

THE USE AND ABUSE OF PROPERTY RIGHTS IN SAVING THE ENVIRONMENT

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“The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!”¹

Private property creates for the individual a sphere in which he is free of the state. It sets limits to the operation of the authoritarian will. It allows other forces to arise side by side with and in opposition to political power. It thus becomes the basis of all those activities that are free from violent interference on the part of the state. It is the soil in which the seeds of freedom are nurtured and in which the autonomy of the individual and ultimately all intellectual and material progress are rooted.²

INTRODUCTION

While freedom and property may be inseparable, the temptation to sacrifice one or the other to seemingly more critical societal goals is ever present. And when either one is threatened, so is the other.³ Yet, the temptation to yield either is an inexorable imperative of those who govern. In the United States, for example, the threat to security in the post-9/11 world has led to the Patriot Act, which some claim intrudes upon individual liberty and privacy of American citizens.⁴

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1. See *Miller v. United States*, 357 U.S. 301, 307 & n.7 (1958) (citing THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953)) (attributed to William Pitt, Earl of Chatham).

2. LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION 63 (Ralph Raico trans., 1985), available at <http://mises.org/liberal/ch2sec3.asp>.

3. BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (Transaction Publishers 2001); RICHARD PIPES, PROPERTY AND FREEDOM (Knopf Doubleday 1999), BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION (Transaction Publishers 1997).

4. See, e.g., John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

Starting with the rise of progressivism and continuing through the post–New Deal era, the compulsion to reengineer society for the “common good” has been effected at great cost to originalist understandings of individual rights.⁵

Another artifact of progressivism was the wide-scale adoption of zoning and other land-use controls, a trend that received its first major imprimatur of legitimacy in an opinion written by the conservative Supreme Court Justice George Sutherland, in *Euclid v. Ambler*.⁶ When it comes to the transfer of the control over established rights in property and wealth, nothing has come close to the revolution engendered by the widespread adoption of zoning and land use controls in the United States.⁷ Where land use decisions were once exclusively made by owners of the land, subject only to the proscriptions against creating common-law nuisances, the decisions rest today in myriad boards, commissions, and regulatory agencies at the local, state, and federal level, all of whom have one or more hands in the decision-making process. This curtailment of an individual’s liberty to make choices over the use of property is the functional equivalent of the impressment of various easements and negative covenants on the property. Thus while neighbors could once have voluntarily negotiated the terms of neighboring land uses through easements containing, for example, height or density restrictions, in the new zoning world these same restrictions are imposed on a broader scale by political bodies. Moreover, these governmental bodies can and often do use this power to leverage exactions, fees, and other direct wealth transfers from owners to government.

Landowners today are facing another reality: the rise of pressure to put property into conservation easements. While there can be tax

5. See, e.g., Thomas J. West, *The Constitutionalism of the Founders versus Modern Liberalism*, 6 NEXUS J. OP. 75, 89 (2001) (noting that progressive era theories of constitutionalism rejected traditional understandings of rights); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (Cato Institute 2006).

6. 272 U.S. 365 (1926).

7. But see Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91 (2011) (*Euclid v. Ambler* represents not so much a usurpation of property rights as a fundamental change in the definition of property ownership. Specifically, Shoked argues that with the rise of suburban ownership, the Jeffersonian ideal of the independent yeoman farmer has been transformed into an ideal of yeoman suburban owners. In order to protect the interests of these suburban owners, the meaning of property entails less liberty of action in order to promote the stability interests of suburban owners.).

advantages of donating land to conservation easements, the long-term consequences of splitting estates though the conservation easement process is unknown. Similarly, when landowners feel compelled to put land into conservation easements, either to stave off more severe zoning or to appease government regulators and environmentalists during a development process, the resulting land patterns may be more haphazard than planned.

There are some checks imposed upon governmental avariciousness. There can be a democratic response to attempts by government to take property from small landowners for the benefit of politically well-connected developers.⁸ But that response has largely been confined to the post-*Kelo* backlash and some of that response was “engineered” by redevelopment interests to render reform into a joke.⁹ Ordinarily, democratic instincts do not treat landowners particularly well as the leveling instinct criticized by Madison remains with us today.¹⁰ Rent control in cities with politically powerful renter constituencies is a classic example of democratic usurpation of property rights.¹¹

But both supporters and critics of property rights recognize the decline.¹² Some of this has been reflected by replacing the common-law language of property (related to a hard and fast physical thing) with reference to a “bundle of sticks”¹³ or an invocation of social norms that promote “human flourishing.”¹⁴ The bundle of sticks metaphor

8. One such example is the reaction to redevelopment in the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005).

9. See, e.g., Ilya Somin, Op-Ed., *Prop. 99's False Promise of Reform*, L.A. TIMES, May 19, 2008, at A15. See also Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

10. Madison argued that the structure of the federal government would resist “A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project . . .” THE FEDERALIST NO. 10 (James Madison).

11. Ted Dienstfrey, *The Politics of Rent Control in the United States: A Program at the Yellow Light*, in RENT CONTROL, MYTHS AND REALITIES 5 (Block et al. eds., 1981).

12. See, e.g., Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 481 (1983) (“[W]e are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners.”); Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065 (2007).

13. *United States v. Craft*, 535 U.S. 274, 278 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”).

14. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (describing property in terms of a social-obligation norm that promotes human flourishing).

is just another way of dividing up ownership rights, taking some, and leaving the owner with the remainder and without compensation. Property in terms of “human flourishing” may be a fine exercise for the academy but it fails to provide a means for defining and understanding property by lawyers, judges, and lay people. Both of the latter constructs are also, conveniently, much more malleable in the hands of those seeking to restrict more traditional understandings of property rights.

Imprecision in language reigns supreme. As far back as 1922 we learned that a regulation that goes “too far” may be proscribed by the United States Constitution as an uncompensated regulatory taking.¹⁵ But what is too far? Ninety years later we can only wish for a judicial nostrum as precise as Justice Stewart’s quip about pornography.¹⁶ We do know when there is a total wipeout of all use or value, there may be a categorical taking.¹⁷ We know that a physical invasion of any magnitude is a taking.¹⁸ And, to some extent we know that in at least some circumstances, an exaction that is untethered to an impact caused by land development may be determined unconstitutional by Supreme Court doctrines articulated in *Nollan v. California Coastal Commission*¹⁹ and *Dolan v. City of Tigard*.²⁰ And, of course we know that there may or may not, but usually not, be a taking in other circumstances after various ambiguous and undefined “factors” are weighed against each other.²¹ Today, after 90 years of chasing the quark,²² the promise of relief suggested by the law of regulatory

15. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

16. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

17. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

18. *Id.* at 1015; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

19. 483 U.S. 825, 836–37 (1987) (requiring that there be a “nexus” between the impacts caused by a development and exactions demanded by a permitting agency).

20. 512 U.S. 374, 385 (1994) (requiring that there be “rough proportionality” between an exaction and an impact caused by a development).

21. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (suggesting three factors have particular significance in determining the existence of a regulatory taking: the economic impact of the regulation, impact on distinct investment-backed expectations and the character of the regulation); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 776–77 (1997) (listing seven additional factors).

22. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 n.17 (1985) (analogizing trying to discern the meaning of a taking to the search by physicists for the quark). *See also* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 327–33 (1998) (noting that at least the physicists have found their quark).

takings exists more in theory than as practical reality for the typical landowner of ordinary means.

New challenges to rights in property surfaced in the 1960s with a revolution in land use controls. With rising environmental consciousness, Euclidean zoning schemes, which supposedly existed to provide reciprocal economic and aesthetic benefits to all landowners, have been supplanted by more overarching and pure environmental controls. Such controls have ranged from an early utilitarian ethic to conserve natural values for the benefit of people and their future generations to a later embrace of an ethic to preserve environmental values for the sake of preservation itself. In some cases the public's thirst for environmental amenities has given way to expressions of classic Nimbyism and even into cooption by those who harbor the misanthropic dreams of deep ecology.²³

The doctrine of regulatory takings has been powerless to protect any but the most extreme regulatory assaults on property rights. If rights in property are vulnerable to majoritarian desires for zoning, rent control, and all manner of environmental controls, and if freedom and property are interdependent,²⁴ does this pose a genuine threat to "freedom?"

This article will focus upon the threats to property represented by the environmental initiatives of the past forty years and how these initiatives have evolved from the ideals of conservation to the schemes of preservation, including conservation easements. Finally, it will ask whether the threats to freedom are truly dangerous assaults on individual liberty or simply bumps in the road to a green Nirvana.

I. A FEW WORDS ABOUT FREEDOM AND RIGHTS IN PROPERTY

If the regulatory state poses a threat to freedom, it must be asked, freedom to do what? Freedom to stand up to the government bureaucrats who hold the keys to the regulatory kingdom? Freedom to earn a living from the use of privately owned property? Freedom to use property and property-derived wealth to challenge the government

23. See BILL DEVAL & GEORGE SESSIONS, *DEEP ECOLOGY, LIVING AS IF NATURE MATTERED* (Gibbs Smith 1985). For an account of the deep ecology, the forests, and the spotted owl, see ALSTON CHASE, *IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE MYTHS OF NATURE* (Transaction Publishers, 2001) [hereinafter *IN A DARK WOOD*].

24. See, e.g., *supra* notes 1 and 2.

itself? I do not presume in this article to suggest any new or novel ideas about the meaning of freedom. Nor do I presume it is possible to suggest that there is a universally accepted definition of the word. Freedom is universally considered a good thing to have—in varying degrees at any rate. Even those states unwilling to allow it to flourish in the classical liberal sense have often adopted the Orwellian tactic of providing freedom to the state’s citizens after redefining what freedom means. Thus, some states are in the habit of defining freedom to be the availability of whatever the government provides for its citizens—jobs (freedom from want), security (freedom from fear), and food (freedom from hunger). Other states have an even more paternalistic way of suggesting to its citizens that they have all the freedom they will ever need—conservative religious-based dress codes for women provide freedom from male harassment, proscriptions on Islamist or Christian preaching provides freedom of the fear of an Islamist or Christian state. In other states restrictions on “hate speech” can provide citizens with freedom from blasphemy and unwanted societal intolerance for one’s race, religion, or gender orientation. And zoning, of course, by limiting the freedom of one set of owners to utilize their property, may provide freedom from unwanted neighborhood uses to another set of owners.

Generally, however, at least for the purposes of this paper, freedom means, or meant, something entirely different in the tradition of Western democracies. Reflecting the classical liberal tradition, freedom in these states traditionally meant not the positive provision of goods and services, and not even the protection from the slings and arrows of one’s fellow citizens, but the freedom *from* government itself, spelled out in terms of negatives imposed on government. The best example is in the Bill of Rights—the government *shall not* restrict free speech,²⁵ the government *shall not* infringe on the practice of religion or the beliefs of its citizens, the government *shall not* take property except in limited circumstances and only after the payment of just compensation, the government *shall not* deprive one of his life or liberty without due process of law, the government *shall not*

25. But a more positivist view is that “the 1st Amendment is about government fostering speech—the more, the better—with public funds if necessary.” Michael McGough, *Supreme Court Justices Can Pick from Two 1st Amendments*, LOS ANGELES TIMES, June 29, 2011, available at <http://opinion.latimes.com/opinionla/2011/06/supreme-court-justices-can-pick-from-two-first-amendments.html>.

search one's home or effects without a warrant, and so on.²⁶ Moreover, just because a proscription doesn't exist in the Constitution, it doesn't mean the government can infringe upon an unenumerated freedom.²⁷ This sense of freedom permits one to speak for or against the government and for or against a particular religious belief without fear of being punished. It permits one to believe any legitimate or cockamamie philosophy one likes without being locked up.²⁸ It permits one to worship the One True God, several middling False Gods, the Devil, Gaia,²⁹ some Really Big Trees,³⁰ or the holy of the holies—the Great Pumpkin³¹—all without the benefit or impediment of government sponsorship or persecution. At the same time, freedom in the classical liberal tradition permits the Greta Garbos of the world to exercise their freedom to be let alone.³²

Property provides a buffer between government and the individual. If an individual may utilize property as a means to a livelihood, as a cushion against economic want, and as a physical place to be free from the prying eyes of officious government employees, then the essential relation between property and freedom is apparent. But if property cannot be used without obtaining an assortment of arbitrary permissions from a multitude of officials, if the right to earn a living from property is made dependent on the good will of others, and if property may be routinely entered and inspected as a condition of its use, then the hallmarks of a free society are diminished.

Thus, the freedoms embodied in classical liberalism cannot be considered in isolation. They are not hermetically sealed off from one another and there are common threads running through them all. In the views of the Founding Fathers, first and foremost of the

26. See, e.g., U.S. CONST. amend. I, IV, V.

27. U.S. CONST. amend. IX.

28. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (A First Amendment case, Justice Kennedy wrote, "The right to think is the beginning of freedom.")

29. See David Spangler, *The Meaning of Gaia: Is Gaia a Goddess or Just a Good Idea?*, IN CONTEXT, Late Winter 1990, at 44, available at <http://www.context.org/ICLIB/IC24/Spangler.htm>.

30. For more, see *Tree Worship*, WIKIPEDIA, http://en.wikipedia.org/wiki/Tree_worship (last visited June 23, 2012).

31. Worship of The Great Pumpkin was first recorded in 1959. See *Religion of the Great Pumpkin*, COMIC BOOK RELIGION, http://www.comicbookreligion.com/?c=24710&The_Great_Pumpkin (last visited June 23, 2012).

32. "I want to be let alone." Greta Garbo in *The Grand Hotel*. See *Greta Garbo*, WIKIPEDIA, http://en.wikipedia.org/wiki/Greta_Garbo (last visited June 23, 2012).

common threads was the right to own and use property. In his *Essay on Property*, James Madison took a generous view of property, explaining that property and rights are one and the same, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”³³ He later posited that if the United States keeps the promise to respect property, greatness would be in store:

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.³⁴

The Founders’ respect for individual rights in property is understandable. To varying degrees, they were influenced by the likes of John Locke and William Blackstone. In his *Second Treatise on Government*, Locke had an almost libertarian take on property. In one passage, for example, Locke suggested that the preservation of property is the essential reason why government is instituted among men:

And ’tis not without reason, that he [man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.³⁵

The consequence of a government’s failure to protect the property of its citizens was severe:

[W]henever the *Legislators endeavor to take away, and destroy the Property of the People . . .* they put themselves into a state of War with the People, who are thereupon absolved from any further Obedience³⁶

33. James Madison, *Property*, in *THE PAPERS OF JAMES MADISON* (William T. Hutchinson et al. eds., 1792), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

34. *Id.*

35. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, SECOND TREATISE, § 123 (P. Laslett ed., 1988).

36. *Id.* § 222. Accordingly, the Declaration of Independence echoed this theme: “[W]henever any Form of Government becomes destructive of these ends [life, liberty and the pursuit

William Blackstone was equally effusive on property. In his *Commentaries on the Laws of England*, he wrote:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.³⁷

The recognition of the inseparable bond between property and freedom remains alive to this day. In *Lynch v. Household Finance Corp.*, the Supreme Court noted:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.³⁸

This long Western, British, and American embrace of a natural law conception of property rights—rights that are inherent to mankind and not the boon of a magnanimous government—has not been of course universally acknowledged or appreciated. Jean Jacques Rousseau lamented the nature of private property:

The first man, who, after enclosing a piece of ground, took it into his head to say, “This is mine,” and found people simple enough to believe him, was the true founder of civil society. How many crimes, how many wars, how many murders, how many misfortunes and horrors, would that man have saved the human species,

of happiness], it is the Right of the People to alter or to abolish it, and to institute new Government . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

37. 1 WILLIAM BLACKSTONE, COMMENTARIES *2.

38. 405 U.S. 538, 552 (1972) (citing J. LOCKE, OF CIVIL GOVERNMENT 82–85 (1924); J. Adams, *A Defense of the Constitutions of Government of the United States of America*, in F. COKER, DEMOCRACY, LIBERTY, AND PROPERTY 121–32 (1942); 1 WILLIAM BLACKSTONE, COMMENTARIES *138–40).

who pulling up the stakes or filling up the ditches should have cried to his fellows: Be sure not to listen to this imposter; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody!³⁹

There have been many successors to Rousseau. From Karl Marx to Lenin to Mao, many scholars and political leaders have had little use for a philosophy of rights that elevates individuals above their governments and that attempts to justify and cement the inequalities that inevitably arise in a system of laws that distributes property and wealth on principles other than total equality. Rousseau also presaged a more modern attack on private property—the notions of deep ecology that animates a core ethos within the environmental movement. In his *Discourse on Inequality* he posited that without civilization and all its accouterments, men would be in a state of perfect health and bliss.⁴⁰

This tradition is seen today in the deep ecology movement, which eschews modern industrialization and technology.⁴¹ As will be shown, while the egalitarianism most famously championed by Marx and Engels was the greatest threat to traditional understandings of and respect for private property in the 19th and 20th centuries, the rise of environmentalism poses an equally serious challenge in the 21st.

II. THE RISE OF ENVIRONMENTAL REGULATION

On the eve of the first Earth Day in 1970, the propaganda machine was in full swing. The earth was in decline. The world's population was headed toward massive famine of apocalyptic dimensions.⁴² Our air and water were poisoned.⁴³ The great animals were on a fast train to extinction, and Noah was absent, his God having recently died.⁴⁴ A mock documentary on public television portrayed two greedy capitalist developers in the near(?) future shaking hands as the last

39. JEAN JACQUES ROUSSEAU, ON THE INEQUALITY AMONG MANKIND, PART II, at 1, *available at* <http://www.bartleby.com/34/3/2.html>.

40. JEAN JACQUES ROUSSEAU, ON THE INEQUALITY AMONG MANKIND, PART I, at 9, *available at* <http://www.bartleby.com/34/3/1.html> ("Man therefore, in a state of nature where there are so few sources of sickness, can have no great occasion for physic, and still less for physicians . . .").

41. *See, e.g.*, DEVAL & SESSIONS, *supra* note 23.

42. *See, e.g.*, PAUL R. EHRLICH, *THE POPULATION BOMB* (Ballantine Books 1971).

43. *See, e.g.*, RACHEL CARSON, *SILENT SPRING* (Houghton Mifflin Co. 1962).

44. The death was reported in a *Time* cover story. *Is God Dead?*, *TIME*, Apr. 8, 1966, *available at* <http://www.time.com/time/covers/0,16641,19660408,00.html>.

square foot of land in America was paved under. It wasn't subtle, but it was effective.

In order to stave off the coming calamities, Congress and the Nixon White House lurched into action. In the space of a few short years, Congress passed the National Environmental Policy Act of 1969,⁴⁵ Clean Air Act of 1970,⁴⁶ turned relatively ineffectual water pollution laws into the powerhouse of the Clean Water Act in 1972,⁴⁷ and, in what turned out to be true wolf in endangered megafauna's clothing, the Endangered Species Act ("ESA") in 1973.⁴⁸

In addition, in order to combat toxic wastes, Congress passed the Toxic Substances Control Act in 1976 ("TSCA")⁴⁹ and the Resource Conservation and Recovery Act of 1976 ("RCRA").⁵⁰ A few years later, in response to a perceived toxic waste calamity at Love Canal,⁵¹ Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund").⁵² There are other federal statutes as well.⁵³ In addition, and largely beyond the scope of this article, all the states have adopted their own environmental laws which serve to complement the federal laws.

These statutes changed everything, and everything was changed in ways that were mostly unanticipated by those who adopted them. If there is one truism about the combined weight of these statutes, it is that they went way beyond Euclidean zoning in their ability to convert the right to develop and use property into a privilege where the ultimate decision-making powers were wrested from the owners and given to the public, the bureaucrats, and the courts. The enactment of each one of these statutes, combined with the associated regulations and enforcement actions, have served to reduce the freedom of individual landowners to utilize property as the owners see fit. In

45. 42 U.S.C. § 4321, *et seq.* (1970).

46. 42 U.S.C. § 7401, *et. seq.* (1970).

47. 33 U.S.C. § 1251, *et seq.* (1972).

48. 16 U.S.C. § 1531, *et seq.* (1973).

49. 15 U.S.C. § 2601, *et seq.* (1976).

50. 42 U.S.C. § 6901, *et seq.* (1976).

51. Love Canal was the site of a toxic waste site that later became a residential neighborhood. It became the subject of national and international attention in the mid-1970s. See *Love Canal*, WIKIPEDIA, http://en.wikipedia.org/wiki/Love_Canal (last visited June 23, 2012).

52. 42 U.S.C. § 9601, *et seq.* (1980).

53. For a complete list, see *Summaries of Environmental Laws and EOs*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/lawsregs/laws/#env> (last visited June 23, 2012).

some cases, the freedom of individuals has been circumscribed in other ways as well. The alleged external harms caused by particular land uses may well have justified the expansion of the statutory law after the common law proved inadequate to prevent and remedy concerns over pollution. Nevertheless, the question of how much individual freedom has been sacrificed in pursuit of an environmental utopia has been seldom asked. In a few years we will be entering the fifth decade of robust environmental regulation. It may be time to consider what we have wrought, and whether it is time to alter course.

A. *The Endangered Species Act*

The Endangered Species Act⁵⁴ (“ESA”) is the most powerful of all environmental laws.⁵⁵ In the early 1970s, public angst over the fate of charismatic megafauna such as the bald eagle, trumpeter swan, peregrine falcon, various whales, grizzly bears, and similar animals led to a clamor for federal protection. With the ESA, species received federal protection. But we also got a whole lot more than virtually anyone anticipated. The reach of the Act is not confined to megafauna; it covers virtually every plant and animal including many that Congress never considered in its wildest collective imagination as deserving federal protection. Nor is it likely that Congress appreciated that species would be protected, “whatever the cost.”⁵⁶

The mechanisms of the Act are far-reaching and the impacts of the ESA on economic activity have been legendary.

1. **Spotted owl**—imperiled the timber industry in the Pacific Northwest after a series of lawsuits filed by environmentalists.⁵⁷

54. 16 U.S.C. § 1531, *et seq.* (1973).

55. For a description of the impacts of the ESA and suggestions to reform the act, see JOHNATHAN ADLER, *REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM* (Jonathan H. Adler, ed. 2010).

56. In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Supreme Court held that a major federal dam project must be stopped because of a small fish called the snail darter. The Court explained that the ESA required the protection of species above all else, “whatever the cost.” *Id.* at 184. *But see* Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill’s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 MO. ENVTL. L. & POLY REV. 318 (2010) (arguing that costs should be a factor in ESA enforcement).

57. *See* IN A DARK WOOD, *supra* note 23.

2. **Delta Smelt**—severe water cutbacks in California’s central valley so more water is available for a five-inch minnow-like fish have caused a regulatory drought—meaning farmers have had to fallow hundreds of thousands of acres of farmland and farmworkers have experienced much higher levels of unemployment.⁵⁸
3. **Klamath Basin**—severe water cutbacks to save salmon have caused severe economic distress to many farmers in a region bordering California and Oregon.⁵⁹
4. **Grizzly bears, wolves**—with the protection of the former and reintroduction of the latter, western ranchers have become bitterly opposed to the ESA, which they see as allowing for depredations without adequate compensation.⁶⁰

Beyond all these examples of economic impact, the ESA has worked more fundamental changes. First, along with the Clean Water Act described in the next section, the ESA has provided the federal government with the authority to wrest local land-use decision-making powers from local and state governments (those powers that belonged to landowners in the pre-*Euclid* days). While nowhere does the ESA explicitly usurp local land use decision-making powers, it has that practical effect. A local government may, for example, decree that Greenacre be used for ecosmart affordable working class housing. But if an endangered or threatened plant or critter is found on Greenacre, the owners may be required to attempt to obtain a federal incidental take permit before building to avoid running afoul of Section 9,⁶¹ and if any federal permits or actions are required (say the filling of a wetland or the use of federal low-income housing grant

58. See, e.g., *Delta Smelt*, WIKIPEDIA, http://en.wikipedia.org/wiki/Delta_smelt (last visited June 23, 2012).

59. Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L. Q.* 279 (2003).

60. See, e.g., *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 1114 (1989) (holding that depredation by protected bears is not a taking); Brian N. Beisher, *Are Ranchers Legitimately Trying to Save Their Hides or Are They Just Crying Wolf—What Issues Must Be Resolved Before Wolf Reintroduction to Yellowstone National Park Proceeds*, 29 *LAND & WATER L. REV.* 417 (1994). For information supporting wolf introductions, see Gray Wolf, DEFENDERS OF WILDLIFE, http://www.defenders.org/wildlife_and_habitat/wildlife/wolf_gray.php (last visited June 23, 2012). For a view calling for active management of wolf populations, see the statement of the Rocky Mountain Elk Foundation at http://rliv.com/wolf/WolvesND09_LOWREZ.pdf (last visited June 23, 2012).

61. 16 U.S.C. § 1538 (1973) (prohibiting taking protected species without federal permission).

moneys), then the federal agencies must comply with Section 7⁶² of the act (which requires extensive preactivity review and possible mitigation). More significantly to local governments, however, are those cases suggesting that a local or state government official who issues a permit that might result in a “take” of a species may be held liable for violating the ESA.⁶³ Clearly, with the overlay of the ESA, local land use regulation is not what it used to be.⁶⁴

But there has also been a more fundamental shift with respect to the individual property owner. With the enactment and enforcement of the ESA, the federal government now holds a de facto conservation easement, or at least a negative covenant, over private land that contains endangered plants or animals and a potential easement over all other property that might someday be found to contain a species that might someday be listed.

In the circumstance of a private easement, one party acquires an easement over the land of another in a voluntary exchange, with the payment of consideration, and the availability of private enforcement mechanisms enforceable by arbitration or a court. But the imposition of species easements is quite different. There is often little or no notice to the landowner that the federal government has acquired authority over the property. There is certainly no payment of consideration. And, most distressing to a landowner, the easement can be enforced with massive fines or imprisonment. It is no wonder that some landowners have been become bitter over the legacy of the ESA.

Whether the ESA has saved any species may depend on what we mean by “saved.” Has the ESA allowed the “recovery” of a meaningful number, or at least a nonzero number, of species? Or has it prevented the slide of species into the abyss of extinction? By the recovery

62. 16 U.S.C. § 1536 (1973) (requiring federal agency consultation for federal actions affecting protected species).

63. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (permitting by state regulators of lobster fishing, which may interfere with endangered whales, could be a take in violation of the Endangered Species Act).

64. Rarely asked, however, is whether the federal government actually possesses such local land-use powers under our constitutional system that considers that government to be one of limited jurisdiction, with only the powers enumerated in the Constitution. Especially with respect to non-commercial intrastate species, arguments have been raised that not even the New Deal era expansion of the Commerce Clause provides the federal government the authority to impose species-based restrictions on land use. So far, however, these challenges to federal authority have been unsuccessful. *See, e.g.*, *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir.), *cert. denied*, ___ U.S. ___ (2011) (holding that regulation of intrastate fish did not violate Commerce Clause).

standard, most acknowledge that the ESA hasn't done much. But the ESA's defenders posit that it has met the "slide into the abyss" standard—though this is more through supposition than any hard evidence. After all, we don't have a spare Earth handy to test the efficacy of the ESA against the parallel universe Earth that lacks an ESA.

On whether the ESA does any harm to endangered and threatened species, there have always been whispered but, for obvious reasons, largely unverified tales of landowners who deal with their endangered species "problem" with the "shoot, shovel, and shut-up" trifecta. But there are more plausible, and documented, stories of landowners "preplanning" for the arrival of endangered species by rendering land unfit for nonhuman habitation. Owners of southern pine plantations are thought to be harvesting trees early and before the trees are mature enough to develop cavities that red-cockaded woodpeckers are wont to interpret to be an "open house" invitation.⁶⁵ Owners of meadows likely to attract the endangered preble's meadow-jumping mouse have taken similar actions.⁶⁶

Species protection is a public good, like any other public good. When the cost of anything approaches zero, the demand for that good will trend toward the infinite. With the ESA, not only is the cost to the government of acquiring control over private property close to zero, but there is the added incentive of costs and attorneys' fees for anyone who successfully sues the federal government over the need to list additional species and set aside critical habitat for those species. With that, entities like the Center for Biological Diversity ("CBD") and others have embarked on mass-litigation tactics to list hundreds of species and set aside hundreds of thousands of acres of public and private land as critical habitat. Landowners are not happy.

In 2005, Congressman Richard Pombo engineered the passage of the most sweeping reform of the Endangered Species Act ("ESA") since it was passed in 1973. HR 3824, The Threatened and Endangered Species Recovery Act of 2005, would have required more workable habitat restoration and better peer review science for listings.⁶⁷ Most intriguingly, it contained a compensation mechanism that would have

65. Jonathan Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in ADLER, *supra* note 55, at 16.

66. *Id.* at 17.

67. See Threatened and Endangered Species Recovery Act of 2005, H.R. Rep. No. 109-237 (2005) available at <http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt237/pdf/CRPT-109hrpt237.pdf>.

rewarded landowners for maintaining endangered species habitats rather than the current practice of punishing landowners with a massive devaluation of their land values. While it passed the House with bipartisan support, it failed in the Republican-controlled Senate. To thank Representative Pombo for his efforts, the environmental community labeled Pombo an “eco-thug” and flooded his district with attack ads and volunteers in order to ensure his defeat at the 2006 election.⁶⁸

Despite the clout of powerful environmental groups, the escalating and economic regulatory gridlock engendered by groups like CBD may someday be too much for Congress and the American public. It is one thing to take on the logging industry in the Pacific Northwest, or the farmers in central California, or an isolated reservoir here or a major energy pipeline in the West. But as the impacts of the Act ratchet down on more and more landowners, and the affected landowners begin to understand more clearly how the ESA has effectively imposed an uncompensated easement upon their lands, Congress may be forced to fix what’s broken. Until then, however, the ESA will remain a deeply flawed vehicle that has not begun to meet its promise for protecting species on private land.⁶⁹

B. The Clean Water Act—Wetlands Regulation

Another statute of far broader consequence than anticipated is the Clean Water Act’s provisions for the protection of wetlands. The CWA’s stated purpose was to restore the nation’s waters to swimming and drinking standards. Section 404 of the CWA pertains to wetlands.⁷⁰ Prior to the CWA, the Corps of Engineers had some control over wetlands—those indisputably adjacent to navigable waters—through the Rivers and Harbors Act of 1899.

Like the ESA, the CWA’s wetlands section has had a dramatic impact and impingement on both state and local governments and private landowners. If a landowner suspects there might be wetlands on a parcel, the landowner may ask the United States Army Corps of

68. Rachel Gordon, *Challenger Defeats Pombo in a Stunner*, S.F. GATE, Nov. 8, 2006, available at http://articles.sfgate.com/2006-11-08/bay-area/17318630_1_jerry-mcnerney-pombo-and-doolittle-evasion.

69. See generally ADLER, *supra* note 55.

70. 33 U.S.C. § 1344, *et seq.*

Engineers to perform a “wetlands delineation” of the property. Alternatively, the owner may ask the Corps to approve of a delineation performed by a consultant for the landowner. If wetlands are found, the landowner usually must obtain a Section 404 permit prior to undertaking any activities that affect the wetlands. However, if the owner disagrees with the delineation, there is no recourse. For example, assume a local government desires to build a playground on land it does not think contains wetlands. If the Corps considers the property a wetland under its jurisdiction, then the municipality must either apply for a permit at great cost⁷¹ or risk an enforcement action with concomitant fines and even criminal penalties.⁷² Most disturbingly, the landowner cannot challenge a wetlands delineation in court.⁷³

The toll of Section 404 can weigh even more heavily on individual landowners without the resources to fight back and who become entangled in an enforcement action. For example, if a landowner does not even suspect that a parcel contains wetlands, the owner may innocently neglect to ask for a wetlands delineation before altering the land—such as by grading the land to prepare it for farming or development. This can lead to a surprise enforcement action in the form of an Administrative Compliance Order. Based on “any evidence” which could be as little as a drive-by observation or complaint from a disgruntled neighbor, the EPA could issue a compliance order demanding a restoration—with no avenue of appeal. This, in fact, is the fate of the Sacketts from Priest Lake, Idaho. It is a system of neighbor informing against neighbor.

In 2007, the Sacketts purchased a modest residential lot across the street from Priest Lake, a navigable waterway. Michael Sackett was an experienced local contractor, and knew well the implications of wetlands. He also thought he knew a wetland when he saw one. But alas, identifying a wetland can be notoriously difficult—and subject

71. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”).

72. *Id.* (“These costs cannot be avoided, because the Clean Water Act ‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities.’”).

73. *Fairbanks N. Star Borough v. United States Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008), *cert. denied*, ___ U.S. ___ (2009) (wetlands jurisdictional delineation of playground site not appealable under the Administrative Procedures Act because it did not constitute final agency action).

to widely divergent opinions.⁷⁴ Shortly after the Sacketts began clearing their lot in order to build their single-family home, they received a compliance order from the EPA. In a nutshell, the order demanded that the Sacketts restore their lot to the status quo ante, plant it with native vegetation, and fence it off for three years.⁷⁵ After three years, if the Sacketts still wished to build, they could then apply for a Section 404 permit which the Corps and EPA may or may not grant. Only then could the Sacketts appeal the basic question of whether their land contained any wetlands at all.

The Sacketts consulted wetlands consultants who agreed with the Sacketts that the property was not in fact wetlands.⁷⁶ Yet there was nothing they could do.⁷⁷ Every day that the Sacketts failed to restore their “wetlands” meant another day of violating the compliance order and a fine of \$37,500 per day plus an additional fine of \$37,500 per day for violating the underlying statute.⁷⁸ The Sacketts are under the sword of Damocles, because the EPA may never bring an enforcement action, or it might bring one tomorrow. Logically, one would think that a couple in the predicament of the Sacketts could challenge the compliance order before a neutral arbitrator, i.e., a federal court. And, for nearly five years, they were told they could not. According to the

74. See, e.g., *Rapanos*, 547 U.S. 715.

75. See *Scope of Work*, Attachment 1 to EPA Compliance Order (Nov. 26, 2007), in Joint Appendix *Sackett v. United States Environmental Protection Agency*, __ US __ (No. 10-1062), 2010 WL 7634112 at 25–29.

76. This would hardly be the first time the Corps and EPA have made a serious mistake over the identification of wetlands. After spending 18 months in prison for illegally filling wetlands on a small residential lot, Ocie and Carey Mills, a father and son, went back to court over the adequacy of their restoration of their wetlands. This time, however, the court concluded that their property had never been wetlands to begin with. See, e.g., *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1992), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

77. Unless they wanted to take the other option of ignoring the order, continuing the filling, and waiting to see if the EPA would bring civil and criminal charges against them—in which case they could bring a defense that the land was not a wetlands. But such a course of action is inadvisable.

78. As of the date of the Sacketts filing their opening brief before the Supreme Court, the accumulated fines totaled over \$40 million dollars for violating the order alone. Opening Brief *Sackett v. United States EPA*, __ US __ (2011) (No. 10-1062), 2011 WL 4500687, available at <http://www.pacificlegal.org/document.doc?id=567>. If violations of the act itself are added in, the fines can be up to \$75,000 per day, or over \$80 million for the Sacketts’ small lot. The government admitted at oral argument that these fines amount to \$75,000 per day of violation. Oral Argument, *Sackett v. Environmental Protection Agency* (2012) (No. 10-1062), 2012 WL 38639 at 26, 1.15–1.18, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.

Ninth Circuit, neither the CWA nor the Administrative Procedures Act provides judicial review.⁷⁹ The only remedy, according to Ninth Circuit, is to wait until EPA brings an action against the Sacketts for violating the order, or for the Sacketts to restore the putative wetland, wait, and apply for a permit—a permit that may or may not allow the Sacketts to challenge EPA’s finding that there were jurisdictional wetlands on their property.⁸⁰

In a unanimous decision, the Supreme Court reversed.⁸¹ First, the Court held that the ACO was a final agency action because there was no post-ACO process and the ACO had legal effects, such as remedial obligations, civil penalties, and increased difficulties in obtaining permits.⁸² Second, any available review was inadequate because the Sacketts cannot initiate review but must risk EPA’s penalties and because judicial review of a permit denial from the Corps would not provide an adequate remedy for the ACO from the EPA.⁸³ Finally, the Court found that the judicial review of ACOs will not harm EPA’s enforcement powers. While avoidance of judicial review might be more efficient, efficiency is not a sufficient reason for evading judicial review.⁸⁴ But the Sacketts are hardly out of the woods. Now they must return to district court and argue, presumably on a very limited record, that their property does not contain wetlands. The trouble is that no one really understands the definition of a wetlands. As Justice Alito pointed out in a concurrence in *Sackett*, “[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”⁸⁵

Notably, the *Sackett* decision does not address the first problem normally addressed by landowners: whether a jurisdictional determination is reviewable. At best, *Sackett* indicates that the Court was distressed about the hardships engendered by unreviewable agency

79. Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* See *Sackett v. United States EPA*, 622 F.3d 1139 (9th Cir. 2010).

80. The Sacketts may apply for an after-the-fact permit only after their property has been restored pursuant to the compliance order. If the permit is approved, they cannot challenge the compliance order. If the permit is denied, they can challenge the wetlands determination, but not the compliance order *per se*.

81. *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367 (2012).

82. *Id.* at 1371.

83. *Id.* at 1372–73.

84. *Id.* at 1374.

85. *Id.* at 1375 (Alito, J., concurring).

actions. But whether Sackett translates into greater reviewability of agency actions beyond Clean Water Act ACOs remains to be seen.⁸⁶

The point of cases like the Sacketts and the Mills⁸⁷ before them is that a fundamental interest in property ownership no longer exists for vast numbers of property owners who are saddled with wetlands, real or imagined, subject to federal jurisdiction or otherwise. The development of *any* property is fraught with peril so long as a federal agency can swoop and demand compliance with a finding of wetlands *without any practical recourse for the affected landowner*. And because of the ambiguities in the basic definition of what is a wetland, and with the federal government's expansive reach in defining navigable waterways, the CWA represents another shift in the ownership of property rights away from the individual and toward the federal government. In essence, with Section 404, the federal government has obtained an easement, fully realized or inchoate depending on whether "wetlands" have been identified yet, over a vast acreage of property in the United States.

C. *The Clean Air Act*

There is enormous pressure on the federal government to "do something" about the specter of anthropogenic global warming. With "greenhouse gasses" having recently been brought under the ambit of the Clean Air Act with an endangerment finding, the potential for further incursions on property rights is palpable. At present, EPA is proposing what it calls a "tailoring rule" wherein it will regulate only emitters of more than 50 tons of greenhouse gases. The rule is an eminently pragmatic response to the absurd potential that EPA could otherwise be forced to impose a permitting regime over every bakery, dry cleaner, office building, and homeowner with a fireplace in the United States. For better or worse, the tailoring rule, however, has no basis in law.

For landowners, one threat looming on the horizon is the impact attempts to regulate greenhouse gasses will have on land development. Already in California, which has passed its own greenhouse gas

86. For further analysis, see Robert Meltz, *The Supreme Court Allows Pre-Enforcement Review of Clean Water Act Section 404 Compliance Orders: Sackett v. EPA*, CONGRESSIONAL RESEARCH SERVICE, Report 7-5700 (March 26, 2012), available at <http://www.nationalaglawcenter.org/assets/crs/R42450.pdf>.

87. See *supra* note 76.

law, AB 32,⁸⁸ there are initiatives underway to regulate and restrict residential development under the assumption that people driving to and from their new homes will add to the output of greenhouse gasses.⁸⁹ When added to existing land use restrictions, this may constitute yet another uncompensated land use restriction.

III. THE CONSEQUENCES OF GROWING GOVERNMENT OWNERSHIP OF INTERESTS IN LAND

A. *Government Interests in Private Property*

The federal government owns nearly one-third of the nation's landmass in fee. When land owned by state and local governments is added, we see that between 40–50% of the nation's landmass is owned by government.⁹⁰ As governments at all levels embark on efforts to acquire additional land for conservation purposes, these percentages are increasing.

With the growing regulatory control over wetlands and endangered species in the United States, the federal government has gained a servitude in the millions of acres that once were not subject to federal regulation. For example, in the United States Fish and Wildlife Service's most recent report, issued in 2006, total wetland acreage in the United States was estimated to be 107.7 million acres⁹¹ to 110

88. California Health & Safety Code § 39650 *et seq.* See California Environmental Protection Agency Air Resources Board, *available at* <http://www.arb.ca.gov/cc/ab32/ab32.htm>.

89. See Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 121 (2009).

90. Over 900 million acres out of a total of 2.2 billion acres are owned by state and local governments. *State by State Government Land Ownership*, PROPERTY RIGHTS RESEARCH (June 6, 2004), *available at* <http://www.propertyrightsresearch.org/nationalfrms.htm> (follow "2004 Archives" hyperlink; then follow "June" hyperlink; then scroll down to "State by State Government Land Ownership, 06-02-04"). In the Western states, that figure is closer to 81%. *Western States Data*, WILDLAND FIRE (Nov. 13, 2007), <http://www.wildlandfire.com/docs/2007/western-states-data-public-land.htm> (last visited June 23, 2012). However, the figures on how much land is owned by state governments is not well known and the exact amount of land owned by the federal government is subject to some uncertainty as well. See Anthony Randazzo & John M. Palatiello, *Knowing What You Own: An Efficient Government How-To Guide for Managing State and Local Property Inventories*, REASON FOUNDATION POLICY STUDY 383 (June 2010), *available at* http://reason.org/files/how_to_manage_or_sell_state_local_property.pdf; Anthony Randazzo & John M. Palatiello, *Knowing What You Own: An Efficient Government How-To Guide for Managing Federal Property Inventories*, REASON FOUNDATION POLICY STUDY 384 (June 2010), *available at* http://reason.org/files/how_to_manage_or_sell_federal_property.pdf.

91. Claudia Copeland, *Wetlands: An Overview of Issues*, CONGRESSIONAL RESEARCH SERVICE (July 12, 2010), *available at* <http://www.nationalaglawcenter.org/assets/crs/RL33483.pdf>.

million acres, excluding Alaska.⁹² With the uncertainty over what is and what is not a wetlands subject to federal jurisdiction, prudent landowners are told that they ought to consult first with the federal government before engaging in earthmoving activities. Even if property contains no wetlands, it could be listed as critical habitat for threatened and endangered species throughout the United States.⁹³ Even if private property is not designated as critical habitat, it remains unlawful to “take” an endangered species. Because a take can include habitat modification, landowners no longer own an absolute right to utilize their property in a way that could affect a species. To date, no court has found a significant constitutional limit on the growth of federal restrictions on private land development.

B. Conservation Easements

1. Conservation Easements and the Common Law

In addition to control over real property through regulatory fiat, there is a growing use of conservation easements to accomplish the same ends. With a conservation easement, the fee title to land is divided up with the underlying ownership remaining in the original owner and a “conservation easement” is sold or donated (not always voluntarily) to a governmental entity or an NGO. The owner of the conservation easement has the right, in perpetuity, to prevent new development in the newly encumbered parcel. In other words, if the owner of a farm or cow pasture sells or donates a conservation easement on his land, he may never again have the right to improve the property, build on it, or sometimes even convert it to another use if the existing use becomes uneconomic.⁹⁴

92. See *Five-Year Survey Shows Wetlands Losses are Slowing, Marking Conservation Gains and Need for Continued Investment in Habitat* UNITED STATES FISH & WILDLIFE SERVICE (Oct. 6, 2011), available at <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009-News-Release.pdf>.

93. There are no readily available estimates of the total critical habitat acreage in the United States, although the raw data for individual species can be found at: *Critical Habitat*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/gis/data/national/index.html> (last visited June 23, 2012).

94. For a history of conservation easements and a discussion of some of the challenges they create, see Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

Conservation easements work by splitting an estate in real property into two or more parts and throwing at least one of those parts into the dustbin of history. The purpose behind conservation easements is that they provide a mechanism that will *permanently* protect land from development. It is a dubious proposition that is contradicted by over seven centuries of legal tradition.

In a typical case, a parcel of land that is presently used for rural agricultural purposes (ranching, farming, or timber harvesting) is subdivided so that its “development rights” are severed from its lower intensity agricultural uses. These development rights are in turn sold, donated, or condemned by a government agency or private land trust (which may in turn sell those rights to the government). The government or land trust now owns a “conservation easement” over the property. The owner of the underlying estate may continue to use the property for agricultural uses, but is proscribed from any additional development of new infrastructure or buildings. In many instances the owner of the conservation easement may also acquire the right to regulate the nature of the agricultural use to maximize the protection of ecological values. A farmer may be prevented from replacing or upgrading farm buildings, a rancher may be ordered to avoid riparian areas or to reduce the density of cattle, or a timber owner may be proscribed from clear cutting or rebuilding access roads.

Conservation easements present a significant challenge to traditional understandings of real property interests because they are new, were not allowed under the common law governing real property, and may detract from the role that property ownership plays in maintaining the independence and liberty of the landowner. What is most antithetical about the relationship between conservation easements and traditional understandings of property law is that these easements contradict the long tradition of the law that has rebuffed attempts of present generations to control the actions of future generations.

Since at least the 13th century, every major attempt to change real property law has resulted in unintended consequences. Every attempt to restrict the ability of future generations to put property to productive use has been eliminated or watered down in relatively short order. There will be unintended consequences of the accelerating trend to create conservation easements on a massive scale. Nobody can presume to know precisely what those consequences will be—but a few

good guesses are in order. We also do not know what future generations will think of conservation system easements, but it would be naive to believe that conservation easements will survive precisely as the creators of these easements now postulate or that future generations will not alter or abandon those easements as necessity requires.

There is an expression in the law that the “dead hand cannot reach beyond the grave to control the living.” Or, as one state Supreme Court put it, “society is better off, if property is controlled by its living members than if controlled by the dead.”⁹⁵ What the court meant was that if the members of future generations cannot decide what to do with their property, society and the economy will suffer. But first a little history of the English common law of property is in order.

If there is one short phrase that can best sum up the history of the English common law of property, it is a trend toward pragmatic utilitarianism. As we have moved from the feudal estates set up by William the Conqueror after the Battle of Hastings in 1066 to the Industrial Age, the move has always been, in fits and starts and a few temporary back steps, toward the free alienability of land.

After William the Conqueror acquired his real estate holdings in England, he rewarded many of his nobles in the military with estates in land. That is when the feudal system of land tenure is usually considered to have begun in England. William’s supporters, however, did not acquire the land outright. They did not have a right to sell the land or pass it onto their heirs without the King’s permission. They were required to provide certain obligations such as performing specified duties or providing knights, money, or food to the King in exchange for the right of keeping their land.

Over time, the nobles chafed under the absolute control of the King. Political tensions between the nobles and King John escalated into a battle at Runnymede where the King, in the face of superior military power, agreed to the Magna Carta, first adopted in 1215. Among other things, the Magna Carta established that should a nobleman die, his heir had the right to inherit the nobleman’s estate after payment of only a reasonable sum of no more than £100 to the King.⁹⁶ In other words, the King could no longer attempt to regain the estate after a nobleman’s death in derogation of the nobleman’s heirs.

95. *Cast v. National Bank of Commerce Trust & Sav. Ass’n of Lincoln*, 183 N.W.2d 485, 490 (Neb. 1971).

96. The Magna Carta, Para. 2 (1215).

Another one of the abiding tensions in the development of the common law has been the desire by some to sell or devise property with strings attached. Most commonly, the owners of large estates wanted to make sure that the property would remain in the family estate in perpetuity and not be dissipated by spendthrift heirs. At the same time, however, the inheritors of that property desired the freedom to do with it what they wished without being ruled by the dead hands of their ancestors. The law has been seesawing on this issue for nearly 800 years. But inexorably, the trend has favored free alienability. The developments include⁹⁷:

- 1225: *D'Arundel's Case*: A conveyance to "A and his heirs" permitted A to convey to third parties, despite the interest of the heirs. One of the earliest cases promoting the free alienability of land.⁹⁸
- 1285: Statute de Donis Conditionalibus: Created "entails" or "fee tails" wherein a conveyance to A and his heirs forbade A from selling the property in fee if there were heirs. This lasted for about 200 years.⁹⁹
- 1290: Statute Quia Emptores: Ended the creation of new feudal obligations, and permitted freeman to sell property. Meant to reform feudal estates, this statute unintentionally led to the ultimate end of the feudal system.¹⁰⁰
- 1583: *Spencer's Case*: Provided that *covenants* could run with the land, but required such covenants to meet strict tests, to prevent such covenants from interfering with free alienability of land.¹⁰¹

97. For a long list of statutes and cases exemplifying the back and forth struggle in the common law to create perpetual interests, see EDWARD H. RUBIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 213 (Foundation Press 1974). The cases here have been excerpted from Rubin's list.

98. Bracton's Notebook, Case 1054; see discussion in John R. Rood, *The Struggle for Perpetuity*, 8 MICH. L. REV. 181, 183–84 (1910).

99. The Statute of Westminster the Second (De Donis Conditionalibus), 1285, 13 Edw. 1 c. 1 (Eng.). See Rood, *supra* note 98, at 187–88. Rood notes disparagingly that the result of this statute was "mischief" that "had to be endured" "for nearly two hundred years before a means of evading it was discovered."

100. 18 Edw. 1, c. 1–2 (Eng.). See discussion in Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 U.C.L.A. L. REV. 1303, 1319–20 (2003).

101. 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583) (Requirement that brick wall be built on leased land upheld against sublessees because the parties so intended and the covenant "touched and concerned" the land). For discussion of covenants that run with the land, see Olin L. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12 (1978).

- 1660: Statute of Tenures: Abolished last incidents of feudal land law, allowing tenants to devise lands without obligations of knighthood.¹⁰²
- 1682: Duke of Norfolk's Case¹⁰³: Established limits on the ability to devise property to heirs with conditions and led to *Rule Against Perpetuities*.¹⁰⁴
- 1848: *Tulk v. Moxhay*¹⁰⁵: Enforcement of restrictive covenant upheld.
- 1886: Gray's *Rule Against Perpetuities*: Limits ability of testators to control use of land for a period of time longer than the last life in being plus 21 years.¹⁰⁶
- 1948: *Shelley v. Kraemer*: 234 U.S. 1 (1948), United States Supreme Court strikes down racially based restrictive covenants—covenants that were enabled in large degree 100 years earlier in 1848 in *Tulk v. Moxhay*.
- 1980s: Many states adopted laws, sometimes after lobbying by The Nature Conservancy, that liberalized the ability to establish perpetual land trusts and conservation easements.

The purpose behind conservation easements (also known as conservation servitudes, futures, or scenic or open space easements) is to destroy the economic utility of the development rights in the underlying fee. The idea is to put the development rights into the hands of some third party—either the government or a nonprofit—which will preserve the land forever from development. But quite clearly, such easements are of questionable viability in light of the history of almost 800 years' worth of common law that has inexorably moved toward a system that promotes the economic utility of property through the removal of restraints on alienation. For under the modern law, until very recently, conservation easements would have been struck down by the courts.¹⁰⁷

102. 12 Charles II, c. 24 (1660). See *Tenures Abolition Act 1660*, THE NATIONAL ARCHIVES, <http://www.legislation.gov.uk/aep/Cha2/12/24/section/IV> (last visited June 23, 2012).

103. 3 Ch. Ca. 1, 22 Eng. Rep. 931 (1682).

104. See discussion in Dukeminier & Krier, *supra* note 100, at 1319–20.

105. 2 Ph. 774, 41 Eng. Rep. 1143 (deed required perpetual maintenance of ornamental garden for the benefit of the inhabitants of Leicester Square).

106. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (Roland Gray ed., 4th ed. 1942) (1886). For a discussion on the demise of the Rule Against Perpetuities in the United States, see Dukeminier & Krier, *supra* note 100 (noting the rise of perpetual trusts to alleviate the sometimes harshness of the rule and for federal estate tax purposes).

107. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 12–17 (1989). See also Mahoney, *supra* note 94, at 748.

Conservation easements first came into use in a significant way in the 1930s, often with government purchasing easements for highway viewsheds and the like. These easements often proved impractical and difficult to manage. There were also serious questions about the viability of such easements in light of principles of property law.

To deal with this problem, in recent years many states have adopted new laws that specifically allow for conservation system easements.¹⁰⁸ These laws, many modeled after the Uniform Conservation Easement Act,¹⁰⁹ work to separate the fee from the development rights, thereby making it even more difficult for future generations to put land to a use contrary to the intent of owners at the time a conservation system easement is created. These statutes generally have no means for terminating the easement.

Florida, for example, adopted the following: (§ 704.06):

(2) Conservation easements are *perpetual*, undivided interests in property and may be created or stated in the form of a restriction, easement, covenant, or condition

. . . .

(4) Conservation easements shall *run with the land and be binding on all subsequent owners* of the servient estate . . . and shall entitle the holder to enter the land . . . to assure compliance.¹¹⁰

In 1979, the California legislature declared that it was “in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.”¹¹¹ To that end, it defined a conservation system easement to mean:

“[C]onservation easement” means any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is *binding upon successive owners* of such land, and the purpose of which

108. See Mahoney, *supra* note 94, at 749–50.

109. *Uniform Conservation Easement Act*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1982), available at <http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf>.

110. Fla. Stat. § 704.06 (emphasis added).

111. Cal. Civ. Code § 815.

is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.¹¹²

As in all the other states codifying conservation easements, in California, a “conservation easement shall be *perpetual* in duration.”¹¹³ The statute further states that only nonprofits and governmental entities may hold conservation easements. Special provisions are made for the enforcement of such easements.

2. *The Long-Term Implications of Conservation Easements*

Conservation easements are a relatively new trend in the common law, but they seek to achieve the same thing that large landowners have tried to achieve for centuries: to determine today how an estate of land shall be used for generations. Recognizing the history of the common law of property, what are we to make of this modern attempt to tie land in perpetuity? At this early stage in the history of conservation easements there are many more questions than answers, such as:

- What unintended consequences will there be?
- Will this lead to the agglomeration of huge estates of conservation easements that will someday be the target of government dissolution, as Henry VIII dissolved the monasteries in the late 1530s?
- Will it lead to an ever diminishing supply of land for new home construction, driving up the price of housing and driving an ever increasing percentage of Americans into rental housing?
- Will the separation of the development rights from the underlying fee lead to the ultimate economic nonutility of the underlying fee, leading to the widespread abandonment and foreclosure of those lands?
- Have the creators of the modern conservation system easement truly created a mechanism that will allow the dead hand to reach beyond the grave? Or will the common law ultimately repeal even this attempt?

There may be mechanisms available today to break up existing conservation easements. Traditional trusts are not inviolate. Courts have long used a doctrine known as *cy pres* to alter existing trusts if

112. Cal. Civ. Code § 815.1 (emphasis added).

113. Cal. Civ. Code § 815.2(b) (emphasis added).

a court finds that circumstances have changed so much that the intent of the original trustor can no longer be met, or that it is against public policy.¹¹⁴ Thus, a trust established to provide aid for persons with smallpox might be transformed to allow the money to be used to fight other diseases today. Or a trust that prohibits the use of its scholarship funds for minorities might be modified today as being against public policy.¹¹⁵ It is conceivable that the changed land ownership patterns and economics of the future decades or centuries will be enough for a court to break a conservation easement and allow the development rights to be reunited with the owner of the fee.

If, however, the original grantor of the easement was paid for or took a tax break for granting the easement, or realized the benefit of lower property taxes, the termination of the easement will be complicated. In addition, the likelihood that a court will terminate a conservation easement just because the fee owner is facing financial hardship is not a particularly likely scenario in today's legal climate. This will depend, however, on a court finding that a conservation easement is more like a covenant than a traditional easement in land—courts usually do not reform easements on public policy grounds, but covenants (such as racial restrictions) are more easily altered. It also may depend on whether a court takes to heart the legislative intent in many conservation easement statutes that the easement shall be “perpetual.” Similarly, the legislative intent here is clearly a rejection of the common law principle that the law should not hinder land from being put to beneficial or productive use.

If a conservation easement is created for a specific purpose, such as the preservation of a particular endangered species or endangered animal, and the animal becomes extinct, then it is more conceivable that the easement could be terminated.¹¹⁶ Conservation easements are a troubling attempt to abrogate almost 800 years of common law experience. What the next 800 years will bring is anybody's guess.

114. See, e.g., Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635 (1988) (arguing for expanded use of the doctrine).

115. See Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471 (1998).

116. For a discussion of conservation easements and the doctrine of changed circumstances, see Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Circumstances*, 40 HASTINGS L.J. 1187 (1998). See also Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039 (2007).

CONCLUSION

Since 1215, a pervasive trend in common law began to throw off the control by the King and then other large landowners on the free alienability of land. With the greater control over of the land by ordinary citizens, so too did understandings of freedom grow for the common Englishman.¹¹⁷ Now we are moving in the opposite direction. The right to develop property is increasingly controlled by government through regulation, or outright ownership, or ownership of conservation easements.

The history of land ownership patterns in the United States closely mirrors the history of government power. The age of homesteading of federal property and devolution of land to the states ended, for all practical purposes, in the 1930s, at the same time the federal government began its dramatic New Deal era expansion. In recent years the federal government has gone on an acquisition binge. Land equals power, and one follows the other. The adoption of the Endangered Species Act and wetlands rules under the Clean Water Act are the most dramatic government and power land grabs of this century. On the state and local level, government is likewise acquiring more and more property. The push toward the acquisition of conservation easements will accelerate this trend all the more. What will be the unintended consequences of placing more and more property into the hands of governmental entities?

We must also ask if the diminishment of property rights is good for the environment. With the ESA, there are many examples where the threats to landownership from endangered species have caused negative consequences. Backlash against other onerous land use regulations could have similar effects. History has not been kind to attempts to severely restrict, permanently or otherwise, the free use and alienability of property. While the new environmental ethic might indeed be as permanent as any major new religion, it is impossible to predict with certainty what the future may hold. If the past is any guide to the future, some skepticism over attempts to

117. See PIPES, *supra* note 3, and SIEGAN, *supra* note 3, for broad discussions of the relation between freedom and property. Pipes, especially, suggests that individual landownership correlates to the English tradition of individual liberty as contrasted to the Russian experience where ordinary citizens traditionally had neither property nor freedom.

impose servitudes—whether regulatory or voluntary—over property may be in order.

Moreover, the environment is not static. Lakes turn into meadows, meadows into forests, and forests back into meadows. Rising sea levels and temperatures may alter many ecosystems, just as much as falling sea levels or cooling temperatures might. Invasive species are creating permanent changes in ecosystems across the globe. And yet with statutory prescriptions and the growth of conservation easements, we are attempting to freeze a dynamic environment in perpetuity.

Ultimately, if property and freedom are inexorably intertwined, as several centuries of political philosophy and experience seem to indicate, it might also be worthwhile to ponder what the ultimate consequences for freedom might be caused by the diminishment of property rights in the United States.