

# Absolute Preferences *and* Relative Preferences in Property Law

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The dominant form of legal discourse in contemporary America is welfarist / utilitarian. Though there are important alternatives,<sup>1</sup> utilitarianism largely prevails as well in property theory, where most scholars presume that maximizing social welfare is the primary goal of a property system, and then analyze particular legal rules or institutions based on how well they achieve that objective.<sup>2</sup>

Given that so many property theorists consider ourselves to be welfarists, it is perhaps surprising that with one significant exception,<sup>3</sup> property scholars have largely ignored developments in behavioral economics suggesting that people derive utility in divergent ways. I am not referring to the fact that peoples' preferences differ with respect to, say, the best flavor of ice cream. A growing experimental literature suggests that, among the population of those who prefer chocolate ice cream to vanilla ice cream, there are two distinct camps. The former will prefer four scoops of chocolate to three, three to two, two to one, and one to none. This set of preferences is easy for classically trained economists to understand. The latter, more puzzling, group will prefer a situation in which they receive one scoop of ice cream, and those around them receive none, to one in which they receive two scoops of ice cream, but those around them receive three.

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<sup>1</sup> See, e.g., MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS (1996) (espousing a personhood theory and applying it to numerous questions in property theory); Gregory S. Alexander, *The Social Obligation Norm in Property Law*, 94 Cornell L. Rev. 745 (2009) (arguing that Amartya Sen and Martha Nussbaum's Capabilities Approach should be the metric by which property regimes are evaluated); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 Mich. St. L. Rev. 877 (applying a natural rights framework to takings doctrine); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 Va. L. Rev. 1053 (1998) (applying a Rawlsian framework to questions of governance in common interest communities).

<sup>2</sup> Gregory S. Alexander, *Pluralism and Property*, 80 Fordham L. Rev. 1017, 1017 (2011).

<sup>3</sup> Nestor M. Davidson, *Property and Relative Status*, 107 Mich. L. Rev. 757 (2009).

In the pages that follow, I will try to show how this striking finding – that some people care more about absolute wealth and others care far more about relative wealth – might help us better understand several mysteries developments in property doctrine, and may explain why certain seemingly low-stakes property disputes prove stubbornly unamenable to informal dispute resolution. Along the way, I will suggest that precisely because of this heterogeneity, very difficult questions lurk just under the surface in aspects of property doctrine that have long been thought uncontroversial, at least among welfarists.

Part I of this essay reviews the experimental evidence from behavioral economics, marketing, and law, exploring more fully the pluralistic nature of utilitarian preference frameworks. Part II examines a series of inheritance cases involving “double shares” of testamentary estates, where absolute preferences and relative preferences point toward starkly divergent results in cases, resulting in inconsistent caselaw and occasionally temperamental judicial rhetoric. Part III shows how the existence of absolute and relative preferences illuminates a potential source of future conflict in takings doctrine and might help explain prominent moves towards “difference splitting” in the modern law of easements and waste.

## I. Heterogeneous Absolute Utility and Relative Preferences

There are two basic stories we can tell about what makes people feel rich. One story says that people feel rich based on the absolute resources available to them. A second story says that people aren’t responsive to absolute wealth but to relative wealth. Economists have figured out simple ways to test how well each of these stories resonates with survey respondents. For example, suppose you give someone two choices:

- A. Your current yearly income is \$50,000; others typically earn \$25,000.
- B. Your current yearly income is \$100,000; others typically earn \$200,000.

Suppose further that the survey instrument insists that prices of goods and services are the same in scenario A and scenario B (i.e., the purchasing power of money remains the same). What state of the world will people prefer, A or B? The answer is that roughly half the survey population will prefer choice A.<sup>4</sup> That is, survey populations seem quite heterogeneous, with half of the population being most concerned with their absolute income while the other half cares most about their income relative to others. Changing the nature of the good being consumed will affect the ratio of respondents preferring more relative resources to more absolute resources. Yet some people appear to be stubbornly oriented toward either absolute resources or relative resources even though such a focus may be disadvantageous in a particular context. For

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<sup>4</sup> Sara J. Solnick & David Hemenway, *Is More Always Better? A Survey on Positional Concerns*, 37 J. Econ. Behav. & Org. 373, 378 (1998)

example, in contemplating an outfit for a job interview, most respondents (62%) wanted to have a nicer suit than others interviewing for the job, but one-third of respondents preferred a nicer outfit in absolute terms. In contemplating how long one's daily commute would be, the overwhelming majority of survey respondents (79%) cared about the absolute commute time, but 18% said they cared most about how long their commute was relative to peers' commutes.<sup>5</sup>

Results from widely replicated ultimatum games provide more evidence suggestive of similar heterogeneity in orientations.<sup>6</sup> The set-up of an ultimatum game is familiar: A proposer is given some amount of money, and he offers a portion of it to a responder. If the offer is accepted, then the proposer and responder each get to keep the agreed upon percentages of the cash. If the offer is rejected, the entire amount is forfeited. A rational actor model would predict that any offer of a penny or higher would be accepted, but the experimental evidence reveals that offers below 40% are often rejected by the responder.<sup>7</sup> Responders become more likely to accept low offers when the stakes rise to several months' wages,<sup>8</sup> but even at very high-stakes ungenerous offers are frequently rejected.<sup>9</sup> For instance, with stakes approximating wages for 20 to 30 hours of work, Slovak responders rejected 40-60 offers nearly 14% of the time and approximately 25-75 offers 56% of the time.<sup>10</sup> In short, even high-stakes experimental settings prompt some individuals to expend costly resources sanctioning individuals who have appropriated a large share of a reward that might have been equitably split.

Notice again the heterogeneity in willingness to sanction proposers. It seems likely that the individuals focused more on absolute preferences comprise the individuals willing to accept small shares and those with a relative preferences orientation are much more likely to veto uneven proposed splits. There may be cultural variation in the strategies played in these ultimatum games. A small-scale study of the indigenous Machiguenga in the Peruvian Amazon

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<sup>5</sup> Sara J. Solnick & David Hemenway, *Are Positional Concerns Stronger in Some Domains than in Others?*, 95 Am. Econ. Rev. 147, 148 tbl. 2 (2005).

<sup>6</sup> The literature varies on the extent to which relative utility considerations are the most likely explanation for the results observed in ultimatum game experiments. Compare Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. Chi. L. Rev. 323, 343-44 (2001) (concluding that positional considerations explain sanctioning in ultimatum games), with Gregory Besharov, *Three Questions About the Economics of Relative Position: A Response to Frank and Sunstein*, 82 B.U. L. Rev. 1241, 1249 (2002) (suggesting that other explanations for ultimatum game behavior are more likely).

<sup>7</sup> Lisa A. Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 Econ. Inquiry 47, 48 (1999).

<sup>8</sup> *Id.* at 56-58.

<sup>9</sup> Robert Slonim & Alvin E. Roth, *Learning in High Stakes Ultimatum Games: An Experiment in the Slovak Republic*, 66 Econometrica 569, 574-75 (1998).

<sup>10</sup> *Id.* at 585.

found that among members of that group, offers below 20% were quite common, and even low offers were likely to be accepted by the responder.<sup>11</sup>

These sorts of results have shown up outside of experimental settings as well. To take one example of many, when San Diego, California opened up its fast-moving carpool lanes to drivers who had paid a toll, the carpoolers who suddenly had to share “their” lanes with non-carpoolers articulated divergent sentiments. Some based their objections on an absolute preferences framework: more cars in the carpool lanes meant carpoolers’ commutes would be lengthened.<sup>12</sup> But other carpoolers welcomed the toll-payers enthusiastically. These carpoolers felt richer precisely because the non-carpoolers using the lane had to pay a sum of money to enjoy the benefits that the carpoolers were already “freely” enjoying.<sup>13</sup> Robert Frank’s magisterial study of relative preferences found similar considerations of status relative to peers powerfully explained economic arrangements such as the commission structures for automobile salesmen,<sup>14</sup> the salaries of tenured professors,<sup>15</sup> and the proliferation of vice presidents at banks.<sup>16</sup>

On the basis of this and similar evidence, it seems likely that there is heterogeneity in most populations on the question of whether absolute preferences or relative preferences primarily motivates economic behavior. Frank and others have argued that particular goods are likely to be purchased by those seeking status, as opposed to absolute utility,<sup>17</sup> and they have noted a possible neurological basis for humans’ propensity to care about relative status.<sup>18</sup> Yet Frank and other social scientists have not emphasized the pluralistic nature of absolute and relative preferences.

Fascinatingly, a small literature in the field of marketing and consumer behavior – one that has been largely ignored by economists – strongly suggests that individuals differ in their level of status consciousness, that people are consistently status-conscious (or not), and that individuals’ responses to a test measuring status consciousness correlate with their revealed

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<sup>11</sup> Joseph Henrich, *Does Culture Matter in Economic Behavior? Ultimatum Game Bargaining Among the Machiguenga of the Peruvian Amazon*, 90 Am. Econ. Rev. 973, 977-78 (2000).

<sup>12</sup> Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 Ind. L.J. 1231, 1253 (2000). 1262-63

<sup>13</sup> *Id.* at 1254, 1262-63.

<sup>14</sup> ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* 75 (1985).

<sup>15</sup> *Id.* at 79-82.

<sup>16</sup> *Id.* at 99-102.

<sup>17</sup> See, e.g., Robert H. Frank, *How Not to Buy Happiness*, 133 Daedalus 69, 77-79 (Spring 2004); Richard H. McAdams, *Relative Preferences*, 102 Yale L.J. 1, 70-72 (1992).

<sup>18</sup> Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 Am. Econ. Rev. 137, 138-39 (2005).

preferences.<sup>19</sup> Survey respondents who scored high on the personality tests measuring status consciousness were also more likely to purchase designer sneakers, high-end beers, luxury cars, and join fraternities or sororities in college.<sup>20</sup> Levels of status-consciousness were statistically indistinguishable among populations of students in the United States, Mexico, and China.<sup>21</sup> It therefore seems plausible that there are basically coherent “absolute utilitarian” and “relative utilitarian” / status conscious types.<sup>22</sup>

I therefore want to make two defensible assumptions in this essay: (1) Individuals differ in their orientations toward absolute and relative preferences, and (2) People who are primarily concerned with relative utility in one setting are likely to be oriented toward relative utility in other contexts. My working hypothesis is that judges will display the same heterogeneity in responses when confronted with a clash between absolute preferences and relative preferences. To test that hypothesis, Part II will analyze a series of inheritance controversies in which judges have had opportunities to confront the issue squarely.

One task remains before we get to those inheritance cases. It is worth examining the absolute versus relative preferences question from a normative perspective. Regardless of the preferences of survey respondents, is there a “right” way to think about utility; one that the law should privilege? Are relative utilitarian preferences counterproductive, such that we might disregard them in the same way that some welfarists disregard the utility that a Nazi derives from beating a Gypsy?<sup>23</sup> In an important recent article, Nestor Davidson has argued that various aspects of property law, such as covenants facilitating the creation of common interest communities, public use tests enabling the state to relocate residents, and exclusionary zoning, promote positional competition.<sup>24</sup> He has suggested that such competition for status may be socially undesirable and that property law ought to try to curtail it, though he is sensitive to the pathologies that may prevent the state from doing so effectively.<sup>25</sup> Similarly, Barton Beebe has

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<sup>19</sup> Jacqueline K. Eastman et al., *Status Consumption in Consumer Behavior: Scale Development and Validation*, 7 J. Marketing Theory & Practice 41, 45-48 (1999).

<sup>20</sup> *Id.* The fascinating fraternity finding reinforces the author’s longstanding interest in the relationship between the Greek system and property theory. See LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 1-3 (2011) (using a study of the rush process in fraternities to begin his book on exclusivity and exclusion).

<sup>21</sup> Jacqueline K. Eastman et al., *The Relationship Between Status Consumption and Materialism: A Cross-Cultural Comparison of Chinese, Mexican, and American Students*, 5 J. Marketing Theory & Practice 63 (1997).

<sup>22</sup> Although no one in either literature has made the link, status consciousness and relative utilitarianism seem to be either identical or exhibit high levels of overlap. My only hesitation in equating status consciousness and relative utilitarianism is the correlation Eastman found between status-consciousness and materialism. Eastman, *supra* note 19, at 46. In theory, someone could be both materialistic and an absolute utilitarian. For a discussion of the psychology literature’s attitude toward personality coherence and consistency, see Daniel Cervone & Yuichi Shoda, *Beyond Traits in the Study of Personality Coherence*, 8 Current Directions in Psych. Sci. 27 (1999).

<sup>23</sup> For a law-oriented introduction to the debate within utilitarianism, see James S. Fishkin, *Justice versus Utility*, 84 Colum. L. Rev. 263, 265-68 (1984).

<sup>24</sup> See Davidson, *supra* note 3, at 805-12.

<sup>25</sup> *Id.* at 812-16.

suggested that, with respect to branded goods, the arms race among those oriented toward relative preferences for positional goods is undesirable. He argues that intellectual property law, especially trademark law, might be weakened so as to restrain zero-sum competition for status.<sup>26</sup>

I am not as convinced that a welfarist can conclude that trying to stamp out relative preferences is welfare-enhancing, even in a wealthy society that scores well on measures of Gross Domestic Product and human capabilities. In the short run, the zero sum nature of relative preferences might mean that making Jack better off causes relative utilitarian Jill to feel worse off. But the long-run effect of Jill's unhappiness is indeterminate. Perhaps it motivates Jill to work harder or innovate more, increasing the odds that she will compose a song or cure a disease.<sup>27</sup> (She might even discover a foolproof way to convert relative utilitarians into absolute utilitarians!) Widespread complacency in a rich society filled with absolute preference-oriented individuals could, by the same token, impoverish future generations. We simply do not know enough about tradeoffs between jealousy and incentives to work, nor about whether those tradeoffs differ between relative and absolute utilitarians. Moreover, Richard McAdams has argued persuasively that competition for positions of high status largely explains the creation and enforcement of social norms.<sup>28</sup> It is hard to tell a story about how competition for absolute resources could have similar effects. In short, although arms races for positional goods may be wasteful in a static environment, that fact does not demonstrate that the law should seek to channel consumption away from positional goods.

Before concluding that the state should try to socially engineer relative preferences out of existence, we might also want to get a better handle on the distribution of talents in a society, the tendency of particular economic systems to reward those talents differentially, the dynamic effects of redistributive taxation on wealth creation, and the extent to which the relative preferences of consumers in one country is influenced by the purchasing patterns of consumers in another country. Little wonder, then, that a review of twentieth century policy interventions designed to curtail competition for positional goods concluded that the policies had basically failed, though the author did not conclude that the failure of such policies is inevitable.<sup>29</sup> To summarize my disagreement with Davidson and especially Beebe, then, I believe we need to be

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<sup>26</sup> See Barton Beebe, *Intellectual Property and the Sumptuary Code*, 123 Harv. L. Rev. 809 (2010). Context matters in evaluating Beebe's normative argument. It is instructive that he writes about competition for scarce, branded luxury goods in a modern, industrialized society. Were we to contemplate, say, competition for shelter in modern Haiti, we might prefer that the relative utilitarians outnumber absolute utilitarians in the population. Given the widespread poverty in Haiti and the low quality of its housing stock, a population comprised solely of absolute utilitarians would contain a far greater number of unhappy people than a population comprised entirely of relative utilitarians. In the latter society, at least some segment of the population would feel happy with their houses.

<sup>27</sup> See McAdams, *supra* note 17, at 59-62.

<sup>28</sup> See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

<sup>29</sup> Roger Mason, *Conspicuous Consumption and the Positional Economy: Policy and Prescription Since 1970*, 21 Managerial & Decision Econ. 123, 128-31 (2000); see also McAdams, *supra* note 17, at 72-103 (discussing the successes and failures of law's efforts to curtail competition for positional goods more generally).

skeptical about both the law's ability to effectively restrain relative preference impulses, and the ultimate desirability of that enterprise.

Having voiced that concern, I now want to gallop down a path quite different from the one taken by Davidson, Beebe, and Frank. Whereas they focused on the existence of relative preferences in various domains and asked what should be done about them, I want to emphasize the non-universality of relative preferences, and examine how the cohabitation in our society of relative utilitarians, absolute utilitarians, and people feeling the tug of both frameworks affects property doctrine and judicial rhetoric. Let us begin with battles over dead people's stuff.

## II. Appellate Case Law Considering Dual Inheritance from Adoption Within the Bloodstream

Sibling resentments are a topic as old as our species. Themes of familial jealousy provide much of the Bible's most compelling drama, especially in its opening chapter. Cain's resentment of Abel began when God accepted Abel's burnt offering of a sheep willingly, while rejecting Cain's offering of vegetables. This prompted a "very angry" Cain to slay his brother in a field.<sup>30</sup> Esau had a more compelling grievance against his brother Jacob: Jacob convinced his starving elder brother to exchange his birthright for a bowl of lentil stew.<sup>31</sup> Not long after, Jacob conned his father Isaac into bestowing upon Jacob a blessing that had been intended for Esau.<sup>32</sup> Robbed of his blessing, and cheated of his birthright, Esau vowed to kill Jacob as soon as Isaac died.<sup>33</sup> Yet Jacob eventually avoided Abel's fate by placating Esau with a gift: a great deal of livestock.<sup>34</sup> Jacob's own children would hardly be immune to brotherly treachery. Joseph was Jacob's favorite son. Joseph's brothers resented his special relationship with their father, and they coveted the coat that Jacob gave Joseph. They therefore faked Joseph's death and sold him into slavery for twenty pieces of silver.<sup>35</sup> After Joseph became rich and powerful in Egypt, he eventually forgave his brothers and treated them well, though he conspicuously gave more food, clothing, and silver to his little brother Benjamin, who was uninvolved in his abduction.<sup>36</sup> And so on and so forth.

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<sup>30</sup> Genesis 4:2-4:9.

<sup>31</sup> Genesis 25:29-25:34.

<sup>32</sup> Genesis 27:1-27:30.

<sup>33</sup> Genesis 27:41.

<sup>34</sup> Genesis 32:15-32:16 ("Two hundred she goats, and twenty he goats, two hundred ewes, and twenty rams, thirty milk camels with their colts, forty cows, and ten bulls, twenty she asses, and ten foals.").

<sup>35</sup> Genesis 37: 3-29.

<sup>36</sup> Genesis 43-45:

It is not just to the book of Genesis that those interested in sibling resentments, parental favoritism, and unintended inheritances may turn. Nineteenth and twentieth century law reports provides those same sorts of tales in abundance, and the law of inheritance on these sorts of facts causes jurists to struggle fiercely with their brethren. In this essay our focus shall be on cases involving unforeseen adoptions, especially adoptions within the bloodstream, which in turn force courts to confront the question of whether a particular Benjamin is entitled to more Benjamins than his kin.

It is worth contrasting two exemplars. The first case reflects a strong absolute preferences orientation, and the second reflects a strong relative preferences orientation. *In re Benner's Estate*, a 1946 opinion from the Supreme Court of Utah can get us started. Martha Ann Benner had one daughter, and that daughter had three children of her own in turn. After Martha's daughter died, Martha adopted one of her grandchildren, Henry Benner. Martha then died intestate. A legal question immediately arose as to how Henry should be treated under the intestacy statute. Should he be treated as a son? As a grandson? As both a son and a grandson? As a son, he would take half of Martha's estate, with his birth sisters splitting the other half. As a grandson, he would take one-third of Martha's estate. And if he remained both a son and a grandson, then he would take two-thirds of Martha's estate (one-half as a son plus one-sixth as one of three grandchildren). Which should it be?

Henry argued that he should be treated as both a son and a grandson, but the lower court decided that he should be treated only as a son, taking half the estate.<sup>37</sup> The Supreme Court of Utah reversed, holding instead that it was appropriate to treat Henry as both a son and a grandson. The court began with the adoption statute and found the statute unclear as to how adoptions of grandchildren should be treated for the purposes of inheritance law.<sup>38</sup> The court then noted that several earlier cases (which we shall review in turn) dual capacity inheritances had been deemed inequitable,<sup>39</sup> but decided to reject such cases on several grounds, the most interesting of which is the following: "Had a person not a relative been adopted by decedent, the other heirs would not have had one person less in their own family entitled to take by representation and they would therefore have gotten no more than they will now."<sup>40</sup> With this sentence the court abstracts from a dispute in which both absolute and relative preferences considerations might explain the probate challenge's motivation into one where the analytical issue concerns relative preferences alone. In so doing, the court weakens the moral authority of the beneficiary who argues that he was cheated out of a fair share of the inheritance. Not every court contemplating the issue of double shares to adoptees makes this move, and the failure to follow suit impoverishes those courts' discussions of the issue.

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<sup>37</sup> *In re Benner's Estate*, 166 P.2d 257, 257 (Utah 1946).

<sup>38</sup> *Id.* at 258-59.

<sup>39</sup> *Id.* at 259.

<sup>40</sup> *Id.*

To fully chase down the *Benner's Estate* clever argument, we should follow it to its natural conclusion. Each of Henry's birth sisters would get one-sixth of Martha's estate by virtue of the court's ruling that Henry was entitled to take as both a son and as a grandson. Suppose that Martha had adopted a young Richard Posner (born January 11, 1939) instead of Henry. Under those circumstances, Henry and his birth sisters would have each wound up with one-sixth of the estate, and Posner would have taken half of Martha's estate (presumably held in trust until he could put it to its highest and best use). So the Utah court was saying to the birth sisters, essentially, "It's none of your business whether Henry gets one-sixth or two-thirds. You should care only about what you receive, not what you receive in relation to others." Translation: The sisters contesting the will should focus only on absolute preferences, not relative preferences. Under the absolute preferences framework, they lose.

To call this argument clever is not to suggest that the court's reasoning is airtight. Martha manifested an obvious intention to adopt neither Richard Posner nor any other non-kin youngster. Had she known that the adoption of Henry would have no legal effect on his future inheritance, it is unlikely that she would have instead substituted another child as her adoptive target. Indeed, the difference between treating Henry as both a son and a grandson, rather than as a son only, was meaningful for the sisters in absolute utility terms. Henry the mere son would have taken half Martha's estate, leaving each of his birth sisters with one-fourth of the inheritance. Without confronting this argument on its own terms, the court offered this somewhat on-point response: "when a person adopts a child an act of favoritism is shown thereby."<sup>41</sup> But it remains unclear whether Martha's actions were motivated by love for Henry, some animosity toward his siblings, or another factor (perhaps Henry was the youngest and least independent of the siblings).

Writing as the sole dissenter in *Benner's Estate*, Justice Turner objected with six-shooters blazing. To Justice Turner, a dual inheritance like the one taken by Henry "will tend to destroy the proper relationship which should exist between one adopted and children of the parent's blood."<sup>42</sup> That wasn't the end of it for Justice Turner, whose impassioned plea on relative utility's behalf I will now quote at length:

After the relationship of parent of adoption and child is created, can there by anything of greater moment for a child's happiness and general welfare than the love and respect of brothers and sisters of adoption and the love and respect of the boys and girls born of his own natural parents? If we are concerned primarily with the welfare of the child we must be concerned with the preservation of these relationships. They cannot exist when the adopted child gives evidence of such a covetous nature that he would take a dual inheritance at the expense of these.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 260 (Turner, J., dissenting).

To approve the inheritance from the parent of adoption to the adopted child by succession through the child's deceased mother is inconsistent with the paramount relationship of adoption. We can rejoice that cases identical with this are rare, not because grandchildren are seldom adopted by the grandparent, but that the child of adoption seldom seeks a greater inheritance than that of natural children.

The desire for more is evidence of greed. Greed is a vicious disease. At first it develops slowly and is often unobserved. When in its obvious state it becomes as malignant as internal cancer. Its germs may spread like a plague. Blight of the malady is all about us. Surely greed deserves no sustenance from a court of justice.<sup>43</sup>

Cancer. Plague. Greed. Malignancy. There is a lot of emotion evident in Justice Turner's choice of metaphors. Query whether he creates as much light as heat. The result below, which Justice Turner would like to see affirmed, will still leave Henry with twice the share of Martha's estate that each of his sisters receive. Might not such an arrangement produce the familial jealousy and discord that so troubles Turner? And siblings in Henry's circumstances would often be minors, whose executors would be calling all the shots and could shoulder the blame for any greed. Furthermore, what if Henry fully recognized the jealousies that seeking two-thirds of Martha's estate might prompt, but decided that the benefits were worth the costs? Finally, perhaps Justice Turner had causation backwards: Maybe requests for a dual inheritance are not a cause of familial discord; they are rather a consequence of it. For all we know, Henry's older siblings abandoned him upon their mother's death, and this abandonment may have prompted both Martha's decision to adopt him and his desire for retribution.

If the majority opinion in *Benner's Estate* exemplifies the rational actor model, then *Unsel v. Meier* typifies the approach of focusing on relative preferences.<sup>44</sup> *Unsel* amplifies the arguments articulated by Justice Turner, stripping them of some of their emotional valence but elevating them to the level of public policy concerns. *Unsel* also involves an adoption within the bloodstream. Instead of an intestacy case, however, *Unsel* involved a probated will that tried to create a fee tail.

John T. Hart had six children, though his son Harry predeceased him. Under the terms of the will, John T. wanted each of his five surviving children and his two grandchildren via Harry to take a share of his extensive real estate holdings in fee tail. John died in 1966. By 1992, the prospects for his eighty-year-old daughter, Vivian, to produce biological offspring were looking dim.<sup>45</sup> So Vivian adopted her niece, Judith. Judith's mother, Lena, was Vivian's sibling. Judith

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<sup>43</sup> *Id.* at 260.

<sup>44</sup> 972 S.W.2d 466 (Mo. Ct. App. 1998).

<sup>45</sup> *But cf.* Genesis 17:17 – 17:19 (noting that Sara was 90 years old at the time of Isaac's conception).

was Lena's only daughter, but Lena had a surviving son as well, one James K. Hampton.<sup>46</sup> After Vivian died in 1996, Judith was her only issue, and the question arose as to whether Judith would be entitled to a fee simple interest in the real estate held by Vivian immediately as well as the expectation of receiving half of Lena's interest upon Lena's death.<sup>47</sup>

Perhaps seeking to avoid the sort of moral indignation expressed by Justice Turner's dissent, Judith foreswore any intention to take via her biological mother, Lena. All she sought was Vivian's interest in the real property. She argued that under Missouri's adoption statute her adoption by Vivian severed any legal connection between her and Lena, leaving her birth brother, James, to inherit the entirety of Lena's interest in the land. Judith's relatives, acting as appellants, argued that, to the contrary, Missouri law would not strip Judith of the ability to take via Lena, permitting Judith a "double share" of John Hart's real estate.<sup>48</sup> The *Unsel* court concluded that the adoption would not extinguish Judith's right to take property via Lena.<sup>49</sup> The court therefore had to confront the double share issue. Citing language from an earlier case, the court stated the following:

It is no part of the public policy of the state that adoption should operate as an instrumentality for dual inheritance, with resulting animosity and litigation among those whom a testator provided in his will would share with equality and per stirpes. And the denial of dual inheritance under these circumstances is not opposed to the public policy of promoting the welfare of adopted children.<sup>50</sup>

As the *Unsel* court saw it, then, to "recognize Judith's adoption in relation to the entailed interest would enable her to receive a double share and would violate the expressed public policy of this state."<sup>51</sup> Perhaps to help insulate its opinion from further appellate review, the *Unsel* court then reached an independent basis for the decision apart from public policy, which is that permitting Judith to take Vivian's share would contravene John's intent that his children and grandchildren each be treated equally.<sup>52</sup>

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<sup>46</sup> *Unsel*, 972 S.W.2d at 469.

<sup>47</sup> Missouri law converts fee tails into "an estate for life in the first taker, with the remainder in fee to the person to whom the estate tail would, on the death of the first taker, pass according to the course of the common law. Consequently, by these wills and this statute, Lena held a life estate interest in the various tracts and the heirs of her body took the contingent remainder interests in fee." *Unsel*, 972 S.W.2d at 470 (quoting *Davidson v. Davidson*, 167 S.W.2d 641, 642 (Mo. 1943)).

<sup>48</sup> *Id.* at 470.

<sup>49</sup> *Id.* at 471.

<sup>50</sup> *Id.* at 471-72 (quoting *Mississippi Valley Trust Co. v. Palms*, 229 S.W.2d 675, 681 (Mo. 1950)). See also *Palms*, 229 S.W.2d at 681 ("We find nothing in this will to indicate any intention that one grandchild, or that the children of any one of testator's children, should have more than one share of the Dickson trust estate. Any intention so capricious and inequitable cannot be read into the will.").

<sup>51</sup> *Unsel*, 972 S.W.2d at 472.

<sup>52</sup> *Id.*

Under *Unsel v. Meier*, relative preferences have been enshrined as a tenet of Missouri public policy. While it is true that some of John’s offspring would have gotten less of his land had the decision come out the other way, at least two (Judith and James) saw their respective interests in the real estate shrink from one-sixth each to a little over one-twelfth. It is by no means clear that John T’s intent would have favored one outcome over the other. Moreover, it is worth running the *Benner’s Estate* thought experiment on the facts of *Unsel*. What would have happened if Vivian had adopted a stranger, rather than her niece? That stranger would have wound up with a one-sixth interest in John’s real estate. Given a choice between two of his natural grandchildren each receiving a one-sixth interest in his real estate and an adopted adult outside his bloodstream receiving that one-sixth interest, can it be supposed with confidence that John would have preferred the former situation over the latter? The reverse seems more plausible.

The only way in which it makes sense to say that an adoption within the bloodstream violates public policy more than an adoption outside the bloodstream is if one accepts a strong version of the relative utility story. But grafting such a view onto John’s intentions goes beyond the evidence available. While Judith’s kin no doubt resented the possibility of her gaining a double recovery, they might express even more hostility to an interloper who was adopted by an 80-year old woman, largely for the purposes of depriving Vivian’s nieces and nephews of real property to which they would otherwise be entitled. Yet the effect going forward of the rule in *Unsel* is to encourage precisely those sorts of outside-the-bloodstream adoptions of adults.

A survey of similar cases reveals a similar fragmentation of judicial opinion. As previously indicated, none of them follow *Benner’s Estate* down the path of comparing an in-the-bloodstream adoption to a hypothetical outside-the-bloodstream adoption. Like their Show Me State brethren, the judges of the New Hampshire Supreme Court viewed a dual inheritance as an “extreme . . . situation” raising “unnatural and abnormal possibilities.”<sup>53</sup> The court therefore embraced a clear statement rule: dual inheritances would only be recognized by the court where the will spelled out the testator’s preference for a double share.<sup>54</sup> This canon of construction presuming no double shares mirrors the public policy interest invoked in *Unsel*. In *Morgan v. Reel*, the Pennsylvania Supreme Court held that adoptions were intended to “put the adopted child on the same footing as actual children . . . but not on any more favorable footing. This would be the natural and presumed intent.”<sup>55</sup> It therefore held that a granddaughter who became the testator’s daughter by adoption would inherit only as a daughter, not as a daughter and granddaughter. This result, of course, was the outcome sought by Judith in *Unsel*, one the court

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<sup>53</sup> *Young v. Bridges*, 165 A. 272, 277 (N.H. 1933).

<sup>54</sup> *Id.* at 276.

<sup>55</sup> 62 A. 253 (Pa. 1905).

there refused to authorize. The Supreme Court of Indiana embraced similar reasoning in *Billings v. Head*.<sup>56</sup>

*Delano v. Bruerton*, a Massachusetts case, embraced the same sort of reasoning, holding that an adoption could make the adoptee as well off as his new siblings, but no better off.<sup>57</sup> It therefore rejected the demand of the testator's grandson by birth / son by adoption for a double share of the testator's estate. To the court, "the adopted child would almost invariably take more as an adopted son than he could by right of representation or inheritance through his parents."<sup>58</sup> Happily, the court did not stop there. Instead, it paused to consider a hypothetical put forth by counsel, one that would make any law professor proud:

We think the only exception is the one supported by the counsel for the guardian, which is that a man who has had four children adopts his great-grandson, who by the intermarriage of cousins is the only issue of two of the children of the adopting parent. In that case he would take more as a great-grandson by right of representation of his parents than he would as an adopted child of the intestate.<sup>59</sup>

Alas, the court's response was unsatisfying. It deemed the hypothetical "so extremely unlikely to occur that it cannot have much weight in the interpretation of the statute."<sup>60</sup> A pity. Writing in the *Vanderbilt Law Review*, Jan Ellen Rein argued that such cases reach the correct result because most testators would not have contemplated the possibility of "manipulative adoptions" at the time they executed their wills.<sup>61</sup> But none of these jurisdictions place legal obstacles in front of the testator who wishes to adopt someone outside the bloodstream.

Contrary authorities are as numerous. The Supreme Court of Kansas, while recognizing the controversy associated with adoptees receiving double shares insisted that such "inequality . . . is created by the statute."<sup>62</sup> After quoting at length from the Indiana, Pennsylvania, and Massachusetts opinions, the Kansas court found their reasoning "unconvincing."<sup>63</sup> The Illinois courts did a better job of explaining their rejection of the anti-double share rule. *In re Estate of Cregar* asked, in essence, "what's the problem with testamentary inequality, particularly where different generations are concerned?" After all, said the court:

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<sup>56</sup> 111 N.E. 177, 177-78 (Ind. 1916).

<sup>57</sup> 20 N.E. 308, 309 (Mass. Sup. Jud. Ct. 1889).

<sup>58</sup> *Id.* at 309.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 Vand. L. Rev. 711, 806-09 (1984).

<sup>62</sup> *In re Bartram's Estate*, 198 P. 192 (Kan. 1921).

<sup>63</sup> *Id.* at 194.

Our present Probate Act which provides for distribution to descendants of collateral kindred per stirpes has a certain element of inequality built into it. If one sister or brother of the intestate has one child whereas another sister or brother has two children, then a descendant of the latter sister or brother would receive only one-half as much as the descendant of the first sister or brother. Therefore, there seems to be no clear-cut legislative policy in Illinois which opposes unequal sharing among nieces or nephews of an intestate.<sup>64</sup>

The *Cregar* court may have pulled its punches. While equal distribution among children is common in the United States, it is hardly universal. Depending on the study, somewhere between half and 16% of all testators with multiple children provide for unequal shares to their children.<sup>65</sup> And the United States is far more tolerant of unequal shares than some other democracies. For example, Norway requires that two-thirds of a decedents' estate be shared equally among siblings where the decedent is survived only by multiple children.<sup>66</sup> The remaining third can be divided as the testator sees fit.

In short, a review of the authorities reveals divergent approaches.<sup>67</sup> Some of the courts think that holding a plaintiff's share constant, it should make no difference to the plaintiff whether a particular relative gets a larger share of a familial inheritance. Other courts view double shares as a result so certain to poison familial relationships that state public policy ought to prohibit such arrangements in the absent of a clear statement by the testator that such a distribution was intended. This lack of a uniform reaction among judges mimics the lack of consensus among respondents to social science surveys. Judges, like people in general, seem to be evenly divided, with approximately half adopting results congenial to absolute preference orientations and the other half opting for outcomes congenial to relative preference orientations. To be sure, hints of absolute and relative preferences are prominent in some cases, yet absent in others. Some judges think of themselves as engaging in a purely formalist exercise, but both the formalist opinions and the ones that invoke policy interests seem to split roughly down the middle.

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<sup>64</sup> In re Estate of Cregar, 333 N.E.2d 540, 545 (Ill. Ct. App. 1975). The Supreme Court of Iowa took a different tack toward justifying double shares, noting that the natural parents of adopted children sometimes do not consent to the severance of the parent-child relationship, which made it strange to suppose that an adoption terminated the adoptee's right to inherit from her biological parents. Wagner v. Wagner, 50 Iowa 532, 534 (1879). The court thus turned the issues into a question of biological parents' rights. Absent any indication of an intent to disinherit adopted children, the court refused to read one into the statute.

<sup>65</sup> B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 J. Pol. Econ. 733, 734 n. 1 (2003).

<sup>66</sup> Elin Halvorsen & Thor O. Thoreson, Parents' Desire to Make Equal Inter Vivos Transfers 3 (CESifo Working Paper No. 2468) (Nov. 2008).

<sup>67</sup> See Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception be Extended?*, 77 Cornell L. Rev. 1188, 1217-18 (1992).

In light of this heterogeneity, it is perhaps surprising that so many judges use emotionally charged rhetoric when writing opinions resolving these inheritance cases. Though the survey data does not tell us this, it is possible that individuals who think primarily in terms of absolute preferences have a hard time thinking in terms of relative preferences, and vice versa, though there are surely some who vacillate between these approaches. To speculate further, it is possible that the sort of disconnect that shows up in both the survey responses and the case law is a “cultural cognition” effect, similar to the ones identified by Dan Kahan, Don Braman and their co-authors.<sup>68</sup> Their work identifies a number of commonly recurring cultural orientations, each of which perceives risks or ideological issues in ways common to those who share the same orientation but fundamentally different from those who share alternative orientations. Although a focus on absolute preferences versus relative preferences / status consciousness is not part of the cultural orientations they develop in their work, it is conceivable that the orientation to value one or the other correlates with other aspects of particular cultural orientations.

### III. Extensions to Other Aspects of Property Law

The underlying issue of relative preferences and absolute preferences is by no means limited to inheritance. Let us begin with the law of takings. Under the Constitution’s Fifth Amendment, private property may not be taken for public use without just compensation. The primary test that determines whether a government regulation has gone so far as to amount to an unconstitutional taking of private property is the *Penn Central* test.<sup>69</sup> The first prong of the *Penn Central* test directs judges to focus on the “economic impact of the regulation on the claimant.”<sup>70</sup> The greater the loss the claimant, the more likely a regulation amounts to a taking. The test is oriented toward absolute losses, though those losses are expressed as a fraction of the claimant’s ownership interest.<sup>71</sup> Hence, an owner who has suffered a 90% diminution in value is quite likely to prevail under the *Penn Central* test, even if the dollar amount lost is relatively small, say a few thousand dollars. By contrast, an owner who loses tens of thousands of dollars in value from a multi-million dollar property is almost sure to lose under *Penn Central*.

As *Penn Central* jurisprudence has evolved, the doctrine has shifted from one focused largely on considerations of absolute preferences to those invoking notions of relative preferences. *Penn Central* itself hinted that these considerations would be relevant when it noted that the train station whose owners claimed that the application of the city’s historic preservation

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<sup>68</sup> See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837 (2009); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291 (2003).

<sup>69</sup> Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

<sup>70</sup> *Id.* at 124.

<sup>71</sup> *Id.* at 129-31.

law amounted to a taking was one of more than 400 parcels in New York City's whose development potential was similarly restricted.<sup>72</sup> Some subsequent Supreme Court cases and influential academic commentary have come to understand *Penn Central*'s test as a proxy for whether "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."<sup>73</sup> We might understand this shift toward thinking about how much the claimant is being imposed upon compared to others as an expression of renewed interest in the relative preferences trope. To be sure, there are other reasons to care about singling out – for example, singling out might indicate a breakdown in normal local politics that imposes "equal protection" sorts of harms.<sup>74</sup> But it also may be motivated by less well-thought-through relative utility instincts.

Other branches of takings law similarly implicate both absolute preferences and relative preferences. Justice Scalia's famous majority opinion in *Lucas v. South Carolina Coastal Council*,<sup>75</sup> nods in both directions simultaneously. The *Lucas* test provides a bright-line rule, and an exception. A *per se* taking occurs where the state deprives an owner of (rule) "all economically beneficial use" of land, unless (exception) the deprivation inheres "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The bright-line rule part of the *Lucas* test is oriented toward absolute preferences – a 100% loss in the value of land is a taking. But the exception is heavily relativistic. In determining whether the state's justification for a wipeout regulation obviates the need to compensate, the courts are to examine not only the contents of state law as it existed at various points in time, but also whether the Smiths are being treated worse than the Joneses. In the Court's words, "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."<sup>76</sup>

There are several possibilities to explain the "background principles" exception. One is that the Court seeks to make it more painful for the state to regulate aggressively without paying compensation – the Court is essentially preventing the state from treating grandfathered prior users more favorably than newcomers. But a conceivable alternative explanation for – and an indubitable effect of – the Court's language is to make the payment of compensation inevitable in those instances where both absolute utilitarian and relative utilitarian owners would be demoralized by the state's regulation. Perhaps *Lucas*'s previously unrecognized genius is that

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<sup>72</sup> *Id.* at 132.

<sup>73</sup> *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (citing *Penn Central Transp. Co.*, 438 U.S. at 123-25); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (identifying "singling out" as a hallmark of takings); Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1344-48 (1991) (discussing the nuances of singling out in takings law).

<sup>74</sup> Levmore, *supra* note 73, at 1344-46.

<sup>75</sup> 505 U.S. 1003 (1992).

<sup>76</sup> *Id.* at 1031.

the rule only applies in the “relatively rare situation”<sup>77</sup> in which landowners of any stripe would be fighting mad.

Some pockets of state constitutional takings law more closely resemble inheritance law, where absolute and relative preferences do not co-exist peacefully, but rather undergird dueling majority and dissenting opinions. A fine example of the absolute preferences / relative preferences split in takings law is *San Remo Hotel v. City and County of San Francisco*.<sup>78</sup> In that case the California Supreme Court considered a San Francisco ordinance that required the owners of about 500 residential hotels in the city to either maintain existing units that housed low-income occupants or pay a fee to the city’s residential hotel preservation account.<sup>79</sup> The owners of the San Remo Hotel wanted to convert the building from one that housed some long-term residents into one that catered exclusively to short-term tourists.<sup>80</sup> The city required them to obtain a conditional use permit before permitting the conversion, and green-lighted the conversion only after the owners paid \$567,000 into the residential hotel preservation account. The owner paid this fee under protest and then sued, alleging that the city had taken its property in violation of the state constitution’s takings clause.<sup>81</sup>

Then-Justice<sup>82</sup> Janice Rogers Brown viewed the city’s extraction of \$567,000 as a taking. As Brown’s dissenting opinion described the case, it was unconscionable for the city as a whole to place the burden of addressing the community’s low-income housing needs on 500 residential hotel owners who “certainly did not cause poverty in San Francisco.”<sup>83</sup> What’s most striking about Brown’s eloquent opinion is its unrelenting focus on the “singling out” inquiry. In her view:

No matter the analysis, the facts of this case come down to one thing – the City and County of San Francisco has expropriated the property and resources of a few hundred hotel owners in order to ameliorate – off budget and out of sight of the taxpayer – its housing shortage. In short, this ordinance is not a matter of efficiently organizing the uses of private property for the common advantage; instead, it is expressly designed to shift wealth from one group to another by the raw exercise of political power, and as such, it is a *per se* taking requiring compensation.<sup>84</sup>

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<sup>77</sup> *Id.* at 1017.

<sup>78</sup> 41 P.3d 87 (Cal. 2002).

<sup>79</sup> *Id.* at 108.

<sup>80</sup> *Id.* at 91.

<sup>81</sup> *Id.* at 122 (Brown, J., dissenting).

<sup>82</sup> Brown moved from the California Supreme Court to the D.C. Circuit in 2005.

<sup>83</sup> *Id.* at 121.

<sup>84</sup> *Id.* at 125-26 (Brown, J., dissenting).

Notice what Brown leaves out. Because her emphasis is on how the hotel owners fare *relative* to the taxpayers and other landowners of San Francisco, Brown barely mentions the \$567,000 payment. We do not know whether the payment represents a large or a small portion of the value of San Remo Hotel's property. We do not know whether such a payment made a small dent in the owner's cash flow or rendered the conversion project unprofitable.<sup>85</sup> Because Brown would like to replace the balancing inquiries from Supreme Court cases like *Penn Central* or *Nollan / Dolan* with a new per se test, inquiries like the extent of the diminution in the owner's property value, drop out of the equation. So too does any consideration of whether the city is requiring the owners to maintain an existing use, versus engage in a new use – Justice Brown says such considerations are irrelevant.<sup>86</sup> Because “the City has essentially said to 500 unlucky hotel owners: We lack the public funds to fill the need for affordable housing in San Francisco, so you should solve the problem for us by using your hotels to house poor people” the city ordinance was unconstitutional on its face.<sup>87</sup>

The majority opinion in *San Remo* focused much less on the relative preferences of the hotel owners as compared with other San Francisco voters and property owners. Rather, its focus was on the absolute burdens placed on the plaintiffs, the extent to which the regulation required a continuation of the owners' prior uses of the land, and the practicalities of the situation. Writing for the majority, Justice Werdegar noted that how much the particular plaintiffs were losing remained the relevant calculus: “the HCO neither targets an arbitrarily small group of property owners, nor deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face.”<sup>88</sup> The question of how much money San Remo lost, a question ignored by Justice Brown, is deemed a central inquiry by Justice Werdegar. Similarly, the majority emphasized that, as in the *Penn Central* case itself, the San Remo Hotel was being asked to continue an existing use that was presumably profitable.<sup>89</sup> To the majority, considerations of relative preferences were unlikely to be decisive. It did not matter that only 500 owners were being singled out for a disparate burden in the case at bar, because the HCO should not be looked at in isolation. Rather, it should be understood as

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<sup>85</sup> One might infer that San Remo's payment of the \$567,000 fee to the city, followed by the commencement of the suit suggested that the project would still be profitable after the fee was paid. But one cannot be sure of this, since it is possible that the owner decided that (1) the prospects of prevailing in litigation were good, and (2) the costs of delaying the conversion project until after a final resolution of their claims would be prohibitive.

<sup>86</sup> *Id.* at 127.

<sup>87</sup> *Id.* at 127-28.

<sup>88</sup> *Id.* at 109 (maj. op.).

<sup>89</sup> *Id.* (“Also, like the landmarks law upheld in *Penn Central*, the HCO allows the property owner to continue the property's preordinance use unhindered: like the landmarks law, therefore, the HCO ‘does not interfere with what must be regarded as the property owner's primary expectation concerning the use of the parcel.’”).

part of a much larger system of government burdens and benefits that should hopefully balance out over the long haul.<sup>90</sup>

Clashes between relative preferences and absolute preferences arise in the law of easements too. Take the casebook staple of *Brown v. Voss*.<sup>91</sup> In that case, Brown had an express easement to cross Voss's land (parcel A) for the purposes of "ingress to and egress from" parcel B. Brown then purchased parcel C, which abutted parcel B, and began using the easement to construct a home that straddled the property line between parcels B and C. After bad blood developed between the two neighbors, Voss sued Brown for easement misuse. He argued that while Brown was entitled to use the easement to reach parcel B, any use of the easement to reach the larger combined parcel exceeded the scope of the easement. The Washington Supreme Court agreed with Voss that Brown's actions amounted to easement misuse, though it affirmed the lower court's denial of injunctive relief.

The famous dispute was exacerbated by Brown's strongly held view that it was completely unreasonable for Voss to care whether Brown used their easement to reach parcels B and C or just parcel B.<sup>92</sup> Asked on cross-examination whether he had ever asked Voss's permission to use the easement for the benefit of parcel C, Brown answered: "Why should I?"<sup>93</sup> Once Brown arrived at parcel B via the easement, what possible basis could Voss have for caring whether Brown continued on to the adjacent parcel C? Brown thought in terms of absolute preferences. Voss, by contrast, was offended that Brown never asked him for permission to expand the scope of the easement and never communicated with Voss about his plans to build a house straddling the boundary of both parcels.<sup>94</sup> It is not accurate to suggest that relative preference considerations cleanly motivated Voss. While he understood the black letter rule deeming Brown's use of the easement to reach parcel C a trespass, he seemed more concerned with what he perceived as Brown's arrogance than with anything else. But Voss plainly didn't approach the dispute in the same absolute preference terms as Brown. It seems plausible that the same sorts of absolute-preferences versus relative-preferences disconnects that emerge in judicial opinions might explain why particular controversies develop into the sorts of intractable disputes that result in litigation.

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<sup>90</sup> *Id.* ("Thus, the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to properly from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.").

<sup>91</sup> 715 P.2d 514 (Wash. 1986) (included in JESSE DUKEMINIER ET AL., PROPERTY 820-825 (7<sup>th</sup> ed. 2010)).

<sup>92</sup> Elizabeth Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 Cardozo L. Rev. 1445, 1467-68 (1995).

<sup>93</sup> *Id.* at 1474.

<sup>94</sup> *Id.* at 1484-89.

*Brown v. Voss* splits the difference between the relative preferences and absolute preferences approaches. On the one hand, the court held that the use of the easement to benefit the enlarged parcel was an easement misuse (a sort of trespass.) At the same time, the court held that Voss was not entitled to an injunctive remedy to cure the trespass, based on a balancing of the equities. In cases involving technical easement misuse, courts ordinarily hold that property rights to exclude ought to be protected with property rules.<sup>95</sup> The law of easement misuse thus exhibits an orientation toward relative utility considerations. Yet the *Brown* court seemed to feel that no judicial resources should be devoted to the ongoing enforcement of an injunction in a case where the entirety of the harm seemed relative, not absolute. At the same time, the court refused to embrace a bright-line “this is not a trespass rule,” perhaps understanding implicitly that the use of an easement to benefit a larger dominant estate will sometimes impose higher absolute costs of the owners of the servient tenement. As the size of a dominant parcel grows, the burden on the servient parcel ordinarily increases.

*Brown* is not the only case in which a strange remedy hints at conflicts among judges or panels that feel the tug of both absolute and relative utility considerations. Take *Woodricker v. Wood*, a 1994 Ohio controversy that is the principal case on the law of waste in the Dukeminier, Krier, Alexander, and Schill casebook.<sup>96</sup> *Woodricker* concerned an old barn that straddled the boundary between two plots of land. One plot of land was owned by a mother (Wood) and her son. The other plot of land belonged to Wood (who held a life estate), with the remainder interest divided between Wood (who had a three-quarters share) and Woodricker, Wood’s daughter (who had a one-quarter share). Wood and her son wanted the barn torn down. Woodricker wanted it preserved.<sup>97</sup> The trial court found that while the barn itself had a value of \$3200, the property as a whole would be worth more if the barn were torn down than if it were maintained.<sup>98</sup>

Although the common law of England had held that any permanent destruction of a structure could constitute waste, even if the tear-down improved the value of the parcel as a whole, most American courts have long since rejected this common law rule.<sup>99</sup> Under the modern approach, an act that increased the value of property cannot constitute waste.<sup>100</sup> Because

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<sup>95</sup> See, e.g., *Penn Bowling Rec. Ctr. V. Hot Shoppes, Inc.*, 179 F.2d 64, 66 (D.C. Cir. 1949); *Schadewald v. Brule*, 570 N.W.2d 788, 796 (Mich. App. 1997).

<sup>96</sup> 1994 WL 236287 (Ohio App. 1994), excerpted in Jesse Dukeminier et al., *Property* (7<sup>th</sup> ed. 2010).

<sup>97</sup> *Id.* at \*1.

<sup>98</sup> *Id.* at \*3.

<sup>99</sup> A leading American case that breaks with the English common law rule is *Melms v. Pabst Brewing Co.*, 79 N.W. 738, 740 (Wis. 1899) (“Must the tenant stand by, and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless?”). For a rich discussion of the American break with the English rule, and the economic, republican, and developmental reasons behind it, see Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 Cornell L. Rev. 653 (2006).

<sup>100</sup> *Woodricker*, 1994 WL 236287, at \*2.

the law of waste in America concerns itself exclusively with absolute preferences, and market valuations provide the least controversial measure of utility in land use settings, the court refused to enjoin the destruction of the barn. The trial court nevertheless ordered Wood to pay Woodrick \$3200 upon tearing down the barn, and the appellate court let this result stand. As the appellate tribunal put it, the “trial court’s decision to award Woodrick the value of the barn was not a payment to justify waste but was, instead, indicative of the trial court’s intent to protect the rights of both parties and to reach a fair resolution of their dispute according to the law.”<sup>101</sup>

The affirmance of the \$3200 payment is puzzling. Without a finding that Wood’s destruction of the barn amounted to waste, there was no legal basis for the award of damages to Woodrick. Based on the evidence, the destruction of the barn would make an ordinary landowner better off, not worse off, and aside from Woodrick’s participation in the litigation there was little or no evidence to show how much value Woodrick ascribed to the barn. As a matter of black-letter law, the trial court simply erred, though Wood’s failure to cross-appeal on the issue arguably precluded its reversal by the appellate court. Yet the appellate court nevertheless invoked notions of fairness to justify the damages award. As a matter of legal realism, what explains the survival of Woodrick’s remedy without a right?

The most plausible explanation of what the court (and perhaps Wood) might have been thinking is something along the lines of idiosyncratic valuation. More precisely, even though the market defined the barn as a negative value asset, it had sentimental value to Woodrick. The barn had been on the property for more than 25 years, and Woodrick was evidently sufficiently attached to it to litigate against her mother.<sup>102</sup> Under these assumptions, the destruction of the barn would not have equal effects on Wood and Woodrick. For Wood, the destruction would be all positive – she would enjoy economic gains that eclipsed any sentimental attachments. But while Woodrick would gain her share of this economic upside – the remainder’s market value would increase after the barn was razed – she would also suffer a loss that the other remaindermen would not feel.

Even though the black letter law of waste was telling the trial court that it should ignore this positional inequality, the trial court may have been unable to help itself from considering the problem in relative utility terms. And from a relative preferences perspective, the fact that Woodrick alone would suffer a sentimental loss struck the trial court as an unfair outcome, no matter if the evidence still suggested that Woodrick would benefit economically from the barn’s razing. So the trial court did something lawless. The appellate court then convinced itself that this importation of relative utility considerations into an absolute utility doctrine was proper,

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<sup>101</sup> *Id.* at \*3.

<sup>102</sup> Or, to recap the themes of sibling rivalry discussed earlier, the relationship between mother and daughter might have already been so damaged as to engender the litigation, perhaps on some pretext like an old barn.

approving of the trial court's "intent to protect the rights of both parties and to reach a fair resolution of their dispute *according to the law.*"<sup>103</sup>

It is impossible to prove that relative preference considerations explain the otherwise puzzling result in *Wood*, and I do not want to be understood as making that strong claim. As with the inheritance cases and the easement cases, it is plausible that other aspects of the case drove the judges' reasoning. Indeed, without looking too hard, we could of course find cases in which judges followed the black letter law of waste in cases where an action increased the value of the underlying property, denying any recovery to a party that objected to the changed use of the land.<sup>104</sup> In short, we should not predict that half of the time, let alone all of the time, courts confronting factual scenarios like *Wood*'s will try to convert results congenial to absolute preference considerations into those congenial with relative preference considerations or do the reverse in cases resembling *Brown v. Voss*. Rather, we should use the concept of relative and absolute preferences, and the apparently heterogeneous orientation of the population toward those frameworks to supplement our understanding of what might have motivated the parties in a case and the judges who decided the controversies.

We can make this point more broadly. The dispersion of absolute preferences and relative preferences sentiments throughout the populace do not explain every mystery in property theory. But they might help explain some of them. Equipped with tests that allow us to identify segments of the population that are oriented more towards absolute gains and relative gains, respectively, we might understand why an ordinary dispute between two neighbors over an easement might not be resolved through neighborliness norms,<sup>105</sup> resulting instead in a battle that finds its way to a state supreme court. And once such a case has reached a judicial tribunal, differing conceptions of what utility means and how individuals experience gains or losses can help point judges toward legal rules that appropriately reflect the pluralism apparently present in society. At present, some judges simply do not seem to realize that there are multiple ways of thinking about preferences, and that lacuna evidently prompts them to write decisions that are unnecessarily dogmatic, emotional, and rigid. And other judges may feel the tug of both sorts of preferences simultaneously, which could prompt them to equate tests that are not equivalent or to craft "split-the-difference" remedies that introduce conceptual confusion into property doctrine. For the reasons I suggested in Part I, the normative case against relative preferences is tentative at best.<sup>106</sup> As a result, it would be inappropriate for judges to conclude that absolute preferences

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<sup>103</sup> *Id.* at \*3 (emphasis added).

<sup>104</sup> See, e.g., *Beesley v. Hanish*, 521 A.2d 1235, 1241 (Md. Ct. App. 1987).

<sup>105</sup> The classic work on informal neighborliness norms and their importance in preventing the litigation of garden-variety disputes among neighbors is ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

<sup>106</sup> See *supra* text accompanying notes 23-29.

are favored by state public policy interests, such that ambiguous language should be construed so as to be consistent with absolute preferences.

Pulling the lens back even further, we might expect to see the same sorts of dynamics that I have described here arising in the law of other common law subjects, especially contracts. Contract disputes between two parties may escalate because one party to a transaction brought a set of absolute utility priors to a transaction while the counterparty's understanding of the contract's terms was informed by relative utility considerations. If the world is indeed equally divided between relative-preferences and absolute-preferences types, then courts casting about for a default term that will make everyone happy or best reflect the likely meetings of the minds are doomed to failure. Perhaps the best that can be hoped for is a world in which individuals are fairly consistently oriented toward absolute or relative preferences. If that empirical result obtains, then the courts at least ought to be able to resolve cases in which two like-minded parties contracted, but one of the parties is *ex post* misrepresenting her prior assumptions for strategic advantage. But where two divergent types have created an ambiguous contract, splitting the difference may be the best they can do. The realm of testamentary disposition is, by contrast, more satisfying. Because the thoughts and preferences of only one party (the testator) are at issue, courts are more likely to be able to utilize the evidence before them to reach the "right answer" in any given legal dispute.

#### IV. Conclusion

There is no crisp normative answer to the question of whether courts ought to care about absolute preferences or relative preferences. People do not think monolithically. Some seem primarily concerned with absolute utility. Others seem primarily concerned with relative utility. And still others might feel the competing pull of each way of thinking, focusing alternatively on one or the other, depending on the context. The mistake courts most commonly seem to make is to avoid a pluralistic conception of human motivation. Whereas the double share cases stridently assume away hard questions of human intent and behavioral psychology, the more appropriate approach is to gather in intellectually honest way evidence about how a particular decedent thought about preferences and justice during his own life. In so doing, the courts ought to recognize that the relevant legal question is solely one of getting inside a particular person's head, not making sweeping pronouncements of state public policy interests that assumes a one-size-fits-all approach can explain actors' motivations in property controversies. To the extent that absolute utilitarians and relative utilitarians have different conceptions of the good, courts and legislatures might consider creating two sets of tailored default rules – one for those who think about resources in absolute terms and one for those who think about them in relative terms.

More broadly, this paper has posited that some clashes between neighbors or will beneficiaries may themselves be explained by the disconnect between these two divergent

approaches to thinking about resource distribution. Recall Mr. Brown's inability to understand why it was any of Voss's business whether one parcel or two were benefited by the easement across Voss's land. And recall the divergent characterizations of those seeking double shares – described in neutral terms by the *Benner's Estate* majority and in condemnatory terms by the dissenting judge. As lawyers seek to mediate these cases or settle them before trial, it behooves them to recognize that litigants may be speaking different languages, each of which is adhered to by a large number of like-minded individuals. Those focused on absolute preferences aren't greedy, malignant automatons. Nor are those focused on relative preferences irrational status fetishists. They are all ordinary people trying to make sense of the world and the laws that inhabit it.