Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality

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Montesquieu long ago described feudalism as "an event which happened once in the world," which, he doubted, would ever happen again. Many commentators, including some quite distinguished ones, have nonetheless embraced the remarkable thesis that this century is witnessing the emergence of a new feudal society in the United States. Some of the more prominent writings include those by William Ghent, Friedrich Hayek, Roscoe Pound, Morris Cohen, Charles Reich, Theodore Lowi, and Gerald

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2. William J. Ghent, Our Benevolent Feudalism (1902) (discussing similarities between employees in large companies and the feudal system).

3. Friedrich A. Hayek, The Road To Serfdom (1944). England was the primary focus of Hayek's essay, but his thesis, perhaps more implicitly than explicitly, was also directed to the United States.


5. Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927) (discussing how sovereignty of states is limited by courts' interpretations of property rights and discussing the nature of property, its justification, and the politics based on it).


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Frug,8 and Bruce Yandle,9 among others.10

To be sure, there is not a revival of feudalism akin to that recently occurring in academia regarding republicanism.11 Only a few commentators advocate a return to feudal concepts.12 As would be expected, most of the references are negative;13 their function is generally to discredit the developments that the authors analogize to feudalism. The developments that serve as the primary objects of these attacks are the perceived demise of private property rights and the marketplace, the rise of corporate power, and the assignment of programs regarding basic individual needs to a virtual maze of seemingly inaccessible and unaccountable regulatory agencies. A unifying concern is the loss of individual autonomy and security in contemporary society.

This Article explores the merits of these various historical analogies to feudalism. The focus of the Article is environmental law because it has been singled out by those most recently making the analogy. This includes both those who are opposed to some of the changes occasioned by environmental law and thus use the feudal analogy to discredit them,14 and those who applaud the changes and use the analogy as a positive source of historical support and inspiration.15 The tension between the individual and the collective in the pursuit of environmental quality presents an especially formidable obstacle because of the seemingly irreconcilable character of

8. Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1129-33 (1980) (demonstrating the developments that have undermined the private nature of major corporations, resulting in the disappearance of the traditional bases which have distinguished them from public corporations).


13. See infra text accompanying notes 23-43.

14. See Yandle, supra note 9, at 536-39; infra text accompanying notes 49-64. See generally McClaughry, supra note 10.

their conflict. Environmentalism and the environmental protection laws that it has precipitated, challenge fundamental private property doctrine and promote governmental authority at the expense of traditional notions of individual autonomy.

This Article is divided into three parts. First, I describe the feudal analogy, prefaced by an account of what is generally contemplated by the term "feudalism." Second, I challenge the analogy and contend that, despite some superficial symptomatic similarities between past and present, the analogy rests on a fundamental misunderstanding of the basis of feudalism and the import of those shifts in contemporary law resulting from increased environmental protection. In this discussion, I contend that resistance of the analogy is necessary to further positive developments in environmental law and that the analogy should not be perpetuated, especially by those who favor current legal trends.

Finally, I suggest that although any medieval analogy is necessarily overwhelmed by the differences between society then and now, our emerging legal regime can be better traced to the kind of regime existing under medieval communalism. The philosophical basis of medieval communal society, which was antithetical to the feudal manors, was that individual liberty and welfare could be served through collective action and mutual cooperation. That regime is a far better model than feudalism for understanding the purpose and effect of contemporary environmental protection law and much of current national welfare legislation. It also serves as a potentially valuable focus for considering the merits of today's regime. For although the feudal analogy is ultimately unhelpful, the feudal and communal analogies together underscore the need to reduce the tension between individual needs and collectivist goals in pursuing environmental quality. In this manner, feudalism serves not as an analogy to discredit the present, but as a contrasting image that allows us better to understand and improve upon it.


17. See infra text accompanying notes 21-64.

18. See infra text accompanying notes 64-183.

19. See infra text accompanying notes 143-57.

20. See infra text accompanying notes 184-216.
I. The Feudal Analogy

Feudalism finds its roots in the word “feudum” or “fief,” which initially meant an object, such as a piece of land, “conveyed not absolutely but with conditions attached.” Based on his writings on the legal and ecclesiastical aspects of medieval society in England and Europe, the seventeenth-century antiquarian scholar Sir Henry Spelman is the individual most frequently identified as the “discoverer” of feudalism. Since Spelman, commentators from many academic disciplines have expanded the significance of the term “feudalism” by using it to describe, from their various perspectives, an economic, political, legal, or social regime that existed from 750 A.D. to 1300 A.D. in Europe, with the eleventh through the thirteenth centuries representing the core feudal years in England.

Adam Smith, who was the first to use the term “feudal” formally to refer to an entire society, described feudalism in his Wealth of Nations primarily as an economic system of production based not on either market forces and personal incentive, but rather on the latter’s close relatives, coercion and force. Those using the term to describe a political regime refer to feudalism as a form of government, under which governmental authority, including authority over natural resource wealth, is akin to a private commodity, distributed among a group of military leaders. An important characteristic of the political feudal regime is that feudal leaders, within their respective geographic areas, possess great discretion in their exercise of authority over dependents who have sworn personal allegiance to their lords.

Feudalism as a legal regime has been defined by F.L. Ganshof as that “body of institutions creating and regulating the obligations of obedience and service . . . on the part of the freeman (vassal) towards another freeman (the lord), and the obligations for protection and maintenance on the part

23. The tenth, eleventh, twelfth, and thirteenth centuries are generally considered the period in which feudal institutions were most vigorous. See Francois L. Ganshof, Feudalism at xvii-xviii, 65-67 (Philip Grierson trans., 3d ed. 1964); History of Feudalism, supra note 21, at xi. When precisely feudalism’s decline marked its formal demise is itself a subject of considerable controversy. See John M.W. Bean, From Lord to Patron: Lordship in Late Medieval England 3231 (1989); John G. Bellamy, Bastard Feudalism and the Law 125-44 (1989); Bloch, supra note 1, at 448-49. There are, of course, many books and articles on feudalism; the ones upon which this Article principally relies include: Perry Anderson, Passages from Antiquity to Feudalism (1974); Geoffrey W.S. Barrow, Feudal Britain: The Completion of the Medieval Kingdoms 1066-1314 (1956); John M. W. Bean, The Decline of English Feudalism 1215-1540 (1968)[hereinafter Bean, Decline of English Feudalism]; Bloch, supra note 1; Georges Duby, The Three Orders: Feudal Society Imagined (Arthur Goldhammer trans., 1980); Feudalism in History (Rushton Coulborn ed., 1969); Ganshof, supra; History of Feudalism, supra note 21; Stroud F.C. Milsom, The Legal Framework of English Feudalism (1976); Charles Seignobos, The Feudal Regime (Earle N. Dow trans., 1902); Charles S. Lobinger, The Rise and Fall of Feudal Law, 18 Cornell L.Q. 192 (1922-33).
24. History of Feudalism, supra note 21, at xvi, xviii.
of the lord with regard to his vassal." 26 Finally, historian Marc Bloch rejected efforts at defining feudalism as either just an economic system or legal regime, in favor of a description of the basic characteristics of what he termed "feudal society." 27 According to Bloch, these characteristics were: An extremely hierarchical society with subject peasantry at the bottom and a specialized military class at the top; widespread use of the service tenement instead of salary, leading to extreme subdivision of property rights in land; ties of obedience and protection binding one man to another; and fragmentation of political and governmental authority. 28

The thesis that our society is becoming more feudal in character, establishing a "new feudalism," has been with us since the late nineteenth century 29 and continues today. To be sure, it has served mostly as an epithet, a fairly unfocused, yet eye- and ear-catching slur against certain kinds of societal changes. 30 On the other hand, several common themes have emerged in response to the charges, some of which have been embraced and thoughtfully advanced by fairly distinguished commentators.

They include claims of William Ghent in 1902, 31 Morris Cohen in 1927, 32 Roscoe Pound in the 1930s, 33 and more recently Gerald Frug 34 that the concentration of economic power in large industrial giants reflects a new industrial feudalism, threatening individual liberty and equality with a growing subordination of lower classes. 35 Others make similar charges

26. Ganshof, supra note 23, at xvi; see also History of Feudalism, supra note 21, at xvii-xviii.
27. Bloch, supra note 1, at 443.
28. Id. at 446.
29. See Hudson, supra note 10, at 277; Richmond, supra note 10, at 414. The claim has probably been made ever since Adam Smith first propagated the term. Feudalism appears to have been the "bogeyman" of eighteenth-century political and economic theorists in France, Scotland, and the United States, who utilized the threat of a return to feudalism as a means of discrediting certain proposals. See Gregory S. Alexander, Time and Property in the American Republican Legal Culture, 66 N.Y.U. L. Rev. 273, 298-99 & n.104 (1991) (characterizations of primogeniture and entailments of land as "feudal" encrustations on the common law of property"; Stephen J. Tonsor, Feudalism, Revolution and Neo-Feudalism, 21 Comp. Stud. Soc. & Hist. 131, 153-37 (1979) (discussing how theorists use feudalism as a bogeyman in the eighteenth and nineteenth centuries).
30. Robert Nisbet, Prejudices: A Philosophical Dictionary 125-26 (1982); see also Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205, 328-29 (1979) (discussing Blackstone's coherent and detailed "but essentially wrongheaded" picture of Norman law as a point of contrast for Blackstone's views on the English practices of his own time).
31. See Ghent, supra note 2. Ghent was concerned primarily with the status of employees of large companies: "Bondage to the land was the villeinage in the old regime; bondage to the new job will be the basis of villeinage in the new." Id. at 184.
32. See Cohen, supra note 5, at 12-14.
33. See Pound, supra note 4, at 14-15.
35. Others advancing this same thesis, or one closely related, include Benvenuti, supra note 10, at 53-54; Hudson, supra note 10, at 289-90; Marshall, supra note 10, at 16; see also Nisbet, supra note 31, at 131 (Because of the current weakness of the state, "a resurgence of
based on the increasing authority of "special interest groups"; the
tendency of larger businesses towards leasing and franchising small busi-
nesses under the umbrella of a parent company, which they compare to
subinfeudation; the diffusion of ownership rights by splintering property
rights through devices such as stocks; and the weaving of public and
private law, which they compare to the treatment of governmental powers
as a private commodity under feudalism.

A distinct group focuses its claim of a new feudalism on the emergence
of a more powerful government, the demise of the marketplace, and the
loss of the sanctity of private property, which they closely associate with a
reduction of individual autonomy and liberty. This group includes
Friedrich Hayek, Theodore Lowi, and Charles Reich. Professor Reich,
for instance, has argued that the existing public welfare regime, where the
individual is dependent on government largesse, is akin to feudal society
because under it the most basic and vital individual interests in indepen-

feudalism . . . is to be expected in the West."); Vano, supra note 10, at 17-23, 81-83
(contending that there is a revival of feudalism in Canada); Richmond, supra note 10, at 414
(arguing that the American dream of equality has not been realized and that a new feudalism
is emerging).

36. See, e.g., Gidon Gottlieb, Relationism: Legal Theory for a Relational Society, 50 U. Chi.
L. Rev. 567, 594 (1983) ("This by now familiar image of interacting instrumentalities—
including agencies of the State that are themselves under the influence of special interests—is
the image of a 'new feudalism' in which neither the general laws nor the general interest are
certain to prevail."); Lowi, Two Roads to Serfdom, supra note 7, at 297 (arguing that
government was "contributeing to the impression [that] . . . privilege and private goods [go] not
to the deserving but to the best organized"); Marshall, supra note 10, at 14 (citing the
increasing numbers of big economic blocs and lobbies).

37. Benvenuti, supra note 10, at 53-54; Pound, supra note 4, at 14; Reich, supra note 6,
at 767.

38. Ghent, supra note 2, at 23-24, 162-65; Thomas C. Grey, The Disintegration of
[hereinafter Property]; Francis S. Philbrick, Changing Conceptions of Property in Law, 86 U.
Pa. L. Rev. 691, 727 (1938); Pound, supra note 4, at 14; Frank Snare, The Concept of
Property, 9 Am. Phil. Q. 200, 205 (1972).

39. Lowi, The End of Liberalism, supra note 7, at 68 (characterizing agriculture as "The
New Feudalism"); Frug, supra note 8, at 1129-33 (the dichotomy between public and private
behavior has been eroded by the expansion of corporate communal behavior); Nathan, supra
note 10, at 156 (private security companies performing antiterrorist function "may be a
portent of a new kind of feudalism"); Reich, supra note 6, at 764-70 (governmental largesse and
the increasing public-private partnership translate governmental power into a private
commodity); see generally Mary A. Glendon, The New Family and the New Property 226-27
Serfdom—Legal Economic Discourse and Downtown Development 89-97, 98-102
(1991) (chapters entitled "Planning and Serfdom: The Police Power" and "Planning and
Serfdom: The Purse Power").

40. Hayek, supra note 3, at 88-100, 240-41.

41. Lowi, The End of Liberalism, supra note 7; Lowi, Two Roads to Serfdom, supra note
7.

42. Reich, supra note 6. Perhaps the strangest feudal claim is contained in an Indiana State
Legislature resolution, passed in 1947, which condemned "this growth of national feudalism"
in the form of federal statutes preempting state laws. See Hanley v. Indiana, 126 N.E.2d 879,
887 (Ind. 1955) (Emmert, J., dissenting) (quoting General Assembly, Concurrent Resolution,
dence and dignity are subject to whim of the state.\textsuperscript{43}

Finally, there are those who advocate a return to feudal property concepts. These commentators express regret in the abandonment of what they characterize as the feudal notion that certain social responsibilities are tied to ownership of natural resources and that individuals own no more than a usufructuary interest in natural resources. Professor Philbrick's work in the 1990s,\textsuperscript{44} the ecologist Keith Caldwell,\textsuperscript{45} and Professors John E. Cribbet,\textsuperscript{46} Eric T. Freyfogle,\textsuperscript{47} and Donald W. Large,\textsuperscript{48} fall into this category.

With regard to environmental protection laws, the feudal analogy can be segregated into three basic parallels:

\textbf{A. Decreasing Reliance on Contract and Free Market Forces}

The demise of feudalism was marked by the rise of the marketplace.\textsuperscript{49} Free market forces, propelled by freedom of contract, became the basis for decisions regarding the allocation and distribution of natural resources. Recent decades have witnessed laws that seek to override market decisions by regulating decisions related to the exploitation and utilization of natural resources.\textsuperscript{50} To some, the resulting curtailment of the very free market forces that contributed to (or were at least coincident with) feudalism's demise portends feudalism's possible return.

\textbf{B. Erosion of Private Property Rights in Natural Resources}

Many view the protection of unencumbered, absolute, private property rights in natural resources, especially land, as the foundation of our system of laws and as antithetical to a feudal regime.\textsuperscript{51} The opposition

\textsuperscript{43} Reich, supra note 6, at 768-71.
\textsuperscript{44} Philbrick, supra note 38, at 710.
\textsuperscript{47} Freyfogle, supra note 15, at 733-34, 739.
\textsuperscript{48} Donald W. Large, This Land Is Whose Land? Changing Conceptions of Land as Property, 1973 Wis. L. Rev. 1039.
\textsuperscript{49} See infra text accompanying notes 82-84.
between "feudalism" and "liberty" was a common theme in many of the writings of John Adams, Thomas Jefferson, and Noah Webster, among others, which heavily influenced the early development of American property law.52 That same dichotomy is relied upon by those who claim today that environmental property laws are returning us to a feudal society by restricting private property rights.53

There is certainly reason to believe that private property rights in natural resources are eroding.54 Recent limitations include laws that so restrict the use of lands as to reduce fee simple interests to mere usufructuary rights.55 The expanded power of eminent domain, which finds its roots in the feudal notion of the lord's superior dominion over property,56 and laws that heavily tax land owners for the value of natural resources extracted from their property illustrate how fee simple interests have been reduced. State taxes can be analogized to feudal incidents, charges, redevances, and tallages.57 Likewise, an analogy can be drawn between the kinds of affirmative obligations imposed today by police power measures and laws such as the public trust doctrine, and the kinds of servitudes imposed on vassals and peasants under feudalism.58 Yandle argues that the practical

52. Alexander, supra note 30, at 302-16, 341-43.
53. McLaughry, supra note 10, at 677, 699; Yandle, supra note 9, at 538.
55. Ganshof, supra note 23, at 15, 131-33 (noting the division between the land and the vassal); McLaughry, supra note 10, at 677, 693-94 (describing the concept of "social property," in which owners of land merely hold the land "with a temporary usufruct"); see also Seignobus, supra note 23, at 40 (describing usufructuary interest under feudalism); Yandle, supra note 9, at 559 (stating that expanding statutes make private property rights "a facade on an ornate political structure").
56. A lord had a right of seizure, which entitled the lord to take what he needed for his own house including "provisions, beasts of burden, ploughs, fodder, even beds," ordinarily at some price. See Seignobus, supra note 23, at 20-21.
57. Both vassals and peasant tenants were subject to various kinds of charges. These payments were initially fictionalized as a "gift" to the lord. Over time, however, their compulsory character and their frequency became increasingly apparent. Barrow, supra note 23, at 44, 196-97 (describing feudal incidents); Bloch, supra note 1, at 252-53 (describing tallages); Seignobus, supra note 23, at 9-11, 16-17 (describing feudal charges, including redevances, which are a type of feudal charge paid either in money or produce and due at fixed times of the year or on the occasion of specific acts).
58. Several kinds of feudal services were typically required of a vassal, including auxilium (military service), consilium (duty to sit in the lord's court), keeping the lord's secrets, and other services such as entertaining and providing lodging to the lord when he chose to visit, providing a horse and providing other equipment such as gloves, swords, and horseshoes. See Ganshof, supra note 23, at 87-93 (discussing auxilium and consilium); History of Feudalism, supra note 21, at 73 (discussing the obligation of vassals to welcome lords in their homes); Seignobus, supra note 23, at 20 (discussing lords' right to take service and revenue from vassals). "Corvées" were obligations of serfs to perform certain work. Some were imposed by the lord, such as fetching stone, plowing fields, harvesting grain, mowing meadows, and
cumulative effect of these various laws is feudal in character because they "nationalize[] the rights to use environmental assets and endow[] those rights to the sovereign," which is Congress. 59

C. Subjugation of the Individual

Feudalism is also characterized by subjugation of individuals within a hierarchical regime in which superior authorities possess virtually unbridled discretion over individual wealth. 60 For instance, a few powerful lords possessed power over natural resources and exercised monopoly control over their use. Furthermore, these lords exercised plenary control through banalities, such as mills, which provided the sole source of needed services. 61

Those who argue we are returning to a new feudal order refer to private sector companies that are amassing property rights in the nation's wealth, 62 including natural resources such as farmland and mineral resources, and leasing the land as absentee owners to tenants. 63 Proponents of the feudal analogy also refer to the great discretion that executive branch agencies exercise over individuals pursuant to broad legislative delegations of police power and eminent domain authority. They argue that this discretion diminishes individual autonomy and subjects individuals to the mercy of government bureaucrats. 64

59. Yandle, supra note 9, at 517.
61. "Banalities" were exploitative monopolies that peasants were required to use. For instance, a peasant would typically be compelled to take grain to be ground to the lord's mill. Other services over which a lord frequently reserved monopoly power included the right to sell wine or beer at certain times, to supply horses, to bake the tenant's bread in the lord's oven, and to make the tenant's wine in the lord's wine-press. The prices charged for these services were purportedly very high. See Anderson, supra note 23, at 184; Bloch, supra note 1, at 251; Seignobus, supra note 23, at 17-18.
63. Ghent, supra note 2, at 11-21; Benvenuti, supra note 10, at 53 (the small and next-to-small farmer "will be more and more controlled by the firms which purchase his crop, specify what strains he will grow, when and how he grow them, and which standards of quality control, delivery conditions and prices, reducing him to little more than a subsidiary supplier").
64. Lowi, Two Roads to Serfdom, supra note 7, at 296-97; Yandle, supra note 9, at 536-39.
II. RESISTING THE FEUDAL ANALOGY

The feudal analogy is flawed especially with regard to the causes and effects of changes precipitated by environmentalism. The analogy misapprehends both the nature of feudalism and the character of the reforms currently underway, which is wholly antithetical to feudalism. Environmentalism erodes legal doctrine that was feudalism's undoing, but without portending a return to feudalism. Indeed, environmentalism's effect on our laws, and its continuing promise, place even further distance between contemporary law and feudalism.

A. The Nature of Feudalism and Its Demise

The feudal analogy generally rests on a misapprehension of the nature of feudalism. The characteristics of the legal regime emerging in the wake of modern environmentalism are akin to those that marked feudalism's demise. These characteristics are not reminiscent of feudalism.

First, centralized governmental authority is a hallmark of contemporary environmental law. That type of authority was an anathema to feudalism and prompted its downfall. The feudal lords lost their authority in part because of the rise of nation states in the twelfth and thirteenth centuries. These states lodged centralized authority in administrative agencies and national courts, both of which are powerful entities in our society.

For instance, in England, King Henry II used the royal courts to tie local communities more closely to his central government. In 1166, he issued the "Assize of Clarendon," which gave instructions to judges for the dispensation of royal justice, and ten years later he issued the "Assize of Northampton," which improved methods of proof in response to wide-

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65. Of course, there are certainly vestiges of feudalism evident in American culture and legal doctrine today, particularly in property law. See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) ("The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism."); Bloch, supra note 1, at 451-52 (vassal homage established principle that sovereign bound to people and thus laid foundation for representative democracies); Ganshof, supra note 23, at 170 (contending that prestige of military, binding force of contract, and importance of virtue in contemporary society can all be traced to our feudal heritage); Nisbet, supra note 30, at 127 (roots of "deference, respect, civility, noblesse oblige, loyalty, and honor").

66. Conversely, feudalism "may be said to have arrived" when "the personal relations of loyalty between . . . lord and vassal . . . [took] the place of the political system operating through officials serving the state." Fuedalism in History, supra note 23, at 189; see also Anderson, supra note 23, at 153; Ganshof, supra note 23, at 51-59.

67. Barrow, supra note 23, at 262-81; Bean, Decline of English Feudalism, supra note 22, at 13; Bloch, supra note 1, at 421-25; Ganshof, supra note 23, at 159-60, 165-66; Milsom, supra note 23, at 46-47; Seignobus, supra note 23, at 68. Indeed, the Magna Carta was essentially the baron's response to increasing assertions of royal authority. Barrow, supra note 23, at 202-07. Of course, a dispute concerning the authority of royal courts to adjudicate and sentence clergy for crimes prompted the celebrated split between King Henry II and Thomas Becket, Archbishop of Canterbury, and the latter's murder by royal knights. Id. at 149-56.

68. See Palmer, supra note 60, at 2.
spread dissatisfaction with “trial by ordeal.” The most significant royal reform of that time in England, however, concerned real property. The “Assize of Novel Disseisin” and the “Assize of Mort d’Anccestor” provided possessory protection of real property through the royal courts. Whatever their purpose, the net result was to inject the king between the parties of a feudal relationship. This was feudalism’s undoing.

The development of custom and the common law was followed by the rise of the centralized state, statutory law, and finally, the creation of representative bodies in government. These features of government provide the institutional underpinnings of contemporary environmental law, which depends heavily on a centralized government, evolving common

69. Barrow, supra note 23, at 155-57; see also Seignobus, supra note 23, at 60-63 (describing trial by ordeal).
71. There is considerable controversy among historians regarding whether this assertion of royal jurisdiction was intended to undermine feudalism or simply had that practical effect. See Bryce Lyon, The Emancipation of Land Law from Feudal Custom, 86 Yale L.J. 782 (1977) (reviewing Milsom, supra note 23); Robert C. Palmer, The Feudal Framework of English Law, 79 Mich. L. Rev. 1130 (1981)(same).
72. Palmer, supra note 60, at 8-24. For this reason, Professor Yandle’s feudal analogy is especially unpersuasive. See generally Yandle, supra note 9. Yandle treats nuisance law as an aspect of feudalism. Id. at 525-32. The development of both private and public nuisance law was related, however, to feudalism’s demise. The Assize of Nuisance sought relief from the royal courts, not the manorial courts. See Janet Loengard, The Assize of Nuisance: Origins of an Action at Common Law, 37 Cambridge L.J. 144, 147 (1978). It was also not until the end of the sixteenth century, long after feudalism’s dissipation in Western Europe in England, that a nuisance action could be brought by an individual other than a freeholder. William A. McRae, Jr., The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27, 41-42 (1948). Yandle is likewise wide of his mark in his description of the function of the jury in nuisance law. See Yandle, supra note 9, at 528-29. Contrary to his apparent assumption, a jury did not historically determine the law and facts of all nuisance actions. When the assize of nuisance first developed in the late twelfth century, it was a criminal writ, and the jury was used only as a presentment jury (akin to a grand jury today that has power to indict the defendant). See Charles L. Wells, The Origin of the Petty Jury, 27 Law Q. Rev. 347, 348 (1911).

Nor does there appear to be much more merit to Yandle’s assertion that the jury system promoted economic efficiency by making the jurors, in effect, jointly and severally liable for the amount of liability that the jury found in favor of the plaintiff. See Yandle, supra note 9, at 528-29. This claim is based on two inaccurate premises: (1) members of a jury were always residents of the same “hundred” (district) as the defendant; and (2) the joint and several liability of those in the hundred for wrongs committed by other members meant that each would share in the liability. In fact, jurors were often from places outside the hundred and therefore had no liability exposure in those circumstances. Wells, supra, at 349, 357, 359. Even more fundamentally, joint and several liability did not mean communal liability. According to Pollock and Maitland, under the then-prevailing liability scheme, “[t]he person who is injured picks out two or three wealthy inhabitants of the district, sues them for the whole sum and recovers it from them.” Pollock & Maitland, supra note 70, at 617. It was not until much later that a defendant held jointly and severally liable for the whole could subsequently bring a claim for contribution against others in the hundred. Id.

73. Barrow, supra note 23, at 191-94, 283-95; History of Feudalism, supra note 21, at 177-87, 201-06; see also Bloch, supra note 1, at 370-71 (describing the historical development of representative government in England).
law principles and a host of detailed statutes, and judicial review.\textsuperscript{74}

Second, public retention of property rights in natural resources is another basic characteristic of environmental law today that shares little in common with feudalism. Until this century, federal policy encouraged the conveyance of public lands into private ownership.\textsuperscript{75} In recent decades, the federal government increasingly has exercised its proprietary powers over the public lands in order to regulate private use and enjoyment of those lands.\textsuperscript{76} Increasingly detailed permitting schemes for specific commercial activities and increased preservation of existing natural resources have been the mainstays of federal policy. No comparable analogue existed under feudalism.

Indeed, feudalism dissipated in part because of its inability to deal with the very type of environmental problems that are currently causing dramatic shifts in the definition of private and public rights in natural resources. The feudal system prompted overutilization of farmland and soil loss through waste, overgrazing, and excessive land clearing.\textsuperscript{77} Much of this environmental degradation flowed from the actions of absentee land owners, a dominant feature of feudalism, who sought to raise short-term revenues at the expense of the long-term viability of the natural resources.

\textsuperscript{74} The centralized state that emerged from feudalism expressed at least some concern with environmental protection. Air pollution control legislation was one of the first products of centralized government:

On the conservation of the air: "The same Augustus. We are disposed to preserve by our zealous solicitude, insofar as we are able, the salubrious air which divine judgment has provided. We therefore command that henceforth no one be permitted to place linen or hemp for retting in any waters within the distance of one mile from any city or castle, lest from this, as we have learned certainly happens, the quality of the air is corrupted. If anyone does this, he should lose the linen and the hemp which he has immersed and it should be given to the court. We order that the bodies of the dead, not placed in coffins, should be buried to a depth of one-half a rod. If anyone does the contrary, he shall pay our court one augustalis [gold coin minted by Frederick]. We further order that those who take the skins of animals should put the carcasses and wastes which create an odor outside the territory [of a city] by a fourth part of a mile, or throw them into the sea or river. If anyone does the contrary, he shall pay to our court one augustalis for dogs and animals which are larger than dogs, and one-half an augustalis for smaller animals."

\textsuperscript{75} History of Feudalism, supra note 21, at 270-71 (quoting Constitutions of Melfi (1231))


under their control. Furthermore, feudalism's inability to provide adequate food supplies created serious human health problems and was partly responsible for creating the human conditions that promoted epidemics. In fact, the extent of harm caused by the Black Plague, in which two-fifths of the population of much of Europe perished, is traceable to the failings of the feudal economy.

B. Changing Conceptions of Property and Individual Liberty

The feudal analogy mistakes the symptoms of change for the direction of change. It also rests on an equation for individual liberty that is inapposite to contemporary society because of its excessive reliance on absolutist notions of private property rights in natural resources. Thus, the analogy leads to the mistaken conclusion that society is taking a step back to feudalism, when in fact we are placing even greater distance between ourselves and our feudal heritage.

The rise of the marketplace and private property rights in land was symptomatic of feudalism's decline. The conversion of feudal obligations to cash obligations and the rise of the importance of feudal incidents and charges relative to feudal services were instrumental in the evolution of feudalism from a personal to an economic relationship. The development of royal courts and the proliferation of customary laws upholding rights of vassals to property, including the basic private property rights of inheritance and alienation, marked the rise of a monied economy and the diminishment of the noble class' social status.

Furthermore, notions of inviolable private property rights in natural resources, such as land, are incompatible with the thrust of emerging legal doctrine. Much of contemporary environmental law provides greater protection of society's interest in natural resources at the expense of their exclusive private ownership.

78. Anderson, supra note 23, at 188.
79. Id. at 199.
80. Id. at 201-02.
81. Poston, supra note 77, at 36-39.
82. Bloch, supra note 1, at 207-09 (discussing the alienation of sief anathema to feudalism); Duby, supra note 23, at 322-25 (discussing the effects of trade and money on traditional notions of feudalism); Palmer, supra note 60, at 4. But see Feudalism in History, supra note 23, at 288-97 (arguing that there was no clear relationship between rise in commerce and decline in feudalism; rather, the rise of the middle class and the liquidity of wealth were "instruments in the attenuation of feudalism" and not "agents of its destruction").
83. Anderson, supra note 23, at 206-08; Barrow, supra note 23, at 85-86, 289, 338; Bloch, supra note 1, at 236-38, 253-54, 278; Ganshof, supra note 23, at 43-50, 90-91, 98-100, 151-54; History of Feudalism, supra note 21, at 77 (discussing the role of monetary changes); Milson, supra note 23, at 154.
84. Bean, Decline of English Feudalism, supra note 23, at 4-6; Bloch, supra note 1, at 190-205; Ganshof, supra note 23, at 131-33; History of Feudalism, supra note 21, at xiv-xvi, 76-77; Milson, supra note 23, at 37-65, 155; Seignobus, supra note 23, at 9-10, 15, 40-41.
85. See, e.g., J. Peter Byrne, Green Property, 7 Const. Commentary 239 (1990) (discussing the transformation of property law because of the adoption of environmentally sustainable land use programs); T. Nicolaus Tideman, Takings, Moral Evolution, and Justice, 88 Colum.
These laws include restrictions on the use of property as well as affirmative obligations that the property owner must undertake to protect or maintain property owned in fee simple. Prominent examples include laws that impose soil loss limitations on farmers, and laws that require surface miners to restore mined land to its natural condition. Another example is a historic preservation law, upheld by the Supreme Court, that imposed affirmative obligations of repair on the owner of a historic preservation landmark. The same trend is evident in remedial law, which is more receptive to damages than injunctive remedies for violations of real property rights. Thus, remedial law effectively converts private property into a right to compensatory relief.

The mistake of those who advance the feudal analogy is their assumption that any diminution in the status of either the market or private property portends a return to feudalism. Feudalism and private property, however, are not two endpoints of a swinging pendulum. That is a false and misleading image. The more accurate depiction is that recent changes in property doctrine reflect an evolutionary step even further away from feudalism. Property rights in natural resources are being deemphasized and reoriented in order to protect community interests in environmental protection.

It should be no great revelation that property law, like law generally, is not a static concept. Property law is now, always has been, and always will be the subject of constant revision in response to changing social contexts. Property law is not isolated and immunized from the social forces that prompt legal reform. The ways and the reasons for property law's evolution

L. Rev. 1714, 1728 (1988) ("The idea that land and natural resources are common property has had a significant influence on recent takings decisions.").

86. See generally Lazarus, supra note 50, at 668-79; Sax, Decline of Private Property, supra note 54. Professor Radin, however, believes that the current Supreme Court is more receptive to curtailments of property rights that can be characterized as negative easements than it is to affirmative easements or servitudes. In considering a takings challenge, the Court is more likely to engage in "conceptual severance," and thus find a taking in the case of an affirmative easement or servitude. See Margaret J. Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1687, 1678-79 (1988).

87. E.g., Woodbury County Soil Conserv. Dist. v. Orner, 279 N.W.2d 276, 279 (Iowa 1979) (upholding soil loss limitations).


92. See supra text accompanying notes 49-59.
have long been the subject of considerable economic, historical, and legal academic commentary.\textsuperscript{93}

The emergence and decline of feudalism itself reflects this inevitable process of change. Feudalism and the legal doctrines that supported it were the product of a particular set of social conditions. Feudalism apparently resulted in Europe from a collision of Roman and Germanic cultures during the fifth and sixth centuries, which was spurred on by technological innovation (allegedly the horse stirrup\textsuperscript{94}) and foreign invasion.\textsuperscript{95} But whatever its precise origins, feudalism spread and persisted, both notwithstanding and because of its oppressive and exploitative hierarchical regime, by offering some security in the very unstable times that emerged during the ninth century as the centralized political structure established by Charlemagne crumbled away.\textsuperscript{96} The same factors subsequently prompted the feudalization of England, following the Norman conquest of England by William the Conqueror.\textsuperscript{97}

Over time, however, feudalism's disadvantages overwhelmed its corresponding advantages. As described in the previous section, one of those disadvantages was its apparent inability to redress environmental pollution problems or to promote sound natural resource management practices.\textsuperscript{98} Feudalism ultimately became an untenable regime, prompting the reform of its laws, including property laws that had defined the personal relationships upon which feudalism depended.

Currently, we are witnessing another transitional period in the law. There is a growing realization that notions of absolute private property rights in natural resources, which were central to the demise of feudalism

\textsuperscript{93} Calabresi & Melamed, supra note 91 at 1089; Cohen, supra note 5, at 22-23; Cribbet, Concepts in Transition, supra note 15; Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347, 350-53 (1967); Donahue, supra note 91; Morton J. Horwitz, The Transformation in the Concept of Property in American Law, 1780-1860, 40 U. Chi. L. Rev. 248 (1973); Philbrick, supra note 38, at 696; Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. L. Rev. 195, 225-54 (1914); Reich, supra note 6, at 733.

\textsuperscript{94} See History of Feudalism, supra note 21, at xxiii (describing theory that Charles Martel reorganized his army around the advantages of the horse stirrup, which allowed a horseman to remain on the horse while delivering a powerful blow). See generally Lynn White, Jr., Medieval Technology and Social Change 1-28 (1962) (discussing generally the impacts of the invention of the horse stirrup on medieval societies).

\textsuperscript{95} The precise historical cause of feudalism is itself a matter of considerable scholarly debate, but the description in the previous text and footnote expresses one of the more prominent historical explanations. See Anderson, supra note 25, at 107-11, 128-29; Bloch, supra note 1, at 147-62, 449; Rushton Coulborn, A Comparative Study of Feudalism, in Feudalism in History, supra note 25, at 257, 270; see also History of Feudalism, supra note 21, at xxiv (asserting that "the prime cause of feudalism in the West was the Koran" because feudalism resulted from Muhammad's breaking into the Mediterranean Sea and forcing the West to look to its own agrarian resources).

\textsuperscript{96} In contrast to conflicting theories regarding feudalism's origins, this explanation of feudalism's staying power seems to have attracted a broader consensus. See Anderson, supra note 23, at 142; Barrow, supra note 23, at 46-47; Duby, supra note 23, at 345; Ganshof, supra note 23, at 3-4, 17-19; History of Feudalism, supra note 21, at 207; Strayer & Coulborn, supra note 25, at 7-8; Strayer, supra note 25, at 21-22.

\textsuperscript{97} Anderson, supra note 23, at 159-61; Barrow, supra note 23, at 42-43.

\textsuperscript{98} See supra text accompanying notes 49-64.
centuries ago, are themselves now presenting significant obstacles to
efficient and effective natural resource management and environmental
protection. Likewise, there is concern that these now-ingrained private-
property-based doctrines have resulted in inequitable distributions of
natural resource wealth and environmental quality. In short, legal reforms
that once facilitated necessary change more recently have become an
unwelcome brake upon further reform.

Because of technological innovations, change is now necessary, as it
was at the time of feudalism’s development. The technologies that under-
mine the stability of existing private property concepts are of a different
order of magnitude than the horse stirrup that may have promoted
feudalism. They are technological innovations that give individuals the
capacity to undertake massive natural resource exploitation and environ-
mental degradation. The result is a dramatic increase in the externalities
associated with natural resource exploitation.

There also has been an “invasion,” just as there was at the time when
feudalism originated. Today’s invasion, however, differs from that which
precipitated feudalism. Rather than an invading army and a clash between
East and West cultures, the need for further change in our laws results from
an invasion of new information and new values from within: information
concerning the fragility of the ecosystem and the value of ecological
diversity and its relationship to individual liberty. Today, the pace of
change is so great that a culture can virtually collide with itself.

This new information and these new values express themselves in
myriad ways through the law. Perhaps most significantly, they increase our
appreciation of the complex interdependencies existing in the natural
environment, which ultimately triggers the reform of property law doc-
trines. Notions of absolute private property rights in natural resources
depend for their legitimacy on the image of natural resources, including
land, as spatially and temporally bounded commodities. By casting doubt
on that vision, environmental externalities undermine absolutist property
doctrines. Moreover, the resulting disequilibrium is resolved only once
property doctrine is reformed in a manner that better accommodates the
collective interests implicated by those externalities.


100. Conversely, the failure to appreciate the significance of these externalities may cause
courts to conclude, wrongly, that certain governmental regulation amounts to an undue
interference with private property. Such a misapprehension of the physical workings of the
coastal zone prompted the Supreme Court in Lucas v. South Carolina Coastal Council, 112 S.
Ct. 2886 (1992) to mistakenly suggest that it was likely that a restriction on development along
the coastal zone could be justified based on traditional tort and property law limitations on
harmful uses of property. Id. at 2901; see Richard J. Lazarus, Putting the Correct “Spin” on

101. A parallel here might be drawn between the strain placed upon feudalism by vassals
having multiple lords and the strain placed on private property rights in natural resources
today. See Barrow, supra note 23, at 290-93; Bean, Decline of English Feudalism, supra note
23, at 5-6; Bloch, supra note 1, at 211-17; Ganshof, supra note 23, at 102-05, 144. The ensuing
complexity in legal and social obligations required reform of feudalism much as ecological
complexity today requires reform of private property law.
Such reforms may be expressed in a variety of settings. Property
down the path may be forthrightly and candidly changed, as courts and
legislators have consistently done. The same end may also be
accomplished through the guise of tort law, the application of which can
effectively limit the externalities of private property ownership. Governmental
exercises of the police power represent a more modern expression
of collective efforts to limit private property rights, which is why Fifth
Amendment Takings Clause challenges to those governmental restrictions
have taken on such great significance in recent years.

102. For discussion of the ongoing evolutionary process in property law in the context
of water law, see Linda Butler, Environmental Water Rights: An Evolving Concept of Public
Property, 9 Va. Envl. L.J. 323 (1990); Eric T. Freyfogle, Context and Accommodation in
Modern Property Law, 41 Stan. L. Rev. 1529 (1989); Carol M. Rose, Energy and Efficiency in
discussion focusing on ownership of wildlife, see Holmes Rolston, Property Rights and
process in natural resources law, see Caldwell, supra note 45, at 769-75; John J. Costonis, Fair
Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use
Controversies, 75 Colum. L. Rev. 1021, 1032-33 (1975); Oakes, supra note 51, at 588-89;
Pound, supra note 93, at 234; Sax, Decline of Private Property, supra note 54, at 486; Joseph
L. Sax, Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private
Property, 1983 Utah L. Rev. 313, 322-24; Samuel C. Wiel, Natural Communism: Air, Water
Oil, Sea and Seashore, 47 Harv. L. Rev. 425 (1934); see also E. Donald Elliott, Anthropologizing
between risk and culture and its application to the rise of environmentalism).

103. See Gribet, Changing Concepts, supra note 15, at 254; Gribet, Concepts in
Transition, supra note 15, at 17-26; Philbrick, supra note 38, at 724-25; Sax, supra note 102,
at 318-22. Of course, nuisance law evolved at a quite earlier stage in history for similar reasons,
that is, in response to the kinds of conflicts that resulted from an increasingly urban
population competing over physical space. See Daniel R. Coquille, Mosses from an Old
Manse: Another Look at Some Historic Property Cases About the Environment, 64 Cornell L.
Rev. 761, 778-79 (1979); Horwitz, supra note 93, at 249-51.

104. The Supreme Court has increasingly confronted the question whether environmental
restrictions on the use of real property amounts to an unconstitutional taking requiring just
access a condition to building permit); First English Evangelical Lutheran Church of Glendale
v. County of Los Angeles, 482 U.S. 304 (1987) (flood control ordinance); Keystone Bitumi-
nous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987) (surface mining restriction); United
States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (wetlands regulation); William-
son County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985) (residential
zoning restriction); Hodel v. Indiana, 452 U.S. 314 (1981) (surface mining restriction); Hodel
restriction); San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621 (1981) (commercial
zoning restriction); Agins v. City of Tiburon, 447 U.S. 255 (1980) (general plan needed);
designation).

The Supreme Court’s 1991 Term was no exception. In Lucas v. South Carolina Coastal
Council, 112 S. Ct. 2886 (1992), the Court considered a takings challenge brought against a
state restriction on the building of any permanent structure within a specified distance from
the shoreline. The plaintiff claimed that the amount of a taking because it
effectively prohibited construction of a home on property zoned residential at the time of
purchase and thereby (according to the plaintiff and trial court) rendered the market value
negligible. The state defended on the ground that the restriction was necessary to prevent
“serious public harm,” based on the externalities created by such construction within a fragile
ecosystem. The Supreme Court reversed the state supreme court’s judgment, which had
dismissed the takings claim. The Court ruled that where, as the Court assumed had happened
Economic efficiency (through the internalization of externalities) is one objective of reform, but it is not the sole impetus for change. The changes occurring today reflect reduced respect for the existing distribution of property rights as well as for the ability of the market to achieve allocatively efficient and equitable results without some collective intervention. Many commentators question the neutrality and efficacy of relying on market forces. Some posit that the existing distribution of property rights holdings is simply the product of legal rules favoring one set of substantive policies.\textsuperscript{105} Hence, they suggest that the moral force opposing redistribution, pursuant to a different set of substantive policies that more heavily weigh current norms regarding matters such as environmental protection, is greatly diminished.\textsuperscript{106}

At a more fundamental level, the changes in property law occasioned by environmentalism reflect a changing conception of the relationship between the individual and the natural environment. Environmentalism challenges the basic proposition that individual liberty is somehow inextricably linked to inviolable private property rights in natural resources.\textsuperscript{107} Individual liberty remains essential, but environmentalism seeks to reframe the setting in which it can best be fostered.\textsuperscript{108}

For this reason, environmentalism may be better perceived as aspiring not to undermine, but to enhance individual liberty. Contrary to the traditional liberal model, the relative "freedom" and "autonomy" possessed by an individual in contemporary society no longer turns on the exercise of absolute dominion over the natural environment in order to avoid dependence on others. Ours is an increasingly urban and interconnected society.

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here, a government regulation deprives a landowner of all economic use or value, the regulation amounts to a taking unless background principles of state tort and property law otherwise prohibited the proposed development of the land. The Court remanded the case to the state courts to allow them to reconsider the factual finding of no remaining economic value and to take account of any applicable state tort or property law doctrine. \textit{See generally} Lazarus, supra note 100.
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\textsuperscript{106} \textit{See} Sunstein, supra note 105, at 39; Sunstein, supra note 11, at 51.

\textsuperscript{107} Byrne, supra note 85, at 247; \textit{see also} Gregory S. Alexander, The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis, 82 Colum. L. Rev. 1545, 1595-96 (1982) (contrasting the traditional idea of property rights defined as individual autonomy and the alternative ethic of sharing and sacrifice); Oakes, supra note 51, at 624 (tracing the origins of the idea that property rights are linked to individual liberty); Philbrick, supra note 38, at 713-14 (describing the philosophical doctrines behind the link between liberty and property).

\textsuperscript{108} Professor Ross draws a similar conclusion in rejecting an analogy to feudalism applied to labor unions that was based on the fact that union employment contracts tend to be extremely comprehensive. Arthur M. Ross, Do We Have a New Industrial Feudalism?, 48 Am. Econ. Rev. 903, 903-04 (1958). Ross argues that the fact that employees are quitting their jobs in lesser numbers does not indicate that they, like serfs under feudalism, have been immobilized. It is possible that working conditions today are in fact better and thus employees have less reason to leave their employment. Id. at 904-17.
It bears little relevance to the lifestyles envisioned by traditional liberalism, which has been subject to considerable criticism. Moreover, the existing distribution of private property rights in natural resources would seem more akin to that of a sharply hierarchical society than to an egalitarian one. These property rights are distributed unequally, as are other sources of wealth. Relatively few people control a disproportionately large amount. The resulting power property rights confer on the few is likely to make those lacking such power feel less autonomous and secure in their selves.

Environmentalism is responsive to these concerns, by seeking to further human opportunity, including enjoyment of the natural environment, through environmental protection measures that protect and redistribute environmental amenities. These measures include both public retention and acquisition of property rights in natural resources, as well as governmental restrictions on the exercise of private property rights with serious negative spillover effects on others. Environmental protection, therefore, may provide an example of collective controls that promote rather than confine individual autonomy and opportunity.

109. See Michael J. Sandel, Liberalism and the Limits of Justice 149-54, 177-83 (1982); Schuck, supra note 105, at 1604-05; cf. Caldwell, supra note 45, at 760 ("Land law rooted in the conventions of Tudor England cannot be expected to serve the needs of the post-industrial society, now emerging."); Philbrick, supra note 38, at 723-24. Whether it is fair to characterize traditional liberal thinking as promoting the individual in isolation from the community is itself the subject of some debate. Compare Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1567-70 (1988) with Hendrik Hartog, Imposing Constitutional Traditions, 29 Wm. & Mary L. Rev. 75, 76 (1987) and Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 Yale J.L. & Feminism 7, 8 (1989).

110. See Baker, supra note 105, at 808-09.

111. See Mark Sagoff, The Economy of the Earth: Philosophy, Law, and the Environment 155-58, 167-70 (1988) (discussing the difference between environmentalism and deontological liberalism and also discussing the "importance of the environment in the 'national idea'"); Joseph L. Sax, Mountains Without Handrails: Reflections on the National Parks 51-55 (1980) (discussing how preservationists seek to persuade the majority); see also Freyfogle, supra note 102, at 1553 (arguing that when the government is more responsive to communal needs, there is less need for private property to be drawn with a view toward creating individual preserves legally protected from state intervention); Nedelsky, supra note 109, at 11-12 (discussing the need to resist the notion of dichotomy between individual autonomy and collectivity in favor of the view that "relatedness is not, as our tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy"); cf. Sandel, supra note 109, at 183 ("we can know a good in common that we cannot know alone").

Professor Charles Reich, who in The New Property, supra note 6, expressed great concern in 1964 over the subjugation of the individual with the rise of government, has more recently lamented the absence of "crossover between the environmental movement and various components of the individual sector." See also Charles Reich, The Individual Sector, 100 Yale L.J. 1409, 1445 (1991). According to Reich, "we undervalue the individual's need for nature, and fail to connect the visible decline of nature with the invisible effect this may have on people's character's and values." Id. See also Douglas Linder, New Directions for Preservation Law: Creating an Environment Worth Experiencing, 20 Envtl. L. 49 (1990) (discussing the idea that the natural areas which should be preserved are those which most expand opportunities for worthwhile human experiences).

112. See Sunstein, supra note 105, at 40-41 (collective response needed in some areas where individual autonomy restricts others' beliefs and preferences); Baker, supra note 105, at 742, 815-16 ("collective control does not necessarily limit, but can further, important aspects of individual liberty"); Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781, 790-91 (1987)
Finally, the view that environmentalism is hostile to the concept of property per se is another misconception. Environmentalism seeks to reformulate, not reject wholesale, property law. What environmentalism does reject is the popular fiction that an individual possesses absolute and exclusive rights in the exploitation of natural resources. It supports an accounting of the existing and future impacts of the exercise of such rights on other persons, as well as on other inhabitants of the ecosystem. Environmentalism seeks to accommodate the limitations on property rights that such an accounting will inevitably require. Environmentalism suggests the possibility of differentiating between property rights essential to human personality, which warrant great deference and protection under the law, and property held simply for commercial exploitative purposes or for the enhancement of power over others.113

113. See Baker, supra note 105, at 744-54 (discussing the various functions of property); Donahue, supra note 91, at 57 (stating that the “future of the concept of property in America may well depend on whether the courts find a way to draw a distinction between property for power and property for security”); Philbrick, supra note 38, at 696-97 (discussing the history of the general concept of property, with attention to the distinction between property for use and property for power); Margaret J. Radin, Property and Personhood, 34 Stan. L. Rev. 957, 968 (1982) (discussing the idea of expressing one’s character through property). Professor William Rodgers describes three kinds of property that, because they serve different human values, should be entitled to different degrees of protection from governmental intrusion: (1) core property rights that could be “taken” only with the owner’s consent (“property necessary to carry out a trade or make a living. . . ; [2] a survival minimum”); (2) property rights that would require compensation when taken (“ordinary property”); and (3) property rights in which society retained some social or collective interests that could be redefined to the detriment of the owner without compensation (“social property” such as natural resources commons). William Rodgers, Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law, 10 Écologie L.Q. 205, 207, 232-37 (1982); see also Calabresi & Melamed, supra note 91, at 1105-15 (discussing the rules for protecting and regulating entitlements). To a certain extent, the Supreme Court already undertakes such a scrutiny of the character of property in considering the merits of other kinds of constitutional claims. For instance, the Court considers the character of the defendant’s real property and its relation to the defendant’s privacy expectations in considering whether a search or seizure violates the Fourth Amendment. See Oliver v. United States, 466 U.S. 170, 177-81 (1984). The Court distinguishes between real property in proximity to a house (the “close”) and property outside that area (“open fields”). Id. The latter is not entitled to the same level of Fourth Amendment protection because it is not as intimately associated with the defendant’s privacy expectations. Id. A similar argument could be made in the context of due process and takings challenges to governmental limitations on the exercise of property rights. Indeed, the Court has already done so, to a certain extent, in rejecting a takings challenge to a state constitutional free speech requirement that the owner of a shopping center allow certain leafleters on his premises. PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980). The commercial nature of the private property owner’s expectations, reflected in his decision to open up the property to shoppers, was crucial to the Court’s ruling that no unconstitutional taking had occurred. Id. Professor Reich, however, has argued that the rebellion against private property has, perversely, had a disproportionate impact on the property of the individual, which he views as essential for human liberty, rather than property held by corporations for power. Reich, supra note 6, at 772-73.
Indeed, the likely result of the accommodations promoted by today’s environmental laws will be the eventual creation of modified property rights in all kinds of natural resources. The object of these modified property rights will include natural resources long thought susceptible to exclusive, absolute, private ownership, such as land. It also may extend to natural resources long considered not susceptible to private ownership and better left open to the commons, such as air, marine, and wildlife resources. In each of these contexts, society is likely to define through government intervention the extent of the collective interest in the first instance and assign private rights (that is, development, air pollution, water pollution, fishing, hunting, harvesting) not inconsistent with that interest.

These private rights may in turn be susceptible to transfer by sale, thus enlisting the power of the marketplace in trying to ensure the continuing achievement of an efficient allocation under changing economic conditions. The creation of such a market also has the significant advantage of imposing a continuous economic incentive on private parties to minimize the commercial exploitation and degradation of natural

114. I have previously discussed this emerging trend in greater detail. See Lazarus, supra note 50, at 698-702 (describing the rise of "new property" in natural resources law).

115. See Byrne, supra note 85, at 243 (stating that a regulatory program incorporating the "green theory" of property might identify land within the jurisdiction of outstanding natural value).

116. See Terry L. Anderson & Donald R. Leal, Free Market Environmentalism 3 (1991) (asserting that when government makes rights clear, and enforces them well, market processes can encourage good resource stewardship; Freyfogle, supra note 102 (discussing water rights in California); Robert H. Nelson, Private Rights to Government Actions: How Modern Property Rights Evolve, 1986 U. Ill. L. Rev. 361 (giving an overview of the development of modern property rights); Rose, supra note 102, at 295 (advocating a reconceptualization of theoretical property into two branches, individual and collective); Richard B. Stewart, PrivProp, RegProp, and Beyond, 13 Harv. J.L. & Pub. Pol'y 91 (1990) (advocating the adoption of hybrid systems of property that can overcome common law failure while avoiding many of the abuses of centralized regulation).

117. There is, however, an increasing need to consider the distributional consequences. Notions of the need for fairness principles permeate many of the modern laws regarding the allocation of natural resources. Maldistribution of natural resources historically has also affected the ability of society to accomplish needed change. See Stephen B. Presser, The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence, 84 Nw. U. L. Rev. 106, 143-44 (1989) (describing Jefferson's belief that the judiciary posed the greatest threat to individual liberty). Today, there is an increasing realization that environmental laws, by failing to account for existing social inequities, may unintentionally exacerbate past discriminatory practices. See Richard B. Stewart, Regulation in a Liberal State: The Role of Non-Commodity Values, 92 Yale L.J. 1537, 1570 n.117 (1983) ("Many environmental programs apparently provide disproportionate benefits to the wealthy and well-educated."). See generally Richard Lazarus, Pursuing Environmental Justice: The Distributional Effects of Environmental Protection, 87 Nw. U. L. Rev. (forthcoming 1999); Rachel D. Godsil, Note, Remediating Environmental Racism, 90 Mich. L. Rev. 394 (1991) (stating that minorities and poor whites bear an unequal share of the burdens of hazardous waste). There is certainly legitimate ground for concern that the environmental movement is predominantly an upper-middle-class white movement and therefore may be predisposed to emphasize the environmental concerns of that constituency. Dana A. Alston, Introduction to The Panos Institute, We Speak for Ourselves: Social Justice, Race and Environment 3 (1990); Weisbrod, supra note 115, at 118, 130, 133, 139 (1978); Peter C. Yeager, The Limits of the Law: The Public Regulation of Private Pollution 109 (1991).
resources through either mining or pollution.\footnote{118}

\section{Environmental Law and Hierarchy}

Proponents of the feudal analogy have a mistaken view of the texture of the emerging fabric of natural resources and environmental law. The current period of reformation in property law towards a new synthesis is reminiscent of feudalism only in the most limited sense: private property rights in natural resources are deemphasized. The reasons for this deemphasis, however, are as different as the visions of society each represents.

Current changes in public and private rights in natural resources do not suggest a return to a hierarchical society. They challenge rather than foster the monopolization of natural resources by captains of industry. Indeed, from this perspective, environmental law properly could be seen as addressing the concerns of those who feared that concentrated corporate accumulation of natural resource wealth threatened a return to feudalism.\footnote{119}

For the purpose of ridding an area of feudal vestiges,\footnote{120} the high water mark of eminent domain authority was upheld by the United States Supreme Court in Hawaii v. Midkiff.\footnote{121} The rise of police power authority reflected in the Supreme Court's upholding of surface mining control legislation in Keystone Bituminous Coal Ass'n v. DeBenedictis,\footnote{122} a sharp contrast to the Court's earlier decision in Pennsylvania Coal Co. v. Mahon,\footnote{123} can likewise be traced to notions favoring limited corporate ownership of natural resources owned for purposes of commercial exploitation. Similar trends are evident in state laws limiting corporate ownership of farmlands,\footnote{124} state laws requiring fixed-length notice of termination for farm tenancy,\footnote{125} state laws imposing soil loss limitations,\footnote{126} and other laws.

\footnote{118} See generally Anderson & Leal, supra note 116; Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333 (1985) (stating that economic incentive systems are feasible and effective means to implement environmental goals).


\footnote{121} Id. at 229.

\footnote{122} 480 U.S. 470 (1987).


\footnote{124} See Julian L. Juergensmeyer & James B. Wadley, 1 Agricultural Law 146-51 (1982 & Supp. 1985); see, e.g., MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (rejecting equal protection challenge to state law banning nonfamily corporate ownership or operation of farm).

\footnote{125} See Neil D. Hamilton, Legal Aspects of Farm Tenancy in Iowa, 34 Drake L. Rev. 267, 281-87 (1984-85). One author characterizes a state law providing farmer tenants with certain rights such as fixed notification of termination time the "Magna Carta of farmer tenants." Id. at 283.

\footnote{126} See Moser v. Thorp Sales Corp., 312 N.W.2d 881, 897 (Iowa 1981); Woodbury County Soil Conserv. Dist. v. Ortnr, 279 N.W.2d 276, 279 (Iowa 1979).
that seek to protect the collective interest in sound management of agricultural land.127

The same policy concerns are reflected in the rise of taxation of natural resource exploitation. The underlying rationale of such taxes, upheld in the face of constitutional challenge, is that a significant part of the commercial value of natural resources belongs to the public even when those resources are owned by a private party. Tax law, like police power regulations, effectively defines and limits the extent of private property ownership in natural resources.

For instance, in United States v. Ptasynski,128 the United States Supreme Court upheld the Crude Oil Windfall Profit Tax Act of 1980, which imposed a tax on profits made from oil sales.129 The theoretical basis of the tax was Congress's determination that the tremendous market value of the natural resources at issue was attributable to public policies and not the product of the company's own labor; hence, those corporate profits were a "windfall" to which the public at large was entitled.130

In Commonwealth Edison v. State of Montana,131 the Supreme Court upheld a thirty percent severance tax on the extraction of coal.132 The state's justification for the tax was the need to safeguard the public interest in resources located within the state's borders, including the rights of future generations to a fair share of the wealth represented by those resources. Accordingly, state officials place the tax revenues in a trust fund to provide for future citizens of the state.133 In rejecting a Commerce Clause challenge to the state tax based on the fact that almost all of the coal extracted was destined for out-of-state markets, the Court found nothing wrong in the state's practice of using a general revenue tax to safeguard the interests of future generations of state residents. The necessary implication was that future generations had sufficient interest in the resource to warrant protection of their interests.

Indeed, the rights of future generations are a significant driving force for change in private property. Property law has long reflected the need to protect the future from the dead hand of the past.134 This theme is

129. Id. The Court rejected a constitutional claim that the tax's exemption for certain domestic crude oil produced in Alaska violated the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Ptasynski, 462 U.S. at 80-84 (1983).
130. Id. at 76.
132. Id.
133. Id. at 613.
134. Ironically, this is one of the complaints made against "conservation servitudes," which seek, within the private property regime, to promote resource conservation by isolating a right to preserve the environmental status quo as a transferable property right. See Gerald Korngold, Privately Held Conservation Servitudes: A Policy Analysis in the Context of in
common to much of the property doctrine dreaded by first-year law students. It is the substantive motivating force behind the rule against perpetuities, the rules on restraints on alienation, and the law of waste.135

Historically, however, the need for such intergenerational restraints on private property rights has remained fairly discrete. These restraints have not challenged the appearance of private property as sacrosanct. That appearance, however, is being undermined with increased technological capacity for resource exploitation.

What once was predominantly a "common pool" problem within a generation136 has increasingly become a common pool problem between generations.137 There now exists the technological capacity to consume and destroy natural resources long thought to be inexhaustible. Existing technologies also have created resource hazards of an enduring nature which cross generations, such as radioactive and other hazardous wastes.

These temporal resource conflicts, as much as the more widely appreciated spatial conflicts, have prompted disillusionment with reliance on traditional private property doctrine and the market's ability to achieve efficient and fair resource allocation. Even stalwart advocates of private property, ranging from John Locke to the indefatigable Richard Epstein, have recognized private property's limitations in application to common pool resources.138 However, their apparent assumption that the common

Gross Real Covenants and Easements, 63 Tex. L. Rev. 433, 442 (1984) ("Rigid choices today may defeat the right of future generations to make critical decisions affecting their lives.").


136. "The term 'common pool resource' refers to a natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use." Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 30 (1990). The dangers of overutilization of common pool resources is described in Garrett Hardin's now-classic essay, The Tragedy of the Commons, 162 Science 1243 (1968).


138. John Locke, The Second Treatise of Civil Government, ch. V, ¶ 27, at 15 (J.W. Gough ed., 3d. ed. reprinted 1976) ("For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what is once joyned to, at least where there is enough and as good left in common for others.")(emphasis added); Epstein, supra note 134, at 705 ("the only justification for restraints of private alienation is to prevent the infliction of external harms, either through agression or the depletion of common pool resources"); Richard A. Epstein, Why Restrain Alienation?, 85 Colum. L. Rev. 970, 978 (1985) (recognizing that it is important to restrict freedom of alienation where there are common pool resources). But see Jeremy Waldron, The Right to Private Property 209-18 (1988) (narrowly reading Locke's common resource proviso).
pool limitation is a relatively minor exception to the private property rule fails to account for the potential significance of the exception with the addition of temporal conflicts.139

Many of the more recent natural resource and environmental protection laws reflect such temporal, common pool concerns. Two radical expressions in federal law are the Wilderness Act of 1964140 and the Endangered Species Act of 1973,141 both of which are specifically designed to protect the future from the excesses of the present. Another prominent example is the natural resource damage provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,142 which provides for the recovery of monies necessary for the restoration of natural resources damaged by the release of hazardous substances.

The analogy between feudalism and the emerging legal regime is especially inapt. The new laws rest on notions of equality and community between current and future generations wholly inconsistent with the essentially hierarchical regime of feudalism.143 Feudalism was based on reciprocity, but it was based on reciprocity that was grossly unequal in its assignment of obligations and rights between the parties in a feudal relationship.144 A fundamental element of feudalism was subordination of one individual to another.145 Feudal vassalage ultimately developed into a system of exploitation and coerced labor.146 The only reciprocity existing was among those at the very top of the feudal hierarchy.147

It is important to resist the feudal analogy because feudalism was such an oppressive regime. Clearly, changes are occurring in the laws affecting private and public rights in natural resources. However, whether the pace of change is sufficient to keep up with the serious environmental problems we face is questionable.

Although commentators, including Samuel Weil,148 Aldo Leopold,149

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139. Compare Epstein, supra note 134, at 669 ("Land itself lasts forever . . . . The durability of the asset means that no one person can consume it in a lifetime . . . .") with Tideman, supra note 85, at 1723 ("Land and natural resources are therefore not properly subject to claims of ownership in perpetuity, but must be managed in such a way that all people in all generations share their benefits.").


143. Cf. Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1526-27 (1983) ("In contrast with feudal society, the welfare state is based on government control and espouses an ideology of equality. . . . [F]eudalism was intentionally hierarchical; feudal society did not subscribe to the belief that people were or should be equal.").

144. Bloch, supra note 1, at 224, 227-28.

145. Even those vassals at the top of the feudal hierarchy, who initially sought to become vassals because of the associated prestige and security, ultimately viewed the relationship as deprecating and subordinating. Ganshof, supra note 23, at 19, 22-34.

146. See Duby, supra note 23, at 150-53; History of Feudalism, supra note 21, at xviii (describing views of Adam Smith); Seignobus, supra note 23, at 92-94.

147. Duby, supra note 23, at 354-56.

148. Wiel, supra note 102, at 457.
Roderick Nash, Joseph Sax, Christopher Stone, and others have long predicted and urged adoption of a new ethic and attitude towards natural resources, progress has been grudging and slow. Public attitudes favoring absolute rights of property in natural resources have remained firmly ingrained, serving as a substantial brake on needed change through the democratic process. The public continues to associate private property rights in land with personal freedom.

Therefore, it is important to debunk the notion that current changes in private rights in natural resources reflect a return to feudalism, a subjugation of individuals, and a loss of liberty and personal security. Showing that these changes are instead antithetical to feudalism may facilitate our accomplishing change more quickly and more democratically. A shift in public attitudes in local communities more often than not precedes rather than results from fundamental legal reform.

Those who romanticize feudalism, arguing in favor of enlisting aspects of feudal society in pursuit of environmental protection, are misguided. One cannot legitimately extract from feudal society the notion that rights in natural resources are coupled with social obligation, and ignore the


151. Sax, supra note 137, at 93.

152. Stone, supra note 137, at 111-14.


154. See William B. Scott, In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Centuries 202-03 (1977) ("Americans . . . continue to affirm a concept of liberty and justice similar to that expressed in the Declaration of Independence. Even Americans' concept of property has remained remarkably fixed despite the fact that the opportunity for individual proprietorship is more restricted today than at any previous time in our past."). Id. Nedelsky, supra note 51, at 246-60; Caldwell, supra note 45, at 762-63. See also Alexis de Toqueville, II Democracy in America 270 (Phillips Bradley ed., 1978) ("In no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property.").

155. See also Joel F. Handler, The Conditions of Discretion—Autonomy, Community, Bureaucracy 135-37 (1986) ("It is rare that a significant court or political pronouncement of major importance springs full-blown from the hearts and minds of the judges or political leaders. Rather, these pronouncements are reflections of activities, groups, and interests struggling for social change."). See generally William W. Fisher, The Significance of Public Perceptions of the Takings Doctrine, 88 Colum. L. Rev. 1774 (1988) (concluding that the character of the connections between public perspective and legal and economic theory vary, but popular attitudes are relevant to each of the perspectives).

156. Cribb, Changing Concepts, supra note 15, at 247; Freyfogle, supra note 15, at 733-34, 739; Philbrick, supra note 58, at 710.
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oppressive, nonreciprocal nature of those obligations under feudalism. 157 To suggest such a notion and recognize a significant historical link between feudalism and the reforms in property law today, necessarily discredits the reforms being made.

D. Environmental Law and Administrative Feudalism

Finally, environmental law provides little support for the claim that a new feudalism is evident in the kind of authority exercised by executive branch agencies. 158 Environmental law does not reflect, nor does it depend upon, executive branch agencies exercising virtually unbridled administrative discretion, which some have analogized to feudalism. 159

Modern administrative law doctrine provides considerable checks on administrative agency action. 160 Indeed, much of that doctrine developed in response to increased governmental activity in environmental

157. Professor Glendon correctly points out that part of the problem stems from the fact that those who use feudalism as an exemplar look to the relationship between lord and vassal, while those who emphasize feudalism’s negative aspects focus on the plight of serfs within feudal society. Glendon, supra note 39, at 230-31. There were different levels of subjugation within the hierarchy of feudal society. For instance, there were apparently at least two distinct categories of tenements by the end of the twelfth century in feudal England. There were tenements of uncertain duration, subject to “dishonourable services,” and there were tenements the possession of which was protected by the royal courts. The former were described as unfree and the latter, which developed increasing protection from the royal courts over time, were free holdings called “fiefs.” Bloch, supra note 1, at 189; see Barrow, supra note 23, at 92 (stating the life of a villein was “one of ceaseless toil”); id. at 335-38 (describing “tenants in base serjeant,” which were the tenants at bottom of feudal relationship, and peasant cultivators); Bloch, supra note 1, at 168-71, 241 (describing the development of feifs and tenements and comparing them); Seignobos, supra note 23, at 13-14 (distinguishing free villeins from serfs). In England, unlike in France, the terms “villein” and “serf” were essentially synonymous because villeins were denied resort to the royal courts and the social stigma associated with their status was considered hereditary. Bloch, supra note 1, at 272. In all events, even the relationship between lord and vassal was fundamentally unequal. Id. at 227-28, 264-65. The vassal’s obligations far outweighed the lord’s. To fulfill these obligations, the vassal ultimately depended on the coerced exploitation of those lower in the feudal hierarchy whose existence vacillated between protection and oppression. Id. at 227-28, 264-65: Duby, supra note 23, at 150-53 (describing eleventh-century land owners who guaranteed security to their inhabitants but exacted a high price for their peace). An analogous criticism has been directed at those who proffer civic republicanism as a model for contemporary society. See, e.g., Derrick Bell & Freema Bansal, The Republican Revival and Racial Politics, 97 Yale L.J. 1609, 1612-14 (1988) (arguing black Americans should question a civic republican philosophy of society which has historically prevented a subclass of society from participating); Linda K. Kerber, Making Republicanism Useful, 97 Yale L.J. 1663, 1665, 1669 (1988) (warning a modern “republican revival” ignores the patriarchal culture that initially sustained the theory); Martin H. Redish & Gary Lippman, Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications, 79 Cal. L. Rev. 267, 268 (1991) (stating classical republicanism may not be feasible after its “morally deplorable elements” are excluded); Kathleen M. Sullivan, Rainbow Republicanism, 97 Yale L.J. 1713 (1988) (rejecting republicanism comprised of a variety of individual preferences, as well as republicanism focused on a single goal).

158. See supra text accompanying notes 62-64 (discussing the great discretion executive agencies hold).

159. See supra text accompanying notes 66-81 (discussing the differences between feudalism and present environmental policy).

160. Lazarus, supra note 50, at 679-83.
protection. Although there have been swings in the judicial pendulum in this area, the courts over the last several decades have generally provided litigants with increased access by relaxing prudential and constitutional standing, ripeness, and mootness requirements. The courts have remained ready to reverse agency statutory interpretations and to remand for insufficient records.

Furthermore, the environmental statutes hardly confer unfettered discretion on the administrative agency. Although some of Congress's earliest statutory forays were somewhat open-ended, that has certainly not been the trend over the last two decades. As Congress has gained more experience in environmental protection and learned from the agencies' experiences with prior laws, it has become much more willing to write fairly detailed laws.


161. Id. at 684-88.
163. See Coggins, supra note 75, at 6-31; Lazarus, supra note 50, at 658-60.
164. For some recent examples, see Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991) (remanding EPA listing of site on Superfund's National Priorities List); Fertilizer Institute v. EPA, 925 F.2d 1303 (D.C. Cir. 1991) (vacating the EPA's interpretation of "release" as contrary to the express language of CERCLA); Esmeralda County v. Energy Dep't., 925 F.2d 1216 (9th Cir. 1991) (finding that the DOE acted arbitrarily in declining to designate two local communities under the Nuclear Waste Policy Act as being affected by a particular nuclear waste repository site); Marble Mountain Audubon Soc'y v. U.S. Forest Serv., 914 F.2d 179 (9th Cir. 1990) (noting that Forest Service violated National Environmental Policy Act of 1969 by failing to consider adequately the environmental impacts of a proposed timber sale); Alaska Ctr. for the Env't v. EPA, 762 F. Supp. 1442 (W.D. Wash. 1991) (EPA violated Clean Water Act by failing to establish the required maximum daily loads for water quality). See also Thomas Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 980-93 (1992) (describing judicial willingness to second-guess agency interpretation of statutory language).
Comprehensive Environmental Response, Compensation and Liability Act of 1980\textsuperscript{171} to detailed congressional amendment of those laws in the 1980s and in 1990.\textsuperscript{172} Other laws, such as the Alaska National Interest Lands Conservation Act,\textsuperscript{173} Outer Continental Shelf Lands Act,\textsuperscript{174} National Forest Management Act,\textsuperscript{175} Federal Land Policy and Management Act,\textsuperscript{176} Public Rangelands Improvement Act of 1978,\textsuperscript{177} and Reclamation Reform Act of 1982,\textsuperscript{178} likewise reflect a trend towards less, not more administrative agency discretion, as compared to the open-ended delegations to agencies that marked legislation earlier this century.\textsuperscript{179}

At the federal level, environmental law is looking more like the Tax Code than the Sherman Act. But in all events, even when the delegations are open-ended, the legislative touchstone is the protection of human health and the natural environment.\textsuperscript{180} Whatever vagueness exists in the term, no such focus existed under feudalism in the first instance.

Congressional oversight is also not confined to statutory prescription. Congressional oversight in the area of environmental protection has been consistently rigorous. Over one hundred congressional committees and subcommittees have overlapping jurisdiction over environmental issues. And those committees have used their leverage as public overseers frequently to shape agency policy.\textsuperscript{181}

In short, those administrative agencies responsible for the fashioning of environmental law have not acted with unfettered discretion. They have been subject to varying, and often opposing, forces emanating both from


\textsuperscript{179} Coggins & Wilkinson, supra note 75, at 2-10.


within the government (Congress, Courts, and the Office of Management and Budget) as well as from the private sector. Rather than a bureaucracy run amok, the end result may be precisely the kind of deliberative process capable of producing reasoned decisionmaking, at least so long as the inevitable conflicts between competing forces are kept short of self-destructive.

III. THE MORE USEFUL ANALOGY: MEDIEVAL COMMUNALISM

Historical analogies are almost always problematic. They oversimplify the past and ignore the complexities of the present. The feudal analogy is no exception. Its failing, however, runs much deeper in its application to contemporary environmental law. Feudalism and environmentalism provide two wholly different and fundamentally opposed visions of society. For this reason, insofar as historical analogies are a useful normative model at all, the better historical analogy for contemporary environmental law is medieval communalism, which not only resisted feudalism, but ultimately promoted its downfall.

Western Europe was never completely feudalized; pockets of "allods" (freehold property) remained, portions of the rural population in all countries avoided bonds of personal and hereditary dependence, and the concept of the "state" never completely disappeared. "Mutual oaths," which contrasted sharply with the oath of subordination found within feudalism, also persisted. Initially, such oaths existed only sporadically, surviving in tenth-century peace movements and a few isolated communes. Their significance, however, rose with the medieval communal movement, which ultimately triumphed in some villages. By provid-

184. Any analogy to medieval communalism can no doubt be faulted for romanticizing an aspect of medieval society that, while less oppressive than feudalism, was still hardly a model of equality measured by contemporary standards. See infra note 193. My point, however, is not that medieval communalism provides the best analogy to what is occurring today, but instead that it provides the "better" analogy within medieval society. As discussed in infra text accompanying notes 185-215, moreover, the communal analogy is especially useful because it provides a ready reminder of important community values that warrant greater attention in the fashioning of environmental protection laws.
185. Bloch, supra note 1, at 445.
186. Id. See also Anderson, supra note 23, at 193.
188. Many practices within feudal society had communal trappings, such as the open field system and the village commons. Professor Carl Dahlman, an economist, has proposed that in medieval England and Europe communal property rights to natural resources were, in certain contexts, preferable to private property rights in their ability to promote allocatively efficient results. See Carl J. Dahlman, The Open Field System and Beyond: A Property Rights Analysis of an Economic Institution 131-38 (1980); see also John Quiggin, Private and Common Property Rights in the Economics of the Environment, 22 J. Econ. Issues 1071, 1082-86 (1988) (advocating in favor of allocative efficiency advantages of common property rights in natural resources). But see Ephraim Lipson, The Economic History of England 74-77 (1959) (characterizing the open field system as "wasteful, unsystematic, and in every way bad
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ing an avenue of escape from feudal restraints, medieval communalism undermined the lord's authority on the manor and the hierarchical order upon which feudalism depended.189

Medieval communalism, through collective efforts, sought to promote both individual freedom and welfare and the common good. For this reason, contemporary environmentalism might better be traced to the medieval communal movement than to feudalism.190 Environmentalism promotes equality between individuals both spatially and temporally through environmental protection and resource conservation.191 Indeed, the emerging constitutional justification for much of environmental law's upsetting of existing expectations bound up in property law rests on the "reciprocity of advantage" and social contract underlying the law's restrictions and obligations.192 In addition, environmental law seeks to promote individual freedom by ensuring a natural environment in which individual freedoms can be exercised meaningfully.

The communal analogy falters, however, where the analogy may provide the greatest guidance for contemporary environmentalism. This is also where the criticisms of those advancing the feudal analogy have their greatest force. Simply put, notwithstanding a shared system of values, the institutional framework upon which environmentalism has relied in recent decades has little in common with the workings of village communities within which medieval communalism thrived.193

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189. See Anderson, supra note 23, at 204-06; Bloch, supra note 1, at 242, 355; Richard Lachman, From Manor to Market: Structural Change in England 1536-1640, at 6-7 (1987); Frug, supra note 8, at 1088-90. 190. Of course, contemporary environmental law is hardly the first expression of a communal approach to natural resources. Nor is medieval European communalism the sole historical source of inspiration. Some Native American communities in the United States have long embraced such a philosophy in defining the relationship of the individual and the community to the natural environment. See William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England 58-81 (1983); Freyfogle, supra note 15, at 726-27. 191. Environmentalism also increasingly promotes equality throughout ecosystems by protecting other species. Although contemporary environmental law does not reflect the more radical views of deep ecology, biodiversity has joined human health and welfare as legitimate bases for environmental protection. See the Wilderness Act, 16 U.S.C. §§ 1331-1336 (1988); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1988), as three examples of federal statutes reflecting such broad concerns. 192. See generally Raymond R. Coletta, Reciprocity of Advantage and Regulatory Takings: Toward A New Theory of Takings Jurisprudence, 40 Am. U. L. Rev. 297 (1990) (asserting that the "average reciprocity of advantage" should be more expansively applied). 193. There is, of course, a danger here in romanticizing medieval communalism, much in the way that I have faulted others for romanticizing feudalism. See supra notes 82-97 and accompanying text. Serious inequities existed within village communities during the middle
Under the ideal or normative communal model, many of the values that private property would otherwise further are promoted instead through the individual’s participation in the collective decisionmaking process. In effect, individual autonomy and freedom are enhanced not through isolation from the community but through the individual’s relations within the community, including the individual’s making of decisions affecting his or her quality and character of life.

As in the communal model, environmental protection laws have deemphasized exclusive private property rights in natural resources and have sought to promote the individual through, rather than in isolation from, the collective. Unlike the communal model, however, concerted effort has not been made within those laws to provide for individual access to the decisionmaking process. Consequently, individual access to the decisionmaking process has been minimal.

Environmental protection laws have relied on national uniformity and a highly centralized government at the expense of local autonomy. The decisionmaking has generally occurred at the federal level—in congressional committees, executive branch agencies, and courts far removed from the individuals affected. Moreover, the statutes and regulations implementing environmental protection measures are extraordinarily technical and complex. Consequently, these statutes and regulations are accessible only to the elite few who possess the resources to enlist the assistance of those with the necessary technical and legal expertise. There has been little room in this scheme for the kinds of diverse, decentralized associations and communities that foster individual values through collective action under

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ages. Their membership consisted mostly of individuals from elite classes. See Anderson, supra note 23, at 194; Bloch, supra note 1, at 417; see also supra note 157 (analogous complaint directed against advocacy of civic republicanism).

194. See generally Sandel, supra note 109. In a recent article, Stephen Gardbaum describes three independent communitarian positions and argues that only one of those three is incompatible with liberalism. See Stephen A. Gardbaum, Law, Politics, and the Claims of Community, 90 Mich. L. Rev. 685 (1992). Like other commentators, Gardbaum rejects the hypothesis that “liberalism rests upon atomism and subjectivism.” Id. at 689. The three communitarian positions identified by Gardbaum are: (1) antiatomism, which he characterizes as involving “community as a causal factor in the constitution of personal identity,” id. at 692; (2) strong communitarianism, which advances notions of “community” “as a particular substantive value” without which we cannot conceive our personhood, id. at 691-92; and (3) metaethical communitarianism, which considers “community” as the “necessary forum or source of value,” id. at 694. Gardbaum faults others for concluding that these three claims are interconnected, believing that they are instead independent. Id. at 691-92. This Article does not purport to resolve, or even to address, this ongoing debate regarding the most appropriate framework for evaluating communitarian claims.


197. Schuck, supra note 105, at 1612; see also Michael A. Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 Yale L.J. 1651, 1660-61 (1988); Freyfogle, supra note 102, at 1554.
the communal model.198

There are, of course, significant obstacles to the decentralization of environmental protection decisionmaking. Apart from the political problems associated with any shift in decisionmaking authority,199 environmental protection invites centralized decisionmaking. The regulated markets are nationwide, as are most of the basic industries.200 Many environmental problems are also national in scope. Pollution spreads between localities and it does not serve the environment to allow localities to avoid the hard choices associated with pollution reduction by simply exporting their pollution elsewhere. Finally, local decisionmaking units are reputedly overly influenced, if not "captured," by local commercial interests upon whose economic viability they depend.

Notwithstanding these obstacles, there is reason to be optimistic that more decentralization, with increased opportunity for individual access to the decisionmaking process, is possible in environmental protection policy. The command and control system of pollution control depends on a highly centralized regime, but the shortcomings of that regulatory regime are increasingly apparent for reasons of both economic efficiency and distributional fairness. The cost of national uniformity has been exceedingly high, as differences between localities and between facilities are not taken into account.201 In addition, the distribution of resources for environmental protection increasingly appears to reflect the wheeling and dealing of pork barrel politics at the national level rather than an effort to distribute resources based on a neutral assessment of the environmental threats presented.202 The net result is not necessarily excessive environmental protection, but rather misdirected environmental protection. Too many resources are expended to address some problems, with too few resources left over to address other, sometimes more important, environmental matters.203

198. Joel F. Handler, Law and the Search for Community 153-54 (1990); Handler, supra note 155, at 255-58, 284; Stewart, supra note 117, at 1543-54.

199. Those who have established access within the existing power structure would naturally resist any major reform. See Lazarus, supra note 183, at 315-17.

200. See Gerald E. Frug, Why Neutrality?, 92 Yale L.J. 1591, 1600 (1983) ("There can be no meaningfully decentralized decisionmaking about environmental matters as long as decisions about capital mobility are centralized."); Stewart, supra note 117, at 1544-46.

201. Ackerman & Stewart, supra note 118, at 1333-40; see also Stewart, Madison's Nightmare, supra note 195, at 343 (national uniform regulations "are inevitably procrastean in application").


Finally, there is reason to be skeptical of the widely accepted notion that local governmental authorities are likely to be too favorably disposed to industry to engage in effective environmental protection. Recently, state and local governments frequently have imposed more stringent environmental protection controls, causing industry to seek the refuge of federal preemption to avoid their application.\textsuperscript{204} Dissatisfaction with the inefficiencies, inefficacy, and unfairness of the current command and control regime has prompted renewed interest in alternative approaches that allow for more consideration of local differences and for greater local control over the precise mix of pollution permitted from a particular facility.\textsuperscript{205} Greater utilization of economic incentives is no doubt the most widely touted alternative.\textsuperscript{206} Pollution prevention\textsuperscript{207} and cross-media regulation\textsuperscript{208} represent two more new directions for environmental protection, both of which potentially embrace the incentive approach.

Of course, these alternatives are not uncontroversial. Significant support for the existing scheme persists,\textsuperscript{209} and open hostility to economic incentives for environmental protection remains in some quarters.\textsuperscript{210} But whatever the ultimate merits of these disputes, the advantages of the more decentralized approaches warrant independent weight in their resolution.\textsuperscript{211}

The issue is not simply one of economic efficiency. Nor is it just a problem of distributional fairness, although this too is a value that historically has not been considered adequately in fashioning environmental protection policy.\textsuperscript{212} The challenge is to establish a system of govern-

\textsuperscript{204} See, e.g., Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476 (1991) (Federal Insecticide, Fungicide & Rodenticide Act does not preempt more stringent local pesticide regulation); California v. Federal Energy Regulatory Comm'n, 495 U.S. 490 (1990) (Federal Power Act preempts states from imposing more stringent instream flow requirements on federally licensed hydropower facility); see also Frug, supra note 200, at 1600.

\textsuperscript{205} Stewart, Madison's Nightmare, supra note 195, at 353-56.

\textsuperscript{206} Ackerman & Stewart, supra note 118; Robert W. Hahn & Robert N. Stavins, Incentive-Based Environmental Regulation: A New Era for an Old Idea, 18 Ecology L.Q. 1 (1991). Professor Stewart contends that shifting to a system of transferable pollution permits would likely reduce the cost of pollution control by 50\% ($60 billion) per year. Stewart, Madison's Nightmare, supra note 195, at 353.


\textsuperscript{208} See generally Lakshman Guruswamy, Integrating Thoughtways: Re-Opening of the Environmental Mind, 1980 Wis. L. Rev. 463 (discussing cross-media regulation).


\textsuperscript{211} The advantages of decentralization and communalism are similarly a common theme in much of the current literature concerning republicanism. See, e.g., Horwitz, supra note 11, at 67-70; Wilson C. McWilliams, The Anti-Federalists, Representation, and Party, 84 Nw. U. L. Rev. 12, 32-38 (1989); Sullivan, supra note 157, at 1715; Sunstein, supra note 109, at 1578, 1589; see supra note 11 (discussing the usefulness of the communal analogy for an analysis of contemporary environmental law).

\textsuperscript{212} See supra note 117 (discussing the consequences of the failure of environmental policy to adequately consider distributional fairness).
ment that promotes environmental protection in a manner that fosters individual rights by not excluding individuals from the decisionmaking process.\textsuperscript{213} By accounting for local conditions and by redirecting the public policy debate from the technology of pollution control to the amount of pollution acceptable,\textsuperscript{214} some of the more decentralized local approaches offer the possibility of being more inclusive and providing individuals with a greater voice in the affairs of their community.\textsuperscript{215} This advantage may not be a dispositive factor in choosing between competing schemes, but its significance has been inadequately heeded in the ongoing debate concerning environmental protection policy.\textsuperscript{216}

CONCLUSION

The charge that environmentalism threatens a return to feudalism can be easily dismissed. The feudal analogy misapprehends both the nature of feudalism and the character of the kinds of changes in contemporary law, particularly property law, that have resulted from increased environmental protection. The basic features of environmental protection's legal regime share far more in common with the forces that prompted feudalism's demise than with feudalism itself. Moreover, environmentalism's basic philosophy, which rests on notions of equality and community between generations, is fundamentally opposed to the hierarchy of feudalism. This philosophy sought to exploit the labor of others and the land for the immediate gain of a very few.

The feudal analogy's flaw, however, runs even deeper. Therefore, resistance to it is crucial to the furtherance of environmental protection goals. The analogy rests on the persistent fiction that individual liberty is inextricably linked to absolute private property rights in natural resources. In effect, it posits a dichotomy between liberty and feudalism, and then places private property on the liberty side and environmental law (because it erodes traditional private property doctrine) on the feudalism side. This same dichotomy infects much of modern constitutional doctrine affecting rights in private property, particularly the Fifth Amendment's Takings

\textsuperscript{213} In a related vein, Professor Stewart argues that "aspiration," "diversity," "mutuality," and "civic virtue" are all values central "to the liberal idea that individuals choose and realize their own conception of the good" and having been "historically nurtured in the decentralized, associational tradition of American liberalism, must be addressed by the regulatory programs of a developed national economy." Stewart, supra note 117, at 1566. Cf. Nedelsky, supra note 51, at 261 ("The transformation of property requires nothing less than a new conception of the scope of the state.").

\textsuperscript{214} Professors Ackerman and Stewart believe that the creative use of market incentives will "vastly improve the quality of democratic debate about environmental value, allowing a wider public to address basic issues that the present regulatory system obscures under a flood of technocratic mumbo-jumbo." Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 Colum. J. Envtl. L. 171, 189 (1988).

\textsuperscript{215} Handler, supra note 198, at 46-47, 98-99, 153-54.

\textsuperscript{216} Professor Carol Rose makes a similar argument in describing the advantages of local governments' exercising control over land use planning. See Carol M. Rose, The Ancient Constitution Vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism, 84 Nw. U. L. Rev. 74, 95-98 (1989).
Clause, which is intended to protect private property from collectivist intrusion and thus can stand as an obstacle to environmental protection efforts.

Whatever the merits of the long-standing liberty/feudalism dichotomy, the important lesson of contemporary environmentalism is that individual welfare and liberty need not be viewed as dependent on unfettered private rights in the exploitation of natural resources. In an effort more reminiscent of medieval communalism than of feudalism, modern environmental protection laws promote the individual through the collective pursuit of environmental quality. Environmentalism seeks to reconceive the setting within which individual autonomy may prosper by focusing on the kind of natural environment necessary for individuals to thrive.

However, significant room exists for improving how environmental protection is accomplished. Because of its highly centralized and technical focus, the institutional framework upon which environmentalism has historically relied has tended to deny individuals meaningful access to the fashioning of environmental protection policy. To a certain extent, this may be an inevitable response to environmental problems that exist on a national scale and present complex scientific questions. But to the extent that more decentralized approaches are otherwise currently under consideration, the need to enhance opportunities for individual participation in the making of decisions affecting the quality and character of the natural environment warrants greater emphasis.