Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property*

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Whether the remaining western public lands will remain permanently in federal ownership is one of the sporadic staples of American politics.¹ A quiescent issue for some years, it recently reappeared as page one news² following a proposal by the Reagan Administration to sell approximately thirty-five million acres of mostly Bureau of Land Management, and some National Forest, land.³ The almost frenzied responses to the land sale announcements of last summer faded into the background, however, as it became clear that even the most likely pro-sale constituencies—political leaders and land users in the West—are skeptical about current “privatization” proposals.⁴

I do not plan to dwell on responses to the Administration’s announcement, but I do want to note briefly why it should come as no surprise that proposals to sell public lands generate both enthusiasm in the abstract and reluctance at the concrete level. The federal government as a landlord of hundreds of millions of acres of quite ordinary land is an anomaly in both American tradition and thought. Large-scale federal ownership has no explicit basis in the Constitution, was never anticipated by the framers and is inconsistent with 150 years of disposition history. Indeed, it is particularly anomalous in this country, which—unlike so many others—abjures public ownership of telephone and telegraph, railroads, airlines, gas and electric utilities and other major features of the economy. As a matter of fact, it was not clearly settled until 1896 that the federal government could acquire, through eminent domain, own-

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ership of land for a Civil War Memorial at Gettysburg.\textsuperscript{5} Conversely—and however theoretically incongruous it may seem—the United States has owned much of the West since the first European settlers arrived, and, with whatever qualifications one might want to make, it can hardly be denied that the region has prospered greatly. A major reason for the prosperity is that the federal landlord has never exercised its full proprietary or governmental powers. In fact, arrangements for the use of the public domain reflect decades of political and economic bargaining under which many (and probably most) of those having interests in the land have obtained benefits and—even more importantly—have adapted to them.\textsuperscript{6} The existing system, however imperfect it may appear from the perspective of political philosophy, economic efficiency or resource management, is a mature system that has generated highly developed expectations. Any changes that unsettle such long-held expectations are costly and destabilizing.\textsuperscript{7}

If we look at the proposal for disposition from this perspective, we should not be surprised to discover that a major motivation for all constituencies is to hold on to what they already have. Current users, many of whom have used public lands at modest prices and benefited from public subsidies, have much to lose—particularly in a time of high interest rates—if they must bid against large investors and foreign capital for the continued use of lands now federally owned. For this reason, they are understandably reluctant about market-price sales into private ownership. At the same time, changing public attitudes threaten some of the current users’ benefits. Pressures for increased rental rates for the use of the lands, intensified environmental regulation, growing public demand for recreational access and with it demand for maintaining land in its more-or-less natural condition, all could be muted if the land were no longer subject to the political pressures that public ownership generates. It should be noted, paradoxically, that such fears, which grew greatly during the Carter Administration, have been significantly stilled under the Reagan Administration, and

\footnote{6. See, e.g., P. Culhane, Public Lands Politics 313, 341 (1981) (indicating that federal management agencies are responsive to multiple and competing constituencies, giving everyone some of what they want, with result that all have learned to use the existing system to their advantage).}
\footnote{7. This is not to suggest that the system is rigid and unchanging, but only that, as Culhane indicates, every interest group could perceive drastic changes as giving them less than they now have. \textit{Id}.}
that some proponents of sale are still fighting battles in a war that was won—at least for the short term—at the ballot box in 1980.  

Proponents of public ownership oppose sale for exactly the same reasons. The benefits they have recently obtained through legislation, such as the Wilderness Act of 1964 and the environmental protection provisions of the Federal Land Policy and Management Act of 1976, would be threatened by privatization. Again, it must be said that the attitudes of the current Administration make these victories less promising than they might otherwise seem. Who is in the White House may be more important than who owns the land; but in the long term those primarily interested in public access, environmental protection and other such issues can hardly help but be worse off if significant parts of the federal domain are sold into private ownership. In short, it is quite possible that privatization would make current user constituencies of all stripes worse off, to the advantage of other remote interests, such as foreign investors and high bracket taxpayers.

It is important to understand how various constituencies respond in terms of their perception of immediate gains and losses from any given proposal. To do so, however, is to risk missing a fundamental element in the controversy over the public domain: A profound change is transforming public conceptions of the uses that ought to be made of land. It is use, not ownership, of land that is of primary concern. The current dispute over the public domain is one small part of this larger transformation.

Public ownership and private ownership of land are generally seen as exclusive alternative choices, each leading to different ultimate uses. To put the matter somewhat crudely, private ownership will ordinarily lead to profit-maximizing use of land, while public ownership will lead to nature preservation, low density recreation and the like. For well-known reasons that need not be rehearsed here, there is a school of thought that claims private ownership is almost always preferable because it leads to economically efficient uses, while public ownership, because it does not require individuals to express their real willingness to pay for the uses they make, fails to express real preferences and thereby fails to maximize real net benefits.

I suggest, however, that the private and public realms are not distinct and opposing, but are inextricably intertwined. Imagine a hypothetical situation in which no property has yet passed into private hands; it is all still owned by the political community which has acquired it by purchase, conquest or discovery. A proposal is made to distribute the land, by whatever method, into private ownership. The question is asked, why and how should the land be distributed? In such a case it is not possible to think about private rights abstracted from public goals. For example, it may be concluded that land should be distributed to private owners because it is desirable to have settlers who will secure our frontiers, because democracy is best achieved with a community of independent proprietors, or because private ownership will maximize production of food and minerals that we all need.

In any such case, it is inevitable that the rights given will be defined, conditioned, or limited with respect to the perceived needs of the larger community. Railroads received land, for example, because the public wanted improved transportation and the grants were conditioned in those terms.\(^1\) For similar reasons, a public servitude was retained in navigable waters.\(^2\)

There is no more striking modern illustration of the relationship between public goals and private rights than the regime of Western water law, which permits the acquisition of only those elements of a property right that are thought to advance the interests of the community. Under this system, the private party receives the right to make a beneficial use only, to use without waste, to use but not to hold for speculation. And of course one could multiply historic examples: the right to distribute property by inheritance, but not to the exclusion of a spouse; the right to exclude from most commercial establishments, but not from a public inn. Moreover, some rights of property ownership that were once permitted have since been cut off, such as the right to exclude on the basis of race or the right to hold property in another person as a slave.

These familiar facts are not much in our consciousness because almost all property has already been given out and we rarely have to ask what elements of ownership should be withheld or conditioned. Interestingly, however, that is precisely our situation as to the public lands. Moreover, since most uses made of property

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that has been given out continue to be consistent with public goals, we do not have much occasion to brood about mistakes we might have made. We continue to value traditional elements of ownership such as exclusive possession of one's personal property, the right to exclude unwanted visitors, and the profits of manufacture or agriculture to the landowner.

If, conversely, we saw a clear divergence between public values and traditional property rights, and if we were aware of that divergence when we had to make original disposition of some property, would there be any reason to grant those interests that we believed were antithetical to the needs of the larger community? Would we withhold the right of eminent domain in the face of military necessity, permit land or water to be withheld by speculators in a starving community or prohibit airplane overflights on the assumption that the land owner had property rights up to the center of the sky?

Indeed, one might cite as modest modern examples the different rights granted under the Mineral Leasing Act of 1920\textsuperscript{13} and those granted under the Mining Law of 1872.\textsuperscript{14} Or, to take an example where private rights have increased, the traditional reservation of public easements across public lands has recently been modified to require compensation to private patentees.\textsuperscript{15}

I suggest that the contemporary dispute over the fate of the federal lands is best understood not as controversy over public ownership versus private ownership, but as the product of a sharply changing view of the rights that private users of lands should be permitted to have. Indeed, the owner's identity (the United States or private parties) matters much less than the uses permitted, whether the use is regulated by withholding title or through regulation.

What is the nature of this changing public value? Simply put, it is increasing doubt about the extent to which rights of development should pass into private hands. I am by no means the first to note the attenuation of the right of development in American property law,\textsuperscript{16} but the phenomenon has not been much thought

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  \item \textsuperscript{16}See Lefcoe, The Right to Develop Land: The German and Dutch Experience, 56
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about in the context of the future of the public domain. Before turning to the implications of this transforming idea for the federal lands, let me expand upon it in a more general way.

It is easiest to illustrate the change I have in mind with reference to the history of urban land use in America. Prior to the First World War, before the era of zoning flowered, a landowner could generally make whatever use of his property he wished, subject only to the constraint that he not commit a nuisance. As comprehensive zoning became the norm, the nuisance justification remained, in theory, but so much deference was given to legislative judgments that it obviously was fading in fact in favor of some other values. Are we to believe that apartment buildings in a residential district really were "parasites," as the Supreme Court said in the famous Euclid case, or that billboard control really was justified because thieves and rapists could hide behind them, as another court suggested?

Widespread acceptance of zoning reflected a genuine movement away from the nuisance justification, or at least a great liberalization of it, in favor of the notion that the neighborhood was a kind of common. In other words, when one bought a house he didn't acquire just his isolated tract, but a great many common amenities, such as quality schools, quietude and low levels of crime. This development was important because it reflected a movement away from a highly individualistic conception of private property rights (owners can do largely what they want where they want) to a conception in which the interrelationships among owners (protection of neighborhood character) came to the fore. And with this increasingly societal perception came the first important element of the related idea that the right of development would no longer be the principal generator of social value. The right of development had to give way significantly to a duty of maintenance and protection of other values that already existed. When one begins to think that almost everything you, the owner, does, affects us, the neighbors—and that is a perception intrinsic to modern

19. This view probably had its most explicit expression in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). That case has been criticized, not because it fails to recognize the interest of the property owner, but because other public values are sometimes transgressed by exclusionary zoning laws.
zoning—one has moved very far away from the individualistic approach that is central to nuisance and to the traditional conception of private property rights.

This marked change was perhaps concealed by the fact that much traditional zoning took the form of use separation. That is, it divided cities into separate single and multiple residential zones, as well as commercial and industrial areas. Thus, in a sense, few uses were prohibited; they were simply shifted around from one place to another. The traditional right of development apparently still existed in full force; the only question was one of location. Indeed, Justice Sutherland took pains in the Euclid case to make explicit that zoning was compatible with conventional nuisance concepts. His famous example of the right thing in the wrong place was the pig in the parlor instead of the barnyard.20

But it didn’t take many years to discover that most communities didn’t want pigs anywhere. Exclusionary zoning led to hundreds of cases challenging exclusion of apartment houses, mobile homes, people poorer than present residents, waste disposal sites and, more recently, adult book stores.21 However one might evaluate some of the elements of this widespread exclusivity that has come to dominate contemporary urban and suburban land use law, there is little doubt that the old idea of property as the right of development has found itself in deep conflict with growing community interests in the protection and maintenance of existing common values. Property rights may be cut down. As the Supreme Court said in the recent Belle Terre case: “The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.”22

One might think that modern zoning was simply extending its conception of nuisance without fundamentally intruding on the right of development. That view, however, has stretched to the breaking point with a series of modern additions to urban and suburban land use law. Let me use as examples contemporary open space zoning23 and historic preservation.24 While one might torture

20. Euclid, 272 U.S. at 398.
such laws into versions of anti-nuisance regulations (if you tear down your historic building you will harm the city’s character), I submit it is much more accurate to describe them as clear evidence—in one limited setting—of the growing view that the owner not only must not do harm, but must use his property to do good. The right of development yields to the duty to participate in the maintenance of such common values as his property is providing to the community at large—historic character or open space.

One could cite many examples that are even more far reaching. I have in mind the now common wetland protection and coastal ordinances that require owners to leave their property significantly undeveloped in order to maintain natural values.\textsuperscript{25} Also, a growing number of so-called inclusionary ordinances demand that an owner provide some amount of low or moderate income housing as a condition to permission to build the sort of housing he wants.\textsuperscript{26}

In all these cases duty seems a more appropriate term than right in describing the interest of the owner. The community interest is more central than the individual interest, and maintenance of existing values is more important than development.

In pointing to these changes, I should make clear that I make no comment about when and whether an existing owner ought to receive compensation, as for a taking, in the event previously recognized uses are curtailed by the police power.\textsuperscript{27} The important issue from this perspective is what rights of use a property owner should have, or what rights private parties should be given in property not yet distributed, rather than what arrangement should be made in a case in which an owner has had some rights we no longer think he should have.\textsuperscript{28}

Perhaps another way of making the same point is to call atten-

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\item \textsuperscript{27} See Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).
\item \textsuperscript{28} It seems clear, however, that courts are not immune from the temptation to merge the notion that one should not have had a right with the notion that he did not ever get a right. See, e.g., City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980).
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tion to the surprising level of public support for the proposition that, as to publicly owned lands, nondevelopment is the highest and best use of the land. The most familiar illustration, of course, is the repeated evidence from public opinion surveys of very broad support for wilderness designation of considerable elements of the public domain.29 On reflection, that is a less astonishing datum than it might at first seem, for it is a version of the sentiment felt in modern zoning, in the rise of the historic preservation movement in the cities and in the shoreland and wetland development controls that have sprung up almost everywhere in coastal regions.

Such phenomena are sometimes explained by pointing out the "costlessness" of such decisions to the general public. If privately owned wetlands are left undeveloped, it is said, the burden is felt by some private owner. But if public land is designated as wilderness, or closed to mining in favor of low density recreation, the beneficiaries do not have to endure the losses such uneconomic uses entail. The costs are diffused among all taxpayers rather than being borne, for example, by the backpackers themselves.

I submit that no such simple explanations will suffice. Is it not true that the very benefits that flow to the public when developments are permitted, benefits such as jobs, tax revenues, tourism and lower commodity prices, are the very benefits that are evidently lost to it when development is restrained or prohibited? If the community can appreciate the values of jobs and tourism brought to them, they ought equally easily to be able to appreciate the benefits they are foregoing when such development does not occur.

To put the matter as bluntly as possible, I see no reason to believe that either the general public or the Congress, which hears at great length of the losses to be felt in matters such as wilderness designation, should be viewed as insensitive to those claims. Indeed, such claims frequently prevail. By no means is all land proposed for wilderness so designated; by no means is every wetland protected or every historic structure preserved. Most land, both public and private, is still open to substantial commercial, industrial and residential development.30 And that result obtains precisely because the benefits of development are very well under-

stood. The important point is that less land is now opened to development than was the case in the preceding decades. And the benefits of nondevelopment—preservation of natural features and wildlife habitat and opportunities for quiet recreation—are now perceived as much greater than they were in the past. Public values are changing, and the balance of perceived costs and benefits between development and nondevelopment is changing apace.

Before discussing reasons for this transformation and its implications for the future of the public domain, I would like to comment briefly about why public controls are necessary to permit such changes and why these kinds of shifting values need help to become established. They are unlikely to be implemented simply by leaving property in private ownership so that preferences can work themselves out through bargaining in the marketplace.

Public control of land use is necessary because of the nature of the benefits, sometimes called existence values, that flow from nondevelopment. I think I can best illustrate why these values cannot be measured by the marketplace through a hypothetical example drawn from the area of historic preservation. Note, however, that a similar line of reasoning could be applied to any of a number of other nondevelopment, or existence values, such as open space, public recreational access, wildlife habitat or scenic prospects.

Imagine a country like France, where there is a strong sense of nationhood and a well-developed interest in what the people call their patrimony. Suppose further the existence of many historic chateaux in the country, oozing with historical importance, but also greatly in need of restoration and situated in places that make them prime targets for commercial development. Many people are interested both in visiting such places and in preserving them, and although they are willing to pay a good deal to purchase the castles, they cannot in general outbid commercial interests for them. Deeply discouraged, they are ready to abandon their effort, believing that their bids represent the true value of preservation which is, lamentably in their view, less than the value of the chateaux for commercialization.

However, suppose then the following observation: The full value of preserving the chateaux is, in fact, not measured by the bids thus far made. The value may consist not only in the opportunities afforded to those who like to visit these places and who are personally interested in historic preservation, but also in the increased sense of nationhood and social cohesion generated by the
existence and restoration of the chateaux. These are benefits that will flow to every citizen and the nation as a whole.

There is no reason why some limited group should pay or be expected to pay for these values that flow not just to them but to the entire nation in the form of increased national solidarity. Nor can voluntary contributions be expected to finance all the benefits that will flow from maintenance of the chateaux. Values like a strengthened sense of national identity will flow automatically to every citizen, even those who do not contribute, presenting what is familiarly known as the free-rider problem.

Moreover, and perhaps even more importantly, such benefits’ very existence may in a sense depend on whether or not they are recognized by the relevant community acting as a community. For example, as a member of a church, I may be more willing to contribute to charity for the poor if the obligation is taken up by my church as an institution. This is because it is not only distribution of the money to the poor that is important to me, but the recipients’ perception that the community cares about them. And I, as a member of that community, may have a very important stake in the perceptions of the poor simply because I think their disaffection is dangerous. In the same sense, as a citizen of the political community, I may not only value the vigor that flows from increased national solidarity, but I may think that vigor depends on whether or not there is a community-wide commitment to national solidarity. In this respect, my interests as a member of the community may be perfectly selfish, but they are nonetheless distinct from my interests as an individual.

Of course, there is no objective way to test the validity or desirability of these existence values, which may manifest themselves in a variety of forms—historic preservation or open space, welfare payments or military spending, an obligation for military service in wartime or protection of coastal redwood trees. My only point is that such community values are emerging in regard to uses of land, with implications for the content and structure of private property rights, and that such values will not be fully or adequately reflected through conventional market bargaining between private individuals.

Having identified some of the changes that are taking place in our conception of appropriate private rights in land, let me turn briefly to the reasons for this growing divergence between public values and the traditional private property rights. When a society committed to industrial growth is in the process of settlement,
where resources are abundant and population relatively sparse, nothing could be more normal than associating full-steam-ahead development with the idea of progress and prosperity. And where growth is progress, what better way to encourage such growth than essentially unlimited private property rights? A social strategy that harnesses the spirit of individual enterprise to the opportunities of development is likely to get a full measure of "progress," defined as development. And that, of course, is exactly what we had for a very long time. From this perspective it is neither accidental nor in the immutable nature of things that development rights are incorporated in the rights of landowners. Such an arrangement only seems normal and inevitable because until recently public values (the idea of progress) coincided with that particular form of property (development rights).\footnote{31} If, conversely, a society were committed to stability as its central value, one would expect a very different definition of property rights to evolve. In Switzerland, for example, where it is strongly believed that most agricultural land should remain agricultural, it is virtually impossible to obtain permission to develop such land for other uses; in Germany, where public "wandering rights" are considered very important, it is not surprising to find such rights constitutionally subtracted from the rights of private owners.\footnote{32} And I remember the surprise of law students in France over my explanation of the American situation, in which landowners view restrictions on their right to develop as an expropriation of their property for which compensation should be required. Without a development permit from the government, in the French experience, the landowner has no preexisting right to develop; it is the permit that creates the right.

From what I have said up to this point, I have perhaps given the impression that I believe the public has abandoned totally its faith in economic growth as development, and in the ideas of progress and well-being that go along with such faith. I believe no such thing; such ideas still have a strong, and sometimes dominating, hold on us. At the same time I think it clear that such ideas have nothing like the strength they once had. We are in a state of transition, or in a state of disequilibrium, in which both traditional ideas of progress and their opposite sometimes hold sway. The en-

\footnote{31. For some examples of changes moving in the opposite direction during the period of American industrialization, see Horowitz, \textit{The Transformation of American Law} 1780-1860, at 31-32 (1977).}

\footnote{32. See Lefcoe, \textit{supra} note 16, at 42.}
vimental movement of the last decade, the historic preservation movement, and vastly increased public intervention in urban and suburban development are all reflective of increased skepticism about the price that is paid for free-swinging development.

Most of us, I think, are of two minds. We see—especially in a time when the economy is stagnant—the benefits of conventional economic growth. We also see the costs of that growth in the form of toxic wastes, rising energy prices, congestion, noise and a host of other effluents. We want the benefits of stability without losing the benefits of development. Inevitably, the search for a new equilibrium will bring with it a reconsideration of the rights that go with land ownership, for the uses made of land probably shape our daily lives and lifestyles as much as any institution we have.

The present trend in dealing with private lands generally around the country seems rather clearly to tend toward withdrawing a right of development. This right is giving way to a possibility of development, granted where important natural or historic features are protected, where environmental impacts are mitigated, where public access is favored when not intruding significantly on private uses, and where open space is accommodated to development.

Having dwelt on the broader issues underlying the debate over the public lands, I shall now conclude with a brief statement of the application of ongoing legal developments to the question of ownership and control of the public domain. If the western lands now in federal ownership are to be managed consistently with the trends I have been describing, maintenance of public ownership under existing arrangements, where private use is widely permitted, but where development is constrained by laws such as the Federal Land Policy and Management Act, would seem appropriate policy. Granting ownership without development rights, and with some retained public access rights, could be equally consistent with current trends. Such an arrangement, however, would not likely gain much favor with those who are anxious for sale. Paradoxically, disposition of the unconstrained fee, or any other arrangement that would promote private development along traditional lines, as is urged by some advocates of sale, though it seems most consistent with our tradition, would actually be a sharp departure from the more important and more deeply rooted tradition

that the elements of private ownership will always be defined and redefined in order to further and reflect contemporary public values. That is why we are neither going to see widespread public land sales nor a significant relaxation of controls over developmental activity.