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FEE SIMPLE ABSOLUTE AS A VARIABLE RESEARCH CONCEPT

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This essay will examine whether fee simple absolute ownership should be regarded as a variable or a constant concept for research purposes considering possible new natural resource management systems in this nation. The fixity or flexibility of the fee simple absolute is too narrow a statement of the inquiry, however. The chief premise is that "property" is a constellation of highly complex adjustments of entitlements and expectations. These adjustments, the principles that underlie them and the ends they serve are constantly reexamined by all branches of government in response to perceived imperfections in the functioning of our property systems and to the emergence of felt needs that reflect societal reality and generate new formulations of sound policies and laws.

When alterations of our systems of property are seen to be needed, courts or legislatures may effect changes within the constraints and limits on their powers. This is not to say that major alterations of property systems are the constant mode. On the contrary, property systems are dominated by the conservatism inherent in the need for continuity of their major internal structure and of the principal values that they serve. Major and minor alterations do occur, however, and the major alterations occur most frequently in response to perceptions of new priorities and needs.

A MODEL OF THE AMERICAN PROPERTY SYSTEM

The basic law school course in real property serves adequately as a model for discussing the United States' property system. The threadbare metaphor of the real property course is that "property" in land is comparable to a bundle of sticks. Each stick is a major right, expectation, or freedom to use property in a particular way. In class various sticks are selected for close examination: one stick represents the ability of the owner to convey a freehold estate, another the power to lease the land, a third the right to be free of nuisances from neighbors, and another the ability to grant easements or to control the use of land through restrictive covenants. To the professor's delight and the students' dismay, each stick promptly disintegrates

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into myriad splinters of subsidiary doctrines that more amply bespeak the reality of "property" as a complex of rights. Furthermore, each stick and splinter has two troublesome ends, and some are forked. For example, the freedom of the owner to lease land immediately raises the reciprocal rights of the lessee who firmly grasps the other end of this property stick. Often a case involves the rights of the lessor, lessee, and even sublessees as well; the stick forks and perhaps forks again as more parties assert conflicting entitlements in the same tract of land.

These sticks and splinters seem a favorite whittling stock of the courts, who whittle by deciding cases; of legislatures, who whittle by enacting statutes; and of agencies, who carve in the fine details of statutory implementation. The whittling is purposive and aimed at fashioning a more effective, desirably shaped splinter or stick of rights. Though exhibiting clear pride of workmanship, no two courts or legislatures ever craft an end product of identical splinters or sticks. A New York landowner may hold rights that differ significantly from those of a New Jersey landowner.

In the first portion of the course in real property two realities are prominent. First, amidst the fierce antiquarianism of many doctrines being expounded, there appear unmistakably the growth and mutation of doctrines that have served the realities of English and American societies over the centuries. Statutes and cases trace the waxing and waning of tensions between medieval kings and peerage and the attempts of the living to free property from controls imposed by long dead ancestors. The English common law is changed by accretion over centuries of interaction between King, parliament, the courts and the perceived needs of society. In the American colonies and states, there was a purposeful effort by courts and legislatures to take hoary English doctrines and fit them to the realities of our political system and contemporary uses of property.

The fact that property systems are growing, organic social institutions is apparent during this phase of the property course. The process of growth and alteration continues with surprising rapidity at times. Within the past decade, for instance, courts in many jurisdictions have commenced a major refurbishment of the law of residential landlords and tenants in response to perceptions of the widespread abuses in urban and core city apartment rental practices.[1] Based on new perceptions of the inability of the purchaser to

1. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

accomplish meaningful inspection of a modern home, many courts in this same decade have begun to deny the home builder's ancient "freedom" to build and sell defective housing under the protective aegis of the doctrine of *caveat emptor.*[2]

Second, during the initial phase of the course emphasis is placed on determination and definition of the adversary property expectations of one individual versus another. Courts and legislatures seem to be involved in the process of maintaining and fine-tuning a massive, complex system of property rights that is generally functioning quite well. Within this system, the vast bulk of transactions are carried forward successfully. Individuals can normally exercise their property expectations and property freedoms as they wish. The government interferes minimally, making marginal adjustments in the system by statute when minor stress points arise or by judicial decision when individuals are improvident enough to cast a transaction in a form that invades known problem areas. The pervasive aura is that the system exists for the benefit and support of the transactional freedom of individual property owners. This part of the course thus has a distinctly Nineteenth Century flavor, for the unfettered exercise of individual property rights, the apotheosis of the fee simple absolute, was perhaps the hallmark of the perception of property during the Nineteenth Century in the United States. This is not to say that stability, predictability and transactional freedom of individual property rights has ceased to be a major goal of our property institutions. The contrast to be made, rather, is the one between a laissez faire approach that enabled maximum individual freedom of transaction as the *summum bonum* of our Nineteenth Century property system, and the increasing degree of governmental intervention and control that have characterized the Twentieth Century.

The Nineteenth Century zeal for free exercise of property rights ranged far beyond the uses of land. It perhaps reached its apogee concerning freedom to contract when the United States Supreme Court in the 1890's invalidated a succession of early state statutes seeking minimal protection of the lot of the working classes.[3] Blindly invoking the shibboleth of freedom to contract, the Court temporarily perpetuated the very denial of that freedom to broad classes of unorganized workers. The era's ebullient assertion of con-

2. *See, e.g.,* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Connor v. Great Western Savings and Loan Ass'n, 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).

3. *See,* Philbrick, *Changing Conceptions of Property in Law,* 86 U. Pa. L. Rev. 691, 717-23 (1938), and cases cited therein.

tractual and real property freedoms was undergirded by pervasive ideology. Philosophies of natural rights in property were especially apposite in this era, when the frontier and growing industrialization were powerful realities. These philosophies combined with the teachings of the classic economists to give a secure ideological base to extreme assertions of individual entitlement to and freedom in the exercise of property rights.[4] The popular expression of these sentiments continues to be with us, and with certain extremely important justifications. Arguably, as freedom and security of individual property rights recede in the face of increasing governmental intervention, collective values threaten to become ascendant over individual values. An ultimate question is posed concerning the extent to which the individual or the state will be subservient to the other's asserted interests.

Returning to the model of the basic course in real property, the second major phase of the course focuses on the Twentieth Century and on the government as a major, affirmative actor. The government relies on police power regulation to prevent uses of property that, it is asserted, harm the public health, morals, safety, and the general welfare. It makes overt use, and is accused of making covert use, of powers of eminent domain to acquire or damage elements of the individual's property rights in furtherance of governmental enterprise or regulatory activities. Gone is the earlier micro emphasis of the course, where government acted by courts and legislatures to maintain and fine-tune the supportive, enabling machinery of the property system. The government is now seen as an ubiquitous, regulating and enterprising actor, creating and exercising affirmative legislative schemes of pervasive impact. The government is set against the individual owner and his bundle of property rights. The arbitration processes of the courts and legislatures studied in the first part of the course often had allocative consequences comparable to those caused by the governmental systems now under examination. Most students are satisfied, however, that they are now studying fundamentally different usages of governmental power.

The pivotal legal questions in this latter phase of the course arise as courts review the exercise of governmental power in derogation of the rights of individual property owners. Is the legislature seeking licit ends? Has it chosen means that are reasonably calculated to effectuate those ends? Are individuals accorded adequate procedural safeguards against the alteration of their property rights? Are powers properly delegated to administrative agencies, and are those agencies

4. *Id.* at 710-19.

using their powers in a licit manner? Finally, have property interests of those owners affected suffered such diminution in value as to be an unconstitutional taking, absent payment of compensation? This last question arises under provisions of the Fifth Amendment to the United States Constitution and comparable state constitutional provisions which provide that private property may not be taken for public use without payment of just compensation. Lawyers refer to this clause and its consequences as "the taking issue," and the courts are the final arbiters of its mandates.[5]

THE GROWTH IN ACCEPTANCE OF GOVERNMENTAL REGULATION OF PROPERTY USE

The expansion of governmental regulation and enterprise programs in this century has frequently occasioned corresponding shrinkage in the fee simple absolute bundle of rights. Zoning is the best known example of governmental regulation of private property under the police power. Millions of owners find their bundle of rights substantially diminished when the government decrees that they may develop their property for single family residential use only.[6] Shrinkage in the bundle is matched by shrinkage in the dollar value of the land so zoned. Regulation and accompanying loss are imposed by the government for public benefit and public purpose. Yet there is no compensation available under typical systems of police power regulation. This leaves reviewing courts with the all or nothing choice that a value diminution is either an allowable consequence of the regulation, that a "taking" has not occurred, and that the regulation is valid; or that the degree of diminution is impermissible without compensation, that a "taking" has occurred, and that the regulation is constitutionally invalid.

The complexity that surrounds the "taking" question may be glimpsed from a Massachusetts case[7] in which the appellate court reviewed a regulation that precluded the owner of a 78 acre tract

5. Helpful analysis of the taking issue may be found in these articles: Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 Sup. Ct. Rev. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power,* 74 Yale L.J. 36 (1964) [hereinafter cited as Sax I], Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149 (1971) [hereinafter cited as Sax II]; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 4 S. Cal. L. Rev. 1 (1970); F. Bosselman, D. Callies & J. Banta, The Taking Issue 82-138 (1973) [hereinafter cited as Bosselman]. Bosselman contains extensive historical review and analysis of present developments and trends.

6. The landmark case is Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

7. Comm'r of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965).

from developing the 49 acres of the tract that lay within a coastal marsh. In remanding the case for a new trial on the "taking" issue, the court directed that evidence be taken concerning, among other things: the assessed value of the marshy portion for tax purposes; how much the owner paid for the marshy portion; the fair market value of the marshy portion subject to and free of the regulation; the estimated cost of the improvements proposed by the owner; the uses that could be made of the marshy portion independently of and in conjunction with the remainder of the property; and whether a "taking" had occurred if the marshy portion, as restricted, could not be used so as to yield a fair return on either the amount of its initial cost to the owner, or upon its present fair market value free of the contested restrictions.[8]

The notion that apparently validates the practice of zoning is that a rough reciprocity of advantage and disadvantage flows from the broad, moderately uniform protections and limitations created by the zoning system. The owner may be precluded from putting his lands to harmful "lower" uses, but in turn receives the assurance that his neighbors are likewise precluded. The industrial "pig" is kept in the lower use industrial "barnyard," and out of the residential "parlor" district.[9] In specific instances, of course, a "taking" may be adjudged to have occurred and the ordinance invalidated, for there is a stratum of property rights that is inviolate to the instrusion of police power regulation. Certainly the police power would not permit the state simply to usurp the title to an individual's property without compensation. Short of that result, in areas of major and minor value diminution the "taking" question is some metaphysical blend of factors including the urgency and propriety of the ends sought, the harmful nature of the uses precluded, the percentage of value diminution under a variety of tests, the level of remunerative use left to the owner, and the philosophy of the judiciary in that particular jurisdiction.

Non-regulatory government activity may also diminish the value of the bundle of property rights. The massive discomforts and value diminution visited on property owners around major military and commercial airports are not usually compensable unless the aircraft happen to fly directly over an owner's land, violating his airspace at close proximity to the ground.[10] The property right stick labeled

8. *Id.* at 111-12, 206 N.E.2d 671-72.

9. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388. The "pig in the parlor" metaphor is the Court's.

10. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

"freedom from offensive noise and vibration" is thus plucked from the owner's bundle without compensation. Many other uncompensated value diminutions result from governmental activities that range from vital to apparently marginal in terms furthering necessary public interests. In these cases the government has assertably seized or destroyed value, but the losers are not compensated, however, and in commenting on the results the lawyers and social economists may both exercise their insights.[11]

The governmental activities described above considerably curtail the Nineteenth Century bundle of fee simple absolute property freedoms. The examples given depict limitations on affirmative rights, such as occur under zoning and coastal marsh regulation, and limitations on negative rights, e.g., rights to be free from harmful externalities caused by aircraft operations. The Nineteenth Century property owner might have found the former curtailment of rights the less tolerable, and in fact the exuberant exercise of affirmative property rights often carried the corollary of externality consequences. Externalities were fewer in a less crowded, less technological society, and the Nineteenth Century emphasis was on full exercise of property freedoms with little concern or accountability for externalities. After all, was not the unseen hand taking care of that sort of problem? The great increase in the levels of externalities, in our abilities to perceive them, and in our sensitivity to them have accounted for the burgeoning of police power regulation. It is perhaps the government's desire, shared with all proprietors, to avoid paying for externalities that has resulted in some of the more poignant and perplexing litigation under the "taking" doctrine.[12] In contrast to the Nineteenth Century, no satisfactorily synoptic base of philosophy or ideology justifies the Twentieth Century's myriad programs of governmental regulation and enterprise and their "taking" consequences. This is troublesome, for broad policy restatements, if not new philosophies, may well be needed to ground and guide major redefinitions of our natural resources property systems.

GOVERNMENTAL CREATION OF PROPERTY RIGHTS

This essay will return to these thoughts, but first must allude to other inventories of property rights, for the catalogue is grossly inadequate at this point. Federal and state governments have massively entered the business of creating property by their nearly

11. *See, e.g.,* the discussion contained in Michelman and Sax II, *supra* note 5, and Coase, *The Problem of Social Cost,* 3 J. Law & Econ. 1 (1960).

12. *See, e.g.,* United States v. Willow River Power Co., 324 U.S. 499 (1945), and United States v. Fuller, 409 U.S. 488 (1973).

innumerable systems for licensing, contracting, franchising, issuing permits, conferring subsidies, and disposing of publicly owned natural resources. It would also seem appropriate to include taxation as a governmental system that both creates and destroys "property." In a celebrated article, Prof. Charles Reich draws together many forms of governmental largess under the rubric, "the new property."[13] He warns of the coercive, manipulative power that governments may attain over the citizenry by abusive processes of dispensing and withdrawing such largess.[14] The perceptions of Prof. Reich raise again the fundamental question of subservience of the individual to the state noted earlier that in major part generates the tensions surrounding the "taking" question.

Vested rights to many forms of governmental largess certainly exist, either by status entitlement to receipt, or by entitlement to continuation upon initial qualification and conferral. Vested property rights exist or are assertable under many existing systems of disposal of public domain resources. Rights in mining claims initiated under the 1872 Mining Law[15] have been characterized by the Supreme Court as property in the fullest and highest sense of the word,[16] and perhaps are truly that when the holder of a valid mining claim confronts a claim jumper. The strength of the claimant's rights has nonetheless been substantially curtailed by the federal government with the recent application of a more onerous test for initiation and holding a claim to a valuable mineral discovery. The "bet on the draw" flavor of the old "reasonable, prudent man" test has now largely been supplanted by the Supreme Court's approval of the "present profitable marketability" test.[17] It seems dubious that all unpatented mining claims could be extirpated out of hand, but it would certainly seem permissible as a condition of continuation to require that they be properly surveyed and assayed to show profitable mineralization.[18]

Public domain mineral leases are another instance of rights that are vested in some senses, although the government's sovereign power

13. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

14. *Id.*

15. Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1970).

16. Forbes v. Gracey, 94 U.S. 762 (1876).

17. United States v. Coleman, 390 U.S. 599 (1968); *but see* Converse v. Udall, 399 F.2d 616 (9th Cir. 1968) *cert. denied*, 393 U.S. 1025 (1969). The prudent man test, Castle v. Womble, 19 L.D. 455 (1894) asked whether a prudent person would continue to invest time and money with a reasonable prospect of developing a valuable mine. The present, profitable marketability test requires not reasonable hope but that the claimant is, or could be, presently marketing minerals from his claim.

18. *See* S. 3085, 93d Cong., 2d Sess. (1974), in which a comparable system is suggested.

over resources should be an adequate ground for the application of new standards for the continuation of these leases if paramount national interests require. Further, in the event some leases were terminated out of hand, the compensable "property" held by the lessees might have considerable flexibility. If out of compelling necessity the government should remove the mineral largess it has granted under certain leases, fair compensation to lessees might take the form of restitution of lessee expenditures plus interest and perhaps a compensatory sum, rather than the payment of fair market value of the leasehold.[19] This would depend on legislative definition and judicial ratification of the compensable "property" held by lessees.

To round out the picture, some federally granted resource use permits have been framed so that no legally vested rights accrue to recipients, as with the Taylor Grazing Act permits.[20] These rights may nonetheless be "vested" in a practical sense, as has often been asserted of grazing permits. Rights may also be "vested" in a political sense. Their holders may have the political clout to enforce trade-offs or compensation within legislatures as a condition to the modification or termination of rights, even though no compensation might be enforceable as of right within the courts.[21] When commodity interest groups act in consort with their administrative agency patrons, their power is formidable indeed.

Any discussion of "property" in broader senses is unrealistic without mention, if not thorough exploration, of the patterns and powers of its tenure. Various authors[22] have remarked upon the extremely efficient aggrandizement of wealth within the control of corporations, the split of "ownership" into the diffuse and passive ownership of shareholders, and the active management ownership by the hierarchy of hired corporate management.[23] The property base of corporations and corporate interest groups gives them powerful voice in the formulation of national policies. This is also true throughout the range of natural resource policies. The recent and amazingly rapid achievement of near hegemony by the transnational

19. *See* text at note 8 *supra,* where some elements of such an approach are suggested as determinants of the "taking" issue.

20. 43 U.S.C. § 315b (1970), *see also* United States v. Fuller, 409 U.S. 488 (1973).

21. The government may choose to make payment where a move is compulsory. The Supreme Court in United States v. Willow River Power Co., *supra* note 12, held no taking had occurred, but Congress nonetheless made payment for the damage inflicted, Priv. L. No. 378, c. 32, 64 Stat. A13 (1950).

22. *See, e.g.,* A. Berle & G. Means, The Modern Corporation and Private Property (1932), and Berle, *Property, Production and Revolution,* 65 Colum. L. Rev. 1 (1965).

23. Berle, *supra* note 22, at 12-18.

corporations creates yet a further echelon of property tenure and power that may stretch or exceed the ability of any one nation to control.

By now we have seen that "property" is a complex of systems, any one of which is at least moderately manipulable to achieve societal goals. Fee simple absolute, the bundle of sticks initially discussed, is a small part of much larger bundles that more closely resemble a bramble bush. Fee simple absolute is a useful concept to retain at a prominent level, however, for it conjures up the central theme of the autonomous individual set against the collective ethic of public welfare.

LEGISLATIVE AND JUDICIAL MODIFICATIONS OF FEE SIMPLE ABSOLUTE

The workings of some basic natural resources policies pursued by courts and legislatures are clearly visible in litigation concerning modification of the fee simple absolute. The cutting edge of the law is applied in areas of perceived needs, to the effectuation of desired policies of the society within which the law functions. As the emergence and perhaps urgency of needs accelerates, so too must the law's response. Accelerating the pace of wise and appropriate response to problems may be the most crucial difficulty that confronts us. The response must be couched in terms of policies and priorities for new action, bolstered by a pervasively held modern ideology comparable to that which grounded the mystique of fee simple absolute in the Nineteenth Century United States. The impetus for these new policies and priorities comes largely from outside the law as abstract doctrine. It comes from the perceptions and contributions of the various disciplines represented at this symposium and from the larger citizenry. Policies and priorities will finally be established in legislatures, with many craftsmen, including lawyers, engaged in the formulation of the specifics of definition and effectuation.

Within the reservoir of legal doctrines are many that may provide insight and stimulate thought in the quest for new policies and priorities. Research into the bases of these doctrines and clear articulation of their dimensions are threshhold contributions that the legal discipline can make. The recent book, *The Taking Issue,*[24] is a major example of this sort of contribution. A few doctrinal areas deserve mention as further illustration of the conceptual contributions the

24. Bosselman, *supra* note 5.

law may make to the better formulation and resolution of our resource dilemma.

One of the most venerable maxims of the common law is, "So use your property as not to injure the property of others." This saw immediately calls to mind the doctrines of nuisance and the widespread forms of pollution regulation recently undertaken. Underlying these regulatory developments is an expanded comprehension of the meanings of the maxim. "Injury" is now perceived as the ubiquitous and cumulative abuse or depletion of various major components of the environment. These components, be they watershed, airshed, global climate, or genetic banks, are now understood as corruptible and often destructible supply stocks. They are perceived as such within both present tense and futurist time frames, with affiliated externality and opportunity costs.

Over the centuries the courts, on their own initiative and in interaction with legislation, have created doctrines that deal partially with externality and opportunity costs. These doctrines might be fashioned into more comprehensive responses to the problems that now beset us.

Relevant judicial doctrine in this area may be best understood as rules of accountability for the consequences of property decisions. Nuisance doctrine casts accountability between property owners substantially in the present tense. If one owner's use of his property is immediately injurious to the use and enjoyment of another's, the injured party may perhaps obtain both monetary damages and an injunction against continuation of the nuisance.[25] Social economists have commented informatively on the trade-offs that are implicit but often ignored in judicial resolution of nuisance situations.[26] Furthermore, where legislatures act to curb nuisance situations, courts seem to be more lenient towards the destruction of substantial value in the hands of the perpetrator of the nuisance.[27]

Perhaps of more interest here are doctrines that relate to accountability between property interests over time. Sequential interests, such as the present interest of the holder of a life estate (the life tenant) and the holder of the successor interest (the remainderman)

25. In Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), however, the New York Court of Appeals awarded "permanent" damages to a nuisance plaintiff, and apparently said it would henceforth issue few nuisance injunctions, leaving the business of regulation to administrative agencies.

26. Coase, note 11, *supra* note 11; *see also* Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 Stan. L. Rev. 1 (1968), and similar articles in the same volume.

27. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard in residential neighborhood closed: uncompensated value diminution from $800,000 to $60,000 upheld as not constituting a "taking").

were well-known to the common law. In such narrow common law areas, and then more broadly in response to legislative enactments, the judiciary was called upon to consider the interests of posterity. The courts fashioned the doctrine of waste to balance the desires of the life tenant to make productive use of property against the remainderman's desire to receive the property in substantially unimpaired condition. As a general rule in this country the doctrine of waste required that the life tenant not cause or permit material decrease in the value of the property, and that he use good husbandry in managing the property.[28] In some senses we all are at most life tenants of the nation's renewable and nonrenewable resources and should feel bound by the responsible obligations of stewardship that are the essence of the doctrine of waste.

The futuristic vision implicit in the doctrine of waste has been applied beyond the context of the life tenant and remainderman by a variety of ancient and modern statutes that sought waste prevention as their primary goal. The long term societal interest is that stocks of natural resources not be improvidently depleted or destroyed. Successor generations are seen as remaindermen, and present holders of fee simple absolute are essentially characterized as life tenants. Profligate, needlessly destructive or consumptive use by present owners is thus seen as an impermissible destruction of the patrimony of future generations. One court phrased it thus:

> Edmund Burke once said that a great unwritten compact exists between the dead, the living, and the unborn. We leave to the unborn a colossal financial debt, perhaps inescapable, but incurred, nonetheless, in our time and for our immediate benefit. Such an unwritten compact requires that we leave to the unborn something more than debts and depleted natural resources. Surely, where natural resources can be utilized and at the same time perpetuated for future generations, what has been called "constitutional morality" requires that we do so.[29]

Such concepts appear in limited areas of natural resources legislation and judicial precedent. These could be expanded quite readily into a broadly operative basis for policies and controls over natural resources use. In 1949 the Washington Supreme Court reviewed a statute that required persons engaged in commercial logging operations to make provisions for reforesting logged areas.[30] A sole dissenting justice viewed the case as involving an intolerable invasion

28. 56 Am. Jur. *Waste* § § 2, 6, 18, 26 (1947).

29. State v. Dexter, 32 Wash.2d 551, 556, 202 P.2d 906, 908, 13 A.L.R.2d 1081, 1086, *aff'd mem.*, 338 U.S. 863 (1949).

30. *Id.*

of sacred fee simple absolute property rights by the state acting in an odiously paternalistic manner better befitting an emperor or czar.[31] The state argued that although an individual may receive title to a tract of land and its resources from the government, the government nonetheless retains sovereignty over that tract and its resources.[32] The majority of the court affirmed this broad proposition, quoting a famous formulation of the Maine Supreme Court:

> . . . the amount of land being incapable of increase, if the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one of the great purposes of government defeated.[33]

The Washington court concluded that the statute under review was a valid exercise of the state's police power in prevention of the waste of its resources.[34]

In the regulation of oil and gas production by pooling and unitization statutes, legislatures have decreed and courts have approved even more substantial abridgements of the fee simple absolute concept of ownership rights and freedoms.[35] These statutes aim at curbing the immense, multiple wastes that accompanied early oil and gas production practices. The wastes consisted of rapidly depleting connate reservoir energy, leaving in place much oil or gas that might have been naturally produced by better production practices, venting gas into the atmosphere, and producing beyond market demand to the point that prices collapsed. Further, once it was held that all owners overlying a pool of oil or gas had correlative rights in its production, seizure of a disproportionate share by any individual was deemed a violation of those correlative rights.[36] These doctrines were later broadened to form a major basis for statewide and national regulatory allocation of oil and gas production.[37]

The courts have approved regulatory consequences of pooling and unitization statutes as severe as that requiring an owner, unwilling to join in a production agreement, to become a compelled lessor of his oil and gas, receiving only the conventional one-eighth owner's lease

31. *Id.* at 563-70, 202 P.2d at 912-16, 13 A.L.R.2d at 1090-95 (dissenting opinion) (His epithets, not mine).

32. *Id.* at 13 A.L.R.2d 1083 (syllabus of state's argument).

33. *Id.* at 557, 202 P.2d at 908-9, 13 A.L.R.2d at 1087, *quoting In re* Opinion of the Justices, 103 Me. 506, 511, 69 A. 627, 629 (1907).

34. State v. Dexter, 32 Wash.2d 551, 561, 220 P.2d 906, 911, 13 A.L.R.2d 1083, 1090 (1949).

35. *See,* Carmichael, *Transferable Development Rights as a Basis for Land Use Control,* 2 Fla. St. L. Rev. 35, 85-98 (1974), and citations therein.

36. *Id.* at 77-83.

37. *Id.* at 85-98.

royalty from production.[38] In another case, the United States Supreme Court upheld a statute of the Wyoming legislature which in effect ordered cessation of use of natural gas to produce carbon black, in preference for its long term use as a fuel.[39] The decision upheld the authority of the legislature to give preference to one alternative use of a resource over an extended period of time, even though this legislatively decreed preference destroyed the rights and properties of the carbon black producers and apparently put them out of business.[40] The Court said:

> . . . necessarily there was presented to the judgment and policy of the State a comparison of utilities which involved, as well, the preservation of the natural resources of the State, and the equal participation in them by the people of the State. And the duration of this utility was for the consideration of the State, and we do not think that the State was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.[41]

Aside from oil and gas, where tracts of land in the hands of individual owners share a potential for common development, legislatures have enacted and courts approved statutes that artificially "pooled" the individual tracts to the often substantial extent that is necessary to effectuate the desired common use. The use might otherwise have been blocked by dissident landowners, and thus "wasted" in the different sense of development potential foregone. Such statutes have enabled milldam proprietors to erect dams and cast waters onto the lands of upstream owners upon payment of compensation,[42] and have enabled drainage and irrigation districts to levy assessments on the lands of all owners within the districts, whether individual owners desired receipt of drainage or irrigation benefits or not.[43] Actual and potential abridgement of individual property rights under these systems was extreme.[44] Widespread control of resource use may again raise possibilities for applying these pooling and regulatory concepts.

38. Anderson v. Corporation Comm'n, 327 P.2d 699 (Okla. 1957), *appeal dismissed,* 358 U.S. 642 (1959).

39. Walls v. Midland Carbon Co., 254 U.S. 300 (1920).

40. *Id.* Putting certain producers out of business in regions of Indiana was also the apparent consequence of the form of police power regulation approved in Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

41. Walls v. Midland Carbon Co., 254 U.S. 300, 324 (1920).

42. Carmichael, *supra* note 35, at 58-66.

43. *Id.* at 66-77.

44. *Id.*

CONCLUSION

Implicit in all these regulatory systems is the legislative perception that special intervention was required to secure wise and productive use of certain stocks of resources over time. In periods of particular stress, legislatures have moved to make fundamental modifications of property rights that are perceived as being used contrary to the public good. Instances include pervasive rent controls during and after World War II[45] and the mortgage moratoria passed by many state legislatures during the depths of the Depression.[46] Since the nation is now in a period of particular difficulty concerning our use of resources, research into legislation induced by stress and emergency at other times should be provocative and helpful. Moreover, elements of the venerable public trust doctrine might be broadened and refurbished into suitable legislative and judicial approaches toward these difficulties.[47]

The opposite of public interest in many of the cases and statutes mentioned was that resource uses created heavy present and future externalities and opportunity costs. In this society where property systems are intimately interrelated and permeated by governmental support and regulatory structure, major externality webs emanate from all resource use decisions of any considerable individual or collective magnitude.[48] In a few recent cases the courts have approved police power regulation that in specific cases forbade any development of property where externality consequences were high and strong public policies were involved.[49] Substantial curtailment and deferral of development is also permissible within the outer reaches of the police power.[50] Widespread use of such systems may come to be a pressing need. And certainly within our system of numerous subsidies, largess privileges, variable tax consequences and

45. *See generally,* Am. Jur.2d *Landlord & Tenant* § § 1248-52 (1970).

46. *See generally,* Am. Jur.2d *Mortgages,* § § 940-62 (1971).

47. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 473 (1970). This article gives thorough treatment of contemporary treatment of the doctrine. And there is authority that the United States holds public domain in trust for the people of the nation. *See* United States v. Trinidad Coal Co., 137 U.S. 160, 170 (1890).

48. *See* Sax II, *supra* note 5, at 151-61.

49. *See, e.g.,* Just v. Marinette County, 56 Wis.2d 7 201 N.W.2d 761 (1972) (marsh fill); Potomac Sand & Gravel Co. v. Governor, 266 Md. 358, 293 A.2d 241, *cert. denied,* 409 U.S. 1040 (1972) (dredging sand and gravel); and Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), *cert. denied* 409 U.S. 1108 (1973) (flood plain development).

50. Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972).

so forth, major systems of rigorous regulation and partial compensation may come into widespread use.[51]

In conclusion, the fee simple absolute and its mystique operate at one level as a bulwark of policy and understood rights that set the individual apart as an entity inviolate by overweening acts of the state. At another level, fee simple absolute is a highly modifiable bundle of rights that may be substantially diminished in the protection and furtherance of the collective well-being. The law as a discipline could well undertake more systematic research into the historic formulations of public values served by governmental intervention within our property systems and the permissible dimensions of the alteration that may be caused within those systems. Such research would suggest guideposts to the future and would provide needed illumination for the national debates over resource policies that will well serve our complex and changing interests.

51. A court grafted compensation onto police power regulation in Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968). *See also* Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. Pa. L. Rev. 179 (1961).