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# ARTICLE

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## ABSOLUTE PREFERENCES AND RELATIVE PREFERENCES IN PROPERTY LAW

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### INTRODUCTION

The dominant form of legal discourse in contemporary America is welfarist. Though there are important alternatives,<sup>1</sup> welfarism also

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<sup>1</sup> See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 54-78 (1996) (personhood); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *CORNELL L. REV.* 745, 762-65 (2009) (human flourishing); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 *MICH. ST. L. REV.* 877, 886-92 (natural rights); 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, 1089-1106 (1998) (Rawlsian justice).

largely prevails in property theory: most property 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 property scholars have largely ignored developments in behavioral economics suggesting that people derive utility in divergent ways.<sup>3</sup> 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: absolutists and relativists. Those in the first camp will prefer four scoops of chocolate to three, three to two, two to one, and one to none.<sup>4</sup> This set of preferences is easy for classically trained economists to understand. Those in the second camp are more puzzling because they prefer a situation in which they receive one scoop of ice cream, but those around them receive none, to a situation in which they receive two scoops of ice cream, but those around them receive three.<sup>5</sup>

In the pages that follow, I will try to show how this finding—that some people tend to care more about absolute wealth, while others tend to care more about relative wealth—might help us better understand several mysterious 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 because of this heterogeneity, 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 Article reviews the experimental evidence from behavioral economics, marketing, and law, and explores more fully the pluralistic nature of welfarist frameworks. Part II examines a series of inheritance cases involving “double shares” of testamentary estates, where absolute preferences and relative preferences can help explain starkly divergent outcomes that result in inconsistent case law and occasionally temperamental judicial rhetoric. Some of this rhetoric

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

<sup>3</sup> Nestor M. Davidson has discussed the issue at length. See generally Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

<sup>4</sup> See *infra* Part I for a detailed discussion of absolute preferences.

<sup>5</sup> See *infra* Part I for a detailed discussion of relative preferences.

makes dire predictions about how testamentary beneficiaries will respond to particular distributions. Yet unstated and contestable assumptions about relative and absolute preferences are driving those judges' prognostications. Part III shows how the existence of both absolute and relative preferences illuminates a potential source of future conflict in takings doctrine and might help explain prominent moves toward "difference splitting" in the modern law of easements and waste.

#### I. HETEROGENEOUS ABSOLUTE PREFERENCES 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 are responsive not to absolute wealth but to relative wealth. Economists have devised simple ways to test how well each of these stories resonates with survey respondents.

For instance, Sara Solnick and David Hemenway's survey gave respondents two choices: choice *A*, in which your current yearly income is \$50,000 while others typically earn \$25,000, or choice *B*, in which your current yearly income is \$100,000 while others typically earn \$200,000.<sup>6</sup> The survey's prompt also informed the respondent that prices of goods and services were the same in both scenarios (i.e., the purchasing power of money remained the same).<sup>7</sup> What state of the world will people prefer: *A* or *B*? The answer is that roughly half the survey population will prefer either choice.<sup>8</sup> That is, survey populations seem quite heterogeneous, with half the population most concerned with their absolute income and the other half concerned mostly about their income relative to others'.

Changing the nature or value of the good being consumed affects the ratio of respondents preferring more relative resources to more absolute resources.<sup>9</sup> Still, some people appear to be stubbornly oriented

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<sup>6</sup> Sara J. Solnick & David Hemenway, *Is More Always Better?: A Survey on Positional Concerns*, 37 J. ECON. BEHAV. & ORG. 373, 377 (1998).

<sup>7</sup> *Id.* It is of course possible that some respondents fought this part of the hypothetical and that answers were skewed accordingly. A better worded question might have mentioned that "your neighbors and coworkers earn *x*." Such phrasing would have emphasized that scarce commodities like oceanfront land are no harder to get in a world where immediate peers are earning \$200,000 than in a world where they are earning \$25,000.

<sup>8</sup> *Id.* at 378.

<sup>9</sup> See Sara J. Solnick & David Hemenway, *Are Positional Concerns Stronger in Some Domains than in Others?*, 95 AM. ECON. REV. 147, 149 (2005).

toward either absolute resources or relative resources even when such a focus may be disadvantageous. For example, given the competitive nature of the job application process, one would presume that a job interview candidate would prefer a better outfit relative to others interviewing for the same position. Nonetheless, one-third of the survey respondents preferred a nice outfit in absolute terms.<sup>10</sup> Similarly, given that any increase in the length of one's commute leaves drivers with less time to use in more rewarding ways,<sup>11</sup> one would expect survey respondents always to choose a shorter absolute commute. However, eighteen percent of the survey respondents cared more about the length of their commute relative to that of others.<sup>12</sup>

These sorts of results have also shown up in responses to real-world stimuli. For example, when San Diego, California opened its fast-moving carpool lanes to drivers willing to pay a toll, the carpoolers who suddenly had to share "their" lanes with noncarpoolers articulated divergent sentiments.<sup>13</sup> Some objectors grounded their displeasure in absolute preference terms: more cars in the carpool lanes would lengthen carpoolers' commute times due to increased congestion.<sup>14</sup> But other advocates enthusiastically welcomed the change. These carpoolers felt richer precisely because the noncarpoolers using the lane had to pay a sum of money to enjoy the benefits that the carpoolers were already "freely" enjoying.<sup>15</sup> Robert Frank's magisterial study of relative preferences found that similar considerations of relative status powerfully explained economic arrangements such as the commission structures for car salesmen,<sup>16</sup> the salaries of tenured professors,<sup>17</sup> and the proliferation of vice presidents at banks.<sup>18</sup>

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<sup>10</sup> *Id.* at 148 tbl.1.

<sup>11</sup> "Commuting ranks dead last" among all major life activities in terms of the happiness it engenders. Lior Jacob Strahilevitz, "How's My Driving?" for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1730 (2006) (citing Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 SCIENCE 1776, 1777 tbl.1 (2004)).

<sup>12</sup> Solnick & Hemenway, *supra* note 9, at 148 tbl.1.

<sup>13</sup> Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1253 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1254, 1262-63.

<sup>16</sup> See ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 68-75 (1985) (concluding that some automobile salesmen are more motivated to maximize their commissions whereas others are willing to trade lower absolute commissions in order to be the biggest fish in a small pond).

On the basis of this and similar evidence, it seems likely that heterogeneity exists in most populations with respect to whether absolute preferences or relative preferences primarily motivate economic behavior. Frank and others have argued that the desire for status has led to the competitive consumption of particular goods, thus reflecting a focus on relative as opposed to absolute utility.<sup>19</sup> They have also noted a possible neurological connection to humans' propensity to care about relative status.<sup>20</sup> Yet Frank and other social scientists have not emphasized the pluralistic nature of absolute and relative preferences. Indeed, a very recent study using functional magnetic resonance imaging technologies to study subjects' reactions to absolute and relative gains found that across a large, pooled population, both absolute and relative gains tended to spark significant activity in reward-related areas of the brain, but noted that the "variance between subjects is quite large."<sup>21</sup> The paper found no evidence that men or women were systematically oriented toward relative or absolute gains, but it did not elaborate on the extent to which there were distinct camps of neurologically absolute—and relative—gain-focused individuals.<sup>22</sup>

Fascinatingly, a small body of literature in the field of marketing and consumer behavior—largely ignored by economists—strongly suggests that individuals differ in their levels of status consciousness, that people are consistently status conscious (or not), and that individuals' responses to a test measuring status consciousness correlate

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<sup>17</sup> See *id.* at 79-82 (finding that top grant-getters are substantially underpaid relative to the amount of grants they solicit and questioning whether these top earners derive enough benefit from occupying a high status position to offset their salaries).

<sup>18</sup> See *id.* at 99-102 (suggesting that employees will trade salary for a high-status title, thus enabling the firm to prevent talented employees from leaving for higher-paying firms with fewer titled positions available).

<sup>19</sup> See, e.g., Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 70-72 (1992) (tying the overconsumption of status goods to the desire for relative status); Robert H. Frank, *How Not to Buy Happiness*, DAEDALUS, Spring 2004, at 69, 77-79 (arguing that people increasingly trade better quality of life for status-enhancing consumption because the latter can be more readily compared to others).

<sup>20</sup> See Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AM. ECON. REV. 137, 138-39 (2005) (noting that "local rank appears to affect, and be affected by, concentrations of the neurotransmitter serotonin, which regulates moods and behavior," and stating that there is evidence to support a relationship between the hormone testosterone and local rank).

<sup>21</sup> Thomas Dohmen et al., *Relative Versus Absolute Income, Joy of Winning, and Gender: Brain Imaging Evidence*, 95 J. PUB. ECON. 279, 283 (2011).

<sup>22</sup> *Id.* at 282.

with their revealed preferences.<sup>23</sup> Survey respondents who scored high on the personality tests measuring status consciousness were also more likely to purchase designer sneakers, high-end beers, and luxury cars, and more likely to join fraternities or sororities in college.<sup>24</sup> Levels of status consciousness were statistically indistinguishable among populations of students in the United States, Mexico, and China.<sup>25</sup> It is therefore plausible that there are two basic types of status-conscious individuals: “absolute welfarists” and “relative welfarists.”<sup>26</sup>

I will therefore make two defensible assumptions in this Article: (1) individuals differ in their orientations toward absolute and relative preferences, and (2) people who are primarily concerned with relative welfare in one setting are more likely to be oriented toward relative welfare 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.

Before turning to the 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 preferences counterproductive, such that we might disre-

<sup>23</sup> See, e.g., Jacqueline K. Eastman et al., *Status Consumption in Consumer Behavior: Scale Development and Validation*, J. MARKETING THEORY & PRAC., Summer 1999, at 41, 44-48 (reporting studies that confirm the validity of a “self-report scale that can be used in a variety of studies to measure differences in status consumption”).

<sup>24</sup> *Id.* at 45-46. The fraternity finding reinforces my longstanding interest in the relationship between the collegiate Greek system and property theory. See LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 1-3 (2011) (using a study of the fraternity and sorority rush process to introduce a book on exclusivity and exclusion).

<sup>25</sup> See Jacqueline K. Eastman et al., *The Relationship Between Status Consumption and Materialism: A Cross-Cultural Comparison of Chinese, Mexican, and American Students*, J. MARKETING THEORY & PRAC., Winter 1997, at 52, 61, 63 (noting the equivalency, despite statistically significant differences, in materialism preferences).

<sup>26</sup> The relationship between status and relative preferences may be highly complex. Although no one in either literature has made the link, it is tempting to conclude that status consciousness and relative welfarism are either identical or substantially overlapping. My main hesitation in equating status consciousness and relative welfarism is based on the correlation Eastman found between status-consciousness and materialism. See Eastman et al., *supra* note 23, at 46. In theory, an absolute welfarist could also be materialistic. Indeed, it is possible that, particularly in the United States, money is the primary basis for differentiation among elites, so the most status conscious people focus on amassing as much wealth as possible. Or someone may try to maximize her present wealth so as to purchase future status, say by “buying an ambassadorship” or retiring to a life of philanthropy.

gard them in the same way that some welfarists famously disregard any utility that a Nazi derives from beating a Jew?<sup>27</sup> Two important and recent articles have suggested that property rights should disfavor relative preferences. In the first article, Nestor Davidson 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>28</sup> He then suggested that such competition for status may be socially undesirable, so property law ought to curtail it, though he acknowledged the pathologies that may prevent the state from doing so effectively.<sup>29</sup> Similarly, Barton Beebe has suggested that the “arms race” for branded, positional goods among those oriented toward relative preferences is undesirable.<sup>30</sup> He argued that intellectual property law, especially trademark law, could be weakened to restrain “zero-sum” competition for status.<sup>31</sup>

Relative preferences seem to be hard wired in many people,<sup>32</sup> and the distinct possibility that biology will thwart governmental efforts to manipulate individuals’ preferences should not be discounted. But even assuming that the law could abate or redirect individuals’ relativistic preferences, I am not as convinced that eliminating relative preferences will enhance social welfare, even in a society with high gross domestic product and human capabilities. As Richard McAdams has argued, competition for positional goods may not be zero-sum if people care most about their relative status in the fields that matter most to them, and if people’s heterogeneous endowments allow them to

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<sup>27</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) (reviewing UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982)).

<sup>28</sup> Davidson, *supra* note 3, at 805-10, 812.

<sup>29</sup> See *id.* at 812-16 (discussing three approaches—taxation, information, and property law—that the government could adopt to combat status competition).

<sup>30</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 819 (2010).

<sup>31</sup> 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, for example, competition for shelter in modern Haiti, we might prefer that the relative welfarists outnumber the absolute welfarists in the population. Given the widespread poverty in Haiti and the low quality of its housing stock, a population comprised solely of absolute welfarists would contain a far greater number of unhappy people than a population comprised entirely of relative welfarists. In the latter society, at least a segment of the population would feel happy with their houses.

<sup>32</sup> See Dohmen et al., *supra* note 21, at 282-83.

excel in divergent fields.<sup>33</sup> Even if we limit ourselves to discussing those relative preferences that are zero-sum, arguments for trying to fight those preferences should be cabined. In the short run, the zero-sum nature of some relative preferences implies that Jill, a relative welfarist, will feel worse off if Jack is made better off.<sup>34</sup> But the long-run effect of Jill's unhappiness is indeterminate. Perhaps her unhappiness will motivate Jill to work harder or innovate more, thereby increasing the odds that she will compose a song or cure a disease.<sup>35</sup> (She might even discover a foolproof way to convert relative welfarists into absolute welfarists!) Widespread complacency in a rich society filled with absolute-preference oriented individuals could, similarly, impoverish future generations. Moreover, McAdams has argued persuasively that competition for positions of high status largely explains the creation and enforcement of social norms.<sup>36</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, this potential waste 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 should better understand 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 are influenced by the purchasing patterns of consumers in another country. It is little wonder, then, that a review of twentieth-century policy interventions designed to curtail competition for positional goods concluded that the policies had failed.<sup>37</sup> To summarize my disagreement with Davidson

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<sup>33</sup> McAdams, *supra* note 19, at 49-51.

<sup>34</sup> Where the law is confronted with pure distributional problems, such as how a windfall inheritance ought to be divided among multiple heirs, there is no reason to prefer known relative or absolute preferences in divvying up the bounty. Of course, shying away from one type of preference or the other may be justified if discerning some parties' true absolute or relative preferences proves to be more difficult.

<sup>35</sup> Cf. McAdams, *supra* note 19, at 59-62 (suggesting that relative preferences can correct market failures, though recognizing that the greater effort produced by relative preferences is not always beneficial).

<sup>36</sup> See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 357-86 (1997) (discussing how the esteem theory—which includes esteem “in comparison to others”—influences societal norms).

<sup>37</sup> See 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 19, at 72-79, 83-103 (discussing the successes and failures of legal



and especially with Beebe, I believe we need to be skeptical about both the law's ability to restrain relative preferences effectively and the ultimate desirability of that enterprise.

Having voiced that concern, I will now pursue a path quite different from that taken by Davidson and Beebe. Whereas they asked what should be done about preferences in various domains, I will emphasize the non-universality of relative welfarist preferences and examine how the cohabitation in our society of relative welfarists, absolute welfarists, and people who feel the tug of both frameworks affects property doctrine and judicial rhetoric.<sup>38</sup> I begin with inheritance battles.

## II. APPELLATE CASE LAW CONSIDERING DUAL INHERITANCE FROM ADOPTION WITHIN THE BLOODSTREAM

Sibling resentment is an ancient topic. Themes of familial jealousy provide much of the Bible's most compelling drama. Cain's resentment of Abel began when God accepted Abel's burnt offering of a sheep willingly, while rejecting Cain's offering of vegetables.<sup>39</sup> This prompted a "very wroth" Cain to slay his brother in a field.<sup>40</sup> Esau had a more compelling grievance against his younger brother Jacob: Jacob convinced a starving Esau to exchange his birthright for a bowl of lentil stew.<sup>41</sup> Not long after, Jacob conned their father Isaac into bestowing upon Jacob a blessing that had been intended for Esau.<sup>42</sup> Robbed of his blessing and cheated of his birthright, Esau vowed to kill Jacob as soon as Isaac died.<sup>43</sup> Yet Jacob eventually avoided Abel's fate by placating Esau with a gift, a great deal of livestock.<sup>44</sup> Jacob's own children would hardly be immune to brotherly treachery. Joseph was Jacob's favorite son.<sup>45</sup> Joseph's brothers resented his special relationship with

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efforts, including taxation and antidiscrimination laws, to curtail competition for positional goods).

<sup>38</sup> Frank's book is sensitive to this cohabitation, though it is not a primary theme in his book. See, e.g., FRANK, *supra* note 16, at 75 (noting that those oriented toward absolute or relative gains may sort themselves into different firms within the labor market).

<sup>39</sup> *Genesis* 4:4–5 (King James).

<sup>40</sup> *Id.* 4:5–8.

<sup>41</sup> *Id.* 25:29–34.

<sup>42</sup> *Id.* 27:1–30.

<sup>43</sup> *Id.* 27:41.

<sup>44</sup> *Id.* 32:14–15 ("Two hundred she goats, and twenty he goats, two hundred ewes, and twenty rams, thirty milch camels with their colts, forty kine, and ten bulls, twenty she asses, and ten foals.").

<sup>45</sup> *Id.* 37:3.

their father and coveted the coat that Jacob gave Joseph.<sup>46</sup> They therefore faked Joseph's death and sold him into slavery for twenty pieces of silver.<sup>47</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>48</sup> And so on and so forth.<sup>49</sup>

While those interested in sibling resentments, parental favoritism, and unintended inheritances can start their reading with the Book of Genesis, they need not stop there. This Part will show that nineteenth- and twentieth-century law provides these same sorts of tales in abundance—particularly the law of inheritance, which causes jurists to struggle fiercely with their brethren.

Cases involving unforeseen adoptions, especially adoptions within the bloodstream, force courts to confront the question of whether a particular Benjamin is entitled to more benjamins than his kin. Jurists often bring to bear absolute and relative welfarist considerations as they struggle with these cases.

At the outset, it is worth contrasting two exemplary cases. One reflects an absolute preferences orientation, while the other reflects a relative welfare orientation. *In re Benner's Estate*<sup>50</sup> showcases the former view. Martha Ann Benner had one daughter, who had three children of her own.<sup>51</sup> After Martha's daughter died, Martha adopted one of her grandchildren, Henry Benner.<sup>52</sup> Martha then died intestate.<sup>53</sup> A legal question immediately arose as to how Henry should be treated under the intestacy statute. Should he be treated just as a son? Just as a grandson? As *both* a son and a grandson? As a son, he would take

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<sup>46</sup> *Id.* 37:4.

<sup>47</sup> *Id.* 37:20–33.

<sup>48</sup> *Id.* 43–45.

<sup>49</sup> Jens Dammann alerted me to the fact that relative preference sentiments are articulated in the New Testament as well. For example, in *Matthew* 20:1–16, a householder hires laborers to work in his vineyard for a penny a day. At dusk, when the laborers who have been working since the morning realize that those who worked in the vineyards for only an hour are also receiving a penny, they complain. The householder responds that he is paying the workers exactly what he promised to pay, and his generosity towards those who started working late in the day is a good deed towards the late-arriving workers, not a slight against the early-arriving workers. The early-arriving workers exhibited relative preferences but the householder insisted that absolute preferences were the relevant ones.

<sup>50</sup> 166 P.2d 257 (Utah 1946).

<sup>51</sup> *Id.* at 257.

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

<sup>53</sup> *Id.*

half of Martha's estate, with his birth sisters splitting the other half.<sup>54</sup> As a grandson, he would take one-third of Martha's estate.<sup>55</sup> Finally, as both a son and a grandson, he would take two-thirds of Martha's estate (one-half as a son plus one-sixth as one of three grandchildren).<sup>56</sup>

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 and thus receive half the estate.<sup>57</sup> The Utah Supreme Court reversed, holding that Henry should be treated as both a son and a grandson.<sup>58</sup> To reach this result, the court first found the inheritance statute unclear as to how adoptions of grandchildren should be treated.<sup>59</sup> The court then noted that several earlier cases<sup>60</sup> had prohibited dual capacity inheritances,<sup>61</sup> but the court rejected 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>62</sup> With this sentence, the court turned a dispute in which both absolute and relative preference considerations might explain the probate challenge's motivation into one where the decisive analytical issue concerns relative preferences alone. By altering the pertinent baseline, the court weakened the moral authority of the beneficiary who argued that he was cheated out of a fair share of the inheritance.

To fully understand this clever argument in *Benner's Estate*, we should follow it to its natural conclusion. Under the court's ruling that Henry was entitled to inherit as a son and a grandson, each of Henry's birth sisters received one-sixth of Martha's estate. Suppose instead that Martha had adopted a young Richard Posner 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 inherited half of Martha's estate. Therefore, the court's ruling essentially told the birth sisters, "It's none of your business whether

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<sup>54</sup> *Id.* at 258.

<sup>55</sup> *Id.* at 259.

<sup>56</sup> *Id.* at 259 (Turner, J., dissenting).

<sup>57</sup> *Id.* at 257 (majority opinion).

<sup>58</sup> *Id.* at 259.

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

<sup>60</sup> See *infra* notes 79-81 and accompanying text (discussing some of the reasons why courts have prohibited dual inheritances).

<sup>61</sup> *In re Benner's Estate*, 166 P.2d at 259.

<sup>62</sup> *Id.*

Henry gets one-sixth or two-thirds. You should care only about what you receive, not about what you receive in relation to others.” Translation: the sisters contesting the will should focus only on absolute preferences, not relative preferences. And 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 no obvious intention to adopt Richard Posner or anyone else outside the bloodstream. Had she known that her adoption of Henry would have no legal effect on his future inheritance, it is unlikely that she would have adopted a stranger instead.<sup>63</sup> Indeed, the difference between treating Henry as both a son and a grandson, rather than only as a son, *was* meaningful for the sisters in absolute welfare terms. If Henry had inherited only as a son, he would have taken half of Martha’s estate, leaving each of his birth sisters with one-fourth of the inheritance rather than the one-sixth they received under the court’s decision. Although the court did not directly confront this argument, it did state that “when a person adopts a child an act of favoritism is shown thereby.”<sup>64</sup> But it is 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 grandchildren.

Writing as the sole dissenter in *Benner’s Estate*, Justice Turner objected with six-shooters blazing. To Justice Turner, a dual inheritance “will tend to destroy the proper relationship which should exist between one adopted and children of the parent’s blood.”<sup>65</sup> That was not, however, the entire problem for Justice Turner, whose impassioned plea on relative utility’s behalf I now quote at length.

After the relationship of parent of adoption and child is created, can there be 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>63</sup> If the assumption about adopting a stranger strikes the reader as wildly implausible, then the court’s explicit invocation of the absolute preferences argument becomes particularly telling with respect to the judges’ states of mind.

<sup>64</sup> *In re Benner’s Estate*, 166 P.2d at 259.

<sup>65</sup> *Id.* at 260 (Turner, J., dissenting).

... 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 stage 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>66</sup>

Cancer. Plague. Greed. Malignancy. There is a lot of emotion evident in Justice Turner's choice of metaphors, based largely on his prediction that kin will think about inheritances in relative preference terms and that jealousy will result from double shares. Query whether Justice Turner generates as much light as heat. The trial court's decision, which Justice Turner would have liked to affirm, would have left Henry with twice the share of Martha's estate that each of his sisters received.<sup>67</sup> Might such an arrangement not produce the same familial jealousy and discord that so troubles Turner? Alternatively, if Henry were represented by an executor because he is a minor, his siblings could direct their anger at the executor. Even if Henry were acting on his own behalf, he might have decided that the benefits were worth the costs associated with provoking his siblings' jealousies. Finally, it is possible that Justice Turner had causation backwards: maybe requests for a dual inheritance are not a cause of familial discord, but rather a consequence of it. For example, Henry's older siblings might have abandoned him upon their mother's death, thus prompting both Martha's decision to adopt him and his desire for retribution.

Having presented an example of absolute preference-oriented reasoning in *Benner's Estate*, I now turn to *Unsel v. Meier*,<sup>68</sup> which typifies the relative welfare approach. *Unsel* amplifies Justice Turner's arguments by stripping them of some of their emotional content while simultaneously elevating them to the level of public policy concerns. *Unsel* also involved an adoption within the bloodstream. Instead of an intestacy case, however, *Unsel* involved a probated will that tried to create a fee tail.

One of John Hart's six children, Harry, predeceased him.<sup>69</sup> Under the terms of his will, John wanted each of his five surviving children

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<sup>66</sup> *Id.* at 260.

<sup>67</sup> *Id.* at 257 (majority opinion).

<sup>68</sup> 972 S.W.2d 466 (Mo. Ct. App. 1998).

<sup>69</sup> *Id.* at 469.

and his three grandchildren via Harry to take a share of his extensive real estate holdings in fee tail.<sup>70</sup> John died in 1966.<sup>71</sup> By 1992, the prospects for his eighty-year-old daughter, Vivian, to produce biological offspring looked dim.<sup>72</sup> So Vivian adopted her adult niece, Judith, whose mother was Vivian's sister, Lena.<sup>73</sup> Judith was Lena's only daughter, but Lena also had a surviving son, James Hampton.<sup>74</sup> After Vivian died in 1996, Judith was her only issue, and the question arose as to whether Judith was entitled to both a fee simple interest in the real estate held by Vivian and an expectation interest in half of Lena's property interest.<sup>75</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.<sup>76</sup> All she sought was Vivian's interest in the real property. 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's real estate.<sup>77</sup> The *Unsel* court concluded that the adoption would not extinguish Judith's right to take property via Lena.<sup>78</sup> It therefore had to confront the double share issue. Citing language from an earlier case, the court stated,

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

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

<sup>71</sup> *Id.* at 468.

<sup>72</sup> *But cf. Genesis* 17:17–19 (noting that Sara was ninety years old at the time of Isaac's conception).

<sup>73</sup> *Unsel*, 972 S.W.2d at 469.

<sup>74</sup> *Id.*

<sup>75</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.

*Id.* at 470 (citations omitted) (quoting *Davidson v. Davidson*, 167 S.W.2d 641, 642 (Mo. 1943)).

<sup>76</sup> *See id.* (stating that respondents on behalf of Judith asserted that under the law, the adoption severed her relationship with Lena and her interest in Lena's property).

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

<sup>78</sup> *Id.* at 471.

these circumstances is not opposed to the public policy of promoting the welfare of adopted children.<sup>79</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>80</sup> Perhaps to help insulate its opinion from appellate review, the *Unsel* court then reached an independent basis for the decision apart from public policy, by finding that permitting Judith to take Vivian’s share would contravene John’s intent that his children and grandchildren be treated equally.<sup>81</sup>

Under *Unsel v. Meier*, the prediction that relative preferences will shape kins’ assessments of their own inheritances is 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) each saw their respective interests in the real estate shrink from one-sixth to a little over one-twelfth. It is by no means clear that John’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 latter situation over the former? The reverse seems more plausible.<sup>82</sup>

The only way 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 preferences

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<sup>79</sup> *Id.* at 471-72 (quoting *Miss. 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>80</sup> *Unsel*, 972 S.W.2d at 472.

<sup>81</sup> *Id.*

<sup>82</sup> The law ought to do its best to respect the preferences that the testator would have articulated in the absence of transaction costs so as to reduce estate planning expenditures during life. Indeed, if the law perfectly respected the preferences that testators would have articulated were they still alive, such a result would maximize the incentives for testators to accumulate and preserve wealth while minimizing the incentives to bother with writing a will. Both results would represent Pareto improvements.

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 a double recovery, they might have expressed even more hostility to an interloper adopted by an eighty-year-old woman, largely for the purposes of depriving Vivian's nieces and nephews of real property to which they would otherwise have been entitled. Yet the effect of *Unsel* is to encourage precisely these sorts of adoptions of adults outside the bloodstream.

A survey of similar cases reveals a similar fragmentation of judicial opinion. As previously indicated, no court has followed *Benner's Estate* down the path of comparing an adoption in the bloodstream to a hypothetical adoption outside the bloodstream. Like their Show-Me State brethren, the justices of the New Hampshire Supreme Court viewed a dual inheritance as an "extreme . . . situation" raising "unnatural and abnormal possibilities."<sup>83</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 such a double share.<sup>84</sup> This canon of construction presuming no double shares mirrors the public policy interest invoked in *Unsel*.<sup>85</sup> Similarly, 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>86</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.<sup>87</sup> Judith in *Unsel* sought the same outcome, of course, but the court there thwarted her.<sup>88</sup>

*Delano v. Bruerton*, a Massachusetts case, embraced the same sort of reasoning. The court held that an adoption could make the adoptee equally well off as his new siblings, but no better off.<sup>89</sup> It therefore rejected the demand of the testator's grandson by birth, who was also a

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<sup>83</sup> *Young v. Bridges*, 165 A. 272, 277 (N.H. 1933).

<sup>84</sup> *Id.* at 276.

<sup>85</sup> *Unsel*, 972 S.W.2d at 471-72.

<sup>86</sup> 62 A. 253, 256 (Pa. 1905).

<sup>87</sup> *Id.* at 257.

<sup>88</sup> See *supra* notes 68-78 and accompanying text. The Supreme Court of Indiana embraced reasoning similar to its Pennsylvania counterpart. See *Billings v. Head*, 111 N.E. 177, 177-78 (Ind. 1916) ("[I]t was not the legislative purpose that an adopted grandchild should ever inherit more . . . than would one of his natural children . . . ." (citing *Delano v. Bruerton*, 20 N.E. 308 (Mass. 1889), and *Morgan*, 62 A. 253)).

<sup>89</sup> 20 N.E. at 309.



son by adoption, for a double share of the testator's estate.<sup>90</sup> 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>91</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 supposed 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>92</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>93</sup> A pity. Jan Ellen Rein once 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>94</sup> But none of these jurisdictions place extra legal obstacles in front of the testator who wishes to adopt someone outside the bloodstream.

Contrary authorities are as numerous. The Kansas Supreme Court, while recognizing the controversy associated with adoptees receiving double shares, insisted that such "inequality . . . is created by statute."<sup>95</sup> After quoting at length from the Indiana, Pennsylvania, and Massachusetts opinions discussed above, the Kansas court simply characterized these court's reasoning as "not convincing."<sup>96</sup> By contrast, an Illinois court did a better job of explaining its rejection of the anti-double share rule in *In re Estate of Cregar*—it asked, in essence, What is the problem with testamentary inequality, particularly where different generations are concerned?<sup>97</sup> After all, said the court:

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<sup>90</sup> *Id.*

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

<sup>92</sup> *Id.*

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

<sup>94</sup> Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 808-09 (1984).

<sup>95</sup> *In re Bartram's Estate*, 198 P. 192, 194 (Kan. 1921).

<sup>96</sup> *Id.*

<sup>97</sup> 333 N.E.2d 540, 545 (Ill. App. Ct. 1975).

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 shares among nieces or nephews of an intestate.<sup>98</sup>

The *Cregar* court may have pulled its punches. While equal distribution among children is common in the United States, it is hardly universal. According to one 1996 study, 21.4% of all testators with multiple children provide for unequal shares among their children.<sup>99</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 decedent's estate be shared equally among siblings where the decedent is survived only by multiple children.<sup>100</sup> The remaining third can be divided as the testator sees fit.

In short, a review of the authorities reveals divergent approaches.<sup>101</sup> Some 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 absence of a clear statement by the testator that such a distribution was intended. The uneven reaction among judges mimics the lack of consensus among respondents to social science surveys.<sup>102</sup> If this admittedly small sample of cases is indicative, then judges (like people in general) seem to be evenly divided, with approximately half accepting legal arguments that

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<sup>98</sup> *Id.* (citation omitted). The Supreme Court of Iowa took a different tack toward justifying double shares by noting that the natural parents of adopted children sometimes do not consent to the severance of the parent-child relationship, which makes it strange to suppose that an adoption terminated the adoptee's right to inherit from his biological parents. *Wagner v. Varner*, 50 Iowa 532, 534 (1879). The court thus re-framed the issue as 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. *Id.*

<sup>99</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). Additional studies place the figure as high as 37.5% or as low as 15.7%. *Id.*

<sup>100</sup> Elin Halvorsen & Thor O. Thoreson, *Parents' Desire to Make Equal Inter Vivos Transfers*, 57 CESIFO ECON. STUD. 121, 123 (2011).

<sup>101</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) (discussing different ways in which states react to "double share" dual inheritance).

<sup>102</sup> See *supra* notes 6-8 and accompanying text.

seem to assume an absolute preference orientation among heirs, and the other half opting for outcomes that implicitly assume relative preference orientations. To be sure, hints of absolute and relative preferences are prominent in some cases, yet absent in others. Some judges envision themselves as engaging in a purely formalist exercise, but both the formalist opinions and those invoking policy interests also seem to split roughly down the middle.

In light of this heterogeneity, it is perhaps surprising that many judges use emotionally charged rhetoric when anticipating how beneficiaries will respond to particular distributions. Though the survey data does not tell us this, it is possible that many individuals who think primarily in terms of absolute preferences have some difficulty projecting relative preferences onto beneficiaries, and vice versa. 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 those identified by Dan Kahan, Donald Braman, and their coauthors.<sup>103</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.<sup>104</sup> Although a focus on absolute preferences versus relative welfare and status consciousness are not part of the cultural orientations they develop in their work, it is conceivable that one’s welfare preference correlates with other aspects of particular cultural orientations.

### III. EXTENSIONS TO OTHER ASPECTS OF PROPERTY LAW

The underlying issue of relative and absolute preferences is by no means limited in application to inheritance. Let us begin with the law of takings. A key difference between the inheritance cases and the takings cases is that the former primarily concern gains for the heirs, whereas the latter involve losses imposed on landowners. Experi-

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<sup>103</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, 1308 (2003) (concluding that individual’s positions on gun control are largely founded upon the cultural views they have formed).

<sup>104</sup> See Kahan et. al, *supra* note 103, at 849-51 (discussing how four Americans from varied cross-sections of life would interpret the facts in *Scott v. Harris* differently because of their backgrounds); Kahan & Braman, *supra* note 103, at 1299-302 (hypothesizing that demographics and cultural indicators are actually the strongest predictors for attitude on gun control).

mental evidence has indicated that relative preferences are more pronounced in the realm of gains than losses.<sup>105</sup> We therefore might expect to find the law of takings more receptive to an absolute-losses orientation than the law of inheritance. Yet, as we shall see, it is not clear that the case law reflects that contextual distinction.

Under the Constitution's Fifth Amendment, private property may not be taken for public use without just compensation.<sup>106</sup> The primary test for determining whether a government regulation has gone so far as to amount to an unconstitutional taking of private property is the *Penn Central* test.<sup>107</sup> The first prong of the *Penn Central* test directs judges to focus on the "economic impact of the regulation on the claimant."<sup>108</sup> The greater the loss to the claimant, the more likely it is that the 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>109</sup> Hence, an owner who has suffered a ninety percent 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, however, the doctrine has shifted away from focusing largely on considerations of absolute preferences to invoking notions of relative preferences. *Penn Central* itself hinted that these considerations would be relevant. The Court noted that Grand Central Station, whose owners claimed that the application of the city's historic preservation law amounted to a taking, was situated on one of more than 400 parcels in New York City whose development potential was similarly restricted.<sup>110</sup> Some subsequent Supreme Court cases and influential academic commentary have come to understand the *Penn Central* 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>111</sup> We might understand

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<sup>105</sup> Solnick & Hemenway, *supra* note 9, at 149-50.

<sup>106</sup> U.S. CONST. amend. V.

<sup>107</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>108</sup> *Id.* at 124.

<sup>109</sup> *Id.* at 131.

<sup>110</sup> *Id.* at 132.

<sup>111</sup> *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (citing *Penn Central*, 438 U.S. at 123-25); see also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (identifying "being singled out to bear the burden" as a hallmark of a takings violation); Saul

this shift toward thinking about the state's imposition upon the claimant in relative terms as evincing renewed interest in relative preferences. To be sure, there are other reasons to care about singling out—for example, people might be risk averse, or singling out might indicate a breakdown in normal local politics that imposes harms that sound in “equal protection” terms.<sup>112</sup> But the shift may also be motivated by knee-jerk relative preference instincts.

Other branches of takings law similarly implicate both absolute and relative preferences. Justice Scalia's famous majority opinion in *Lucas v. South Carolina Coastal Council*<sup>113</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 “all economically beneficial use” of land (the rule), unless the deprivation inheres “in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership” (the exception).<sup>114</sup> 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 instructed 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>115</sup>

There are several possible explanations for the “background principles” exception. One is that the Court seeks to make it more painful for the state to regulate aggressively without paying compensation, by essentially preventing the state from treating grandfathered 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 where the state's regula-

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Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344-48 (1991) (discussing the nuances of “singling out” in takings law).

<sup>112</sup> See Levmore, *supra* note 111, at 1344-46 (identifying an “equal protection element in takings law” stemming from the notion that the government may not single out a party that is politically unprotected).

<sup>113</sup> 505 U.S. 1003 (1992).

<sup>114</sup> *Id.* at 1027-29.

<sup>115</sup> *Id.* at 1031.

tion demoralizes both absolute welfarist and relative welfarist owners. Perhaps *Lucas's* previously unrecognized genius is that the rule only applies in the “relatively rare situation[.]”<sup>116</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 coexist peacefully, but rather undergird dueling majority and dissenting opinions. A fine example of the absolute versus relative preferences split in takings law is *San Remo Hotel v. City and County of San Francisco*.<sup>117</sup> In that case, the California Supreme Court considered a San Francisco ordinance that required the owners of about five-hundred residential hotels in the city either to maintain or replace existing units that housed low-income occupants or pay a fee to the city’s Residential Hotel Preservation Fund Account.<sup>118</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>119</sup> The city required them to obtain a conditional use permit before allowing the conversion, and green-lighted the conversion only after the owners paid \$567,000 into the preservation account.<sup>120</sup> The owner paid this fee under protest and then sued, alleging that the city had taken its property in violation of the California Constitution’s Takings Clause.<sup>121</sup>

Dissenting, then-Justice Brown<sup>122</sup> viewed the city’s extraction of \$567,000 as a taking.<sup>123</sup> As she saw 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 five-hundred residential hotel owners who “certainly did not cause poverty in San Francisco.”<sup>124</sup> What is most striking about Brown’s eloquent opinion is its unrelenting focus on the “singling out” inquiry. In her view,

[n]o 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

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<sup>116</sup> *Id.* at 1018.

<sup>117</sup> 41 P.3d 87 (Cal. 2002).

<sup>118</sup> *Id.* at 92, 109.

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.* at 95.

<sup>121</sup> *Id.* at 122 (Brown, J., dissenting).

<sup>122</sup> Brown moved from the California Supreme Court to the D.C. Circuit in 2005.

<sup>123</sup> *Id.* at 125-26.

<sup>124</sup> *Id.* at 120.

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>125</sup>

Notice what Justice Brown leaves out. Because her emphasis is on how the hotel owners fare *relative* to the taxpayers and other landowners of San Francisco, Justice 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 the 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>126</sup> Because Justice Brown would like to replace the balancing inquiries from Supreme Court cases like *Penn Central*, *Nollan v. California Coastal Commission*,<sup>127</sup> and *Dolan v. City of Tigard*<sup>128</sup> with a new, per se test, inquiries such as the extent of diminution in the property's value drop out of the equation. So too does any consideration of whether the city requires the owners to maintain an existing use or engage in a new use—for Justice Brown such *Penn Central* considerations were irrelevant.<sup>129</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, according to Justice Brown, was unconstitutional on its face.<sup>130</sup>

The majority opinion in *San Remo* focused much less on the relative preferences of the hotel owners, as compared with those of other San Francisco voters and property owners. Rather, its focus was on the absolute burdens placed on the plaintiffs, the extent to which the

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<sup>125</sup> *Id.* at 125-26.

<sup>126</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, 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>127</sup> 483 U.S. 825 (1987)

<sup>128</sup> *See* 512 U.S. 374, 386-87, 394-95 (1994) (reaffirming the principle in *Nollan* when finding no “essential nexus” between the state's interest for a public greenway and bicycle pathway, and the permit condition to pave a parking lot).

<sup>129</sup> *San Remo Hotel*, 41 P.3d at 127 (Brown, J., dissenting) (“Nor can the HCO be justified under the theory that the City is merely requiring property owners to continue the existing use of their property.”).

<sup>130</sup> *Id.* at 127-28.

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: "[T]he HCO neither targets an arbitrary 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>131</sup> The question of how much money San Remo lost, a fact ignored by Justice Brown, was deemed a central inquiry by Justice Werdegar.<sup>132</sup> 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>133</sup> To the majority, considerations of relative welfare were unlikely to be decisive. It did not matter that only five-hundred owners were being singled out for a disparate burden, because the HCO should not be looked at in isolation. Rather, it should be understood as part of a much larger system of government burdens and benefits that should hopefully balance out over the long haul.<sup>134</sup>

Clashes between relative and absolute preferences also arise in the law of easements. Take the casebook staple of *Brown v. Voss*.<sup>135</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.<sup>136</sup> 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.<sup>137</sup> After bad blood developed between the two neighbors—Voss constructed a "concrete sump and a chain link fence within the easement"—Brown "sued [Voss] for removal of the obstruc-

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<sup>131</sup> *Id.* at 109.

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

<sup>133</sup> *See 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.'" (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978))).

<sup>134</sup> *See id.* ("Thus, the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property 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>135</sup> 715 P.2d 514 (Wash. 1986). For casebook treatment of *Brown*, see, for example, JESSE DUKEMINIER ET AL., PROPERTY 820-25 (7th ed. 2010).

<sup>136</sup> *Brown*, 715 P.2d at 515.

<sup>137</sup> *Id.*



tions.”<sup>138</sup> Voss countersued for easement misuse.<sup>139</sup> 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.<sup>140</sup> The Washington Supreme Court agreed with Voss that Brown’s actions amounted to easement misuse,<sup>141</sup> though it affirmed the lower court’s denial of injunctive relief.<sup>142</sup>

The famous dispute was exacerbated by Brown’s strongly held view that it was completely unreasonable for Voss to care whether Brown used the easement to reach parcels *B* and *C* or just parcel *B*.<sup>143</sup> Asked on cross-examination whether he had ever sought Voss’s permission to use the easement for the benefit of parcel *C*, Brown answered, “Why should I?”<sup>144</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>145</sup> Thus, it is not accurate to suggest that relative preferences considerations clearly 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 Brown’s perceived arrogance than with anything else. Regardless, Voss plainly did not approach the dispute in the same absolute preference terms as Brown. It seems plausible that similar absolute-versus-relative preference disconnects that emerge in judicial opinions explain why particular controversies develop into intractable disputes resulting in litigation.

Whereas the takings cases focus the court’s attention on a litigant who has lost property, and the inheritance cases focus on litigants who stand to gain property (some more than others), a case like *Brown v. Voss* is manifestly zero-sum. Parties are fighting over a finite resource, and one party’s losses inevitably entail another party’s gains. At the

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<sup>138</sup> *Id.* at 516.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 517.

<sup>142</sup> *Id.* at 518.

<sup>143</sup> See Elizabeth Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445, 1467 (1995) (“In [Brown’s] view, his easement gave him access to both parcels; once he passed onto one half of his property, parcel *B*, he then had a right to continue from there to the other half of his property.”).

<sup>144</sup> *Id.* at 1474.

<sup>145</sup> *Id.* at 1483-84.

same time, whether the parties understand their conflict in absolute or positional terms may drive their feelings of utility and disutility, which may in turn explain their propensity to litigate.

The obviously zero-sum nature of the dispute is a possible explanation for why *Brown v. Voss* ultimately splits the difference between the relative and absolute preference 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).<sup>146</sup> On the other hand, the court—relying on the trial court’s equity balance—held that Voss was not entitled to injunctive relief.<sup>147</sup> In cases involving easement misuse, courts ordinarily hold that property rights to exclude ought to be protected with property rules.<sup>148</sup> The law of easement misuse thus exhibits an orientation toward relative welfare 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 because it implicitly understood that the use of an easement to benefit a larger dominant estate will sometimes impose higher absolute costs to 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 welfare considerations. Take *Woodrick v. Wood*,<sup>149</sup> a 1994 Ohio controversy that is a principal case on the law of waste.<sup>150</sup> *Woodrick* concerned an old barn that straddled the boundary between two plots of land.<sup>151</sup> A mother, Catherine Wood, and her son, Sheridan Wood, owned one plot of land.<sup>152</sup> The other plot of land belonged to Catherine (who held a life estate), with the remainder interest divided between herself (who had a three-quarters share) and Patricia Woodrick, her daughter (who had a one-quarter share).<sup>153</sup> Catherine and her son

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<sup>146</sup> *Brown*, 715 P.2d at 517.

<sup>147</sup> *Id.* at 518.

<sup>148</sup> See, e.g., *Penn Bowling Recreation Ctr. v. Hot Shoppes, Inc.*, 179 F.2d 64, 66 (D.C. Cir. 1949); *Schadewald v. Brulé*, 570 N.W.2d 788, 796 (Mich. Ct. App. 1997).

<sup>149</sup> No. 65207, 1994 WL 236287 (Ohio Ct. App. May 26, 1994).

<sup>150</sup> This case is also excerpted in JESSE DUKEMINIER ET AL., *supra* note 135, at 218-20.

<sup>151</sup> *Woodrick*, 1994 WL 236287, at \*1.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

wanted the barn torn down, while Patricia wanted it preserved.<sup>154</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>155</sup>

Although the English common law held that any permanent destruction of a structure constituted waste, even if it improved the value of the parcel as a whole,<sup>156</sup> most American courts have long since rejected this common law rule.<sup>157</sup> Under the modern approach, an act that increases the value of property cannot constitute waste.<sup>158</sup> Because the American law of waste concerns itself exclusively with absolute preferences, and market valuations provide the least controversial measure of welfare in land use settings, the court refused to enjoin the destruction of the barn.<sup>159</sup> The trial court nevertheless ordered Wood to pay Woodrick \$3200 upon tearing down the barn, and the appellate court let this result stand.<sup>160</sup> In the appellate tribunal's words, "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>161</sup>

The appellate court's 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

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*2.

<sup>156</sup> *Id.*

<sup>157</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), which stated, "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, 668-75 (2006).

<sup>158</sup> See, e.g., *Woodrick*, 1994 WL 236287, at \*2.

<sup>159</sup> *Id.* at \*3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

the appellate court. Yet, the appellate court nevertheless invoked notions of fairness to justify the damages award.<sup>162</sup> 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 akin to 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 twenty-five years,<sup>163</sup> and Woodrick was (evidently) sufficiently attached to it to litigate against her mother.<sup>164</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—as the remainder's market value would increase after the barn was razed—she would also suffer a loss that the other remaindermen would not even 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 preference 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 basically did something lawless. The appellate court then convinced itself that this importation of relative welfare considerations into an absolute welfare doctrine was proper, as it approved 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>165</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 find cases where judges refused to enjoin the destruction of an

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at \*1.

<sup>164</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. See *supra* notes 67-68 and accompanying text.

<sup>165</sup> *Woodrick*, 1994 WL 236287, at \*3 (emphasis added).

asset when the razing increased the value of the underlying property, thereby denying any recovery to a party that objected to the changed use of the land.<sup>166</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*.<sup>167</sup> 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 and judges in a given case.

We can make this point more broadly. The dispersion of absolute and relative preference sentiments throughout the populace does not explain every mystery in property theory. But it might help explain some of them. Equipping ourselves with tests to identify segments of the population that are oriented more towards absolute gains and relative gains, respectively, we might understand why two neighbors use a state supreme court, rather than neighborliness norms, to resolve an ordinary dispute over an easement.<sup>168</sup> And once such a case has reached a judicial tribunal, differing conceptions of how individuals experience gains or losses can point judges toward legal rules that appropriately reflect the pluralism in our 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, or rigid. Other judges may feel the tug of both sorts of preferences simultaneously, and this tension 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>169</sup> As a result, it would be inappropriate for judges to conclude that state public policy interests favor absolute preferences, such that ambiguous language should be construed as consistent with absolute welfarist preferences.

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<sup>166</sup> For an example of such a case, see *Beesley v. Hanish*, 521 A.2d 1235, 1241 (Md. Ct. Spec. App. 1987).

<sup>167</sup> See *supra* notes 135-142 and accompanying text.

<sup>168</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>169</sup> See *supra* notes 27-37 and accompanying text.

Pulling the lens back even further, we might expect to see the same sorts of dynamics that I have described here arising in other common law subjects, especially contracts. A contract dispute might escalate because one party to a transaction brought a set of absolute preferences to a transaction while relative preferences informed the counterparty's understanding of the terms. If the world is indeed equally divided between relative and absolute welfarist 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 fail. Perhaps the best we can hope for is a world in which individuals are consistently oriented toward either absolute or relative preferences. If we obtain that empirical result, then courts at least should be able to resolve cases in which two like-minded parties contract, but one of the parties misrepresents her prior assumptions for strategic advantage *ex post*.<sup>170</sup> But where two people of divergent types have created an ambiguous contract, splitting the difference may be the lesser evil. 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.

#### CONCLUSION

There is no clear 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 welfare. Others seem primarily concerned with relative welfare. 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 seem most commonly 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 an intellectually honest way, evidence about how a particular decedent thought about preferences and justice during his own life.

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<sup>170</sup> Even in those situations of preference convergence, further questions arise. For example, is the relevant comparison for relative welfarist Raymond to counterparty Clara in the contract negotiations, or to Raymond's co-workers, neighbors, and college roommates? If the former comparison is relevant, then a focus on fair distribution of any contractual surplus may be appropriate. If the latter comparison is decisive, then a court might try to maximize the joint value created by the contract so that Raymond and Clara both see their relative welfare enhanced.

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 assume that a one-size-fits-all approach can explain actors' motivations in property controversies. To the extent that absolute welfarists and relative welfarists 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 another for those who think about them in relative terms.<sup>171</sup>

More broadly, this Article 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 Brown's inability to understand why it was any of Voss's business whether the easement across Voss's land benefited one parcel or two.<sup>172</sup> 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.<sup>173</sup> As lawyers seek to mediate these cases or settle them before trial, they need to recognize that the plaintiff and defendant may be talking in entirely different languages, each of which boasts a respectable number of native speakers. Those focused on absolute preferences are not 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 govern their lives within it.

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<sup>171</sup> Ariel Porat and I are developing this idea at much greater length in a separate article.

<sup>172</sup> See *supra* note 144 and accompanying text.

<sup>173</sup> See *supra* notes 50-62 and accompanying text.