

# The Destructive Role of Land Use Planning\*

Andrew P. Morriss<sup>†</sup>

Roger E. Meiners<sup>\*\*</sup>

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† Associate Dean for Academic Affairs, Galen J. Roush Professor of Business Law and Regulation and Associate Professor of Economics, Case Western Reserve University and Senior Associate, Political Economy Research Center, Bozeman, Montana; A.B. 1981, Princeton; J.D., M. Pub. Aff. 1984, University of Texas at Austin; Ph.D. (Economics) 1994, Massachusetts Institute of Technology. An earlier, shorter version of this article was published as Roger E. Meiners & Andrew P. Morriss, *Property Rights in a Complex World*, in *LAND USE PLANNING IN THE 21ST CENTURY* (Sam Staley & Randall Holcombe eds. forthcoming). Thanks to Adam Hirschfeld for excellent research assistance and to Cynthia Hill for outstanding (as always) secretarial support. This paper was begun while I was a Visiting Scholar at the Political Economy Research Center and the support of the Earhart Foundation and the Board of Directors of the Political Economy Research Center is gratefully acknowledged.

\*\* Professor of Law and Economics, University of Texas at Arlington, and Senior Associate, Political Economy Research Center, Bozeman, Montana; B.A. 1970, Washington State University; M.A. (Economics) 1972, University of Arizona; Ph.D. (Economics) 1977, Virginia Polytechnic Institute; J.D. 1978, University of Miami.

Over the past century, land use planning by regulatory agencies has increasingly displaced the decentralized process of private landowners making their own decisions about land use. Local governments, county governments, state governments, and, to an increasing extent, the federal government are all requiring private landowners to modify their plans in order for their land to conform to government plans. Increasingly, such plans are justified as necessary to protect the environment, which extends their reach beyond traditional land use concerns like protecting residential neighborhoods from commercial intrusions.<sup>1</sup>

These steps are justified by the need to account for the public interest in preserving endangered species, protecting the environment, coordinating land use in crowded urban centers, preventing urban sprawl, and curbing countless other alleged environmentally destructive ills.<sup>2</sup> Only by imposing planning, so the argument goes, can the land use be rationalized to prevent destructive, self-interested behavior from creating a sterile series of concrete suburbs populated only by strip malls and sidewalk-less neighborhoods. Unfortunately, the increased scope and complexity of planning has reduced the clarity and certainty of property rights in land without necessarily accomplishing its goals. As the traditional rights of landowners become more dependent upon planners' approval, property rights increasingly resemble feudal tenures rather than the traditional common law notions of property rights.

At the same time as planning increases its reach over private land use decisions, the planning model has fallen into disrepute in the economy generally. The experience of the twentieth century suggests that the use of decentralized markets, not central planners, is the superior means of social coordination. Planned economies on the right (Nazi Germany, Fascist Italy) and the left (the former Soviet and

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1. To take just two recent examples from opposite ends of the country: *see, e.g.*, Earl Blumenauer, *Entrepreneurial Environmentalism: A New Approach for The New Millennium*, 29 ENVTL. L. 1, 2 (2000) (praising Oregon's comprehensive land use planning); Patricia E. Salkin, *The Politics of Land Use Reform in New York: Challenges and Opportunities*, 73 ST. JOHN'S L. REV. 1041 (1999) (noting that "New York must, however, recognize and articulate the relationship between sound land-use planning and controls with the environment, economic competitiveness, housing, public infrastructure, and quality of life.").

2. *See* Shelley Ross Saxon, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales and the United States*, 32 URB. LAW. 21, 34-35 (2000) (describing U.S. planning regime's role in environmental regulation); *see also* John M. DeGrove, *Sustainable Communities: The Future Direction for Managing Growth in Florida*, LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION SC10 ALI-ABA 605, 609 (Aug. 14, 1997) (describing Florida Department of Community Affairs regulatory program).

eastern bloc countries, Communist China, North Korea, Cuba) either collapsed or are collapsing.

The obvious question thus presents itself: is land use planning fundamentally different from other forms of central planning? If so, does that difference suggest that land use planning will succeed where other forms of central planning failed? We conclude that land use planning is not fundamentally different from other forms of economic central planning. Further, the working of the market economy, and the long-term success of America's economy, is intertwined in the clear and certain rights and responsibilities generated by the common law of property. The complexity of the modern world does not diminish the need for private property; indeed, it strengthens its imperative. Returning to a feudal conception of property is bad for personal freedom, bad for civil society, and bad for the environment.

The last part of the foregoing bears particular emphasis. Too often, defense of property rights is linked to a rejection of socially laudatory goals. Protecting property rights does not mean acquiescing in the destruction of the environment, the blighting of urban landscapes, or callous disregard for the suffering of others. Property rights, along with markets and the common law, make up an institution that is quite successful at not only allowing but facilitating such goals and has long been recognized as such. For example, historian Richard Pipes notes that "early [Christian] church theoreticians saw property as 'another disciplinary institution intended to check and counteract the vicious disposition of men.'"<sup>3</sup> Our argument here is not that rights should be protected to privilege the few, but that the failure to protect property rights will not only impoverish the many but harm the environment as well. Note also that our argument is not simply that planning has been a tool of brutal totalitarian regimes, but that even a pure democratic system run by benevolent wise persons has deep flaws that prevent it from achieving its stated aims.

In Part I we briefly describe the nature of common law property rights rules. In Part II we examine the corrupted form of property rights, which we label "administrative property," developing today through application of the planning model to land use. In Part III we explore how common law property rights work better than the corrupted modern version for resolving the contemporary problems planning attempts to address.

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3. RICHARD PIPES, PROPERTY AND FREEDOM 16-17 (1999).

## I. PROPERTY RIGHTS IN LAND

Perhaps more than any other branch of the common law, Anglo-American property law grew out of the history of the struggle between English monarchs and aristocracy for control of England. In this section we briefly describe the origins of common law property rights and compare them to the rights created by government fiat.

A. *Common Law Property Rights and Fiat Rights*

The law of real property in the United States traces to the Norman Conquest of England in 1066.<sup>4</sup> William the Conqueror, having seized England by defeating Harold II at Hastings, now faced the problem of holding and exploiting his new realm.<sup>5</sup> The Anglo-Saxon landed class had been defeated, but England was still a conquered and potentially hostile land that required military occupation.<sup>6</sup> William also needed to keep his Norman allies loyal. He solved both problems by claiming the land in the Kingdom as his.<sup>7</sup> He then granted rights to use land to key supporters in exchange for continued military services.<sup>8</sup> It was William's intent that his lords only be tenants and that their land would revert to the crown upon the death of a lord or if military services were not rendered.<sup>9</sup> Landholders would thus be dependent on the King for their wealth and so have an incentive to remain loyal.

The aristocracy had other ideas. Land was their major form of wealth and they wished for their heirs to inherit their lands and for their land to be alienable. Through their legal and political struggles with the monarchy, that eventually became the common practice. Thus, over the centuries, through legal conflicts between lords and monarchs, the law evolved into the common law of property we know today.<sup>10</sup> Persons other than the one who wears the crown can own land.

The components of today's American property law thus originated in legal conflicts between England's aristocracy and

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4. *Id.* at 126-30.

5. *Id.* at 126.

6. *Id.*

7. *See id.*

8. *See* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 3-4 (2d ed. 1986).

9. *See id.* at 3 ("Norman administrators did have a theory of tenure, and applied it universally; all land whatsoever was held of some lord, and ultimately of the Crown."); *see also* PIPES, *supra* note 3, at 106 ("In theory, under the regime of lordship and vassalage, all land belonged to the sovereign and everyone else held it conditionally.")

10. *See* PIPES, *supra* note 3, at 106-07.

monarchs. Covenants and servitudes, easements and profits, the fee simple absolute and the tenancy in common—the basics of property law today—all grew out of the same system that required one lord to hold his majesty’s head while the King vomited during sea voyages and another to perform “a leap, a whistle and a fart *coram domino rege*” each Christmas Day.<sup>11</sup>

How can legal rules devised by such a system be other than archaic and obsolete? Many modern courts and legislatures think the common law rules of property are obsolete. Confronted with seeming “technicalities” in property law, modern judges often argue that the law should not be “constricted by feudal forms of conveyancing.”<sup>12</sup> Throwing off feudal-era shackles rids the law of burdensome technicalities and rationalizes the structure of rules. At the same time, legislatures and regulatory agencies take steps to correct problems caused by individuals’ failure to conform to regulators’ views of how the land should be used. As a result, legislatures impose planning requirements and authorize regulatory burdens to ensure that property owners properly conform their activities to the central plan.<sup>13</sup> William the Conqueror’s vision of property rights as feudal tenures ultimately gave way to a complex and nuanced set of property rules that provided guarantees of personal liberty in place of the dependence on the king that William had sought to create.<sup>14</sup> One key distinction between common law property rights and feudal tenure rights is thus that property rights belong to private parties and are not “held of” a superior.<sup>15</sup>

A second important distinction lies in the negative and positive character of common law and feudal rights. Common law property rights are negative rights; that is, they define the ability to exclude others from participating in decisions about how resources are used.<sup>16</sup> Thus our property rights in our homes allow us to prevent you from moving in with either of us, but say nothing about whether our houses are “adequate” or whether you have to contribute to paying for renovations that will make them so. Feudal tenures (which can be framed as the king’s “right” to have you hold his head while he vomits on sea voyages), on the other hand, had elements of positive

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11. SIMPSON, *supra* note 8, at 6.

12. Willard v. First Church of Christ, Scientist, 498 P.2d 987, 989 (Cal. 1972). *But see* Estate of Thomson v. Wade, 509 N.E.2d 309, 310 (N.Y. 1987) (reaffirming common law rule on grounds of protecting reliance interest of those who acted on the basis of the rule).

13. *See* PIPES, *supra* note 3.

14. *See id.* at 129-30.

15. *See id.*

16. *See id.* at 131-32.

rights. Similarly, many modern rights, such as the right to subsidized medical care, make demands on others. Your right to subsidized health care requires us to contribute to paying your doctors' bills, something that may conflict with our rights to (or ability to acquire) adequate housing. Putting rights in conflict, as is inevitable with positive rights, results in a reduction of the strength of the rights claims. This is true with general claims (the right to subsidized medical care) but is a particular problem for positive rights concerning specific pieces of land, where competing uses cannot be excluded.

A negative property right in land is absolute: the owner may prohibit all the world from making any use of the piece of property in question. A positive right to another's land, by contrast, cannot be absolute. If we have the right to have you maintain a particular habitat for an endangered species and the right is absolute, we no longer hold a right in your land; we own your land. Once a need for a tradeoff is recognized, however, no one's rights in the property are "rights;" they are merely factors to be weighed and considered by an ultimate decision maker.

Property rights differ from positive rights in another important way: property rights are independent of the state.<sup>17</sup> For example, while the Constitution created the framework for government, expressly limited the powers of government, and provided safeguards against invasions of certain rights, the Constitution did not grant us the rights we have as citizens but recognized pre-existing rights.<sup>18</sup> Property rights' independence of centralized government authority, for example, can be seen in the experience of nineteenth century gold miners in the American West.<sup>19</sup> Finding themselves in areas with no government authority, Gold Rush miners, drawn from virtually every corner of the globe, immediately began creating private systems among themselves to allocate and protect property rights. Similarly, Harold Demsetz documented the rise of property rights among eastern

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17. Governments, of course, possess eminent domain powers and so may take property if they compensate the owner. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

18. See JOHN R. UMBECK, *A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH* (1981); Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 *LAND & WATER L. REV.* 581 (1998).

19. See generally UMBECK, *supra* note 18 (describing the evolution of property rights during the California Gold Rush and noting that property rights that were initially solidified through violence and private contractual arrangements were later formalized through legislation); Morriss, *supra* note 18, at 581.

Native American tribes when the fur trade made developing the rights worth the costs.<sup>20</sup> Likewise, Terry Anderson has shown that Native Americans in the west often held property rights as individuals.<sup>21</sup>

Common law property rights also differ in another crucial dimension from “rights” created by government fiat. The common law is an evolutionary process, one which gradually sharpens definitions over time in response to the facts of disputes.<sup>22</sup> Fiat rights, on the other hand, are shaped by the political process and so subject to sharp discontinuities in content.<sup>23</sup> Thus the “right” to welfare benefits, a central part of the “new property” championed by former Yale Law School professor Charles Reich,<sup>24</sup> underwent major changes over the decades following the courts’ acceptance of Reich’s arguments before its demise in the 1990s’ welfare reform.<sup>25</sup>

The dominant metaphor for property rights, a bundle of sticks, suggests a final crucial difference between property rights and fiat rights. As the world changes and generally becomes more complex, people discover new opportunities and problems that require reallocation of existing property rights. By allowing parties to combine and recombine individual sticks from the bundle in response to their evaluation of their needs, property law adapts to the modern world. Indeed, it is its remarkable ability to evolve that has enabled a

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20. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351-53 (1967).

21. TERRY L. ANDERSON, *SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS* (1997).

22. See JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW: AN ADDRESS* 28 (1889) (“[T]he procedure of making or declaring the law of private transactions . . . consists simply in the examination, arrangement, and classification of human actions according to the legal characteristics which they exhibit.”); see also F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 115-22 (1973) (describing the evolutionary nature of law); BRUNO LEONI, *FREEDOM AND THE LAW* 58-94 (1991).

23. Consider, for example, the differences in the content of welfare “rights” before and after the welfare reform of the 1990s. Before the reform, welfare recipients held a protected property interest in their benefits. After the reform, welfare recipients had no such interest. See Melissa K. Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 BERKELEY WOMEN’S L.J. 153, 154 (1998).

24. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733-46 (1964).

25. See, e.g., *Wyman v. James*, 400 U.S. 309, 328 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity’ . . . . We are living in a society where one of the most important forms of property is government largesse which some call the ‘new property.’” (citing Reich)) (Douglas, J., dissenting). Ironically, Justice Douglas also called upon Reich’s article for support of the proposition that protecting government benefits as property and making them dependent on the whims of bureaucrats would make them resemble feudal tenures. See *Thorpe v. Hous. Auth. of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring).

set of legal rules and concepts originating in medieval England to remain useful and relevant almost 1,000 years later.

No one would think of describing a statute as a bundle of sticks, however, and individuals are certainly not allowed to opt in and out of individual statutory provisions. Statutes are commands; commands ultimately backed by the threat of force. Commands are many things but they are not flexible. One command may be displaced by a new command, but following a command (or, at least, a command with content) requires obedience, not flexibility. The difference can be seen clearly by comparing the number of three-hundred-year-old statutes still enforced today with the number of still extant common law rules.

The difference between rigid and flexible principles for property use is one way to characterize the distinction between centralized statutory schemes for regulating land use and the decentralized common law of property and markets. A truly rigid property use scheme would likely impose extremely high costs. Modern land use planning schemes therefore incorporate relief valves to return some flexibility to the system. For the same reason that income taxes are not made “flexible” by allowing individual taxpayers to opt out of, say, the top marginal tax bracket, this flexibility cannot be given directly to land owners. Just as the wealthy would simply choose a lower marginal tax rate, so too would land owners defeat the scheme whenever it threatened their ability to make use of their land.

Instead the flexibility is built into the land use regulatory scheme by providing balancing tests, multifactor tests, and variances.<sup>26</sup> Flexibility comes from blurring the sharp edges of the regulatory rules, not eliminating them. Thus individual property owners can be relieved of specific regulatory burdens, or not, at the discretion of legislators, administrators, and regulators. This blurring, rather than erasure, of the rules produces a corresponding blurring of the land owners’ rights. The result is to eliminate the rights as rights and replace them with tenures; privileges held of the sovereign, rather than of right.

To briefly summarize, we have identified four important differences between common law property rights and rights under land use planning schemes:

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26. See, e.g., RALPH E. BOYER, HERBERT HOVENKAMP, & SHELDON F. KURTZ, *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* 432-33 (4th ed. 1991) (outlining a nonexclusive catalog of varying zoning regulations).



- (1) Common law property rights are negative rights; planning requires positive rights;
- (2) Common law property rights have origins outside the state; planning regimes are creatures of political entities, and the rights they create depend on political conditions;
- (3) Common law property rights are created and defined through an evolutionary process; planning regimes rely on fiat rights defined in a discontinuous political process; and
- (4) Common law property rights can be rearranged by private transactions; fiat rights cannot.

The imposition of a land use planning regime onto a society of property holders has the effect of transforming existing property rights into a status equivalent in many respects to a feudal tenure. Before exploring this further, we will illustrate the point with an example drawn from a recent, all too typical court proceeding.

*B. A Modern Property Rights Saga*

The bundle of sticks held by modern American property owners has been significantly reduced by regulatory statutes of various sorts, particularly during the twentieth century.<sup>27</sup> A property owner in 1900, for example, who held a piece of property in fee simple absolute owned almost any “stick” that could be included in the bundle.<sup>28</sup> The only major restrictions on his actions came from nuisance law and voluntary agreements. Nuisance law restricted property owners’ ability to use their land in ways that interfered with other property owners’ ability to use their own land.<sup>29</sup> This was a binding constraint; common law courts often simply enjoined uses of land found to be a nuisance, putting a halt to the offending landowner’s activities unless he paid off or bought out his neighbors.<sup>30</sup> Landowners could also contract away specific sticks from their bundle through covenants, easements, and servitudes.<sup>31</sup> Such rights were essentially permanently “lost” unless repurchased from their new owners.

Property owners today hold a much smaller bundle of sticks. Zoning and environmental restrictions, in particular, have removed many sticks

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27. See generally Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923 (1999) (giving an overview of traditional common law remedies).

28. *Id.*

29. *Id.*

30. *See id.*

31. *Id.*

from the bundle.<sup>32</sup> Perhaps most importantly, these restrictions are often indeterminate, making it unclear exactly which sticks remain. We call the resulting bundle of sticks, which are smaller and less well-defined than the common law fee simple absolute bundle, “administrative property.” To illustrate, we first recount an example of this new form of feudalism.

In 1973 Lloyd Good purchased property on Lower Sugarloaf Key, Florida, a part of Monroe County.<sup>33</sup> In 1980, Good took steps to develop about ten acres of his property for residential lots on canals that would allow direct boat access.<sup>34</sup> After hiring a firm to begin the process of obtaining permits from various agencies, Good received a permit from the Army Corps in 1983 that would allow some dredging and filling of wetlands.<sup>35</sup> The county government objected to the permit, however, so the construction plans were amended and the Army Corps issued a new permit in 1984.<sup>36</sup> The new permit was to be valid for five years, and subject to further Corps amendments.<sup>37</sup> The Corps insisted Good wait for further review, which resulted in a third permit being issued in 1988, one that further reduced the construction area.<sup>38</sup>

During the eight years that the Army Corps evaluated matters, Monroe County had instituted new restrictions on development to make development “in harmony with natural ecology.”<sup>39</sup> When Good sought a building permit, the County rejected his request, saying it had a moratorium on all major developments.<sup>40</sup> Good appealed to the Monroe County Board of Adjustment and was rejected; his appeal to the Monroe County Commission was successful, however, and Good was issued a dredge and fill permit in 1984.<sup>41</sup> A state agency, the Florida Department of Community Affairs (DCA), then appealed the County’s approval of Good’s permits to another state agency, the Florida Land and Water Adjudicatory Commission (FLAWAC),

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32. Traditional local zoning is being replaced by regional or state-wide land use planning. Oregon, for example, adopted centralized control of all property in the state. *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION* (Carl Abbott et al. eds., 1994). Higher level approaches to zoning have meant the introduction of increasing restrictions on land use.

33. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999); *Good v. United States*, 39 Fed. Cl. 81 (1997).

34. *Good*, 39 Fed. Cl. at 85.

35. *Id.* at 87.

36. *Id.* at 86.

37. *Id.*

38. *Id.* at 87.

39. *Id.*

40. *Id.*

41. *Id.*

which, in 1986, rejected the building plans.<sup>42</sup> In the meantime, the County issued new construction rules that posed new barriers for Good.<sup>43</sup> Good sued FLAWAC in state court. Although the state court held in 1987 that the permit rejection was improper, it nonetheless required Good to comply with the new Monroe County rules that had gone into effect after the improper permit rejection.<sup>44</sup>

Good prepared new development plans, which were filed in 1989.<sup>45</sup> Five months later, the County granted preliminary approval, subject to approval also being granted by a third state agency, the South Florida Water Management District (SFWMD).<sup>46</sup> Good dutifully applied to SFWMD.<sup>47</sup> Six months later, in 1990, the application was rejected.<sup>48</sup> In the meantime, the preliminary approval from the County expired since it had a one-year limit on its validity, thereby requiring Good to begin a new application to the County.<sup>49</sup> Good informed the Army Corps of his problems with state agencies and scaled back his development proposal to the Corps in an application filed in 1990.<sup>50</sup>

During the years Good spent in this regulatory labyrinth, three species that live on Sugarloaf Key were added to the endangered species list: a turtle, a rabbit, and a rat.<sup>51</sup> The listing now obligated the Army Corps and the Fish and Wildlife Service (FWS) to take this wildlife into account in evaluating Good's 1990 permit application.<sup>52</sup> The Corps and the FWS tussled over the matter, the Corps allowing its permit to stand while the FWS recommended it be revoked pending further biological studies.<sup>53</sup> In 1991 the FWS released a new biological study which urged further restrictions on construction.<sup>54</sup> Good responded in 1992 with an opinion by an environmental consultant, who opined that the development would not have an impact on the endangered species.<sup>55</sup>

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42. *Id.* at 88.

43. *Id.* at 87-88.

44. *Id.* at 88.

45. *Id.* at 88-89.

46. *Id.*

47. *Id.* at 89.

48. *Id.*

49. *Id.*

50. *Id.* at 89-90.

51. *Id.* at 89.

52. *See id.*

53. *Id.*

54. *Id.* at 91-92.

55. *Id.* at 93.

In 1994 the Corps denied Good's 1990 application on grounds of habitat loss for endangered species and notified Good that his 1988 permit had expired and would not be reapproved.<sup>56</sup> Good sued the federal government later in 1994, contending it had taken his property for habitat protection.<sup>57</sup> Although in 1995 the FWS issued a report that it would approve scaled back development (eight lots versus the fifty-four originally planned), Good's Army Corps permits had all expired and he proceeded with his suit.<sup>58</sup> The Court of Federal Claims then denied Good's claim because habitat protection did not destroy all economic value.<sup>59</sup> Good appealed to the Court of Appeals for the Federal Circuit, which, in 1999, also held against him.<sup>60</sup>

Twenty-six years after the purchase of the land, and nineteen years after beginning the permit approval process, the appeals court held that Good had no suit for compensation, because he lacked "reasonable, investment-backed expectations" that he would be able to develop his property as he knew environmental regulations were likely to become more stringent in the future.<sup>61</sup> While none of the relevant statutes or regulations blocking his development had been in place when Good bought the property, the Court found that at that time (1973) the Army Corps "had been considering environmental criteria in its permitting decisions."<sup>62</sup> According to the court, Good thus had to know that "rising environmental awareness translated into ever-tightening land use regulations."<sup>63</sup>

No doubt Good was aware that the rules regarding development were ever-tightening, although given that the delays in his development all stemmed from government agencies, it is hard to know what he could have done to speed things up. Nor do we doubt that the decision of the court is correct; the Supreme Court has held that unless a regulation destroys nearly all economic value of land, there is no taking.<sup>64</sup> Hence, the odds of compensation being required when "only" eighty-five percent of the building plans are eliminated is very unlikely. Good's case is not unique; developers can repeat many such stories.

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56. *Id.*

57. *Id.* at 94.

58. *Id.*

59. *Id.* at 96, 114.

60. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

61. *Id.*

62. *Id.* at 1362.

63. *Id.*

64. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

### C. *Administrative Property*

As we described earlier, common law property rights and comprehensive planning schemes differ in significant ways. Planning has not (yet) displaced common law rights entirely. Rather it is overlaid onto the pre-existing common law system. The resulting hybrid has some characteristics of both. We use the term “administrative property” to describe this new mixed form of land-holding becoming more prevalent in the United States today. Administrative property can be distinguished from common law property rights in four ways:

(1) The bundle of sticks is smaller. For example, zoning regulations restrict property uses; environmental regulations prevent destruction or creation of wetlands without multiagency approval; and endangered species regulations prevent harvesting timber.

(2) The rights remaining in the bundle are underdetermined, creating uncertainty about their contours. For example, variances may be granted to zoning requirements,<sup>65</sup> “trades” in wetlands permitted,<sup>66</sup> or agencies may demand dedication of land to public use to gain acceptance of a plan.<sup>67</sup>

(3) Rights removed from the bundle are scattered among multiple claimants, creating the danger of an “anticommons.”<sup>68</sup> Lloyd Good’s rights, for example, were redistributed to an alphabet soup of agencies, each of which had the ability to stop his use of his land but none of which had sole authority to allow the use of the land.

(4) Transaction costs among those holding rights from the common law bundle are increased by the relocation of rights from private hands to entities that must serve multiple stakeholders and comply with expensive procedural due process requirements. For example, development rights questions are determined by local government units that must consider the interests, among others, of taxpayers, contributors, landowners,

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65. Osborne M. Reynolds, Jr., *The “Unique Circumstances” Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127 (1999) (“Variances are the principal administrative device for granting relief to individual property owners from the unnecessary harshness of zoning laws.”).

66. Kurt Stephenson et al., *Toward an Effective Watershed-Based Effluent Allowance Trading System: Identifying the Statutory and Regulatory Barriers to Implementation*, 5 ENVTL. LAW. 775, 779 n.3 (1999) (describing wetlands banking).

67. See *id.* at 779 n.3-780 n.3.

68. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 622, 667-79 (1998).

and neighbors. The transaction costs of contracting around planning dictates, if allowed at all, are thus increased.

Moreover, even these reallocations of property rights from the common law bundle are not fixed. Property owners must know that, as they enter into nearly endless permit procuring processes, the rules could tighten even more. As Lloyd Good discovered, one could well be in a seemingly endless loop of federal and state regulatory agencies offering conflicting rules.<sup>69</sup> The result of these four differences is that the permit givers are the parties who ultimately have the legal ability to determine land use. People like Lloyd Good are therefore in a position similar to that of a feudal serf, allowed to use a piece of a federal-state estate for very limited purposes, with rights that may change at the whim of one of many representatives of the “crowns.”<sup>70</sup>

In a nutshell, the general rule regarding governmental regulation of private property is now that, so long as there is a statutory basis for a regulation, and regulators have jumped through the appropriate procedural hoops in writing and enforcing regulations under the statutory authority granted to them by the federal or state legislature, nearly any control may be imposed on any property. Only if there is near total destruction of the value of the property by a change in regulation need there be compensation under the Takings Clause of the Fifth Amendment.<sup>71</sup> Thus, short of taking title to property or

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69. There is generally no redress for land owners who incur massive bills for lawyers, environmental consultants, permit specialists, and so on, all with no certainty in outcome.

70. The consequences of such administrative control over property can, at the extreme, literally destroy a society. Ireland was long subject to administrative control from London, which destroyed incentives to invest in property. The result was the potato famine, long-term grinding poverty, mass emigration, and environmental destruction. TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* 243-56 (1998). While the economy has recovered as stable and enforceable private property rights have taken hold, the social consequences remain. For another survey of the consequences of uncertain private property rights, see PIPES, *supra* note 3. The arbitrary nature of the government is not simply the result of a flawed institutional design. The dynamic created by administrative property requires that enforcement contain an element of arbitrary power. Actions against property owners must draw substantial attention. Property-holding serfs must be on notice that if they do not jump through all hoops required by various emissaries of the crown, which may change at any time, it may be off to the gaols. Jail is a real possibility. See *United States v. Mills*, CR 88-03100-WEA (N.D. Fla. 1988), *aff'd*, 904 F.2d 713 (11th Cir. 1990). Cross the line, fixed or not, and the value of your property may be destroyed.

71. The most noteworthy case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There, a reclassification of beachfront property formerly zoned residential construction was changed to beach preservation, thereby prohibiting construction. *Id.* at 1006-07. The Supreme Court held that the State of South Carolina had the right to change the classification of the property but, by doing so, knew it was taking the value of the property and so had to provide compensation for the loss Lucas suffered. *Id.* at 1027. With the exception of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), all Supreme Court taking cases in recent decades have dealt with instances of near total destruction of property. In *Dolan*, where there was only a partial taking of

destroying its economic value, agencies may, under a variety of statutes, destroy most of the value of property or effectively force it to be used for purposes favored by the agencies.

The threat of such regulatory action is enough to force many landowners to “cooperate” in an effort to salvage some of their property.<sup>72</sup> Planners have discovered this and are enjoying great success in persuading property owners to “donate” bike paths and development rights in return for permit approval.<sup>73</sup> Such a course of action destroys the essential element of property rights, converting them from a decentralized mechanism built around negative rights to a centralized, fiat right.

But this is precisely the point, according to regulators. It is because planners are able to consider the interests of multiple stakeholders, balancing competing interests, that they are able to transcend purely private interests and optimize property usage. If planners could be relied upon to “get it right” this might not be as catastrophic as it is. The nature of planning, however, means that such an approach is doomed to failure. In the next section we address the issue of how politics affects administrative property.

## II. THE DEMANDS OF PLANNING

Because governments are political entities, it is necessary to consider the role that politics plays in influencing land use planning decisions. Administrative property is created by subtracting some rights from the common law fee simple absolute bundle and transferring those rights to government entities. Implementation of planning is accomplished by the exercise of those rights through the legislative and regulatory process. Even in the best case, with benevolent and efficient political bodies and bureaucrats handling the planning process, there will be significant information-related problems that need to be addressed.

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about one-seventh of Florence Dolan’s property in exchange for a building permit, the Court found a compensable taking by a 5-4 vote, but appeared to qualify this by focusing on poor procedure on the part of the city. Certainly the courts since *Dolan* have not expanded the notion of takings to cover partial property destruction by regulatory fiat.

72. See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (describing attempted exactions by state regulatory agency in exchange for building permits); Lars Noah, *Administrative Arm Twisting in the Shadow of Congressional Delegation of Authority*, 1997 WIS. L. REV. 873, 901-03 (1997) (noting that “exactions appear to remain an attractive regulatory device for local land use officials and cash-strapped municipalities”).

73. See Craig Anthony Arnold, *Land Use Regulation and Environmental Justice*, 30 ENVTL. L. REP. 10,395, 10,406 (June 2000) (describing “exactions” that can be obtained from developers in return for approvals).

In the real world, political pressure can also be expected to play a major role in the structure of statutes that affect property values. Special interests seek to enhance the value of their property by providing special benefits to it, by imposing restrictions on competitors' property that make it less desirable, or by simply seeking to avoid bearing costs that are threatened by new rules; for example, by being grandfathered in so the new rules do not impinge on what exists. The special interest nature of the statutory process cannot be avoided, so those who seek to impose controls on property for scientific planning purposes have a massive hurdle to overcome, as they must convince legislators to ignore the interests that are a part of the legislative process. This is, we believe, a utopian dream, but it poses a serious problem that advocates of governmental scientific property planning must address.

Given the general failure of central planning for economies, land use planners must also offer one or both of the following arguments to justify applying central planning to land use. First, they may argue that using planning for a relatively small section of the economy will not have the disastrous consequences of applying it to the entire economy or that, even if such consequences exist, the costs imposed by such planning will at least be exceeded by its benefits.<sup>74</sup> Second, they may argue that public planning for protection of the environment differs from public planning for the production of bread in some fashion that allows planning to perform better with respect to the environment than it does with respect to bread. Note that it is not sufficient merely to argue that market failures with respect to the environment are more severe than those that may exist with respect to bread. It is the relative performance of institutions that matters, not the absolute performance of one possible institution. In light of the century's disastrous experience with central planning, we suggest that the burden of persuasion must be against planning and in favor of markets.

However, let us turn to examining the possible justifications for environmental (and other) land use related problems that can be thought of as arising from various combinations of the following types of "market failure":

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74. For justification of land use planning, see GEORGE B. DANTZIG & THOMAS L. SAATY, *COMPACT CITY: A PLAN FOR A LIVABLE URBAN ENVIRONMENT* (1973); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997); Bruce Katz & Jennifer Bradley, *Divided We Sprawl*, ATLANTIC MONTHLY, Dec. 1999, at 26. Dantzig and Saaty, like many planners, advocate "total-system models" to control city life. See DANTZIG & SAATY, *supra*, at 109-85. They conclude that such planning will provide "a richer quality of life." *Id.* at 224.



- complexity;
- ignorance;
- externalities;
- public goods; and
- failure to capture preferences.

Planning would thus be justified if one or more of these market failures could be solved at an acceptable cost in the land use context. In this Part we compare administrative and common law property rights with respect to each of these market failures.

#### A. Complexity

Complexity prevents market solutions, planners argue, because individuals are unable to understand the impacts of their actions. People moving to “large-lot” suburbs, for example, set off a chain reaction that decimates inner cities, increases pollution, destroys farmland, and causes a host of other problems.<sup>75</sup> Planning, many claim, can do a better job.<sup>76</sup>

Before analyzing this claim, let us rephrase it so that we can be clear about its implications. Those who decry “urban sprawl” are, at base, asserting that private parties, left to their own devices, dealing in real property with each other by contract under traditional property law, cannot produce an “acceptable” ordering of people in their physical locations.<sup>77</sup> People will choose “inappropriate” locations that

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75. See, e.g., William M. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 59 (1999) (“Urban sprawl causes many direct and indirect societal and environmental harms. . . . Urban sprawl also threatens biodiversity and contributes to transportation-caused air pollution and the deterioration of river water quality as development destroys green areas, displaces agricultural uses, creates impervious surfaces and adds to river discharges. . . . Abandonment of the urban core, which is both a cause and effect of sprawl, increases disparities in wealth, housing, environmental, and business conditions.”); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 *U. PA. L. REV.* 873, 874 (2000) (“[U]rban sprawl threatens so much: quality of life (particularly in our poorest neighborhoods), prime farmland, the environment, our historic and cultural heritage, and our sense of community.”).

76. See, e.g., James Poradek, Comment, *Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws*, 81 *MINN. L. REV.* 1343, 1350 (1997) (“By integrating land-use control with other issues of governance, comprehensive planning provides an efficient and legal method for municipalities to coordinate their needs and resources.”).

77. Note that a different argument is also possible and frequently made: current government policies (taxes, regulations, spending) may be providing an incentive to engage in environmentally damaging behavior. For example, subsidies to highway construction may be promoting sprawl. Removing those distortions can eliminate the problem. This is different, however, from creating new incentives in the opposite direction.

are inefficient and ecologically destructive.<sup>78</sup> Because of this alleged market failure, government planners at one or more levels must be trusted, with appropriate citizen input, to force people, in their homes and businesses, to favor certain locations and building designs over locations and designs they might otherwise prefer. This is accomplished by taxes, subsidies, and regulations that encourage or require people to locate in certain places chosen by regulators or forbid certain uses of property.<sup>79</sup>

Zoning and building regulations have long done some of this, but those who believe urban sprawl should be prevented argue there must be more than traditional building controls; more comprehensive planning of land utilization is necessary.<sup>80</sup> Without considering the inevitable role of politics in such planning; presuming that planners can do their jobs without special interest intervention; we contend that the planner, no matter how well intentioned, how well informed, or how intelligent, cannot do a better job than people will without such direction. Why?

Complex problems require two commodities in short supply: information and understanding. To improve on the decentralized behavior of individuals, land use planners must understand the problem sufficiently to design a solution, understand human behavior sufficiently to implement the solution through a minimally intrusive incentive structure, and understand the relationships in the rest of society, particularly in the economy, well enough to ensure that there are not unintended consequences.

Planning solutions address these information demands quite differently than do markets. Planning requires that identifiable individuals accumulate the necessary information and make decisions based on that information that affect people today and tomorrow. To

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78. See, e.g., Charles B. Ferguson, Jr., *Hamlets: Expanding the Fair Share Doctrine Under Strict Home Rule Constitutions*, 49 EMORY L.J. 255, 264-65 (2000) (attributing inefficient commuting to urban sprawl and lack of mass transit).

79. See, e.g., EPA, *Livable Communities Initiative—Better America Bonds*, at <http://www.epa.gov/bonds> (last updated Mar. 16, 2000); see also Karen M. White, "Extra" Tax Benefits for Conservation Easements: A Response to Urban Sprawl, 18 VA. ENVTL. L.J. 103 (1999) (advocating using tax code to promote conservation easements).

80. See generally PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1994) (defining "the new urbanism" as land use planning that incorporates diversity, public space, and a structure conducive to pedestrian traffic and advocating through case studies for such planning in the development of new sub-urban communities and the redevelopment of existing urban centers); Reid Ewing, *Is Los Angeles Style Sprawl Desirable?*, 63 J. AM. PLAN. ASS'N 107, 118 (1997) (arguing that the solution to sprawl is active planning which should be supplemented by policies that offer incentives for "good" development and disincentives for "bad" development).

decide whether the character of land use in a particular area should change from residential to industrial, for example, a planner must know what the alternative costs of housing are for the current residents, the alternative costs of industrial property, how strongly the residents feel about maintaining their current homes and neighborhood, the impact on surrounding neighborhoods, and more. The decision makers must then be sufficiently insulated from political pressure and personal gain (e.g., exploiting their knowledge that a decision is pending or accepting bribes) to ensure an objective decision. They must be educated in the appropriate decision-making techniques, told what factors can be considered, and so forth.

Markets and private property, on the other hand, rely on price signals to give individuals the information necessary to make decisions on a decentralized basis. Thus a property owner need not know why his property has risen in price; he needs to know only that someone is willing to offer him a price he is willing to accept to purchase his property and devote it to an alternative use.

The complexity market failure that can justify planning is that this price signal is insufficient because it fails to contain information that the planner would consider relevant. For example, an individual may not appreciate the significance of the wetland on his property to migratory birds and so fill it in for another use.<sup>81</sup> Solving this information problem does not require removing the decision from the marketplace, however. It requires only that entities enter the market place with resources and seek to purchase the necessary rights to preserve the critical wetland. Under those conditions the price signals will reflect the demand for wetlands.<sup>82</sup> Note also that the entire bundle of rights need not be purchased, only the rights necessary to accomplish the purpose at hand. Complexity is thus a reason to prefer decentralized markets and common law property rights to planning and administrative property, rather than the reverse.

### *B. Ignorance*

Private right holders lack knowledge of all impacts of their decisions. This ignorance can be solved, it is asserted, by requiring

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81. See, e.g., *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993) (the EPA prosecuted subdivision home builder for filling a one acre, bowl-shaped depression that “ponded” during wet weather); see also Elaine Bueschen, Comment, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931 (1997) (describing controversy over the EPA’s assertion that such isolated wetlands were covered by the Clean Water Act).

82. Of course, not all wetlands will be preserved under such a system, but not all wetlands are preserved under regulatory systems either.

the expert advice of planners—advice that must be made mandatory if it is to be uniformly implemented. Planners are certainly better able than hundreds or thousands of private property owners to consult with experts about many environmental features that could influence land use. Do the economies of scale with respect to learning about general scientific principles justify substituting planning for markets? No.

The ignorance critique misses the crucial insight offered by economics into how markets process information. One major advantage of markets over planning is that markets are able to process knowledge through a decentralized mechanism. A property rights holder need not know all that an expert knows about the environmental features of her land; all that matters is that someone is aware that learning about a particular type of feature could lead to a profit-making opportunity. Such opportunities will draw entrepreneurs, who will seek to exploit the property owner's ignorance.<sup>83</sup>

The ignorance story also fails to take into account the importance of local as well as general knowledge. An environmental science Ph.D. may well know more than suburbanite Smith about wetlands ecology, but Smith, and his children who play on his property, know much more about the specific parts of Smith's property than the Ph.D. does. Planning substitutes general knowledge for local knowledge, trading general ignorance for local ignorance. Educating a thousand Smiths about the importance of wetlands can be done with a single book or video, while educating scientists about local conditions on a thousand plots requires a thousand studies, making the transaction costs of overcoming local ignorance much higher than the transactions costs of overcoming general ignorance.

### C. Externalities

The externality market failure claim is among the most common.<sup>84</sup> The market fails to capture some effect of consumption or

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83. The ignorance need not be ignorance about commercial value. It may be ignorance about environmental amenities that others value, such as habitat for salmon, a rare plant, or the dung beetle. By contracting for some or all rights in the property, those who value particular environmental amenities may obtain them. For numerous examples, see TERRY L. ANDERSON & DONALD R. LEAL, *ENVIRO-CAPITALISTS: DOING GOOD WHILE DOING WELL* (1997).

84. Almost all economic textbooks assert that pollution is the major form of externality and that externality is the major form of market failure. See, e.g., ROBERT B. EKELUND & ROBERT TOLLISON, *ECONOMICS* 429 (5th ed. 1997) ("Market failure can occur on a global level. Pollution in many forms is a particularly ugly side effect of 'progress.'"); CAMPBELL R. MCCONNELL & STANLEY R. BRUE, *MICROECONOMICS* 325 (13th ed. 1996) ("Pollution [is] the most acute negative externality facing industrial society . . ."); JOSEPH STIGLITZ, *ECONOMICS* 507 (2d ed. 1997) ("One of government's major economic roles is to correct the inefficiencies resulting from externalities.

production of a good; as a result private and social marginal costs and benefits diverge. The market-clearing price, where private marginal cost equals private marginal benefit, is thus inefficient.

Of course such things exist. The examples range from the trivial (we plant too few flowers in our gardens because we cannot charge our neighbors to look at them) to the catastrophic (we burn too much fossil fuel because we do not suffer when global warming raises the sea level and Pacific Island nations shrink or vanish). The range and breadth of externalities apparent to even undergraduate students in an introductory economics class should immediately make us suspicious, because the theory proves too much.<sup>85</sup>

The missing piece of the externality story is a solution to the problem which planners can implement. The textbook solution, impose an optimal tax or subsidy, is riven with impossibly difficult knowledge problems.<sup>86</sup> Political reality aside, we argue that no such solution exists because planners cannot adequately determine values to substitute for market prices. To see why, consider how markets generate prices.

Valuation of things, whether it be habitat preservation or home construction, does not require direct or conscious valuation (pricing) by all persons who benefit from such goods. The incentive structure we call the market weaves uncountable decentralized individual exchange relationships into an extensive web. Explicit valuations only occur at the many events when an actual voluntary exchange occurs. The results of these many revealed valuations are communicated through what we know as the market, across time and space, as signals to other market participants about what is most desired. These signals serve as inputs into the decisions made by

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Among the many types of negative externalities, perhaps the most conspicuous are those that harm the environment.”).

85. It also proves too little. As far back as 1956, economists showed that, in the presence of multiple externalities, one cannot know whether “solving” one will improve allocative efficiency, even within the confines of neoclassical economic theory. See R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11-12 (1956); Andrew P. Morriss, *Implications of Second Best Theory for Administrative and Regulatory Law: A Case Study of Public Utility Regulation*, 73 CHI.-KENT L. REV. 135 (1998) (tracing the history of second best theory).

86. All environmental economics textbooks have taught about the advantages of pollution taxes for at least thirty years. See, e.g., EBAN GOODSTEIN, *ECONOMICS AND THE ENVIRONMENT* 272-76 (1995). Congress is certainly aware of its power to tax, but political reality dictates command-and-control regulations, not taxes, are preferred by legislators responding to special interests. See James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Control Versus Taxes*, 65 AM. ECON. REV. 139 (1975).

current and potential market participants who may know nothing about the details of particular transactions or the parties involved.

Market values are the unintended and undesigned results of decentralized market activities that reflect the preferences and wealth of the persons involved. Market participants confront prices of goods and services which they are potentially interested in offering or buying. When a person values a good, he does not determine the market price of a good. Instead, as a supplier or a buyer, a person chooses how much he will sell or buy, if any, given what others have determined they are willing to sell or buy. Hence, determination of market values is not in any one party's hands and is typically spread over such a large number of persons that no one person has more than a trivial effect on market values.

So while each person at each exchange intentionally chooses the offer or acceptance price, in light of knowledge transmitted from other market participants, it is not correct to say that market values are consciously chosen. Consumers do not individually determine market outcomes; those are the result of uncoordinated individual determinations. Economic valuation is possible because no one person or committee is responsible for determining the market value of any good or service on the market.

If economic efficiency required consumers to value not only their homes but all inputs that go into their homes, it would be impossible for consumers to compute economically meaningful values for these items. No consumer could know enough to value all the inputs that go into the production of a single home. All each consumer knows, and reveals by action, is how much he values a particular home relative to all other choices that might have been made.

Consumers rely upon suppliers because of the tremendous wealth-creating advantages of the division of labor and specialization so well explained by Adam Smith two centuries ago.<sup>87</sup> While these advantages are well understood, less appreciated is Nobel economics laureate Friedrich Hayek's point about the division of knowledge.<sup>88</sup> The competitive market process relies upon individual valuations, many of which are done by specialists who focus on a part of the market, such as home construction or habitat preservation. Each valuation specialist enjoys access to "knowledge of the particular

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87. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS* bk.1, chs. 1-2 (1776).

88. See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945), reprinted in FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 77-91 (1948).

circumstances of time and place” as they learn about the values that others in the market possess.<sup>89</sup>

What economists call market prices cannot be derived by a process other than by participation in a decentralized and competitive market. Values or prices arrived at by any other means are not comparable to the prices and values generated by persons interacting freely. Most advocates of urban planning probably do not deny that private provision of homes is efficient; there seem to be few advocates of government production of housing. The concern usually expressed is that the market will not provide enough environmental amenities such as green space because the market does not know how to provide such amenities, and that, in any event, less green space will be available because of the large number of people who appear to prefer to have their home on a parcel of private real estate that consumes more space than some planning advocates would prefer. Numerous arguments to this effect have been made to justify public provision of green space. In essence they all boil down to a claim that the market (i.e., people in the market) does not properly value the existence of environmental amenities.<sup>90</sup>

As we have seen, however, neither do planners. We are thus left with a choice between “flawed” market prices and arbitrarily determined nonmarket prices. There is no reason to systematically prefer nonmarket signals to market signals (prices), since nonmarket prices have more flaws and inflict costs on everyone subject to the rule, rather than only the private participants paying for the consequences of their imperfect decisions.

#### D. *Failure to Capture Preferences*

When not supposing that markets fail because private rights holders are ignorant or face costs and benefits that differ systematically from society’s, planning advocates often argue that environmental preferences are not given “room” in the marketplace.<sup>91</sup> People want green space, habitat protection, and so on. After all, they vote for people who promise to get these things for them from the political process. They just are not able to purchase such things in the marketplace. Planning is therefore necessary to ensure that the

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89. *Id.* at 84.

90. See Donald J. Boudreaux et al., *Talk Is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765, 780-82 (1999).

91. See DAVID RUSK, *INSIDE GAME OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* (1999).

demands not met by the market are provided instead by the political process.

Unfortunately, once again planning falls short. How do we know if there is enough green space, territory for habitat protection, or some other environmental goal? Unless we are willing to cede the decision to an autocrat, it comes down to popular preferences. The problem, then, is how to determine those preferences.

Markets operate by revealed preference; your actions in the marketplace reveal your preferences through your purchases. If people are offered small, efficient, low emission electric cars and large, gas-guzzling sport utility vehicles, we can tell by what they purchase which package of transportation services and environmental protection they prefer. Similarly, if people have a choice between high density urban housing and large-lot homes in the suburbs, the relative prices of the two types of housing will reflect the relative demand.

Planners, if they are to correct market signals, must by definition rely on nonmarket signals. How much are people willing to pay for such amenities? Polls indicate that a large majority of people would like to see more environmental amenities. These polls may be accurate, but still not reflect real values.<sup>92</sup> Quality of governmental protection of resources aside, let us focus on the question of whether public provision of environmental amenities is justified because citizens assert in opinion polls that there should be more green space and whether the private sector cannot provide something that is, in fact, valued.<sup>93</sup>

Preferences expressed by polling have little to do with true valuation.<sup>94</sup> Suppose a large number of people truthfully assert that they would be willing to devote some small sum to assist in the preservation of the Florida panther. Respondents to such questions answer based on the assumption that the panther is the only environmental amenity they will be asked to pay for, which is very different than when people have to calculate simultaneously (and

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92. Of course, advocates assert that such polls are strong evidence that people would like more environmental amenities, and since the market does not generate it, such amenities should be provided through collective action at some level of government. President Clinton recently ordered the creation of several new national monuments, expressing the belief that this is a necessary role for government to play in order to protect environmental assets for future generations.

93. It may be worth remembering, when citing poll numbers, that many citizens claim they would support governmental control of the press. Distaste for the First Amendment does not mean that censorship should be imposed because many people think the free press distasteful.

94. See Boudreaux et al., *supra* note 90.



know they must actually pay for) the values they place on all other possible environmental amenities, such as green space, national monuments, manatee habitat, tree frogs in Costa Rica, and thousands of other possibilities. To have more accurate information about personal valuation of environmental amenities, respondents must simultaneously evaluate all relevant amenities, so they could calculate how much they would be willing to pay for panther habitat, knowing that they also wish to donate their personal resources to a multitude of desired environmental goods. Further, such a schedule of values must also include how much each person will spend on housing, taxes, food, clothing, transportation, and other existing and future goods and services already under consideration. This is a terribly complex calculation, yet it is one we all make every day as we allocate our resources to multiple purposes.

Valuing environmental amenities is no more difficult than valuing green beans, movies, or church activities to which we choose, or choose not, to devote resources. Those who happen to have strong preferences for certain environmental amenities simply do not like the fact that other people choose not to devote as much of their resources to their favored amenity as they would like. But this is no different than some other person's distress at the "failure" of the market to provide a Somalian-food restaurant near where they live. The fact that many people do not share our desire for particular goods or public policies does not mean there is market failure or government failure.

Not only are market valuations the result of uncountable numbers of valuations of participants, but values are constantly changing so that a snapshot of values today is not reflective of values tomorrow. The essence of market activity is found in its entrepreneurial dynamics and creativity. Prices change constantly to reflect changed facts, values, and new opportunities. Unless resource owners are allowed to react to changing values, market results will not reflect the desires of market participants. If market reflection of personal valuations is restricted, the allocation of resources grows further and further out of kilter and individual freedom is reduced.

#### *E. Public Goods*

Another market failure story is built around the claim that environmental goods are "public goods" and so underprovided by the marketplace. Public goods are "[j]ointly consumed goods that are not diminished when one person enjoys their consumption. When

consumed by one person, they are also made available to others. National defense, flood control dams, and scientific theories are all public goods.”<sup>95</sup>

Public provision of certain services, such as national defense, has long been assumed necessary because there is no other way to be protected from invaders. The military may be an inefficient provider of national defense, so the argument goes, but Microsoft and General Motors are not going to produce national defense because people will not volunteer to pay for enough defense. People (usually “other” people) must be compelled to pay for national defense or we will not have enough and may suffer a catastrophe. The same justification may be posed for public provision of environmental amenities. The government may be a bumbler in the production and provision of services, but it is the only acceptable alternative; the other alternative would be very few environmental amenities and little environmental protection.<sup>96</sup>

Land use planning proponents often assert that environmental amenities such as green spaces are public goods; that is, goods that the private sector will “under produce” because buyers cannot capture the value of their expenditures and because people will free ride on purchases made by others rather than pay for the good. Assertions that there is an under provision of environmental amenities are value judgments, however. These judgments may be based on expert evaluations, but they are still subjective assertions about how other people should be forced to dedicate their resources via the public sector.

We now know that scare stories about the USSR led to what can be criticized as wasteful spending on the military for several decades.<sup>97</sup> Military leaders had strong incentives to overstate the Russian threat. Larger budgets are preferred by heads of bureaucracies such as the military. That aside, they would prefer overinvestment so that, in the event of a conflict, under the precautionary principle, they could not be blamed for underestimating the enemy. Citizens are in a difficult position. Unlike private providers, who compete with each other to sell us their goods or services, thereby allowing us the benefit of multiple sources of

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95. JAMES D. GWARTNEY ET AL., *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 130 (9th ed. 2000).

96. It assuredly is a bumbler. *See, e.g.*, CHARLES WOLF JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 36-99 (1988); David G. Davies, *The Efficiency of Public Versus Private Firms: The Case of Australia's Two Airlines*, 14 *J.L. & ECON.* 149 (1971).

97. *See* BRIAN J. FINEGAN, *THE FEDERAL SUBSIDY BEAST* 83-117 (2000).

information, governments are often monopoly providers. Not only is the United States military the only supplier of national defense to United States citizens, it has, via Congress, the power to force us to buy certain levels of military provisions. Even if we are sure we have all the military we need, we cannot refuse the order of Congress to pay for even more.

Planners who order the provision of environmental amenities, such as green spaces, are not unlike military leaders. They will assert there is not enough of the service they favor and that there are critical reasons, environmental in this case, why we must allow ourselves to be taxed or regulated more to pay for more public provision of such goods. While there can be critics of such propositions, once the legislature and its planning agents have spoken, all will pay, like it or not. Public agencies pleading for more resources for environmental amenities are no different than the Postal Service or highway department or any other public monopoly provider with the power, via the legislature, to coerce.

Suspicion of motives of public sector providers aside, is it true that without public provision there will not be environmental protection, such as green space preservation? The evidence does not indicate that environmental amenities will be neglected. Around the world there are for-profit and private nonprofit programs that provide huge amounts of land to protect species and other resources that humans believe are worth protecting.<sup>98</sup> People specifically dedicate billions of dollars worth of resources each year to what we call environmental protection.<sup>99</sup> Just as official measures of gross domestic product (GDP) fail to include the value of housework, yard work, and time devoted to charitable activities, measures of formal environmental activities do not value environmental protection provided by millions of property owners. That is, ordinary home owners have strong incentives to enhance their property and its environment, and protect it against depreciation, because prospective property buyers value such amenities and because people simply like to devote resources to such activities. Public planners do not need to instruct property owners to protect their own environments. Simply identifying a potential failure is thus an inadequate justification for

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98. See, e.g., ANDERSON & LEAL, *supra* note 83.

99. For numerous examples that cover a wide spectrum of activity, see Terry Anderson, *Viewing Wildlife Through Coarse-Colored Glasses*, in *WHO OWNS THE ENVIRONMENT?* 259-60 (Peter J. Hill & Roger E. Meiners eds., 1998) (discussing habitat cultivation and protection areas covering up to hundreds of thousands of acres in the United States and southern Africa that private parties and tribes have pieced together).

land use planning in the absence of a credible analysis of what nonmarket information is available to correct the market signals.

### III. THE CASE FOR COMMON LAW-BASED ENVIRONMENT PROTECTION AND LAND USE DETERMINATION

If we are correct, then planning has some serious disadvantages for land use issues. If it is the only alternative, however, we might still be forced to rely upon it. What is the alternative offered by the common law and markets? In this section we examine that alternative.

#### A. *Common Law Property Rights Tools*

The preceding section suggests that the standard justifications for land use planning confront difficulties not generally acknowledged in the planning literature. Planning does, however, offer one significant feature that is not present in the common law-market regime: planners can implement their preferred solutions relatively cheaply because of their ability to take advantage of the coercive power of government. Administrative property may be costly to property owners, but it is cheap for planners. Does the common law of property and markets offer any alternatives to coercive power for solving problems? Yes.

The existing legal system, based on traditional property law, does not restrict people from devoting resources to the provision of environmental amenities. At law, there is no limit to the kind of arrangements that people may devise to protect and enhance property, in any quantity, so long as there is no violation of public policy or of the rights of other property holders. Conservation easements and covenants, and other legal devices, most of which have existed for centuries, are used to ensure environmental protection.<sup>100</sup> The lack of legal barriers, which allows people to effect their desires to protect property for habitat or other purposes, means the market for environmental protection operates quite freely and is subject to strong legal protection.

Thousands of land conservation easements have been formally established to prevent property from being developed or to limit its use so that the habitat of certain species will be protected. Numerous foundations, such as the Nature Conservancy, assist in such matters, although many of these foundations have become purchasing agents

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100. See, e.g., Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 442-43 (1984).

for the federal government and do not keep the property in private hands.<sup>101</sup> Besides such well-known foundations, there are hundreds of local groups and thousands of private persons who have established land trusts without formal coordination. The notion that all private land is being plowed up for cookie-cutter housing development simply does not square with what is happening and has been happening for many years.<sup>102</sup>

Moreover, the experience of private environmental protection efforts underscores the importance of the evolutionary nature of common law property rights. By creatively identifying only those aspects of property that are necessary to accomplish their environmental protection goals, private groups are able to reduce the cost of acquiring the necessary protection. In other words, by carefully selecting the sticks from the bundle which they wish to purchase, private conservation organizations and individuals can lower the price of environmental protection while simultaneously allowing the landowners to make economic use of the remaining “sticks” in the bundle. Private entities acting in the marketplace have a powerful incentive to so economize because it enables them to use their scarce resources to acquire “sticks” from other bundles as well.<sup>103</sup>

Compare this to the incentives for a government agency. Unless it purchases land outright or totally destroys the land’s economic value, the agency pays nothing for the sticks it removes from the landowners’ bundles. Indeed, the only real constraint on planners in such a situation is that they avoid depleting their political capital by issuing too many unpopular regulations. Given the natural ignorance of most voters about the content of statutes and administrative regulations, this is a loose constraint indeed. Planners thus have little incentive to narrowly tailor their regulations.

Planners can easily generate support for many restrictions on land use because reductions in the supply of land available for development drives up the value of existing developed property, providing a boon to many existing owners of developed property. The costs are borne by a smaller number of property owners who face

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101. *Id.*

102. See Robert Bruegmann, *The American City: Urban Aberration or Glimpse of the Future?*, in PREPARING FOR THE URBAN FUTURE: GLOBAL PRESSURES AND LOCAL FORCES 336, 345-50 (Michael Cohen et al. eds., 1996).

103. See Louis De Alessi, *Private Property Rights as the Basis for Free Market Environmentalism*, in WHO OWNS THE ENVIRONMENT? 30 (Peter J. Hill & Roger E. Meinert eds., 1998).

development restrictions and by newcomers to the area searching for housing. The poor tend to bear the burden disproportionately.<sup>104</sup>

Traditional common law also provides strong protection for property rights threatened by the actions of others. In recent decades, popular discussion about matters that affect the environment, including urban sprawl, has unfortunately come to center on public policy. The common law is still there, however, and it is the most relevant law for allowing people to construct the environment in which they prefer to live. It offers strong protection against damages inflicted on that environment by others.

Nuisance law provides the backbone of common law environmental protection. It is a common sense notion that holds it to be an actionable violation of the law for one party to invade another's interest in the use and enjoyment of land.<sup>105</sup> Such interferences must be substantial and unreasonable or sufficiently noxious to give rise to such an action, so that every trifle that bothers us does not rise to the level of an action at law. When there is an actionable nuisance, there may be damages to compensate for loss of use of the land, or loss of enjoyment of the land, as well as injuries to one's health or loss of family member services. They are, as Justice Sutherland said in a famous bit of dictum, "a right thing in the wrong place, like a pig in the parlor instead of the barnyard."<sup>106</sup>

While most nuisance actions are brought by private parties seeking to protect their property, public attorneys may also bring nuisance actions on behalf of a large class of persons similarly affected by a public nuisance.<sup>107</sup> Private land is also protected by actions against trespassers, which includes a broad array of offenses that invade one's property without permission. Juries hearing nuisance and trespass cases tend to be harsh against invaders of private property; each year some of the largest tort judgments in the nation are against invaders of private property.<sup>108</sup> The point of this

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104. See, e.g., Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 121 (1970) ("In general, a tenant will be better off in [unzoned] Houston than he would be in a zoned community. The availability of a great many building sites and the high density permitted has probably resulted in a greater supply of every kind of rental accommodation, and a lower cost.").

105. Roger Meiners & Bruce Yandle, *Common Law and the Concept of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926-35 (1999). Nuisance cases go back at least four centuries. A court in 1611 held the odor from a pig farm to be a nuisance and provided the common maxim: "One should use his property in such a way as not to injure that of another." *Aldred's Case*, 77 Eng. Rep. 816, 817 (K.B. 1611).

106. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

107. BOYER, HOVENKAMP, & KURTZ, *supra* note 26, at 404-05.

108. See, e.g., Margaret Cronin Fisk, *Overall Awards Shrink But New Trends Emerge*, NAT'L L.J., Feb. 23, 1998, at C2-3 (describing \$3.6 billion New Orleans jury award for a

short discussion is that owners of private property have strong protection available for their interests. That does not mean there will not be catastrophes or invasions of interests, but there is a strong standard of protection available which encourages people to invest in land and its protection.

Private property rights and common law thus provide the means to create voluntary transactions to protect environmental and other values and the means to protect property rights against harm caused by others. Because these means depend on the voluntary actions of individuals, however, they will not solve every land use problem. Some potential plaintiffs will decide to live with damage to their rights because the cost of individual or collective action is too great or because they opt to free ride on the efforts of others. Some environmental goods will not find a space in the market because the cost of producing them is too costly or because there is insufficient demand for them. The question is thus whether the combination of private property, common law, and markets does a better job than central planning and administrative property at protecting these values. We turn to that in the next section.

### B. *Private Solutions to Land Use Problems*

As the Montana Land Reliance (MLR), one of many private land trusts hot-linked to the Land Trust Alliance web site,<sup>109</sup> explains, a “conservation easement is the legal glue that binds a property owner’s good intentions to the land in perpetuity.”<sup>110</sup> The MLR holds hundreds of easements on more than 300,000 acres of “ecologically important land.”<sup>111</sup> It notes that in conservation easements, which are individually tailored to meet the needs and desires of each owner of

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chemical leak from railroad cars that affected 8,000 persons); *CASE: Sullivan v. Russell Corp.*, NAT’L L.J., Feb. 22, 1999, at C10 (awarding \$52.56 million in Alabama for nuisance and trespass suffered by five families due to contamination of a lake by textile plant dyes); *Claims for Lost Recreational Value in Environmental Litigation*, NAT’L L.J., July 20, 1998, at A17 (describing \$12.7 million California jury award for the tort of “lost recreational value” for beach damage from oil spill; award of \$215 million settlement in Montana for restoration of the Clark Ford River Basin); *Cyanide-Laced Wood Chips Poisoned Town’s Public Land*, NAT’L L.J., Feb. 28, 2000, at C9 (jury awarding property owners in Wisconsin \$114.47 million against WEPCo for leaving cyanide-laced wood chips hidden on land sold to others); *217.7 M Awarded Against Rockwell for PCB Runoff*, NAT’L L.J., July 29, 1996, at A15 (awarding \$218 million in Kentucky against Rockwell International for PCB contamination of water).

109. See The Land Trust Alliance, *Land Trusts*, at <http://www.lta.org/map/MT.htm> (last visited Sept. 15, 2000).

110. The Montana Land Reliance, *An Introduction to Conservation Easements*, at <http://mtlandreliance.org/easements.htm> (last visited Sept. 15, 2000).

111. Montana Land Reliance Homepage, at <http://mtlandreliance.org> (last visited Oct. 12, 2000).

property involved, agriculture and silviculture may be allowed to continue, subject to the terms of the enforceable agreement between the land owner and the MLR, which gives the MLR the right to enter easement areas to monitor activities.<sup>112</sup> Activities that the MLR specifically prohibits are subdivisions for residential or commercial activity, construction of nonagricultural buildings, nonagricultural commercial activity, strip mining, or dumping of toxic or noncompostable waste.<sup>113</sup> When property is dedicated to certain environmental uses, it usually results in an income tax write-off for the property owner or donor and a reduction of estate and gift tax duties, thereby further encouraging such action.<sup>114</sup>

The MLR is a successful land trust, although not nearly as large or well known as many environmental groups. Many people have dedicated their wealth and property to give the MLR enough assets to have offices in three towns in Montana and to write an average of forty new easements each year. Not only the rich engage in such behavior; there are numerous community efforts that bring together people, usually of modest means, who wish to help preserve their slice of the environment. For example, the Green Horizon Land Trust has been operating out of Lake Wales, Florida, since 1991.<sup>115</sup> With easements on about 900 acres, it focuses on preservation in Polk, Osceola, and Citrus counties.<sup>116</sup> Its sites include the Cowpen Slough Preserve, thirteen acres in Polk County that is habitat for many wetland plant species and numerous birds.<sup>117</sup> Another site in Polk is the Scrub Plum Preserve of six acres, which is used as an outdoor classroom for the students of Babson Park Elementary School.<sup>118</sup> The Van Fleet Trail site of eighteen acres is being donated to Polk City to use as a public park.<sup>119</sup>

The experience of the Green Horizon Land Trust is not unusual. Some land it oversees primarily for species habitat preservation, some it manages as private parks, some it has deeded over to various state or local agencies for their management.<sup>120</sup> The lands were obtained

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112. *Id.*

113. *Id.*

114. The Montana Land Reliance, *Tax Implications of Conservation Easements*, at <http://mtlandreliance.org/tax.htm> (last visited Oct. 12, 2000).

115. The Green Horizon Land Trust, *Preserving Central Florida's Natural Heritage*, at <http://www.greenhorizon.org> (last modified July 8, 2000).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*



by market-price purchases, bargain sales, donations, easements or other private contractual arrangements. There is no limit to the ingenuity that people may use in constructing property transfers or restrictive agreements to meet environmental objectives by the parties involved. No governmental oversight is required for such activities to occur. Indeed, as with all market activities, we posit that there will be more creative and diverse environmental protection when it is left to private parties than if it is directed by government.

*C. Advantages of the Common Law*

The decentralized system of common law property rights and markets offers several positive advantages over centralized planning and administrative property. In this section we discuss those advantages.

1. Incentives for Decision Makers

Government-run environmentalism is no different than government-run military. Having the EPA as the nation's environmental czar produces the same kind of problems as having the Pentagon as the nation's military czar. The same institutional arrangements that resulted in (true) stories about \$700 hammers and \$6,000 coffee pots are expected magically not to suffer from the politics and incentives of the federal bureaucracy when it comes to the environment.<sup>121</sup> But there is no difference. The same Congress and the same administrations under political control respond to a host of special interests as billions of dollars are doled out, and scores of regulations are issued, to command and control the environment.

While a centralized military may be justified because of the nature of national defense, that is not the case when it comes to habitat protection in Polk County, Florida. The folks at the Green Horizon Land Trust know more about, and care more about, the environment where they live than can the EPA employees in Washington, D.C., Atlanta, or Florida; the State of Florida employees in Tallahassee; or even the employees in Polk County. It is not that the employees of the various governments are ignorant or uncaring. Government employees work for legislators, who have imperfect knowledge and who must respond to a host of special interests. Even if special interests could be put aside, which they cannot, no government agency can direct matters better than people on the

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121. See FINEGAN, *supra* note 97.

ground can direct them for themselves. Central planning consistently produces a one-size-fits-all result. If you prefer size 42 suits, black only, you are in luck.<sup>122</sup>

## 2. Avoiding Mistakes

Every generation acts as if it possesses the wisdom of the ages. When we decide how to allocate our resources, we do it with a host of constraints, including what we think to be correct information and the most appropriate social values. So long as we only command our own resources, we cannot do much damage to others. But when, through the governmental process, we command everyone today and in the future to dedicate the resources of many to one set of rules, we play the role of environmental gods; sure that our wisdom is best for today and tomorrow. Let us consider two examples, one small and one big, of environmental action, that indicate that what the majority thinks is right may not always be so.

A century ago, hawks were considered vermin because they preyed on other birds. Not only did farmers hate “chicken hawks” because they killed chickens, free range or not, even the Audubon Society promoted the eradication of eagles, hawks, falcons and other such birds because they killed song birds.<sup>123</sup> Governments paid bounties for the killing of chicken hawks (and wolves) because wise public policy dictated that these pests be eliminated.<sup>124</sup>

Raptor killing reached hundreds, even thousands, on a single fall day at Hawk Mountain in Pennsylvania.<sup>125</sup> A conservation-minded woman, Rosalie Edge, differed from prevailing opinion.<sup>126</sup> She wanted to save the vermin. Not wealthy, she scraped together a few hundred dollars, leased hundreds of acres on Hawk Mountain, prime raptor grounds, and barred hunting from the area.<sup>127</sup> She eventually purchased the mountain side and created a sanctuary to save them.<sup>128</sup>

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122. Political control of environmental assets literally produces such results. Yellowstone National Park is biologically sterile after a century of management by the federal government. See Charles E. Kay, *Yellowstone: Ecological Malpractice*, 15 PERC REPORTS (SPECIAL ISSUE) 1 (June 1997). National Forests, under United States Forest Service control, are similarly biologically threatened. See Holly Lippke Fretwell, *Forests: Do We Get What We Pay For?*, in PUBLIC LANDS SERIES, PERC (1999).

123. ANDERSON & LEAL, *supra* note 83, at 44.

124. The government still pays bounties for elimination of “undesirable” species. J. Bishop Grewell, *War on Wildlife: Government Subsidized Animal Destruction*, PERC WORKING PAPER (2000).

125. ANDERSON & LEAL, *supra* note 83, at 44.

126. *Id.*

127. *Id.* at 44-45.

128. *Id.*

Located in the Appalachian Mountains of eastern Pennsylvania, hundreds of thousands of hawks migrate past Hawk Mountain each autumn.<sup>129</sup> Once a killing field, Hawk Mountain Sanctuary has become an internationally known conservation, education, and research organization.<sup>130</sup>

Rosalie Edge was considered a nut in her day. The woman was devoted to protecting vermin! Imagine her reception if she attempted to persuade the “Raptor Eradication Board” to save the hawks. Yet her efforts—one person going against prevailing wisdom and public policy—created the Hawk Mountain Sanctuary and Association.<sup>131</sup> It is funded from membership dues, visitor fees, and private contributions.<sup>132</sup> Today Rosalie Edge is hailed as a wise person. We do not know if she was wise or not. She simply did what she thought was right. She provides us one example of how land ownership can conserve landscapes and protect wildlife if even one individual is committed to preservation.<sup>133</sup>

A second, larger scale example illustrates the danger of putting the power of the government behind an environmental objective. Today we know the Florida Everglades to support a rich and unique array of plant and animal life.<sup>134</sup> It existed, largely undisturbed, for thousands of years until a century of wise public policy attempted to destroy it.<sup>135</sup> Before state and federal policy devoted substantial sums to attempt to drain the Everglades, there were various private efforts, but none were successful because the value of the Everglades, drained, was too low to cover the cost of the enterprise.<sup>136</sup>

Beginning with the Swamp and Overflowed Lands Act of 1850, the federal government authorized the state of Florida to push for drainage of swamps.<sup>137</sup> By complying with the Act, the state gained title to more than twenty million acres of land (otherwise the state would today look like a Western state, largely under Bureau of Land Management control).<sup>138</sup> The state encouraged swamp drainage through the Internal Improvement Fund (IIF), which provided state

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129. *Id.* at 45.

130. *Id.* at 45-46.

131. *See id.* at 46.

132. *Id.*

133. *See id.* at 44-46.

134. *See Clay Landry, Unplugging the Everglades, PERC WORKING PAPER (2000).*

135. *See id.*

136. *Id.*

137. *Id.* at 2.

138. *Id.* at 2-3.

bonds and taxing power to subsidize Everglade development.<sup>139</sup> The IIF saga, which lasted for decades, brought financial ruin to the state and private developers lured by the subsidies.<sup>140</sup>

Decades of effort drained less than a million acres prior to the New Deal, which ordered the Army Corps of Engineers to assault the Everglades.<sup>141</sup> During the middle of the twentieth century, federal money poured in to build dams, canals, and other projects that produced what we see today, with about ten million acres affected.<sup>142</sup> The Nixon administration began to slow the flow of federal dollars as environmentalists began to complain of the damage to the environment.<sup>143</sup>

Today we know that the swamp drainage policies were destructive. A multibillion dollar federal plan is on the table to rework canals and levees to try to undo some of the damage to what we now call precious wetlands, not fetid swamps.<sup>144</sup> Going against public policy that dominated for over a century was the Florida Federation of Women's Clubs.<sup>145</sup> They convinced the Model Land Company to set aside Paradise Key, a hummock fifteen miles from Homestead, that was popular with birders and other tourists.<sup>146</sup> It led to the creation of Royal Palm State Park, which was privately run and operated until destroyed by hurricanes in the late 1920s, at which time the land was turned over to the tender mercies of the federal government.<sup>147</sup> Compounding the environmental problem in the Everglades are the various federal sugar subsidies, which artificially increase the price of sugar grown in the United States, so that all consumers can contribute to the sugarcane operations that might not otherwise exist in central Florida.<sup>148</sup>

Why has this state of affairs persisted for so long? Are members of Congress and various administrations not aware of this environmental mess? Of course they are, but they face a host of special interests, such as the sugar growers who have been generous campaign supporters over the years.<sup>149</sup> Such powerful special

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139. *Id.*

140. *Id.*

141. *Id.* at 8-15.

142. *Id.* at 11-13.

143. *Id.* at 14-15.

144. *Id.* at 24.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 16-17.

149. *See id.*

interests, and their employees, are not to be lightly discarded. There is nothing evil in any of this, it is just the political process at work. The story describes just one of the many conflicting forces that come together when resources are commanded by edict from Washington, rather than by people on the ground who must pay for their decisions.

People make mistakes. They destroy resources in futile efforts to make failing enterprises succeed. But the cost of these mistakes, from which many learn, is small compared to the costs of having resources controlled by central planners and their legislative overseers who tend to engage in massive, lumbering projects, such as Everglades drainage, that are harder to stop than an oil tanker headed for the rocks. Public policy rarely allows different values to be expressed; one set of values is imposed on all and all taxpayers get to share in the costs, whether they like it or not. Even worse may be the loss of information that occurs when resources are centrally commanded. Diversity allows not only freedom of expression of values, but allows others to learn from the choices, good and bad, that others make. In a planned regime, all pay for and get the same results, and we know little of what might have been.

“But we are different,” modern planners may insist. We are attempting to preserve, not to destroy the environment. If we prove wrong, reversing our mistakes will not require undoing development but merely opening up protected areas. It may be that humanity has finally unraveled the secrets of the environment sufficiently that we, unlike our parents and grandparents, will not make such costly mistakes as draining the Everglades or hunting hawks to the verge of extinction. Perhaps, unlike our feudal ancestors, we are all-knowing and all-seeing. History suggests otherwise, however.

Moreover, “preservation” is not what modern environmental policy pursues with such single-minded energy. We are not simply “banking” land and natural resources. Even when we merely lock one source of resources like the oil of the Arctic National Wildlife Refuge in a vault, we encourage more intensive exploitation of other, potentially more sensitive areas. More dangerously, each time we ban trafficking in endangered species, like the Atlantic Green Sea Turtle, we risk devastating private sector efforts to save those very species, like the Cayman Turtle Farm. Today’s mistakes will be different from yesterday’s, if we can learn from history, but there is no guarantee we have traded false negatives for false positives.

*D. Environmental and Land Use Creativity*

For the environment to be protected and for people to have spaces to enjoy, there must be experimentation so we learn more about the environment, what works, and what people prefer. This will not happen with command-and-control of the environment. The EPA or any other agency, no matter how well intended, cannot possibly be as creative as people living on the ground and working in their environments.

The national parks, often talked about as sacred grounds, are in dreadful environmental condition.<sup>150</sup> The crown jewels of the park system, such as Yellowstone, are environmental messes ecologically and for the users.<sup>151</sup> The people who work for the Park Service at Yellowstone are not ill-intending or lazy. The problem is that their incentives are wrong. Yellowstone rangers work for bosses in Washington, who order them not to shoot bison to avoid publicity in newspapers in Boston and New York, where people get teary-eyed about bison.<sup>152</sup> So the park managers let bison starve to death rather than cull the herd. Yellowstone has so many visitors, compared to the facilities in place, that raw sewage is dumped into pristine trout streams.<sup>153</sup> Those spills occur while outhouses that cost \$300,000 per hole are being built.<sup>154</sup> The people who work at the park would never make such foolish decisions, but their far-away bosses in Washington force such things to occur. No member of the administration or Congress who oversees the park wants these things to happen; this is simply what happens when people command resources they do not own and for which they ultimately are not responsible. The other problem is the same one faced by the bureaucrats in Moscow responsible for bread production. They did not want wheat to go ungrained or wasted, but nonetheless disastrous shortages occurred.

The lack of creativity in public land management stands in stark contrast to developments in the private sector, which gives us clues about the wide array of environment-enhancing developments we can expect to see more of, so long as people are willing to pay for it and environmental entrepreneurs are not stymied by reams of government regulations.

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150. For an extensive discussion of mismanagement of Yellowstone, see ALSTON CHASE, *PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK* (1986).

151. *See id.* at 6.

152. *See id.* at 31-33.

153. *See id.* at 218.

154. *See id.*

The U.S. Fish and Wildlife Service, charged with assisting species preservation, has spent large sums reintroducing wolves into the greater Yellowstone area, since a previous generation's government policies of bounties and government hunters eradicated the wolves.<sup>155</sup> The plan, and the many public hearings that preceded it, generated controversy and ill will in the area. In short, many ranchers believed they would be forced to subsidize the predators, which would kill lambs and calves.<sup>156</sup> Environmental activists (and newspaper editorial writers) sneered at the selfishness of the ranchers.<sup>157</sup>

While that controversy was swirling, the Defenders of Wildlife (via their office in Montana) took another tack.<sup>158</sup> They sold prints of wolves howling in Yellowstone and raised about \$100,000.<sup>159</sup> They then announced that they would pay ranchers who lost livestock to wolves.<sup>160</sup> When a rancher suspected a kill, the Montana Department of Livestock was called.<sup>161</sup> If its inspector said the kill was due to a wolf, Defenders would accept that judgment and pay the rancher the market value of the lost livestock.<sup>162</sup> In effect, Defenders accepted liability for the cost of the wolves. While they do not own the wolves, their liability for costs inflicted by wolves reduced the opposition of ranchers to their presence.<sup>163</sup> The ranchers were not forced to feed the wolves for free.

The program did not turn out to cost very much. After a decade less than half the money collected from the sale of prints had been paid to ranchers.<sup>164</sup> So Defenders announced that it would pay bounties to property owners who identified verified wolf dens on their property thereby encouraging ranchers to let wolves breed in peace.<sup>165</sup> These payments allow those concerned about wolf habitat to effectively provide the habitat, at their expense, across a huge area involving many land owners. Individual contracts with each property owner would be very costly, but the simple act of volunteering to

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155. *Gibbs v. Babbitt*, 214 F.3d 483, 488 (4th Cir. 2000).

156. *Id.* at 489.

157. See, e.g., *Let Them Come Back*, L.A. TIMES, Nov. 4, 1987, at 7; *Welcoming Wolves Back to the West*, CHI. TRIB., July 8, 1994, at 16; *Will Yellowstone Be a Home for Wolves?*, ST. LOUIS POST DISPATCH, Dec. 18, 1994, at 2B.

158. See Anderson, *supra* note 99, at 266-67.

159. *Id.* at 266.

160. *Id.*

161. *Id.*

162. *Id.* at 266-67.

163. *Id.*

164. *Id.* at 266.

165. *Id.* at 266-67.

accept costs imposed by the predators significantly reduced traditional hostility toward wolves. Even more importantly, the Defenders' program allowed continued use of the ranchers' land, which would not be the case if it had been seized to be added to the Park.<sup>166</sup>

The multimillion dollar federal program, on the other hand, offers no solace to ranchers whose livestock feed federal wolves. Since shooting a wolf is a federal offense, the best policy is "shoot, shovel and shut up." Property owners are put at war with the environment, especially with endangered species, the presence of which could lead to federal mandates to curtail economic use of private property.<sup>167</sup> The Defenders' program revealed that when private actors, faced with real costs, creatively approach a problem, the cost of habitat protection may not be nearly as high, or as highly charged with emotions, as either side believed.

Similarly, but on the other end of species use, hunting contracts provide higher quality habitat for elk in Montana, Arizona, and other prime hunting states.<sup>168</sup> Elk on public lands have been decimated, so hunting is bad and the quality of elk may be declining as the prime bulls are the first targets of hunters looking for trophy elk.<sup>169</sup> Unlike in the good old days, when people could pretty much hunt where they wished, most ranchers and farmers have posted their lands against hunting to keep out the increased number of hunters chasing smaller numbers of elk.<sup>170</sup> Hunting associations have contracted with multiple landowners for rights to hunt elk on private land.<sup>171</sup> The landowners have incentives to allow the herds to stay healthy so the hunters will pay healthy fees to the landowners. While many hunters are distressed at what they are sure is a constitutional right to hunt elk for free (or for the low price state elk tag), fee hunting is allowing hunting to persist while protecting wildlife.<sup>172</sup> The best quality elk hunting in the United States today is on the White Mountain Apache Indian Reservation in Arizona, where the tribe (after kicking out the State of Arizona) sharply limited hunting to allow elk herds to grow

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166. *Id.*

167. The ranchers' concerns were well taken, as private property owners discovered when the government reintroduced red wolves in North Carolina. See *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

168. ANDERSON & LEAL, *supra* note 83, at 150.

169. *Id.* at 150-57.

170. *Id.*

171. *Id.* at 152.

172. *Id.* at 149.



and mature.<sup>173</sup> Sales of hunting rights are now a major source of tribal income and the elk have never been healthier.<sup>174</sup>

Will people pay to protect ducks they are likely to never see? Many would say ducks are classic public goods: nearly anyone (with a gun and a state hunting license) can shoot ducks, which range over huge areas, migrating from Mexico to Canada. Yet Ducks Unlimited and the Delta Waterfowl Foundation raise tens of millions of dollars a year in contributions from people who like to duck hunt.<sup>175</sup> A donor in Texas may be “paying” for pothole preservation in Manitoba that will benefit some ducks the donor/hunter never sees. The result of this private action is that the waterfowl population of North America may be higher now than ever.<sup>176</sup> Side benefits of private efforts to increase the number of ducks include wetlands conservation and restoration, which benefits many species besides ducks.<sup>177</sup> Private groups have managed to provide significant amounts of a “public” good because they have figured out how to do so cheaply, through creative use of property rights. Just as importantly, private organizations such as Ducks Unlimited are able to convince donors their donations will be put to good use, a promise governments find hard to keep.

Similar efforts in Zimbabwe to protect elephants are underway. Elephants, a favorite of zoo visitors, are no joy to their neighbors in Africa who face crop and housing destruction from these huge beasts.<sup>178</sup> Elephants also trample a number of people to death each year.<sup>179</sup> In Kenya, where elephants are declared to be a “national treasure” and “protected” by the government, poaching has driven the numbers of living elephants to a small fraction of years ago, despite ever-escalating government measures to protect elephants—including “shoot to kill” orders that have produced hundreds of dead poachers but no decline in dead elephants.<sup>180</sup> In Zimbabwe, by contrast, natives have incentives to protect elephants from poachers, and to even tolerate crop loss, because they capture some of the economic value

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173. *Id.* at 151.

174. Anderson, *supra* note 99, at 267-74. It is also a nice source of income for Ted Turner at his Montana ranch, at which he allows limited, high-dollar elk hunting. Turner provides high quality habitat for elk and bison. ANDERSON & LEAL, *supra* note 83, at 75-77.

175. ANDERSON & LEAL, *supra* note 83, at 58-61.

176. *Id.* at 61.

177. *Id.* at 268-69.

178. *Id.* at 274.

179. *Id.* at 274-75.

180. *Id.*

of the elephants.<sup>181</sup> Hunters will pay huge fees for the right to shoot a bull elephant; and, of course, tourists like to see the elephants afoot.<sup>182</sup> By allowing native villages to share in hunting fees and work with tourists, the animals are transferred from pests into assets.<sup>183</sup>

Some animal lovers believe it obscene to shoot elephants. Unless they are willing to go where the animals live and outbid other uses of the animals, however, the evidence is clear, from elephants and many other species, that if people on the ground have reason to want the animals to live, they will live and prosper. On the other hand, if indigenous people see the animals as a deadly pest, not an asset, no amount of weeping by well-intended people with Save the Elephant stickers on their cars will do anything to actually help the animals, regardless of the superior feeling it gives the buyer of the sticker.

#### IV. CONCLUSION

We face a choice today between two visions of property rights: William the Conqueror's and the common law's. How we make that choice will determine whether we find ourselves performing the modern equivalent of "a leap, a whistle and a fart *coram domino rege*"<sup>184</sup> for bureaucrats and agencies, or whether property rights will act as a protective wall against the heavy hand of government.

Environmentalism is serious business. People are willing to pay for habitat and green spaces for humans when offered credible means of doing so. The real work of environmentalism means on-the-ground work preserving habitat for species, including human usage. It means inventing new methods of improving habitat and new ways to allow multiple uses of habitat. The evidence is that central planning of environments, as in national parks and forests, produces dreadful environmental results. There is no reason to suspect that city planners can make any better use of habitat for humans than the humans living in those cities will sort out for themselves.

An even more powerful point has to do with the critical nature of private property rights. As Harvard historian Richard Pipes discusses in his recent book, *Property and Freedom*, the history of the world, over many nations and centuries, indicates that without strong private property rights, it is unlikely that there will be either personal freedom

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181. *See id.* at 275.

182. *See id.*

183. *See Anderson, supra* note 99, at 275-76.

184. SIMPSON, *supra* note 8, at 6.

or economic advancement. The alternative to freedom, of course, is government control. The last century witnessed “disturbing developments . . . that have enabled governments, in the name of social justice and the ‘common good,’ to abolish or infringe on property rights and, by so doing, sometimes abolish and often restrict individual freedoms.”<sup>185</sup> We are no different from other peoples in other times. We are not blessed with a superior intellect that allows us to avoid the tragedies of central control; the tragedies which follow from dreamy promises that help bring central control to fruition. As we work to ensure a better quality of life for our children, the best we can do is leave them more freedom and wealth to develop their world. We should not tie them to the arrogant presumptions that our generation is sure are the work of the best and the brightest.

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185. PIPES, *supra* note 3, at 282.