OWNING THE LAND: FOUR CONTEMPORARY NARRATIVES

ERIC T. FREYFOGLE*

Table of Contents

I. INTRODUCTION—TALES OF EDEN, OLD AND NEW

The craft of history has a lot to do with the telling of stories. Cast by an able historian, a narrative can perform weighty work interpreting the past and enlightening the present. A single story can illustrate a line of reasoning at the same time that it presents it. An apt incident can stand for and help explain a larger, messier course of conduct. Ordinary people use narratives in much the same way, to exemplify a bit of wisdom or probe the meaning behind an event.

During the colonial period of American history, storytelling remained a cherished art. It was also a time when people sought meaning in the world around them and in the grand sweep of history that carried them onward. Given the religious temper of the day, many colonists instinctively looked to the Bible to help make sense of their lives and work. For some of them, the New World represented a promised land, not unlike the land that Moses sought on the Exodus. For John Winthrop and his band of Puritans, New England was the place God chose for them to erect their city on a hill, that their light might shine forth to all the lands in accordance with the Sermon on the Mount in Matthew. Over and over, however, the Book of Genesis gave the colonists a sense of what they were about, and within Genesis the story of Adam and Eve in the Garden of Eden.[1]

---

* Max L. Rowe Professor of Law, University of Illinois College of Law. B.A., Lehigh University, 1973; J.D., University of Michigan Law School, 1976. Professor Freyfogle teaches courses in property, environmental law, and natural resources law.

1. The visions and utopian dreams of American colonists provide an organizing focus in DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE (1958). A classic study of Winthrop's mission is EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (1958). The search for meaning in the New World was part of the larger process of discovering the continent's nature, a process that has continued ever since in the form of an

The Eden narrative fascinated the colonists, just as it had caught the interest of generations before them. That fascination arose, paradoxically, as much from the story's ambiguity and malleability as it did from its importance.[2] The garden story was not so much a single tale as it was a collection of raw materials out of which several tales might arise. One narrative that took root likened the New World to the Garden of Eden itself.[3] Just as Adam and Eve were placed in the Garden, so too the colonists were led to America. The colonists found this America to be a lush, fertile land, wonderfully designed and so abundant in its yield that the colonists' needs would all be met for generations without end. In this narrative, America was a friendly, productive place. The unbroken forest represented wealth, and so did the river teeming with fish. To enjoy this garden the colonists needed merely to live in it, in as godly a way as they knew how.

Alongside this America-as-Eden narrative grew a second, much different narrative. In this alternative story, America was not Eden; it was the wilderness where Adam and Eve were banished when they misbehaved.[4] This wilderness had much potential to it, but the colonists needed to transform it with their labors, taming and controlling it, before the land would be habitable.[5] In this story, the ideal garden was not the unaltered land that greeted the colonists when they first arrived.[6] It was the well-tended, pastoral countryside around a New England village or a Virginia plantation. Trees needed to be cut, the land plowed, fences erected, and wild beasts driven off before Eden would rise again.[7]

---

ongoing social conversation. As environmental historian Richard White notes, "Americans have defined themselves and their continent in terms of nature while quarreling over what nature contains and what it means." Richard White, *Discovering Nature in North America*, 79 J. AMER. HISTORY 874, 877 (1992).

2. Several widely differing Christian interpretations of the story are considered in ELAINE PAGELS, ADAM, EVE, AND THE SERPENT (1988).

3. *See* DONALD WORSTER, THE WEALTH OF NATURE 9-15 (1993); Carolyn Merchant, *Reinventing Eden: Western Culture as a Recovery Narrative*, *in* UNCOMMON GROUND: TOWARD REINVENTING NATURE 132, 154-56 (William Cronon ed., 1995) [hereinafter Merchant, *Reinventing Eden*]. My thinking about Eden narratives in the United States borrows heavily from the work of Professors Worster and Merchant; less directly it draws upon the three classic studies of LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA (1964), R.W.B. LEWIS, THE AMERICAN ADAM: INNOCENCE, TRAGEDY, AND TRADITION IN THE NINETEENTH CENTURY (1955), and HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1950).

4. *See* Merchant, *Reinventing Eden*, *supra* note 3, at 154; Carolyn Merchant, Paradise and Property: Locke's Narrative and the Transformation of Nature (1997) (unpublished manuscript, on file with author).

5. *See* Merchant, *Reinventing Eden*, *supra* note 3, at 140.

6. *See id.*

7. *See id.*

This second narrative diminished the luster that attached to the raw New World, but it comported much better with the harsh realities of hard-working frontier life. It also fit together well with the institution of private land ownership, so important in the colonists' minds and lives. Adam and Eve might frolic and gambol, feeding upon grapes at their leisure, but colonists worked hard for their bread. Before working, however, they needed to gain access to a piece of land. They wanted secure access, enabling them to plant in the spring knowing they could reliably harvest in the fall. They wanted, in short, their own private property.

By the time of the Revolution, colonial culture had changed markedly from the early days, and the economy had changed along with it. The science and politics of the Enlightenment had given a boost to modes of thought that valued the individual human as a distinct moral entity, apart from the surrounding social order.[8] Increasingly, nature was viewed, not as an organic whole filled with mystery, but as a collection of parts that fit together in complex yet ultimately knowable ways.[9] In the economic realm, farming increased not to yield food for home consumption, but to produce surplus crops or livestock to sell in the market.[10] A full market economy was still a long way off, but it was plainly coming, and bringing with it a heightened emphasis on individualism and individual rights.[11]

To Americans wrapped up in this change, the writings of John Locke made a good deal of sense.[12] Locke celebrated the common individual, arguing he possessed natural rights that arose in advance

---

8. Three important works surveying and criticizing the dominance of Enlightenment thought are JOHN RALSON SAUL, VOLTAIRE'S BASTARDS: THE DICTATORSHIP OF REASON IN THE WEST (1992), DAVID EHRENFELD, THE ARROGANCE OF HUMANISM (1978), and WILLIAM LEISS, THE DOMINATION OF NATURE (1972). The American context is considered in HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976).

9. This trend is assessed in its larger context in CAROLYN MERCHANT, THE DEATH OF NATURE: WOMEN, ECOLOGY, & THE SCIENTIFIC REVOLUTION (1980).

10. *See* ALLAN KULIKOFF, THE AGRARIAN ORIGINS OF AMERICAN CAPITALISM (1992); J.E. CROWLEY, THIS SHEBA, SELF: THE CONCEPTUALIZATION OF ECONOMIC LIFE IN EIGHTEEN-CENTURY AMERICA (1974).

11. The classic study, focusing on Western culture, is KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944). The English context is considered in JOYCE APPLEBY, ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1978). Appleby considers the rise of economic thought in the United States, and its growing ascendance over civic republican ideas, in various works including her CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984) and LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992). Implications for property rights are considered in Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982).

12. *See, e.g.*, WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 36-70 (1977).

of any social order and trumped even the powers of the King.[13] Preeminent among these individual rights was the right to property, which Locke justified by way of his well-known labor theory. As Locke interpreted the Bible, God originally gave the Earth to humankind collectively, as property in common, yet any individual who wanted could seize a thing from the common stock, including land, and make it his own simply by mixing his labor with it.[14] Before the labor was added, the thing had no value.[15] Once the labor was mixed in, value arose and the thing became private property.[16]

Locke's labor theory of property made particularly good sense in North America, more so than it did in England. Frontier colonists could easily see how labor was the key ingredient in the creation of value. Moreover, because land was plentiful, one person's occupation of land did not deny his neighbor the chance to gain land too. Back in England, a person had to buy property or inherit it, and one person's occupation of land did deny another the chance to use it.

Americans instinctively linked Locke's theory of property to their dominant narrative about the Garden of Eden, the narrative in which labor transformed the dangerous wilderness into a peaceful, pastoral garden.[17] North America was the raw land described by Locke, waiting to be seized. By mixing labor with it the colonists gained property rights at the same time they transformed the land into the new Eden.[18] Private property proved to be a highly effective engine of progress. It provided just the incentive needed to induce the rebuilding of paradise in accordance with divine instructions.

Bolstered by Locke's theory, this progressive Eden narrative overshadowed the alternative narrative that valued more highly the

---

13. Locke's ideas of property are set forth principally in Chapter V of his Second Treatise of Government. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 303-20 (Peter Laslett, ed., Cambridge Univ. Press 1988) [hereinafter TWO TREATISES]. These ideas are assessed critically in LAWRENCE G. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 32-56 (1977); ALAN RYAN, PROPERTY AND POLITICAL THEORY 14-48 (1977); RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 151-61 (Russell & Russell 1973). The omission of the right of property in the Declaration of Independence is considered in MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 213-28 (1978).

Daniel Boorstin, in his study of Blackstone's commentaries and mid-eighteenth century English legal thought, notes that Locke's work was popular in England during the century, but only because theorists were able to read into it such conflicting interpretations. *See* DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 168 (1941). "In the course of the [eighteenth] century, [Locke's theory] was many things to many men, and 'Locke' became the pseudonym for everyman's theory of property." *Id.*

14. *See* TWO TREATISES, *supra* note 13, at 304-06.

15. *See id.* at 311.

16. *See id.* at 314.

17. *See* Merchant, *Reinventing Eden*, *supra* note 3; Merchant, Paradise and Property: Locke's Narrative and the Transformation of Nature, *supra* note 4.

18. *See* Merchant, *Reinventing Eden*, *supra* note 3, at 142.

untouched land. Jefferson kept alive this alternative narrative when he defended the beauty and perfection of North America to his doubtful European correspondents.[19] By the time Jefferson died in 1826, the alternative tradition enjoyed renewed favor among romantic writers who looked to nature for meaning and inspiration.[20] Writers, however, were an elite few, and this interpretation gained little support until the end of the nineteenth century. By then, the frontier had ended and people began to realize that something had disappeared along with it.[21] Outdoor hiking and camping gained in popularity, as people sought to regain contact with the dwindling wilds. For example, citizens founded the Boy Scouts and Campfire Girls.[22] John Muir regaled readers with his adventures in the Sierras and Alaska and gained an audience when he spoke of the inherent value of wild lands. In *The Call of the Wild*,[23] Jack London captured the public imagination with his tale of a domestic dog that joined the wolves. *Tarzan of the Apes*,[24] a true blockbuster of the day, told the captivating tale of an English infant reared in the jungle.[25]

By the late nineteenth century the American landscape itself became a more ambiguous source of narrative material, just like the Eden material in the Book of Genesis. The landscape too became the stuff from which conflicting stories might arise. Labor could indeed add value to the American land and make it more productive, just as John Locke said it did, but the land also had value without labor and too much labor could be as bad as too little of it. When misapplied or over applied, labor could bring ruin to the land by scraping away the trees, eroding the soil, and polluting the waters. Altering the wilderness sometimes did not bring progress, but decline.

As the countryside showed more and more scars of misuse, this declensionist interpretation made greater sense for people. It prompted calls for conservation, pollution control, and the preservation of wildlife refuges and wilderness areas.[26] Conservation

---

19. Principally in his NOTES ON THE STATE OF VIRGINIA (William Peden ed., North Carolina Press 1955). Jefferson's work is often considered from different angles. *See, e.g.*, RODERICK NASH, WILDERNESS AND THE AMERICAN MIND ch. 4 (3d ed. 1982) (as a defense of perfection of American nature); MARX, *supra* note 3, 116-44 (as a pastoral ideal).

20. *See* LAWRENCE BUELL, THE ENVIRONMENTAL IMAGINATION *passim* (1995); NASH, *supra* note 19, at 67-107; MAX OELSCHLAEGER, THE IDEA OF WILDERNESS 133-71 (1991); MARX, *supra* note 3; LEWIS, *supra* note 3; DONALD WORSTER, NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS 59-111 (2d ed. 1994); ROBERT KUHN MCGREGOR, A WIDER VIEW OF THE UNIVERSE: HENRY THOREAU'S STUDY OF NATURE (1997).

21. *See* NASH, *supra* note 19, at 147.

22. *See id.* at 147-48.

23. *See* JACK LONDON, THE CALL OF THE WILD (1903).

24. *See* EDGAR RICE BURROUGHS, TARZAN OF THE APES (1914).

25. *See id.* at 122-60; OELSCHLAEGER, *supra* note 20, at 172-204.

26. *See* NASH, *supra* note 19, at 129.

measures became more numerous, placing limits on the expanding market economy that Locke's reasoning had helped fuel.[27] Just as important as the real limits that the conservation movement imposed were the symbolic and psychological challenges it presented. To see inherent value in the land, as John Muir and others did, implied that humans alone had not created all value. If the land was a fruitful garden before humans entered it, then humans became merely tenders of that garden subject to divinely set instructions, and the private property rights they held were limited accordingly. For humans, this interpretation represented a demotion in status, from conqueror and value-creator to something much less, a steward of preexisting value and a shepherd of animals and plants lent in trust.

Over the centuries, Americans have rarely thought about giving up private property or reducing its importance in the national fabric, but they have eagerly debated what ownership ought to entail.[28] A concern about the role of government in the lives of people, especially the role of the federal government, fueled the debate over the past decade.[29] The particular concern has been the expansion of regulations aimed at stemming the degradation of lands and waters.

As a cultural institution, private property has long reflected a good deal of inner tension over how the individual fits together with the community.[30] It reflects the values associated with individualism, such as privacy, autonomy, and opportunity, as well as the values associated with community well being, mutual-aid, and neighborly solidarity. Currently, the individual side of things has become resurgent, or at least has gained conspicuous defenders out to chip away at the community's power. Today's champions of the individual have not drawn openly upon the Bible. Nevertheless,

---

27. The classic study is SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920 (1959).

28. Some of the debates are considered in GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970 (1997); SCOTT, *supra* note 12; William Weston Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880 (1991) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library).

Useful considerations of the role of narratives in debates over private property include Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37, 48-53 (1990); Myrl Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Marc R. Poirer, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43 (1997).

29. The "wise use" movement, arising in the mid-1990's, is critically considered in *John Echeverria & Raymond Booth Eby, Let the People Judge: Wise Use and the Private Property Rights Movement* (1995).

30. Now the leading assessment is ALEXANDER, *supra* note 28. Two thoughtful considerations are Duncan, *supra* note 28, and Poirer, *supra* note 28.

their rhetoric is recognizable as the Lockean version of paradise regained, with private property as the source of traction.

Drawing upon John Locke, critics of land-use regulations piece together an updated narrative of land ownership, informed and given shape by libertarian political theory and market economics. This powerful rhetoric builds upon the tradition of liberal individualism that has so dominated American culture.[31] The centerpiece of this narrative, the star character, is the autonomous individual human, possessor of essential rights and vigorous participant in the market economy.[32]

Despite its prominence, the narrative of autonomy is not the only story about property rights being told today. Vying for public support are three other narratives which also explain where private property came from, why it exists, and what ownership ought to entail. For intensive land users, a good deal of short-term profits are at stake in this story-trading enterprise. Behind the money, though, are fundamental questions about how people and land fit together, as well as how the individual human fits into the larger social whole. First, where does value come from? Does value come from the individual landowner or from the communities of which the owner

---

31. The classic consideration is LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). A summary of liberalism today as a public philosophy is set forth in MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4-7 (1996). In the context of property rights, a useful consideration is Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) (summarizing liberalism in the context of property rights).

32. I define liberalism as historian Lance Banning did in a useful comparison of liberal and classical republican thought:

> *Liberalism* is a label most would use for a political philosophy that regards man as possessed of inherent individual rights and the state as existing to protect these rights . . . A full-blown, modern liberalism, . . . posits a society of equal individuals who are motivated principally if not exclusively by their passions or self-interest; it identifies a proper government as one existing to protect these individuals' inherent rights and private pursuits. . . . Liberalism, thus defined, is comfortable with economic man, with the individual who is intent on maximizing private satisfactions and who needs to do no more in order to serve the general good.

Lance Banning, *Jefferson Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, XLIII WM. & MARY Q. (3d ser.) 3, 11-12 (1986) (emphasis in original). I do not mean to suggest that this version exhausts the possibilities of liberalism in the promotion of communal goals and values, or that it is true to liberalism's historical roots in an accepted moral order. A thoughtful assessment of liberalism's intellectual past is Thomas A. Spragens, Jr., *Communitarian Liberalism*, *in* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 37 (Amitai Etzioni ed., 1995); a more extended consideration is JOHN P. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM (1984). A defense of liberalism against the charge of excessive individualism is presented in WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989). Civic republicanism's appeal as an alternative to liberalism as thus defined is considered in G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994).

is necessarily a part, both the community of nature and the surrounding social community? The second question regards the essential nature of the human animal; are we inherently good or bad, and do we act altruistically? A related question is whether we act best when making decisions alone or together. Are we basically self-directed loners, distinct from one another and our natural surroundings, or are we better understood as socially constructed and intimately connected to each other and the land? To own land is necessarily to possess power, which leads inevitably to questions about that power. How should power be divided between the individual and the community? Who can be trusted with power, and where lies the greatest danger of its misuse?

Ultimately, there are the questions about the nature of the good and how it is best pursued. Is there such a thing as the common good, something that one can talk about distinct from the aggregate preferences of individuals? Furthermore, in the pursuit of that good, are people better off relying on one another, on their more-or-less democratic institutions of governance, or should they instead choose the automatic pilot option, giving into the market and letting the invisible hand lead where it will?

Widely varied answers to these questions are embedded in today's four narratives of land ownership. This Article discusses in turn the libertarian narrative of individual autonomy, the more traditional narrative of property focused on economic opportunity, a community-centered narrative that understands property as an evolving tool to meet community needs, and a biocentric narrative that looks to the land itself to prescribe the rules on how it can be used. This discussion begins reviewing these tales with the one that has stirred up the most controversy lately, the narrative of autonomy. It is in this narrative that one finds John Locke talked about most openly, along with his optimistic story of endless progress.

II. THE LIBERTARIAN IDEAL OF AUTONOMY

The libertarian perspective on private property gained considerable ground in the late 1980s. It was spurred on, not just by unpopular environmental constraints, but by the publication of a book that presented the view coherently and passionately—*Takings*, by Professor Richard A. Epstein of the University of Chicago Law School.[33] Epstein's book leveled a broad attack on all forms of

33. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]. The following discussion of Epstein's thinking draws upon this major work as well as many of his articles, including *A Clear View of The*

government regulation, particularly land-use rules.[34] It struck a responsive chord, and quickly became a leading text, not just among libertarian scholars, but among wise-use groups, ardent free-market advocates, and all manner of opponents of environmental rules.

Epstein argued that the private property rights of an owner were so fixed and secure that governments could do little to diminish them without paying compensation for any drop in value.[35] The only exception was a law that banned an owner from engaging in land uses that were so obviously harmful to neighbors as to amount to what the old common law deemed a nuisance.[36] As Epstein saw things, a landowner could use his land as he pleased so long as he did not spew pollution onto neighboring lands or otherwise physically disturb what a neighbor was doing.[37] Laws that went beyond nuisances and restricted other, noninvasive activities interfered with a landowner's vested private rights.[38] They were unconstitutional, and landowners deserved compensation for their losses.[39] Laws that restrained the alteration of wildlife habitat, for instance, were plainly unconstitutional unless compensation was paid.[40] So were laws restricting the draining and filling of wetlands and laws banning construction on ecologically sensitive lands.[41]

Epstein began his book with a story similar to John Locke's.[42] In the early days of pre-history, Epstein related, humans lived without governments or other communal structures. Land then was unowned, and any person could gain ownership of a vacant parcel simply by occupying it first.[43] But tensions arose because some people failed to respect the property rights of others, selfishly seizing the fruits of their neighbor's work.[44] Tensions also arose as resources became scarce and people had trouble finding vacant land to

---

Cathedral: The Dominance of Property Rules, 106 YALE L. J. 2091 (1997); *Some Doubts on Constitutional Indeterminacy*, 19 HARV. J. L. & PUB. POL'Y 363 (1996); *A Conceptual Approach to Zoning: What's Wrong with* Euclid, 5 N.Y.U. ENVTL. L. J. 277 (1996); *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591 (1995); Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); *Property as a Fundamental Civil Right*, 29 CAL. WEST. L. REV. 187 (1992); *Regulation-and Contract-in Environmental Law*, 93 W. VA. L. REV. 859 (1991); *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

34. *See generally* EPSTEIN, TAKINGS, *supra* note 33.
35. *See id.* at 35-36.
36. *See id.* at 112-25.
37. *See id.* at 121.
38. *See id.* at 121-25.
39. *See id.*
40. *See id.* at 123.
41. *See id.* at 121-23.
42. *See id.* at 7-18.
43. *See id.* at 10.
44. *See id.* at 10-15.

grab.[45] In response, people created governments to protect their private rights, vesting them with just enough power to maintain peace.[46] In short, private property came first, and governments were formed to keep it secure.

In his argument, Epstein made extensive use of Locke's writings, particularly Locke's fundamental claim that individual rights existed independently of government and hence trumped the wishes of lawmaking majorities.[47] When Epstein got to the details of Locke's labor theory, however, he found that it really did not fit his purposes, and he ended up revising the theory significantly to meet his needs. The beginning chapter of Locke's story, God's gift of the Earth to humans in common, was the first to go.[48] Writing for a secular audience, Epstein had no use for God in his narrative, nor did he like the notion of land being owned initially in a collective way. If land was owned by everyone, it was hard to explain how a single individual could seize a parcel and make it his own without getting group consent.[49] To seize a piece of the common fund was a type of theft, and it was not clear why others would put up with it.

The very centerpiece of Locke's theory, the idea that property rights arose through labor, also troubled Epstein.[50] If working the

---

45. *See id.*

46. *See id.* at 13.

47. *See id.* at 14-15.

48. *See id.* at 10. In deleting God from Locke's story, Epstein noted only that the divine gift created problems because it resulted in the communal ownership of property. He does not note that God's role in Locke's story brought along with it an entire moral order that undergirded and gave shape to the individual's role in society. As Thomas Spragens notes,

> From its outset, liberalism has embraced individualism, in the sense that it prized autonomy and demanded compelling warrant for any governmental restriction of individual freedom. But the individual in Locke, Mill, Adam Smith, and Condorcet enjoyed his or her freedom only within the context of complementary obligations, deriving from communal attachments and responsibilities, from the restraints of a valid moral order, and from the force of human sympathy. No early liberal would have ever defended the buccaneer individualism of a Herbert Spencer or ever even conceived of an individual like Sartre's Orestes, who finds "nothing left in heaven, no right or wrong, or anyone to give me orders" and concludes that he is to live by "no other law but mine."

Spragens, *supra* note 32, at 43 (citation omitted). The divine role in Locke's world view included the sense that humans belonged to God and, as landowners, were subject to the obligations of responsible stewardship. *See id.* at 40.

49. *See* EPSTEIN, TAKINGS, *supra* note 33, at 10-11.

50. Epstein's objections to the labor theory address this issue only tangentially, but it is, I believe, implicit in his comments. His most extended treatment of the labor theory appears in his defense of first possession. *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979). In the course of discussing the classic case of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805), dealing with the capture of an unowned fox, Epstein criticizes the dissenting judge's position because (according to Epstein) it sought to protect the original hunter's labor invested in the hunt; the majority opinion, which Epstein favors, gave the fox to the party who actually took possession of it, without regard to labor expended—a clearer, easier rule to apply. *See* Epstein, *Possession as the Root of Title*, at 1224-25. Epstein points to various difficulties that

land translated into ownership, then awkward questions quickly arose: How much labor did a person need to expend, and for how long? Could one merely scratch the soil and plant a few seeds, or was major construction required? And what about vacant, undeveloped land? Could a person ever claim ownership of such land, or must it remain unowned until someone finally put it to use? For Locke, the quantity-of-labor issue was a minor detail in his world of presumed abundance, and as for vacant lands, they became government property as soon as governments were created. All of this disturbed Epstein. In a world of scarcity, the quantity-of-labor question was simply too important to ignore. If the government took over vacant land, it would presumably possess broad discretion to dictate the terms on which people might use the land.

To avoid these troubles, Epstein revised Locke's story materially. Epstein's story began with land unowned and an individual did not need to labor on the land to gain it.[51] He merely needed to be the first to occupy it.[52] By eliminating the requirement of labor and allowing a person to gain title to vacant land, Epstein avoided Locke's problems and denied governments excessive power over

---

arise in attempting to protect the value of a person's labor in various settings; though the particular hypotheticals he presents do not principally deal with the challenge of calculating the value of that labor.

My guess is that Epstein avoids dealing with the issue more directly because of the difficulty that it poses. In Locke's theory, as he recognizes, labor gave rise to property rights only when a thing was so plentiful that it had essentially no value. When a thing did have value, the labor logically would give rise at most to a lien for the value of the labor itself (although Locke did not deal with this factual possibility). *See id.* at 1226. Had Epstein pursued this point, however, he likely would have recognized that labor that trivially improves an item's value—for instance, picking up a book off the floor that the true owner has dropped—cannot reasonably give rise to any claim of a lien for value added. Particularly in the case of land, a person who merely takes possession typically adds no appreciable value to the land, and would hence acquire no property right in the land under a scheme that ignored *de minimus* additions to value. Epstein might have openly defended a claim that minimal labor was enough to create a property right, but in doing so he would have highlighted how far he had deviated from Locke's natural-rights justification for property, in which the protection of labor was a *sine qua non* element. On the other hand, Epstein does claim at one point, without elaboration and in apparent contradiction to his other statements, that "possession does not come without an expenditure of resources." *See* EPSTEIN, TAKINGS, *supra* note 33, at 61. "Think what would happen," he asks, "if the rule were the first one to look at property could claim to be its owner." *Id.* Yet we are left to wonder what further steps are involved in taking first possession of property (staking boundaries? fencing? excluding others?). Moreover, Epstein seems to agree that government can claim ownership of entire regions of land based on first possession, and to grant valid titles to the land, before anyone has ever even looked at the land. *See* Epstein, *Possession as the Root of Title*, *supra*, at 1242 n.27.

Though Epstein presumably understood full well the importance of labor in Locke's natural-rights reasoning, he does make occasional statements that suggest otherwise. *See, e.g., id.* at 1227 (noting labor theory intended merely "to aid the theory that possession is the root of title").

51. EPSTEIN, TAKINGS, *supra* note 33, at 11.

52. *See id.*

unaltered land. Yet, as Epstein made these changes to Locke's story, he wiped out all sense that private ownership rewarded a person for labor expended and, thus, stimulated that labor. Without a requirement for labor, individual ownership no longer rested on a theory of desserts, and it was no longer true, as Locke presumed, that a parcel's value derived entirely from the labor expended on it.

Lacking any theory of desserts to justify private property, or for that matter any formal theory of natural rights, Epstein found himself turning to utilitarian arguments to bolster his case.[53] First occupancy, he admitted, was not the only possible way of allocating unowned property—it was not in some way a natural law of the universe. Nonetheless, Epstein claimed, first occupancy enjoyed "very attractive utilitarian features."[54] First occupancy, he also admitted, faced objections based on fairness, particularly by those who arrived too late to get in on the original division of land and other things. Epstein turned again to considerations of utility. Late arrivals were better off anyway, for a world with private property was better than a world in which nothing was owned privately. Far from complaining about their comparative disadvantage—far from complaining that nothing was left for them to seize for free—people should be grateful just to live in a world in which private property was possible.[55]

In the end, Epstein's debt to Locke's specific theory was modest indeed. So extensively did Epstein revise Locke that his citation reflected merely the lawyer's love of precedent. Rather than relying on Locke's property theories, Epstein's true debt ran far more to Locke's general ideas, as one of the creators of the dominant culture of liberal individualism.[56] Locke created and wrote about a fictional world populated by individuals, both individual landowners and individual parcels of land. An individual in this world could seize land, mix labor with it, and thereby create value, all without

---

53. *See id.* at 5. Epstein's initially grounds his argument in natural rights reasoning. "The political tradition in which I operate, and to which the takings clause itself is bound, rests upon a theory of 'natural rights.'" *Id.* "The question of governance is how the natural rights over labor and property can be preserved in form and enhanced in value by the exercise of political power." *Id.* at 3.

54. *See id.* at 217. Epstein's earlier "qualified defense" of first possession, *id.* at 1238-43, is couched in utilitarian terms, and his criticisms of Locke's theory would seem logically to undercut any labor-related theory of natural rights in property. In TAKINGS, however, he expressly notes that "one is loathe to adopt a theory of individual rights that rests solely upon the shifting sands of utilitarian calculation." *Id.* at 335.

55. *See id.* at 11. "What is lost to late-comers from the world of acquisition is provided for in the world of trade and commerce for the betterment of those who did not acquire anything from the original commons." *Id.*

56. *Id.* at 10 ("a Lockean, like myself . . ."). *See also* Duncan, *supra* note 28 (usefully critiquing this larger Lockean tradition).

adversely affecting neighbors or seeking their permission.[57] Locke's hero was the isolated individual, disconnected from any community, human or otherwise. Locke described a fictional countryside composed of individual land parcels, as isolated and discrete as their respective human owners. When Locke's hero labored on his personal piece of the Earth, his actions stayed within his boundaries, without positive or negative externalities. Because a land parcel's value came entirely from human labor, raw land was worth nothing and its destruction entailed no loss of wealth. The narrative of autonomy accepts these individualistic premises and builds upon them, creating a tale in which the collective whole no longer counts for much at all. This near-total denial of community is reflected in several features of the autonomy narrative.

The meaning of land ownership—that is, the bundle of rights that accompany ownership status—is largely static in this narrative.[58] Epstein created his ideal bundle of landowner rights by looking to Blackstone and an idealized version of English common law.[59] To this base he mixed in one part nineteenth-century American jurisprudence and one part twentieth-century macroeconomics. He could have used another formulation of landowner rights, given that various combinations of rights are consistent with the narrative of autonomy. What was important for Epstein, and for the narrative of autonomy, was that these rights remain stable once in place so that the market economy could work best.

The static nature of property rights in the narrative of autonomy has two related implications. First, the lawmaking community has little if any power to redefine property rights over time or otherwise regulate land uses, except to deal with aggression and physical invasions. The power to make land-use decisions rests at the level of the individual landowner, not at any higher level of organization. The corollary implication is that property is no longer an organic institution; instead, it is a formal institution based on first principles and deductive reasoning. Property rights no longer shift over time in response to changes in public values and knowledge, nor do they respond to population increases, changes in technology, and other material factors.[60]

---

57. *See* TWO TREATISES, *supra* note 13, at 308-09.

58. *See, e.g.*, Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 258 (1980); EPSTEIN, TAKINGS, *supra* note 33, at 24-30, 60-61.

59. Epstein pays homage to "the classical common law" throughout his book. EPSTEIN, TAKINGS, *supra* note 33, at vii *passim*.

60. *See* Epstein, *The Static Conception of the Common Law*, *supra* note 58, at 258.

By vesting power in the individual owner, the narrative of autonomy carries with it a particular narrative of power and how it is misused.[61] Power in the hands of individual owners, according to this story, is relatively benign. Individual owners might act up and need occasional containment, but real danger arises only when power shifts to the community. A community with power will inevitably abuse it, seeking wealth for itself and trampling on individual rights. The narrative of autonomy responds to this danger by minimizing the public's power to act collectively, displaying in the process a deep distrust of democracy.

Finally, in its depiction of the moral landscape, the narrative of autonomy denies a community has legitimate substance to it apart from the members that compose it.[62] Individuals acting in concert become merely a special interest group, nothing more. Because a community lacks cohesion and identity, one cannot talk sensibly of the well being of the community or of community health. By easy extension, one also cannot talk sensibly of such a thing as a land community that includes non-human forms of life, or of the ecological health of such a community, or of duties that a landowner might owe in recognition of his membership in such a community.

III. THE TRADITIONAL UNDERSTANDING

The second and more truly conservative perspective on private property sinks its roots into traditional understandings of what private property has meant to generations of Americans. It too contains an implicit tale of individualism, but its emphasis lies less on autonomy than on self-reliance, mutual respect and, above all, opportunity. On the contemporary scene, this perspective enjoys support among various members of the United States Supreme Court, most notably Justice Antonin Scalia.[63]

The traditional understanding of property places great weight on property's place in American history, particularly in the late

---

61. Epstein presents his evaluation of competing risks in *supra* note 50, at 1239 (because of dangers of "extensive and continuous state control," it is "[b]etter to begin with a system that places wealth in private hands").

62. *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 33, at *ix* ("Statements about groups of individuals must be translated into statements about individuals."), 13 ("Every transaction between the state and the individual can thus be understood as a transaction between private individuals, some of whom have the mantle of sovereignty while others do not.").

63. Fred Bosselman usefully considers Justice Scalia's writings on property in FRED BOSSELMAN, *Scalia on Land, in* AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 82 (David Callies ed., 1993) and in *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994) [hereinafter Bosselman, *Four Land Ethics*]. My comments on Justice Scalia borrow extensively from Professor Bosselman's work.

nineteenth century when the frontier conquest was complete and a market economy dominated.[64] For generations, landless poor from around the world came to America, gained land, and produced wealth. Although private property was always an important engine of growth in this land of opportunity, its full value was not recognized until the late nineteenth century. Before then, communities exercised substantial control over property, sometimes even taking land from people without paying for it.[65] By the late nineteenth century, when the post-Civil War amendments to the Constitution were comfortably on the books, private property as an institution had come into its maturity.[66] Fully developed, the norms of private ownership protected the individual land parcel as a discrete market commodity and as the indispensable site of domestic life and economic enterprise.[67] In that mature form, soon encrusted by tradition, private ownership gained protection in the Constitution, particularly in the due process clause of the Fourteenth Amendment.[68]

Like the libertarian narrative of autonomy, the traditional understanding of property sees human labor as a mechanism that brings value to land. Even vacant land, however, can have value by operation of market forces, and land speculation in this narrative is as honored and protected as physical toil.[69] Humans act most industriously when they stand to gain as individuals, and private ownership serves its function only so long as it provides adequate opportunities for people to labor and earn wealth.[70] To serve this function, land development must remain possible and economic expectations need protection.

Unlike the libertarian view, however, the traditional interpretation recognizes the reality and utility of human communities.[71] Because land-uses are not as autonomous as John Locke supposed and their effects spill over property boundaries, the community has the right to regulate an owner's rights and to change them over time, a function largely denied by the libertarian scheme. But such

---

64. *See* Bosselman, *Four Land Ethics*, *supra* note 63, at 1500 n.255.

65. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992).

66. *See id.*

67. *See id.* at 1019 n.8 ("our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land.").

68. *See* U.S. CONST. amend. XIV, § 1.

69. *See, e.g.*, *Lucas*, 505 U.S. at 1030-32 (protecting expectations of owner of vacant land).

70. *See* Bosselman, *Four Land Ethics*, *supra* note 63, at 1485-1506 (discussing the importance to Scalia of preserving economic opportunities).

71. *See* Bosselman, *Four Land Ethics*, *supra* note 63, at 1501 & n.256 (contrasting Justice Scalia's tradition-focused thought with libertarianism).

changes can only occur if property's traditional core functions are adequately preserved.[72]

The traditional understanding of private property—the "historical compact" as Justice Scalia would call it—protects particular core rights, including the right to build a home and otherwise labor on the land in time-honored ways.[73] Landowners have the right to exclude anyone from their property, as well as rights to reap the land's income and to transfer the land at will. The community has no legitimate interest in what the landowner does within the bounds of his own land. If he wants to ruin the soil, strip the trees, or destroy wildlife habitat, he is free to do so, as long as the harmful effects of his conduct do not traverse the all-important boundary.[74] What the community can rightly worry about are the impacts a landowner has on neighboring land and on the community as a whole, not just physical invasions of neighbors as in the libertarian vision of ownership,[75] but other land uses that clearly disrupt the public's health, safety, or welfare.[76]

This traditional interpretation appeared in several prominent Supreme Court decisions in the late 1980s and early 1990s, mostly written by Justice Scalia. The first prominent case arose out of California and involved a landowning couple, the Nollans, who sought a permit to rebuild their beachfront vacation cottage into a much larger, year-round home.[77] The California Coastal Commission, charged with protecting and enhancing the coastal zone for the common good, was willing to allow the construction, but only if the Nollans in return granted the public permission to walk along their beach, up to the high-tide line.[78] As the Supreme Court viewed it, however, this regulatory requirement cut too deeply into private property's core values, both the right to exclude and the right to

---

72. *See Lucas*, 505 U.S. at 1029 (restricting state power in total-deprivation cases to "background principles" of property law).

73. *See Lucas*, 505 U.S. at 1028; Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) ("the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'"). Dissenting in *Lucas*, Justice Blackmun took strong issue with Justice Scalia's history. *See Lucas*, 505 U.S. at 1055-56 (Blackmun, J., dissenting) ("It is not clear from the Court's opinion where our 'historical compact' or 'citizen's understanding' comes from, but it does not appear to be history.").

74. *See id.* at 1030-31 (takings inquiry should focus on "the degree of harm to public lands and resources, or adjacent private property posed by the claimant's proposed activities"); Babbitt v. Sweet Home Chapter, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (opposing regulatory measures to protect endangered species wildlife habitat on private lands).

75. *See e.g.*, EPSTEIN, TAKINGS, *supra* note 33, at 120.

76. *See* Bosselman, *Four Land Ethics*, *supra* note 63, at 1503-05 & nn.266-68.

77. *See Nollan*, 483 U.S. at 828.

78. *See id.* at 827.

build a structure as ordinary as a home.[79] Public access to the beach, the Court agreed, had become difficult. But the Nollans alone had not caused the problem, and the state could not insist that they and landowners like them solve it. If the public wanted better access, the public should pay for it.[80]

A second Supreme Court decision, also warmly received by conservative audiences, involved a land developer, David Lucas, who owned two vacant lots on a barrier island off the coast of South Carolina.[81] Other landowners on the island had built homes, and Lucas merely wanted to do the same.[82] But before he broke ground, the South Carolina legislature realized that construction on fragile barrier islands caused many problems and it imposed a ban on construction close to the water—a ban that covered David Lucas's lots.[83] As in the Nollans' case, the Supreme Court viewed the state law as the equivalent of a physical taking of Lucas's land.[84] The law, Justice Scalia announced, undercut Lucas's legitimate expectations.[85] As a landowner, he was entitled to make economic use of his land so long as he avoided doing anything traditionally considered harmful, and building a home was almost by definition not harmful. If the state wanted Lucas's land set aside as a nature preserve, it should buy the land from him.[86] As it went about resolving these cases, the Supreme Court was troubled by the prospect that a group of lawmakers could simply awaken one day and change all the rules of land ownership, with no compensation to those most affected.[87] That power, the Court seemed to say, posed too much of a threat to property's core entitlements.

The *Lucas* decision drew strong dissents from other members of the Supreme Court who were willing to give South Carolina's legislature greater leeway in balancing environmental goals against the benefits of secure development rights.[88] Over time, the dissenters pointed out, circumstances and values change.[89] Conduct once considered innocuous can be viewed as harmful, even building a house. Ecological effects once ignored or tolerated can become more

79. *See id.* at 831.
80. *See id.* at 841.
81. *See Lucas*, 505 U.S. at 1006-07.
82. *See id.* at 1007-08.
83. *See id.*
84. *See id.* at 1029-30.
85. *See id.* at 1034.
86. *See id.* at 1030.
87. *See id.* at 1018-19.
88. *See id.* at 1036 (Blackmun, J., dissenting), 1061 (Stevens, J., dissenting).
89. *See id.* at 1070-71 (Stevens, J., dissenting).

worrisome. A legislature that allowed unwise development in the past, before ill effects became known, should not be hampered from changing its mind.

Given the limited room for changes in property law, this narrative of tradition reflects in weakened form the same distrust of democracy that characterizes the narrative of autonomy.[90] Humans are basically self-interested creatures, out to get what they want, and they will take advantage of other people unless barred from doing so. Aggression and deception are ways of taking advantage that need control. But government regulation is also a way for some people to take advantage of others, and it too needs control.[91] Regulations that do more than ban overt harm, that seek to promote some particular vision of the common good, are especially suspect. Lurking behind them is the prospect, if indeed not the certain reality, that some elite group is unfairly extracting wealth from some other group. The Constitution protects against this kind of theft, and it does so by enshrining a traditional image of ownership.

The particular virtue of this narrative of tradition is that it senses and respects the need for ordinary people to think that property has a settled, core content to it. Property would not likely serve its various functions—economic, civic, and personal—unless owners could rest easy in their thoughts that they possessed something the state could not simply seize, destroy, or redefine out of existence.[92] Of the various functions that property serves, economic development is perhaps the most important in this story. The tradition to which this narrative turns derives from an historical period, the late nineteenth century, when economic development was the prime national goal. Had this narrative instead looked to a different period in American history—to the first years of the nineteenth century, for instance—it would have uncovered a different property tradition; one more agrarian in its outlook, one that was more prepared to protect sensitive land uses when they were disrupted by the newer, intensive land uses of commerce and industry.[93]

---

90. *See, e.g., id.* at 1018 (fear that legislature would press private property "into some form of public service under the guise of mitigating serious public harm"), 1028 n.14 (possibility of legislation "plundering landowners generally"); Stevens v. City of Cannon Beach, 505 U.S. 1207 (1994) (displaying deep distrust of state common law courts).

91. *See Lucas*, 505 U.S. at 1018. This fear runs throughout Justice Scalia's opinions, particularly in *Babbitt*, *Cannon*, *Lucas*, and *Nollan*.

92. Laura S. Underkuffler-Freund usefully considers this need, in real and symbolic terms, in *Takings and the Nature of Property*, 9 CAND. J. L. & JURIS. 161 (1996).

93. In his *Lucas* dissent, Justice Blackmun draws upon historical sources from earlier periods, including the late eighteenth century. *See Lucas* 505 U.S. at 1055-60. The early nineteenth century experience is considered in WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH CENTURY AMERICA (1996); the early regulatory tradition is

In its embrace of a backward-looking vision, the narrative of tradition has a solid measure of conflict if not inconsistency within it. Private property here is a civil rather than a natural right, subject to the lawmaking powers, and its justification arises from the good consequences that it helps bring about in terms of economic growth. Yet to keep property stable and secure enough to give full confidence to investors, freeing them from their worst regulatory fears, is to sap some of the life out of the institution of private ownership. It is to withhold from the processes of government the power that government has long had to keep the institution in line with shifting social norms and values. Over time, one might guess, this tension would likely grow greater and greater, as the dominant culture continued to evolve and found itself bound to an increasingly dated and wooden ownership scheme.[94]

IV. PROPERTY AND THE EVOLVING COMMUNITY

The third narrative of property ownership, the narrative of social evolution, lacks any single author as conspicuous as Professor Epstein or Justice Scalia. The elements of this narrative have come to characterize the work of many scholars in various academic disciplines. The narrative is also supported by community advocates and cultural critics from outside the academy, some concerned with environmental degradation, others with pervasive urban and social ills. Two legal scholars who belong comfortably with this group are Professors Joseph Sax of the University of California at Berkeley and Joseph Singer of Harvard University. Sax's concern lies with the land community, about which he has written with passion.[95] Singer's concern is with the human social community, particularly in

---

surveyed in John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996). Even Justice Scalia's focus on the late nineteenth century is skewed by its underappreciation of the continuing vibrancy of legal doctrines promoting the common good. Those doctrines are considered in Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984).

94. Justice Stevens raised this prospect in his *Lucas* dissent ("The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."). *See Lucas*, 505 U.S. at 1068-69.

95. Recent relevant writings by Professor Sax include *The Ecosystem Approach: New Departures for Land and Water*, 24 ECOLOGY L. Q. 883 (1997); *Using Property Rights to Attack Environmental Protection*, 14 PACE ENVTL. L. REV. 1 (1996); *Takings Legislation: Where It Stands and What is Next*, 23 ECOLOGY L. Q. 509 (1996); *Understanding Transfers: Community Rights and the Privatization of Water*, 1 WEST-N.W. 13 (1994); *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993). Useful earlier reviews of Richard Epstein's work by Professor Sax include *Takings*, 53 U. CHI. L. REV. 279 (1986) and *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

its urban forms.[96] Despite their different emphases, they share a view of where private property comes from, why it exists, and how it changes over time.[97] One might also attach to this narrative, from outside the legal field, the pioneering wildlife manager and ethicist, Aldo Leopold, with the qualification that his important comments on private property covered only parts of this narrative. Leopold did not speak of the origins of property, but he did perceive it as a cultural creation, arising from people and subject to change by them as their ecological knowledge rose and their moral visions widened.[98]

The narrative of social evolution goes something like this: In the beginning was the social community, a collection of people living as a tribe or small settlement, linked by ties of blood and group identity. Over time, this community found it helpful to allocate property rights to individual community members, both for the good of the individuals involved and the good of the community as a whole. Sometimes property rights were limited to specific, temporary use interests—the right to farm in one place, or to hunt or fish in a given spot, or to use an area to collect firewood or forage for berries.[99] Other times the rights were more inclusive, lasting longer and including powers to transfer the thing owned. Sometimes property was made available as a reward or incentive for labor; other times it was allocated for unrelated reasons—to help people who were sick, to recognize differences in social status, and to promote group identity and survival. However private rights were defined and allocated, they were created by the community and lasted only so long as the community recognized their validity. In the case of

96. Joseph Singer's relevant recent works include his PROPERTY LAW: RULES POLICIES, AND PRACTICES (2d ed. 1997); *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); *The Social Origins of Property* (with Jack M. Beerman), 6 CAN. J. L. & JURIS. 217, 228 (1993) [hereinafter Singer, *The Social Origins*]; *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 653 (1988).

97. Among the many useful contributions to this perspective are Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 BYU L. REV. 629; T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988); Duncan, *supra* note 28, at 1129; Poirer, *supra* note 28, at 66.

98. Leopold's comments on ownership principally appear in his A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (1949) and *Round River, in* THE RIVER OF THE MOTHER GOD AND OTHER ESSAYS (1953); some of his most mature comments, however, appear in inaccessible essays and letters. Although Leopold's ideas are ably surveyed in Curt Meine's biography, ALDO LEOPOLD: HIS LIFE AND WORK (1988), his evolving understandings of private property rights await a more extended and focused treatment.

99. One illustration is presented in WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

land, private rights arose by transfer from the community, not by first occupancy or other private action.[100]

Private property in this narrative of social evolution is very much an organic institution, created by a people and subject to change by them over time.[101] Community interests are paramount, and the community alone decides what ownership entails. Proponents of this narrative embrace the study of history warmly, often noting how property norms have differed widely in time and space. What they derive from history is not a specific bundle of substantive property rights, as in the case of the narrative of tradition, but the overriding lessons of continuous normative change and community control.

Strong individual property rights are not inconsistent with this narrative of social evolution. A community might decide, for instance, that extensive individual rights promote economic activity and indirectly benefit the community at large. Yet the narrative recognizes also that property owners can act in ways contrary to the common good, sometimes by generating external harms, sometimes simply by deviating far from what the community needs at a given time. Thus, the benefits that come from secure property rights are subject to conflicting values and tradeoffs, and it is up to the community in the end to make those tradeoffs.[102] The only limit on community power comes from the takings and due process clauses that, in this narrative, protect landowners from being singled out for ill treatment, but do not insulate them from adverse changes in widely applicable laws.

When proponents of this evolutionary narrative look out onto the land, they are impressed more by the interconnection of the pieces than by their discreteness.[103] Land-use externalities are ubiquitous, with ripple effects that spread far and wide. Given these externalities, private land is always impressed with a public trust, a trust that can be demanding and confining in the case of lands that play critical roles in the functioning of surrounding communities.[104] To own

---

100. *See* Singer, *The Social Origins*, *supra* note 96, at 229.

101. *See id.* at 228 ("Because property is socially and politically constructed, the scope of property rights changes over time as social conditions and relationships change.").

102. *See id.* ("The police power embodies the community's ability to regulate and alter the scope of entitlements over time as their social meaning changes. This power to change the scope of property rights is necessary to *preserve* their social function.").

103. *See, e.g.*, Joseph Sax, *The Ecosystem Approach*, *supra* note 95. The interdependence of land uses has been a particular theme of evolutionary writers focused on ecological issues. A fine introduction to that growing body of scholarship is Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299 (1995).

104. The public trust idea has been a recurring subject of interest for Professor Sax since his early influential work on the subject. *See, e.g.*, Joseph Sax, *Liberating the Public Trust Doctrine*

land in such a landscape is to be charged with a duty to use it with restraint, tempering individual gain with due regard for the well being of the whole.

Many proponents of this narrative of social evolution embrace particular visions of what community health is all about, and they are passionate about their views. Yet, this narrative is not one in which experts or committed advocates have the power to dictate land-use rules, however lucidly they might perceive the public good. By granting substantial lawmaking power to the assembled community, this evolutionary narrative rests its faith in the processes of democracy, in the prospect and possibility that people over time will elevate their ethical norms as Aldo Leopold predicted they would. Because the people are in charge in the long-term, public education becomes an important task for proponents of this narrative. Education is essential, along with an unending supply of hope.

Proponents of this tradition supply the sharpest critics of the narrative of autonomy and Professor Epstein's work.[105] One comment they make is that Epstein improperly lifts Locke's liberal vision out of its particular social context. Locke lived and worked at a time when a dominant, guiding moral order was presumed, and Locke himself had no thought of challenging it.[106] His focus on individual autonomy was meant as a corrective to the earlier, feudal age when the hierarchical structure held vast power and the individual counted for little. Locke proposed more of a balance, acknowledging the community's moral authority yet setting against it an emphasis on individual integrity. Today, it is the individual who has gained ascendance, particularly in the rhetoric of the day. To regain the kind of balance Locke had in mind, it is the common good that today needs more weight.

Critics complain with particular vehemence about the poor history that characterizes and weakens the narrative of autonomy.[107]

---

from Its Historical Shackles, 14 U.C. DAVIS L. REV. 185 (1980); Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

105. *See, e.g.*, Joseph Sax, *Takings Legislation: Where It Stands and What Is Next*, *supra* note 69; Joseph Singer, *The Social Origins*, *supra* note 96.

106. *See* note 13, *supra*; Michael Walzer, *The Communitarian Critique of Liberalism*, *in* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 52 (Amitai Etzioni ed., 1995).

107. *See* Duncan, *supra* note 28, at 1137; Hart, *supra* note 93, at 1281; Louise O. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); James M. McElfish Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 E.L.R. (NEWS & ANALYSIS) 10231 (1994); John A Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993); Harry N. Scheiber, *The Jurisprudence-and Mythology-of Eminent Domain in American Legal History*, *in* LIBERTY, PROPERTY,

Property, they note, is inherently a social institution, so much so that it is nonsense to speak of property in a pre-social era. For A to have rights against B, B must recognize them and respect them. But B is unlikely to do that without similar assurances from other people—without, that is, a collective agreement among people to respect one another's respective entitlements. As far as anthropologists can tell, humans have always lived in social groups; there never was a pre-social time.[108] If there ever were such a time, it surely had no private property in it.

When they turn to Justice Scalia's tradition-guided narrative, adherents of the social-evolution story are disturbed mostly by the seeming inconsistency within it. Scalia's narrative accepts the historical reality that property is an evolving cultural institution. However, the community that counts in this narrative is not the community of people now living. It is the community of lawmaking people who lived late in the nineteenth century, people now long dead. But why trust those people, critics ask, and not people alive today? If people several generations ago could fairly balance the relative interests of individual and community, why not lawmakers of the present generation?

V. THE NARRATIVE OF NATURAL USE

The final ownership narrative, one based on the land's natural uses, has similarities with both the narrative of autonomy and the narrative of social evolution. Like the autonomy narrative it harbors great suspicion of democracy and seeks to ground ownership norms in durable values, protected against a misguided populace. Yet, like the narrative of social evolution it sees a landscape dominated by interdependent pieces, with property rights existing only to the extent consistent with the continued well being of the communal whole. In this story, the land is more than just a collection of abstract parcels, circumscribed by human-drawn boundaries. Instead, it is an intricately woven community of life, including the plants and animals that live alongside the resident humans. This land has value, apart from anything humans have done to it.

AND GOVERNMENT (Ellen Frankel Paul & Howard Dickman eds., 1989); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

108. *See* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 363 (1996) ("Virtually all peoples of whom we have any knowledge have invented property regimes for themselves in order to manage the resources they find important." (citations omitted)); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 692 (1938) ("Wherever man is found, we find both individual ownership and ownership by family groups, large or small, and other associations; with rarer instances of what appears to be true community ownership of particular things.").

In the legal literature, this natural-use narrative found its classic expression a quarter-century ago in a relatively brief appellate decision by the Supreme Court of Wisconsin. The decision came in the now-celebrated case of *Just v. Marinette County*,[109] involving the validity of a then-novel regulation protecting sensitive wetlands. The legal issue before the court was a constitutional one—did the wetlands regulation affect the landowner's core property rights to such an extent that the community in fairness ought to compensate the landowner for the loss.[110] To get to that constitutional issue, however, the court first had to explain what it meant to own something like a wetland.

Early in its opinion, the Wisconsin court framed the relevant question as plainly as it could: "Is the ownership of a parcel of land so absolute," it queried, "that man can change its nature to suit any of his purposes?"[111] To this court, knowing what it did about the ecological roles of wetlands, the answer seemed clear:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.[112]

To own sensitive land like a wetland, the court announced, was to have the right merely to use land in "its natural state" and for its natural uses; it did not include the right to change the character of the land at the expense of harm to public rights.[113] Nature had its own norms of health, and set its own rules for how land might be used without disrupting that health.

This narrative of natural use is the simplest of all. Drawn from the declensionist Eden narrative, it goes like this: In the beginning was a healthy land—an Eden, rich and complex. People soon entered the picture, dividing the land into pieces and allocating those pieces to private owners. People did not know it at the time—and would not know it for generations—but the land-use rights they obtained were not as unlimited as they supposed. Nature had its own limits, and human-created property rights were conditioned by

---

109. *See* Just v. Marinette County, 201 N.W.2d 761 (1972), *cited in* EPSTEIN, TAKINGS, *supra* note 33, at 123; *Lucas*, 505 U.S. at 1059 (Blackmun, J., dissenting).

110. *See Just*, 201 N.W.2d at 767.

111. *See Just*, 201 N.W.2d at 768.

112. *Id.*

113. *Id.*

these limits. Nature, of course, had no courts of law to enforce these limits and no prosecuting attorneys to file suit. But it had powers, nonetheless, and potent ways to express its disappointment. When wetlands were drained, floods and droughts soon followed. When hillsides were plowed, nature reclaimed some of its topsoil. When bulldozers overturned wildlife habitat, the communal membership declined in number and variety.

In this natural-use narrative, the land itself is the lawgiver, supplier not of the details of individual ownership, but of the broad limits beyond which human owners may not wander. The paramount goal is community health, and the relevant community is the land itself. In its pure form—the form set forth in *Just v. Marinette County*—nature's limits constrain property rights pretty much without regard for whether lawmakers like it or not. Thus, like the narrative of autonomy, the narrative of natural use includes restraints on democratic processes—restraints in this case that arise directly from the land.

Just v. Marinette County remains a well-loved decision among committed environmentalists, but its pure version of natural property rights has not caught on. Even admirers of the decision realize that nature's ways are not so clear and predictable as to always distinguish good land uses from bad. Ecological processes are complex, and it is often hard to know what impacts a land-use change will have on surrounding lands and whether the change will or will not diminish land health. Beyond the nagging difficulties of scientific uncertainty there is discomfort with the idea that humans cannot make their own laws. To embrace nature itself as a source of rules, binding on lawmakers and without human interpretation, tinkers with much more than the law of private property: it alters the entire idea of sovereignty and public power. The natural-use perspective, therefore, needs revision to make it tolerable to the modern democratic mind. Nature's integrity can remain a bedrock value and limit. But humans must control the lawmaking process, interpreting the land scientifically and ethically and translating their conclusions and choices into new ownership norms.

VI. TOWARD A NEW NARRATIVE OF OWNING

The environmental movement has stumbled over the past decade in no small part because of clashes over property rights. As many people see it, laws protecting the environment threaten the core values of private property, and the threat seems to be growing. The story of America has been about economic opportunity, landowner independence, and private property—and environmentalism seems

to threaten them all. It threatens, that is, the entire progressive narrative that has been so central to America's self-image. The Eden narrative of decline was acceptable so long as it remained a minor, dissenting perspective on the American saga. But as a dominant perspective, it is simply too frustrating and misanthropic.

Despite recent Supreme Court decisions like *Nollan* and *Lucas*, the Constitution's protection of private property imposes only minor restraints on the power of governments to reshape property laws. Legally, states have considerable leeway in drafting land-use rules, banning activities deemed harmful and insisting that landowners fulfill newly imposed obligations. In other words, states have the power to adopt any of the four perspectives on private property and shape their property laws accordingly. Over the long run, their choices will be based on public sentiment and political power, which means states and local governments will embrace a more ecologically oriented view of property only when the public asks for it or at least stands willing to support it. Public sentiment, of course, is affected by many factors, including awareness of environmental problems and a willingness to change behaviors to alleviate them. But to many, property by its very nature is linked with freedom, opportunity, and progress, all at the heart of America's self identity; and when the law tinkers with ownership rights, it threatens these core values as well.

A central task in the promotion of land health will be the crafting of a new perspective on land ownership, and, surrounding that, a new perspective on the larger American enterprise. Hardly any conservation task is more important, and work on it has only begun. One environmental narrative of ownership is embedded in the work of the late Edward Abbey, a radical writer whose novels and essays inspired readers to rise up in anger at the land's degradation and to strike back, literally or figuratively, by dumping sugar in the gas-tank of the engine progress.[114] Abbey's narrative has serious flaws and is not likely to play more than a minor role in the promotion of land health. Yet it is instructive, nonetheless, and helps illustrate the task that lies ahead.

Abbey lived most of his adult life in the southwestern American desert. He had no thought that humans could improve his chosen home; people only degraded land, just like the Eden tale of decline described. But if Abbey did not embrace America's vision of endless

114. No full study of Abbey's thought yet exists. His life is recounted in JAMES BISHOP, JR., EPITAPH FOR A DESERT ANARCHIST: THE LIFE AND LEGACY OF EDWARD ABBEY (1994). Much of Abbey's work is considered in ANN RONALD, THE NEW WEST OF EDWARD ABBEY (1982).

progress, he latched on as firmly as anyone to its liberal individualism. Like Richard Epstein, Abbey was a libertarian, a firm believer in unyielding individual rights. And like Epstein, he endorsed a view of property in which the landowner's rights were stable and predictable over time. Where he disagreed with Epstein, parting widely from him in fact, was on the core element of individual liberty. For Abbey, liberty meant foremost the right to head to the wilds and become part of an unspoiled world, rather than any right to build skyscrapers or golf courses. A country was not fit to live in, Abbey proclaimed, "when a man must be afraid to drink freely from his country's rivers and streams."[115] For Abbey, clean water was as much a civil right as free speech.

In his peculiar way, Edward Abbey surpassed the zeal of Epstein and other political libertarians. Epstein's fear was the abuse of power by government; private power, he seemed to say, could be trusted, subject only to minimum restraints on aggression. Abbey, however, was skeptical of any form of concentrated power. To his mind, evolution and sabotage were the proper responses to corporate pollution and timber clear-cutting, as well as to political oppression. Abbey's radical vision translated readily into a vision of private land ownership. Landowners had secure private rights, to be sure, but they could not pollute the water or air, introduce exotic plants, or drive away the native wildlife. Nature set the baseline for ownership norms, just as it did in the natural-use view of property. Humans were part of the land, just like other animals, but they did not form harmonious social communities. Attached to the land, humans were largely detached from one another.

Abbey stood on the fringe of environmental thought because of his misanthropic views of society and his emphatic embrace of the Eden tale of decline. He was the frontiersman who set out, not to open up wild places so that waves of settlers could follow, but to find an isolated spot where he could live unmolested. Abbey's loner needed a full square mile to call his own to provide sufficient privacy and to buffer his impacts on the land. In a congested world, Abbey's vision simply was not realistic, and in his pragmatic moments Abbey knew it.

Clearly, constructing a new environmental narrative will not come easily. The task is daunting, for a new narrative needs to promote land health while at the same time respecting the individual, encouraging enterprise, and allowing for private rights in land. For

---

115. EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 185 (Ballantine ed. 1971).

such a story to succeed, it needs above all to be a tale of progress and hope.

Because environmentalists so often oppose development projects, they commonly assume a negative stance; they block progress as their critics see it, inhibiting hopes and dreams. In the new century, environmentalism needs to take on a more positive face, casting itself as a movement for the resettlement of America, this time in a mature, durable way. Environmentalism, that is, needs to embrace a narrative of progress, a tale in which humans mold the land in healthy ways, meeting their needs through means that are ethically and naturally sound. In addition, a new environmental narrative needs to emphasize the community much more than the traditional story does, not to the exclusion of the individual but as a vital entity that also deserves respect. Land-use rules would be viewed as expressions of community values and expectations, as well as tools that the community uses to promote its goals and defend its well being.

But if a new environmental narrative is going to resonate with modern culture, it also needs to promote private property's privacy and civic aims, which means respecting the dignity and moral integrity of the individual landowner. Land-use laws can evolve, yet they need to change slowly enough so that property owners feel sufficiently secure. Ideally, change should occur so smoothly and continuously that most landowners are not disrupted by it and do not come to fear it.

Edward Abbey's work suggests another way in which an environmental narrative can respect the individual—by pointing out how a healthy land expands options for individuals, protecting them as individuals from unwanted pollution and degradation. Older liberal ideas offer a similar message—individuals gain power when they gather with neighbors in pursuit of collective goals. When a community has power to act, individuals gain new, collective ways to achieve their wants. Land-use rules issued by a community may indeed restrict a landowner's rights, but they also protect landowners, particularly those who depend on clean water, clean air, and abundant wildlife.

If a more environmental view is to prevail, however, certain fears must be addressed. One fear, providing fuel for libertarian ideas, is the fear of being excluded from decision-making processes. Another is the fear that changing laws will disrupt investments, expectations, and opportunities. Laws might become so unsettled and unpredictable that investments are no longer safe. To the excluded outsider, power vested in the community provides a danger, not a new opportunity to achieve collective goals.

The lesson here for environmental policy is plain enough: ordinary landowners and other citizens must be drawn into the processes by which land-use decisions are made. Broad-based participation can diminish fears of exclusion. At the same time, such participation can help landowners become more knowledgeable about environmental problems. And the more knowledgeable people are, the more likely they are to see land-use restrictions as legitimate responses to real problems, rather than as the corruption or dismantling of private rights.

In a more progressive environmental tale along these lines, private property can have an honored role. Property law can serve as an important if not indispensable tool for individuals and communities to use as they promote land health—listening to the land, tailoring their lives to a place, and settling in for the long term.