rights do, any of a multitude of non-owners could accuse an owner of under using her property. And after the state disentitled that title owner, it would then need to determine which of those non-owners was the most deserving replacement owner. In short, although adverse possession suffers from overinclusivity and underinclusivity problems, those problems seem prices worth paying to get the advantages of two- or multi-level systems of regulation.

## V. DEONTOLOGICAL LIMITS ON EXCLUSIVE PROPERTY

As the last Part showed, productive labor theory supplies an indirect, presumptive justification for exclusive property, and it also marks off outer limits on that justification. As Section IV.D showed, that justification can adapt legal property rights to conform to the moral requirements associated with productive use, claim-marking, and the necessity proviso. Yet Part IV did not study how exclusive property rights accommodate the sufficiency proviso.

### A. *Exclusive Control and the Sufficiency Proviso*

The sufficiency proviso is not as easy to reconcile to property rights as the other three components of labor. Although exclusive property gives owners more privacy and freedom to pursue their own individual goals, it also restricts non-owners' opportunities for similar privacy. Although exclusive land ownership may incentivize owners to produce more food, shelter, and other resources, it denies non-owners opportunities to produce resources from the same land. A labor-based justification for exclusive property needs to explain how it deals with these sufficiency claims. At least superficially, such a justification seems to disregard those claims. Trespass has a necessity privilege but no sufficiency defenses. That perception leads some scholars to assume that labor-based property "ha[s] nothing to do with society and its collective good," including but not limited to the needs of non-owners.<sup>205</sup>

Nozick disagreed; he argued that increased productivity from ownership "satisfies the intent behind the 'enough and as good left over' proviso."<sup>206</sup> To some readers, however, that response seems to undermine the force and coherency of labor theory. Rights-based

205. ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* 92 (2007).

206. NOZICK, *supra* note 83, at 177 (quoting, with slight alterations, LOCKE, *supra* note 8, § II.33, at 291).

theories seem most forceful when they make “entitlement . . . a matter of natural right, superior to all manipulations of the state in the interest of social welfare”; a right-holder must be able to insist that the right be protected though the heavens fall (*fiat justitia, ruat caelum*) or else the right is not really a right.<sup>207</sup>

*B. The Deontological Character of Productive Labor Theory*

Herein lies another misperception about flourishing-based practical reasoning. Many theories of rights, including many flourishing-based theories, do not have the character just described. John Rawls once protested: “All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>208</sup> Rawls also offered a more attractive and capacious understanding of rights-based theories: “deontological” theories. Productive labor theory is deontological in Rawls’s sense without generating absolute or illimitable rights.

In Rawls’s usage, a theory of politics is deontological if it makes the Right lexically prior to the Good.<sup>209</sup> The Good consists of the general advantages a proposal is likely to confer on the citizenry at large.<sup>210</sup> In a deontological morality, the Right consists of important normative interests held by individual citizens.<sup>211</sup> So understood, “deontology” allows a political community to pursue socially advantageous policies; its main constraint is to make the community pursue chosen policies without trenching on citizens’ strongest individual interests.<sup>212</sup>

Even though Locke and Rawls’s theories of politics differ in many other respects, productive labor theory satisfies Rawls’s

207. MARGARET JANE RADIN, REINTERPRETING PROPERTY 108 (1993). Although this passage criticized a theory reconciling adverse possession with a Nozickian theory of property, the general criticism applies identically to any rights-based theory claiming to reconcile exclusive ownership and sufficiency-based limitations.

208. RAWLS, *supra* note 22, at 30. Similarly, in an entry on deontology in a philosophy encyclopedia, Larry Alexander and Michael Moore believe that “[t]he most familiar forms of deontology . . . hold that some choices cannot be justified by their effects—that no matter how morally good their consequences, some choices are morally forbidden.” Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (2016), <http://plato.stanford.edu/entries/ethics-deontological/#DeoFoiCon> [<https://perma.cc/2AUU-2UFM>]. “Deontology” does not bar the consideration of *all* choices or consequences, only choices or consequences particularly antithetical to the interests of right-bearing and rational individuals. *Id.*

209. See RAWLS, *supra* note 22, at 30–32; see also Alexander & Moore, *supra* note 208 (offering the definition in text as a standard definition of deontology).

210. *Id.* at 399.

211. *Id.* at 28–32.

212. *Id.* at 30–32.

definition of deontology. Rational and sociable flourishing reconciles individual rights and the common good. In relation to property, the Right consists of the interest every citizen has in surviving, in having an equal opportunity to satisfy basic preconditions for making her life better, and in being free to pursue a distinct program for her own improvement.<sup>213</sup> The common good does not consist of any policy that suits the preferences of a bare majority of citizens. Because citizens are presumed to be rational and sociable,<sup>214</sup> as an ideal matter, the common good in politics resembles the common interests of a partnership in law; it consists of “the good of every particular Member of th[e] Society, as far as by common Rules, it can be provided for.”<sup>215</sup> Since the common good is defined as the concurrent and free exercise of individual rights by rational and sociable citizens,<sup>216</sup> the Right is lexically prior to the Good.<sup>217</sup>

So understood, deontology imposes one last major constraint on exclusive property. Morally, the sufficiency proviso entitles all citizens to equal opportunities to access and to use some reasonable share of a community’s resources.<sup>218</sup> The proviso does not stop the community from extinguishing moral usufructs in positive law in the course of instituting private property. As John Finnis puts it, however, owned resources remain in principle “morally subject to a kind of inchoate trust, mortgage, lien, or usufruct in favour of” non-owners.<sup>219</sup> In the worst possible case, exclusive ownership is justifiable only to the extent that it seems practically likely to leave non-owners with as many opportunities for survival and improvement as they would have had if the owned resource had remained in usufruct. Preferably, exclusive ownership should benefit non-owners indirectly. Some owners should use ownership to produce conveniences of life, and those conveniences should circulate to non-owners.

213. See generally *id.* (developing a theory for societal justice).

214. *Id.* at 142–45.

215. LOCKE, *supra* note 8, § I.92, at 210; *accord id.* § II.134, at 356.

216. RAWLS, *supra* note 22, at 142–45.

217. See Michael Zuckert, *Reconsidering Lockean Rights Theory: A Reply to My Critics*, 32 INTERPRETATION 257, 264 (2005); see also MYERS, *supra* note 86, at 12 (arguing that “Locke affirms the broad plurality of human goods and insists that public life be governed by a deontological doctrine of personal rights or self-ownership”).

218. LOCKE, *supra* note 8, § II.33, at 291.

219. John Finnis, *Natural Law: The Classical Tradition*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 51 (Jules Coleman et al. eds., 2004).

C. *Sufficiency and the Right to Alienate Property*

In principle, it may be possible to meet that adequacy criterion through one or both of two overlapping strategies. In some cases, non-owners do not have strong or particularized interests in plans to use any given resource—only a general interest in having access to some resources for their own life needs and goals. In that case, their sufficiency interests may be satisfied by making property alienable, and instituting a common coinage and system of commerce.<sup>220</sup>

When this strategy suffices, the sufficiency proviso is embodied not by any element of or defense to trespass, but in the powers to alienate property, to acquire it, and to make contracts. At least in theory, when exclusive ownership encourages owners to produce surplus resources, non-owners can earn money and then use earnings to buy the goods they need for their own life goals. As Buckle puts it, “[t]he bounty produced by the propertied extends to the unpropertied, improving their condition.”<sup>221</sup> If the unpropertied “actually benefit from the appropriative acts of the propertied[.]” exclusive ownership not only facilitates labor but also respects the interests marked off by the sufficiency proviso.<sup>222</sup> Of course, it is an implicitly empirical question whether a given system of property does in fact encourage produce to circulate to the unpropertied. Again, however, at least in principle, there must be *some* situations in which ownership is productive enough, and commerce robust enough, to satisfy the adequacy criterion set by the sufficiency proviso. In practice in American, European, and Japanese economies since 1700, rising tides have lifted most boats.<sup>223</sup> And if a given system of property seems unlikely to satisfy this adequacy criterion, exceptions may be instituted. The system may scale back the scope of exclusive property and institute stronger use claims, or it may remedy the problems by instituting public programs ensuring the needy opportunities to work and earn basic material support.<sup>224</sup>

220. The economy and these legal rights also relieve pressure on the necessity proviso for people who are starving, but to the extent that people are in extreme need and have “no means to subsist otherwise[.]” they continue to have claims on other forms of charitable or public assistance. See LOCKE, *supra* note 8, § I.42, at 170.

221. BUCKLE, *supra* note 13, at 154.

222. *Id.* at 154–55.

223. See text accompanying *supra* notes 166–67.

224. Locke himself proposed programs offering support to the needy who were incapable of work and jobs for the needy who could work. See LOCKE, *An Essay on the Poor Law*, in LOCKE: POLITICAL ESSAYS, *supra* note 7, at 182–98.

*D. Sufficiency and Implied Easements*

The justification discussed in the last Section is most persuasive when people without property have inchoate interests in using some resources but lack strong claims to particular resources. The justification is not nearly so persuasive when some community members have strong interests in particular resources. In those situations, deontological constraints justify further limits—express sufficiency-based limitations—on exclusive property rights.

The simplest doctrines illustrating this possibility are easements of access. Notwithstanding his “despotic dominion” sound bite, Blackstone specified that private rights to land were subject to many different “hereditaments,” which we might call “implied easements” or “implied rights of way.”<sup>225</sup> Non-owners had usufructuary rights, as specified by common law and background statutes, to enter owned land for limited purposes: pursuing game, fishing, grazing livestock, collecting wood, and other similar uses.<sup>226</sup> In antebellum American common law, these use-based exceptions significantly scaled back the trespassory and exclusive character of land ownership.<sup>227</sup>

In fairly rural conditions, these implied rights of way are permissible and probably necessary limitations on exclusive ownership. When most land is undeveloped in a community, citizens cannot expect to acquire materials necessary for survival or improvement from labor, savings, and commerce. Many American states fit this description at one time; before the twentieth century, in many American states only one percent to twenty percent of owned land was improved.<sup>228</sup>

If and when land is developed and becomes productive later, owners may then reasonably argue that production and commerce obviate the need for these implied easements of access. Those demands, and pushback by indigent residents, will make property law (depending on one’s point of view) social and flexible, or chaotic and indeterminate. Yet the same basic points continue to apply. In a system of otherwise exclusive property, strong sufficiency claims may

225. 2 BLACKSTONE, *supra* note 1, at \*32.

226. See 2 BLACKSTONE, *supra* note 1, at \*32–34.

227. See Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 675–79 (2011); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 549–53 (1996).

228. See Sawers, *supra* note 227, at 676 (“While as much as twenty percent of Maryland, Delaware, Virginia, and Kentucky was improved in 1850, less than one percent of Texas or Florida was. Although fencing may be the norm today (particularly in the East), America was largely open before 1870 and fenced land was ‘exceptional.’” (footnotes omitted)).

be accommodated by instituting use-based rights of access as limitations on broad rights of exclusion. Even if local judgments are not uniform enough, and even if there is not enough specific empirical information, to clarify where exclusion should end and rights of access should begin, productive labor theory institutes a multi-level structure giving ownership and sufficiency claims their due.

## VI. LABOR, FLOURISHING, AND PERFECTIONISM

This Article has now demonstrated its first claim: Productive labor theory justifies property understood as a presumptive right of exclusive control, and the presumption may be overridden when owners fail to labor or when non-owners have strong sufficiency or necessity claims. And the principles proving that first claim supply the supports needed to justify property in a more satisfying manner. This Part focuses on the first of those supports. Productive labor theory grounds property rights in flourishing-based moral principles, but it does so in such a manner as to minimize government decision makers' opportunities to treat property as a right to do what they believe will contribute to everyone's flourishing.

### A. *Perfectionism: Theory Versus Practice*

Although progressive property is not necessarily hostile to property, it may inadvertently threaten property. Again, *A Statement of Progressive Property* celebrates the “plural and incommensurable values” property implicates, and the values the cosigners affiliate with property—security, knowledge, wealth, flourishing, and environmental stewardship, to name a few—seem hard to reconcile.<sup>229</sup> This portrait of property legitimates a train of reasoning: an owner values *A*; a non-owner values *B*; *A* and *B* are incommensurable; and since there is no other way to resolve the value conflict, a legal decision maker must, however reluctantly, prefer one to the other. Property gets reduced to a right to use one's own as judges or regulators deem necessary for the flourishing of others or the community at large.

Productive labor theory is structured to anticipate and avoid legitimating that train of reasoning. Exclusive rights give different individuals freedom to decide for themselves whether, on their own lots, to value *A*, *B*, or other sources of gratification. In a few cases, such as in dire emergencies, value choices are unavoidable. In many

229. Alexander et al., *supra* note 6, at 743–44.



others, legal officials can promote everyone's flourishing simply by requiring everyone to respect one another's property. Yet when legal officials can avoid pitting specific land uses against one another and do so anyway, they indirectly undermine the conditions for everyone's flourishing.

Section II.B recounted the most basic reason why: reliably often, public officials know significantly less than affected citizens about whether or how a given resource will help them flourish, simply because self-interest gives the citizens incentives to consider those questions more seriously than the officials will. Yet there are other reasons. First, all too often, people get blinded by "self-love," and people so blinded will agitate for policies that are "partial to [the interests of] themselves and their Friends."<sup>230</sup> Here, Locke expresses in his vernacular concepts similar to *Federalist No. 10*'s account of faction,<sup>231</sup> or public choice and economic theories of regulation.<sup>232</sup> If property rights are directly linked to flourishing in politics, non-owners—and especially wealthy non-owners—are likely to lobby the government to redistribute property on the ground that they will promote flourishing throughout the community better than the owners themselves will.

Second, politics attracts political extremists. Political life, especially in a large liberal nation-state, attracts "Quarrelsome and Contentious" character types who harbor extreme religious or ideological opinions.<sup>233</sup> Politics also attracts character types who love eminence, and when such types have leisure they may be quarrelsome and contentious in pursuit of political position.<sup>234</sup> Character types like these are likely to be attracted, as practically-minded citizens are not, to reform programs that require property to be used for the common good, in ways that are demanding and likely to frustrate owners' private plans.

These risks cannot be wholly avoided in property or in any other field of law. But productive labor theory structures property to

230. LOCKE, *supra* note 8, § II.13, at 275.

231. See THE FEDERALIST NO. 10, at 46–49 (Alexander Hamilton, James Madison, & John Jay) (Clinton Rossiter ed., 1999).

232. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971) (explaining the promulgation and enforcement of regulations regarding economic disputes primarily as a function of some regulated parties' interests in gaining competitive advantages over other regulated parties).

233. LOCKE, *supra* note 8, § II.34, at 291; see also LOCKE, *supra* note 27, bk. IV, chs. xvi–xx, at 657–719 (outlining how people form groups founded upon mistaken religious dogmas or secular opinions).

234. MYERS, *supra* note 86, at 195.

minimize the risks. If one believes, as classical liberals do, that political life is extremely partisan and that people's needs and interests toward different resources vary extremely widely, legal rules that focus heavily on flourishing will unfortunately boomerang. Such rules may restrict freedom and equal opportunity as properties become restricted by side limitations related to different flourishing-related needs. Flourishing-related arguments may attract special interests and encourage property to get caught up in ideological conflicts over property. And since flourishing-related legal tests require context-specific balancing, they give greater influence to insiders.<sup>235</sup> More marginalized groups in a community will benefit from simple and uniform property rules; insiders will better exploit ambiguity. Obviously, these concerns will not arise in every dispute, and they cannot be proven in any conclusive way. As the rest of this Part will suggest, however, the concerns do arise in some of the fields of law most celebrated in progressive property scholarship.

#### B. *Rights to Roam*

The first example consists of statutory rights to roam. Sweden has long recognized *Allemansrätt* (translated “everyman’s right”). *Allemansrätt* is a right of way entitling non-owners to roam countryside owned by others.<sup>236</sup> In 2000, England and Wales enacted the Countryside and Rights of Way Act codifying rights to roam over mapped open country, mountains, and coastal land.<sup>237</sup> In 2003, Scotland enacted an even broader roaming right, giving roamers rights to cross most land for purposes of recreation, education, or passage.<sup>238</sup> Progressive property works often cite rights to roam as an example of progressive property in action.<sup>239</sup> Progressive property works tend to ask whether roaming rights serve valuable life goals (such works say “yes”), and then to ask whether owners have any

235. See *supra* Section IV.

236. See Kevin Colby, *Public Access to Private Land—Allemansrätt in Sweden*, 15 LANDSCAPE & URB. PLAN. 253, 253–54 (1988); *Roam Free in Sweden*, VISIT SWEDEN, <http://www.visitsweden.com/sweden/Things-to-do/Nature--Outdoors/Nature-loving-Sweden/Roam-free-in-Sweden/> [<http://perma.cc/82DF-EN8F>].

237. Countryside and Rights of Way Act 2000, c. 37, § 2 (Eng. & Wales); see COMMITTEE OF PUBLIC ACCOUNTS, THE RIGHT OF ACCESS TO OPEN COUNTRYSIDE, 2006–07, HC 91, at 9 (UK), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/91/91.pdf> [<http://perma.cc/283F-QXQQ>].

238. Land Reform (Scotland) Act 2003, (ASP 2) §§ 1(3), 6, 9.

239. See Lovett, *supra* note 63 (describing the Land Reform (Scotland) Act of 2003 as an example of progressive property in action); see also FREYFOGLE, *supra* note 76, at 250–51; Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375, 404–12 (2007).

interests in exclusive control concrete and immediate enough to override roaming rights (such works say “no”).<sup>240</sup>

Productive labor theory offers a less sanguine assessment of roaming rights. The problems do not arise because roaming falls outside the scope of morally legitimate activity. When labor is grounded in relation to rational flourishing, the use of land for physical exercise and recreational enjoyment constitutes moral labor.<sup>241</sup> Yet it does not necessarily follow that mandated roaming rights are desirable. A government could facilitate the same flourishing-related activities by buying or condemning scenic land and paths, and converting them into parks or trails managed by the government or a public delegate. Although purchase or condemnation would be more expensive, they would keep brighter lines between private property and public recreational functions. And if one thinks through *why* condemnation is expensive, those costs bring to light adverse social consequences from roaming statutes. Those consequences have not been adequately considered in scholarship supportive of roaming rights.

One issue is a short-term/long-term problem. Conventional portraits of roaming rights may overemphasize the demands of roamers and underemphasize the impact of roaming rights on ownership. This imbalance is understandable. A roamer wants to derive present enjoyment from crossing a particular plot of land. It can seem churlish for an analyst to point out that, once roamers have some right to enter land, they might not stick to the trails or stick to hiking. Furthermore, the concerns that trouble landowners—lack of security, risks of accident—are not certain to occur, and the resultant harms will take years to arise if they ever really occur.

Nevertheless, a moral theory needs a satisfying way to reconcile both sets of concerns. Moreover, there is at least some evidence that roaming rights chill land use. Swedish farmers have had to confront roamers to stop them from picking crops, and other landowners have complained that roaming rights have interfered with their opportunities to put their land to more active uses.<sup>242</sup> These abstract and long-to-ripen conflicts may restrain land ownership. In a recent study of land sales in England and Wales, Jonathan Klick and Gideon

240. See, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 298–301 (2009).

241. See *infra* notes 96–99, 115–17 and accompanying text; accord Lovett, *supra* note 63, at 760–77 (surveying legislative reform efforts and arguments by Scottish reformers seeking to expand access for recreational roaming).

242. See, e.g., Colby, *supra* note 236, at 259–63.

Parchomovsky discovered that 10% increases in roaming access correlated with 8% and 6% drops, respectively, in the sales price of land covered by reforms executed in the year 2000.<sup>243</sup> Those price drops do not automatically prove that covered land is less usable now than it was before 2000, or that roaming rights are undesirable. At a minimum, however, they confirm that market buyers perceive land as less valuable for their planned uses. In a rights-based framework, if title owners are making some valuable use of their land, their concerns receive presumptive weight.<sup>244</sup>

Separately, current scholarship may not adequately portray the class and geographical overtones of roaming rights. In a country with a developed economy, the land most likely to be roamed on will be rural and the likeliest roamers will be urban residents.<sup>245</sup> Exclusive property rights express one normative message: if people want to live urban lives most of the time and roam recreationally occasionally, they need to convince rural owners that their temporary interests in roaming will not jeopardize farmers' more durable plans for roamed-on land. A roaming regime expresses a more partisan message: rural landowners must respect the land rights of urban owners when they come to town, but their lots are servient to the recreational interests of urban residents who choose to roam in the country.<sup>246</sup>

Productive labor theory does not flatly prohibit rights to roam. In communities (like Sweden) where such rights have been recognized by long usage,<sup>247</sup> roaming rights could end up being another form of implied easement that all citizens accept and recognize as part of land ownership. Yet because productive labor theory supplies a strong justification for exclusive property, it makes more salient than progressive theories the long-term effects of repeat entries by strangers on owned land. Furthermore, because productive labor theory keeps the exceptions to exclusive ownership fairly narrow, it judges roamers' sufficiency claims by a stricter standard. Even if recreational walking contributes to rational forms of improvement, it does not contribute to a dimension of flourishing that is basic or imperative. In this respect, roaming rights differ from most if not all

243. John Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. Pa. L. Rev. (forthcoming 2017) (manuscript at 29–39), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755613](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755613) [<https://perma.cc/DF6A-MN6J> (staff-uploaded archive)].

244. See *supra* Section III.B.

245. For example, in Sweden in the 1980s, one expert estimated that only 125,000 of 8,000,000 had land worth roaming. See Colby, *supra* note 236, at 257.

246. See Klick & Parchomovsky, *supra* note 243, at 39.

247. Katz, *supra* note 240, at 298 n.70.

of the rights of way familiar in Anglo-American law—hunting, grazing, and necessity-based emergency entrances.<sup>248</sup> In short, productive labor theory helps clarify the case for exclusive ownership, and it keeps rural property from getting entangled in regional “way of life” conflicts between farmers and urban recreational roamers.

### C. *Landmark Laws and Penn Central*

Landmark laws provide another helpful illustration. The best-known landmark law—New York City’s—generated the case that led to the Supreme Court’s decision in *Penn Central Transportation Co. v. City of New York*.<sup>249</sup> When a site is old enough and is determined (in New York City’s administrative code’s terms) to have “a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation,”<sup>250</sup> a landmark commission may prevent changes to the site if such changes would detract from its public interest or value.<sup>251</sup>

Although landmark laws raise a range of interesting issues, they are interesting here<sup>252</sup> because they highlight important differences between productive labor theory and leading progressive property works. Progressive works have been sympathetic toward landmark laws,<sup>253</sup> most often because they express a communitarian norm whereby an owner may justly be prevented from using his property “in some way that the community regards as against its collective interest.”<sup>254</sup> Yet New York’s track record with landmark laws (New York’s scheme just celebrated its fiftieth anniversary in 2015)<sup>255</sup> may confirm some of the concerns about perfectionist theories of property regulation.

Productive labor theory does not make landmarking schemes flatly inappropriate, but it does portray them fairly skeptically. In

248. See text accompanying *supra* note 226.

249. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

250. N.Y.C., N.Y. ADMIN. CODE § 25-302(n) (2015).

251. *Id.* § 25-302(x).

252. Among other things, this Article abstracts away from constitutional doctrinal questions about whether any takings case law should treat landmark designations as takings. This Article instead critiques landmark laws and relevant inverse condemnation policies.

253. See Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1403–05 (2013) (citing *Penn Cent.*, 438 U.S. 104) (analyzing *Penn Central*, a case in which the Court determined landmark laws do not constitute takings, and asserting that the criticism elicited by the Court’s decision is unwarranted).

254. Alexander, *supra* note 67, at 791, 793.

255. *What Happened in 1965?*, NYC LANDMARKS 50, [http://www.nyclandmarks50.org/history\\_and\\_education.html](http://www.nyclandmarks50.org/history_and_education.html) [<https://perma.cc/RG9P-68DW>].

principle, neighbors do have and can claim sufficiency-based interests in the aesthetic, traditional, or community-oriented aspects of a nearby building. But those sufficiency claims need to be reconciled with the other factors relevant to labor—productive use and claim-marking. First, when rights are assigned by a discretionary regulatory process focusing on subjective aesthetic or community qualities, those processes create claim-marking problems. In nuisance cases, courts are generally reluctant to grant relief for complaints about blocked light on this ground;<sup>256</sup> they worry that proprietary rights to light would make it extremely difficult for landowners to get fair “notice of limitations on the use of [their] property.”<sup>257</sup> Similar concerns apply as well to landmark schemes.

Separately, boundary-based property rules facilitate the productive use of land by giving different neighbors equal opportunities to use their lots for different goals. When property law focuses on perceptible invasions, it focuses on the disturbances that hit owners most where they live, and it keeps the criteria for “noxiousness” and “wrongfulness” fairly apolitical.<sup>258</sup> If the law expands to cover uses that seem ugly, out of place, or objectionable, it encourages neighbors to complain about nearby land uses they happen to dislike. Courts intuit this concern in private nuisance cases about aesthetic nuisances or access to light: “Because every new construction project is bound to block someone’s view of something, every landowner would be open to a claim of nuisance.”<sup>259</sup> Earlier inverse condemnation cases worried that residential-only zoning imposes a “strait-jacket” on development and change in zoned neighborhoods.<sup>260</sup>

The public law of landmarking does not need to follow the policy preferences locked into nuisance cases or now-repudiated inverse condemnation precedents. But these authorities illustrate possible downsides to landmarking schemes. Landmark supporters assume

256. See, e.g., *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 358–60 (Fla. Dist. Ct. App. 1959).

257. *Sher v. Leiderman*, 226 Cal. Rptr. 698, 704 (Ct. App. 1986).

258. See, e.g., *Green v. Castle Concrete Co.*, 509 P.2d 588, 591 (Colo. 1973) (arguing of a suit to have a lawful activity declared a public nuisance, “Given our myriad and disparate tastes, life styles, mores, and attitudes, the availability of judicial remedy for [aesthetic] complaints would cause inexorable confusion[]”); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1411–13 (2010).

259. *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380, 382 (Iowa 1988).

260. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926).

that landmarks should be designated whenever they create aesthetic, historic, or community-related social goods.<sup>261</sup> Productive labor theory identifies countervailing goods, namely different citizens' interests in different active land uses. Citizens will differ in their preferences as between active land uses and a neighborhood characterized by more passive uses and a stronger sense of heritage, aesthetics, and community. Yet landmarking designations favor passive uses over active ones. In disputes in which all preferences cannot be satisfied, productive labor theory recommends erring on the side of facilitating the uses more necessary for basic life goals.<sup>262</sup>

When authorities pursue landmark policies aggressively anyway, a classical liberal, rights based political theory makes seem significant four possible unfortunate consequences. The first is to choke the free use and development of local property. Fifty years in, New York City's Landmarks Preservation Commission now exercises jurisdiction over 33,000 landmarked buildings and 130 historic districts throughout the five New York boroughs<sup>263</sup>—including 27% of the buildings in Manhattan.<sup>264</sup>

Second, the landmarking process will probably become disputatious. Developers and affordable-housing advocates will agitate for looser designation standards, while preservationists and “not in my backyard” local residents will agitate for tighter standards. New York's experience fits that pattern. In 2014, the city's Landmarks Preservation Commission chairwoman proposed to “decalendar” ninety-three sites on the ground that the Commission had been considering their preservation applications for decades.<sup>265</sup> Most of these applications had languished because they were controversial, but the chairwoman attracted intense criticism for

261. See The White Plains Historic Preservation Law, CITY OF WHITE PLAINS, [www.cityofwhiteplains.com/DocumentCenter/View/1873](http://www.cityofwhiteplains.com/DocumentCenter/View/1873) [<http://perma.cc/4HWY-CXKT>].

262. Early twentieth century regulatory takings disputes about billboard bans framed the stakes as being about the merits of “aesthetic considerations,” which they described as “a matter of luxury and indulgence rather than of necessity . . . .” *City of Passaic v. Paterson Bill Posting, Advert. & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905); see also *Varney & Green v. Williams*, 100 P. 867, 868 (Cal. 1909) (quoting *Passaic*, 62 A. at 267), *overruled by* *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407 (Cal. 1980); *Crawford v. City of Topeka*, 33 P. 476, 477 (Kan. 1893).

263. *The Low Down on the NYC Landmarks Law*, PERCHWELL, <http://blog.perchwell.com/low-down-on-nyc-landmarks-law> [<http://perma.cc/8SJC-REUJ>].

264. Editorial, *New York's Landmarks Law at 50*, N.Y. TIMES (Apr. 17, 2015), [http://www.nytimes.com/2015/04/18/opinion/new-york-city-landmarks-law-at-50.html?\\_r=0](http://www.nytimes.com/2015/04/18/opinion/new-york-city-landmarks-law-at-50.html?_r=0) [<http://perma.cc/HG69-9AAC> (staff-uploaded archive)].

265. Josh Barbanel, *New York City Landmarks Panel's Move Upsets Critics—and Supporters*, WALL ST. J. (Dec. 9, 2014, 10:40 PM), <http://www.wsj.com/articles/new-york-city-landmarks-panels-move-upsets-supportersand-critics-1418182825>.

taking the applications off of the commission's calendar all the same.<sup>266</sup>

In addition, the statutory criteria for landmarking ("special character," "interest," or "value") are vague.<sup>267</sup> That vagueness seems likely to invite arbitrariness. A current New York preservation commissioner agrees; in his opinion, commission determinations end up centering on standards of appropriateness: "[A]ppropriateness" is "a marvelous word, and it's unclear what it is . . . . It boils down to whatever the commissioners say it is on any given Tuesday."<sup>268</sup> Those same standards may also invite censoriousness, a tendency by some political and community leaders to claim authority to pronounce the tastes that ought to be the community's. When the Penn Central Company tried to negotiate regulatory waivers for its proposed renovation of Grand Central Station, a landmarks commission member recommended rejecting its proposal because the proposed remodeling would have been "nothing more than an aesthetic joke."<sup>269</sup>

Finally, when the free use of property is constrained, the distribution of and access to property may become more regressive. Because landmark designations restrict new development, access to these communities is generally limited to relatively wealthy citizens.<sup>270</sup> Further, because landmark processes are complex and arcane, well-connected elites enjoy disproportionate influence in shaping how landmarking criteria are applied.<sup>271</sup> Other prospective residents are likely to be excluded—especially outsiders, poorer residents, and members of races or ethnic groups not well connected to city elites.<sup>272</sup> The aftermath of New York's landmarking has confirmed this concern as well. On average, the residents of historic districts in Manhattan are twice as wealthy (\$123,000 versus \$63,000) and less

266. *Id.*

267. N.Y.C., N.Y. ADMIN. CODE § 25-302(n) (2015).

268. Emily Nonko, *You Say Tomato: How the Landmarks Preservation Commission Approves Modern Design*, OBSERVER (June 23, 2015, 7:35 PM), <http://observer.com/2015/06/you-say-tomato-how-the-landmarks-preservation-commission-approves-modern-design/> [<http://perma.cc/H6DF-7VEK>].

269. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 118 (1978).

270. *See Less Housing Production, Racial Diversity in Historic Districts*, THE REAL DEAL (Apr. 20, 2015, 8:00 AM), <http://therealdeal.com/blog/2015/04/20/less-housing-production-racial-diversity-in-nycs-historic-districts/> [<http://perma.cc/G895-EZAE>].

271. *See* EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 149 (2011).

272. *See* Ambler Realty Co. v. Village of Euclid, 297 F. 307, 312–13, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).



than half as racially diverse as the residents of non-landmark areas.<sup>273</sup> Of the 206,000 units of housing built in New York City from 2003 to 2012, only 100 (0.29%) were both affordable and built within landmarked buildings or districts.<sup>274</sup>

Leading defenses of landmark schemes praise landmark laws as an example of a real-life institution refuting a “classical liberal approach [in which regulatory power] is limited to the negative obligation . . . to avoid committing nuisance.”<sup>275</sup> Yet productive labor theory does not regard property as a right to do anything short of inflicting harms on one’s neighbors. Rights are structured negatively for the most part because such rights indirectly do a better job of securing citizens’ affirmative interests in flourishing. Negative rights are simpler, clearer, more consistent with the rule of law, and less likely to be tested by ideologues or exploited by moneyed influences to the detriment of less influential citizens.<sup>276</sup>

Separately, although beauty, historic character, and common culture can all generate sufficiency claims and contribute to the common good, they’re not the most basic parts of the common good. The common good consists in the first instance of a community understood as a partnership that facilitates individual partners pursuing their own needs and goals.<sup>277</sup> If a community really thinks that some particular piece of property will enhance the satisfaction of all citizens, for aesthetic or other refined reasons, it may freeze future use of that property. Yet the community should recognize that its landmarking designations interfere with more fundamental obligations to provide equal opportunities to people to pursue their own goals. The best ways to recognize these dangers are to structure landmark designations as takings of servitudes that ordinarily inhere in private ownership, and to use this eminent domain power only for the vistas and buildings most essential to forming a strong sense of local community.

273. See *Less Housing Production, Racial Diversity in Historic Districts*, *supra* note 270.

274. Press Release, *REBNY Study Concludes Landmark Districts Create Barriers to Housing Production Throughout the Five Boroughs*, REBNY (June 1, 2014), [https://www.rebny.com/content/rebny/en/newsroom/press-releases/2014/REBNY\\_Study\\_Concludes\\_Landmark\\_Districts\\_Create\\_Barriers\\_Housing\\_Production\\_NYC.html](https://www.rebny.com/content/rebny/en/newsroom/press-releases/2014/REBNY_Study_Concludes_Landmark_Districts_Create_Barriers_Housing_Production_NYC.html) [http://perma.cc/S7GA-XBNG]; accord GLAESER, *supra* note 271, at 148–52 (discussing landmark districts inhibiting building additional housing in New York City and the effect of that stagnation on the housing prices throughout the area).

275. Alexander, *supra* note 67, at 753.

276. See Radin, *supra* note 82, at 1898–903; Wenar, *supra* note 81.

277. See *supra* Section V.B.

*D. Land Assembly and Eminent Domain*

The most vivid contrasts between natural rights-based and perfectionist approaches to property regulation arise in land assembly disputes. “Land assembly” is the term used here to refer to development practices, under state and local law, authorizing the condemnation of private land and reassigning it to commercial developers to build higher-end residential units or new commercial units.<sup>278</sup> State enabling statutes authorize land assembly under one or both of two main approaches. Blight powers authorize localities to condemn private land and transfer it to private redevelopers if the land is “substandard,” “blighted,” or “deteriorating.”<sup>279</sup> The U.S. Supreme Court rejected constitutional challenges to blight programs in the 1954 decision *Berman v. Parker*.<sup>280</sup> “Economic development” powers authorize localities to exercise the same powers on a different showing: the condemnation and redevelopment is needed to improve local “economic welfare” through “the continued growth of industry and business.”<sup>281</sup> The Court upheld economic development-based programs against constitutional challenge in the 2005 decision *Kelo v. City of New London*.<sup>282</sup>

Land assembly programs illustrate how plurality, social obligations, and interest balancing can destabilize property rights. To be clear, support for land assembly practices is not a necessary or constitutive element of progressive property. *A Statement of Progressive Property* does not specifically praise land assembly.<sup>283</sup> Although some progressive scholarship is resignedly accepting of land assembly,<sup>284</sup> more is ambivalent toward<sup>285</sup> or sharply critical of<sup>286</sup> the institution.

278. See, e.g., Roderick M. Hills, Jr. & Michael Heller, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1467–69 (2008).

279. CONN. GEN. STAT. § 8-141 (2015).

280. 348 U.S. 26, 35 (1954).

281. § 8-186. For other relevant portions of the statute, see §§ 8-187 to -189, -193.

282. *Kelo v. City of New London*, 545 U.S. 469 (2005). I co-authored an amicus curiae brief against the position adopted by the Court in *Kelo* and for a position largely like that advocated by Justice Thomas. See Brief for Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioners, at 4, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2802971.

283. See Alexander et al., *supra* note 6, at 743–44.

284. See FREYFOGLE, *supra* note 205, at xix–xxi.

285. See Alexander, *supra* note 67, at 781 (doubting whether the benefits from a redevelopment project contribute significantly enough to human flourishing to justify “an owner sacrific[ing] her property entitlement”); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 315–16 (2006) (portraying redevelopment condemnations as raising difficult choices between “castle” and “investment” understandings of property).

Nevertheless, *A Statement of Progressive Property* does insist that property rights need to be connected “to the underlying human values that property serves,” that these “[v]alues can generate moral demands and obligations,” and that “[c]hoices about property entitlements are unavoidable.”<sup>287</sup> In land assembly disputes, tenets like these encourage a train of reasoning: owner property rights need to be connected to social interests in having a vibrant community; the community will generate growth or a unified aesthetic environment if it remakes a neighborhood; and private owners owe a civic responsibility to sacrifice their lots for growth or common aesthetic interests.<sup>288</sup> This argument surfaces quite regularly in the practice of land assembly. In *Berman*, the Supreme Court described the land owners’ property rights as being subordinate to what it described as a “broad and inclusive” “concept of the public welfare,” and gave the legislature leeway to decide that “the community [would] be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>289</sup> This same argument structure recurs in contemporary debates about land assembly after *Kelo*. For supporters of economic development condemnations, “[t]here is . . . a ‘greater good’ to be served” by programs like the Fort Trumbull program challenged in *Kelo*, “and some citizens should be willing to make a sacrifice if they are fairly compensated.”<sup>290</sup>

Although the debate over land assembly and *Kelo* cannot be settled or even treated exhaustively in this Article,<sup>291</sup> two points matter here. First, *Kelo* was one of the most notorious property

286. See Peñalver, *supra* note 68, at 863 (citing *Kelo* as an example of economic analysis’s “troubling willingness to trade on the well-being of individuals in pursuit of increased aggregate measures of well-being”); Laura S. Underkuffler, *Kelo’s Moral Failure*, 15 WM. & MARY BILL RTS. J. 377, 383 (2006).

287. Alexander et al., *supra* note 6, at 743–44.

288. See, e.g., *Berman v. Parker*, 348 U.S. 26, 33 (1954).

289. *Id.*

290. Stan DeCoster, *The Battle of Eminent Domain*, CONN. C. MAG., <http://www.conncoll.edu/camelweb/index.cfm?fuseaction=publications&circuit=cconline&function=view&uid=21&id=419821961> [<https://perma.cc/XLK3-5RHJ>].

291. For accounts sympathetic to the use of eminent domain, see HELLER, *supra* note 44, at 113–17 (noting serious issues with both voluntary assembly and eminent domain and asserting that *Kelo* was correctly decided as a matter of constitutional law); George Lefcoe, *Jeff Benedict’s Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 942–44 (2010) (book review) (noting advantages for property owners from eminent domain buyouts and the overall mobility of the American people); Thomas W. Merrill, *The Goods, the Bads, and the Ugly*, LEGAL AFF., [http://www.legalaffairs.org/issues/January-February-2005/toa\\_merrill\\_janfeb05.msp](http://www.legalaffairs.org/issues/January-February-2005/toa_merrill_janfeb05.msp) [<http://perma.cc/MQ9W-25HD>] (noting that “at key points in our history, forced transfers of property have been perceived to be the best solution to particular social problems”).

lawsuit of the last forty years. Shortly after *Kelo* was handed down, the U.S. House of Representatives passed a resolution condemning it by a 365 to 33 vote, opinion surveys three months later reported that between 80% and 95% of respondents were critical of the decision, and forty-three states enacted reform statutes responding to its holding.<sup>292</sup> Productive labor theory gives a powerful account why the citizens outraged by *Kelo*<sup>293</sup> might be expressing good Lockean property and political instincts. Second, productive labor theory expresses well the concerns that make *Kelo* so problematic—concerns about perfectionism in land use policy.

Most simply, productive labor theory supplies a starting presumption: if an owner is making some non-trivial, beneficial use of the relevant lot, it should not be condemned and reassigned for development by another private actor without a clear and convincing reason. This presumption is neither final nor irreversible. One can see as much in nineteenth and early-twentieth century cases skeptical of the expansion of eminent domain.<sup>294</sup> Such cases construed the “public use” requirement narrowly to authorize only the government or common carriers to use condemned property.<sup>295</sup> Yet some such cases also construed constitutional police power limitations to authorize some condemnations and private redistributions—say, for laws authorizing irrigation projects in arid territories,<sup>296</sup> or authorizing the transfer of riparian land to an applicant who wanted to build a power mill.<sup>297</sup> In situations like these, the proposed project promised to generate significant public benefits and condemnation was unavoidable in a relatively strict sense because the benefits could not be realized unless most or all plots of land were integrated into the project.<sup>298</sup>

292. See H.R. Res. 340, 109th Cong., 151 CONG. REC. H5592–93 (2005); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102, 2109–11 & n.45 (2009) (Zogby Int’l, American Farm Bureau Federation Survey 27 question 28 (Nov. 2, 2005); Ctr. for Econ. & Civic Opinion at Univ. of Mass./Lowell, *The Saint Index Poll* question 9 (2007)) (examining state legislative responses).

293. See text accompanying *infra* note 313.

294. See ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN* 35–72 (2015); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 919–28 (2004); see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 170–75 (1986).

295. See, e.g., *Ryerson v. Brown*, 35 Mich. 333, 341–42 (1877); SOMIN, *supra* note 294, at 35–72.

296. See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

297. See, e.g., *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 20–21 (1885); see Claeys, *supra* note 294, at 919–28; EPSTEIN, *supra* note 294, at 170–75.

298. See Claeys, *supra* note 294, at 906–09.

These earlier cases construed “public use” and police power principles strictly because they started with the presumption stressed in Parts II and III: if someone is deploying a resource to *some* non-trivial life-benefitting use, in most situations the best way to promote community flourishing is to protect that use.<sup>299</sup> That presumption explains the opposition to land assembly and also that opposition’s intensity. Justice Sandra Day O’Connor expressed Lockean sentiments in the best-known passage of her dissent in *Kelo*: “Who among us can say she already makes the most productive or attractive possible use of her property? . . . Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>300</sup>

That presumption also informed other and earlier classical liberal judicial opinions protesting the abuse of eminent domain. Lest we forget, the Supreme Court considered *Berman* because the authorizing statute challenged in that case had been narrowly construed by a three-judge district court to avoid possible constitutional problems.<sup>301</sup> Regardless of what one thinks of the doctrinal merits of the lower court’s argument, the court anticipated the natural rights themes discussed in this Section. The court supposed for the sake of argument that the condemned neighborhood:

fails to meet what are called modern standards. . . . Suppose its owners and occupants like it that way. Suppose they are old-fashioned, prefer single-family dwellings, like small flower gardens, believe that a plot of ground is the place to rear children, prefer fresh to conditioned air, sun to fluorescent light. . . . Is a modern apartment house a better breeder of men than is the detached or row house? . . . Are such questions as these to be decided by the Government? And, if the decisions be adverse to the erstwhile owners and occupants, is their entire right to own the property thereby destroyed?<sup>302</sup>

This presumption is justified by several implicitly empirical background assumptions. As Section VI.A explained, one is a strong skeptic that centralized regulation with planning will succeed often enough to make the game worth the candle. Whether land assembly does succeed often enough is an empirical matter, and there

299. See, e.g., *Fallbrook Irrigation Dist.*, 164 U.S. at 158; *Head*, 113 U.S. at 20–21.

300. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting).

301. See *Schneider v. District of Columbia*, 117 F. Supp. 705, 724–25 (D.D.C. 1953), *modified sub nom. Berman v. Parker*, 348 U.S. 26, 35 (1954).

302. See *id.* at 719.

is little directly relevant information.<sup>303</sup> The project in *Kelo* provides at least one vivid case study confirming that land assembly can backfire. Four years after the Supreme Court removed the last judicial obstacle to New London's project, the developer set to receive the property in dispute had failed to receive financing.<sup>304</sup> It took New London another six years to start this new project on the site.<sup>305</sup>

Another background concern is that economic development powers attract special interest pressures. In New London, the Pfizer plan first arose because the chairwoman of the New London Development Corporation (the "NLDC") was married to a Pfizer executive and used his contacts to identify and recruit another Pfizer executive to the NLDC's board.<sup>306</sup> The NLDC exempted from condemnation and redevelopment the Italian Dramatic Club, a private social club popular with local politicians.<sup>307</sup>

Productive labor theory also incorporates a concern that, when government actors get to determine the highest and best uses of property, their decisions will get caught up in conflicts between different ways of life. *Kelo* struck a nerve partly because it captured this aspect of land assembly policy. As one former Connecticut state official explained of the Fort Trumbull project, Pfizer officials "were

303. See Eduardo M. Peñalver, *Property and Politics*, NEW RAMBLER (Sept. 28, 2015), <http://newramblerreview.com/book-reviews/law/property-and-politics> [https://perma.cc/CQP8-7DRX] (reviewing SOMIN, *supra* note 294). There is fine empirical work on compensation practices, see, for example, Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 203–04 (2010). For a case studying and at least one case study on how private actors circumvent eminent domain, see, for example, Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 5 (2006). But it is more difficult to test, and there are few (if any) works trying directly to test, whether particular redevelopment projects generate net benefits, and the same goes for tests about whether eminent domain and redevelopment policies in particular states generate net benefits for all land uses and projects affected by them. For one of the few counterexamples attempting to grapple with these broader issues, see Stephen J.K. Walters & Louis Miserendino, *Baltimore's Flawed Renaissance: The Failure of Plan-Control-Subsidize Redevelopment*, PERSP. ON EMINENT DOMAIN ABUSE, June 2008, at 3–4.

304. See Katie Nelson, *Fort Trumbull Still Vacant 4 Years After Seizure*, NEW HAVEN REG. (Sept. 25, 2009, 12:01 AM), <http://www.nhregister.com/general-news/20090925/fort-trumbull-still-vacant-4-years-after-seizure> [https://perma.cc/8YUX-GZL3].

305. See Colin A. Young, *RCDA Sends Proposal for Fort Trumbull Development to City Council*, THE DAY (Mar. 25, 2015, 6:50 PM), <http://www.theday.com/article/20150324/NWS01/150329885> [https://perma.cc/H2DW-XRFH].

306. See JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* 24, 27 (2009).

307. See *id.* at 65–66, 175.

trying to attract people with Ph.Ds. who make \$150,000 to \$200,000 a year to eastern Connecticut . . . and they were not going to tell them they had to drive to work through a blighted community.”<sup>308</sup> Ultimately, “The idea that she wasn’t worthy of living next door to Pfizer left Susette [Kelo] feeling scorned and slighted too. ‘Rich white people don’t like us,’ she said.”<sup>309</sup>

## VII. LABOR AND THE MORAL VALUE OF EXCLUSIVE PROPERTY

The last Part showed how productive labor theory anticipates and avoids the tendencies that make flourishing a troublesome grounding for property rights. Yet one may reasonably wonder whether it is necessary to justify property in relation to flourishing at all. Economic analyses can and have purported to justify property understood as a robust right to exclude. There are fine economic analyses evaluating trespass,<sup>310</sup> adverse possession,<sup>311</sup> landmarking schemes,<sup>312</sup> eminent domain,<sup>313</sup> and even roaming statutes<sup>314</sup> with judgments similar to the judgments offered in this Article.<sup>315</sup>

### A. *Efficiency and Legitimate Authority*

Yet it has not been proven satisfactorily that economic efficiency is a quality relevant to instituting property laws. In property scholarship, some law and economics scholars have addressed this issue; productive labor theory complements their works by filling in a

308. See Ted Mann, *Pfizer’s Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, 12:01 AM, <http://www.theday.com/article/20051016/BIZ04/911119999> [https://perma.cc/AV4W-4SKK].

309. BENEDICT, *supra* note 306, at 102.

310. See generally Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985) (applying an economic model to defend the strict liability nature of trespass).

311. See, e.g., Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1137–45 (1984).

312. See, e.g., Smith, *supra* note 28, at 981–82; Richard A. Epstein, *The Problem with NYC’s Landmark Preservation Laws*, HOOVER INSTITUTION: DEFINING IDEAS (Apr. 20, 2015), <http://www.hoover.org/research/problem-nycs-landmark-preservation-laws> [https://perma.cc/3HDJ-Q3MX].

313. See, e.g., Epstein, *supra* note 4, at 2111–20; Kelly, *supra* note 303, at 5. See generally Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183 (2007) (reconsidering *Kelo* and deference to local governments in light of eminent domain abuse and the shortfalls of economic development takings).

314. See Klick & Parchomovsky, *supra* note 243, at 23–34; Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279, 283–84 (2011).

315. See Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL’Y 2, 6–9 (1990).

theory of justice roughly of the character assumed in their works.<sup>316</sup> As we shall see, however, some law and economic analyses of property assume that economic analysis can justify exclusion without addressing how efficiency relates to legal legitimacy.<sup>317</sup> Productive labor theory highlights philosophical challenges overlooked by those works. Last, some leading justifications for economic analysis assert that it can justify legal rules *without* recourse to a theory of justice.<sup>318</sup> Productive labor theory (like a Lockean theory of politics generally) provides further confirmation that these justifications suffer from important legitimacy problems.

In a theory of justice and rights, any normative account of law is defective and incomplete unless it addresses the problem of legitimate authority. As Frank Michelman explains, every law needs a “moral warrant for the application of collective force in support of laws produced by nonconsensual means, against individual members of a population of presumptively free and equal persons.”<sup>319</sup> In moral terms, people are capable of reasoning about their own well-beings and choosing particular forms of well-being they find satisfying, and other things being equal their choices deserve respect. As a result, as a moral matter, any legal rule that stops a person from pursuing his own legitimate project for well-being seems presumptively to interfere with his freedom. The rule may be justified. An owner may be required to sacrifice property to pay his fair share of taxes, to compensate someone else for having violated *her* rights previously, or to contribute a resource the public needs vitally for a public use. Yet the justifications for taxes, corrective justice, or eminent domain connect the sacrifice to a reasoned argument. On one hand, the argument must explain why the owner’s rights need to be qualified in relation to the common good; on the other hand, the argument must explain (like the deontological constraints discussed above in Part V) why the common good incorporates a decent respect for the interests of the owner.

This demand creates a challenge for economic justifications for legal rules.<sup>320</sup> If “the term ‘efficiency’ . . . denote[s] that allocation of

316. See *infra* Section VII.E.

317. See *infra* Sections VII.C.

318. See *infra* Section VII.B.

319. Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13, 22–23 (2003).

320. The text focuses on the most important moral challenge to efficiency-based justifications for law, but not the only one. Before transaction cost bargaining analysis is used to project the best use of a resource, it needs to be shown that the resource is a fit subject for bargaining (unlike, say, the acquisition of body parts, or access to rights of



resources in which value is maximized[.]”<sup>321</sup> why does the “value” that is maximized confer legitimate authority? As Jules Coleman explains,

To look at the law as the economist sometimes implores us to do, from the point of view of behavior, and not reasons [that give law legitimate authority], is not to understand the law at all. For what is distinctive of law is that it regulates our affairs by offering reasons for acting that are coercively enforceable.<sup>322</sup>

This legitimacy challenge may be met in one of two main ways. One is to argue that economic efficiency justifies certain legal rules *irrespective* of its relation to justice; the other is to accept that efficiency analysis can become normative if supplemented by “additional premises” about justice and rights.<sup>323</sup> Several prominent exclusion theories embrace the latter strategy.<sup>324</sup> Yet general justifications for economic analysis pursue the former strategy,<sup>325</sup> and some economic defenses of exclusion avoid engaging the relevant philosophical issues.<sup>326</sup> As a result, the next two sections recount the reasons why economic efficiency might not have the value necessary to justify property to explain why there are problems worth addressing, and how productive labor theory can help address them.

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sexual congress). If the parties start bargaining with any resources or wealth, it needs to be shown why those distributions are just enough for bargaining to commence. One also needs to determine what the “resource” is and with what legal rights and responsibilities its *res* is composed of before any bargaining begins. *See* Michelman, *supra* note 5, at 32–34. If the analysis suggests that rights may be shifted because they are efficient according to the Kaldor-Hicks criterion, that criterion assumes normative premises that may be debatable and may not be applicable across all act-disputes. *See* FLETCHER, *supra* note 42, at 158–68.

321. POSNER, *supra* note 42, § 1.2, at 16.

322. Jules L. Coleman, *Some Reflections on Richard Brooks’s “Efficient Performance Hypothesis”*, 116 YALE L.J. POCKET PART 416, 421–22 (2007), <http://yalelawjournal.org/forum/some-reflections-on-richard-brooks-efficient-performance-hypothesis> [https://perma.cc/A76U-4Y3F].

323. KLAUS MATHIS, *EFFICIENCY INSTEAD OF JUSTICE? SEARCHING FOR THE PHILOSOPHICAL FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW* 33, 38–39 (Deborah Shannon trans., 2009); Michelman, *supra* note 5, at 31.

324. *See infra* Section VII.E.

325. Although this Article focuses primarily on Richard Posner’s normative justifications for efficiency analysis, *see* POSNER, *supra* note 42, §§ 2.1–2, at 29–33, a similar critique could be made of LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 3–4 (2002) (arguing that “legal rules should be selected entirely with respect to their effects of well-being of individuals in society”).

326. *See infra* Section IV.C.

B. *The Normative Value of Efficiency*

Richard Posner deserves pride of place for his efforts to justify economic analysis normatively. Although Posner has proposed three possible justifications, each has difficulties. The first possible justification is that economic analysis helps maximize social value, as understood in classical forms of utilitarianism.<sup>327</sup> Such forms of utilitarianism are problematic, however, because they assume that “utility” refers to “pleasure” or “preference” in hedonistic and subjective senses.<sup>328</sup> When utility is described in terms of hedonistic and subjective preferences, it seems determinate. Yet that portrait also makes utility problematic. Subjectivism and hedonism legitimate the preferences of sadists, racists, tyrants, and other vicious people.<sup>329</sup> Separately, although it is never easy, in any ethics, to make any one person’s preferences commensurable with others’ preferences, incommensurability problems can be more severe when each person’s preferences are subjective and incapable of being valued by others. The problems that make utility incommensurable across individuals make it even harder to aggregate individual preferences into one social utility profile. Efforts to do so reduce individuals to being “cells in the overall social organism rather than . . . individuals.”<sup>330</sup>

Alternately, the value being maximized in efficiency could be social wealth.<sup>331</sup> Yet wealth maximization is problematic as well. Wealth is not a sufficient condition for moral well being; some people

327. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–16 (J.H. Burns & H.L.A. Hart eds., University of London 1970) (1789); JOHN STUART MILL, UTILITARIANISM 55 (Roger Crisp ed., 1998) (1861); HENRY SIDGWICK, THE METHODS OF ETHICS 411–17 (1874); see also J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 3, 9–12 (J.J.C. Smart & Bernard Williams eds., 1973) (defending “act-utilitarianism” and its singular goal of maximizing “probable benefit”); Julia Driver, *The History of Utilitarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/> [<https://perma.cc/DZG6-JEBE>].

328. Driver, *supra* note 327 (“The Classical Utilitarians, Jeremy Bentham and John Stuart Mill, identified the good with pleasure, so, like Epicurus, were hedonists about value.”).

329. ARISTOTLE, NICOMACHEAN ETHICS bk. 10, ch. 3, at 1173 (C.D.C. Reeve trans., Hackett Publ’g, Co. 2014).

330. POSNER, *supra* note 42, § 1.2, at 16–17. See generally Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997) (discussing the frequent failures of economic models of utility to successfully predict real human behavior); Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST, *supra* note 327, at 81–82 (sketching a general critique of traditional utilitarianism).

331. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 494 (1990).

are more miserable after winning lotteries than they were before. Nor is wealth a necessary condition; some people manage to prosper without significant material wealth. In law,

the wealth maximization standard...is (at least in its immediate applications) apparently biased in favor of the wealthy, is oblivious to questions of distributive justice, and in general disregards all human valuations or motivations that are not responsive to considerations of price, or cost, in a sense approximately measurable by methods available to economic science.<sup>332</sup>

One last possibility consists of a combination of Pareto superiority and consent.<sup>333</sup> Transactions are Kaldor-Hicks efficient if the social gains from the transactions exceed their social losses; transactions are Pareto superior if they generate social gains without making anyone worse off.<sup>334</sup> Because Pareto superior transitions do not diminish the utility positions of any affected stakeholders, Posner suggested, it would be just to infer that stakeholders do not object to such transitions—and then to presume that they have consented to those transitions.<sup>335</sup> Yet this justification raises problems as well. As Posner himself acknowledges, “the conditions for Pareto superiority are almost never satisfied in the real world,” because most legal transitions do worsen some individuals’ positions.<sup>336</sup> Furthermore, even when Pareto superior criteria are satisfied, Posner’s argument leverages a positive statement about preferences into a normative claim: that preferences deserve respect even if the preferences seem destructive or antisocial. Pareto superiority does not necessarily describe a normatively attractive quality, Jules Coleman concludes, because “people sometimes choose to do what they do not prefer to do, and do not do what they would otherwise prefer to do, often because they think it wrong to act as they would otherwise prefer.”<sup>337</sup>

332. Frank I. Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 311 (1979); see also RADIN, *supra* note 207, at 1–29; Anthony Kronman, *Wealth Maximization As a Normative Principle*, 9 J. LEGAL STUD. 227, 228–29 (1980). See generally Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (discussing the ways in which economic models often ignore important human motivators beyond wealth).

333. Posner, *supra* note 331, at 490.

334. See *id.* at 488, 491.

335. See *id.* at 488–97.

336. POSNER, *supra* note 42, at 18. See Posner, *supra* note 331, at 495 (describing Kaldor-Hicks efficiency as an administrable substitute for Pareto superiority).

337. Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1519 (2003) (reviewing KAPLOW & SHAVELL, *supra* note 325); see also Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

C. *The Normative Value of Efficiency in Property*

1. Exclusive Property

The problems recounted in Section V.B. can trouble economic analyses of property laws unless such analyses are qualified carefully. For example, some works justify exclusion by comparing the pros and cons of open-access regimes and exclusive property.<sup>338</sup> In such works, exclusion seems desirable because the wealth created by encouraging investment, reaping, and sowing outweighs the costs of administering exclusive rights.<sup>339</sup> This justification assumes that a property regime can be justified by the wealth it creates. Yet that assumption raises the question of why some people's enrichment, or the whole community's aggregate enrichment, can justify a legal regime restricting others from access to resources they might want to enjoy.<sup>340</sup>

Some works justify exclusive ownership on the grounds that it protects owner subjective value<sup>341</sup> and minimizes the information costs that non-owners need to expend to process property rights.<sup>342</sup> Without additional premises, these justifications raise the problems associated with classical forms of utilitarianism and Posner's Pareto superiority-consent argument. People's desires toward property can vary widely and clash sharply. Those variations and clashes make it hard to reconcile different "subjective valuations" on different resources, or to reconcile such valuations with social costs like information costs.

Although critics of economic analysis sometimes cite the preferences of racists and sadists to illustrate these arguments,<sup>343</sup> those illustrations may not be the most revealing examples. In any community, some people can attach to property preferences that are, on one hand, not vicious but understandable and still, on the other hand, extremely difficult to reconcile with the preferences of other citizens. Some aboriginal communities object strongly to regimes of individual exclusive ownership of freely alienable lots on the ground that the land held by their communities is "imbued with spiritual

338. See, e.g., Merrill, *supra* note 55, at 2081–93.

339. See, e.g., Demsetz, *supra* note 4, at 354–59.

340. See Peñalver, *supra* note 68, at 827 (discussing how economic analysis provides little guidance in determining what the goals of property law should be).

341. See, e.g., SOMIN, *supra* note 294, at 190–92; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–85 (1986).

342. See Merrill & Smith, *supra* note 4, at 385–88.

343. See, e.g., Singer, *supra* note 21, at 916–18 ("If utility is premised on both autonomy and equality, then perhaps we do not count the interests of racists in determining whether a law prohibiting intentional discrimination in housing is good.").

meaning[,] . . . constitutive of the identity of the people who live [on it,]” and not only “given to them to live upon, but also given to past and future generations.”<sup>344</sup> That understanding of land use and ownership inspired at least some of the Native American opposition to white European-American settlement of the Western frontier over the nineteenth and early twentieth centuries.<sup>345</sup> Other citizens may have strong religious or ideological commitments to living in strong communities. In his 1993 article *Property in Land*, Ellickson assembled sociological scholarship showing why Protestant Hutterites, Israeli kibbutzniks, and Woodstock youth all preferred communal arrangements.<sup>346</sup> Other citizens may be paternalists.<sup>347</sup> Such citizens take satisfaction not from living in communal or open-access regimes themselves but from seeing their fellow citizens change *their* preferences to want to live in such regimes.<sup>348</sup>

These three preference sets—for aboriginal ways of life, for intensely held anti-romantic or communitarian preferences, and for paternalist property policies—conflict sharply with the preferences of citizens who have more practical tastes. A system of private property needs a better argument to justify disregarding such preferences, and this argument needs to have legitimate authority sufficient to justify protecting private property with government force.

## 2. Land Assembly Powers and Other Limits on Exclusive Property

Similar problems arise in law and economic treatments of the regulatory systems that supply exceptions to private property. Consider the law and economic scholarship on land assembly.<sup>349</sup> In standard portraits, land assembly issues present a tradeoff. In some situations, a community may generate great social gains if many smaller tracts of land are reassembled into one large-scale project. Lots should be reassembled if the main obstacle to reassembly consists of owners holding out to expropriate the social gains. Reassembly should *not* take place if the parties favoring it seem likely

344. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1601 (2001).

345. See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 54–81 (1983).

346. Ellickson, *supra* note 4, at 1346–62.

347. See Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 152–55 (1970).

348. Ellickson, *supra* note 4, at 1317 & n.2 (attributing this view to Karl Marx & Friedrich Engels, *The Communist Manifesto*, in KARL MARX: SELECTED WRITINGS 221, 237 (David McLellan ed., 1977)).

349. On assembly and its context, see *supra* notes 278–82 and accompanying text.

to expropriate owner subjective value, if the government process for administering reassembly seems likely to generate secondary rent-seeking and other short-term administrative costs, or if it seems likely to generate long-term costs by undermining private markets for reassembly.<sup>350</sup>

Unless such analyses are qualified by moral premises, they conceal problems similar to the ones recounted in the last subsection. True, there may be some affected owners who are acting solely from a desire to extract as much wealth from developers as they can, and there may be some developers who enjoy dispossessing landowners as much as Steenberg Homes's assistant manager enjoyed trespassing across the Jacques' lot.<sup>351</sup> In many and probably most cases, however, "holding out" and "subjective value expropriation" do not convey adequately the strength or the complexity of both sides' claims. In practice, both terms seem to be used in ways that assume latent moral premises.

We can illustrate adequately here with the motivations and arguments of the supporters and opponents of the project that launched the *Kelo* lawsuit. The best-connected insiders were committed not only to increasing New London's aggregate wealth but also to changing the city's way of life.<sup>352</sup> These insiders thought New London was decrepit, and that a new pharmaceutical plant and an influx of urban professionals would put the city on the map.<sup>353</sup> The president of the NLDC brought a missionary zeal to the project; she described her inspiration to launch New London's development program as being "like the hand of God in my life."<sup>354</sup> On the other side, many of Fort Trumbull's residents were elderly and wanted to be spared the hardship of being moved from their homes.<sup>355</sup> Neighborhood resident Billy Von Winkle had spent two decades "turn[ing] some of the neighborhood's most blighted structures into quality, affordable housing"; he thought he deserved no less than

350. See, e.g., HELLER, *supra* note 44, at 108–17; SOMIN, *supra* note 294, at 74–99; Calabresi & Melamed, *supra* note 44, at 1106–08; Daniel B. Kelly, *Acquiring Land Through Eminent Domain: Justifications, Limitations, and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 344, 344–64 (Kenneth Ayotte & Henry E. Smith eds., 2011); Thomas J. Miceli & Kathleen Segerson, *The Economics of Eminent Domain: Private Property, Public Use, and Just Compensation*, 3 FOUND. & TRENDS MICROECONOMICS 275, 291–96 (2007).

351. *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154, 157 ¶¶ 7–8 (Wis. 1997).

352. See *supra* Section VI.D.

353. BENEDICT, *supra* note 306, at 38–54, 100–02.

354. *Id.* at 18–23.

355. Wilhelmina Dery received the most attention in this respect; she was in her late eighties and wanted to die in her own home. See *id.* at 88.

\$700,000 for his work, and he became incensed when he decided that pro-assembly actors were using eminent domain to undercut his bargaining position.<sup>356</sup> Suzette Kelo did not want to move out of her neighborhood under any circumstances, and she took offense at what she perceived as a group of “[r]ich white people” trying to take over her neighborhood so that incoming professionals could have residences with a nice view.<sup>357</sup> Furthermore, onlookers—faculty at Connecticut College in particular—opposed the Fort Trumbull part of the project because they thought that the neighborhood had distinct architecture, and that it was unjust to use eminent domain to clear the neighborhood.<sup>358</sup>

When disputants have perceptions and desires like these, it is difficult to make economic cases for land assembly by appealing solely to efficiency. Assume that leaders approve an assembly like the project litigated in *Kelo* on the ground that it seems likely to create net wealth in New London. When leaders make such a decision, they assume that wealth creation takes priority over elderly residents’ interests in peace and quiet, Van Winkle and other improving owners’ claims to just returns for their investments, the demands of Kelo and residents like her not to be treated condescendingly, and the interests of onlookers like Connecticut College faculty in seeing justice. Pareto superiority and implied consent do not eliminate these problems. None of the individuals just mentioned explicitly consented to the New London project, and when it disregarded their objections, the NLDC went forward with a Pareto inferior project. If some aggregative and classical form of utilitarianism grounds the justification for land assembly, that grounding will not be satisfying either. The preferences of elderly residents, Van Winkle, Kelo, and Connecticut College faculty seem difficult to reconcile with a putative social interest in putting New London on the map or increasing jobs, wealth, and the tax base.

#### *D. A Lockean Critique of Efficiency*

As the last two sections have shown, over the last generation legal scholars have raised serious challenges to arguments, by Posner and others, that efficiency has normative value standing alone.<sup>359</sup> All of these critiques were anticipated by Locke. Consider first the

356. *See id.* at 36–37, 62, 101–02.

357. *See id.* at 65, 67–69, 102.

358. *See id.* at 123–28.

359. *See supra* Section VII.B–C.

problems associated with classical forms of utilitarianism. Although Locke wrote his *Two Treatises* a century or two before Bentham, Mill, and Sidgwick, he says enough to anticipate preference utilitarianism.<sup>360</sup> He is fully aware of the problem of vicious utility preferences; a major concern of his *Two Treatises* is the possibility that the human imagination, fanatic tendencies, and dogmatic tendencies may “carry [man] to a Brutality below the level of Beasts.”<sup>361</sup> One of the main points of Locke’s political theory is to distinguish between the states of character associated with the “Industrious and Rational” and those associated with the “Quarrelsome and Contentious.”<sup>362</sup> In other words, even if people are motivated by their desires and their perceptions of pleasure and pain, those desires and perceptions do not enjoy normative status if they go beyond what is sufficient for rational and sociable forms of happiness.<sup>363</sup>

Locke also anticipates the main objections to wealth-maximization. Locke agrees that wealth lacks normative value on its own “as to Money, and . . . Riches and Treasure,” he warns, “these are none of Nature’s Goods, they have but a Phantastical imaginary value: Nature has put no such upon them.”<sup>364</sup> For Locke, people usually desire money and precious resources for one of three reasons: greed,<sup>365</sup> desire for conventional status,<sup>366</sup> or to acquire the means by which to satisfy survival and improvement-related needs.<sup>367</sup> If flourishing is the theoretical goal, of these three, only the last is legitimate.

Finally, Locke anticipates problems with making consent a basis for obligation. This suggestion may strike readers as surprising,

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360. See BUCKLE, *supra* note 13, at 146; SIMMONS, *supra* note 86, at 56–58. Buckle provides further confirmation from Locke’s *An Essay Concerning Human Understanding*. See BUCKLE, *supra* note 13, at 142–45 (citing Locke, *supra* note 8, § 2.6, at 271).

361. LOCKE, *supra* note 8, § I.58, at 182.

362. *Id.* § II.34, at 291.

363. *Id.* (“He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another’s Labour: If he did, ‘tis plain he desired the benefit of another’s Pains, which he had no right to . . .”).

364. *Id.* § II.184, at 391.

365. *Id.* §§ II.37, II.111, at 294, 342 (respectively) (describing greed in terms of “*amor sceleratus habendi*, evil Concupiscence,” and a “desire of having more than Men need[.]”).

366. See *id.* § II.46, at 299–300 (noting that some goods are not desired because of their utility, but because “Fancy or Agreement hath put the Value on [them]”).

367. See *id.* § II.47, at 300–01 (describing money as a “lasting thing that . . . Men would take in exchange for the truly useful, but perishable Supports of Life”).



because Locke is frequently portrayed as a social contract theorist.<sup>368</sup> Locke does hold that individuals should not be subjected to the authority of a government unless they have consented to be governed under its jurisdiction.<sup>369</sup> Yet once citizens have provided this general consent, it does not follow that they cannot be bound to follow specific substantive regulations unless they consent to those regulations as well. Indeed, Locke takes pains to repudiate consent-based theories of property. Locke argues against consent-based theories, and for labor-based theories, because people might withhold consent unreasonably and cause their neighbors to “starve[.]”<sup>370</sup> So legal officials may institute labor-securing regulations, assuming that a just and rational citizenry has already acquiesced in a “tacit and voluntary consent” to such regulations.<sup>371</sup>

#### *E. A Lockean Rehabilitation of Efficiency*

Not only does Locke anticipate familiar problems with efficiency analysis, he also supplies a better possible grounding for such analysis. Again, Michelman noted that “a careful reader” of economic analysis “can always infer additional premises” about human behavior and sociability “implicit in the literature’s accounts of the efficiency virtues of private property.”<sup>372</sup> Among other possible premises, Michelman suggested the following: people do value freedom and should be treated as owners of their own persons and agency, and people deserve enough access to their community’s resources that they can pursue concurrently their own individual life goals.<sup>373</sup> These sound like Lockean premises.<sup>374</sup> For law and economic scholars open to the possibility, productive labor theory supplies moral context, making economic analysis of property rights more defensible.

Indeed, some law and economic scholars are open to this possibility. Let me illustrate with three examples, starting first with

368. See, e.g., Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/soc-cont/> [<https://perma.cc/YQK5-FC2E>].

369. See Charles R. Beitz, *Tacit Consent and Property Rights*, 8 POL. THEORY 487, 487 (1980); A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 274 (1976); Alex Tuckness, *Locke’s Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2016), <http://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/TXM7-LZ6V>].

370. See LOCKE, *supra* note 8, § II.28, at 288.

371. See *id.* § II.50, at 301–02.

372. Michelman, *supra* note 5, at 32.

373. See *id.* at 33.

374. See, e.g., LOCKE, *supra* note 8, § II.27, at 287 (stating that “every Man has a Property in his own Person[.]”); *id.* § II.34, at 291 (insisting that ownable resources are best dedicated to the “use of the Industrious and Rational[.]”).

Ellickson and his article *Property in Land*.<sup>375</sup> Ellickson makes his transaction-cost-based justification for property contingent on three rights-based claims: (1) people have rights to their persons; (2) people deserve property in the things they make from their labor; and (3) property rights entail liberties to alienate property.<sup>376</sup> The justifications for property rights developed in Parts II through V can confirm and justify those assumptions.

Consider next Henry Smith's approach to exclusion. Smith has long stressed that his insights about information costs are compatible with both utilitarian and nonutilitarian justifications for property.<sup>377</sup> The account provided here confirms as much, within limits. On one hand, productive labor theory's claim-marking requirement provides a basis in rights-based morality for most of what Smith says about information costs.<sup>378</sup> On the other hand, the responsibilities of owners to use their possessions productively, and the sufficiency and necessity provisos, impose broad outer limits on the situations when information costs deserve to take priority. These limits lay the foundations for limits on property, one presumes, reflected in the governance-based limits Smith recognizes on exclusion.<sup>379</sup>

Productive labor theory can also complement consequentialist theories justifying property rights. Productive labor theory reconciles property rights to the common good, by justifying both in relation to rational interests in survival and preservation. In principle, a theory of consequentialism may make similar moves from social welfare to individual rights; it could incorporate into social welfare profiles individual normative claims relating to fairness, equality, or freedom. In this spirit, Richard Epstein has proposed a hybrid form of utilitarianism based on a "congruence" he sees "between natural law and utilitarian theories on some of the key building blocks of our own legal tradition," including property rights.<sup>380</sup> Some have wondered whether Epstein's account hangs together as a consequentialist

375. See Ellickson, *supra* note 4.

376. *Id.* at 1326 n.34.

377. See, e.g., JAMES PENNER & HENRY E. SMITH, *Introduction* to PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, *supra* note 14, at xxi (suggesting that productive labor theory "might well have a tendency to converge with economic theories" of property); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 971 (2004) (arguing that "exclusionary rights can be justified on a number of grounds: libertarianism, autonomy, personhood, desert, and so on" to include utilitarian grounds as well).

378. See Smith, *supra* note 377, at 975–90.

379. See Smith, *supra* note 377, at 973; Smith, *supra* note 18, at S478–83.

380. RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 11 (1999).

theory.<sup>381</sup> Because productive labor theory justifies property rights and the public good in relation to interests in rational flourishing,<sup>382</sup> it may supply the reconciliation Epstein hopes to attain.

One way or another, productive labor theory may be able to give an account of the reasons why economic defenses of property rights have the sort of value justifying enforcing property in law. Labor facilitates a form of preference-satisfaction within broad but firm outer boundaries. As explained, in ordinary situations people *should* have freedom to use resources for survival and their own reasonable life goals.<sup>383</sup> To the extent that people have preferences to acquire property for these varied ends, their preferences deserve respect and satisfaction. But productive labor theory imputes to citizens a “tacit and voluntary consent” *not* to have other preferences: to enslave or get priority over neighbors; to deploy resources idly or destructively; to claim shares of resources inconsiderate of the just sufficiency and necessity claims of others; or to take satisfaction from the legal regime’s choking the productive use of resources.<sup>384</sup>

Similarly, productive labor theory facilitates a form of wealth maximization. Although in principle it is “entirely a contingent matter” whether “accumulation or industry are rational,” in practice “by and large they *are* rational.”<sup>385</sup> When a society creates new homes, medicine, food, and life conveniences, it expands the range of things with “usefulness to the Life of Man.”<sup>386</sup> And when a society institutes money and financial instruments, these instruments have moral value insofar as they give people durable and respected mechanisms for banking the potential to acquire things useful for their reasonable life goals.

## F. Illustrations

### 1. Exclusive Property

This moral background supplies the premises needed to strengthen economic justifications for exclusive property. When exclusive property is said to generate “wealth,” that statement makes

381. See Henry E. Smith, *Commentary*, in *PROPERTY IN LAND AND OTHER RESOURCES* 356, 357 (Daniel H. Cole & Elinor Ostrom eds., 2011) (casting doubts about Epstein’s “[u]tilitarian-based natural law, if such a thing is possible”).

382. See *supra* Section II.A.

383. See *supra* Part II & Section VI.A.

384. See LOCKE, *supra* note 8, § 11.50, at 301–02.

385. BUCKLE, *supra* note 13, at 153.

386. LOCKE, *supra* note 8, §§ II.37, II.184, at 294, 391 (respectively).

moral sense if it is understood as coarse and compressed shorthand for a moral claim. As Part IV showed, exclusive property can, in combination with contract and money, “over-balance the Community” of resources, by increasing the store “of *things really useful* to the Life of Man . . . .”<sup>387</sup> The moral claim makes clear, however, commonly overlooked moral limits on “wealth-creation” or “wealth-maximization.”<sup>388</sup> As Part V showed, the fruits of increased productivity need to be distributed consistent with the sufficiency proviso, but when that constraint is satisfied property’s wealth-creating tendencies justify it. Similarly, exclusive property can maximize the protection of subjective value—as long as “subjective value” is understood to encompass activity consistent with the sociable pursuit of survival or rational improvement, and not destructive, idle, or selfish valuations on things.<sup>389</sup> And “information cost” minimization is relevant to property as well, as long as information costs are understood as a compressed shorthand for the claim-marking element, and suitably qualified for the sufficiency and necessity claims of non-owners.<sup>390</sup>

So understood, productive labor theory also helps economic analyses deal with hard preferences, like the preferences recounted of aboriginals, communitarians, or antiproperty romantics.<sup>391</sup> Citizens like these are entitled to their preferences for their own ways of life. They deserve equal opportunities to acquire property and manage the property they acquire as common land for their own members. They may not leverage their preferences into super-preferences, however, so that the entire community’s system is structured to force or incentivize other citizens to conform to their preferred methods of living. The rest of the community has legitimate authority to disregard those last preferences on the ground that they restrict free labor and deny the rights of the rest of the citizenry.

## 2. Property Reassemblies

Similar arguments supply premises missing from economic justifications for programs limiting exclusive property rights; again, reassembly schemes illustrate this issue. Wealth enlargement and maximization are much more defensible if understood as coarse and compressed shorthand for a moral goal—increasing the opportunities

387. *Id.* at §§ II.40, II.46, at 296, 299 (respectively).

388. *See id.*

389. *See supra* Section I.C.

390. *See supra* Section II.C–D.

391. *See supra* Section VII.C.1.

for all to acquire conveniences of life and labor productively. Some American nuisance decisions have appealed to this principle, especially undue hardship cases in which a court-ordered injunction would shut down a town company.<sup>392</sup> And some earlier public use and police power decisions appealed to this principle as well, in cases *approving* reclamation of swamp drainage projects and reassemblies of land for irrigation projects and power mills.<sup>393</sup> For example, one leading U.S. Supreme Court case upheld a state law authorizing the reorganization of land for power mills on this ground:

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.<sup>394</sup>

Of course, the standards assumed in this passage are less determinate than a standard like wealth-maximization. Yet those standards are less determinate because they recognize important moral limitations that are either assumed or disregarded by the concept of wealth-maximization. If a reconfiguration of property increases net wealth, that increase is helpful, but by no means sufficient to justify the reconfiguration. Because any reconfiguration disrupts conventional property rights, it bears a burden of satisfying

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392. To explain how it would consider the relevant equities in the nuisance suit by landowners against two nearby copper refineries, the court reasoned,

[I]n a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.

Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 667 (Tenn. 1904).

393. See, e.g., Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 157–64 (1896) (upholding an irrigation project both on public use and reciprocity of advantage grounds); Wurts v. Hoagland, 114 U.S. 606, 614 (1885) (upholding a state law authorizing state geology surveyors to drain swamps and to assess affected owners for the expenses, as a police regulation improving land); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 704 (1884) (declaring it “not open to doubt that it is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community[,]” and upholding a swamp reclamation project on this basis); Fiske v. Framingham Mfg. Co., 29 Mass. (12 Pick.) 68, 72–73 (1831) (upholding a mill act on the ground that it facilitates the beneficial use of water courses, on condition that the act be construed not to preempt other riparians’ common law actions for flooding).

394. Head v. Amoskeag Mfg. Co., 113 U.S. 9, 21 (1885).

rights-based deontological limitations.<sup>395</sup> Those limitations are easy to satisfy when owners are making little or no beneficial use of the property needed for reassembly—say, arid land that has not been developed because it is not yet irrigated. The same limitations may also be satisfied when it is practically impossible to generate a new and more productive activity without reassembly. The Supreme Court’s holding above captures that concern in power mill litigation—especially in its statement that the mill “cannot be fully and beneficially enjoyed in its existing condition.”<sup>396</sup> In those latter cases though, the government must not only certify that reassembly is strictly necessary, but also ensure through generous compensation that the ousted owners benefit from the reconfiguration. In the passage just quoted, not “just” compensation but “equitable compensation.”<sup>397</sup>

In short, although the foregoing criteria do take wealth enlargement into account, they do so only as part of a more complex moral calculus about how to enlarge opportunities to acquire and use resources while respecting the freedom and the flourishing interests of current owners. That same moral background fills in the context lacking from terms like “subjective value” and “hold out.” These terms make it sound as if regulators can decide which reassemblies to authorize using a simple subtraction formula. The regulators should authorize a project if all of its social benefits from a project are greater than its subjective-value losses. Before conducting this analysis, regulators should make sure that project opponents are opposing the project sincerely and not holding out. This approach is far more justifiable if “subjective values” and “hold-outs” are understood in moral terms.

Imagine that a new power mill could not be built without ousting a riparian. Imagine also that the riparian objected—not because he was greedy, but because he opposed the mill for the same ideological, “don’t tread on me,” class-based reasons that motivated Suzette Kelo to object to eminent domain in her New London neighborhood.<sup>398</sup> A conscientious official could reasonably treat Kelo and the riparian

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395. See *supra* Part V.

396. *Head*, 113 U.S. at 21.

397. See EPSTEIN, *supra* note 294, at 170–75 (analyzing public use challenges by inquiring whether the surplus from property reorganization was distributed proportionately among the parties affected by the reorganization); Claeys, *supra* note 294, at 918–27 (analyzing public use challenges as police power challenges, and inquiring whether the challenged laws secured an average reciprocity of advantage to parties affected by the property reorganization).

398. See *supra* Section VII.C.2.

differently. The official could classify Kelo as a “sincere dissenter” protecting “subjective value” and the riparian as a “hold out.” Yet the distinction between Kelo and the imagined riparian has nothing to do with their actual motivations or preferences—by assumption, the motivations and preferences are identical. Rather, the hypothetical riparian would be a “holdout” even if she were not trying to expropriate wealth from the mill company, because, in context, her intentions and her rights claims would be extreme. It would not matter how sincerely she opposed the mill. If a reasonable and social onlooker were to agree that there was no means short of condemnation to create the mill, that the community stood to benefit from the mill, and that the authorities were taking every reasonable step to protect the flourishing interests beneath her property rights, the riparian would be a “holdout” simply by virtue of objecting to a project increasing opportunities throughout the community. By contrast, Kelo could still be a “sincere dissenter” protecting “subjective value” because she is asserting her rights in a context in which a reasonable and sociable onlooker would conclude that condemnation is *not* so strictly necessary that it justifies overriding the ordinary presumption that owners should be free to use their own lots for their own goals. Here, productive labor theory again complements economic accounts of land assembly by supplying moral assumptions under which economic analyses could be politically legitimate.

#### CONCLUSION

In his contribution to the 2009 *Symposium on Progressive Property*, Gregory Alexander concluded, “American property law is not solely about either individual freedom or cost-minimization.”<sup>399</sup> Productive labor theory confirms as much. But it provides an alternative considerably different from the understandings of freedom, cost-minimization, and progressive values on display in current scholarship.

Productive labor theory supplies a rights-based theory of property that does not receive adequate appreciation. Productive labor theory presents not a theory of autonomy but of liberty ordered to facilitate flourishing. Flourishing, productive labor, sufficiency, sociability, and equal opportunity supply a normative framework for reasoning about exclusive rights and use-based needs, and this

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399. Alexander, *supra* note 67, at 818.

framework puts cost-minimization and other consequentialist concerns in their proper contexts.

This justification supplies property with a normative foundation more satisfying than it currently has. To exclusion theorists, productive labor theory provides a friendly reminder of the questions that still need to be answered about the link between efficiency and property law—but it also supplies answers to those questions. To progressive theorists, productive labor theory offers a friendly warning: flourishing can work not only to justify property, but also to destabilize it and encourage aggressive political infighting around it. Here too, productive labor theory offers a solution: progressives may be able to agree that property consists of a general and indirect right of exclusive control, which may be limited when strong flourishing-based interests so suggest.

Productive labor theory will not answer every question about property law. Yet it is instructive that an old account of property manages to be both durable and relevant to contemporary scholars' questions. And maybe that account can keep property on sturdier foundations than those on which it has rested in recent scholarship.