January 1994

Four Land Ethics: Order, Reform, Responsibility, Opportunity

Fred P. Bosselman
IIT Chicago-Kent College of Law, fbosselm@kentlaw.iit.edu

ARTICLES

FOUR LAND ETHICS: ORDER, REFORM, RESPONSIBILITY, OPPORTUNITY

BY
FRED BOSSELMAN*

Aldo Leopold's hope that Americans' thinking would converge toward a single land ethic has not been realized. The author, recognizing that views on the proper role of land in our society have become increasingly diverse, suggests Leopold's hope for a single ethic is futile. Instead, the author proposes Americans accept that they have inherited multiple land ethics. He explores four land ethics, using a different person as a prototype for each. Sir Thomas Malory's King Arthur of medieval England represents the ethic of order; David Ricardo, English entrepreneur of the Industrial Revolution, represents the ethic of reform; John Muir, American preservationist, represents the ethic of responsibility; and Supreme Court Justice Antonin Scalia represents the ethic of opportunity. The author concludes that each ethic will be an element of any public decisionmaking process having a major impact on land.

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* Professor of Law, Chicago-Kent College of Law. J.D. 1959, Harvard Law School; A.B. 1956, University of Colorado. I would like to thank Dan Tarlock, Stuart Deutsch, and Lenore Glanz for comments on preliminary drafts, Georgia Head for valuable research assistance, and Anne Barrett for adroit word juggling. A grant from the Marshall T. Ewell Fund of the Chicago-Kent College of Law funded the research for this article.

I. INTRODUCTION

The term "land ethics"[1] has found a prominent place in environmental literature ever since Aldo Leopold rather casually and cryptically coined it in the 1930s.[2] If one defines the phrase to mean a system of thought that relates land to ideas of right and wrong, one can identify many prior systems which have achieved prominence at some time or place.

Leopold's hope that Americans' thinking would converge toward a single land ethic has not been realized. To the contrary, our debates about land are ever more intemperate and ideological

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1. Aldo Leopold first used the term as an organizing concept in July 1947, while putting together some earlier manuscripts in an essay having that title. CURT MEINE, ALDO LEOPOLD: HIS LIFE AND WORK 350, 501-03 (1988). Leopold realized that an ethic could only evolve in the minds of a thinking community, and that his own statement of it was tentative. *Id.* at 504. He died not long after the essay was written, and it was published posthumously in ALDO LEOPOLD, A SAND COUNTY ALMANAC 201 (1949).

2. The Leopold essay has inspired a wealth of commentary. *See, e.g.*, RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 68-74 (1989) [hereinafter NASH, RIGHTS]; MARK SAGOFF, THE ECONOMY OF THE EARTH 147-50 (1988); PETER S. WENZ, ENVIRONMENTAL JUSTICE 292-94, 308-09 (1988); ROBIN ATTFIELD, THE ETHICS OF ENVIRONMENTAL CONCERN 157-58 (2d ed., 1991); CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS 111-14 (1987); HOLMES ROLSTON, PHILOSOPHY GONE WILD 18-27 (1986); J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC 5-6, 223-47 (1989) [hereinafter CALLICOTT, DEFENSE]; COMPANION TO A SAND COUNTY ALMANAC (J. Baird Callicott ed., 1987); DONALD WORSTER, THE WEALTH OF NATURE: ENVIRONMENTAL HISTORY AND THE ECOLOGICAL IMAGINATION 108-10 (1993); BRYAN G. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS 41-60 (1991); Anthony Weston, *Before Environmental Ethics*, 14 ENVTL. ETHICS 321 (1992); Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990); Eric T. Freyfogle, ed., *Symposium: Stewardship of Land and Natural Resources*, 1986 U. ILL. L. REV. 319 (1986); James P. Karp, *Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737 (1989); J. Peter Byrne, *Green Property*, 7 CONST. COMM. 239 (1990); James M. Olson, *Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and an Earth Ethic*, 20 ENVTL. L. 891 (1990); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989); Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1218-19 (1991). For a synopsis of Leopold's major written works, see Eric T. Freyfogle, *Book Review Essay: On the Trail of the Land Ethic*, 1992 U. ILL. L. REV. 913 (1992).

as they reflect increasingly divergent views about the appropriate role of land in American society. The discussions of property taxes, public land policies, and environmental regulations, for example, often seem to involve parties who are not really listening to each other because they hold their opponents' views in such disrespect. These debates will become more rational and less abusive if we attempt to understand how the varying roles that land has played in Anglo-American historical traditions have influenced Americans' attitudes toward land.

We have inherited deeply ingrained ethical ideas about land that we can not easily cast aside even if we choose. Any search for a new land ethic needs to understand and play off of our different historical attitudes toward land. We need to develop an understanding of land's role in Anglo-American historical traditions to help us create dispute resolution mechanisms that take into account the deeply held values that land represents to different people. Many different land ethics exercise an important influence over the way people regard land in the United States and I do not intend to postulate an ideal land ethic. Rather, by showing the deep-seated historical origins of four different land ethics, I hope to demonstrate that the search for a single consistent land ethic, for which Leopold hoped, may be futile.

Each part of this article focuses on a single individual whose ideas serve as a prototype for a particular land ethic. In Part II, Sir Thomas Malory's semi-legendary King Arthur represents the land ethic of medieval England, in which land symbolized order. In Part III, David Ricardo reflects the changing land ethic in post-Waterloo England, where land was seen as the vehicle for reform. In Part IV, John Muir serves as the spokesman for nineteenth-century preservationists, to whom land represented responsibility. Finally, in Part V, Justice Antonin Scalia expresses the views of modern American utilitarians, for whom land means opportunity. I conclude that only a pluralistic process in which multiple land ethics are debated will be a satisfactory basis for the resolution of many of the current bitter conflicts over land in America.

II. ORDER: THE LAND ETHIC OF SIR THOMAS MALORY

King Arthur, the idealized British ruler[3] served as the symbol-

3. Although the shrouds of history mist Arthur's existence, there is reason

ic embodiment of the land ethic of medieval England—the land ethic of order.[4] In the fifteenth century,[5] Sir Thomas Malory wrote the most famous version of the story of King Arthur,[6] illustrating that a strong monarch symbolized the end of anarchy because the monarch ruled those who controlled the land. The story of King Arthur reflects the essential role that the control of land played in the maintenance of order.

In order to maintain order, the monarch had to ensure that land would be controlled indefinitely by those who owed their loyalty directly to him. The monarch used medieval legal institutions, such as entailment, the "real writs," and the uniqueness of land in equity to do so. However, as English society moved gradually away from a purely agricultural society to a mercantile one, the monarch's control of those who controlled the land decreased.

A. Malory's Story of King Arthur

In Malory's day, a monarch had the power to allocate land to favored individuals, but with that power the monarch also assumed the duty to impose and maintain order within the nation's social structure.[7] The instability of the Wars of the Roses and the

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to believe that in the sixth century, when Arthur lived, land already played a central role in the English social structure. 3 JOHN MORRIS, THE AGE OF ARTHUR 499-502 (1977). John Morris labored for decades to compile and produce the first solid study of life in Arthur's time. NORMAN F. CANTOR, INVENTING THE MIDDLE AGES (1991). *See also* LESLIE ALCOCK, ARTHUR'S BRITAIN: HISTORY AND ARCHAEOLOGY, AD 367-634 (1971); RICHARD HODGES, THE ANGLO-SAXON ACHIEVEMENT: ARCHAEOLOGY & THE BEGINNINGS OF ENGLISH SOCIETY 23-34 (1989).

4. CHRISTOPHER DEAN, ARTHUR OF ENGLAND: ENGLISH ATTITUDES TO KING ARTHUR AND THE KNIGHTS OF THE ROUND TABLE IN THE MIDDLE AGES AND THE RENAISSANCE 92-93 (1987). *See generally* ARTHURIAN LITERATURE IN THE MIDDLE AGES: A COLLABORATIVE HISTORY 108-11 (Roger Sherman Loomis ed., 1959).

5. When Malory wrote MORTE D'ARTHUR in 1469-70, the War of the Roses had been raging for almost twenty years. The turbulent era in which Malory wrote was far from the ordered society over which Arthur ruled. *See* M.C. BRADBROOK, SIR THOMAS MALORY 8-9 (1958); ELIZABETH JENKINS, THE MYSTERY OF KING ARTHUR 128 (1975).

6. Two slightly different versions of MORTE D'ARTHUR exist, one known as "Caxton" after the name of the original printer (Janet Cowen ed., Penguin Books 1969) [hereinafter CAXTON] and the other known as "Vinaver," after the translator of a more recently discovered manuscript (Keith Baines ed., Mentor Books 1962) [hereinafter VINAVER].

7. The Normans, who ruled England during the middle ages, sought to

fear of a return to the anarchy of the Dark Ages stimulated a renewed interest in the King who symbolized the end of anarchy.[8]

During the so-called Dark Ages of the centuries preceding Malory's day, armed bands moved back and forth across Britain claiming whatever land they could control at any given time. A person who planted grain in the Spring could not be sure who would control the land at the time the grain ripened.[9] In these

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enhance their stature with the British public by identifying with the Britons, who had ruled in the second half of the fifth century and into the sixth century, before the Saxon invasion. William of Normandy, who conquered England in 1066, took over the traditions of earlier Saxon kings, who in turn traced their traditions back through Alfred the Great to Ethelbert, whose reign began in 561. H.P.R. FINBERG, *Anglo-Saxon England to 1042*, *in* 1 THE AGRARIAN HISTORY OF ENGLAND & WALES 385, 458-66 (1972). The Saxon laws were superimposed on the existing land tenure system of the Britons. 3 MORRIS, *supra* note 3, at 495-503; GRAEME FIFE, ARTHUR THE KING 62-63 (1991). Modern research increasingly discounts the long-accepted assumption that the land tenure system was imposed by the Normans; many historians now believe that most of the basic elements of the system were already in place at the time of the Norman conquest. *See, e.g.*, S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 100-02, 149-51 (2d ed. 1981). For the earlier view, see for example, PAUL VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY: ESSAYS IN ENGLISH MEDIAEVAL HISTORY 219-21 (1908). For a discussion of the academic politics of Normanism and Saxonism, see CANTOR, *supra* note 3, at 268-86.

8. Some three centuries earlier, during the reign of another unpopular monarch, a similar revival of interest in King Arthur flourished. The first written source that brings together the complex of stories we now refer to as the Arthurian chronicles was written in Latin in the year 1136 as *Historia Regum Brittanniae* by Geoffrey of Monmouth and is available today in English translation as HISTORY OF THE KINGS OF BRITAIN 212-61 (Penguin Books 1966) [hereinafter GEOFFREY]. *See* THE ARTHURIAN ENCYCLOPEDIA 209-14 (Norris J. Lacy ed., 1986). Geoffrey's book "might be called the first of the international best sellers." JENKINS, *supra* note 5, at 60. "Within fifteen years after its publication not to have read [GEOFFREY] was a matter of reproach; it became a respected textbook of the middle ages." DEAN, *supra* note 4, at 5. Its publication coincided with the beginning of the almost anarchical reign of King Stephen from 1135 to 1154. 1 SOCIAL ENGLAND 367-72 (H.D. Traill & J.S. Mann eds., 1902); FRANK BARLOW, THE FEUDAL KINGDOM OF ENGLAND 1042-1216, at 202-26 (1955). Geoffrey was also a Norman who used the Arthur stories as a way of tying the Norman kings to the pre-Anglo-Saxon traditions of the British. *See* NORMA LORRE GOODRICH, KING ARTHUR 342-44 (1986); DEAN, *supra* note 4, at 7. For examples of twelfth- and thirteenth-century stories in which Arthurian characters were used as surrogates for actual members of the Norman nobility, see D.D.R. OWEN, ELEANOR OF AQUITAINE: QUEEN AND LEGEND 180-212 (1993).

9. DEAN, *supra* note 4, at 93. *See* 1 HILAIRE BELLOC, A HISTORY OF ENGLAND 179-82 (1925). A British monk named Gildas, who presumably grew up

circumstances it is not surprising that the people would welcome as monarch a powerful person who could bring all of the warring factions under control.[10]

To accomplish such control, the monarch allocated to the leader of each warring faction ("baron")[11] an area of land.[12]

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during Arthur's lifetime, wrote of those years nostalgically as the years when "rulers, public persons and private, bishops and clergy, each kept their proper station," and the "restraints of truth and justice" were still observed. 3 MORRIS, *supra* note 3, at 117-18. *See also* ROBERT W. HANNING, THE VISION OF HISTORY IN EARLY BRITAIN: FROM GILDAS TO GEOFFREY OF MONMOUTH 45-46 (1966). Once Arthur was defeated and the Anglo-Saxons took command of what they called "Angleland" or England, the power of the monarch in relation to the thegns diminished and the lawlessness and intimidation by the thegns' armies grew rampant enough to elicit strong condemnation by Gildas. HODGES, *supra* note 3, at 22-23. References to Arthur virtually disappear during the period of Anglo-Saxon rule that extended with occasional interruptions from the sixth century into the eleventh. 3 MORRIS, *supra* note 3, at 132-33. For a discussion of prehistoric origins of private rights in land see Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1365, 1398-99 (1993).

10. *See* EDWARD B. MCLEAN, LAW AND CIVILIZATION: THE LEGAL THOUGHT OF ROSCOE POUND 79-80 (1992). Monarchy apparently had a long tradition among the Britons before Arthur's time, although the available evidence is scant. ALCOCK, *supra* note 3, at 319-24; PETER HUNTER BLAIR, ROMAN BRITAIN AND EARLY ENGLAND, 55 BC-AD 871, at 153-54 (1963). "The age of Arthur is the beginning of modern British history. . . . The instinct of the middle ages [correctly] began its tradition with Arthur of Britain, the champion of a legendary golden age, the pattern of a just society that should be, but was not . . . ." 3 MORRIS, *supra* note 3, at 509.

11. The term "baron" is actually shorthand for a much more complex system of titles that varied in different parts of the country. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 408-11 (1909); F.M. STENTON, THE FIRST CENTURY OF ENGLISH FEUDALISM, 1066-1166, 83-113 (1932). The Anglo-Saxon equivalent of the baron was commonly known as a "thegn," or "thane" by the time of Shakespeare, but the thegns occupied a similar place in the hierarchy as the later barons. BARLOW, *supra* note 8, at 6-15. Records for the years 931-34 suggest that there were some 120 top thegns who obtained their rights to land directly from the King. MICHAEL WOOD, DOMESDAY: A SEARCH FOR THE ROOTS OF ENGLAND 106 (1986).

12. Each of the immediate grantees from the monarch then made further allocations to their subordinates, and so on until all land was held in some sort of dependent tenure and the allocation of land became the system for bringing order out of anarchy and imposing a hierarchical social structure throughout Britain. *See* 1 POLLOCK & MAITLAND, *supra* note 11, at 232-36.

> The land law in . . . [medieval] England, is a far more important branch of law than it is in modern times. The land is the source of many legal

Malory's depiction of the coronation of King Arthur symbolizes the key relationship between the monarchy and land:

> And so anon was the coronation made. And there was he sworn unto his lords and the commons for to be a true king, to stand with true justice from thenceforth the days of this life. Also, then he made all lords that held of the crown to come in, and to do service as they ought to do. And many complaints were made unto Sir Arthur of great wrongs that were done since the death of King Uther, of many lands that were bereaved lords, knights, ladies, and gentlemen. Wherefore King Arthur made the lands to be given again unto them that ought them.[13]

As the last leader of the Britons, a people soon to be conquered by the Saxons, who in turn would be conquered by the Normans, Arthur symbolized[14] the heroic, benevolent monarch who created law and order out of anarchy through the divine right to allocate land.[15] By the fifteenth century, the beneficent Arthurian image contrasted starkly with the factional violence that characterized most of the medieval period, and especially the Wars of

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> relations which in modern times would come under such rubrics as justice and police, master and servant, employer and labourer. Therefore, when we say that the royal court is settling the principles of land law . . . we say also that it is settling that branch of the law which governed many and varied legal relations of the majority of Englishmen.

2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 260 (3d ed. 1923).

13. CAXTON, *supra* note 6, at 20. For similar references in the Arthurian tales to the allotment of land to maintain order, see also *id.* at 109, 115-16; VINAVER, *supra* note 6, at 26; GEOFFREY, *supra* note 8, at 225; JOHN STEINBECK, THE ACTS OF KING ARTHUR AND HIS NOBLE KNIGHTS 22 (1976). For a definition of "knights" see 1 POLLOCK & MAITLAND, *supra* note 11, at 411-12. The use of land grants to reward military leaders continued throughout the middle ages, but other forms of compensation grew more common as land increasingly became scarce. J.M.W. BEAN, FROM LORD TO PATRON: LORDSHIP IN LATE MEDIEVAL ENGLAND 234-35 (1989).

14. The lack of solid knowledge about whether Arthur's exploits really occurred has fueled archaeological exploration, tourism promotion, and the publication of children's books, but it is not the facts of Arthur but the myth of Arthur that is significant. *See* MICHAEL WOOD, IN SEARCH OF THE DARK AGES 60 (1987). *See also* G.O. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 19-20 (1961); ROGER S. LOOMIS, CELTIC MYTH AND ARTHURIAN ROMANCE 350-53 (1967).

15. FIFE, *supra* note 7, at 75-76. Before requiring his knights to swear an oath to uphold the code of honor, Arthur gave them land. "The endowing with lands is important: it placed a knight beyond financial need, which might impair his ability to act chivalrously, that is without self-interest." *Id.* at 76.

the Roses in which Malory participated.[16] By that time, men attached their lands to any feudal lords who could further their interests, but only for so long as those temporary patrons could be useful.[17]

To justify their authoritarian power, the Normans sought to exaggerate the wretchedness of earlier times "to show that the alternative to their strict rule was civil war and misery."[18] By tying the idea of law and order to a powerful ruler and his gallant knights who subdued anarchy by dominating the land from their castles, the Normans equated themselves with an almost legendary period of peace and stability.[19]

As the English monarchs gradually solidified their control[20]

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16. BRADBROOK, *supra* note 5, at 8-10; K.B. MCFARLANE, ENGLAND IN THE FIFTEENTH CENTURY 231-61 (1981).

17. MCFARLANE, *supra* note 16, at 17-18. *See also* KEITH TRIBE, LAND, LABOUR AND ECONOMIC DISCOURSE 27-33 (1978).

18. J.L. BOLTON, THE MEDIEVAL ENGLISH ECONOMY 1150-1500, at 209 (1980).

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> These were desperate times. . . . The country had been criss-crossed by armed forces plundering and devastating wherever they went. . . . Amidst all this the hard-headed King William saw his own practical needs as paramount: to maintain his armies with supplies, and to pay them. . . . He would milk the English dry if he could.

WOOD, *supra* note 11, at 18. William considered himself the legitimate successor to Edward the Confessor through his aunt, Edward's Norman mother, and eventually "consented that the laws of Edward the Confessor, with such additions and alterations as he thought proper to make, should in all things be observed." GEORGE CRABB, A HISTORY OF ENGLISH LAW 44-45 (Burlington, Chauncey, Goodrich, 1831). For a discussion of the role of knights in Norman society and in King Arthur's times, see F.M. STENTON, ANGLO-SAXON ENGLAND 556 (1989), and SAYLES, *supra* note 14, at 19-20.

20. After the Anglo-Saxons conquered Arthur's Britons in the sixth century, they maintained "rigorous distinctions of personal status" which were carefully reflected in their hierarchy of landownership. STENTON, *supra* note 11, at 5. The Norman conquest in 1066 merely substituted new Norman names for the previous landowners and made a stronger, more centralized role for the King. *See* MILSOM, *supra* note 7, at 79; 1 MARC BLOCH, FEUDAL SOCIETY 188-89 (1961). The first two decades following the Norman Conquest were characterized by a tremendous shift in land ownership, which consolidated the increasingly manorialized land tenure of England into a system of estates held from the King by tenants. WOOD, *supra* note 11, at 64.

> A Norman aristocracy had been planted on the estate of Englishmen who had fallen in the war of the Conquest or failed to make terms with the king in the settlement after his coronation. . . . On every hand the

and grew more confident of the stability of their reign, the rigid distinctions among the levels of society gradually relaxed.[21] But the keystone of the medieval system, the strong monarch, attained a transcendental status.[22] By the sixteenth century, it was accept-

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> English lords who had survived the Conquest must have felt their insignificance in comparison with the acquisitive aliens on whose support the king in fact relied.

STENTON, *supra* note 19, at 625-27. The barons under William the Conqueror merely took over "the familiar form of social order by which the men of a village maintained their lord's household by rent or labour in return for his protection and for the justice done in his hall." STENTON, *supra* note 11, at 114. William scattered his land grants so that no individual baron would be too powerful in any one region. G.E. MINGAY, A SOCIAL HISTORY OF THE ENGLISH COUNTRYSIDE 15 (1990). The *Domesday Book*, the great survey of the land of England, which was completed some twenty years after the Norman conquest, *see* WOOD, *supra* note 11, at 17-25, reflected a custom well under way; that is, the process of "subinfeudation," by which the barons granted to their soldiers or knights small land holdings around the baronial residence so that they would be available for immediate service if the need arose. AUSTIN LANE POOLE, OBLIGATIONS OF SOCIETY IN THE XII AND XIII CENTURIES 4-5 (1946); STENTON, *supra* note 11, at 143-44; BOLTON, *supra* note 18, at 37. These knights, in turn, would grant even smaller land parcels to tenants who did the actual farming. REGINALD LENNARD, RURAL ENGLAND 1086-1135: A STUDY OF SOCIAL AND AGRARIAN CONDITIONS 40-104 (1959).

> Domesday Book shows that all but a small proportion of the English people worked the land. Indeed, four-fifths of the recorded heads of household in 1086 are dependent labourers of some sort, ranging from the villein class—over a third of the entire population—through bordars, cottars, burs and slaves or serfs (*servi*), the last class amounting to nearly a tenth of the recorded population.

WOOD, *supra* note 11, at 149. Many tenants were free farmers bound to the land only by custom, but others, called villeins, were tied to the land in a manner akin to slavery. POOLE, *supra*, at 12-15; MINGAY, *supra*, at 13-14. English kings continued to use land grants to reward supporters well into the fourteenth century. ASA BRIGGS, A SOCIAL HISTORY OF ENGLAND 84 (1983).

21. 2 HOLDSWORTH, *supra* note 12, at 56. Slavery declined precipitously during the twelfth century as the Norman rule stabilized. *See* J. AMBROSE RAFTIS, TENURE AND MOBILITY 205 (1964).

22. *See, e.g.*, A.L. BROWN, THE GOVERNANCE OF LATE MEDIEVAL ENGLAND, 1272-1461, at 5 (1989) (the king was the "heart and driving force" of English government). *See* THOMAS HOBBES, II LEVIATHAN Ch. 17 (1651). In comparison to other European countries, the English system of land tenure was the most monarch-dominated. "In this country where every piece of land was a tenement, the king was literally the lord of all the lords." 2 BLOCH, *supra* note 20, at 430. *See* PETER N. RIESENBERG, INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT 14-15 (1956). Nevertheless, the English monarch was not "above the law" and was legally bound to protect those who were subordinate

ed that the monarch had two bodies: a human one and a conceptual one that was "the personification of the kingly office in the guise of a corporation sole."[23] Or as Coke would put it, in the eyes of the law the sovereign never dies.[24] Land held by the monarch automatically passed to the successor and was said to belong to "the crown."[25]

Although the monarch's control over land had become somewhat relaxed by Malory's day, it still served as the foundation for the English social structure.[26] The symbolic importance of the strong monarch was essential for the maintenance of the existing hierarchy of land tenure[27] which determined "not only the wealth and taxable capacity of the subjects of the state, but also the political and social position of those inhabitants."[28] King Arthur assumed an important role as a symbol.[29] Arthur was the embodiment of a "strong and just ruler who protected his people against barbarism without and oppression within."[30] The tale of King Arthur emphasized the need for a strong monarch, something Malory's contemporaries were unable to find until the Wars of the Roses ended in 1485 with the victory of Henry VII over Richard III.[31]

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to him. *See* JOHN N. FIGGIS, THE DIVINE RIGHT OF KINGS 30-33 (1965).

23. 1 POLLOCK & MAITLAND, *supra* note 11, at 511.

24. 1 J.H. THOMAS, LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND ¶ (r), at 86 (Philadelphia, Robert H. Small 1827).

25. *See* BROWN, *supra* note 22, at 7-11. The idea of "the crown" as a separate entity existed, at least in embryonic form, as early as the thirteenth century. 1 POLLOCK & MAITLAND, *supra* note 11, at 525; RIESENBERG, *supra* note 22, at 100-05.

26. MCFARLANE, *supra* note 16, at 23-43. *See* Bryce Lyon, *The Emancipation of Land Law from Feudalism*, 86 YALE L.J. 782, 783-84 (1977). Malory sought to discourage dissatisfaction with the traditional order. DEAN, *supra* note 4, at 101.

27. *See* ERIC JOHN, LAND TENURE IN EARLY ENGLAND: A DISCUSSION OF SOME PROBLEMS 2-3 (1960); 1 BLOCH, *supra* note 20, at 181-86; R.C. Palmer, *The Origins of Property in England*, 3 LAW & HIST. REV. 1, 8 (1985).

28. 2 HOLDSWORTH, *supra* note 12, at 55. *See, e.g.*, SAYLES, *supra* note 14, at 239 ("The country was to be put . . . into a straitjacket, from which it would struggle long years to escape."); MILSOM, *supra* note 7, at 100 ("Tenure belongs to a smaller world in which there is no need and no room for abstract ideas like ownership.").

29. *See* WOOD, *supra* note 14, at 39.

30. 3 MORRIS, *supra* note 3, at 119. Arthur was defeated by treachery and disunity. *Id.*

31. Medieval chroniclers used the folktale of King Lear, a British king from

B. The Monarch's Control of the Land: Land as Territory

The key attribute of land to the monarchs and barons of medieval England was its *boundaries*, which ensured that the realm would be controlled by those barons whom the monarch trusted: "These obligations incidental to feudal tenure . . . reflect a time when the king must control the private as well as the public lives of his subjects. These men were endowed with wealth and power which the king could not allow to be transmitted to untrustworthy hands."[32] The territorial relationships[33] among the human occupants, which treated each piece of land alike, regardless of its productive potential or lack thereof,[34] filled the need

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pre-Roman times, to illustrate the folly of royal weakness. Seeking to retire after a sixty-year reign, Lear decided to divide his kingdom between his three daughters. While his two eldest daughters encouraged such a division, promising their father that they would continue to treat him royally, his youngest daughter, Cordelia, warned against this precipitous act. Cordelia's opposition angered the king and he divided the country between his two older daughters and sent Cordelia to be married to the King of France. The two older daughters soon forgot their promise and Lear was compelled to flee to France. In France, Lear beseeched Cordelia to help him recover his kingdom. A French army put Lear, and subsequently Cordelia, back on the British throne. This story reflects the essential role that control of land played in the maintenance of order. It also demonstrated the folly of any monarch who thought that he could treat crown lands as a personal possession rather than an institution. LAYAMON'S BRUT: A HISTORY OF THE BRITONS 58 (Donald G. Bzdyl trans., 1989). *See* BROWN, *supra* note 22, at 12-17.

32. POOLE, *supra* note 20, at 94.

33. Anthropologists have found that human territorial behavior aims at optimizing access to local resources which satisfy particular needs or wants "while simultaneously" decreasing "the probability of conflicts over them." Michael J. Casimir, *The Dimensions of Territoriality: An Introduction*, *in* MICHAEL J. CASIMIR & APARNA RAO, MOBILITY AND TERRITORIALITY 1, 20 (1992). To use an ethological analogy, an animal uses land as both territory and habitat. Its territory represents the boundaries of land from which it excludes other animals of the same species. REMY CHAUVIN, ANIMAL SOCIETIES 161-62 (1968). The behavioral patterns by which animals attain and defend their territories from each other are analogous to the medieval rules of land tenure. *See* JOHN MAYNARD SMITH, EVOLUTION AND THE THEORY OF GAMES 153-61 (1982); Susan E. Reichert & Peter Hammerstein, *Game Theory in the Ecological Context*, 14 ANN. REV. ECOL. SYST. 377 (1983). The extent to which human territorial behavior is genetically based has been the subject of extended scholarly debate. *See, e.g.*, RALPH B. TAYLOR, HUMAN TERRITORIAL FUNCTIONING 34-74 (1988).

34. There were some major exceptions. The few remaining forests had a special legal status. *See* CHARLES R. YOUNG, THE ROYAL FORESTS OF MEDIEVAL

for a "relationship of reciprocal obligations" which would attach everyone solidly to the proper place in the hierarchical social structure.[35] In using the land law to establish a stable division of power among themselves,[36] and to establish the social status of the various lower ranks of the hierarchy,[37] the nobility relied on the power to exclude others from their lands, but generally did not use land law to influence the way the land was actually used by the feudal tenants.[38]

Social class distinctions were not purely one-sided, but involved reciprocal obligations among the monarch, nobles, and others further down the social ladder.[39] For example, a baron might violate the code either by disregarding his oath of fealty to the monarch or by disregarding his duty to maintain peace and justice[40] among those who were subinfeudated to him.[41]

ENGLAND (1979). They also had a special "illegal" status as a shelter for "Robin Hood" and other homeless rebels. MINGAY, *supra* note 20, at 24-25; ROBERT POGUE HARRISON, FORESTS: THE SHADOW OF CIVILIZATION 75-81 (1992). And lands that were at times submerged by the tide were treated differently. A. DAN TARLOCK, WATER RIGHTS AND RESOURCES § 8.04 (1988). The English marshes or "fens" were, like the forests, home for rebellious and independent folk. JEREMY PURSEGLOVE, TAMING THE FLOOD: A HISTORY AND NATURAL HISTORY OF RIVERS AND WETLANDS 34-39 (1988). But the limited nature of these exceptions merely proves the rule that in most instances the physical condition of the land played little part in the system of law that governed the relationships of humans in regard to it.

35. *See generally* S.F.C. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM 39 (1976). *See also* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 36-37 (2d ed. 1986); Palmer, *supra* note 27, at 4.

36. G.E. MINGAY, ENGLISH LANDED SOCIETY IN THE EIGHTEENTH CENTURY 3 (1963) ("Above all, land was immovable and indestructible; and the very permanence of the land gave stability to the society that was based upon it.").

37. *See* MILSOM, *supra* note 7, at 100-03; 1 POLLOCK & MAITLAND, *supra* note 11, at 356-83, 412-32.

38. "By and large, the great landlords had delegated their responsibilities as farmers to their tenants; henceforward, their main interest in their estates would be financial and administrative . . . ." MAY MCKISSACK, THE FOURTEENTH CENTURY, 1307-1399, at 341 (1959). *See also* PAUL VINOGRADOFF, VILLEINAGE IN ENGLAND 170-75 (1892). *See generally* REGINALD LENNARD, RURAL ENGLAND 1086-1135: A STUDY OF SOCIAL AND AGRARIAN CONDITIONS (1959).

39. MILSOM, *supra* note 7, at 99; 1 BLOCH, *supra* note 20, at 227-29.

40. "Homage had been the most powerful bond there could be between lord and tenant: and one of the mystical forces it brought into play was that which barred the lord from claiming the tenement for himself so long as the force lasted." MILSOM, LEGAL FRAMEWORK, *supra* note 35, at 139. *See also* HENRY SUMNER MAINE, DISSERTATIONS OF EARLY LAW AND CUSTOMS 314-16 (1883).

41. We now tend to characterize the medieval land tenure system as "feu-

Because land was the keystone of the social order, it was essential to develop laws that ensured that the land would continue to be controlled indefinitely by those who owed their loyalty directly to the monarch. Thus, medieval legal institutions were designed to deter disruption of land ownership patterns; these institutions included entailment, the "real writs," and the "uniqueness" of land in equity.

Entailment, which placed conditions or limitations on succession to property, served that purpose by making it very difficult for the nobility to sell their land.[42] Under entailment, a family, not an individual, owned land. On the death of the current scion it passed automatically to the next member of the family in line to inherit.[43]

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dal," but as Richard Lazarus has recently reminded us, the term is ours, not theirs, and it has a confusing array of connotations. Richard Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1743-53 (1992).

42. K.B. MCFARLANE, THE NOBILITY OF LATER MEDIEVAL ENGLAND 62-63 (1973). For a summary of the convoluted history of entailment and its related institutions, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 234-48 (2d ed. 1979); SIMPSON, *supra* note 35, at 208-41. Entailment was strictly observed before the Norman conquest. JOHN P. POWELSON, THE STORY OF LAND: A WORLD HISTORY OF LAND TENURE AND AGRARIAN REFORM 51 (1988). Under the Normans, the practice of subinfeudation was used to elude the feudal restraint on alienation, "but . . . no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord." 2 J.H. THOMAS, LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND ¶ (A), at 274 (Philadelphia, Robert H. Small 1827). Some historians believe that the evasion of primogeniture and entailment was common as early as the thirteenth century, but the evidence of an active market for land during this period is sketchy. ALAN MCFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM 124-29 (1978); MCKISSACK, *supra* note 38, at 257-61.

43. The doctrine of primogeniture perpetuated the possessions of the nobility in their own families.

> If lands were held by knight's service or military tenure, then, according to the law of the realm, the eldest son succeeded to the father *in totum*. . . . When a man left several daughters . . . his inheritance was equally divided amongst them. . . . When a man died without leaving either a son or a daughter, his grandchildren, if he had any, were to succeed him . . . for it was then the law of succession . . . that the descendants in the right line were to be preferred to those in the collateral line.

CRABB, *supra* note 19, at 86-88. "Failure of heirs constituted by far the most serious threat to baronial stability," and the "transmission of land to sons-in-

Entailment made the income of the nobility dependent on agriculture: Because they were unable to sell their land and invest the funds in other assets, the nobility could generate wealth only from rent. And except for the few whose lands were located at the site of a mineral deposit or a growing urban area, rent could be received only from farmers who used the land for agricultural purposes.[44] Consequently, although the nobility were assured of a steady source of income, they were discouraged from entrepreneurial wealth-seeking in favor of playing their family's role as the symbol of law and order.[45]

Although entailment provided the vehicle for perpetuating the feudal system of social control, procedures for enforcing it were also needed. As the population increased, writs and charters from the monarch could no longer be used to resolve every dispute. Judges were necessary to handle the growing number of cases, and rules of law were needed to guide their decisions.[46] The "real

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law inevitably meant the concentration of ever greater estates in the hands of fewer landlords . . . throughout the later Middle Ages." MCKISSACK, *supra* note 38, at 259-60. *See also* Eugene C. Hargrove, *Anglo-American Land Use Attitudes*, 2 ENVTL. ETHICS 121, 126-128, 130 (1980).

44.

> From the earliest settlements until the industrial revolution the economic basis of society was agrarian. Land was wealth, livelihood, family provision, and the principal subject matter of the law. . . . A generation or so after the Conquest, a single plot of land may have been in some sense the property of several different people: a peasant, the lord of his manor, the lord's lord, the King.

MILSOM, *supra* note 7, at 99. For a discussion of the contrast between Milsom's view of the origins of feudalism and the earlier views of F.W. Maitland, see CANTOR, *supra* note 3, at 67-68. For a discussion of differing views on the point at which feudalism ended, see POWELSON, *supra* note 42, at 70-75.

45. "[S]ocial distinctions were permanently fixed through the hereditary nature of land tenure. . . . Social status therefore came to depend upon the amount of land held and the nature of the service performed." SAYLES, *supra* note 14, at 238. *See* ELIE HALEVY, ENGLAND IN 1815, at 181, 221-24 (2d ed. 1949). Because the lord depended on the agricultural workers for income, the workers enjoyed economic security. However, as towns, markets, and the use of money developed, the lords "were led naturally to exploit the resources of their land, and the sale of produce brought them much profit." SAYLES, *supra* note 14, at 432. *See also* 2 HOLDSWORTH, *supra* note 12, at 577.

46. "As the affairs of state became more complicated, the practice of the king's sitting in person gradually ceased, and the office of administering justice was committed to his representatives the judges." CRABB, *supra* note 19, at

writs" were a special series of procedures relating to land developed by the common law courts.[47] These were designed to ensure that the monarch's justices could enforce the social prerogatives and obligations of the nobility.[48] Similar writs were used to enforce the return of escaped slaves.[49] In this manner, the judges maintained the social order that attached both the nobility and the farmers to specific territory.

As English society moved gradually away from a purely agricultural society toward a mercantile one, the courts increasingly resolved disputes by awarding damages.[50] The idea of the damage award posed a threat to the social stability embodied in existing patterns of land ownership because it meant that entailed land could be transferred to a new owner, and the heirs of the seller

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100. At first, the remedies given by English law were not limited by a fixed register of writs. "The king's judges were not tied so strictly to the rules of substantive law or to rules of procedure that could not do equity." 2 HOLDSWORTH, *supra* note 12, at 246. Holdsworth says that the specific relief given at this period in the common law courts was not based upon the same principles as those upon which the Court of Chancery in later days granted specific performance. The common law courts granted specific relief on the ground that "a wrong was committed if the particular interest in land were used in such a way," not upon the personal ground that the defendant's conduct was inequitable. Relief of a real or specific kind was granted because "the very nature of the action pre-supposed and demanded it." *Id.* at 245-49.

47. BAKER, *supra* note 42, at 203-04. *See* Palmer, *supra* note 27, at 23 ff; GEORGE BOOTH, THE NATURE AND PRACTICE OF REAL ACTIONS 11 (New York, Stephen Gould 1808); 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 3-12 (3rd ed. 1923).

48. *See* Robert C. Palmer, *The Feudal Framework of English Law*, 79 MICH. L. REV. 1130, 1134 (1981).

49. Nativo habendo was the writ used to assert the right to a villein. The writ directed the sheriff to deliver to the lord his villein who had run away from the manor. *See* 3 HOLDSWORTH, *supra* note 47, at 20.

50. During the second half of the eighteenth century a market economy began to emerge in England marked by the development of a national commodities market. As the market for grain became regional instead of local, money was used more often as a means of exchange and goods came to be thought of as fungibles. The first recognition of expectation damages appeared after 1790 in cases involving speculation in stock. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 174 (1977) [hereinafter HORWITZ I]. "At a time when legal conceptions were still overwhelmingly derived from ideas about landed property, new forms of property developed and expanded that were increasingly difficult to fit into conventional categories." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 145 (1992) [hereinafter HORWITZ II].

could be satisfied with money damages in exchange, thereby evading the prohibition on the sale of entailed land.[51] To avoid that problem, a separate rule of law was established by the Chancery court. The rule was that land is unique, and an award of damages is not adequate relief to a person who was entitled to land.[52]

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51. *See* DONALD R. DENMAN, ORIGINS OF OWNERSHIP 132-33 (1958).

> The tenant who cannot be put out, and whose heirs will have a right protected by the external law of the king's court, is on the way to having something that we should call ownership. But it is not until he can give his land away, or sell it and keep the proceeds for himself, that the tenurial relationship finally becomes unreal; and the stages by which this happened are not altogether clear.

MILSOM, *supra* note 7, at 110.

52. As rules of procedure became more rigid, the equitable characteristics of the old common law courts began to decay. 2 HOLDSWORTH, *supra* note 12, at 334. One of the causes for decay was the new rule that new writs must be sanctioned by statute and that statutes should have the sanction of Parliament. *Id.* at 335. "'Every writ brought in the king's court,' it was said in 1294, 'ought to be formed according to the common law or statute.'" *Id.* However, the judges were not anxious to abandon their equitable jurisdiction right away, so in 1294 the following rule was adopted: "'Where one comes to the Chancery and prays a remedy . . . no remedy having been previously provided, then, in order that no one may quit the court in despair, the Chancery will agree on the form of a writ . . . .'" *Id.* Since the specific relief given by the common law was conditioned on the technical rules relating to real actions, and cases had arisen which showed that these principles were too narrow, the common law courts drove litigants to the Chancery. *Id.* at 345.

> There are many cases in which if a contract be broken no amount of damages that a jury will give will be a sufficient remedy to him who suffers by the breach. A man for example agrees to buy land, and he agrees perhaps to give more for it than anyone else would have given. The seller refuses to perform his part of the agreement, it may be that no damages that could be given to the buyer would be a just compensation to him for his loss. What damages can you give? Even if a land can be said to have a market value, still a man may well have consented to pay more than its market value and yet be very anxious that the agreement should be performed; to him the land has a fancy value.

F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW; TWO COURSES OF LECTURES 237-38 (1929). *See also* Robert Bird & William E. Fanning, *Specific Performance of Contracts to Convey Real Estate* 23 KY. L.J. 380 (1935). The authors discuss the exception to the general rule that contracts will not be specifically enforced in equity unless the remedy at law is inadequate. The exception is that equity will grant specific performance of contracts to convey real estate regardless of legal remedies and their adequacy of relief. "'Equity adopts this principle not because the land is fertile or rich in minerals, but merely because it is land, a much favored subject in England . . . .'"

C. The Decrease of the Monarch's Control: Land as Habitat

Land provided the English people with habitat as well as territory. As the centuries elapsed, the economic productivity of land grew increasingly diverse, keeping apace with the growing complexity of human society; consequently, the economic benefits that accompanied different noble fiefdoms varied greatly. A minor baron who married into the wealthy gentry and whose land happened to include what became the fashionable quarter of rapidly-expanding London became fabulously wealthy,[53] while many a land-rich north country noble hunted grouse in patched clothes.[54] But despite their economic differences, these nobles saw themselves as occupying the same rank in the social order; they sat next to each other in the House of Lords and sent their children to the same schools.[55]

The amassing of land was not limited to the nobility. Although English legal institutions sought to inhibit the breaking up of the nobility's landholdings, they never became draconian enough to counteract completely the natural tendency of individual barons to trade land for other assets of choice.[56] The assembly of this land by individuals who lacked noble birth but possessed substantial amounts of land—the nobility's primary asset—led to the creation of what became identified as a new social class, the "gentry."[57] Like the nobility, the landed gentry identified with

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Id. at 380 (quoting Kitchen v. Herring, 1 Eng. Chan. 607, 57 Eng. Rpts. 239 (1824)).

53. *See* MINGAY, *supra* note 36, at 58.

54. The knightly classes included "men of widely diverse ancestry and fortunes." MCKISSACK, *supra* note 38, at 264. *See* PAMELA HORN, LIFE AND LABOUR IN RURAL ENGLAND, 1760-1850, at 30-35 (1987).

55. MINGAY, *supra* note 36, at 58. The depopulation of the countryside during the plagues of the fourteenth century contributed to an increase in the turnover of land holdings. *See generally* M.H. POSTAN, ESSAYS ON MEDIEVAL AGRICULTURE AND GENERAL PROBLEMS OF THE MEDIEVAL ECONOMY (1973) (examining problems of medieval English agriculture and rural life).

56. *See* Joshua Williams, *On the Origin of the Present Mode of Family Settlements of Landed Property*, 1 PAPERS OF THE JURIDICAL SOC'Y 45, 54-55 (1855).

57. F.M.L. THOMPSON, ENGLISH LANDED SOCIETY IN THE NINETEENTH CENTURY 109 (1963) ("The landed gentry . . . were the untitled aristocracy . . . ."). *See* HOWARD NEWBY, SOCIAL CHANGE IN RURAL ENGLAND 33-37 (1979). The ranks of the gentry grew rapidly when the Tudors confiscated church lands and sold

each other far more closely than with people of another class who might happen to have wealth equal to their own.[58] The gentry tended to use the somewhat less rigid "strict settlement" rather than entailment,[59] but the legal uniqueness of land continued to be a key element of the social system,[60] and although tenant farmers obtained rights greater than feudal villeins,[61] enforcement of the prerogatives of the landowning classes remained a central element of the English legal system.[62]

Agricultural workers were also locked into their role in society. In the early feudal period many of them were serfs, but even as prosperity increased and they obtained more legal rights, they found few opportunities to acquire land.[63] The land remained in

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them to raise cash. DENIS E. COSGROVE, SOCIAL FORMATION AND SYMBOLIC LANDSCAPE 190-91 (1984). *See* POWELSON, *supra* note 42, at 80-81. By the 19th century, half the land of England was controlled by two to three thousand individuals, few of whom had the power to sell it. HERMANN LEVY, LARGE AND SMALL HOLDINGS: A STUDY OF ENGLISH AGRICULTURAL ECONOMICS 118-19 (1911).

58. *See* MINGAY, *supra* note 36, at 131-32; MINGAY, *supra* note 20, at xi; HALEVY, *supra* note 45, at 195-96.

59. When English law placed restrictions on the number of generations for which property could be entailed, marriage settlement deeds, drawn up when the eldest son married, were used to tie up land for three generations, which was the extent allowed by perpetuity law. A "regular succession of these deeds had the same practical effect as a perpetual entail . . . ." THOMPSON, *supra* note 57, at 64.

60. FREDERIC W. MAITLAND, DOMESDAY BOOK AND BEYOND 151 (1970).

61. *See* MINGAY, *supra* note 20, at 38. (The land surplus in relation to labour after the plague years may have produced a "golden age of the peasantry" in the 15th century.)

62. *See* Hargrove, *supra* note 43, at 130; HORN, *supra* note 54, at 167. Lawyers were typically drawn from the ranks of the gentry. The gentry often sent their sons to study law for a year or so as a foundation for the management of the family estate. CANTOR, *supra* note 3, at 63.

63. HORN, *supra* note 54, at 163-68. *See* RAFTIS, *supra* note 21, at 209-10. In the early medieval period, some farmers actually chose to abandon free status in favor of villeinage "for greater security of tenure, or as a bar to pleas of debt, or to support claims of inheritance." POSTAN, *supra* note 55, at 284. The land supply continued to be tight, with substantial new crop land being created through clearing and dike building, until about 1300, when the trend began to reverse and land became somewhat more freely available. POWELSON, *supra* note 42, at 60. By 1350, England was beginning to export grain in large quantities, and the prosperity of agriculture was creating pressures to loosen the restrictions on land tenure. R.A. Pelham, *Fourteenth Century England*, *in* AN HISTORICAL GEOGRAPHY OF ENGLAND BEFORE A.D. 1800, at 230, 238 (H.C. Darby ed., 1936). By the end of the eighteenth century, England

the control of the landed magnates, and the tenant farmers could look forward only to generation after generation of labor.[64]

Given the bleakness of this outlook, it is not surprising that the nobility would revive and disseminate the Arthurian stories, going back to Malory, as a way of emphasizing the risks that the citizenry would face from a breakdown of law and order.[65] Malory longed for the stability of an orderly social structure with a benevolent monarch in his or her palace, the nobility in their castles, the gentry in their manors, and the peasants in their cottages.[66] The benevolent monarch presiding over the round table remains even today the most picturesque symbol of land ownership as an orderly system of social hierarchy.[67]

III. REFORM: THE LAND ETHIC OF DAVID RICARDO

Trapped in a system under which the existing social order could be maintained only through traditional patterns of land-based economic activity, the landowning magnates were ill-pre-

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was the world's leading agricultural producer. HALEVY, *supra* note 45, at 198-202.

64. WOOD, *supra* note 11, at 149 ("The mass of the English people, then, were unfree and heavily burdened with obligations in labour and produce to the landlord for whom they worked."). Fifteenth-century landowners sought a return on land values of approximately five percent. MCFARLANE, *supra* note 16, at 70-72. By the eighteenth century, return on land value was three to four percent. MINGAY, *supra* note 20, at 51. The classic description of the bleakness of rural life is J.L. HAMMOND & BARBARA HAMMOND, THE VILLAGE LABOURER (6th ed. 1978).

65. *See* GEOFFREY ASHE, THE QUEST FOR ARTHUR'S BRITAIN (1971). The author suggests that Arthur tried to draw the Saxons into some kind of a combined system, and that the failure to achieve this unity was his successors' fault. "Nevertheless, he set the enemy on a road that led to distinctive and genuine political virtues: solidarity, balance, a capacity for adjustment and creative reconciliation of interests." *Id.* at 186.

66. BRIGGS, *supra* note 20, at 170; MINGAY, *supra* note 36, at 6-10. By that time, of course, castles remained only as isolated symbols of the feudal past, and both the nobility and gentry occupied "manors," a term incapable of precise definition. *See* 1 POLLOCK & MAITLAND, *supra* note 11, at 596. The manor house set in a parklike landscape became the symbol of power memorialized in the art of the time. COSGROVE, *supra* note 57, at 196, 232-33. For a history of the period during which Malory lived, see ROBIN NEILLANDS, THE WARS OF THE ROSES (1992).

67. *See supra* notes 29-30 and accompanying text. *See also* BRADBROOK, *supra* note 5, at 10-11.

pared to adapt to the new manufacturing and transportation technologies that were to reshape the world in the nineteenth century.[68] The Industrial Revolution in England created a new class of entrepreneurs, which resented the privileges of the nobility and gentry, whose wealth and social status were tied closely to their ownership of land.[69]

In the early 1800s, entrepreneur David Ricardo argued for reform of the restrictive English system of land ownership, basing his argument on his theory of "economic rent." He argued that rent was simply a windfall that was captured by the lucky landowner whose land had been endowed by nature with better productivity or accessibility than marginal sites. This argument supported the drive of entrepreneurs for political gain against the landed classes of the nobility and the gentry.

In America, Thomas Jefferson shared Ricardo's objections to the restrictive English system of land ownership. Yet, most American commentators thought Ricardo's theory of economic rent had limited applicability to the New World because America had few absentee landowners and wealth and power were increasingly concentrated in entrepreneurs, the owners of liquid capital needed to make the country self-sufficient. However, with the post-Civil War westward expansion and the resulting settlement and cultivation of increasingly marginal land, American commentators revived Ricardo's theories. One commentator, Henry George, carried Ricardo's theory of economic rent further than Ricardo would ever have expected.

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68. MINGAY, *supra* note 36, at 12, 51; HALEVY, *supra* note 45, at 180. *See* Richard G. Wilkinson, *The English Industrial Revolution*, *in* THE ENDS OF THE EARTH: PERSPECTIVES ON MODERN ENVIRONMENTAL HISTORY 80 (Donald Worster ed., 1988).

69. "The aristocracy managed to keep itself a small elite. It was [in the 18th century] much rarer than it had been in the past for a younger son to go into trade." CHRISTOPHER HIBBERT, THE ENGLISH, A SOCIAL HISTORY 1066-1945, at 309 (1987). *See also* CAROLYN MERCHANT, THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION 212-13 (1980); JOHN B. BREBNER & ALLAN NEVINS, THE MAKING OF MODERN BRITAIN 150-55 (1943); M.E. Rose, *Social Change and the Industrial Revolution*, *in* 1 THE ECONOMIC HISTORY OF BRITAIN SINCE 1700, at 253-256 (Roderick Floud & Donald McCloskey eds., 1981).

A. Ricardo the Entrepreneur

During the Industrial Revolution in England, the newly wealthy entrepreneurs sought to reform government policies that favored the old money of the landed nobility and gentry over the new money of the manufacturers,[70] such as the tariffs on foreign agricultural products.[71] Because the primary source of income for the nobility and gentry was rents collected from the tenant farmers who cultivated the land,[72] it was in their interest to keep the price of farm products high. The entrepreneurs, believing that high food prices were forcing them to pay workers higher wages,[73] sought to make imports of farm products cheaper.[74]

One of the most eloquent spokesmen for reform on behalf of the entrepreneurs was David Ricardo.[75] The son of a prominent financier, Ricardo left school at age fourteen to pursue a career in finance.[76] He was sufficiently successful at forty-two to be able to retire to his country estate[77] and pursue his hobby of "political

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70. PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830, at 370-77 (1991).

71. *See generally* C.R. FAY, THE CORN LAWS AND SOCIAL ENGLAND (1932).

72. The increasing enclosure of common lands and the combination of small holdings into larger units, often held by "doctors, lawyers, clergymen and soldiers all turned farmers," aggravated the hardship of agricultural workers. HERMANN LEVY, *supra* note 57, at 21 (1911); POWELSON, *supra* note 42, at 80-81; HALEVY, *supra* note 45, at 223. *See also* D.W. HASBACH, A HISTORY OF THE ENGLISH AGRICULTURAL LABOURER 57 (1908); A.J. POCOCK, BREAD OR BLOOD: A STUDY OF THE AGRARIAN RIOTS IN EAST ANGLIA IN 1816, at 21 (1965).

73. However, the entrepreneurs de-emphasized the potential reduction of wages to avoid antagonizing the workers. J.D. CHAMBERS & G.E. MINGAY, THE AGRICULTURAL REVOLUTION, 1750-1880, at 152 (1966).

74. *See* BREBNER & NEVINS, *supra* note 69, at 158-59; MARK BLAUG, RICARDIAN ECONOMICS: A HISTORICAL STUDY 9 (1958).

75. Ricardo's views on economic policy were "the ruling 'orthodoxy' in [economics] from the 1820s to the 1870s." OVERTON H. TAYLOR, A HISTORY OF ECONOMIC THOUGHT 172 (1960).

76. DAVID WEATHERALL, DAVID RICARDO: A BIOGRAPHY 14 (1976). *See* JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 470 (1954).

77. JACOB H. HOLLANDER, DAVID RICARDO: A CENTENARY ESTIMATE 50-51 (1910). Ricardo's father was wealthy, but after David married a Quaker, violating both the tenets of her religion and his parents' Judaism, his family temporarily cut him off; however, he became quite wealthy on his own. WEATHERALL, *supra* note 76, at 26-27. He participated in the famous "Waterloo loan," loaning money to the British government shortly before the Battle of

economy."[78] His attack on the tariffs[79] was widely-read. Within the next eight years he not only expanded his ideas into a treatise and pamphlets, but he also served as a member of Parliament[80] and participated extensively in discussions with other leading political economists, such as Thomas Malthus and James Mill.[81]

Waterloo and turning a profit with the defeat of Napoleon. *Id. at* 71.

78. In this article I discuss Ricardo's influence on the way people thought about land. This influence stemmed from the political arguments that he advanced and the authoritative way in which he argued that his position was supported by laws of economic inevitability. I do not discuss the merits or demerits of his economic theories by current standards because they are irrelevant to this issue.

79. DAVID RICARDO, *An Essay on the Influence of a Low Price of Corn on the Profits of Stock, in* [VOLUME IV: PAMPHLETS AND PAPERS, 1815-1823] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 1, 2 (Piero Sraffa ed., 1953). Ricardo wrote this essay in response to protectionist arguments advanced by his friend Malthus. FAY, *supra* note 71, at 138-140; HOLLANDER, *supra* note 77, at 77. Ricardo also wrote extensively on monetary issues and other subjects not relevant to this article. *See, e.g.*, TRIBE, *supra* note 17, at 114-15.

Some commentators have suggested that Ricardo's economic theories were usually derived to support political arguments that he had already made. *Cf.* MICHAEL J. GOOTZEIT, DAVID RICARDO 67 (1975); GUNNAR MYRDAL, THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY 75-77, 120 (1st English ed. 1953); SCHUMPETER, *supra* note 76, at 673.

80. Ricardo served in Parliament from 1819 until his death. WEATHERALL, *supra* note 76, at 137, 170.

81. BLAUG, *supra* note 74, at 40-41; *see also* WEATHERALL, *supra* note 76; WALTER BAGEHOT, ECONOMIC STUDIES 81-82 (Richard Holt Hutton ed., 1953). Ricardo was James Mill's closest friend and served much like a godfather to Mill's son John Stuart. MICHAEL ST. JOHN PACKE, THE LIFE OF JOHN STUART MILL 38-39 (1954). The last letter that Ricardo wrote before his death was to James Mill to comment on a paper written by John Stuart. Letter from David Ricardo to J. Mill, Esq. (Sept. 5, 1823), *in* [VOLUME IX: LETTERS JULY 1821-1823] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 385-87 (Piero Sraffa ed., 1953). John Stuart carried on the Ricardian tradition in his own writings, at least in regard to his theory of rent. TAYLOR, *supra* note 75, at 262-63; PACKE, *supra* at 298-99. Unlike his close friend Malthus, Ricardo viewed the future with optimism. In an 1819 letter to a friend travelling on the continent, Ricardo wrote:

> You will find the politicians of this country in a very gloomy mood. Commerce is languishing—merchants and manufacturers are failing—overtrading has become general and all our markets are glutted with goods. Cotton and many other articles are lower in price here than they can be grown for in other countries where they are produced. Pauperism is increasing, and employment cannot be found for the industrious. To crown the whole we are labouring under great financial difficulties, our revenue being insufficient to meet our expenditure. You

His premature death, due to sudden illness, in 1823 cut short his brilliant career.[82] He was widely regarded as a courteous and skilled debater even by his parliamentary opponents, and he served as an exponent of the use of reasoned discourse to resolve social issues.[83]

> will hear from the Whigs that the country is in a most alarming state and that nothing but a miracle can save it from ruin, and from the Tories you will not receive much more comfort. For my part I comfort myself by recollecting the observation of Adam Smith that complaints of the above description have always been frequent in this country: and yet at the very times that they most prevailed we were advancing in wealth and population.

Arnold Heertje & David Weatherall, *An Unpublished Letter of David Ricardo: To Thomas Smith of Easton Grey, 27 April 1819*, 88 THE ECON. J. 569, 570 (1978). *See also* THE DIARY OF BENJAMIN NEWTON, RECTOR OF WATH, 1816-1818, at 10 (C.P. Fendall & E.A. Crutchley eds., 1933) ("Mr. and Mrs. Ricardo called here [July 26, 1816]. Mr. Ricardo's opinion that the depression and commercial difficulties are only temporary.").

82. SCHUMPETER, *supra* note 76, at 470-75; WEATHERALL, *supra* note 76, at 185-86.

83. Henry Lord Brougham, Sketch of Ricardo in Parliament [From Historical Sketches of Statesmen who Flourished in the Times of George III, Second Series, by Henry Lord Brougham, London, Charles Knight, 1839, pp. 188-191], *in* [VOLUME V: SPEECHES AND EVIDENCE] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO, at xxxii-xxxiv (Piero Sraffa ed., 1953) (testimonial to Ricardo by political opponent); *see also* JOHNSON, *supra* note 70, at 861-62; WEATHERALL, *supra* note 76, at 169-70; SCHUMPETER, *supra* note 76, at 473; STEPHEN GUDEMAN, ECONOMICS AS CULTURE: MODELS AND METAPHORS OF LIVELIHOOD 50 (1986) ("Ricardo's skills as a broker were turned to economic analysis."). Some later critics, however, argued that the political economy movement that Ricardo embodied "robbed poverty of its sting for the rich by representing it as Nature's medicine." HAMMOND & HAMMOND, *supra* note 64, at 149.

Ricardo's ideas about tariff policy became accepted in England after his death. FAY, *supra* note 71, at 98-99. *See also* J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW, 1832-1840, at 39 (1992); MINGAY, *supra* note 20, at 186-87. "Ricardian theory made a decided impact on contemporary opinion which the Lauderdale-Malthus economic doctrines failed to do." MORTON PAGLIN, MALTHUS AND LAUDERDALE: THE ANTI-RICARDIAN TRADITION 157, 160 (1961). "[Ricardian economics] was the quasi-official economics of a new philosophical movement, propagated by a zealous group of social reformers." *Id.* at 160. For a brief period, Ricardo's ideas contributed to a "consensus of sound opinion among all classes." A.H. HALSEY, CHANGE IN BRITISH SOCIETY 51 (3d ed. 1986); TRIBE, *supra* note 17, at 147-48. Then a more radical group of thinkers warped pieces of Ricardian theory into the rigid class warfare that was characterized by Fabianism and Marxism. W.D. RUBINSTEIN, ELITES AND THE WEALTHY IN MODERN BRITISH HISTORY 71, 361-62 (1987); *see also* TAYLOR, *supra* note 75, at 203-04.

B. Ricardo's Theory of Economic Rent

Ricardo's brief period in the public eye began in 1815, a watershed year in European history, when the defeat of Napoleon at Waterloo ended the protracted Napoleonic Wars. England borrowed unprecedented sums to finance the conflict, and the burden of this debt limited government options for adjusting to peacetime conditions.[84] Englishmen were restive under the high taxes which were needed to finance the war effort.[85] The resumption of high tariffs on grain (the "Corn Laws")[86] resulted in the Corn Law riots of 1815-16, in which mobs attacked members of Parliament and other government officials.[87]

Ricardo argued against the Corn Laws in his writings and from his seat in Parliament.[88] He articulated a platform for

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84. HOLLANDER, *supra* note 77, at 16-17; JOHNSON, *supra* note 70, at 369-70.

85. Grain prices had risen to record levels and there was an "all-pervasive land shortage." Wilkinson, *supra* note 68, at 89. JOHNSON, *supra* note 70, at 372.

86. The Corn Laws, sometimes referred to in this article as tariffs, had been repealed during the Napoleonic Wars but were reinstituted in 1815. *See* GOOTZEIT, *supra* note 79, at 27-29. The term "corn" was used synonymously for grain, which consisted principally of wheat. FAY, *supra* note 71, at 1.

87. ARTHUR D. GAYER ET AL., 1 THE GROWTH AND FLUCTUATION OF THE BRITISH ECONOMY, 1790-1850 at 111-15 (1953); MINGAY, SOCIAL HISTORY, *supra* note 20, at 138-39, 158-62. *See generally* POCOCK, *supra* note 72.

88. *See, e.g.*, David Ricardo, Speech to Parliament on the Commercial Restrictions Petitioned for by the Merchants of London (May 8, 1820), *in* [VOLUME V: SPEECHES AND EVIDENCE] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 44, 47 (Piero Sraffa ed. 1953); David Ricardo, Speech on "Agricultural Distress" (May 30, 1820), *in* [VOLUME V: SPEECHES AND EVIDENCE] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 49 (Piero Sraffa ed., 1953); David Ricardo, Speech on "Mr. Gooch's Motion for a Committee on Agricultural Distress" (March 7, 1821), *in* [VOLUME V: SPEECHES AND EVIDENCE] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 81-86; David Ricardo, Speech on the Corn Importation Bill (June 1822), *in* [VOLUME V: SPEECHES AND EVIDENCE] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 196 (Piero Sraffa ed., 1953). Ricardo also criticized the size of the national debt and the degradation of the currency. OSWALD ST. CLAIR, A KEY TO RICARDO 62 (1957). *See* TODD G. BUCHHOLZ, NEW IDEAS FROM DEAD ECONOMISTS 73, 77 (1989). Ricardo did not consider himself a radical. TAYLOR, *supra* note 75, at 182. When attacked in parliament for appearing to take the side of the mercantile classes, Ricardo "denied that he was interested either as a mercantile man or as a fundholder. He [said he] was a landed proprietor, and his interests were bound up with that of the House." V RICARDO, Speech on "Mr. Gooch's Motion for a Commit-

Britain's postwar policy that offered a concise and persuasive argument for reform: each nation should specialize in the thing it does best, and because Britain surpassed all other nations in its ability to manufacture goods, it should import cheap farm products and devote the energies of its workers to manufacturing.[89]

The heart of Ricardo's argument was his theory of "economic rent," which he first set out in 1815 in *An Essay on the Influence of a Low Price of Corn on the Profits of Stock.*[90] Ricardo used the term "economic rent" to define the excess received by the landowner over a normal return on capital.[91] The owner of the

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tee on Agricultural Distress", *supra*, at 81-82, 87. Ricardo invested some £275,000 in the purchase of landed estates between 1814 and 1819. DAVID RICARDO, MEMOIRE, *reprinted in* [VOLUME X: A MEMOIRE OF RICARDO: WITH AGENDA] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 95-99 (Piero Sraffa ed., 1953). "It is difficult to exaggerate the weight placed by Ricardo on the social advantages flowing from security of property." HOLLANDER, ECONOMICS, *supra* note 77, at 591.

89. *See* DAVID RICARDO, ON PROTECTION TO AGRICULTURE (4th ed. 1882), *reprinted in* [VOLUME IV: PAMPHLETS AND PAPERS, 1815-1823] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 201-05 (Piero Sraffa ed., 1953). Ricardo was careful to advocate only a gradual reduction of tariffs in order to reduce potential drastic impacts on the economy. *See id.* at 243-44; DAVID RICARDO, PROPOSALS FOR AN ECONOMICAL AND SECURE CURRENCY: WITH OBSERVATIONS ON THE PROFITS OF THE BANK OF ENGLAND AS THEY REGARD THE PUBLIC AND THE PROPRIETORS OF BANK STOCK (1816), *reprinted in* [VOLUME IV: PAMPHLETS AND PAPERS, 1815-1823] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 82 (Piero Sraffa ed., 1953). *See* ROBERT LEKACHMAN, ECONOMISTS AT BAY 219-20 (1976); Herbert Hovenkamp, *The Political Economy of Due Process*, 40 STAN. L. REV. 379, 407 (1988); HOLLANDER, *supra* note 77, at 126-28. Agriculture went into an economic downturn after 1818. 2 GAYER, *supra* note 87, at 929. But Ricardo argued that landowners had no more right to be protected from changes in market conditions than entrepreneurs, who often lost capital to new inventions or to more efficient areas of production. CHAMBERS & MINGAY, *supra* note 73, at 123.

The theories of Ricardo and other early supporters of the movement known as "political economy" served as the original foundation for the now widely accepted support among economists for free trade. HOLLANDER, *supra* note 77, at 125. *See* SCHUMPETER, *supra* note 76, at 611-12. For an argument that this position failed to take into account the domination by colonial countries of the places where specialized crops or products were produced, see CLIVE PONTING, A GREEN HISTORY OF THE WORLD 221-23 (1991). *See also* KARL POLANYI, THE GREAT TRANSFORMATION 182-83 (1944).

90. IV RICARDO, *An Essay on the Influence of a Low Price of Corn on the Profits of Stock*, *supra* note 79, at 1.

91. DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXA-

poorest land in cultivation would get no rent, he argued, but only return on capital. Therefore, no land would yield economic rent until poorer land is cultivated, because rent is the component of the landowner's income that is attributable to the fact that his or her land is of higher quality than some other land. He argued that when a country is first settled and land is freely available, the produce of land "will belong to the owner of such capital [invested to produce it] without any deduction for rent."[92] But as it becomes necessary to till more distant and less fertile land, the owner of the better land will be able to charge rent; this "rent would rise on the land previously cultivated, and precisely in the same degree profits would fall."[93]

To Ricardo, land was not just territory in the feudal sense, it was habitat, a scarce natural resource, the quality of which differed greatly from parcel to parcel.[94] By providing the public with a simple formula that appeared to correlate the increase in economic rent with the amount of marginal land put into cultivation,[95] he put a spin on the issue that could be translated into soundbites at the local ale-house.[96]

TION (3d ed. 1817), *reprinted in* [VOLUME I: ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 174 (Piero Sraffa ed., 1953).

92. *Id.* at 69.

93. IV RICARDO, *An Essay on the Influence of a Low Price on Corn on the Profits of Stock*, *supra* note 79, at 1, 10, 13-14.

94. MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 91 (3d ed. 1978). *See* Letter from David Ricardo to Rev. T.R. Malthus (Oct. 17, 1815) *in* [VOLUME VI: LETTERS, 1810-1815] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 301-02 (Piero Sraffa ed., 1953).

95. For a discussion of early agricultural use of submarginal land in England, see M.M. POSTAN, THE MEDIEVAL ECONOMY AND SOCIETY: AN ECONOMIC HISTORY OF BRITAIN, 1100-1500, at 22-25 (1972). Schumpeter referred to Ricardo's tendency to oversimplify economic concepts for popular consumption as the "Ricardian Vice."

96. *See, e.g.*, IV RICARDO, *An Essay on the Influence of a Low Price of Corn on the Profits of Stock*, *supra* note 79, at 13; V RICARDO, Speech on "Agricultural Distress," *supra* note 79, at 49. *See also* SCHUMPETER, *supra* note 76, at 470. *See* SAMUEL HOLLANDER, THE ECONOMICS OF DAVID RICARDO, 599 (1979); TAYLOR, *supra* note 75, at 173-74. Walter Bagehot noted that Ricardo's love of abstraction could be the result of his success in the stock market. BAGEHOT, *supra* note 81, at 167.

This idea of "economic rent" was designed to put the landed magnates in a less deserving posture than the entrepreneurs; the magnates' fortunes varied with the fortuitous attributes of their land holdings rather than with the skill of their investment. In this manner, Ricardo made a theoretical basis for a distinction between land and capital that served as the linchpin for land reform.[97]

Ricardo argued that high tariffs on farm products unfairly increased the income of the landed magnates at the expense of the other classes:

> If we import [corn,] the portion of the capital last employed on the land, and which yielded no rent, will be withdrawn; rent will fall and profits rise. . . . If corn can be imported cheaper than it can be grown on this rather better land, rent will again fall and profits rise, and another and better description of land will now be cultivated for profits only. In every step of our progress, profits of [capital] stock increase and rents fall, and more land is abandoned . . . .[98]

97.

> The produce of the earth—all that is derived from its surface by the united application of labour, machinery, and capital, is divided among three classes of the community; namely, the proprietor of the land, the owner of the stock or capital necessary for its cultivation, and the labourers by whose industry it is cultivated.

I RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, *supra* note 91, at 5. Ricardo's unique contribution was to demonstrate that agriculture required all three social functions: capital, labor, and landownership. GUDEMAN, *supra* note 83, at 50-51; *see also* MINGAY, *supra* note 36, at 6-10; TRIBE, *supra* note 17, at 129; P. Garegnani, *On Hollander's Interpretation of Ricardo's Early Theory of Profits*, 6 CAMBRIDGE J. OF ECON. 65, 68-69 (1982). The businessmen were involved in a struggle against both the landowners, to hold down rents, and against labor, to hold down wages. TAYLOR, *supra* note 75, at 180.

98. IV RICARDO, *An Essay on the Influence of a Low Price of Corn on the Profits of Stock*, *supra* note 79, at 38-39. *See also* V RICARDO, Speech on the Corn Importation Bill, *supra* note 88, at 196.

> [Ricardo] dramatized the conflict of interests between landlords and the other social classes: Under a system of agricultural protection, diminishing returns in agriculture would cause the distribution of income to shift in favor of the landlords and against the receivers of profits. Since profits were the prime mover of progress, the long run effect of the corn laws would be a stationary economy. The issue was cheap corn and (industrial) progress versus high priced corn, high rents and an end to economic expansion.

PAGLIN, *supra* note 83, at 89. *See* Letter from David Ricardo to Trower (March

By characterizing the additional earnings of the gentry that resulted from high tariffs as "economic rent,"[99] a term that implied a windfall, Ricardo succeeded in putting the landowners on the defensive.[100]

In sum, Ricardo defined the parameters of the argument over land reform, which continues unabated today. By characterizing land ownership as a source of windfall income, rather than as the product of an investment decision, he formulated a powerful argu-

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25, 1822), *in* [VOLUME IX: LETTERS JULY 1821-1823] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 180 (Piero Sraffa ed., 1953); HALEVY, *supra* note 45, at 322-25.

99. Although the unfailingly generous Ricardo credited Malthus with the origination of the theory of economic rent, and other political economists of the day were using similar concepts, his contemporaries credited Ricardo with the theory and it became associated with his name. *See* IV RICARDO, *An Essay on the Influence of a Low Price of Corn on the Profits of Stock*, *supra* note 79, at 4-6. The Ricardian definition of rent was expanded on by other economists, and remains a continuing source of the difficulty economists have in communicating with the outside world. *See* ST. CLAIR, *supra* note 88, at 64-75; ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS 94-96 (4th ed. 1972).

100. FAY, *supra* note 71, at 140 ("It was Ricardo who [provided] the stamp of classical truth . . . ; and on it the classical economists . . . contentedly pastured for the best part of a century."). Other writers had defined each of the components of Ricardo's model, but his unique contribution was to reduce the elements to a complete and accessible theory. *See generally* GUDEMAN, *supra* note 83, at 55-56. TRIBE, *supra* note 17, at 118-22.

Ricardo left little indication of his ethical attitude toward the natural world. His early retirement from investment banking to an estate in the country seems to have created an ambivalence toward agrarian values. In a letter to a friend written shortly after his purchase of the estate he wrote that he intended to "enjoy the calm repose of country life" but "I am not yet become a farmer. I leave the management of [my land] wholly to others, and hardly take sufficient interest in what is going on, to make it probable that I shall ever be conversant with agricultural subjects." Letter from David Ricardo to Sir John Sinclair (Oct. 31, 1814), *in* [VOLUME VI: LETTERS 1810-1815] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 150 (Piero Sraffa ed., 1953). His view on wild animals is reflected in his response to a close friend who twitted him for not shooting his own pheasants:

> [T]heir death, or that of some other animal, is necessary for my subsistence, and I may legitimately pursue them for that purpose. I employ a skilful man who brings them down with the least sum of pain, that can be inflicted in such a warfare. Are you no more guilty than this?

Letter from David Ricardo to Trower (Nov. 2, 1818), *in* [VOLUME VII: LETTERS 1816-1818] THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 318-319 (Piero Sraffa ed., 1953).

ment that supported the drive of the entrepreneurs for political gain at the expense of the nobility and gentry.[101] Although economists later argued that his theory of economic rent lacked general applicability because it was tied to the tight restrictions on land ownership inherited from medieval England,[102] large landowners even today must defend themselves against Ricardian arguments that a broader base of land ownership would promote economic growth.[103]

C. The American Reaction to Ricardo

Following the publication of Ricardo's works, Americans studied his theories.[104] An American edition of his *Principles of Political Economy and Taxation* appeared shortly after its publication in England,[105] and for many years American writers on political economy used the Ricardian view on any issue as the accepted doctrine to be supported or attacked.[106] Many American commentators accepted Ricardo's theory of economic rent as valid for England but inapplicable to conditions in the United States because of land's unique role in the "New World."[107]

Americans initially saw land as habitat more than territory.[108] Ever since the first settlements were made, the dream of

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101. *Supra* notes 93-100.

102. *See infra* note 107 and accompanying text.

103. *See infra* text accompanying note 278.

104. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 44-47 (1991). Even long after most of Ricardo's theories became unfashionable, American economists favorably cited his theory of rent. *See, e.g.*, GEORGE STIGLER, PRODUCTION AND DISTRIBUTION THEORIES 291-92 (1941).

105. 1 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1606-1865, at 369-70 (1966).

106. 2 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1606-1865, at 513, 517-22, 708-10 (1966).

107. DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 228 (1948). *See also* 2 DORFMAN, *supra* note 106, at 537, 550, 560-61, 792-96 (discussing Thomas Cooper, George Tucker, Jacob Nunez Cardozo and Henry C. Carey); TAYLOR, *supra* note 75, at 166-67 (discussing how Malthusian predictions were not fulfilled in the history of the western United States). *Cf.* HOWARD HORWITZ, BY THE LAW OF NATURE: FORM AND VALUE IN NINETEENTH CENTURY AMERICA 127 (1991).

108. By 1818, many Americans recognized that land's value was "derived from wealth that could be created by using it rather than [from] the social status that accrued from its mere possession." KERMIT L. HALL, THE MAGIC

land ownership[109] had attracted immigrants to America.[110] As early as the late 1700s, Thomas Jefferson argued that widespread land ownership was an essential precondition to democracy.[111] Jefferson shared Ricardo's objections to the restrictive English system of land ownership[112] and used the terms "land" and

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MIRROR: LAW IN AMERICAN HISTORY 99 (1989). *See also* COSGROVE, *supra* note 57, at 171-73.

> [T]he unspoiled terrain . . . [and the] seemingly unlimited natural resources [of America] and the relative absence of cultural or institutional restraints made possible what surely has been the fastest-developing, most mobile, most relentlessly innovative society in world history. By now that dynamism inheres in every aspect of our lives, from the dominant national ethos to the structure of our economic institutions down to the deportment of individuals.

Leo Marx, *American Institutions and Ecological Ideals: Scientific and Literary Views of our Expansion of Life-style are Converging*, 170 SCIENCE 945, 947 (1970). *But see* RICHARD L. BUSHMAN, THE REFINEMENT OF AMERICA (1992) (chronicling imitation of English gentry by Americans beginning in eighteenth century).

109. On the attitudes toward land as a commodity in colonial America, see JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY 118-28 (1991); WILLIAM CRONON, CHANGES IN THE LAND 161-62 (1983); PETER N. CARROLL, PURITANISM AND THE WILDERNESS: THE INTELLECTUAL SIGNIFICANCE OF THE NEW ENGLAND FRONTIER, 1629-1700, at 15, 183-84 (1969); CECILIA TICHI, NEW WORLD, NEW EARTH: ENVIRONMENTAL REFORM IN AMERICAN LITERATURE FROM THE PURITANS THROUGH WHITMAN 1-4 (1979). *See also* David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 488-90 (1993); Eric Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 725-28 (1985); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

110. COSGROVE, *supra* note 57, at 161; D.W. MEINIG, ATLANTIC AMERICA, 1492-1800, at 410-14 (1986); JOHNSON, *supra* note 70, at 209-14 (1991).

111. "The small landholders," said Jefferson, "are the most precious part of a state." Letter dated October 28, 1785, from Thomas Jefferson to James Madison, *in* THOMAS JEFFERSON, WRITINGS 842 (Merrill D. Peterson ed., 1984).

112.

> The high value attached to landownership by the colonists is best understood in terms of the English experience. In England, as in western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely: All land was held under a tenurial relationship with the Crown.

JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL

"property" virtually synonymously.[113]

His platform of fee simple land ownership became a basic element of United States policy.[114] The new central government used public land sales to finance itself and to pay the debts of the War of 1812.[115] This fueled fierce speculation.[116] The govern-

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HISTORY OF PROPERTY RIGHTS 11 (1992); *see also* MARCUS LEE HANSEN, THE ATLANTIC MIGRATION 1607-1860, at 17-19 (1940). The original charters given by the King to colonial settlement groups such as the Virginia Companies granted them lands in the new world, subject to feudal duties that were by then obsolete in England. PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 11-12 (1992). Thomas Jefferson was proud to have authored the Virginia legislation abolishing entail and primogeniture. Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 471-72 (1976). Writing in 1765, John Adams characterized the English system of land tenure as "a code of laws for a vast army in a perpetual encampment" by which

> the common people were held together in herds and clans in a state of servile dependence on their lords, bound, even by the tenure of their lands, to follow them, whenever they commanded, to their wars, and in a state of total ignorance of everything divine and human, excepting the use of arms and the culture of their lands.

John Adams, *On the Feudal and the Canon Law*, *in* THE RISING GLORY OF AMERICA, 1760-1820, at 25, 27 (Gordon S. Wood ed., 1971).

113. Katz, *supra* note 112, at 473. "American republicans valued property in land primarily because it provided personal independence . . . [and] stimulated the productivity of an alert and active citizenry . . . ." DREW K. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 68 (1980). *See also* CHARLES A. MILLER, JEFFERSON AND NATURE: AN INTERPRETATION 205 (1988) ("Nearest to nature and nearest to Jefferson's heart in political economy lies agriculture."); WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS 46-47, 58-59 (1977).

114. Thomas Jefferson "dreamed of the West as a freehold empire." Richard P. Cole, *Community Justice and Formal Law: The Jurisprudence of the Western Ordinances*, 16 LEGAL STUD. F. 263, 275 (1992). He believed that the earth was given to men for their support and comfort. Katz, *supra* note 112, at 474. But humans were merely the top link in the "great chain of beings." BOORSTIN, *supra* note 107, at 34-39, 49. *See* Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259, 273 (1992) (collection of authorities on Jeffersonian attitude towards commodification of property). *Compare* RICHARD K. MATTHEWS, THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW 120-24 (1984). The courts increasingly supported an unwritten policy to "facilitate alienation of lands, and to encourage their cultivation." WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 159 (1975) (quoting Montague v. Gay, 17 Mass. 439, 440 (1821)). *See* Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 677-86 (1983).

115. *See generally* MALCOLM ROHRBOUGH, LAND OFFICE BUSINESS (1990). To

ment offered land to potential English immigrants[117] in fee simple, something few residents of England could ever expect to obtain.[118]

Because the New World had few absentee landlords, most American commentators believed that Ricardo's concept of rent as a windfall had limited applicability in America.[119] Where tenancy did occur, landlords could not raise rents to exorbitant levels because of the availability of vast quantities of open land from the government at low cost.[120] Some anti-landowner sentiment did occur in America, particularly in those few areas where large landholdings were prevalent,[121] but even the antifederalists of the

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promote sales the government emphasized the Jeffersonian image of the small farmer as hero. *See* HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH 141-42 (1950); COSGROVE, *supra* note 57, at 174-80.

116. *See* BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 152-54 (1965); Cole, *supra* note 114, at 281-83. *See also* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER 104-13 (1983).

117. *See, e.g.*, MORRIS BIRKBECK, NOTES ON A JOURNEY IN AMERICA: LETTERS FROM ILLINOIS 65-69 (1818).

118. *See* LEVY, *supra* note 72, at 118-19; HANSEN, *supra* note 112, at 146-48.

119. *See, e.g.*, FRANCIS BOWEN, THE PRINCIPLES OF POLITICAL ECONOMY 164-92 (1859). Some commentators, such as John McVickar, argued that American landowners received no economic rent because they were too distant from markets, while others, such as Jacob Cardozo, accepted the existence of economic rent but argued that it was a legitimate element of an economic system in a country with easy opportunities for land acquisition. 2 DORFMAN, *supra* note 106, at 517-22, 560-61. *See* ROSS, *supra* note 104, at 86-87; JOHN D. HAEGER, THE INVESTMENT FRONTIER 92-93 (1981); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 424-31 (1988).

120. FRANK H. KNIGHT, ON THE HISTORY AND METHOD OF ECONOMICS 24 (1956). Ricardo himself was curious and somewhat ambivalent about the extent to which economic rent would occur in land-rich America. ST. CLAIR, *supra* note 88, at 67.

121. Demands for land reform were most common in New York state. *See, e.g.*, THOMAS SKIDMORE, THE RIGHTS OF MAN TO PROPERTY 23-24 (1829).

> In New York, leading Dutch and English families pried great swaths of land from the government and yearned for the privileges of lords of the manor. The feudal dreams of these men vanished when they came face to face with the labor shortage in the colonies. . . . As the governor of New York reported in 1700, "what man, will be such a fool to become '[a tenant farmer in New York] when for crossing Hudson's River that man can for a song purchase Jerseys?'"

HOFFER, *supra* note 112, at 70. *See generally* Arthur E. Sutherland, *Tenantry of the New York Manors: A Chapter of Legal History*, 41 CORNELL L.Q. 620 (1956). *But see* STEVEN WATTS, THE REPUBLIC REBORN: WAR AND THE MAKING OF

post-revolutionary period frequently emphasized the need to maintain a "balance of power."[122] Additionally, landowners were less frequently perceived as a hereditary class because of the abolition of English rules such as entailment.[123] Power and wealth were increasingly concentrated, not in the owners of agricultural land,[124] but in the owners of the liquid capital needed to develop the manufacturing industries necessary to make the country self-sufficient.[125] By the time of the American publication of Ricardo's *Principles* in 1818,[126] it was the entrepreneurs who had the trappings of "aristocracy"; the wealthy middle class that produced Ricardo was not in the middle in America—it was on top.[127]

The rapid switch to a paper economy worried some agrarians[128] like John Taylor, who argued that land was the only legitimate form of property and that everything else was fictitious property,[129] but many republican landowners were diversifying

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LIBERAL AMERICA, 1790-1820, at 16-28 (1987).

122. Alexander, *supra* note 114, at 267. *See* WATTS, *supra* note 121, at 220-28; Carol M. Rose, *Anti-Federalism From the Attack on Monarchism to Modern Localism*, 85 NW. U. L. REV. 74, 93 (1990); ANDREW R.L. CAYTON & PETER S. ONUF, THE MIDWEST AND THE NATION: RETHINKING THE HISTORY OF AN AMERICAN REGION 37-39 (1990).

123. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 12-13 (1956); 2 DORFMAN, *supra* note 106, at 537, 558-59; HALL, *supra* note 108, at 43-45.

124. *See* BLAUG, *supra* note 74, at 13; MYRDAL, *supra* note 79, at 62-63; 2 DORFMAN, *supra* note 106, at 792-96. Americans of that period were especially prone to view agriculture as only an intermediate stage of the progression through which societies naturally evolve. FORREST MCDONALD, NOVUS ORDO SECLOROM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 132-42 (1985); MCCOY, *supra* note 113, at 19. *See also* Robert F. Hebert, *Marshall: A Professional Economist Guards the Purity of his Discipline*, *in* CRITICS OF HENRY GEORGE: A CENTENARY APPRAISAL OF THEIR STRICTURES ON PROGRESS AND POVERTY 56, 61-63 (Robert V. Andelson ed., 1979).

125. WATTS, *supra* note 121, at 220-21. Jefferson himself, although encouraging farmers' independence, wanted them to participate in commerce through the sale of their products. MILLER, *supra* note 113, at 208-09.

126. NELSON, *supra* note 114, at 147.

127. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 99 (1955).

128. *See* WATTS, *supra* note 121, at 220-28.

129. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 227 (Loren Baritz ed., 1969) ("Land is in some degree a representative of every man's interest, as being the source of human subsistence, and a landed interest cannot tax without taxing itself. Out of pa-

their investments so that the distinction between landowner and capitalist often was so blurred that it became meaningless.[130] In the words of one historian, "The aristocracy of capital thus destroyed the aristocracy of land."[131]

As the mid-1800s approached, arguments concerning the legitimacy of paper property submerged into a more basic debate about the legitimacy of another type of property: slaves.[132] The southern states retained feudal legal doctrines which permitted humans to be treated not only as property but, like land, as a unique form of property for which "paper" compensation was inadequate.[133] It took a long and bloody war to eliminate the idea of people as property.

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per stock nothing grows."); *see* ARTHUR SCHLESINGER, JR., THE AGE OF JACKSON 23-24 (1945); WATTS, *supra* note 121, at 16-28; 1 DORFMAN, *supra* note 105, at 303-04; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 588-91 (1969). For a more concise presentation of Taylor's "pastoralism" than can be obtained from perusing his verbose prose in the original, see ROBERT E. SHALHOPE, JOHN TAYLOR OF CAROLINE 134-41 (1980); C. WILLIAM HILL, JR., THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE, 241-44 (1977); EUGENE TENBROECK MUDGE, THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE 166-73 (1939). For a similar view a century later, see THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 123 (1937).

130. *See* WATTS, *supra* note 121, at 220-21. "So long as the settlement of new land was possible, the partnership between agrarian virtue and commercial industry could be maintained and could perpetuate the illusion that the American 'new man' had reentered Eden." J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 540 (1975). *See also*, MCCOY, *supra* note 113, at 188; CHARLES A. MILLER, JEFFERSON AND NATURE: AN INTERPRETATION 209-16 (1988); WORSTER, *supra* note 2 at 100-101; James Willard Hurst, Book Review (of HORWITZ I, *supra* note 50), 21 AM. J. LEGAL HISTORY 175, 179 (1977); Ian Shapiro, *J.G.A. Pocock's Republicanism and Political Theory: A Critique and Reinterpretation*, 4 CRITICAL REV. 433, 458 (1990).

131. SCHLESINGER, *supra* note 129, at 318.

132. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715-21 (1993). In defense of slavery, Southerners harked back to medieval traditions of chivalry. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 510-12 (1965). Jefferson's reputation suffered after his presidency because of his insistence that the objection to slavery in the new western territories was anti-Southern prejudice. MCCOY, *supra* note 113, at 251.

133. *See generally* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860, at 158-69 (1981).

D. Henry George and The Ricardian Revival in America

The post-Civil War period saw rapid westward expansion in which increasingly marginal land was settled and cultivated.[134] In states such as California,[135] the result of the federal land sales program became less and less like Jefferson's vision of a nation of prosperous small farmers and more like the concentrated power of large landowners that had characterized Ricardo's England.[136] In California, Henry George, an eloquent writer, picked up Ricardo's theory of economic rent and carried the idea further than Ricardo ever would have expected.[137] He proposed the complete elimination of what Ricardo had defined as economic rent.[138]

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134. *See* WILLIAM K. WYANT, WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION MOVEMENT 62-67 (1982); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY & THE GROWTH OF THE AMERICAN WEST 169-88 (1985). For a discussion of the effect of the wide availability of western land on American attitudes, see LEO MARX, THE PILOT AND THE PASSENGER 315-27 (1988).

135. PAUL W. GATES, THE FARMER'S AGE: AGRICULTURE, 1815-1860, at 390 (1960) ("The legacy of the California land claims was a concentrated pattern of ownership of land, a small number of farms in relation to the population, large bonanza farms, and a high proportion of farm laborers and tenants."); *see also* KEVIN STARR, AMERICANS AND THE CALIFORNIA DREAM, 1850-1915, at 133-41 (1973).

136. ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 13 (Celia Campbell-Mohn ed., 1993); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 365 (1973) ("Land law took the form of exalting the yeoman farmer; it used him for slogans and propaganda. The law itself served more complicated interests: businessmen, speculators, merchants, lawyers, as well as farmers and settlers."); HORWITZ I, *supra* note 50, at 234. The Jackson democrats exhibited concern about this possibility even before the Civil War. SCHLESINGER, *supra* note 129, at 345-49. *See also* R. Cole Harris, *The Simplification of Europe Overseas*, 67 ANNALS OF THE ASS'N OF AMERICAN GEOGRAPHERS 469, 474-75, 482-83 (1977) (arguing that similar trends occurred in all temperate lands settled by Europeans).

137. HENRY GEORGE, PROGRESS AND POVERTY (15th anniv. ed. 1948). Although George claimed to have arrived at the idea of economic rent independently of Ricardo, he saw himself as a disciple of Ricardian ideas. CHARLES ALBRO BARKER, HENRY GEORGE 276-77 (1955); JOHN L. THOMAS, ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD AND THE ADVERSARY TRADITION 110-113 (1983).

138. GEORGE, *supra* note 137, at 406. He quoted Ricardo as having looked favorably on a tax on rent. *Id.* at 422. He did not, however, credit Ricardo as having initiated the concept of economic rent, and he was quite critical of "political economy." *Id.* at 168-69. "There is in truth a marked resemblance between the science of political economy, as at present taught, and the science

George was born in Philadelphia and moved to California in 1862.[139] Raised in an evangelical Christian household, he strongly believed in the protestant work ethic.[140] He worked as an editor of various California newspapers until 1876 when he was appointed state inspector of gas meters, a job that allowed him time to flesh out his writings on economics.[141] In what he himself characterized as a flash of insight, he concluded that the "monopolistic" nature of landownership in the United States was destroying the Jeffersonian ideal.[142]

George's book *Progress and Poverty* became a best seller, making its author a popular if controversial speaker throughout the world.[143] George proposed that the government levy a tax equal to 100% of the amount by which economic rent from unimproved land exceeded the return that the land would have provided if it had been simply capital.[144]

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of astronomy, as taught previous to the recognition of Copernican theory." *Id.* at 221. *See also* HENRY GEORGE, THE SCIENCE OF POLITICAL ECONOMY (1932). Yet George often referred to "Ricardo's law of rent," and shared Ricardo's political belief "that workers and investors have a common cause against the landowners, landholders and land speculators." EDWARD J. ROSE, HENRY GEORGE 70-71 (1968).

139. BARKER, *supra* note 137, at 58. *See* DANIEL AARON, MEN OF GOOD HOPE: A STORY OF AMERICAN PROGRESSIVES 58-59 (1951).

140. THOMAS, *supra* note 137, at 13.

141. BARKER, *supra* note 137, at 232. While editing a Sacramento paper he read and corresponded with John Stuart Mill, and published a letter from Mill in his newspaper. GEORGE RAYMOND GEIGER, THE PHILOSOPHY OF HENRY GEORGE 41 (1933); ROSE, *supra* note 138, at 42-43.

142. ROSE, *supra* note 138, at 41-42; THOMAS, *supra* note 137, at 52-53; MILLER, *supra* note 113, at 264 (Henry George was "substantially Jeffersonian"). To George, land had a deeper, almost religious meaning than simply a form of wealth. *Id.* at 66-67; AARON, *supra* note 139, at 69-71. He sought to "recuperate one's inalienable right to one's labor and one's self" by eliminating the corruption of that right by land markets. HORWITZ, *supra* note 107, at 233. *See also* GEIGER, *supra* note 141, at 134-35,142.

143. ANNA GEORGE DEMILLE, HENRY GEORGE: CITIZEN OF THE WORLD 85-91 (1950). *See* Samuel B. Clarke, *Criticisms upon Henry George, Reviewed from the Stand-point of Justice*, 1 HARV. L. REV. 265, 283-85 (1887). George argued that the growing concentration of land ownership was reversing the trend toward economic equality and widening the gap between the rulers and the ruled in a pattern that had led in the past to the downfall of civilizations. CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS 63-66 (1991). "The simplicity of George's argument explains its great success and influence in the late nineteenth century." Hovenkamp, *supra* note 119, at 437.

144. THOMAS, *supra* note 137, at 110-31; SCOTT, *supra* note 113, at 183-84.

A variety of populist and progressive movements that blossomed in the late 19th and early 20th centuries advocated George's ideas.[145] These movements have helped shape the taxing systems of countries throughout the world;[146] in the United States, however, most state and local governments regarded his ideas on tax policy as too radical,[147] and only a few jurisdictions adopted them in modified form.[148]

After George's death, his writings and those of Ricardo receded into the background as American writers on political economy addressed other issues.[149] In the absence of a deeply imbedded

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For Ricardo's own ideas about land taxes, see I RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, *supra* note 90, at 173-88.

145. STEVEN B. CORD, HENRY GEORGE: DREAMER OR REALIST? 33-37 (1965).

146. GEIGER, *supra* note 141, at 385-456. *See also* R.W.G. BRYANT, LAND: PRIVATE PROPERTY, PUBLIC CONTROL 283-302 (1972); Alan R. Prest, *Land Taxation and Urban Finances in Less-Developed Countries*, *in* PROCEEDINGS OF THE WORLD CONGRESS ON LAND POLICY, 1980, at 369, 372-78 (Matthew Cullen & Sharon Woolery eds., 1982); Robert V. Andelson, *Neo-Georgism*, *in* CRITICS OF HENRY GEORGE, *supra* note 124, at 381, 387-89.

147. Even liberal economists such as Richard T. Ely rejected George's indictment of landownership as extreme. Steven B. Cord & Robert V. Andelson, *Ely: A Liberal Economist Defends Landlordism*, *in* CRITICS OF HENRY GEORGE, *supra* note 124, at 313-25. But George was opposed to socialism, or the nationalization of capital, and only wanted to tax land in a manner that would eliminate economic rent. DEMILLE, *supra* note 143, at 126-27; AARON, *supra* note 139, at 78-81. "Even Karl Marx felt George important enough to despise." *Id.* at 88.

148. Alfred Marshall said of George's book: "[W]hat is true is not new, and what is new is not true." DEMILLE, *supra* note 143, at 130. *See also* Donald Hagman, *Land Value Taxation*, *in* WINDFALLS FOR WIPEOUTS 399, 411-21 (Donald Hagman & Dean Misczynski eds., 1978); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 384-398 (1968).

149. KNIGHT, *supra* note 120, at 150-51. Until 1825, "economist" was simply used to define any advocate of free trade, an idea that was widely popular except with the landed gentry. In 1826, however, free trade lost its popular appeal when the first world financial crisis began, and the "economists were also knocked off the elevated pedestal they occupied while the boom was on." JOHNSON, *supra* note 70, at 862-63, 889-93. "As long as the Corn Laws remained on the statute books, the issue of free trade gave practical significance to the Ricardian system. . . . After 1870, however, most economists turned their backs on what they understood to be the Ricardian theory of value and distribution . . . ." BLAUG, *supra* note 94, at 141. *See generally* Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990). *But see* Frank W. Fetter, *The Rise and Decline of Ricardian Economics*, 11 HISTORY OF POLITICAL ECONOMY 67 (1988).

distinction between manufacturing-dependent entrepreneurs and agriculture-dependent gentry, such as had characterized Britain, the relevance of maintaining a sharp distinction between land and other capital assets[150] lost its usefulness.[151] To American economists, Ricardo's distinction among "land, labor and capital" became simply a distinction between capital and labor.[152]

IV. RESPONSIBILITY: THE LAND ETHIC OF JOHN MUIR

The vast quantity of land and natural resources that made North America so attractive to Europeans[153] produced "the economics of superabundance." The lumber companies, for example, "burned or left to rot many times the value of lumber that they actually marketed. With such abundance it was unprofitable to utilize any but the best trees; the rest were simply impediments to progress."[154] By the beginning of the nineteenth century, the eco-

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150. *See, e.g.*, Simon N. Patten, *The Scope of Political Economy*, 2 YALE REV. 264, 286 (1893). Ricardo never wavered from this tripartite analysis. *See* I RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, *supra* note 90, at 5.

151. In England, however, Ricardian economics continued to dominate at least until the 1930s, when Keynes complained that "Ricardo conquered England as completely as the Holy Inquisition conquered Spain." JOHN MAYNARD KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 32 (1936). In America, some farmers tried to emphasize the distinction between agricultural and mercantile interests through groups like the Grange, but had limited political success. *See* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 360-65 (1991); Gia L. Cincone, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 STAN. L. REV. 1229, 1239-42 (1987); Jonathan Lurie, *Speculation, Risk and Profits: The Ambivalent Agrarian in the Late Nineteenth Century*, 46 AGRIC. HIST. 269 (1972).

152. Frank H. Knight, *Fallacies in the Interpretation of Social Cost*, 38 Q. J. ECON. 582 (1924). *See* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 54-55 (1967); MYRDAL, *supra* note 79, at 62.

153. BERNARD BAILYN, VOYAGERS TO THE WEST 432-33 (1986); D.W. MEINIG, THE SHAPING OF AMERICA: ATLANTIC AMERICA, 1492-1800, at 31-33 (1986); CARROLL, *supra* note 109, at 14-15, 190-93; GUNTHER BARTH, FLEETING MOMENTS: NATURE AND CULTURE IN AMERICAN HISTORY 6-7 (1990). *See also* Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 2-3 (1994).

154. CRAIG W. ALLIN, THE POLITICS OF WILDERNESS PRESERVATION 12 (1982). *See also* Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1043-45 (1973). For a study of the effects of economic abundance on the American character, see DAVID M. POTTER, PEOPLE OF PLENTY (1954).

nomics of superabundance was depleting the continent's resources.[155] Americans began to feel a sense of responsibility for this depletion.[156]

The single individual who most effectively called the public's attention to this depletion was John Muir.[157] Greatly influenced by his upbringing, Muir thought that land was holy and must be preserved. Through his writings and lobbying, he inspired legislation to protect natural areas and instigated the growth of tourism as an economic incentive to preserve such areas.

A. Muir's Early Years

Born in Scotland, Muir arrived in the United States in 1849 at the age of eleven.[158] His family bought woodland in central Wisconsin, where John and his brother spent long days cutting and grubbing trees to make a farm.[159] When the soil became exhaust-

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155. HENRY JR. SAVAGE, LOST HERITAGE 288-90 (1970); DYAN ZASLOWSKY, THESE AMERICAN LANDS: PARKS, WILDERNESS AND THE PUBLIC LANDS 4-5 (1986). For another perspective see Stephen F. Williams, *Running Out: The Problem of Exhaustible Resources*, 7 J. LEGAL STUD. 165 (1978).

156. In 1833, John James Audubon wrote:

> We are often told that rum kills the Indian; I think not; it is oftener the want of food, the loss of hope as he loses sight of all that was once abundant, before the white man intruded on his land and killed off the wild quadrupeds and birds with which he has fed and clothed himself since the creation. Nature herself seems perishing.

1 MARIA AUDUBON, AUDUBON AND HIS JOURNALS 407 (1897). Audubon was a conservationist, but not an environmentalist by today's standards. *See* PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 43-45 (1993). A growing concern for the natural environment coincided with reexamination of attitudes toward the American Indians. *See* Paul Shepard, *A Post-Historic Primitivism*, *in* THE WILDERNESS CONDITION 40, 48-52 (Max Oelschlaeger ed., 1991); ROSE, *supra* note 138, at 14-19.

157. LEE CLARK MITCHELL, WITNESSES TO A VANISHING AMERICA 53 (1981). *See* MAX OELSCHLAEGER, THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY 172 (1991) ("In instrumental terms, Muir is the father of the American Conservation [now preservation] movement . . . ."); RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 122 (rev. ed. 1973) [hereinafter NASH, WILDERNESS] ("Wild country needed a champion, and in . . . John Muir it found one.").

158. EDWIN WAY TEALE, THE WILDERNESS WORLD OF JOHN MUIR 27 (1954); JAMES MITCHELL CLARKE, THE LIFE AND ADVENTURES OF JOHN MUIR 8 (1979).

159. TEALE, *supra* note 158, at 32-34. Muir's father was "a sodbuster" who "wandered from place to place, establishing a farm and then selling it." MI-

ed six years later, the Muirs found another section of land six miles away and began the process again.[160]

John's father was an intensely religious man, described as an itinerant preacher, who joined and left a number of protestant denominations.[161] Calvinistic and stern, he apparently grew more fanatical in his religious beliefs with age and eventually, at least in his son's recollection, he forced his children to clear land for farming while he read the Bible.[162] One commentator suggests that to understand John Muir one must realize that as a child he was forced to "lay waste to the wilderness" in the name of God.[163]

In 1860, Muir enrolled in the University of Wisconsin in Madison, where he showed a quick and creative mind and a far-ranging interest in the world around him,[164] but the slow and structured pace of university life bored him. When the prospect of being drafted to fight in the union army loomed, Muir moved to Canada.[165] After the war, he briefly lived in Indianapolis and then packed his few possessions on his back and walked to Florida.[166]

B. Muir's Vision of the Land

When Muir arrived in Florida, a serious bout of malaria left him weak and aware of human mortality.[167] The notebooks he

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CHAEL P. COHEN, THE PATHLESS WAY: JOHN MUIR AND THE AMERICAN WILDERNESS 178 (1984).

160. FREDERICK TURNER, REDISCOVERING AMERICA: JOHN MUIR IN HIS TIME AND OURS 54-57 (1985).

161. *Id.* at 28-32; TEALE, *supra* note 158, at 27.

162. LINNIE MARSH WOLFE, SON OF THE WILDERNESS: THE LIFE OF JOHN MUIR 34-35 (1946).

163. Max Oelschlaeger, *Wilderness, Civilization and Language*, *in* THE WILDERNESS CONDITION, *supra* note 156, at 271, 285. *See* STEPHEN FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT 31-34 (1981).

164. *See* WOLFE, *supra* note 162, at 78.

165. 1 WILLIAM FREDERIC BADÈ, THE LIFE AND LETTERS OF JOHN MUIR 116-49 (1924); TURNER, *supra* note 160, at 111-115.

166. TEALE, *supra* note 158, at 75-76. Muir's estrangement from his father dates from this period. WOLFE, *supra* note 162, at 107. Muir did not receive a college degree until he received an honorary degree from Wisconsin in 1897, followed by honorary degrees from Harvard, Yale and California. TEALE, *supra* note 158, at 60.

167. 1 BADÈ, *supra* note 165, at 170-71; TURNER, *supra* note 160, at 150-51;

kept on his trip, which he later converted into a book, *A Thousand-Mile Walk to the Gulf*,[168] show that during this trip he developed the central idea that would guide him for the rest of his life: God made the world for its own sake, not just for the sake of the human race.[169]

Muir's rejection of his father's religious belief that God created the earth for man's benefit[170] did not lessen his Calvinistic drive.[171] After recovering his health, Muir boarded a ship destined for San Francisco. Arriving there in April, 1867, he almost immediately headed toward the Sierra mountains and reached the valley with which he will always be associated, Yosemite.[172]

Muir saw the land as a temple.[173] His magazine articles[174]

CLARKE, *supra* note 158, at 57.

168. JOHN MUIR, A THOUSAND-MILE WALK TO THE GULF (1916). *See* COHEN, *supra* note 159, at 3-4 (1984).

169. Muir wrote:

> The world, we are told, was made especially for man—a presumption not supported by all the facts. . . . Why should man value himself as more than a small part of the one great unit of creation? . . . The universe would be incomplete without man; but it would also be incomplete without the smallest transmicroscopic creature that dwells beyond our conceitful eyes and knowledge.

MUIR, WALK, *supra* note 168, at 136, 139. *See also* TURNER, *supra* note 160, at 152-54. Muir retained a deep respect for God and for his own inner concept of Christianity, but he was not a church member. FOX, *supra* note 163, at 79-81.

170. SHABECOFF, *supra* note 156, at 70-71. Muir was not the first person to reject the idea that the world was made solely for humans. Seventeenth century enlightenment philosophers, such as Descartes and Leibniz, shared that view, as did Goethe, who wrote, "Zweck sein selbst ist jegliches Tier" (every animal is an end in itself), *quoted in* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA 189 (1936).

171. On the influence of Calvinism on Muir's outlook, see CATHERINE L. ALBANESE, NATURE RELIGION IN AMERICA FROM THE ALGONKIAN INDIANS TO THE NEW AGE 96-105 (1990). *See also* THOMAS J. LYON, JOHN MUIR 15 (Boise State College, Western Writers Series #3, 1972); TURNER, *supra* note 160, at 152-53; RICHARD CARTWRIGHT AUSTIN, BAPTIZED INTO WILDERNESS: A CHRISTIAN PERSPECTIVE ON JOHN MUIR 25-31 (1987).

172. 1 BADÈ, *supra* note 165, at 177-86; TURNER, *supra* note 160, at 163-65. *See generally* JOHN MUIR, THE YOSEMITE (1912).

173. *See* FOX, *supra* note 163, at 80; BRYAN A. NORTON, TOWARD UNITY AMONG ENVIRONMENTALISTS 79 (1991).

174.

> At a time when polite magazines were overflowing with Latinate, poly-

about land were a remarkable blend of aesthetic and spiritual emotion plus literary punch.[175] He told his readers that the land must be both worshipped and studied.[176] In *My First Summer in the Sierra*,[177] a book he wrote in his advancing years based on a diary he wrote in his twenties,[178] he revisited his youthful ecstasy from a mature perspective: "All the wilderness seems to be full of tricks and plans to drive and draw us up into God's Light."[179] Describing a mountain stream, Muir said that "the place seemed holy. Where one might hope to see God."[180] Of a grove in which he

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> syllabic, circumlocutory mush, Muir wrote a lean, direct prose, bristling with the energy of hard, Anglo-Saxon words and occasional striking neologisms. He re-created the whole sensory feel of life in the wilderness. At its best his writing all but surrounds the reader.

FOX, *supra* note 163, at 56.

175. A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 879 (1992); RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 14-15 (1984).

176. NASH, RIGHTS, *supra* note 2, at 40-41 ("Nature was his church, the place where he perceived and worshipped God, and from that standpoint protection of nature became a holy war."). *See also* CALLICOTT, *supra* note 2, at 137-38; ROBERT C. PAEHLKE, ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS 16-17 (1989); OELSCHLAEGER, *supra* note 157, at 285-90; NORTON, *supra* note 173, at 33. For a current discussion of the concept of the environment as sacred, see Daniel Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 340-42 (1986).

177. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA (Gretel Ehrlich ed., 1987) (1916) [hereinafter MUIR, SIERRA]. See CLARKE, *supra* note 158, at 64-79 for a description of the circumstances of Muir's initial encounter with the Sierras.

178. MUIR, SIERRA, *supra* note 177, at xv.

179. *Id.* at 247. One of his early articles, written for a Sacramento newspaper, was headlined "God's First Temples—How Shall We Preserve Our Forests." CLARKE, *supra* note 158, at 170. *See also* JOSEPH CAMPBELL, THE POWER OF THE MYTH 31 (1988) ("The idea . . . [of pantheism] . . . is of an undefinable, inconceivable mystery, thought of as a power, that is the source and end supporting ground of all life and being."). *See* OELSCHLAEGER, *supra* note 157, at 289 ("The incredible beauty of things captivated Muir totally and completely, and in that evolutionary reality he saw God.").

180. MUIR, SIERRA, *supra* note 177, at 49. Muir's wonderment at mountains echoed Wordsworth. *See* MARJORIE HOPE NICOLSON, MOUNTAIN GLOOM AND MOUNTAIN GLORY: THE DEVELOPMENT OF THE AESTHETICS OF THE INFINITE 388-93 (1959). Although Muir knew the writings of the English romantics, there is little evidence they influenced his thinking greatly. TURNER, *supra* note 160, at 283. Ruskin's writings about "mountain gloom" he dismissed as "bogle humbug." *Id.* at 222. He also read Agassiz, von Humboldt and Marsh. WOLFE, *supra* note 162, at 82-83. For a concise analysis of Muir's writings as literature, see HERBERT F. SMITH, JOHN MUIR (1965).

camped, he said "everything in it seems equally divine . . . , one smooth, pure, wild glow of Heaven's love, never to be blotted or blurred by anything past or to come."[181] He called Yosemite, "a grand page of mountain manuscript that I would gladly give my life to be able to read. . . . It draws me so strongly, I would make any sacrifice to try to read its lessons."[182]

As Frederick Turner points out in his biography, Muir never fully formulated a land ethic: "At the outset, Muir felt himself unprepared to develop what amounted to a land ethic, and indeed, long after he had become a legend and a symbol of the preservationist cause, there remained a kind of quizzicality to his public utterances."[183] But Muir *embodied* a land ethic, serving as a role model for those who would rather experience Muir's ecstatic lessons from nature than theorize about them.[184] The "backpacker," lean, fit and serious, driving to and past exhaustion, expresses the unique mixture of Calvinism and pantheism that John Muir embodied.[185]

Muir's writings[186] greatly influenced the creation of the national park system[187] and the growth of tourism as an economic incentive to preserve natural areas.[188] His writings also inspired

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181. MUIR, SIERRA, *supra* note 177, at 68.

182. *Id.* at 102, 258-59. *See* COHEN, *supra* note 159, at 104-06. For an analysis of current conditions at Yosemite, see ALFRED RUNTE, YOSEMITE: THE EMBATTLED WILDERNESS (1990); Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3 (1992).

183. TURNER, *supra* note 160, at 231. *See also* NORTON, *supra* note 2, at 79-81, 143.

184. "Neither above nor apart from nature, he merged so fully with his subject matter as to become indistinguishable from it. . . . Aiming only to make a living, he found himself a minor literary celebrity." FOX, *supra* note 163, at 57.

185. COHEN, *supra* note 159, at 83-85, 147-48. In his writings, Muir exhibited a casual disregard for personal safety. *See, e.g.*, his description of his ride down the side of Yosemite Valley on an avalanche. MUIR, THE YOSEMITE, *supra* note 172, at 48-49.

186. *See generally* JOHN MUIR, OUR NATIONAL PARKS (1901).

187. *See, e.g.*, WILLIAM K. WYANT, WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION MOVEMENT 379 (1982); ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 58-62 (1979); MICHAEL FROME, REGREENING THE NATIONAL PARKS 110-11 (1992); NORTON, *supra* note 173, at 31.

188. Muir was ambivalent about tourism; he recognized the political support it generated, LISA MIGHETTO, WILD ANIMALS AND AMERICAN ENVIRONMENTAL ETH-

laws passed after his death, such as the Wilderness Act and the Alaska conservation legislation.[189]

C. Image as Ethic

Muir attained his fame as a writer for the popular periodicals of his day.[190] He campaigned vigorously for the protection of wilderness in the pages of magazines such as *Scribners* and *Century*.[191] When he made the long journey to Washington or New York wearing his western clothes and untrimmed beard he cut a striking and distinctive figure in the halls of Congress or on Wall Street, and he was influential in the early successes of the conservation movement.[192] After the organization of the Sierra Club in 1892, Muir began immediately to help defeat federal legislation that would have authorized the logging of half the timber in Yosemite National Park.[193]

The initial success of Muir's efforts rested largely on his descriptive writing in articles and books such as *The Mountains of California*, which became an immediate popular success.[194] But as the battles in Congress grew more intense he increasingly supplemented his descriptions of natural areas with more didactic appeals to the public's sense of responsibility for the land.[195] "Ev-

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ICS 3-4 (1991), but he disdained the Philistine attitudes of the tourists themselves. *See, e.g.*, MUIR, OUR NATIONAL PARKS, *supra* note 186, at 27-29. AUSTIN, *supra* note 171, at 45-46, 66, 84.

189. *See* FOX, *supra* note 163, at 289.

190. *See* WOLFE, *supra* note 162, at 197-98; 2 BADÈ, *supra* note 165, at 394-95; AUSTIN, *supra* note 171, at 64. NASH, WILDERNESS *supra* note 157, at 122. Only at a later stage in his life did he begin the writing of most of the books for which he is now best remembered. Many of them were edited versions of the notebooks he kept as a young man. *See* COHEN, *supra* note 159, at 341-61 (discussing several of Muir's later works).

191. FOX, *supra* note 163, at 86-87; COHEN, *supra* note 159, at 253-54; MIGHETTO, *supra* note 188, at 11-12.

192. TURNER, *supra* note 160, at 284-98. Muir's storytelling entranced New York audiences, "as if a literate Boone had suddenly materialized among them." *Id.* at 294.

193. WOLFE, *supra* note 162, at 254-55.

194. JOHN MUIR, THE MOUNTAINS OF CALIFORNIA (1894). *See* WOLFE, *supra* note 162, at 268. On Muir's semantics, see COHEN, *supra* note 159, at 296-300.

195. Muir's ethic of responsibility toward the land can be traced far back into history. *See generally* JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS (1974). Muir's importance stems

ery other civilized nation in the world," he wrote in an 1897 article, "has been compelled to care for its forests . . . . Our government . . . is like a rich and foolish spendthrift who has inherited a magnificent estate in perfect order, and then has left his fields and meadows, forests and parks, to be sold and plundered and wasted."[196]

Muir grudgingly realized that if public support was to be obtained for preservation of natural areas more people needed to visit these areas and share the experience with their friends.[197] With Theodore Roosevelt's unexpected accession to the presidency upon McKinley's death in 1901, Muir found a promising audience for his preservation message.[198] In 1903, Roosevelt visited Yosemite, where he and Muir camped for three nights in the Mariposa Grove, accompanied only by two rangers and a cook.[199] Roosevelt agreed with Muir that Yosemite should become a national park under federal control, and Muir helped guide the legislation that accomplished this in 1905-06.[200]

For the next few years, the death of Muir's wife and the illness of his daughter sapped his energy.[201] Meanwhile, the City of San Francisco was making new plans to build a dam and reservoir in Yosemite's Hetch Hetchy Valley to provide drinking water for the rapidly growing city, a project that Muir had bitterly opposed

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less from the originality of his thinking (although his own variant was unique) than from the inspirational quality of his prose and from his personal stature as a role model who both lived and described the wilderness experience. NORTON, *supra* note 173, at 80-81.

196. John Muir, *The American Forests*, ATLANTIC MONTHLY, Aug. 1897, *reprinted in* MUIR, OUR NATIONAL PARKS, *supra* note 186, at 248, 252. *See also* WOLFE, *supra* note 162, at 273; TURNER, *supra* note 160, at 309-13. Muir's criticism of wasteful practices by landowners recalls similar attitudes of Henry George. Henry George and Muir both lived in the San Francisco area around the 1870s, and they had friends in common. Muir agreed with some but not all of George's arguments. COHEN, *supra* note 159, at 177; WOLFE, *supra* note 162, at 183; CLARKE, *supra* note 158, at 147-48; FOX, *supra* note 163, at 352-53.

197. *See* COHEN, *supra* note 159, at 302-15 (discussing Muir's efforts for access and public involvement).

198. TURNER, *supra* note 160, at 318, 324. Theodore Roosevelt "all by himself summed up the return to nature." FOX, *supra* note 163, at 121.

199. TURNER, *supra* note 160, at 523-27; WOLFE, *supra* note 162, at 290-94; FOX, *supra* note 163, at 125-27.

200. WOLFE, *supra* note 162, at 301-04.

201. *Id.* at 305-10.

and apparently defeated a few years earlier.[202] But the earthquake of 1906, and the massive fire that followed, called attention to the city's need for water and caused a change of attitude in Washington.[203] Muir, at age seventy, jumped back into the fight, but after the most famous political battle of American conservation history, Congress authorized the flooding of Hetch Hetchy in 1913, a year before Muir's death.[204] Nevertheless, the protracted battle won new converts to the conservation movement and established Muir's image firmly in the public consciousness.[205]

In summary, although Muir's view of the natural world may have been worshipful and ecstatic, he did not, unlike many of the earlier American promoters of "nature," hesitate to engage in political activity to achieve his objective—the preservation of key tracts of natural land.[206] Because Muir's focus was on *land* rather than on an abstract conception of nature[207] or on a sentimental concern for animals or plants,[208] he was forced, despite his

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202. TURNER, *supra* note 160, at 337-38. FOX, *supra* note 163, at 139.

203. TURNER, *supra* note 160, at 338-39.

204. *See* FOX, *supra* note 163, at 142-47. *See also* TURNER, *supra* note 160, at 337-43; COHEN, *supra* note 159, at 326-37.

205. *See* FOX, *supra* note 163, at 289-90. *See also* NASH, WILDERNESS, *supra* note 157, at 161-81.

206. For example, to get state legislation receding Yosemite to the federal government passed, Muir negotiated with the president of the influential Union Pacific Railroad to obtain its support. WOLFE, *supra* note 162, at 302. Charles Miller concisely characterizes Muir as "a transcendentalist in philosophy, an explorer by temperament, a scientist out of curiosity, and a publicist from necessity." MILLER, *supra* note 113, at 267.

207. Muir respected Emerson and especially Thoreau, but even about Thoreau he had some reservations. TURNER, *supra* note 160, at 230. "[B]oth Emerson and Thoreau seemed insufficiently wild to him." FOX, *supra* note 163, at 83.

208. Although Muir respected the status of individual animals and plants, see *supra* note 169, he expressed similar attitudes toward the mountains, rivers and other inanimate components of the ecosystem:

> The most famous and accessible of these canyon valleys, and also the one that presents their most striking and sublime features on the grandest scale, is the Yosemite, situated in the basin of the Merced River at an elevation of 4000 feet above the level of the sea. It is about seven miles long, half a mile to a mile wide, and nearly a mile deep in the solid granite flank of the range. The walls are made up of rocks, mountains in size, partly separated from each other by side cañons, and they are so sheer in front, and so compactly and harmoniously arranged on a level floor, that the Valley, comprehensively seen, looks like an immense

lifelong distaste of politics and his preference for the contemplative life, to participate in the arena where land use decisions are made.[209]

V. OPPORTUNITY: THE LAND ETHIC OF ANTONIN SCALIA

The land ethic of opportunity greatly contrasts with Muir's preservationist vision of the land and ethic of responsibility. Today the most important exponent of the land ethic of opportunity is Supreme Court Justice Antonin Scalia.[210] The roots[211] of

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hall or temple lighted from above.

But no temple made with hands can compare with Yosemite. Every rock in its walls seems to glow with life. Some lean back in majestic repose; others, absolutely sheer or nearly so for thousands of feet, advance beyond their companions in thoughtful attitudes, giving welcome to storms and calms alike, seemingly aware, yet heedless, of everything going on about them. Awful in stern, immovable majesty, how softly these rocks are adorned, and how fine and reassuring the company they keep: their feet among beautiful groves and meadows, their brows in the sky, a thousand flowers leaning confidingly against their feet, bathed in floods of water, floods of light, while the snow and waterfalls, the winds and avalanches and clouds shine and sing and wreathe about them as the years go by, and myriads of small winged creatures—birds, bees, butterflies—give glad animation and help to make all the air into music. Down through the middle of the Valley flows the crystal Merced, River of Mercy, peacefully quiet, reflecting lilies and trees and the onlooking rocks; things frail and fleeting and types of endurance meeting here and blending in countless forms, as if into this one mountain mansion Nature had gathered her choicest treasures, to draw her lovers into close and confiding communion with her.

THE YOSEMITE, *supra* note 172, at 4-5. For a summary of current ethical attitudes toward non-living natural systems, see Rose, *supra* note 153, at 23-24.

209. "Spiritually, he never left Yosemite: there lay his power to inspire and provoke people into caring about the wilderness." FOX, *supra* note 163, at 120.

210. Born in 1936, Justice Scalia attended the University of Fribourg, Switzerland, Georgetown University (A.B. summa cum laude 1957) and Harvard University Law School (LL.B. magna cum laude 1960). After graduation, he practiced in Cleveland until 1967 when he joined the University of Virginia law faculty in Charlottesville. He took a leave to serve as the General Counsel of Telecommunications Policy from March 1971 to September 1972. Upon returning to Charlottesville, he served as the part-time Chairman of the Administrative Conference of the United States from September 1972 to August 1974, when he left the faculty to become Assistant Attorney General. He left that position to serve as Professor of Law at the University of Chicago from 1977 until 1982. He was appointed by President Reagan to the circuit court in 1982 and to the United States Supreme Court in 1986. *See* 2 WHO'S WHO IN AMERICA

Scalia's land ethic trace back to the utilitarian ideas of Jeremy Bentham, an English writer who was a friend and contemporary of James Mill and David Ricardo.[212] These ideas can be seen in Scalia's judicial opinions. In particular, his opinion in *Lucas v. South Carolina Coastal Council*[213] shows his view that land should be protected from government regulation to a greater degree than personal property. However, Scalia's opinions do not reflect a pure libertarian viewpoint; Scalia supports incidental and reciprocal government regulation of land.

A. The Roots of Scalia's Land Ethic: Bentham and Utilitarianism

Bentham's "utilitarianism" attracted attention because it apparently reduced ethics to a simple proposition: an action is good if it contributes to maximizing the happiness of the greatest number of human beings.[214] Government's only role, Bentham ar-

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(45th ed. 1988-1989).

211. One scholar has attributed the origins of Scalia's textualist approach to the influence of his father, who emigrated from Italy and became a professor of languages and literature in Brooklyn. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1308 n.53 (1990). Scalia's father believed that literalness was essential and "was so skeptical of the value of translation that he doubted the worth of his profession." *Id.* at 1316.

212. HALEVY, *supra* note 45, at 577-83. "Englishmen wanted a theory which would sustain liberal reforms but ward off revolution. The natural rights theory, connected in men's minds with the Revolution in France, was not respectable; the Benthamites publicized the utilitarian theory and it served the purpose." RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 245 (1951). *See also* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1683-84 (1988).

213. 112 S. Ct. 2886 (1992).

214.

> The simple core of all Benthamism consisted of just this series of propositions: (1) all that human beings, universally, want from life can be summed up as the greatest obtainable amount of happiness, or sum of pleasures, and avoidance, as fully as possible, of unhappiness, pains, or displeasures; (2) the good or right or ideal conduct of life is simply its intelligent conduct, to maximize the pleasure and minimize the pain experienced in or from all the results of all one's actions, choices, or decisions; (3) the social problem is simply that of so arranging society's institutions and laws and the relations and interactions among its members, that for everyone the course of action most beneficial to himself

gued, was to attach sufficient pain to "bad" human actions so that those actions would be deterred.[215]

For example, the theft of another's property was bad, but not because it transferred the pleasure received from that property from one person to another; such a transfer was merely a neutral action under Bentham's felicific calculus.[216] But theft was bad because it detracted from the pleasure people obtained from the assumption that their property was secure.[217] And the legitimacy

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> will always be the one most beneficial to his fellows also, and deterrent penalties of self-injury will be attached to all courses injurious to others; and, finally, (4) all this can be achieved by creating and applying an exact science of ethics, jurisprudence, and politics, using as its master tool a (Bentham's) "felicific calculus" of the relative quantities of pleasure and pain to be expected as results of different private and public actions, and so of the pattern of all actions required to bring about "the greatest happiness of the greatest number."

TAYLOR, *supra* note 75, at 120. Although Bentham's perspective was anthropocentric, he argued for legislation to protect animals and an end to cruelty toward animals. His argument was based on his observation that animals are sentient creatures that seek pleasure and avoid pain. MIGHETTO, *supra* note 188, at 43. For a discussion of Bentham's view on the ethical status of animals' pain, see NASH, RIGHTS, *supra* note 2, at 23.

Bentham also applied his utilitarian principles to slavery. "It is absurd to attempt showing that a man ought to be happy when he is actually miserable; and that a condition into which no one wishes to enter, and from which everyone wishes to escape, is a condition good in itself . . . ." JEREMY BENTHAM, THE THEORY OF LEGISLATION 202 (C.K. Ogden ed. 1931) (1840). Another utilitarian rationale for rejecting slavery was the idea that "slave labour in the absence of security and incentives was likely to be less productive than paid free labour." H.L. HART, ESSAYS ON BENTHAM 97 (1982).

215. PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA 10-11 (1986). Bentham thought that government was a necessary evil and that its only justification was that "its coercive action creates less pain than it prevents." JOHN PLAMENATZ, THE ENGLISH UTILITARIANS 82-83 (1949). He devoted his life to criticizing existing institutions and to advocating reforms that would produce as much happiness as possible. When some of his reforms were rejected, he concluded that "[t]he actual end of every government is the greatest happiness of the governors." *Id.* at 82.

216. "[T]he disutility caused by theft can only be explained by reference to the expectations of the owner, the expectation to retain possession indefinitely." GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 169 (1986). *See also* JOHN DINWIDDY, BENTHAM 104 (1989). Bentham's felicific calculus is the theory that men estimate the consequences of alternative possible actions and then choose to perform the one which is likely to produce the greatest happiness. PLAMENATZ, *supra* note 215, at 74. For a further explanation of this calculus, see note 224 and accompanying text.

217. JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 229-35

of that expectation was based purely on its existence: One has the right to rely on the security of any category of property for which the law creates expectations of reliance.[218]

The apparent simplicity of Bentham's utilitarianism quickly proved to be illusory, and during the first half of the twentieth century utilitarianism "went through a period of eclipse, only to see in the 1960's a revival" that continues to produce lively debates among different schools of utilitarians.[219] How is happiness to be measured? The German philosopher Schopenhauer claimed that the "English philosophers talk about happiness, but they mean money."[220] Some utilitarians agree, and some support various other measures of "utility" or "welfare."[221] But despite inter-

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(1948). Bentham said that property, considered with respect to the proprietor, always implies a benefit. "On the part of the proprietor, it is created not by any commands that are laid on him, but by his being left free to do with such or such an article as he likes. The obligations it is created by, are in every instance laid upon other people." *Id.* at 229.

218. Bentham believed that property is entirely the creation of law, and should be given to the person whose lawful expectation of having it is the strongest. POSTEMA, *supra* note 216, at 153, 184-87. For a discussion of Bentham's views on reform of land law, see Mary Sokol, *Jeremy Bentham and the Real Property Commission of 1828*, 4 UTILITAS 225 (1992). Bentham set out a scheme for a new basis for property rights. Instead of basing property rights on feudal concepts of tenures and estates, he wanted to base property law on the notion of rights and obligations. *Id.* at 243. He wanted to abandon the concept of tenures because it retained the feudal fiction that "all land is granted by and held from the Monarch in return for services." For Bentham, ownership of property depended on the law: "Property and law are born together and must die together. Before the laws, there was no property: take away the laws, all property ceases." *Id.* at 234.

219. DINWIDDY, *supra* note 216, at 120. *See* Patten, *supra* note 150, at 275 (1893) ("Bentham and his school assumed" that "all our measurable pleasures and pains are directly or indirectly due to economic causes. A better knowledge of psychology has caused a reaction against this ideal of the older utilitarian . . . ."). For a current summation of utilitarian views, see Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity, and Evolution*, 12 HOFSTRA L. REV. 723 (1984).

220. *Quoted in* TAYLOR, *supra* note 75, at 120.

221. For a comparison between utilitarianism and wealth maximization see RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 65-76 (1981). Judge Posner argues that wealth maximization avoids some of the ethical difficulties posed by utility maximization. *Id.* at 87. "If one views wealth maximization as constrained utilitarianism (the constraint being that society seeks to maximize the satisfaction only of those whose preferences are backed up by a willingness to pay), one can defend it by whatever arguments are available to defend utilitari-

nal differences, most utilitarians still agree with two of Bentham's key propositions: First, it is the happiness of humans that should be emphasized,[222] and second, the security that expectations will be realized is a key component of happiness.[223]

In addition, Bentham's proposed "felicific calculus,"[224] by which efficiency, defined as the maximization of human happiness in the aggregate, was to be measured, was too abstract and mechanical to attain popularity outside academic circles, but a corollary utilitarian proposition did attain popularity: efficiency is enhanced by maximizing the landowner's *opportunity* to use his private property to fulfill the landowner's own human needs.[225] "Opportunity" was a word that even the least educated landowner could understand and learn to love.[226]

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anism . . . ." *Id.* This article ignores the many distinctions among modern branches of utilitarian theory.

222. *See, e.g.*, T.L.S. Sprigge, *The Greatest Happiness Principle*, 3 UTILITAS 37 (1991). The classical utilitarians equated "happiness" with pleasure and the absence of pain: "[One can] identify being happy with being in a state of consciousness whose overall quality is pleasurable, while being unhappy is being in a state whose overall quality is unpleasant . . . ." *Id.* at 40-41.

223. Bentham contrasted the notions of liberty and security. POSTEMA, *supra*, note 216, at 170. He defined liberty as "the state of actually being free from restriction and constraint." *Id.* at 171. However, he said that unsecured liberty was of little value: "[W]hat we need (for coherence in our own lives) is a reasonable basis for predicting our own individual futures, and this comes not from the mere possession, but from the *sure knowledge*, of that liberty." *Id.* at 171.

224. Bentham's felicific calculus was a method for valuing pleasures and pains, the legislative ends of his utilitarian philosophy. He proposed: "To a person considered by *himself*, the value of pleasure or pain considered *by itself*, will be greater or less, according to the four following circumstances: 1. Its *intensity*. 2. Its *duration*. 3. Its *certainty*. . . . 4. Its *propinquity* or *remoteness*. . . . 5. Its *fecundity*. . . . 6. Its *purity*." When considering the value of pleasure or pain to a number of persons, Bentham adds a seventh factor, "7. Its *extent*." BENTHAM, *supra* note 217, at 29-32. Bentham admitted that his calculations might seem fictitious. "'Tis in vain to talk of adding quantities which after addition will continue as distinct as they were before, one man's happiness will never be another man's happiness. . . . [Y]ou might as well try to add 20 apples to 20 pears.'" He argued, however, that "[t]his addibility of the happiness of different subjects" was a necessary starting point for political reasoning. DINWIDDY, *supra* note 216, at 49-53.

225. "In [Bentham's] eyes, 'Give people as great a sum of pleasures as possible' and 'Give them what they want in the order of their preferences' are equivalent rules." 2 JOHN PLAMENATZ, MAN AND SOCIETY 12 (1992).

226. For an environmental perspective on utilitarianism, see WENZ, *supra*

Opportunity became a powerful land ethic in America because it provided a beneficent rationalization for a process that had been underway since colonization began.[227] The European immigrants to the New World regarded themselves as belonging to a higher level of civilization than the nomadic natives whose lands they occupied. The motives of these immigrants, who took advantage of the opportunity to use the land in a way that they thought was more productive than the way their predecessors had used it, could now be justified by their descendants in the name of utilitarian efficiency.

B. Scalia's Judicial Opinions Reflect Bentham's Ideas

Scalia's attitudes toward land seem to be squarely grounded in Bentham's concepts: anthropocentrism, tradition, and opportunity. The anthropocentrism, against which John Muir rebelled, has played a major role in some of Scalia's court decisions.[228] In the

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note 2, at 155-80 (arguing that utilitarianism furnishes answers to environmental justice); Clayton R. Koppes, *Efficiency, Equity, Esthetics: Shifting Themes in American Conservation*, *in* THE ENDS OF THE EARTH: PERSPECTIVES ON MODERN ENVIRONMENTAL HISTORY 230, 231-33 (Donald L. Worster ed., 1989).

227. James Willard Hurst identified the attitudes that I lump under "opportunity" as the working principle of law in action; that is, "the law not so much as it may appear to philosophers, but more as it had meaning for workaday people and was shaped by them to their wants and vision." HURST, *supra* note 123, at 5. It was deemed to be socially desirable, said Hurst, that there be "broad opportunity for the release of creative human energy" by people having "a wide practical range of options or choices as to what they do and how they are affected by circumstances." The law "should protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression" and "mobilize the resources of the community to help shape an environment which would give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances." *Id.* at 5-6; *see also* HALL, *supra* note 108, at 114-15.

228. Scalia says that the "vast majority of political issues . . . ultimately boil down to questions of prudence or utility," and that "even though our point of departure is a morally charged word like justice, practical utility is what we are really discussing here." Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 123-24 (1986) [hereinafter *Morality*]. He recognizes that the legislative branch of government has the power to identify and enforce purely moral values; if not, he says, "why can it be made illegal to torture dogs—or for that matter, to marry two wives?" *Id.* at 124. The Constitution, however, creates a "moral imperative" that the judiciary can enforce against the other branches of government only in very limited situa-

1992 Supreme Court opinion *Lucas v. South Carolina Coastal Council*,[229] he quoted the great English lawyer and justice, Sir Edward Coke: "For what is land but the profits thereof?" and asserted that the Court's "abiding concern" should be for the "productive use of, and economic investment in," land.[230]

Scalia apparently derogates any attitude toward land that is not anthropocentric and utilitarian.[231] This emphasis on the asset value of land to its human owner caused Scalia to impose significant limitations on the standing to sue of anyone having an interest in land other than an ownership interest.[232] Scalia recognized, however, that non-owners might derive "utility" from public land, but he accepts only a narrowly defined and site-specific definition of the non-owners' potential interest.[233] In another standing case

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tions, such as "the precept against the taking of innocent human life." *Id.* at 125. For views similar to Scalia's, see JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS 175-78 (1974); W. H. Murdy, *Anthropocentrism: A Modern Version*, *in* ETHICS AND THE ENVIRONMENT 12-21 (Donald Scherer & Thomas Attig eds., 1983).

229. 112 S. Ct. 2886 (1992).

230. *Id.* at 2894. Coke, like Scalia, did not propound his anthropocentric beliefs timidly:

> For as the heavens are the habitation of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; . . . all the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, every thing, as it serveth more immediately, or more merely for the food and use of man . . . hath the precedent dignity before any other. And this doth the earth; for out of the earth cometh man's food, and bread that strengthens man's heart . . . and wine that gladdeth the heart of man, and oil that makes him a cheerful countenance . . . .

THOMAS, *supra* note 24, at 231. For some observations on Scalia's own views on food, see Alex Kosinski, *My Pizza with Nino*, 12 CARDOZO L. REV. 1583 (1991).

231. *Lucas*, 112 S. Ct. at 2893-95 n.8; Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987). Ironically, perhaps, the founder of utilitarianism, Bentham, considered the thinking of lawyers to be "peculiarly stupid, irrational, rigid, unprogressive, and in general effect inhumane or barbarous." TAYLOR, *supra* note 75, at 123. And as for his view of American lawyers, see KING, *supra* note 215, at 64.

232. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). For an extended analysis of the opinion, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 214 (1992).

233. To assume that a biologist had an interest in an entire species, Scalia said, required a "Linnean leap." *Defenders of Wildlife*, 112 S. Ct. at 2140 n.3. In

he expressed no sympathy for the National Wildlife Federation's "disappointment" at its inability to use the courts to promote its "across the board" objective of protecting wildlife and habitat.[234]

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his reference to Linnaeus, Scalia appropriately goes back almost 250 years to a pre-Darwinian biologist who was unapologetically anthropomorphic. "All these treasures of nature, so artfully contrived, so wonderfully propagated, so providentially supported . . . seem intended by the Creator for the sake of man." Carolus Linnaeus, *The Oeconomy of Nature* (1751), *quoted in* DONALD WORSTER, NATURE'S ECONOMY: THE ROOTS OF ECOLOGY 36 (1977). *See also* OELSCHLAEGER, *supra* note 157, at 105. Gerald Postema has suggested that if Jeremy Bentham's philosophy had a model, it was probably the writings of Linnaeus. POSTEMA, *supra* note 216, at 164-65.

Some commentators have suggested that, for example, an "American professor of zoology presently attempting to study the Nile crocodile in Egypt" would have standing even after *Defenders of Wildlife*. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1164 (1993). But Scalia's test seems to require a less abstract relationship between human and animal:

> It is clear that the person who observes or works with a *particular animal* threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible . . . to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, *see Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 231, n.4, 106 S. Ct. 2860, 2866, n.4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

Defenders of Wildlife, 112 S. Ct. at 2139-40 (emphasis added) (footnote omitted).

234. Lujan v. National Wildlife Federation, 497 U.S. 871, 894 (1990). His writings have consistently reflected a narrow definition of the category of people who have property rights. For example, in an early article he wrote that an applicant for a lease of public lands would not be deemed to have a property interest. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action, Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 918-20 (1970) [hereinafter Scalia, *Sovereign Immunity*]. In his search for traditional classifications, Scalia has suggested that the Court should choose the narrowest category, a position that has brought him intense criticism from some commentators. *See, e.g.*, L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992).

Scalia is displeased with the Warren Court's extension of standing to those without property interests.[235] He believes that the courts need to protect only regulated entities from improper regulation because the intended beneficiaries of regulation (the public that is impacted by the activities of business) can rely on the legislature for protection, as it was those beneficiaries who persuaded the legislature to undertake the regulatory program in the first place.[236] Scalia's opinion in *Lucas* expands upon this belief.

C. *Lucas: the Uniqueness of Land*

In *Lucas*, Scalia announced his newly minted idea that land is protected from government regulation to a greater degree than personal property.[237] This new rule has puzzled many commentators,[238] but Scalia bases his rationale for this distinction on basic Benthamite theory: the idea that property is simply established

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235. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983) [hereinafter Scalia, *Doctrine of Standing*]; Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 388-89, 405 (1978); *see also* Peter B. Feldman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1815 (1991).

236. Scalia, *Doctrine of Standing*, *supra* note 235, at 894-97. *See* Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 791, 801-802 (1990); Richard Nagareda, Note, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 710-15 (1987). *See also* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 210-17 (1990) (concise historical review of standing of beneficiaries of regulatory programs).

237. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2900 (1992).

238. *See, e.g.*, Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction*, 17 VT. L. REV. 647, 672, 676-78 (1993); William W. Fisher, III, *The Trouble With* Lucas, 45 STAN. L. REV. 1393, 1400-01 (1993); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 2-3 (1993). A student of early Scalia articles would recognize land as one of those "well-defined and fully developed 'existential' categories of legal activity" that are recognized by lawyers and judges, though not always by scholars, as a category of "factually similar precedent" whose "consistency among themselves" is more important than "their reconcilability with the mass of decisions involving the general principle." Scalia, *Sovereign Immunity*, *supra* note 234, at 882, 919, 920.

expectations.[239] People have expected a greater degree of security in land than in personal property, Scalia argues, and those expectations are enough to justify the distinction.[240] Scalia applies this Jeffersonian mystique of the yeoman landowner as the foundation of democracy in *Lucas* to facts far removed from Jefferson's original concept.

The issue in *Lucas* was whether Lucas, who owned two lots in the Wild Dunes subdivision in a suburb of Charleston, South Carolina, should be permitted to build homes on them, despite the fact that there was some risk that beach erosion might destroy the homes.[241] By characterizing the issue as Lucas's right to use his own land, Scalia evoked the traditional American values associated with Jefferson's fee simple empire—homeownership and self-sufficiency—and found that the Constitution protected Lucas.[242]

Lucas, however, was a professional developer of homes; he was in the business of selling homes to others.[243] Had the issue been characterized as one of business regulation—should Lucas be allowed to sell homes on potentially dangerous lots[244]—the

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239. *See supra* note 218. For a review of varying utilitarian interpretations of the taking clause, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 45-70 (1977).

240. One can argue, of course, with the legitimacy of the assessment that the average person had a higher expectation of security about land than about other property. Fisher, *supra* note 238, at 1401. *See generally* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

241. *See* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1422 (1993).

242. *See* Radin, *supra* note 212, at 1692 ("An owner of vacant land does not have a personal connection to the money she hopes to reap from development, [but] someone who buys land for a personal residence and then has residential use taken away from her has a stronger claim than the speculator."). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 520 (1977) (Stevens, J., concurring) (invalidating an ordinance that "cuts so deeply into a fundamental right associated with the ownership of residential property"); United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501 (1993) ("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance.").

243. *See* Transcript, at 33-37, Lucas v. South Carolina Coastal Council, (Court of Common Pleas, Aug. 7, 1989) (No. 89-CP-10-0066) [hereinafter *Lucas Transcript*].

244. Even after the opinion of the state supreme court on remand, Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992), left unresolved the

Court would have upheld the regulation regardless of the financial impact on Lucas.[245] Only the "mystical" traditions associated with

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factual question of whether the construction of homes on the Lucas lots would be especially risky, Lucas testified that he would not hesitate to sell his lots to the public because "all of the knowledge that I've gained in my ten years of association at Wild Dunes has been that this is an accretionary island—accreting island, and that if there is erosion it will be of temporary nature, and that has proven to be the case in my observation in the last ten years. The beach—the high watermark has moved from fairly close to this, within a hundred feet, in the last two or three years. It is now the length of a football field from the property line." *Lucas Transcript*, *supra* note 243, at 52. However, the state's engineer testified that the examination of aerial photographs showed that all or part of the Lucas lots were underwater at least 50% of the time over the last forty years. *Id.* at 113. The coastal engineer who worked for the developers of Wild Dunes, testifying as a witness for Lucas, said on cross examination that the Wild Dunes developers had built an artificial revetment and pumped in sand from offshore to "renourish" the beach. He testified that the developers had "applied for revetment permit and built that and also the renourishment program to protect the properties." *Id.* at 31.

Replenishing or "nourishing" beaches, by dredging sand from offshore shoals and pumping it onto the beach, has become common in recent years, but it is controversial. "[B]each replenishment upsets the natural system, and it is costly and temporary, requiring subsequent replenishment projects to remain effective. The Corps of Engineers refers to its beach replenishment projects as 'ongoing,' but 'eternal' would be a better word." WILLIAM J. NEAL ET AL., LIVING WITH THE SOUTH CAROLINA SHORE 42-44 (1984).

Responsible developers such as Lucas undoubtedly inform prospective purchasers that the homes they are buying are located on replenished lots, and responsible car dealers undoubtedly inform buyers when they turn back a car's speedometer, but the temptation to mumble during disclosure must exist.

245. As Scalia wrote elsewhere in the *Lucas* opinion:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; '[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S. Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale) . . . .

Lucas, 112 S. Ct. at 2899. *See also* Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust for Southern California, 113 S. Ct. 2264 (1993). For contrasting views of the precedential effect of *Lucas* on laws protecting natural resources, compare Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council,

land[246] supported the position that land was unique,[247] and not subject to all of the same rules that apply to other types of property.[248]

Although Scalia avows land's uniqueness, he also advocates its free marketability, which means that if land is to produce maximum happiness, it must be "commodified" so that it can be converted into other forms of wealth if its owner so chooses.[249] This

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45 STAN. L. REV. 1433, 1446 (1993), with John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 705-07, 716-19 (1993). *See also* Lazarus, *supra* note 241, at 1421.

246. For Scalia's views on the "primeval" origins of land's unique status in property law, see Associacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1521 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (opinion by Scalia). His views hark back to the earlier era criticized by Ricardo, in which land had the status of a uniquely privileged form of property—a view rejected by modern economists to whom land is simply one of many potential forms of capital. *See supra* note 150 and accompanying text.

247. For a discussion of Scalia's views on land, see Fred Bosselman, *Scalia on Land*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 82 (David Callies ed., 1993).

248. *See* Michael C. Blumm, *Property Myths, Judicial Activism, and the* Lucas *Case*, 23 ENVTL. L. 907, 913 (1993). For example, land ownership may, under some circumstances, still be a condition precedent for voting. For a recent analysis of the decisions, see Southern Calif. Rapid Transit Dist. v. Bolen, 822 P.2d 875 (1992).

Recent literature on the continuing value of specific performance as a remedy for breach of contract has usually accepted without significant debate or discussion the traditional rule that specific performance is available if the contract is for the sale of land because land is "unique." *See, e.g.*, William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299, 305 (1985). Earlier commentators assumed that the rule was based on English tradition: Land, "because of its power to determine the financial, social and political status of every British subject, was naturally a highly favored subject in the courts of Britain. . . . Land was power and influence and those were things much desired." Robert Bird & William E. Fanning, *Specific Performance of Contracts to Convey Real Estate*, 23 KY. L.J. 380, 380-81 (1935).

249. *Compare* Hodel v. Irving, 481 U.S. 704, 719 (Scalia, J., concurring) *with Lucas*, 112 S. Ct. at 2899-2900 (discussing Andrus v. Allard, 444 U.S. 51 (1979)). *Allard* and *Irving* illustrate contrasting theoretical views about the commodification of the property of American Indians, a group for whom the Jeffersonian mystique of land ownership is peculiarly inapplicable because of their traditions of communal property ownership and their exclusion from mainstream public land law. *See* John H. Leavitt, Hodel v. Irving: *The Supreme Court's Emerging Takings Analysis—A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 606-13 (1988). In *Allard* the Court upheld a statute

means it should be made easily available for purchase, assembly, and use through legal rules that draw bright lines around both the boundaries of land and the rights of the owner.[250]

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prohibiting the sale of eagle feathers, which had been designed as a conservation measure to protect eagles, as applied to a sale of an antique Indian headdress. The Court unanimously held that no compensation was required because, although the owner had lost the right to sell the property, he could exhibit it and charge admission. In *Irving*, the Court struck down a statute establishing a mechanism under which small fractional interests in land owned by individual Indian tribe members might escheat to the tribe. The Court held that the right to transmit property at death was so basic that the destruction of that right constituted a taking even though there may have been no economic injury. *See* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1623-24 (1988). Ironically, the Court's conceptual severance and enshrinement of land's commodity value reduced the marketability of Indian-owned land because the existing land titles were so fragmented that the timber and ranching interests wishing to use the land had difficulty assembling it, even though the Bureau of Indian Affairs did most of the work. *See* William H. Gilbert & John L. Taylor, *Indian Land Questions*, 8 ARIZ. L. REV. 102, 115 (1967). Scalia recognized similar problems of the administrability of scattered parcels of Indian land in a case in which property rights were not at issue. County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 690-92 (1992); *see* Note, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: *State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AMER. U. L. REV. 1213, 1224-25 (1993). But he saw no such basis for supporting a restriction on land transfers in *Irving*. In fact, he was so enthusiastic about the Court's philosophical support of each individual Indian's right to commodify his land that he added a brief concurring opinion saying that he thought that the *Irving* decision "effectively limits *Allard* to its facts." 481 U.S. at 719. Subsequently, in *Lucas* he cited *Allard* in his attempt to distinguish between land and personal property from the viewpoint of public expectations: because of "the State's traditionally high degree of control over commercial dealings" in personal property, an owner of such property "ought to be aware of the possibility that new regulation might render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers)." *Lucas*, 112 S. Ct. at 2849-900. His *Irving* opinion, like his opinion in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), evinces a willingness to strongly support the sanctity of philosophical property concepts in land even in situations where the economic impact on the landowner is minimal, as was the case in *Nollan*. *See* Byrne, *supra* note 2, at 247.

250. FRIEDMAN, *supra* note 136, at 359 ("The dominant idea of American land law was that land should be freely bought and sold."); Alexander, *supra* note 114, at 290-91 (commodification and the Jeffersonian tradition.) For critiques of this approach, see POLANYI, *supra* note 89, at 72-73; Mark Sagoff, *Settling America, or the Concept of Place in Environmental Ethics*, 12 J. ENERGY, NAT. RESOURCES & ENVTL. L. 349, 355-56 (1992). Scalia's support for the

Scalia has consistently supported narrowly drawn, bright line rules,[251] especially as applied to land.[252] His opinions make it

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general concept of commodification was shown by his opinion in Lukhard v. Reed, 481 U.S. 368, 381 (1987), a case in which the issue was whether an award of damages for personal injuries constituted personal income of the type that would make the recipient ineligible for welfare. Scalia commented that if damages for personal injuries did not constitute income, all healthy people might exceed the $1000 limit on personal resources under federal welfare programs because they could sell their body parts for more than $1000. Toby Golick, *Justice Scalia, Poverty and the Good Society*, 12 CARDOZO L. REV. 1817, 1822 (1991). For an example of the conflict inherent in the commodification of a "unique" asset, see Kevin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 71-72 (1985).

251. In his article, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *The Rule of Law*], Scalia discussed the dichotomy between the "general rule of law" and the "personal discretion to do justice." When "personal discretion" is used, Scalia states that justice is done one case at a time, taking into account all of the circumstances, and that the judge begins to resemble a finder of fact more than a determiner of law. However, as laws have become more numerous, "we can less and less afford protracted uncertainty regarding what the law may mean. . . . There are times when even a bad rule is better than no rule at all." *Id.* at 1179. *See, e.g.*, Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). *See* Beau James Brock, Comment, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623 (1991); *see also*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing "rule of law as a law of rules" as opposed to "rule of law as a rule of standards"). In discussing the opinion in *Lucas*, 112 S. Ct. at 2886, Sullivan suggests that Scalia stopped short of an absolute rule that total destruction of economically productive use constitutes a taking *per se*, leaving open the possibility that "background principles of state law" might save a restriction, but that he "planted seeds that can be cultivated into more conservative results tomorrow" by delegating to the lower federal courts, composed predominantly of Reagan-Bush appointees, the interpretive power to construe background state law principles narrowly so as to limit the force of this exception. *Id* at 111-12; *see also* Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 324-28 (1993); Sax, *supra* note 245; Radin, *supra* note 212, at 1681-83.

252. In *Nollan* he rejected Justice Brennan's doubts about the boundary of coastal land. *Nollan*, 483 U.S. at 839 n.6. In City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 373 (1991), he chose to treat all land use regulations as anticompetitive rather than adopt the more flexible standard urged by the billboard operator. Scalia explains:

> In deciding, for example, whether a particular commercial agreement containing a vertical restraint constitutes a contract in restraint of trade under the Sherman Act, a court may say that under all the cir-

clear that he believes land to be an asset. Additionally, he favors legal doctrines that make it easy to translate land into money so that it can more easily be traded in the private market.[253] He believes such rules are supported by long tradition,[254] and he gives

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> cumstances the particular restraint does not unduly inhibit competition and is therefore lawful; or it may say that no vertical restraints unduly inhibit competition, and since this is a vertical restraint it is lawful. The former is essentially a discretion-conferring approach; the latter establishes a general rule of law.

Scalia, *The Rule of Law*, *supra* note 251, at 1177 (citation omitted). Similarly, in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 607-08 (1987), he dissented from the holding that the California Coastal Commission's regulations might be classified as "environmental" on a case by case basis, preferring to label all of the Commission's powers as "land use" planning that would have been preempted by federal statute for federal lands. In *Lucas*, Scalia continues his attempt to increase the use of categorical rules. Although the concept is only vaguely defined and is made subject to state nuisance and property law exceptions, Scalia sets out the "deprivation of all economically productive use of land" as a taking per se. *Lucas*, 112 S. Ct. at 2901. *See* Fred R. Disheroon, *After* Lucas*: No More Wetland Takings?*, 17 VT. L. REV. 683, 684 (1993).

253. In *Sovereign Immunity*, *supra* note 234, at 875, Scalia noted that money is adequate compensation when the land is acquired by the government. While sitting on the D.C. Circuit he held that a landowner had no basis to enjoin a taking of his land if monetary relief were available, and that when interests in land have been converted to other assets they no longer partake of the special legal rules applicable to land. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1564 (D.C. Cir., 1984) (Scalia, J., dissenting), *vacated*, 471 U.S. 1113 (1985); Associacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1523 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). This may reflect a doctrinal preference for damage remedies over specific relief based on theories of economic efficiency. *See* Bowen v. Massachusetts, 487 U.S. 879, 924 (1988) (Scalia, J., dissenting), *discussed in* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 689 (1990).

254. In *Lucas*, Scalia found that the tradition of treating regulations as conceptual takings was so well established through its acceptance by the Court since 1928 that further inquiry into the historical accuracy of the interpretation was foreclosed, despite his recognition that the original understanding of the takings clause did not extend to protection against regulation. *Lucas*, 112 S. Ct. at 2900 n.15. This failure to "dissemble" is somewhat surprising in light of Scalia's 1989 advocacy of originalism:

> It may surprise the layman, but it will surely not surprise the lawyers here, to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis

tradition great weight.[255]

> of what the judges currently thought it desirable for it to mean. That is, I suppose, the sort of behavior Chief Justice Hughes was referring to when he said the Constitution is what the judges say it is. But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing—either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989); *see also* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 61-63 (1994). Scalia's recognition of the validity of state nuisance and property law is also carefully limited to traditional, as opposed to novel, interpretations of that law "when used to establish an exception under the takings clause." *Lucas*, 112 S. Ct. at 2901. That he considers the rules applicable to land to be bound up in tradition is most apparent in the *Associacion* opinion, in which he describes the treatment of land under international law with adjectives such as "primeval," "instinctive," and "mystical." Associacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1521 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). For a summary of the types of regulation to which land was traditionally subjected at the time the Constitution was adopted, see Schultz, *supra* note 109, at 487-90.

255. To Scalia, if a rule or custom can be traced back far enough the need for further justification of it disappears. For example, in Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991), he held that the Court's long established interpretation of the Eleventh Amendment was a sufficient justification for dishonoring the explicit promise of President Washington to the Indians that they could have access to the federal courts for claims against the states regarding their lands.

Scalia expresses such a strong reverence for "tradition" that he elevates it to a status equal with the Constitution itself, and superior to the founders' original intent: "[T]he text of the Constitution *and our traditions* say what they say and there is no fiddling with them," and we should rely "upon *text and traditional practice* to determine the law." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2883-84 (1992) (Scalia, J., dissenting) (emphasis added). *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991); Rutan v. Republican Party of Illinois, 497 U.S. 62, 93 (1990) (Scalia, J., dissenting); Coy v. Iowa, 487 U.S. 1012, 1017 (1988); Schad v. Arizona, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring) ("It is precisely the historical practices that *define* what is 'due' [process]."). For commentary on Scalia's use of tradition, see, e.g., Kannar, *supra* note 211, at 1331-32; Timothy L. Raschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992). Despite the high regard expressed by Scalia for the founders' original intent in his article *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855-56 (1989), when the choice is between adhering to the Court's traditional interpretation of a constitutional clause and his interpretation of the

D. Incidental or Reciprocal Government Regulation

Scalia's opinions do not reflect a libertarian viewpoint.[256] Some of his former academic colleagues have criticized his failure to support the libertarian position,[257] in particular his failure to afford property other than land the same degree of protection to which land is entitled.[258] Even in regard to land, Scalia supports a greater degree of governmental regulation than libertarian theo-

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original intent, he often sides with tradition. *See* Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 259 (1987) (Scalia, J., dissenting in part). *See also Lucas*, 112 S. Ct. at 2900 n.15. *But see* Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914, 915-21 (1993) (criticizing Scalia's interpretation of history in *Lucas*.) For other criticisms of Scalia's "selective" use of tradition, see Brock, *supra* note 251; Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1697 (1991); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgement*, 33 B.C. L. REV. 981, 990-991, 1022-36 (1991); Fisher, *supra* note 238, at 1399-1400.

256. Sax, *supra* note 245, at 1437. The most notable exponent of a truly libertarian land ethic was James Watt, who headed the Mountain States Legal Foundation before becoming Secretary of the Interior under President Reagan. Paul Culhane, *Sagebrush Rebels in Office: Jim Watt's Land and Water Policies*, *in* ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 293, 294-95 (Norman J. Vig & Michael E. Kraft eds., 1984). His tenure in office was controversial. *See* Samuel P. Hays, *Beauty, Health and Permanence: Environmental Politics in the United States, 1955-1985*, at 494-521 (1987); George C. Coggins & Doris K. Nagel, *'Nothing Besides Remains': The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 549 (1990).

The intellectual stimulation for the libertarian land ethic comes from Richard Epstein, a law professor from the University of Chicago who has propounded a theory in support of minimal government intervention in regard to land. *See, e.g.*, Richard Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). For a commentary on the differences between libertarian and utilitarian positions on property issues, see Margaret Jane Radin, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 3739, 744, 752-58 (1986). For an earlier analysis, see HURST, *supra* note 123, at 7-8. *See also* Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Hovenkamp, *supra* note 119, at 402-410, 417-20.

257. *See* Epstein, *supra* note 240, at 1375.

258. *See* Warner/Elektra/Atlantic Corp. v. County of Du Page, 991 F.2d 1280, 1285 (7th Cir. 1993) (opinion of Posner, J.).

rists would allow: Scalia's opinions support government regulation of land if based on what he believes to be sound economic principles.[259] These principles require landowners to bear the cost of obligations that are either 1) *incidental* to other valid purposes of legislation, or 2) *reciprocal* to the obligations of other property owners.

Under the "incidental effect" test,[260] a generally applicable law is valid if it is not specifically directed at a constitutionally protected interest, and it has only an incidental effect on that interest. Scalia has expressed this view in regard to such varied issues as religion, speech, abortion and land.[261] As he uses the test in practice, he apparently defines "incidental effect" as "an effect incidental to the *purpose*" of the law, since he has used the test to uphold laws that caused people to lose their jobs, an effect

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259. Bentham also supported land law reform within the framework of existing expectations. POSTEMA, *supra* note 216, at 190. It should be noted, of course, that many of Justice Scalia's opinions represent the views of a narrow majority of the court, and thus may have required compromises to obtain a consensus. Even his dissents, however, do not appear to represent extreme libertarian positions. *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Pennell v. City of San Jose, 485 U.S. 1, 20 (1988).

260. The "incidental effect" test has become a Scalia specialty ever since he used it in the famous peyote decision. Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990). For citations to commentaries on this opinion, see Fred Bosselman, *Extinction and the Law: Protection of Religiously-Motivated Behavior*, 68 CHI.-KENT L. REV. 15, 29-30 nn.89-92 (1992).

261. *Smith*, 494 U.S. at 890 (free exercise of religion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (free speech); *Lucas*, 112 S. Ct. at 2899 n.14. *See also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2878 (1992) (Scalia, J., dissenting) ("I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right . . . ."). *Cf.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 762 (1993) ("[I]t does not suffice for application of § 1985(3) [of the Civil Rights Act] that a protected right be incidentally affected. A conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right. The right must be 'aimed at'; its impairment must be a conscious objective of the enterprise." (citation omitted). For some thoughts about the implications of this line of cases for natural resource protection, see Fred Bosselman, *Protecting Resources under the Scalia Regime*, 2 LAND USE FORUM 63, 63-65 (1993). For a pre-*Lucas* discussion of the potential application of this view to property rights, see Frank Michelman, *Liberties, Fair Value and Constitutional Method*, 59 U. CHI. L. REV. 91, 108-111 (1992).

that would hardly be viewed as incidental by the person affected.[262] His comment in *Lucas*, that if a regulation is not "aimed at" land it might not result in a compensable taking, would appear to create a wholly new test of "purpose" in regard to the validity of land use regulations.[263]

His "reciprocity of advantage" test is a more traditional one.[264] In his *Lucas* opinion Justice Scalia cited Holmes' dictum that "Government hardly could go on" if it had to pay for every change in property values in supporting regulations of land use that promote reciprocity of advantage.[265] His *Nollan v. California Coastal Commission* decision contains emphatic recognition that regulations may and should address cumulative impact in order to spread the cost reciprocally among all of the landowners causing the problem.[266] He even suggests that the failure to con-

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262. *Smith*, 494 U.S. at 872, 890 (1990); *Barnes*, 501 U.S. at 572.

263.

> The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith*, *supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U.S., at 655-656, 8 S. Ct., at 293-294. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. Justice STEVENS' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

Lucas, 112 S. Ct at 2899 n.14.

264. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *see also*, Sullivan, *supra* note 251, at 90. ("In *Mahon*, Justice Holmes viewed regulatory takings law as a 'question of degree' that 'cannot be disposed of by general propositions' or absolute rules; the question is when a state has gone 'too far.'").

265. *Lucas*, 112 S. Ct. at 2894. Richard Epstein criticizes Scalia for "sacrificing intellectual clarity for judicial moderation." Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 41. *See also* Epstein, *supra* note 240, at 1375; Stewart E. Sterk, Nollan, *Henry George and Exactions*, 88 COLUM. L. REV. 1731, 1746-47 (1988); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1648-49, 1653-54 (1988).

266. Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987). Scalia's support for special rules relating to the regulation of land that are more restrictive than the rules applicable to other commodities reflects a

sider cumulative impacts uniformly among all property owners

"public choice" analysis of the political process, which concludes that landowners are an interest group that needs the court's protection from public officials who desire to acquire their land without paying for it. *Cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 642-43, 650-56 (1990) (analysis of Scalia's use of public choice theory in statutory interpretation). Scalia has a low opinion of government land use planning. After examining the California Coastal Commission's program he was convinced that land use management "is afoot," a phrase that any Sherlockian would immediately identify with the search for crime. California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 610 (1987). If "leveraging of the police power" were to be allowed, it would be likely to "produce stringent land-use regulation which the State then waives to accomplish other purposes." *Nollan*, 483 U.S. at 837 n.5. Scalia labeled this practice "extortion." *Id.* at 837. He emphasized that the exaction of real estate from a developer was particularly suspect because of the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841. Scalia reiterates this point explicitly in *Lucas*, where he seems to assume that state court judges' interpretation of the common law represents the tradition to which we should adhere rather than the pattern of legislative practice. *Lucas*, 112 S. Ct. at 2894-95. Yet Scalia again has been careful to distance himself from the libertarian viewpoint. Scalia, *Morality*, *supra* note 228, at 124. When his colleagues attempt to distinguish zoning from economic regulation, he argues that the very purpose of zoning is to "displace unfettered business freedom." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 372 (1991). Apparently zoning is a legitimate function if used to internalize externalities, but when other motivations intrude the Constitution is violated. *See* Hovenkamp, *supra* note 119, at 442-46.

Thus in his dissent in *Pennell* Scalia said that the takings clause should be used to invalidate any attempt to hide redistributive motives in the form of off-budget subsidies. He distinguished zoning, the validity of which is based on the fact that "the restricted use is the source of the social problem." Pennell v. City of San Jose, 485 U.S. 1, 22 (1988). *But see* Fisher, *supra* note 238, at 1395-96 (Scalia opinions in *Lucas* and *Pennell* are hard to reconcile). However, if a redistribution program were based on long tradition, would it offend the Constitution? *Compare* Scalia, *Morality*, *supra* note 228, at 125-26, *with* Rose, *supra* note 122, at 79-80, 95 (local land use regulators are guardians of a Pocockian "ancient constitution" of unwritten community understandings).

Scalia sees traditional zoning, on the other hand, as a method by which externalities are internalized. It meets his test because the proposed use is the cause of the effect sought to be remedied by the regulation. *Pennell*, 485 U.S. at 20. In his opinion for the Court in *Columbia*, which exempts zoning from antitrust review, he conceded that zoning adversely affects new market entrants but he had no doubt about the validity of such a purpose. *Columbia*, 499 U.S. at 372-76. (Admittedly no issue of zoning's constitutionality was before the Court, but his glowing defense of zoning would surely have been more circumspect if he had doubts about the issue.) He has written elsewhere that "[t]o say that distributive justice is a purely moral matter is not to say that government cannot undertake the function." Scalia, *Morality*, *supra* note 228, at 126.

might make a regulation unconstitutional.[267] Scalia is a firm believer in private market mechanisms but he also supports regulation of land use for a wide variety of purposes[268] so long as the regulation of land is incidental to a valid public purpose or provides a reciprocity of advantage.[269]

In summary, Justice Scalia strongly supports the *opportunity* of landowners to maximize their wealth through ownership of land.[270] He prefers crisp legal rules that minimize the need for balancing vague standards, and supports a rule treating land as unique and enhancing land's status as a commodity.[271] He rec-

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267. *Nollan*, 483 U.S. at 835 n.4, 837 n.5. Scalia's endorsement of common law nuisance may reflect an assumption that judges, unlike legislators, will use some "felicific calculus" to weigh impartially the impact of an activity on all affected persons. *See* Humbach, *supra* note 238, at 14. For a utilitarian interpretation of common law nuisance, see Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 1 (1973).

268. *See, e.g.*, *Nollan*, 483 U.S. at 834-36. Scalia recognizes that the list of purposes will be increasing with new scientific knowledge. *Lucas*, 112 S. Ct. at 2899-2900. However, Scalia's respect for tradition seems to exceed his respect for modern science. Where land is involved, legislative claims of scientific motivation are treated by Justice Scalia with extreme skepticism. *Id.* at 2898 n.11. The South Carolina legislature's concern about erosion was dismissed in *Lucas* as staff-constructed puffing not even worthy of consideration. *Id.* And the concerns about biodiversity expressed in *Defenders of Wildlife* were treated as if they were simply aesthetic preferences. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992).

269. Scalia examines regulators' motives closely because he believes that "rent-seeking" by government officials is a prevalent and troublesome social problem. *See* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1764 (1988) (discussing *Nollan*); *cf.* Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1335 (1994) (Scalia, J., dissenting from denial of certiorari). For a critique of this position, see Margaret Jane Radin, *Evaluating Government Reasons for Changing Property Regimes*, 55 ALB. L. REV. 597, 602 (1992); Frank I. Michelman, *Discretionary Interests—Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan*, 55 ALB. L. REV. 619, 625 (1992). Professor Michelman says "we have to imagine Justice Scalia as having a special theory or animating vision that tells him to presume lawmaker perversity and bad faith when the issue is property rules (and consequently distribution), but to presume lawmaker reliability and good faith when the issues are personal autonomy and public morals." *See also* David Schultz, *Judicial Review and Legislative Deference: The Political Process of Antonin Scalia*, 16 NOVA L. REV. 1249 (1991).

270. *See supra* notes 228-36.

271. *See supra* notes 237-55.

ognizes, however, that regulation of land use is a valuable way of controlling cumulative impact through reciprocal sharing of burdens, and that regulation can be justified as incidental to the achievement of other governmental purposes, but he scrutinizes such purposes closely to ensure that they are not proxies for the acquisitive instincts of governmental officials.[272]

VI. LAND ETHICS IN ACTION

The four land ethics discussed above play important roles in the United States today. This section briefly describes these roles.

A. Order

Arthurian land policies designed to protect the social order continue to play an important role in the United States. Although class distinction in the United States never attained the rigidity of the English model, land policy in the United States has frequently been used to stabilize existing social relationships.

For example, federal tax policy creates a sharp distinction between homeowners, who receive interest deductions, and tenants, who do not.[273] A new nationally supported system of mortgage commodification has increased the extent to which "homeowners" now hold in an almost tenurial relationship to the pension funds and similar institutions that dominate long-term investment.[274] An Arthurian network of deed restrictions and local zoning protects many residential communities from disruptions in the social order.[275] Gated communities increasingly resemble forti-

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272. *See supra* notes 256-69.

273. IVAN FAGGEN ET AL., FEDERAL TAXES AFFECTING REAL ESTATE § 2.01[2] (1991). There are other tax advantages for owners of personal residences. *See id.* at ch. 9; Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1627-28 (1993) ("A recent study calculated that in 1988, federal government subsidies to homeowners exceeded $81 billion.").

274. *See generally* Susan M. Golden, *Collateralized Mortgage Obligations: Probing the Limits of National Bank Powers Under the Glass-Steagall Act*, 36 CATH. U. L. REV. 1025 (1987); Edward L. Pittman, *Economic and Regulatory Developments Affecting Mortgage-Related Securities*, 64 NOTRE DAME L. REV. 497 (1989); Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369 (1991).

275. *See generally* CONSTANCE PERIN, EVERYTHING IN ITS PLACE (1977); Radin,

fied castles.[276]

B. Reform

Ricardian demands for reform are less shrill in the United States than in many other countries because the privileges attached to land ownership have never been as dramatic as those that prompted Ricardo's call for reform. Nevertheless, substantial privileges exist and have prompted demands for greater equity.[277]

Reformers object that agricultural interests destroy the soil resource and pollute the environment while receiving cash subsidies, property tax abatements, and relief from responsibility for damages caused by pesticides.[278] They question whether mining interests should continue to use the federal lands without making reimbursement to taxpayers.[279] One noted law and economics scholar has characterized urban redevelopment cartels as "feudal."[280]

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supra note 256, at 756-57; Rose, *supra* note 122, at 95.

276. TAYLOR, *supra* note 33, at 183-84, 334-35; James Krohe, *Bunker Metropolis*, CHICAGO ENTERPRISE, Sept.-Oct. 1992, at 16.

277. *See generally* CHARLES C. GEISLER & FRANK J. POPPER, LAND REFORM, AMERICAN STYLE (1984).

278. PAUL FAETH ET AL., PAYING THE FARM BILL 20-25 (1991). For a discussion of the issue of stewardship responsibilities in agriculture, see Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 225-40 (1993).

279. *See* NATIONAL COMMISSION ON THE ENVIRONMENT, CHOOSING A SUSTAINABLE FUTURE 121-22 (1993); CARL J. MAYER & GEORGE A. RILEY, PUBLIC DOMAIN, PRIVATE DOMAIN: A HISTORY OF PUBLIC MINERAL POLICY IN AMERICA 43-54 (1985); Susan Milius, *The Law With the Big Loophole*, NATIONAL WILDLIFE, Aug.-Sept. 1992, at 40.

280. Professor Malloy argues that the political networking necessary for success in the development process resembles the feudal system in which status trumped ability. *See* ROBIN PAUL MALLOY, PLANNING FOR SERFDOM 43 (1991); Robin Paul Malloy, *Planning for Serfdom: An Introduction to a New Theory of Law and Economics*, 25 IND. L. REV. 621 (1992). *See also* STEPHEN L. ELKIN, CITY AND REGIME IN THE AMERICAN REPUBLIC 91-95 (1987). For a postmodern perspective on urban redevelopment, see SHARON ZUKIN, LANDSCAPES OF POWER: FROM DETROIT TO DISNEY WORLD 260-63 (1991).

C. Responsibility

Modern Muirians have substituted wetlands for Muir's Sierran peaks as the resource most in need of preservation.[281] Moreover, the protection of wilderness has become well-accepted policy in Congress,[282] and a growing recognition of the importance of biodiversity has placed emphasis on the need for preservation of a wide range of habitats. Perhaps the most dramatic recent success of the ethic of responsibility is the legislation imposing responsibility on those who have poisoned the land through careless use of toxic chemicals.[283] The costs involved in these responsibilities have been so excessive in relation to the damage involved that they have prompted new calls for reform.[284] If John Muir were to return he would not lack causes for which to fight.

Although those who attempt to model their activities on Muir's are but a small fraction of the population,[285] Muir's influence goes far beyond those who follow directly in his footsteps. Many Americans honor his example intermittently or vicariously. For example, the Outward Bound movement has brought thousands of business executives into the wilderness as an educational

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281. *See, e.g.*, NATIONAL WETLANDS POLICY FORUM, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA (1988). One wonders how Muir would have reacted to this twist of geomorphology. For Muir's view of wetlands, see MUIR, WALK, *supra* note 168, at 83-124.

282. The adoption of the Wilderness Act has been characterized as a replay of the Hetch Hetchy battle in which Muir finally won. FOX, *supra* note 163, at 286-90.

283. *See, e.g.*, State of Ohio v. United States Dept. of Interior, 800 F.2d 432 (D.C. Cir. 1989) (discussing ramifications of Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)).

284. For a summary of the scientific position, see EPA SCIENCE ADVISORY BOARD, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990).

285. Muir founded the Sierra Club in 1892. TOM TURNER, THE SIERRA CLUB: 100 YEARS OF PROTECTING NATURE 47-60 (1991). It now has 650,000 members. NATIONAL WILDLIFE FEDERATION, CONSERVATION DIRECTORY: A LIST OF ORGANIZATIONS, AGENCIES, AND OFFICIALS CONCERNED WITH NATURAL RESOURCE USE AND MANAGEMENT 120-21 (37th ed. 1992). The larger American environmental groups had a combined membership of about 5 million in the mid-1980s. JOHN MCCORMICK, RECLAIMING PARADISE: THE GLOBAL ENVIRONMENTAL MOVEMENT 137 (1989).

experience,[286] and groups like the Nature Conservancy allow people to honor their responsibility to nature vicariously through cash or land donations.[287]

D. Opportunity

If utilitarians had worried that the entrepreneurial opportunity to create wealth out of land would be stifled by rigid controls, by the ability of privileged vested interests to avoid reform, and by the demands of preservationists for greater responsibility, the free-wheeling business climate of the 1980s proved their worries groundless. Legislation converted many savings and loan associations into governmentally insured entrepreneurial vehicles for the development of real estate that were often operated by developers with little regard for market needs.[288] The result was a taxpayer bailout of unprecedented proportions[289] and a record oversupply of commercial buildings, which may dampen new construction well into the twenty-first century.[290]

Meanwhile, in residential real estate, Ricardo's idea that economic rent was the windfall of the gentry was transformed into the government-subsidized homeownership movement—if you can't beat the gentry, join the gentry![291] Economists might classify land as just another asset, but the American public thought otherwise.[292]

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286. *See* Joan Vogel, *Manufacturing Solidarity: Adventure Training for Managers*, 19 HOFSTRA L. REV. 657 (1991).

287. *See* NOEL GROVE, PRESERVING EDEN: THE NATURE CONSERVANCY (1992) (describing the American environmental movement and TNC's role in it).

288. STEPHEN PIZZO ET AL., INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS (1st ed. 1991); EDWARD J. KANE, THE S & L INSURANCE MESS: HOW DID IT HAPPEN? (1989).

289. On January 27, 1993, the Congressional Budget Office estimated that the Resolution Trust Company will have spent $120 billion by the time it completes its work. *Lower Bailout Costs Seen*, N.Y. TIMES, Jan. 28, 1993, at D2.

290. "Lots of people are talking about an uptick in business these days. Those people are not in commercial real estate. The industry's motto of the early 90's . . . 'stay alive 'til '95' . . . has deteriorated to 'find something to do until 2002.'" Claudia H. Deutsch, *It's the Business Tenant Who's Calling the Shots*, N.Y. TIMES, Jan. 31, 1993, at C12.

291. *See* SCOTT DONALDSON, THE SUBURBAN MYTH 65-66 (1969); CHRISTINE BOYER, DREAMING THE RATIONAL CITY 139-42 (1983); ROBERT FISHMAN, BOURGEOIS UTOPIAS 156-57 (1987).

292. Between 1895 and 1929, there was an especially dramatic surge in new

Landowners continue to be successful in amassing government subsidies for their activities (or inactivities), relying on the Jeffersonian mystique to hide the fact that most of the subsidies are being paid to large corporations.[293] Congress has begun paying farmers to not farm in sensitive areas,[294] and some landowners are seeking higher subsidies against losses in land value.[295]

VII. CONCLUSION

Each of the land ethics discussed in this article represents an important factor in the way Americans currently think about land: Malory's ethic of order, Ricardo's ethic of reform, Muir's ethic of responsibility, and Scalia's ethic of opportunity. Each will be an element of any public decisionmaking process having a major impact on land. The search for a new land ethic will continue, but

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home construction. GLENN H. BEYER, HOUSING AND SOCIETY 360-61 (1965). The depression beginning in 1929 and the war that followed virtually halted housing construction until after 1945, but from the 1960 through the 1980s, American consumers and the financial institutions that backed them became infected with the Ricardian vice: they believed that the price of land could go in no direction except up. During the 1980s, financial institutions would often loan money on real estate regardless of the credit status of the borrower. The president of one savings and loan association is reported to have said "if the owner has a pulse, we'll give him a loan." JAMES GRANT, MONEY OF THE MIND: BORROWING AND LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN 396 (1992).

293. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 6.04 (Supp. 1992).

294. *See generally* GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-93-132, CONSERVATION RESERVE PROGRAM: COST-EFFECTIVENESS IS UNCERTAIN (March 1993).

295. "The public continues to associate private property rights in land with personal freedom." Lazarus, *supra* note 41, at 1764. "And in a very practical way, perhaps property's symbolic force animates the incredible touchiness that is still set off by the regulation of landed property—particularly physical invasions of land . . . ." Carol M. Rose, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 10 CONST. COMMENTARY 238, 244 (1993) (book review). Of course we also justify the creation of public parks, preserves, and open spaces in terms of the same Jeffersonian agrarian ideology. *See* Charles J. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 435 (1975). For a pointed economic critique of landowner subsidies, see C. Ford Runge, *Economic Implications of Wider Compensation for 'Takings' or, What if Agricultural Policies Ruled the World?*, 17 VT. L. REV. 723 (1993).

in a democratic society the existence of multiple ethics must be accepted.[296]

An understanding of the history of land's role in our ethical behavior will enlighten the search for ethical standards that better reflect current conditions. Aldo Leopold recognized that our ethical attitudes change gradually as we observe the flow of the seasons and the centuries through which our environment has evolved.[297] What is needed are ongoing conflict management systems to cope with regular conflicts between existing ethical systems.[298]

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296. On the general need for multiple ethical viewpoints, see, e.g., Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 696-97 (1983); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 790-91 (1993). *See also* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 167-75 (1982). Christopher Stone has specifically explored the need for pluralism in environmental ethics. *Compare* STONE, *supra* note 2, at 202-12, *with* A. Dan Tarlock, *Earth and Other Ethics: The Traditional Issues*, 56 TENN. L. REV. 43, 69-71 (1988). For a discussion of the relationship of classical theories of pragmatism to environmental ethics, see Robert C. Fuller, *American Pragmatism Reconsidered: William James' Ecological Ethic*, 14 ENVTL. ETHICS 159, 172-73 (1992). *See also* Joseph Brent, CHARLES SANDERS PEIRCE: A LIFE 160-61, 174-77 (1993). For a recent analysis of degrees of pluralism in environmental ethics, see Peter S. Wenz, *Minimal, Moderate, and Extreme Moral Pluralism*, 15 ENVTL. ETHICS 61 (1993). *But see* J. Baird Callicott, *The Case Against Moral Pluralism*, 12 ENVTL. ETHICS 99 (1990). "It is the genius of democratic societies to adopt a meta-ethical perspective on various opposing moral beliefs and judgements." SAGOFF, *supra* note 2, at 785. *See also* Richard R. Wallace & Bryan G. Norton, *Policy Implications of Gaian Theory*, 6 ECOLOGICAL ECON. 103, 115-16 (1992); MARX, *supra* note 134, at x-xiv.

297. NORTON, *supra* note 173, at 60.

298. David R. Godschalk, *Negotiating Intergovernmental Development Policy Conflicts: Practice-Based Guidelines*, 58 J. AM. PLAN. ASS'N 368, 376-77 (1992); Bosselman, *supra* note 261, at 37-41; Stuart Meck, *Themes from Thymos*, 59 J. AM. PLAN. ASS'N 147 (1993).