# MARKETS AND ETHICS IN U.S. PROPERTY LAW

by
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All views, interpretations, recommendations, and conclusions expressed in this paper are those of the author and not necessarily those of the supporting or cooperating organizations.

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# MARKETS AND ETHICS IN U.S. PROPERTY LAW

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The law of property in the modern United States contains a profound bias toward developmental uses and against such non-market values as the health and welfare of the communities that live on the land or, indeed, the ecological well-being of the land itself. This bias inheres in the law that affects both the public lands, for whose management the national government is responsible, and land that lies in private hands. It is so deeply ingrained in the U.S. legal culture that it presents itself to political view as a law of nature: the fundamental liberty of private owners to develop their property as they please is the cornerstone of American civil and economic freedom, while unlimited access to the resources of the public lands is an all-but-inviolate principle on American politics.[2]

This pro-developmental bias is a historical artifact, built into our law over the course of the nineteenth century by courts, legislatures, and private citizens for whom economic development

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[2]On the ways in which law and legal culture "naturalize" certain aspects of social order while leaving others open to political questioning, see Robert W. Gordon, "Law and Ideology," Tikkun, 3 (1985): 14-18, 83-86; also Gordon, "Critical Legal Histories," Stanford Law Review, 36 (1984): 57-126.

was the key to the nation's security and prosperity. It is not essential to the nation's law or to any of its institutions. Indeed, since the beginning of the nineteenth century it has existed in constant tension with other, contradictory values that uphold responsibility to communitarian, social and environmental concerns as a counterweight to narrow economism and individual profit-seeking. This tension inheres in law governing both the public lands and private property, and manifests itself in each in similar ways. For most of the time since Thomas Jefferson this communitarian aspect of U.S. property law focussed its concern primarily on such social values as education, economic stability, and participatory democracy. Ecological concerns have emerged as an important factor in debates over land use in the second half of the twentieth century, but these are only the latest manifestations of the long-standing, Jeffersonian concern for non-market values that runs through the nation's history.

**I. The Public Lands**

Today the United States owns perhaps 690 million acres of land, or about one-third of the country's total land area.[3] The

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[3]On the public lands generally, see Marion Clawson, The Public Lands Revisited (Baltimore, 1983); Charles F. Wilkinson, "The Law of the American West: A critical Bibliography of the Nonlegal Sources," Michigan Law Review, 85 (1987): 953-1024; Wilkinson, "The Field of Public Land Law -- A Ten-Year Retrospective," Public Land Law Review, 10 (1989): 19-27; George Cameron Coggins, "Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law," Land and Water Law Review, 29 (1994): 381-398; Coggins, "The Developing Law of Land Use Planning on the Federal Lands," University of Colorado Law Review, 61 (1990): 307-353; Marla E. Mansfield, "A Primer of Public Land Law," Washington Law Review, 68 (1993): 801-857.

public lands include such parcels as the national forests, the national parks, military bases, the White House, and the continental shelf. Federal ownership of these lands was an essential precondition to the birth of the United States in the first place: confederation between the thirteen original states would not have taken place if those states with significant claims to lands on the western frontier had not agreed with states that did not have such claims that the western lands would be ceded to the national government and administered by the Congress as a common fund for the benefit of the whole people.[4] This agreement survives today in Article IV, Section 3 of the United States Constitution, which provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."

From the beginning, the United States was unusual among nations in two respects. First, the national government used the public lands as a primary instrument of social policy. Second, the United States is unique in the broad diffusion of private landownership among its citizens and in the extent of those citizens' liberty to do with their land as they please. The early United States was an ambitious experiment with an uncertain future. It had relatively little capital available for investment and short supplies of labor and entrepreneurship. One

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[4]Paul W. Gates, "An Overview of American Land Policy," Agricultural History, 50 (1976): 213-229, p. 213-214.

thing the country did have, however, was land and lots of it. At the Founding the national government owned 200 million acres of land, stretching from the crest of the Appalachian mountains to the Mississippi River. By 1860 public landholdings reached as far as the Pacific Ocean and had increased to over a billion acres, with Jefferson's purchase of Louisiana territory from Napoleon, the acquisition of Florida from Spain and Oregon from the British, and the thinly-disguised theft of the northern third of Mexico in the 1840s. In 1868 the nation purchased Alaska Territory from Russia and added another 200 million acres or so. This land was among the richest on the planet: it contained gold and other precious metals, vast expanses of timber, and some 30 million buffalo, among other resources.[5]

The effort to manage this endowment as a common fund for the benefit of the whole people was crucial to the success of the republican experiment in the United States, and has been perhaps the single most powerful influence on the nation's history. Law has been the medium through which this process has taken place. Americans rely on law as a kind of corporate brain for their society, using legal processes and institutions to identify problems that require public attention, to consider and to choose among alternative strategies for addressing them, and for

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[5]On the history of the public lands, see Paul W. Gates, History of Public Land Law Development (Washington, 1968); J. Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (Cambridge, MA, 1964), 13-61.

carrying out whatever goals and strategies they do choose.[6]

The people made two crucial decisions regarding the public lands at the very outset of the republican experiment. The first was to carve the western lands up into territories that would ultimately, after a period of modified self-government under Congressional supervision and a Presidentially-appointed Territorial Governor, be admitted to the Union as equals to the original thirteen states. The United States would thus develop as a republic, not as a colonial empire on the British, Spanish, and French models. The Confederation Congress embodied this decision in the Northwest and Southwest Territorial Ordinances of 1785 and 1787, which were later ratified by the new Congress under the 1787 Constitution.[7] The second decision was to put the land inside these new states into the hands of private citizens. Congress took the first step toward this goal in a 1796 statute that established the Cadastral Survey: this divided up the landscape into abstract rectangles -- the essence of the republican form -- with the goal of making the public lands easy

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[6]See J. Willard Hurst, Law and Social Order in the United States (Ithaca: Cornell University Press, 1977), 23-25. Useful introductions to legal history include Lawrence M. Friedman, A History of American Law 2d (New York: Simon & Schuster Touchstone, 1985), and Kermit L. Hall, The Magic Mirror: Law in American History (Oxford: Oxford University Press, 1989).

[7]Paul W. Gates, "An Overview of American Land Policy," 50 Agricultural History 214, 214 (1976); J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison, 1956), 24. On the early administration of the land laws, see Malcolm J. Rorbough, The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837 (Oxford, 1968), 3-24.

to administer and easy to market, both before and after the initial sale to private individuals. At this point, however, there emerged a fundamental disagreement over public lands policy, which continues to this day. As a nation we have never been sure whether the public lands should be administered primarily for their productive potential or for their potential to provide social or ethical benefits to the people.

One side of this debate was market-oriented in its outlook. Its chief exponents were the Federalists, whose ideological leader was the Washington Administration's Treasury Secretary, Alexander Hamilton. Hamilton's idea was to market the land as quickly as possible so as to generate cash to be used for government purposes. Government would not involve itself in the administration of land use per se; market forces would determine which lands would be developed and when, and to what purposes. The Federalists reasoned that Government simply did not have the bureaucratic resources required to administer the public lands; market forces would naturally employ the far-greater collective genius of the people in making productive use of the land. The goal, then, was to use the land to generate market benefits in the form of revenue for government purposes and economic development by and for private citizens. Political and social benefits would accrue naturally, as a by-product of market forces that were more or less inexorable in any event.[8]

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[8]Gates, "Overview of American Land Policy," 217; Hurst, Law and Economic Growth, 34-36; Friedman, A History of American Law 2d, 230-234.

The other side of the debate over public lands policy was suspicious of market forces and hoped that government would administer the lands more deliberately to promote social and political goals. The chief exponent of this theory was the third President, Thomas Jefferson, who dreamed of creating not a commercial as Hamilton envisioned but an autarchic, agrarian republic of independent, small-scale, diversified farmers. This would entail distributing the land slowly and carefully into the hands of actual settlers, at a rate determined by the growth of the population rather than market forces and at a price designed to promote a broad diffusion of landed property among the citizenry. Here, the primary goal of public lands policy would be to promote social and political goals directly, to fashion a nation of orderly, "virtuous" communities of independent, self-governing citizens.[9]

Of the two visions, that of the Hamiltonians better anticipated the future course of the nation's development. Jefferson's vision was firmly rooted in eighteenth-century social thought. Jefferson's view of the economy was essentially Mercantilist: the wealth of a nation consisted in the land it held under cultivation and the stock of wealth it had on hand. Fundamental economic change was not part of this picture: to Jefferson, the world he saw was essentially stable and orderly.

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[9]Hurst, Law and the Conditions of Freedom, 55; Hurst, Law and Economic Growth, 24-25. On the importance of "civic virtue" to early American republicanism, see Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York, 1969), 65-70.

Progress consisted of slow and steady accretion to the national wealth through population growth and the gradual addition of new cultivated lands to the nation's stock.[10] Economic development and industrialization were to be avoided: in Europe, Jefferson thought, manufacturing was necessary to support surplus population for which no new lands were available. The United States, however, was blessed with "an immensity of land courting the industry of the husbandman." Public policy, then, should put new lands into the hands of farmers as the demand for them arose. As he wrote in Notes on the State of Virginia, farmers were "the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue."[11]

Given his eighteenth-century view of a steady-state economy and the policy it suggested for the public lands, Jefferson anticipated that it would take many generations to settle the Louisiana Territory. He was wrong in this, of course: it took no more than two or three. The Hamiltonians, with their emphasis on market development and economic diversification, had a clearer view of the world that was coming into being at that very moment. They saw the world, not in terms of enduring structures as did Jefferson, but in characteristic nineteenth-century terms of

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[10]On eighteenth-century views of economic value and policy, see Michel Foucault, The Order of Things: An Archaeology of the Human Sciences (New York: Random House, 1970), 166-196.

[11]Thomas Jefferson, Notes on the State of Virginia, ed. William Peden (1787; repr. Chapel Hill: University of North Carolina Press, 1955), 164-165.

dynamic change proceeding according to immutable laws.[12] Evolution was one such law that would be discovered later on; Marx's dialectical materialism and Durkheim's modernization were others.

In the nineteenth-century view, what drove economic change was the law of supply and demand, which inexorably pushed resources toward their most efficient uses. Industrialization was not only to be welcomed but would be essential to the nation's survival and prosperity. No government could anticipate the changes that industrialization would eventually bring to the economy and society. With the political and industrial revolutions of the late eighteenth century, as Michel Foucault put it, "history had been restored to the irruptive violence of time."[13] Efforts to confine social and economic change, the Hamiltonians saw, would be utterly futile. It was better to liberate the capacity of the citizens to move change along by opening the public lands to them as rapidly as possible and to let the collective wisdom of the market determine how those lands would be used.

Behind the leading edge of history as it was, the Jeffersonian perspective was nonetheless built into U.S. laws and institutions, and remains so to this day. U.S. public lands policy has thus ever since contained elements of both

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[12]On nineteenth-century economics, see Foucault, The Order of Things, 226.

[13]Foucault, The Order of Things, 132.

Jeffersonian and Hamiltonian motives, in schizophrenic tension. One can see the market-oriented side of the policy manifested in the rapid sale of the public lands to speculators as well as to settlers, in the outright pro-development grants of land to railroad corporations in the mid-nineteenth century, and in the consistent Federal practice of selling water, timber, and minerals from the public domain to private developers at below-market rates. Above all, the Hamiltonian legacy manifests itself in the consistent and nearly wholesale government abdication to market forces of the responsibility for determining the nature of land use.[14]

The Jeffersonian, ethical side of public lands policy has also remained strong throughout the nation's history, however. Beginning in 1862 Congress passed a series of Homestead Acts that offered free land to actual settlers who would develop it. The Morrill Act of 1862 created a system of land-grant colleges to promote public education in the agricultural and mechanical arts. After 1890 there emerged an evolving system of federal reservations for forest conservation, national parks, wildlife refuges and so on, all designed to shield the public lands from the blind rapacity of market forces and to reserve opportunities for recreation, contemplation, natural experience for an

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[14]Gates, "The Homestead Law in an Incongruous Land System," American Historical Review, 41 (1936): 652-681; Hurst, Law and the Conditions of Freedom, 67-70.

increasingly industrial, urbanized nation.[15]

Overall, despite the apparent schizophrenia of the strange amalgam of Hamiltonian and Jeffersonian impulses it contained, U.S. public lands policy worked remarkably well to serve both market and non-market goals through most of the nineteenth century. It settled the country with astonishing rapidity. Public lands policy was crucial to the Union victory in the Civil War insofar as it put the lands north of the Ohio River and east of the Mississippi into the hands of a great many independent, small-scale, Jeffersonian farmers, who then supplied food, soldiers, and materiel to the Union Army in such quantities as simply to overwhelm the Confederate war effort. By the end of the century it had midwifed the birth of the world's largest industrial economy.

The profligate waste of land, timber, wildlife, and other resources that attended this growth did not escape notice at the time. "The thirst of a tiger for blood," wrote John Quincy Adams,

> is the fittest emblem of the rapacity with which the members of all the new states fly at the public lands. The constituents upon whom they depend are all settlers, or tame and careless spectators of the

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[15]Owen Olpin, "Toward Jeffersonian Governance of the Public Lands" (Symposium: Twenty-Five Years of Environmental Regulation), Loyola of Los Angeles Law Review, 27 (1994): 959-968. On the birth of the National Forest system, see Samuel P. Hays, Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920 (New York: Atheneum, 1979), 27-48.

> pillage. They are themselves enormous speculators and land-jobbers. It were a vain attempt to resist them here.[16]

In the event, however, there was not a lot that government could do to tame the process, given the size of the continent, the energy of the settlers, and the government's own vestigial capacity to enforce what law there was. Francis A. Walker admitted in a report for the 1890 Census that nineteenth-century American agriculture had exploited the land "in some degree at the expense of future generations" and that traditionally wasteful land-use practices would have to change in the future. But nineteenth-century lands policy had laid the foundation both for an industrial economy and a more careful, intensive agriculture in the future. To this extent the policy made economic sense: Walker compared the nation's behavior to that of "the strong, courageous, hopeful young man, who puts a mortgage on his new farm, that he may stock it and equip it for a higher productiveness," in contrast to that of "the self-indulgent man of middle life who encumbers his estate for the purposes of personal consumption."[17] Until the 1890s, at any rate, there seemed to be abundant reserves of timber, wildlife, and other resources on the public lands.

**II. Private Property**

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[16]Quoted in Hurst, Law and the Conditions of Freedom, 68.

[17]Francis A. Walker, "American Agriculture," in U.S. Department of the Interior, Bureau of the Census, Tenth Census of the United States (1890), vol III, Agriculture, xxviii-xxxiii.

Even though the goal of both the Mercantilist-minded Jeffersonians and the forward-looking, modernizing Hamiltonians was to transform the public lands into the property of private individuals, this did not mean that government's interest in how the land was to be used was at an end. In the United States, private property has never amounted to absolute, unqualified dominion over land. The Social Contract meant that private landowners remained subject to the great triad of government powers: *taxation,* by which government extracts a share of its citizens' wealth through constitutionally-ordained procedures, *eminent domain,* through which government may expropriate private property entirely, so long as the taking is for a legitimate public purpose and the owner receives fair compensation, and *the police power,* with which government may regulate the private use of land. As Chief Justice Lemuel Shaw of the Massachusetts Supreme Court put it in 1851, "all property . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare."[18] Under U.S. law, then, private property amounts to a more or less limited *franchise* from government to pursue one's private ends so long as they correspond in a general way with those of the community as a whole.

Determining the scope and extent of that franchise, however, is a political process that takes place through lawmaking under Constitutional restraints. Thus subject to popular sovereignty,

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[18]Commonwealth v. Alger, 7 Cush 53, 83-84 (Mass., 1851).

the law of private land use has also been subject to an enduring schizophrenia that closely conforms to the conflict that has inhered in lawmaking for the public lands. Here, as a nation the United States has never been sure whether the main purpose of private property has been to serve market goals primarily, or whether it should give equal or greater weight to social, political, or ethical considerations that are hard to formulate in market terms. Put another way, as Carol Rose has, is the end of the property-based Social Compact to promote social stability and virtue among the citizenry, or is it merely to generate wealth?[19] As in policymaking for the public domain, environmental concerns have emerged in the last few decades as perhaps the most important non-market concern in the regulation of private land use, but are only the most recent manifestation of a tension that is built into our institutions and has endured since the Founding.

On one side of this divide at the beginning were people like Jefferson and Thomas Paine, for whom private property was the key to a political ideology of civic Republicanism that valued participation with other citizens in self-government as the highest good. Jefferson and Paine valued private property above all for the independence of thought and action that it guaranteed, thinking this independence to be essential for one's capacity for altruistic citizenship. Modern heirs to the

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[19]Carol M. Rose, "Mahon Reconstructed: Why The Takings Issue is Still A Muddle," Southern California Law Review, 57 (1984): 561-599, pp. 587-592.

Jeffersonian tradition include such scholars as Charles Reich and Frank Michelman, who value property rights as did Jefferson because they insulate political minorities both from oppression by the rich and powerful and from the whims of legislatures and government agencies that too-often serve the needs of the powerful exclusively.[20] Such legal devices as rent-control laws and fair-trade laws, for example, require people to temper their market avarice with a measure of altruistic, civically-virtuous concern for others perhaps less-powerful than they. They subordinate individuals' dominion over the use of their property to the good of the community at large.

On the other side of the divide were philosophical liberals such as Locke, or James Madison, who thought that Jeffersonian civic virtue was a slender reed on which to build a political system. As the experiences of the ancient republics showed, government that required consistently selfless behavior on the part of its citizens was exceedingly fragile and doomed to fail. It was far more reasonable, as Madison explained in The Federalist Papers, to expect people to be self-regarding most of the time but to devise a political system that would diffuse individual avarice and economize what public-regarding, civic

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[20]Rose, "Mahon Reconstructed," 593; Charles Reich, "The New Property," Yale Law Journal, 73 (1964): 733-787; Frank Michelman, "Property as a Constitutional Right," Washington & Lee Law Review, 38 (1981): 1097-1981.

altruism might be available.[21] Federalism and the separation of powers was the key to this process within government. A wide diffusion of independent property interests throughout society at large, Madison and other liberals thought, was the essential foundation for stable republican government.[22]

Liberalism thus predicted that an infinite number of self-regarding decisions by an infinite number of autonomous property owners would not only lead to the efficient use of resources in the economy but also, in the same manner, to government in the best interest of the whole people. Government thus need not get into the messy business of determining that one way of living or using one's property was better for the community than another. Although Madison never would have thought this way, at its extreme this liberal view eventually collapsed voting into consumerism: both politics and markets were efficient, the one trading votes and the other dollars. The public interest therefore consisted of no more and no less than the algebraic sum of all the private interests. One of the most articulate proponents of this view today is Justice Antonin Scalia of the U.S. Supreme Court, whose vision increasingly dominates the law of land-use regulation in the federal courts.

Over the nineteenth century, the victory of this

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[21]James Madison, The Federalist No. 10, ed. Roy P. Fairfield, (Baltimore, 1981), 16-23. See also Bruce A. Ackerman, "The Storrs Lectures: Discovering the Constitution," Yale Law Journal, 93 (1984): 1013-1072, 1020-1031.

[22]Rose, Mahon Reconstructed," 588-589.

utilitarian, market-oriented approach to the law of private land use was nearly total. As William Cronon has shown, even from the first settlements in the New World Europeans brought with them an economy that was based on the transformation of land to commercial use.[23] This economy, which treated the land as no more than a bundle of potentially marketable commodities, proved at once to be thoroughly incompatible with and utterly displaced the Native American system of land use, which, although it was complex, law-bound, and built on rights to harvest resources, nonetheless knit itself into the natural functioning of the land so as to maintain the natives' subsistence economy over the long run. The disruption of native societies was at the same time a military, economic, and above all an ecological process.

As between Euro-Americans, traditional common-law restrictions on property ownership had for centuries limited the uses to which individual owners could put their property, likewise so as to preserve the stability of the traditional agrarian economy over the long run. Common-law rules, which frequently authorized complaining neighbors to put a stop to offensive uses themselves without waiting for formal authorities stepped in, limited the harvest of wildlife, the diversion of rivers and streams from their natural courses, even the erection

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[23]William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (New York, 1983), 75-79.

of structures that blocked neighbors' access to light and air.[24] In the early nineteenth century many of these traditional restrictions fell away as American courts overturned these "anti-developmental" property rules and replaced them with market-oriented, pro-development doctrines so as to encourage what the legal historian J. Willard Hurst called the release of entrepreneurial energy.[25] The relative "reasonableness" of competing uses for land or water, for example, came by 1850 to be measured and compared in terms of their dollar contribution to the community's net economic product: in a process that the economist Joseph Schumpeter called "creative destruction," the law permitted new and more efficient factories, mills, and mines to expropriate land, water, and even sunlight from their older and less efficient competitors. Utilitarianism thoroughly infused the law of private land use: a private nuisance came to be defined as a use that generated more costs to neighbors than it did benefits to the user, while a public nuisance was any use where the benefits to a developing property owner did not outweigh its external costs to society at large.

Between private citizens and the state, market-oriented utilitarianism entered the law of property rights when private landowners claimed that police power regulations so hindered

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[24]Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge, MA, 1977), 31-62; Harry N. Scheiber, "Public Economic Policy and the American Legal System: Historical Perspectives," Wisconsin Law Review (1980): 1159-1190, 1161-1172.

[25]Hurst, Law and the Conditions of Freedom, 3-32.

their ability to use their property as they saw fit as to amount to an exercise of the eminent domain power, in which case the state owed the aggrieved property owner fair compensation for the expropriation of his or her property. When a government body needed to take possession of a citizen's land outright, it found some public purpose for the taking and paid some compensation, however minimal that compensation might become in the hands of creative judges and lawyers.[26]

When the claim was that the law had made it impossible for owners to use their property as they wished, even though they retained possession, the matter was more complicated. State legislatures have always had a great deal of authority to proscribe uses of land that they deemed detrimental to the public health, safety, or morals. In the famous case of Mugler v. Kansas in 1886, the U.S. Supreme Court held that a state prohibition law worked no taking against the owner of a brewery, even though it denied him the only possible economic use of his plant.[27] What distinguished takings from ordinary police regulations was that in the latter case the benefit to the public health, safety, and morals outweighed the inconvenience to the regulated property owner.

Justice Oliver Wendell Holmes moved toward a more strictly monetary utilitarianism in the 1922 case of Pennsylvania Coal

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[26]Harry N. Scheiber, "Property Law, "Expropriation, and Resource Allocation by Government, 1789-1910," Journal of Economic History, 33 (1973): 232-251.

[27]Mugler v. Kansas, 123 U.S. 623 (1887).

Company v. Mahon: there, a state statute prohibited the underground mining of coal where it would cause overlying residential properties to subside. Justice Holmes found that the statute imposed a greater cost on the coal company than it conveyed benefits to the homeowners and thus qualified as a taking.[28] Generally, however, governments have wide authority to weigh moral, aesthetic, or even ecological values against the monetary loss to property owners. It is extremely rare for a court to find a so-called "regulatory taking" such as the Supreme Court did in the Mahon case: typically anything short of outright expropriation of an owner's title qualified as a reasonable exercise of the police power, no different from a food-inspection law, say, or a speed limit.[29]

As in the case of the public lands, the utilitarian, market-oriented calculus that defined nuisance law, which marked off the boundaries between private landowners, and takings law, which defined the frontier between individual landowners and public power, worked reasonably well to serve both economic expansion and the preservation of public virtue for quite some time. One reason was that legislatures, through the political process, retained lots of authority to incorporate non-market, non-monetary values into a broader utilitarianism. Another reason, however, was that land itself remained cheap and plentiful until

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[28]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[29]See Joseph L. Sax, "Takings and the Police Power," Yale Law Journal, 74 (1964): 36-76.

the end of the nineteenth century brought with it the end of the frontier. Petty expropriations by powerful neighbors or by the state generally hit landowners at random, diffused here and there across society so that only rarely would losers organize into a politically effective mass. The relative ease of picking up and moving on, as compared the cost of trying to fight the law and those who called its expansionary tune, also tended to keep opposition to a minimum. Even John Locke, however, wrote that private property could serve as the medium of the Social Contract only so long as there remained "enough, and as good left; and more than the yet unprovided could use."[30] In the twentieth century, the stakes would go up.

**III. Late 20th Century Law: Market Values v. Ecological Values**

The contest between market and non-market values, between the "revenue" approach of the early Hamiltonians and the "settlement" approach of Jefferson and his followers, has persisted throughout the history of the U.S. legal system, both in struggles over the management and disposition of the public lands and in conflicts over the use of private property, both between private neighbors and between private owners and state authorities. In the late twentieth century the revenue-settlement dichotomy most often presents itself to public view in the form of contests between market or developmental values and

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[30]John Locke, "Second Treatise," in Two Treatises of Government, ed. Peter Laslett (Cambridge, 1960), §33, p. 333. See also Carol M. Rose, "'Enough, and as Good' of What?" Northwestern University Law Review, 81 (1987): 417-442.

environmental ones. For Jefferson, the values that most needed legal protection from the corrosive effects of the free market in land were essentially political ones: the independence and self-sufficiency that citizens needed in order to keep the virtuous republic from unraveling. Today, people who fear the corrosive effects of the market are more likely to speak on behalf of ecology, which knits society into the natural environment that sustains it. The issues, at bottom, are the same: should landowners have complete license to develop their resources in pursuit of their private, self-defined goals, or are there more diffuse, intangible, hard-to-monetize values that require landowners to sacrifice a measure of their private gain for the good of the community as a whole? Two recent decisions from the United States Supreme Court, one of them dealing with the management of public lands and the other with state regulation of private land use, each display in the end the economistic, developmental bias that suffuses US land law and remains its dominant theme. Both, however, also manifest the tension between the developmental main theme and its Jeffersonian antithesis, now emergent in the form of claims that affirm the close interconnections between ecology, land use, and human community.

Lyng v. Northwest Indian Cemetery Protective Association came down from the United States Supreme Court in 1988.[31] Lyng is famous in the law schools and on bar-review courses as a

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[31]Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

first-amendment, freedom-of-religion case, but had its origins in a controversy over the management of public lands. Forests and fisheries were the resources at stake; the contestants were a handful of California Indian tribes and the United States Forest Service.[32] Immediately at issue was a Forest Service plan to complete the middle section of a logging road through a remote part of the Six Rivers National Forest in northwestern California. Loggers and the Forest Service claimed that the road was necessary to provide access to marketable timber. Environmentalists, however, claimed that the road, which would cut through rugged and unstable terrain, would cause intolerable soil erosion and would injure water quality in the Klamath River system, which was home to a seriously depleted salmon fishery. The Klamath watershed also contained an Indian reservation: Yurok, Karok, and Tolowa Indians had lived in the region since aboriginal times and used areas near the road site for traditional religious practices. Advocates of religious freedom, tribal autonomy, and environmentalism thus all came together on

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[32]Commentaries on the Lyng decision include Jennifer E. Spreng, "Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion," Saint Louis University Law Journal, 38 (1994): 837-879; Robert J. Miller, "Correcting Supreme Court 'Errors': American Indian Response to Lyng v. Northwest Indian Cemetery Protective Association" (case note), Environmental Law, 20 (1990): 1037-1062; Michael N. Ripani, "Native American Free Exercise Rights in Sacred Land: Buried Once Again," American Indian Law Review, 15 (1990): 323-339; Donald Falk, "Bulldozing First Amendment Protection of Indian Sacred Lands" (case note), Ecology Law Quarterly, 16 (1989): 515-570. On the background to Lyng, see Arthur F. McEvoy, The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980 (Cambridge, 1986), 213-214, 245-247.

one side; the Forest Service and the timber industry was on the other.

The Forest Service had commissioned a study of the area as part of its obligations under the National Environmental Policy Act; this study had recommended that the road not be completed. The area was indispensable to the religious practices of these Indian communities, with specific mountaintops, rocks and other sites being used for specific observances. "Successful use," the report continued, "depends upon certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[33] The road, on the other hand, would "cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indians."[34] NEPA does not require that government agencies follow the advice of such reports, however, only that they generate the information and look it over.[35] The Forest Service went ahead with its plans, and the Indians sued.

Although the Lyng plaintiffs had sued to enjoin the construction under a number of statutes, it was their constitutional claim under the First Amendment that made it up to the Supreme Court on appeal, and on that claim they lost. It is

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[33]Quoted in Lyng, 485 U.S. at 442.

[34]Id.

[35]Strycker's Bay Neighborhood Council, Inc., v. Karlen, 444 U.S. 223 (1980); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

well-settled that Congress has nearly plenary authority to manage the public lands as it sees fit, subject of course to Constitutional restraints.[36] As to this particular constitutional claim, Justice O'Connor's opinion for the majority was that the First Amendment did not require the government to conduct it s own internal affairs so as to comport with the religious beliefs of particular citizens.[37] "Internal affairs," in this case, meant building roads and harvesting timber on Forest Service land. The government's ownership of the land was key to the decision: like any private owners, the government was entitled to develop its property as it saw fit, and the religious beliefs of a tiny minority of citizens could not be allowed to stand in the way.

Whatever the Forest Service's calculations had been, at the Supreme Court level the Lyng decision did not involve even the most rudimentary consideration of costs and benefits, much less a careful balancing between market and non-market concerns in managing the public lands for the benefit of the common people. As the dissent pointed out, "today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the

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[36]Kleppe v. New Mexico, 426 U.S. 529 (1976). See Dale D. Goble, "The Myth of the Classic Property Clause Doctrine" (Natural Resources Symposium), Denver University Law Review, 63 (1986): 495-533; Albert W. Brodie, "A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands," Pacific Law Journal, 12 (1981): 693-726.

[37]Lyng, 485 U.S. at 451-452.

Forest Service can build a six-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the government itself and to the private lumber interests that might conceivably use it."[38] The private losses involved were huge, while the public benefit was negligible. Here, the government stood in the position of a private owner rather than a trustee, and a particularly irresponsible one at that.

Nonetheless, the Indian respondents in Lyng did articulate the link between the land, their spiritual life, and their social order, and at a minimum they got a favorable hearing from at least a minority of the Supreme Court. Indian reservations have become increasingly important to environmental politics for a number of reasons. First, developments in the law over the last few decades have strengthened the tribes' political autonomy and their authority to protect their resources from damage, both directly from activities on the reservation and indirectly from competing uses on neighboring lands. In addition, the importance of "natural" land uses to the Indians' traditional economies and societies means that the tribes tend to use their authority to protect environmental and other non-market values more vigorously than do non-Indians. Finally, because ecology links the health of Indian resources with economic activities far beyond the boundaries of Indian jurisdictions, Indian rights and Indian culture will increasingly place limits, backed up with the force

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[38]Lyng, 485 U.S. at 476 (Brennan, J., dissenting).

of law, on resource-development practices in regions of the country where Indian communities survive. Like endangered species, the law commits the United States to ensuring the survival of what Indian economies remain and to restraining development so that the environment can continue to support those economies. The irrational and unjust result in Lyng v. Northwest Indian Cemetery Protective Association only underscores the strength of the general trend.

Lucas v. South Carolina Coastal Council was another recent U.S. Supreme Court decision that upheld an expansive view of the reach of a landowner's autonomy: here, however, the owner in question was a private party rather than the United States government.[39] David Lucas was a real-estate entrepreneur who built a residential development on a barrier island east of Charleston, South Carolina and, in 1986, purchased the last two lots in the development for his own account. Under the federal Coastal Zone Management Act, South Carolina had for some years placed restrictions on beachfront development, although as the law stood at the time Lucas's development was perfectly legal. In 1988, however, two years after Lucas bought his parcels, the state tightened its restrictions on development in such a way as to prohibit construction on the two lots that Lucas had bought for himself.

The South Carolina legislature justified the restrictions on

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[39]Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

several grounds. It found that beaches all along the state's shoreline were eroding, and that construction had exacerbated the problem, thus exposing life and property to danger from storm damage. Seawalls and other engineered protections were not as effective as natural beaches at preventing the erosion. The state's beaches were, finally, important to the local economy as tourist attractions and as habitat for wildlife. Acting within what it thought was the traditional scope of its power to protect the public health, safety, and morals, the legislature allowed existing construction seaward of the prohibition line to stand; no new construction could take place, however, including the houses that Lucas had planned to build on his two lots.

Lucas sued, claiming that this was no ordinary police-power exercise but rather a taking of his property without due process of law, in violation of the Fourteenth Amendment of the U.S. Constitution. In what looked like a decision tailor-made to raise a constitutional challenge under the cost-benefit calculus of Pennsylvania Coal Company v. Mahon, the trial court (sitting without a jury), found that the state regulation had deprived Lucas's property of all of its economic value. The state Supreme Court, relying on the "take-title theory" of Mugler, the 1886 Kansas brewery case, held that Lucas was still in possession of his lands: the restrictions on beachfront development were a legitimate use of the police power to protect the public welfare

and thus did not amount to a compensable taking.[40]

In 1992 the United States Supreme Court reversed the state decision and remanded the case for further consideration. For the majority, Justice Scalia developed a new, two-part approach to "regulatory takings" according to which the state courts were to decide the case on remand. First, the courts were to decide whether or not the regulation in question had deprived the complaining party of 100% of its economic value. If some economic value remained the regulation fell onto the police power as opposed to the eminent domain side of the constitutional takings line. If there was a so-called "total taking" of economic value, then the courts were to inquire whether or not the prohibited use violated "restrictions that background principles of the State's law of property and nuisance already place[d] upon ownership."[41] If the prohibited use was a traditional common-law nuisance -- a slaughterhouse, say, or a gravel pit, or perhaps even a brewery -- the court was to presume that Lucas had bought the parcels in the first place knowing that the state had the authority to keep him from proceeding. Justice Scalia noted in passing that residential construction was "the essential use of land" and would probably not fall under his "background principles" of common-law nuisance, but that was for

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[40]Lucas v. South Carolina Coastal Council, 304 S.C. 376, 404 S.E.2d 895 (1991).

[41]Lucas, 112 S.Ct. at 2900.

the lower court to decide.[42]

Lucas was a case that was brought in order to "play for rules" -- its managers designed the case so as to give the courts an opportunity to write doctrine into constitutional law as much as to resolve the particular dispute at hand. The decision itself as a very narrow one, applying only to the tiny handful of imaginable cases where regulations deprive owners of all economic use of their land *and* the regulating agencies are unable plausibly to describe the prohibited uses as nuisances. It will likely have a much greater impact in the law schools, then, than it will in the world at large. It has received a great deal of attention and criticism, however, both from the environmental Left and from the property-rights-oriented Right.[43] What is of particular interest here is the role that "background principles of property and nuisance" play in Justice Scalia's takings scheme.

According to Joseph Sax, a leading environmental law scholar, the Lucas court's underlying agenda was to prevent states from regulating land use "by requiring owners to maintain

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[42]Lucas, 112 S.Ct. at 2901.

[43]See, for example, Daniel W. Bromley, "Regulatory Takings: Coherent Concept of Logical Contradiction?" Vermont Law Review, 17 (1993): 647-682; Richard Epstein, "Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations," Stanford Law Review, 45 (1993): 1369-1432; Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," Stanford Law Review, 45 (1993): 1433-1455; Frank I. Michelman, "Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism," William and Mary Law Review, 35 (1993): 301-328.

their property in its natural state as part of a functioning ecosystem."[44] The majority drew its historical "background" from the frontier days of the nineteenth century, when the common law was straightforwardly pro-development and when nuisance findings (cases like Mugler v. Kansas aside) generally turned on a strictly monetary, cost-benefit calculus. Whatever non-market values did make up part of the nineteenth-century background, they certainly did not include ecological ones. Indeed, the Court had a hard time imagining that environmental values could be of any real concern to a state legislature: of all the legislative findings that went into the South Carolina beachfront protection statute, the one that the majority seized upon as the "real" purpose behind the statute was the enhancement of tourism. This made the statute look more like a transfer of rights from owner Lucas to beachgoing tourists -- technically, the public condemnation of a "visual easement" -- and thus more like a specific expropriation than a police regulation generally applicable to all.[45]

That land could have real value to the public as part of a functioning ecosystem seems not to have been within the reach of the majority's collective imagination. Quoting the seventeenth-century jurist Edward Coke, Justice Scalia asked, "for what is land but the profits thereof?"[46] The opinion thus took an

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[44]Sax, "Property Rights and the Economy of Nature," 1438.

[45]Lucas, 112 S.Ct. at 2898 n. 11.

[46]Lucas, 112 S.Ct. at 2894.

extreme Hamiltonian view of the nature of property, beyond anything that James Madison or any nineteenth-century judge would have allowed. Land that the state wishes to dedicate to "natural" functions is to that extent public land and thus incompatible from private ownership, which consists solely in the right to turn the land to a profit. If the state wishes to promote ecological functions of land to the exclusion of developmental ones, it necessarily does so at the expense of the private owner and must compensate that owner for pressing his or her property into public service.

The several dissenting opinions in Lucas pointed out that the case was not ripe for review, that the Court had reached down into the system to bring it up for review in a play for doctrine, and that the decision had upset long-settled eminent domain law with its theory of "total economic takings" and substituted for it an entirely new and unprecedented alternative. The dissenters pointed out that property and nuisance law had never allowed the autonomy of property owners to trump absolutely the public, community-serving attributes of private property. In the nineteenth century judges like Lemuel Shaw of Massachusetts had used Jeffersonian rhetoric to underscore the authority of state legislatures to promote economic growth, even if at the occasional expense of private owners who stood in the way. American legislatures historically have recognized different goals for property and nuisance law and changed those laws accordingly; at one time to promote the Jeffersonian values of

civic republicanism, at another to promote industrialization and economic growth, lately to promote environmental conservation. Environmentalism is simply the most recent manifestation of the structural tendency of U.S. law to keep market and non-market values in constant tension in the process of regulating the use of public and private lands.

**Conclusion**

The decisions in Lyng v. Northwest Indian Cemetery Protective Association and Lucas v. South Carolina Coastal Council thus take uncommonly rigorous positions on one side of the dichotomy between developmental and non-market values that has kept the law of land use in the United Sates in tension since the founding of the Republic in the late eighteenth century. This tension first manifested itself in the conflict between settlement-oriented Jeffersonians and revenue-oriented Hamiltonians over the management of the public domain, and it appears today as a conflict between those who would manage the public lands on behalf of jobs and industry and those who would give higher priority to environmental, cultural, and spiritual values. The same tension runs through the American law of private land use, which upholds both the freedom of landowners to pursue profit as they see fit and their responsibility to conform their behavior to community notions of the public good, whether the community -- through politics and self-government -- defines that good in terms of Jeffersonian agrarianism, of entrepreneurial dynamism, or of ecological interdependence. The

Lyng and Lucas decisions are bad news for environmentalists, but they are interesting in that they bring the two sides of American land law into such sharp relief.

One of the most important roles that the United States Supreme Court plays in our legal system is to draw out such philosophical conflicts from time to time and to subject them to reasoned analysis in the light of contemporary concerns, just as it did in the Lyng and Lucas cases. The Supreme Court hardly has the last word on the law, however, much less in the ongoing political struggle to define the values that will control the nation's interaction with its natural environment. The genius of the Founders was to embed the Court, like all other levels and branches of government, in a tri-partite, dual-level system of checks and balances that ideally would economize on what little communitarian, other-regarding civic virtue might be available in the system as a whole. If civic virtue now entails a concern for the natural environment and such concern seems to be in short supply in the federal courts, Federalist theory suggests that it should appear elsewhere in the system, so that the tension between competing values remains more or less in equilibrium.

Just as Madison would have predicted, although the federal courts are no longer the friends of environmentalism that they once were, other branches and levels of government seem more willing to balance environmental and developmental concerns in a different way. In the 1972 case of Just v. Marinette County, the Wisconsin Supreme Court affirmed, on facts nearly identical to

those in the Lucas case, that it was "not an unreasonable exercise of power to prevent harm to public rights by limiting the use of private property to its natural uses."[47] Some states explicitly include ecological values within the scope of the regulatory power: unlike NEPA, a number of state environmental protection statutes impose substantive limits on both public and private activity.[48] Even the federal Congress has only limited power to undo such statutes as the Clean Water Act and the Endangered Species Act, both of which have come under strenuous attack from developers because they can require private landowners in some cases to leave their land in its natural state. Many interesting and valuable experiments have taken place within administrative agencies at both state and federal levels, in which government agents cooperate with Indian tribes and other private groups in the management of land, water, wildlife, and other resources. If environmentalists wish to see their modern version of Jeffersonian values given more weight in the law of public and private land use, their only recourse is to the traditional remedy of active, civically-virtuous participation in republican government through democratic politics.

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[47]Just v. Marinette County, 56 Wis. 2d 7, 17,201 N.W.2d 761, 768 (1972).

[48]See Renz, "The Coming of Age of State Environmental Policy Acts," Public Land Law Review, 5 (1984): 31-