

# Book Reviews

## Land Use and the Study of Early American History

*Changes in the Land: Indians, Colonists, and the Ecology of New England.* By William Cronon. New York: Hill and Wang, 1983. Pp. x, 241. Cloth \$15.95; paper \$6.95.

*Labor in a New Land: Economy and Society in Seventeenth-Century Springfield.* By Stephen Innes. Princeton: Princeton University Press, 1983. Pp. xxi, 465. Cloth \$35.00. Pp. xxi, 197. Paper \$7.95 (excludes tables).

Eric T. Freyfogle†

Good history books do more than relate history. A good history book provokes the reader to think about the present, to consider the relevance of past experiences to the issues of current society. A good history volume should be, not an enclosed package of facts and interpretations, but a point of departure for the reader's thoughts. When a history book successfully fulfills this provocative function, it deserves the attention of readers whose interests lie more with the present than with the past.

William Cronon's *Changes in the Land*<sup>1</sup> and Stephen Innes' *Labor in a New Land*,<sup>2</sup> two recent works on colonial New England society, are good history books by this definition. Both are thoughtful, well-digested

---

† Assistant Professor of Law, University of Illinois. B.A., Lehigh University, 1973; J.D., University of Michigan, 1976.

For valuable comments on earlier drafts I would like to thank my colleagues Michael Hoeflich, Andrew Merritt, Deborah Merritt, and Thomas Ulen, and also James Springer, anthropologist and member of the Class of 1986 at the University of Illinois College of Law.

1. W. CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983) [hereinafter cited by author and page number only].

2. S. INNES, *LABOR IN A NEW LAND: ECONOMY AND SOCIETY IN SEVENTEENTH-CENTURY SPRINGFIELD* (1983) [hereinafter cited by author and page number only].

studies of critical themes in the development of early American society. Although both are aimed at an audience of colonial American scholars (and are likely to enjoy a wide and favorable reception among that audience), the works are fine stimulants for ruminations on aspects of contemporary American society; both therefore deserve a considerably broader readership. These works raise, in intriguing and revealing historical settings, fundamental issues about man's relationship with the land and nature and about the role of property in American society. Both works furnish the reader with valuable historical and cultural perspectives on current resource-allocation controversies. These works, however valuable they may be for readers who are historical scholars, are perhaps more valuable for those who are not.

Cronon's work considers the land use practices and property ownership concepts of the early New England colonists and compares them with the substantially differing approaches of the aboriginal Algonquian Indians. Cronon's story is one of conflict: a conflict between, on one side, an evolving capitalist property system that treated natural resources as economic commodities and that granted landowners extensive, exclusive land exploitation rights, and, on the other side, an Indian property system characterized by complex shared land use rights and more ecologically stable land use practices. His illuminating cross-cultural comparison readily invites further comparison with twentieth-century land use practices and ideologies.

Innes' volume examines the growth of capitalism and economic individualism in seventeenth-century Springfield, Massachusetts. As capitalism came to Springfield and other New England towns, it changed substantially the role of land in the social life of the community. In pre-capitalist days, land and community were one, and land use decisions, whether made individually or communally, were designed to further social and communal goals as well as economic ones. As capitalism advanced, land was viewed increasingly as an economic commodity with land use decisions based more exclusively on economic factors. Land was used more to make money and less to control and reflect the community's social and religious life.

Both these books on early colonial America provoke the reader to reconsider many assumptions about land use and private property, assumptions that permeate American property law and contemporary land use planning. Together with other recent scholarly studies, these works provide the raw material for readers to identify and evaluate various trends in seventeenth-century New England man-land practices and ideologies, a process of synthesis that raises many questions about man's current orien-

## Land Use

tation toward land and nature and sheds light on contemporary difficulties.

### I.

To the English colonists who first arrived in numbers in the 1630's, the New England countryside appeared largely unused and only lightly populated, more a wilderness than an inhabited country. Yet this seemingly virginal land was in use and subject to private ownership by various tribes of the Algonquian language group. These native inhabitants had long subjected the countryside to a complex system of land ownership and use that enabled them, with their late Stone-Age skills, to obtain sustenance and shelter from the rocky New England land. As Cronon relates, lands that the arriving settlers viewed as unowned, unused, and even wasted under English versions of the man-land relationship were viewed much differently by the native Algonquian inhabitants with their differing culture and ideology. The arriving colonists, weighted down with their own cultural assumptions and ideologies, were ill-prepared to comprehend these vastly different Indian land use patterns.<sup>3</sup>

In his study of the ecological transformation of the New England countryside during the colonial era, Cronon details these complex Indian land use and property ownership practices.<sup>4</sup> Compared to the arriving white settlers, the Indians lived lightly on the land. Seasonal migrations and small village sizes reduced the Indians' impact on any one location. Indians gathered and hunted only food that was plentiful and easily accessible, and moved on or changed diets when scarcities appeared. These practices, interpreted as laziness by contemporary whites, served to protect the re-

---

3. W. CRONON, at 33, 56-58, 66-70. See J. AXTELL, *THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA* 47-53 (1981); F. JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 15-16, 136-37 (1975); A. VAUGHAN, *NEW ENGLAND FRONTIER: PURITANS AND INDIANS 1620-1675*, at 110-13 (rev. ed. 1979); Wallace, *Political Organization and Land Tenure Among the Northwestern Indians, 1600-1830*, 13 Sw. J. ANTHROPOLOGY 301, 304, 311-12 (1957). For bibliographic references to studies of Indian-colonial dealings in early New England, see A. VAUGHAN, *supra*, at vi-xiv.

4. Cronon's professed aim in his study is "to write an ecological history of colonial New England." W. CRONON, at vii. He devotes much of his book to "such things as pine trees, pigs, beavers, soils, fields of corn, forest watersheds, and other elements of the New England landscape." *Id.* His thesis is that "the shift from Indian to European dominance in New England . . . involved fundamental reorganizations . . . in the region's plant and animal communities." *Id.* Industrial societies tend to assume that problems of pollution, natural resource supply, and ecological destruction arose only in the modern age with the coming of industrialization and increased population pressures. Cronon's work provides a case-study refutation of this assumption. He explains in detail how plant and animal populations in New England were dramatically altered by the pre-machine-age agricultural practices of the sparsely populated early New England settlements. See *infra* note 39 and accompanying text. This essay, with its focus on the comparative property ownership and land use ideologies of the Indians and colonists, largely ignores Cronon's analysis of the marked impacts of European practices on the pre-contact Indian land use orientation. It also largely ignores the considerable detail Cronon presents on the ecological impacts of European practices.

productive capabilities of useful plant and animal species. Because food was not available to the Indian evenly throughout the year, there were periods of want as well as periods of plenty, particularly among northern tribes. The Indians generally did not prepare for expected shortages by gathering and storing extra food during times of plenty, preferring instead to suffer periods of temporary undernourishment. This indisposition to hoard food further reduced the Indian impact on the land.<sup>5</sup>

The countryside of early New England was divided among numerous Indian villages, each generally inhabited by a couple hundred residents. The leader or sachem of each village held sovereign title as village representative to all of the village lands. Boundaries among villages, although subject to occasional change, were relatively clear and respected. In many instances, sachems owed homage to higher or stronger sachems of the same tribe, and some villages at times had easement-like rights to use or to cross lands held by other villages. But generally, the village was the basic unit of sovereign land ownership with tribal land co-ownership rare or unknown.<sup>6</sup>

The average Indian group that comprised a single village migrated seasonally on the lands it owned. Village groups in northern areas with climates hostile to agriculture were pure hunter-gatherer societies.<sup>7</sup> Villages in areas where agriculture was possible typically lived on their agricultural lands in the warm months; like their northern compatriots, they migrated farther inland during colder months and dispersed themselves for hunting. A village group usually changed its camp locations only after a number of years, when agricultural fertility had declined, firewood had become scarce, or a site had otherwise become undesirable. Such seasonal migrations were possible because the Indians were content with insubstantial, portable dwellings and possessed few personal belongings. Southern tribes set aside village lands for hunting, burning the land regularly to aid travel and to remove low-level shrubs that hindered the hunter's sighting of animals. These fires, kept low on the ground to avoid damage to mature trees, gave the countryside a park-like appearance. More importantly, the fires provided room for the growth of forage grasses and

---

5. See W. CRONON, at 37-45, 48-50, 53; E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 54-56 (1975); Martin, *The European Impact on the Culture of a Northeastern Algonquian Tribe: An Ecological Interpretation*, 31 *WM. & MARY Q.* 3, 11-16 (3d ser. 1974). Compare F. JENNINGS, *supra* note 3, at 65-67 (noting evidence of Indian food surpluses used in trade).

6. See W. CRONON, at 37-38, 58-61; F. JENNINGS, *supra* note 3, at 67-71, 112-16, 136-37; A. VAUGHAN, *supra* note 3, at 32-34, 51, 105-07; Wallace, *supra* note 3, at 311-12.

7. These groups commonly migrated in the warmer months to the seacoast areas to feed on seafood and waterfowl. In colder months they spread themselves more thinly across the northern forests for late fall and winter game hunting.

thereby stimulated the growth of the animal populations sought by Indian hunters.<sup>8</sup>

Individual Indian families generally possessed and tilled their own agricultural lands. Such lands were privately owned and used until soil fertility declined or the village changed its camp location, at which point the lands were abandoned without afterthought. Indians commonly mixed several crops—corn, beans and squash, for example—in a single field, a technique that produced fields that seemed messy and overgrown in comparison to the clean, single-crop English fields but that yielded substantial benefits by reducing weeds, preserving soil moisture, and increasing crop yields. Prior to the colonists' arrival, the Indians did not use deep-cutting plows, animal power, or fertilizer in their husbandry practices, nor did they enclose their fields with fences—practices which would have had substantial effects on natural ecological balances.<sup>9</sup>

The Indian land tenure system's incorporation of diverse forms of individual and group ownership is particularly worthy of scrutiny. In their use of property, the Indians clearly embraced a system of private ownership, although they carved up property rights much differently than the colonists did and retained more property rights for communal use.<sup>10</sup> Indian families owned exclusively the land on which their wigwams or other dwellings stood. This exclusive right of use continued until the family abandoned the land. Village agricultural lands were divided up and owned by individual families, with each family's ownership rights in the farm lands continuing only so long as the family made actual use of the lands. The family's rights

did not include many of the privileges Europeans commonly associated with ownership: a user could not (and saw no need to) prevent other village members from trespassing or gathering nonagricultural

---

8. See W. CRONON, at 37–51; J. AXTELL, *supra* note 3, at 47–48, 62–63; F. JENNINGS, *supra* note 3, at 61–62; D. LEACH, *FLINTLOCK AND TOMAHAWK: NEW ENGLAND IN KING PHILIP'S WAR 2–3* (1958); N. SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500–1643*, at 33–34 (1982); A. VAUGHAN, *supra* note 3, at 30–31, 46–47.

Cronon's work is noticeably and regrettably devoid of quantitative data to support the developments that he traces, such as date-specific data pertaining to animal populations (both wild and domesticated), the quantities of agricultural products shipped out of New England, the acreage tilled or used as pasture, and the proportion of New England occupied by colonists and Indians.

9. See W. CRONON, at 42–45; J. AXTELL, *supra* note 3, at 50–52; F. JENNINGS, *supra* note 3, at 62–63; E. MORGAN, *supra* note 5, at 54–56; N. SALISBURY, *supra* note 8, at 30–31.

10. Individual Indians owned exclusively those personal goods that they collected or made with their own hands. Yet Indians regularly made "gifts" of personal property to establish and preserve social ties with other Indians and villages. This gift giving, usually undertaken with an expectation of later reciprocity by the recipient, "was a crucial means for establishing and reproducing one's position in society." W. CRONON, at 61–62 (citation omitted). See *id.* at 59–62; F. JENNINGS, *supra* note 3, at 102–04; N. SALISBURY, *supra* note 8, at 44, 48–49; W. WASHBURN, *THE INDIAN IN AMERICA* 20–22, 32–33 (1975).

food on such lands, and had no conception of deriving rent from them. Planting fields were "possessed" by an Indian family only to the extent that it would return to them the following year. In this, they were not radically different in kind from other village lands . . . .<sup>11</sup>

In short, an Indian who "owned" agricultural lands simply had a usufruct right—an exclusive right for the period of ownership to use the land for agricultural purposes. Ownership interests in all other Indian lands—the "clam banks, fishing ponds, berry-picking areas, hunting lands, the great bulk of a village's territory"<sup>12</sup>—were even more clearly limited to usufruct rights and even more distinctly fragmented. Rights to collect edible wild plants and birchbark for canoes, to catch fish and shellfish, to hunt populous roaming animals such as deer and turkeys, and to set snares and traps for less numerous or more sedentary creatures were all viewed as separate land use rights and all subject to different use allocation schemes.<sup>13</sup>

---

11. W. CRONON, at 62-63. See W. WASHBURN, *supra* note 10, at 32-33. Cf. A. VAUGHAN, *supra* note 3, 105-07 (noting some evidence of intertribal land sales, a practice suggesting that land had an exchange value as well as a use value).

12. W. CRONON, at 63.

13. Cronon's explanation of this flexible land tenure is worth considering in full:

[D]ifferent groups of people could have different claims on the same tract of land depending on how they used it. Any village member, for instance, had the right to collect edible wild plants, cut birchbark or chestnut for canoes, or gather sedges for mats, wherever these things could be found. No special private right inhered in them. . . . [T]he same was true of rivers and the coast: fish and shellfish could generally be taken anywhere, although the nets, harpoons, weirs, and tackle used to catch them—and hence sometimes the right to use the sites where these things were installed—might be owned by an individual or a kin group. Indeed, in the case of extraordinarily plentiful fishing sites—especially major inland waterfalls during the spawning runs—several villages might gather at a single spot to share the wealth. All of them acknowledged a mutual right to use the site for that specific purpose, even though it might otherwise lie within a single village's territory. Property rights, in other words, shifted with ecological use.

Hunting grounds are the most interesting case of this shifting, nonagricultural land tenure. The ecological habits of different animals were so various that their hunting required a wide range of techniques, and rights to land use had to differ accordingly. The migratory birds in the ponds and salt marshes, for example, were so abundant that they could be treated much like fish: whoever killed them owned them, and hunters could range over any tract of land to do so, much like the birds themselves . . . . Likewise, flocks of turkeys and the deer herds were so abundant in the fall that they were most efficiently hunted by collective drives involving anywhere from twenty to three hundred men. In such cases, the entire village territory was the logical hunting region, to which all those involved in the hunt had an equal right.

The same was not true, on the other hand, of hunting that involved the setting of snares or traps. The animals prey to such techniques were either less numerous, as in the case of winter deer or moose, or sedentary creatures, like the beaver, which lived in fixed locales. These were best hunted by spreading the village population over as broad a territory as possible, and so usufruct rights had to be designed to hold the overlap of trapped areas to a reasonable minimum . . . .

At least for the duration of the winter hunt, the kin group inhabiting a camp probably had a clear if informal usufruct right to the animals caught in its immediate area. Certainly a man (or, in the north, his wife) owned the animals captured in the traps he set, though he might

## Land Use

Thus, an Indian who “owned” land possessed only one or more rights to use the land for a particular purpose. Some uses, such as use of a wigwam site, were exclusive uses, while others, such as the right to take migratory birds from the land, were retained in common by the village and not allocated to individuals.<sup>14</sup> Significantly, some rights that are currently associated with land ownership, such as the right to amass and hold land that is in excess of personal needs and the right to transfer for value unneeded land to another person, were alien to Indian land tenure practices and cultures (until introduced by the colonists) and were not rights that belonged to anyone, individually or communally. Recognizing that there were “rights” held by no one is critical if one is to comprehend fully the Indian approach to ownership and to appreciate fully their relationship with the natural environment.

In essence, the Indians did not believe that they, or anyone else, “owned” the land. Like other hunter-gatherer and horticultural groups, they believed that land was no more subject to ownership than was the air, water, sky, or the numerous spirits that inhabited the world. Man merely used the land to enjoy its fruits, and was expected by custom to use it in a way that preserved its integrity. Man lived on the land but did not “own” it in the capitalistic sense; man consumed natural resources but altered his consumptive practices when they threatened nature’s abilities to renew; man used plants and animals to satisfy his need but did not disrupt his natural environment by importing numerous non-native breeds and species. Land was useful to the New England Indians for many lim-

---

have obligations to share which created *de facto* limits to his claims on them. The collective activities of a camp thus tended to establish a set of rights which at least temporarily divided the village territory into hunting areas.

W. CRONON, at 63–64 (citations omitted). See F. JENNINGS, *supra* note 3, at 61–62.

Cronon’s discussion of family property rights in hunting grounds, long a disputed topic, raises this issue to a higher, more sophisticated level by giving such detailed separate examination to the various rights to take different types of animals during different seasons. The course of this debate is reviewed in Cronon’s bibliographic essay, W. CRONON, at 227–28, and in W. WASHBURN, *supra* note 10, at 73–75. Most researchers conclude that individual family hunting rights (as opposed to village hunting rights) were vague and flexible until the arrival of the colonists, when increased trade competition and declining animal populations made hunting areas more valuable and intensified concern over property rights in hunting areas. The fur trade spurred the transition to a family hunting territory system. With this transition, Indians developed a sense of conservation and, at least in some areas, endeavored to trap the nonmigratory fur-bearing animals on a sustained yield basis. See C. MARTIN, *KEEPERS OF THE GAME 175–76* (1978).

14. Once allocated, however, private property rights were protected by Indian tribes just as they were by colonial towns. According to historian Francis Jennings:

An Indian who “wandered” into the territory of an alien tribe, or who poached on the hunting grounds of a fellow tribesman without permission, committed thereby an offense that might be punished by death. Farmers planted in tracts assigned to them by their chiefs. In the most literal sense every Indian knew his place on the land and was kept on it by enforced custom.

F. JENNINGS, *supra* note 3, at 67–71 (citations omitted). See Wallace, *supra* note 3, at 304, 311–12. For more general discussions of Indian practices in enforcing village rules, see F. JENNINGS, *supra* note 3, at 111; W. WASHBURN, *supra* note 10, at 17–20, 40–42.

ited and relatively specific purposes, and the Indians devised flexible ways of allocating to individuals the rights to use tribal lands for these specific purposes.<sup>15</sup>

Present-day legal scholars often use the bundle-of-sticks metaphor as a way to explain that the ownership of a property item at law entails the possession of a large number of distinct rights to use, conserve, protect,

15. See W. CRONON, at 65-70; N. SALISBURY, *supra* note 8, at 34-39; W. WASHBURN, *supra* note 10, at 11-12, 27, 55-56; Martin, *supra* note 5, at 11-16. Modern ethnohistorians, while largely agreeing that Indians were relatively respectful of their physical environment, have reached no consensus on the mental state that motivated specific Indian practices. "World view and the relation of man to nature," one researcher has asserted, "are perhaps the most difficult and problematical aspects of ethnohistorical reconstruction." Sturtevant, *Animals and Disease in Indian Belief*, in INDIANS, ANIMALS, AND THE FUR TRADE 177, 182 (S. Krech ed. 1981). Indians were certainly not conservationists in the contemporary sense and were not motivated by any ethical or moral relationship toward nature. Yet something in the Indian world view and value system led them to exercise restraint and to avoid excessive depletion of plant and animal populations.

Whether Indians should be admired and studied for their highly developed environmental ethic—a issue on which Cronon implicitly takes an affirmative stand—has been the subject of much heated debate. The latest round of scholarly argumentation has asked whether pre-contact Northeastern Indians refrained from depleting populations of fur-bearing animals because of some ethical restraints on their conduct or because they lacked sufficient motivation to increase their hunting. It is agreed that until the beginning of the colonial fur trade, Indians followed practices that maintained high animal populations but after contact they began killing animals at rates that rapidly depleted animal populations. This rapid shift in Indian practices seems to suggest that a lack of material motivation rather than an ethical standard underlay the earlier Indian restraint, and that the advent of colonial markets provided the stimulus for increased Indian trapping.

In a provocative essay dealing principally with the Micmacs and Ojibwas of eastern Canada, Calvin Martin ties this shift in Indian practices to a breakdown in Indian spiritual beliefs: In the Indian view, man was linked with spirits that protected fur-bearing animals and other animate and inanimate objects. This "spiritual realm was the principal conduit, or channel, through which man was linked with his physical and natural surroundings." C. MARTIN, *supra* note 13, at 38. Indian spiritual belief systems included taboos or injunctions against overkilling animals and operated somehow to keep Indians in rough harmony with their ecosystems. "Land use was therefore not so much a moral issue for the Indian as it was a technique animated by spiritual-social obligations and understanding." *Id.* at 187. For Martin, post-contact Indians were willing to engage in the fur trade only after their spiritual beliefs had been dramatically interrupted by colonist-induced epidemics, European technology, and Christianity. *Id.* at 61.

Many have found Martin's spiritual thesis unpersuasive and have argued that pre-contact Indians avoided overkill simply because they enjoyed freedom and leisure, disliked physical overexertion, and, with resources relatively abundant, had no motivation to overexploit in any area when they could move elsewhere with higher animal populations and thereby obtain sustenance with less effort. See INDIANS, ANIMALS, AND THE FUR TRADE, *supra*. Charles Bishop has gone so far as to argue that Indians had no concept of limited supplies of goods, no well-defined concept of exploitation, and no appreciation of the desirability of limiting harvests so as to avoid reducing natural population levels. Bishop, *Northeastern Indian Concepts of Conservation and the Fur Trade: A Critique of Calvin Martin's Thesis*, in INDIANS, ANIMALS AND THE FUR TRADE, *supra*, at 39, 52-56. For Bishop, Indian respect for nature, as evidenced by the data uncovered to date, can best be explained as a consequence of Indian desires to minimize work. *Id.* at 44-48. Only with the introduction of colonial trade did Indians have any economic incentive to trap animals more ruthlessly and thoroughly, and Indians showed no compunction against doing so once this motivation was provided. See *id.* at 44-51. Cronon also discredits Martin, W. CRONON, at 91, yet himself offers no coherent thesis on the sudden willingness of Indians to overkill animals. In his chapter on hunting, he sides with Martin's critics by citing newly created Indian "needs," *id.* at 92, 97-98, 105, yet adds undeveloped references to the role of epidemics, which disrupted Indian "status systems" and thereby "eliminated many of the social sanctions which had formerly restricted individual accumulation," *id.* at 98, 161.



## Land Use

and transfer the item.<sup>16</sup> In a “mature” legal system, it has been argued, all sticks are present, and they are all possessed by the owner of the property unless transferred by him or taken lawfully by the government.<sup>17</sup> This metaphor, despite its hazards,<sup>18</sup> helps emphasize the property ownership and land use views of the seventeenth-century New England Indians. Until the colonists arrived the Indians did not aggregate the specific land use rights into a single bundle and identify with this bundle a new concept of absolute or full ownership. For these Indians, many sticks were unknown and fully alien to their system. Other sticks remained owned by the village members communally. Those sticks distributed to individual village members were handed out individually, and the possession of one stick relating to a land parcel carried no presumption that other sticks came with it. In short, the Indians bundled their land use rights in ways peculiarly suited to their communal, peripatetic lifestyles and their nature-respecting orientations.

## II.

The seventeenth-century white colonists conceived of and allocated property rights in ways distinctly different from their Indian neighbors. In its early centuries of development, the English common law divided ownership rights in land among lords, vassals, and subvassals in a feudal hierarchy that granted exclusive property rights to no single person. Ownership of a land interest in this feudal system carried responsibilities as well as rights. “Property in medieval Europe,” William Scott has observed, “meant obligations and conditional ownership, not rights and economic freedom.”<sup>19</sup> By the early seventeenth century, however, feudalism and the feudal ideal of mutual personal obligations had largely yielded to a system of fee simple land ownership and a new property ownership ideology. In the seventeenth-century mind, each land parcel had only one “owner,” and the person who “owned” the land necessarily possessed a large bundle of sticks.<sup>20</sup>

The first English emigrants to Massachusetts tended to recreate in the New World the land use practices and other traditional, familiar ways of

---

16. See *infra* note 76 and accompanying text.

17. See Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest ed. 1961).

18. See *infra* text following note 73.

19. W. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROSPERITY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 9 (1977).

20. See J. BEAN, THE DECLINE OF ENGLISH FEUDALISM, 1215-1540 (1968); A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 163-94 (1961); Donahue, *The Future of the Concept of Property Predicted from its Past*, in XXII NOMOS: PROPERTY 28-42; Lemon, *Spatial Order: Households in Local Communities and Regions*, in COLONIAL BRITISH AMERICA 86, 87-88 (J. Greene & J. Pole eds. 1984).

life that they had left behind in English villages. Many settlers arrived with intentions to reform traditional legal structures, but these reforming impulses were overpowered by the settlers' cultural baggage. As a result, the initial settlements in colonial Massachusetts took on the appearance of rural English farm and coastal communities.<sup>21</sup> The distribution of land to residents in the first New England towns, as well as the regulation of the uses of town lands, reflected the primacy of communal, noneconomic goals. In an effort to maintain godly communities, town fathers distributed town lands only to immigrants who passed moral and religious tests. To maintain solidarity, towns generally prohibited land ownership by other than town residents and required town approval of land sales.<sup>22</sup> Deference to social betters was evident in nearly all aspects of town and church life. Land distributions reflected this deference as towns allocated new lands not in equal increments per capita or per family but according to the substantial social class variations that existed among town residents.<sup>23</sup> Land ownership thus played a vital communal role in supporting what was perceived as the natural social structure.

Town land distributions also reflected the considerable variety in land use practices that existed in England, practices that colonists carried with them to the New World. In some English villages individual farmers owned small strips scattered over large village fields that were tilled communally by the village farmers; in other villages, where the enclosure movement had begun earlier, farmers held their lands in the form of single, enclosed farms that were farmed individually. In some areas land had a well-recognized market value and was regularly bought and sold; in other areas, transfers for value were rare and land values were less influ-

---

21. See D. ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERRAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981); D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 3-31 (1958); D. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS* 3-4, 18 (1979); K. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS* xiii, 3-22 (1970); S. POWELL, *PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN* 139-46 (1963); Breen, *Creative Adaptations: Peoples and Cultures*, in *COLONIAL BRITISH AMERICA*, *supra* note 20, at 195, 207; Campbell, *Social Origins of Some Early Americans*, in *SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY* 63 (J. Smith ed. 1959).

22. See D. ALLEN, *supra* note 21, *passim*; P. GREVEN, *FOUR GENERATIONS* 41-51, 62-64 (1970); D. KONIG, *supra* note 21, at 29-30; K. LOCKRIDGE, *supra* note 21, at 3-22; S. POWELL, *supra* note 21, *passim*. But see S. INNES, at 44-45, 123-25 (noting unusual disinclination in Springfield to impose economic restraints to maintain social cohesion).

23. Land distributions, generally made free of charge, were not made in equal increments per capita or per family. Towns allocated farm land and pasturage rights so as to maintain the substantial social class variations that existed among the town residents. Although the towns' policies varied considerably, the typical practice was to award larger, better-situated tracts to families that were larger in size (including servants) and higher in social status. Land allocations thus recognized and perpetuated the existing social and economic distinctions among the early town families. See D. ALLEN, *supra* note 21, *passim*; P. GREVEN, *supra* note 22, at 41-51; S. INNES, at 45; K. LOCKRIDGE, *supra* note 21, at 10-12; S. POWELL, *supra* note 21, at 9-11, 83, 136.

## Land Use

enced by proximity to market.<sup>24</sup> Some colonial towns, like Sudbury and Andover, Massachusetts, adopted open-field farming techniques by dividing town lands into several large fields and allocating to each town family one or more discrete strips in each of the fields and by setting aside substantial areas as communal pasturages and woodlots. Farming decisions in these open-field towns were commonly made by the farmers as a group. Because the landholdings of each farmer in open-field towns were widely scattered, farm families naturally lived together in villages, much like their Indian neighbors, rather than dispersed upon individual farms.<sup>25</sup>

Most towns adopted enclosed-field farming practices and allocated to each family one or a small number of larger, more isolated land tracts. Farmers in such towns tilled their lands separately and tended to share fewer items of personal property. Even towns that followed this enclosed-farm practice, however, often tried to force residents to live in a single village and in close proximity to the local church. In an effort to build close-knit, neighborly communities and to preserve religious and social solidarity, home building was restricted to specified geographic areas near the town centers, even though farm lands, and hence the work sites of town residents, might be far distant. The economic benefits of living closer to farm work sites (and farther from watchful, critical neighbors), however, encouraged families to move onto their separate farms. Within a few decades of settlement, the enclosed-farm towns were characterized by a broad dispersion of the farm families.<sup>26</sup>

Not all land was allocated to families, however. Many towns allocated to the first settlers only a small portion of the total town chartered lands and reserved most lands for later distribution as needs dictated, thus retaining the town's power to control development for decades. Some areas were held as commons with specific, limited rights to use the commons allocated to families in the same manner (and often at the same time) as private lands were allocated. Other areas were simply surplus lands, generally more distant from the town center, retained to accommodate later town expansion and owned and managed in the interim by town governments.<sup>27</sup>

---

24. See D. ALLEN, *supra* note 21, *passim*; S. POWELL, *supra* note 21, *passim*.

25. See D. ALLEN, *supra* note 21, *passim*; W. CRONON, at 72-74; P. GREVEN, *supra* note 22 (for Andover); S. INNES, at 44-45, 123-25; K. LOCKRIDGE, *supra* note 21, at 12-14; S. POWELL, *supra* note 21, *passim* (for Sudbury).

26. See D. ALLEN, *supra* note 21; J. DEMOS, *A LITTLE COMMONWEALTH* 9-12 (1970); P. GREVEN, *supra* note 22, at 51-61; S. INNES, at 45-47; S. POWELL, *supra* note 21, at 95, 118-38; Lemon, *supra* note 20, at 92-95; see also Kelly, "In dispers'd Country Plantations": Settlement Patterns in Seventeenth-Century Surry County, Virginia, in *THE CHESAPEAKE IN THE SEVENTEENTH CENTURY* 183 (T. Tate & D. Ammerman eds. 1979) (noting similar evidence of dispersed settlement patterns in early Virginia).

27. See D. ALLEN, *supra* note 21; K. LOCKRIDGE, *supra* note 21, at 12-13; S. POWELL, *supra*

The property ownership ideas and land use practices that were brought to New England by the first colonists underwent considerable change in the seventeenth century, change that reflected, for the most part, a clear shift toward increasing economic individualism. One change then occurring in the Anglo-American world was in the prevailing theoretical justification for private property.<sup>28</sup> For centuries prior to the colonizing of New England, theorists had debated whether private property ownership was a natural right existing independent of government action or whether it was an artificial, human construct instituted by governments and hence subject to governmental infringement.<sup>29</sup> By the seventeenth century, the rising mercantile class and the rural landed gentry saw as their greatest practical need the curtailment of government power over private property. After its articulation in late century, John Locke's labor theory of property, which argued that man had a natural right to the visible products of his labor, was especially popular in England since it seemed to justify resistance to governmental interference with private property.<sup>30</sup> When the New England character was first established in the 1630's, this shift to natural rights theories of property ownership was not yet far advanced in England. The view that private property was an innate natural right remained subordinate to the Puritan view that town governments had full power to regulate man's economic activities. But there nonetheless existed among the early settlers a growing sense that property rights were to some extent God-given human rights that no government could abolish. Not surprisingly, as natural rights sentiments grew, colonists became increasingly resistant to governmental efforts to fetter the use and development options of individual land owners.<sup>31</sup>

As colonists gradually embraced this natural rights justification for economic individualism, they came to view land and other natural resources as commodities whose value was determined primarily if not exclusively by the market. The arriving New England colonists brought with them a belief that nature and its bounty existed solely to serve man. Land and the resources of nature were commodities that man could own and alter, consume, or even destroy at will to satisfy his desires. Indeed, land was not valuable unless it was altered and tamed: Wilderness was simply a waste-

---

note 21, at 93-97.

28. See R. SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 124-61 (1951); W. SCOTT, *supra* note 19, at 5-23 (1977); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 713-31 (1938).

29. For an excellent summary of medieval and early modern conceptions of property, see R. SCHLATTER, *supra* note 28.

30. For a discussion of Locke's theories, see L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 32-43 (1977); R. SCHLATTER, *supra* note 28, at 151-61.

31. See W. SCOTT, *supra* note 19, at 10-17; Philbrick, *supra* note 28, at 708-14.

## Land Use

land until subdued by the axe and subjected to human control. Lands that Indians left unfenced and wandered upon for occasional hunting were, in the colonists' view, largely unused and wasted.<sup>32</sup>

This consumptive orientation toward nature, already pronounced in the minds of the first settlers, continued to strengthen as the colonial era progressed. Colonists viewed an item's monetary worth in the market as a prime, if not the prime, determinant of its inherent value. Increasingly, land was valued not just for its produce but for the money it could bring upon sale. The colonists began to divide elements of nature into two categories: those possessing and those lacking market value, treating as worthless those elements lacking value in the market. To the colonial mind, nature was no longer a coherent, interrelated environment. Plants, animals, and minerals that Indian practices respected as part of the scheme of nature were ignored and carelessly destroyed by colonists because they lacked "value" in market terms.<sup>33</sup>

A colonial landowner could realize fully the exchange value of his land only if he was free to sell to the highest buyer and to convey to the buyer the right to use the land free of use restrictions. Not surprisingly, then, land-owning colonists began to question the limitations placed on their land use rights, including communal land use practices, shared ownership rights, and other town practices that controlled land use in furtherance of noneconomic ends. Landowners also resisted open-field farming practices, so open-field towns gradually yielded during the seventeenth-century to farmer demands to consolidate their various separate parcels and to enclose them as discrete, individually managed farms. Landowners gained the right to move onto farms distant from town centers and to sell their lands free of ownership restraints and moral screening tests for new residents. Step by step, the landowner's bundle of land use rights grew larger, a development very much a part of a larger colonial and western trend toward individualism and economic liberty.<sup>34</sup>

Paradoxically, as landowners placed substantial weight on the market value of land and successfully resisted land use restraints, they devalued their land by continuing to employ the wasteful practices that had seemed appropriate during the first years of settlement. Plentiful land in early

---

32. See W. CRONON, at 75; R. NASH, *WILDERNESS AND THE AMERICAN MIND* 23-43 (3d ed. 1982).

33. See W. CRONON, at 73-79, 165-70; D. KONIG, *supra* note 21, at 67-68; K. LOCKRIDGE, *supra* note 21, at 145-51; Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Theory*, 15 WM. & MARY. L. REV. 759, 761 (1974).

34. See D. ALLEN, *supra* note 21, *passim*; J. DEMOS, *supra* note 26, at 11-12, 188; K. LOCKRIDGE, *supra* note 21, at 80-85, 94-100; S. POWELL, *supra* note 21, at 118-39; Lemon, *supra* note 20, at 92-95; cf. A. MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY, AND SOCIAL TRANSITION* (1978) (noting evidence of economic individualism centuries earlier in England).

New England stimulated appetites for land acquisition. As a result, average landholdings in early New England were substantially larger than corresponding landholdings in England. The availability of land coupled with shortages in farm laborers encouraged landowners to use agricultural practices that were labor saving and land wasting, an attitude of waste that remained in place even as land scarcities developed in the earliest-settled farm communities.<sup>35</sup>

The early New England system of land use and property ownership adhered to by early New England colonists thus differed in several significant ways from the practices of the neighboring Indians. By the end of the seventeenth century, the colonial landowner possessed nearly exclusive rights to use his land for all purposes and to exclude and halt all other uses and users. Land use rights that were viewed as discrete by the Indians (and therefore allocated individually) were aggregated into a single bundle by the colonists and awarded to a single "owner" of the land. In comparison to the more refined, complex Algonquian system of allocating land use rights, the New England approach was characterized chiefly by an extraordinary aggregation of land use rights in one individual.<sup>36</sup>

A second distinction between the two systems appears in their respective views of land valuation. The Indian had no real concept of the value of land apart from its productiveness to the holder. Land had no recognizable market, transfer or rental value. To the Indian, land was owned only to the extent it was needed at the time; the idea of hoarding land for use years or decades later made little sense. Under the colonial system, however, a family could own lands that it was not using and that were even in excess of its contemplated needs. The colonists also believed, contrary to Indian practices, that land used by one family might be owned by another, with some economic rent due by the tenant to the landlord.<sup>37</sup>

The permanence of the individual colonial land ownership rights distinguished them in a third substantial way from the corresponding Indian rights. Indian rights, limited as they were to the right to make a specific

---

35. See W. CRONON, at 165-70. As Cronon indicates, the increasing clamor for unrestrained land use rights developed hand-in-hand with wasteful land use practices. See also P. GREVEN, *supra* note 22, at 65-68 (evidence of excessive landholdings in Andover, Massachusetts); K. LOCKRIDGE, *supra* note 21, at 155-57 (evidence of the continuation of wasteful agricultural practices in Dedham, Massachusetts). For a view of the even more consumptive Virginia attitude toward nature and its presumed never-ending bounty, see T. BREEN, *PURITANS AND ADVENTURERS: CHANGE AND PERSPECTIVE IN EARLY AMERICA* 164-96 (1980).

36. See D. ALLEN, *supra* note 21, *passim*; W. CRONON, at 73, 76-78; P. GREVEN, *supra* note 22, at 51-61.

37. Indians did retain ownership rights in lands that were used only part of the year, and to this extent did comprehend ownership of rights in lands not in immediate use. See *supra* pp. 719-21. Tribes did recognize intertribal transfer of sovereignty over land, which is a form of transfer for value, yet this should best be viewed, as Cronon urges, as "more a diplomatic exchange than an economic one." W. CRONON, at 61.

## Land Use

and personal use of the land, naturally ended when the land was no longer useful to the owner for that specific purpose. Colonists, by comparison, believed in permanent settlements and viewed permanence as a characteristic of land ownership rights.<sup>38</sup> The two cultures differed further in the respect they showed for the natural environment. Indian land practices contemplated and tolerated less interference with the ecosystem; colonial agricultural practices, on the contrary, reflected a view of plants, animals, and minerals as individual commodities that were not part of an interrelated ecosystem. Native wild animals were driven out by the colonists and replaced with non-native domestic ones; land was stripped bare and planted with a single crop species, often a non-native one; trees and minerals were taken by the colonists with no thought of replacement or replenishment. In comparison to the neighboring Indians, the colonists were far more willing to attack and manipulate the land and its resident plant and animal species in order to suit human needs.<sup>39</sup>

### III.

Cronon's engaging history describes the land use conflict between Indians and colonists in early America. Innes, in his tale of seventeenth-century Springfield, explores a subsequent conflict among the colonists themselves—a conflict that raises what is perhaps the fundamental land use question: Do land use decisions so directly affect the community welfare, are land and community so directly linked, that land use decisions in an advanced, human society must necessarily be based on social, communal considerations as well as on economic ones? Innes raises this issue in an intriguing, indirect way by describing the decline of one family's social and political influence, a decline caused in large part by a growing sentiment in seventeenth-century Springfield that land and community should be separate decisional spheres.

Springfield, Massachusetts, established as a trading post on the Connecticut River in the 1630's on the then-frontier fringe of colonial civilization, was dominated by commercial concerns in its first century to a degree uncharacteristic of the more religious, quasi-feudal farming towns

---

38. See W. CRONON, at 53, 65–69, 166–69; *supra* pp. 720–21.

39. See W. CRONON, at 108–70.

Ethnohistorians have reached no consensus on the Indians' view or mental attitude toward nature. See *supra* note 15. "Anthropologists generally regard the pre-Columbian North American Indian as having been a sensitive member of his environment, an individual who merged 'himself sympathetically into the world of living and even non-living things.'" C. MARTIN, *supra* note 13, at 33 (citation omitted). The reasons for this sensitivity and sympathy, however, are not clear. As Cronon demonstrates, Indian practices in comparison to colonial practices were much less disruptive of natural ecosystems. It was thus principally in their actions rather than through articulated world views that Indians demonstrated a respect for nature and ecosystem balances.

of Puritan New England. At the apogee of the Springfield economy stood the towering figure of William Pynchon, town founder, principal landowner, commercial leader, and landlord or employer of most of the town breadwinners. In their extensive, diverse economic endeavors throughout western Massachusetts, William Pynchon and his son John embraced sooner and more fully than their neighbors the emerging ideology of economic individualism. The Pynchons were at the forefront of the ongoing changes in economic practices and thought. Yet the Pynchon family was much more than an economic power. William Pynchon held all important civil and judicial power and oversaw Springfield in its early years "much like an English manorial lord."<sup>40</sup> By 1665, John Pynchon "held virtually every significant leadership position. He was simultaneously magistrate, judge of the country court, permanent moderator of the town meeting, and captain of the militia."<sup>41</sup> The Pynchon mansion dominated Springfield architecture, standing in stark contrast to the modest dwellings of most villagers.<sup>42</sup>

Had he lived a few centuries earlier, William Pynchon undoubtedly would have boasted a noble title and would have enjoyed as lord the fealty and loyalty of his economic and social subordinates—his vassals. Had he lived in the nineteenth century, Pynchon would have been viewed as the town's leading businessman, an entrepreneurial magnate whose influence rested openly and entirely on his economic power. Pynchon lived, however, in the seventeenth century, which was a time of transition in colonial America from feudalism to capitalism, a period referred to by William Scott as the age of "socialized individualism."<sup>43</sup> This societal transition included, as one of its chief elements, a splitting apart of the social and economic spheres of life. In earlier feudal times, land ownership invariably conferred on the landowner substantial political and social privileges. In the emerging capitalist age, however, these privileges were no longer an assumed aspect of land ownership. In nineteenth-century capitalist society, the large property owner received from his economic subordinates only his contractual dues. Their loyalty, respect, and public support, once automatically given to the large landowner of social and political dominance, now had to be separately acquired.<sup>44</sup>

---

40. S. INNES, at xix.

41. *Id.* A wealth of information on the Pynchons' judicial activities is set forth in the pioneering COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1629-1702): THE PYNCHON COURT RECORD (J. Smith ed. 1961).

42. S. INNES, at 18.

43. W. SCOTT, *supra* note 19, at 5-23.

44. See R. SCHLATTER, *supra* note 28, at 63-76; Philbrick, *supra* note 28, at 708-14. On the medieval equation of land ownership and social control, see C. ERICKSON, THE MEDIEVAL VISION 104-23 (1976).



## Land Use

In telling the tale of the Pynchons, Innes describes a clash between fundamentally conflicting views of the social roles of private property. The Pynchons attempted to use their massive property holdings in western Massachusetts to command the social respect and political support of their economic subordinates. They succeeded in this goal for several decades, Innes tells us, by forming “patron-client” ties with many of their tenants and employees and by controlling, with their client support, the economic and political lives of most residents of western Massachusetts. These clients of the Pynchons went beyond their contractual duties, supporting and respecting the Pynchons as the leaders of Springfield society. The Pynchons in return favored them in economic matters and, when feasible, protected them from the harsh vicissitudes of life on the early American frontier. “As patron, John Pynchon exchanged the fruits of his status, power, influence, and authority for the loyalty and political support of the client.”<sup>45</sup>

The patron-client relationship, Innes contends, was a transitional phase from the master-servant relationship of the manorial system to the employer-employee relationship of the capitalist economy:

The patron-client relationship harkened back to the manor by its emphasis on person-to-person ties, but even more it anticipated the triumph of contractualism and the cash nexus by its preeminently economic nature. Patron-client ties occupied the middle ground between feudalism and capitalism, and they allowed the peasants of the sixteenth century to become the wage-earners of the eighteenth.<sup>46</sup>

While representing an economic advancement over the manorial economy, the Pynchon patron-client approach was nonetheless inconsistent with the ascending spirit of economic individualism. As Innes relates, “the future would belong to the market, not the manor.”<sup>47</sup>

As the seventeenth century progressed, the common man increasingly resisted the idea that a property owner had as one of his rights of ownership the right to dominate the noneconomic lives of those who lived under

---

45. S. INNES, at 40. Clients owed their loyalty to the Pynchons, but received in return distinctly favorable treatment:

Pynchon often ignored contractual deadlines if the client found himself unable to meet them. Mortgages were not foreclosed, lands and housing were not seized, debts were not called on the day or even the month or year of maturity. Laborers, too, were hired when Pynchon had no genuine need or desire to take them on. Likewise, he seldom pursued his technical legal rights as a creditor, landlord, or employer in cases relating to clients. The strength of the particular patron-client bond determined whether Pynchon would modify, renegotiate, or postpone collection of debts. For the same reasons, some renters were able to secure significantly better terms than others.

46. *Id.* at 18.

47. *Id.* at 42.

or around his economic umbrella. This development tracked the similar growing resistance to town land use restraints. Town leaders like the Pynchons drew their strength from a mentality that mixed together land and community. This mentality eventually yielded to the view that land was simply an economic commodity with land use issues properly resolved by the land owner alone based solely on factors of economic efficiency. The Pynchons based their ascendancy as patrons on their immense property holdings. As property and economic activity gradually became a sphere of human activity distinct from social and political spheres, the Pynchon family's political and social dominance eroded, and resistance to the family mounted. By the end of the seventeenth century, the Pynchons as landowners could no longer demand the social and political deference that once came to them naturally. Deference and fealty had to be earned, and the Pynchons in the eighteenth century were largely unable to earn it.<sup>48</sup>

This separation between economic power on the one hand, and social and political power on the other, was also responsible for the loss by town governments of their power to control land use and land ownership in furtherance of social and political goals. This loss of control meant an increase in absentee land ownership, a disturbing development to town leaders who equated land ownership with social participation. For these tradition-minded townsmen, David König has observed, "Nonresident ownership of land depersonalized it and destroyed the ancient equation of land tenure with membership in the community. . . . Physically removed from the town, [nonresidents] were unfamiliar with the community's unwritten customs and relationships." Occasionally, therefore, they were "less reluctant to pursue material gain at the expense of local harmony."<sup>49</sup>

The entrepreneurial spirit that emerged in seventeenth-century Springfield, with its emphasis on individual liberties, displaced the Pynchons' quasi-feudal view of property ownership. Yet the Pynchon property view, based as it was on an organic feudal vision, had in many ways benefited Springfield's less powerful residents. The Pynchons had had responsibilities as well as rights; they enjoyed a cultural and political dominance over town members, but were constrained to use their property to benefit their clients and their community—not only themselves. As the Pynchons lost the noneconomic rights that once attached to their land holdings, they gained the right to use their property to exploit without restraint those who were dependent upon it.

This separation of land from community marked the final demise of the

---

48. See S. INNES, at 151-84.

49. D. KONIG, *supra* note 21, at 67-68.

feudal property scheme of mutual obligations, a demise that produced costs as well as benefits. "The disappearance of any long established social system," wrote Francis Philbrick in 1938, "must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public."<sup>50</sup>

### IV.

The seventeenth century in New England was a time of conflict in man-land ideologies, both between the colonial and Indian cultures and within the colonial settlements themselves. These conflicts, while interesting in their historical settings, are perhaps of greater interest because of their similarities to contemporary land use and environmental controversies. By bringing these early conflicts to life, Innes' and Cronon's historical studies highlight and add perspective to the issues facing today's land use planners and property theorists.

In seventeenth-century New England, Indian land use practices openly conflicted with and were inexorably displaced by the more aggressive colonial system, with its larger bundle of landowner rights, its respect and protections for land exchange value, its permanent ownership rights, and its consumptive attitude toward nature. Within the colonial system, private landowners seeking greater land use rights successfully tangled with those who sought to preserve the older views that linked together land and community. The gradual ascendancy of economic individualism undercut town efforts to restrict property ownership and land use practices in furtherance of communal, noneconomic goals. Unlike their Indian neighbors, the colonists viewed elements of nature as discrete, disconnected commodities and treated as valuable only those resources of nature that possessed monetary value in the market place. Declining restraints on land transfers meant that landowners were better able to achieve the highest market exchange values of their land. Commodities lacking market value were afforded little respect, and landowners assumed full rights to alter and disrupt at will the natural New England ecosystems. The desirability of continued common resource ownership was also questioned. With the separation of land and community, common resource ownership, a marked feature of many New England towns in the first years of settlement, quickly passed from the scene as a major alternative to individual private land ownership.

In the twentieth century, American society has lost much of the enthusiasm for unrestrained economic individualism that was such a motivating

---

50. Philbrick, *supra* note 28, at 710 (citation omitted).

ideology three centuries ago. Contemporary society has openly shifted weight from economic development to individual rights and communal values and has defined the general welfare in terms that place increasing weight on factors that conflict with economic development. More and more, society is questioning the wisdom of a property system that affords a landowner a complete or nearly complete bundle of ownership rights while imposing few corresponding burdens and reserving few rights for society as a whole.

In light of this contemporary questioning of the values first embraced in America in the seventeenth century, it is perhaps particularly worthwhile to consider the losing man-land ideologies of the seventeenth century—those of the Algonquians and of the colonial supporters of a waning man-land ideology that linked land and community. The study of these earlier theories of property raises questions of contemporary significance concerning property ownership and land use. For example, should an owner have as one of his rights of ownership the right to destroy or consume limited natural resources? Should land be simply an economic commodity owned by man, or should man's rights be tempered by the Algonquian recognition that man is a part of nature and has ethical responsibilities to his environment? Should society more openly embrace a broader view of value that also considers land as "used," and perhaps best used, when it is left in its natural, undeveloped condition? Perhaps the most provocative issue raised by the Algonquian approach to land use is the old issue of the "tragedy of the commons," the "tragedy" of resource exhaustion that comes with unrestrained public use of a limited communal resource.<sup>51</sup> Should society react to this problem not by carving the resource into separately owned parcels as it has done for centuries, but by allocating usufruct interests to individuals while retaining ultimate public ownership of the resource? That is, should land use rights be unbundled in such a way that landowners possess only particular land use rights rather than ultimate dominion over the land?

The experiences of the Pynchons and the losing advocates of colonial town planning raise still other ideological issues. Should society give up its paradigm of unrestrained ownership and adopt instead the view that ownership rights are somehow linked with duties to the community? Should private property be subject to public control, not simply when a particular proposed land use activity is a nuisance, but whenever the public wants a tract of land used in a way that differs from the individual "owner's" personal desires?

Historical studies like these works by Cronon and Innes provide the

---

51. See Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

stimulus to pursue these lines of inquiry. They shed light, for example, on current debates over the preservation and protection of lands and structures that produce few current monetary benefits. American law now protects wilderness areas and endangered species,<sup>52</sup> places considerable weight on aesthetic values in zoning and nuisance controversies,<sup>53</sup> and considers land "in use" when it is set aside under land use plans as "open space."<sup>54</sup> These diverse current steps toward preservation reflect a new realization that all elements of nature possess value.<sup>55</sup> Readers of Cronon's tale who embrace this new, broader definition of value will admire the restraint toward natural ecosystems exhibited by the Algonquian tribes. Indeed, the Algonquian tribes, criticized by the colonists for failing to make real use of their land under the then-prevailing consumptive European ideology, should perhaps instead now be commended for a broad if unarticulated understanding of the many ways that land can be used.

These historical studies also provide a perspective on current debates over the nature and extent of the land use rights possessed by a landowner. Recent takings decisions suggest that a landowner has no legally protected right to receive in the market place his land's highest market value; his right is only the right to make some reasonable use of the property.<sup>56</sup> Recent legal developments have also deprived landowners of some of the sticks in their bundle of land use rights—including the right to control overhead air spaces not being reasonably used;<sup>57</sup> the right to appropriate water from beneath the land surface or from adjoining surface streams;<sup>58</sup> the right under zoning regulations to develop land or to change land uses; and, to an extent, even the right to exclude the public from

52. See 16 U.S.C. §§ 1271-1287, 1531-1543 (1982) (endangered species and wild and scenic rivers); *id.* §§ 1131, 1133 (wilderness areas); *id.* §§ 1, 3 (national parks); G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW 724-839* (1981); Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970); Note, *Wilderness Management and the Multiple-Use Mandate*, 59 MINN. L. REV. 155 (1974).

53. Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980); Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 361-81 (1982).

54. OPEN SPACE AND THE LAW (F. Herring ed. 1965); Kuster, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1, 5-8 (1972).

55. Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1396-1402 (1981).

56. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (substantial reduction in land value caused by maximum density zoning not a taking); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (denial of right to develop overhead air space not a taking); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (denial of right to fill and develop wetlands not a taking).

57. See *United States v. Causby*, 328 U.S. 256, 260-61 (1946); J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 392-96 (2d ed. 1975).

58. See, e.g., *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982); Wheeler, *The Right to Use Groundwater in Arizona After Chino Valley II and Cherry v. Steiner*, 25 ARIZ. L. REV. 473, 484-87 (1983).

private property.<sup>59</sup> The Algonquian land use approach described by Cronon suggests by its example that real flexibility is possible in distributing land use rights and in limiting the bundle of rights held by the principal "owner."

Still other contemporary legal developments reflect the centrality and continuing vitality of seventeenth-century issues and conflicts. Contemporary observers<sup>60</sup> have asked whether landowners' private rights create corresponding duties owed to the community. Owners of ecologically sensitive lands such as wetlands<sup>61</sup> and owners of historic buildings such as the Penn Central Terminal<sup>62</sup> have been burdened with duties to maintain and preserve their "private" property on the theory that at least certain property, even when in private hands, is a public asset that the owner must preserve for the benefit of the larger community and future generations. Legal scholars synthesizing these emerging landowner duties have viewed land as a resource "affected with a public interest."<sup>63</sup> This theory of land ownership, like the feudal scheme, would routinely impose legal duties on landowners to correspond with their legal rights.<sup>64</sup> Others have argued from this evidence that a landowner's legal powers should entail not dominion over land but simply usufructory land rights with no right to waste land to the detriment of later users.<sup>65</sup>

59. See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state by constitutional provision can compel private shopping center to allow political solicitors); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (conduct of public interest attorney seeking to enter farm to see migrant workers beyond reach of trespass statute). *But see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (private landlord not required to accept cable television equipment on property absent condemnation). For a general discussion of restraints on the right to exclude, see C. DONAHUE, T. KAUPER, P. MARTIN, *CASES AND MATERIALS ON PROPERTY* 254-80 (2d ed. 1983).

60. W. BERRY, *THE GIFT OF GOOD LAND* 267-81 (1981); W. BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 7 (1977); W. JACKSON, *NEW ROOTS FOR AGRICULTURE* 96-113 (1980); Caldwell, *Politics and Public Land Policy*, in *AMERICA'S PUBLIC LANDS: POLITICS, ECONOMICS & ADMINISTRATION* 297-329 (H. Nathan ed. 1972); Caldwell, *supra* note 33, at 759-61; Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). For an earlier, elegant recitation of the view that land ownership should carry communal obligations, see E.B. WHITE, *ONE MAN'S MEAT* 266-67 (Harper & Row ed. 1982). For a thoughtful socialist perspective on the need to limit the powers of the owner of property in order to foster communal values, see Kohak, *Possessing, Owning, Belonging*, in *BEYOND THE WELFARE STATE* 155-71 (I. Howe ed. 1982).

61. *Turnpike Realty Co. v. Town of Dedham*, 72 Mass. 1303, 284 N.E.2d 891 (1972) (restriction on development of flood plain area), *cert. denied*, 409 U.S. 1108 (1973); *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975) (restriction on filling salt marsh); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (required maintenance of wetlands without development). *But see* *MacGibbon v. Bd. of Appeals*, 369 Mass. 512, 340 N.E.2d 487 (1976) (public desire to maintain marshland in natural state not grounds for denying fill permit). See Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 Wis. L. REV. 1039.

62. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (required maintenance of facade of railroad terminal).

63. Babcock & Feurer, *Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289 (1977).

64. *Id.*

65. See Caldwell, *supra* note 33.

## Land Use

Also at issue in the twentieth century, as in the seventeenth, is the question of communal land ownership. To a marked degree, communal ownership has regained adherents, as evidenced by resource set-asides varying from large wilderness areas<sup>66</sup> to common open spaces in Planned Unit Developments,<sup>67</sup> by laws asserting public ownership over water,<sup>68</sup> wildlife,<sup>69</sup> and other resources previously viewed as unowned and available for capture,<sup>70</sup> and by the 1976 formal decision by Congress to reverse its theretofore existing policy in favor of disposing of the 700-million-acre landholdings of the federal government and to replace it with a policy of long-term retention and management in the public interest.<sup>71</sup>

\* \* \*

Viable property systems come in many varieties with no single form of property ownership essential for a society to thrive. By detailing the different blends and variations in property systems that have suited the special needs of particular peoples in different settings, historical studies such as *Changes in the Land* and *Labor in a New Land* broaden property ownership discussions beyond the polarities of public ownership and pure individual ownership. They facilitate reexamination of paradigms and principles of property ownership that have long served as the building blocks of property thought.<sup>72</sup>

---

66. See 16 U.S.C. §§ 1131-1134 (1982).

67. R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* ch. 32 (1981) (planned unit developments).

68. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913) (“[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable.”). Most Western states, which follow prior appropriation theories of water allocation, allow appropriations of water only after issuance of a permit and upon a showing that the proposed use will be beneficial. See 5 R. POWELL & P. ROHAN, *supra* note 67, at 449-64; see also Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 547, 554-76 (1983) (discussing growing restraints on landowner water rights in Eastern states).

69. N.Y. Environmental Conserv. Law § 11-0105 (1973) (wildlife).

70. 43 U.S.C. § 1701(a)(1) (1982) (federal lands management); G. COGGINS & C. WILKINSON, *supra* note 52, at 43-143. Communal ownership of other types of property also seems on the rise. See, e.g., Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 690-95 (predicting continuation of current trend in increased employee ownership of factories).

71. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 102, 90 Stat. 2743, 2744 (codified as amended at 43 U.S.C. § 1701 (1982)).

72. For reasons not easy to identify, American legal historians have shown comparatively little interest in the colonial era, an indisposition bemoaned recently by Stanley Katz, one of the leading historians of law in early America. See Katz, *The Problem of a Colonial Legal History*, in *COLONIAL BRITISH AMERICA*, *supra* note 20, at 457, 467-77. Katz observes that several recent, major studies of nineteenth-century legal developments have evidenced an erroneous and regrettable belief “that colonial law is to be either ignored or caricatured as stable, unchanging, and in the end uninteresting.” *Id.* at 473. Grant Gilmore saw little relevance to the colonial period: “The law of the primitive agricultural settlements which were painfully hacked from the wilderness in the seventeenth century . . . had no more relevance to the law of our own industrialized society than the law of the Sioux or the Cheyennes.” G. GILMORE, *THE AGES OF AMERICAN LAW* 8 (1977). Katz’ reaction was perhaps

These studies and other recent historical works shed a new and contradicting light on writings of early legal scholars who based influential property theories on assumptions about "natural" forms of property ownership and "natural" progressions in the development of property rights. They challenge, for example, the conclusions of Blackstone, who based his property theories on the erroneous assumption that private property was the natural form of ownership in early societies.<sup>73</sup> They undermine as well the developmental theories of Sir Henry Maine and other nineteenth-century exponents of the historical school of property who concluded from the then-available data that primitive communal ownership evolved naturally with civilization into the more "advanced" mode of private property.<sup>74</sup> As contemporary historians and anthropologists disprove these assumptions about the natural force of unrestrained private ownership, contemporary legal scholars would do well to reexamine the property law decisions and rules so heavily based upon them.

The special comparative lens of the seventeenth century enables us to focus more clearly, and critically, on three models of property ownership that have long defined and restrained discussions of property law. One model suggests that the justification, if not the origin, of private landholdings lies in the "tragedy of the commons," the tragedy of overuse and declining productivity that occurs when a scarce natural resource like a

---

predictable: "The colonial historian hardly knows where to begin in dealing with such nonsense." Katz, *supra*, at 472. On the implications of the label "primitive," see W. WASHBURN, *supra* note 10, at xvii-xviii.

73. Blackstone's historical analysis of property is set forth in 2 W. BLACKSTONE, COMMENTARIES \*2-14. For Blackstone, the property owner's rights of ownership were necessarily considerable. Blackstone defined the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 *Id.* at \*2. Blackstone largely adhered to the natural rights theory of property ownership, yet at several points used language suggesting that property rights are derived from civil society. See, e.g., 1 *id.* at \*299 (asserting that property forfeiture for criminal conduct is justified because property is a civil right conferred by society); 2 *id.* at \*12 (asserting that the right to inherit is a political right since the decedent's ownership itself was a civil rather than a natural right); see also D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 167 (1941) ("Some of the most obscure—one might say mystical—passages in the *Commentaries* are the descriptions of the right of property."). For critical discussions of Blackstone's historical analysis of property, see R. SCHLATTER, *supra* note 28, at 164-71; D. BOORSTIN, *supra*, at 167-86. See also K. NEWMAN, LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES 7 (1983) (identifying the mid-nineteenth century as the birth of legal history and viewing earlier scholarly analyses of the foundations of modern law as philosophic rather than historic). For a more recent example of an attempt to support conclusions on property ownership and property use from incomplete historical data on primitive societies, see Demsetz, *Toward a Theory of Property Right*, 57 AM. ECON. REV. 347 (1967). On the uses of history by the Supreme Court over the years, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

74. See R. SCHLATTER, *supra* note 28, at 261-69; H. MAINE, ANCIENT LAW ch. VII (London 1861); H. MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 98-118 (H. Holt & Co. ed. 1888); H. MAINE, VILLAGE-COMMUNITIES IN THE EAST AND WEST 224-30 (3d ed. 1876) (1st ed. London 1871); see also Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. LEGAL & POL. SOC. 115, 123 (1943).



## Land Use

pasture is owned communally and open to unrestrained use by all.<sup>75</sup> Each user of a communal pasture, this tale asserts, is economically stimulated to increase the size of his animal stock on the pasture to secure for himself a greater share of the communal resource, a result that leads ultimately to overuse and degradation. A second model, the familiar bundle-of-sticks metaphor, likens land ownership to possession of a bundle of individual sticks each representing some right to use, alter, transfer, bequeath, or destroy the item of property.<sup>76</sup> A mature legal system, this metaphor suggests, will recognize all possible land use rights and will allocate each right to some person or group of people. A third model, frequently tied to W.N. Hohfeld, posits that property rules deal not with relationships between people and things but rather with relationships among people with respect to a thing.<sup>77</sup> Items of property have no rights, only people have rights, and the property rights of people are their rights as against other people to decide when, in what manner, and by whom an item of property will be used.

These three models—the tragedy of the commons, the full bundle of sticks, and the view of property law as jural rights among people—all focus attention on the division of rights among people, an ideological orientation that seems value laden when considered in historical and cultural perspective. All assume that each piece of property will have a principal owner rather than multiple owners. None of the models asks, at least not directly, whether some sticks in the bundle should be possessed by no one. None asks whether items of property might themselves have defensive “rights” in the sense that no person has the right to abuse, exhaust, or destroy the item of property. The tragedy of the commons, it would seem, will not be fully solved by dividing the commons into separately owned parcels, for each parcel owner would remain free to abuse it to the detriment of future owners. The tragedy can be solved only by allocating limited use rights in a manner that will allow no one to overuse or exhaust the land.

As a contrast to these three popular images of property rights, students

---

75. See Hardin, *supra* note 51.

76. The classic discussion of ownership, A. M. Honore's noted article of that title, lists all of the sticks that would be included in a full bundle and suggests that a mature legal system will recognize and somehow allocate among persons all of the elements of full ownership. Honore, *supra* note 17. For one view of the development of the bundle-of-sticks metaphor and a discussion of the values that it incorporates, see Grey, *The Disintegration of Property*, in XXII NOMOS: PROPERTY 69 (1980). For uses of the metaphor, see, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The metaphor has long been in use. See Hallowell, *supra* note 74, at 123 n.20.

77. This analysis was developed fully decades ago by W.N. Hohfeld, whose analysis has remained highly regarded. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). *But see* C. STONE, *SHOULD TREES HAVE STANDING?* (1974) (suggesting that natural objects in some sense may have rights).

of property would do well to read and ponder historical studies such as these works by Cronon and Innes. *Changes in the Land* and *Labor in a New Land* contain no answers to current issues. Their value lies rather in raising the questions and in showing us, through the presentation of alternative approaches to land use and property ownership, that land use ideologies develop over time and that our current ideology may well need adjusting. These very substantial contributions make both volumes worthy of our attention.