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# Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis\*\*

## ABSTRACT

*Conventional wisdom asserts that after a century of disposition, Congress changed course and began retaining land in federal ownership during the Progressive Era. This "shift narrative" shapes our understanding of conservation history and federal land holdings in the Western United States. Unfortunately, it is largely incorrect. We propose an alternative narrative that emphasizes instead a fragmentation of policy. Fragmentation grew in part out of changes in the nation's political economy after the Civil War. Expanding central government power in some cases underwrote federal ownership of natural resources. However, the diverse priorities of increasingly effective corporate interests and scientific/professional groups assured a fragmentation of policy. Fragmentation also blossomed when Progressive Era theories of property began to gain support. These more social and utilitarian views of ownership did not replace their Lockean antecedents, but simply supplemented and confused American ideas of ownership. The result to this day is a conflicted vision of property that suggests to us a need for a more dialectical analysis of property rights along the lines of G.W. Hegel. The final part of the article details a revisionist history of public domain policy based on the political-economic changes just described. Rather than a sudden or incremental shift to retention, we describe a wide variety of policy decisions. Among these are choices to strongly retain some selected lands, retain and later dispose of others, weakly retain some lands, split the estates of still others, and only nominally retain a good portion of the remainder. We conclude that the idea of a shift to federal ownership conceals the diverse public domain tenure*

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*arrangements and makes meaningful conversation about historic policies and future paths more difficult. Better understanding of both the political-economic setting and the ideas of property of the period, we argue, will help us to better understand the resulting policies as they affect the present day.*

## I. INTRODUCTION

### A. Goals and Structure of Paper

The received wisdom tells us that near the close of the nineteenth century, after more than one hundred years of granting and selling land to raise money and to encourage orderly settlement of the western territories, the federal government reconsidered. It decided to retain at first selected lands, and then, essentially, all public domain lands in federal ownership. This reorientation of policy is typically portrayed as a "shift" from land "disposition"<sup>1</sup> to land "retention." It is generally described as a decision by the wise men of government to stop the pillage of our common heritage and to scientifically manage those lands remaining in federal ownership for conservation purposes.<sup>2</sup> The standard "shift-to-retention" story, as we will

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1. In this article, we are not going to concern ourselves much with the problems in the construction of "disposition" or the "disposition era." However, an argument could be made that the glossing of the cash and credit sales, preemption, grants to states and corporations, and free land elements of the disposition era is not reasonable. Much of the land passed to the states was not, for example, entirely disposed of—it remains under state management. See JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LAND: HISTORY, MANAGEMENT, AND SUSTAINABLE USE* 6, 18-24 (1996). For build up on the homestead act see, e.g., HELENE SARA ZAHLER, *EASTERN WORKING MEN AND NATIONAL LAND POLICY, 1829-1862* (1941). For detail on the disposition era policies, see PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968).

2. The classic "aha" story is Gifford Pinchot's formulation of his now-famous horseback ride through Rock Creek Park: "The forest and its relation to streams and inland navigation, to water power and flood control; to the soil and its erosion; to coal and oil and other minerals; to fish and game; and many another possible use or waste of natural resources....Here were not isolated and separate problems....Here were no longer a lot of different, independent, and often antagonistic questions, each on its own separate little island, as we had been in the habit of thinking. In place of them, here was one single question with many parts. Seen in this new light, all these separate questions fitted into and made up the one great central problem of the use of the earth for the good of man." GIFFORD PINCHOT, *BREAKING NEW GROUND* 322 (1947) [hereinafter BNG]. Pinchot credits himself with having discovered *conservation*, a whole new way of thinking about the world. See *id.* But he also clearly expressed the driving image of his confreres in the Roosevelt administration: "the crux of the gospel...lay in a rational and scientific method of making basic technological decisions through a single, central authority." SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920*, 271 (1959).

refer to it, thus depicts a clear change in policy direction, generally presented with strong moral implications.

The purpose of this article is to reconsider this standard narrative regarding changes in public land law and policy at the turn of the century. Much of the narrative is misleading in ways that are of great importance to current debate. The monolithic nature of the term "retention" masks a wide variety of policies and tenure arrangements that presently operate on the public lands. The moral power of the asserted "shift" obscures multiple and conflicting motivations behind the diverse policies enacted in a way that prevents clear discussion and understanding of many public land conflicts to the present day.

We believe it is important to understand the "shift-to-retention" story because we are among those who believe that narratives have power in law,<sup>3</sup> in policy definition and analysis,<sup>4</sup> and in decision making.<sup>5</sup> Policy stories tell us what the problem is, who caused it, whether things are improving or disintegrating, and what to do about it.<sup>6</sup> They are especially useful when the conditions for policy making are uncertain, complex, or difficult to explain. We argue that the "shift-to-retention" story is a useful summary of one side—the Progressives—in a complex and protracted debate. But, like any tale told by a passionate advocate, it is a poor guide to what actually happened and why. Without doubt, the narrative has had a powerful grip on public domain policy and the conservation movement, more generally, throughout the twentieth century. We do not cavil at the simplifications of the "shift-to-retention" narrative *per se*, for it is a model and *perforce* must simplify the reality it represents. Our objections to the "shift-to-retention" tale arise from the core ideas and events that are omitted, concealed, and distorted therein. Those inaccuracies confound our understanding of both historic and current choices. Therefore, we believe an improved story is needed.

We propose to weave a different tale in which policy does not shift in unity but rather fragments. In our account, public domain policy does not manifest a single coherent vision, but splits onto a number of frequently incompatible paths, reflecting different combinations of ideas about the nature of government, the nature of ownership, and the economic and environmental priorities for developing specific resources. There was no single moral direction or guiding light to these multiple

3. See, e.g., CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* ch. 2, at 25-45 (1994).

4. See, e.g., EMERY ROE, *NARRATIVE POLICY ANALYSIS: THEORY AND PRACTICE* (1994).

5. See generally Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 *POL. SCI. Q.* 281 (1989); William Cronon, *A Place for Stories: Nature, History and Narrative*, 78 *J. AM. HIST.* 1347 (1992).

6. See Stone, *supra* note 5, at 282.



policies. Instead, multiple visions of ownership and equity engendered multiple and conflicting policy solutions.

We present our revised narrative in five sections. Part I will clearly identify our target—the “shift-to-retention” story as it has appeared in the literature over the years. We will observe the standard narrative in its original telling and as it continues to shape our understanding of public resource management and institutions. The bulk of the article will consider the details of Progressive Era public domain policy with an increasing specificity. Two subsequent sections will put the standard story into the wide-angle context of social, political, and intellectual forces of the same era. Because our narrative focuses on two basic elements, government and land ownership, we will first focus our attention on late nineteenth century elaboration and diversification of ideas about (1) the role of government, and (2) the role of property in American society. This recitation of ideas in conflict and transition attacks the “shift-to-retention” thesis indirectly. We simply wonder why—in a period in which basic assumptions about the role of government in society and the economy, the appropriate form of democratic decision making, the nature of property, and the meaning of land ownership were all undergoing fundamental reorientation—would anyone suppose that public land policy, at a key intersection of those ideas and forces, would emerge expressing a single clear theme? More specifically, both sections identify some lines of fracture along which we argue that public land policy fragmented.

Part II is broad, discussing major changes in the economic and social context of government action that set the stage for public domain policy fragmentation. Although some of the discussion is familiar, we retell the story for two reasons. First, public land law and policy is frequently overlooked or underplayed in general histories. When the public domain story is told, it therefore tends to be experienced in relatively pure bites, as environmental or conservation history, as if public land law were separate from, or could be understood apart from, the rest of the nation and the world in the nineteenth century. Context is needed. Second, the Progressive narrative about government, especially regarding the central role of the federal government, has emerged in recent times as either inevitable or, more recently, the way things always were. We need to understand the contingent nature of what was self-evident to Progressive advocates because many of those contested assumptions are coming under intense reconsideration in our own time.<sup>7</sup> Our effort to make those points will

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7. Our favorite example is the treatment of the early acquisition of the public domain in GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW*, 45-46 (3d ed. 1993). The authors, determined advocates of federal authority over federal land, ignore the state cessions and the agreements made with the states during the 1780s regarding the

focus on four very much related elements: (1) the emergence of the federal or central level as "the" government, and a growing sense of a continental nation;<sup>8</sup> (2) the rise of administrative science and scientific management as the core element of democratic decision making; (3) the rise of a national economy; and (4) the conflicted relationship between government and the modern business enterprise. Our discussion emphasizes the importance of late nineteenth century German ideas in underwriting many of these changing attitudes about government.

Part III focuses closer attention on one aspect of the diversification of ideas and programs that is especially relevant to the public domain: changes in thinking about property. We describe a complex amalgam of ideas about ownership that evolved both prior to and during the Progressive Era. New property theories specifically did not displace the Lockean notions of property expressed in early American nation building. Rather, in the altered social and political climate of the nineteenth century, American ideas of property fragmented. While we continued to embrace Locke, most transparently in the intensifying deference to homesteaders and "actual settlers,"<sup>9</sup> we also began adding new and quite different ideas more appropriate to the rise of the corporation and the nation. Our discussion emphasizes a broadening of what can be owned and who can own it; a broadening of what the idea of ownership entails, including a growing separation of title from control, which is central in public domain policy; and an expansion in the ends that a property system serves. These newer notions of property underwrite much of the fragmentation in public domain policy. We also suggest the relevance of a Hegelian theory of property to our fragmentation thesis. We underscore that we are not talking about an incremental broadening of ideas about property, or some old ideas and some new that dilute each other into a sloppy middle ground between Locke and Progressive Era thinkers such as Morris Cohen. We are talking about a fragmentation of ideas and policies, a simultaneous pursuit of incompatible notions. Hegel's framework for understanding property tries to encompass the contradictions that we see expressed in American

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public domain and begin the acquisition process with the Louisiana Purchase. *See id.*

8. See Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 502 (1984) (discussing the federal government as privileged in the public lands context).

9. We use the term "actual settler" frequently and should point out that we mean by it a person, not necessarily a male or a citizen, who enters the public domain with the intent of working the land her or himself. Dispositions to actual settlers can be distinguished from sales to land speculators (although "actual settlers" also speculated in land), and grants to states and corporations, such as railroads. The basic distinction we make reflects the Lockean notion that an actual settler intends to possess the land by mixing his or her sweat with it. *See infra* text accompanying notes 312-22.

ideas about property and in the core fissures of public domain policy. We suggest that his ideas provide a useful way to view the current situation on much of the public lands.

Part IV turns specifically to the issue of public land law and describes in detail the three forms of fragmentation that constitute our thesis. Our narrative starts shortly after the Civil War, focuses on the period between 1890 and 1916, and concludes with the Taylor Grazing Act of 1934.<sup>10</sup> In our retelling, we supplement the standard "shift-to-retention" story with enough caveats, complications, and counter-narratives to establish the plausibility of our fragmentation hypothesis as described above. While some lands were effectively retained by government during this period, many more were not, including vast areas of minerals and grazing land that are typically described as retained. Government control over these resources also splintered into numerous distinct agencies and bureaucracies, with internal feuding and antagonistic policy agendas often being the result. And finally, we show that the resources themselves were increasingly carved apart by policy and institutional fragmentation. All of this fragmentation was heavily influenced by the social/political changes described in Parts II and III.

Part V draws some theoretical and practical implications from our rejection of the "shift-to-retention" model in favor of the fragmentation story. It summarizes the forms of policy fragmentation we describe and uses them to build an alternative framework for discussing public domain policy and law. We conclude that our present public land policies are not the residue of a retention program, but rather a complex bundle of mutually incompatible programs, each reflecting different ideas about government, property, and the exacting priorities of professional groups and their constituents. We suggest that focusing on eras in which a particular policy dominates discussion, and which are often inscribed as good and evil, creates enormous barriers to understanding both where we are in public lands law and policy and how we got here. Our ability to understand policy history and engage in policy debate would be enhanced by an explicit focus on entitlements. By this we mean an appreciation of the familiar Lockean and Progressive elements of our inheritance, and also an understanding of their continuing incompatibility. The nation's century-long unwillingness to fully embrace or eschew either is characteristic of programs which operate on the vast majority of public lands and is well expressed in the approach to property and government described by Hegel.

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10. See generally E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES, 1900-1950* (1951). Pepper is the best source on the Taylor Grazing Act as the end of the relevant period.

## B. The Standard Story Recounted

It is important to have some clear targets before we start shooting. What is a "shift-to-retention," and how is this theme encountered in the literature? What were the problems that retention advocates perceived, what did they advocate, and how has the "shift-to-retention" been presented, at the time it ostensibly occurred, and to subsequent generations?

### 1. The Problem

In the standard story,<sup>11</sup> the "shift-to-retention" policy addressed two basic problems, namely waste and greed. Although greed continues to generate most of the soaring rhetoric about the nineteenth century, waste was a major focus of attention. Benjamin Hibbard's 1924 classic *A History of the Public Lands Policies* described the situation:

[A] great number of men prominent in politics, educators, editors, and others of public spirited character became suddenly awakened to the patent fact that the natural resources of the country could not be lavishly used, and wantonly wasted indefinitely without great danger of ultimate disaster.<sup>12</sup>

Noting, for example, that the American public viewed coal and energy resources as "inexhaustible," Gifford Pinchot, that ubiquitous Progressive Era icon, complained that even in the face of dwindling reserves, only five percent of the coal actually mined was used. Similarly, even after many oil and gas fields had already failed, "vast amounts of gas [were] poured into the air and great quantities of oil into the streams."<sup>13</sup> More characteristically, Pinchot was appalled by the waste caused by forest

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11. The literature is, of course, endless. Our discussion below features Gifford Pinchot, a prolific writer and reasonable exemplar of the era, with a supporting pastiche of commentaries, including PEPPER, GATES, HAYS, CLAWSON, DANA AND FAIRFAX, HIBBARD, ISE, LOOMIS, ROBBINS, AND UDALL. See, e.g., MARION CLAWSON, *UNCLE SAM'S ACRES* (1951) (written while Clawson was Director of the BLM) [hereinafter *UNCLE SAM'S ACRES*]; MARION CLAWSON & BURNELL HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957); Marion Clawson, *Reassessing Public Lands Management*, in *PRIVATE RIGHTS AND PUBLIC LANDS* 17 (Phillip N. Truluck ed., 1983) [hereinafter *Reassessing*]; SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* (2d ed. 1980); BENJAMIN HORACE HIBBARD, PH.D., *A HISTORY OF THE PUBLIC LAND POLICIES* (1924); JOHN ISE, *THE UNITED STATES FOREST POLICY* (1920); JOHN B. LOOMIS, *INTEGRATED PUBLIC LANDS MANAGEMENT: PRINCIPLES AND APPLICATIONS TO NATIONAL FORESTS, PARKS, WILDLIFE REFUGES, AND BLM LANDS* (1993); ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936* (1942) and STEWART L. UDALL, *THE QUIET CRISIS* (1963).

12. HIBBARD, *supra* note 11, at 472.

13. GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 7 (1910) [hereinafter *THE FIGHT*].

fires; failure to replant after harvest; and failure to protect soil, water, and waterways on which our prosperity depended. Waste was rampant.

The greed was of two varieties, general and corporate. Pinchot noted that "[f]ew passions of the human mind are stronger than land hunger,"<sup>14</sup> and the "superb practical optimism" of the American people led them to a short-sighted inability to plan for future resource needs.<sup>15</sup> The common man required uncommon leadership. However, the progressive conservationists focused their ire on corporate greed and monopolies. Roy Robbin's classic *Our Landed Heritage: The Public Domain 1776-1936* concluded that at the turn of the nineteenth century,

a few thinking men beg[an] to realize that the nation's natural resources were being exploited in such an alarming fashion that the time was near when these vast sources of wealth would be completely under the control of a few individuals who had no regard for their proper utilization....The agency most responsible for this exploitation was not the individual farmer who typified the earlier period of American history, but the corporation which with abundant capital at its disposal was able to appropriate large areas of valuable land and often to exact an exorbitant tribute from the people who were attempting to build up the civilization of the country...[T]he abuses which accompanied the corporate exploitative processes were such that many persons began to wonder if the very foundations of democratic America were not in danger.<sup>16</sup>

## 2. *The Solution—Public Land Retention and Scientific Management*

The Progressive Era solution to the problems of waste and greed was twofold: government land retention and scientific management. The basic notion of land retention contained two elements: an end to disposition of land and resources, hence permanent government ownership of the land; and thereafter, increasingly aggressive federal acquisition of title, jurisdiction, and management control.<sup>17</sup> Government retention and management of land was widely described as the necessary first step in addressing waste and greed.

Arthur Newton Pack, for example, wrote in 1923 that central government ownership of forested lands was the "sole remedy" for a number of reasons: "first, because the government, being a continuing

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14. *Id.* at 13.

15. *Id.* at 4-5.

16. ROBBINS, *supra* note 11, at 301.

17. See *Reassessing*, *supra* note 11, at 20-21.

entity, can alone afford to hold land long enough to await the second growth timber crop; and secondly, because lands thus held may be protected from fire without encountering the much mooted question of conflicting authority."<sup>18</sup> Jonathan Ise discusses the "necessity" of government ownership in terms of obviating the fears of artificial price controls, stability in the lumber market, reduced waste, and provision for proper reforestation.<sup>19</sup> Luther Gulick, himself a major figure in the emergence of scientific management theory, described the retention program as a "road to salvation." Writing in 1951, Gulick viewed the program as defined by "an unconscious 'export of technology,'" from Western Europe advocating "positive governmental action including the retention of a large part of the public domain forever as a forest preserve."<sup>20</sup>

Land retention was first and foremost intended to provide support for *actual settlers* on the public domain. This fact is almost always obscured, both by end of the twentieth century environmental advocates who want to present the "shift-to-retention" story as a move toward preservation, and by the progressive land managers themselves, whose reach for land to manage far exceeded their grasp. Nevertheless, Gifford Pinchot reminds us forcefully that "[t]he single object of the public land system of the United States...is the making and maintenance of prosperous homes."<sup>21</sup> The future of the nation was, in this view as in Jefferson's, tied to the special characteristics of the small holder and avoidance of foreign systems of tenantry.<sup>22</sup>

The most valuable citizen of this or any other country is the man who owns the land from which he makes his living. No other man has such a stake in the country. No other man lends such steadiness and stability to our national life. Therefore no other question concerns us more intimately than the question of homes. Permanent homes for ourselves, our children, and our Nation.<sup>23</sup>

Herein we observe a fundamental rift within the Progressive vision. Although Pinchot vowed to stand for the actual settlers as long as he "had the strength to stand for anything,"<sup>24</sup> he nevertheless generally opposed proposals that opened land within forest reserves to agricultural

18. ARTHUR NEWTON PACK, *OUR VANISHING FORESTS* 110 (1923).

19. See ISE, *supra* note 11, at 366-68.

20. LUTHER HALSEY GULICK, *AMERICAN FORESTRY, A STUDY OF GOVERNMENT ADMINISTRATION AND ECONOMIC CONTROL* 11-12 (1951).

21. THE FIGHT, *supra* note 13, at 11.

22. See *id.* at 13-14. Compare Thomas Jefferson on the *Agrarian Ideal*, 1787, in MAJOR PROBLEMS IN AMERICAN ENVIRONMENTAL HISTORY: DOCUMENTS AND ESSAYS 141, 141-42 (Carolyn Merchant ed., 1993).

23. THE FIGHT, *supra* note 13, at 21.

24. *Id.* at 30.

homesteading. This straddle was justified by the Progressive's view of science as essential. The theory seemed to be that wise management of the water, timber, and other natural resources on the reserved lands would support home building on the *unreserved* public domain.<sup>25</sup>

Science was the key element of this wise management. Again, from Pinchot: "The first duty of the human race is to control the earth it lives upon."<sup>26</sup> According to the Progressives, the essential element of this control was comprehensive, integrated, government-led resource development and management. This embrace of science was first and foremost a reflection of a growing belief in scientists' ability to control the natural world and bend it to human will.<sup>27</sup> Some naysayers, Pinchot noted, had once believed that fires were acts of God, which came in the natural order of things. In 1910, scientific foresters knew better. "To-day we understand that forest fires are wholly within the control of men."<sup>28</sup>

But the embrace of science also reflected Progressive Era beliefs about legitimate and efficient decision making. Progressives were generally suspicious of the disruptive and potentially dangerous political process. Deeply impressed by the social upheavals and economic struggles of the late nineteenth century, they believed that social and economic problems should be addressed by "experts who would undertake scientific investigations and devise workable solutions."<sup>29</sup> Many early commentators on Progressive Era conservation evinced a generic dismay at Congress' complicity in what they viewed as the evils of the nineteenth century disposition programs. The inability of Congress to deal intelligently with the nation's public resources was caused in part, according to Jonathan Ise, by "the inability of Congress to pursue an intelligent policy regarding anything."<sup>30</sup>

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25. Compare Peffer's discussion of Pinchot dragging his feet on opening national forest land to homesteading until he realizes that failure to make some concessions threatens the reservations more generally, PEFFER, *supra* note 10, at 325, with Pinchot's description of his own activities: behind his back the U.S. Geological Survey had approved some national forest land for homestead entry which was neither suitable nor intended for agriculture and "passed promptly and fraudulently into the hands of lumbermen." BNG, *supra* note 2, at 321.

26. THE FIGHT, *supra* note 13, at 45.

27. See generally GEORGE PERKINS MARSH, MAN AND NATURE (1864) (frequently and inaccurately discussed as a paean to preservation, when in fact, it is a celebration of the ability of science to define effective control over the natural world).

28. THE FIGHT, *supra* note 13, at 45.

29. HAYS, *supra* note 2, at 267. See also *id.* at 264-71. See generally Louise P. Fortman & Sally K. Fairfax, *American Forestry Professionalism in the Third World: Some Preliminary Observations*, ECON. & POL. WKLY., Aug. 12, 1989, at 1839 (explaining that science privileged college education as against on-the-ground experience, and proceeded on the assumption that locals were simply self-serving exploiters rather than knowledgeable managers of a resource).

30. ISE, *supra* note 11, at 371.

Yet, the same commentators had to deal with legislation that was central to their narrative. Incredibly, what usually happened was the story line blurred and the narrator simply asserted that there was no meaningful process or history behind the congressional action. The 1891 forest reservation authority was, according to Stewart Udall, "apparently innocuous, and its potential did not penetrate the minds of the adjourning members. Committees had not considered it; its adoption contravened the rules of both Houses; it was not debated;...[A]s a piece of legislation, it was a fluke: one of the most far-reaching conservation decisions ever made was ironically consummated in half-hidden haste."<sup>31</sup> Whatever "good" happened in Congress was either an accident or a miracle.<sup>32</sup>

The scientific orientation of the Progressives was not, however, exclusively oriented toward government decision making. Samuel P. Hays described the scientific element in terms of greater efficiency—foresight and planning that would direct human affairs, both public and private. Hays noted that the Progressive Era government officials maintained close contact with the burgeoning engineering and other professional societies, and were advocates of more efficient mining methods and use of by-products from iron and steel manufacture.<sup>33</sup>

In spite of the technological transformation that was taking place throughout society, the conservationists argued that the only way to achieve rational, comprehensive, scientific decision making was on government owned land. Many were convinced that conservative, scientific management would never be embraced by corporations whose only goal was short-term profit. Indeed, one of the ironies of the Progressive Era was that government ownership, which is generally and appropriately characterized as a manifestation of growing federal regulatory authority, appeared necessary because of inadequate constitutional authorities to control private land use.<sup>34</sup> Hence, the straddle on actual settlers—land was

31. UDALL, *supra* note 11, at 113.

32. See, e.g., ISE, *supra* note 11, at 116-18 for the accident thesis. See also Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of U. S. v. New Mexico*, 15 IDAHO L. REV. 509, 534 n.106 (1979); Harold K. Steen, *The Origins and Significance of the National Forest System*, in ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM 3, 6 (Harold K. Steen ed., 1992) (confessing that "historians—myself included—have managed to maintain a fiction that Congress didn't know what it was voting on when it ratified the process to create forest reserves by presidential proclamation").

33. See HAYS, *supra* note 2, at ch. VII, 122-46 (exploring this notion of efficiency as the core of conservation). See also RICHARD T. ELY ET AL., *THE FOUNDATIONS OF NATIONAL PROSPERITY* (1917), discussed in HAYS, *supra* note 2, at 123.

34. In spite of the growth of the federal bureaucracy and the expanding sense of nationhood that we shall describe in Part II, it was nevertheless not at all clear at the start of the twentieth century that the federal government had authority to direct the management of private forests or private lands abutting important watersheds and waterways.



for them, but federal authority existed on public, not private, lands. Pinchot bragged that the Forest Service not only took the position that "the small man had the first right to the natural resources of the West," but was also the first to "make it stick. 'Better help a poor man make a living for his family than help a rich man get richer still.' That was our battle cry and our rule of life."<sup>35</sup> However, on the same page, Pinchot came closer to the truth. "While we could still say nothing but 'Please' to private forest owners, on the national Forest Reserves we could say, and we did say, 'Do this,' and 'Don't do that.' We had the power..."<sup>36</sup>

### 3. *The Shift*

The "shift-to-retention" policy was necessary to give the government the power it needed to address waste and greed. The literature portrays it in a number of ways. As suggested above, early commentaries described wise men identifying a crisis and selecting retention as the cure. "Men Must Act..." is the name of a key chapter in the Udall retelling.<sup>37</sup> Even today, it is not uncommon to read about a simple policy shift or to encounter the assertion that the "federal government" made an "explicit decision"<sup>38</sup> to retain lands. One recent text characterizes the National Park and National Forest "lands remaining in federal ownership today" as the result of "an explicit federal action" to withdraw them from entry under disposal programs.<sup>39</sup> A residual category of lands remained in federal ownership, according to this analyst, because they were "literally 'lands nobody wanted.'"<sup>40</sup> That assertion, though common, is an extremely costly error.<sup>41</sup> In these narratives, the simple notion of a "shift-to-retention"

35. BNG *supra* note 2, at 259.

36. *Id.* The "public forests," Pinchot noted, "held this enormous attraction for a forester—they were under one and only one ownership and control. In contrast with the slow process of inching along from private owner to private owner, which I knew so well, Congress by a single act could open the way for the practice of Forestry upon these enormous stretches of public forest lands. No wonder they caught and held my keen interest and attention." *Id.* at 79.

37. See UDALL, *supra* note 11, at ch. X, 138-58.

38. See LOOMIS, *supra* note 11, at 24.

39. See *id.* at 24-25. In today's commentaries, the origins of these "explicit decisions" vary slightly. For example, economist Loomis sees them as a response to three factors: concern over abuse and fraud; desire to preserve unique scenic and geologic wonders; potential for shortages of critical natural resources. See *id.*

40. *Id.* at 24.

41. It is well known that a great deal of the ostensibly "unreserved, unentered" public domain remained in public ownership not because it was unwanted, but rather because the structure of disposition laws made taking title legally almost impossible. See, e.g., HAYS, *supra* note 2, at 51-52. Until the 1870s, disposition policy focused either on revenue generation or agricultural settlement and made it very difficult to obtain land legally for uses that did not fit into the row cropping model familiar in the east. See *id.* at 53. Those uses included timber

implies a sharp change of direction from one priority to another brought about by wise men who saw clearly and took appropriate action.

At the close of the twentieth century, the "shift-to-retention" story appears most frequently in discussion of eras in public land management: a period of land acquisition was followed or accompanied by a period of land disposition and capped by a period of land retention.<sup>42</sup> The story typically runs, we acquired land until the Alaska purchase, disposed of it throughout the nineteenth century, and beginning in either 1872 (Yellowstone) or 1891 (forest reservations), shifted to a policy of government retention of public domain land. This "eras notion" allows for a little fudging on exactly when acquisition ended, and disposition and then retention began.<sup>43</sup> Of course, this fudging is necessary as even today the federal government still acquires and disposes of land. One consequence

harvest, mining, and ranching. *See id.* Land for those uses was therefore generally obtained illegally through extensive graft and manipulation of loopholes, carefully constructed or otherwise, in the disposition statutes. *See id.*; Joseph Arthur Miller, Congress and the Origins of Conservation: Natural Resource Policies, 1865-1900, 113 (1973) (unpublished Ph.D. dissertation, Univ. of Minn.) (on file with the University of Michigan); Leigh Raymond, *Viewpoint: Are Grazing Rights on Public Lands a Form of Private Property?*, 50 J. RANGE MGMT. 431 (1997) (discussing this familiar point). Entrymen had, of course, found a way around government efforts to prevent fraud in land disposition, so it is not clear how real were the barriers these provisions ostensibly created. Nevertheless, occupants of the public rangelands settled for control over vast acreage of the public domain, occupying them effectively (albeit initially as trespassers), but leaving little more than bare title with the federal government for most of the twentieth century. *See discussion infra* Parts IV & V.

42. *See* UNCLE SAM'S ACRES, *supra* note 11, at 16-17; *Reassessing*, *supra* note 11, at 18-20. Clawson's periods have expanded from the most familiar acquisition-disposition-retention framework to include periods of custodial management, intensive management, and consultation and confrontation. *See Reassessing*, *supra* note 11, at 18-21. Clawson describes the use of the periods as the "usual" approach to the subject. *See* UNCLE SAM'S ACRES, *supra* note 11, at 16. It appears to have begun in the analysis for the first Public Land review in 1884 by THOMAS DONALDSON, THE PUBLIC DOMAIN, ITS HISTORY, WITH STATISTICS (1880). Because of when he wrote, Donaldson does not say much about reservations or retention, but he does discuss acquisition and disposition. *See generally id.* Louise Peffer, however, attributes the three phases story to F.H. DENNETT, THE PUBLIC LANDS OF THE UNITED STATES (1910). *See* PEFFER, *supra* note 10, at 4. *See also* GATES, *supra* note 1, at ch. XX, 563-606 (using the basic concepts, but not the terminology). It is also important to note that while this "shift-to-retention" framework is ubiquitous, it is not monolithic. Some scholars have tried, with limited success, to pose alternatives. *See* SALLY K. FAIRFAX & CAROLYN E. YALE, FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES 5-13 (1987) (discussing an ebb and flow in different resource arenas between a reliance on private entrepreneurs and market-based decisions as opposed to government regulation and planning). *See also* ROBBINS, *supra* note 11, at 423 (taking a slightly different configuration that preserves the emphasis on the "shift-to-retention" and the pending omniscience suggested therein).

43. Occasionally a scholar will note that the eras "overlap and the precise dates of beginning and ending may be debated." *Reassessing*, *supra* note 11, at 18; UNCLE SAM'S ACRES, *supra* note 11, at 16-17. However, the notion of a shift is unmistakable.

of this triptych is the positioning of government ownership of land as the dawn of enlightenment, the sine qua non from which public-spirited conservation inevitably followed.<sup>44</sup> In their standard undergraduate policy text, Dana and Fairfax, for example, characterize the shift as an "awakening."<sup>45</sup> Robbins juxtaposes disposition, "The Corporation Triumphs," with a "shift-to-retention" policy, "The Government Forces Conservation."<sup>46</sup> Ise simply identifies the period of the shift as the "golden era."<sup>47</sup>

## II. CHANGING CONCEPTS OF GOVERNMENT

This section begins the retelling of the "shift-to-retention" story presented in Part I by exploring the development in ideas about government that led to the fragmentation of public domain policy. It recounts the emergence of a strong national government replacing local governments as the political center of the nation. This emergence augers well for the traditional narrative about national management of national lands. The equally familiar tale of science emerging as a key element of legitimacy in public decision making also fits nicely with the traditional "shift-to-retention" notion.

We show, however, that the increasing importance, scope, and professionalism of the national government, and all that it entailed, represented the addition of new ideas and institutions of government to national policy and politics, not the erasure of earlier ones. Moreover, both the general public and the government evinced mixed feelings about new powers of regulation, often remaining supportive of large corporations despite their growing size and strength. In like fashion, corporations frequently supported, rather than opposed, government regulation on the public lands, and government retention of title when it suited their priorities. While the observations we make regarding American government in this section may be familiar to some readers, the conclusions we draw for public land policy are quite different from the traditional view. Clearly, the rise of a stronger, more united nation and federal bureaucracy was crucial to making possible any policy of retaining and managing some portion of public lands. But in general, ideas about government became more complex during this period, and this complexity contributed to the fragmentation of public land policy that occurred at roughly the same time.

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44. Note that this notion of acquisition-disposition-retention implicitly shapes several standard texts. See, e.g., COGGINS ET AL., *supra* note 7, at xi; DANA & FAIRFAX, *supra* note 11, at ix.

45. DANA & FAIRFAX, *supra* note 11, at 33.

46. ROBBINS, *supra* note 11, at ix-x.

47. ISE, *supra* note 11, at 143.

## A. New Ideas about Government—Roots of the Retention Option

In the late nineteenth century, a set of German ideas took hold in the United States and weakened what had been to that point a fairly unalloyed embrace of the ideas of English writers following in the liberal tradition of John Locke. These new ideas affected disciplines as diverse as economics, education, public administration, political science, and forestry as they were practiced in the United States. In many cases, German ideas provided alternatives to the classic liberal emphasis on the paramount rights of the individual against the state within a "laissez faire" system of governance. For the purposes of this analysis, the Lockean view in defining early U.S. land policy is central. The alternatives offered by German thinkers were equally important in underwriting other policy options on public lands as the self-evidence of Locke became less clear.

### 1. *The Lockean Status Quo Ante*

The first one hundred years of political history in the United States were dominated by the thoughts and ideas of English political economy in general and particularly the writings of John Locke.<sup>48</sup> Louis Hartz perhaps overstated the case when he called the United States a society that "begins with Locke and...stays with Locke, by virtue of an absolute and irrational attachment it develops for him...."<sup>49</sup> His basic point was accurate nonetheless. In public domain policy, Locke's views were almost perfectly reflected in Jefferson's vision of a nation of small and independent freeholders. The preemption acts of the early nineteenth century<sup>50</sup> were distinctly Lockean in nature, rewarding those who worked previously "unclaimed" land with

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48. See WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 35 (1977); PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 15 (C.B. Macpherson ed., 1978) [hereinafter CRITICAL POSITIONS]; LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA ch. I, at 3-22 (1955). For the influence of English political economy in general in the nineteenth century see SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901, 6-8 (1969); JOHN G. SPROAT, "THE BEST MEN," LIBERAL REFORMERS IN THE GILDED AGE 7-10 (1968). Other crucial English thinkers to early American political economy include Adam Smith, John Stuart Mill, David Ricardo, and Herbert Spencer. See FINE at 8-10. This argument is not to say that thinkers of other backgrounds were insignificant to the American polity until 1880—French writers, for example, had an important influence as well. See *id.* Nevertheless, the pre-eminent source of political and economic ideology at the time was clearly the British Isles.

49. HARTZ, *supra* note 48, at 6.

50. See JOHN OPIE, THE LAW OF THE LAND—TWO HUNDRED YEARS OF AMERICAN FARMLAND POLICY, ch. 4, at 43-56 (1987). See also GATES, *supra* note 1, at ch. XIV, 341-86.

a chance to acquire fee-simple title to it,<sup>51</sup> setting the stage for a limited government of independent tillers of the soil.

Locke was far from the only English thinker to have a strong impact in nineteenth century America. Adam Smith, David Ricardo, and John Stuart Mill were important in supporting a liberal tradition of individual freedoms from state interference in American policy. More influential after the Civil War was Herbert Spencer, whose vision of "Social Darwinism" had great influence and popularity among Americans.<sup>52</sup> Spencer's ideas regarding the application of natural selection principles to human society were read in America as a tract in favor of classic liberal principles. Spencer expounded a limited role for government, extensive use of free markets, and maximum individual freedom and self-reliance.<sup>53</sup> These American interpretations of Spencer followed broadly on Locke's own liberal tradition of limited government, individual freedom, and the sanctity of private property.<sup>54</sup> In terms of the public lands, Spencer's views clearly supported the Lockean policy of extensive disposition of land into private hands. While the views of Locke and Spencer differed significantly on many other points, together they anchored a long tradition of English liberalism in the United States that came under attack in the Progressive Era.

## 2. *The German Influence*

By the end of reconstruction, the grip of Locke's ideas was no longer unalloyed. Critics such as Henry George noted that the actual distribution of land in the United States was a far cry from the Lockean-Jeffersonian ideal. The alleged "closing of the frontier" in the 1890s, as proclaimed by Frederick Jackson Turner, also brought the potential end of the era of Jefferson's hardy yeomen into the public view.<sup>55</sup> By 1890, the

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51. Of course, many such settlers still could not afford to buy the land they had settled, leading to claims associations and other extra-legal efforts to maintain ownership without paying full price. See OPIE, *supra* note 50, at ch. 4, 43-56.

52. See DAVID WILTSHIRE, *THE SOCIAL AND POLITICAL THOUGHT OF HERBERT SPENCER* 92-93 (1978); FINE, *supra* note 48, at 41-43.

53. See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 36 (1944).

54. In another similarity, Spencer followed Locke (rather than other English liberals such as Bentham or Mill) in basing his theories of the relationship between individuals and the state on a notion of natural rights. For more discussion of the natural rights outlook and the crucial role it plays in changing notions of property see discussion *infra* Part III.

55. See Frederick J. Turner, *The Significance of the Frontier in American History*, in *Annual Report of the AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1893*, 199, 199-200 (1894). It is important to note, however, that although Turner made his famous observation in the 1890s, congressional policy continued to be based on what was increasingly described as the myth of the homesteader until the Depression. See *supra* text accompanying notes 21-25. Patricia Limerick observed that with the "closing" of the frontier, land and its availability lost

influence of Locke's ideas on the nation had diminished significantly from 100 years previously. Important challenges to the hegemony of Locke and his English brethren came from the ideas of a recently united German nation. Many turn-of-the-century American intellectuals and reformers were educated in Germany before making their careers in the United States.<sup>56</sup> The strength and power of the new German state (created in 1871) and its bureaucratic powers of regulation made a significant impression on American political reformers who were faced with a weak and ineffective federal government at the time. Hence, the influence of German culture and ideas in the late nineteenth century became "so pervasive as to be virtually dominant" in American society.<sup>57</sup>

The Germanic influence on public lands management was unmistakable and frequently commented upon. German-born forester Bernhard Fernow, third chief of the Division of Forestry, laid much of the groundwork for the forest reservation legislation of the 1890s. Fernow, along with Carl Schurz, brought the German idea of scientific management of forests to the United States and educated the first generation of American foresters in schools they founded at Cornell in New York and Biltmore in North Carolina.<sup>58</sup> Gifford Pinchot was trained in German forestry prior to his rise to power in American politics at the turn of the century.<sup>59</sup> The German tradition in forestry was, not at all coincidentally, a military-style control over the harvest and regeneration of what were considered in Europe to be scarce, essential timber resources.<sup>60</sup> As in education, labor relations, economics, political science, and so many other areas, the ideas of German educators had a profound effect on the path of American resource management.<sup>61</sup>

its centrality in individual and national notions of "progress" and upward mobility. Patricia Nelson Limerick, *A History of the Public Lands Debate* 7-8 (Oct. 11-13, 1995) (unpublished manuscript, on file with the University of Colorado Natural Resources Law Center).

56. See discussions of reformers in economics, education, and conservation, for example, presented below.

57. *THE AMERICA HEGELIANS—AN INTELLECTUAL EPISODE IN THE HISTORY OF WESTERN AMERICA* 10 (William H. Goetzmann ed., 1973).

58. See Char Miller, *Wooden Politics: Bernhard Fernow and the Quest for a National Forest Policy, 1876-1898*, in *THE ORIGINS OF THE NATIONAL FORESTS* 287, 291-92, 297 (Harold K. Steen ed., 1992).

59. See BNG, *supra* note 2, at 8-9. His training actually occurred in France, but was conducted under the direction of Prussian forester Dietrich Brandis. See *id.*

60. See R.W. Behan, *Forestry and the End of Innocence*, *AM. FORESTS*, May 1975, at 16, 18-19 (1975) (a classic article discussed briefly in DANA & FAIRFAX, *supra* note 11, at 65-67). For a brief review of the feud between Pinchot and Fernow, and the serious negative consequences of Pinchot's ascendancy, see *id.* at 19, 38-41.

61. See also DANA & FAIRFAX, *supra* note 11, at 52-53.

Less frequently discussed in the conservation context, the writings of German thinkers also became an increasingly important factor in the development of American government. In a period of extreme economic change and labor unrest, for example, German critics of laissez faire enjoyed increasing authority in the United States. The growth of the nineteenth century American labor movement and the strong union actions of the period, dramatized by such events as the Haymarket Riot of 1886 and the Pullman Strike of 1877, were shaped in part by socialist thinking and activism drawing on the ideas of Marx and Engels.<sup>62</sup> Socialism remained a powerful force in American union activities through World War I. Significant, although declining, public support of the socialist agenda continued through the Depression.<sup>63</sup> Less radical than their socialist brethren, economists of the "new school" of political economy, led by Richard Ely and Henry Carter Adams, were trained extensively in Germany before returning to the United States.<sup>64</sup> Their critique of laissez faire ideology asserted the inductive and relative notion of economic truth rather than the deductive and "immutable" laws of economics that were popular at the time.<sup>65</sup> This belief in an alternative, empirical form of economics was firmly rooted in German thinking. In general, these German-based dissents from a market-oriented set of government policies were also a force pushing away from an unmitigated policy of public land disposition.

Less radical and more appealing to most American intellectuals, the ideas of G.W. Hegel spread widely in the late nineteenth century. America Hegelianism took root in the St. Louis movement and its *Journal of Speculative Philosophy* after the Civil War. It spread to the highest reaches

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62. See MELVYN DUBOFKY, *INDUSTRIALISM AND THE AMERICAN WORKER, 1865-1920* ch. 2 (2d ed. 1985). Socialist and Marxist radicals found room under the inclusive umbrella of the Knights of Labor until its demise in favor of the more moderate American Federation of Labor in the 1890s. See generally JOHN H.M. LASLETT, *LABOR AND THE LEFT: A STUDY OF SOCIALIST AND RADICAL INFLUENCES IN THE AMERICAN LABOR MOVEMENT, 1881-1924* (1970) (describing the close relations between the socialist and trade union movements at the turn of the century).

63. See IRVING HOWE, *SOCIALISM AND AMERICA* ch. 1, at 3-48 (1985). Howe and others point out that Socialists and members of the Socialist party included both moderate and hard-line reformers with a more orthodox Marxist perspective. See *id.* Their support for collectivism and worker control of the means of production were all clearly rooted in the writings of Marx to a greater or lesser degree. See also PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOLUME III: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909*, 370 (1964). It is interesting also to observe that even as early as the Civil War, no fewer than four generals in the Union Army were avowed Marxists. See *THE AMERICA HEGELIANS*, *supra* note 57, at 6.

64. See FINE, *supra* note 48, at 199.

65. See *id.* at 198.

of the federal government by the 1890s.<sup>66</sup> The Journal was itself the most prestigious philosophical periodical in America during its publication from 1867 to 1893.<sup>67</sup> Prominent in the American version of Hegelianism was a strong sense of nationalism and a teleological view of American history moving towards a utopian future. Hegel's ideas had a widespread impact at American universities throughout the late nineteenth century.<sup>68</sup> A broad range of American scholars, including Ralph Waldo Emerson, Joseph Pulitzer, and John Dewey, all espoused some degree of a Hegelian perspective in their work.<sup>69</sup> Consequently, public policy ideas as diverse as kindergarten for young children and a notion of national destiny for America can be attributed in part to the ideas of this movement.

More striking for our purposes were the aspects of Hegelian thought that overlap with the Progressive Movement's agenda. This is not to argue that the Progressive Movement explicitly or exclusively drew inspiration from the German thinker. Indeed, the Progressives owed a large and more obvious intellectual debt to earlier French positivists such as Auguste Comte and Henri Saint-Simon.<sup>70</sup> In particular, the Progressive embrace of science and scientific management as the best method of social progress was distinctly in tune with Comte's work. But while their debt to positivism is clear, Progressives also partook of several ideas that are quite Hegelian in nature—particularly in their view of the proper role of the state in modern life.

Embracing academic, non-partisan expertise and the power of the middle class in reforming government, the Progressives echoed Hegel's views on how the state should develop.<sup>71</sup> Like both the French Positivists and the Progressive reformers, Hegel's philosophy emphasized the importance of an educated elite, and in particular the tight connection between academic experts and government officials.<sup>72</sup> Furthermore, Hegel's work accentuated the power of the middle class as the bedrock of a stable

66. See THE AMERICA HEGELIANS, *supra* note 57, at 7-10. The relative influence of Hegel, through his American interpreters, is contested. McClay, for example, argues that "[t]he social thought of the St. Louis group was never likely to take Gilded Age America by storm." WILFRED M. MCCLAY, THE MASTERLESS: SELF AND SOCIETY IN MODERN AMERICA 136 (1994). Nevertheless, Hegel's dominating influence over Germanic thinking in politics and philosophy in the late nineteenth century as a whole is undisputed, as Goetzmann claims.

67. See PAUL EDWARD GOTTFRIED, THE SEARCH FOR HISTORICAL MEANING: HEGEL AND THE POSTWAR AMERICAN RIGHT 16 (1986).

68. See EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY—SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 7 (1973); THE AMERICA HEGELIANS, *supra* note 57, at 9.

69. See GOTTFRIED, *supra* note 67, at 16-20.

70. See ROBERT H. NELSON, REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS, ch. 5, at 85-122 (1991) [hereinafter HEAVEN ON EARTH].

71. See G.A. Kelly, *Hegel's America*, 2 PHIL. & PUB. AFF. 3, 19, 26, 29-31 (1972).

72. See *id.* at 29.



and utopian society.<sup>73</sup> The Progressive Movement was similarly reliant in particular on the new American middle class for its primary support.<sup>74</sup> The Progressives sought a "new nationalism," with the state serving as a check on the selfish individualism of unregulated civil society. In this respect, their agenda resembled Hegel's own vision of the ideal state.<sup>75</sup>

Government and its policies rapidly came to reflect the new ideas that were shaping American political culture, as the intellectual influences on public policy makers in the late nineteenth and early twentieth century gradually became more diverse. Importantly, the ideas behind the changing political arena were frequently in opposition. The newer ideas of German thinkers such as Marx and Hegel did not simply replace the ideas of English political economists in the American consciousness. Instead, such German ideas took a place beside those of Locke and Jefferson, Spencer, and Mill. Not surprisingly, public policies diversified along with these differing ideas about the nature and role of government. Thus, in the public lands field, we find it useful to simplify in the following way: If

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73. See *id.* at 26.

74. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* ch. 5, at 111-32 (1967). See also *HEAVEN ON EARTH*, *supra* note 70, at ch. 5, 85-122 (discussing the Progressive Era along similar lines). However, neither Wiebe nor Nelson make the connections to Hegel that we are asserting.

75. See R. JEFFREY LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY 1890-1920*, 215 (1982). The connection between Hegel and Progressive public policies will return in our discussion of property in Part IV. This argument is contested in part by writers such as McClay and Kelly, who argue that little of the Hegelian notion of the ideal state "resonates within the American historical experience," Kelly, *supra* note 71, at 27. We contest this claim vigorously. Hegel himself saw the United States of his age (1820s and earlier) as not a true state at all, but merely a form of "civil society," a collection of individuals seeking self-interest with no collective conscience or national identity. See, e.g., *id.* at 3. Hegel felt that America would fail to be a true nation under his theory until it developed stronger competition over goods, more class structure, and had a populace that began to feel "physically, economically, and psychologically cramped." *Id.* at 7. There is a strong argument that this description was exactly the America of the late 1800s. The frontier was ostensibly closed and the borders of the nation were set; economic competition was becoming stronger than ever before, corporate control was limiting a former sense of personal freedom among individuals; and a dominant wage labor system had created a much stronger class system. The historical birth of the Progressive Movement thus came at the exact time when America finally became a true nation under the Hegelian framework. While the Progressive reform movement in government was not true to Hegel's ideas in every sense (it was not, for example, a monarchy as was apparently the ideal form of government for Hegel; see *id.* at 8), it clearly added many of the necessary elements of an ideal Hegelian state to the American system. See *id.* at 24. Kelly argues that there is a desire for more Hegelian ideas in government in the United States of the 1960s, but his arguments are even more appropriate in describing the "third path" between pure individualism and radical socialism taken by Progressives at the turn of the century. In this manner, we find his analysis of a "Hegelian" influence on governing the United States to be remarkably accurate in describing the Progressive Era of government from 1880-1920. See, e.g., *id.*

Locke and his English brethren can be seen as the spiritual guides of the policy of disposition to private land holders, Hegel and the newly ascendant German state can be viewed as a force that helped splinter and fracture the old model.

### 3. *The Rise of a Strong National Identity*

The growing importance of a national identity and a federal level of government was critical to the emergence of a policy of large-scale permanent land holdings. Any major departure from the long-standing commitment to full disposition of the public domain was unlikely until the country shifted from "a nation of island communities" into a country in which the federal level of government and a corresponding sense of national identity were paramount.<sup>76</sup>

Confidence in the national government was at a nadir during the 1870s. The emphasis remained on small-town life where local communities remained the natural setting for solving social problems. The unity of the nation, which peaked briefly in the aftermath of the Civil War and climactic events such as the Grand Review of the victorious Union Army,<sup>77</sup> dissolved as rapidly as the size of the same armed forces.<sup>78</sup> By 1877, the reconstruction of the former confederacy was largely a failure in terms of creating a new, national consciousness, and the nation was mired in a deep economic depression.<sup>79</sup> National cohesion and pride were low, and popular confidence in government as an agent of change was lacking.<sup>80</sup>

From 1880 to 1920 these factors began to change.<sup>81</sup> Instead of the states' rights issues of reconstruction, the country became increasingly concerned with industrial growth.<sup>82</sup> Collectivism emerged as an alternative social movement to localism, best symbolized by the public response to the 1888 publication of *Looking Backward* by Edward Bellamy. *Looking Backward* was a utopian vision of collective government ownership of the means of production with an egalitarian distribution of resources. The book was immensely popular at the time, and gave rise to hundreds of Bellamite

76. WIEBE, *supra* note 74, at 4 (the "island communities" image is famously located here).

77. See MCCLAY, *supra* note 66, at 9-40.

78. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, 86-87 (1982). By the mid 1870s, the federal military had shrunk from a wartime peak of one million soldiers to only 25,000 men in uniform. See *id.*

79. See WIEBE, *supra* note 74, at 1-2.

80. See MORTON KELLER, *AFFAIRS OF STATE—PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 85 (1977); MARK WAHLGREN SUMMERS, *THE GILDED AGE, OR THE HAZARD OF NEW FUNCTIONS* 23-24 (1997); H. Wayne Morgan, *Toward National Unity*, in *THE GILDED AGE* 1, 3 (H. Wayne Morgan ed., 1970).

81. See KELLER, *supra* note 80, at 285.

82. See *id.* at 286.

Societies nationwide intent on adopting his vision of the future.<sup>83</sup> Such an outbreak of collectivism stood in marked contrast to the individualism and localism of the previous decade. Public domain policy followed suit. Symbolically, in the same year that *Looking Backward* was published, Congress enacted legislation authorizing federal agencies to exercise eminent domain.<sup>84</sup> In general, government at the federal level began to assume a larger role in many aspects of American life.<sup>85</sup>

It would be a clear mistake to argue that localism was left dead in Bellamy's wake. The populist emphasis on small-town power and local autonomy probably reached its zenith in 1896 with the presidential campaign of William Jennings Bryan.<sup>86</sup> But while localism never disappeared from the American landscape, after Bryan's defeat it lost vigor as the organizing principle of public policy.<sup>87</sup> Other forces continued to drive the nation together, especially in the economic realm. New national markets in the 1890s for goods from companies like Sears, Singer, and Ford combined with a rising consumer economy served as a unifying force in the country.<sup>88</sup> By 1912, according to one major historian, the three major parties agreed on the "responsibility of the national government for guidance" of society, and were in conflict only over who would get the honor of completing the Progressive agenda of reform spurred by government intervention.<sup>89</sup> The elevation in priority of the nation as an important political unit for public policy was essentially complete.

The rise of a national identity was essential to a policy of national lands. Without this change in the American political climate, a growing inability to dispose of certain parcels of land might have led to a push for disposition to the states or other local governments.<sup>90</sup> The growing power and identity of the nation provided an important force in the overall

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83. See SCOTT, *supra* note 48, at 160-65.

84. See generally NICHOLSON EMINENT DOMAIN § 1.1-1.41 (rev. 3d ed., Sackman Van Brunt ed., 1979) (for the nature and origins of the eminent domain power). See *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668 (1896) (upholding federal eminent domain authority). See *infra* text accompanying notes 281-93.

85. See *infra* text accompanying notes 281-306.

86. See KELLER, *supra* note 80, at 579-80.

87. See Sax, *supra* note 8, at 501 (observing that "the chips are strongly stacked against localism in American law"). For a different, but thoughtful, perspective on the demise of localism in American political life see DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (1990).

88. See MAURY KLEIN, *THE FLOWERING OF THE THIRD AMERICA: THE MAKING OF AN ORGANIZATIONAL SOCIETY, 1850-1920*, 181 (1993).

89. WIEBE, *supra* note 74, at 217.

90. See DANA & FAIRFAX, *supra* note 11, at 138-39. President Herbert Hoover and his Secretary of the Interior, Ray Lyman Wilber, proposed disposition of the surface estate to the states in the late 1920s, but absent the mineral value, the offer was rejected. See *id.* at 139.

fragmentation of public lands policy. It was a force that encouraged broad acts of retention that would be unimaginable in the United States of the 1790s or even in the 1870s.

## B. Sources of Fragmentation within the Growing Federal Government

We have pointed to a number of new, but not exclusively German, ideas about government that conflicted with our Lockean heritage. The strong national government and identity bode well for a shift to a policy of national lands retained and managed by an increasingly effective federal government. In this section, we discuss three elements that fragmented that apparently coherent picture. First, the varied landscape of the United States steadily required more diverse federal policies. Second, government bureaucrats rapidly found allies in the private sector who advocated for increased authority, resources, and legitimacy for their burgeoning professions. Third, the growing national economy provoked a very ambivalent and conflicted reaction from the government. Thus, we find fragmentation of public domain policy clearly demonstrable in the ambivalent, constantly shifting love-hate relationship between government and corporations at the turn of the nineteenth century.

### 1. *Edaphic Facts—The Landscape as a Source of Fragmentation*

For most of the nineteenth century, it was the policy of the government to divide land into interchangeable 160-acre postage stamps. Until the 1870s, federal land laws effectively treated all public land as identical, highly abstracted squares noted on official survey maps and often sold to buyers at great distances from the soil itself.<sup>91</sup> The cadastral survey took no notice of variances in terrain or topography as it prepared the land for disposition.<sup>92</sup> By and large, the survey system worked fairly well for the relatively consistent and mesic lands of the mid-western grain belt. By the time settlers reached the famed one hundredth meridian, however, the inadequacies of the standardized system of disposition became unavoidable.

John Wesley Powell is known as the first person to bring these problems with public land policy in the arid west to the attention of Congress in a formal manner. His famous 1878 *Report on the Lands of the Arid Region* suggested vast changes to the disposition laws, to bring them

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91. See OPIE, *supra* note 50, at xvi-xxi, 1-3; GATES, *supra* note 1, at 69.

92. See OPIE, *supra* note 50, at xvi-xxi.

more in tune with the less hospitable environs of the inter-mountain west.<sup>93</sup> While policy-makers largely disregarded his report, its lessons loomed ever larger as the years went by and "traditional" policies for public land disposition began to fail miserably. In numerous cases during the late nineteenth and early twentieth centuries, natural features of climate and topography conspired to force Congress to explore a variety of policy directions. Reclamation efforts were an explicit acknowledgment of the need to supplement disposition policy with irrigation in order to continue homesteading.<sup>94</sup> A move to reacquire land in eastern forests for renewed federal ownership succeeded in part due to serious fires and flooding in the Appalachian region in the years before 1911.<sup>95</sup> Similarly, the dust storms of the 1930s were a key factor in passage of an act to regulate public domain grazing after decades of debate.<sup>96</sup> Just as important were the economic interests attached to different resources. These interests advocated in Congress for different policies to meet the diverse requirements of developing and marketing timber as opposed to minerals, coal as opposed to gold, and scenic wonders as distinguished from water sheds.

Expressing a continuing embrace of the homesteader, Congress frequently ignored these edaphic and climatic facts of the lands. It simply presumed that row cropping, such as succeeded in the eastern and old northwest states, would continue in the intermountain west.<sup>97</sup> Nevertheless, the diversity in climate, aridity, and other natural factors influenced policy makers on several occasions to make significant policy shifts away from the status quo. An increased awareness of the diversity of the landscape led to a consequent diversity in policies for that landscape.

## 2. *Growing Federal Bureaucracy and Growing Interest Group Politics*

Samuel Hays has argued persuasively that the central factor behind the Progressive Movement was the drive to base public policy decisions on scientific principles of management rather than the pull and haul of self-interested local politics.<sup>98</sup> According to Hays, conservation was fundamentally concerned with "efficiency" in the management of natural resources. Despite their populist and anti-corporate rhetoric,<sup>99</sup> conservationists were

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93. See GATES, *supra* note 1, at 419-20. See also WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* ch. III (1954).

94. See *infra* text accompanying notes 375-83.

95. See WILLIAM B. GREELEY, *FORESTS AND MEN* 15-19 (1951).

96. See PEPPER, *supra* note 10, at 220; DANA & FAIRFAX, *supra* note 11, at 160.

97. See GATES, *supra* note 1, at 770. See also JONATHAN RABAN, *BAD LAND: AN AMERICAN ROMANCE* *passim* (1996).

98. See HAYS, *supra* note 2, *passim*.

99. See *supra* note 1 and accompanying text (discussing this position in more detail).

scientists, first and foremost, and were committed to using their expertise to manage public resources in the least wasteful manner possible.<sup>100</sup> Accordingly, the locus of power for the progressive scientific expert was the burgeoning federal bureaucracy.<sup>101</sup>

Prior to the 1870s, the federal government grew quite slowly in scope and number of employees.<sup>102</sup> Most growth reflected increases in the Postal Service as the nation's territory extended.<sup>103</sup> At the end of Reconstruction, however, the executive branch began to increase rapidly as a public sense of national pride and identity matured.<sup>104</sup> Starting with a gigantic administrative agency designed to serve Civil War pensioners, the government increasingly created federal bureaucracies intended to serve and regulate specific interest groups.<sup>105</sup> Numerous new agencies were created around the turn of the century, including such familiar names as the Interstate Commerce Commission and the National Labor Relations Board, not to mention the U.S. Forest Service. Furthermore, Progressive reformers filled more positions in the federal bureaucracy on the basis of tests and skill, rather than political patronage, thanks to the widening impact of the Pendleton Act, passed in 1883.<sup>106</sup> In the early twentieth century, Teddy Roosevelt relentlessly expanded the power of both the presidency and the federal government during his tenure in the White House.<sup>107</sup> By the end of World War I, the federal government had been transformed into a large, professional bureaucracy serving numerous regulatory and promotional functions. In particular, the increase in federal administrative regulation of economic life became a dominant theme throughout the early twentieth century and into the present era.<sup>108</sup>

100. See HAYS, *supra* note 2, at 2.

101. The trend towards bureaucratization in American government is also well documented and debated in its finer points. For several good places to start see generally James Q. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77; SKOWRONEK, *supra* note 78; WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982); PETER WOLL, *AMERICAN BUREAUCRACY* ch. 2, at 35-75 (2d ed., 1977).

102. Except for a temporary government expansion during the Civil War.

103. See WOLL, *supra* note 101, at 36-37.

104. See SKOWRONEK, *supra* note 78, at 49; Wilson, *supra* note 101, at 82-88.

105. See Wilson, *supra* note 101, at 88.

106. See, e.g., SKOWRONEK, *supra* note 78, at 59-84.

107. See JOHN MORTON BLUM, *THE PROGRESSIVE PRESIDENTS: ROOSEVELT, WILSON, ROOSEVELT, JOHNSON* 17-18, 28 (1980).

108. See *THE ISSUE OF FEDERAL REGULATION IN THE PROGRESSIVE ERA* 2 (Richard M. Abrams ed., 1963). Note that in some cases states engaged in extensive regulation of business and economic interests even before the Civil War. See *The Government Business Relationship in Historical Perspective*, in *THE SHAPING OF TWENTIETH-CENTURY AMERICA* 1, 2-3 (Richard M. Abrams & Lawrence W. Levine eds., 1965); Robert A. Lively, *The American System: A Review Article*, in *THE SHAPING OF TWENTIETH-CENTURY AMERICA* 4, 4-23 (Richard M. Abrams & Lawrence W. Levine eds., 1965); Harry Scheiber, *The Road to Munn: Eminent Domain and the*

An emphasis on expertise was not exclusively the preoccupation of federal bureaucrats. Many historians have noted the progressive emphasis on science as a general method of reform.<sup>109</sup> The research and writings of efficiency experts such as Frederick Taylor led to a growing belief among progressive activists in general that "scientific management" was the answer to many public and private problems. Science and higher education in general were bursting forth throughout the nation at the turn of the century.<sup>110</sup> New schools of higher education, and professional programs of study in topics such as forestry, hydrology, and political science provided the education and expertise required for this scientific approach to government.<sup>111</sup> In this model, political concerns, as well as the concerns of individual or corporate resource users, were secondary to using science to create efficient resource use. The conservation agenda was but a part of a more general system of putting the expert in charge.

The growth of science and efficiency as a touchstone among both government and private decision makers went hand-in-hand with a growing emphasis on "client-serving" bureaucracies. Reflecting the attitudes of the age, many such agencies officially had a regulatory relationship with their constituency (such as the Interstate Commerce Commission or the National Labor Relations Board), while others were established explicitly or in part to promote the interests of their "client" group (such as the Federal Communications Commission and the Civil Aeronautics Board).<sup>112</sup> In either case, agencies developed close relationships to those they regulated over time, while inexorably seeking to expand their own budgets and powers.<sup>113</sup> Natural resource agencies were no exception. The growing influence of such varied constituencies led to a variety of policies—individually tailored to the needs of a given interest group.

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*Concept of Public Purpose in the State Courts*, in PERSPECTIVES IN AMERICAN HISTORY 329, 329-402 (1971) [hereinafter Scheiber-Munn].

109. See, e.g., WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, 82 (1982).

110. See PURCELL, *supra* note 68, at 7.

111. See KELLER, *supra* note 80, at 477; MCCLAY, *supra* note 66, at 136.

112. See Wilson, *supra* note 101, at 95.

113. See generally PAUL J. CULHANE, *PUBLIC LAND POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT* (1981) (discussing the agency capture principle in the public lands context); PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960); ROGER G. NOLL, *REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS* (1971) (representing two standard theories of agency "capture"); PHILLIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1966). See also JUDITH E. GRUBER, *CONTROLLING BUREAUCRACIES: DILEMMAS IN DEMOCRATIC GOVERNANCE* 80-83 (1987) (admirably summarizing this phenomenon).

Perhaps the best way to understand the importance of the combined impact of scientific bureaucracies and constituent claims is to contrast Progressive Era reclamation policy to the earlier creation of the railroads. The construction of the railroads was by far the largest economic venture of its time—and it was funded primarily by private enterprise. Grants of public land helped finance the projects to some degree, but much of the necessary capital actually came from overseas.<sup>114</sup> So great was the need for private capital that the construction of the roads led to the creation of the modern financial markets of New York City during the same period.<sup>115</sup> The role of the government in creating this rail system was minimal, despite the fact that in Europe nearly all such transportation projects were government built.<sup>116</sup> At the time, such significant involvement by the U.S. government was out of the question. However, one can see a new set of circumstances underwriting the Newlands Act in 1902.<sup>117</sup> In the Progressive Era, powerful economic interest groups advocated large western construction projects implemented entirely with public funds. Hence, by the passage of the Reclamation Act, the federal government and scientific bureaucrats were in a position to undertake such projects, and reclamation supporters were strong enough to insist upon it.

### 3. *Government Ambivalence toward the Growing Corporate Economy*

The rise of client-serving bureaucrats and agency-supporting clients gives lie to the standard Progressive story about controlling corporate greed. There is no question that corporations grew to a dominant position in the national economy in the last quarter of the nineteenth century.<sup>118</sup> However, that growth was not accompanied by consistent

114. See GATES, *supra* note 1, at 356; DANA & FAIRFAX, *supra* note 11, at 19-20. For a slightly different view see Wallace D. Farnham, *The Weakened Spring of Government: A Study of Nineteenth Century American History*, 63 AM. HIST. REV. 662, 671 (1963) (arguing that the land grants to the railroads were largely irrelevant to the actual financing of the construction of the rails). See also JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970*, 79 (1970) (echoing Farnham's assertion in part).

115. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 93 (1977).

116. See *id.* at 205.

117. Newlands Act, Pub. L. No. 161, 32 Stat. 390 (codified in scattered sections of 43 U.S.C.) (1902). It is worth noting that whereas entrepreneurs anticipated huge profits from construction of railroads, reclamation projects were not uniformly viewed in that light.

118. See generally CHANDLER, *supra* note 115. The trend is almost universally noted in Gilded Age histories. Other works emphasizing this change include NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS: 1895-1904* (1985); DAVID O. WHITTEN, *THE EMERGENCE OF GIANT ENTERPRISE, 1860-1914: AMERICAN COMMERCIAL ENTERPRISE AND EXTRACTIVE INDUSTRIES* (1983); OLIVIER ZUNZ, *MAKING AMERICA CORPORATE 1870-1920* (1990). For a more concise overview of the growth of big business, two good sources are John Tipple, *Big Businessmen and a New Economy*, in *THE GILDED AGE* 13 (H. Wayne Morgan ed., 1970);



public or government positions. On the contrary, the relationship between the government, including the Progressives, and the corporations blew hot and cold throughout the period.

Corporations grew phenomenally. In the first third of the nineteenth century, the lack of a cheap energy supply limited American business development.<sup>119</sup> Most businesses were small, local, and privately held by a few individuals or family members. The discovery and development of the first significant American coalfields in the 1830s spurred the creation of the first American "modern business enterprises"—the railroads and the telegraph companies.<sup>120</sup> The development of the railroads and the telegraph wires across the country provided the reliable transportation and communication infrastructure that was the prerequisite of nearly all other large-scale businesses. By the 1890s, large businesses, with thousands of employees and annual sales of six figures or more, were commonplace.<sup>121</sup> Many such companies had nation-wide markets. The consolidation of firms, both vertically and horizontally, into even larger enterprises was an increasingly common phenomenon.<sup>122</sup> Large corporations controlled the vast majority of economic operations in manufacturing, railroads, mining, and many other industries.<sup>123</sup> By World War I, according to business historian Alfred Chandler, the modern business enterprise was the "dominant business institution in many sectors of the American economy."<sup>124</sup>

The rise of the modern business was closely related to the changing role of the corporation in American political economy. Prior to around 1840, corporations played a relatively limited role in American economic life.<sup>125</sup> Early corporations were tightly controlled by the government and special acts of the legislature that created them, and existed at the

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Glenn Porter, *Industrialization and the Rise of Big Business, in THE GILDED AGE, ESSAYS ON THE ORIGINS OF MODERN AMERICA 1* (Charles W. Calhoun ed., 1996).

119. See CHANDLER, *supra* note 115, at 76.

120. See *id.* at 79.

121. Many such enterprises remain household names today. Sears, Roebuck (\$338,000 of sales in 1893); Bell Telephone (142,527 employees in 1914); and Singer Sewing Machines (60,000 sales employees alone by 1900) are but three examples. See WHITTEN, *supra* note 118, at 55, 70, 83.

122. See CHANDLER, *supra* note 115, at 288.

123. See SCOTT, *supra* note 48, at 133.

124. CHANDLER, *supra* note 115, at 3. This is not to say that every industry or enterprise in America was a large corporation. Small producers of custom products not easily mass-produced continued to play a significant, if lower-profile, role in the nation's economy during the Gilded Age. See Porter, *supra* note 118, at 6-7.

125. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 188 (2d ed. 1973).

continued sufferance of the legislature.<sup>126</sup> Most corporations were formed to provide public or quasi-public services, such as turnpikes, canals, or other large public works projects.<sup>127</sup> Private manufacturing and business concerns were largely partnerships created by contract between a handful of owners until mid-century.<sup>128</sup> A sharp distinction between public and private corporations did not exist in this era. In fact, some states even encouraged a "mixed" form of corporation, creating private enterprises with public officials seated on the board of directors.<sup>129</sup>

By the 1870s, however, strictly private corporations became the dominant form of business organization. In the forty years from 1830 to 1870, and with a great deal of public debate, government slowly weakened and eliminated restrictions on incorporation.<sup>130</sup> Incorporation became an administrative, rather than legislative task—essentially a right, rather than a privilege.<sup>131</sup> Corporate charters were no longer special contracts between a legislature and an enterprise, subject to ongoing monitoring and significant threat of revocation. They became a bureaucratic detail, subject only to the filing of a few forms. Furthermore, American jurisprudence strengthened the legal protection for these economic creations, giving corporations the legal status of "persons" in 1886.<sup>132</sup> Soon after, the courts declared corporate charters to be a form of private property requiring compensation if revoked or withdrawn without due process of law.<sup>133</sup> Thus, the typical industrial business enterprise at the turn of the century enjoyed expanded legal powers as a corporate entity as well as larger size, bigger markets, and improved administrative efficiency.

The Progressive Era rhetoric challenged and responded to this unprecedented growth of large corporate businesses and their power over

126. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) (declaring corporate charters irrevocable contracts between the government and the charter recipients). However, in a concurring opinion, Justice Story suggested that governments simply qualify the powers granted to corporations in the charters, so that the resulting contracts would then be declared "revocable" or otherwise subject to revision or cancellation. See *id.* at 700 (Story, J. concurring). State legislatures rushed to follow his suggestion, making the case more of a victory than a defeat for public control over corporate power at the time. See FRIEDMAN, *supra* note 125, at 197; Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 J. AM. HIST. 740, 751-55 (1987); HURST, *supra* note 114, ch. 1, at 13-57.

127. See HURST, *supra* note 114, at 17, 22-23; Pisani, *supra* note 126, at 751.

128. See FRIEDMAN, *supra* note 125, at 190; HURST, *supra* note 114, at 14.

129. See FRIEDMAN, *supra* note 125, at 192; Pisani, *supra* note 126, at 752.

130. See Pisani, *supra* note 126, at 753.

131. See FRIEDMAN, *supra* note 125, at 512.

132. See *County of Santa Clara v. Southern Pac. Ry. Co.*, 118 U.S. 394 (1886).

133. See *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362 (1894), as discussed in LUSTIG, *supra* note 75, at 91-93. See also HURST, *supra* note 114, at 65.

public policy. Traditionally, the period of the late nineteenth and early twentieth centuries was an era of "laissez faire" government in which regulation or control of big business was a very uncommon occurrence.<sup>134</sup> It was this allegedly weakened state of government regulatory power that fueled the narratives used by Progressives justifying their policy reforms.<sup>135</sup> Progressives like Pinchot clearly declared that the inability of the federal government to direct private land use required federal ownership of land to assure protection of watersheds, fire control, and replanting of timber.<sup>136</sup>

Many researchers have described, however, a more complex relationship between government and big business in the late nineteenth and early twentieth centuries.<sup>137</sup> The actual relationship between government and business was much more ambivalent than Progressive narratives would indicate. American government, like many of its citizens, both encouraged and feared the rapid growth of big business. In the first place, the very notion of a "laissez faire" era implies a lack of both negative and positive interference by government in economic life. In fact, as several historians have pointed out, nineteenth century governments often subsidized and promoted business development rather than simply following the laissez faire ideal to leave private enterprise alone.<sup>138</sup> Examples of such subsidies included extensive tariffs protecting various American industries,<sup>139</sup> grants of public land to private railroads<sup>140</sup> and the delegation of powers of eminent domain to private turnpike and other companies.<sup>141</sup> Moreover, in certain western states, the development of

134. The defining court case of this period for the laissez faire argument is, of course, *Lochner v. New York*, 198 U.S. 45 (1905) *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) & *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (in which the right of a bakery to force twelve hour days on its workers is upheld by the Supreme Court).

135. See *supra* text accompanying notes 55-75.

136. See *supra* text accompanying note 36.

137. In addition to the cites in note 36, see generally FINE, *supra* note 48; KLEIN, *supra* note 88, at 171-91; LUSTIG, *supra* note 75 (academics who have paid particular attention to the role of government in controlling or promoting business interests at the turn of the century). See also JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968).

138. See FINE, *supra* note 48, at 19; JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 7-10 (1956) [hereinafter *LAW & CONDITIONS OF FREEDOM*]; MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW, 1789-1920*, 5, 12 (1987); Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973) [hereinafter *Scheiber-Expropriation*].

139. See KELLER, *supra* note 80, at 376-80; Lewis L. Gould, *Party Conflict: Republican versus Democrats, 1877-1901*, in *THE GILDED AGE: ESSAYS ON THE ORIGINS OF MODERN AMERICA* 215, 216 (Charles C. Calhoun ed., 1996).

140. See *infra* text accompanying notes 282-84. See also HIBBARD, *supra* note 11 (for a preliminary discussion).

141. See *Scheiber-Expropriation*, *supra* note 138, at 237; HURST, *supra* note 114, at 63.

various private industries such as mining and livestock was declared explicitly a part of the "public interest" in the state constitution for purposes of facilitating the growth of local economies.<sup>142</sup>

In other respects, however, government became increasingly apprehensive about the unrestrained growth of modern corporations. Where earlier the primary goal of the government had been economic development and promotion, now the idea of regulation gained strength.<sup>143</sup> The power of *laissez faire* as a popular ideology began to decline.<sup>144</sup> An early state law to regulate the rates (and thus the profits) of the grain elevator industry, for example, was upheld by the Supreme Court in 1873.<sup>145</sup> States in general became more active on the regulatory front during the post-reconstruction period.<sup>146</sup> New state actions included regulations in pursuit of public health and public morals, as well as economic relief from monopoly and other alleged business excesses.<sup>147</sup> At the federal level, early Progressive reformers succeeded in creating the Interstate Commerce Commission in 1887 to control railroad business activities.<sup>148</sup> Congress also passed the Sherman Anti-Trust Act in 1892 in order to slow the pace of business consolidation.<sup>149</sup> Other controls over big business similar to these proliferated throughout the Progressive Era.

The increased propensity of the legislative branch to restrain and control business activity met resistance from the judiciary. During the so-called "*Lochner* era," from the 1880s until at least World War I, the federal courts frequently frustrated or limited attempts by the legislative branch to regulate business.<sup>150</sup> State and federal courts struck down a variety of

142. See Scheiber-*Expropriation*, *supra* note 138, at 243.

143. See FINE, *supra* note 48, at 355; KELLER, *supra* note 80, at 409-38; Pisani, *supra* note 126, at 756-67.

144. See FINE, *supra* note 48, at 169-96, 198-247, 347-53 (describing a diversity of social forces that were allied against the *laissez faire* ideology, including religious members of the "social gospel" movement, and "new school" economists in the 1880s, who were heavily influenced by German thought of the period).

145. See *Munn v. Illinois*, 94 U.S. 113 (1876) (finding Illinois' interest in grain elevator and storehouse operations as justification for regulation). See also Scheiber-*Munn*, *supra* note 108, at 329.

146. See KELLER, *supra* note 80, at 418.

147. See FINE, *supra* note 48, at 355-58; KELLER, *supra* note 80, at 409-22.

148. See SKOWRONEK, *supra* note 78, at 121-23, 248-49; Pisani, *supra* note 126, at 759-61 (both stating the agency lacked significant regulatory power until after 1900).

149. See Pisani, *supra* note 126, at 760 (although enforcement of the act was minimal until the early twentieth century).

150. See FINE, *supra* note 48, at ch. V, 126-64. See generally BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942) (describing the key role of attorneys in shaping the *laissez faire* doctrine of the Supreme Court in the late nineteenth century); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 61 J. AM. HIST. 970 (1975).

business regulations, including laws controlling railroad fares,<sup>151</sup> preventing monopoly power in industries of "production,"<sup>152</sup> setting maximum hour laws for certain types of employees,<sup>153</sup> and impeding the right to commercially manufacture noxious products in private residences,<sup>154</sup> among many others. By restraining the power of government to regulate, the courts reflected a certain degree of isolation from the desires of a majority of the nation to place at least some controls on economic growth.<sup>155</sup>

But the efforts of the courts to limit business regulation were not entirely consistent; even in this relative stronghold of laissez faire doctrine, there were conflicting attitudes and decisions. In the areas of public morals and public health, for example, the Supreme Court frequently ruled in favor of government control. Prominent examples include decisions in favor of laws that closed a brewery without compensation due to a state prohibition law, and prevented the sale of oleomargarine ostensibly on public health grounds.<sup>156</sup> The court also permitted regulation of working hours for mining employees, and permitted some degree of rate regulation for railroads, albeit by the courts themselves rather than state commissions or the Interstate Commerce Commission.<sup>157</sup> On the public lands, the court upheld the fledgling regulatory powers of the newly created Forest Service against private entrepreneurs in two crucial decisions.<sup>158</sup> Even Justice Field,

(describing the key role of Justice Field in setting the boundaries of government regulation of private enterprise in the late nineteenth century); L.B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238 (1911) (arguing against the judicial tendency to annul legislative action in the early twentieth century).

151. See *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (declaring the need for federal rather than state-by-state regulation of railroad rates and commerce); *Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (declaring the rate-setting policies of a state commission to be unconstitutional).

152. See *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (declaring Sherman Anti-Trust Act inapplicable to industries of "production" [e.g., in this case, of refined sugar] rather than "commerce" or trade).

153. See *Lochner v. New York*, 198 U.S. 45 (1905) *overruled in part by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) & *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (declaring unconstitutional restraint of contract a New York law limiting working hours for bakers to 10 hours per day and 60 hours per week).

154. See *In re Jacobs*, 98 N.Y. 98 (1885) (declaring unconstitutional a law preventing the manufacture of cigars on any floor of a tenement used for living space).

155. See Boudin, *supra* note 150, at 270; TWISS, *supra* note 150, at 4.

156. See, e.g., *Powell v. Pennsylvania*, 27 U.S. 678 (1887); *Mugler v. Kansas*, 123 U.S. 623 (1887).

157. See *Holden v. Hardy*, 169 U.S. 366 (1898); *Smith v. Ames*, 169 U.S. 466 (1898).

158. See, e.g., *United States v. Grimaud*, 220 U.S. 506 (1911) (holding that authority to make administrative rules not an unconstitutionally delegated legislative power); *Light v. United States* 220 U.S. 523 (1911) (holding constitutional Congress' authority to withdraw lands from settlement without consent of state).

no friend of regulating private property, utilized the public trust doctrine and the notion of public rights to void the sale of the Chicago waterfront to a private railroad company in 1892.<sup>159</sup> As legal historian Harry Scheiber points out, although the courts in general sought to grant new corporate enterprises a great deal of freedom and assistance during the gilded age, public rights and regulatory control never vanished from view.<sup>160</sup>

To make matters more complicated, in many cases large private interests failed in their efforts to *obtain* regulation by the government. Two cases serve as good examples. First, the railroad industry attempted to obtain "pooling" legislation in the 1880s. It would have allowed them to form cartels to end the ruinous rate wars and speculative pressures taking a toll on their profitability.<sup>161</sup> No such legislation was ever enacted, and the railroads finally turned to mergers as an alternative strategy for reducing competitive pressures. The second case comes from the public lands. For decades prior to the Taylor Grazing Act, large grazers strove without success to create a government leasing system to end the "range wars" over access to forage on the public domain.<sup>162</sup> Ironically, in both cases the private industry groups failed to gain the regulation they desired during an era of government economic policy that was supposedly of great support to the private sector. The role of government in facilitating and restraining large economic development remained torn throughout the period.

### C. Summary

The growth of a continental nation, a more confident and assertive national identity, and a powerful national economy, made it possible for the federal government to develop an increasingly aggressive array of programs and policies. Many of these changes were supported by changing assumptions about government associated with the influx of German ideas about politics and economics. The growth of the federal bureaucracy did not, however, displace the earlier Lockean notions of limited government

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159. See *Illinois Central R.R. v. State of Illinois*, 146 U.S. 387 (1892) (see *infra* notes 302-04 and accompanying text). See also McCurdy, *supra* note 150, at 993-95.

160. See Harry M. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 251 (1984).

161. See SKOWRONEK, *supra* note 78, at 124-31 (noting the failure of any particular interest group—big business, agrarian populists, or others—to obtain business regulation legislation to its own satisfaction prior to 1900).

162. See *infra* note 439 and accompanying text. The stockmen's quest for regularized access was delayed from the late 1890s, when it was first proffered as a possibility, until 1934, largely by the aforementioned spat between the Departments of Agriculture and the Interior, and continuing conflict between sheep and cattle interests. See DANA & FAIRFAX, *supra* note 11, at 158-65.

and agrarian democracy. The rise of science did not dictate a unified policy for public land management. Nor did the rise of corporations lead to a government policy devoted exclusively or even primarily to controlling private enterprise or subduing capitalist greed. The government also encouraged corporate growth even as the corporations sought regulatory programs supportive of their interests. Ideas about government and the nature of government decision making in a democracy were fragmenting. These changes were closely related to a similar revolution in thinking about property and the nature of ownership to which we now turn.

### III. CHANGING CONCEPTS OF PROPERTY

Ideas about government were not the only ones fragmenting during the late nineteenth and early twentieth centuries. The definition and understanding of property was also highly contested and divided during this period. We focus on property for three reasons. First, it is central to public lands policies to a degree evinced by few other legal or social ideas. Second, we believe that much of the current public debate, which continues to be arrayed around the arid structure of the "shift-to-retention" dogma, can be better understood as a dispute about the meaning of ownership. Finally, the resulting disarray of public lands rules and decisions that we describe begs for an improved organizing theory to amend or replace the simple "shift-to-retention" narrative. For these reasons, the rather abstract work of this section is central to the revised approach to public land policy we present in this article.

#### A. A Continuum of Property Ideas: From Locke to Cohen and Hegel

To describe the fragmentation of the concept of property in the late nineteenth century, it is helpful to introduce a continuum of property views and place a few political philosophers of property on it. The continuum locates an "intrinsic" view of property at one end and an "instrumentalist" view at the other. A closely related spectrum is one that places property as an individual right at one end and property as a social benefit at the other.

##### 1. *The Intrinsic View*

The defender of the intrinsic view sees property as an individual's right against society and government.<sup>163</sup> It is a right, in the sense made

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163. Leading proponents include John Locke and Robert Nozick. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 2D TREATISE, ch. 5 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (Locke's work is divided into sections and will subsequently be referred to hereinafter as LOCKE, 2D TREATISE, §); ROBERT NOZICK, ANARCHY STATE AND UTOPIA (1974). A modern

popular by Ronald Dworkin, that is a "trump" that must be respected by all other actions in defense of the individual's autonomy.<sup>164</sup> Thus, the intrinsic view is of property as an *absolute*, Blackstonian<sup>165</sup> right to do with one's property as one wishes, even to the point of destroying it. It is also a pre-political right—one that exists outside of the government framework and which must be respected by the political process in order for the government to be legitimate. It therefore includes the idea that property is a natural right, derived from some personal action or actions that no just law can undo. Defenders of the intrinsic position argue for either a general right of property for all, or a special right of property for some and not others.<sup>166</sup> Who gets what and how much is not the core issue. What matters is simply that whatever the agreed upon mechanism for taking ownership, property rights include near-absolute power over the object in question that must be respected by government to the benefit of the individual owner at nearly all costs.

## 2. *The Instrumentalist View*

For the instrumentalist, property is nothing but a human institution created to further the ends of society.<sup>167</sup> It is therefore subject to change to meet evolving social goals. The view flatly rejects the idea that property is somehow a natural or pre-political right. Property is instead a construct of government—something created to further the common good that exists exclusively at the continued pleasure of the political system. Property rights may serve in part as a bulwark against the tyranny of the majority, but they are not inviolate. Government created private property to better the common lot of society, and therefore must be able to change the nature of the right over time where common interests require changes. Another way of characterizing the instrumentalist view is to think of a property

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revision of this view sees property rights as political, but still focused on the needs of the individual. This view might include the ideas of Jeremy Bentham as well as law and economics scholar Richard Posner.

164. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (in particular, a common threat to such individual rights supported by Dworkin is the demand of greater social needs and such utilitarian demands must give way before individual rights in many cases).

165. See, e.g., JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY—A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 273 (1998). Traditionally, the writings of eighteenth century English legal scholar Sir William Blackstone are taken as the definitive statement of "absolute" or unmitigated rights of ownership, including full powers of use, exclusion, bequest, and alienation.

166. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* ch. 4 (1988) (explaining the distinction between special and general rights, citing introduction of the idea to H.L.A. Hart).

167. See *infra* notes 180-90 and accompanying text on Cohen. Leading proponents of this view include Morris Cohen and, more recently, Joseph Sax.



relationship creating a duty in others, rather than a right for the property-holder. The Progressive legal scholar Wesley Hohfeld<sup>168</sup> noted that rights and duties can be viewed as "legal correlatives" of one another—the notion of a right for one person necessarily implies a concurrent duty in others to the right-holder to forbear or take certain action.<sup>169</sup> Hence, within the instrumentalist approach, property is better seen as a privilege than a right—something that must meet the ends of society as a whole in order to be acceptable.<sup>170</sup>

Few argue for either a purely intrinsic or instrumentalist approach to property. Nevertheless, these archetypes allow us to describe different approaches to property as tending more to the instrumentalist or intrinsic position. In particular, a juxtaposition of John Locke and Morris Cohen, who fall near the opposite ends of the spectrum, helps frame our discussion of property fragmentation in the late nineteenth century political and legal realms of the United States.

### 3. *Locke's Account*

The Lockean account is firmly located in the intrinsic approach to property. In Locke's seventeenth century political writing, private property served an important role as safeguard of the free-holding citizen against the potentially despotic state.<sup>171</sup> For Locke, property was a right that individuals derive from the ownership of their bodies and their labor. That people own their bodies and their labor was taken by Locke as self-evident.<sup>172</sup> Everything not owned in nature was free to be appropriated by human actors. By mixing labor or sweat with the object desired, either directly or through the "owned" labor of servants or slaves, a person became the owner of that item.<sup>173</sup> Hence, the familiar phrase, "That is mine with which I have mixed my sweat." No government action was required

168. See generally Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 Yale L.J. 721, 736-38 (1919) (Hohfeld uses the opposite notion of "duty" to more clearly define the widely used legal idea of "right," concluding that if I have a right to exclude you, you have a duty to remain off of my property).

169. See WALDRON, *supra* note 166, at 68-73. The notion of rights and duties as legal correlatives raises a host of possible objections and complications—including the notion of rights without corresponding duties and others.

170. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: The Crisis of Legal Orthodoxy* 155 (1992); WALDRON, *supra* note 166, at 69-73 (making similar arguments by asking how private property can be justified if it leaves some people without access to even the most basic means of survival).

171. See LOCKE, 2D TREATISE, *supra* note 163, at § 87.

172. See LOCKE, 2D TREATISE, *supra* note 163, at § 27. Why this is so obvious to Locke is unclear to some later commentators. See, e.g., LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 36-41 (1977).

173. See LOCKE, 2D TREATISE, *supra* note 163, at § 27.

to create this ownership claim. Indeed, it was the obligation of government to respect such property rights as natural and in some sense prior to legitimate government action.

Initially, Locke's system of individual appropriation was restricted in two ways. The first was the "Lockean proviso" that "enough and as good" must remain for others after an appropriation has taken place. Thus, taking ownership of common resources in conditions of scarcity was not simply a matter of mixing one's labor—other considerations were required.<sup>174</sup> The second restriction was to ownership of subsistence needs only. The natural processes of spoilage and waste prevented accumulation of property beyond what one can immediately use.<sup>175</sup> With these two restrictions, the Lockean account was quite limited in its power to justify individual appropriation. Locke evaded the first limitation by emphasizing the availability of unused land in areas like America, where an abundance of resources remain available for private taking. He dispensed with the second limitation by noting the creation of money. Money serves, by "tacit and voluntary consent" among men, as a permanent repository of value, thus permitting unlimited accumulation of wealth without threat of spoilage.<sup>176</sup> With these maneuvers, Locke argued that the labor theory of ownership extends to unlimited accumulation of goods.

Both the Lockean proviso and the "implicit agreement" to permit unlimited accumulation have been the subject of extensive subsequent commentary and critique.<sup>177</sup> Nevertheless, despite its more controversial aspects, the basic Lockean system of property as a license for unlimited individual accumulation has held a powerful place in the American pantheon of political thought since the revolution. Even today, the notion of ownership based on "moral desert," particularly through personal labor, is a powerful influence on property law and social custom.<sup>178</sup> An "intrinsic" right to ownership pervades the rhetoric and policies of groups as diverse

174. See LOCKE, 2d Treatise, *supra* note 163, at § 35. Locke contrasts in this section the impossibility of taking ownership of land by unilateral action in England, where land is scarce, with other places such as America in which land is plentiful enough to permit appropriation without harm to others. See *id.* Whatever the merits of this argument on his part, it reveals his understanding of the limits on unilateral appropriation caused by the proviso "enough and as good" left for others.

175. *Id.* at § 36.

176. *Id.* at §§ 48-51.

177. See NOZICK, *supra* note 163, at 149-231; STEPHEN R. MUNZER, A THEORY OF PROPERTY ch. 10 (1990) (for those generally sympathetic to Locke's agenda, or at least portions thereof). See also BECKER, *supra* note 172, at 32-56; WALDRON, *supra* note 166, at ch. 6; C.B. MACPHERSON, POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM ch. 5 (1962).

178. See MUNZER, *supra* note 177, at 260 (noting one example of this desert-based argument for ownership).

as the "wise use" and the "pro-choice" movements.<sup>179</sup> As an explanation and defense of private property, the Lockean model remains central more than 300 years after the publication of Locke's work.

#### 4. *Morris Cohen and The Progressive View*

The Progressive Movement in American politics was accompanied by a significant outpouring of legal and political philosophy sympathetic to its reformist goals. Foremost among the Progressive thinkers was Morris Cohen. Drawing on the ideas of contemporaries such as Hohfeld and British socialist R.H. Tawney, Cohen produced a large number of works espousing a progressive, reformist approach to law and politics.<sup>180</sup> In particular, he expressed a social view of ownership while downplaying the Lockean emphasis on the rights of the individual. His was a strongly instrumentalist perspective on property, viewing the institution as a political means to common societal ends.

Cohen's approach to property was influenced heavily by the views of socialists such as R.H. Tawney, who stressed the "function" of property in society as its justification for being.<sup>181</sup> Cohen, in particular, emphasized the existence or absence of substantial public benefit in evaluating a system of property. In his landmark essay "Property and Sovereignty," Cohen noted the tight connection between the traditionally distinct realms of

179. See, e.g., Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. REV. 1597 (1991) (discussing an abortion case).

180. See Morris R. Cohen, *Property and Sovereignty*, in LAW AND THE SOCIAL ORDER 41 (1967) [hereinafter *Cohen-Sovereignty*]. See also MORRIS RAPHAEL COHEN, *REASON AND LAW: STUDIES IN JURISTIC PHILOSOPHY* (1950); MORRIS R. COHEN, *STUDIES IN PHILOSOPHY AND SCIENCE* (1949); MORRIS COHEN, *THE FAITH OF A LIBERAL* (1946).

181. See R.H. TAWNEY, *THE SICKNESS OF AN ACQUISITIVE SOCIETY*, ch. V (1920), reprinted in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 133 (C.B. Macpherson ed., 1978). Tawney's thesis was that property systems should be judged according to the "function" they serve in society. See *id.* Property rules that play a useful role are to be supported as legitimate. Property rules that cease to be useful are to be rejected. See *id.* Tawney neglects to declare by whose criteria the term "useful" is to be defined, but he nevertheless gives some examples in which property has ceased to serve its original, worthwhile function. For example, property once served to guarantee "security" for each man to keep what he had made or sown. See *id.* at 138. "Such property," wrote Tawney, "was not a burden upon society, but a condition of its health and efficiency." *Id.* In the beginning of the twentieth century, however, property no longer protected the security of the laborer to the fruits of his efforts. See *id.* at 146. Indeed, the security of the average worker to attain and keep the necessities of life was threatened severely by the property rights of the corporate owners who employed him. See *id.* In this respect, property had ceased to provide the security it was designed for, and therefore needed to change. "Property is the instrument," concluded Tawney, "[but] security is the object..." *Id.* A right to property that ceased to play the correct function in society is, on this account, the "greatest enemy of legitimate property itself." *Id.* at 150.

private and public power.<sup>182</sup> Control over things leads inexorably to control over other people as well, for property is a fundamentally social institution involving restrictions on the actions of others. In the industrial capitalist world of the early twentieth century, Cohen noted that property owners exert such tremendous control over those who lack property as to effect a kind of sovereignty over their lives.<sup>183</sup> This objection was not, in and of itself, an argument against private property as it then existed. Cohen sought only to consider whether the sovereignty created by property as it was structured in early twentieth century America was more or less justified than any other form of governance.<sup>184</sup>

Cohen's answer was that property has a useful function, but must be limited in its power to the continued service of the common good. The question for Cohen, of course, was what degree and type of limitations on property were desirable for society.<sup>185</sup> His answer promoted typically Progressive restrictions on private property, including a weakened power of bequest for individuals.<sup>186</sup> It also included a stronger power for government to mandate higher wages and better working conditions without compensating business owners for their alleged loss of "property."<sup>187</sup> More important, however, was the basic assumption of the intellectual exercise undertaken by Cohen in the first place. Simply by asking what ends property must serve, Cohen embraced the instrumentalist approach and downplayed the intrinsic value of property rights. In so doing, he rejected core elements of Locke's ideas.

Despite these clear differences, however, Cohen's position was not an outright rejection of the Lockean approach. In fact, Cohen defended the idea of natural rights and natural law in general.<sup>188</sup> Nor was Cohen entirely hostile to the labor theory of ownership propounded by Locke and his followers. "[T]he labour theory contains too much substantial truth," he wrote, "to be brushed aside."<sup>189</sup> The key difference was that Cohen put much less weight on the importance of labor as a justification for ownership. On his account, private property was a very poor candidate for a

182. See Cohen-Sovereignty, *supra* note 180.

183. See *id.* at 47.

184. See *id.* at 49.

185. See *id.* at 57.

186. See Cohen-Sovereignty, *supra* note 180, at 27-31. See also John Stuart Mill, *Of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 87-91 (C.B. Macpherson ed., 1978) (Mill was hardly the first to question the unlimited right of bequest; however, he was one of the stronger critics of such a right.).

187. The expansion of property to include intangibles such as a regulatory environment is discussed at length *infra* text accompanying notes 252-61.

188. See MORRIS R. COHEN, REASON AND NATURE: AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD 401-26 (1931).

189. Cohen-Sovereignty, *supra* note 180, at 52.

natural right. For Cohen, as for Tawney and other instrumentalists, the labor theory of ownership was justified only insofar as it serves greater ends such as efficiency or industry on the part of individuals. Scrutinizing the function of property as a tool to other ends remained the key method of analysis. In this manner, the role of property as an individual right that must be respected by others was seriously weakened. A property right was no longer a "trump" against the greater needs of society—it was simply an instrument of public will, subject to manipulation by government to serve the greater good.<sup>190</sup> Ownership was fundamentally political, rather than pre-political, in nature.

### 5. *Hegel—A Third View*

The theories of Hegel provide a third way of viewing property that reflects the opposition between rights and duties as framed by Cohen and Locke.<sup>191</sup> His view takes a dialectical approach, recognizing property as a system that must simultaneously embrace the individual's rights of ownership and temper them with socially oriented controls. Because the tension between Cohen and Locke remains unresolved to this day in American politics and law, we find the Hegelian view useful for studying property in the Progressive Era and the twentieth century in general. For it was Hegel, and the Hegelian notion of property, that spoke both early and with power on the conflict within a system of ownership between the individual and society, between individual rights and social concerns—themes that underwrite and best explain Progressive Era policies for public lands.

Ownership is critical to Hegel's conception of human development in a way that is unlike many, if not all, of the political philosophers who preceded him.<sup>192</sup> Hegelian property is simultaneously individual and social

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190. Many modern legal scholars continue to embrace this view of property with enthusiasm. See, e.g., Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

191. Hegel's political thoughts, and his ideas about property in particular, have inspired much recent legal commentary and analysis. See, e.g., WALDRON, *supra* note 166, at 343 (dedicating a chapter of his work to a discussion and critique of Hegel's account of ownership); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1,014-15 (1982) (taking the Hegelian idea of property and applying it to modern legal disputes, drawing a distinction between "personal," such as wedding rings, and "fungible," such as stock certificates, forms of property); ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 7 (1995) (explaining fragmented public policy and common law through a Hegelian approach).

192. See generally HEGEL'S *THE PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1952) [hereinafter *PHILOSOPHY OF RIGHT* with § or §A]. Although Hegel discusses the concept of property in a number of his works, the most extensive and complete consideration is found in this later publication. This work is divided into "sections," (§) with longer glosses, or "additions," (§A)

in orientation and purpose. For Hegel the relationship of individuals to the world and other persons around them begins with the notion of ownership. This initial relationship is the first social aspect of his theory. His vision of property is also fundamentally connected to the human development of personality, however, as a concurrent emphasis on the individual.

Hegel begins his analysis of political philosophy in the *Philosophy of Right* by viewing humanity as beings with free will. But while people are free in his analysis, they initially lack any means of connecting their free will to the external world that surrounds them.<sup>193</sup> It is property that makes this initial connection. Hegel contrasts the freedom of human will with the world of "things." Objects external to humans are un-free and therefore, in Hegel's view, without rights.<sup>194</sup> Ownership consists of the free will being placed in the external object of nature with the purpose of taking ownership.<sup>195</sup> This placement of the will can occur through physical possession with intent to own or by simply "marking" the object in a manner recognizable by others.<sup>196</sup> In this manner, humans possess an intrinsic right to ownership of property by virtue of their freedom of will.

Hegel contrasts property with mere possession—the latter being control of an object without the exercise of free will critical to ownership.<sup>197</sup> This distinction separates humans from mere animals; the latter may have possession of various items to meet their bodily needs, but they lack the freedom inherent in human decision making to take ownership.<sup>198</sup> Property therefore is not simply a means to create wealth more efficiently or to distribute goods (as it might be in the instrumentalist account), nor is it a right that simply protects the individual from the state (as in the intrinsic account). It is instead a fundamental expression of our freedom and our humanity—the first expression of our free will that gives us a personality and set of rights distinct from the rest of the natural world. The primacy of property makes Hegel's account quite different from those of his predecessors such as Locke,<sup>199</sup> despite the fact that both his account and Locke's stressed the intrinsic nature of the property right.

While recognizing property's intrinsic value, Hegel's account of private ownership also includes significant social benefits and components.

on many such sections found in the back of the book.

193. See *id.* at § 41.

194. See *id.* at § 42.

195. See *id.* at § 44.

196. See *id.* at § 54. All property is "alienable" in Hegel's account by virtue of an individual choosing to remove his or her will. See *id.* at § 65.

197. See *id.* at § 45.

198. See *id.* at § 42A, 45, 47A. This particular point of Hegel's is obviously debatable.

199. Or contemporaries such as Bentham. See HARRY BROD, *HEGEL'S PHILOSOPHY OF POLITICS: IDEALISM, IDENTITY, AND MODERNITY* 67-68 (1992).

This inclusion puts him in contrast again with Locke, who emphasized the gains to the individual under a private property regime. For Hegel, property is the very basis of interpersonal relations—the initial means by which two free individuals learn to recognize and interact with one another in the external world. Only occupation of an object by another's will prevents a claim of ownership.<sup>200</sup> Because of this, my property claim must be recognizable by you and others before it becomes legitimate, "my inward idea and will that something is to be mine is not enough."<sup>201</sup>

We do not argue that property is exclusively or even primarily a social institution in Hegel's thought. Property plays a crucial role in an individual's development of personality and a relationship to the external world.<sup>202</sup> The very individual rights to life and liberty are grounded in the notion of "self-ownership." The active occupation of one's own body by one's free will prevents control or ownership by others.<sup>203</sup> Property not only is itself a right, it creates other individual rights as well. However, property also bears a strong social role within Hegel's system. The importance of "social consensus," as Shlomo Avineri observes, to maintaining a healthy system of property makes Hegel's view complex.<sup>204</sup>

Hegel is quite aware of the potential for conflict between these individual and social aspects of ownership. This becomes evident in his discussion of the historical moment of civil society in particular.<sup>205</sup> Here, the individual aspects of property are dominant, as people come together primarily to further their own individual ends. In civil society, rampant self-interest and pursuit of individual ends threaten general social goals. Private property is an important part of this threat. As Stillman observes, Hegel is aware of the "tendencies toward atom-ism and individual acquisitiveness" that are "latent in property ownership," and must be

200. See PHILOSOPHY OF RIGHT, *supra* 192, at § 50.

201. *Id.* at § 51. Compare ROSE, *supra* note 3, at 297. The parallels between this observation by Hegel and those of modern legal thinker Carol Rose are quite thought provoking. Rose concludes by arguing that in many important ways the key to understanding a property claim is to think of it as an act of persuasion to the outside world. See *id.* The connections to the ideas of Hegel are clear.

202. See, e.g., Peter Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in NOMOS XXII PROPERTY 130-67 (J. Roland Pennock et al. eds., 1980) (noting the importance of property to individual development within Hegel's work).

203. See *id.* at 133.

204. See SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 89 (1972).

205. See generally PHILOSOPHY OF RIGHT, *supra* note 192, 1-13. Hegel's philosophy is strongly "historicist," seeing the past as a steady progression of human society through various stages or moments of development. See *id.* The moment of civil society is one such stage, improving on those that preceded it but still itself to be improved in future moments of social development to come. See *id.*

corrected.<sup>206</sup> To this end, Hegel seeks other institutions such as the family and the state to serve as a balance to the power of individual ownership. Hegelian property rights are not to be respected at all costs by society. They are subject to modification and constraint by competing social needs.<sup>207</sup> Indeed, Avineri notes that the Hegelian state is a constant threat to individual rights of private property, even as it insists on the continued legitimacy of such rights.<sup>208</sup> Thus, the tension remains unresolved.<sup>209</sup>

To summarize, for Hegel private property ownership remains crucial to human development in a manner that is fundamentally different from a mere mechanism of individual wealth maximization. Property develops and relies on important individual *and* social qualities as an institution. It recognizes the tendency toward atomistic and selfish behavior by individuals within civil society that must be checked by state and family intervention. Yet, it is not simply a mechanism of politics or society for furthering social goals. It is crucial to the individual's most fundamental relationships to the world around her. Within the Hegelian account, the idea of property should honor and include both the individual roots of ownership and the need for social constraints upon it. Therefore, Hegel's theory of property is uniquely suited to the fragmented notions of property and public land policy developed during the Progressive Era.

## B. The Fragmentation of Property in America—Three Fissures

How did the fragmentation of property along the Locke-Cohen spectrum play out in the American legal-political realm of the late nineteenth century? What had been a strong allegiance to the intrinsic rights of ownership was weakened by challenges from increasingly social

206. Stillman, *supra* note 202, at 145.

207. See ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 133 (1984).

208. See AVINERI, *supra* note 204, at 85.

209. A provocative, although tangential, difficulty for Hegel's account of ownership is the problem of the property-less. The Hegelian view puts such importance on ownership for human development, that it appears to imply some sort of right or entitlement to "property for all." See WALDRON, *supra* note 166, at ch. 1. See also Stillman, *supra* note 202, at 134. This does not mean an equal share of property for everyone, as radical egalitarian critics like P.J. Proudhon might argue, but merely the chance to own some meaningful amount in order to develop one's individuality. See PHILOSOPHY OF RIGHT, *supra* 192, at § 49. Thus, the importance of property for personal development makes the existence of the "rabble"—the masses within society lacking any property at all—a quandary. It is, for Hegel, an unavoidable downside to the accumulations of property within civil society. And yet, he has only the weak suggestions of "colonization" and public relief or charity as potential cures. See Stillman, *supra* note 202, at 148. The importance of property for human development on his account leaves him vulnerable to criticism that his argument must explain how to provide some measure of "property for all" or why such universal ownership is not required.



and instrumentalist views. The result was a more conflicted conception of property, both in terms of justifications for ownership and of what property ownership actually entailed. We elaborate here on three major rift lines: a broadening in what can be owned and who or what can own it; a broadening in understanding of what ownership entails, including a separation of ownership and control; and a broadening of the individualist ends which property serves, to include a more social definition of property's role. The first two encompass changes in what the power of ownership included legally and politically in the United States. The third is a more specific example of changes in the American legal system to justify ownership along the Locke-Cohen spectrum just presented.

In general, the powers of property right holders broadened during the late nineteenth and early twentieth centuries. Increasingly abstract entities served as both owner and subject of ownership. Meanwhile, the traditional connection between ownership and control over items weakened as the unified right of property began to fragment into more and more divisible "sticks" within the "bundle of rights" that came to define ownership in the late nineteenth century.<sup>210</sup>

### 1. *Abstractions as Owner and Owned*

In the early years of the nation, public policy largely recognized individuals as the owners of property. In general, these individuals owned physical things: animals, tools, other people (in the case of slavery), and especially, land.<sup>211</sup> These individualist and "physicalist" views of property broadened significantly, however, after the Civil War.<sup>212</sup> No longer did the hardy farmer with his 160 acres of land provide the dominant image of ownership. Instead, abstract legal constructs in the form of corporations became the holders of extensive property rights. What they owned also expanded to include numerous non-physical "things" such as the right to a reasonable profit or freedom from undue regulation.<sup>213</sup> By the end of the period covered by this study, it was clear that almost anything could

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210. See, e.g., Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 (1995).

211. See HORWITZ, *supra* note 170, at 145; SCOTT, *supra* note 48, at 6, 15. However, the ownership of intangible property was not uncommon in the eighteenth and early nineteenth centuries. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 827 (1995). Nevertheless, the dominance of tangible forms of ownership prior to the Civil War is generally acknowledged. See *infra* text accompanying notes 271-73.

212. The term "physicalist" is from HORWITZ, *supra* note 170, at 145.

213. See HORWITZ, *supra* note 170, at 146; Freyfogle, *supra* note 210, at 97-99.

legally own almost anything else except other human beings.<sup>214</sup> The rise of these abstractions reflected the general move on our continuum from the intrinsic view of property towards an instrumentalist one.<sup>215</sup>

a. *The Old View—Concrete Ownership*

Consider the approach to property in the early years of colonial America and the United States. The dominant image and form of ownership was an individual white male with property in an agrarian plot of land. At the time of the revolution, nearly 70 percent of the white male citizens were landowners.<sup>216</sup> Sole proprietors owned and directed nearly every business enterprise in the United States. Few corporations existed, and those that did were primarily for quasi-public purposes such as road building and banking.<sup>217</sup> As late as 1840, few alternatives to a farm or business owned by an individual or small group of persons existed on the American economic landscape.<sup>218</sup> This Lockean-inspired approach to property ownership of objects by persons extended into the 1870s and beyond, supported by Populists and others who opposed the growing power of the modern corporation.<sup>219</sup>

Non-physical forms of property were not unknown at the time. Indeed, there was a growing reliance within the eighteenth-century American economy on imaginary assets such as promissory notes and other forms of credit based on only "promises, hopes, and expectations."<sup>220</sup> The rise of credit, and other transferable forms of intangible property as private assets, put fear in the minds of civic republicans such as Jefferson and Adams, who explicitly sought a more stable and less transferable form of ownership in agrarian land.<sup>221</sup>

214. Of course, Cohen and others would argue that the effective ownership of laborers did not expire with the emancipation proclamation. For more on this point see *infra* text accompanying notes 271-73.

215. See HORWITZ, *supra* note 170, at 145-67 (noting this trend).

216. See SCOTT, *supra* note 48, at ch. 2.

217. See STUART BRUCHEY, CORPORATION, HISTORICAL DEVELOPMENT IN THE CHANGING ECONOMIC ORDER: READINGS IN AMERICAN BUSINESS AND ECONOMIC HISTORY 143 (Alfred D. Chandler et al. eds., 1968).

218. See CHANDLER, *supra* note 115, at 3.

219. See LUSTIG, *supra* note 75, at 52-53.

220. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 333-35 (1991). See also David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464 (1993).

221. See Alexander, *supra* note 220, at 292. See also Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 470 (1976). These republican views of Jefferson, Adams, and others were strongly influenced by the works of James Harrington, a seventeenth century political philosopher who sought stability and equity in government through stable, widely dispersed, and relatively non-transferable rights of

Nevertheless, these intangible forms of ownership lacked the widespread recognition and certain legal preferences accorded to physical property. Physical objects, especially land, were the pre-eminent and most common form of property during this period.<sup>222</sup> Although many other feudal aspects of property law disappeared from American law soon after the revolution,<sup>223</sup> land remained a central form of property well into the nineteenth century. Presidents from Jefferson to Jackson privileged the ownership of land, and continually encouraged a stream of early nineteenth century public land acts favoring preemption, squatters rights, and small free-holding farmers.<sup>224</sup> Emphasis on the physical nature of property extended into "takings jurisprudence" as well. As late as the Civil War, any violation of the Fifth Amendment still required an actual physical intrusion upon or removal of property from the aggrieved owner.<sup>225</sup> The Homesteading act of 1862 was a crowning piece of legislation for the traditional view of property, one passed even as the form of ownership it encouraged was beginning its decline.<sup>226</sup>

In summary, the antebellum view of property focused on the intrinsic, Lockean value of physical property such as land for individuals and small groups of owners. While cracks in this approach appeared well before the Civil War,<sup>227</sup> they did not become part of a more dominant pattern in American society until the last third of the nineteenth century.

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property to land. See generally JAMES HARRINGTON, *OCEANA* in 33 *IDEAL COMMONWEALTHS* (1901). See, e.g., GATES, *supra* note 1, at 257 (the widespread existence of government certificates redeemable for public land—issued to Revolutionary War soldiers in lieu of a salary—bedeviled the new nation as it tried to raise money from the sale of the public domain, because much of the land was purchased with these highly discounted forms of public debt.).

222. See SCOTT, *supra* note 48, at ch. 4; FRIEDMAN, *supra* note 125, at 230; HORWITZ, *supra* note 170, at 145.

223. See FRIEDMAN, *supra* note 125, at 234-45.

224. See, e.g., OPIE, *supra* note 50, at 22. See also LUSTIG, *supra* note 75, at 67 (even arguments of later nineteenth century critics of government land policy such as Henry George were rooted in a Lockean view of ownership with land having a privileged status).

225. See Treanor, *supra* note 211, at 796; HORWITZ, *supra* note 170, at 147.

226. See DANA & FAIRFAX, *supra* note 11, at 22; SCOTT, *supra* note 48, at 70.

227. See SCOTT, *supra* note 48, at 88 (observing that a minority of more radical American thinkers such as Theodore Sedgwick began to use property and monetary wealth interchangeably, rather than privileging land ownership, as early as 1836). See also FRIEDMAN, *supra* note 125, at 235 (noting the rapid ascent of land as a tradable commodity rather than a permanent source of family support within American society as exemplified in many cases by the family farmer acting as a land speculator, eagerly selling his plot at a profit when prices were high and moving on to another homestead further west).

*b. The New Vision—Abstract Property and Abstract Owners*

The major changes in the United States discussed in Part II, including the rise of corporations and the "modern business enterprise,"<sup>228</sup> and the relative decline in importance of small family farming, put the traditional "physicalist" form of property under great pressure to adapt. As increasingly complicated forms of ownership became the rule, the American legal system moved to recognize and embrace that reality by expanding the notion of property. This action reflected a more instrumentalist view of property as something to be manipulated and altered by public officials as required by public needs. Both who could be an owner and what could be owned expanded slowly but steadily, as the idea of property became increasingly abstract.<sup>229</sup>

Starting with the new railroad and telegraph companies, large corporations began to take the place of smaller entrepreneurs as the owners of property in the United States.<sup>230</sup> Railroads were the first private businesses to acquire and utilize large amounts of capital from sources outside their local region.<sup>231</sup> The power of the roads as the dominant corporate force in America can be easily underestimated—as late as 1900, three-quarters of the corporations traded on the New York Stock Exchange were railroad companies.<sup>232</sup> As the railroads and other corporations gained economic power, they also gained legal recognition. Contrary to the populist, Lockean view, corporate advocates sought full rights of private property for their legal constructs. In 1886, that goal was realized as the Supreme Court declared corporations to be "persons" entitled to due process and compensation for losses of property under the Fifth and Fourteenth Amendments.<sup>233</sup> Ironically, a constitutional amendment passed to protect freed slaves from abusive laws served extensively as a protection of large corporate interests in the 1890s.<sup>234</sup> Also ironic were the instrumentalist property views later associated with Cohen that appeared in the courts' ratification of corporate ownership.<sup>235</sup> The reliance on a labor theory

228. The term is Alfred Chandler's. See *supra* text accompanying notes 115-24.

229. See HORWITZ, *supra* note 170, at ch. 5, 145-67 (making this general observation).

230. See *supra* text accompanying notes 119-29. See also SCOTT, *supra* note 48, at 133-35.

231. See Alfred D. Chandler, Jr., *The Coming of Big Business*, in *THE CHANGING ECONOMIC ORDER: READINGS IN AMERICAN BUSINESS AND ECONOMIC HISTORY* 268, 270-71 (Alfred D. Chandler et al. eds., 1968).

232. See LUSTIG, *supra* note 75, at 43.

233. See *id.* at 92. See also *County of Santa Clara v. Southern Pac. Ry. Co.*, 118 U.S. 394 (1886).

234. See FRIEDMAN, *supra* note 125, at 521.

235. This notion is ironic given the ostensible Progressive reform agenda against the interests of big business.

of ownership for property was clearly missing.<sup>236</sup> In other words, corporate owners do not sweat in the Lockean sense of ownership.

The expansion of property's legal reach was even more dramatic in terms of what was subject to ownership. Moving rapidly away from the emphasis on land and physical property, courts began in the 1880s and 1890s to adopt a more flexible, market-based mentality. Property was no longer the thing one possessed; it was the "market value" of the item.<sup>237</sup> Property grew to include abstractions such as a company's earning power or the right to a fixed rate of return. Even the corporate charter, itself granted by government, was considered property.<sup>238</sup> Through copyright, trademark, and patent law innovations, other intangible forms of property became the increasingly common subjects of legal ownership claims.<sup>239</sup> Unfettering property from its physical limitations created a problem for the courts, however. Nearly every government regulation could be seen as having an impact on the market value of private investments, and therefore as an interference with private property rights. In the antebellum period, a fairly strict adherence to the physical definition of property kept this problem under control.<sup>240</sup> With the rise of a market value notion of property, boundaries were difficult to establish. "During the period," notes historian Morton Horwitz, "American courts came as close as they had ever had to saying that one had a property right to an unchanging world."<sup>241</sup> This expansive property right remained a mainstay of *Lochner*<sup>242</sup> era court decisions almost until World War II.

The increased abstraction of ownership played out in other ways on the legal-political landscape as well. Although Henry George and Frederick Jackson Turner did not make their arguments about the declining availability of land until the 1880s and 1890s, the social and political importance of land ownership diminished as early as the Civil War. Even before passage of the Homestead Act in 1862, most states moved away

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236. Although economists argue that the stockholders' provision of capital is the sine qua non of the corporation, they take no physical role in the production of value of their companies.

237. See HORWITZ, *supra* note 170, at 149; LUSTIG, *supra* note 75, at 96; Freyfogle, *supra* note 210, at 97-98.

238. See LUSTIG, *supra* note 75, at 92-93. See also *supra* note 133 and accompanying text (discussing corporate charters).

239. See FRIEDMAN, *supra* note 125, at 255-57, 435-38. Patents, copyrights, and trademarks all existed in American law by early in the nineteenth century. The number of patents increased rapidly into and after the Civil War, however, and the range of intangible ideas protected by trademark and copyright also expanded significantly in the post-bellum period.

240. See HORWITZ, *supra* note 170, at 150.

241. *Id.* at 151.

242. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) & *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

from a requirement of land ownership for holding public office.<sup>243</sup> Land ownership as a requirement for voting also gave way, replaced in some states by only a requirement for freedom from debt and pauperism.<sup>244</sup> The increasing numbers of professional managers and other wage-workers in the United States starting in the 1840s drove these political changes.<sup>245</sup> By the 1880s, wage laborers and others lacking land ownership became a dominant part of the American industrial economy.<sup>246</sup> The relevant form of property was no longer land, but simply wealth. Hence, the distinction between freemen and free-holders was already disappearing as the number of non-land owners grew steadily.<sup>247</sup>

The preceding discussion of new ownership forms reflects an intriguing mix of the instrumental and intrinsic approaches discussed above. On the one hand, the pre-political, natural rights approach to property failed to envision ownership of non-physical things, such as a specific regulatory environment. In this respect, property during the late nineteenth century took on a much more instrumentalist cast. On the other hand, the kind of protection afforded to these intangible new forms of property was often strongly rooted in the old intrinsic-right position. Indeed, Morris Cohen and other Progressives railed against the injustices of the *Lochner*<sup>248</sup> era court with its nearly unfettered protection of expanded property rights.<sup>249</sup> The growing abstraction of ownership was thus a combination of the instrumentalist and intrinsic positions, evocative of Hegel in its attempts to respect both traditions of ownership.<sup>250</sup>

243. See SCOTT, *supra* note 48, at 202.

244. See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

245. See CHANDLER, *supra* note 115, at 167, 245.

246. See PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOLUME I* ch. 4 (1947) (observing the shift of the majority of the workforce into wage labor rather than subsistence farming or other forms of self-employment).

247. See SCOTT, *supra* note 48, at 171.

248. See *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) & *Ferguson v. Skrupa*, 372 U.S. 726 (1963). See *supra* text accompanying note 150.

249. See Cohen-Sovereignty, *supra* note 180, at 172 ("there is no unjustifiable taking away of property when railroads are prohibited from posting notices that they will discharge their employees if the latter join trade unions, and that there is no property taken away without due or just process of law when an industry is compelled to pay its laborers a minimum of subsistence instead of having subsistence provided for them by private or public charity or else systematically starving its workers").

250. See SCOTT, *supra* note 48, at 146. In this respect, we agree with Scott's assessment of the role played by Justice Field in effecting this shift: "Stephen Field's genius was to take an older natural right conception of property and tie it to new, emerging forms of ownership. Even though Field considered himself a conservative, he was an instrument of change." *Id.*

The abstraction of property contributed to the fragmentation of public land policy in several ways. The growing importance and legal embrace of corporate ownership made the simple policy of disposition, intended in spirit at least for actual settlers, less appropriate or relevant in certain cases. Furthermore, the power of "ownership" over certain types of regulatory environments was sure to make private interests ambivalent or even supportive of a "shift-to-retention" of some public lands. Ownership of the physical plot of earth was increasingly irrelevant as policies offering access and government non-interference with private development of those "public" resources expanded. Thirdly, the de-emphasis on land ownership as a qualification for political life in terms of voting or holding office also made the blanket policy of disposal to small holders less urgent as a course of action. The abstraction of property thus encouraged the alternatives to disposition created during the Progressive Era.

## 2. *Fragmenting the Powers of Ownership—Separating Title from Control*

Another important fracture within the concept of property regarded the powers of ownership. During the late eighteenth and early nineteenth centuries, owning property was tightly connected to fully controlling its use. After the Civil War, this connection became increasingly tenuous as modes of regulating and controlling valuable resources diversified. The rise of the corporation and the decline of agrarian populism both contributed significantly to this division. The division also related to the emergence of the "bundle of sticks" metaphor for property, which came into use around the same time.<sup>251</sup> The metaphor complemented the view of property as exchange value, rather than just a physical object. Corporate owners retained the revenue "stick" of an enterprise while passing on the "stick" controlling day-to-day operations. The rise of the bundle metaphor coupled with the separation of title and control were additional blows to the intrinsic idea of ownership in favor of rival views.

### a. *The Old View—Ownership Is Control*

The dominant view of property in post-revolutionary America was of a right to absolute control over that which was owned. Following the doctrine of Blackstone and other legal scholars, the property owner claimed a "despotic dominion" over his land and goods, including the rights of exclusion, alienation, use, and even destruction.<sup>252</sup> Casting off any

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251. See HORWITZ, *supra* note 170, at 149. See also Freyfogle, *supra* note 210, at 97; *supra* note 74 and accompanying text.

252. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 31 (1977). See also OPIE, *supra* note 50, at 19; CRITICAL POSITIONS, *supra* note 48, at 7-8 (observing the rise of a virtually unlimited set of powers of ownership during the eighteenth century over

remaining feudal restrictions on ownership, American law made the owner the nearly exclusive decision-maker regarding the fate of his property.<sup>253</sup> Although business regulations existed even in colonial times, few besides the right of eminent domain substantially interfered with the individual's basic control over his land and his goods.<sup>254</sup> Fear of interfering with the vested property rights of others, for example, helped impede attempts to abolish or limit slavery for decades prior to the Civil War. Property ownership was fundamentally a means of control over objects and individuals, the extreme case being the power to legally own other persons.<sup>255</sup>

The union of ownership and control was deeply rooted in the labor theory of value espoused by Locke. "For 'tis *Labour*," wrote Locke, "indeed that *puts the difference of value* on every thing..."<sup>256</sup> The labor theory of value served as a strong justification for ownership to reward hard work. Early American society was, as already noted, a nation of freeholders and small proprietors.<sup>257</sup> Thus, it was well suited to this close relationship between personal control and ownership. In this manner, the intrinsic view of property was more supportive of this tight connection between ownership and power over material things.<sup>258</sup>

The power of ownership was always contested, however, even in the antebellum and colonial periods. William Treanor notes that colonial governments regularly interfered with private property rights, often without compensating landowners.<sup>259</sup> Other writers have noted that eighteenth and early nineteenth century governments regularly interfered

formerly feudal systems, which restricted ownership rights significantly more). Compare Freyfogle, *supra* note 210, at 99.

253. See Alexander, *supra* note 220, at 298; Katz, *supra* note 221, at 471. In particular, the feudal practices of primogeniture and entail received extensive criticism and opprobrium prior to their elimination by American reformers.

254. See JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 22-25, 75 (1992) (noting the federal government did not extensively use the right of eminent domain until after the Civil War). See *supra* notes 281-93 and accompanying text.

255. See *supra* notes 268-73 and accompanying text.

256. LOCKE, 2D TREATISE, *supra* note 163, at § 40.

257. See discussion *supra* text accompanying note 216 (Scott and Chandler make these points, among others). But see Schultz, *supra* note 220 (for an alternative view that regulation was more common in the revolutionary period than is commonly argued).

258. See PHILOSOPHY OF RIGHT, *supra* note 192, at § 44. This power is preserved in the Hegelian view of property, but is seriously weakened as one moves further towards the instrumentalist position. Hegel views property as a right of total control over that which is owned. Such power is what helps differentiate humans from the non-human world.

259. See Treanor, *supra* note 211, at 785-91. See generally HILDEGARD BINDER JOHNSON, *ORDER UPON THE LAND: THE U.S. RECTANGULAR LAND SURVEY AND THE UPPER MISSISSIPPI COUNTRY* (1976) (noting an absence of the allowance for roads in the cadastral survey).



with private property rights even while their rhetoric espoused the continued sanctity of the private owner.<sup>260</sup> Nevertheless, several tight connections between ownership and control during this period remain clear. Individuals who owned land or businesses made all or nearly all the decisions about how to manage them. Corporations and other forms of private ownership without control over property were relatively uncommon. Public restrictions on private land use were limited, at least by twentieth century standards,<sup>261</sup> although significant exceptions did exist. More importantly, forms of control without ownership, *besides* basic government regulation, were much less common in revolutionary America than they became in the late nineteenth century.

*b. The New View—Ownership and Control Diverge*

One of the fundamental new qualities of the modern corporation was the de-coupling of ownership from management. With the development of the railroads and their huge requirements for capital, business sought private investment from far and wide.<sup>262</sup> Railroads represented an example of a large group of corporate shareholders owning the company, but remaining distant and uninvolved with the day-to-day operations within it. By the 1880s an entire "class" of professional railroad managers had arisen.<sup>263</sup> Few of them were owners of their enterprises, but all exercised enormous power over the day-to-day operations of the company. These managers, working on salary rather than profit sharing, built the large railroad "systems" of the 1880s—not the shareholders who nominally owned the companies.<sup>264</sup> In this manner, a rift developed along with the rise of the corporate entity between the formerly united ideas of ownership and control.

The rise and fall of national concern over foreign ownership of land provides another helpful example of the title-control separation at work. Foreign capital began to acquire large portions of land in the western United States after the Civil War. By 1874, western populist interests began

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260. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 224-29 (1990). See also Scheiber-*Expropriation*, *supra* note 138, at 232. See generally Alexander, *supra* note 220.

261. Widespread zoning, for example, was unheard of until late in the nineteenth century and was not ratified as a legal practice by the Supreme Court until *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Environmental regulations and restrictions on land use were far less common (although not unheard of) in the eighteenth and nineteenth centuries than they are today.

262. See CHANDLER, *supra* note 115, at 87.

263. See *id.* at 130.

264. See *id.* at 167.

to protest growing foreign land ownership.<sup>265</sup> By the late 1880s, these concerns reached a fevered pitch culminating in federal and state acts restricting alien ownership of land.<sup>266</sup> The alien land law movement was short-lived, however, ending in 1897 when the federal government essentially repealed its own restrictions on foreign land ownership.<sup>267</sup> The death of alien land laws marked a realization of two things: (1) that the country felt an acute need for foreign capital, especially in the wake of the depression of 1897, and (2) that foreign ownership of land was not necessarily an alarming loss of national sovereignty or control. In this manner, the decline of the alien land law movement was a loss for those who supported the intrinsic importance of property ownership.

An even more provocative example of the separation of ownership from control occurred after the abolition of slavery during the Civil War. In colonial times, ownership of other persons was an established practice even before the slave trade started in earnest. "Indentured servants" literally sold themselves to owners in the New World for a limited period of time in order to secure passage to America.<sup>268</sup> The respect for private property required under the Constitution was in significant part due to a fear of abolition of slavery without compensation to the existing slave owners.<sup>269</sup> Such authority over ownership of other persons as a means of controlling their labor was legally affirmed as late as 1857, when the Supreme Court declared that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."<sup>270</sup>

With the abolition of slavery, and the decline of subsistence agriculture, wage labor became the dominant mode of employment. Employment for wages appeared to be the opposite of slavery or indentured servitude by virtue of the arrangement being a free contract between

265. See Douglas W. Nelson, *The Alien Land Law Movement of the Late Nineteenth Century*, IX J. WEST 46, 47 (1970).

266. See *id.* at 51-52 (this backlash is illustrative of the more standard view of "ownership of property as control" striking out in fear against foreign ownership and therefore control of domestic land).

267. See *id.* at 55.

268. See FONER, *supra* note 246, at 19 (estimating that in certain states as many as 75% of the residents had been or were indentured servants at the time of the American Revolution). See also Steinfeld, *supra* note 244, at 342-43, 347 (noting that unlike their modern successors, early Americans "frankly acknowledged" the power of property rights over other persons and were not embarrassed by this fact; the control that property gave was legitimately exercised in the eighteenth century over other physical objects and beings, including other persons).

269. See SCOTT, *supra* note 48, at 96-99 (noting that nearly all southern state constitutions had clauses requiring compensation for slave owners if slavery ended). See also Katz, *supra* note 221, at 470-71 (observing the respect Jefferson had for existing property rights in general).

270. *Dred Scott v. Sandford*, 60 U.S. (9 How.) 393, 401 (1856), superseded by Constitutional amendment.

employer and employee.<sup>271</sup> In practice, however, a vast labor pool made available through immigration combined with a favorable legal climate to make wage labor a highly effective form of control for employers over their work force.<sup>272</sup> By giving workers a "property right" to their labor, the courts set up an illusion of freedom when in fact economic and legal conditions very much limited the options of the wage laborer to negotiate effectively the terms of her contract.<sup>273</sup> In this respect, the post-slavery era saw a continued exercise of control over significant portions of the American labor force without legal ownership over persons. Hence, the decline of slavery in favor of wage labor provided a particularly ironic example of the divergence of ownership from control.

The growing separation of title from control relied on a strongly instrumentalist concept of property. This instrumentalist trend was an addition to, rather than a replacement of, the intrinsic ideal of ownership and control being tightly matched. Owners retained a great deal of control of their property in many situations—the separation of title from such control was more like a widening system of cracks in an almost monolithic facade.<sup>274</sup> Property ideas displayed an increased flexibility in order to recognize and encourage this economic shift. The resulting tension is again suggestive of Hegel's property views.

The separation of ownership and control found extensive expression in the public lands policies considered herein. By distinguishing title from control, the government and the users of the public lands created far more flexibility for policies regulating the land's use, disposition, and retention. Government retention of title, in many cases, no longer meant a lack of control for private users. In the same manner, disposition of land no longer meant a total loss of control for the government. Corporations

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271. Indeed, numerous *laissez faire* court decisions turned on this freedom of contract notion in rejecting pro-labor laws and regulations such as wage and hour laws. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) & *Ferguson v. Skrupa*, 372 U.S. 726 (1963). For discussion of the extensive labor unrest of period, see *supra* text accompanying notes 62-65.

272. See SUMMERS, *supra* note 80, at 109.

273. See Steinfeld, *supra* note 244, at 351-57. See also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (asserting a particularly powerful Progressive Era statement of this view).

274. The examples of continued control via ownership are obvious and numerous. The unconditional power to exclude others from private land remains very strong in the American legal and social worlds to this day. See, e.g., *Dolan v. Tigard*, 512 U.S. 374 (1994) (blocking city's regulations requiring dedication of private property to public use in exchange for permission to enlarge business parking lot, because a reasonable relationship was not shown in order to satisfy Fifth Amendment requirements). Other forms of control including alienation and use remain part of the bundle held by many property owners in many circumstances.

thereby ushered in a more sophisticated and fragmented idea of ownership—one that was crucial to both public policy as well as the idea of property itself, as will be explored more thoroughly in Part IV.

### 3. *Changes in the Justifications for Ownership—From an Individual to a Social Perspective*

The shift to a more socially oriented view of property can be seen throughout the late nineteenth and early twentieth centuries. Most historians agree that the judges of the period were conservative advocates of a laissez faire approach to regulation strongly supporting the sanctity of individual private property rights against mounting social pressure.<sup>275</sup> But in the face of this staunch judicial defense of property rights, the counter-vailing tendency to consider social goals grew stronger. One can see the expanding "social" view of property and ownership particularly well in three areas of the law: changing notions of federal authority to acquire and retain land; the related development of a federal power of eminent domain; and the public trust doctrine.<sup>276</sup>

#### a. *Federal Authority to Acquire and Retain Land*

Both judicial and public thinking about the federal government as a permanent landholder evolved considerably in response to land acquisitions associated with the Civil War. The acquisitions found their way into crucial Supreme Court cases of the 1880s. Innovation in expectations regarding government authority to acquire land for public purposes was a part of an important expansion of federal authority—both to hold and manage land, which it already owned, and to acquire private land for public purposes.<sup>277</sup> The change also reflected a growing emphasis on the social priorities served by a system of property, rather than the power of the individual owner.

Until the 1880s, it was presumed that if the federal government needed to acquire land from an unwilling seller within a state, it needed the

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275. See, e.g., FRIEDMAN, *supra* note 125, at 359-61; SELVIN, *supra* note 138, at 285; Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1983). But see Freyfogle, *supra* note 210, at 99 (offering an opposing view of where the weight of public preference resided).

276. One can also see the expanding social notion of property in the government's increasingly ambiguous policies towards private corporations. See *supra* text accompanying note 137.

277. See generally Sarah Connick & Sally K. Fairfax, *Land Acquisition for Conservation in the United States: A Policy History* (Dec. 11, 1997) (unpublished manuscript on file with authors).

state's permission.<sup>278</sup> The federal government could only acquire land if it had been ceded by the state legislature. Then, Congress was required to exercise "exclusive Legislative" power over the area. For much of the nineteenth century, the state government took the lead on land acquisition for federal purposes: when the federal government needed land within a state, the state would undertake condemnation proceedings on behalf of the federal government and then cede the land to the federal government.<sup>279</sup>

This rather stylized approach to the federal land acquisition authority began to break down in the aftermath of the Civil War. Most pivotally, lands where battles occurred and soldiers fell were used for burial grounds. In the period during and immediately after the war, the federal government was generally viewed as lacking authority to acquire such privately held lands. Hence, the graves and battlegrounds were initially acquired by states and by private charitable groups made up primarily of Civil War veterans.<sup>280</sup> However, as the twenty-fifth anniversary of major battles neared, the federal government acquired national war memorials for itself. The pursuit of national reconciliation and unity fueled this acquisition activity. This trend expressed the general shift towards a more "social" conception of ownership in society.

*b. The Federal Power of Eminent Domain*

Eminent domain played a complicated and conflicted role in nineteenth-century American property law: The power of condemnation

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278. See Connick & Fairfax, *supra* note 277, at ch. 2, 4-6. This was apparently required by court interpretations of the Constitution, which established a process for acquisition of land for a national capitol and "other needful buildings" such as lighthouses and forts. See *Kohl v. United States*, 91 U.S. 367, 373 (1875) (a key case where the Court recognized the power of the federal government to exercise this right even though it had not been utilized in the past). The plaintiffs erroneously argued, "For upwards of eighty years, no act of Congress was passed for the exercise of the right of eminent domain in the States, or for acquiring property for Federal purposes otherwise than by purchase, or by appropriation under the authority of State laws in State tribunals." *Id.* at 369.

279. See Connick & Fairfax, *supra* note 277 and sources cited therein, for a brief discussion of this enormously complex topic in the context of public domain issues. This notion of exclusive jurisdiction made federal enclaves into attractive way stations for fugitives of state law. See *id.* at Introduction 15-16, ch. 1, 3-4. Beginning in the 1820s, Congress had passed "Assimilative Crimes Acts" to give state criminal statutes force in areas of exclusive federal jurisdiction. See *id.* at ch. 1, 6-7. Following a dispute with New York State over title to a lighthouse which the War Department had built and maintained, and over which the federal government had not exercised exclusive jurisdiction, Congress in 1841 required that all acquisitions be accompanied by an assertion of exclusive jurisdiction. See *id.* at Introduction 16, ch. 1, 3-7.

280. See *id.* at Introduction 16, ch. 2, 9-20 (detailing a history of these early acquisitions and their constitutional implications).

clearly is rooted in a privileging of the social conception of ownership over the individual viewpoint. As such, it has always been somewhat controversial in American culture. While no state included the power of eminent domain in its constitution, nearly every state court accepted the idea as common law by 1820.<sup>281</sup> The Supreme Court did not sustain the power of states to exercise the right of eminent domain until 1848. But prior to this date, in many states the power of eminent domain was already exercised extensively by private companies ranging from milldams to canal and rail operators.<sup>282</sup> While local resistance to the private exercise of eminent domain could be significant and lead to re-routing of roads on occasion,<sup>283</sup> the extensive use of the power by private companies continued and peaked between 1870 to 1910.<sup>284</sup> Even in the heyday of laissez faire jurisprudence near the turn of the century, the "social" notion of property as expressed by use of eminent domain reached full flower.

The exercise of eminent domain powers broadened in the second half of the nineteenth century. Initially, exercise of eminent domain was confined to expanding economic opportunity and growth.<sup>285</sup> The boundary weakened after the Civil War, however, as cities and public agencies began to condemn privately held land in order to create parks and other expansions of open space for recreation for their citizens.<sup>286</sup> The connection of such actions to the rising social and collectivist consciousness of citizens celebrated by Edward Bellamy<sup>287</sup> and others cannot be ignored. Individual accumulation of wealth through private property no longer served as the exclusive paradigm. Property ownership could be shaped and even overridden for public ends other than increased economic gain for individuals.

The late nineteenth century also marked the ratification of the power to condemn private property by the federal government. In 1888, the

281. See SCOTT, *supra* note 48, at 126.

282. See Scheiber-Expropriation, *supra* note 138, at 237-39.

283. See Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263, 1275 (1981).

284. See Scheiber-Expropriation, *supra* note 138, at 243.

285. See *id.*; LAW & CONDITIONS OF FREEDOM, *supra* note 138, at 63.

286. See FRIEDMAN, *supra* note 125, at 420. However, the federal government's authority to acquire land for parks and recreation purposes continues to this day to be shaky. See Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 19 (1980). The National Park Service did not receive authority to acquire lands for park purposes until the late 1950s. Even then, it has usually been seriously constricted. See generally Connick & Fairfax, *supra* note 277; Joseph L. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709 (1980); Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Joseph Sax on the National Parks*, 25 ECOLOGY L.Q. 385 (1998) (discussing the limitations on the National Park Service).

287. See *supra* text accompanying notes 83-86.

federal government formally ratified its power of eminent domain into law.<sup>288</sup> The Supreme Court upheld this federal power in 1896. *United States v. Gettysburg Electric Rail Co.* authorized the federal government's acquisition of private land at the site of the Gettysburg battlefield for a war monument.<sup>289</sup> However, the Court did not rely on the authority of the "Property Clause" to "make all needful rules and regulations respecting the territory or other property belonging to the United States,"<sup>290</sup> but used the "War Powers" Clause instead.<sup>291</sup> The Court reasoned that any government authorized to declare and conduct war had the authority to take steps to "enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them..."<sup>292</sup>

Not only was eminent domain becoming a more important tool for achieving a wider variety of public goals, it was becoming a legitimate imposition on private property rights in the name of *national* as well as local or state interests. The agenda of the nation as a whole assumed an increasingly significant role in the public eye, and the corresponding power of private property interests diminished. Where opportunities existed to educate all Americans about the skills and tactics of battle, the private ownership of lands no longer served as much of an obstacle.

Harry Scheiber has demonstrated that such "public" legal rights were present and in opposition to vested private property rights throughout the entire nineteenth century.<sup>293</sup> However, the nature of these public rights expanded towards the end of the century, taking on causes far less economic. Instead, they acquired a more collectivist or social cast in opposition to the ownership rights of individuals. Rather than serving as a more efficient means to maximize economic growth, eminent domain and government regulation served a growing array of economic and non-economic purposes, at both a local and national level. Such changes indicated a further fragmenting of the idea of property in order to encompass broader social goals and priorities. The old view of property in service of individual gain did not disappear, but new forms of state power to interfere with and weaken such private rights arose and gained strength as the century drew to a close. The expanded doctrine of eminent domain thus evokes the Hegelian notion of property. By using the power to

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288. See Act of Aug. 1, 1888, ch. 728, § 1, 25 Stat. 357 (codified at 40 U.S.C. § 257 (1994)). See also Meidinger, *supra* note 286, at 30 (noting that the federal power to condemn land for uses such as post offices was ratified by the courts in *Kohl v. United States*, 91 U.S. 367 (1875)).

289. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896).

290. U.S. CONST. art. IV, § 3, cl. 2.

291. See U.S. CONST. art. I, § 8, cl. 11.

292. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896).

293. See Scheiber-*Expropriation*, *supra* note 138, at 232.

condemn land for purposes other than the furthering of individual economic gain, the nation embraced a stronger social perspective on property to temper some of the excessive tendencies of civil society.

c. *The Public Trust Doctrine*

The emergence of the public trust doctrine provides a final example of the growing social view of ownership. The public trust doctrine clearly reflected an anti-Lockean approach to property ownership—one out of step with the dominant judicial views of the time. Yet, as many scholars have noted, the late nineteenth century was a period of extensive public trust jurisprudence.<sup>294</sup> Even in the judicial branch, this social view of ownership made significant inroads while the intrinsic view remained strong, thereby creating another set of fragmented decisions that can best be described as Hegelian.

The public trust doctrine is fundamentally a product of state law, although elements of the doctrine date back to Roman times.<sup>295</sup> In the United States, applications of the doctrine vary significantly by state.<sup>296</sup> Generally, the public trust doctrine provides for continued public ownership in common for the benefit of all citizens of most submerged and tidal lands under navigable waters.<sup>297</sup>

Although contained in English common law at the time of American independence, the public trust doctrine had essentially no impact

294. See SELVIN, *supra* note 138, at 294; Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter *The Public Trust Doctrine*]; BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST—PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY (1998).

295. See Jan Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196-97 (1980).

296. See *The Public Trust Doctrine*, *supra* note 294, at 476-77. See also *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Shivley v. Bowlby*, 152 U.S. 1 (1893) (establishing title based on grant from state rather than federal government of submerged lands into private ownership). But see James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913 (1995) (arguing in favor of removing the states as primary "trustees" of the doctrine).

297. See DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK xvi-xix (1990). The doctrine separates ownership of such lands into two forms of title—the *jus privatum* and the *jus publicum*. The *jus privatum* contains most elements of the fee simple property rights, while the *jus publicum* retains the right of the public to access and use these lands and waters for navigation, recreation, and certain other uses. In most cases, the doctrine prevents the alienation of the *jus publicum* in these lands by the government, even as it permits sale of other property rights to these lands as part of the *jus privatum*. Thus, the public trust does not necessarily prevent the sale of any such submerged lands into private hands; indeed, Slade estimates that nearly one-third of all land in the United States subject to the public trust is in private ownership.



in the United States until 1820.<sup>298</sup> The first important public trust decision pertained to questions of access to shell-fisheries in the tidal waters of the eastern seaboard. Both *Arnold v. Mundy* (1820) and *Martin v. Waddell* (1842) were decided in favor of the public right of access to submerged lands in private ownership.<sup>299</sup> In the *Martin* decision, the continued and ongoing customary use of the area in dispute by fishermen was an important factor for the court. These early public trust cases focused on the issue of "access" to privately held lands. There was no challenge made to the continued private "ownership" of the property in question until 1876, when the Supreme Court utilized the public trust doctrine to prevent full riparian ownership of submerged lands filled by the state to serve as railroad right-of-way.<sup>300</sup> By 1890, the public trust began to settle title disputes over filled lands and lands surrounded by navigable waters.<sup>301</sup> Conflicts over full title to the lands in question supplanted those over access as the sanctity of the individual's property right receded before the social demands of the state.

This trend climaxed in the 1892 case of *Illinois Central Railroad v. Illinois*,<sup>302</sup> a decision referred to by Joseph Sax as the "lodestar" of all public trust cases.<sup>303</sup> In this case, the state of Illinois sold nearly the entire Chicago waterfront to the privately owned railroad company. When they revoked the sale four years later, the railroad sued for compensation for their lost property. The Supreme Court, however, ruled against the plaintiffs, arguing that the initial sale was invalid under the public trust doctrine. Therefore, no compensation was due for the subsequent withdrawal of the property. Written by Justice Stephen Field, a well-known advocate of both the public trust and vested rights of private property, the decision recognized that the legislature could alienate portions of the submerged and coastal lands of a region, but never at the expense of the public's rights of access and use. The size and scope of this sale made it a violation of the trust doctrine.<sup>304</sup>

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298. See SELVIN, *supra* note 138, at 2-3.

299. E.g., *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Martin v. Waddell*, 41 U.S. 367 (1842). See MCCAY, *supra* note 294, at ch. 4, 5 (discussing both cases along with their historical and ecological context).

300. See *Barney v. Keokuk*, 94 U.S. 325 (1876).

301. See, e.g., *Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656 (1888); *Packer v. Bird*, 137 U.S. 661 (1890).

302. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

303. See *The Public Trust Doctrine*, *supra* note 294, at 489.

304. See *Illinois Cent.*, 146 U.S. at 453. The *Illinois Central* decision was not unanimous. See *id.* at 464, 476. Three justices dissented, arguing that the sale of the submerged lands to the railroad had done nothing to date to impair public rights of access to the lands and waters in question. See *id.* at 472-73. Therefore, the legislature may have only alienated the *jus privatum*, and not the *jus publicum*, and the sale would be permissible under the public trust doctrine. See *id.* at 474-75. In making their case, the justices cite *Hoboken v. Pennsylvania Railroad*, 124

The path taken in these cases illuminates the changing nature of property rights, even within the conservative world of the federal judiciary. In 1840, public trust decisions served to establish access of public users to privately owned submerged lands. By 1876, the doctrine placed the majority of the property rights in reclaimed lands in the public sector, leaving the riparian owner with "bare legal title" only.<sup>305</sup> With the *Illinois Central* decision in 1892, the Court moved so far as to endorse the removal of land from private to public hands, putting full title and control in the service of the public at the expense of asserted private property rights. The Lockean notion of property, so jealously protected by the laissez faire courts of the Gilded Age, was increasingly subject to a more social conception of property rights as championed by the waxing influence of the public trust doctrine. Nor was the public trust influence limited to Supreme Court decisions. Selvin, for example, explains the doctrine's role in the late nineteenth century in appropriating and guaranteeing adequate water supplies for growing cities in the eastern and western United States.<sup>306</sup> Therefore, the peaking of public trust power at the turn of the century corresponded with the rise of the social idea of property even in the judicial realm where such ideas met with strong resistance.

### C. Changing Concepts of Property—A Summary

We set out in this section a continuum of different views of property. These views ranged from an intrinsic, pre-political approach that emphasized the importance of individual rights to an instrumentalist, fully political approach that emphasized the importance of aggregate social welfare. Two theorists defined the ends of the spectrum, with John Locke representing the most intrinsic view contrasted with the strongly instrumentalist approach of Morris Cohen. A third view, provided by German philosopher G.W. Hegel, gives an alternative perspective on property. It attempts to embrace the tensions between the intrinsic and instrumental positions rather than choosing between them. We find this Hegelian perspective to be most helpful in understanding the twentieth century concept of property in the United States, particularly as it manifests within public land policy.

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U.S. 656 (1887), in which the New Jersey state legislature's sale of both the *jus privatum* and *publicum* to a private operator of submerged lands abutting the city of Hoboken was upheld as legitimate. See *id.* at 465. What, the dissent asks, is the difference between these two cases? See *id.* Another important California state court decision in 1914 nullified a different set of private land claims under similar public trust reasoning. See *People v. California Fish Co.*, 138 P. 79 (1914).

305. See *Barney v. Keokuk*, 94 U.S. 325, 339 (1876).

306. See SELVIN, *supra* note 138, at ch. 4.

A series of examples from turn of the century American law and policy illustrate changes along this continuum of property ideas. First, we noted an expansion of the notion of what a property right entails. In particular, owners and subjects of ownership became more abstract, while the connection between ownership and control became more tenuous. This expansion of the practical use of property matched a shift towards a more social notion of property to compete with the individualist approach of the antebellum era. In each of our examples, we concluded that the instrumentalist ideas of Cohen gradually augmented, complicated, or "fragmented" what had been a simpler approach to property that relied heavily on the ideas of Locke.<sup>307</sup> We do not argue that the movement from intrinsic to instrumental views of property was in any way a shift from one end of the continuum to the other.<sup>308</sup> Indeed, the change was halting and contested.

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307. We want to distinguish our discussion of fragmentation from a more general academic debate over property's potential "disintegration" as a viable legal concept. The leading article on this topic is Thomas Grey, *The Disintegration of Property*, in NOMOS XXII PROPERTY 69 (J. Roland Pennock et al. eds., 1980); see also C.B. Macpherson, *Capitalism and the Changing Concept of Property*, in FEUDALISM, CAPITALISM, AND BEYOND 105 (Eugene Kamenka et al. eds., 1975). Some writers have attempted to broaden or change the notion of property over time to include rights not commonly thought of as subject to ownership in lay terms. Famous examples include Charles Reich's assertions of ownership in government largesse, as well as C.B. Macpherson's claim of a worker's property right to a livelihood. See, e.g., Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); CRITICAL POSITIONS, *supra* note 48, at 199-207. In some cases, such claims are argued as logical extensions of some traditional view or justification of private property (as in Reich's case); in others, the writer is quite open about the need to appropriate the power of the term "Property" in modern society for their own agenda. See, e.g., C.B. Macpherson, *Human Rights as Property Rights*, 24 DESSENT 72 (1977). All of this expansion and contestation of the notion of property has led scholars such as Grey to question the continued effectiveness of the institution at all. What, in other words, does property mean when it starts to mean anything; when its legal definitions are increasingly alienated from its common usage? See Nedelsky, *supra* note 260, at 240; BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1-24 (1977); Rose, *supra* note 3, at 1-8. It is our hope that the differences between our argument for fragmentation in this section and a full-blown disintegration of the notion of property are apparent. Property ideas did not disintegrate within the period we consider, they simply became more complicated. Thinkers and lawyers did not invent new ideas of ownership out of whole cloth in order to appropriate the power of the notion of private ownership. Each competing vision of property drew on an established intellectual tradition that gave that view credibility and relevance to the term "property" being contested. The rival views of property were not absurdities—they were considered alternatives that sought to challenge to varying degrees the formerly dominant Lockean view. Nor were they unduly removed from common or popular ideas of ownership—based in popular media and culture regarding property rights. In this way, our discussion clearly should not be taken as an argument for property's demise as a meaningful legal, political, or social concept.

308. In locating the peak of property's fragmentation as a legal/political concept around the turn of the century, we potentially run into disagreement with two other respected views of legal history. The first is best expressed by legal historian Harry Scheiber, who argues that

It resulted in a mix of property ideas along the spectrum that we presented. Neither position dominated to the exclusion of the other. The result was a fragmented set of public land policies couched in a conflicted notion of property best categorized as Hegelian.

#### IV. FRAGMENTATION OF PUBLIC DOMAIN LAW AND POLICY

In this section, we discuss the fragmentation of public domain policies in the context of the changing notions of government and property described in Parts II and III. Our goal is to demonstrate that the "shift-to-retention" narrative regarding public land law and policy is too simple, and to suggest the outlines of a more useful one. Our argument has four elements. First, we show that there is no straight line or discernible trend that culminates in a policy of retention. Congress enacted major disposition statutes before and after establishing key retention programs. Second, we show that the means or instruments of policy are fragmented as well. Different policies developed for different resources, and resources themselves were fragmented. Third, we briefly gloss each program—using the terms and concepts of the previous two sections—to develop a more complex vocabulary for talking about the diverse public domain policies

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both private and public rights have coexisted uneasily in American law since well before the Civil War; an argument that could be construed to be in conflict with our position. That this would be incorrect should be evident from our discussion of public rights in eminent domain in this section, in which we noted the broadening use of eminent domain for more "social" purposes as well as the rapid expansion of power at the national level of government. We do not disagree that rival views of ownership have roots in American law dating back to colonial times. We simply note some important expansions of one type of view, the instrumentalist position, during the Progressive Era that had a critical impact on public land policies, among other public actions.

Similarly, some authors have argued that a crucial shift in the idea of property took place during the New Deal era when *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) explicitly repudiated the *Lochner* doctrine. See NEDELSKY, *supra* note 260, at 229; Cass Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421 (1987). This decision is slightly beyond the period under consideration in this article, and may seem to be in disagreement with our conclusions. We would argue that such an inference would be mistaken. The year 1937 marked the end of property's reign as the judicial check against government regulation, and a relative high water-mark of the views of Cohen and other Progressive legal thinkers. But the alternative views of property that gave rise to that watershed decision were around for decades prior, as has been shown at length herein. Thus, in one sense this section of the article could be seen as demarcating early indicators of new ideas of ownership prior to their peak in the *West Coast Hotel* decision. Our argument is that the social and instrumental views of property underwriting the *West Coast Hotel* outcome grew significantly stronger during the period we consider, and that these changes are directly related to concurrent shifts in public land policy.

which in fact emerged from the period.<sup>309</sup> Key elements of this vocabulary include (1) lands which the government nominally retained, keeping formal title but disposing of control; (2) lands over which the government retained actual or potential control, but disposed of the economic value of the resource; (3) lands which the government briefly retained and then either relinquished title or devised an improved disposition system; and (4) lands in which the government made major investment in order to encourage further land disposition. Finally, our discussion demonstrates the struggle between two conflicting views of ownership that were equally influential upon our public land policies during this time.

#### A. Before Roosevelt and Pinchot—The “Actual Settler” and the Seeds of Fragmentation

The 1860s saw the emergence of the homesteader or “actual settler” as the major focus of public domain policy. Programs gradually steered away from the previous commitment to disposition through special grants to railroads, states, and cash sales.<sup>310</sup> However, by the close of the nineteenth century, needs of actual settlers were occasionally met, not by disposition, but by federal retention of resources, most notably the forests. Moreover, collective values, such as national pride in scenic grandeur, manifested in a small and ill-defined kernel of a reservation policy for scenic wonders. These changes were the early seed of a fragmented policy future.

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309. See Miller, *supra* note 41, at 205, for a discussion of the disposition programs that also continued in some cases until the present day. Miller notes that the reformers did not succeed in their goal of preventing all dispositions save to settlers. *See id.* They were unable to halt the swamp land grants program established in 1850 to encourage states to reclaim swamplands, and they fought unsuccessfully to revest lands granted to railroads that did not perform on the terms of the grant. *See id.* However, they were able to stop further land grants to the railroads and prevent a program granting millions of acres to civil war veterans. *See id.* They were also able to prevent adoption of wholesale disposition of land to support the development of education programs. *See id.* But these reforms were not moves toward federal land retention. Rather they were intended to assure continuing disposition of land to actual settlers.

310. See Miller, *supra* note 41, at ch. 3. If our goal were primarily to erode the empirical underpinnings of the acquisition-disposition-retention model, we would pay more attention to the construction of the disposition period. Because we are most concerned about the problems for current debate bequeathed to us by the shift-to-retention element, we focus there. However, we are convinced that the “disposition” era notion is also too simple. The “shift” from land sales to free land for actual settlers is also inadequately discussed in literature aimed at presenting the nineteenth century as a “great barbecue.” For a wonderful antidote, see ZAHLE, *supra* note 1, for the buildup to the homestead era.

### 1. Homesteading—Sweat Equity in Land for Actual Settlers

The Homesteading Act of 1862 defined the dominant theme of congressional policy and public discourse until the Depression. The statute was a near perfect appropriation of Locke's notion of mixing sweat with the land to establish ownership. It invited all those over 21 years of age<sup>311</sup> to enter up to 160 acres of land and meet certain occupancy and residency requirements, to "prove up" or take title to the land.<sup>312</sup> Congress amended and expanded homesteading to sculpt policy for the alleged benefit of farmers, homebuilders, and settlers well into the next century.<sup>313</sup> The congressional commitment to disposition of land to actual settlers continued well after the "retention era" was alleged to have begun and was the justification for many programs that we now regard as retention oriented.

### 2. The Mining Acts—Sweat Equity for Actual Prospectors and Severing Land from Water

The Homestead Act preceded three laws<sup>314</sup> responding to the needs of another major group of westward migrants, actual prospectors. An 1866 statute<sup>315</sup> enshrined congressional deference to local custom of the mining camps, and the ancient idea of the free miner.<sup>316</sup> Reflecting Lockean enthusiasms, the act proclaimed that "all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase" subject to the local rules and customs of the mining districts

311. See generally NELL IRVIN PAINTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (1976) (explaining that Congress did not limit the program to either white males or citizens, but did require that non-citizens file a declaration of their intent to become citizens).

312. See GATES, *supra* note 1, at 393-99 (for data on homesteading in the twentieth century, when most of the homesteading actually took place). See also GATES, *supra* note 1, at ch. 18; PEPPER, *supra* note 10, at 167.

313. Homesteading on federally owned lands ended first in Hawaii in 1920, in the continental United States in 1936 (although technically it was still possible to apply for a "reclassification" for disposition until 1976), and in Alaska in the late 1960s.

314. We now tend to gloss all three together as the Mining Act of 1872, ch 152, 17 Stat. 91 (1872) (codified as amended in scattered sections of 30 U.S.C. (1994)). The other two were passed in 1866 and 1870. Act of July 25, 1866, ch. 262, § 1, 14 Stat. 251; Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217. See JOHN LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 2 (1987).

315. See 30 U.S.C. § 22 (1994). See Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in GATES, *supra* note 1, at ch. 13, 719. Passage of the act was accompanied by "legendary political shenanigans." See *id.* See also LESHY, *supra* note 314, at 11 (supporting this contention).

316. See John C. Lacy, *'49ers, Reformers and Escapees: Changing with the Federal Mining Law*, 1994 A.B.A. SEC. NAT. RESOURCES, ENERGY, & ENVTL. L. (Fall Meeting).

wherein they were located.<sup>317</sup> The 1866 Mining Act was also important for its disposition of federal interests in water. Congress acquiesced in the miners' practice of (1) separating the water from the land and (2) asserting that the rights of the first user of a water source prevailed over rights of both subsequent users and riparian landowners. Section 9 of the 1866 statute provides that whenever, "by priority of possession, rights to the use of water...have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and the decisions of courts," the possessors' rights shall be maintained and protected.<sup>318</sup> The fragmentation here was twofold. The federal government "severed" the land from the water, thus disconnecting public land law and administration from water law and administration. It also passed to state control water arising on the public domain. Congress continued to control land disposition; however, the fact that allocation of water was a matter for state decision was of enormous importance in regions where control of the water was tantamount to control over the land.<sup>319</sup>

The year 1872 is an interesting one for public land scholars. Congress enacted the final, and presently the most infamous of the mining acts, the General Mining Act of 1872. In the same year, Congress reserved Yellowstone for park and preservation purposes. In the 1872 General Mining Act, Congress wove the 1866 Mining Act's format into the Lockean "rules of discovery" that have proven very durable. "Locators" under the 1872 act were required to perform \$100 worth of development work annually in order to maintain their rights as claimants, and rules regarding the marking and recording of locations were adopted.<sup>320</sup> Both the mining law and the simultaneously developing water regime had in common a particularly Lockean notion of "use it or lose it." The annual development work required of locators was similar to the provision in western water law that appropriators lose their rights if they discontinued use for a

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317. 30 U.S.C. § 22 (1994); Swenson, *supra* note 315, at 720. This American expression of the ancient customs of free mining is unique in at least one important respect: the United States government eschewed the standard rent and royalty in connection with minerals development of the public domain. See Lacy, *supra* note 316, at 10-15 (observing this federal policy).

318. Act of July 25, 1866, ch. 262, § 9, 14 Stat. 251, 253. See also WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 439-53 (1931) (detailing how the arid-region doctrine of prior appropriation arose); COGGINS ET AL., *supra* note 7, at 365-66 (succinctly summarizing the legal principles).

319. See Miller, *supra* note 41, at 166. See also HAYS, *supra* note 2, at 15-19 (discussing the consequences of this severance for subsequent conservation efforts).

320. See Swenson, *supra* note 315, at 723.

discernable period.<sup>321</sup> Although miners did not precisely fulfill Jefferson's vision of family farmers populating the nation, the 1872 Act nevertheless reflected clearly Locke's labor-based theory of ownership. The basic commitment to free access to "lands owned by the United States" for the purpose of developing minerals has often been modified and challenged, but never overturned.<sup>322</sup>

### 3. *Reservation of Scenic Wonders—Embryonic Appearance of Social Elements of Ownership*

Congress evinced a "sporadic interest" in preserving areas of superlative beauty or uniqueness.<sup>323</sup> In 1832, Congress set aside four sections in Arkansas to protect hot springs of arguable medicinal value for "future disposal."<sup>324</sup> The 1864 cession of Yosemite Valley to the state of California manifested an evolving congressional interest in scenery and recreation. Congress distinguished the California cession from the Hot Springs transaction by requiring that California hold the ceded lands "inalienable for all time" as a place of "public use, resort, and recreation."<sup>325</sup> Eight years later, Congress reserved the Yellowstone area in federal ownership.<sup>326</sup> Any clear idea of what constituted a national park was still

321. Not only must one mix one's sweat with natural objects to establish ownership, one must keep doing so lest the resource return to the common pool for re-appropriation by another more willing to make the resource productive.

322. Although the 1872 Act continues in effect, its impact has been circumscribed by subsequent legislative, judicial, and administrative actions. Those actions withdraw some areas from mineral entry, limit the number of minerals covered by the Mining Law, and, beginning in the 1970s, put some significant restrictions on what constitutes a "valuable" mineral deposit. See Sally K. Fairfax & Barbara T. Andrews, *Debate Within and Debate Without: NEPA and the Redefinition of the "Prudent Man" Rule*, 19 NAT. RESOURCES J. 505, 514-18 (1979). It is worth noting, however, that long before the reach of the Mining Law was contracted, it was expanded. In 1897 Congress extended the provisions of the 1872 Act to cover all oil lands of the public domain. See PEFFER, *supra* note 10, at 125-30.

323. See GATES, *supra* note 1, at 566.

324. See *id.* As is well known, Hot Springs was never disposed of and became, to the dismay of many park enthusiasts, a national park.

325. GATES, *supra* note 1, at 566. It is curious that the Yosemite act attracts attention as the first of what many consider to be national park reservations, because it was actually a disposition to the state that was not rescinded for almost half a century.

326. Again, it is commonly observed that Congress established the first national park with the Yellowstone reservation, but that is still not really true. It is not even clear that Congress meant to reserve a "national" anything—the likely reason that Yellowstone was reserved in federal ownership while Yosemite was ceded to California is that there were no states in Wyoming, Montana, or Utah to take title to a cession. Thus, Congress simply reserved the land from entry. Nor did the reservation precipitate reliable protection for the resources of the area. Protracted debates about what to do with the area occupied Congress for the next thirty years, and probably intensified the destruction of the geysers and the wildlife. For the most lucid discussion of the motivations behind the Yosemite reservation, most of which are



several decades away,<sup>327</sup> and the National Park Service was not established for almost 50 years.<sup>328</sup> However, the reservation reflected a growing public trust-like notion that some lands or resources were of such overwhelming importance to a nation that they ought not to be privately owned.<sup>329</sup> This idea of natural treasures and curiosities was usually discussed in connection with criticism and despair arising from the commercial exploitation of Niagara Falls.<sup>330</sup> It existed side-by-side with the fact that the reservation itself owed its existence to the advocacy, not of nature lovers, but of railroad officials anticipating the custom of tourists in the area.<sup>331</sup>

Nevertheless, the idea of land reservations to allow for both commercial development of tourism opportunities and protection of natural wonders was gaining familiarity in Congress.<sup>332</sup> Note that some

attributable not to the storied meeting of explorers around a camp-fire, but rather to the urging of railroad developers, seeking to develop a tourist trade, see RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY* ch. 1, at 7-27 (1997).

327. It is not even clear that this reservation was ever intended to be "non-utilitarian" as against the Forest Service emphasis on commodity development. For a wonderful discussion of the National Park Service's emphasis on tourist development, and the "pitting of one utilitarian urge—tourism and public recreation—against another—the consumptive use of natural resources, such as logging, mining, and reservoir development..." See SELLARS, *supra* note 326, at ch. 1, 15.

328. As is well known, the situation deteriorated in Yellowstone sufficiently to motivate the Secretary of the Interior to invite the U. S. Army to protect the area. See generally H. DUANE HAMPTON, *HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS* (1971). It is less well known that Army protection was also seriously contemplated for the forest reservations between the time they were set aside in 1891 and the time that Congress clarified their purposes and established a regulatory regime for the areas. See *A Plan to Save the Forests: Forest Preservation by Military Control*, *LXIX CENTURY ILLUSTRATED MONTHLY MAG.*, Feb. 1895, at 626-34. See also ISE, *supra* note 11, at 121.

329. The evolution of this idea apart from the public trust, which it closely resembles, is treated in Joseph Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990); Joseph L. Sax, *Is Anyone Minding Stonehenge?: The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543, 1549-50 (1990) (describing Lubbock's theory as having two implications that were radical at the time: first, that private proprietorship was insufficient to ensure the protection of the artifacts; second, the duty of protection required a much-enlarged role for the government and allowed the government to "affirmatively veto" the owner's priorities); Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Joseph Sax on the National Parks*, 25 *ECOLOGY L.Q.* 385 (1998) (summarizing this development).

330. See Connick & Fairfax, *supra* note 277, at ch. 2, 36.

331. This assertion runs counter to much of what the Park Service and its advocates would have us believe. However, it seems incontrovertible. See SELLARS, *supra* note 326, at ch. 1, 15.

332. See, e.g., Keith R. Widder, *Mackinac National Park*, in *REPORTS IN MACKINAC HISTORY AND ARCHAEOLOGY, MACKINAC STATE HISTORIC PARKS* (1975) (detailing how Congress set aside a small, former military installation on Mackinac Island in Michigan by calling it a "national park," and how the managers promptly began laying out sites for summer homes within the reservation).

commercial development—such as farming and mining—required private ownership, whereas the railroads perceived their advantage in the tourist business as tied to the idea that some things ought not be privately owned in order to be exploited.<sup>333</sup> The growing influence of a social vision of property as described in Part III was also quite apparent in the formulation of policy regarding scenic wonders. The fragmentation of public land policy was beginning.

#### 4. *Timber, Timber Culture and Desert Lands—Disposition for Actual Settlers in the Face of Edaphic Facts*

Numerous 1870s statutes also evinced congressional awareness that most of the easily developable land had been taken up and further homesteading required investment to make the lands habitable and productive. Settlers encountering limited rainfall associated it with an absence of trees. Congress's first efforts to address this aridity relied on familiar, intrinsic notions of property by attempting to inspire private investment in addressing the natural variations. The 1873 Timber Culture Act passed in a burst of national enthusiasm for tree planting.<sup>334</sup> The statute encouraged settlers to plant and maintain trees by extending the homesteading principle. It allowed homesteaders to receive an extra 40 acres of land if they kept timber growing on one sixteenth of their claim.<sup>335</sup> The act reflected an early congressional embrace of scientific dogma as a basis for policy. It also reflected the presumption that trees would alter the climate, making the area less arid and more susceptible to homesteading.<sup>336</sup>

The Desert Land Act of 1877 had a similar structure, but focused more directly on the emerging aridity problem: Congress promised settlers up to 640 acres to entry-men who invested the extra effort required to irrigate them.<sup>337</sup> The Act was the last major sortie of irrigation advocates who believed that the private entrepreneur should bear the burdens of

333. See SELLARS, *supra* note 326, at 89 (discussing this cooperative relationship between government landowners and private tourist developers).

334. Timber Culture Act, ch. 277, 17 Stat. 605 (1873), *repealed by* Timber Culture Repeal Act, ch. 561, 26 Stat. 1095 (1891). See also ISE, *supra* note 11, at 29-30. Arbor Day was first celebrated in Nebraska in 1872. See DANA & FAIRFAX, *supra* note 11, at 40-41.

335. See ISE, *supra* note 11, at 44-45. The act in its first iteration required that the full 40 acres be planted to trees during the first year after entry, which proved to be an impossible standard. See *id.* Several subsequent efforts to make the program more amenable to actual conditions by extending the time allowed for planting and reducing the acreage did not contribute as anticipated to successful establishment of timber stands in treeless areas of the west. See *id.*

336. See GATES, *supra* note 1, at 399-400.

337. See *id.* at 638-43.

bringing water to arid lands. Very soon thereafter, advocacy turned to focus on state and, eventually, federally subsidized irrigation.<sup>338</sup>

Congress also moved to make timber available to actual settlers. There was in 1878 no legal way of acquiring public timberlands or the timber itself.<sup>339</sup> The Free Timber Act provided free timber for settlers, and the Timber and Stone Act established a process for selling timberland.<sup>340</sup> A peculiarly enthusiastic Interior official, Commissioner of the General Land Office William Sparks, successfully sought congressional authority to remove large, illegal enclosures of public domain land erected by cattle interests. This was a major victory for "actual" homesteaders, as distinguishable from ostensible "cattle barons." The removal of illegal fences following passage of the 1885 act temporarily allowed homesteaders to enter the area to mix their sweat with the intermountain West. The number of farms grew rapidly until the turn of the century.<sup>341</sup>

#### *5. The Irrigation Survey—Early Applied Science and Major Reservations Rapidly Rescinded*

By the end of the 1880s, a consensus emerged in Congress and throughout the affected areas that the only way to provide a permanent population in the arid west was through irrigation. Congress reserved irrigable lands and potential dam sites to avoid alienation while they developed a better way to irrigate and dispose of them. This quickly became a policy pattern. Congress frequently adopted a stance of reserving the resource until it could devise an improved way to dispose of it.

In 1888, while Congress was in the middle of drafting a major land law reform, the Senate passed legislation directing the Secretary of the Interior to inventory appropriate streams, reservoir sites, irrigable lands, and costs of irrigation. The House, fearful that such a study could lead to monopolization of the inventoried sites, amended the proposal by providing that all such irrigable lands should be reserved from entry.<sup>342</sup> President Cleveland interpreted the act to preclude all land entries in any

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338. See *id.* at 640-42. The act proved highly susceptible to fraud, especially by those seeking access to water, and became the target of much attention from land reformers. However, it was regarded as a god send by those seeking to put together ranch size properties under statutes designed for row cropping in the humid eastern states.

339. See ISE, *supra* note 11, at 56. Thus, when Lincoln's Secretary of the Interior, Carl Schurz, began to enforce anti-theft laws "sufficiently vigorously to discourage timber stealing," Congress came under pressure from actual settlers to remedy the situation. *Id.* at 56-57.

340. See *id.* at 55-58.

341. See GATES, *supra* note 1, at 466-68. See also RABAN, *supra* note 97, *passim*.

342. See Everett W. Sterling, *The Powell Irrigation Survey, 1888-1893*, 27 MISS. VALLEY HIST. REV. 421, 422 (1965).

of the arid regions that might possibly be irrigable. That decision had the effect of invalidating 134,000 entries and filings made on approximately nine million acres of land between the passage of the act and its interpretation. The decision also halted further entry in all the land available under disposition laws in California, Colorado, North and South Dakota, Kansas, Montana, Nebraska, Nevada, Oregon, Washington, and the territories of Idaho, Arizona, New Mexico, Utah, and Wyoming.<sup>343</sup> The response to the invalidations and closures provided strong indication that the nation was not ready for a shift-to-retention.

John Wesley Powell, the best exemplar of the early scientific federal bureaucrats, hurried to the field to prepare assessments and maps of irrigable lands and reservoir sites as quickly as feasible. However, repeal of the 1888 reclamation reservations was rapid. In August 1890, Congress amended away the authority to reserve irrigable lands and cut the funding for the survey. Soon, all that remained of the Irrigation Survey was a series of maps that were of considerable value to the young Bureau of Reclamation when it initiated activities under the 1902 Newlands Act.<sup>344</sup> A significant early expression of growing attention to scientific management of public resources, the Survey nonetheless demonstrated the continuing power of disposition. Thus, neither science nor the prospect of federal largess on irrigation was sufficient to protect the reservations from actual settlers.

#### 6. *Indian Reservations—Another Major Reservation Policy Rescinded*

Actual settlers also prevailed in the post-Civil War era over almost a century of U.S. Indian policy. Between 1830 and the 1890s, Native Americans ceded vast expanses of the North American continent to the United States government in return for land on reservations and a "pledge of honorable treatment by Washington."<sup>345</sup> Following the Civil War, however, the government waged war on the Indians, abrogated most of the treaties, and passed title to millions of acres of Indian Reservations to settlers. Between the Federal Allotment Act of 1887 and the Indian Reorganization Act of 1934, land in reservations declined by almost one third, from 138 million acres to approximately 52 million acres.<sup>346</sup> More-

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343. See *id.* at 426.

344. See *id.* at 434. In 1897 the repeal language was interpreted to apply as well to the reservoir sites. Because of his maps, Powell is frequently referred to as the "father" of the Reclamation Service. Small consolation after watching his lifework go in the tank, but not anything when considering the opprobrium heaped upon his head during the two years in which entries in the arid region were suspended.

345. Charles Geisler, *Property Pluralism*, in *PROPERTY AND VALUES* (Charles Geisler et al. eds., forthcoming 1999) (manuscript at 10, on file with author).

346. See *id.* at 10.

over, the federal government trustee "repeatedly and unilaterally leased Indian lands at below market value, and mismanaged" funds that they collected, diverting the amount due the Indians, which has been estimated at more than \$2 billion.<sup>347</sup> Besides being a national disgrace, the eventual disposal of many of these reservations was an example of the "reserve and rescind" policy we discussed with respect to irrigation lands and others in this section.

#### 7. 1891 Forest Reservation Authority—Goal Fragmentation and Park/Forest Confusion

The destruction of the Irrigation Survey, ironically, coincided with the Forest Reservation Act, unmistakably the high point of what is normally described as the "shift-to-retention" period. Section 24 of the 1891 General Land Law Reform Act provided the president general authority to identify and reserve from homestead entry forested areas of the public domain. Because the reservation authority in the "Forest Reserve Act" was general, rather than limited to a specific site like Yellowstone or Yosemite, the 1891 act is frequently used to date the beginning of the "reservation era." In the same spirit, the U.S. Forest Service has vociferously claimed the act as part of its founding myth. As a result, it is difficult to see it not merely as authority for retention, but also as a key reflection of the fragmentation of policy that was occurring.

The Forest Service dominance of the story of the act typically has obscured the fact that the statute reflects two competing elements of the instrumental approach to ownership. Nascent urgings by a growing group of "scientific foresters," which the Forest Service embraced, competed with the priorities of the preservationists, which it has not.<sup>348</sup> Although both groups argued for government ownership and the recognition of the social value of the land, their priorities were quite different. The assumptions

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347. See *id.* at 11, citing K.B. Kelly, *Federal Indian Land Policy and Economic Development in the United States*, in ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS DEVELOPMENT SERIES 30 (1979).

348. See DANA & FAIRFAX, *supra* note 11, at 56. Confusion between national parks and national forests continued, at least in some quarters, until the Depression era. The 1891 act is preceded by three 1890 reservations which eventually became parts of Sequoia, General Grant, and Yosemite National Parks. They were debated and passed Congress as a "forest reservation." The bill required the Secretary of the Interior to make rules which are now familiar as park-like rules: to "provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." Act of Sept. 25, 1890, ch. 926, 26 Stat. 478. See also Dana & FAIRFAX, *supra* note 11, at 56. The reservations ought to suggest that current day assumptions, that "X" action or statute was for a National Park and "Y" was for a National Forest, are utterly without foundation. Miller is particularly emphatic that these confusions are more than merely semantic. See Miller, *supra* note 41, at 290-92.

underlying the statute were amply reflected in the fact that President Harrison first utilized the new authority to expand Yellowstone National Park. This was a cause he had long championed while he was in the Senate.<sup>349</sup> The rift between scientific foresters and park preservationists ultimately widened into one of the major drivers of public domain policy fragmentation.<sup>350</sup> Because of the Secretary of the Interior's initial preservationist interpretation of the 1891 authority, forest reservations were, in law if not in fact, entirely closed to use—no grazing, no timber harvest, no homesteading, no mineral entry.<sup>351</sup> Throughout the decade of the 1890s, diverse interests labored to fashion a compromise that would meet their aspirations. The growing scientific forestry community and their allies in the irrigation-watershed protection movement were not always compatible with the priorities of homesteaders and ranchers, and the increasingly vocal wildlife<sup>352</sup> and wilderness protection advocates.<sup>353</sup>

349. See DANA & FAIRFAX, *supra* note 11, at 58. Within four years, President Cleveland set aside about 14.5 million acres in reservations, which were more like parks, as we presently understand them, than forests. See *id.* at 60.

350. For more detail on Park Service/Forest Service hostilities, see Connick & Fairfax, *supra* note 277, at ch. 4, 4-9.

351. These restrictions were much harder on those who needed federal recognition—such as homesteaders, and miners seeking to patent claims—as opposed to those who simply trespassed, such as livestock operators, and therefore benefited from federal inability to enforce its policies.

352. See ISE, *supra* note 11, at 45-48. The growing wildlife interests experienced their first major legislative victory in 1894 with the passage of amendments to the Yellowstone reservation, which provided extensively for the protections of wildlife in the park. See *id.*

353. See ANDREW DENNY RODGERS III, BERNHARD EDUARD FERNOW: A STORY OF NORTH AMERICAN FORESTRY 157-58 (1951) (citing Bernhard Fernow, Report of the Division of Forestry for 1891, 224-29). Much of John Muir's familiar lamentations about sheep date from this period, wherein he is seeking to protect the forest reservations from being reopened to grazing. Historians frequently lament that Congress failed to make arrangements in the 1891 act for forest management on the reserves. It seems likely that no such management was intended; the forest reserve authority was initially applied to parks. Bernhard Fernow, then director of the Division of Forestry in the Department of Agriculture, made precisely the same interpretation of the statute. His Report of the Division of Forestry for 1891 argues that the reserves have two purposes, first, an economic one, assuring "a continuous forest cover of soil on mountain slopes and crests for the purpose of preserving or equalizing water flow in the streams." The second, objects "are those of an aesthetic nature, namely to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure." See also ANDREW DENNY ROGERS, BERNHARD EDWARD FERNOW: A STORY OF NORTH AMERICAN FORESTRY 157 (1951). Naturally Fernow thought that the second, while legitimate, was subservient to the first. The Secretary of the Interior, who was charged with interpreting and implementing the statute, did not agree. In his 1891 report, the Secretary of the Interior "urgently recommended that Congress take proper action to have the reservations that are proclaimed by the President established as national public parks granted to the states to be preserved unimpaired..." In addition to the agricultural and economic purposes achieved through "the preservation of the forests upon the public

### 8. *The Carey Act: Federally Regulated Disposition to States for Irrigation*

Even as debate about forest and park reservations intensified, irrigators were successful in advocating for the last major disposition program to the states to support reclamation. The Carey Act provided for granting up to one million acres in each state containing desert lands to support reclamation.<sup>354</sup> The statute was a compromise in response to long standing advocacy that the federal government ought simply to donate the desert lands to the states, as it had done under the swamp lands grants of mid-century.<sup>355</sup> Irrigation advocates gradually built the case that individuals and small firms could not carry the burden of irrigation. Moreover, the period in which the national government simply yielded either land or authority to the states to undertake such projects had passed. The statute that was finally enacted resembled the Desert Lands Act.<sup>356</sup> However, Congress carefully constrained it to require that the states would "file maps showing their plans for irrigation and the sources of water" and sell or otherwise dispose of the land only to actual settlers in tracts carefully regulated in size.<sup>357</sup>

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domain," the Secretary added that, in making the reservations "it is to be considered also that these parks will preserve the fauna, fish and flora of our country, and become resorts for the people seeking instruction and recreation..." See SECRETARY INTERIOR ANN. REP. 14-15 (1891). In March, immediately after the reserve bill passed, and again in September, President Harrison made reservations totaling 1.2 million acres. Significantly, Harrison proclaimed the Pacific Forest Reserve in February 1892, it having been recommended by the General Land Office assessment of the area as appropriate "for national park purposes." Cyrus A. Mosier, *Report Relative to the Proposed Reservation of Public Lands, Mount Rainier Region* (1892) cited in LAWRENCE RAKESTRAW, *A HISTORY OF FOREST CONSERVATION IN THE PACIFIC NORTHWEST, 1891-1913*, 44 (1979). By 1893, Presidents Harrison and Cleveland had set aside approximately 19.2 million acres of forest reserves. Thereafter, the forest reservation process halted, awaiting some resolution from Congress regarding the status of the lands. Congress continued, however, to deal with a number of park reservations and proposed park reservations throughout the decade. In 1896, Congress reserved Casa Grande Ruin, the first archaeological site to receive federal protection. See A. BULL CLEMENSEN, *CASA GRANDE RUINS NATIONAL MONUMENT, ARIZONA: A CENTENNIAL HISTORY OF THE FIRST PREHISTORIC RESERVE 1892-1992* (1992).

354. The Carey Act, ch. 301, § 4, 28 Stat. 422 (1894) (codified as amended at 43 U.S.C. § 641 (1994)).

355. See GATES, *supra* note 1, at 321-24 (discussing the fraud ridden Swamp Lands Acts).

356. Desert Lands Act, 43 U.S.C. §§ 321-38 (1994).

357. GATES, *supra* note 1, at 648-51; Miller, *supra* note 41, at 442-45. The provisions and their effects suggest that the carefully sculpted requirements may have limited activity under the statute—noting that at the rate lands were taken up it would have required more than 150 years for states to utilize their million acres. See GATES, *supra* note 1, at 630. More reasonable perhaps is Miller's suggestion that federal reclamation programs were in the offing. See Miller, *supra* note 41, at 444-45.

### 9. *The 1897 "Organic Act": Scientific Management or Actual Settlers?*

The Forest Service embraced the 1897 legislation as its "Organic Act," and has long argued that the statute authorized scientific management of the forest reserves.<sup>358</sup> This was based on a provision that authorizes the Secretary to make rules and regulations that will achieve the goals of the reservation, specifically "to preserve the forests thereon from destruction."<sup>359</sup> The Forest Service tale is a post hoc misrepresentation of the context and content of the statute that passed. As a series of courts subsequently concluded,<sup>360</sup> the 1897 act did not authorize scientific management as envisioned by the scientific foresters of the day and as long practiced by the Forest Service. The language in the section of the act authorizing timber sales was carefully limited to what might be called vicious tree control. The act authorized the Secretary to remove only dead or mature trees that hinder growth of new trees in order to protect watersheds. More generally, the provisions illustrated an amalgam of the continuing support for actual settlers and the increasing acceptance of government regulation of socially important resources. However, the means of support to settlers altered perceptibly. Government regulation of public resources, rather than disposition of them, was central to the act.

The bill that passed in 1897 authorized more than the regulated sale of timber. Other provisions, rarely referenced adequately, demonstrated the continuing strength of the intrinsic view of property. Indeed, the embrace of the settlers cast real clouds on the future of the reservations.<sup>361</sup>

358. The literature on this is large. Start with ISE, *supra* note 11, for a standard line, then DANA & FAIRFAX, *supra*, note 11, for a brief summary and move to Miller, *supra*, note 41, for the details.

359. DANA & FAIRFAX, *supra* note 11, at 63. The 1897 act passed as a rider on an appropriations bill. *See id.*

360. 16 U.S.C. § 476, repealed by Act of Oct. 22, 1976, Pub. L. No. 94-588, § 13, 90 Stat. 2958. This followed the decision in *West Va. Div. of Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975) (requiring the Forest Service to mark each individual tree authorized for cutting under timber contracts). *See* DANA & FAIRFAX, *supra* note 11, at 327-41.

361. The president's authority under the 1891 act to make reservations was heavily challenged and barely survived. Furthermore, the bill evinces hostility to the reserves which was not evident until literally the last weeks of the negotiation process. As Congress worked on the 1897 bill, President Cleveland precipitously proclaimed 13 new reserves, a total area of 21.3 million acres, as recommended by a National Academy of Sciences (NAS) committee impaneled to study the issue. *See* BNG, *supra* note 2, at 107-109. Unlike the previous reserves, these were poorly studied, and the experts had not even visited five of them. *See id.* Whole towns, villages, farms, mines, mills, and thousands of inhabitants were included. *See* Miller, *supra* note 41, at 327. Congress and the public were deeply outraged by the abusive exercise of authority and they "rudely stopped the process of legislative compromise." *Id.* at 310. Even Pinchot believed that the NAS recommendations were an error. *See* BNG, *supra* note 2, at 119-22. General public support for the reserves is evinced in the fact that the president's authority



Proposals authorizing protection of the forests by army troops were removed.<sup>362</sup> The act opened reserves to mineral exploration and to sheep and cattle grazing. It granted to settlers within the reserves free access and the right to build roads and other improvements on the reserved land to achieve it.<sup>363</sup> Finally, Congress declared its intention that no land valuable for agriculture or mining was to be included in a forest reserve.

As the scientific managers in government gained stature and confidence, the 1897 statute was manipulated to accomplish many of their goals. Far from being an embrace of scientific forest management, however, the 1897 Act opened the 1891 reservations to diverse entry. It clearly expressed the continuing priority on disposition to actual settlers. Thus, in making forest reservations Congress did not abandon the disposition policy, but facilitated it.<sup>364</sup>

10. *Narrow Government Authority to Hold Land—Camfield v. United States.*<sup>365</sup>

In the same year that Congress enacted the wonderfully complex 1897 statute, the Supreme Court considered a crucial challenge to federal authority to hold land. In the famous *Camfield* case, the Court confronted crafty entrymen who had arranged fences on privately held parcels in a checkerboard section to enclose the publicly owned parcels as well.<sup>366</sup> The

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to set them aside was not revoked at that point. See Miller, *supra* note 41, at 303. It did, however, as a condition of retaining the reserves, restore the Cleveland reserves to entry for nine months (during which period settlers could and did stake claims) and authorize the president to modify any reservation made under the 1891 statute. See *id.* Efforts to rescind the president's reservation authority continued, with a major peak again in 1897, until they succeeded in 1907. See *id.*

362. See *A Plan to Save the Forests: Forest Preservation by Military Control*, LXIX CENTURY ILLUSTRATED MONTHLY MAG., Feb. 1895, at 626.

363. See ISE, *supra* note 11, at 139-40.

364. See THE FIGHT, *supra* note 13, at 12. Gifford Pinchot is emphatic: "The single object of the public land system of the United States, as President Roosevelt repeatedly declared, is the making and maintenance of prosperous homes." *Id.* at 11. The disposition system, Pinchot argued, was debauched, allowing "[g]reat areas of the public domain" to pass "into the hands, not of the home-maker, but of large individual or corporate owners whose object is always the making of profit and seldom the making of homes.... Few passions of the human mind are stronger than land hunger, and the large holder clings to his land.... Unless the American homestead system of small free-holders is to be so replaced by a foreign system of tenantry, there are few things of more importance to the West than to see to it that the public lands pass directly into the hands of the actual settler instead of into the hands of the man who, if he can, will force the settler to pay him the unearned profit of the land speculator, or will hold him in economic and political dependence as a tenant. If we are to have homes on the public lands, they must be conserved for the men who make homes." *Id.* at 12-15.

365. *Camfield v. United States*, 167 U.S. 518 (1897).

366. The checkerboard lands arise from the structure of land grants to railroads: in order to prevent monopolization of access to the tracks by the railroads, and to assure that the government would recover some of the value added by the road, Congress retained every

defendants argued that because the fences were on private land, forcing their removal under the 1885 anti-enclosure statute was unconstitutional. Not so, concluded the Supreme Court. The Court reasoned that the fences were a nuisance. Like any proprietor, the federal government had the right to be free of nuisance. Although the Court decision treats the federal government as any other proprietor, the Court also noted that the general government had authority "analogous to the police power of the several states" to protect itself from nuisance on its own land. Moreover, the Court simply presumed that the federal government may hold onto the land and take steps to protect it. "A different rule," the Court stated, "would place the public domain of the United States completely at the mercy of state legislation."<sup>367</sup> The *Camfield* case was not an interpretation of Congress' authority under the property clause in Article IV of the Constitution. It is best understood, along with the *Gettysburg* and *Fort Leavenworth* cases, as part of the growing acceptance of the federal government as the superior sovereign. This notion gradually ripened into federal authority to acquire, hold, and share authority over land within states. Hence, *Camfield* is a fairly confined, but significant, recognition that the federal government would continue to hold property in the western states.

## 11. Summary

The *Camfield* case and the 1897 act provide a nice *fin de siecle* indication of the shape of emerging resource policy. Major events of the period reflected changing notions of government and property in a diversifying public land policy. They also demonstrated the difficulty in changing the emphasis on the Lockean intrinsic view of ownership on the public domain. By the end of the nineteenth century, interpretations of the Constitution clearly permitted continuing federal land ownership. We emphasize this point because end-of-the-twentieth century commentators frequently presume that the authority always existed, and that federal land ownership was always contemplated, always legitimate.<sup>368</sup> That is simply not the case. As the national level of government grew in stature and scope, its land holding authority grew with it. However, the gradual expansion in the federal government's inclination and ability to hold land was not accompanied by a clear "shift-to-retention" policy. Reservations for preservation of natural wonders and protection of watersheds joined acquisitions for national battlefields in the public domain policy quiver. However, the major goal in *all* of Congress' enactments, the reservations as well as the disposals, was continuing disposition of land to actual settlers.

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other section in the swaths of grants.

367. *Camfield*, 167 U.S. at 526.

368. See COGGINS ET AL., *supra* note 7.

No longer unalloyed, the Lockean vision of individuals taking title to property by claiming them with labor out of a state of nature continued, nevertheless, to dominate public domain policy.

One way to categorize these alterations in the range and emphasis of public domain policy is to observe the differences emerging in congressional response to different kinds of resources. One end of the spectrum is clear—mineral development continues to this day to be tied to intrinsic assumptions about property—discovery, investment of effort, and ownership. Mineralized lands are on a separate, identifiable, and coherent trajectory. Similarly, Congress clearly intended arable land to be open to settlement even when inadvertently included in forest reservations. Beyond continued disposition, however, three separate reservation policies began to emerge. The preeminent one at the close of the century was a congressional effort to halt disposition of selected resources pending creation of an improved disposition scheme. Congress abandoned extensive reservations, for example, to civilize the Indians and to facilitate reclamation under pressure from railroads and settlers. The 1891 forest reservations occupied a middle ground. Once made, they were subsequently opened to entry for mining or for diverse homesteading alienation and use. At the other end of the spectrum, scenic curiosities<sup>369</sup> were reserved more permanently for tourist development.<sup>370</sup> Parks joined battlefields as sources of national inspiration as well as tourist commerce, reflecting the growing strength of instrumental views of property. Finally, a crucial form of resource fragmentation is worth notice. In meeting the needs of miners, Congress separated the land from the water. Control over water remained largely, but not exclusively, with the states for most of the twentieth century.<sup>371</sup>

Irrigation interests occupied a particularly instructive place as powerful and explicit advocates of fragmentation. They urged the federal

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369. See Connick & Fairfax, *supra* note 277, at ch. 2, 35. Alfred Runte, not to be trifled with on these matters, argues emphatically, and largely convincingly, that there was no thought at or near the time of the Yellowstone reservation of preserving natural systems or nature. See *id.* The focus was on the curiosities and peculiarities of nature. He alleges that the emergence of natural systems conservation can be traced in the evolution of New York State's efforts to protect Niagara Falls, a process in which the federal government, notably, took no part. See *id.*

370. However, it is interesting to note that the second park reservation did not last out the century. Many commentators note that, having made the Yellowstone reservation, Congress did not set aside another park-like reservation for almost twenty years. That is not true. It is correct that no Yellowstone-like reservations made it into the system of National Parks. However, Congress set aside Mackinac Island in 1876, using for the first time the term "national park." However, it remained a reservation for only 20 years before it was turned over to the state for use as a state park. See generally Widder, *supra* note 332.

371. See A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 13-17 (1985).

government to retain the watershed land under government protection in forest reservations but to dispose of the irrigable acres. In the debates on the 1897 Act, they defended the forest reserves from the predations of homesteaders, loggers, and others who might disturb the forest cover and stream flow.<sup>372</sup> Just as frequently, however, they are portrayed as the hobgoblins of park reservations, advocating dams in scenic mountain valleys as they sought a mix of federal programs to meet their exacting needs. Accordingly, they embody the beginning of a fragmented public domain policy that is clearly visible at the end of the nineteenth century: public domain policy, at the peak of what is typically styled as the reservation era, actually headed off in a number of incompatible directions, all folded around the fundamental theme of support for continuing disposition to actual settlers.

### **B. Roosevelt and Pinchot: The Progressives in Office—The Flowering of Fragmentation**

Louise Pepper observed that no change came about "automatically" in public domain policy just because the nineteenth century ended and the twentieth began.<sup>373</sup> However, Theodore Roosevelt's administration gave the turn of the century a significance that was more than chronological. Conservation became, as is well known, a national crusade, a touchstone of the Roosevelt administration. Under this focus, ideas and proposals that had incubated for decades were implemented. This did not mean that concern for the actual settler abated. To the contrary, establishment of homes for the "little guy" was the rhetorical centerpiece of the Progressive's faith. However, it was also true that in Roosevelt's shadow a key element of the "shift-to-retention" thesis arguably emerges. For a few brief moments, the Secretaries of Agriculture and Interior pulled in the same direction, giving a chimera of credibility to the integrated approach to resources promised by the Progressives.<sup>374</sup> That partnership soon faded, contributing to serious institutional fragmentation in public domain policy, and the major alterations of the Roosevelt-Pinchot era revealed a fragmentation of title to resources underwritten by the changing notion of property discussed in Part III. Progressive Era retention policies were frequently more apparent than real, a division of the "bundle of sticks" of ownership

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372. See Donald J. Pisani, *Forests and Reclamation, 1891-1911*, in *ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM* 237-58 (Harold K. Steen ed., 1992) (detailing the relationship between the foresters and the irrigators and how it fell apart when transformed into a relationship between the Forest Service and the Reclamation Service).

373. See PEPPER, *supra* note 10, at 8.

374. See *supra* note 2.

among rival claimants. Frequently, the result was that the federal government was left with lines on a map that suggest retention, while control and economic benefit from the resource passed, in law or in fact, to states or private parties.

1. *Reclamation: Institutional Fragmentation and Subsidizing Continuing Disposition*

Roosevelt turned first to reclamation. His embrace of reclamation arose from the fact that it would "expand the opportunities for homemaking."<sup>375</sup> The 1902 Newlands Act<sup>376</sup> demonstrated a growing federal power and the importance of science. Yet both the power and the science were marshaled in support of continued disposition. Passage of the act was driven by rhetoric embracing homesteading, the "sweet obligato [that] accompanied almost any discussion of public land matters."<sup>377</sup> The statute promised irrigation water to achieve the agricultural settlement potential of the arid West. The irrigation program initially provided a system for self-financing the projects.<sup>378</sup> However, a series of congressional enactments over the twentieth century gradually forgave most repayment obligations and allowed farmers access to water at enormously subsidized prices. The subsidized yeoman, not precisely a personification of the Lockean/Jeffersonian vision, nevertheless represented the continuing hold of the actual settler mystique despite major changes in expectations about government programs and property.

The Newlands Act depended for its implementation on scientifically credible government agencies. The U.S. Geological Survey (USGS)

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375. PEFFER, *supra* note 10, at 32-33.

376. 43 U.S.C. § 371 (1994). The Newlands Act authorized the Secretary of the Interior to "plan, build, operate, and maintain irrigation works" in 16 arid western states. *Id.* The Act provided for withdrawal of sites for irrigation works, federal construction and operation of reclamation facilities, including dams and water distribution systems. Again the literature is enormous. For good starting points for those who wish to approach the topic in the context of public domain policy, see generally GATES, *supra* note 1, at ch. 22; HAYS, *supra* note 2; DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY AND THE GROWTH OF THE AMERICAN WEST* (1985); MARK REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1986).

377. PEFFER, *supra* note 10, at 40.

378. The basic idea was that the receipts from public land sales in the sixteen states and water use fees would be used to pay for the construction and maintenance, and that the projects would be self-supporting. Peffer notes that the act "in one respect...presented a new idea ...with the exception of moneys earmarked for land grant colleges," land sale receipts would be allocated to construction of irrigation works. PEFFER, *supra* note 10, at 33. Her discussion of the pros and cons of having funds allocated without congressional appropriations is still relevant. See *id.* at 40. The notion that debits would be forgiven in the acquisition of public lands had a long history, dating from the cash sales programs of the early 1800s. See GATES, *supra* note 1, at 7-10.

received initial responsibility for implementing the act. However, the Secretary established the Reclamation Service separate from USGS as an agency within the Department of the Interior in 1907.<sup>379</sup> The national forests were justified largely in terms of their contribution to water for settlement. However, the water and the land producing the water were managed by two different sets of experts in two different agencies, and in two frequently warring departments. Thus, the fragmenting practice of responding to each emergent political interest by establishing a new federal agency had begun.

Moreover, in order to achieve the goal of continuing disposition, the western states agreed to an expansion of federal power including the federalization of what was viewed as state's responsibility for reclamation policy.<sup>380</sup> This was, as historian Donald Worster has noted, difficult for many westerners to accept.<sup>381</sup> However, the statute also promised that reclamation projects would not interfere with established state water allocation law or title to water established under it.<sup>382</sup> Thus, the western states were able to accept this federalization in part because it was merely a "brief acknowledgment of the principle of reservation."<sup>383</sup> The lands were destined for settlement and the agricultural interests were able to avoid most of the federal control while benefiting from the subsidies.

379. See BARBARA T. ANDREWS & MARIE SANSONE, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST ch. 3 (1983). By 1907 the Forest Service had existed for two years.

380. See generally ANDREWS & SANSONE, *supra* note 379. The statute makes rules about the distribution of water to actual settlers on small parcels of land. The commitment to state control of allocation was subsequently much litigated and challenged. However, it provided the vehicle by which large agricultural interests, particularly in southern California, evaded the act's at least nominal embrace of small agriculturists.

381. See WORSTER, *supra* note 376, at 159-62. See also DONALD WORSTER, AN UNSETTLED COUNTRY: CHANGING LANDSCAPES OF THE AMERICAN WEST 31-54 (1994).

382. See WORSTER, *supra* note 376, at 161 (reminding us the Jeffersonian vision was for "white, American family men" since the statute provided that "no Mongolian labor" could be used on construction crews).

383. PEFFER, *supra* note 10, at 39-40. More appropriately for the present discussion, perhaps, Peffer styles this federalization in terms of a balance between two principles—reservation and settlement—which are combined in the statute. The west was "bitterly antagonistic to any form of federal overlordship....[yet] in its eagerness to gain a desired end by irrigation it was willing to make a brief acknowledgment of the principle of reservation when, as under the terms of the Reclamation Act, the land was merely to be set aside in preparation for future settlement." *Id.* But Peffer's argument is ultimately flawed—the west was not opposed to any form of overlordship or to reservations per se. Westerners supported reservations that met their needs and opposed those that did not. See HAYS, *supra* note 2, at 13. Moreover, the act as passed is a compromise—areas in irrigation projects were withdrawn from all entry *except* homestead entry.

## 2. *Sedimentary Deposits and Reservations in Limbo*

Minerals policy was another area in which Congress was feeling its way toward enhanced federal control without making effective reservations. Hardrock deposits continued on the simple path of complete disposition without any return to the government. Sedimentary deposits or energy minerals soon were split off and evinced the same pattern as the reclamation reservations. Presidents Roosevelt and Taft halted alienation of federal coal and oil deposits until Congress designed an improved way to continue disposition. Between July and November of 1906, Roosevelt withdrew 66 million acres of land likely to contain coal.<sup>384</sup> President Taft continued mineral withdrawals, closing 4.5 million acres of oil lands, primarily in Wyoming and California, to all forms of entry.<sup>385</sup> The result was another stalemate—reserved resources, like the early forest reservations and the national parks, and no process identified for management or access. There was no question that these minerals would be developed, but the question of how was not resolved until 1920.<sup>386</sup>

## 3. *The Irony of the Forest Transfer Act of 1905—Scientific Management and the End of the Forest Reservation Authority*

The General Land Office in the Department of the Interior had not met with much success in managing the forest reservations set aside under the 1891 Act and subject to regulated use under the 1897 statute.<sup>387</sup> Pinchot and Roosevelt early on decided to move the reserves to the Department of Agriculture. Pinchot, from his position as the Director of the Division of

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384. See PEPPER, *supra* note 10, at 69-71, (citing S. Doc. No. 59-141 (1906-07)). In December of that same year, Roosevelt addressed Congress and proposed a leasing system for coal, oil, and gas.

385. See PEPPER, *supra* note 10, at 110-15, 125. Challenges to executive authority to make such reservations without specific congressional direction resulted in passage in 1910 of the Pickett Act. Intended to assure the president's authority, the statute was so witlessly drawn as to subject it to more trenchant attack.

386. See PEPPER, *supra* note 10, at 115-18. The issue was finally resolved in favor of presidential withdrawal authority that predated and transcended the Pickett Act's ill advised provisions in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

387. Part of the problem was that Pinchot, in an effort to build support for transferring the reserves to the Department of Agriculture, where he was Director of the Division of Forestry, devoted considerable energy to undercutting the efforts of the General Land Office (GLO). The GLO's effort to manage the lands is an under-told story. The requirement of turning an agency of bookkeepers and patent investigators into a field force of land managers was not easily met. See James Muhn, *Early Administration of the Forest Reserve Act: Interior Department and General Land Office Policies, 1891-1897*, in *ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM* 259-75 (Harold K. Steen ed., 1992). See also ISE, *supra* note 11, at ch. 3 & 4, 155.

Forestry in the Department of Agriculture, could then institute the practice of scientific forestry "on the ground."<sup>388</sup>

In the transfer we see three major fragmenting elements. First, the institutional fragmentation underlying the transfer was significant. The founding of the Forest Service spread public domain management between two departments. It heralded the growing practice of establishing a new agency to meet the specific needs of those whose expertise or economic needs were related to specific resources. Second, the lead-up to the transfer enabled stock operators to control national forest grazing policy. Livestock operators, who largely had been barred from the reservations by the Department of the Interior's park-oriented interpretation of the 1891 Act, bargained hard for greater access in return for their support of the transfer. The General Land Office manual warned that "stockmen used the forests only as a privilege and not as a right, and that the Secretary could exclude them entirely at his discretion."<sup>389</sup> Pinchot, blurring forever that fundamental distinction between a right and a privilege, "led the fight in Washington for greater recognition for the stockmen."<sup>390</sup> Finally, in the transfer we perceived growing hostility between Congress and the Executive Branch over public domain policy. Congress established the Forest Service with generous salaries for forest managers and staff. It also developed a fund containing all receipts for timber and grazing permits that could be used to support further administrations of the reserves, designated thereafter as National Forests.<sup>391</sup> However, the generosity did not endure growing western resentment of Pinchot's rather high-handed management style. In the 1907 appropriations bill, Congress stripped the agency of its self-supporting status, making management funds subject to annual appropri-

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388. "On the ground" distinguishes Pinchot from his predecessor, Bernhard Fernow, whom Pinchot believed was ineffectual in that he did not emphasize the silviculture that Pinchot had learned in Europe. *But see* R.W. Behan, *Forestry and the End of Innocence*, AM. FORESTS, May 1975, at 16, 19; Richard Behan, Address to the N.W. School of Law, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry* (1978).

389. HAYS, *supra* note 2, at 55-57 (citing the General Land Office Manual).

390. HAYS, *supra* note 2, at 57. In 1901, Pinchot attracted Albert F. Potter, an official in the Arizona Wool Growers' Association, to the Bureau of Forestry to establish a Division of Grazing. Potter became the chief architect of Forest Service grazing policy. Stockmen were also successful in requiring "the selection of forest supervisors and rangers, when practicable, from the citizens of the states or territories in which the reserves were located." Ise calls this a "little political concession." ISE, *supra* note 11, at 157. Note, however, that the same little concession was among the early amendments to the Taylor Grazing Act, absent the "when practicable" dodge.

391. *See* ISE, *supra* note 11, at 162-63. A separate statute, also passed in 1905, gave officers of the United States authority to arrest without process any person found violating a law or regulation governing forest or park reservations. *See id.* at 162; Act of Feb. 6, 1905, Pub. L. No. 46, ch. 456, 33 Stat. 700. This general law enforcement authority has never been granted to the BLM except in narrow geographic areas.



tions. It granted the states an increasingly generous share of agency receipts. Congress also rescinded the reservation authority in just those states where the forest cover might have justified further forest reservations, namely Washington, Oregon, Idaho, Montana, Wyoming, and Colorado.<sup>392</sup> Although the reserves survived intense congressional criticism, the president's 1891 forest reservation authority was gone,<sup>393</sup> and Congress and the Executive Branch were on significantly different wavelengths concerning public land management.<sup>394</sup>

4. "Redistribution Policy" on National Forest Grazing Lands—Cohen in the Service of Locke

The standard narrative suggests that once the U.S. Forest Service was established, the forest reservations were permanent. This superficial analysis fails to note not only the clear preference for settlers in the 1897 act, but also the growing disjunction between formal title to land and control over resources. Sparring with livestock interests dominated the early years of Forest Service existence, not timber management.<sup>395</sup> Early Forest Service grazing priorities were similar to those of the Reclamation Act. Both demonstrated explicit preference for subsistence farmers and newcomers over large, established producers.

Under the "redistribution" policy of the Forest Service, first-comers to the national forest rangelands received a yearly permit to graze similar to the original General Land Office permits. Moreover, access was temporary. The Forest Service clearly established that as new arrivals came into an area, available forage would be redistributed to accommodate the newcomers. Small producers were to be allowed to increase their permitted number of stock, and newcomers were to be granted grazing access. They both had a right to expand their operations and to expect redistribution of

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392. See generally DANA & FAIRFAX, *supra* note 11, at 91-92. Forced by other factors to sign the offending appropriations bill, Roosevelt cooked up with Pinchot a number of additions to the forests in those states immediately prior to approving the act. Roosevelt added 16 million acres to the reservations that clinched congressional hostility to Pinchot and the Forests for a protracted period. See also PEPPER, *supra* note 10, at ch. 5; Sally K. Fairfax, *Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as if States Mattered*, in *FEDERAL LANDS POLICY* 77 (Phillip O. Foss ed., 1987).

393. Challenges to the mineral withdrawals led to legislation and litigation that ultimately established that the president has independent authority to reserve lands from the public domain. See *supra* text accompanying notes 385-88.

394. This hostility was reflected 60 years later in the report by the PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND CONGRESS* (1970).

395. The relative importance of livestock and timber is expressed in the fact that despite extremely low grazing fees, they exceeded or equaled timber receipts from 1906 to 1917 and vastly outpaced them until 1921. See DANA & FAIRFAX, *supra* note 11, at 87.

permits to graze on national forests from the larger operators until the newcomers reached a specified level just below which the larger operators could not be reduced. Accordingly, the redistribution policy was an excellent illustration of the admixture of incompatible property notions in Progressive Era policy: the existing access rights of established ranchers were treated in an instrumental way, as alterable to achieve an important social goal of continuing disposition to actual settlers. The instrumental approach to original claimants ironically created the opportunity for continued assignment of intrinsic rights to newly arriving ranchers still acting out the Lockean-Jeffersonian model.

Forest Service grazing policy evolved rapidly from reserved land management into a major example of nominal retention. Established ranchers tolerated the redistribution policy only until confronted with a rash of new homestead entries, which was not long in coming.<sup>396</sup> Our national preoccupation with hearty yeomen was exacerbated by a burst of early twentieth century enthusiasm for "dry farming," a short hand for scientific dogma of the day that rain follows the plow.<sup>397</sup> It led to the Kinkaid Act in 1904 where Congress experimented with 640-acre homesteads in northwest Nebraska.<sup>398</sup> The popularity of the bill's scientific theory was so widespread that bills for extending its provisions soon proliferated in Congress.<sup>399</sup> A series of "enlarged" homestead acts passed Congress in the first decade of the new century.<sup>400</sup> Established livestock operators became increasingly insistent on derailing the redistribution policy and increasing recognition of their "rights" to graze national forest lands.

##### 5. Homesteading on National Forests—More Rescinded Reservations

While the Forest Service, following Pinchot's lead, made more and more policy accommodations to the livestock operators, Congress persisted in its enthusiasm for disposition of reserved forestland to homesteaders. In 1906 Congress reiterated its direction, first articulated in the 1897 act, that the forests were not intended to include land suitable for agriculture by opening the National Forests to homesteading. They gave the Secretary *discretion* to classify lands appropriate for entry. The Secretary's pace in making those designations was predictably desultory. Congress in 1912 directed the Secretary to make such classifications. Again, the agency

396. See PEPPER, *supra* note 10, at 134-39. Homestead entries peaked in 1910 and continued strong after World War I. Forty percent more land was homesteaded between 1897 and 1922 than between 1862 and 1897. See *id.*

397. See GATES, *supra* note 1, at 503.

398. Fans of MARIE SANDOZ'S OLD JULES (1935) are not always aware of the role of public land law in that saga. It is Kinkaid Act land that Jules worked.

399. See PEPPER, *supra* note 10, at 140-41.

400. See GATES, *supra* note 1, at ch. 17, 463-94.

hemmed and hawed, nevertheless opening about 2.5 million acres to entry.<sup>401</sup> While not a huge amount of land, it was broken into about 18,000 separate tracks,<sup>402</sup> which had a considerable impact on both the forests and the cattle operators.

6. *The Antiquities Act of 1906—Strong Retention of Land and Disposal of Key Resources*

Given these successful challenges to the forest reservation policy, the Antiquities Act of 1906 appeared as a far more complex and important statute than typical treatment of it would suggest. The statute broadened and solidified the government's interest in the growing category of property that could not be privately owned. In the same year that Congress insisted that national forests be opened to homestead entry, and within months of rescinding the president's forest reservation authority, it passed the Antiquities Act. This act granted general reservation authority to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that were situated upon the lands owned or controlled" by the United States, an authority far broader than that granted in 1891 concerning forest reservations.<sup>403</sup> The president was also authorized to accept donations of relevant tracts of land on behalf of the United States.<sup>404</sup>

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401. See DANA & FAIRFAX, *supra* note 11, at 102-03.

402. See GATES, *supra* note 1, at 512. The act was popular in part for its contribution to getting land onto tax rolls. See *id.*

403. Although the reservations were supposed to be specifically limited to the "smallest area compatible with the proper care and management of the objects to be protected," the use of the authority has frequently been expansive. Antiquities Act of 1906, § 2, 16 U.S.C. § 431 (1994). Hal Rothman, the act's Boswell, complains that the act "has been undervalued, ignored, and discounted by both contemporary observers and historians." HAL ROTHMAN, *AMERICA'S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION* xi (1989). This seems a fair statement. However, in Rothman, as elsewhere, the Antiquities Act is treated in the context of accreting National Park policy, as one little increment on the road to retention and enlightenment. Thus, it seems a rather natural development. The act is more interesting. When considered in the context of the anti-reservation tendencies in Congress at the time it passed, its existence is astounding. Moreover, Rothman plays down the parts of the statute that are extraction oriented, and thus misses the interesting split in thinking about ownership. For a more recent consideration of owning heritage resources and sensitive properties, see Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990); Joseph L. Sax, *Is Anyone Minding Stonehenge: The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543 (1990). See also Freyfogle, *supra* note 210.

404. 16 U.S.C. § 431. This donation authority is not trivial. At the time, this was the only authority to accept donations of land for conservation purposes. See Connick & Fairfax, *supra* note 277, at Introduction 6, 18. The Antiquities Act authority was used to initiate Acadia National Park and Muir Woods. The former is the beginning of national parks in the east. See *id.* at ch. 3, 87.

Despite its power to retain land, however, the Antiquities Act was also an extraction statute, not unlike the General Mining Act.<sup>405</sup> The act severed the land from the portable antiquities and relics thereon, and authorized the respective secretaries to grant permits for exploring ruins and gathering objects. It required that the objects be sent to museums and other scientific or educational sites. We therefore interpret the statute as creating a new kind of property—for some items that can only be owned and managed by museums. Unfortunately, the field of archaeology was not up to the privileges granted at the time. The process that ensued is arguably best analogized to the permit system of mineral extraction until well after World War II.<sup>406</sup> Thus, the Antiquities Act was a mixed bag. Unquestionably it was, and remains, the strongest commitment to land reservation for conservation in the code. Notwithstanding, it provided scanty scientific cover for systematic removal of Indian relics from reserved lands and almost no protection at all from looters either on or outside of the lands reserved.

#### 7. *Federal Reserved Water Rights—Growing Federal Authority Reunites the Water with Some of the Reserved Land*

Congress and the Executive Branch were not the only participants zigzagging on disposition and retention. During the first decade of the century the Supreme Court precipitated a small, but quite significant retreat on the disposition of water to the states. In 1908, the Court considered a case in which enterprising white farmers had diverted streams surrounding an Indian reservation to the extent that they effectively de-watered the Indian land. In a case challenging the legitimacy of these diversions, the Court crafted, with unclear Constitutional authority, a doctrine of implied water reservation. When the federal government set aside and reserved land from the public domain, it automatically, without even mentioning water, reserved sufficient water to accomplish the purpose of the reservation.<sup>407</sup> Any doubts about the reach of the federal authority to retain land and other resources that lingered in the wake of *Camfield*, the Court resolved in *Winters*.

The expansion of federal authority in connection with reserved lands was so great that it was not necessary for the federal government to comply with state water law to establish title to water. This was a danger-

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405. We are grateful to our colleague Bryan Lym, who first voiced this interpretation of the statute during a seminar on cultural resources many years ago.

406. See PAUL FAGETTE, *DIGGING FOR DOLLARS: AMERICAN ARCHAEOLOGY AND THE NEW DEAL* xvii-xxvii, ch. 1, at 1-18 (1996).

407. See *Winters v. United States*, 207 U.S. 564, 577 (1908) (holding that the federal government reserved enough water rights by implication upon reservation of land for Indian tribes to effectuate the purposes of that reservation).

ous doctrine indeed. The reservation was open ended rather than for a specific amount. Moreover, it was not subject to the "use it or lose it" element of state water allocation systems. Finally, the date of priority attached to the reservation was usually very senior in most watersheds.<sup>408</sup> Although the case's doctrinal basis is still not altogether clear, it was impossible not to read the Court's decision as an important increment in the development of federal authority over the public domain land. The reserved water right was an opposite number to the Irrigation Survey and, ironically, the Indian land reservations. In the latter two cases, the federal government reserved land and then unreserved it. Under the *Winters* doctrine, the Courts recovered control over resources that Congress had granted to the states. Thus, the Courts had come a long way from the rather niggling arguments of *Camfield* in a rather short time.

#### 8. *The Weeks Act—Reacquiring Forest Lands in the Eastern United States*

The Antiquities Act's authority to accept donations evinced a willingness of Congress to acquire private land for some federal purposes. This authority was extended grandly in 1911 to include actual purchase of forested lands. The Weeks Act authorized establishment of a commission which sought out, in a rather complex process, land high in watersheds for acquisition. Congress, not the courts as in the case of the *Winters* doctrine, deemed some resources and public purposes sufficient to justify the reacquisition of land disposed of previously. However, before 1911 it was not clear that Congress had the authority to do so. The Weeks Act was debated primarily in the context of whether the federal government had authority to acquire lands for conservation purposes.<sup>409</sup> The initial answer to that question was a resounding "no." Ultimately, Congress was willing to be convinced that the bill was not a forest protection act, for which allegedly there was no authority, but rather a Commerce Clause based effort to protect watersheds. Hence, the commerce-based bill passed

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408. But, because the Court left the basis for this novel doctrine murky, it was possible for denizens of the state water bar to assert that the authority was tied to either the War Power or the Treaty Power, or to the government's special fiduciary relationship with the Indian reservations. Thus the argument went for many years; the same implied right did not attach to the federal government's reservations of land for forest, park, or similar purposes. Not until 1976, it is interesting to note, did the government pursue litigation to extend this doctrine to include those lands. See *Cappaert v. United States*, 426 U.S. 128, 138-41, 146 (1976) (holding the federal government reserved enough water rights by implication to effect the purposes of its reservation to protect a unique species of fish).

409. See Connick & Fairfax, *supra* note 277, at Introduction 17. Although the vision of how the federal government could hold, manage, and acquire land was expanding; it did not yet extend to acquisitions for conservation. See also Meidinger, *supra* note 286, at 19-23. It is important to note that Congress did not authorize land acquisition for park purposes until the late 1950s. See Connick & Fairfax, *supra* note 277, at Introduction 20.

easily.<sup>410</sup> Acquiring land was not, of course, the same as reserving it.<sup>411</sup> Passage of the Weeks Act nevertheless manifested an acceptance of federal ownership, management, and the advantages of federal participation in local economies. It also indicated the importance of sellers in the politics of federal land acquisition. Owners of marginal, over-cut timber land and beat-out farms throughout the eastern United States were happy to sell their property to the federal government rather than simply abandon it.<sup>412</sup>

9. *Homesteading Continues Nonetheless—A Belated Attempt to Recognize the Realities of Row Cropping in the Arid West by Severing the Surface from the Subsurface Estate*

Although government ownership, and even acquisition of land, had clearly gained a secure place in the array of public domain laws and policies, the increasingly mythic notion of homesteading continued to dominate debate. The last of the major homesteading statutes, passed in 1916, recognized the aridity of the intermountain west. The Stock Raising Homestead Act permitted 640-acre homesteads in designated areas under very favorable conditions.<sup>413</sup> The statute depended on an important fragmentation in the concept of property. While granting the surface to the homesteader, the underlying coal and other valuable minerals were reserved to the federal government. This provision gave rise to enormous areas in which title to the surface was "severed" from title to the subsurface.

In spite of its name, the bill was most emphatically not a victory for ranchers. Again the notion of intrinsic property and the accompanying image of actual settlers would not be denied in spite of the strenuous objections of the stock operators.<sup>414</sup> The only concession to ranchers' interests was the authorization for withdrawal of public lands for stock driveways.<sup>415</sup> Under the act, the stockmen saw the "march of the homesteader[s]" continue across the range areas which the stockmen were trying to control.<sup>416</sup> Ironically, ranchers were forced by continuing disposition to homesteaders to become explicit and consistent advocates of land retention

410. See Connick & Fairfax, *supra* note 277, at Introduction 17.

411. See Connick & Fairfax, *supra* note 277, at Introduction 5-7. We find it interesting that land acquisition for forests in the East was much earlier and more easily established than reservation authority in the West. Note, however, that acquisition authority for parks, as opposed to forests, has never been clearly acceptable. See *id.*

412. See *id.* at Introduction 19 (discussing one of the motives behind the act).

413. See Stock Raising Homestead Act of 1916, 43 U.S.C. § 294 repealed by Pub. L. No. 94-579, § 702, 90 Stat. 2787, 2789 (1976).

414. See PEPPER, *supra* note 10, at 162-63. See also GATES, *supra* note 1, at 501.

415. See GATES, *supra* note 1, at 517.

416. See PEPPER, *supra* note 10, at 161.

in order to prevent further breakup of "their" ranches. Increasingly, the livestock operators saw that they could get what they wanted by manipulating the managing agencies, separating title from control.

#### 10. *The National Park Service Established—Institutional Fragmentation*

Like 1872<sup>417</sup> and 1906,<sup>418</sup> public domain policy students find 1916 sweetly ironic. The intensification of disposition under the Stock Raising Homestead Act was juxtaposed with the passage of a bill establishing the National Park Service (NPS).<sup>419</sup> Some of the irony disappears, however, with further information about the NPS act. It was more ballyhooed than the 1905 statute that authorized the formation of the U.S. Forest Service.<sup>420</sup> The Park Service "organic act" was far less of an embrace of government management and clearly was not a congressional imprimatur for federal preservation efforts.<sup>421</sup> The Act opened the national parks, monuments and reservations to both timber harvest and grazing of livestock.<sup>422</sup> Moreover, the first responsibility assigned to the "service thus established" was to "promote and regulate the use of the federal areas known as national parks, monuments, and reservations."<sup>423</sup> (Emphasis added.) To achieve that goal, Congress authorized the Secretary to "grant privileges, leases and permits for the use of land for the accommodation of visitors."<sup>424</sup> These "privileges" ripened into proprietary interests for concession holders.<sup>425</sup>

417. Both the General Mining Act of 1872 and the Yellowstone reservation passed. General Mining Act of 1872, ch. 152, 17 Stat. 91 (1872) (codified as amended in scattered sections of 30 U.S.C.); Act of Mar. 1, 1872, ch. 28, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21).

418. Both the Antiquities Act and the Forest Homesteading Bill passed. Antiquities Act of 1906, ch. 3060, § 2, 34 Stat. 225 (1906) (codified at 16 U.S.C. § 431); Act of June 11, 1906, ch. 3074, Pub. L. No. 220, 34 Stat. 233, *repealed by* Pub. L. No. 94-579, § 702, 90 Stat. 2787, 2789 (1976).

419. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-4 (1994).

420. See Forest Transfer Act, ch. 288, 33 Stat. 628 (codified in scattered sections of 16 U.S.C.) (1905). As noted above, the Forest Service song and story embraces the far more ambivalent 1897 act.

421. The National Park Service act is frequently and accurately portrayed as a defeat for the Forest Service. See Connick & Fairfax, *supra* note 277, at Introduction 19.

422. The Secretary of the Interior has rarely pursued such options.

423. 16 U.S.C. § 1. See LARRY M. DILSAVER, *AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS* 46-47 (1994); SELLARS, *supra* note 326, at ch.1, 7-27, ch. 2, at 28-46.

424. National Park Service Concessions Policy Act of 1965, 16 U.S.C. § 20a (1994) *repealed by* National Park Service Concessions Management Improvement Act of 1998, Pub. L. No. 105-391, § 401, 112 Stat. 3515 (1998).

425. See George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 740-59 (1997). But notice as well that a new system to award concessions in parks was created by the National Parks Omnibus Management Act of 1998, 16 U.S.C. §§ 5951-57 (West Supp. 1999).

For obvious reasons, most of the present day discussion of the act centers on a putative paradox in one sentence in the statute. Modern advocates of the Park Service as an instrument of nature preservation find it confusing that the NPS is required "to conserve the scenery and the natural and historic objects and the wild life therein" and to "provide for public enjoyment," while ensuring that the parks are left "unimpaired for the enjoyment of future generations."<sup>426</sup> Steven Mather, first director of the Park Service, was less wracked by that arguable conundrum than subsequent advocates of park purism. He was a tireless promoter of roads, hotels, cars, and tourism in the national parks.<sup>427</sup>

The founding of the National Park Service would be, given some late twentieth century notions of what the statute said, an unambiguous mark in the reservation/preservation column. However, a simple reading of its actual words and early implementation tells a different story. It opened lands previously closed to grazing and timber harvest. More importantly, the act began a "cooperative effort between government and private business—notably railroad, automobile and other tourism interests—to...preserve places of great natural beauty and scientific interest, while also...creating and perpetuating an economic base through tourism."<sup>428</sup>

#### 11. *Mineral Land Leasing Act of 1920—Nominal Retention and Institutional Fragmentation*

After more than a decade of debate and litigation, passage of the Mineral Land Leasing Act of 1920 (MLA) answered the question of how to develop reserved sedimentary and energy mineral deposits. The 1920 statute could be understood as the retention poster child. This seems a reasonable conclusion at first blush, but several caveats are worth mention. First, from the outset, leases for coal were issued without any apparent effort to protect the federal interest in the resources. Regarding on-shore oil and gas, for the most part, the government proceeded as if applicants had a right to a lease. Indeed, it continues to do so in many cases.<sup>429</sup> Although the government retained considerable potential control over development

426. 16 U.S.C. § 1. See Robert B. Keiter, *National Park Protection: Putting the Organic Act to Work*, in *OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS* 75, 75-78 (David J. Simon ed., 1988) (interpreting the statute as a management mandate, biased in the politically correct direction of preservation).

427. See SELLARS, *supra* note 326, at ch. 3, 47-90.

428. *Id.* at 89.

429. See FAIRFAX & YALE, *supra* note 42, at ch. 5, 68-71. The most notable exception is the 1997 decision not to allow leasing on the Lewis and Clarke National Forest in Montana on the grounds that such leasing would disrupt regional citizens' "sense of place."



of many of those deposits, it did not exercise it.<sup>430</sup> Second, western states cut an impressive financial deal in the receipt sharing provisions of the minerals leasing program.<sup>431</sup> While only nominally giving up control over development of valuable resources within their boundaries, the states gained 90 percent of the revenues from mineral development, which under the MLA are distributed to the states. Fifty percent of the revenues are distributed to the state in which the development takes place, and another 40 percent are earmarked for deposit in the "reclamation fund," an account established to provide start-up money for reclamation projects.<sup>432</sup> The remaining ten percent is deposited in the general fund of the U.S. treasury.

Thus, the MLA presents an interesting challenge to our discussion of retained resources. Nominally, the control it gave federal managers over the location, timing, intensity, and reclamation of minerals development suggested that the resources were clearly retained.<sup>433</sup> In practice, the government rarely exercised that control. All of the economic returns from the resources were split off and granted to the states.<sup>434</sup> Accordingly, when one considers the "bundle of sticks" that has become the dominant metaphor for understanding property, it is clear that under the MLA, the federal government disposed to the states key elements of the bundle.<sup>435</sup> Therefore, it seems reasonable to conclude that what the government retained is the *potential* to control.

## 12. "Redistribution" Redux—Title and Control Part Company on National Forest Ranges

A slightly different partitioning of the bundle of rights arises in the continuing saga of the Forest Service's redistribution policy regarding grazing access. By the mid-1920s, one segment of the livestock industry had achieved effective control over the grazing program on national forests. Ranchers with base properties succeeded both in excluding transient sheep operations from forest ranges and in redefining permit terms sufficiently to be secure against redistribution to newcomers. Indeed,

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430. See ROBERT H. NELSON, *THE MAKING OF FEDERAL COAL POLICY* ch. 2, at 23-29 (1983).

431. See FAIRFAX & YALE, *supra* note 42, at ch. 5, 74-78, 91, 98.

432. See FAIRFAX & YALE, *supra* note 42, at 151-53. The reclamation fund is, like many of the retention programs discussed herein, more apparent than real. In fact, there is no reclamation fund at all; it is a bookkeeping fiction.

433. The leasing system also fragmented the management of access to mineralized lands—minerals within national forests were and continue to be managed by agencies in the Department of the Interior.

434. This is not nearly so clear a fragmentation of title as the surface/subsurface split effected by the 1916 Stock Raising Homestead Act.

435. See Sally K. Fairfax, et. al., *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 *ECOLOGY L.Q.* 630 (1999) [hereinafter *Formal & Informal Claims* (updating control over mineral development, and the devolution thereof to states)].

the permit morphed from an annual permit to "turn out" a designated number of animals into an exclusive right to graze virtually in perpetuity on a specific place.

The new permits gave ranchers access to a specific area and the right to fence it in, and effectively eliminated community allotments for subsistence grazing.<sup>436</sup> The stockmen successfully sought a rancher-dominated board to review any allotment changes made by the agency.<sup>437</sup> They also sought a separation between the upward limit on newcomer growth potential and the low point to which the agency could reduce existing permittees' allotments in order to make room for newcomers. Under the new policy, no newcomer could ever achieve holdings equal to the size of existing operations. This created a permanent two-level system that effectively discouraged newcomers and thereby significantly reduced any pressure for redistribution. Finally, the Forest Service changed permits from year-to-year allocations into leases with 10-year terms. Even the ten-year limit was largely a formality—the permits effectively became permanent allotments in the vast majority of cases.

Although ranchers were unsuccessful in having their entire agenda enacted into law, they forever altered the contours of the permit program on Forest Service lands. It had been a very short walk from Forest Service control over grazing on national forests to permittees gaining control over the Forest Service grazing lands. For almost all purposes, the permittees succeeded in gaining most of the benefits of ownership while avoiding most of its burdens (e.g., paying property tax on privately owned land). Over time, the largess ripened into an entitlement, which has been increasingly difficult to alter.<sup>438</sup> Thus, what looked like a reservation and an assertion of federal control over access to federal property was rapidly transformed by political manipulation into a Forest Service statement of preference for one among several rival claimants of federal largess.

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436. See PATRICK C. WEST, UNIV. OF MICH. MONOGRAPH #2, NATURAL RESOURCE BUREAUCRACY AND RURAL POVERTY: A STUDY IN THE POLITICAL SOCIOLOGY OF NATURAL RESOURCES 60-62 (1982).

437. The stockmen did not ignore the courts as an avenue for achieving favorable policies. They challenged both the Constitutionality of the congressional delegation of rule making authority to the Secretary of Agriculture, and the statutory basis of the Secretary's decision to charge a nominal fee for grazing access. In both instances, their challenge failed. See, e.g., *Light v. United States*, 220 U.S. 523 (1911); *United States v. Grimaud*, 220 U.S. 506 (1911).

438. See Raymond, *supra* note 41, at 432. Raymond is clear that as a legal matter, a property right does not exist. See *id.* However, the effect of established expectations solidified in a web of other rights and policies, such as the facts of permit transfer and the tax implications noted above, has created an effective right. See *id.* at 436-38.

### 13. *The Taylor Grazing Act—More Nominal Retention and Federal Acquiescence*

Forest Service acquiescence in livestock operator's priorities began with Pinchot's need for their support in procuring a transfer of the forest reserves from the Department of Interior to the Department of Agriculture. It continued because the Forest Service and the Department of the Interior engaged in a protracted struggle for authority over the remaining unreserved, un-entered public domain. Most especially under Secretary Harold Ickes (1930-1947), the Department of the Interior refused to relinquish control over the remaining grazing lands in the public domain. Passage of the Taylor Grazing Act followed a process of two federal agencies competing with each other to gain the support of stock operators. Not surprisingly, implementation of the Taylor Grazing Act evinced a pattern similar to grazing programs on national forests. It looked on the surface like a reservation, but should be understood as a successful effort by one set of claimants to achieve exclusive access to specific areas. That access has evolved into a right or entitlement becoming extremely difficult to alter.

The Taylor Grazing Act (TGA) passed in 1934 following the successful wooing of the livestock industry by Interior Secretary Harold Ickes with promises of less restrictive management in the Interior Department. Under the statute, and the amendments and executive actions which rapidly followed, the remaining public domain lands in the continental United States were withdrawn from entry and established as grazing districts. This withdrawal from entry gives the TGA the appearance of a retention statute.<sup>439</sup>

After 1934, the federal government nominally controlled entry and use of all public lands in the contiguous forty-eight states.<sup>440</sup> However, it is difficult to characterize either the intent or the end result as retention. From

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439. The Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as 43 U.S.C. § 315); See PEFFER, *supra* note 10, at 222-25. Certainly this is Peffer's position when she characterizes its passage as the closing of "the public domain." *Id.* at 224. Peffer is the classic source on the Taylor Grazing Act. See also Sally K. Fairfax, *Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel*, in DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT: A REPORT PREPARED BY THE COMMITTEE ON DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT 1715, 1722-27 (National Research Council, National Academy of Sciences 1984) [hereinafter *Coming of Age*].

440. See *Coming of Age*, *supra* note 439, at 1722-27. For consistency's sake, it is worth noting that the act specifically provides that these steps were ostensibly taken "pending final disposition." Hence, we have a final act in our series of withdrawals or reservations pending development of an improved disposition program. The principal impact of this language was to cloud title to the lands and to justify minimal federal oversight for another four decades. See *id.* at 1728-29.

the outset, the grazing district lands were viewed as encumbered by previously existing rights, and the allocation of access under the TGA proceeded merely to stabilize patterns of previous use.<sup>441</sup> There was no intimation in the allocation of TGA permits—as there had been in the Reclamation Act and the Forest Service's redistribution program—that the government was doing anything other than sorting out existing access by formalizing some claims and eliminating others. To be sure, the ranchers manipulated the allocation process.<sup>442</sup> Indeed, the commitment of the first director of the program was to achieve "democracy on the range." "Ferry" Carpenter wrote proudly that in Idaho he was not welcome in his capacity as Director of the Grazing Service at meetings called to allow local ranchers to describe their historic use. Therefore, Carpenter simply skipped the meeting and waited until locals later changed their minds and invited him back.<sup>443</sup> This was not a land reservation, but a formalization of local users' control over the resource. Perhaps recognizing this, Congress did not act to establish an agency to manage the grazing districts until 42 years after the TGA passed.<sup>444</sup>

### 13. Summary

Ironically, we see under Roosevelt and Pinchot, not a broadening of the reservation policy or a flowering of the government ownership and management programs which they so ardently sought, but a complex fragmentation of policy. The least subtle element of this policy disarray, and the one least compatible with the "shift-to-retention" thesis, is the specific and increasingly emphatic commitment to continuing disposition. The 1872 General Mining Act was not the "last" of the disposition statutes, as it is frequently portrayed. Disposition programs continued through

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441. See FARRINGTON R. "FERRY" CARPENTER, *CONFESSIONS OF A MAVERICK: AN AUTOBIOGRAPHY* 164-65 (1984). Carpenter's goal was to set up grazing advisory boards of existing grazers and let them do it. See *id.*

442. See DANA & FAIRFAX, *supra* note 11, at 162-63. Ranchers used the presence of fences, which had been declared an illegal nuisance in *Camfield*, as evidence of historic range use for purposes of establishing a right to a permit. Statutory criteria included historic use and access to a base property. By defining historic use as "between 1929 and 1934," the more prosperous ranchers were able to eliminate those who had cut their herds during the worst of the Depression. See *id.* at 163. Thus, by giving those with a base property first access, as opposed to the sheep herders with historic use but no base property, the cattlemen were absolutely advantaged. See *id.*

443. See CARPENTER, *supra* note 441, at 164.

444. See Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1731 (1994). Under the Federal Land Policy and Management Act, Congress officially organized the Bureau of Land Management. Previous versions, the Bureau of Grazing, the Grazing Service, and the early BLM were the result of internal reorganizations within the Department of the Interior. See *id.*

heavily subsidized homesteading activities made possible by the Reclamation Act. This policy culminated in the Stock Raising Homestead Act of 1916, and peaked again, in terms of acreage involved, with the stock operators' kidnapping of the Forest Service redistribution program, and the passage of the Taylor Grazing Act in 1934.

Similarly disappointing to the "shift-to-retention" theorists is the unmistakable fact that many established reservations were rescinded. Notably, some Indian Reservations and the Irrigation Survey succumbed to disposal along with the pivotal forest reservation authority granted to the president in 1891. In the early years of this century, Congress opened existing forest reservations to homesteading, grazing, and minerals entry. Even while establishing the National Park Service, Congress simultaneously opened park and monument reservations to timber harvest and grazing of livestock.

The nominal reservations are slightly more difficult to discern. Forest Service actions effectively returned control of national forest grazing lands to the livestock operators. Congress intended the Forest Service to assure the continuing availability of forage resources on national forests to the stream of actual settlers. The Stock Raising Homestead Act made little sense if Congress anticipated that settlers arriving to take advantage of that act would be shut out of grazing on public forests. Nevertheless, the agency rapidly turned its back on its initial programs and gradually relinquished effective control to the stock operators. We conclude that the putative reservation evolved into a statement of preference for one set of rival claimants to the public lands.

Similarly, the Taylor Grazing Act separates title from control, and the grazing districts it created are appropriately viewed as only nominally retained. The act as well as its implementation looked and felt as if Congress decided to avert its eyes while the dominant groups divided up the carcass of the public domain to "stabilize the range livestock industry." The Department of the Interior simply turned over the public range in an exercise of "democracy."<sup>445</sup> More interesting still were the partial retentions. The Stock Raising Homestead Act divided the earth into two separate estates. The Mineral Leasing Act fragmented the resource three ways, separating control from title, and both from the right to benefit economically from the development. The revenue shares extracted by the states in the process of ceding control suggest that the resource was only partially

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445. Typically one encounters the phrase "home rule on the range." It is possible that in future years the BLM will utilize the "bare title" that they do have, to impose effective management on these resources. However, at present writing, the momentum continues in the opposite direction and it is difficult to consider the grazing lands of the West in any meaningful sense "retained."

retained in federal ownership. Moreover, the mining industry was every bit as effective in preventing federal management of mineral deposits as were the livestock operators. Therefore, the retention of control must be considered not only partial, but also nominal.

This section provided both chronological background and a revisionist look at public domain policies between the Civil War and the Taylor Grazing Act. We found no clear line of policy development away from land disposition toward a coherent federal policy of retention. We conclude that there is sufficient reason to discard the "shift-to-retention" model and to justify further investigation of the "fragmentation" alternative.

## V. CONCLUSIONS

Our goal has been to reconsider the "shift-to-retention" account of public domain history. It is clear that between 1879 and 1934 permanent government land ownership, and subsequently land management, became a more important element of public domain policy than it had been during the previous century. However, the notion of a shift-to-retention does not bear weight as the organizing theme for understanding public resource law and policy at the turn of the last century, or at the close of the present one. Given the fragmenting ideas about government and property that we described in Parts II and III, the assertion that policy issues at the intersection of land and government would take off on a single coherent path should immediately arouse suspicions. Nevertheless, the story has had staying power or "legs" because it suits the needs of those advocates who find that the idea of public management facilitates their control over public resources without burdening them with ownership responsibilities.<sup>446</sup>

### A. The Fragmentation Narrative

Instead of a single shift, we described three extensive forms of policy fragmentation. First, and most seriously, goals and means of policy fragmented. Retention certainly became an important policy option, especially in the late nineteenth century. For certain types of land, such as those containing scenic wonders, antiquities, and stands of timber, retention became a robust and fully-developed policy alternative under Pinchot's and Roosevelt's guidance. But for many lands normally described as "retained," the story is more complex. In some cases, the idea of "retention" obscures the crucial fact that many federal holdings were

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446. Oddly, beneficiaries include two groups not traditionally seen as bedfellows: environmental advocates and commodity users, particularly ranchers.

actually re-acquired by the government from private owners, through voluntary sale and condemnation, rather than simply being withdrawn from disposal. Federal authorities quickly reconsidered other reservations of land. In every "reserve and rescind" example, the pressure to undo the reservation came in favor of continued disposal for use by actual settlers. In fact, during the ostensible "shift-to-retention" era, disposition to actual settlers remained a primary policy goal on huge percentages of land in federal ownership. Thus, this juxtaposition of retention and continuing disposition is quite destructive of the "shift-to-retention" model as an analytical tool.

Another path of policy fragmentation lay somewhere between the retention and disposition options we have described so far. Extensive resources—most particularly grazing lands as well as energy and sedimentary minerals—appear to have been retained, but upon closer inspection have not been effectively held for government ownership and management. We refer to such lands as having been either partially or nominally retained. These resources reflect many of the elements of the fragmenting notion of property and ownership discussed in Part III. These partially and nominally-retained lands are particularly important in part because they are so extensive—they have created a myth all their own.<sup>447</sup> The Report of the Public Land Law Review Commission<sup>448</sup> has indelibly imprinted the notion that the federal government owns and manages one-third of the nation's land.<sup>449</sup> State and native claims have reduced federal holdings in Alaska, however, where the major concentration of federal lands continues to be located. More important to our narrative, we calculate that if you remove even just the "nominally-retained" grazing lands from the government owned column, the extent of federal land ownership is reduced considerably, to about ten percent of the nation's land. This single, simple observation could become an important element of an improved dialogue regarding federal land ownership.

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447. We are grateful to our colleague Scott Sellwood, who elaborated this line of thought in, of all places, his master's oral exam!

448. Actually, it was the fourth in a series of public land law review commissions, dated in 1880, 1905, 1929, and the final one, thus far, in the late 1960s. See PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO CONGRESS* (1970).

449. This observation has given rise to much comment about the anomaly of such extensive government holdings in the epicenter of capitalism, and some less rational discourse about socialism, communism, and, more recently, jack and/or black-booted storm troopers in helicopters. Ironically, the latter refrains appear most prevalent in those regions of the country where citizens ought to be aware that the alleged federal control is frequently more apparent than real.

The second fragmentation occurred among resource management institutions. Far from producing the integrated approach to planning and management of resources that Pinchot envisioned in Rock Creek Park, the Progressive Era ushered in an extensive diversification of agencies and laid the foundation for competition between various branches of government. The proliferation of agencies, each to serve a different constituency, had begun, and never again would all of the public domain be the responsibility of a single agency or department. Similarly, the bureaucratization of resource management led to extensive competition, not just among agencies, but between Congress and the Executive Branch. Whatever else federal policy was to become, it would not provide a comprehensive, integrated approach to government-owned resources.

Third, the resources themselves were fragmented. The process began in our discussion with the 1866 Mining Act, with the severance of the land from the water, for purposes of determining jurisdiction. It continued as different professions and agencies carved first one piece then another out of the public domain. Forests, water, minerals, scenic wonders, and forage were each assigned to separate agencies or bureaucracies as the landscape was fragmented. As new notions of ownership permeated law and society, Congress parceled out the "bundle of sticks" differently for different resources. Congress retained nominal control but granted economic benefits to the states or private actors, and so on. There was no longer a single, dominant conception of lots on the public domain as indivisible subjects of ownership, just as there was no longer a single dominant policy for the land's continued protection and use.

## **B. Implications for Theory and Practice**

It is the lot of academics to believe that an improved analytical framework and vocabulary are important to both theory and practice. Our discussion suggests that a more complex approach to understanding public domain policy is needed. We make three suggestions about what a new and improved theory should look like. We follow those comments with some concluding thoughts on how these new theoretical ideas help in the practical world of public land policymaking today.

### *1. Implications for Theory*

First, we believe that a scheme based on periods dominated by a progression of particular policies is unworkable. Since we have simultaneously engaged in disposition, expanded retention, and reacquisition of lands for the better part of a century, any notion of eras is bound to be badly misleading. More specifically, a tale that positions a particular era and approach to policy in the golden light of omniscience is even more prone to error.



Second, an effective narrative regarding twentieth century public land policy must make room to display durable tensions underlying our choices. The "shift-to-retention" narrative encompasses many basic trade-offs in our political life: public ownership as against private stewardship; bureaucratic/political control or entrepreneurial/economic decision making; economic development versus preservation for aesthetics or environmental services; science as a basis for legitimacy in public decision making as distinct from popular preference on the one hand and from practical experience on the other; centralized, ostensibly comprehensive decision making at the federal level as opposed to state, local, regional or other mixed approaches.

Unfortunately, the "shift-to-retention" narrative privileges one element of each choice and frequently inscribes the other as evil. Corporations are bad; science is good; locals and their knowledge are not to be trusted, but somehow actual settlers are our heroes. It is important to have a narrative that recognizes the legitimacy of more than one element within these basic notions of government and that focuses on where and when a specific approach is more likely to achieve stated goals.

We believe that an emphasis on property and entitlements, formal title as well as informal rights, access and expectations, is a useful place to start.<sup>450</sup> By entitlements we mean formal title as well as informal rights and expectations of access, use, and other property-like claims.<sup>451</sup> Our discussion of property in Part III established that there are two significantly different perspectives on ownership within our political discourse—the intrinsic and the instrumentalist views. Both Lockean ideas and Progressive Era notions associated with the less-familiar Cohen have had, and continue to have, an important influence on policy, and neither seems likely to usurp the other anytime soon. Both embody assumptions regarding the proper role of government—crudely limited versus activist—both of which similarly wax and wane without ever triumphing or disappearing. Part IV revealed this conflicting set of ideas about property and government in public land policy. In fact, that experience is far broader than the "retain in federal ownership" vs. "dispose of to states or privatize" dyad that has congealed around the last several reenactments of the Sagebrush Rebellion

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450. See Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historic Shackles*, 14 U.C. DAVIS L. REV. 185, 187-88 (1980) (defining "established expectations" as a property element protected by the public trust doctrine).

451. See generally *Formal & Informal Claims*, *supra* note 435.

Saga.<sup>452</sup> We must appreciate the full spectrum of title arrangements, both historic and currently emerging, on the public domain.<sup>453</sup>

But Part III confirmed that there is something important missing from the familiar juxtaposition of Locke and his Progressive Era critics. The Hegelian account of government and ownership gives us a useful handle on the incompatible ideas and policies that we have observed in public domain law and policy, but which is missing from the Locke/Intrinsic to Cohen/Instrumental continuum. Indeed, it is Hegel who best describes the property ideas in operation on the majority of the public land. Not Locke, because under nominal retention, the full intrinsic rights of ownership are not recognized—they remain checked by social demands. Not Cohen, because the same social demands are nevertheless unable to displace the individual rights of those with tenure on public lands. It is Hegel who strives to find some balance between competing demands of property—the social and the individual—without unduly disregarding either or homogenizing the combination and provides an ingredient missing from the traditional spectrum of discussion.

Consider again the grazing example. Much of the advocacy surrounding the conflict over control of federal grazing lands implicitly partakes of a simplified account of ownership. Those in favor of stronger federal management see the ongoing assertions of control by local users as a sham. Only an instrumental approach to property, disregarding Lockean claims of ownership and entitlement by local users, can support this position. Similarly, those favoring private rights in public lands buttress their arguments with an intrinsic account of property, in which the government is obliged to recognize existing rights of tenure rather than creating or changing them.<sup>454</sup> Given the fundamentally opposite visions of property that underwrite their positions, it is no wonder that advocates on both sides of the volatile issue are generally unable to move towards satisfactory conclusions.

The stories of the advocates, however, only tell half a tale. In reality, government policy with respect to public lands embraced both an intrinsic and an instrumental approach to property at the same time, without attempting to untangle all the contradictions thereby created. The Taylor Grazing Act, for example, reserved some powers of ownership to

452. See, e.g., John D. Leshy, *Sharing Federal Multiple-Use Lands: Historic Lessons and Speculations for the Future*, in *RETHINKING THE FEDERAL LANDS* 235 (Sterling Brubaker ed., 1984).

453. See generally *Formal & Informal Claims*, *supra* note 435.

454. See, e.g., WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* (1989) (a classic example of this argument). Hage is currently suing the federal government over reductions in his permit to graze Forest Service lands in Nevada. See *Hage v. United States*, 35 Fed. Cl. 147 (1996); *Hage v. United States*, 42 Fed. Cl. 249 (1998).

the federal government even as it was recognizing pre-existing rights. Thus, the intrinsic view of property was modified by instrumentalist ideas of control regarding federal public lands. Neither view of property was dominant. Instead, federal policy attempted to embrace both visions of ownership, because a complete adherence to either was unacceptable. There clearly remain some deeply held beliefs that pre-existing claims on these lands (or "entitlements" in today's vernacular) are to be respected. And yet, there also clearly remain contrary beliefs that these lands are federally owned for the betterment of the nation as a whole. These mutually exclusive views are a significant part of policy fragmentation, and a key means of creating the wide swaths of "nominally retained" land. Such irreconcilable differences suggest the utility of Hegel's dialectical analysis to ownership as a third approach to underwriting policy.

Having proffered an entitlements approach emphasizing Hegel's notion of property as an appropriate gloss on our fragmentation narrative, we reject three others that could be made to fit with the same story line. The first is to describe fragmentation as conceptual mush. One might argue that Progressive Era policy makers and subsequent public land managers have been bumbling along incrementally for a century, seeking the path of least resistance or acting in a conceptual void. We reject that interpretation flatly, having demonstrated to the contrary that policy has long been driven by a firmament of powerful, but incompatible ideas about government and property.

We also reject a slightly more directed version of the "conceptual mush" gloss, a pragmatism theme. One might explain the fragmentation resulted from experimentation and a willingness to try whatever worked in diverse political and edaphic circumstances. Although less troubling than the mush hypothesis, a canny pragmatist story simply will not wash.<sup>455</sup> Finally, we reject the flip side of the pragmatist theme, the notion that policy was and continues to be driven by mere, messy, undesirable, and ultimately evil power politics. The role of politics must be understood, not reviled, in any narrative that successfully describes past fragmentation and the present-day array of entitlements.<sup>456</sup> Political advocates use ideas and stories to make their claims precisely because they have power.

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455. See HEAVEN ON EARTH, *supra* note 70, *passim* (arguing there has been almost nothing ingenious about the public land law and policy in the last 125 years—almost everything we tried failed).

456. All three of these glosses fail on the point of durability. People believe and/or manipulate the Progressive Era "shift-to-retention" mystique. If we were simply up against witless mush, mindless pragmatism, or power politics, the dominant story of the public domain and conservation history would be easier to change and transcend than it has proven to be. Thus, the Progressive Era "shift-to-retention" myth is a barrier to clear thinking. See HEAVEN ON EARTH, *supra* note 70, at 328-29.

## 2. *Implications for Practice*

Several narratives emerge from a refined frame of reference based on a Hegelian approach to entitlements. One consequence of adopting a richer frame of reference or vocabulary concerning entitlements is that it makes us realize that we have tried a far greater range of instruments for arranging title and control than the simplistic "shift-to-retention" narrative permits us to discuss. We have, under different circumstances and for different resources, tried everything from "the government retains all rights" to "the government gives away all rights." In between we have tried "the government retains bare title and grants away all control and economic benefit," "the government retains control and title but grants all economic benefit," "the government gives away the surface but retains the subsurface," and vice versa.

One of the unhappy insights from recognizing that fact is to become aware that no single arrangement seems to satisfy completely. Perhaps they only seem to fail because we are not wholly aware of what we have done. We have not adequately analyzed or understood the nuances, pros, and cons of each arrangement of title or the circumstances in which it might be effective. Clarification of the diverse ways in which we have fragmented both policy and title allows a fuller understanding of the alternatives that we have tried. We should lay to rest the imprecations of good and evil that accompany the "shift-to-retention" model because it taints wholly legitimate private rights and expectations. Nevertheless, the fact remains, we have tried many different approaches to apportioning title and control. Thus, we should treat with suspicion any suggestions that some new arrangement of rights will resolve our differences.

A second outcome of an improved frame of reference relocates our expectation on the intrinsic-instrumentalist continuum. We realize that many of the decisions to retain that we thought we had made a century ago are the real heart of the debate that is going on now. No wonder we are so irritable with each other. No wonder the dialogue seems unrelated to the actual issues that managers, local communities, investors, environmentalists, and recreationists encounter. One branch of the attentive public believes its predecessors' press releases by simply assuming that lands inscribed on the maps as federal are "public."<sup>457</sup> Another branch recognizes that government title is partial, fraught with caveats and compromises, and riven with legitimate private rights. Yet another branch, particularly Native Americans and claimants of access under ancient Spanish land grants and

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457. See generally *Formal & Informal Claims*, *supra* note 435 (dissenting on this and related points).

entitlements, argues that any level of federal title or private claims based on federal policies are simply bogus, based on theft.<sup>458</sup>

Recognizing the legitimacy of those diverse perspectives enables us to understand that growing exercise of federal authority over western lands<sup>459</sup> is in fact an effort to turn the potential federal control over partially and nominally retained resources into actual control. Indeed, the issue of government ownership and control is alive and the focus of debate right now. We have been deluded by the founding myths of the conservation movement and several key agencies into believing that the issue of retention was resolved a century ago. Thus, many participants in the debate are ill equipped to understand the wide variety of assumptions and expectations that others bring to the discussion.

Another way to use this model is to observe that most of the assumptions that underwrote the possibility of federal ownership and scientific management are unwinding. We are not in an era of burgeoning nationalism, continental aspirations, and faith in science.<sup>460</sup> Similarly,

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458. See *id.* at 637-39. A virtue of the entitlements approach is that it provides entree into expectations that do not normally make it onto the agenda, reconfiguring the national forests, for example, in the wake of the growing realization about the extent to which they were simply stolen from prior claimants. For Hispanic claims see Donald Dale Jackson, *Around Los Ojos, Sheep and Land Are Fighting Words*, SMITHSONIAN, Apr. 1991, at 36; CLYDE EASTMAN & JAMES R. GRAY, COMMUNITY GRAZING: PRACTICE AND POTENTIAL IN NEW MEXICO 23-30, 51-82 (1987); Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985). For a brief look at problems in National Parks, see *Formal & Informal Claims*, *supra* note 435, at 637-39 (discussing Native American peoples and their rights in the formation of early parks).

459. The dominant trend has been to greater and greater federal control under statutes such as the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-14 (1994); the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-82 (1994); the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-43 (1994); the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1308 (1994); and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-70 (1994). Nevertheless, it would be as much of an error to describe a "shift" at the end of the twentieth century as it is at the end of the nineteenth century. Offsetting the growing federal control narrative are a number of counter trends, including growing recognition of traditional and aboriginal claims in the Southwest and in and around former and never-were-but-should-have-been Indian reservations, huge dispositions of land to states and natives under the Alaska Native Claims Settlement Act (ANSCA) 43 U.S.C. §§ 1601-29 (1994), giveaways "beyond avarice" of federal coal under SMCRA (the descriptive phrase was frequently used by then-BLM Director Frank Gregg) and the growing range of entitlements for "receipt sharing" payments to counties from non-existent harvests (a process now known as "de-coupling" the receipt share from the harvest). See, e.g., *Formal & Informal Claims*, *supra* note 435, at 642-44.

460. See HEAVEN ON EARTH, *supra* note 70, at xix-xxi (noting, for example, that the market has an increasing cache as a distributor of goods, and the sense of community in American life has been dissipating since the end of the Second World War). See also Donald Snow, *Introduction to JOHN BADEN et al., THE NEXT WEST: PUBLIC LANDS, COMMUNITY AND ECONOMY IN THE AMERICAN WEST* 1-9 (1997). Interestingly, much of this resurrection of community and

science is no longer accepted in most circles as an authoritative arbiter of public priorities. Instead, each of us has faith in scientific findings that support our prejudices and preferences.<sup>461</sup> Some observers attempt to translate these changes in the national mood about government into the underpinnings for a new gospel. Traditional environmentalists reassert the Progressive Era values of science and centralized management under the authority of the Endangered Species Act.<sup>462</sup> Others argue that the local or community level—face-to-face democracy—provides some special alchemy.<sup>463</sup> In part, the quest for a new, simplifying principle is rooted in the notion that we used to have one.<sup>464</sup> Our argument, to the contrary, is that we never had a single gospel. To the extent that we think one existed, we are deluding ourselves. Americans have been, for the better part of 125 years, in the maw of a debate over disparate principles and constantly changing frames of reference regarding both property and government. Accordingly, multiple and incompatible views of public land issues are important and relevant. A policy story that fails to recognize that fact confuses the present by misrepresenting the past.

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rejection of government programs is tied to an embrace of Aldo Leopold's aura. *See id.* at 6-8. Leopold is quite incorrectly proffered as a hero of and advocate for government ownership and management. *See id.*

461. *See* Sally Fairfax, LESSONS FOR THE FOREST SERVICE FROM STATE TRUST LAND MANAGEMENT EXPERIENCE 9 (Resources for the Future Discussion Paper No. 99-16, 1999). Ecologists are expressing greater hesitation about their own abilities to predict ecosystem response to different management alternatives or attributing outcomes to particular management strategies, events, or disturbances. *See id.* at 10.

462. Robert Nelson asserts that the market is enjoying increased cache as a distributor of goods. *See* HEAVEN ON EARTH, *supra* 70, at xxi-xxvi. Nelson seems high centered on economics and decentralization/community control. *See* HEAVEN ON EARTH, *supra* 70, at 460.

463. *See* KEMMIS, *supra* note 87, at ch. 8, 109-41. It is at any rate enjoying a renaissance in public esteem and aspirations. *But see* RANDAL O'TOOLE, REFORMING THE FOREST SERVICE (1988) (focuses less on privatization and markets than on proper incentives to federal bureaucrats, which does, of course, tend in the same market driven direction, but only after partaking of the Progressive's embrace of scientific, government management).

464. *See, e.g.,* *Coming of Age*, *supra* note 439.