# GREEN PROPERTY

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The past two decades have witnessed the emergence of ecological preservation as a political value of the first magnitude. As citizens have learned how relentless industrialism damages current public health, future generations, and our biological heritage, democratic mechanisms have produced curbs on obvious and gross abuses. For some, the spectacle of waste bred by frank materialism has led to further reflections on the connections among environmental degradation, acquisitive individualism, and an inane mass culture. From these reflections have developed the various shades of green political thought that offer a hopeful alternative to the increasingly irrelevant contexts of right and left.[1]

Ecological perspectives on human activity have so far had a marginal influence on the fundamental postulates of American law. This essay begins an effort to imagine legal principles that further ecological values and to criticize extant principles that embody the antithetical values of exploitation and consumption.

I will focus on the transformation of property law inherent in adopting an environmentally sustainable land use program. The Rehnquist Court likely will find itself confronted by ever more aggressive public control over land use, because a radical transformation of land use patterns is necessary to stem environmental degradation and to promote a civic urban life. The shape of such a transformation is only barely hinted at here, but I attempt to articulate a few basic postulates of green property and contrast it with the assumptions about constitutional property contained in the prominent takings opinions of Chief Justice Rehnquist and Justice Scalia. These opinions may provide a doctrinal basis for the Court to check land use reforms through Constitutional nullification, as earlier con-

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1. Recent writings include: R. PAEHLKE, ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS (1989); J. PORRITT & D. WINNER, THE COMING OF THE GREENS (1988); B. TOKAR, THE GREEN ALTERNATIVE (1987); P. BUNYARD & F. MORGAN-GRENVILLE, THE GREEN ALTERNATIVE (1987); C. SPRETNAK & F. CAPRA, GREEN POLITICS (1984).

servative courts stalled the adoption of social welfare and economic regulation measures. My larger purposes are to give legal voice to green politics and to measure its distance from conservative orthodoxy.

Green political thought resists easy summary because it is various and unsystematic. It spans a spectrum from a mild preference for preserving sites of unusual natural beauty to violent assertions of animal rights. The unifying theme is a refusal to treat the natural world as a commodity subject to human domination. Rather, a thoroughgoing green insists on respecting the moral autonomy of nature and seeks to live in a manner that promotes ecological balance. Greens draw from the extinction of species and the pollution of air, water and countryside an explanatory myth of human greed and insolence that threaten destruction to all known life. Accordingly, greens reject politics based on individual self-interest and measures of social welfare based on individual wealth. Taken as a whole, green political thought represents as different a vision of human society from liberal capitalism as do feudalism and socialism.

The strength of these political ideas is difficult to gauge. Some mild version of them seems ubiquitous. Polls demonstrate the priority people in industrial nations place on clean air and water and on the preservation of animal species and open space. Recent political victories, such as the shelving of the Two Forks dam in Colorado, the outlawing of the ivory trade, the adoption of a natural burn policy at Yellowstone by the Parks Service, and the proliferation of recycling laws (even in New York City) testify to the political power of environmentalism. Many who support these decisions, however, do so without drawing fundamental principles from what they may view as practical cures for the minor blemishes of consumer capitalism. They may reject as hysterical total bans on pesticides, elimination of automobiles, and radical decentralization of political and economic life. In a world where George Bush, too, is an environmentalist, green views are indispensable but still marginal.

Nevertheless, the prospect for movement toward a green perspective appears excellent, if for no happier reason than that our present obsession with producing more unnecessary "wealth" will continue to cause frightening harms to the natural environment. Conscious articulation of green ideas can make familiar the unimaginable. Green political groups have directed attention to the more far-reaching implications of ecological values and to the family relationships among greens, feminists, peace activists, and the

dispossessed of the Third World. Die Grunen, the West German green party, demonstrates the potential political might (and inevitable pitfalls) of organized radical ecologists.[2]

Environmental concerns have become a significant influence on the goals of American land use law. For example, recent critical-areas regulations severely regulate development in areas of sensitive natural value such as coastlines and watersheds.[3] These regulations impose the most extensive controls on development of private land in our history. They do so to safeguard the natural functions of estuaries, coastlines, and wetlands upon which both sustainable economic activity such as fishing, and organic life itself depend. Also, they affirm the intrinsic worth of the Earth and call on us to restrain our cupidity as the minimum condition of self-esteem. Such regulations reduce the market value of affected land by curtailing industrial development, severely restricting residential densities, and imposing new restrictions on agricultural methods. Indeed, conversion of the site from an economic commodity to a functioning part of a healthy environment may be said to be the objective of the regulation.

Regulation so pervasive challenges fundamental assumptions concerning property in land. Our land law has stood on the twin bases that the owner ought to have extensive discretion over the use of land and that land ought to be put to its most profitable use. These potentially contradictory assumptions are reconciled in the person of the hypothetical rational owner whose fate is to pile up wealth tirelessly. American land use law has expressed these ideological assumptions. Courts justified zoning as a means to increase the total market value of a community's land, by eliminating market depressing incompatible uses, and by preserving the right of each owner to develop his parcel of land in a profitable manner. Zoning regulations that failed to protect these interests of the landowner were said to "take" the owner's property.

As land regulation has increased, courts generally have found ways to sustain the regulations against complaints that owners' property had been taken. Most conspicuously, they have pushed back the economic limits imposed by the takings clause to the point

2. Die Grunen received 8.3 percent of the vote in the 1987 West German parliamentary elections and currently have forty-two MP's. The party has experienced intense inner controversy between "realos" and "fundis" over the question of whether to make the necessary compromises to become a participant in governing.

3. A recent example is Maryland's Chesapeake Bay Critical Area Act, MD. NAT. RES. CODE ANN. § 8-1801 (Supp. 1987). The Act created a Critical Area's Commission empowered to coordinate land use regulations over 600,000 acres of land along the Bay and its tributaries among sixty local jurisdictions. In most of the area within 1000 feet of the shoreline the Act restricts residential density to one residence per twenty acres.

where the owner usually can prevail only if he can make *no* economic use of the land. While permitting government to control land use, this change preserves the principle that an owner is entitled to investment income from her land.

This principle itself is no longer unquestioned. The Supreme Court of Wisconsin wrote in *Just v. Marinette County* nearly twenty years ago: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[4] Hedged about as this is with qualifications, it strikes the true green note. It recognizes that land development can impose enormous costs on others; the owner has no more right to diminish water quality through filling wetlands than through pumping phosphates into a river. Growing understanding of the significance of wetlands has taught courts about the "externalities" that their destruction entails.[5] Although *Just* has spawned some progeny, whether it will provide the national rule for "taking" of wetlands remains to be seen. More interesting is whether improved ecological understandings—showing that current forms of commercial development harm the environment by weakening the atmosphere, increasing erosion and runoff of nutrients into waters, and destroying habitats for other organisms—can lead to a more general conclusion that no one has a presumptive right to develop land.

Similarly, judicial resuscitation of the public trust doctrine created an environmental tool of breathtaking potential. The doctrine is very powerful because it gives a state, as trustee for the public at large, an inalienable and overriding property right in certain land even if privately held. This public right has been held to require that owners both permit reasonable public access and preserve the environmental value of the land or water. No takings claim can prevail when property is subject to a public trust, because the state

4. Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

5. Economists, of course, conceive of pollution as costs that the polluter places on other members of the community, i.e., externalities. The prices of the primary commodities produced by the polluter do not reflect the entire social cost of its production, thereby removing incentive to the producer to reduce pollution and causing an inefficiently high consumption of the underpriced commodity. *See, e.g.*, A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 89-93 (1983). Thus, for example, the manufacturer of paper diapers does not bear any of the cost of disposing of the millions of such diapers soiled weekly; the public bears this cost through taxes supporting municipal waste management. *See* Menell, *Beyond the Throw-Away Society: An Incentive Approach to Regulate Municipal Solid Waste* (forthcoming in the ECOLOGY L. REV. December, 1990). In the context of wetlands filling, pollution costs imposed on others include lessening of water and air quality, loss of species habitat and loss of public amenity. Obviously, the attribution of an appropriate share of the generalized harms to any specific fill project is problematic.

acts pursuant to preexisting property rights rather than police or eminent domain powers. The primary doctrinal restriction on the public trust doctrine is the fiction that the modern law has developed from the prerogatives of the English king, which restricts the public trust to traditional natural areas such as tidelands and navigable waters. More formidable obstacles lie in the widespread desire of property owners to increase their wealth through development and in legitimate concerns that extensive public ownership will result in a "tragedy of the commons."

These regulatory and doctrinal developments provide the basis for a green theory of property. Such a theory would seek primarily to give legal effect to the ecological land ethic, as formulated by thinkers such as Aldo Leopold, which emphasize the moral duty of humanity to act as steward of natural life.[6] A regulatory program incorporating this theory might identify land within the jurisdiction of outstanding natural value and subject it to the following:

1) Any change in the character of land that impairs its natural value would require a permit.
2) No permit would be granted unless the development served a compelling human need.
3) If the development appears to cause some specific harm to the environment not directly forbidden by positive regulations (such as narrowing the habitat of a diminishing species) it can be permitted only if
   a) it will be accomplished with the minimum of environmental damage,
   b) the developer will pay in dollars the cost of environmental damage, and
   c) the human gains from development substantially exceed the environmental harm from the project.
4) Reasonable public access must be permitted over any land designated as having scientific, aesthetic or recreational value.
5) No compensation should be paid landowners for any regulations or denial of permits under the above regulations if such actions are taken in good faith.

This bare statement of regulatory standards does not begin to address the legitimate political concerns about the institutions that would administer this regime not its collateral effects on harmless economic activity. The sketch is merely given to suggest the shape of laws serving ecological rather than utilitarian ends.[7]

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6. *See* A. LEOPOLD, A SAND COUNTY ALMANAC xviii-xix, 237-64 (1966).

7. Utilitarian or economic analysis should not be employed to formulate the goals of green property law. First, as mentioned above in note 5, economics has done a poor job of describing the costs of development or the benefits of conservation. Second, such analysis employs as the criterion of the good the perceived benefit to currently living humans. This is almost a restatement of the ecological and moral failure that greens address. Cost-benefit techniques do not adequately capture the damage done to future generations by current resource decisions; the future of the planet is not encompassed within current market prices or discount rates. Such analysis also gives no weight to the rights of non-human organisms. (Of course, once the decision to count non-human organisms is made, a decision which itself cannot be justified adequately by human pleasure, utilitarianism may contribute to ecological

A green theory of property would support a regulatory program of land use serving ecological ends of removing impediments to the exercise of public control.[8] Property law embraces society's allocation of benefits among its members and the boundaries between private and public control of things. These relational rights have changed often to reflect changing visions of social order.[9] Thus, nineteenth century law sought to disentangle absolute ownership of land from the lingering restrictions of a more communal, pre-industrial regime dating back to the medieval manor; the purposes of such reform included stimulation of wealth creation, enhancement of social mobility, and glorification of individual liberty. A green property law must thoroughly subject individual rights in natural resources to the community's need for biological and spiritual vitality; the purposes of such reforms include the preservation of higher forms of life on earth, the inculcation in humans of moral self-restraint in consuming resources or exploiting others, and the enhancement of pleasure and grace from direct experience of the natural world.

It remains a challenge to articulate these principles in legal doctrine. The essence of such doctrinal innovation must be that the individual possessor does not own the right to degrade the natural ecological systems on his land; such a right must be held by the jurisdiction in trust for present and future members of the community. Such trust should reflect a real fiduciary obligation to other

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thinking. See P. SINGER, ANIMAL LIBERATION (2d ed. 1989)). Moreover, economics hinges on a model of human behavior predicated on individual acquisition of benefits limited only by the need to compete with other individuals for scarce resources; greens urge the moral necessity to restrain appetite for the good of the ecological community. Finally, ecological responsibility would be morally right even if most people preferred to consume everything they can appropriate.

None of this means, of course, that economic analysis is not an indispensable tool for effectuating green policies once those policies have been established on some other basis.

8. *See* Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVIR. L. REV. 311 (1988). Hunter's useful critique is marred by his strange belief that ecological land use decisions involve no value choices but only the direct application of scientific knowledge. This is plainly false: a people with complete knowledge of environmental sciences might choose to maximize their present consumption of resources on the plausible assumption that the disastrous consequences of this behavior would not materialize until after they were dead. The rejection of this alternative requires the acceptance of a normative proposition, such as that we are responsible for the welfare of future generations or that degradation of the environment is a wrong in itself. Green thought depends on a vision of natural law, a faith that the deep structures of natural life are beneficent and suggest powerful analogies for human moral choice.

9. *See* Reich, *The New Property*, 73 YALE L.J. 733, 771-78 (1964). Green property places individual power over nature under more extensive collective control, while Reich's new property sought to give the individual more extensive freedom over resources created or allocated by the state. Although they move in opposite directions along a single continuum from individual to collective power, they do not conflict in principle.

species of life. Joined with such public beneficial ownership of natural ecological systems should be a right of reasonable access by the public to worthwhile natural sites. This formula essentially extends the present public trust doctrine to all undeveloped and agricultural land, while severing it from the historical fictions that sometimes have sustained it.

While no legislature will adopt such a program tomorrow, new land regulatory measures may well tend in his direction. A potential obstacle to such development, however, is the authority of the Supreme Court to freeze the definition of property in its current form through interpretation of the takings clause. The Court can impede the evolution of property law in deciding whether a complainant's economic interest amounts to property and in deciding whether the degree of governmental control amounts to a taking. A conservative Court could retard substantially the development of green land use regulation by finding that representative laws violate the Constitution. Opinions written by both Chief Justice Rehnquist and by Justice Scalia suggest that such concerns are real.

The Court in the still recent *Nollan* case raised the standard by which courts must evaluate the constitutionality of land use restrictions that condition development on the cession of property rights.[10] Also, Justice Rehnquist has argued (for four members of the Court) that state statutes which prohibit externalities must pass *de novo* review under an unspecified federal nuisance standard to avoid being struck down.[11] One might justify closer judicial scrutiny in these cases because of the explicit constitutional command against uncompensated takings of private property. But these same judges have long told us that property rights are defined by state law; if state law defines private property rights narrowly, federal judicial invalidation must imply a constitutional standard for what is property. The elaboration of such a standard could create a fearful weapon of reaction against ecological land use regulation. I will briefly review a few corners of doctrine to assess the gravity of this threat.

First, Rehnquist's dissent in *Penn Central*[12] represents a near complete identification of property with economic development op-

10. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In that case, Justice Scalia also pointed at a nonpositivist basis for property in his pregnant comment that "the right to build on one's own property . . . cannot remotely be described as a 'government benefit.'" *Id.* at 682 n.2. *See* Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988).

11. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (Rehnquist, J., dissenting).

12. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142-43 (1978).

portunity. In finding that Penn Central's air rights above the terminal were property themselves, he emphasized that the Constitution protects every traditional interest in possession, use and disposition of property; prohibition on exercise of any such right amounts to a taking, unless the prohibition prohibits a nuisance or effects a net increase of economic value within an area that is shared by the burdened owner. Such analysis is antithetical to green thinking. It ignores the public rights in private property and equates private ownership with the power to convert a thing to a more profitable use. Although *Penn Central* involved preservation of a historic urban building, Rehnquist's formulation offers obvious barriers to restrictions on subdividing farmland or commercially developing woodlands; he would note only the loss of potential value to the owner, while ignoring the loss to the quality of public life from the destruction of landscape.

Yet constitutional formulations protecting the owner's economic potential are unlikely to block the greening of property. Rehnquist's position lost decisively in *Penn Central* to a position which, while murky, emphasizes the owner's current use of the terminal and limits his constitutional economic right to a "reasonable" return on its investment. More importantly, science and public education have made it easier for environmental advocates to articulate the harms that development imposes on the public and so satisfy the nuisance and zoning exceptions to Rehnquist's analysis, albeit through the dubious enterprise of quantifying externalities.[13]

Rehnquist's commercial analysis only mirrors in exceptionally philistine manner our society's concept of land as primarily an economic asset rather than a biological or spiritual place. On a Court so myopic, economic concerns will not abate faster than in society at large. Green lawyers must find language, marshall facts, and

13. Providing dollar values for natural entities for which there is no market is inevitably fictive. What is the measure of the loss to a community when a wooded hill above a pond is stripped of trees and an office center is built? A clever analyst could estimate specious costs for the polluting effects of increased runoff to the pond from the site and for increased traffic on existing roads, but nothing acceptable can be offered for the decrease in bird life, the demoralizing loss of beauty, or the inhabitants' sense of a break with the past. One might simply say that the wooded hillside is worth what the community would be willing to pay for the right to prevent development.

What is the value of a species of snail that faces extinction? Apologists for environmental protection often cite the potential future human value of unique genetic material that each species contains. Improbabilities and discount factors may reduce the present dollar value of this application to near zero. Yet such analysis appears quite inadequate because it measures only the selfish commercial interests of humans. Neither the contribution of the extinction of one species toward, in combination with other harms, making the earth uninhabitable for humans nor the loss to non-human organisms from the extinction of another species can be plausibly measured.

fashion arguments that can present the case against development in its most appealing form. The absence of such a legal vision renders the opinions of Justice Brennan in both *Penn Central* and *Nollan* rather defensive and flacid.

Second, both Justices Rehnquist and Scalia have written provocative opinions urging the invalidation of land use restrictions as infringing the liberty of owners. In *Fresh Pond Shopping Center*,[14] Rehnquist dissented from the dismissal of an appeal from a decision upholding a local rent control agency's prohibition against a corporation demolishing its apartment building for a parking lot. The essence of Rehnquist's argument was that the agency constitutionally could not "take" the owner's liberty to control the use of its property; he explicitly put the economic consequences to the owner to one side and equated the owner's loss of control with a physical invasion. This individual liberty to manipulate resources must be a central target of green lawyers because it presupposes mankind's moral dominion over creation. Such liberty should be granted sparingly to resolve land utilization problems that complete community control might exacerbate. The private owner might be thought of as an agent of the community, who is rewarded for his efforts with a limited equity interest.

The equation of property with liberty also plays a prominent role in Justice Scalia's opinion for the Court in *Nollan v. California Coastal Comm'n*,[15] which struck down the imposition of a condition to expansion of a beach house that the owners permit the public to walk down the beach. Scalia put economic losses to the owners to one side and concentrated on the loss of personal dominion that comes from the inability to exclude others. He said little about the economic character of the Nollan's loss, but much about the "extortion" of trading permission to build for access rights.

Greens should attack directly the proposition that owners may exclude the public from proximity to the ocean or other special natural areas. Valuable preparatory work has been accomplished in elaborating the public trust doctrine to deprive owners in several states of the right to exclude the public from the wet sand area of the beach. The courts have contrasted the harmfulness of development of an ocean beach with the desirability of public (non-consumptive) enjoyment of that immensely invigorating location. Greens should argue that experience of ocean shorefront is an inalienable right of all people, surely no less significant than the right

14. Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983).
15. 483 U.S. 825 (1987).

to leaflet a shopping center.[16] Without access to nature, humans lose perspective on their limited claims on creation, their duties of nurture, and perhaps on the providence of death. Every inducement should be offered to divert citizens from shopping centers and televisions to woods and shores. Direct knowledge of the natural world will strengthen public support for responsible policies of preservation.

The argument for exclusion rests on inertia and selfishness. Great Britain has retained from the middle ages public rights of way throughout its countryside. We lack such public rights because of the sparseness of early American settlements and because our property law coalesced when land development was the greatest hope for personal wealth and mobility. Much was sacrificed in the name of development. What losses would owners suffer from recognition of publicly regulated rights of access on land and water of special merit? The most persuasive fear is that public access will create a tragic commons, resulting in destruction through overuse of the prized resource. But such harms can be contained through regulation. The Nollans could not have claimed that lateral access would destroy the beach before their seawall, but they have an interest in prohibiting litter. The owner's pleasure in exclusive dominion itself need not be countenanced. Some loss of tranquility may be suffered, but those who purchase in highly desirable areas cannot expect complete solitude.

Third, the Justices protect property as a check on governments unable to pursue a common good other than the organized self-interest of constituents. For example, in his dissent in *Pennell v. City of San Jose*,[17] Justice Scalia stressed the desirability of requiring government to pay for benefits taken from property owners in order to deter inefficient wealth transfers, those the public would not be willing to pay for given competing needs. This point has some force, although it commodifies public values (should the Czechs purchase the right to free elections from the Communist Party?) and assumes the justice of the initial allocation of entitlements. Greens must believe that reorientation of society to protection of the earth represents a more fundamental moral change than simply the ascendancy of a new interest group: they aspire to the abandonment of individual self-interest as a basis for social organization.

16. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (California constitutional provision that permits people to distribute pamphlets and solicit signatures on a petition at a shopping center does not take owner's property rights in violation of fourteenth amendment). *See also* State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (upholding public access to beaches based on custom).

17. 485 U.S. 1, 15 (1988).

Similarly, greens reject the political economy function of compensation because ecological balance is a good independent of whether it is preferred by the majority: even if a majority of voters would not support the purchase of an ecological balance, it should be done. Indeed, many voters suffer from consciousness "polluted" by the ceaseless manipulation and organized prurience of a consumer media.

Greens have only begun to think about the political institutions that will make these choices. Green groups frequently adopt an internal decisionmaking procedure that emphasizes mutual education and consensus. Greens resist the careerist politics that typify our larger institutions. (Die Grunen has insisted, for example, that parliamentary representatives rotate out of office every few years.) Many also have advocated extensive decentralization of government to political units reflecting the boundaries of natural ecosystems (such as the Appalachians), a movement known as bioregionalism.[18] At the same time greens are committed to disarmament and international cooperation.

One might criticize this as a dreamy, short-lived utopianism that threatens to lapse into anarchy or authoritarianism. Yet abandoning the vision of overcoming greed and parochialism leaves us with little hope that we can preserve the earth as sustenance and joy for our children. Science has assembled an impressive array of information about threats from air pollution, toxic waste, climactic change, water pollution, extinction of species, and population growth.[19] Perhaps under the shadow of disaster an informed citizenry can achieve public virtue. Preservation of the prerogatives of property owners will not address these issues.

The opinions of Scalia and Rehnquist suggest that a radical transformation of property law to reflect ecological values would encounter judicial resistance. Such resistance would not be different in kind from the types of resistance greens should expect at every level of public decisionmaking. The law is wedded to a concept of property that gives precedence to a right to change the existing biologic character of land over increases in the owner's individual wealth. The constitutional shibboleths of the Justices could freeze the fluid stream of property law in the posture of acquisitive individualism. The task of green property law is both to find practical mechanisms for utopian aspirations and to criticize those elements of the legal culture that obstruct urgent reforms.

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18. *See* K. SALE, DWELLERS IN THE LAND (1985).

19. The September 1989 issue of SCIENTIFIC AMERICAN is devoted to recapitulation of what scientists understand about the process and extent of environmental degradation.