Property in *Radical Markets*

Katrina Miriam Wyman†

INTRODUCTION

Radical Markets is a bold book, bubbling with ideas, which captures something of the current zeitgeist in arguing that the United States is now burdened by the concentration of economic–and political–power. This essay focuses on the book's discussion of property rights in land.[1] It questions whether Posner and Weyl identify a monopoly problem with private property in land that warrants the attention of contemporary policymakers—and suggests that their discussion of the digital platform monopolies is more intriguing.

As Posner and Weyl argue, landowners have a monopoly on a specific piece of the earth in the sense that they control the uses to which their land is put (subject to overarching government regulation). However, there is little empirical evidence that this monopoly is sufficiently harmful that private property should be jettisoned for the partial common ownership that Posner and Weyl propose. There often are substitutes for individual parcels that reduce the harm from any landowner's control over one parcel. Moreover, the United States already has developed mechanisms for addressing landowner monopolies when they grievously complicate converting land to higher value uses, including granting private entities, such as the developers of major infrastructure like pipelines and utilities, as well as governments, the right to expropriate land. In addition, giving everyone the right to forcibly purchase the property of others as Posner and Weyl propose would create social problems of its own that may make the supposed cure worse than the disease. Is it worth making a tenant and her two children living in a Bronx apartment vulnerable to having to move on short notice from the area where her mother lives and her children are in nursery school, because there is a new University of Chicago Law graduate with a well-paying job

† Sarah Herring Sorin Professor of Law, NYU School of Law.

1 See Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 30–79 (Princeton 2018).

in Midtown Manhattan able to pay the value that the tenant put on her apartment in the wee hours of the night, after she finally got her youngest child to sleep?[2]

Much more interesting than the book's discussion of land is its discussion of digital platforms and their profiteering from the data that they are fed by individuals. Posner and Weyl likely are on sounder footing in arguing that the market power of dominant digital platforms is worthy of policy attention, compared with the landowner monopoly. The idea of addressing this market dominance by promoting payments by digital platforms to the public for the data that it supplies is intriguing. This is a context where Posner and Weyl have identified an important problem and are advancing an innovative proposal that warrants further discussion, if not adoption in its current form.

If Henry George, one of Posner and Weyl's inspirations,[3] were alive today he might be focusing on digital platforms, urging the recognition of the community's role in producing technological progress and better sharing of its rewards. George's focus on property rights in land reflected the significance of land as an asset in the nineteenth century, when the United States was distributing land acquired from Native Americans in the West,[4] and transitioning from an agricultural to an urbanized industrial economy.[5] Today, intangibles are a far more significant economic asset class in the United States than land,[6] and the role of digital platforms is a major source of social contestation.[7] Similar to the way that

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2 A lease is a form of private property, even though a lease does not provide perpetual ownership. Thus, presumably, a lease also would be subject to the partial common ownership that Posner and Weyl advocate, meaning that, as in the example in the text, a renter would have to transfer her apartment if someone came along willing to pay the renter's self-assessed valuation of the leasehold. See, for example, Nicholas Spear, *Taking Leases*, 80 U Chi L Rev 2005, 2015–17 (2013) (explaining that leases are a compensable property interest under the Takings Clause).

3 See, for example, Posner and Weyl, *Radical Markets* at 4 (cited in note 1).

4 For one history of these often unjust land acquisitions, see generally Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap 2005).

5 See Edward T. O'Donnell, *Progress and Poverty in the Gilded Age: Henry George and the Crisis of Inequality* 20–25, 115 (Columbia 2015).

6 Aaron D. Simowitz, *Siting Intangibles*, 48 NYU J Intl L & Pol 259, 260 (2015) (showing that intangibles constitute most US corporate assets), citing Carol Corrado, Charles Hulten and Daniel Sichel, *Intangible Capital and Economic Growth*, (Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Apr 2006), archived at http://perma.cc/QE62-PY4Z; Mary Juetten, *Pay Attention to Innovation and Intangibles – They're More Than 80 Percent of Your Business Value* (Forbes, Oct 2, 2014), archived at http://perma.cc/84MT-QT8Y (referring to the work of Andrew Sherman).

7 See, for example, Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 14–23, 89 (Columbia 2018); David Meyer, *What to Know about 'Freedom from Facebook,'*

George's work laid the foundation for adapting societal institutions to industrialization and urbanization,[8] *Radical Markets* might help to lay the intellectual foundation for reforming institutions to adapt to digitalization, even if, like George's idea for a land value tax, Posner and Weyl's specific proposals are not the ones that society ultimately chooses to adopt.

I. LANDOWNERS HAVE A MONOPOLY . . .

Posner and Weyl accurately describe landowners as enjoying monopoly control over a parcel of the earth, because they have the right to exclude others, and the right to control uses of land (subject to government regulation like anti-discrimination statutes and zoning).[9] They maintain that this monopoly is socially costly because landowners can thwart re-purposing land to higher value users by strategically holding out for higher prices or refusing to sell.[10] Posner and Weyl are by no means the first to focus on the holdout problem.[11] However, they are saying something new in suggesting that the ability of landowners to decide whether to sell their land is so socially costly that it ought to be curtailed by granting all individuals and corporations the right to forcibly purchase the property of others.

II. BUT HOW COSTLY IS THE MONOPOLY?

Whether the structure of existing land rights is so socially costly that it ought to be abandoned for partial common ownership is partly an empirical question. Posner and Weyl provide little empirical evidence for the proposition that bargaining problems impede the efficient allocation of land on a massive scale today. To be sure, they provide some estimates of the potential

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the New Progressive Campaign to Break Up the Social Media Giant (Fortune, May 21, 2018), archived at http://perma.cc/WJ5C-8PZU; Russell Brandom, *The Monopoly-Busting Case against Google, Amazon, Uber, and Facebook* (The Verge, Sept 5,2018), archived at http://perma.cc/DP2H-J72Q; David McCabe, *Scoop: 20 Ways Democrats Could Crack Down on Big Tech*, (AXIOS, July 30, 2018), archived http://perma.cc/SA5G-FLUT; Jamie Condliffe, *How to Fix Social Media's Big Problems? Lawmakers Have Ideas*, (NY Times, July 30, 2018), archived at http://perma.cc/8KMC-SEC4.

8 O'Donnell, *Progress and Poverty in the Gilded Age: Henry George and the Crisis of Inequality* at 60–63, 81 (cited in note 5).

9 See, for example, Posner and Weyl, *Radical Markets* at 38 (cited in note 1).

10 Id at 38–39.

11 See generally, for example, Michael Heller, *Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books 2008); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv L Rev 621 (1998).

economic gains from shifting from private to partial common ownership.[12] However, it is hard to tell from the book whether these estimates reflect the full array of economic and non-economic benefits of private property, which include not only the incentives to invest in land and community, but also scope for individuals to protect their privacy and exert some control over their environment.[13] It is also hard to tell if these estimates of the economic gains of switching have been adjusted downwards to reflect the effects of the legal devices that the US and other western societies already have developed for overcoming the holdout problem when it is especially socially costly, such as eminent domain.

While Posner and Weyl acknowledge some of the existing devices for overcoming socially costly holdouts, they tend to quickly discount them.[14] Consider two examples that Posner and Weyl provide to illustrate the significance of the holdout problem in obstructing re-purposing land to higher value uses and the need for partial common ownership: the complaint from the co-founder of the Hyperloop One that the company needs a "right of way" because private landowners could use their right to exclude to thwart assembly of land needed for the infrastructure project;[15] and the apparent difficulty of assembling land in the Canadian Rockies for fracking for natural gas.[16] It is ironic that Posner and Weyl invoke these examples to illustrate the social costliness of private property because the United States has well established mechanisms for preventing holdouts from thwarting the construction of transportation infrastructure and oil and gas drilling.[17]

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[12] See Posner and Weyl, *Radical Markets* at 69, 72–73 (cited in note 1).

[13] See generally Katrina M. Wyman, *In Defense of the Fee Simple*, 93 Notre Dame L Rev 1 (2017).

[14] Posner and Weyl, *Radical Markets* at 33 (cited in note 1):

> At present, developers minimize the holdout risk by taking costly precautions when they buy up land—for example, by acting secretly through shell corporations. But they still must engage in lengthy and expensive negotiations with individual sellers, which can cause delays and increase risk to intolerable levels. That is why governments often take the lead, using the power of eminent domain to create new commercial or residential districts.

[15] Id at 32.

[16] Id at 63.

[17] While I have not extensively researched Canadian oil and gas law, compulsory pooling and unitization, the techniques described below for overcoming holdouts, appear to exist in some Canadian provinces. See Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* §§ 905, 912 (Lexis 8th ed 2019) (Canadian provinces

In many states, railroads have been statutorily delegated the right to use eminent domain to enable them to acquire rights of way.[18] In others, including California, state governmental authorities use eminent domain to assemble the land necessary for rail projects such as the high-speed rail line from Los Angeles to San Francisco.[19] Given the precedents for using eminent domain to build rail lines, it is possible that the builders of the Hyperloop, which would be similar to a railroad, could be delegated the power to expropriate land, or that the state would use eminent domain to assemble the land to build the Hyperloop.

Private property owners often own the rights to minerals, including oil and gas, in the sub-surface of the earth, but they lack the financial resources and technological wherewithal to exploit the minerals.[20] Oil and gas drillers use landmen to lease the rights to drill from mineral rights owners in areas thought to have reserves.[21] If landmen are unsuccessful in leasing rights to a section necessary to drill in another area, the oil and gas drillers often can use state statues providing for forced pooling and unitization to overcome individual holdouts.[22] Contrary to Posner and Weyl's portrayal of private rights as an obstacle to oil and gas

among the jurisdictions with compulsory pooling and in list of jurisdictions with compulsory unitization); *Unit Agreements* (Freehold Petroleum and Natural Gas Owners Association), archived at http://perma.cc/SNU5-H8WL.

18 Larry W. Thomas, *Railroad Legal Issues and Resources* *69 (The National Academies of Sciences, Engineering, and Medicine, 2015) online at http://www.nap.edu/read/22093/chapter/22#69 (visited on May 5, 2019) (Perma archive unavailable); David L. Callies et al, 1A *Nichols on Eminent Domain* § 3.03 (explaining that Congress and state legislatures may authorize others to use eminent domain). On delegated eminent domain authority in general, see generally Abraham Bell, *Private Takings*, 76 U Chi L Rev 517 (2009).

19 See, for example, Tim Sheehan, *High-Speed Rail Escalates Eminent Domain Legal Battles for Land* (The Fresno Bee, Apr 20, 2015), archived at http://perma.cc/K3ZX-FEJJ; Roger Rudick, *California High Speed Rail's Plan for the Future* (Streetsblog SF, Oct 8, 2018), archived at http://perma.cc/GT4Y-TN6J.

20 See, for example, Marie Cusick and Amy Sisk, *Millions Own Gas and Oil under Their Land. Here's Why Only Some Strike It Rich* (NPR, Mar 15, 2018), archived at http://perma.cc/7KLA-4KPP.

21 Martin and Kramer, *Williams & Meyers, Oil and Gas Law* § L Terms (cited in note 17) (defining "landman").

22 Id at §§ P Terms, U Terms (defining pooling and unitization); Abby Harder, *Compulsory Pooling Law: Protecting the Conflicting Rights of Neighboring Landowners* (National Conference of State Legislatures, Oct 24, 2014), archived at http://perma.cc/ZZB8-UD8N; Marie C. Baca, *Forced Pooling: When Landowners Can't Say No to Drilling* (ProPublica, May 18, 2011), archived at http://perma.cc/3RNH-4H2E. The legal existence of forced pooling does not mean that it is uncontroversial. See John Aguilar, *Anti-Fracking Activists Sue Colorado over "Forced Pooling," Promise More Challenges* (Denver Post, Jan 23, 2019), archived at http://perma.cc/MQQ8-AW3E.

drilling, some observers argue that the American practice of private ownership of mineral rights is a major reason why fracking is more prevalent in the US than other countries such as Britain, where governments own mineral rights, and have fewer financial incentives to allow drilling than private mineral owners.[23]

III. THE OMITTED VARIABLE: PUBLIC LAW VETO POINTS

It is not private property rights but rather the veto points created by public law, which are omitted from Posner and Weyl's stylized vignettes, that are likely to be the more meaningful legal obstacles today to re-purposing land for new transportation infrastructure like the Hyperloop, fracking in some areas, or residential and commercial development in urban centers.[24] In the late 1960s and the early 1970s, environmental and land use regulations in the United States were fundamentally overhauled in response to concerns about the effects of industrialization, urbanization and suburbanization.[25] In 1969, Congress passed the National Environmental Policy Act,[26] which requires environmental impact statements for actions that require federal approval that will significantly impact the environment.[27] States and local governments introduced similar environmental review requirements, reacting in some cases to non-transparent government decisionmaking about land use before and after World War II that led to the destruction of many urban neighborhoods, including minority and low-income neighborhoods, and sprawling patterns of development that consumed environmental resources.[28] The result is that embarking on large projects such as

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[23] Simon Lack, *British Shale Revolution Crushed: America's Unique Ownership of Oil and Gas* (Forbes, Oct 16, 2018), archived at http://perma.cc/2XHD-68NE.

[24] The need for financing may dwarf the legal obstacles created by private property rights and public law. The interview that Posner and Weyl cite for the obstacles to the Hyperloop also refers to the developer's need to raise funding for the project, as well as the potential that environmentalists might object to it. Posner and Weyl, *Radical Markets* at 32–33 (cited in note 1).

[25] See generally Richard J. Lazarus, *The Making of Environmental Law* (Chicago 2004); Katrina M. Wyman and Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 Cal L Rev (forthcoming 2020), archived at http://perma.cc/3VHN-7DS3.

[26] Pub L No 91-190, 83 Stat 852 (1970), codified at 42 USC § 4321 et seq.

[27] 42 USC § 4332.

[28] This approach to development is often associated with Robert Moses. See generally Robert Caro, *The Power Broker: Robert Moses and the Fall of New York* (Vintage 1974). See also Tom Angotti, *Land Use and the New York City Charter* *4 (New York City Charter Commission 2010):

building mega-residential towers or large transportation infrastructure such as Hyperloops requires not only assembling land that is privately owned but also navigating governmental approval processes that provide the public with access to information, participation rights, and means of seeking redress in court if the relevant government decision-makers fail to follow the prescribed process and consider the requisite factors. Thus private land assembly, Posner and Weyl's central concern, is now only a necessary, but not a sufficient, condition for development on privately owned land.[29] Re-purposing land on a large scale is now effectively a two-stage process: developers must buy the land from other private actors and obtain the necessary public approvals in processes that give members of the public opportunities to raise concerns about proposed projects.

Because of the environmental revolution of the 1960s and 1970s, building any kind of major infrastructure like the Hyperloop is almost certainly likely to require an environmental review, extensive public consultation, and government approval. If environmentalists, other members of the public, or private landowners are opposed, they can attempt to sue, arguing that the environmental review was inadequate or that the consultation process was procedurally defective. They may not succeed, but the process and the litigation are likely to delay the project and possibly change the economics of it.[30] Fracking on private land also may require government-issue permits intended to protect envi-

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> In 1975, ULURP (Uniform Land Use Review Procedure) was established in the City Charter . . . to further democratize land-use decision making, and move away from the Robert Moses-era model of mega-projects, which were also becoming increasingly less feasible given the city's fiscal crisis and cuts in federal funding.

[29] Thank you to Lee Fennell for suggesting that land assembly is a necessary, but not sufficient, condition for major developments today.

[30] US environmental NGOs are currently using environmental review requirements, as well as other legal levers, to try to block the development of natural gas and oil pipelines across the country, to avoid locking the U.S. into another generation of fossil fuel use. Pamela King, *Pipeline Wars Arrive at the Supreme Court. What's Next?* (E&E, Jan 16, 2019), archived at http://perma.cc/C23T-FSFS. For a recent decision that blocked further construction of the Keystone XL pipeline to transport oil from Alberta on the basis of the inadequacy of the environmental impact statement required by the National Environmental Policy Act, see generally *Indigenous Environmental Network v United States Department of State*, 347 F Supp 3d 561 (D Mont 2018).

ronmental resources, and these permit requirements can meaningfully delay fracking activity.[31] New York, Vermont and Maryland have state-wide bans on fracking, a more powerful hindrance to fracking than any single private property owner can invoke with their right to exclude.[32]

Public law vetoes, not private property rights, are also likely the main obstacle to re-purposing land to new higher value uses in the cities where most Americans now live.[33] Consider the Two Bridges proposal to build four skyscrapers in the Lower East Side of Manhattan that would include roughly 3,000 apartments, including approximately 700 affordable units,[34] "the single largest number of unsubsidized affordable housing units provided in New York City history."[35] The developers have assembled the necessary land, so the holdout problem that Posner and Weyl posit blocks re-purposing land is not present.[36] However, there is vocal opposition to the development in the community surrounding the proposed site. People are concerned that the large scale development will fundamentally change the character of the neighborhood and lead to more gentrification and displacement of existing residents.[37] Although the City Planning Commission determined that the project could proceed without going through the City's elaborate Uniform Land Use Review Process (ULURP), the project was nonetheless the subject of an Environmental Impact Statement under the State Environmental Quality Review Act

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31 Alex Ruppenthal, *Wollsey Withdraws Fracking Permit, Citing "Burdensome" Illinois Law* (WTTW, Nov 3, 2017), archived at http://perma.cc/9XS8-9F7E.

32 *Hydraulic Fracturing in the United States* (Wikipedia, Feb 12, 2019), archived at http://perma.cc/MKV9-28VC.

33 Lee Fennell's *Fee Simple Obsolete* nicely captures the importance of re-purposing land in cities given the importance of urbanization. See generally Lee Anne Fennell, *Fee Simple Obsolete*, 91 NYU L Rev 1457 (2016). On the significance of the regulatory revolution of the 1960s and 1970s, see Christopher S. Elmendorf, *Beyond the Double Veto: Land Use Plans as Intergovernmental Contracts* 71 Hastings L J *8–9, 11 (forthcoming 2019), archived at http://perma.cc/VC5C-Q6QM.

34 Tanay Warerkar, *Locals Denounce Two Bridges Towers at City Planning Hearing* (Curbed New York, Oct 17, 2018), archived at http://perma.cc/4H7Q-BQQS.

35 Affirmation of Janice Mac Avoy, *Council of the City of New York v Department of City Planning*, Index No 452302/2018, (NY Sup Jan 10, 2019) ¶ 5 (MacAvoy Affirmation) (attributing this description to Marisa Lago, Chair of the New York City Planning Commission).

36 Id at ¶ 4 ("Property Owners each own or are in contract to purchase property that are within the Two Bridges Large Scale Residential District"); see also Steven Wishnia, *Can Lawsuits Stop Four More Gigantic Towers from Going Up in Two Bridges?* (Gothamist, Jan 25, 2019), archived at http://perma.cc/F8UE-DCT8.

37 See Wishnia, *Can Lawsuits Stop Four More Gigantic Towers* (cited in note 36); Warerkar, *Locals Denounce Two Bridges Towers* (cited in note 34).

and the City Environmental Quality Review process, public hearings, and a vote by the City Planning Commission.[38] The Manhattan Borough President and the City Council are now suing the City Planning Commission, arguing that its decision not to subject the project to ULURP is arbitrary and capricious, and a second lawsuit from community groups argues that the Commission's approval of the project should be vacated.[39] It was to avoid the many veto points in New York City's land use regulatory process that New York State Governor Andrew Cuomo proposed to use a General Project Plan to redevelop a site in Long Island City for a new headquarters for Amazon, before Amazon decided not to pursue the project.[40] Moreover, New York City's regulatory process is much easier for developers to navigate than that in places such as California where much less construction is as "of right," and discretionary governmental approval is routinely required for even small-scale developments.[41]

Posner and Weyl neglect the obstacles that public law veto points have come to represent to development since the revolution in land use and environmental regulation of the 1960s and 1970s.[42] To be sure, environmental review and consultation requirements serve a useful purpose because proposals to repurpose

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[38] See Mac Avoy Affirmation at ¶ 9 (cited in note 35) (describing process).

[39] See Wishnia, *Can Lawsuits Stop* (cited in note 36); Warerkar, *Locals Denounce* (cited in note 34); Caroline Spivack, *Two Bridges Towers Hit With Lawsuit From Community Groups*, (Curbed New York, Mar 22, 2019), archived at https://perma.cc/K5AL-HLU4; Verified Article 78 and Declaratory Judgment Amended Petition-Complaint, *Council of the City of New York v Department of City Planning*, Index No 452302/2018, (NY Sup Jan 24, 2019) ¶ 7; Verified Hybrid Article 78 and Plenary Action Petition, *Lower East Side Organized Neighbors v New York City Planning Commission*, Index No 1503024/2019 (NY Sup Mar 22, 2019).

[40] Daniel Geiger, *Cuomo Likely to Steer Amazon Project around City Council* (Crains New York Business, Nov 9, 2018), archived at http://perma.cc/YG9X-9BS7; Sam Raskin, *Amazon's HQ2 Deal with New York, Explained* (Curbed New York, Feb 16, 2018), archived at http://perma.cc/WXJ9-FAM6; New York State Urban Development and Research Corporation Act, NY Unconsol Law § 6308 (McKinney).

[41] See generally, for example, Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Enviro L J 21 (2018). See also Elmendorf, 71 Hastings L J at *9, 12, 46, 48, 58–59 (cited in note 33).

[42] Perhaps Posner and Weyl think that the problem of public law vetoes will be addressed by their proposal for Quadratic Voting. But using QV to elect city council members, or make land use decisions, might exacerbate the problem of neighbors blocking new development that would benefit the city as a whole. QV would provide an intensely interested small number of people—like the neighbors on the Lower East Side—with the tools to express the intensity of their preferences to the detriment of the broader community that might gain from the changes, but that remains rationally ignorant of its potential to benefit because it is too costly to follow every neighborhood battle. See Posner and Weyl,

land, like the Hyperloop or Two Bridges, impact not only the private land buyers and sellers, but also neighbors, individuals who would like to move into the area and non-human species like plants and animals. In the case of fracking, people and non-humans around the world are affected, insofar as fracking and the resultant oil and gas generate greenhouse gas emissions.

But while public law vetoes create a mechanism for forcing consideration of some of the negative externalities of development proposals, these veto points also may generate negative externalities of their own by thwarting socially desirable repurposing of land. How to adapt the public law veto points to facilitate development, while addressing its potentially negative consequences, is likely more of a priority than addressing the private law holdout problem for which the law has well-established devices. There may be no single solution to the public law veto point problem. Overcoming obstacles to building new housing in New York City may require different changes than facilitating the construction of Hyperloops that cross many rural areas. For example, in cities like New York, the opposition of neighbors in lower-income, minority communities might be muted—although almost certainly not eliminated—if not only communities like theirs, but also wealthier neighborhoods where whites predominate, were required to accept their fair share of the tall buildings.[43]

IV. FROM LAND TO DIGITAL MONOPOLIES

For this Luddite professor of conventional property law based in the nineteenth century enclave of Greenwich Village, the most promising part of *Radical Markets* is its discussion of the market power of digital platforms. While the monopoly problem in land is

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Radical Markets at 110 (cited in note 1) ("[Under QV,] when minorities have sufficiently intense interests, they can protect their interests from majority domination.").

[43] See Affidavit of Thomas Angotti, *Northern Manhattan Is Not For Sale v City of New York*, Index No 161578/2018 (NY Sup Dec 10, 2018) ¶ 6 ("[R]ecent rezoning actions have targeted blocks and neighborhoods within communities of color for upzoning to promote new development while protecting blocks and neighborhoods with predominantly white populations"). There is considerable controversy in New York City about the way that residential displacement is measured as part of the environmental review process. See generally, for example, *Ordonez v City of New York*, 2018 WL 3385054 (NY Sup); Renae Widdison, Jen Becker, and Elena Conte, *Flawed Findings: How NYC's Approach to Measuring Displacement Fails Communities* (Pratt Center for Community Development 2018), archived at http://perma.cc/8TRE-VMU9. "Fairness" across boroughs was a factor in the siting of marine transfer stations to transfer solid waste in New York City in the 2000s. See generally *Association for Community Reform Now ("ACORN") v Bloomberg*, 52 AD3d 426 (NY App 2008).

an old one that policymakers have long worked on mitigating, the problem of market power in online data is a new one, which would have been unimaginable to Henry George and his contemporaries. Digital platforms like Amazon, Facebook, Google, and Uber appear to present two kinds of market power problems, albeit to varying degrees. One is a monopoly or oligopoly problem as they are the sole, or one of a small number of, sellers of a good or service—online retail in Amazon's case, digitally dispatched transportation in the case of Uber.[44] The second is a monopsony problem, as some of these platforms are the only or one of a small number of "buyers" of data.[45] For example, Facebook and Google have been able to accumulate vast troves of personal data while "paying" individuals with services of minimal value in comparison to the value that the platforms derive from the troves of data that they are amassing.

As with the landowner monopoly, it is partly an empirical question whether the social costs of the market power of digital platforms is sufficiently grave to fundamentally restructure their operations. Again, there is little empirical evidence of the costs of the status quo or the benefits of Posner and Weyl's proposed changes. But there is a great deal of public unease at the moment with these platforms, suggesting that the harms deserve more attention from public policymakers in the US than they so far have received. Posner and Weyl focus on a subset of the sources of the social unease—principally, the concerns that the "siren servers" are undercompensating people for their data,[46] and that a few companies are creating barriers to socially beneficial competition by amassing vast amounts of data. To address these concerns, Posner and Weyl propose that individuals be paid for the data

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44 Charles Sizemore, *Here's Why Amazon Isn't a Monopoly* (Business Insider, Aug 15, 2017), archived at http://perma.cc/FXT5-JCLW.

45 Uber might be regarded as a monopsony buyer of digitally dispatched drivers, which has been able to hold down the revenues that its drivers receive because it does not compete much for drivers. In arguing for the equivalent of a minimum wage for app-based drivers in New York City, two economists emphasize that there are only four major companies digitally dispatching drivers in the City, and that these drivers are often low-skilled immigrant men with few attractive alternative employment prospects. See James A. Parrott and Michael Reich, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment* *53–69 (The New School Center for New York City Affairs, Jul 2018), archived at http://perma.cc/QG8R-GRCJ.

46 Posner and Weyl, *Radical Markets* at 231 (cited in note 1) (using the term "technofeudalism" to refer to the situation in which "the siren servers provide useful and enjoyable information services, while taking the market value of the data we produce in exchange").

that they provide the platforms, potentially through intermediaries such as unions.[47] The platforms might come to resemble the pharmaceutical companies that pay people identified by intermediaries (doctors and hospitals) for data about their reactions to drugs, after obtaining informed consent.[48] As with the siren servers, it is the accumulation of data that is particularly valuable to the pharmaceutical companies running the drug trials, not any single individual's reactions to an experimental drug. Although not entirely novel, the idea of paying people for their data is worth considering, if only as a means of stimulating additional proposals for addressing the consequences of digitalization.

CONCLUSION

The best parts of *Radical Markets* challenge one to think about the dramatic technological advances in recent years, and how to better share the fruits of these advances to reduce the inequalities that they appear to have exacerbated so far. In the 1870s, when Henry George was writing *Progress and Poverty*, he did not foresee the development of the income tax and its use to help fund a regulatory and welfare state that would mitigate the effects of the extreme poverty and deprivation that he witnessed in New York and other major US cities.[49] While his idea of taxing away all the undeveloped value of land was radical, it built on the long history of governments taxing land, because it was a visible and measurable asset. Posner and Weyl's proposal for a "'common ownership self-assessed tax' on wealth"[50] hints at how digitalization might lead to the development of new forms of taxation, as technologies make new assets visible to governments, and ease the collection of taxes. The development of these new forms of taxation also may lead to new forms of entitlements—as the administrative and welfare state gave rise to "new property," to use Charles Reich's felicitous phrase—that address inequalities and

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47 Id at 245. Posner and Weyl presumably have in mind something more protective of individual rights than Facebook's recent program to pay people $20 a month. Shannon Palus, *Facebook Paid People $20 a Month for Access to All Their Digital Activity. Why Did They Sign Up?* (Slate, Jan 31, 2019), archived at http://perma.cc/57LU-AY5U.

48 For a description of drug trials, and how pharmaceutical companies determine how much to reward people for their participation, see Brandon Ballenger, *7 Things to Know before You Join a Clinical Trial*, (Money Talks News, Mar 9, 2012), archived at http://perma.cc/2N6D-EEA8.

49 O'Donnell, *Progress and Poverty in the Gilded Age* at 23–24, 42 (cited in note 5) (describing the impact on George of his 1869 trip to New York).

50 Posner and Weyl, *Radical Markets* at 61 (cited in note 1).

other social ills linked with digitalization. The very technologies that give rise to digitalization may make available new tools for mitigating its effects far beyond what we can imagine today. *Radical Markets* should stimulate academics and others to develop new ideas for the technology of governance.