Building a Better Cathedral:
Labor, Exclusion, and Flourishing in Property Law

Eric R. Claeys*

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Introduction

Property is 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.”\(^1\) Although Blackstone was almost surely indulging in rhetorical excess,\(^2\) it’s no accident that his description has become a soundbite in recent property scholarship. The most familiar property rights confer on owners powers to exclude others from their possessions. Property rights confer such exclusive power even when non-owners really need to use the property, or when non-owners won’t hurt it. “Sole … dominion” captures that normative structure; “despotic” captures how ominous and problematic it seems.

In contemporary scholarship, the two main families of property theories reflect that unease. Each family captures and justifies one important dimension of property. Each leaves property on shaky foundations in another dimension.

One such theory-family covers “exclusion theories.” Exclusion theories justify property’s being structured as Blackstone’s sweeping right to exclude. Exclusion theories justify this rights-structure on various economic grounds, especially incentivizing investment and improvement, protecting owner subjective value, and minimizing third parties’ information costs in dealing with resources.\(^3\) Yet although these accounts capture property’s exclusive character,

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1. [William Blackstone, Commentaries *2.](#)
they are nagged by philosophical doubts. Assume that efficiency can explain why exclusive property creates wealth. Even on that assumption, what about efficiency justifies excluding non-owners from a resource if they have strong needs to access it? Questions like these have not yet been satisfactorily resolved 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 political legitimacy. Progressive theories portray property as being justified in relation not to efficiency but to moral interests in well-being or flourishing. Property is messy and context-dependent, such theories maintain, because it balances “plural and incommensurable” interests. These theories avoid the problems from which exclusion theories suffer. Yet they also make exclusive property even harder to justify. When property is cast as a right to use a resource as seems consistent with a range of relevant and plural values, it can easily get recast as a right to use an ownable resource as a judge or the community finds valuable for everyone. At which point, property doesn’t seem property anymore. The grounding progressive theories provide “comes at a heavy price to the qualities that make property law special.”

Exclusion and progressive theories each raise one serious challenge to property as conventionally understood. Because each raises a different and fundamental challenge about property, however, together the two theories seem to leave property on uneasy foundations. This Article aims to reconcile that opposition and unease. It tries to build a better cathedral for property.

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Now, since the term “cathedral” comes with a lot of context in property scholarship,\(^7\) let me explain my intended context here. This Article assuredly does not follow Calabresi and Melamed’s landmark “Cathedral” article in its subject matter;\(^8\) I do not introduce a newfangled taxonomy of proprietary legal entitlements, and I keep discussions of “property rules” and “liability rules” to a bare minimum. To a limited extent, I am invoking the “cathedral” metaphor that Calabresi and Melamed themselves invoked. In other words, this Article invites scholars to look at property from a different perspective, like one of the many perspectives Monet offered in his series of paintings of the Rouen Cathedral.\(^9\) For the most part, however, this Article appeals to a different “cathedral” metaphor. To build a cathedral capable of standing for several centuries, the builders had better start with very, very sturdy foundations. What is true in architecture may be true also in legal ordering. To make property law more durable, scholars may profit from considering whether the field needs shoring up, with a normative foundation missing from current scholarship.

This Article aims to supply such a foundation. Its general intention is to introduce a third alternative to exclusion and progressive theories, namely a classical liberal, natural rights justification for property. To do so, this Article takes a new look at John Locke’s chapter “Of Property,” in his *Second Treatise of Government*.\(^{10}\) “Of Property” deserves pride of place in the Western legal tradition for making property a dominant category in legal and political thought. Legal historians acknowledge that it “is difficult to overstate the impact of the Lockean concept


\(^8\) See id. at 1106-15.

\(^9\) See id. at 1127-28.


There are many, many different versions of the *Two Treatises* available; my sense is that Laslett’s edition comes as close to being a generally-accepted scholarly version as there is. As a compromise, I cite to passages of the *Two Treatises* by treatise number (II), then section number (25), and then page of the Laslett edition (285).
of property”\textsuperscript{11} on American property law. Property scholars also recognize that Locke “still today [supplies] the point of departure for most philosophical discussions of property.”\textsuperscript{12} As Wendy Gordon’s path-breaking work on Lockean intellectual property shows,\textsuperscript{13} sometimes scholars can clarify and shake up what may seem entrenched contemporary debates, by consulting a durable source in the canon. That is the general aim of this Article. This Article means to enliven the debate between progressive and exclusion theories, by showing how a Lockean, rights-based approach resembles, challenges, and complements each side.

Of course, as Locke’s theory of property continues to resonate, so it also continues to attract considerable resistance. In many quarters, Locke’s theory seems “fraught with difficulties,”\textsuperscript{14} or it “appears in several versions, most of them deficient in one respect or another.”\textsuperscript{15} Nevertheless, now may be a good time to wonder whether these perceptions are accurate. Outside the legal academy, over the last generation, a lot of fine work has been done 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. One of the contributors to that work defines labor in such terms, as “rational (or purposeful), value-creating activity … directed toward the preservation or comfort of our being.”\textsuperscript{16} This Article refers to flourishing-based labor theory as “productive labor theory.”

Productive labor theory is just now starting to get recognition in contemporary legal

\textsuperscript{12}Thomas W. Merrill, Accession and Original Ownership, 1 J. LEG. ANAL. 459, 497 (2010).
\textsuperscript{15}Jesse Dukeminier et al., Property 14 (8th ed. 2014).
scholarship. And now that progressive property has raised deep questions about the link between property and flourishing, that political-philosophy work is now extremely relevant to the most urgent questions in legal property scholarship.

To explain why, this Article makes three more specific claims. First, productive labor theory supplies a rights-based justification for property understood as a presumptive right of exclusive possession, control, and enjoyment. 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. 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. Productive labor theory thus justifies exceptions to exclusive property—when the link between labor and exclusive control seems really 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. Exclusive control supplies the working template for property for 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-based structure helps shore up the property cathedral; it addresses the main problems from which exclusion and progressive property theories suffer. Which takes

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us to this Article’s second claim: Productive labor theory anticipates and avoids the downsides already noted with progressive property. Like progressive property theories, productive labor theory grounds property in moral interests in flourishing. As admirable as flourishing is in theory, however, in practice it provides a troublesome grounding. When property is 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 are both interested in getting 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 than progressive theories do. To illustrate this claim, this Article discusses European statutory easements of passage (“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*19); and controversies over eminent domain and redevelopment (associated, most recently, with the Court’s landmark decision in *Kelo v. City of New London*20).

And last, productive labor theory anticipates the philosophical criticisms from which exclusion theories suffer—and it 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 gives more people security to use their own resources than an open-access system would, if it encourages citizens to produce more useful goods, and these goods circulate widely throughout the society through commerce. Not only does that justification make

exclusive property more defensible, it also helps clarify the place of economic analysis of property. Exclusive property can be efficient—as long as one is clear about the moral premises implicit in wealth-maximization, preference-satisfaction, and other putatively-normative justifications for efficiency.

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 strong rights or normative interests within narrow parameters and only weak claims or no claims about policy consequences, it’s assumed, while economic theories make broad claims about consequences and few claims about 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.” Singer is correct, and labor theory provides a counterexample correcting the trends that concern him. But if they can look past the details of “labor,” “sufficiency,” “survival,” and “improvement,” other scholars may find the normative structure of productive labor theory helpful in revealing similar interplays in other rights-based approaches: not only progressive theories but also Rawlsian property theories, traditional natural law theories, corrective justice theories, and pluralist rights-based theories. And the same basic insights may even interest scholars on the consequentialist side of

the divide. 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.\textsuperscript{26}

This Article’s argument proceeds as follows. Part I surveys contemporary property scholarship, to show why the property cathedral has some unstable foundations. Parts II through V explicate this Article’s first claim, that productive labor theory justifies property understood as a presumptive right of 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 show how the first claim fills the two unstable dimensions of property’s foundations. 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 economic analysis. Yet it also suggests how the theory shores up the normative foundations beneath economic analysis of property—by clarifying the moral entitlements that citizens can bargain with.

I. Cracks in the Property Cathedral

Since Locke himself acknowledged that people appreciate what is “familiar and more particular” than what is remote and more theoretical, let’s start by tracing how contemporary property scholarship is backing into Lockean themes. In short, property is counterintuitive anyway, and the main trends of recent property scholarship have only made it seem more so.

A. The Uneasy Place of Exclusion in Property

The tort of trespass to land illustrates better than any other legal doctrine how counterintuitive property seems to lay sensibilities. The *prima facie* action for trespass gives an owner a cause of action whenever someone else enters her land without her consent. The entrant needn’t cause any actual harm to the land. An action accrues even if the entrant enters in the mistaken belief that he has a right to go on the land he enters, or if the entrant has some ostensible excuse justifying the entry.

A right this uncompromising and exceptionless seems to leave a logical gap between justifications and their operating structures. Assume property rights encourage investment, by guaranteeing owners that they will reap where they sow. That justification is overinclusive; why let owners get protections against trespassory entries even when they haven’t invested to improve their lots? For any other justification for trespassory property rights, it’s easy to find similar overinclusivity problems.

28 See REST. (2D) TORTS § 158 (1979). Trespass protects not only “owners” but also all legitimate “possessors,” see id.; the text focus on “owners” because they’re the paradigmatic possessors. “Entries to land” encompass not only entries onto the surface of a lot but also intrusions into the subsurface and (within limits set for overflights) the airspace over the lot. See id. cmt. g.
29 See REST. (2D) TORTS § 164 (1979).
Even though these doubts nag trespassory property rights in theory, they don’t seem to affect property rights in practice. Consider *Jacque v. Steenberg Homes, Inc.* Steenberg Homes employees cleared a snowpath across a field on the Jacques’ 170-acre lot, over the Jacques’ objections, to deliver a mobile home to a customer while the nearest road was covered in snow. Although the Steenberg Homes assistant manager who ordered the delivery treated the Jacques contemptuously, the employees who towed the home didn’t leave any damage on the Jacques’ property. The Jacques refused to approve a crossing in part because they believed (mistakenly) 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.” On these facts, there were several reasons not to say that Steenberg had committed a trespass. Nevertheless, the jury found that Steenberg Homes had committed a trespass, awarded the Jacques $1 nominal damages, and awarded them another $100,000 in punitive damages.

The Wisconsin Supreme Court upheld the judgment of trespass and the punitive-damage award, and when it did so, it cited the exclusionary model of trespass as a self-evident starting proposition. The Jacques didn’t 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.” Over and over, with citations to many and diverse sources, the Wisconsin supreme court insisted that “the owner’s right to exclude others from his or her land is ‘one of the most

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31 563 N.W.2d 154 (Wisc. 1997).
32 See id. (reporting 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).
33 Id. at 157.
34 See id. at 166.
35 Id. at 159.
essential sticks in the bundle of rights that are commonly characterized as property.”\textsuperscript{36} Yet the court never explained why a right to exclude is essential.

B. Early Law-and-Economic Analyses of Property

Not only is property counter-intuitive on its own, leading scholarly approaches to property have made it seem even more puzzling. Important here, early law-and-economics analysis 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 analysis.” Such scholarship is “post-Coasean” because it follows and builds on the analysis of property disputes developed in Ronald Coase’s 1960 article \textit{The Problem of Social Cost}.\textsuperscript{37} Analyses in this genre portray property disputes as incompatible-use disputes, in which parties rationally bargain to maximum net joint product.\textsuperscript{38} Following Coase, Richard Posner, Guido Calabresi, and many other law-and-economics scholars concluded that the best way to study property is to inquire what pairings of uses would maximize joint product in an ideal world, identify transaction costs, and then assign legal entitlements in the manner that seemed most likely to maximize joint product once transaction costs had been factored in.\textsuperscript{39}

For better or worse, that framework makes property’s exclusive structure seem even stranger. Take \textit{Jacque} again. It seems extremely formalistic to give the Jacques a legal right to exclude Steenberg Homes without any showing of cause or harm. Steenberg Homes didn’t leave

\textsuperscript{36} Id. at 159-60 (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1993)).

\textsuperscript{37} See Richard A. Posner, Economic Analysis of Law §§ 2.1 to -.2, at 29-33 (8th ed. 2011); George P. Fletcher, Basic Concepts of Legal Thought 155-70 (1996); Merrill & Smith, supra note 3, at 375-83.

\textsuperscript{38} R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2-4, 8-16 (1960).

any actual damage to the field. Any decision that lets Steenberg Homes 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 seemed to be excluding for irrational reasons, especially their (legally-mistaken) belief that a crossing license might ripen into an adverse possession claim. In this framing, it might seem sensible effectively to assign a one-time crossing license to Steenberg Homes—by requiring the Jacques to prove harm before receiving any relief beyond their nominal dollar. Or, one might follow Calabresi and Melamed’s “cathedral” approach, 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 one-time crossing license.40

C. Exclusion Theories

Post-Coasean transaction cost analysis has contributed to property theory. It forces policy analysts to consider the possible consequences of different assignments of property rights, and then again to compare the consequences of different assignments. Nevertheless, indirectly, such transaction cost analysis contributed to property’s being in such an uneasy state.

One problem is substantive: Post-Coasean transaction cost analyses may abstract from the constraints that make property exclusive. In its simplest forms, such analysis focuses on use-conflicts between two neighbors, 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 a wide range of strangers. Parties may disagree sharply about how valuable their uses are, and outsiders and public officials may know far less than the parties about how and why parties value their uses. These and other complicating factors justify keeping property rights simple and exception-free—not subject to context-specific balancing, as early transaction

40 See Calabresi & Melamed, supra note 7, at 1106-10.
cost analyses tended to suggest. 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.”⁴¹ And gradually, some law and economics scholars worried that earlier law-and-economic analyses of property had been applying “graduate studies”-level methods to “elementary school” problems,⁴² or that earlier work had neglected “the problem of order” to focus too much on “the refined problems of concern in advanced economies.”⁴³

Exclusion theories elaborate on these concerns. Although exclusion theories don’t all insist that exclusion is conceptually indispensable or primary in property,⁴⁴ they do maintain that a right of exclusive control is practically necessary. Property’s right to exclude is desirable as a presumptive starting strategy, which may be overridden only for good cause.⁴⁵

Two examples should illustrate. First, 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.”⁴⁶ Although Merrill and Smith acknowledge that the exclusive model may be overridden when other concerns override, they stress that exclusion makes sense as a starting strategy.⁴⁷ 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.”⁴⁸

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⁴¹ Ellickson, supra note 3, at 1329.
⁴² Epstein, supra note 3, at 2096.
⁴³ Merrill & Smith, supra note 3, at 398.
⁴⁵ See, e.g., Epstein, supra note 3, at 2106 n.38 (stressing the importance of a proprietor’s right to “hold” property).
⁴⁶ Merrill & Smith, supra note 3, at 394-95.
Similarly, in a defense of clear property rights and strong rules for injunctive relief, Richard Epstein argued that such rules protect owner subjective value more often than their alternatives. 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. Now, *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),” and the winter blizzard might arguably have created one of the “momentary crises” justifying liability rules. But 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.

D. Progressive Theories

Post-Coasean transaction cost analyses had another problematic feature: Like all other economic analyses of legal rules, such analyses assumed 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. It doesn’t necessarily follow from the fact that a given rule is efficient, noneconomists argued, that the rule has the sorts of attributes that make it philosophically legitimate, to the point that it could be enforced under threat of coercion and penalty.

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

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49 Epstein, supra note 3, at 2092-2102.
50 Id. at 2120; see id. at 2092-93.
51 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 by the necessity.”); Epstein, supra note 3, at 2109-10 (citing Ploof).
intellectual commitments,” one of the key features for that orientation is concern about the normative pretensions of economic analysis. In 2009, Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler co-signed a joint Statement of Progressive Property. The co-signators warned against making property law “solely a matter of satisfying personal preferences,” and that reducing the normative values property serves “to one common currency distorts their intrinsic worth.” In their individual works, Singer has warned of the “severe limitations” of efficiency analysis, Alexander warns that law-and-economics analysis suffers from “poverty of its analysis of moral values and moral issues,” and Peñalver devoted half of a recent article critiquing normative justifications for wealth-maximization in property.

In their efforts to put property law on more solid ground, progressive property works offer justifications for property with two overlapping features. First, they ground property in normative interests in flourishing—and 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. As Anna di Robilant explains, 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.” Similarly, the Statement of Progressive Property grounds

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53 Alexander et al., supra note 5, at 743-44.
54 Singer, supra note 21, at 904; see id. at 915-21 (recounting “The Problem with Efficiency”).
property in “plural and incommensurable values” covering life, security, freedom to live life on one’s chosen terms, and flourishing.\textsuperscript{58} The same scholars repeat these commitments in their individual corpuses.\textsuperscript{59}

Because they ground property in pluralistic understandings of flourishing, progressive property theories have one other common feature: They tend to resist the Blackstonian, right to exclude portrait of property. Property is often portrayed as a triangular relation between an owner, a thing, and non-owners. Blackstone’s “despotic dominion” image, and cases like Jacque, stress the side between the owner and the thing. An account of property can’t make primary the thing-owner side, progressive works argue, without unduly deprecating the other two metaphorical sides.\textsuperscript{60} Hence, the \textit{Statement of Progressive Property} warns that the right to exclude is “inadequate as the sole basis for resolving property conflicts or designing property institutions.”\textsuperscript{61} 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.”\textsuperscript{62}

As with earlier transaction-cost and exclusion theories, the moniker “progressive” doesn’t determine all the details needed to settle a hard case such as Jacque. Alexander, for one,

\textsuperscript{58} Alexander et al., \textit{supra} note 55, at 743.
\textsuperscript{59} See Singer, \textit{supra} note 21, at 944 (“we have plural, incommensurable values and that we generally hold to a form of practical reason to decide hard cases in a pragmatic manner.”); Alexander, \textit{supra} note 55, at 751 (“human flourishing is a multivariable concept and that the multiple relevant components of human flourishing are incommensurable”); Peñalver, \textit{supra} note 56, at 867 (praising virtue ethics for its “recognition of a plurality of values”).
\textsuperscript{60} See, e.g., \textsc{Joseph William Singer}, \textit{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.”). This argument is frequently attributed to Morris R. Cohen, \textit{Property and Sovereignty}, 13 \textsc{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.”)
\textsuperscript{61} Alexander et al., supra note 5, at 743.
approves of the Wisconsin supreme court’s settlement of the case.\textsuperscript{63} Even so, because progressive theories relate property to flourishing and plural values, they do have a tendency to encourage legal officials to intervene closely in property disputes. After all, if a plaintiff insists that exclusion protects one value he cherishes, and a defendant insists that accession will facilitate a different and incommensurable value she cherishes, that stand-off seems to force the court to decide which party’s value has the greater value. Thus, when Alexander defends the result in \textit{Jacque}, he does not do so by justifying exclusion as a general strategy, but instead by asking whether the Jacques’ interests in home residence or Steenberg Homes’ commercial interests contribute more to flourishing.\textsuperscript{64} Freyfogle portrays \textit{Jacque} in a similar manner, and he ultimately criticizes the case’s result: “[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.”\textsuperscript{65}

E. Locke

In short, exclusion theories can explain the place of exclusion in property, but they can’t be said to “justify” exclusive property since they haven’t addressed philosophical doubts about the legitimacy of economic analysis. Progressive property theories are right to raise those doubts, and they put property on more solid foundations by connecting it to human flourishing. But progressive property works don’t give a satisfactory account why exclusion might play a role in property law.

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. And this is

\textsuperscript{63} See Alexander, supra note 55, at 816-17.
\textsuperscript{64} See id.
why it may be a good time to take a longer look at Locke. Many classical liberal theories took property and flourishing seriously. For example, many American state constitutions connect “inherent rights” over “the means of acquiring and possessing property”—with “safety” and “happiness,”66 the precondition for and ultimate end of flourishing. Even so, Locke provides a lengthier defense of property than many other classical liberal theorists or jurists, and he is also well-known and -respected among contemporary scholars.

In contemporary scholarship this suggestion may sound surprising. Scholars on all sides assume that classical liberal theories of rights can justify the right to exclude—but not link it back to flourishing. In contemporary scholarship, it’s often assumed that classical liberal or natural-rights theories focus on negative rights, or autonomy-based rights, or “will”67 theories of rights.68 Robert Nozick’s libertarian book Anarchy, State, and Utopia69 is often portrayed in property scholarship as supplying the definitive justification for classical liberal theories of rights.70 In progressive property works, it’s assumed that classical liberal theories “provide[] a strikingly thin understanding of the social obligations of private ownership”—at which point they cite Nozick.71

But those impressions just confirm how helpful it would be to take a closer and longer look at Locke. Many classical liberal jurists and theorists didn’t prize autonomy as much as they

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68 See, e.g., Singer, supra note 21, at 922 (assuming that “classical liberalism” means “separation of the right and the good”); 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 id. at 1898-1903 (portraying traditional liberalism as being preoccupied with negative liberty and portraying Mill’s and Kant’s political theories as exemplary).
69 (1974).
70 See, e.g., SINGER, supra note 60, at 168; see also Merrill, supra note 12, at 497-98 (equating Locke’s theory of property with Nozick’s).
did flourishing. Although modern scholars anachronistically read them to have propounded negative or will theory of rights, such jurists and theorists actually propounded affirmative and interest-based theories of rights, where the “interests” in question were moral interests in rational flourishing. Philosophical work over the last generation\(^{72}\) has brought out that linkage, especially in relation to property. That work is getting finally gathering notice in the legal academy. As Alexander and Peñalver have observed, Locke’s theory differs substantially from the libertarian “position … typically ascribed to him within contemporary property scholarship.”\(^{73}\)

And that insight explains why Locke may help shore up the uneasy foundations beneath the property cathedral. On one hand, if Lockean labor theory is grounded in flourishing,\(^ {74}\) 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 grounding for 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.


\(^{73}\) Alexander & Peñalver, supra note 17, at 56.

\(^{74}\) Or, in the alternative, that Lockean political and property theory can be reconstructed so as to be compatible with flourishing-based foundations. I am persuaded that Locke was a eudaimonist or 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.
II. Productive Labor

A. Flourishing

It is perfectly understandable why Locke has been portrayed for so long 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, 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.”\(^75\) This passage makes Locke’s program sound like a program of negative liberty and autonomy-based rights, and Nozick and others cite this passage as a point of libertarian departure.\(^76\)

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, to staying within the bounds of the natural law.\(^77\) Libertarians may gloss over this passage, but it limits and focuses the freedom Locke justifies—which explains why Locke criticizes suicide.\(^78\) And, although people don’t need to take “leave” from neighbors to enjoy their rights, the rights they enjoy are 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.”\(^79\) And in his Essay Concerning Human Understanding, which “establishes the rational foundations for

\(^{75}\) Locke, Two Treatises, supra note 10, II.4, 269.
\(^{76}\) See, e.g., Robert Nozick, Anarchy, State, and Utopia 10 (1974).
\(^{77}\) Locke, Two Treatises, supra note 10, II.4, 269.
\(^{78}\) See id. II.6, -135, 271, 357; George Windstrup, Locke on Suicide, 8 Political Theory 169 (1980).
\(^{79}\) Locke, Two Treatises, supra note 10, II.57, 305.
morality” assumed in the Two Treatises,80 Locke assumes “morality is the proper science, and business of mankind in general; (who are both concerned, and fitted to search out their sumnum bonum).”81

These passages reflect the main hallmarks of a flourishing-based morality. “Sumnum bonum” refers to a highest or complete good, i.e. the happiness of a mature and rational actor. In contrast with deontological and consequentialist metaethical groundings, which ground morality (respectively) in the logical structure of moral agency, or in good consequences, flourishing-based theories (often called “eudaimonistic” theories82) make “primitive” or “morally fundamental”83 a complete, rational, and objective understanding of happiness.

B. Rights

Yet if Locke grounds political rights in “happiness,” a sumnum bonum, and other concepts associated with flourishing, why do rights loom so large in his political theory? In short, there are two ideal-type strategies for promoting flourishing. In one, the government or community leaders determine what will help each person flourish, and design laws and government policies to pursue those conditions of flourishing. 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 to a limited degree on the former, he relies considerably more on the latter, and he makes the latter central in his arguments and imagery.

81 LOCKE, ECHU, supra note 27, IV.xii.11, at 646. Accord JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 1, IN JOHN LOCKE: SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE HUMAN UNDERSTANDING 3, 10 (Ruth W. Grant and Nathan Tarcov eds., 1996) (1693).
Although Part VI will recount the reasons for this preference at greater length,\textsuperscript{84} one justification should suffice here—what Locke might call “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.”\textsuperscript{85} Many political philosophers aren’t nearly as optimistic. As Singer recently noted, “Long ago Aristotle argued that we cannot expect exactitude in the realm of moral reasoning …. Aristotle began his \textit{Nicomachean Ethics} by noting that “[o]ur discussion will be adequate if it has as much clarity as the subject-matter allows.”\textsuperscript{86} Notwithstanding their differences on other 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.”\textsuperscript{87}

At the same time, Locke and other classical liberal theorists worry far more than Aristotle did about epistemological mediocrity when it comes to designing political theories and institutions. Because people are non-omniscient, classical liberals suspect, government promotes flourishing best when it promotes flourishing indirectly. Often enough, government is incompetent at ascertaining what uses and activities best promotes 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 standard for the human good,” government

\textsuperscript{84} The text isn’t covering one other factor more relevant to Locke’s theory of politics. A political program of duties has a tendency to make citizens submissive, expectant that the political sovereign will take care of their problems for them. A political program of rights encourages citizens to be spirited, and use self-help to take care of their own problems. See SIMMONS, \textit{supra} note 72, at 68-120.

\textsuperscript{85} POSNER, \textit{supra} note 37, § 3.6, 67.

\textsuperscript{86} Singer, \textit{supra} note 21, at 930-31 (quoting ARISTOTLE, \textit{NICOMACHEAN ETHICS} 5 (John Warrington trans. & ed., M.M. Dent & Sons Limited 1963)).

\textsuperscript{87} LOCKE, ECHU, \textit{supra} note 27, IV.xii.10, 645.
promotes flourishing as best it can when it “properly enforce[s] the conditions for people to have the liberty to pursue their *sumnum bonum* in the natural and voluntary associations of civil society.” 88 Although Nozick doesn’t embrace this approach himself, he describes it fairly as an 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.” 89 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 get deep into the recesses of property law, we can appreciate this strategy using some of the more basic legal rules regulating the integrity of the human person. On one hand, the *prima facie* action for battery resembles closely the *prima facie* action for trespass; an unconsented touching of the plaintiff’s person is a *prima facie* battery. 90 Security that one can control the use of one’s body doesn’t lead directly to any one way of life, but it is a necessary precondition for all reasonable ways of life. Battery gives people that security. Now, this security is overbroad in some respects. If battery were the only doctrine specifying the liberties that people had with their bodies, they might sell themselves into slavery, or engage in prostitution. But those activities aren’t consistent with rational understandings of human happiness for their participants. And those activities are threatening to the rights of the community at large, for when people consent to being slaves or prostitutes they set examples encouraging others to view their neighbors as potential tools for their economic projects or sexual gratification. 91 So a natural rights-based approach to the body marks off a few outer-limit

88 LARRY ARNHART, POLITICAL QUESTIONS: POLITICAL PHILOSOPHY FROM PLATO TO PINKER 490 (2015).
89 NOZICK, supra note **Error! Bookmark not defined.**, at 310.
90 See, e.g., Vosburg v. Putney, 50 N.W. 403 (Wis. 1891); REST. (THIRD) OF TORTS §§ 13, 16.
prohibitions on what people may do with their bodies, and otherwise it gives people broad autonomy rights over their bodies. This structure bets that most people have enough self-interest and motivation to use the freedom they get 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 must constitute intelligent, purposive activity contributing to rational flourishing in some respect. But 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,”92 or “the best advantage of Life, and convenience.”93

In that context, labor comes to mean rights to engage in activity pursuing surviving 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.”94 Similarly, American philosopher A. John Simmons defines it as “free, intentional, purposive action aimed at satisfying needs or supplying the conveniences of life.”95

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 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

92 LOCKE, TWO TREATISES, supra note 10, I.92, 209.
93 Id. II.26, 286.
94 BUCKLE, supra note 16, at 151.
95 A. John Simmons, Makers’ Rights, 2 J. ETH. 197, 210 (1998).
to labor entails a responsibility to use property productively. That responsibility automatically
rules out “acts of destruction or mere amusement.”96 Nozick famously asked whether someone
can appropriate a sea by pouring $C_{14}$-marked tomato juice in it, and Jeremy Waldron asked
whether someone could appropriate a vat of cement by placing a ham sandwich in it before the
cement hardened.97 These hypotheticals test several features of “labor,” one of them being
whether the concept covers activity that exerts positive effort of no or negative moral value. It
doesn’t. 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.98

On the other hand, once it’s 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 with a resource, and
deploys it to some non-trivial beneficial life use, the party’s intended use shouldn’t be balanced
against the needs or wishes of others without a clear justification.

Here, Jacque provides an excellent illustration as well. The road-blocking blizzard might
create a situation in which interest-balancing might be unavoidable.99 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, their use-plans deserved presumptive priority and respect.

96 BUCKLE, supra note 16, at 151.
97 NOZICK, supra note 76, at 175; Jeremy Waldron, Two Worries About Mixing One’s Labour, 33 PHIL. Q. 37, 43
(1983)
98 See BUCKLE, supra note 16, at at 152; Claeys, supra note 17, at 23-24; Adam Mossoff, Locke’s Labor Lost, 9 U.
99 See infra section IV.C.2.
III. Productive Labor and Property

A. The Social Dimensions of Property

Now, in the portrait just given of Jacques, the decisive factor is that the Jacques already owned their lot. By giving conventional property rights that much weight, that portrait may seem to portray property in the manner that so concerns progressive property scholars—as a normative relation in which “an owner has a right to exclude others and owes no further obligation to them.” To explain why, however, we must consider how labor rights justify property.

The progressive property project holds as a key tenet that property is a social relation. Property rights can’t be designed without “look[ing] to the underlying values that property serves and the social relationships that it shapes and reflects.” Productive labor theory generates a social theory of property as well. One can see as much from the problem Locke takes as his point of departure—“how Labour could at first begin a title of Property in the common things of Nature.” In a community without organized government, all resources are open for use by all. This presumption for open access expresses not only “mere starting place” but also as “a concrete expression of the equal standing of, and the community relationship between, all people.” Before anyone may appropriate a usable thing and exclude others from access to it, he must produce normative reasons why private property respects equality and community better than open access does.

100 Alexander, supra note 55, at 747.
101 Alexander et al., supra note 5, at 743.
102 LOCKE, TWO TREATISES, supra note 10, II.51, 302 (emphases removed and added).
B. Productive Use

Productive labor theory establishes four relevant normative reasons. Two reasons generate prerequisites for establishing a moral property claim. The first prerequisite is straightforward—productive use. If someone discovers and starts using a resource in some beneficial manner, he engages in commendable conduct, for the effective “expansion of the available social resources” he causes. Productive use is relatively easy to satisfy, as easy to satisfy in moral terms as “beneficial use” requirements are to satisfy in Western prior appropriation law. In that field of 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 usufruct. 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 appropriative right, so too does nonuse cause a labor-based moral right to expire. 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” 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 discussed recently elsewhere. Some portraits of

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104 BUCKLE, supra note 16, at 154.
108 LOCKE, TWO TREATISES, II.31, 290.
Lockean labor theory include a waste proviso; spoliation is one of many ways in which a proprietor may violate the productive use requirement. Recent works have stressed several social duties for owners: to maintain their property in good condition, not to destroy their property needlessly, or to use their property solely or primarily with spite or malice. 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 requirement often generates requirements for appropriation, clear possession, or diversion. 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 declared fairly simply—by the private law rules on battery, or public law “prohibitions against killing, raping, and maiming.” Property rights and obligations can’t be so simple, because all individuals in a community deserve equal opportunities to use resources for their own life goals. One of the implications is this: When anyone intends to appropriate a resource, she owes fellow community members a duty to make

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109 See id. II.38, -.46, 295, 300; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 207-09 (1988); SIMMONS, supra note 72, at 285-88.
110 See Shoked, supra note 71.
114 See supra note 90 and accompanying text.
115 MACLEOD, supra note 23, at 1.
her appropriation reasonably clear. As Simmons explains, “[l]abor 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.’”116 Locke gets at this requirement when he says that labor “put[s] a distinction between [appropriated resources] and common.”117

In easy cases, the conduct that establishes productive use will mark the relevant claims. The labor that tills land simultaneously, “as it were, inclose[s] it from the Common.”118 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 doesn’t appropriate the land. And even if someone pours Nozick’s C14-laced tomato juice into a sea for a productive use, e.g. to feed fish, the pouring doesn’t stake boundaries clear enough to demarcate what part of the sea has been appropriated.119 In neither case is the claimant respectful of others’ equal opportunities to use land or sea water, knowing what land and sea have already been claimed by others.

D. Provisos: Sufficiency and Necessity

Morally, productive use and clear claim-marking establish a moral property right. When a claimant acquires property, however, that property doesn’t entitle the proprietor to exclude others with no further obligation. Analytically, labor-based moral rights include a liberty (or Hohfeldian privilege120) to use the resource, and a claim-right to be free from interference while using it.121 But the liberty and claim-right may both be overridden, if and when others in society

116 Simons, supra note 72, at 272 (quoting Locke, Two Treatises, supra note 10, II.40, 296, and citing id. I.51, 302).
117 Id. supra note 10, II.28, 288.
118 Id. II.32, 291.
119 Pace Nozick, supra note 76, at 174.
120 See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913).
121 Stephen Munzer suggests that the liberty comes with a Hohfeldian power, to convert what had been an unowned resource into an owned one. Stephen R. Munzer, A Theory of Property 263-64 (1990). Munzer focuses on the
can prove that their preservation- or improvement-related needs are more urgent than the owner’s property. The other two elements of labor—two 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 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. In 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, that preference can be overcome. 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 [the] other’s necessity.”

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. So a farmer may acquire property over farmland by fencing and farming it. But if he appropriated more land initially than was consistent with others’ appropriating similar areas for their own uses, the excluded non-owners may cite the sufficiency jural relations before a prospective owner appropriates a resource; the text focuses on the relations in effect after appropriation.

122 See, e.g., Evans v. Meriweather, 4 Ill. 492 (1842).
proviso to force the farmer to give up land to the point that they have “enough, and as good” as the farmer.124

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In short, when “labor” is grounded to survival and rational improvement, it generates a social theory of property. Proprietors are linked to non-owners by: duties to use their property productively; duties to keep using it; duties to keep declaring claims to it; exposures to the urgent needs of others; and exposures to claims by others for resources sufficient to pursue their own equal opportunities. Those linkages make labor-based moral property rights usufructs. But if that is the case, a labor-based system of property needs to confront property’s counterintuitive character. As Eric Freyfogle has asked, why shouldn’t usufructuary moral rights justify “private owners holding something akin to use rights, tailored to respect the common good”?125 The next two Parts take up these questions.

IV. Productive Labor’s Justification for Exclusive Property

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 don’t track the elements of the justifying theory closely, the expectation goes, they violate the theory’s principles.126 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.

124 LOCKE, TWO TREATISES, supra note 10, II.27, -.33, 288, 291; SIMMONS, supra note 72, at 288-98; BUCKLE, supra note 16, at 159-60.
125 FREYFOGLE, supra note 62, at 239.
126 See also Smith, supra note 30, at 963-71 (critiquing this tendency in Alexander, supra note 55).
The expectation mistakenly suggests that productive labor theory is supposed to supply a specific template for law and politics. It isn’t. 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.\textsuperscript{127} Conventional property rights and regulations relate to labor as such traffic rules do to personal interests in travelling and being safe. The elements of productive labor supply a “great Foundation” for property rights,\textsuperscript{128} which is to say they lay down the fundamental goals 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—\textit{e.g.}, the general presumption that any non-trivial and beneficial use of a resource establishes a good property claim.\textsuperscript{129} But conventional rules need not track the elements of labor directly, not if they facilitate those elements more effectively by indirect strategies.

As a result, when a system of property law creates rights to exclude without express use, claim-marking, or sufficiency requirements, it isn’t automatically self-contradictory or unjust. Productive labor moral norms can justify a two- or multi-level strategy in positive law. When they do, 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

\textsuperscript{127} See John Finnis, Natural Law and Natural Rights 285-86 (2d ed. 2011).
\textsuperscript{128} Locke, Two Treatises, supra note 10, II.44, 298.
\textsuperscript{129} See supra section III.B.
appropriate. This is the habit of “practical reason” so lacking in recent property scholarship—130—and the mode of reasoning that welfarists and rights-based theorists should consider more closely.

B. The Practical Case for Rights of Exclusive Control

Once one clarifies how moral rights relate to legal conventions, exclusive control becomes much easier to justify. Legal officials should institute usufructs in some situations and rights of exclusive control 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 river water for public uses and to protect riparian land.131 For land and tangible personal articles, however, exclusive control makes considerable sense.

Since the case for labor-based property has been recapitulated elsewhere, we can summarize the three main arguments in favor of it in brief form. 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.”132 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

130 Singer, supra note 21, at 906; see supra note 21 and accompanying text.
132 SIMMONS, supra note 72, at 275.
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 and Covetousness of the Quarrelsom and Contentious” and encourages “the use of the Industrious and Rational.”\(^{133}\) In common-sense terms, control encourages the form of sociability embodied in the phrases, “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. And industriousness toward property encourages important republican civic virtues as well. When people live in communes or open-access regimes, the communities develop family-based or status hierarchies to settle conflicts.\(^{134}\) Those hierarchies make leaders bossy and followers servile. By contrast, when people manage their own land, they become habituated to think about managing their own families, jobs, and life goals generally.

Exclusive ownership has these virtue-inculcating tendencies because of the third factor—productivity. Quite often, under exclusive property, “the Property of labour should be able to over-ballance the Community of land” and other resources unowned and subject to open access, because “Labour … puts the difference in value on every thing.”\(^{135}\) For the right resources (again, land and chattels being classic cases), 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

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\(^{133}\) Locke, Two Treatises, supra note 10, II.34, 291.

\(^{134}\) Ellickson documented these tendencies in Israeli kibbutzim, Hutterite colonies, and Woodstock era communes. See Ellickson, supra note 3, at 1346-62.

\(^{135}\) Locke, Two Treatises, supra note 10, II.40, 296.
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 100 or 1000 times more conveniences of life than could be produced without property and intensive cultivation.\textsuperscript{136}

To be sure, all of these justifications are implicitly at least partly empirical. But 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. In addition, 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. That framework helps identify criteria of “relevancy” or “salience” to test the framework and its quasi-empirical predictions. Here, even if Locke’s 10x and 1000x multipliers are a bit hyperbolic and overly-precise, his basic point has empirical support. From 1700 to 2000 there was a fifty-fold increase in the average incomes of the peoples in the United States, Japan, and Western Europe, and significant increases in objective metrics of lifespan and health.\textsuperscript{137} Some studies have inquired why native American aboriginal communities didn’t grow as fast as white European American settlements during this timespan; the differences are attributable in large part to differences between the (usufructuary) property native Americans maintained in game animals and the (exclusive) property European settlers maintained in land.\textsuperscript{138}

\textsuperscript{136}See id. II.40, 43, 296, 298.
Hernando de Soto’s work has shown how conventional title increases security and growth significantly over non-conventional, use-based prescriptive claims.  

Also to be sure, 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, practically-minded officials may reasonably bet that selfish priorities will motivate most owners to defend their lots and use them productively. And at that point, officials will need to ask the question created by any consequentialist system of reasoning: How over- or under-inclusive can a specific legal rule be before its justification stops justifying it? 

In addition, overinclusivity may not undermine a presumptive right of exclusive property; it may instead justify limits. Here, 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. Exclusive rights apply presumptively, when clear boundaries and strong delineations of managerial authority facilitate different people’s labor more effectively than use-based property systems do. When clear and convincing proof suggests that owners aren’t using exclusive rights as productively or as vigilantly as they ought, the system may institute “governance” overrides divesting owners of their rights. And further use-based “governance” overrides may also be appropriate, when non-owners have unusually strong sufficiency or necessity claims on owned resources.

C. The Conceptual Character of Exclusive Property

This multi-tiered approach to property gets overlooked, largely because contemporary theorists assume that a classical liberal theory of property must justify property understood as a

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140 See supra note 18 and accompanying text.
normative relation in which “an owner has a right to exclude others and owes no further obligation to them.” \(^1\) As this and the last two Parts have shown, statements like these assume that classical liberal property has no relation to interests in flourishing or social relations. But 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 rights without being unqualified rights to exclude. Historically, in Anglo-American law, property has not been understood as an unqualified right to exclude. One leading encyclopedia defined property as “that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things and subjects, and generally to the exclusion of all others.” \(^2\) And 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”). But such rights are limited (hence, “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 things. \(^3\) Rights of exclusive use can expire when owners don’t deserve broad managerial control, or when non-owners have particularly-strong claims to access or use others’ resources. Thus, when scholars criticize the Anglo-American legal tradition for enforcing an unqualified or overly-strong right to exclude, they criticize it for a commitment that’s really foreign to the tradition.

\(^1\) Alexander, supra note 55, at 747.
\(^2\) 19 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 284 (John Houston Merrill ed., 1892) (defining the entry “property” to refer to “that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things and subjects, and generally to the exclusion of all others”).
\(^3\) See Eric R. Claeys, Exclusion and Exclusivity in Gridlock, 53 ARIZ. L. REV. 9, 17-28 (2011) (book review); Finnis, supra note 163, at 51; Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 ARIZ. L. REV. 371 (2003). Recent works conceiving of property as a right to exclude don’t differ materially. See, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1996); Merrill & Smith, supra note 3. Such works describe the right to exclude as core to property, but not inconsistent with limited rights of use or access tailoring core property rights to individuated contexts.
Now, this criticism is understandable, because the *prima facie* claim for trespass does seem to embody an unqualified right to exclude. But here is the other misconception—that one can find the analytical content of property 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’re protected. Different *prima facie* torts, and 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 can’t 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” owners have in positive law.\(^{144}\)

D. Illustrations

1. Trespass

To appreciate these normative and analytical points, let’s consider several basic property and tort doctrines. Trespass to land institutes in common law a rough and ready presumption implementing all the goals explained in section B. Because trespass is organized around a simple “don’t cross without permission” norm, it embodies and promotes claim-marking.

Separately, the clear protection trespass provides facilitates many different heterogeneous uses of land. The Nature Conservancy and other environmental groups acquire land to conserve

it for conservationist or aesthetic environmental goals. 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.\textsuperscript{145} Here, 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. 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.\textsuperscript{146} Yet it’s much harder for communal groups can practice communal ways of life if outsiders challenge their control over their land—on the ground that they’re not using the land productively enough. Paradoxically, exclusive control provides security for heterodox communal ways of life.

This same understanding helps address what may seem to some an issue—whether an owner deserves “property” in the control and use of a lot that’s not being improved and is instead being held speculatively.\textsuperscript{147} In a simple, pre-legal sense, the speculator who doesn’t improve land isn’t 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, it’s labor to discover that potential, acquire the lot, and manage it until the speculator 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 the speculator finds a higher-

\textsuperscript{145} See, e.g., Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
\textsuperscript{147} Similar issues arise in intellectual property, about the role played by intermediaries that (to critics) are “trolls” and (to supporters) identify under-valued patents and connect them to higher-value users. See, e.g., eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
value user and re-sells to that user, he indirectly hastens the process by which the land is used productively. So at least in principle, someone who holds onto land speculatively in the short term can contribute indirectly to greater productive labor in the long term.

And if a trespassory structure can facilitate beneficial uses in all these respects, the decision in *Jacque* comes to make a lot more sense. *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. 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 hard in part because the Jacques may have been acting irrationally (thanks to their mistaken understanding of adverse possession). Here, however, trespass is justified not by whether it is overinclusive but rather by whether, in the range of situations to which it applies, it facilitates productive labor by all owners and non-owners. And other owners in the Jacques’ shoes might have had good-faith desires and rational grounds to keep the field in dispute undisturbed. These considerations don’t flatly require that the Jacques prevail (as the next section will show)—but they do make the judgment in *Jacque* seem far more sensible than it seems in post-Coasean transaction-cost or progressive scholarship.

2. Necessity

Again, however, the presumption for exclusive control is subject to limitations. One is this: 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 nominal owner’s intentions—as in (section III.D) cases in which the necessity proviso arises. The necessity privilege institutes in tort doctrine a moral limitation approximating that necessity proviso in morality. 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.¹⁴⁸

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 illustrates here as well: 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, 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 won’t 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 testified not to have “give[n] a ---” why the Jacques protested and to have giggled after being told that the mobile home had crossed their lot.¹⁴⁹

3. Adverse Possession

Trespass facilitates labor on the basis of another assumption: Even if an exclusionary property right doesn’t expressly require owners to use their lots productively and vigilantly, self-

interest will motivate most owners to use their lots 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/or claim-marking responsibilities. In those cases, 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, and continuously for the local jurisdiction’s limitations period for trespass.\textsuperscript{150} 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.\textsuperscript{151} Other leading accounts maintain that it quiets title to properties burdened by stale land claims.\textsuperscript{152}

In a labor-based framework, although adverse possession serves both of these functions, neither is as fundamental as 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. As nineteenth-century squatters-rights disputes confirm, claim-neglect breeds conflict. Squatters come to believe they have good claims to the land they occupy and use, and neighbors and other onlookers start to take sides in disputes between title owners and squatters.\textsuperscript{153} And the conduct that supplies direct proof of claim-neglect provides strong circumstantial evidence of unproductiveness. Productive

labor theory thus confirms Carol Rose’s interpretation of adverse possession. The doctrine isn’t 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.”

Of course, adverse possession generates further over- 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. These are just two of many possible examples. Again, 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 be also used by opportunistic squatters—and destabilize the functions of exclusive control. A prudent official might still build more discretion into adverse possession doctrine, but she 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 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 over- and under-inclusivity problems, here too those problems are prices that need to be paid to get the advantages of two- or multi-level systems of regulation.

155 For a helpful survey of the ways in which courts apply the same black-letter rules differently to different cases, see R.H. Helmholz, Adverse Possession and Subjective Intent, 61 WASH. U. L. Q. 331 (1983).
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. And 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. But the last Part didn’t cover the last element of labor—the sufficiency proviso.

A. Exclusive Control and the Sufficiency Proviso

The sufficiency proviso isn’t as easy to reconcile to property rights as the other three elements. Exclusive property gives owners more privacy and freedom to pursue their own individual goals—but it also restricts non-owners’ opportunities for similar privacy. Exclusive property may incentivize owners to produce more food, shelter, and other resources—but at the price of denying 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. And superficially, it seems not to. Trespass has a necessity privilege, but no sufficiency defenses. That perception leads some scholars assume that labor-based property “ha[s] nothing to do with society and its collective good,”\(^\text{156}\) including but not limited to the needs of non-owners.

Nozick disagreed; he argued that increased productivity from ownership “satisfies the intent behind the ‘enough and as good left over’ proviso.”\(^\text{157}\) But that response seems to some to undermine the force and coherency of labor theory. The force of labor theory seems that it makes “entitlement … a matter of natural right, superior to all manipulations of the state in the


\(^{157}\) Nozick, supra note 76, at 177.
interest of social welfare”; if so, 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.

Herein lies another misperception about flourishing-based practical reasoning. Many theories of rights, including many flourishing-based theories, don’t have the character described in the last paragraph. 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.” 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.

B. The Deontological Character of Labor Theory

In Rawls’s usage, a theory of politics is deontological if it makes the Right lexically prior to the Good. The Good consists of the general advantage a proposal is likely to have on the citizenry at large. The Right consists of important normative interests held by individual citizens. So understood, “deontology” allows a political community to pursue socially-advantageous policies; the community just needs to pursue those policies by means that avoid trenching on citizens’ strong interests.

Even though Locke’s and Rawls’s theories of politics differ in many other particulars, Lockean theory satisfies Rawls’s deontology criterion here. Rational and sociable flourishing reconciles individual rights and the common good. In relation to property, the Right consists of

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158 Margaret Jane Radin, Reinterpreting Property 108 (1993).
159 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, Deontology, in Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/ethics-deontological/#DeoFoiCon. “Deontology” doesn’t bar the consideration of all choices or consequences, only choices or consequences particularly antithetical to the interests of right-bearing and rational individuals.
160 See Rawls, supra note 22, at 30-32.
the interest every citizen has in surviving, having an equal opportunity to satisfy basic
preconditions for making her life better, and being free to pursue a distinct program for her own
improvement. The common good doesn’t consist of any policy that suits the preferences of a
bare majority of citizens. Because citizens are presumed to be rational and sociable, 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.”161 Since the common good is defined as the concurrent individual rights of rational and
sociable citizens, the Right is lexically prior to the Good.162

So understood, deontology imposes one last major adequacy criterion on exclusive
property. Morally, the sufficiency proviso entitles all citizens to equal opportunities to access
and use some reasonable share of a community’s resources. The proviso doesn’t 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 favor of” non-owners.163 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.

161 Locke, Two Treatises, supra note 10, I.92, 210; accord id. II.134, 356.
162 See Myers, supra note 72, at 12; Michael Zuckert, Reconsidering Lockeian Rights Theory: A Reply to My Critics,
163 John Finnis, Natural Law: The Classical Tradition, in Oxford Handbook of Jurisprudence and Philosophy of Law 1, 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 don’t have strong interests or 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 by instituting a common coinage and a system of commerce. So the sufficiency proviso is embodied not by any element of or defense to trespass—but in the power to alienate property, the power to acquire it, and the power to contract.

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.” 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. Of course, it’s 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, that they satisfy the adequacy criterion set the sufficiency proviso. In practice, in American, European, and Japanese economies since 1700, rising tides have lifted most boats. And if a given system of property seems unlikely to satisfy this adequacy criterion, exceptions may be instituted. The system may

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164 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. LOCKE, TWO TREATISES, supra note 10, I.42.

165 BUCKLE, supra note 16, at 154.

166 See supra notes 137-138 and accompanying text.
scale back the scope of exclusive property and institute stronger use-claims, or it may remedy the problems by letting disadvantaged citizens pay less in taxes or receive public assistance.

D. Sufficiency and Implied Easements

The justification applied in the last section works well when the unpropertied have inchoate interests in using some resources but not strong claims to any particular resources. It doesn’t work so well 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” soundbite, Blackstone specified that private rights to land were subject to many different “hereditaments,” which we might call “implied easements.” These rights had a usufructuary structure. Non-owners had limited 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.167 In antebellum American common law, these use-based exceptions significantly scaled back the trespassory and exclusive character of land ownership.168

In fairly rural conditions, these implied easements are permissible and probably necessary limitations on exclusive ownership. When most land isn’t developed in a community, citizens can’t expect to acquire materials necessary for survival or improvement from labor, savings, and commerce. Many American states fit this description; before the twentieth century, in many American states only 1 to 20% of owned land was improved.169

167 See 2 WILLIAM BLACKSTONE, COMMENTARIES *32-*34.
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 remain. In a system of otherwise-exclusive property, strong sufficiency claims may be accommodated, by instituting use-based rights of access as limitations on broad rights of exclusion. Even if local judgments aren’t uniform enough, and even if there isn’t 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, Perfectionism, and Progressive Property

We have now covered this Article’s 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 two supports needed to shore up the property cathedral. This Part focuses on the first of those supports—the way productive labor theory handles perfectionism in law and politics.

A. Perfectionism: Theory Versus Practice

Although progressive property doesn’t automatically destabilize property, it may inadvertently threaten property. After all, the Statement of Progressive Property “emphasiz[es] property’s indeterminacy[,] the plurality of its justifications and the inevitability of conflicts between property rights.”170 Those emphases encourage a train of reasoning: An owner values A, a non-owner values B, A and B are incommensurable, and since there’s no other way to resolve

170 Super, supra note 6, at 1777; accord Alexander et al., supra note 6, at 743-44.
the value-conflict a legal decision maker must, however reluctantly, prefer one to the other. In the process, 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 that possibility. 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 (e.g., dire emergencies), value choices are unavoidable; in many others, legal officials can promote everyone’s flourishing simply by requiring everyone to respect one another’s property. Indeed, paradoxically, when legal officials prioritize different land uses when doing so isn’t unavoidable, they encourage disputes, politicize property, and indirectly undermine the conditions for everyone’s flourishing.

Section II.B recounted the most basic reason why: Often enough, public officials know too little to make accurate assessments how a given resource will help different people flourish. But that reason is just the tip of the iceberg. Locke suggests other reasons. One is selfish interest. 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.” Here, Locke expresses in his vernacular concepts similar to Federalist 10’s account of faction, or public choice and economic theories of regulation. If property rights are directly linked to flourishing in politics, non-owners—and especially well-to-do non-owners, will lobby the government to redistribute property, on the ground that they will promote flourishing throughout the community better than the owners themselves will. Another reason is sectarianism. Political life, especially in a large liberal nation-state, attracts “Quarrelsome and Contentious” character

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171 Locke, Two Treatises, supra note 10, II.12, at 275.
These character types will agitate for major changes to property rules, simply because they want owners to conform their behavior to their own sectarian opinions about flourishing.

These risks can’t be wholly avoided, neither in property nor in any other field of law. But productive labor theory structures property to 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 get 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. More marginalized groups in a community will benefit from simple and uniform property rules; insiders will better exploit ambiguity. Obviously, these concerns won’t arise in every dispute, and they can’t 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

Sweden has long recognized Allemansrätt (translated, “everyman’s right”), an easement entitling non-owners to roam countryside owned by others. In 2000, England and Wales enacted a Countryside and Rights of Way Act in 2000 codifying rights to roam over mapped open country, mountains, and coastal land, and in 2003, Scotland enacted an even broader

\footnote{\textit{Locke, Two Treatises, supra} note 10, II.34, 291. \textit{See also Locke, ECHU, supra} note 27, IV.xvi to -xx.}


roaming right, giving roamers rights to cross most land for purposes of recreation, education, or passage. Progressive property works often cite rights to roam as an example of progressive property in action.\footnote{Land Reform (Scotland) Act, 2003.}

Progressive property works tend to ask whether roaming rights serve valuable life goals (yes), and then to ask whether owners have any interests in exclusive control concrete and immediate enough to override roaming rights (no).\footnote{See Lovett, supra note 52; see also FREYFOGLE, supra note 62, at 29-60; Jerry L. Anderson, Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks, 19 GEO. INT’L ENV. L. REV. 375 (2007).} But even though recreational roaming contributes to human flourishing, as it surely does, it doesn’t 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. Purchase or condemnation would be more expensive, to be sure. But they would keep brighter lines between private property and public recreational functions. And if one thinks through why condemnation is expensive, those costs bring out into the open adverse social consequences from roaming statutes. Those consequences haven’t been adequately considered in scholarship supportive of roaming rights.

One problem 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 limit their land uses to the ones they’re allowed by law to enjoy. And the concerns that trouble land owners—lack of security, risks of

\footnote{See, e.g., Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L.J. 275, 300-01 (2009).}
accident—aren’t certain to occur, and the harms they threaten will take years to ripen if they really ripen.

Nevertheless, a moral theory needs a satisfying way to reconcile both sets of claims. And there is at least some evidence that roaming rights chill land use. There are at least anecdotal reports that Allemansrätt creates these sorts of problems. Swedish farmers have had to confront roamers to stop them from picking crops, and Swedish land-owners have complained that roaming rights have interfered with their opportunity to put their land to more active uses.\(^{\text{180}}\) And 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 Parchomovsky discovered that 10% increases in roaming access correlated with (respectively) 8 and 6 percent drops in the sales price of land covered by 2000 reforms.\(^{\text{181}}\) Those price-drops don’t automatically prove that covered land is less usable now than it was before 2000, or that roaming rights are undesirable. At a minimum, though, they confirm that market buyers perceive land as less valuable for their planned uses. And in a rights-based framework, if title owners are making some valuable use of their land, their concerns get presumptive weight.

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 land, and the likeliest roamers will be urban residents. 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 won’t jeopardize farmers’ more durable plans for roamed-on land. A roaming regime expresses a different normative message: Rural land owners will need to

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\(^{\text{180}}\) See, e.g., “Roam Free in Sweden,” supra note 175.

\(^{\text{181}}\) “Roam if You Want To? Valuing the Right to Exclude” (manuscript on file with author).
respect the land rights of urban owners when they go to cities, but rural land is servient to the recreational interests of urban residents.

Productive labor theory doesn’t flatly prohibit rights to roam. Recreational walking certainly generates principled sufficiency-based claims on owned land. In communities (like Sweden) where such rights have been recognized by long usage, 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 justifies exclusive property as a starting matter, it avoids underemphasizing the long-term impact of repeat entries by strangers on owned land. And 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 doesn’t contribute to a dimension of flourishing that’s basic or imperative. That distinguishes roaming rights from most if not all of the rights of way familiar in Anglo-American law—hunting, grazing, and necessity-based emergency entrances. 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 roammers.

C. Landmark Laws and *Penn Central*

Landmark laws provide another helpful illustration. The best-known landmark law is New York City’s, which generated the regulatory takings decision *Penn Central Transportation Co. v. City of New York*. When a site is old enough and is determined (in the New York law’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 country, a landmark


\[183\text{ N.Y.C. Admin. Code § 25-302(n) (2015).} \]
commission may prevent changes to the site if such changes would detract from its public interest or value.

Although landmark laws raise a range of interesting issues, they are interesting here\footnote{Among other things, this Article abstracts away from constitutional doctrinal questions whether the Constitution or any jurisdiction’s takings case law should treat landmark designations as takings. This Article is critiquing landmark laws (and relevant inverse-condemnation policies) on their normative merits.} because they highlight important differences between productive labor theory and leading progressive property works. Progressive works have been sympathetic toward landmark laws,\footnote{See Joseph William Singer, The Rule of Reason in Property Law, 46 U.C. DAVIS L. REV. 1369, 1404-05 (2013).} most often because they express a communitarian norm whereby an owner may justly be prevented from using her property “in some way that the community regards as against its collective interest.”\footnote{Alexander, supra note 55, at 791, 793.} Yet New York’s track record with landmark laws (New York’s scheme just celebrated its 50th anniversary in 2015\footnote{NYCL50, “What Happened in 1965?,” http://www.nyclandmarks50.org.}) may confirm some of the concerns about perfectionist theories of property regulation.

Productive labor theory doesn’t make landmarking schemes flatly inappropriate, but it does portray them more skeptically. In 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. Start with claim-marking. When rights are assigned by a discretionary regulatory process focusing on subjective aesthetic or community qualities, those processes blur the content of the use rights tied with land ownership. In nuisance cases, courts are generally reluctant to grant relief for complaints about blocked light on this ground;\footnote{See, e.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. D. Ct. App. 1959).} they worry that proprietary rights to light would make it extremely difficult for land owners to get fair
“notice of limitations on the use of [their] property.” 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 or wrongful. If the law expands to cover uses that seem ugly, or out of place, or objectionable, it encourages neighbors to complain about nearby land uses they happen to dislike. Courts intuit this concern too 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.” Earlier inverse-condemnation cases worried that residential-only zoning imposes a “straitjacket” on development and change in zoned neighborhoods.

The public law of landmarking doesn’t need to follow the policy preferences locked into nuisance cases or now-repudiated inverse-condemnation precedents. But these authorities bring out the possible downsides to landmarking schemes. The normative issue isn’t whether aesthetic, historic, and community-related social goods have value. Rather, what combination of broad control rights and landmark-based use-restrictions will give all citizens the greatest concurrent opportunities to use some land as they like—knowing that different citizens will have different preferences as between active land uses and a neighborhood characterized by more passive uses and a stronger sense of heritage, aesthetics, and community? And, in close cases, productive labor theory would prescribe that boundary rules set the norm, and landmark designations be

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made an extreme exception. In disputes in which all preferences can’t be satisfied, better to err on the side of facilitating the uses more necessary for basic life goals.\textsuperscript{192}

And when authorities pursue landmark policies aggressively anyway, a classical liberal worries, four unfortunate effects should follow. The first is to choke the free use and development of local property more than many local residents would like. 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\textsuperscript{193} -- including 27\% of the buildings in Manhattan.\textsuperscript{194}

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” 95 sites on the ground that the Commission had been considering their preservation applications for decades. Most of these applications had languished because the applications were controversial. But the Chairwoman attracted intense criticism for taking the applications off of the Commission’s calendar as well.\textsuperscript{195}

In addition, the statutory criteria for landmarking (“special character,” “interest,” or “value”) are vague. That vagueness seems likely to invite arbitrariness. A current commissioner

\textsuperscript{192} 1900-era regulatory-takings disputes about billboard bans framed the stakes as being about the merits of “[æ]sthetic considerations,” which they described as “a matter of luxury and indulgence rather than of necessity.” City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 62 A. 267, 268 (1905). Accord Varney & Green v. Williams, 100 P. 867, 868 (Cal. 1909) (quoting Passaic), overruled, Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980); Crawford v. City of Topeka, 33 P.476, 477 (Kansas 1893).


agrees; in his opinion, commission determinations end up centering on standards of appropriateness, “appropriateness” is “a marvelous word, … it’s unclear what it is, [and it] boils down to whatever the commissioners say it is on any given Tuesday.”196 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 community tastes. This tendency is reflected in the *Penn Central* case. A Landmarks Commission member recommended that the Penn Central company’s proposed renovation of Grand Central Station be rejected, because it would have been “nothing more than an aesthetic joke.”197

Finally, when the free use of property is constrained, the distribution of and access to property will become more regressive. In neighborhoods with many landmark designations, richer citizens will be better-situated to live there and well-connected elites will have more influence to shape how landmarking criteria are applied. Others will be correspondingly excluded—especially outsiders, poorer residents, and members of races or ethnic groups not well-connected to city elites.198 New York’s experience with landmarking has confirmed this concern as well. On average, the residents of historic districts in Manhattan are twice as wealthy ($123,000 v. $63,000) and less than half as racially diverse as the residents of non-landmark areas.199 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.200

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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.”\textsuperscript{201} Yet productive labor theory doesn’t criticize landmark laws because it celebrates 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. Largely-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.

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 network facilitating individuals’ pursuing their own needs and goals. 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. But 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 most essential community-building vistas and buildings.


\textsuperscript{201} Alexander, supra note 55, at 753.
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. 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.”202 The U.S. Supreme Court rejected constitutional challenges to blight programs in the 1954 decision *Berman v. Parker.*203 “Economic development” powers authorize localities to exercise the same powers on a different showing, that the condemnation and redevelopment is needed to improve local “economic welfare” through “the continued growth of industry and business.”204 The Court upheld economic development-based programs from constitutional challenge in the 2005 decision *Kelo v. City of New London.*205

Land assembly programs illustrate how plurality, social obligations, and interest balancing can destabilize property rights. To be clear, support for land assembly practices isn’t a necessary or constitutive element of progressive property. The *Statement of Progressive Property* doesn’t specifically praise land assembly. And although some progressive scholarship is resignedly accepting of land assembly,206 more is ambivalent toward207 or sharply critical of208 the institution.

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206 See FREYFOGLE, supra note 156, at xix-xxi.
Nevertheless, the Statement does insist that property rights need to be connected “to the underlying human values that property serves,” that “[v]alues can generate moral demands and obligations,” and “[c]hoices about property entitlements are unavoidable.”

It’s easy to apply commitments like these to land assembly disputes. A local council or planning agency may reason: 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. And that argument surfaces quite regularly in the practice of land assembly. In Berman, the U.S. 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,” in which the “community [would] be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”

This same argument structure recurs in contemporary debates about land assembly after Kelo. For supporters of economic development condemnations, “There 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.”

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208 See Peñalver, supra note 56, at 863 (citing Kelo as an example of economic analysis’s “troubling willingness to trade on the well-being of individual measures in pursuit of increased aggregate measures of well-being”); Laura S. Underkuffler, Kelo’s Moral Failure, 15 WM. & MARY BILL OF RTS. J. 377 (2006).

209 Alexander et al., supra note 5, at 744.


The debate over land assembly and *Kelo* is complex, and cannot be settled or even treated exhaustively here. Two points matter here. First, *Kelo* was the most notorious property lawsuit in the last 40 years. Shortly after *Kelo* was handed down, the U.S. House of Representatives passed a resolution condemning it by a 365-33 vote, opinion surveys three months later reported that between 80 and 95% of respondents were critical of the decision, and 43 states enacted reform statutes responding to its holding. Productive labor theory gives a powerful account why the citizens outraged by *Kelo* might be expressing good Lockean property and political instincts. And 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 her lot, it shouldn’t be condemned and reassigned for development by another private actor without a clear and convincing reason. To be clear, 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. Such cases construed the “public use” requirement narrowly, to authorize only the government or common carriers to use condemned property. But they also construed constitutional police power limitations to authorize some condemnations and private redistributions—say, for laws authorizing irrigation projects in arid territories, or authorizing the transfer of riparian land to an applicant who

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wanted to build a power mill. In situations like these, the proposed project promised to generate significant public benefits, and condemnation was “unavoidable” in a strict sense, that the benefits couldn’t be realized unless most or all plots of land were integrated into the project.

And 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. And that “Lockean” presumption explains much of the opposition to land assembly, and also that opposition’s intensity. That presumption informs the most memorable passage of Justice Sandra Day O’Connor’s *Kelo* dissent: “[W]ho 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.”

The presumption also informed other, earlier, and less well-known classical liberal decisions protesting the abuse of eminent domain. Lest we forget, the Supreme Court considered *Berman v. Parker* because the urban renewal scheme challenged in that case had been declared invalid by the three-judge district court. Regardless of what one thinks of the doctrinal merits of the lower court’s argument, the court picked up the same natural rights themes. The court supposed for the sake of argument that the condemned neighborhood fails to meet what are called modern standards. … Suppose its owners 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 lighting. … Is a modern apartment house a better breeder of men than is the detached or row house? … Are such

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217 *Kelo*, 545 U.S. at 503 (O’Connor, J., dissenting).
questions as these to be decided by the government? And, if the decision be adverse to the erstwhile owners and occupants, is their entire right to own the property thereby destroyed?  

This presumption is justified by several implicitly-empirical background assumptions. As section VI.A explained, one is a strong skepticism 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 is little directly-relevant information. But 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 project stalled. The developer set to receive the property in dispute had failed to receive financing. It took New London another 6 years to start a new project on the site.

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 was married to a Pfizer executive and used his contacts to identify and recruit another Pfizer executive to the NLDC’s board. The NLDC favored

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insiders as it worked out the details of the Fort Trumbull project. It exempted from condemnation and redevelopment the Italian Dramatic Club, a private social club popular with local politicians.\textsuperscript{222}

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. \textit{Kelo} struck a nerve in part because it captured this aspect of land assembly policy as well. As one former Connecticut state official explained of the Fort Trumbull project, Pfizer officials “were trying to attract people with Ph.D.’s 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.”\textsuperscript{223} And “[t]he 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.”\textsuperscript{224}

VII. Labor and the Moral Foundations of Exclusion

The last Part shored up property’s first shaky foundation—the link between exclusive property and flourishing. And since a flourishing-based case for exclusion is philosophically legitimate, it supplies answers to the criticisms that beset economic accounts of exclusive property—which means it shores up the other shaky foundation as well. To see why, let’s consider those criticisms at greater length.

\textsuperscript{223} Mann, supra note 222.
\textsuperscript{224} Benedict, supra note 222, at 102.
A. Efficiency and Legitimate Authority

Economic analyses can and have explained why exclusive property might be efficient. There is fine economic scholarship covering: the character of trespass;\textsuperscript{225} narrow exceptions for cases of necessity\textsuperscript{226} and adverse possession;\textsuperscript{227} problems with making aesthetic complaints or landmark disputes cognizable “harms”;\textsuperscript{228} limiting the abuse of eminent domain in public law property disputes\textsuperscript{229}—and even the problems with right to roam statutes.\textsuperscript{230}

But it hasn’t yet been proven satisfactorily that efficiency is a quality that is relevant to instituting property laws. All of the foregoing studies focus on the ways in which different property rules might incentivize owners and non-owners to behave in ways that promote efficiency around owned resources. As Jules Coleman explains, however, “[t]o 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.”\textsuperscript{231}

From this perspective, any normative account of law is defective and incomplete unless it addresses the problem of legitimate authority. As Frank Michelman put it, 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 free and equal persons.”

In moral terms, people are capable of reasoning about their own well-beings, they are capable of 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 her own legitimate project for well-being seems presumptively to interfere with her freedom. The rule may be justified. An owner may be required to sacrifice property to pay her 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.

B. The Normative Value of Efficiency

This demand imposes a difficult challenge on economic justifications for legal rules: If “the term ‘efficiency’ ... denote[s] that allocation of resources in which value is maximized,” why does the “value” that is maximized have the character that confers legitimate authority?

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233 The text focuses on the most important moral challenge toward efficiency-based justifications for law. There are others. Before transaction cost bargaining analysis is used to project the highest and 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 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 before any bargaining. See Michelman, supra note 4. If the analysis suggests that rights may be shifted because they’re 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 GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 158-68 (1996).
234 POSNER, supra note 37, § 1.2, 16.
Three main answers have been suggested, each has difficulties, and none of these difficulties has been satisfactorily addressed yet.

The first possibility is that economic analysis helps maximize social value as understood in classical forms of utilitarianism. Such forms of utilitarianism are problematic, however, because they assume that “utility” refers to “pleasure” or “preference” in hedonistic and subjective senses. The advantage of tying utility to hedonistic and subjective preference is that this linkage makes utility determinate. Yet there are several disadvantages. Subjectivism and hedonism legitimize the preferences of “utility monsters”—sadists, racists, tyrants, and others who take utility in inflicting misery on others or in pursuing their own goals in extreme disregard of the needs of others. Separately, although it is never easy, in any ethics, to make any one person’s preferences commensurable with others’, incommensurability problems are more severe when each person’s preferences are subjective and not capable of being judged by others. And 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.”

Alternately, the value being maximized in efficiency could be social wealth. Yet wealth-maximization suffers from its own difficulties: “[T]he wealth maximization standard for choice of law 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

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236 POSNER, supra note 37, § 1.2, 16-17. See also Martha C. Nussbaum, Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics, 64 U. CHI. L. REV. 1197 (1997); Bernard Williams, A Critique of Utilitarianism, in UTILITARIANISM: FOR AND AGAINST, supra note 235, at 77.

motivations that are not responsive to considerations of price, or cost, in a sense approximately measurable by methods available to economic science.”

One last possibility consists of a combination, of Pareto superiority and consent. Kaldor-Hicks-efficient transitions enlarge social utility while diminishing the utility-positions of one or more individuals; Pareto superior transitions enlarge social utility without diminishing anyone’s position. Because Pareto superior transitions don’t diminish the utility-positions of any affected stakeholders, Richard Posner suggested, it would be just to infer that no stakeholders object to such transitions—and thus impute their consent to such transitions. Yet this justification raised problems as well. For one thing, as Posner himself acknowledges, “the conditions for Pareto superiority are almost never satisfied in the real world,” because most legal transition do worsen some individuals’ positions. And 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 had no normative status, Coleman concluded, because “people sometimes choose to do what they do not prefer to do, and do not do what they would otherwise prefer, often because they think it wrong to act as they would otherwise prefer.”

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239 Posner, supra note 237, at 490.

240 See id. at 488-97.

241 Posner, supra note 37, at 18; see Posner, supra note 237, at 495 (describing Kaldor-Hicks as an administrable substitute for Pareto superiority).

242 Coleman, supra note Error! Bookmark not defined., at 1519; see id. at 1517-19 (summarizing the argument of 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

These problems apply to economic analyses of property law as they apply to economic analysis generally. First, when exclusion theories justify exclusion, they often do so by comparing the pros and cons of open-access regimes and exclusive property. Exclusion is desirable in large part because the wealth created by encouraging investment, reaping, and sowing outweighs the costs of administering exclusive rights. This justification assumes that a property regime can be justified by the wealth it creates. But that assumption raises the question 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.

Exclusive ownership is also justified on the grounds that it protects owner subjective value, and because it minimizes the information costs that non-owners need to expend to process property rights. 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.

In scholarship, economic analysis’s critics often cite the preferences of racists and sadists to make this point. Law and economics scholars might protest that these preferences don’t

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243 See, e.g., Merrill, supra note 47.
244 See, e.g., Ellickson, supra note 3; Demsetz supra note 3.
245 Peñalver, supra note 56, at 827.
246 See, e.g., SOMIN, supra note 214, at 90-92; Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 82-85 (1986).
247 See Merrill & Smith, supra note 3.
248 See, e.g., Singer, supra note 21, at 916-18.
arise very often in real life. Even if they’re right,249 there are other preferences, which do surface frequently in property disputes and confound utilitarian analysis. Citizens from aboriginal communities and traditions may and have objected strongly to regimes of exclusive ownership; they believe that open access comports better with their traditional ways of life. That possibility drove native American opposition to white European-American settlement of the U.S. western frontier over the nineteenth and early twentieth centuries. Other citizens may have strong religious or ideological commitments to living in strong communities. In his 1993 article *Property in Land*, Robert Ellickson assembled sociological scholarship showing why Protestant Hutterites, Israeli kibbutzniks, and Woodstock youth all preferred communal arrangements.250 Still-other citizens may be paternalists.251 Such citizens take satisfaction, not so much from living in communal or open-access regimes themselves, as from seeing their fellow citizens change their preferences to want to live in such regimes.252

These three sorts of preferences like create problems for efficiency-based justifications. Simply by having the preferences they have, these citizens confound consent-based arguments for private property. When political communities institute exclusive property over such citizens’ objections, they violate the terms of Pareto superiority. Similarly, intensely-held preferences for open access or common property profoundly challenge classical forms of utilitarianism. These preferences need to be reconciled with the preferences of citizens who prefer private property because it confers privacy, wealth, freedom, or access to a wide range of life conveniences. Even if there are fewer aboriginals, communitarians, and anti-property paternalists than there are

249 Rights-based theorists tend to find this response unresponsive. If there aren’t more racists and sadists, one of the contributing factors is a just system of law’s socializing citizens to respect the equal rights of fellow citizens.
250 Ellickson, supra note 3, at 1346-62.
252 Ellickson, supra note 3, at 1317 (attributing this view in id. n.2 to Karl Marx & Friedrich Engels, *The Communist Manifesto*, in *KARL MARX: SELECTED WRITINGS* 221, 237 (David McLellan ed., 1977)).
capitalism-preferrers, the preferences of the former may be more intense than those of the latter, and in any case all the different preferences are incommensurable with each other. The preferences in conflict aren’t accommodated by any process of implicit bargaining. A system of private property needs a better argument why to disregard the preferences of people who strongly oppose private property, 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. In standard portraits, land assembly problems 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 shouldn’t take place if the parties favoring it seem likely 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.253

This vocabulary conceals problems similar to the ones recounted in the last subsection. True, there may 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 dispossessioning land owners as much as Steenberg Homes’s assistant manager enjoyed trespassing across the

Jacques’ lot. In many and probably most cases, however, “holding out” and “subjective value expropriation” don’t convey adequately the strength or the complexity of both sides’ claims.

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. 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.254 The president of the New London Development Corporation brought a missionary zeal to the project; she described her discernment to initiate the redevelopment program as being “like the hand of God in my life.”255 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.256 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 $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.257 Suzette Kelo didn’t want to move out of her neighborhood under any circumstances, and (again) she took offense at what she perceived as a group of “rich white people” trying to take over her neighborhood so incoming professionals could have residences with a nice view.258 And onlookers (particularly, faculty at Connecticut College) opposed the Fort Trumbull part of the project because they thought that the neighborhood had

255 Id. at 20.
256 Wilhelmina Dery got the most attention in this respect; she was in her late 80s and wanted to die in her own home. See id. at 88.
257 See id. at 36-38, 62, 101.
258 See id. at 65-69, 102.
distinct architecture and because they thought it unjust to use eminent domain to clear the neighborhood.\textsuperscript{259}

When disputants have perceptions and desires like these, economic cases for land assembly become much more problematic. Assume that leaders approve an assembly like the project litigated in \textit{Kelo}, on the ground that it seems likely to create net wealth in New London. If that is the ground, then it raises questions why wealth-creation throughout the city deserves priority over the interests of elderly residents in quiet. Or Van Winkle’s interest in getting the return he thought he deserved for his long and steady efforts to improve Fort Trumbull. Or Connecticut College faculty’s interest in seeing justice done. Or Kelo’s interest in not being condescended to by business professionals and do-gooder development officials.

And all of those interests confound the other main justifications for land assembly. If land assembly is generally justified by some combination of Pareto superiority and implied consent, that ground couldn’t apply to \textit{Kelo}. That ground won’t work, either. None of the individuals just mentioned explicitly consented to the New London project, and when it disregarded their objections the New London Development Corporation went forward with a Pareto inferior project. If land assembly is justified by some aggregative and classical form of utilitarianism, that grounding won’t be satisfying, either. The preferences of elderly residents, Van Winkle, Kelo, and Connecticut College faculty seem really hard to make commensurable with a putative social interest in putting New London on the map or increasing jobs, wealth, and the tax base. Any claim that these social interests trump those individual interests makes an extreme normative assertion.

\textsuperscript{259} See id. at 120-28.
D. A Lockean Critique of Efficiency

Now, the critiques of efficiency recounted thus far in this Part above were developed ably in the 1970s and 1980s by American legal theorists. Yet these themes were all anticipated by earlier jurists and political theorists. Including Locke.

Consider first the 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.\(^{260}\) He is fully aware of the “utility monster” problem; 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.”\(^{261}\) And one of the main points of his political theory is to distinguish between the states of character associated with the “Rational and Industrious” and those associated with the “Quarrelsom and Contentious.”\(^{262}\) In other words, even if people are motivated by their desires and their perceptions of pleasure and plain, those desires and perceptions don’t have normative status until they’re proven to contribute to rational and sociable forms of happiness.

Locke also anticipates the main objections to wealth-maximization. Locke agrees that wealth lacks normative value on its own. “[A]s to Money, and … Riches and Treasures,” he warns, “these are none of Natures Goods, they have but a Phantastical imaginary value: Nature has put no such on them.”\(^{263}\) For Locke, people usually desire money and precious resources for one of three reasons— greed,\(^{264}\) desire for conventional status,\(^{265}\) or to acquire the means by

\(^{260}\) See Simmons, 56-58; Buckle 1991, 146. Buckle provides evidence outside the *Two Treatises* from Locke’s *Questions Concerning the Law of Nature*, see Buckle 1991, 142-45. get also cites from Zuckert and Myers 1999 and West 2012. But see Feder’s book.

\(^{261}\) LOCKE, *TWO TREATISES*, supra note 10, I.58, 182.

\(^{262}\) *Id.* II.34, 291.

\(^{263}\) *Id.* II.184, 391.

\(^{264}\) *Id.* II.111, -37, 342, 294 (“*amor sceleratus habendi*, Concupiscence,” or a subrational “desire of having more than Men needed”).

\(^{265}\) See *id.* II.46, 300 (“*Fancy and Agreement*”).
which to satisfy survival and improvement-related needs. 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, because Locke is frequently portrayed as a social contract theorist. He is, in the sense that individuals shouldn’t be subjected to the authority of a government unless they’ve consented to be governed under its jurisdiction. But once citizens have provided this general consent, it doesn’t follow that they can’t 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.” 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.

E. A Lockean Rehabilitation of Efficiency

But not only does Locke confirm the problems most familiar with efficiency analysis, he also supplies a better possible grounding for such analysis. Noneconomists have suggested that economic defenses of exclusion rest on implicit “additional premises” about human behavior and sociability, and they “urge the importance of making additional premises” implicit in economic analysis “explicit.” In a 1982 chapter, Frank Michelman suggested that efficiency-based analysis makes sense if and when it’s filled out by assumptions like the following: People do

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266 See id. II.47, 300-01 (describing money as a “lasting thing that … Men would take in exchange for the truly useful, but perishable supports of Life”).
267 With ambiguities. See Charles R. Beitz, Tacit Consent and Property Rights, 8 POL. TH. 487 (1980); A. John Simmons, Consent and Political Obligation, 5 PHIL. & PUB. AFF. 274 (1976); Alex Tuckness, John Locke’s Political Philosophy, STAN. ENCYC. PHIL. § 3 (Edward N. Zalta ed., 2016), http://plato.stanford.edu/entries/locke-political/.
268 See LOCKE, TWO TREATISES, supra note 10, II.28, 288.
269 Id. II.50, 302.
270 Michelman, supra note 4, at 32.
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.\textsuperscript{271} These sound like Lockean premises. Productive labor theory might
supply the premises noneconomists find missing from efficiency-based justifications for property.

As a result, economic scholars might find productive labor theory helpful in one of two
ways, depending on how they view rights-based theories of law. If they find consequentialist
metaethics more satisfying, they might find productive labor theory helpful, and scour it for its
insights about the linkages between consequences on one hand and sociability, freedom, and
equality on the other. In the last several decades, law and economics scholars have explored
welfare consequentialism;\textsuperscript{272} productive labor theory might shed light on how industry, equal
opportunity, freedom, and sociability all constrain and structure social welfare.

If, however, law and economics scholars are open to rights-based theories, they might
find economic analysis better-grounded on rights-based premises that aren’t supplied by law and
economics itself. Robert Ellickson illustrates this possibility in his article \textit{Property in Land}. In
the course of justifying exclusive property in land, Ellickson signals that this defense is
contingent on three rights-based claims: People have rights to their persons; people deserve
property in the things they make from their labor; and property rights entail liberties to alienate
property.\textsuperscript{273} A Lockean theory of rights and labor isn’t the only theory that could justify these
claims, but it certainly helps. Such a theory establishes parameters in which scholars can study
different states of preference-satisfaction. It identifies the individuals who can express

\textsuperscript{271} See id. at 32-34.
\textsuperscript{272} See MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012);
LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 11-12 (2001).
\textsuperscript{273} Ellickson supra note 3, at 1326 & n.34. Accord James E. Penner & Henry E. Smith, \textit{Introduction, in}
PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, supra note 17, at xiii, xix (suggesting that productive labor
theory “might well have a tendency to converge with economic theories” of property).
preferences. It vests in each of these individuals freedom to choose which preferences count, and it gives each individual’s preferences status equal to others’.

Then, productive labor theory identifies starting entitlements for property’s purposes. *Pace* Ellickson, people aren’t entitled to all of the fruits of their acquisitive or creative activities, because people can acquire or create more than is consistent with others’ sufficiency or necessity interests. Subject to those outer parameters, though, people have broad and equal opportunities to acquire resources and improve them for their life benefit. And as Part IV showed, the usufructuary moral right to property can justify a liberty to transact with property. The rights to transact with property and to save money amplify the moral power of labor.\(^{274}\)

At that point, productive labor theory facilitates a form of preference-satisfaction, within broad but firm outer boundaries. As Part II and section VI.A explained, ordinarily, people *should* have freedom to use resources for survival and their own reasonable life goals. 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.

Similarly, productive labor theory facilitates a form of wealth-maximization. Although in principle it is “entirely a contingent matter” whether “[a]ccumulation and industry are rational,” in practice “by and large they are.”\(^{275}\) When a society creates new homes, medicine, food, and

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\(^{274}\) That is why private property and free contract are sometimes understood as a package combination. *See* Duncan Kennedy & Frank I. Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711, 748-51 (1980).

\(^{275}\) *Buckle*, *supra* note 16, at 153.
life conveniences, it expands the range of things with “usefulness to the Life of Man.” 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 for economic justifications for exclusive property to have legitimate authority. When exclusive property is said to generate “wealth,” that statement makes moral sense if it’s understood as a 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.” The moral claim makes clear, however, moral limits often overlooked on “wealth-creation” or “wealth-maximization.” 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. 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.

276 Locke, Two Treatises, supra note 10, II.184, 391, II.37, 294.
277 Id. II.40, -46, 296, 299.
So understood, productive labor theory also helps economic analyses deal with hard preferences, like the preferences recounted in section C.1 above, of aboriginals, communitarians, or antiproperty romantics. 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 commonses for their own members. But they can’t leverage their preferences into super-preferences, that the entire community’s system be 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 such preferences are likely to choke 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—and again, reassembly schemes illustrate here. Wealth-enlargement and –maximization are much more defensible if understood as coarse and compressed shorthand for a moral goal—increasing the opportunities for all to acquire conveniences of life and labor productively. Some American nuisance decisions have appealed to this principle, in undue hardship cases in which a court-ordered injunction would shut down a town company. And some earlier public use/police power decisions did so as well, in cases approving of reassemblies of land for irrigation projects, dams, power mills, and other large projects. 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

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278 “But in 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 S.C. & I. Co., 83 S.W. 658, 667 (1904).
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.\textsuperscript{279}

The standards assumed in this passage are much less determinate or concrete than a standard like “wealth-maximization.” But that is because the passage acknowledges and makes explicit moral limitations that are partly assumed and partly obscured by “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 by definition disrupts conventional property rights, it bears a burden of satisfying rights-based deontological limitations, similar to those discussed in Part V. 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 hasn’t been developed because there’s no water yet. The same limitations may also be satisfied when it’s practically impossible to generate a new and more productive activity without reassembly. The passage just quoted captures that concern in power mill litigation—especially the passage “cannot be fully and beneficially enjoyed in its existing condition.” 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.”)\textsuperscript{280}

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 a regulator can decide which reassemblies to

\textsuperscript{279}Head v. Amoskeag Mfg. Co., 113 U.S. 9, 21 (1885).
\textsuperscript{280}See Epstein, supra note Error! Bookmark not defined., at 170-75; Claeys, supra note Error! Bookmark not defined., at 918-27.
authorize using a simple subtraction formula. The regulator should authorize a project if all of its social benefits from a project are greater than its subjective-value losses, and before conducting this analysis the regulator 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 more moral terms.

Imagine that a new power mill couldn’t 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,” and class-based reasons that motivated Suzette Kelo to object to eminent domain in her New London neighborhood. A conscientious official could reasonably treat Kelo and the riparian differently: Kelo was a “sincere dissenter,” and protecting “subjective value,” while the riparian was a “hold-out.” Yet the distinction between Kelo and the imagined riparian have nothing to do with their actual motivations or preferences—by assumption, the motivations and preferences are identical. Rather, the imagined riparian would instead be a “hold out,” even if she was not trying to expropriate wealth from the mill company, because in context her intentions would be extreme. It wouldn’t 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 “hold out” 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.

In short, productive labor theory again complements economic accounts of land assembly—by supplying moral assumptions under which economic analyses seem politically legitimate.

Conclusion

In his contribution to the 2009 Symposium on Progressive Property, Gregory Alexander concluded that “American property law is not solely about either individual freedom or cost-minimization.” 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 doesn’t get adequate appreciation. Productive labor theory presents not a theory of radical autonomy but of liberty ordered to facilitate flourishing. Flourishing—and productive labor, sufficiency, sociability, and equal opportunity—supply a normative framework for reasoning about exclusive rights and use-based needs, and this framework puts cost-minimization and other consequentialist concerns in their proper contexts.

And this justification helps shore up the property cathedral. 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, however, productive labor theory offers a

281 Alexander, supra note 55, at 818.
solution: Progressives should 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.

That combination won’t answer every question about property law. But maybe it will help keep the property cathedral on sturdier foundations than it’s enjoyed in recent scholarship.