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In Defense of the Fee Simple

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ARTICLES

IN DEFENSE OF THE FEE SIMPLE

*Katrina M. Wyman**

Prominent economically oriented legal academics are currently arguing that the fee simple, the dominant form of private landownership in the United States, is an inefficient way for society to allocate land. They maintain that the fee simple blocks transfers of land to higher value uses because it provides property owners with a perpetual monopoly. The critics propose that landownership be reformulated to enable private actors to forcibly purchase land from other private owners, similar to the way that governments can expropriate land for public uses using eminent domain. While recognizing the significance of the critique, this Article takes issue with it and defends the fee simple.

The Article makes two main points in defense of the fee simple.

First, addressing the critique on its own economic terms, the Article argues that the critics have not established that there is a robust economic argument for dispensing with the fee simple. The critique that the fee simple leads to the misallocation of land rests on three empirical premises for which the critics have yet to provide much evidence. The critique also downplays or overlooks important economic benefits of the fee simple.

Second, departing from the economic discourse of the critics, the Article argues that the fee simple is valuable because it gives landowners a perpetual right to choose, free from the dictates of others, whether to transfer their land. Thus the fee simple expands the choices of landowners and promotes their independence and autonomy. Eliminating the fee simple would leave landowners vulnerable to the whims of others, and less free and autonomous. Landownership is not only about efficiency, but also about individual freedom.

INTRODUCTION 2

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INTRODUCTION

There is an emerging critique of the dominant legal form of private land ownership in the United States from a small number of economically oriented academics associated with the University of Chicago. According to this “Chicago critique,” the fee simple is problematic because it allows landowners to block, or raise the cost of, transferring land to higher value uses, since fee simple owners have a perpetual “monopoly” on specific parcels of land that enables them to “hold out” forever.¹ Professor Lee Anne Fennell’s article *Fee Simple Obsolete* offers the most forceful exposition of the critique.² She maintains that the fee simple, the main way of owning land privately in the United States, is out of date and a barrier to efficient land use in the urban areas where most people now live.³ This is so, she argues, because the fee simple gives owners a perpetual veto over selling their land, and using this veto, landowners can block or increase the costs of transferring land to higher value uses.⁴ In an intellectually sympathetic article, Professor Eric Posner and E. Glen Weyl (Posner & Weyl) similarly argue that “[t]he existing

1 See generally Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457 (2016); Eric A. Posner & E. Glen Weyl, *Property is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51 (2017). Eric Posner is the Kirkland & Ellis Distinguished Service Professor of Law at the University of Chicago Law School. E. Glen Weyl, who is working on a book with Posner, is a Senior Researcher at Microsoft Research New England, and a visiting Senior Research Scholar at Yale Department of Economics and Law School. Lee Anne Fennell is Max Pam Professor of Law and Ronald O. Coase Research Scholar at the University of Chicago Law School.

Fennell and Posner & Weyl are not the first to describe property owners as enjoying a monopoly. For example, Posner & Weyl refer to Thomas Merrill describing property owners as enjoying a monopoly. See Thomas W. Merrill, *Private Property and Public Rights*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY 91 (Kenneth Ayotte & Henry E. Smith eds., 2012).

2 See Fennell, *supra* note 1, at 1461.

3 *Id.*

4 *Id.* at 1463–64.

system of private property” writ large impedes transfers of private property to higher value uses, by giving owners “a monopoly” that they can use to thwart or increase the cost of transfers.⁵ The ambit of Posner & Weyl’s argument is broader than Fennell’s. They argue that private property generally gives rise to the holdout problem, whether the object of property is land, cars, the spectrum, or something else.⁶ But the ability of landowners specifically to block or raise the cost of transfers to higher value users is one of their central examples.⁷ As Fennell illustrates, for land, the fee simple is the root legal cause of the holdout problem that preoccupies Posner & Weyl, and so fundamentally, they too are critics of the fee simple.⁸

There is an ambitious reform agenda attached to the Chicago critique. With the goal of promoting the reallocation of property through markets, Fennell and Posner & Weyl recommend redesigning property rights.⁹ Although the details of their reform proposals differ greatly, both recommend redesigning property rights to enable private buyers to acquire property from existing owners without obtaining the owners’ consent or their agreement on price. Enabling private buyers to acquire property in this way would straightforwardly reduce the transaction costs of land purchases by entirely eliminating the need to bargain to transfer land. In effect, Fennell and Posner & Weyl would privatize eminent domain by transferring to private parties a version of the authority of compulsory purchase that historically has been the purview of public actors using eminent domain.¹⁰

5 Posner & Weyl, *supra* note 1, at 51. Posner & Weyl expand on E. Glen Weyl & Anthony Lee Zhang, *Ownership of the Means of Production* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 765, 2016).

6 See Posner & Weyl, *supra* note 1, at 51.

7 See *id.* at 52, 102; see also *id.* at 61 (“Real estate development is also hampered because it requires the assembly of multiple plots of land whose owners hold out for high prices.”).

8 To be clear, Posner & Weyl do not use the term “fee simple” to describe the legal interest that they are critiquing; they criticize “private property.” Posner & Weyl, *supra* note 1, at 51. However, Posner & Weyl are critics of the fee simple because they essentially equate private property with perpetual ownership, and the fee simple is the legal interest providing perpetual ownership of land. Thus, they imply that a lease is not private property. See *id.* at 52, 53, 63, 64, 69, 111. But see *id.* at 56, 98 (treating a natural resource lease as private property that could be transferred under their approach). Even if Posner & Weyl would consider nonperpetual legal interests in land to be private property, their concern that private property gives rises to holdout problems applies most aptly to the fee simple because it is perpetual; the ability of landholders with shorter-lived interests to hold out is lessened because their shorter interests will end.

9 See generally Fennell, *supra* note 1; Posner & Weyl, *supra* note 1.

10 Posner & Weyl refer to their proposal as “Harberger taxation with universal compulsory purchase provisions.” Posner & Weyl, *supra* note 1, at 95. Arnold Harberger “first proposed” taxation based on owners’ self-assessed valuations. *Id.* at 54.

There are precedents for private actors exercising the power of eminent domain. Eminent domain is in some instances delegated to private actors, such as utilities. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1265 (3d ed. 2017); see also Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 545–46 (2009).

The Chicago critique of the fee simple is theoretically significant because it runs counter to recent property scholarship affirming the importance of a robust conception of private property.¹¹ The critique is also timely because there is considerable concern about rising housing prices and a lack of affordable housing in many cities in the United States, especially along the coasts. A standard explanation for these rising housing prices among economists is that local governments are constraining the supply of land available for housing through excessively stringent public land use regulation such as zoning and historic preservation laws.¹² The Chicago critics have not extensively applied their critique to the problem of housing affordability. But their critique raises the prospect that part of the blame for high housing prices may lie with the predominant form of land ownership in this country, and that it is not only the public law of land use regulation that needs to be reformed, but also the private law of property.¹³ By granting private landowners the right to refuse to sell their land, the fee simple, like land use regulation, may curtail the supply of land available for redevelopment into affordable housing.

This Article offers a defense of the fee simple. I make two main points.

First, addressing the critique on its own economic terms, I argue that the critics have not proven that there is a strong economic argument for replacing the fee simple. The critique that the fee simple results in inefficient allocation rests on three empirical premises. It assumes (1) that land currently is misallocated on a sufficiently large scale to warrant the attention of policymakers, (2) that the misallocation of land is attributable to the fee simple as opposed to other causes, and (3) that the benefits of replacing the fee simple with any realistic version of the critics' proposals will exceed the costs.¹⁴ But the critics have yet to provide any meaningful empirical evidence for these three propositions, and there are reasons for doubting whether any of them hold up. Moreover, the critique tends to discount, or ignore, several potential economic benefits of the fee simple. As the critics mention, but tend to downplay, the fee simple incentivizes investment. It also promotes the transfer of land, because it is comparatively straightforward to value, and it decen-

11 See *infra* note 82 (listing citations to the literature affirming a robust right of private property).

12 See EDWARD GLAESER, TRIUMPH OF THE CITY (2011); Ed Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply*, (Zell/Lurie, Working Paper No. 802, 2017), <http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/802.pdf>; Jason Furman, Chairman, Council of Econ. Advisers, Remarks at The Urb. Inst., Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents (Nov. 20, 2015). For a lucid analysis of the implications of the economic literature on why housing prices are increasing in coastal cities like New York and San Francisco, and what policies affordable housing advocates should be supporting in light of this economic literature, see John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91 (2014).

13 Fennell briefly alludes to the possibility that shifting to a shorter form of land ownership than the fee simple might increase the stock of affordable housing. See Fennell, *supra* note 1, at 1512.

14 See Fennell, *supra* note 1, at 1477; Posner & Weyl *supra* note 1, at 60–61.

tralizes decisionmaking to landowners with easy access to the information necessary to manage the land. Furthermore, it may promote respect for property rights if we think of perpetual landowners as analogous to players in an indefinitely repeated game.¹⁵

However, the benefits of the fee simple are not fully captured by economic analysis and so my second line of defense of the fee simple departs from the economic discourse of the Chicago critique. In addition to its economic advantages, the fee simple allows landowners to decide whether to transfer their land to others and if so whether to sell it and at what price. There are different ways of understanding why this right to choose whether to transfer land to others is valuable. One is that the right to choose whether to engage with others protects us from the whims of others. Another is that it protects our ability to author our own lives, in turn protecting our autonomy. To return to the economic language of the Chicago critics, the buyer of a fee simple pays something like a “control premium[]” to obtain a legal interest that leaves them as independent and autonomous as common law, statutory law, and constitutional law allow.¹⁶

This Article proceeds as follows. Part I explains what the fee simple is and distinguishes it from other legal forms of landholding. Part II analyzes the Chicago critique and the critics’ reform proposals, and underscores the significance of the Chicago critique for theory and public policy. Part III argues that the critics have yet to provide robust evidence for their largely theoretical economic critique of the fee simple. In addition, it emphasizes that the fee simple has important economic benefits that the critics tend to downplay or ignore. Part IV argues that the fee simple increases the range of choices available to owners, and that systematically abandoning the fee simple therefore would undermine individual independence and autonomy. The Article then briefly concludes.

It is important to take note of the Chicago critique, even if it is not ultimately persuasive. The critique correctly draws attention to the urgent need today in many urban areas to repurpose land. This is an important public policy challenge, given that over eighty percent of the U.S. population, and fifty percent of the global population, resides in urban areas.¹⁷ But the onus is on the proponents of overhauling the fee simple to show that the fee simple needs to be rethought because it leads to a costly misallocation of land that dwarfs the numerous other economic benefits of the fee simple. Moreo-

15 I am grateful to Richard Revesz for suggesting this hypothesis.

16 See, e.g., Bell, *supra* note 10, at 567 (quoting Lawrence A. Hamermesh, *Premiums in Stock-for-Stock Mergers and Some Consequences in the Law of Director Fiduciary Duties*, 152 U. PA. L. REV. 881, 889 (2003)).

17 See Lisa Lambert, *More Americans Move to Cities in Past Decade—Census*, REUTERS (Mar. 26, 2012), <http://www.reuters.com/article/usa-cities-population-idUSL2E8EQ5AJ20120326>; U.N. Dep’t of Econ. and Soc. Affairs, Population Div., *World’s Population Increasingly Urban with More than Half Living in Urban Areas* (July 10, 2014), <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>; see also Fennell, *supra* note 1, at 1461 nn.11–12 and accompanying text.

ver, even if there were empirical evidence that fee simple ownership results in a massive misallocation of land, I would still be concerned about abandoning this form of ownership because of the protection that the fee simple provides against the whims of others. Landownership is not only about the efficient use of land, but also about individual freedom.

I. WHAT IS THE FEE SIMPLE?

I begin by analyzing what the fee simple is—and is not. By fee simple, I mean what is technically called the fee simple absolute. This is a legal interest in land that the United States inherited from England, where it developed over hundreds of years after the Norman Conquest.¹⁸

The fee simple is the most important form of private land ownership in the United States, with “[o]ver 99%” of privately owned land in the country owned in fee simple.¹⁹ Like other legal interests in land, the fee simple provides a bundle of rights over a specific parcel of land. The content of the bundle of rights is defined by common law, privately agreed covenants between landowners, community customs, and statutory, regulatory, and constitutional law—and varies depending on the time and place. The bundle that any owner enjoys, whether they own in fee simple or not, typically includes the right to exclude others from the land, the right to possess it, the right to use and enjoy it, the right to sell the interest, the right to devise it, and the right to pass it by inheritance.²⁰

18 “The term *fee* comes from the Latin *feudum* or *feodum*, which originally simply meant holding. . . . In the twelfth century the term *fee* came to be used to designate an inheritable interest in land rather than a mere life interest.” WILLIAM B. STOEBCUK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 1.6, at 15 n.6 (3d ed. 2000) (citing A.W.B. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF LAND LAW* 3 n.4 (1961)); see also *id.* at 18 n.29 (“The terms *pure fee* or *fee simple* came into use in the latter part of the thirteenth century to designate an interest inheritable by collateral as well as lineal heirs, as distinguished from a *fee tail*, which was inheritable only by lineal heirs (‘heirs of the body’).”).

19 JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* § 9.05(B)(1), at 109 (3d ed. 2012), quoted in Fennell, *supra* note 1, at 1458 n.1. Perpetual land rights also are common in other countries. Robert C. Ellickson, *The Costs of Complex Land Titles: Two Examples from China*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 281, 300 (2012) (“In virtually all of the world’s most prosperous nations, perpetual private land rights are routine.”); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1370 (1993) (“Perpetual private land rights are most emphatically not a uniquely Western institution, however. Land interests of potentially infinite duration evolved separately among the Japanese, the Ibo of Nigeria, and the Navajo of the American Southwest.” (footnotes omitted)).

While this Article focuses on private landholding, it is worth remembering that the federal government owns “nearly a third” of the land mass of the United States. Andrew McGill, *The Massive, Empty Federal Lands of the American West*, ATLANTIC (Jan. 5, 2016), <http://www.theatlantic.com/politics/archive/2016/01/federal-land-ownership/422637/>. Most federally owned lands are in the American West.

20 See STOEBCUK & WHITMAN, *supra* note 18, § 6.67, at 379–80 (stating that tenant has right to transfer lease, except for tenant at will); *id.* § 6.11, at 256 (“leasehold descends by intestacy or may be willed to the same persons as may take freehold estates”); see also William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*,

What distinguishes the fee simple from other interests in land is that the fee simple is a legal interest of “potentially infinite duration.”²¹ A fee simple can last forever because there is no end point built into the fee simple. But there is no absolute guarantee that the fee simple will endure forever, so it is best understood as probabilistically perpetual. A fee simple might end if the landholder dies without any heirs, which technically means that the landowner dies without a will, and at death has no relative who can claim the interest as an heir under the state’s intestate succession statute. In this situation, the fee simple “escheats” to the state.²² Since it is rare that an owner dies without a will or heirs, most fee simples have a high probability of being perpetual.

Other interests in land have no chance of lasting forever, and are therefore likely to be shorter lived than the fee simple.²³ Consider, for example,

22 LOY. L.A. L. REV. 405, 419 (1989); Russell G. Donaldson, Annotation, *Death of Lessee as Terminating Lease*, 42 A.L.R.4TH 963, § 2[a] (1985). In the case of the leasehold, the above-named rights often will be qualified by the terms of the lease.

21 STOEBUCK & WHITMAN, *supra* note 18, § 1.6, at 17.

22 See *id.* §§ 1.6, 2.2, at 17, 29. “In states where tenure still theoretically exists, escheat may be viewed as terminating a fee simple absolute; in states where land ownership is allodial, however, the state merely takes the estate as ‘ultimate heir’ when it escheats.” *Id.* § 2.2, at 29.

In addition, the fee simple may end if the state exercises eminent domain. There seem to be two different views about whether the fee simple ends when the government takes land owned in fee simple through eminent domain. See 3 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN, §§ 9.01, 9.02(9) (2006). On one view, which seems to apply when the federal government takes land through eminent domain, the previous fee simple is extinguished and “a new title” is created. *United States v. 194.08 Acres of Land*, 135 F.3d 1025, 1029 (5th Cir. 1998) (“The default rule in eminent domain is that a taking in fee simple establishes a new title and extinguishes all existing possessory and ownership interests not specifically excepted.” (citing *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924))).

However, on the second view, eminent domain does not extinguish a fee simple, but merely transfers the fee simple interest to the government. Under this theory, the title that the government acquires when it takes private property by eminent domain is “derivative” of the title of the prior owner, and the government takes the property subject to the “encumbrances” that burdened the earlier owner. *Cumberland River Oil Co. v. Commonwealth*, 350 S.W.2d 700, 702 (Ky. Ct. App. 1961) (quoting 3 NICHOLS ON EMINENT DOMAIN § 9.01 (2d ed. 1917)); see also John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 26 (referring to eminent domain as involving the transfer of a fee simple to the government).

As Fennell mentions, property owners can lose their land not only when the government takes it through eminent domain, but also when they do not “pay [their] mortgage or property taxes, [and they] might also be dispossessed by . . . natural disasters, or private lawlessness.” Fennell, *supra* note 1, at 1470 n.49. Though the property owner changes when the land is forfeited for the lack of payment of mortgages or property taxes, I do not believe the fee simple ends in these instances. I also presume that dispossession due to natural disasters or private lawlessness does not end the fee simple.

23 Raffaele Caterina, *Setting the Scene*, in TIME-LIMITED INTERESTS IN LAND 4 (Cornelius van der Merwe & Alain-Laurent Verbeke eds., 2012) (“The time-limited interest is thus seen as an estate in land, which differs from the perpetual fee simple only in quantity.”).

the lease, the principal alternative way of holding land today in the United States and elsewhere.²⁴ In China and Israel, for example, most privately owned land is leased from the state, not owned outright under a perpetual interest such as a fee simple.²⁵ A leading property treatise defines the lease as “a possessory estate in land for a determinate period or at will by permission of another, the landlord, who holds an estate of larger duration in the same land.”²⁶

It is important to recognize that the bundle of rights that the fee simple entails is not unlimited when one looks at dimensions other than time. Property rights generally, including the fee simple as well as other interests like leases, are limited along many dimensions by common law, statute, regulation, constitutional law, and privately agreed covenants. For example, the common law of nuisance, and land use regulations such as zoning, limit what uses an owner may make of land owned in fee simple, and therefore qualify the right to use and enjoy land. So, though the fee simple is often defined as “full ownership of land,” ownership by way of fee simple does not grant absolute authority over land.²⁷

24 MERRILL & SMITH, *supra* note 10, at 643; STOEBUCK & WHITMAN, *supra* note 18, § 2.2, at 32.

25 On landownership in China, see Donald Clarke, *China’s Stealth Urban Land Revolution*, 62 AM. J. COMP. L. 323, 329–30, 358, 365 (2014) (approximately 60% of state-owned land in urban areas is leased out by local governments under long-term leases; arguing that the rights of leaseholders likely will evolve—and already may have evolved—to being de facto perpetual, akin to the fee simple, because economic and political considerations will induce governments to renew leases for free); Ellickson, *The Costs of Complex Land Titles*, *supra* note 19 (critically analyzing the “fixed-term contracts” used to allocate land in China and arguing that they are less efficient than perpetual landholdings like the fee simple); Shitong Qiao, *The Evolution of Chinese Property Law*, in PRIVATE LAW IN CHINA AND TAIWAN 182, 189 (Yun-chien Chang ed., 2016) (urban and rural land use rights in China “are created by contracts between land owners and corresponding land users, and are still far from fee simple”).

On the legal character of land ownership in Israel, see Joshua Weisman, *Long-Term Leases as an Alternative to Ownership*, in PROPERTY PROBLEMS FROM GENES TO PENSION FUNDS 105, 106 (J.W. Harris ed., 1997). “[A]bout 92 per cent of the total area of the State” of Israel is made up of Israel Lands, which are “lands owned by the state, by the Developing Authority and by the Jewish National Fund.” *Id.* at 106 n.3. Leases generally last for forty-nine years, “with an option of a one time renewal for another term of 49 years” and in practice leases are renewed when they come up for renewal so that the effective term is generally ninety-eight years. *Id.* at 112. Long-term leases also are used in “the Australian Capital Territory (Canberra), Singapore, [and] Hong Kong.” *Id.* at 105. Hong Kong’s land tenure system is “the major model for China’s urban land tenure system.” Clarke, *supra*, at 345.

26 STOEBUCK & WHITMAN, *supra* note 18, § 6.1, at 244 (defining the interest held by a “tenant”).

27 *Id.* § 2.1, at 26. Full ownership is to be contrasted with a tenure system, under which land is held of someone higher in a hierarchy in exchange for services or rent. “The essence of tenure is that one person holds an estate of or under another person and owes the other continuing or recurring duties, such as the payment of rent, during the duration of the estate.” *Id.* § 6.13, at 257. “[A]ll land in [feudal] England except the King’s

To make this rather abstract legal description of the fee simple somewhat more concrete, imagine two adjoining townhouses in the West Village neighborhood of Manhattan in New York City. Jane owns the first townhouse in fee simple; Robert is a tenant leasing the second townhouse for a term of two years from a landlord who owns it in fee simple.²⁸ Jane and the fee simple owner of Robert's townhouse own the surface of the land, and to some depths underneath and height above the land.²⁹ Although Jane does not have unlimited authority over her townhouse, she has a more robust bundle of rights than Robert because she has a perpetual interest. The fact that Robert has a two-year lease not only means that his access to his house is time limited, but many of his other rights to the house also are circumscribed, in order to protect the reversionary interest of the fee simple owner. For example:

Jane has the right to exclude others from her townhouse. While Robert also has the right to exclude others, leases often will give the landlord "a privilege to enter for stated purposes."³⁰ Even if no privilege to enter is spec-

demesne land was held of some lord, and ultimately of the King, in return for service of some kind." *Id.* § 1.6, at 16. "Demesne" is "land held in one's own right, and not through a superior." *Demesne*, BLACK'S LAW DICTIONARY (10th ed. 2014). Tenure either does not exist in U.S. states or exists only "theoretically" and has "little or no practical significance." STOEUBUCK & WHITMAN, *supra* note 18, § 1.8, at 21. Thus, land is effectively owned "allodial[ly]." *Id.*; *see also id.* § 2.2, at 29 (recognizing that there may be states where land is not owned allodially, but this has only theoretical significance).

28 Many New York City single-family homes are owned in fee simple. *See, e.g.*, Donna Stockman, *Forms of Ownership in NYC*, SOTHEBY'S INT'L REALTY (2012), <http://www.donnastockman.com/for-purchasers/forms-of-ownership-in-nyc/>. Cooperatives and condominiums are other common forms of ownership in New York City. Cooperatives and condominium buildings usually are built on land owned in fee simple, but there are some that are built on leased land. Julie Satow, *Rising Costs a Concern for Land-Lease Building Owners*, N.Y. TIMES (Jun. 12, 2015), http://www.nytimes.com/2015/06/14/realestate/rising-costs-a-concern-for-land-lease-building-owners-in-new-york.html?_r=0 ("Approximately 100 buildings in Manhattan have land or ground leases, according to several people in the real estate industry. They are mostly co-ops, although the list includes some condominiums.")

Battery Park City is one area of New York City where buildings are built on leased land, not land that is privately owned in fee simple. The land in this area is "leased through 2069" by developers from the Battery Park City Authority, which has "a master lease for 92 acres of landfill on the Hudson River." Charles J. Urstadt, Op-Ed, *Riches Lie Beneath Battery Park City*, CRAIN'S (May 11, 2014), <http://www.crainsnewyork.com/article/20140511/OPINION/140509823/riches-lie-beneath-battery-park-city>; *see also* Mitchell Hall, *Battery Park City*, N.Y.C. BLOG ESTATE (May 22, 2007), <http://www.nycblogestate.com/2007/05/bpc.html>.

29 *See* 1-6 WARREN'S WEED NEW YORK REAL PROPERTY § 6.09 (Loiraine Power Tharp ed., 5th ed. 2017); *see also* Macmillan, Inc. v. CF Lex Assocs., 437 N.E.2d 1134, 1137 (N.Y. 1982) (referring to *ad coelum* principle).

30 STOEUBUCK & WHITMAN, *supra* note 18, § 6.22, at 271.

ified, “it has been held that the landlord may enter to collect rent and to distrain where that is permitted.”³¹

Jane has the right to make many choices about how to use her townhouse. She can decide whether to plant flowers in the front or the back, have friends over to spend the night, and sleep upstairs or downstairs. But her choices are constrained. For example, she cannot own and raise pigs in the backyard because of Health Department rules and probably the common law of nuisance.³² She may not be able to use the house for tanning hides, because of an old covenant that still runs with the land.³³ She probably cannot knock down the townhouse and build a fifty-story office building because of the zoning in the area.³⁴ If she wants to build such a building, she likely will have to seek an upzoning, which will require a lengthy approval process.³⁵ Moreover, she may actually be under an affirmative obligation to maintain the house, because the townhouse, like many buildings in the West Village, may be landmarked or part of a historic district.³⁶ The historic pres-

31 *Id.* Distraint is an old common law right of landlords “to enter the demised premises and to seize goods found there for the collection of unpaid rent.” *Id.* § 6.57, at 365. It does not exist in many states, and where it exists it is typically regulated by statute. *Id.*

32 See New York City, N.Y., 24 Health Code § 161.01(a)(1) (2017) (prohibition on wild animals); *Id.* § 161.01(b)(15) (defining pigs as wild animals); Reuven Fenton, *Hey, NYC—What’s the Pig Deal?*, N.Y. POST (Feb. 18, 2013), <http://nypost.com/2013/02/18/hey-nyc-whats-the-pig-deal/>; Andy Newman, *Pet Pigs of New York: Illegal, Embattled, Beloved*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/nyregion/illegal-but-still-around-new-yorks-hidden-network-of-pet-pigs.html> (discussing how people keep pet pigs in New York City despite health code ban on pigs). Owning certain animals—or large numbers of animals—within urban areas also might constitute a nuisance or violate zoning laws. For examples from other jurisdictions, see *Murphy v. Hitchcock*, 268 N.Y.S. 385 (N.Y. Sup. Ct. 1934) (finding a dog kennel in Mount Pleasant, Westchester County, New York, a nuisance and violation of restrictive covenants); J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* 31–32 (2016) (suggesting that zoning laws in Middletown, Ohio, may have prevented people from owning chickens).

33 Elizabeth A. Harris, *At High-Priced Corner, a Building Forlorn*, N.Y. TIMES (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/nyregion/former-village-dispensary-must-untangle-restrictions.html?_r=0 (stating that bans on “blacksmithing” and “the tanning of hides” are “two restrictions that survive on many New York City deeds today”).

34 On zoning in Greenwich Village, see generally, N.Y.C. DEP’T OF CITY PLANNING, *Far West Village Zoning Proposal—Approved!* (2005), <http://www1.nyc.gov/assets/planning/download/pdf/plans/far-west-village/farwestvillage.pdf> (describing zoning proposal approved by City Council in 2005 and history of zoning in Greenwich Village); *Far West Village Contextual Rezoning Approved*, CITYLAND (Nov. 6, 2010), <http://www.citylandnyc.org/far-west-village-contextual-rezoning-approved/>; Danielle Tcholakian, *Here’s How the City Council’s Zoning Changes Affect the Village and SoHo*, DNAINFO (Mar. 15, 2016), <https://www.dnainfo.com/new-york/20160315/west-village/heres-how-city-councils-zoning-changes-affect-village-soho>; GREENWICH VILLAGE SOC’Y FOR HISTORIC PRESERVATION, http://www.gvshp.org/_gvshp/index.htm (last visited Sept. 22, 2017). Zoning for specific addresses can be accessed through *Find Your Zoning*, N.Y.C. DEP’T OF CITY PLANNING, <https://www1.nyc.gov/site/planning/zoning/index-map.page> (last visited Sept. 22, 2017).

35 A variance seems unlikely to be granted.

36 According to the Real Estate Board of New York, over 70% of properties in Community District 2, which includes Greenwich Village, the West Village, and SoHo, are

ervation laws may require her to get the approval of the City's Landmarks Preservation Commission if she wants to change the windows on the house³⁷—and she is not entitled to compensation for the burdens that the historic preservation laws impose, because of the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.³⁸

As a tenant, Robert has a right to use the townhouse subject to the same city laws and common law rules as the fee simple owner. But he is also bound by the use restrictions imposed by the lease and by the common law of waste, nuisance, and negligence as a backstop to protect the reversionary interest of the fee simple owner.³⁹

Jane has the right to sell the townhouse and to determine the price at which she sells. She also has the right to decide not to sell the house. Robert can sell his leasehold interest, but he can only transfer what he has—the two-year term. Also, the lease may restrict the right to transfer the lease, for example by requiring the landlord's prior approval.⁴⁰

Jane can will the townhouse to her partner upon Jane's death, or not write a will and let the house pass by New York State's intestate succession statute.⁴¹ Jane's successors can do likewise in perpetuity, and neither the government nor another private owner will retake the land, assuming that no owner dies without heirs. Robert can will his lease or it can pass by intestate succession, but again, Robert can only transfer what he has, which is the two-year interest.⁴²

There is a slim chance that the New York City government might seek to acquire Jane's and Robert's townhouses by eminent domain.⁴³ Because of

landmarked. REAL ESTATE BD. OF N.Y., AN ANALYSIS OF LANDMARKED PROPERTIES IN MANHATTAN 5 tbl.1 (2013), https://members.rebny.com/pdf_files/Research_Analysis_of_Landmarked_Properties_in_Manhattan.pdf.

"Landmarks are . . . required to be maintained in a condition of good repair." N.Y.C. LANDMARKS PRESERVATION COMM'N, VIOLATIONS, <https://www1.nyc.gov/site/lpc/violations/violations.page> (last visited Sept. 22, 2017); see also New York City, N.Y., 25 Code § 25-311 (Maintenance and Repair of Improvements).

37 See N.Y.C. LANDMARKS PRESERVATION COMM'N, THE DESIGNATION PROCESS, <http://www1.nyc.gov/site/lpc/about/the-designation-process.page> (last visited Sept. 22, 2017); see also Jim Rendon, *High-Mileage Alterations*, N.Y. TIMES (June 20, 2013), <http://www.nytimes.com/2013/06/23/realestate/high-mileage-alterations.html>.

38 438 U.S. 104 (1978).

39 See STOEBUCK & WHITMAN, *supra* note 18, §§ 6.22–24, at 271–75.

40 See *id.* § 6.67, at 379–87.

41 See N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2015). For an interesting story about an unsuccessful effort to will a West Village townhouse, see Sarah Maslin Nir, *A Brownstone and the Bitter Fight To Inherit It*, N.Y. TIMES (Oct. 23, 2016), http://www.nytimes.com/2016/10/24/nyregion/a-brownstone-and-the-bitter-fight-to-inherit-it.html?_r=0.

42 See STOEBUCK & WHITMAN, *supra* note 18, § 6.85, at 406–07.

43 See, e.g., Richard A. Epstein, *The Use and Limits of Self-Valuation Systems*, 81 U. CHI. L. REV. 109, 124–25 (2014) (describing government taking of "residential facilities" through eminent domain as an event of "extraordinary low probability" (citing Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2116–19 (2009))).

the West Village's location near the Hudson River, these houses may sit in a floodplain, and the government might decide that the houses need to be replaced with dunes to protect other properties in the area. Dune construction likely would constitute a "public use" for which the government constitutionally could use eminent domain, provided it pays "just compensation."⁴⁴ As a fee simple owner, Jane would be constitutionally entitled to the "fair market value" of her perpetual interest. If the government expropriates Robert's house, the government must compensate the fee simple owner. Reflecting his lesser legal interest, Robert only gets compensated if the value of his remaining lease term exceeds the remaining rent that Robert owes his landlord under the lease.⁴⁵ To be sure, Jane and Robert could try to organize their neighbors to oppose the expropriation, but political action to defeat infrastructure, which has a celebrated history in the West Village, is costly in time and money.⁴⁶

In sum, the fee simple owner, but not the tenant, has "full ownership" and "the largest possible aggregate of rights, privileges, powers and immunities with respect to the land,"⁴⁷ to quote a treatise definition of a fee simple. But even the fee simple owner certainly does not have absolute, unlimited authority over the parcel of land that she owns. The limitations on the townhouse fee simple owner may seem extreme—and it is likely that a ranch owner in rural Colorado who also has a fee simple is much less restricted in what they can do on their land.⁴⁸ But the townhouse fee simple owner is more apt to keep in mind for present purposes, because the Chicago critique has the most force when it implies that fee simple owners in densely populated areas like Manhattan have so much power that they can block higher value uses of land.

44 Under the Fifth Amendment to the U.S. Constitution, the government can use eminent domain only to take property for public uses, and it must pay just compensation for property taken. See U.S. CONST. amend. V.

45 STOEBUCK & WHITMAN, *supra* note 18, § 6.35, at 287 ("It is agreed all around that if the demised land is wholly taken by eminent domain, the leasehold and all duties under the lease, including the tenant's duty to pay rent, are terminated. . . . The nearly universal rule is that the condemnor pays only one award, as if the fee simple title were not subject to the leasehold; i.e., the leasehold and the reversion are not valued separately. To the extent the tenant has a 'bonus value' in the leasehold, i.e., the sum by which the fair market value of the leasehold for the remainder of the term exceeds the cost of the tenant's obligations under the lease, the tenant is entitled to share." (footnotes omitted)). If the government expropriated only the lease, only the tenant would be compensated. See *id.* § 6.35, at 288–89.

46 See, e.g., Anthony Paletta, *Story of Cities #32: Jane Jacobs v Robert Moses, Battle of New York's Urban Titans*, GUARDIAN (Apr. 28, 2016), <https://www.theguardian.com/cities/2016/apr/28/story-cities-32-new-york-jane-jacobs-robert-moses> (recounting the story of Jane Jacobs's mobilization of opposition in Greenwich Village to Robert Moses's highway construction plans and redevelopment proposals); see also ROBERTA BRANDES GRATZ, *THE BATTLE FOR GOTHAM: NEW YORK IN THE SHADOW OF ROBERT MOSES AND JANE JACOBS* (2010).

47 STOEBUCK & WHITMAN, *supra* note 18, § 2.2, at 28.

48 See Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2069 (2012).

II. THE CHICAGO CRITIQUE AND ITS SIGNIFICANCE

This Part analyzes the Chicago critique of the fee simple, explains the critics' proposals for reforming land ownership, and identifies the significance of the critique.

A. *The Critique*

The heart of the Chicago critique is that the fee simple leads to the inefficient allocation of land because fee simple owners may strategically thwart the transfer of land to higher value uses. This is so because the fee simple gives owners a perpetual right to refuse to sell their land and to set the price of any sale. (If the landowner has a shorter-term interest, such as lease, the landowner's right to refuse to sell is less consequential because it will end once the interest ends.⁴⁹) Thus, a fee simple landowner like Jane can refuse entreaties to sell from a potentially higher value user, like the developer of a condominium building. She might be a "sincere dissenter" who favors "more Jane Jacobs and less Marc Jacobs" in the Village, or she might be a "strategic holdout" who wants to extract a higher price from the developer and knows that she has leverage because the developer needs her land.⁵⁰ The Chicago critics are most concerned with "strategic holdouts"—sincere dissenters actually may be the higher value users of land if we account for their subjective valuation of their land.⁵¹

The Chicago critique emphasizes that the fee simple complicates bargaining over land and generates transaction costs that thwart the assembly of land to reallocate it to higher value uses.⁵² Fennell uses the language of

49 Posner & Weyl, *supra* note 1, at 52–53 (under Vickrey's auction proposal, "users would eventually be required to return property to the government," and they therefore "could not hold out for a monopoly price, or indeed sell their property at all"). I say that the leaseholder's veto power is "less" consequential deliberately, because someone trying to assemble land for development may have to buy out leaseholders, and if they do not want to sell, the land assembler could have to wait many years if the leaseholders have long-term leases. For an example where a developer's plans had to be altered, though they were not ultimately frustrated, due to the actions of a leaseholder, see ANDREW ALPERN & SEYMOUR DURST, *HOLDOUTS! THE BUILDINGS THAT GOT IN THE WAY* 33 (3d ed. 2011).

50 For the distinction between "sincere dissenters" and "strategic holdouts," see ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 92 (2015); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 29 (2006); Steven Shavell, *Eminent Domain Versus Government Purchase of Land Given Imperfect Information About Owners' Valuations*, 53 J.L. & ECON. 1, 7–9 (2010); Somin, *supra* note 43, at 2116–19.

51 Posner & Weyl's explanation of the Myerson-Satterthwaite Theorem emphasizes that the reason for inefficient allocation is the incentives of sellers and buyers to deviate from their reservation prices to maximize their profit. Posner & Weyl, *supra* note 1, at 61–62.

52 See, e.g., Posner & Weyl, *supra* note 1, at 79 ("One of the worst distortions in our mind from monopoly power is not merely the reduction in turnover, but the time wasted on bargaining.").

“externalities” in explaining the bargaining problems to which the fee simple gives rise. She suggests that the fee simple owner’s “veto power” can be regarded as imposing the negative externality of excessively fragmented landholding, or, alternatively, as thwarting society’s ability to benefit from the positive externality of land assembly and redevelopment.⁵³ Posner & Weyl describe the owner’s “monopoly” as a “transaction cost” that gives rise to “allocative inefficiency.”⁵⁴ Land is allocated inefficiently when there is a party that wants to buy the land to put it to a higher-value use and the existing, lower-value user is refusing to sell.⁵⁵ They argue that the private owner’s ability to thwart or raise the cost of transfers by demanding a higher price than his or her reservation price results in this kind of inefficiency.⁵⁶

As mentioned above, Fennell and Posner & Weyl describe the contracting problems to which private property gives rise as stemming from the “monopoly” that property owners enjoy. A firm is usually said to be a monopoly because it is the sole seller of something.⁵⁷ As the sole seller, the firm has the power to sell goods “at a ‘monopoly price’, one above the minimum she would be willing to accept for her asset, and thus the price she would charge in a market where many individuals with similar valuations of substantially identical property to the owner compete to make a sale.”⁵⁸ When Fennell and Posner & Weyl say that a property owner has a monopoly, they are presumably alluding to the facts that property law (1) assigns a landowner a specific parcel of a good (land) whose overall supply is fixed; and (2) grants that landowner the right to decide whether to sell or retain that parcel, and if to sell, at what price. Because the landowner is the sole potential seller of the

53 Fennell, *supra* note 1, at 1466–67, 1472.

54 Posner & Weyl, *supra* note 1, at 58 (“[T]he monopoly problem is a type of transaction cost.”).

55 See *id.* at 61 (“A central economic problem in a variety of settings is that of ensuring capital—including money, land, machines, and other assets—is allocated to its most productive uses. In traditional economic models, this problem is assumed away: capital assets move to their most productive uses because the people or firms who can use it most productively can pay the highest prices to buy it from those who cannot. However, in the real world this problem of allocative efficiency often takes center stage.”); see also *id.* at 62 (stating that “allocative efficiency” exists if the good is transferred from the buyer to the seller if “the buyer values the good more than the seller”).

56 *Id.* at 52 (“Just like a normal monopolist, a property owner sets a price that approximates what the seller thinks that the likely buyer’s valuation or reservation price for the property is. Because some buyers will have a valuation that is lower than the announced price but higher than the seller’s valuation, some efficient sales will be blocked or delayed. This inhibits the allocation of property to its most valuable uses, a crucial component of a successful market economy.”).

Posner & Weyl credit Myerson and Satterthwaite for “identif[y]ing the monopoly problem in a mathematically rigorous fashion, proving that private property was inconsistent with allocative efficiency.” *Id.* at 57; see also *id.* at 61 (describing the Myerson-Satterthwaite Theorem, for which Myerson “won the Nobel prize”).

57 Edwin G. West, *Monopoly*, in *THE WORLD OF ECONOMICS* 475 (John Eatwell et al. eds., 1991) (referring to the “modern meaning” of “monopoly” as “a single uncontested firm”).

58 Posner & Weyl, *supra* note 1, at 51–52.

land over which they have property, the landowner can choose to demand a price above their valuation of the land—or reservation price—to sell it.⁵⁹ However, the landowner’s “monopoly” is only problematic if they are acting strategically and demanding a price above their reservation price, and if there are no competing, substitutable parcels of land.⁶⁰ Fennell and Posner & Weyl seem to assume that landowners often act strategically when bargaining and that individual owners will often be able to hold up development because developers often need to acquire specific parcels to proceed. But these assumptions could be contested. Indeed, Posner & Weyl acknowledge that they are departing from “the tendency of the law and economics literature to treat the monopoly problem as exceptional—justifying a limited number of legal exceptions to the dominant paradigm of private property.”⁶¹

B. Reform Proposals

Fennell and Posner & Weyl propose redefining ownership to overcome the bargaining problems created by the veto afforded to fee simple owners. The goal in both cases is to enhance market transfers of land (and other goods, in the case of Posner & Weyl) from one private actor to another. But, notwithstanding the promarket framing of the proposals,⁶² the resulting transfers could be nonconsensual and, from the current landowner’s perspective, analogous to eminent domain by a private, rather than a public, actor. This is because Fennell and Posner & Weyl propose mechanisms that would allow a private buyer to force an existing owner to sell at a price that might not match the value that the owner would accept at the moment of sale. So, while the stated goal of the proposals is to promote voluntary land market exchanges, the proposals paradoxically would lead to more compulsory exchanges.⁶³

As a thought experiment, Fennell proposes two new types of fees to supplement, but not replace, the fee simple. Under her proposal for callable fees, local governments would designate large blocks of land as “callblocks.” These callblocks would be privately owned by a developer or government owned, presumably through a perpetual interest like the fee simple, although

59 *Id.*

60 On the importance of nonfungibility, see Posner & Weyl, *supra* note 1, at 63 (“The monopoly problem is most serious when property is illiquid, which typically arises when property is idiosyncratic. Such property is hard to value because it cannot be easily compared to other pieces of property. Thus, it takes a long time for people to agree on a price, if they agree at all, and in the process much effort may be wasted. Artwork is highly illiquid; houses are illiquid; pork bellies and ball bearings are liquid.”); see also Fennell, *supra* note 1, at 1470, 1476, 1490.

61 Posner & Weyl, *supra* note 1, at 106.

62 *Id.* at 83 (describing their proposal as a “decentralized market solution[]”).

63 Posner & Weyl do not seem concerned about the prospect of expanding private takings beyond the ambit of those that now occur under the guise of takings for economic developments, in which governments take private property and then resell it to different private owners in the name of promoting development. See *id.* at 106, 109.

Fennell does not specify the form of the ownership of the callblock.⁶⁴ The callblock owner would carve out and sell parcels within the block to individual private owners for residences or businesses subject to a call option to buy back all the land within the callblock at a “strike price” determined by a defined formula, “after a specified interval has passed (such as ten or twenty years), if certain verifiable conditions” were met, such as declining property values within the block.⁶⁵ The idea is that if developers hold land in large callblocks, it will be easier to repurpose land over time, because they will not have to assemble land from many private owners for a development site. Although Fennell does not draw the parallel, her proposal might be analogized to the way that land is held in many parts of London. Many fashionable parts of London have been owned by families for centuries, and the families lease out the land they own, retaining considerable control over land uses within their holdings through the leasing system.⁶⁶ The leases may in effect provide the families with a call option if they are dissatisfied with the existing uses of the land.⁶⁷

Fennell’s other proposal is for a “floating fee.”⁶⁸ This proposal would strike more at the heart of the fee simple than callable fees, which, as mentioned above, appear to be carved out of land owned perpetually in fee simple. Floating fees would provide owners with “a portable claim” to land, but not a specific parcel of land. So, owners might initially be allocated one specific parcel, but then “[a]fter the relevant procedures are engaged for triggering the readjustment mechanism,” the owner might be shifted to another supposedly equivalent parcel to facilitate the redevelopment of the area they formerly inhabited.⁶⁹ Fennell envisages owners “opt[ing] into districts” with floating fees, and owners potentially could decide that they would like to relocate to another parcel.⁷⁰ But having initially opted into the district, owners might be forced to move, against their wishes, because certain conditions have been triggered.⁷¹ Owners also might be required to relocate to an area that they subjectively believe is not equivalent to their former space, because the parcel is judged to be objectively equivalent. As Fennell mentions, there are real-world analogues to the idea of floating fees. When redeveloping an area, governments or private developers might grant the longstanding

64 Fennell, *supra* note 1, at 1482–85.

65 *Id.* at 1484.

66 See Géraldine Vessière, *Who Owns London?*, CANAL ORDINAIRE (Oct. 19, 2013), <https://canalordinaire.wordpress.com/2013/10/19/who-owns-london/>; *Who Owns London—The Great Estates*, FLATLIVING, <http://www.flat-living.co.uk/lifestyle/438-who-owns-london-the-great-estates> (last visited Sept. 22, 2017).

67 Josh Loeb, *Independent Hoteliers Fear Eviction as Billionaire Landlord Considers Plan To Bring in Hotel Chain*, WEST END EXTRA (Aug. 31, 2012), <http://www.westendextra.com/news/2012/aug/independent-hoteliers-fear-eviction-billionaire-landlord-considers-plan-bring-hotel-ch>.

68 Fennell, *supra* note 1, at 1465.

69 *Id.* at 1490.

70 *Id.* at 1491.

71 *Id.* at 1493 (discussing options for mitigating the need to move involuntarily).

residents of the area spaces in the redeveloped area once the redevelopment is complete.⁷² For example, in the redevelopment of Toronto's Regent Park, "Canada's oldest and largest public housing community," tenants have been granted a "Right of Return" to units in the redeveloped area.⁷³

Posner & Weyl propose a radical overhaul of ownership that would replace the fee simple, not merely supplement it as Fennell would do, to eliminate the need to bargain to transfer property.⁷⁴ They propose to use a tax-based approach, relying on a self-assessment mechanism of the sort that has attracted a number of adherents in the legal academy, but is little used in practice.⁷⁵ Owners regularly would declare values for all their assets, including land, to a government-run registry. All assets, including land, would be taxed, based on the owners' valuations, at rates set by the government to encourage asset sales and investment.⁷⁶ Also, owners would be "required to sell their property at these valuations to any buyer."⁷⁷ This last feature means "that buyers can force sales—limiting a longstanding element of private property, which is that the person who owns property keeps it until she consents to sale."⁷⁸ Posner & Weyl envisage that the obligation to pay taxes on self-assessed valuations will induce owners to state their true valuations and

72 *Id.* at 1490–91.

73 Navroop Tehara, *Tenants' Right of Return: Early Experiences from Toronto's Regent Park Redevelopment*, iii (2015) (unpublished M.A. thesis, Univ. of Waterloo), https://uwspace.uwaterloo.ca/bitstream/handle/10012/9739/tehara_Navroop.pdf; see also Tim Alamenciak, *Regent Park Residents Happier in New Units*, TORONTO STAR (Feb. 19, 2014), https://www.thestar.com/news/gta/2014/02/19/regent_park_residents_happier_in_new_units.html; Zoe McKnight, *Regent Park Residents Find Relocation Unfair*, TORONTO STAR (May 3, 2014), https://www.thestar.com/news/gta/2014/05/03/regent_park_residents_find_relocation_unfair.htm. For other examples of land rights to some land, but not a specific parcel, see Ellickson, *The Costs of Complex Land Titles*, *supra* note 19, at 298 & n.80.

74 Posner & Weyl, *supra* note 1, at 54–55.

75 See, e.g., Epstein, *supra* note 43.

76 Posner & Weyl's proposal builds on Harberger's property tax proposal. Posner & Weyl, *supra* note 1, at 66–68. Posner & Weyl, drawing on Weyl & Zhang, *supra* note 5, argue that the tax rate needs to be set to reflect the need to induce resales of the good, and investment in the good. Posner & Weyl, *supra* note 1, at 68. A tax rate set to induce turnover alone will discourage investment in the good, by reducing the returns that the owner enjoys from the investment. *Id.* at 68–70. Thus different goods should be subject to different tax rates, depending on the level of investment needed in the good and the need to spur resales of the good. *Id.* at 73. Goods that require investment to maintain their value, such as cars, should be taxed at a lower rate than goods that require little ongoing maintenance, such as the spectrum. *Id.* When there is no need to induce investment in the good, it should be taxed solely to induce the optimal rate of turnover in ownership. *Id.* at 69. Also, if it is feasible for government to "subsidize investment," then the tax rate on goods requiring such investment might not need to be reduced to incentivize investment. *Id.* at 80. The "turnover rate" is "the probability that a buyer who values the asset more than the seller materializes in each period." *Id.* at 67.

77 Posner & Weyl, *supra* note 1, at 54; see also *id.* at 66.

78 *Id.* at 54; see also *id.* at 69 (stating that under the proposal, "[p]eople are not so much owners of property as 'lessees' from society, subject to a special kind of lease that

not inflate them to ward off a sale or extract a monopoly price. But the same obligation to pay taxes on the valuation might induce the owner to state a lower valuation than their true valuation if, for example, they are concerned that they lack funds to pay the taxes. The result could be that owners are not only forced to transfer their property to others willing to pay their stated valuation, but that the stated valuation undercompensates the owner at the time of sale, meaning they are not indifferent to the forced transfer of the property when it occurs.⁷⁹ On the other hand, Posner & Weyl's proposal could be a boon to land developers, because it would avoid the need to bargain with landowners to assemble land for developments.⁸⁰

C. *Why the Chicago Critique Matters*

The Chicago critique of the fee simple is significant from a number of perspectives. For one, it is at odds with the dominant tendency in recent

terminates when a higher value user appears, whereupon the lease is automatically transferred to that user"). They explain the reference to owners as lessees as follows:

Property owned under the Harberger tax regime is very like a leasehold. We can think of the owner's property rights as those of a lessee where the lease provides that the term is unlimited—that is, not for a definite period—but subject to termination whenever a third party offers to pay a higher 'rent' (i.e., tax) to the landlord (the government), who exercises the right to reassign the lease to that third party.

Id. at 111.

⁷⁹ Posner & Weyl assume that even if the owner's consent is no longer needed for a sale, the owner is fully compensated at the time of the sale because the owner can update his or her valuation at any time prior to the sale. *Id.* at 100; *see also id.* at 103 ("[P]eople who deeply care about keeping their home can reduce the risk of a (private or public) taking to an extremely low level by announcing a high self-assessment."); *id.* at 108 ("[P]eople who develop a sentimental attachment to their car can register a higher self-assessed valuation and pay the additional tax to fend off buyers."). Their discussion largely ignores the potential that individual "self-assessed" valuations may not be fully informed or fully independent of wealth considerations. Thus they refer only in passing to the potential that a lack of liquid funds may influence people's valuations in a scheme where they are taxed on these valuations, and briefly suggest that a market might emerge in insurance to "cover the tax payments in exchange for a share of the gains if the house were sold at the going price." *Id.* at 88; *see also id.* at 87 ("Some people may, after holding property for an extended period of time, develop special attachments to it and yet not have sufficient liquid assets to pay taxes to preserve it from being taken from them.").

⁸⁰ As Posner & Weyl explain:

A real estate developer interested in purchasing multiple plots of land could draw a shape on a map and be immediately told the aggregate price of the whole region. This could be done for a variety of competing sites for a potential development and the information could even be fed to an optimization engine to find the lowest cost development site. This could dramatically reduce the transaction costs of property acquisition, and all this could be done without ever tipping off owners to the buyer's interest, as all prices would be posted on the electronic cadaster. The holdout problem, the bane of developers everywhere, would be solved.

Id. at 78 (citation omitted).

property theory to reaffirm a robust conception of private property.⁸¹ Since the late 1990s, a number of property scholars have been concerned with reasserting the value of a full-bodied conception of private property.⁸² This conception of property is sympathetic to the fee simple, because it provides owners with a right to exclude others perpetually from their land, unless exclusion violates common-law, legislative, regulatory, or constitutional restrictions. Henry Smith and Thomas Merrill, the most prominent of these “new essentialist” scholars in the United States, offer economic arguments for a broad right to exclude. On the other hand, the Chicago critics are deploying economic discourse toward the opposite end of weakening the fee simple owner’s right to exclude.⁸³ More recently, it generally has been the skeptics of economic analysis of property rights who have argued for limitations on the right to exclude, not economic analysts like Fennell and Posner & Weyl.⁸⁴

Aside from the repudiation of a current strand of academic theorizing about property that it represents, the Chicago critique of the fee simple may be relevant to an ongoing public policy debate about whether the obstacles to assembling land for redevelopment in American cities are too great. In the nineteenth century, a major preoccupation of U.S. policymakers was allocating English-style fee simple rights to lands that had previously belonged to Native Americans.⁸⁵ This was the era of settling the frontier, and forcibly displacing Native Americans who had long inhabited the area. By the middle of the twentieth century, the era of disposing of federal lands and allocating

81 See, e.g., Katrina M. Wyman, *The New Essentialism in Property* (Oct. 10, 2017) (unpublished manuscript) (on file with author).

82 See, e.g., Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593 (2008); Christopher Essert, *Property in Licences and the Law of Things*, 59 MCGILL L.J. 559 (2014); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2014); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255 (2011); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996); Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156 (James Penner & Henry E. Smith eds., 2013); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); James Y. Stern, *Property’s Constitution*, 101 CALIF. L. REV. 277 (2013); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (1st ed. 2007)).

83 Posner & Weyl candidly admit that their proposal involves “the extinction of a significant element of the right to exclude.” Posner & Weyl, *supra* note 1, at 111.

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

85 “When the United States disposed of most of its public domain during the nineteenth and early twentieth centuries, the land was almost always granted in fee simple absolute.” STOEBUCK & WHITMAN, *supra* note 18, § 2.2, at 32; see also Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375, 418 (2007).

fee simple landownership was largely over.⁸⁶ In the twentieth century, and even more so in the twenty-first, introducing new land uses requires changing existing land uses. This often entails assembling land which is already privately owned, redeveloping it, and then reallocating it to a different set of private owners. Thus, the great battles about land today in the United States tend to be about how to repurpose land that is currently privately owned. Most of these battles are occurring in cities, because that is where the vast majority of Americans now live.⁸⁷

Broadly speaking, there are two kinds of situations where people are seeking to assemble existing privately owned urban land for redevelopment.⁸⁸ The first scenario involves what might be called “demand-driven” land assembly. Think of coastal cities such as New York: in these places, the economy is growing, land prices are high, and there is considerable demand from private sector actors to repurpose land to accommodate that economic growth by building new office, commercial, and residential buildings. The second scenario is “supply-driven” land assembly. Think of old industrial cities that are in economic decline, like New London, Connecticut, the subject of the infamous decision of the U.S. Supreme Court in *Kelo v. City of New London*.⁸⁹ In these places, land prices are low, there is ample supply of underutilized land, and little existing private sector demand to repurpose that land. Local and state governments are seeking to assemble land to attract private sector investment, and to thereby promote economic develop-

86 See MERRILL & SMITH, *supra* note 10, at 106 (“[T]he Taylor Grazing Act of 1934 closed all of the remaining public domain from further private entry (other than entry by prospectors for mineral claims).”); see also CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 82 (3d ed. 2013). After the frontier was closed, one-third of the United States remained federally owned, generally because this land was thought to be “too valuable” to allocate to private owners or because it wasn’t sufficiently valuable for private owners to want to claim it. MERRILL & SMITH, *supra* note 10, at 106.

87 See Fennell, *supra* note 1, at 1461.

88 The two scenarios are inspired by Mangin’s discussion of demand- and supply-driven theories of gentrification. See Mangin, *supra* note 12, at 108.

89 545 U.S. 469 (2005). Other examples of local governments using land assembly to promote economic development in declining areas are Kansas City, Kansas, and Madison County, Mississippi. Brief for Nat’l League of Cities et al. as Amici Curiae Supporting Respondents at 23–28, *Kelo*, 545 U.S. 469 (No. 04-108). On the plight of industrial cities in decline, see generally Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

When New York City was in decline several decades ago, it also would have been an apt example of supply-driven land assembly. The construction of Lincoln Center, the revitalization of Times Square, and the building of Metrotech in Brooklyn are all large projects involving land assembly that contributed to the revitalization of New York. For an interesting discussion of these projects that refers to the role of eminent domain in achieving them and includes a detailed discussion of the history of Metrotech, see Brief for the City of New York as Amicus Curiae in Support of Respondents at 1–2, 14–18, *Kelo*, 545 U.S. 469 (No. 04-108).

ment.⁹⁰ This was the story in New London, where there were forces within the city seeking economic development, and where the state governor, working through the New London Development Corporation (NLDC), hoped to promote the economic revival of New London by redeveloping the Fort Trumbull area.⁹¹

As mentioned above, one of the expected benefits of assembling land and repurposing it in prosperous cities such as New York is greater availability of land for housing. In recent years, as housing prices have picked up following the Great Recession, there has been growing public attention to the high cost of housing in many urban areas, especially cities such as New

90 Moussa Diop et al. provide some empirical evidence “that states view takings [of land] as a potent tool to spur economic growth.” Moussa Diop et al., *Public Use or Abuse? The Use of Eminent Domain for Economic Development in the Era of Kelo* 16 (Univ. of Conn. Dep’t of Econ., Working Paper No. 2010-28, 2010), <http://web2.uconn.edu/economics/working/2010-28.pdf>.

91 See SOMIN, *supra* note 50, at 15–16.

Naturally, there are situations that lie somewhere between demand- and supply-driven land assembly. For example, a local government in a prosperous city like New York City might seek to assemble land itself—or promote the private assembly of land—in a specific area within the city that has not been booming, in order to promote the revitalization of that area and meet some of the needs of the region as a whole. This is part of the backdrop to the development of Hudson Yards, currently “the largest private real estate development in the history of the United States.” *The Story*, HUDSON YARDS N.Y., <http://www.hudsonyardsnewyork.com/about/the-story/> (last visited Sept. 22, 2017). New York City initiated the process of repurposing the area, initially with the goal of attracting the Olympics. See Charles V. Bagli, *From Ashes of Olympic Bid, a Future Rises for the Far West Side*, N.Y. TIMES (Nov. 27, 2011), <http://www.nytimes.com/2011/11/28/nyregion/on-far-west-side-bloombergs-failed-olympic-plan-spurs-development.html>; *The Mother of All Megaprojects*, CRAIN’S N.Y. BUS. (Aug. 23, 2015), http://www.crainsnewyork.com/article/20150823/REAL_ESTATE/150829955/the-mother-of-all-megaprojects.

The most important distinction between demand- and supply-driven scenarios of land assembly concerns the relative certainty of economic gains from the assembly. When the land assembly is driven by private sector demand, or governments in economically booming cities, there is a reasonable prospect *ex ante* that the expected gains will be realized. When the assembly is driven by the supply of land, and in the service of promoting economic development in a declining region, it is often uncertain whether there will be economic gains from the land assembly. In the *Kelo* case, the economic development project was risky from the start. The NLDC did not have a signed “development agreement” when it expropriated the land parcels that prompted the litigation in *Kelo*. As a dissenting justice in the Connecticut Supreme Court observed, “the proposed development plan . . . flew in the face of market conditions that made it unlikely that the city would be able to reap significant economic benefits from the condemnations.” SOMIN, *supra* note 50, at 30 (summarizing *Kelo v. City of New London*, 843 A.2d 500, 596–600 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)). Although he did not prevail, and his court and the Supreme Court upheld the condemnations as for a “public use,” this dissenter proved prophetic: the redevelopment for which the parcels were expropriated never occurred. Charlotte Allen, ‘Kelo’ Revisited, WEEKLY STANDARD (Feb. 10, 2014), <http://www.weeklystandard.com/kelo-revisited/article/776021>; Glen A. Sproviero, *Eminent Domain, Revisited*, NEW BOSTON POST (Apr. 11, 2016), <http://newbostonpost.com/2016/04/11/eminant-domain-revisited/>.

York and San Francisco. Housing is becoming increasingly costly not only for low-income but also middle-income earners in these cities, and housing affordability has emerged as an important political issue in local politics.⁹²

Although there is some recognition that increasing demand to live in urban areas may be a contributing factor, economists usually point to restrictions on land supply for housing as the explanation for the increasing cost of housing in urban areas like New York City.⁹³ Some of these supply constraints are due to the topography of the cities where there are high housing prices.⁹⁴ High-priced cities such as New York are surrounded by oceans, and other coastal cities have mountain barriers that limit the room to build.⁹⁵ Other supply constraints are due to regulatory choices, in particular land use regulations, over which humans have greater control. Since the 2000s, Edward Glaeser and other economists have amassed an impressive array of evidence that land use regulation is contributing to higher housing prices in urban areas such as New York and Boston.⁹⁶ Zoning, “parking requirements,

92 See, e.g., Maria L. La Ganga, *Ordinary People Can't Afford a Home in San Francisco. How Did It Come to This?*, GUARDIAN (Aug. 5, 2016), <https://www.theguardian.com/business/2016/aug/05/high-house-prices-san-francisco-tech-boom-inequality>; *Housing New York*, N.Y.C. HOUSING, <http://www1.nyc.gov/site/housing/index.page> (last visited Sept. 22, 2017).

The high cost of housing in these areas has also attracted concern among economists from a national perspective, with some economists arguing that the high cost of housing in dynamic urban areas may be contributing to the entrenchment of economic inequality and reducing national economic growth. See ENRICO MORETTI, *THE NEW GEOGRAPHY OF JOBS* 168 (2012); Conor Dougherty, *Why Falling Home Prices Could Be a Good Thing*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/upshot/popping-the-housing-bubbles-in-the-american-mind.html>; Furman, *supra* note 12, at 3. The concern is that high housing costs are keeping people from less productive regions from moving to more productive cities, and therefore impeding income convergence and dampening productivity growth.

93 See Mangin, *supra* note 12, at 103. Some suggest that demand to live in urban areas may no longer be increasing exponentially. See Conor Dougherty, *Peak Millennial? Cities Can't Assume a Continued Boost from the Young*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/upshot/peak-millennial-cities-cant-assume-a-continued-boost-from-the-young.html>.

94 See Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q.J. ECON. 1253 (2010). Mangin discusses the geographic constraints on supply. See Mangin, *supra* note 12, at 99 (citing Saiz, *supra*).

95 Saiz, *supra* note 94, at 1254. As the effects of climate change increase, the availability of buildable land may shrink further. In coastal cities like New York, sea levels are already rising and in several decades, parts of the city likely will suffer daily flooding. N.Y.C. PLANNING, RESILIENT NEIGHBORHOODS: OLD HOWARD BEACH, HAMILTON BEACH, BROAD CHANNEL 13 (2016) (“Hamilton Beach and Broad Channel are among the most vulnerable inhabited areas [in New York City] in terms of future risk for daily tidal flooding.”). On New York City’s prospects in an era of climate change, see generally Andrew Rice, *When Will New York City Sink?*, N.Y. MAG. (Sep. 7, 2016), <http://nymag.com/daily/intelligencer/2016/09/new-york-future-flooding-climate-change.html>.

96 See, e.g., SANFORD IKEDA & EMILY WASHINGTON, *HOW LAND-USE REGULATION UNDERMINES AFFORDABLE HOUSING* (2015), <https://www.mercatus.org/system/files/Ikeda-Land-Use-Regulation.pdf>; Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of*

setback requirements,”⁹⁷ “minimum lot sizes and maximum density rules,”⁹⁸ and smart growth requirements have been shown to constrain supply and drive up the cost of housing.⁹⁹ The same can be said for historic preservation requirements of the kind which have left large portions of Greenwich Village landmarked.¹⁰⁰ Informed by this research, economists and law professors such as Fischel, Glaeser, Hills, and Schleicher have developed novel proposals to generate laxer land use regulation, by changing the procedures through which land use is regulated or the incentives of homeowners who currently have strong incentives to support restrictive regulation.¹⁰¹

The Chicago critique is significant from a policy perspective because it suggests that there is another legal barrier, apart from land use regulation, that may be constraining the supply of land for housing in high cost cities: the predominant fee simple form of ownership. Neither Fennell nor Posner & Weyl spell out in great detail the potential that existing property rights may be contributing to high housing costs, and that altering the fee simple consequently might help to lower these costs.¹⁰² But the hypothesis that the fee simple increases housing costs is a logical extension of their argument that private ownership currently inhibits transfers of land to higher value uses: by granting landowners a perpetual veto power over the use and sale of their land, the fee simple may increase the cost of, or entirely frustrate, land assembly for more productive uses, which likely includes housing in high priced cities. The idea is that landowners, exercising the veto that the fee simple

Land Use Regulation: Evidence from Greater Boston, 65 J. URB. ECON. 265 (2009); Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Working Paper No. 1948, 2002), <https://law.yale.edu/system/files/documents/pdf/hier1948.pdf>; Scott Beyer, *The Verdict Is in: Land Use Regulations Increase Housing Costs*, FORBES (Sept. 30, 2016), <https://www.forbes.com/sites/scottbeyer/2016/09/30/the-verdict-is-in-land-use-regulations-increase-housing-costs/#dbb2c484162a>.

97 IKEDA & WASHINGTON, *supra* note 96, at 4.

98 *Id.* at 8.

99 For a literature survey, see *id.* at 15–18.

100 As mentioned above, according to the Real Estate Board of New York, over seventy percent of properties in Community District 2, which includes Greenwich Village, the West Village, and SoHo, are landmarked. See *supra* note 36 and accompanying text. The same report indicates that “27.7% of properties in Manhattan are landmarked.” REAL ESTATE BD. OF N.Y., *supra* note 36, at 1; see also IKEDA & WASHINGTON, *supra* note 96, at 17 (citing REAL ESTATE BD. OF N.Y., *supra* note 36).

On the implications of historic designations for housing prices, see Vicki Been et al., *Preserving History or Hindering Growth? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City* (Sept. 2014) (unpublished manuscript), http://furmancenter.org/files/NYUFurmanCenter_HistoricDistricts_2014.pdf.

101 These proposals include home equity insurance (Fischel), “regulatory budgets” (Glaeser), “zoning budgets” (Hills and Schleicher), and “Tax Increment Local Transfers” (Schleicher). For a summary discussion of these proposals, see IKEDA & WASHINGTON, *supra* note 96, at 26–29.

102 However, Fennell does suggest in passing that “[t]he capacity to reconfigure and repurpose property, possibly at higher densities, could add to the overall housing stock for both tenants and buyers.” Fennell, *supra* note 1, at 1513.

provides, may be constraining the supply of land for new uses in a decentralized and uncoordinated manner by refusing to sell or strategically bargaining for prices exceeding their reservation price.¹⁰³

A variation on the hypothesis is that the endless duration of the fee simple contributes to the public regulatory restrictions on land supply for new construction, because the fee simple motivates homeowners to favor restrictions on the supply of land for new construction. The logic is as follows. The endless duration of the fee simple likely increases the value of many homes compared to the value that these homes would have if they were built on leased land. Homes built on leased land likely would be worth less than homes built on fee simple land because of the risk that the land lease might not be renewed and the risk of future rent increases.¹⁰⁴ Next, inflated land prices contribute to making many homes the most important source of household wealth. To protect this highly valuable asset, homeowners vote, or participate in the land use regulatory process, to support regulations that have the effect of restricting the supply of land for new construction that might reduce their home values.¹⁰⁵ Conversely, if the land underlying many homes was leased, home values would be lower because of the risk of non-renewal or future rent increases, homes would be a less important source of household wealth, and homeowners consequently would be less inclined to support supply restrictions to protect the value of their homes.

If we take seriously the hypothesis that the fee simple is constraining the supply of land for higher value uses such as new housing, then we should be looking at changing the form of land ownership, as well as land use regulation, to increase the supply of land for housing and lower housing costs in

103 In New York City, “rent-regulated” tenants—who are not fee simple owners—have legal rights that they may use to hold out for payments from developers eager to acquire their properties for development. See Mireya Navarro, *New York Builders Paying Huge Buyouts to Tenants in Their Way*, N.Y. TIMES (December 24, 2015), https://www.nytimes.com/2015/12/25/nyregion/new-york-builders-paying-huge-buyouts-to-tenants-in-their-way.html?_r=0. In 2015, the press reported on a \$25 million payment by commercial developer Tishman Speyer Properties to three tenants “in the path” of a “\$3.2 billion tower.” *Id.*; see also Daniel Geiger, *Developer Pays Two Tenants \$25 Million to Vacate Their Apartments*, CRAIN’S N.Y. BUS. (Oct. 5, 2015), http://www.crainsnewyork.com/article/20151005/REAL_ESTATE/151009954/david-rozenholc-the-most-feared-tenant-lawyer-in-the-city-just-won-25-million-for-a-client. The press coverage of these buyouts suggests that it is not only the nature of the tenancy, but also the legal processes available to protect it, that provide tenants with leverage. Generalizing from this example, we might hypothesize that it is not only the legal form of landholding, but also the processes available to safeguard it, that may complicate land assembly in dense urban areas.

104 See Satow, *supra* note 28 (stating that Manhattan apartments in buildings built on leased land are cheaper than apartments in buildings that own the land on which they sit); see also Clarke, *supra* note 25, at 333 & n.24 (discussing the discounted value of leased land compared with land owned in fee simple).

105 On the significance of the home as an investment and the implications of this significance for land use regulation, see generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

high priced cities. If developers were able to assemble land more easily, and zoning were less restrictive, then they might be able to construct more housing.

To be sure, the idea that holdouts complicate land assembly is not novel.¹⁰⁶ Michael Heller, for example, has emphasized the potential for property owners to complicate the repurposing of land.¹⁰⁷ At the heart of the debate following the Supreme Court's 2005 decision in *Kelo* about how easy it should be for governments to overcome holdouts was a discussion about how cumbersome it should be for governments to force landowners to sell. Although it was not widely recognized in the debate surrounding *Kelo*, the endless duration of the fee simple is an important legal reason that landowners have a powerful veto that leads to the use of eminent domain.¹⁰⁸ If landowners merely had a time-limited right to their land, then governments could wait them out, especially if the interest was of short duration.

The Chicago critics, especially Fennell, deserve credit for drawing attention to a major legal source of the complications of assembling land through market transactions, and for raising the question of whether that legal source—the fee simple form of ownership—should be changed to facilitate land assembly. If the fee simple was reformed along the lines that the critics advocate, the need for governments to use eminent domain likely would diminish significantly. But that is because Fennell and Posner & Weyl propose to allow private actors—as well as the public sector, presumably—to forcibly acquire land without resorting to eminent domain. In their worlds, forcible transfers of land likely would be much more common than in our world, and not only public, but also private actors, would have the ability to force landowners to transfer their land. I now turn to whether their proposals for overhauling the predominant form of land ownership should be pursued.

III. THE ECONOMICS OF THE FEE SIMPLE

The Chicago critique is an economic one and my first defense of the fee simple is likewise from an economic perspective. I question the claim that the fee simple generates a sufficiently grave misallocation of land that policymakers should cast it aside. Moreover, even if the fee simple causes land to

106 See, e.g., ALPERN & DURST, *supra* note 49, at 33.

107 See MICHAEL HELLER, GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (1998).

108 For example, the term “fee simple” was not used in the amicus briefs of the American Planning Association or the National League of Cities in *Kelo v. City of New London*, both of which underscored the importance of eminent domain for achieving local government objectives. Where amici did use the term, amici did not argue it was the root cause of the holdout problem. See Brief for Property Rights Foundation of America, Inc. as Amicus Curiae in Support of Petitioners at 15, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108); Brief for Reason Foundation as Amicus Curiae in Support of Petitioners at 10, *Kelo*, 545 U.S. 469 (No. 04-108).

be inefficiently allocated, the fee simple has economic benefits that may cancel out its negative effects, and so the fee simple may still be welfare-maximizing, all things considered.

A. *The Allocative Inefficiency Claim*

As explained above, the crux of the Chicago critique is that the fee simple results in such a massively inefficient allocation of land to less productive uses that we should reform the dominant form of landholding in the United States. There are three factual claims about the state of the world embedded in this largely theoretical argument. Neither Fennell nor Posner & Weyl provide much empirical evidence to support these propositions and there are reasons to doubt them.¹⁰⁹

First, the critique supposes that land is currently allocated inefficiently on such a vast scale that there are significant social losses from this misallocation.¹¹⁰ One problem with this claim is that it presumes that it is self-evident

109 I say “much” advisedly. Fennell points to empirical findings that higher prices are paid for land that is being assembled for repurposing. Fennell, *supra* note 1, at 1462 n.15 (“Recent empirical work has investigated land assembly frictions by examining the premia paid for parcels that were destined for assembly. See Leah Brooks & Byron Lutz, *From Today’s City to Tomorrow’s City: An Empirical Investigation of Urban Land Assembly*, 8(3) AM. ECON. J.: ECON. POL’Y 69, 71–72 (2016) (finding, based on a dataset of 2.3 million parcels in Los Angeles County over the period 1999–2011, premiums of fifteen to forty percent for parcels that subsequently became part of a land assembly compared with land that was not subsequently assembled); Chris Cunningham, *Estimating the Holdout Problem in Land Assembly* 1–2 (Fed. Reserve Bank of Atlanta, Working Paper No. 2013-19, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579904 (finding, using data from Seattle, that subsequently assembled land sold for a premium of eighteen percent.”); see also *id.* at 1461 n.13. However, evidence that land assemblers pay higher prices than individuals buying land is not the same as evidence that land is allocated inefficiently. Land assemblers likely are willing and able to pay more for the land than it is worth as is, because the land presumably is more valuable to them when it is assembled into a larger whole.

Posner & Weyl estimate that their tax proposal will increase the value of “business assets [by] . . . more than \$2 trillion.” Posner & Weyl, *supra* note 1, at 114. This is a back-of-the-envelope-type estimate based on strong assumptions. See *id.* at 114–15; see also Weyl & Zhang, *supra* note 5, at 31–32 (“We . . . would guess that 1% of national income or \$150 billion in the United States, or roughly \$1 trillion globally at purchasing power parity, is a good lower bound for the benefit of optimal Harberger taxation.”). As Posner indicated to me, Posner & Weyl’s estimates are based on the “time” that it takes to reallocate land under the current legal regime, which is not exactly the same as the potential for gains in allocative efficiency.

As Lee Anne Fennell helpfully suggested to me, one might debate how much scholarship has to prove its claims and support its reform proposals. Arguably the burden should vary with the implications of the critique and the reform proposals. Potentially, there should be a lesser burden on scholarship such as *Fee Simple Obsolete*, which is merely proposing to supplement the status quo, not to overhaul it as proposed in *Property is Only Another Name for Monopoly*.

110 As mentioned above, Fennell points to empirical findings that higher prices are paid for land that is being assembled for repurposing. See *supra* note 109.

how we should measure whether land is efficiently used.¹¹¹ But there are different ways that land might be valued for determining whether it is misallocated on a society-wide basis. It might be valued objectively, much as real estate appraisers currently assess land value, by trying to estimate the value-maximizing use of the land using market values.¹¹² Alternatively, we theoretically might measure whether land is put to its highest and best use using subjective preferences, by asking landowners and potentially nonlandowners for their own valuations of land, and then determining the highest and best use of land according to individuals' subjective valuations.¹¹³ Even assuming we settle on a definition of highest and best use to assess whether there is indeed a massive misallocation, we must remember that perceptions of what constitutes the highest value of use of land are not stable. For example, think back to the urban renewal programs on which cities embarked in the twentieth century. Planners proposed these projects believing that blighted areas should be cleared and rebuilt anew, and renewal was judged to be the highest and best use of the land. But within short order, many urban renewal projects were judged wrongheaded, because they disproportionately displaced racial minorities and low-income people, and destroyed neighbor-

111 The claim also presumes that efficiency is a desirable metric for evaluating land use. Part IV, *infra*, discusses land in noneconomic terms.

112 Appraisals of this sort require determining the uses of the land that are physically, legally, and financially feasible, and then selecting the use from among these that will maximize market value. For the definition of “[h]ighest and [b]est [u]se” in the Appraisal Institute’s Dictionary of Real Estate Appraisal, see James R. MacCrate, *Part One—What Is the Highest & Best Use?*, REAL ESTATE & VALUATION ISSUES (May 3, 2009), <https://realestatevaluation.wordpress.com/2009/05/03/part-one-what-is-the-highest-best-use/> (quoting *Highest and Best Use*, DICTIONARY OF REAL ESTATE APPRAISAL 135 (Appraisal Inst. ed., 4th ed. 2002)). Such appraisals are complicated by the fact that much land is held for long periods of time and infrequently sold. See, e.g., Joe Anuta, *So Many Manhattan Apartments, So Few for Sale*, CRAIN’S N.Y. BUS. (May 10, 2015), http://www.crainnewyork.com/article/20150510/REAL_ESTATE/150509843/so-many-manhattan-apartments-so-few-for-sale (reporting low number of Manhattan apartments for sale in the first quarter of 2015).

In a document discussing “common errors . . . in appraisal and review reports,” the Appraisal Institute, the trade association for real estate appraisers, states that “[h]ighest and best use is commonly one of the weakest areas in an appraisal.” APPRAISAL INST., COMMON ERRORS AND ISSUES 3, 11 (Apr. 15, 2014), http://www.appraisalinstitute.org/assets/1/29/common-errors-issues_4-14-15.pdf; see also *About Us*, APPRAISAL INST., <http://www.appraisalinstitute.org/about/> (last visited Sept. 23, 2017). Real estate appraisers frequently disagree on the highest and best use of land. See MacCrate, *supra* (“Very often two real estate appraisers may conclude to a different highest and best use which results in a wide range in values and makes it difficult for judges and mediators to arrive at an accurate estimate of value.”).

113 Such an inquiry would require finding a way to persuade individuals to honestly state their valuations of land, a task that has preoccupied the proponents of self-assessment mechanisms. Posner & Weyl define allocative efficiency in terms of individual subjective preferences. See Posner & Weyl, *supra* note 1, at 62 (“[A]llocative efficiency” exists if the good is transferred from the buyer to the seller if “the buyer values the good more than the seller”).

hoods, replacing them with large impersonal buildings.¹¹⁴ There is no guarantee that today's judgment that certain land uses are less productive than others will not be overturned within a few short years.

Aside from the difficulties inherent in determining whether land is efficiently allocated, another reason to doubt whether land is inefficiently allocated on a vast scale is that there are ways that private actors, and to some degree governments, can, and do, overcome the veto power of the fee simple owner. These include eminent domain,¹¹⁵ deploying buying agents to assemble land "discreetly,"¹¹⁶ building around holdouts,¹¹⁷ and zoning.¹¹⁸

114 See, e.g., Steven Cord, *Urban Renewal: Boon or Boondoggle?*, 33(2) AM. J. ECON. & SOC. 184 (1974); see also *Kelo v. City of New London*, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting); Brief for Jane Jacobs as Amicus Curiae Supporting Petitioners at 6–8, *Kelo*, 545 U.S. 469 (No. 04-108). See generally WENDELL E. PRITCHETT, ROBERT CLIFTON WEAVER AND THE AMERICAN CITY: THE LIFE AND TIMES OF AN URBAN REFORMER (2008). Thank you to David Reiss for the reference to Pritchett's book.

115 Fennell and Posner & Weyl refer to eminent domain as a tool of overcoming the landowner's veto power, but they doubt that it is of much practical utility in ensuring the efficient allocation of land. This is clearest in the case of Fennell, who acknowledges that there are few legal limitations on the use of eminent domain under federal constitutional law, but stresses that "[p]olitical limits on the use of eminent domain may be much tighter than legal restrictions, however, often rendering this course of action unduly costly or unavailable." Fennell, *supra* note 1, at 1483; see also *id.* at 1462, 1479, 1512 n.219. Posner & Weyl also recognize that there are few federal constitutional limits on the use of eminent domain in light of *Kelo*, but they emphasize that the need to value land when exercising eminent domain creates the potential for misallocations if land is under or overvalued. See Posner & Weyl, *supra* note 1, at 106, 108–09.

Fennell and Posner & Weyl may be underestimating the extent to which eminent domain is a viable—if costly—option for repurposing land for more productive uses in areas where redevelopment would bring the largest gains, such as dense urban areas like New York City. See, e.g., Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 897 (2007); Christopher Serkin, *Response: Testing the Value of Eminent Domain*, 89 TUL. L. REV. 115, 119 (2014); Diop et al., *supra* note 90, at 9–10. Eminent domain has been used in many important redevelopment projects in New York City's history. Brief for the City of New York, *supra* note 89, at 1–2, 14–18; Serkin, *Local Property Law*, *supra*, at 897; Serkin, *Response*, *supra*, at 119. New York state constitutional law continues to define "public use" more expansively than other states' state constitutional law. *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009); MERRILL & SMITH, *supra* note 10, at 1193; SOMIN, *supra* note 50, at 187–91, 202 (discussing *Kaur* and *Goldstein*); see also *id.* at 196–200 (discussing Second Circuit decisions in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) and *Didden v. Vill. of Port Chester*, 173 F. App'x 931 (2d Cir. 2006)).

A working paper by Diop et al. finds that eminent domain is used more in U.S. states with more urban land and densely populated areas than in "suburban and rural land[s]" and less densely populated areas. Diop et al., *supra* note 90, at 15, 26.

116 See Kelly, *supra* note 50, at 47. For example, the Pennsylvania Railroad assembled the land on which it built the legendary Pennsylvania Railroad Station in New York City entirely through private, unsubsidized purchases using secret buyers who did not know the identity of the purchaser. See *The Rise and Fall of Penn Station*, PBS AM. EXPERIENCE (Feb. 18, 2014), <http://www.pbs.org/wgbh/americanexperience/films/penn/>. Building the station required tearing down 500 buildings and displacing hundreds of families.

Another famous example of a private acquisition using secret purchase is Disney's acquisition of land for Disneyworld. See Kelly, *supra* note 50, at 22–23; see also Chad D. Emerson, *Merging Public and Private Governance: How Disney's Reedy Creek Improvement District "Re-Imagined" the Traditional Division of Local Regulatory Powers*, 36 FLA. ST. U. L. REV. 177 (2009). This involved the purchase of "exurban lands," however, not urban land of the sort that Fennell correctly argues now needs to be assembled from private buyers to facilitate redevelopment in cities. See ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 934 (4th ed. 2013).

Fennell mentions the potential that "private parties can attempt to amass large assemblages of land on their own, using buying agents and the like to get around holdout problems." Fennell, *supra* note 1, at 1507 (citing Kelly, *supra* note 50, at 18–24). But she is skeptical of the desirability of this approach, and observes that "even when this strategy is successful, it concentrates ownership in a way that can generate normative concerns." *Id.* Arguably, Fennell's approach of callable fees also could lead to concentrated ownership of land in the hands of developers who would own "callblocks" of a sufficient size to facilitate repurposing of land over time.

Academic scholarship tends to suggest that governments have greater difficulty than private actors in purchasing land discreetly because of public law transparency requirements. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82 (1986). But governments may have greater scope to do so than the literature implies.

117 See ALPERN & DURST, *supra* note 49.

118 The plans for the redevelopment of the Hudson Yards area on Manhattan's west side include a park between 10th and 11th Avenues, and 34th and 39th Streets. The City has taken some of the land for the park by eminent domain. *In re City of New York*, 938 N.Y.S.2d 225 (N.Y. Sup. Ct. 2011). But the City aims to induce the transformation of other parcels into parkland by granting landowners transferable development rights, pursuant to provisions in the City zoning resolution. NEW YORK, N.Y., ZONING RESOLUTION art. IX, ch. 3, §§ 93-32, 93-35 (2017). This use of the City's zoning authority to spur the creation of a park through transferable development rights is similar to the use of transferable development rights to offset the costs of historic preservation discussed in *Penn Central*, and subject to similar criticisms that the City is evading the requirement to pay just compensation through creative use of its zoning authority and transferable development rights. On the other hand, the transferable development rights may prove to be very lucrative for the landowners, and overcompensate them for their losses. The public will arguably benefit from those rights though as they are funding the park.

Another option that local governments have to facilitate redevelopment is to own and lease land, rather than to sell it outright. By continuing to own land, local governments retain the ability to repurpose the land to deal with local needs in the future once the lease comes to its natural end, or in the midst of the lease if the lessee fails to satisfy one or more conditions of the lease. As an example, New York City Comptroller Scott Stringer recently recommended that the City make greater use of the land that it owns for affordable housing by transferring City-owned land to a land bank for affordable housing. The land bank would lease the land rather than selling the land outright. Mireya Navarro, *Audit Faults New York City for Not Using Vacant Lots for Affordable Housing*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/18/nyregion/audit-proposes-using-vacant-lots-owned-by-new-york-city-for-affordable-housing.html>. For an example where the City is selling land to facilitate the construction of affordable housing, see Carolina Pichardo, *Inwood Library To Be Sold to Developer for Affordable Housing, City Says*, DNAINFO (Jan. 6, 2017), <https://www.dnainfo.com/new-york/20170106/inwood/inwood-library-be-sold-developer-for-affordable-housing-city-says>.

To the extent these mitigation strategies are successful, they reduce the inefficiencies stemming from the fee simple owner's veto power.

In addition to assuming that land currently is massively misallocated, a second assumption embedded in the Chicago critique is that the misallocation is due to the veto power of the fee simple owner. However, as discussed above, there is an extensive body of scholarship pointing to restrictive land use regulations as another potential cause for the misallocation, at least in high-priced coastal cities.¹¹⁹

To be sure, the hypothesis that public land use regulation is the major cause of the misallocation of land to lower value uses might be reconciled with the hypothesis that the fee simple contributes to the misallocation of land. As discussed in Section II.C, the prevalence of fee simple ownership may contribute to the stringency of land use regulations in dynamic cities. Land owned in fee simple is likely more valuable than leased land, and the resulting higher prices of homes built on fee simple lands may induce homeowners to vote or participate in the land use regulatory process to protect their valuable investment. So, the legal structure of land ownership may be an underlying reason why homeowners support the restrictive land use regulations that economists tend to pinpoint as driving up housing costs in dynamic urban areas.

On the other hand, it is also possible that causality runs the other way and that land use regulations exacerbate the veto power of the fee simple. By restraining the supply of land for residential development, land use regulations such as zoning and historic preservation laws may increase the leverage of fee simple owners to demand higher prices or block development outright in areas where residential development is allowed. Thus, it may be that land use regulation empowers fee simple owners, by reducing the amount of substitute land available for development.¹²⁰ Before dispensing with the fee simple on the grounds that it leads to the misallocation of land, empirical analysis is necessary to tease out not only whether land currently is massively misused, but also whether any such inefficiency is due to the fee simple, public land regulation, or other factors.

The third assumption embedded in the Chicago critique is that the critics' proposals for reforming land ownership would be beneficial from a socie-

119 See *supra* notes 12 and 96.

120 For example, in the twentieth century, New York City zoning regulations incentivized developers to build on large lots. This is thought to have enhanced the power of holdouts by requiring developers to assemble larger parcels.

Holdouts attained much of their power as a by-product of central-business-district zoning regulations that favored, and occasionally required, large-lot development. Building coverage of the land typically was restricted to 25 or 40 percent of the lot, with a 20 percent bonus in total floor area in the building in exchange for a publicly accessible plaza on the uncovered portion of the site. The larger the lot, the larger the tower. Small, strategically located holdout lots gained much leverage in the zoning-induced hunt for large midtown lots eligible for maximum development.

Norman Marcus, *Foreword to the Second Edition*, in ALPERN & DURST, *supra* note 49, at x.

tal perspective, because land would be allocated more efficiently. Posner & Weyl concede that the workability of their proposal requires additional evidence.¹²¹

One reason for doubting that the critics' proposals will measurably increase allocative efficiency is that they would retain a significant role for government in allocating land among competing uses. Although land use regulation has its virtues, government policymakers face difficulties acquiring knowledge about the best uses of land, and there is always the potential for politics to distort land use decisionmaking.¹²²

Posner & Weyl present their proposals as market solutions to the bargaining problems created by the fee simple,¹²³ but the government would play a significant role in allocating land in their scheme. It would just do so indirectly through tax policy, rather than through conventional forms of land use regulation such as zoning, historic preservation, and eminent domain. Posner & Weyl envisage that owners will value all their assets, and pay a tax based on their valuations and transfer their assets to buyers willing to pay their valuations. The tax rates will influence how much people value their assets, as owners will value their assets knowing that they will pay a tax based on these rates and their self-assessed valuations. In turn, individual valuations, made in the shadow of the tax rates, will determine how assets are allocated, because owners will have to transfer their assets to any buyer willing to pay the self-assessed valuation. If government sets the tax rate suboptimally low, owners may inflate the value of their land, which may frustrate valuable land assembly. Conversely if the rate is suboptimally high, it may depress owner valuations and enable suboptimally high levels of assembly.

Posner & Weyl assume that governments will delegate the task of setting the tax rates to something like a fully informed intelligent algorithm that will determine the economically optimal tax rate based on the optimal degree of turnover and the need for investment, and will be impervious to the influ-

121 “[W]e acknowledge . . . that only empirical evidence can resolve questions about whether our system would work well or poorly.” Posner & Weyl, *supra* note 1, at 60.

Fennell does not attempt to quantify the benefits of her proposals for callable and floating fees, but then again there is less of a reason for her to do so given that she modestly proposes supplementing the fee simple with additional forms of ownership rather than abandoning it. See Fennell, *supra* note 1, at 1462, 1465, 1482–86, 1490–91.

For discussion of the evidence that Posner & Weyl and Fennell provide, see *supra* note 109.

122 For a recent analysis of the politics of urban land use regulation, see Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

123 Thus they write that:

[O]ur system is far from centralized planning. The government does not set prices, allocate resources, or assign people jobs: it plays no role, except to mechanically administer a system of property rights. Indeed . . . the government's role would be more limited than it is today because there is no need for discretionary interventions to solve holdout and other monopoly-related problems

Posner & Weyl, *supra* note 1, at 69–70 (emphasis added); see also *id.* at 66 n.20.

ence of policymakers and interest groups, like developers and landowners.¹²⁴ But it is unrealistic to think that policymakers will delegate the determination of tax rates to an algorithm in the country of “no taxation without representation”—especially when those tax rates are likely to significantly impact the value of the homes that are the most valuable asset that many people own.¹²⁵ Rather, the tax rates likely would be established in the shadow of the same information problems and interest group politics that beset land use regulation and eminent domain today.

Fennell is more explicit than Posner & Weyl about the role that government will play with callable and floating fees.¹²⁶ The government likely will be determining the boundaries of the callblock and floating fee districts.¹²⁷ Drawing these boundaries presumably will resemble the current zoning process, although the stated goal will differ, because in establishing callable and floating fees, governments will be concerned with designating areas of a sufficient size to facilitate redevelopment in the future, once land use needs change. Just as information constraints and interest groups influence conventional zoning, they are similarly likely to affect the drawing of callable and floating fee district boundaries. Local governments likely will err in the direction of over- and underinclusion, because quite apart from the potential for politics to influence the line drawing exercise, it will be difficult to predict *ex ante* what size of parcel will be optimal for uses that are unknown at the time of mapping.¹²⁸

124 See, e.g., *id.* at 75 (referring to “the cadaster . . . choos[ing] a whole panoply of tax rates”). Of the cadaster, Posner & Weyl explain:

Of course a cadaster is inanimate and in many implementations it would be cadastral authorities that would implement the system. However, we choose to view the cadaster itself as an agent because, as we discuss below, our system does not require any discretionary authority and could be implemented using, for example, an algorithm or a distributed/decentralized blockchain to avoid the possibility of the system being abused. As such we prefer to think of the system as either being itself the enforcement agent or as an impersonal agent of the broader community rather than vesting any power in central authorities who might abuse or manipulate it, given that our goal is precisely to circumvent the reliance of past systems on arbitrary centralized judicial discretion.

Id. at 66–67 n.20.

While Posner & Weyl envisage the tax rates being set in a mechanistic fashion, they seem to envisage actual people, subject to political influences, classifying assets into different categories that will be subject to different tax rates. See *id.* at 74–75.

125 On the significance of the home as an investment, see FISCHER, *supra* note 105.

126 See, e.g., Fennell, *supra* note 1, at 1484–85.

127 *Id.* at 1484–85, 1498. Although Fennell mentions that landowners themselves might establish the boundaries for callable or floating fee districts, she concedes that this is likely to be difficult, partly because of transaction costs involved in getting the landowners together, especially in areas where there are many existing landowners. *Id.* at 1498, 1506.

128 Moreover, the costs of correcting this over- or underinclusion might be high, at least in the case of callable fee districts. Fennell would require that the owner of the call option buy back all the parcels within the callblock. *Id.* at 1485. So if the land required for a development in fifty years required some of the parcels located in each of five callblocks,

In sum, there are reasons to assume that the inefficient allocations of land will persist if we make reasonable assumptions about how the Chicago proposals likely would be implemented. Moreover, it is far from clear that land currently is misallocated on the grand scale that the Chicago critics suppose, or that this serious misallocation, if it exists, is due primarily to the fee simple, as opposed to other factors such as the public land use regulation that has been the object of much recent criticism from economists.

B. *The Economic Benefits of the Fee Simple*

Even though the fee simple allows owners to block efficient land transfers to higher value uses, it is by no means evident that the fee simple is an inefficient form of landownership, because it also has important benefits to offset its downsides. Below I identify four economic benefits of perpetual land rights that need to be kept in mind in considering the Chicago critique. These benefits underscore that the critique highlights only one potential consequence of the fee simple.

One standard economic argument for perpetual land rights is that they incentivize property owners to invest in land to maximize its value over time. The fee simple owner knows that they will reap the benefits of improving the land or refraining from extracting its resources.¹²⁹ On the other hand, owners of legal interests with a shorter duration, like a lease, will focus on maximizing the value of the land only for the period for which they hold it.¹³⁰ Thus, they may not make expensive investments in maintaining the land, because they will not reap the benefits of these investments. Robert, the lessee of the Greenwich Village townhouse, is unlikely to install a new roof, or replace the boiler, because he would pay the cost of the investment but reap only a share of the benefits, absent some mechanism for allocating these costs between him and the fee simple landowner.¹³¹

the developer nonetheless would have to purchase all the parcels within the five callblocks, and would presumably persuade the government to redraw the boundaries of the callblock districts to create the space for the redevelopment and deal with the remaining callblock parcels.

129 See Ellickson, *The Costs of Complex Land Titles*, *supra* note 19, at 297; Ellickson, *Property in Land*, *supra* note 19, at 1368; Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *STAN. L. REV.* 455, 482 (2010).

130 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 73–74 (7th ed. 2007) (“A life tenant will have an incentive to maximize not the value of the property—that is, the present value of the entire stream of future earnings obtainable from it—but only the present value of the earnings stream obtainable during his expected lifetime. He will therefore want to cut timber before it has attained its mature growth even though the present value of the timber would be greater if the cutting of some or all of it were postponed, if the added value from waiting would inure to the remainderman.”); see also Caterina, *supra* note 23, at 7–8.

131 See Posner & Weyl, *supra* note 1, at 64 (stating that tenant will not paint the apartment because “she incurs the full cost of the painting . . . but not all the benefit of those investments”). *But see* Ellickson, *The Costs of Complex Land Titles*, *supra* note 19, at 285 (arguing that tenant will make optimal repair under certain conditions, in particular

To be sure, the fact that the legal interest is perpetual does not mean that any individual owner's time horizon will be endless. People often discount the future, and focus on near-term costs and benefits instead.¹³² Individuals also may make suboptimal choices because they lack the information necessary to maximize the value of land over the long term even if they are so inclined. However, the endless duration of the fee simple should encourage owners to think longer term than an interest of shorter and limited duration, as it provides a mechanism for owners to internalize the benefits and costs of their decisions over the long haul.

The Chicago critics recognize that the fee simple promotes investment.¹³³ To their credit, Posner & Weyl acknowledge that eliminating the right of owners to block transfers will reduce the incentive to invest in their assets; Posner & Weyl's argument is that the resulting increase in allocative efficiency will offset the decline in investment incentives.¹³⁴ But they may be undervaluing the magnitude of the decline in the incentive to invest in the asset—the land, in the case of the fee simple—that would follow from eliminating perpetual ownership.

Moreover, in focusing on the effect of eliminating perpetual ownership on the incentive to invest in the owned asset, the Chicago critics likely are taking an unduly narrow view of the objects that would suffer a decline in investment. They seem to ignore the likelihood that individuals living in a society where they can be forced to transfer their assets at any time may be much less inclined to invest in other things as well, such as place-based goods that generate social capital. If I can be made to transfer my house any time a buyer is willing to pay my valuation, why should I invest in developing a community of friends for my children, let alone myself? Why should I spend time building the parent-teacher association at the neighborhood school, building a community association, or cleaning up the nearby public park (assuming there still would be public parks in Posner & Weyl's world)?¹³⁵ The consequences of making everyone vulnerable to losing their land, as well as other

“when there are only two temporally defined interests, both are easy to value, and both are owned by individuals who trust one another”).

132 See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 853–56 (2009).

133 See, e.g., Fennell, *supra* note 1, at 1466, 1468–69, 1480; Posner & Weyl, *supra* note 1, at 51–54, 61, 63–64 (referring to private property generally, not the fee simple specifically, as promoting investment).

134 Posner & Weyl, *supra* note 1, at 68, 114. The reason that the increased benefits in allocative efficiency are not completely offset by the decline in the incentives to invest is that enabling transfers will facilitate the sales with the highest upside. See *id.* at 68 (“[T]he most valuable sales are ones where the buyer is willing to pay significantly more than the seller is willing to accept. These transactions are the first ones enabled by a reduction in the price.”). But I wonder if Posner & Weyl's proposal is necessary to facilitate transfers that have a high upside. Presumably these transfers stand a good chance of occurring anyways, because there is a large surplus available for the buyer to share with the seller.

135 See *id.* at 97–98 (discussing the application of their proposal to “publicly owned resources”).

assets, could extend well beyond a reduction in the incentive to invest in land and houses.

Fennell's proposals are less likely to reduce the incentive to invest in land, and other goods that generate social capital. Her callable and floating fees would apply only to land, and she would not comprehensively replace the fee simple with these callable and floating fees. She envisages individuals self-selecting to buy into callable and floating fee districts whose boundaries are drawn by local governments, and so the individuals who buy in might be risk-neutral or risk-preferring, leaving risk-averse buyers to purchase fee simples.¹³⁶ Still, there would be some reduced incentive to invest in land—and potentially social capital—under floating and callable fees because the probability that one's ownership would come to an end would be greater than under a fee simple. In addition, that probability could be influenced by factors over which individual owners have little control.¹³⁷

A second economic argument in favor of the fee simple is that the simplicity of a perpetual term makes it easier to alienate land, and therefore to transfer it to its highest and best use.¹³⁸ Property interests generally are transferable, regardless of whether they are endless like the fee simple, or limited like leases.¹³⁹ But the fee simple is especially marketable because there is minimal uncertainty about the duration of the interest in most cases, since there is little risk that it will end from an owner dying heirless. The knowledge that the legal interest can last forever makes it easier for buyers to value the interest, and for lenders to lend against it, because they need not worry about future interest holders seizing the asset.¹⁴⁰ By way of contrast,

136 See Fennell, *supra* note 1, at 1488.

137 For example, Fennell mentions that the developer holding a call option might be able to buy back the parcels within the callblock if there were “significant population changes that are not matched by commensurate densification (or de-densification) within the callblock” or “underperformance of the callblock as a whole on pre-established metrics (property value declines, residential density shortfalls, housing affordability, and so on), relative to the surrounding region.” *Id.* at 1484–85. Fennell suggests that making landowners vulnerable to losing their land if the area fails to meet specified performance targets might encourage landowners to work together to satisfy the targets. *Id.* at 1487. But it is unlikely to be easy for neighbors to manage their land use to meet the kinds of targets that Fennell mentions, especially if there are numerous neighbors and the targets relate to matters that even the neighbors collectively cannot control, such as population changes within the callblock district or the local jurisdiction in which it resides. As a result, the potential of losing their land to the developer for the failure to satisfy a performance target might just as easily disincentivize landowners from investing in their land—and consequently social capital—as incentivize investment in collective decision-making with neighbors. See also Ellickson, *The Costs of Complex Land Titles*, *supra* note 19, at 298 (arguing that the practice in Chinese villages of “reshuffl[ing] . . . the pairings between households and fields” undermines the incentive to take care of the fields).

138 See generally Ellickson, *The Costs of Complex Land Titles*, *supra* note 19, at 290–91, 300–02 (emphasizing the benefits “of a simple system of perpetual private land rights”).

139 See Stoebuck & Whitman, *supra* note 18, §§ 6.67–71, at 379–87.

140 Ellickson, *Property in Land*, *supra* note 19, at 1368 n.267 (“With a fee (or long-term lease) as security, a lender need not take steps to guard against a borrower’s death or

consider a life estate, a legal interest in land for the life of some person. A life estate ends when the measuring life does, but no one knows with precise certainty when that date will come. While technically saleable, there is little market for this type of legal interest because it, unlike the fee simple, is of limited and uncertain duration.¹⁴¹ Under Posner & Weyl's proposal and Fennell's callblocks and floating fees, land rights would be for an uncertain duration. Posner & Weyl briefly consider some of the implications of their proposal for financing asset purchases.¹⁴² But they do not grapple in any depth with how creditors would value assets under their proposal, which would lead to more frequent turnover of assets.

A third economic argument for the fee simple is that it economizes on information costs.¹⁴³ When land is privately owned outright, there is no need for a central government authority to be involved in reallocating land, through setting tax rates, or designating areas for callblocks and floating fees—or directly reallocating land ownership periodically if it reverts to the government at the end of a lease-like arrangement. Because there is no need for the government to involve itself in allocating land, no central authority has to acquire detailed information about the character of the land and optimal land uses in order to determine who should manage it. Decisionmaking is decentralized along with land ownership to individuals who are closer to the land than a central authority would be, and able to use their understanding of the land to more cheaply determine how the land should be used.

A fourth possible benefit of fee simple ownership is that it may lower the cost of enforcing property rights by inducing bottom-up compliance with them. I advance this hypothesis tentatively, because it warrants more analysis

flight. These risks daunt secured lenders when a borrower's land interest is merely a life estate or a usufruct.”).

141 Epstein explains that “the uncertainty in the duration of the term creates genuine ambiguities” for “alienation.” Epstein, *supra* note 129, at 482. Similarly, “[p]roperty tied up with contingent future interests [such as defeasible fees] is often difficult to sell, mortgage, or manage.” Jerry L. Anderson, *The Divergent Evolution of English Property Law*, 29 *PROB. & PROP.* 50, 52 (2015).

Another example of the effects of limited duration on the marketability of legal interests in land concerns the marketability of condominium and cooperative buildings in New York City built on leased land. The apartments in these buildings generally are cheaper and harder to sell than the apartments in buildings built on land owned by the building in fee simple. In addition, as the end of the building's lease with the landowner approaches, buyers face difficulties obtaining financing to buy apartments. See generally Satow, *supra* note 28.

142 Posner & Weyl, *supra* note 1, at 83–85. Posner & Weyl suggest that their proposal would reduce the need for financing to buy assets, because their proposal would lower asset values. *Id.* at 85, 87–88.

143 This paragraph applies to the fee simple one of Merrill and Smith's information cost arguments for the right to exclude as the core of property. See MERRILL & SMITH, *supra* note 10, at 31; Merrill, *supra* note 48, at 2081–83; Smith, *supra* note 82, at 1704. The fee simple might be regarded as the best example of the kind of private property right that Merrill and Smith defend, because it is the most robust form of private property due to its perpetual duration.

than I can offer here. The intuition is that allocating perpetual rights to land sets up a situation that resembles an indefinitely repeated game; fee simple owners have land rights that will last forever (barring the low probability event that they will pass away heirless).¹⁴⁴ Game theory suggests that the expectation of repeat play with no fixed endpoint may induce cooperation, although theory emphasizes that noncooperation also is a possible outcome.¹⁴⁵ Thinking optimistically, fee simple owners may be well-placed to engage in a tit-for-tat strategy that induces cooperation.¹⁴⁶ Neighboring fee simple owners potentially are well-positioned to observe and retaliate against boundary violations. Landowners also may be motivated to stand on their rights, because the rights' endless time horizon means that the landowners will reap the rewards of enforcement. Widely disseminating fee simple ownership may address the potential problem that nonowners might not have much to lose by infringing property rights; if many people are fee simple owners, many may have an incentive to respect the land rights of others to avoid theirs being infringed. So, a less heralded benefit of perpetual land rights is that they may lower the cost of enforcing property rights, by inducing a norm within society of complying with land rights, especially if there are few nonowners. This norm might dissipate if property changes hands more often, as likely would occur under Posner & Weyl's proposal. With greater turnover, neighbors would have fewer opportunities to observe and retaliate against boundary violations, because they would not get to know each other, or their land or buildings, as well as neighbors do with perpetual land rights.¹⁴⁷

In sum, while the Chicago critique emphasizes the downsides of the fee simple, this form of ownership also has significant upsides. It facilitates investment (a point that the critics acknowledge). Its simplicity likely facilitates alienation by comparison with more uncertain legal interests, especially if buyers require financing. It also avoids the need for a central governmental authority to acquire information to manage land because the fee simple decentralizes decision-making authority. Moreover, the fee simple may lower the cost of enforcing property rights by facilitating the bottom-up develop-

144 As indicated above (*supra* note 15), this hypothesis was suggested to me by Richard Revesz.

145 See, e.g., DOUGLAS C. BAIRD ET AL., *GAME THEORY AND THE LAW* 165–78 (1994); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 164–66 (1991); Pedro Dal Bó & Guillaume R. Fréchette, *The Evolution of Cooperation in Infinitely Repeated Games: Experimental Evidence*, 101 *AM. ECON. REV.* 411, 411–13 (2011); Daniel B. Kelly, *Strategic Spillovers*, 101 *COLUM. L. REV.* 1641, 1713 & n.350 (2011).

146 On tit-for-tat, see ELLICKSON, *supra* note 145, at 164–65.

147 Fennell suggests that callable and floating fees might induce owners whose property rights could be called or moved to a different location to cooperate with each other to protect their communities. Fennell, *supra* note 1, at 1487, 1502–03. Cooperation could include respecting each other's property rights. But it is also possible that such fees might induce neighbors to free ride on each other, and therefore lead them to collectively undermine their property entitlements.

ment of a norm of complying with land rights. We should not overlook these various benefits, even as we recognize the costs of the fee simple.

IV. THE FREEDOM-ENHANCING DIMENSION OF THE FEE SIMPLE

The Chicago critique is an economic critique of the fee simple and thus far I have considered the critics' arguments and their proposals on their own, economic terms. I now want to think about the costs of the critics' proposals through a noneconomic lens. The conventional economic discussion of the fee simple in terms of its impacts on investment and allocation does not fully encapsulate the benefits of the fee simple. The fee simple also is valuable because it gives landowners a right to choose, free from the influence of others, whether to transfer their land in perpetuity (subject to whatever limitations are imposed by public and private land use regulation). Because the fee simple landowner has the right to decide whether to transfer their land, they also have the right to decide not to transfer it—and to gift it, to share it, to preserve it, to mine it, or do other things with it instead (subject once again to regulatory constraints). The Chicago critics' proposals would further diminish the choice sets of landowners beyond what public and private land use regulation already do, by casting aside the landowner's right to decide whether to retain their land. There are often important reasons for the restrictions that public and private land use regulation impose on the landowner's right to decide whether to sell their land or keep it, and to do other things; nothing I say here is meant to call into question the edifice of land use regulation constructed over the past few centuries. The Chicago critics' proposals would go further down the path of diminishing the choice sets of landowners, and, in my view, would be one step too far if implemented comprehensively.

The interference with individual choice sets would be most extreme under Posner & Weyl's proposal. They would force landowners to put a value on their land that would be publicly available, and to transfer the land to anyone who came along willing to pay that price. The landowner would not have the choice to keep the property off the market,¹⁴⁸ or to gift, share, or preserve the property in perpetuity in the way that the authority to decide whether to retain the land makes possible. Fennell's proposal does not cut back as much on the right to choose, because Fennell envisages that callblock and floating fees would coexist with fee simples, and landowners would have the option to buy fee simples outside the callblock and floating fee districts. But her proposal still constrains choice, because it would limit the land avail-

148 However, Posner & Weyl would

allow owners to declare intervals up to some reasonable limit (say a year or two) during which they wish to maintain ownership. Upon declaring such an interval, the individual would have to declare a value and allow potential purchasers a 'last chance' to claim the good before such an interval began.

Posner & Weyl, *supra* note 1, at 89. They also suggest that "current owners" could have "a few months" to move from "real property" that someone had acquired from them. *Id.*

able in fee simple. A purchaser who wants to live in a specific area would be forced into callblocks and floating fees if all of the places where the purchaser wants to be are designated for such fees.¹⁴⁹ For analytical convenience, I will focus on illustrating the costs of Posner & Weyl's proposal, since it would represent the starkest elimination of the fee simple.

A. *The Importance of the Right to Decide Whether to Transfer*

Why is the right to choose whether to transfer your land so important? Or conversely, what are the costs of requiring the landowner to put a price on their land, and forcing them to sell their land if someone else comes along and wants to buy it, or if certain triggers are met as under Fennell's proposal?¹⁵⁰

One reason why the right to be able to decide whether to transfer your land is important is that it protects individuals against being subject to the whims of others, or, in Philip Pettit's terms, dominated by others.¹⁵¹ The battered wife is dominated by her violent husband, because if she complains he may beat her depending on his mood;¹⁵² the impoverished tenant has to live with their moody landlord's decision not to turn up the heat or fix the toilet because they lack the resources to assert the right to a habitable apartment or to move.¹⁵³ Under Posner & Weyl's proposal, individual landowners would be vulnerable to anyone coming along at any time, and forcing them to sell their land for any reason.¹⁵⁴ The only consolation is that the buyer would have to pay the transferor their self-assessed value of the land.

Now Posner & Weyl might argue that their proposal does not increase the extent to which landowners are vulnerable to the whims of others compared to the status quo. For example, they might say that if their proposal were implemented, it presumably would be through a democratically elected

149 Fennell, *supra* note 1, at 1511 ("While the opportunity to opt into different tenure forms does make a normative difference . . . it does not provide a complete answer to concerns about displacement.")

150 Thank you to Jeremy Waldron for suggesting several different ways of understanding the importance of the perpetual right to decide whether to sell your land, including Philip Pettit's analysis of nondomination.

151 PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). Pettit defines a person as dominated—and hence not free—when someone else (1) has "the capacity to interfere" (2) "on an arbitrary basis" (3) "in certain choices that" the person "is in a position to make." *Id.* at 52. Pettit argues that a person's choices are vulnerable to being arbitrarily interfered with when another has the ability to act to worsen the person's situation, based on the other's interests and desires, without considering the person's. For Pettit's understanding of arbitrariness and nonarbitrariness, see *id.* at 55–56.

152 *Id.* at 5.

153 For an evocative account of the constrained choices of low-income people in the private rental market, see MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

154 As noted above, Posner & Weyl would allow owners to keep land (and other property types) off the market only temporarily, and only after giving buyers "a 'last chance' to claim the good before such an interval began." Posner & Weyl, *supra* note 1, at 89.

legislature overhauling fee simple landownership, after holding hearings at which landowners could testify, because novel forms of property rights are usually implemented by legislatures, rather than courts.¹⁵⁵ But the democratic pedigree of the transferee's right to purchase should not obscure the vulnerability of the individual transferor to losing their land for any reason. We must look through the origins of the rule and examine whether its implementation in individual decisions takes into account the interests of the transferor (as well as the transferee).¹⁵⁶

A second argument that Posner & Weyl might make is that individual transfers under their proposed form of ownership would take into account the interests of the transferor because, as just mentioned, the transferee would have to pay the transferor a price set by the transferor through the self-assessment method. But it is not clear that the price set by the transferor should be regarded as a genuine reflection of the transferor's interests in the land. Every owner will be valuing their land—and other forms of property—in the shadow of the taxes that the government will establish to encourage the optimal turnover rate of goods. Taxes will be integral to keeping the landowner from using their valuation strategically to frustrate land assembly or extract higher prices from assemblers.¹⁵⁷ But the taxes also may distort the owner's valuation if the owner lacks “the liquidity” to pay much in the way of taxes.¹⁵⁸ Moreover, the price that owners put on their land and other objects may not be personalized to them. Recognizing that most individuals do not walk around with valuations of their property, Posner & Weyl envisage owners using “default valuations” automatically provided “using collaborative filtering and other techniques that form the basis of . . . ubiquitous recommendation engines.”¹⁵⁹ This suggests that so-called self-assessed valuations will reflect an aggregation of others' valuations, influenced by the tax

155 See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (arguing that legislatures do, and should, introduce novel property rights). Fennell contemplates that state legislation might allow callable and floating fees to be established in specific areas if “a supermajority” favors shifting to one of these fees. Fennell, *supra* note 1, at 1498. So Fennell would have not only legislators, but also landowners, deciding whether to alter property rights. See *id.*

156 Pettit emphasizes that the test for whether an act is an arbitrary interference is a procedural test rather than a substantive test.

Notice that an act of interference can be arbitrary in the procedural sense intended here—it may occur on an arbitrary basis—without being arbitrary in the substantive sense of actually going against the interests or judgements of the persons affected. An act is arbitrary, in this usage, by virtue of the controls—specifically, the lack of controls—under which it materializes, not by virtue of the particular consequences to which it gives rise. . . . What is in question in each case is a power of interfering on an arbitrary, unchecked basis.

PETTIT, *supra* note 151, at 55.

157 Posner & Weyl, *supra* note 1, at 67.

158 Posner & Weyl vaguely suggest that private insurers might develop an insurance product that “would cover the tax payments in exchange for a share of the gains if the house were sold at the going price.” Posner & Weyl, *supra* note 1, at 88.

159 *Id.* at 78.

requirements, not any particular interest that the owner has in the land.¹⁶⁰ Even if the price should be regarded as the owner's in some real sense, the fact that the owner would be paid for the transfer does nothing to address the fact that the owner would have lost their ability to decide whether to sell their property in the first place, and at what time.

Perhaps the strongest argument that Posner & Weyl might make that their proposal would not increase the overall amount of domination in society is that it would only alter who is dominated and who are the dominators. Posner & Weyl might argue that landowners who currently use their fee simples to hold out and block development subject developers to their whims; removing the holdouts' power would allow developers to subject landowners to their whims.¹⁶¹ The idea that the proposal would merely redistribute domination and not increase it assumes that individuals would be as likely to be assemblers in Posner & Weyl's world as they are to be holdouts in the current world. If this is so, then the loss of the right to hold out will be canceled out by the acquisition of the right to compulsorily purchase others' land. But if, as seems more likely, many of those who can hold out now are poorly positioned to assemble land in Posner & Weyl's world, then the beneficiaries of the overhaul will be those who can use the power to compulsorily acquire land.¹⁶² The "losers" will be the far more numerous among us who lack the capital or know-how to buy land for development and will instead be subject to the whims of assemblers, and have to transfer them land, whenever they want it, at the price that we have set constrained by taxes intended to discipline our valuation. Overall, given inequalities in the distribution of capital and know-how, domination seems likely to increase if Posner & Weyl's proposal to substitute the right to hold out with the right to compulsory acquisition is implemented.¹⁶³

160 *Id.* at 77–78.

161 The above discussion sets to the side the possibility that any owner might be both a holdout and a developer interested in assembling land.

162 Posner & Weyl seem to think it will become easier to become an owner in their world because asset values will fall. Posner & Weyl, *supra* note 1, at 85. But this ignores the fact that declining asset values will reduce wealth, and presumably incomes as well. So those who are better off now might be less wealthy compared to the status quo, but they presumably will remain wealthier than many others in Posner & Weyl's world as well. Indeed, the better off may become even better off relative to others, because the better off may be able to shield some of their assets from the Posner & Weyl form of ownership by taking them out of the United States and putting them in countries that retain perpetual ownership.

163 Posner & Weyl suggest that the distributional consequences of their proposal could be mitigated by using the funds raised from their proposed tax on asset values to fund a universal basic income. *Id.* at 71, 85–86. Whether the tax could be used to fund such a program would depend on the amount collected, and whether there would be sufficient political consensus to use the proceeds for a universal basic income. I am not optimistic.

B. *Why Protect Individuals Against the Whims of Others*

Establishing that Posner & Weyl's proposal would increase the extent to which individuals are at the mercy of others' whims still begs the question of why we want to avoid being subject to the whims of others. Here we can borrow from Pettit's explanation of why the modern state should seek to promote nondomination to understand the costs of removing the owner's right to decide whether to sell their property or hold it.¹⁶⁴

One reason is that protection from the whims of others gives individuals some certainty that enables them to make plans and reduces their level of "anxiety" about their lives.¹⁶⁵ Posner & Weyl implicitly concede that their vision of ownership would leave people more uncertain, because they acknowledge that their proposal would reduce the incentive to invest in property.¹⁶⁶ But that reduction in investment incentives is only one manifestation of the uncertainty produced by making everyone transfer their property when someone wants to buy it. When there is always the chance that one may be forced to transfer one's home, one may be living "under constant fear of unpredictable interference, and" so unable to "organize" where one will live or work, where one's children will go to school, how to get them there and how to feed them, with any degree of "tranquility."¹⁶⁷

A second reason for safeguarding individuals against the whims of others is to save individuals the need to be constantly anticipating the behavior of those who have more capital than them and might be interested in buying their land, and recalibrating their behavior in light of the acts of others. Posner & Weyl anticipate that individuals will be constantly updating their valuations in light of the valuations that others are imposing on their property.¹⁶⁸ If individuals fail to update their valuations to reflect others', they may become vulnerable to forcibly losing their land, or they may be paid a lower price for it than an owner of similar land. Posner & Weyl maintain that ongoing advances in information technology will make their proposal feasible, because they predict that technology will enable individuals to gather information about others' activities and update their valuations more quickly.¹⁶⁹ But the need to constantly be on the lookout, to be monitoring what others are doing, and to be strategically putting a price on your land (and other property) in light of your goals and the behavior of others is itself a cost of their proposal. As Pettit puts it, "[y]ou can never sail on, unconcerned, in the pursuit of your own affairs; you have to navigate an area that is mined on

164 Pettit has sought to revive "freedom as non-domination" as a "political ideal" for the modern state. PETTIT, *supra* note 151, at 80–81. Above I apply Pettit's three arguments for nondomination in defense of the fee simple. For his elaboration of the arguments, see *id.* at 85–90.

165 *Id.* at 85.

166 See Posner & Weyl, *supra* note 1, at 70–71.

167 PETTIT, *supra* note 151, at 86.

168 Posner & Weyl, *supra* note 1, at 102.

169 *Id.* at 82.

all sides with dangers.”¹⁷⁰ Does the busy parent who is multitasking at home and at work want to have the added burden of putting a price on their land and constantly monitoring their neighbors’ valuations and whether developers are interested in the area, so as to decide whether their own valuation needs updating?¹⁷¹

A third reason to protect individuals from the whims of others is to avoid individuals becoming subordinate to other individuals.¹⁷² When one’s position can be worsened by the capricious act of another, then one is likely to feel that one is a lesser person than that other, because one is effectively at their mercy. Thus, the tenant who is too poor to assert their legal right to heat or a working toilet may feel themselves to be a lesser person than their landlord. Under Posner & Weyl’s proposal, every landowner is subordinate to those with the capital to buy their land. If all landowners had equal capital, knowledge, and ability, then they might exist in a state of equality. But in the real world where all three are distributed unequally, giving everyone the right to force others from their land upon the payment of their price is bound to reward those with greater access to capital. Just as eminent domain is commonly regarded as a tool susceptible to abuse by the wealthy and connected to the detriment of the less well-off,¹⁷³ so privatizing the power of compulsory purchase to everyone is likely to disproportionately benefit those with capital. We run the risk that the less well-off will perceive themselves as the inferiors of the wealthy because they will be subject to an even greater extent to the whims of the rich, who can displace them from their homes and apartments upon the payment of a price that the less well-off may have struggled to find time to identify while trying to manage the daily necessities of life.¹⁷⁴

170 PETTIT, *supra* note 151, at 86.

171 Posner & Weyl indicate that valuing assets would be on par with many of the tasks that people already do in “the market economy,” such as “[c]alculating retirement payoffs, [and] choosing among credit instruments.” Posner & Weyl, *supra* note 1, at 90. It is not clear that many people perform these existing tasks well. Their proposal would impose an additional burden on individuals that might dwarf the existing burdens in its complexity.

172 See PETTIT, *supra* note 151, at 88–89.

173 Serkin, *Response*, *supra* note 115, at 121.

174 As noted above, I doubt that the distributional consequences of Posner & Weyl’s proposal would be addressed by their suggestion that the proposed tax could fund a universal basic income. See *supra* note 163.

There is a brief passage in Pettit’s *Republicanism* that suggests that were he to have considered the matter, Pettit himself might have regarded the elimination of the fee simple as likely to lead to more domination, contrary to his aim of promoting more freedom. The passage describes private property as protecting individuals against being dominated by others, and argues that eliminating private property would reduce the protection that individuals enjoy against the whims of others. PETTIT, *supra* note 151, at 89. Pettit obliquely acknowledges that private property might limit the scope for individual choice and contribute to domination, because it requires state enforcement of owners’ property rights, which harms those excluded by state authority from others’ land. *Id.* at 135. (As Posner & Weyl mention, “[n]ineteenth century critics of Adam Smith’s theories of the market economy identified private property as one of the chief culprits in what they saw as

Still a fourth rationale for protecting individuals from the whims of others is to enable owners to be autonomous, in the sense of masters of their own lives. Autonomy, Pettit insists, is a more expansive idea than nondomination that presupposes that one is not dominated by others.¹⁷⁵ To shape your own life you must be able to plan, to proceed without having to constantly update your behavior in light of the actions of others, and to perceive yourself as on an equal footing with others. Fennell and others recognize that eminent domain entails “the confiscation of autonomy,”¹⁷⁶ because when a government expropriates property, it removes the right of landowners to decide not to sell their property. By extension, privatizing and decentralizing the right to forcibly acquire property would further undermine autonomy.¹⁷⁷

wasteful economic relationships, as well as systems of domination.” Posner & Weyl, *supra* note 1, at 56.) But Pettit maintains that on balance, private property enhances individuals’ choices, because it “make[s] choices and courses of action accessible—for example, those that involve owning and selling and giving things away—that would not otherwise exist even as possibilities.” PETTIT, *supra* note 151, at 135. Because the fee simple provides the most complete bundle of rights of any property interest in land, and because it is potentially perpetual, the argument that private property expands the choices available to those with property applies most aptly to the fee simple form of private property.

175 PETTIT, *supra* note 151, at 81–82.

176 Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 994; see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 184 (1985), cited by Fennell, *Taking Eminent Domain Apart*, *supra*, at 994 n.121; Lee Anne Fennell, *Just Enough*, 113 COLUM. L. REV. SIDEBAR 109, 117 (2013) (“For homeowners, the autonomy to decide whether and when to sell has two components[:] . . . One element relates to the consumption experience of homeownership and the value of the option to remain in possession as long as one likes. . . . The second facet of autonomy relates to the home as an investment and the ability to hold that investment for as long as one likes.”); Lee Anne Fennell, *Taking Eminent Domain Apart*, *supra*, at 966 (“A property owner typically possesses not just the power to turn away a would-be buyer who offers less than her reservation price, and not just the additional power to try her best to win a share of any surplus that the would-be buyer’s proffered transfer would create, but something more. She has the power to turn away a buyer altogether”); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 640 (2013).

177 One reader of this Article asked why autonomy requires perpetual landownership, and why a life estate would not be sufficient to protect individual autonomy. One answer is the desire of many people to provide for their children and grandchildren. As discussed below, there was a debate in nineteenth century Prince Edward Island, Canada, about whether leasehold ownership should be switched to fee simple ownership. In analyzing the main themes in the arguments for switching land tenure from leaseholds to fee simple ownership, Margaret McCallum quotes one tenant representative as telling

the 1860 Land Commission that the leasehold system “may do very well for old bachelors who never expect to be any benefit to their country . . . but . . . [it] has sown the seeds of discontent in many families. Young men have seen and felt the difficulties under which their fathers have toiled . . . and our sons have become wanderers from home, tossed hither and thither over the surface of the earth like the thistle down in autumn.”

C. *Examples*

Returning to the language of economics, the independence and autonomy that the fee simple facilitates is something on which people appear to place a monetary value. Ten years ago, Schill et al. showed that condominium apartments are generally worth more than cooperative apartments in New York City.¹⁷⁸ Although Schill et al. do not interpret their findings this way, the price differential might be considered some evidence that people are willing to pay a premium to have fee simple ownership. Condominiums and cooperative apartments entail different forms of ownership. “The condominium owner owns his or her unit in fee simple absolute and shares an undivided interest in the common elements (for example, sidewalks, hallways, pools, clubhouse, storage place) as a tenant in common with the other condominium owners. In contrast,”¹⁷⁹ the owner of a cooperative apartment owns shares in the cooperative corporation that owns the building and leases their apartment from the cooperative.¹⁸⁰ “Both condominium associations and cooperative corporations enact rules that govern the behavior of their residents,”¹⁸¹ but “the rules of” cooperative associations usually restrict owners more than the rules of condominium associations.¹⁸² For example, cooperative associations usually insist on approving the sales of shares, often “limit the amount of debt an owner may secure with his or her shares,”¹⁸³ and restrict subletting. Thus, the price premium for condominiums can be regarded as some evidence that people are willing to pay what might be called a “control premium” to own their property outright in fee simple, because condominium owners have fee simples and more control over their units than owners in a cooperative.¹⁸⁴ The theoretical protection that the fee simple offers of independence and autonomy appears to be valued today in the marketplace.¹⁸⁵

Margaret E. McCallum, *The Sacred Rights of Property: Title, Entitlement, and the Land Question in Nineteenth-Century Prince Edward Island*, in *ESSAYS IN THE HISTORY OF CANADIAN LAW* 358, 369 (G. Blaine Baker & Jim Phillips eds., 1999) (alterations in original).

178 See Michael H. Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 *J. LEGAL STUD.* 275 (2007).

179 *Id.* at 277.

180 *Id.*

181 *Id.* at 281.

182 *Id.*

183 *Id.* at 282.

184 To be sure, there also may be other explanations for the price differential. For example, there is a difference in the financing arrangements between a condominium and a cooperative which make buying a cooperative somewhat more financially risky and which account in part for the more intrusive governance of a cooperative building. See Schill et al., *supra* note 178, at 283.

On the concept of the control premium in the corporate law context, see Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 *YALE L.J.* 698, 705 (1982). Thank you to Ryan Bubb for pointing me to this article.

185 Another illustration of the value that people attach to outright ownership is the concern that some people have that autonomy is being undermined in the digital age

Debates in nineteenth century North America about land tenure also suggest that the fee simple has historically been valued for the independence and autonomy that it provides, as well as for economic reasons. As already mentioned, the fee simple developed gradually out of the system of feudal landholdings established in England after the Norman Conquest.¹⁸⁶ The British imported the fee simple when they colonized large parts of North America, and displaced the resident indigenous peoples.¹⁸⁷ But British land tenure policies were complicated, and the British also allocated land using other legal forms, including proprietary estates.¹⁸⁸ Some of these estates endured in Canada—and even the United States—decades after the American Revolution.¹⁸⁹ During the nineteenth century, tenants where these estates persisted sought government assistance in transforming leaseholds into fee simple ownership, engendering contentious political debates about the sanctity of property rights in land. The proponents of fee simple ownership argued for it on economic and noneconomic grounds.

Consider the nineteenth century debate about “the ‘Land Question’” in what is now Prince Edward Island (PEI), Canada. After the British obtained PEI from the French in 1763, they divided “the entire Island” into 67 lots.¹⁹⁰ Then, they used a lottery to allocate 66 of them to “Crown favorites,” many of whom remained absentee landlords living in the United Kingdom.¹⁹¹ The proprietors “were required to settle their lands within ten years with one Protestant settler for every two hundred acres, and to pay quit rents to the Crown,” although many of the proprietors did not satisfy their obligations.¹⁹² Working through agents, the proprietors leased out their lands for terms that “varied . . . from a few to a thousand years.”¹⁹³ This leasehold system lasted

because people are acquiring licenses rather than ownership when they digitally purchase books, music and movies and other goods. See AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP* 10–11 (2016).

186 SIMPSON, *supra* note 18; STOEBUCK & WHITMAN, *supra* note 18, § 1.6, at 15–20.

187 STOEBUCK & WHITMAN, *supra* note 18, § 1.7, at 20–21.

188 McCallum, *supra* note 177, at 361.

189 *Id.* at 361, 365–68 n.11; see also REEVE HUSTON, *LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK* 13 (2000); Eric Kades, *The End of the Hudson Valley’s Peculiar Institution: The Anti-Rent Movement’s Politics, Social Relations, and Economics*, 27 L. & SOC. INQUIRY 941 (2002) (reviewing HUSTON, *supra*, and CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK POLITICS 1839–1865* (2001)).

190 McCallum, *supra* note 177, at 361; see also *id.* at 360.

191 Matthew George Hatvany, *Tenant, Landlord, and the New Middle Class: Settlement, Society, and Economy in Early Prince Edward Island, 1798–1848*, at 2 (Ph.D thesis, Univ. of Me., 1996); see also McCallum, *supra* note 177, at 360–61.

192 McCallum, *supra* note 177, at 361; see also *id.* at 362 (“[N]one of the proprietors complied with the conditions for settlement in their original grants, either as stated initially or as modified from time to time in response to proprietorial pleas of hardship.”).

193 *Id.* at 361. Matthew Hatvany, a geographer and historian, argues that the duration of leases varied over time; leases in the early period of British rule were longer than leases offered later. However, Hatvany also emphasizes that leases generally were quite long—according to the 1841 census, “more than 75% of all tenants possessed leases in perpetuity”—and on this basis he concludes that “only for a minority of the tenantry dur-

for over a hundred years until 1875, when the Island's government forced the remaining proprietors "to sell their land to the government" in exchange for compensation determined by a commission.¹⁹⁴

Legal historian Margaret McCallum has helpfully analyzed the arguments made for switching from leasehold to fee simple ownership in PEI "in the 1860s and 1870s."¹⁹⁵ Alluding to the economic argument that the fee simple promotes investment, the critics of the leasehold system maintained that it "stifled initiative."¹⁹⁶ They argued that "[t]enants had no incentive to improve their holdings, or to produce much beyond the mere means of subsistence, when all surplus went to pay rent, and their farms ultimately would revert to the landlord."¹⁹⁷ Alongside their economic arguments, the opponents of the leasehold system also advocated for freehold because it would promote the independence of tenants. For example, McCallum writes that:

An Islander who farmed both freehold and leasehold property told the 1875 Land Commission: "People will make sacrifices to get clear of the hateful name of paying rent. The very name of paying rent stings so badly that a person would not buy a leased farm, but would run away to another that is free."¹⁹⁸

Proponents of freehold ownership emphasized that the "insecurity" that leaseholds generated among tenants not only affected them personally, but

ing the first half of the 19th century was the duration of the lease truly a substantial cause for anxiety." Matthew Hatvany, *The Proprietary Burden?*, 44 ISLAND MAG. 3, 4 (1998).

194 McCallum, *supra* note 177, at 365.

195 *Id.* at 359. McCallum identifies four categories of arguments; the discussion above does not do justice to the breadth of arguments that she mentions. One tenant argument I do not highlight in the text is a Lockean labor argument, a form of argument that also was used to displace indigenous peoples from their lands. According to the argument, while the proprietors had formal title to much of the Island's land, the land properly belonged to the tenants because they had cleared and cultivated it, while the (often absentee) proprietors had defaulted on their obligations. *Id.* at 371–76.

A note on terminology: McCallum uses the term "freehold" to describe the form of ownership that tenants and their supporters sought in PEI. By freehold, she is referring to fee simple ownership. See *id.* at 387 nn.18–19 (referencing legislation that includes the term "fee simple"). In this paragraph, I follow McCallum's terminology and use "freehold."

196 *Id.* at 369.

197 *Id.* Hatvany argues that while the leasehold system has often been blamed for PEI's underdevelopment in the nineteenth century, the system was only one contributing factor. He maintains that there were variations in the extent to which tenants were burdened by the leasehold system, and that

[u]pon further exploration of these issues, we may well find that the rent and lease were not the real burden of the proprietary system. More likely, it was the concept of paying rent in a continent where freehold tenure was perceived as the norm that was odious to tenants at that time—and to historians ever since!

Hatvany, *supra* note 193, at 7; see also Matthew G. Hatvany, *Tenant, Landlord and Historian: A Thematic Review of the "Polarization" Process in the Writing of 19th-century Prince Edward Island History*, 27 ACADIENSIS 109 (1997).

198 McCallum, *supra* note 177, at 368.

also distorted the Island's politics, because tenants "lacked the independence necessary to exercise the franchise according to their own judgment and will."¹⁹⁹ The argument was that "[t]enants who were liable to eviction at the termination of their leases, or when they fell into arrears, were vulnerable to pressure from landlords or their agents to vote according to the landlords' or agents' instructions."²⁰⁰

While PEI appears to have been unique because the British allocated most of the Island through a leasehold system, parts of New York State also were covered with leaseholds in the nineteenth century. The New York State leasehold estates "originated in the seventeenth and eighteenth century land grants of the Dutch and English colonial governments."²⁰¹ "While some grantees sold their lands, others created"²⁰² interests known as "leases in fee."²⁰³ These were different than the leases in PEI; as the name implies, they were an amalgam of a fee simple (because the tenant held "an open-ended inheritable term"), and a leasehold (because tenants were required to pay rent perpetually).²⁰⁴ Landlords also used "leases in lives, which gave tenants rights to the land for as long as one, two, or three people named in the lease . . . survived,"²⁰⁵ and terms of years; in time, perpetual leases were replaced in some areas with annual leases.²⁰⁶ Starting in 1839, tenants rallied against landlords in an "anti-rent movement" that sought to change leaseholds to outright fee simple ownership.²⁰⁷ Although New York State never abolished the leasehold system as PEI did, leaseholds gradually were replaced with fee simples²⁰⁸ as many tenants "bought out their landlord."²⁰⁹ As in PEI, some of the arguments against the leasehold arrangements were economic, with critics maintaining that they discouraged investment because tenants could not be certain that they would reap the rewards of their labors.²¹⁰ But the fee simple also was associated with freedom.²¹¹ Historian Reeve Huston argues that "[t]he anti-renters of the 1840s placed [the] idea" "that landownership was the only sure basis for human freedom" "at the

199 *Id.* at 370.

200 *Id.* Freehold ownership was not a requirement for eligibility to vote in colonial PEI. *Id.* at 369–70. For discussion of how landlords in late eighteenth and early nineteenth century New York State "controlled tenants' votes" and influenced politics in the State, see HUSTON, *supra* note 189, at 30, 112.

201 HUSTON, *supra* note 189, at 13.

202 *Id.*

203 Kades, *supra* note 189, at 942.

204 *Id.* Tenants were also required to make payments to their landlords upon sales of land, although these requirements eventually were abolished following a decision by the New York Court of Appeals. *Id.* at 955; *see also* HUSTON, *supra* note 189, at 27, 195–96.

205 HUSTON, *supra* note 189, at 23.

206 *Id.* at 79.

207 Kades, *supra* note 189, at 945.

208 *Id.* at 946–47, 952; *see also* HUSTON, *supra* note 189, at 199–200.

209 Kades, *supra* note 189, at 948; *see also* HUSTON, *supra* note 189, at 191, 198, 200, 202–03.

210 HUSTON, *supra* note 189, at 141–42; Kades, *supra* note 189, at 957.

211 *See, e.g.*, HUSTON, *supra* note 189, at 107–29.

center of their movement.”²¹² As an example, he refers to an antirent leader “boast[ing in the 1880s] . . . that the movement had allowed tenants to buy their farms ‘in fee absolute.’ Thus each tenant ‘could sit under his own vine and fig tree of his own planting with no one to make him afraid of being disturbed or driven off.’”²¹³

There is a danger of distorting history when using it in the service of a normative argument. So, it bears recognizing that land had a different resonance in nineteenth century North America than it does today. Then, the “yeoman” farmer was celebrated as the backbone of society, and a much larger share of the population was engaged in agriculture than today.²¹⁴ But some of the arguments used in the debates in PEI and New York State, in which the very issue was whether to shift to fee simple ownership, emphasize that there is a basis for thinking of the fee simple as having noneconomic as well as economic benefits. The premium paid for condominiums compared with cooperatives in New York City suggests that these benefits persist into our highly urbanized age.

CONCLUSION

Fennell and Posner & Weyl have done a great service by drawing attention to the potential that the dominant form of private landownership may be a barrier to repurposing land to meet today’s needs, because it grants owners a perpetual monopoly to exclude others and new uses. In major cities like New York, housing prices have risen tremendously and many people are being priced out of the market. More affordable housing is needed to meet the demand, and building more housing will require assembling and

212 *Id.* at 111; *see also id.* at 112 (“Anti-renters believed that proprietors’ ability to strip others of the fruits of their labor gave them an unnatural degree of power, which threatened tenants’ personal liberty. Proprietors subjected entire communities to their whim . . .”).

Huston emphasizes that the antirenters’ “vision” of a “free society” built on independent landholding did not extend to women, African Americans, or aboriginal peoples. *Id.* at 125–29, 200 (internal quotation marks omitted).

213 *Id.* at 208. For an invocation of the same passage from Micah by antirenters during the 1840s, *see id.* at 111.

The antirent movement also offered other arguments against leaseholds in New York State. For example, as in PEI, the antirenters advanced the Lockean-labor argument that tenants should have title to the land because they worked it. *See, e.g., id.* at 111–12, 114–15, 199.

214 *Id.* at 114; McCallum, *supra* note 177, at 368; *see also* Associated Press, *Farm Population Lowest Since 1850s*, N.Y. TIMES (July 20, 1988), <http://www.nytimes.com/1988/07/20/us/farm-population-lowest-since-1850-s.html> (referring to data that “about 72 percent of the American work force” was engaged in “farm occupations” in 1820, and that “farm people made up . . . about 64 percent” of American workers in 1850 (internal quotation marks omitted)).

One of the themes of Fennell’s critique of the fee simple is that it is better suited to a “low-density agrarian society” than high-density urban areas. Fennell, *supra* note 1, at 1481.

redeveloping existing land because, as the saying goes, we are not growing more land—and in fact, with sea level rise, we may be losing buildable land.

But the Chicago critique and the critics' reform proposals discount the benefits of the fee simple. While the perpetual monopoly that the fee simple grants may inhibit transfers to higher value uses, that monopoly also has economic advantages to offset its disadvantages. Moreover, no one that I have spoken with would like to live in the world that Posner & Weyl envisage, where our real property—and everything else we own—could be taken away from us at any moment by someone willing to pay a price that we put on these things, probably late at night after getting the children to bed, in the shadow of a property tax. Fennell's proposals for callblocks and floating fees are less worrisome, because she proposes them as supplements to the fee simple instead of outright replacements of it. But neither Fennell nor Posner & Weyl fully acknowledge the loss in independence and autonomy that would flow from implementing their proposals. The fee simple may impede the transfer of land to its highest value use, but the form of landownership not only affects what uses we make of land but also our sense of ourselves as human beings. All of these ideas for overhauling landownership may be creative, and I do not intend to discourage experimentation with different forms of land tenure. But we should be careful about adopting policies that would leave many of us with less sense of control over our lives, and more vulnerable to the whims of those with capital to spend on buying land. We also should work to spread the benefits of ownership to those who do not currently enjoy them.