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Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology, The

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The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology

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[E]cology has become everyone's business.[1]

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1. Palladio, Inc. v. Diamond, 321 F. Supp. 630, 631 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2nd Cir. 1971).

I. INTRODUCTION

We live in an age of ecology.[2] Environmentalism and its parent science ecology "ha[ve] become part of the mainstream human ethos."[3] In this "age of ecological awareness"[4] we are reevaluating, transforming, and refining the human relationship with the environment.[5] We realize that "[t]he human animal is a part of the ecosystem, not merely an aloof observer."[6] Consequently, traditional notions of property law must contend with new scientific discoveries about our environment as well as popular notions of an environmental ethic.

The science of ecology is the predominant force in shaping and defining how we see ourselves in relation to our environment. Ecology is the branch of science concerned with the patterns and relationships between organisms and their environment.[7] Ecology is a broad discipline,[8] which can colorfully be described as the study of the human "life support system."[9] Aldo Leopold provides a conceptual

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2. *See In re* Flying W Airways, Inc., 341 F. Supp. 26, 33 (E.D. Pa. 1972) (declaring that the age of ecology "dawned in the late 1960's and has now spread across the land"); *see also* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 386-87 (1998) (adding this "trend that has blossomed since the early 1960s" due, in part, to "a rich literary heritage underscored by such prescient thinkers as Henry David Thoreau, Aldo Leopold, and Rachel Carson; . . . the growth of the science of . . . ecology"; and "the horrifying legacy of two centuries of mindless exploitation of the natural environment"); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 138 (1995) (stating recent decisions in wetlands cases "offer a sense of forward motion, a sense that ownership norms are inexorably moving beyond the industrial age into the ecological one").

3. John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 325 (2000); *see* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1446 (1993) (explaining that "the economy of nature is emerging as a prominent viewpoint" in the American culture); *see also* Goldstein, *supra* note 2, at 408 (stating"[e]nvironmental ethics have become part of our societal ethos").

4. Sax, *supra* note 3, at 1455.

5. *See* Tucker, *supra* note 3, at 302 (stating "societies throughout the world are elevating environmental protection to constitutional status"); *see also id.* at 307-15 (examining various state and international (Brazilian and Polish) constitutional provisions dealing with the environment); *id.* at 306, 327 (concluding that "the integration of the environment into state constitutions, national constitutions, and international law is powerful evidence of a societal environmental ethic" and "reflects the maturation of [an] environmental consciousness and concern [for the maintenance of a healthy environment] as a legitimate social value") .

6. Goldstein, *supra* note 2, at 391.

7. THE NEW MERRIAM-WEBSTER DICTIONARY 241 (10th ed. 1989).

8. *See* Goldstein, *supra* note 2, at 402.

> "Ecology is the study of the structure and function of nature. Structure includes the distribution and abundance of organisms as influenced by the biotic and abiotic elements of the environment; and function includes how populations grow and interact, including competition, predation, parasitism, mutualisms, and transfers of nutrients and energy."

Id. (quoting ROBERT LEE SMITH, ECOLOGY AND FIELD BIOLOGY 3 (4th ed. 1990)).

9. Goldstein, *supra* note 2, at 401-02.

> "Life-support environment is that part of the earth that provides the physiological necessities of life, namely, food and other energy, mineral nutrients, air, and water. . . . [L]ife-support system [i]s the functional term for the environment, organisms, processes, and resources interacting to provide these physical necessities. By processes we mean operations such as food production, water recycling, waste assimilation, air purification, and so on. Some of

model of the ecosystem in the "Land Pyramid." Leopold noted that "the balance of nature" can best be described as a pyramid: a base level consisting of soil which supports plant life, which supports insect life and so on through the layers of species with man occupying an intermediate level with bears, raccoons, and squirrels.[10] Although upward progression through successive layers of the pyramid necessarily means a decrease in the numerical abundance of species, species in every layer are connected through the "lines of dependency for food and other services" known as "food chains."[11] Basically, "ecology tells us . . . that all forms of life are linked with, and dependent upon, all other forms of life, and ultimately with the land itself."[12] The biotic units that make up the environment—called ecosystems—are the focus of ecology.[13] An ecosystem is defined as "'a community of organisms interacting with one another and with the chemical and physical factors making up their environment.'"[14] Encompassing both biotic and abiotic factors,[15] ecosystems are the basic unit of our existence, and link one estate of land to another estate of land.[16] Today, ecosystem management is touted as the preferred way to manage land in the face of today's natural resource controversies.[17]

Ecology "is no longer an esoteric branch of biology concerned only with the mutual relationships between environment and plants and feral animal organisms."[18] Rather, ecology is a science whose tenants have "acquired a specific sociological significance."[19] Just as ecology has assumed a prominent role in modern American

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> these processes are organized and controlled by humans, but many are natural and driven by solar or other natural energies. All life-support processes involve the activities of organisms other than humans–plants, animals, and microbes."

Id. (quoting EUGENE P. ODUM, ECOLOGY AND OUR ENDANGERED LIFE-SUPPORT SYSTEMS 13 (2d ed 1989).

10. ALDO LEOPOLD, A SAND COUNTY ALMANAC 214-15 (1949).

11. *Id.* at 215.

12. Freyfogle, *supra* note 2, at 78; *see id.* (explaining that in order to understand nature's order, we must not look at individual objects in isolation, but must appreciate that the world "is a maze of interconnection and interdependence, an organic whole laced together by nutrients and energy flowing through primary producers to top carnivores, and then back to the soil to nourish new life").

13. Goldstein, *supra* note 2, at 351; *see id.* (defining an ecosystem as the basic "'energy-processing and nutrient-regenerating system whose components have evolved over a long period of time'") (quoting EUGENE P. ODUM, ECOLOGY AND OUR ENDANGERED LIFE-SUPPORT SYSTEMS 13 (2d ed 1989).

14. Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 239, 301 (1994) (quoting G. TYLER MILLER, JR., ENVIRONMENTAL SCIENCE: SUSTAINING THE EARTH A7 (1991)).

15. *Id.*

16. Goldstein, *supra* note 2, at 351.

17. *See* Keiter, *supra* note 14, at 294-95 (explaining that ecosystem management is the management of ecosystems as a holistic, integrated entity, focusing on the system as a whole and not on individual resources, in order to restore and sustain natural processes); *id.* at 295, 298 (recognizing that natural systems are not confined to jurisdictional boundaries, and so, "to ensure a sustainable resource base for future generations" ecosystem management is "based upon often-changing, ecologically-defined boundaries"); *see id.* at 295, 333 (stating that ecosystem management "has now been defined with sufficient precision to constitute a viable natural resource management policy" and "is now taking hold on the public domain").

18. People v. K. Sakai Co., 56 Cal. App. 3d 531, 535 (1st Dist. 1976).

19. People v. K. Sakai Co., 56 Cal. App. 3d 531, 535 (1st Dist. 1976).

thought, ecology also applies to the law; it is real property science.[20] Currently, the science of ecology shapes and defines our notions of the environment[21] and should be the basis for our new environmental ethic.

However, humans have not always been so concerned with the environment or the environmental consequences of their actions. "History demonstrates a lack of regard for nature."[22] This is especially true when one considers the rampant and unrestrained development of the "dense and uninhabited wilderness"[23] in the nineteenth century.[24] American Pioneers, endorsed by the nineteenth-century judiciary, set out to develop the wilderness—to tame "the haunt of savages and beasts of prey."[25] After all, "[w]hat are the esplees of a wilderness under the dominion of the tomahawk and the scalping knife?"[26] "Man-as-conqueror" accurately reflects the nineteenth-century paradigm concerning humans and how they viewed their relationship with the natural world.

But today, equipped with our new understandings of ecology, the "present . . . shift in focus from conquering the land to preservation,"[27] has resulted in the emergence of "[a] new land ethic, an ethic of planning and stability."[28] The age old conception of "man-as-conqueror"[29] of the natural world is slowly evolving into a holistic notion of "landowner-as-steward" of his natural environment.[30]

However, outmoded notions of property law prevent a harmonization of ecology and law. If judges continue applying property doctrines developed in the nineteenth century, which promote wilderness destruction, principles of ecology will never have their day in court. Consistent with our new understanding of the environment, courts should adjust modern property law to include a condition of stewardship within the common law notions of what it means to be a property owner in the twenty-first century. By emphasizing the dual roles property plays in our society and

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20. *See* Goldstein, *supra* note 2, at 406-07 (stating that "[e]cology is the science that identifies the systems which run the earth, and that establishes scientifically plausible connections between the action of real property owners/users and the results of those actions on that real property and so on other ecosystems").

21. Goldstein, *supra* note 2, at 390-91.

22. Goldstein, *supra* note 2, at 388.

23. Oliver v. Piatt, 44 U.S. 333, 382 (1845).

24. *See infra* Part II.A (describing the early settlement and development of America as often destructive for the environment).

25. Green v. Liter, 12 U.S. 229, 248 (1814).

26. *Id.* at 237.

27. Mark W. Cordes, *Property Rights and Land Use Controls: Balancing Private and Public Interest*, 19 N. ILL. U. L. REV. 629, 643 (1999).

28. John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 341 (1989).

29. The phrase "man-as-conqueror" is a paradigm taken from Aldo Leopold's famous book, *A Sand County Almanac*. *See* LEOPOLD, *supra* note 10, at 223 (describing the historic need for man to tame the wilderness, and develop the natural world into what man deems is an "acceptable" place to live).

30. *See* Goldstein, *supra* note 2, at 347 (stating that there is an "increasing awareness of the need for human stewardship of the environment"); *see also* Cordes, *supra* note 27, at 644 (asserting that our perspectives on land use have changed for two reasons: (1) we realize the increasing scarcity of essential natural resources like land, air, and water, and (2) we have come to understand and appreciate the valuable ecological role of land, especially that land in its natural state can also serve society).

labeling environmental damage as a cognizable harm capable of redress under the law of nuisance, such adjustments within the law may be accomplished.

This comment examines how the doctrine of nuisance can be a tool to protect environmental values while respecting the sanctity of private property rights. Part II gives a historical perspective on land use in the United States which gave rise to the "man-as-conqueror" paradigm[31] and argues that present day sentiment between people and their environment requires a shift to the "landowner-as-steward" paradigm.[32] Part III examines the dual nature of property, analyzing the public and private aspects of property, and argues that it is a proper place for the courts to be receptive to popular environmental sentiment and involve themselves in establishing the "landowner-as-steward" ideal.[33] Part IV proposes a judicial course of action by defining a workable environmental ethic, through the vehicle of nuisance law, and demonstrating that nuisance law is an effective tool in protecting environmental values while being cognizant of private property rights.[34] Part V concludes that environmental protection is a necessary course of action, that it is supported by an ever-growing segment of the population, and that it can be accomplished, in part, through the broadened nuisance principles as may be applied by the courts.[35]

II. A PROGRESSION OF PARADIGMS

A. *The Evolution of the "Man-as-Conqueror" Paradigm in American Society and the Law*

Modern property law does not instill a land ethic necessary to encourage the landowner-as-steward ideal.[36] In many instances environmental consequences of activities are not even taken into account by courts precisely because they are not

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31. *See infra* Part II.A (explaining how the "man-as-conquer" paradigm developed and manifested itself in early America).

32. *See infra* Part II.B (arguing that our increased knowledge of ecology and understanding of our natural world necessitates a paradigm shift from the "conqueror" paradigm to "landowner-as-steward" paradigm).

33. *See infra* Part III (noting that property serves both private and public interests; that there are limits and constraints on the use of property, and that it is appropriate for courts, in protecting environmental values, to rely on and emphasize these attributes of property).

34. *See infra* Part IV (arguing that the science of ecology may serve as the basis for developing a workable standard, which the judiciary can use to develop an environmental ethic); *see also infra* Part IV (arguing that specifically broadening our concepts of "reasonableness" and "harm" to include destructive and detrimental environmental injury enables the judiciary to utilize the doctrine of nuisance to help curb environmental degradation).

35. *See infra* Part V (concluding that environmental protection is a necessary course of action and can be accomplished, in part, by a judiciary that applies these broadened concepts of nuisance).

36. *See* Goldstein, *supra* note 2, at 403 (stating that there is a "failure of current environmental laws to further the environmental ethic"); *see also* Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529, 534-35 (1989) (explaining that "[t]wo hundred years of constitutional law in this country have failed to produce a consensus on the rights of the individual vis-a-vis society with respect to property").

considered as a cognizable harm by judges.[37] Today, it is widely recognized that American property law, as it has been developed by nineteenth-century judges, has a pervasive "antiwilderness bias."[38] That American property laws have developed such a wilderness disdain is hardly surprising, given the historical time frame in which property laws were developed.[39]

"Early Americans viewed the seemingly endless wilderness with repugnance"[40] and put their efforts into conquering their wild adversary.[41] American settlers saw the vast, wild, untamed land as an obstacle to progress and an unwanted impediment to prosperity and national expansion.[42] Early settlers and pioneers accepted without question the prevailing notions of the day that property rights automatically included the right to unrestrained development of land as well as the right to reap the profits of the land—profits without regard for the toll their actions took on the environment.[43]

The "frontier ethic," under which early settlers adhered to, demanded supremacy over the land.[44] From the earliest days of European settlement this seemingly boundless wilderness tantalized the entrepreneurial settler.[45] To early Americans, precious natural resources appeared inexhaustible. In fact, the "vastness and plentitude [of] the continent encouraged a consumptive, aggrandizing culture, a culture that used and discarded, one that soon became restless with what it possessed and looked always for the next acre to clear."[46] As if on a moral crusade against the

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37. *See* Freyfogle, *supra* note 2, at 126 (explaining that "[b]ecause environmental harms are often so much more subtle, indirect, and diffused than the harms that the common law has normally considered, courts may be prone, wrongly, to discount or ignore them").

38. *See generally* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996) (arguing that, with an abundance of wilderness, American judges developed various doctrines, including waste, adverse possession, possession as notice to a bona fide purchaser, good faith improver, trespass, and nuisance, to encourage agrarian development of land, effectively promoting the destruction of privately owned American wilderness).

39. *See* Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1082 (1973) (explaining that "[o]ur property concepts were developed in a time when exploitation of the land's bounty was seen as a social good to be encouraged").

40. Sprankling, *supra* note 38, at 530-31. Early pioneers "attacked the wilderness relentlessly, destroying forests with girdling and fire." *Id.*

41. *See* LEOPOLD, *supra* note 10, at 188 (explaining that "[t]o the laborer in the sweat of his labor, the raw stuff on his anvil is an adversary to be conquered. So was wilderness an adversary to the pioneer.").

42. Sprankling, *supra* note 38, at 531.

43. *See* Large, *supra* note 39, at 1044 (stating that this early concept of property as a means to profit included the notion that it was acceptable "to change the very essence of the land, if necessary to obtain that profit").

44. Freyfogle, *supra* note 2, at 95; *see* Large, *supra* note 39, at 1043 (explaining that early settlers were driven by "an anthropocentric religion which demanded that man exercise dominion over the earth and all the lesser creatures").

45. *See* Freyfogle, *supra* note 2, at 95 (stating that the "seemingly vacant and plentiful country beckoned the restless American immigrant").

46. *Id.* at 96; *see* Cordes, *supra* note 27, at 643 (explaining that, as a young country, America needed growth and economic expansion which tended to convert property into intensive land uses and reasoning that since land was only seen to have value when developed, and since raw land was plentiful, consumptive and destructive use of land was not threatening).

wilderness, early settlers cleared and domesticated their environment.[47] Far from an end in itself, wilderness provided early settlers with merely the "raw material, not the finished product."[48] Hence, the wilderness was a means to making human aspirations come true.[49]

The American judiciary shared, and encouraged, the antiwilderness sentiment of the people.[50] As Professor Freyfogle explains, American property law developed an extreme human-centered approach in the nineteenth century, to the exclusion of any prowilderness values:

> As much as any body of law, property law evolved in response to the felt needs of the American people. By the early nineteenth century, it had finally become clear that the ultimate source of law was the people and their will; the law had become an expression of shared values, and a potent instrument of popular change. People were not just the source of law; they were, importantly, the law's only recognized subjects—the beings for whose benefit the law existed.[51]

Nineteenth-century courts often worded their opinions to express this prejudice against wilderness.[52] "I confess," candidly wrote Justice Marshall, "that I have no difficulty in pronouncing against the existence of unsettled and uncultivated lands."[53] The "dreary, uninhabited wilderness"[54] was seen by the nineteenth-century judiciary as "mere uncultivated country, [with] wild and impenetrable woods . . . the sullen and solitary haunts of beasts of prey."[55] To make matters worse for early settlers, these "'wild lands,' uncultivated, [and] of little value,"[56] were "covered with s[a]vages equally fierce and hostile."[57] Nevertheless, to the satisfaction of the court, the early pioneers pressed on "find[ing their] way through pathless deserts, into lands still overrun by the aborigines, in order to 'break a twig,' or 'turn a sod.'"[58]

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47. *See* Freyfogle, *supra* note 2, at 96 (stating that the "aggressiveness of frontier culture took on moral and aesthetic overtones" so that unexploited acres "suggested sloth and moral weakness on the owner's part–a hint that the human owner was not up to the challenges of the land"); *id.* (explaining also that the "ideal pastoral vision" did not include ugly sloughs or weed patches).

48. *Id.* at 96.

49. *Id.*

50. *See* Sprankling, *supra* note 38, at 531 (stating that early nineteenth-century judges shared the people's anitwilderness prejudice and drafted opinions to promote "the ideology of exploitive utilitarinanism: land in its natural condition was considered essentially worthless until converted to human use").

51. Freyfogle, *supra* note 2, at 98-99.

52. Sprankling, *supra* note 38, at 531.

53. Brown v. Gilman, 17 U.S. 255, 297 (1819).

54. Shoemaker v. Kingsbury, 79 U.S. 369, 374 (1870).

55. *Green*, 12 U.S. at 249 (1814).

56. Lewis v. Barnhart, 145 U.S. 56, 59 (1892).

57. Massie v. Watts, 10 U.S. 148, 164 (1810). The court never did reconcile or explain how an "uninhabited wilderness" could be "covered with sevages [sic]." *Id.*

58. Davis v. Mason, 26 U.S. 503, 507 (1828).

After all, "[t]o leave them [the Native Americans] in possession of their country, was to leave the country a wilderness."[59]

Ultimately the legal profession elevated notions of property to a level of abstraction,[60] which would severely cripple our ability to see ourselves as members within the dynamic environmental community.[61] As judges and lawyers argued over the hypothetical Blackacre, "property lost its tethers with any particular spot on the landscape; it became an imaginary ideal, unrelated to the natural world."[62] The "bundle of rights" that we describe as characteristic of property ownership added further to the abstraction of property as something not attached to the physical world.[63]

In the nineteenth-century judicial mind, the impetus was clear: develop "property law doctrines that meet the challenges of a wilderness nation"; develop the frontier.[64] Required to contend with the formidable American wilderness—dense, vast forests, detestable swamps and wetlands, boundless plains and prairies, formidable mountain ranges, and inhospitable desert—nineteenth-century American judges "constructed a new property law system with an inherent antiwilderness bias": "[T]he reformulated common law of property tended to resolve use and title disputes in favor of the wilderness exploiter and against the wilderness nonuser."[65]

In *The Antiwilderness Bias in American Property Law*, Professor Sprankling explores the issue of whether modern property law influences the destruction of privately owned wilderness.[66] Rejecting the conventional assumption that property law is essentially neutral,[67] he contends that "For two centuries, the common law of

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59. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

60. *See* Freyfogle, *supra* note 2, at 97 (explaining the law did not treat property as part of a living community but as a "disembodied idea" which the property owner could use and control to the exclusion of outsiders).

61. *See* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH & LEE L. REV., 1057, 1086 (1980) (explaining that property rights are "a construct, a thing of the mind and not of the earth"); *see also* Goldstein, *supra* note 2, at 412 (stating "[i]n an effort to raise the theory of property to a universal and highly intellectual principle, the res was forgotten. The bundle of sticks has no ties to the ground"); *id.* (concluding "[i]n the absence of a theoretical connection to the real nature of real property, the treatment of it, without regard to any environmental implications is inevitable"); *id.* at 369 (stating that, although American property law "may have wavered between . . . varying philosophical constructs, it seems clear that the prevalent concept is based on the abstraction of rights and duties").

62. Freyfogle, *supra* note 2, at 97.

63. *See id.* at 98 (stating that this abstraction of property led to the narrow view of property as a mechanism through which one could derive income such that the value of land was directly related to the land's income-producing capability). For a criticism of the bundle of sticks approach to property, see Goldstein, *supra* note 2, at 371-74 (pointing out that the concept is flawed in the sense that it describes only rights in property to the exclusion of responsibilities of landownership).

64. Sprankling, *supra* note 38, at 525-26.

65. *Id.* at 526.

66. *Id.* at 520.

67. *See id.* at 520 (explaining that the "conventional assumption" is that property law is neutral, "neither encouraging nor discouraging wilderness destruction, except in the limited sense of facilitating owner autonomy"); *see also id.* (stating that any wilderness disappearance is a result of land owners "voluntary choice," an exercise of their free will).

property has actively encouraged [the] destruction [of land] through an inherent antiwilderness bias . . . ." and concludes that this is a trend that we still see today.[68]

Professor Spranklng asserts that English property law, as brought to the American continent by early settlers, was an inadequate tool to govern the task of developing wilderness.[69] The English common law of property was not calibrated to meet the needs of American settlers because of diametric conditions with regard to land in the different countries. England was a small island nation, fully explored, portioned out, and developed, and so its laws evolved to reflect the reality that it was a country which had met its limits and was in a mode of preservation.[70] On the other hand, America was an immense landmass, with wild, seemingly endless terrain. Judges needed to develop a body of property law uniquely suited to meet the demands of the landscape,[71] and "slowly remolded English property law doctrines to meet the challenges of a wilderness nation."[72] The system they constructed was premised on a fundamental antiwilderness bias.[73]

B. A Time for Change: From the "Conqueror" Paradigm to the "Steward" Paradigm

Today, only ten to twenty percent of this country is "wilderness."[74] For all practical purposes, Americans have conquered and tamed this land.[75] Yet we continue to use property doctrines similar to those of the nineteenth century. The reality that we do not live on a boundless continent, coupled with an increasingly sophisticated understanding of our affects on the natural environment, should cause us to broaden our notions of property and infuse modern property law with an environmental ethic.[76]

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68. *See id.* at 590 (stating that even today, our "property law system typically adjudicates use and title disputes concerning privately owned wilderness by preferring exploitation to preservation").

69. *See id.* at 523-24 (explaining that "English property law was a poor tool for encouraging the exploitation of virgin land").

70. *See id.* at 524 (noting the "English wilderness had vanished long before the discovery of America" and so England evolved a "semipreservationist property law system attuned to a postwilderness nation").

71. *See id.* at 523 (explaining nineteenth-century judges were "faced with the task of fashioning a body of property law that would encourage national development").

72. *Id.* at 525.

73. *Id.* at 526.

74. *See id.* at 519 (explaining that the area that is now the United States was over 95 percent wilderness at the beginning of the nineteenth century); *see also* Humbach, *supra* note 28, at 340 (adding that the "remnant wild lands" that remain "lie in isolated bits in the east and in larger fragments father west"); *see id.* at 340 n.3 (noting that there is a total of approximately 90 million acres of land in the National Wilderness Preservation System); *see also* The Wilderness Act of 1964, 16 U.S.C.A. § 1131(c) (West 1964) (defining wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain").

75. *See* Humbach, *supra* note 28, at 340 (stating that "[t]he American landscape has been transformed. Instead of a great wilderness, America's land is now a groomed and cluttered place.").

76. *See* Anderson, *supra* note 36, at 551 (explaining that the notion that property owners should not be allowed to use their property to injure the public interest is more broad than the condition that property should not be used to injure others).

Standing elbow to elbow with our neighbors, we are finally forced to re-evaluate our situation. What we now discover is that two very different worlds are coming together: "By the late twentieth century, this expansionist, market-oriented, tame-the-land ethic would collide noisily with a much different orientation toward the land, one based on the vague but influential sense that humans are part of the land community and have responsibilities to fellow community members."[77] Today, we realize, the age of ecology is upon us. In the face of "mounting evidence that we are pushing the land far too hard,"[78] an environmental ethic has surfaced within the popular culture.[79] Today, society's environmental consciousness has matured to the point where many people understand that the maintenance and preservation of the environment is a sound and important goal.[80]

Society recognizes the concept that environmental protection is an exceedingly critical goal; "[l]and and resources are finite, and we require them for our survival."[81] Humans need clean air to breath and clean water to drink. For at least the foreseeable future, we will depend on the land to grow our crops, the oceans to

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77. Freyfogle, *supra* note 2, at 96-97.

78. *Id.* at 79, 113 (stating that "environmentalists sense strongly today, that humans must contain, if not reduce, their overall impact on the land" and "pay greater heed to the functioning of natural communities and work harder to respect that functioning by keeping [our environment in good condition]").

79. *See* Tucker, *supra* note 3, at 325 (stating that "[e]nvironmentalism, often used in the past to describe a fringe movement, has become part of the mainstream human ethos").

80. *See id.* (concluding that the fact that increasing numbers of citizens are understanding the importance of the environment is due to "an increasingly sophisticated understand[ing] of basic ecological relationships and scientific principles," as well as an "understanding that economic self-interest often trumps the environment in the absence of law"). Perhaps the most conclusive and reliable evidence that environmental concerns are legitimately in the forefront of society's awareness is when one considers the number of environmental law journals being produced today. The Harvard Blue Book lists twenty-three law journals dedicated to the exploration of current environmental issues. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 320-341 tbl. T.10 (COLUMBIA LAW REVIEW ASS'N ET AL. EDS., 17th ed. 2000) (listing the following: *Boston College Environmental Affairs Law Review*; *Buffalo Environmental Law Journal*; *Colorado Journal of International Environmental Law and Policy*; *Columbia Journal of Environmental Law*; *Dickinson Journal of Environmental Law & Policy*; *Duke Environmental Law & Policy Forum*; *Florida State University Journal of Land Use & Environmental Law*; *Fordham Environmental Law Journal*; *Georgetown International Environmental Law Review*; *Harvard Environmental Law Review*; *Hastings West-Northwest Journal of Environmental Law and Policy*; *Missouri Environmental Law and Policy Review*; *New York University Environmental Law Journal*; *Pace Environmental Law Review*; *South Carolina Environmental Law Journal*; *Stanford Environmental Law Journal*; *Temple Environmental Law & Technology Journal*; *Tulane Environmental Law Journal*; *UCLA Journal of Environmental Law and Policy*; *University of Baltimore Journal of Environmental Law*; *Villanova Environmental Law Journal*; *Virginia Environmental Law Journal*; and *Wisconsin Environmental Law Journal*). In addition to these journals, a number of other periodicals also explore environmental issues. *See id.* (listing the following: *Ecology Law Quarterly*; *Environmental Lawyer*; *Great Plains Natural Resources Journal*; *Institute on Planning, Zoning, and Eminent Domain*; *Journal of Energy; Natural Resources & Environmental Law*; *Journal of Environmental Law and Litigation*; *Journal of International Wildlife Law and Policy*; *Journal of Land, Resources, & Environmental Law*; *Journal of Land Use and Environmental Law*; *Journal of Mineral Law & Policy*; *Land and Water Law Review*; *Natural Resources Journal*; *Ocean and Coastal Law Journal*; *Public Land Law Review*; *Public Land and Resources Law Review*; *RISK: Health, Safety & Environment*; *Rocky Mountain Mineral Law Institute*; and *State Bar of Texas Environmental Law Journal*).

81. Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?* 31 ARIZ. ST. L.J. 391, 392 (1999); *see id.* (stating that "[t]he environment can no longer be seen as a vast unlimited resource that we can exploit without consequence for our own advantage").

provide fish, and the earth's forests to regulate our global atmosphere. No matter how technically advanced we become, the land will always constitute our "source of life."[82]

Aside from satisfying our physical, biological needs, "land as a whole . . . is vitally important to the psychological and physiological well-being of mankind."[83] Fishing, climbing, camping, skiing, and hiking are activities best done outdoors. For some reason, the experience is more satisfying, and Half Dome is more impressive when one views it standing in a meadow on the valley floor, rather than in your kitchen looking at a postcard. Perhaps, for the first time in our country's history, "we are coming to recognize the intrinsic value of the natural world."[84]

III. THE COURT'S ROLE

A. *Promulgation of Judicial Environmental Ethics*

Since the American judiciary played a large role in shaping people's attitudes and behavior toward nature in ways that encouraged wilderness destruction and exploitation, it is only fitting that courts today adopt a pro-environment, conservationist land ethic to reshape people's notions of the duties and responsibilities inherent in the private property owner.[85] In order to successfully reshape human thought about their relationship and responsibility to the environment, it is absolutely necessary that courts actively involve themselves in leading a property renaissance.[86] As Aldo Leopold noted, "No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions."[87] By shaping the way we think and behave, courts are unquestionably in a unique position to influence our relationship with the natural world.

A successful transition from the "man-as-conqueror" paradigm of land use to the "landowner-as-steward" ideal requires the judiciary to distance itself from, if not completely reject, outdated nineteenth-century notions of property. Retooling public sentiment about land use and redefining the human relationship within the natural world will require judges to embrace environmental values and realize that land use

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82. Large, *supra* note 39, at 1040.

83. *Id.* at 1040; *see id.* at 1040 n.12 (quoting BROWER, *Wilderness, in* THE ENVIRONMENTAL HANDBOOK 148-49 (G. DeBell ed., 1970)) (explaining "[w]ilderness is important as an idea . . . It's a commodity we make use of even when we aren't in it; its existence makes New York City or Oakland more tolerable, because we know that there is something else").

84. McGregor, *supra* note 81, at 392.

85. *See* Sprankling, *supra* note 38, at 586 (stating "[j]ust as the nineteenth-century instrumentalist [judges] retooled English property law to meet the challenge of wilderness abundance, modern neoinstrumentalist judges must transform American property law to contend with the problem of wilderness scarcity").

86. *See* LEOPOLD, *supra* note 10, at 200-01 (stating "[i]t is only the scholar who understands why the raw wilderness gives definition and meaning to the human enterprise").

87. *Id.* at 209-10.

should be governed by ecological needs. Once environmental values are embraced by courts and become central to the resolution of cases, popular sentiment about the environment may mature into the "landowner-as-steward" ideal.

Although this will require the judiciary to walk a proverbial tight rope, balancing the sanctity and importance of private property rights on the one hand, and public goals of the environment on the other, judges already have the tools necessary to protect environmental values while upholding the private owner's property rights. The answer lies at the very heart of property law—the fundamental truth that property serves both public and private values.[88]

B. *The Dual Role of Property*

What had been lost in the judicial fervor of wilderness development in the nineteenth century was the notion that property serves essentially dual roles, a private role and a public role. Property's private role has been overshadowed and limited by its public role. The dual role of property was largely overlooked because of the sheer abundance of land and a lack of understanding or appreciation for ecological values. However, with the closing of the American frontier in 1890, and more recently with current issues of overpopulation, pollution, environmental degradation, species decline or extinction, and urban sprawl, the time is ripe for a resurgence—a renaissance—in the recognition of the dual role of property in order to define human relationships with property. The following paragraphs provide a basic exploration of the public and private dimensions of property, and conclude that property has always possessed both public and private attributes.

The right to use and enjoy one's property is a fundamental right protected by state constitutions and the United States Constitution.[89] However, the United States Constitution does not create property rights.[90] Rather, property rights are created and defined by existing rules, like common law or state law.[91] "Property" can take various forms,[92] but when we talk about "property" in a legal sense, we allude to the bundle of rights enjoyed by the property owner.[93]

Within the scope of constitutionally protected property rights are "the rights to acquire, hold, enjoy, possess, manage, insure, defend and protect, and improve property, and the right to devote property to any legitimate use."[94] Although there

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88. *See* Sax, *supra* note 3, at 1453 (espousing the proposition "that property can serve two masters: the community and the individual").

89. Buskey v. Town of Hanover, 577 A.2d 406, 409 (N.H. 1990).

90. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

91. *Id.*

92. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975) (holding that a bank account is property for due process clauses of the 14th Amendment).

93. *See Buskey*, 577 A.2d at 409 (acknowledging these rights as the rights "to possess, use, enjoy and dispose of [property]").

94. 16B AM. JUR. 2D *Constitutional Law* § 587 (1998).

is no constitutional limit on the amount of property one can own,[95] the rights of a property owner to do as he wishes with his property are not absolute.[96] A property owner may not use her property in ways that endanger or threaten the general public's health and safety[97] or use property in violation of criminal laws.[98] Such limitations on private property are expressed in the maxims "*sic utere tuo ut alienum*"[99] and "*salus populi est suprema lex.*"[100] Hence, the reality of our system of property is "[w]hile the constitutional guarantees with reference to the enjoyment of property should remain stable, it is equally true that they are not so rigid that they should not, within the realm of reasonableness, bend to accommodate the public welfare, the well-being of the whole people."[101]

Although the owner of property holds many sticks of the bundle, courts have always realized that property is still subject to the three rights of government: (1) right of taxation, (2) right of eminent domain, and (3) right of police power.[102] Eminent domain is one of the powers of a sovereign government to take privately owned property upon payment of adequate compensation.[103] The term "police power"generally refers to the inherent power of the government to act in ways to promote the public health, morals, safety, and welfare.[104] When used within the context of eminent domain situations, "police power" specifically refers to the power of the government to regulate the use of land or property without the payment of compensation.[105] In this way, an exercise of the state's eminent domain powers or the police powers subjects private property to a superior public interest.

However, when exercising the above powers, a state may not arbitrarily interfere with or limit the enjoyment of property.[106] When the state exercises its power over

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95. Hamilton v. Williams, 200 So. 80, 81 (Fla. 1941).

96. *See* People v. Beach, 147 Cal. App. 3d 612, 622 (1983) (holding fundamental constitutional rights are not absolute and may be reasonably restricted in the public interest).

97. *See* Erb v. Md. Dep't of Env't, 676 A.2d 1017, 1027-28 (holding that the plaintiff was not entitled to compensation for the denial of his permit to put in a septic tank on his property because the sewage regulatory scheme regulated against creation of nuisances and the sewage system that plaintiff proposed posed a serious threat to public health and pollution of water); *see also* Allied-General Nuclear Servs. v. United States, 839 F.2d 1572, 1573 (Fed. Cir. 1988) (holding that the plaintiff had no legally protected property right to obtain a permit to operate a facility to recycle spent nuclear fuel where operation of such a facility endangered public welfare); Mugler v. Kansas, 123 U.S. 623, 663 (1887) (stating that "[n]o one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare").

98. *See* Taylor v. Trianon Amusement Co., 200 So. 912, 914 (Fla. 1941) (explaining that property, such as the plaintiff's night club, was operated in violation of criminal laws, and so was properly regulated by the County Solicitor).

99. "So use your own as not to injure that of another's property." BLACK'S LAW DICTIONARY (7th ed. 1999), at 1690.

100. "The safety of the people is the supreme law." *Id.* at 1688.

101. 16B AM. JUR. 2D *Constitutional Law* § 583 (1998).

102. City of Cleveland v. Ruple, 200 N.E. 507, 509 (Ohio 1936).

103. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 423 (4th ed. 1991).

104. *Id.*

105. *Id.* at 423-24.

106. *See* Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 415 (1935) (stating police power is constitutionally limited; therefore, it cannot be exerted arbitrarily or unreasonably).

an individual's property, either through regulation of the property or through an outright taking of the property, the state's exercise must be for a public purpose—in furtherance of the general welfare.[107] Public benefits commensurate with burdens on private property justify the subordination of private property rights.[108]

Another restriction on private property rights that has historically been allowed by courts is the subordination of private land to public welfare through the public trust doctrine. As discussed in *Illinois Central Railroad Company v. Illinois*,[109] the public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."[110] Under the public trust doctrine, all public waters are held in trust by the state for the use and enjoyment of the public.[111] The doctrine has undergone an expansion in recent years and is "flexible enough to meet diverse modern needs. . . . such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands."[112] Therefore, in order to promote broad public interests, a state can impose restrictions on activities on private property that have the result of affecting public use of water.[113]

The notion that private rights in property yield to the public welfare is an old concept dating back to the founding of this nation. Although Thomas Jefferson recognized "that some protection of private property was necessary for true independence," he was ultimately of the republican persuasion that property had an overriding egalitarian and utilitarian aspect to it so that "property is held by the individual in trust for the benefit of society as a whole."[114] Benjamin Franklin, also held beliefs similar to those of Jefferson. Franklin believed that private property

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107. *See* Pacific Palisades Ass'n v. City of Huntington Beach, 237 P. 538, 539-40 (Cal. 1925) (stating that zoning, an exercise by the state of its police power, is only permitted where it is "reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community").

108. *See* Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 73 (Ohio 1941) (explaining that there exists a delicate balance between the rights of individual property owners and the power of the government, and that each faction modifies and restricts the other, yet never extinguishes the other, so that a proper balance between property rights and public welfare may be struck); *see also* Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855, 857 (Fla. 1952) (emphasizing that although the state has the power to regulate private land, the state's police power does not justify an interference with a property owner's rights when the interference outweighs the benefit to the public).

109. 146 U.S. 387 (1892).

110. *Id.* at 436.

111. Larson v. Sando, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993); State v. Bleck, 338 N.W.2d 492, 497-98 (Wis. 1983).

112. District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984); *see* National Audubon Soc'y v. Super. Ct., 189 Cal. Rptr. 346, 360 (1983) (stating that "the public trust . . . is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands").

113. *See* United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950) (stating that "[t]he owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . Thus there has been ample notice over the years that such property is subject to a dominant public interest.").

114. Anderson, *supra* note 36, at 532; *see id.* (stating that although Jefferson believed that people "certainly must be able to make productive use of property, the land itself was the 'common stock' of all [and that i]ndividual rights in property, therefore, must yield at times to the greater needs of society").

existed solely because of society's agreement to recognize and protect individual interests in property.[115] Consequently, any protection society extends to the property owner "is given subject always to the condition that the property be used to further the goals of society as a whole."[116] Thus, early republican philosophy with respect to property was that private property rights were recognized and protected, but always balanced against social needs; the greater good and general welfare of society was always the paramount concern.[117]

Although the concept of general welfare is broad[118] and incapable of a specific definition,[119] "[t]he primary social interests of safety, order, and morals; economic interests; and nonmaterial and political interests" generally fall within its scope.[120] However, these are not the only interests the police power is designed to protect.[121] Protection of natural resources and ecosystems promotes the general welfare, and as such, the state is fully justified in using its broad police power to further the goals of environmental protection.[122] From this brief discussion, two indisputable truths

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115. *Id.* at 533.

116. *Id.*; Benjamin Franklin felt that

> "The accumulation therefore of Property in such a Society, and its Security to Individuals in every [Society], must be an Effect of the Protection afforded to it by the joint Strength of the Society, in the Execution of its Laws. Private Property therefore is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its Contributions therefore to the public Exigencies are not to be considered as conferring a Benefit on the Publik, entitling the Contributors to the Distinctions of Honour and Power, but as the Return of an Obligation previously received, or the Payment of a just Debt."

Id. (quoting B. FRANKLIN, QUERIES AND REMARKS RESPECTING ALTERATIONS IN THE CONSTITUTION OF PENNSYLVANIA, *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (A. Smyth ed. 1907)).

117. Anderson, *supra* note 36, at 533; *but see id.* at 533-35 (noting that "[a]lthough republicanism was the prevailing philosophy behind the American revolution," it was the federalist viewpoint—"a general distrust of legislatures because of their tendency to trample on individual property rights," a desire "that individuals be as free as possible from government interference," and a philosophy which elevated property rights to a level of paramount importance, "to be protected to the same extent as other individual rights"—that eventually prevailed when the Bill of Rights was initially debated by the First Congress); *see also* Cordes, *supra* note 27, at 645 (maintaining that the idea of private property rights limited by public concerns remains "the core principle" of American property law today).

118. *See* Hendricks v. Com., 865 S.W.2d 332, 338 (Ky. 1993) (stating that the values the public welfare doctrine protects "are spiritual as well as physical, aesthetic as well as monetary").

119. *See* Hart v. City of Beverly Hills, 11 Cal.2d 343, 346 (1938) (stating that the "'general welfare' has an infinite range, nearly, if not as completely beyond the contemplation of the human mind as is the universe itself'); *see also id.* (stating the concept of general welfare "knows no bounds; it is as changeable as the 'vagrant breeze'").

120. State v. Hutchinson Ice Creamery Co., 147 N.W. 195, 199 (Iowa 1914).

121. *See* Nashville, C & St. L. Ry, 294 U.S. at 494-95 (expressing the idea that the police power is designed to promote broad interests of public convenience and general welfare, not just public health, safety, and morals).

122. *See* State v. Walsh, 870 P.2d 974, 978 (Wash. 1994) (holding that a "spotlighting" statute was not an impermissible infringement on defendant's Second Amendment right to bear arms, but was a reasonable exercise of police power for the protection of the state's big game); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (holding that an ordinance "designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"); People v. K. Sakai Co., 56 Cal. App. 3d 531, 536 (1st Dist. 1976) (holding that the protection of endangered species is a matter of general concern and an interest in the public welfare, and as such, it falls within the ambit of the

emerge: first, property rights are not absolute, and second, although we regard property rights as a sacred right, landowners ultimately hold their property subject to greater public good. Simply put, "[a]ll private property systems have limitations or constraints on them."[123] For the American landowner in the twenty-first century, this means that his legal rights in property are necessarily bounded by the public interest and general welfare[124] as well as the "growing attitude that there exists an inherent public right in property that transcends the technicalities of title."[125]

C. *Why the Courts?*

"The law of land ownership is one of the cultural elements that expresses our sense of place in the natural order of life."[126] Judges, as keepers of the common law and applicators of statutory law play a central role in shaping public sentiment about what it means to be a landowner, and more broadly, how we view ourselves in relation to our environment. The task of twenty-first-century judges will be to actively set out to remedy the antiwilderness bias cemented in property law by their nineteenth-century counterparts.[127]

"The common law is supposed to respond to public opinion and to reflect with more or less fidelity the moral and ethical sentiments of the people."[128] As science progresses and gives us a more complete understanding of the effects of our activities on the natural world, and as environmental philosophies develop and mature into tenable, conventional edicts, courts must also stay in step with modern thought.[129] As traditional nineteenth-century notions of land as ripe for owner

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State's police powers); Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla. 1981) (holding that the "[p]rotection of environmentally sensitive areas and pollution prevention are legitimate concerns with the police power;" therefore, a regulatory agency finding that proposed development would result in pollution to surrounding bays promoted the welfare of the public and prevented a public harm); State v. Martin, 152 N.E.2d 898, 901-02 (Ohio App. 1957) (stating that conservation of resources is a duty of the state for the benefit of the state's citizens, and as such, falls with in the state's police power); Phillips Petroleum Co. v. Jones, 147 F. Supp. 122, 126 (Okla. 1955) (stating that "[n]othing is more universally recognized than the right which inheres in the state to conserve, protect and develop its natural resources for the people's general welfare and prosperity").

123. McGregor, *supra* note 81, at 413.

124. Humbach, *supra* note 28, at 348; *see* Cordes, *supra* note 27, at 642 (stating "[o]ur nation . . . has long recognized that private property interests are limited by public needs," and this is "a position consistently upheld by courts").

125. Large, *supra* note 39, at 1074.

126. Freyfogle, *supra* note 2, at 109.

127. *See* Sprankling, *supra* note 38, at 588 (explaining that nineteenth-century judges "disrupted the balance of property law with the weight of an antiwilderness thumb" and that it should be the job of twenty-first-century judges to "rebalance the scale with a preservation counterweight").

128. Goldstein, *supra* note 2, at 410.

129. *See* Anderson, *supra* note 36, at 559 (stating that as we become "more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times").

exploitation "are becoming increasingly irrelevant and even harmful,"[130] courts should adapt the common law to reflect the need for environmental protection and stewardship.

In our enlightened environmental age, perpetuating nineteenth-century property laws which have no regard for ecological values demonstrates how foolishly we are lost in the past; allowing dead nineteenth-century judges to control twenty-first-century notions of property is a kin to forcing "a civilized society to remain ever under the regimen of their barbarous ancestors."[131] If history teaches us anything, it is that people living in a certain era have been willing to apply their own contemporary values to the world around them, rather than letting their lives be ordered by people and archaic notions of the distant past.[132] In fact, the relevance and legitimacy of the law and courts in the eyes of the public requires the judiciary be receptive to liberal environmental arguments, seriously consider the environmental implications of their decisions, and craft decisions in a way sensitive to ecological concerns. The judiciary should give popular ideas of conservation, preservation, and ecology their day in court.[133] The judiciary stands in a reciprocal relationship with society: by incorporating public sentiment into their decisions, the public's values are reinforced.[134] So it is with land and property law. "The law of ownership therefore does more than reflect a set of values: it helps instill them, and carries them on."[135] As the judiciary comes to appreciate principles of ecology, values the natural environment as an end in itself, and truly harmonizes the dual functions of property, the American people can only follow suit.

IV. THE JUDICIAL COURSE

A. The Starting Point: An Environmental Ethic

One of the most challenging aspects of this area of law is to define what we mean by an "environmental ethic." If one hundred people were asked to write down

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130. Large, *supra* note 39, at 1082; *see* Sprankling, *supra* note 38, at 584 (stating that although wilderness exploitation may have been defensible at an earlier point in our history when land was abundant, it is now "unnecessary and dangerous").

131. Anderson, *supra* note 36, at 559; *see* Sprankling, *supra* note 38, at 569 (stating that even though the American judiciary pay polite lip service to the environmental, pro-wilderness ideals prominent today, "the judiciary blindly applies most of the antiwilderness doctrines of the past").

132. Freyfogle, *supra* note 2, at 124; *see* Sax, *supra* note 3, at 1447 (stating it is difficult to identify a point in history when property law encouraged activity which directly conflicted with a community's social values).

133. *See* Large, *supra* note 39, at 1082 (explaining "times have changed and that the law [,] to be relevant [,] must adjust to the exigencies of our present crisis in land use"); *see also* Freyfogle, *supra* note 2, at 120 (explaining that "[c]ourts cannot keep the common law up to date merely by looking to the past and making logical deductions"); *id.* (advocating that the solution is for courts to always "keep one eye on the community and its evolving norms and expectations, and mix the values they find there with the heritage and language of the law").

134. *See supra* text accompanying note 51 (explaining that nineteenth-century property law developed based on the people and their will and that the law reflected a set of shared values).

135. Freyfogle, *supra* note 2, at 109.

what they felt would be an appropriate environmental ethic society should live by, one hundred different responses would likely be given.[136] "An environmental ethic defies precise definition because it reflects human values that vary among individuals."[137] Professor Robert Goldstein offers the following definition:

> It is an understanding that in an ecosystem every action taken has consequences; those consequences may be adjudged as positive or negative values based on the needs of society; and that persons must act as stewards of their domain, whether that domain be their "owned" real property or some lesser interest, to prevent actions that cause negative consequences.[138]

Perhaps the simplest, most artful expression of an appropriate standard for an environmental ethic comes from Aldo Leopold in his famous book *A Sand County Almanac*: "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."[139]

The above-discussed formulations for a land ethic are good places to start, and provide skeletal guidance as to what our goals and values should be in the area of environmental protection. But perhaps it is not necessary to reduce our environmental ethic to a black letter maxim. It may not even be wise to do so given that the environment is in a constant state of flux,[140] and our notions of what constitutes a healthy environment change through time.[141] Although its changes are, most of the time to us, imperceptibly slow, our environment is constantly changing and evolving. Ecosystems change and evolve over time, sometimes unpredictably,[142] and modern ecology recognizes the fact "that ecosystems are complex, dynamic, and inherently unstable."[143] Similarly, our attitudes and understanding of the

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136. *See* Goldstein, *supra* note 2, at 388 (explaining that "[d]efining environmental ethics is difficult because it is a value, and is therefore implicitly subjective").

137. Tucker, *supra* note 3, at 300.

138. Goldstein, *supra* note 2, at 391.

139. LEOPOLD, *supra* note 10, at 224-25.

140. *See* Eric T. Freyfogle, *A Sand County Almanac at 50: Leopold in the New Century*, 30 ENVTL. L. REP. 10058 (2000) (stating "[n]ature, ecologists tell us, is in a state of constant flux. It does not reach a climax state of existence and then remain there; it reaches a point of pause, or disturbance, only to continue along an evolutionary path that, to human observers, seems aimless.").

141. *See* Goldstein, *supra* note 2, at 402.

> "A new ecological paradigm has emerged that recognizes ecological systems to be open, regulated by events arising outside of their boundaries, lacking or prevented from attaining a stable point of equilibrium, affected by natural disturbance, and incorporating humans and their effects. A new metaphor of the flux of nature symbolizes the new, or nonequilibrium, paradigm effectively."

Id. (quoting S.T.A. Pickett & Richard S. Ostfield, *The Shifting Paradigm In Ecology*, *in* A NEW CENTURY FOR NATURAL RESOURCES MANAGEMENT 275 (Richard L. Knight & Sarah F. Bates eds., 1995)).

142. Keiter, *supra* note 14, at 295.

143. *Id.* at 302; *see also* Freyfogle, *supra* note 2, at 110-11 (explaining how relying on ecology to provide a complete picture of how to regulate land is perhaps asking more than the science can provide since the "natural order, it turns out, is a moving target, constantly evolving under pressures too numerous to inventory, much less

environment also undergo a process of change and maturation generation after generation. Therefore, a workable environmental ethic will be sufficiently flexible to adapt to and protect the specific environmental circumstances of a locality as well as the needs and values of the people living there. At its most basic level, the science of ecology will provide the theoretical underpinnings necessary to entrench environmental ethics into real property law.[144] Specifically, courts may now look to the science of ecology to assess harmful or unreasonable use of property in a nuisance context.[145]

The ground work for infusing the common law with an environmental ethic has already been laid down for us: elementary concepts of property law tell us that property serves both public and private values, and that land's private aspects are limited by public needs.[146] These are old concepts within our law.[147] However they are also concepts that have been largely forgotten. It is time for courts to involve themselves in the "property renaissance" and give new life to these old concepts of landownership. By the term "property renaissance,' I mean for the courts to give a rebirth to the dual roles of property and actively advocate the public good factor. I mean for courts to actively balance private rights of landownership against the greater public good of a clean environment, in contests between those who want to use land and those who want to protect land. When courts give serious consideration to the environmental consequences of landowner actions as they affect or harm the natural environment, and either enjoin harmful activity, or say the activity is not encompassed in the landowner's bundle of sticks, courts are able to turn the tide on land exploitation, curb environmental degradation, and shape popular conceptions about what it means to be a landowner in the twenty-first century. When landowners realize they do not have the unrestricted right to develop land, but rather hold land in trust for the community, courts will have started to replace the nineteenth-century notion of man-as-conqueror over his property with the twenty-first-century ideal of landowner-as-steward.[148]

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monitor or predict"); *id.* at 111 (stating further "that any populous species affects its surroundings–whether elephants, bison, or humans–which means that some level of human-caused disruption might well be 'natural'").

144. Goldstein, *supra* note 2, at 402.

145. *See id.* at 403 (stating "[i]n the 'prohibition of harmful use,' the ecological systems must be considered, and this could affect otherwise legal conduct on the property").

146. *See supra* Part III.B (describing the dual nature of property rights).

147. *See supra* notes 114-17 and accompanying text (explaining that the concept that private values in land are tempered by public welfare goes back to the founding days of this country).

148. *See* LEOPOLD, *supra* note 10, at 223 (noting the nature of these diametrically opposed points of view: "man the conqueror *versus* man the biotic citizen; . . . land as slave and servant *versus* land the collective organism").

B. A Broadened Concept of Nuisance: A Tool to Develop an Environmental Ethic and Protect Environmental Values

One major way through which courts may advance an environmental ethic, is through a "broader vision"[149] of property rights, gained by examining the law of nuisance. By expanding the notion of what it means to unreasonably use one's property, courts can enjoin destructive, harmful, or exploitative land practices as nuisances, thus protecting environmental values for the good of the community as a whole.

Nuisance is classically defined as "an activity resulting in an unreasonable interference with the use and enjoyment of another's property."[150] Justice Sutherland colloquially defined nuisance as "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[151]

Nuisance theory is a vehicle through which courts can give vitality to the dual roles of property and protect environmental values, while retaining sufficient flexibility to tailor decisions to specific factual circumstances as well as societal and environmental needs. "The term 'nuisance' is incapable of an exhaustive definition which will fit all cases as it is very comprehensive and it includes everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property."[152] Essentially, a nuisance is "a condition which represents an unreasonable interference with another person's use and enjoyment of his property and causes damage."[153] The unreasonableness of an action is determined by the resulting injury, not by the conduct of the person creating the condition.[154]

Nuisances are generally classified as either private, public, or some combination of the two.[155] A private nuisance is an activity that results in an unreasonable interference with the use and enjoyment of another's property.[156] Odors emanating

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149. *See* Anderson, *supra* note 36, at 530 (springboarding off Justice Brennan's language in the *Nollan* dissent, Anderson argues that "[i]n this era of ever-increasing demands on ever-dwindling resources, landowners must not expect to use their property in a manner contrary to the public interest . . . . a 'broader vision' of property rights must prevail"); *id.* (explaining that this "broader vision would recognize that the land ultimately is a public resource . . . [and that landowners must restrain themselves in] their use of property [so as not to] harm the paramount interests of society").

150. Robie v. Lillis, 299 A.2d 155, 158 (N.H. 1972).

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

152. United States v. County Bd. of Arlington, 487 F. Supp. 137, 143 (E.D. Va., 1979).

153. Graber v. City of Peoria, 753 P.2d 1209, 1211 (Ariz. Ct. App. 1988).

154. *Id.*; *see also* Buckeye Union Fire Ins. Co. v. State, 178 N.W.2d 476, 480 (Mich. 1970) (stating that "[p]rimarily, nuisance is a condition" and liability is not predicated on the conduct, but rather on the resulting injury of the condition).

155. Norton Shores v. Carr, 265 N.W.2d 802, 805 (Mich. Ct. App. 1978).

156. *See* RESTATEMENT (SECOND) OF TORTS § 822 (1977) (explaining that, under the general rule for private nuisance, a person is subject to liability if their conduct causes an intentional and unreasonable invasion in another's use and enjoyment of their land. Liability under private nuisance also includes an invasion that is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct or for abnormally

from a sewage lagoon,[157] dust and noise from a cement plant,[158] operation of a cattle feedlot near a residential development,[159] and flies and odors associated with housing horses in a residential neighborhood[160] are all examples of private nuisances. Those who recover for a private nuisance have "property rights and privileges" with respect to the land affected by the activity.[161]

A public nuisance, on the other hand, is defined by the Restatement (Second) of Torts as "an unreasonable interference with a right common to the general public."[162] To sustain an action for public nuisance, the obstruction of a public right must pose "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."[163] The operation of a hazardous-chemical-waste landfill within a city,[164] "noise pollution" emanating from a bar and restaurant six-hundred to eight-hundred feet from residential housing,[165] and the discharge of waste water into a lake[166] are examples of public nuisances. Generally, a city attorney or another public official may bring a public nuisance action since a private party may not bring a public nuisance action unless he or she has sustained "special damage, distinct from that common to the public."[167] However, rules governing who may bring an action in public nuisance might be relaxing.[168]

C. The Broadened Nuisance Theory

Today, "some land-use developments place devastating burdens on today's fragile environment."[169] The externalities of environmental degradation are felt throughout the biotic community, and pose significant consequences for the health, safety, and welfare of people.[170] People today increasingly "view development with

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dangerous conditions or activities.").

157. Pate v. City of Martin, 614 S.W.2d 46, 48 (Tenn. 1981).

158. Lunda v. Matthews, 613 P.2d 63, 66 (Or. Ct. App. 1980).

159. Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706 (Ariz. 1972).

160. Hobbs v. Smith, 493 P.2d 1352, 1353 (Colo. 1972).

161. RESTATEMENT (SECOND) OF TORTS § 821E (1977).

162. *Id.* at § 821B (1).

163. *Id.* at § 821B (2)(a).

164. Village of Wilsonville v. SCA Serv. Inc., 426 N.E.2d 824, 831 (Ill. 1981).

165. People v. Mason, 124 Cal. App. 3d 348 (1981).

166. United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill.1973).

167. Holloway v. Bristol-Myers Corp., 327 F. Supp. 17, 24 (D.C.D.C. 1971).

168. *See* Akau v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982) (stating that "a member of the public has standing to sue to enforce the rights of the public [against a public nuisance] even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action").

169. Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 357 (1990); *see id.* (stating the traditionally narrow scope of the nuisance doctrine may be expanding to restrict "nuisance-like" activities).

170. *See* Coletta, *supra* note 169, at 357 (describing these consequences to public health, safety, and welfare as "substantial" and "immediate").

suspicion and even hostility."[171] Contemporary pro-environment sentiment, coupled with the "reality that much development has significant nuisance-like consequences,"[172] justify an expansion of nuisance principles to protect ecosystems and environmental values.

Land ownership has always entailed social obligation.[173] Today, "land, and especially undeveloped land, is a public resource whose use must be guided by public concerns."[174] Judicial expansion of nuisance principles allows courts to protect the health, safety, and welfare of the people, through environmental protection.

Through a rigorous application of nuisance law, as well as a broad concept of harm or unreasonableness, courts are in a position to apply a land ethic and vindicate environmental values for the good of the community. Since "no individual has the right to use his property so as to create a nuisance or otherwise harm others,"[175] courts may legitimately decree that any nuisance-like activity may be enjoined since it was not part of the bundle of rights the property owner had in relation to his property to begin with.[176] This necessarily requires courts to expand current notions of what constitutes harmful, offensive, or unreasonable consequences of certain activities to include those activities that place excessive environmental harms on the environment. An example how broadened nuisance principles can be applied in a contemporary land use case to prevent environmental harm from residential development causing ecosystem degradation without running afoul of the takings clause is in order. The case of *Good v. United States*[177] will provide the backdrop.

In 1973, Lloyd Good purchased forty acres of undeveloped land on Lower Sugarloaf Key, Florida: thirty-two acres of wetland and eight acres of uplands.[178] Although the sales contract for the land contemplated certain problems with obtaining permits to dredge and fill the wetland area,[179] Good hired a land planning and development firm to obtain the necessary permits to turn Sugarloaf Shores, a

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171. Humbach, *supra* note 28, at 341.

172. Coletta, *supra* note 169, at 357.

173. *See* Humbach, *supra* note 28, at 344 (stating "the social obligation of property . . . is inherent in the structure of American law"); *id.* at 345-48 (explaining property rights exist to serve the public good, and so are limited by the needs of the general welfare, so that "[w]here the private autonomy of ownership would clash with the greater public good, that is where the private rights in property come to an end and the social obligation of property begins"); *see also supra* notes 40-41, 44-49 and accompanying text (detailing how in the nineteenth century the social obligation was defined as the duty to develop property).

174. Cordes, *supra* note 27, at 655.

175. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 n.20 (1987).

176. *See* Anderson, *supra* note 36, at 541 (noting that "[i]f the only viable economic use of the property is one inimical to the public welfare, the owner did not have a property right in the first place").

177. 189 F.3d 1355 (Fed. Cir. 1999).

178. *Id.* at 1357.

179. *See id.* (noting the sales contract stated : "The Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations").

wetland area situated in the Florida Keys, into a residential development.[180] In 1984, the United States Army Corps of Engineers (Corps) granted Good's permit, authorizing Good to fill 7.4 acres of marshland and excavate another 5.4 acres of salt marsh in order to build a 54-lot residential subdivision, complete with a 48-slip marina.[181] Also in 1983, Good received state and county permits approving his plans for development.[182] However, Good would never get to build.

Subsequently, a battle ensued between Good and various state, county, and federal regulatory agencies for final approval and permits for development.[183] In the interim, the Lower Keys marsh rabbit, silver rice rat, and mud turtle[184] were all determined to be endangered species with habitat on Good's property.[185] The Corps eventually denied Good's permits and permit applications, citing the development's threat to the endangered rabbit and rat.[186]

Good subsequently sued the United States, alleging that the Corps' denial of his permits amounted to an uncompensated taking in violation of the Fifth Amendment of the United States Constitution.[187] The Court of Federal Claims found no taking and granted summary judgement in favor of the government.[188]

The United States Court of Appeals affirmed the lower court's determination that no taking had occurred, stating that "In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetland

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180. *Id.* In the contract with the land planning and development firm, Good conceded that "obtaining said permits is at best difficult and by no means assured."

181. *Id.*

182. *Id.* at 1357.

183. *See id.* at 1357-58 (detailing how the Florida Department of Community Affairs challenged the issuance of the county permit, and, that in the time it took Good to clear up this problem, his federal permit issued by the Corps was almost expired); *see also id.* at 1357-59 (explaining that more county permit problems faced Good, and in 1990 Good "[a]pparently dispairing of ever obtaining approval for his 54-lot plan," submitted a scaled-down plan for development which proposed building only sixteen homes, a canal, and tennis court); *id.* (stating that although this new plan "greatly reduced the overall number of houses, it located all of them in the wetlands area [, consequently] overall wetlands loss . . . was only reduced from 10.53 acres to 10.17 acres").

184. *See Good*, 189 F.3d at 1358 (stating that the mud turtle was a "state-listed" endangered species).

185. *See id.* at 1359 (stating that the Fish and Wildlife Service issues a biological opinion stating that Good's planned development "jeopardized the continued existence of both the Lower Keys marsh rabbit and the silver rice rat").

186. *Id.*

187. *Id.*

188. *See id.* at 1359-60 (stating that the Court of Federal Claims found that the Corps denial of Good's permit application did not constitute a "per se" taking under *Lucas v. South Carolina Coastal Council* "because the ESA did not require that the property be left in its natural state and because the government had shown that the property retained value, either for development or for sale of transferrable development rights"); *see also id.* at 1360 (stating that the Court of Federal Claims held there was no taking under the *Penn Central* test either, finding Good lacked the reasonable, investment-backed expectations that he could develop his land since federal and state regulations "imposed significant restrictions on his ability to develop his property both at the time he purchased it and at the time he began to develop it").

in order to develop the land."[189] The court noted that "public concern about the environment resulted in numerous laws and regulations affecting land development," and listed the 1973 Endangered Species Act, the 1975 Corps' decision to broaden its interpretation of its § 404 authority to regulate wetlands, the Florida Endangered and Threatened Species Act, and the 1979 Florida Keys Protection Act which evidenced "further . . . public concern for Florida's environment."[190]

Arriving at the conclusion that Good suffered no compensable taking, the United States Court of Appeals chose to focus on the reasonable, investment-backed expectations prong of the *Penn Central* test. A "regulatory climate," the court concluded was enough to put the landowner on notice that he might not be able to develop his land to the full extent he desires.[191]

Since Good had no reasonable, investment-backed expectations that he could develop his property due to the "pervasive regulatory climate," the court effectively found a way to work within the existing common law framework in order to not find a taking. Although the court never explicitly stated that its goal was environmental preservation, this was the end result. However, scholars have put forth alternative theories about how courts might go about curbing development or other environmentally destructive uses of property, without finding that just compensation must be paid for a "taking," thus protecting the environment and preserving environmental values.

For instance, Professor Jerry L. Anderson argues that landowners' rights regarding development of land "must be tempered by a public interest condition."[192] According to Professor Anderson, not only are property owners subject to the maxim that one may not use their land to injure other, but hold their land "subject to an implied condition that [their land] be used in the public interest."[193] Therefore, any landowner activity that is contrary to the public interest is not a legitimate use of land and will not be recognized as a compensable taking.[194]

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189. *Id.* at 1361-62; *see id.* at 1362 (stating that "Appellant thus had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property" and that "rising environmental awareness translated into ever-tightening land use regulations" and "[s]urely Appellant was not oblivious to this trend").

190. *Id.* at 1362.

191. *Id.* at 1361-62. An interesting question arises as to what exactly is a "regulatory climate" and when it puts someone on notice. *See* Humbach, *supra* note 28, at 367-68 (stating that since "development is an increasingly regulated field, and every competent developer knows that the trend is toward even greater refinement of land use controls" an investor who buys land with the intent to develop it in the future, assuming the same environmental and land use laws will be in place 10 years down the road, only to then be stymied by current laws which forbid development "simply [can] not [have] a reasonable expectation, 'investment-backed' or otherwise"). *See also* Anderson, *supra* note 36, at 558 (explaining that "the current environmental and land use situation has created a necessity that should temper the expectations of every landowner about the use of property").

192. Anderson, supra note 36, at 562.

193. *Id.* at 551.

194. *Id.* at 558.

Applying Anderson's argument to the Good situation, courts would insist that Good's activity on his land be consistent with the public interest. From there, courts may find that destroying over ten acres of wetland habitat in order to build sixteen houses is contrary to the public interest in preserving wetland ecosystems.[195] Therefore Good suffers no taking since he never had the right to engage in such destructive behavior in the first place.

Reciprocity of advantage is another theory through which environmental values can be protected without triggering the takings clause.[196] As Professor Raymond R.

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195. The term "wetland" is given to those transitional areas between land and water bodies where water periodically floods the land or saturates the soil, as well as those areas which remain covered with water year round.

Wetlands are extremely common throughout the United States and can be found in almost every county of every state in the nation. These ecosystems are diverse in character, but can be divided into two broad categories: Non-Tidal Wetlands and Tidal Wetlands. Non-Tidal Wetlands, which account for most of the wetland area of the United States, are ubiquitous throughout the interior of the country. Examples of Non-Tidal Wetlands include Alaskan and Appalachian peat bogs, southern deepwater swamps, inland freshwater marshes, and Western riparian wetlands.

Tidal wetlands are found along the nation's coastlines and those inland bodies of water that are nonetheless influenced by tidal effects. Tidal wetlands include areas known as Tidal Salt Marshes, Mangrove Swamps, and Tidal Freshwater Marshes.

Wetlands are as beneficial as they are abundant, and serve both environmental as well as socio-economic functions and values. These ecosystems enhance environmental quality in a number of ways. First, wetlands ensure shoreline and streambank stabilization as well as control erosion. Shorelines and streambanks absorb the energy of waves and water currents, and wetland vegetation binds soil along waterways, slowing downstream sediment movement. Second, wetlands act as natural water purifiers, improving water quality. Sediments are filtered through these areas and pollutants are absorbed in these ecosystems enhancing the quality of surface and groundwater. Third, in times of rain and flood, wetlands store huge amounts of water, thus reducing the risk of flood damage. The slow release of this stored water helps prevent rivers from drying up during times of drought. Finally, these ecosystems provide vital habitat for a variety of species, many of which are specially adapted to live in these wet environments. Wetlands provide breeding grounds for over 50 percent of northern American waterfowl, and about 35 percent of all threatened or endangered species in the United States depend on wetlands for their survival.

Socio-economic functions of wetlands are also varied and diverse. Wetland areas are rich ecological, cultural, and historic resources providing a myriad of educational as well as recreational opportunities. Hunting, fishing, boating, hiking, sightseeing, animal watching, and photography are just some activities that await anyone wishing to visit a thriving wetland ecosystem.

Many times the socio-economic and environmental benefits of wetland areas are so intertwined as to become one in the same. That is to say, the quality of the socio-economic benefits depend on, and are directly proportional to the health and proper functioning of an intact wetland ecosystem—the healthier the ecosystem, the more it benefits humans. For instance, as discussed above, wetlands clean and filter water. The Florida Everglades help recharge the Biscayne Aquifer—the sole source of drinking water for the Miami metro area. Also, as stated above, vast expanses of wetlands can store huge amounts of water. During heavy rains and snow melt, wetlands can reduce flooding, lessening property damage (and loss of life) in developed areas. Finally, between 60 to 90 percent of U.S. commercial fisheries depend on wetlands to ensure a continuous harvest year after year. Both freshwater and marine life rely on wetland ecosystems to provide food, cover, spawning and nursery grounds.

Obviously, today we are more aware than ever about the benefits of these once-despised environments, and realize that destruction of wetland areas will yield negative consequences for all. As a result, because environmental protection is in our best interest, it would be wise to preserve wetlands, and all ecosystems, through a court-recognized duty of stewardship. U.S. DEPT. OF THE INTERIOR NATIONAL PARK SERVICE PAMPHLET, WETLANDS IN THE NATIONAL PARKS, 1998 (copy on file with the *McGeorge Law Review*).

196. *See* Coletta, *supra* note 169, at 303 (stating that "'average reciprocity of advantage' could be utilized to provide broad justification for land use regulation and thereby substantially limit the accessibility of inverse condemnation actions").

Coletta explains, the crux of reciprocity of advantage is the "presumption that mutual restrictions on property use can enhance the total welfare of the affected landowners."[197] Therefore, state legislatures can enact (strict) land use and zoning regulations, and yet courts applying the reciprocity of advantage theory will find no compensable regulatory taking since individual landowners subject to restrictive land use regulations should not be viewed as "burdened individual[s]," but as realizing benefits accruing to them as members of the community at large.[198] In this way, the scope of compensable takings claims are narrowed and society benefits from increased environmental protection.[199]

Although the Good case is not about zoning, but about permit denial, Professor Coletta's basic reasoning is still applicable here. In not finding a taking, courts may note that any similarly situated landowner with similar development plans can expect the same result. In this way courts are able to preserve fragile ecosystems, allowing the benefits of intact wetland areas to accrue to the community at large. Good, as a landowner is not a "burdened individual" but will be able to enjoy not only his property in a somewhat natural state, but will be able to benefit from surrounding properties that must not be developed in such a drastic and destructive fashion.

Professor Robert J. Goldstein advocates yet another approach by which courts can protect environmental values while avoiding the takings issue. He argues that courts recognize "green wood" in the bundle of sticks that make up a property owner's rights. Green wood "is an effort to remove some of the abstraction from the theory [of] real property,"[200] and infuse modern property law with principles of ecology and an environmental ethic.[201] Specifically, the theory of green wood is that a property owner is under an ethical obligation to refrain from engaging in activity that would result in an "ecological nuisance."[202] To further this end, Goldstein premises his argument, quite correctly, on three principles: (1) that "[n]o piece of land can be considered to be without value or substantially without value," (2) environmental regulation is a valid exercise of police power designed to prevent public nuisance, and (3) "[m]andating the maintenance of [the environment] does not alter the value of the real property as to invoke a taking."[203] Green wood is not meant to stifle development,[204] rather it is a balance of private property rights and

197. *Id.* at 302.

198. *Id.* at 303; *see* Cordes, *supra* note 27, at 648-49 (discussing the related concepts of "givings" (the concept that "much of the value of privately owned land is in fact created by public activity") as well as specific and general reciprocity).

199. Coletta, *supra* note 169, at 365-66.

200. Goldstein, *supra* note 2, at 374.

201. *See id.* at 403 (explaining green wood is "the live stick firmly rooted in the earth from which it sprouted, and closely tied to the environment which nurtured its progression from seedling to maturity").

202. *Id.* at 410-11.

203. *Id.* at 415-16.

204. *Id.* at 421; *see id.* at 411 (stating green wood will "mandate environmental protection [but] will not effect a moratorium on development").

environmental ethics,[205] ensuring that property rights will not be determined solely by economic considerations, but will incorporate the "important societal interest of preserving the environment."[206]

Under Goldstein's green wood theory, courts could prevent Good from destroying over ten acres of sensitive and valuable wetland area because such activity would constitute an ecological nuisance. If Good were allowed to proceed with his development plans, ten acres of wetland would be out of commission and society would loose the benefits accruing from this land, possibly forever.[207] In addition to his legal obligation to not create a nuisance, Good also has an ethical obligation to refrain from such destructive behavior. Even with whatever minimal development Good may be allowed, his land could never become valueless or substantially without value so as to invoke a taking. Furthermore, the courts would recognize that the state permitting processes are environmental regulations conducted as a valid exercise of the state's police power to avoid the public nuisance of wetland degradation.

D. The Property Renaissance: Broadened Nuisance Theory and the Dual Role of Property in Action

Our concepts of the environment in terms of meeting societal needs has changed significantly over time in light of society's new knowledge and understanding of natural processes.[208] Ecology "has brought to an end the era of mythical, abstract Blackacre,"[209] and has left us with an "increasing awareness of the need for human stewardship of the environment."[210] Courts can promote the stewardship paradigm through rigorous application of broadened nuisance principles and through a rebirth of traditional notions of the dual role of property. Specifically, when determining harm[211] within the nuisance context, courts must be guided by principles of ecology with a sensitivity and emphasis upon the externalities foisted upon the biological and social community in which the landowner's activity has its effects. These externalities would be the basis for how courts could judge the reasonableness of an activity or the harm resulting from the ecological nuisance. Aware of society's current emphasis on the environment, courts should explicitly remind landowners of the dual nature of property—that landowners hold their property subject to the

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205. *Id.* at 422.

206. *Id.*

207. In the grand scheme of things, the destruction of ten acres seems trivial, but if every wetland owner had similar objectives, the aggragation of effects could signal death for that particular ecosystem.

208. Cordes, *supra* note 27, at 643.

209. Freyfogle, *supra* note 2, at 125.

210. Goldstein, *supra* note 2, at 347.

211. *See id.* at 382 (stating "[h]armful use connotes harm of others off the property").

greater public good[212]—thereby implicitly directing landowner efforts and expectations toward property away from destructive, negative externality-causing behavior, and in the direction of stewardship.

Today, with our "growing knowledge" of ecology and the environment, we should create "a new set of values: a maturing, rediscovered sense that humans are part of a larger natural order and, as such, ought to abide by moral rules that reflect and incorporate that vital membership."[213] Broadened concepts of nuisance, coupled with an application of the dual roles of property, provide such a framework through which courts can craft this new set of values to harmonize human activity within the natural world and give emphasis to the "social obligation of property that is inherent in the structure of American law."[214] Take, for instance, the landowner in Good's situation. Had he known courts would rigorously apply broadened nuisance principles, thus finding destruction of wetlands results in unreasonable harm,[215] and that courts would stress Good's obligation to hold wetland area to promote the general welfare, Good might not have even bought this land in the first place. If Good knew courts were going to protect environmental values, and prohibit gross and destructive development, and still chose to buy, Good would know courts would allow him to develop only to the extent that development is consistent with his duty of stewardship.[216]

Courts have already established a duty of stewardship of sorts with the recognition that "[a]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[217] Courts have also decreed that a landowner "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."[218] A recognition of the dual role of property, as well as broadened nuisance principles, guides courts as to how land can be used and developed. The extent of development allowed under a broadened nuisance theory and the dual role of property concept would take into account such factors as fragility of the ecosystem, value to society of the ecosystem

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212. *See* Humbach, *supra* note 28, at 347-48 (explaining that "where the private autonomy of ownership would clash with the greater public good, that is where the private rights in property come to an end and the social obligation of property begins").

213. Freyfogle, *supra* note 2, at 104.

214. Humbach, *supra* note 28, at 344.

215. Unreasonable harm here was determined by approximating negative externalities arising from development. *See* Goldstein, *supra* note 2, at 381 (explaining that filling wetland area affects the property rights of all adjacent individual owners because their land will be affected in some way).

216. This may mean constructing a handful of homes using construction techniques that would minimize ecosystem harm. It may mean Good would be allowed to build one home on this land. Or it could mean that the only development that would be consistent with Good's duty of stewardship and obligation not to create an ecological nuisance would be the construction of a five foot fishing pier and boat dock. There is also the possibility that courts could find a particular ecosystem so sensitive, that any development would yield unreasonable harm consisting an ecological nuisance, in which case all development would be forbidden.

217. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

218. Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).

left in a natural state because of services provided by that ecosystem to biotic and abiotic life, environmentalist or preservationist sentiment of the local and national community as it relates to proposed land use or development, the harm inflicted to the particular ecosystem because of development, the externalities associated with development, and the extent to which development is necessary to sustain basic human needs.

E. The Interconnectedness of Land

Although this broadened nuisance theory may seem like a radical change in modern property law, it is more than a novel land-use concept—it is an ecological necessity. Today, we are faced with the reality that we are reaching the land's carrying capacity[219] and are experiencing the harm associated with pushing our lands to the limit.[220] Furthermore, an ecological perspective on nuisance law is needed since the effects of environmental harm are felt throughout the biotic community.[221] Environmental nuisance pays no heed to socially constructed boundary lines. Ecology has taught us that land and its natural processes are interconnected, and that viewing land through the ecological lens decrease the significance of man-made boundary lines:[222]

> We now realize that whatever the state of its title, one parcel of land is inextricably intertwined with other parcels, and that causes and effects flow across artificially imposed divisions in the land without regard for legal boundaries. The land simply cannot be neatly divided into mine and yours.[223]

Due to the transboundary effects of environmental degradation, nuisance—particularly public nuisance—is a theory uniquely tailored to be an affective tool in the area of land management because it enables an individual to assert a claim against a defendant who threatens unreasonable harm to a resource common to all—the environment. Nuisance recognizes that "the effects of property

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219. *See* Freyfogle, *supra* note 2, at 79 (explaining that carrying capacity is "the reality that any type of human land use, however benign the use and however appropriate the location, can prove harmful when too many acres are devoted to it"); *see also id.* (asserting that there comes a point at which society must draw a line delineating when and where the carrying capacity has been reached and where we can disturb the land no further).

220. *See id.* at 127 (explaining that carrying capacity harm is harm that comes to land "caused, not because a given land use is bad per se, but because it is bad and harmful when too many acres are devoted to it and the land's limits are reached").

221. *See* Large, *supra* note 39, at 1047 (stating that as problems with land increase, we increase our understanding of the "interrelatedness of all land").

222. Sax, *supra* note 3, at 1445.

223. Large, *supra* note 39, at 1045.

use inevitably extend beyond land boundaries and often conflict with neighboring uses, necessitating a reasonable accommodation of interests."[224]

The interconnectedness of land is also evident beyond an ecological level. Besides being linked ecologically, parcels of land are also linked philosophically—people today see the American landscape "more and more as the shared heritage of all."[225] A collective concern over the environment is further justification for courts to craft property rights so they assume a more social dimension.[226]

V. CONCLUSION

We once lived in an age of ecological indifference, if not ecological ignorance. "Man-as-conqueror" of land has taken its toll on the natural environment. Today there is an effort to reorient our emphasis from wilderness exploiter to ecosystem steward. "[S]ocietal values do evolve, and the laws must follow. In the case of real property, environmental values have taken hold, and must become the basis for changes in the law."[227]

Today, law makers and lawyers are speaking in ecosystem terms.[228] Are the courts listening?

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224. Cordes, *supra* note 27, at 640; *see id.* at 645 (reiterating that the "core justification" for public control of land in the first instance "is the realization that land uses often conflict with each other, and if left uncontrolled, a landowner's activity will often impose significant costs on neighbors").

225. Humbach, *supra* note 28, at 369; *see id.* (noting that the public also possesses shared concerns over preservation of ever shrinking open spaces and has concerns about the character of land in general); Anderson, *supra* note 36, at 544-45 (arguing that because we live "[i]n an age of ever-dwindling resources and ever-increasing demands on those resources, the principle that the earth is the 'common stock' of man must assume a greater role in takings analysis").

226. *See* Coletta, *supra* note 169, at 362 (recognizing that land ownership is "heavily laden with social obligations," and that society may be moving toward a more socially responsible property scheme because of the increased utilization by courts of police power to uphold zoning regulations).

227. Goldstein, *supra* note 2, at 360; *see id.* at 430 ("Current conditions warrant the acceptance of a definition of real property that takes the environment into full account.").

228. Keiter, *supra* note 14, at 294-95.