

# Anglo-American Land Use Attitudes\*

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Environmentalists in the United States are often confronted by rural landowners who feel that they have the right to do whatever they want with their land regardless of the consequences for other human beings or of the damage to the environment. This attitude is traced from its origins in ancient German and Saxon land use practices into the political writings of Thomas Jefferson where it was fused together with John Locke's theory of property. This view of land and property rights was most influential in the late nineteenth century after the passage of the Homestead Act in 1862 when it was used in the arguments opposing national parks and nature preservation. Today it remains a formidable obstacle to planning and zoning in rural areas, despite unstated underlying assumptions which are either outdated or false.

## INTRODUCTION

Such protected areas as Yosemite, Yellowstone, and the Grand Canyon are often cited as great successes of the environmental movement in nature preservation and conservation. Yet, not all natural objects and areas worthy of special protection or management are of such national significance and these must be dealt with at state, regional, or local levels. In such cases, environmentalists almost always plead their cause before a county court, a local administrative political body, usually consisting of three judges elected by the rural community, who may or may not have legal backgrounds.

Here the environmentalists are probably in for a great shock. Inevitably, some rural landowner will defend his special property rights to the land in question. He will ask the court rhetorically, "What right do these outsiders, these so-called environmentalists, have to come in here and try to tell me what

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to do with my land?" and answering his own question, he will continue, "They don't have any right. I worked that land; it's my property, and no one has the right to tell me what to do with it!" The environmentalists may be surprised that the farmer does not bother to reply to any of their carefully made points, but the real shock comes at the end when the county court dismisses the environmental issues, ruling in the favor of the landowner.

While the environmentalists may suspect corruption (and such dealings are not unlikely), usually both the judges and the landowner are honestly convinced that they have all acted properly. The property rights argument recited by the rural landowner is a very powerful defense, particularly when presented at this level of government. The argument is grounded in a political philosophy almost three centuries old as well as in land use practices which go back at least to Saxon and perhaps even to Celtic times in Europe and England. When the argument is presented to county court judges who share these beliefs and land use traditions, the outcome of the court decision is rarely in doubt. On the other hand, the tradition that natural objects and areas of special beauty or interest ought to be protected from landowners claiming special property rights, and from the practice of landowning in general, is of very recent origin, and without comparable historical and emotional foundations.

For several decades in the late nineteenth century, the rural landowner's theory of property and land use rights was the primary basis for arguments opposing the preservation of Yellowstone as a national park. During the floor debate on the Yellowstone bill in 1872, for example, Senator Cole of California stated:

The geysers will remain no matter where the ownership of the land may be, and I do not know why settlers should be excluded from a tract of land forty miles square, as I understand this to be in the Rocky Mountains or any other place. . . .

There are some places, perhaps this is one, where persons can and would go and settle and improve and cultivate the grounds, if there be ground fit for cultivation.

When Senator Edmunds of Vermont reminded Cole that, according to reports, the land could not be cultivated, Cole replied, "The Senator is probably mistaken in that. Ground of a greater height than that has been cultivated and occupied," and he continued:

But if it cannot be occupied and cultivated, why should we make a public park of it? If it cannot be occupied by men, why protect it from occupation: I see no reason in that. If nature has excluded men from its occupation, why set it apart and exclude persons from it? If there is any sound reason for the passage of the bill, of course, I would not oppose it; but really I do not see any myself.<sup>1</sup>

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<sup>1</sup> U.S., Congress, Senate, *Congressional Globe*, 42nd Cong., 2d Sess., 1 (30 January 1872), p. 697.

Similarly, during the floor debate in 1883 in which the Senate considered for the first time whether Congress ought to appropriate money for maintaining the roads of the park and for the salary of the superintendent, until then an unpaid position, Senator Ingalls of Kansas rose to inform his colleagues that "the best thing that the Government could do with Yellowstone National Park is to survey it and sell it as other public lands are sold." Returning to this point after a lengthy digression, Ingalls concluded:

I do not understand myself what the necessity is for Government entering into the show business in Yellowstone National Park. I should be very glad myself to see an amendment to this bill to authorize that that portion of the public domain to be surveyed and sold, leaving it to private enterprise, which is the surest guarantee for proper protection for such objects of care as the great natural curiosities in that region.<sup>2</sup>

Although no comparable debates have been recorded over Yosemite, which received park status about eight years before Yellowstone, judging by J. D. Whitney's comments in *The Yosemite Book*, published in 1868, the situation was in fact more perilous than at Yellowstone. Apparently, the State of California seriously considered permitting two individuals to preempt the valley floor—a procedure predating but, nevertheless, similar to homesteading in which the landholder demanded special rates for purchase of the land he had illegally occupied, or asked for financial compensation for the "improvements" he had made. Preemption would have left only the walls of the valley in public hands and, as Whitney puts it, paraphrasing Keats, "the Yosemite Valley instead of being 'a joy forever' will become, like Niagara Falls, a gigantic institution for fleecing the public."<sup>3</sup>

To environmentalists, the attitudes of Cole, Ingalls, and the landholders in Yosemite seem as unenlightened as those of the rural landowner in the county court today, but at the time of the Yellowstone National Park bill, a mere ten years after the passage of the immensely popular Homestead Act, they were probably a more accurate representation of public attitudes towards western lands than those of the supporters of either park. Most people in those days believed that western lands should be distributed free, and freely, to unpropertied Americans willing to work and improve the land over a short period of time. Because the Yellowstone bill called for an enormous tract of land to be "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring-

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<sup>2</sup> U.S., Congress, Senate, *Congressional Record*, 47th Cong., 2d Sess., 14 (1 March 1883), p. 3488.

<sup>3</sup> J. D. Whitney, *The Yosemite Book, A Description of the Yosemite Valley and Adjacent Regions of the Sierra Nevada and the Big Trees of California* (New York, Julius Bien and State of California, 1868), p. 20.

ground for the benefit and enjoyment of the people,"<sup>4</sup> many Americans naturally felt that the bill must be the first step in a political scheme to rob deserving Americans of their natural right to western land.

Anticipating this kind of opposition, park supporters claimed that the land was not suitable for farming or mining. The report of the Committee on Public Lands contained the following remarks:

We have already shown that no portion of this tract can ever be made available for agriculture or mining purposes. Even if the altitude and climate would permit the country to be made available, nor over fifty square miles of the entire area could ever be settled. The valleys are all narrow, hemmed in by high volcanic mountains like gigantic walls.

The withdrawal of this tract, therefore, from sale or settlement takes nothing from the value of the public domain, and is no pecuniary loss to the government, but will be regarded by the entire civilized world as a step of progress and honor to Congress and the nation.<sup>5</sup>

These were the statements which Senator Edmunds was referring to when he told the disbelieving Cole that the land was not fit for cultivation.

Although these remarks may make sense to people who place high value on land in a natural and unused state, Cole, with his strong concern for the rights of potential homesteaders, believed them to be bordering on the irrational and the absurd. From his point of view, the claims of the park supporters were contradictory. The land was said to be both worthless and valuable beyond compare. In addition, he was being asked to help protect the land from use and at the same time being told that the land could not be used. Cole could conclude only that these claims were very suspicious, and that the Yellowstone bill must somehow be a threat to the land use philosophy which he supported as a fundamental part of the American heritage.

The incongruity in the park supporters' position producing these seeming paradoxes was the claim that Yellowstone had no use. It was introduced only because it was an expedient way for park supporters to achieve their objective with minimum opposition. Because the claim could be taken to imply approval of the homestead land use philosophy, it created the illusion that no great issue was at stake. However, as everyone knew, the uselessness of Yellowstone for agricultural or mining purposes had had nothing at all to do with the mounting interest in preserving the area. Most likely, some attempt would have been

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<sup>4</sup> U.S. Congress, Senate, *Congressional Globe*, 42nd Cong., 2d Sess., 1 (30 January 1872), p. 697.

<sup>5</sup> Report written by F. V. Hayden at the request of the Committee on Public Lands and quoted by the author in *The Yellowstone National Park, and the Mountain Regions of Portions of Idaho, Nevada, Colorado and Utah*, described by F. V. Hayden, illustrated by Thomas Moran (Boston: L. Prang and Company, 1876), p. 12. This rare book is included in the Thomas Moran papers at the Jefferson National Expansion Memorial, St. Louis, Missouri.

made to preserve Yellowstone even if it had turned out to contain prime agricultural land or valuable minerals. Thus, the Yellowstone bill, far from being compatible with land use attitudes embodied in the Homestead Act of 1862, really was a threat to them.

As support increased in early nineteenth-century America for homesteading and for recognition of the natural and absolute rights of Americans to western land as private property, opposition to this viewpoint also grew among eastern intellectuals who were finding aesthetic and scientific value in land independent of its commercial use. This new attitude towards land is reflected in Thoreau's remark in his essay "Walking" that "the best part of the land is not private property the landscape is not owned. . .," and in similar remarks by Emerson in *Nature* where he writes:

The charming landscape which I saw this morning is indubitably made up of some twenty or thirty farms. Miller owns this field, Locke that, and Manning the woodland beyond. But none of them owns the landscape.

The members of the 1870 Washburn expedition to Yellowstone, who first called public attention to the wonders of that area, were themselves acting in accordance with this new land value attitude, when, after much discussion, all but one of them abandoned plans to preempt Yellowstone for their own personal gain, having decided that it was too extraordinary a place to be privately owned by a few individuals.<sup>6</sup>

How this new viewpoint developed is the subject of another paper.<sup>7</sup> My present purpose is to examine traditional land use attitudes. First, I examine the ancient land use practices which gave rise to these attitudes, second, the political activities and views of Thomas Jefferson which secured a place for them in American political and legal thought, and, finally, the political philosophy of John Locke which provided them with a philosophical foundation.

#### LANDHOLDING AMONG EARLY GERMAN AND SAXON FREEMAN

About two thousand years ago most of Europe was occupied by tribes of peoples known collectively today as the Celts. At about that time, these peoples

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<sup>6</sup> Henry David Thoreau, "Walking" (1862), in *The Portable Thoreau*, ed. Carl Bode, 1st rev. ed. (New York: Viking Press, 1975), p. 602; Ralph Waldo Emerson, *Nature* (1836), sec. 1, in *The Selected Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 1950), p. 5; Nathaniel Pitt Langford, *The Discovery of Yellowstone Park: Journal of the Washburn Expedition to the Yellowstone and Firehole Rivers in the Year 1870*, with a foreword by Aubrey L. Haines (Lincoln: University of Nebraska Press, Bison Books, 1972), pp. 117-19.

<sup>7</sup> Eugene C. Hargrove, "The Historical Foundations of American Environmental Attitudes," *Environmental Ethics* 1 (1979): 209-40.

came under considerable pressure from the Romans moving up from the south and from Germanic tribes entering central Europe from the east. Five hundred years later, the Celts had either been subjugated by the German and Roman invaders or pushed back into Ireland and fringe areas of England. The Roman Empire, too, after asserting its presence as far north as England, was in decay. Roman influence would continue in the south, but in northern and central Europe as well as in most of England German influence would prevail.

The Germanic tribes which displaced the Celts and defeated the Romans were composed of four classes: a few nobles or earls, a very large class of freemen, a smaller class of slaves, and a very small class of semifree men or serfs. Freemen were the most common people in early German society. They recognized no religious or political authority over their own activities, except to a very limited degree. As *free* men, they could, if they desired, settle their accounts with their neighbors and move to another geographical location. Each freeman occupied a large amount of land, his freehold farmstead, on which he grazed animals and, with the help of his slaves, grew crops. When necessary, he joined together with other freemen for defense or, more often, for the conquest of new territories.<sup>8</sup>

Freemen were the key to German expansion. When overcrowding occurred in clan villages and little unoccupied land remained, freemen moved to the border and with other freemen defeated and drove away the neighboring people. Here they established for themselves their own freehold farmsteads. Their descendants then multiplied and occupied the vacant land between the original freehold estates. When land was no longer available, clan villages began to form again and many freemen moved on once more to the new borders to start new freehold farmsteads. In this way, the Germans slowly but surely moved onward across northern and central Europe with freemen leading the way until no more land was available.

Strictly speaking, a freeman did not own his land. The idea of landownership in the modern sense was still many centuries away. In England, for example, landowning did not become a political and legal reality until 1660 when feudal dues were finally abolished once and for all. Freemen, however, lived in prefeudal times. They usually made a yearly offering to the local noble or earl, but technically this offering was a gift rather than a feudal payment and had nothing to do with their right to their land. As the term *freehold* suggests, a freeman held his land freely without any forced obligations to an overlord or to his neighbors.

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<sup>8</sup> The account given in this section is based most directly on Denman W. Ross, *The Early History of Land-Holding Among the Germans* (Boston: Soule and Bugbee, 1883), and Walter Phelps Hall, Robert Greenhalgh Albion, and Jennie Barnes Pope, *A History of England and the Empire-Commonwealth*, 4th ed. (Boston: Ginn and Company, 1961).

In early times, when land was readily available, each freeman occupied as much land as he needed. There was no set amount that a freeman ought to have and no limit on his holdings, except that he could not hold more land than he could use. Thus, in effect, his personal dominion was restricted only by the number of animals that he had available for grazing and the number of slaves he had for agricultural labor. Sometimes, when the land began to lose its fertility, he would abandon his holdings and move to some other unoccupied location nearby. The exact location of each holding was only vaguely determined, and when disputes arose about boundaries, they were settled with the help of the testimony of neighbors or, when that failed, by armed combat between the parties involved.

Much of the unoccupied land was held in common with other freemen in accordance with various local arrangements. Sometimes the use was regulated by establishing the number of cattle that each freeman could place on the land. In other cases, plots were used by different freemen every year on a rotational basis.

When unoccupied border lands were no longer available for new freemen to settle, the way of life of the freemen began to change. The primary problem was one of inheritance. In the beginning, land had never been divided; rather, it has always been "multiplied" as sons moved to adjacent areas and established new freehold farmsteads. Eventually, however, it became necessary for the sons to divide the land which had been held by their father. A serious problem then developed, for, if division took place too many times, then the holdings became so small that they had little economic value, and the family as a whole slipped into poverty.

The solution was *entail*, i.e., inheritance along selected family lines. The most common form of entail was *primogeniture*, according to which the eldest son inherited everything and the others little or nothing. In this way, the family head remained powerful by keeping his landholdings intact, but most of his brothers were condemned to the semifree and poverty-stricken life of serfdom. As a result of these new inheritance practices, the number of freemen became an increasingly smaller portion of the society as a whole as most of the rest of the population, relatives included, rapidly sank to the level of serfs.

Another problem affecting freemen was taxation. The custom of giving an offering to the local noble was gradually replaced by a tax, and once established, taxes often became large burdens on many of the poorer freemen who in many instances paid taxes while other richer landholders were exempted. In such circumstances, freemen often gave up their status and their lands to persons exempted from the taxes and paid a smaller sum in rent as tenants.

Germans thus made a transition from prefeudal to feudal conditions, and freemen ceased to be an important element in the community as a whole. While freemen never disappeared altogether, most lost the economic freedom that

they had formerly had. Although theoretically free to move about as they pleased, they often lacked the economic means of settling their accounts, and so in most cases were little better off than the serfs.

These feudal conditions did not appear in England until long after they were firmly established in Europe. At the time of the conquest of England by William the Conqueror most Englishmen were freemen. Thus, in England, unlike in Germanic Europe, prefeudal conditions did not slip away gradually but were abruptly replaced by a feudal system imposed on much of the native population by the victorious Normans. Under such circumstances, freemen declined in numbers, but struggled as best they could to maintain their freeman status in opposition to Norman rule and as a part of their Saxon heritage. As a result, freemen managed to maintain a presence in England no longer conceivable in Europe. Through them, memories of the heyday of the flamboyant Saxon freemen remained to shade political thought and to shape land use attitudes for centuries after the conquest. Ironically, the conquest drew attention to a class status which might otherwise have quietly passed away.

There were four major political divisions in Saxon England: the kingdom, the shire (called the *county* after the arrival of the Normans), the hundred, and the township, the last two being subdivisions of the shire or county. Throughout English history the exact nature of the government of the kingdom fluctuated, sometimes very radically. Changes occurred in the hundreds and the townships as the courts at these levels were gradually replaced by those of the local nobility, probably with the support of the government of the kingdom. The shire or county and its court or moot, however, persisted unchanged and continued to be one of the most important political units from the earliest Saxon times in England to the present day in both England and the United States.

The county court met to deal with cases not already handled by the hundred moots and with other business of common importance to the community. The meetings were conducted by three men: the alderman, representing the shire; the sheriff, representing the king; and the bishop, representing the church. All freemen in the county had the right to attend the court and participate in the decision process. Most of them, of course, were usually too busy to come except when personal interests were at stake.

There are only small differences between the county courts of Saxon and Norman times and those of modern rural America. The three judges, alderman, sheriff, and bishop, have been replaced by elected judges. Court procedure in most of these courts, however, remain as informal today as it was in pre-Norman England. In many, no record is kept by the court of its decisions and, in such cases, except for word of mouth and intermittent coverage by the news media, little is known of what goes on there. Court judges are primarily concerned with keeping the local landowners contented by resolving local



differences and by providing the few community services under the administrative jurisdiction of the court, e.g., maintaining dirt or gravel roads. This casual form of government is replaced only when the county becomes urbanized, thereby, enabling residents to incorporate it and enjoy extensive new administrative and legal powers and, of course, responsibilities.

The special considerations given to the local landowner by the modern rural county court reflects the relationship of Saxon freemen to the court at the time when such courts first came into existence. The court evolved out of the freemen's custom of consulting with his neighbors during local disputes as an alternative to physical combat between the parties involved. Thus, rather than being something imposed on the freemen from above, the court was created by them for their own convenience. Since the freemen gave up little or none of their personal power, the power of the court to enforce its decisions was really nothing more than the collective power of the freemen ultimately comprising the membership of the court. From the earliest times, freemen had had absolute control over all matters pertaining to their own landholdings. When county courts were formed, freemen retained this authority over what they considered to be their own personal affairs. This limitation on the power of the court was maintained for more than a thousand years as part of the traditional conception of what a county court is, and how it is supposed to function. Today, when a landowner demands to know what right the court or anyone else has to tell him what to do with his own land he is referring to the original limitations set on the authority of the county court, and is appealing to the rights which he has informally inherited from his political ancestors, Saxon or German freemen—specifically, the right to do as he pleases without considering any interests except his own.

A modern landowner's argument that he has the right to do as he wishes is normally composed of a set series of claims given in a specific order. First, he points out that he or his father or grandfather worked the land in question. Second, he asserts that his ownership of the land is based on the work or labor put into it. Finally, he proclaims the right of uncontrolled use as a result of his ownership claim. Not all of this argument is derived directly from the freemen's world view. As mentioned above, the modern concept of ownership was unknown to freemen who were engaged in landholding rather than land-owning. In other respects, however, there are strong similarities between the views of modern landowners and those of the freemen.

Landholding among German freemen was based on work. A freeman, like the nineteenth-century American homesteader, took possession of a tract of land by clearing it, building a house and barns, and dividing the land into fields for the grazing of animals and for the growing of crops. In this way, his initial work established his claim to continued use.

This emphasis on work as the basis for landholding is especially clear in

connection with inheritance. When plenty of vacant land was available, landholdings were never divided among the sons, but, as described above, the sons moved to unoccupied land nearby and started their own freehold farmsteads. Thus, inheritance in those early times was not the acquisition of land itself but rather the transferal of the right to acquire land through work. This distinction is reflected in the early German word for inheritance, *Arbi* in Gothic and *Erbi* in Old High German, both of which have the same root as the modern High German word, *Arbeit*, meaning work.<sup>9</sup>

Thus freemen were interested in land use rather than landownership. The right to land was determined by their social status as freemen and not by the fact that they or their fathers had occupied or possessed a particular piece of ground. The specific landholdings, thus, were not of major importance to the early freemen. Conceivably, they might move several times to new landholdings abandoning the old without the size of their landholdings being affected in any way. As mentioned above, it was their ability to use their holdings, the number of grazing animals, and slave workers they owned, not some form of ownership, which determined the size of their landholdings at any particular time in their lives.

Of course, once unoccupied land ceased to be readily available, freemen started paying much more attention to their land as property, encouraging the development of the idea of landownership in the modern sense. When the inheritance of sons became only the right to work a portion of their father's holdings, the transition from landholding to landowning was well on its way.

Until the time when there were no more unoccupied lands to move to, there was really no reason for freemen to be concerned with proper use or management of their land or for them to worry about possible long-term problems for themselves or their neighbors resulting from misuse and abuse of particular pieces of land. When a freeman lost his mobility, however, he did start trying to take somewhat better care of his land, occasionally practicing crop rotation and planting trees to replace those he cut down, but apparently these new necessities had little influence on his general conviction that as a freeman he had the right to use and even abuse his land as he saw fit.

Today's rural landowner finds himself in a situation not unlike that of freemen in the days when inheritance became the division of land rather than the multiplication of it. In the late eighteenth century and during most of the nineteenth, American rural landowners led a way of life much like that of prefeudal German freemen; now modern landowners face the same limitations their freeman ancestors did as feudal conditions began to develop. Although willing to take some steps toward good land management, especially those which provide obvious short-term benefit, when faced with broader issues

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<sup>9</sup> Ross, *Land-Holding*, p. 24.

involving the welfare of their neighbors and the local community and the protection and the preservation of the environment as a whole, they claim ancient rights which have come down to them from German freemen, and take advantage of their special influence with the local county court, a political institution as eager to please them today as it was more than a thousand years ago.

### THOMAS JEFFERSON AND THE ALLODIAL RIGHTS OF AMERICAN FARMERS

When British colonists arrived in North America, they brought with them the land laws and land practices that were current in England at that time. These included entail, primogeniture, and most other aspects of the feudal tenure system which had taken hold in England after the Norman Conquest. The American Revolution called into question the right of the king of England to lands in North America which in turn led to attempts to bring about major land reform—specifically, efforts to remove all elements of the feudal system from American law and practice and replace them with the older Saxon freehold tenure system. At the forefront of this movement was a young Virginian lawyer named Thomas Jefferson. According to Jefferson's biographer, Merrill D. Peterson, while social and economic forces may have already made the success of the land reform movement inevitable, Jefferson's efforts, nevertheless, "capped the development and exalted the principle of freehold tenure."<sup>10</sup> In any event, whether or not Jefferson caused the land reform, he did manage to identify himself with the effort to such a degree that his statements on the subject could later be used with great authority to justify additional reform, leading eventually to the Homestead Act of 1862. So great was Jefferson's influence on these later reforms that they are usually erroneously viewed as the fulfillment of a Jeffersonian dream arising out of new democratic principles rather than as the achievement of the much older dream of economically disadvantaged Saxon freemen dating back to the Norman Conquest.

From the first moment that Jefferson began airing his land tenure opinions, however, he made it completely clear that they were based entirely on Saxon, and not on Norman, common law. Thus, he consistently spoke of allodial rights—*allodial* being the adjectival form of the Old English word *allodium* which refers to an estate held in absolute dominion without obligation to a superior—i.e., the early German and Saxon freehold farmstead.

Jefferson's attitudes towards the disposition of land developed naturally out of his early studies of the origins of the British legal system, as he himself notes in a letter written some years later:

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<sup>10</sup> Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (New York, London, and Oxford: Oxford University Press, 1970), p. 113.

The opinion that our lands were allodial possessions is one which I have very long held, and had in my eye during a pretty considerable part of my law reading which I found always strengthened it.

As a law apprentice to George Wythe of the law firm, Small, Wythe, and Fauquier, Jefferson first read Sir Edward Coke's *Institutes of the Laws of England*, a work which championed common-law English rights tracing them back to the time of the Magna Charta. Then he continued his readings with the work of Henry Bracton and a digest of King Alfred's laws, both of which deal with Saxon law before the coming of the Normans. These readings convinced Jefferson that Coke's thesis was false and that English common law was actually based on Saxon foundations perverted by later Norman influence. Thereafter Jefferson sought to purge American law of this Norman corruption by using the original Saxon common law as his model.<sup>11</sup>

Jefferson's first public expression of his position came in a political pamphlet titled "A Summary View of the Rights of British America," published in Williamsburg, Philadelphia, and London in 1774. In the second paragraph, Jefferson claims that all British citizens came to America with the rights of Saxon freemen:

... our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness. That their Saxon ancestors had under this universal law, in like manner, left their native wilds and woods in the North of Europe, and possessed themselves of the island of Britain then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country. Nor was ever any claim of superiority or dependence asserted over them by that mother country from which they had migrated: and were such a claim made it is believed his majesty's subjects in Great Britain have too firm a feeling of the rights derived to them from their ancestors to bow down the sovereignty of their state before such visionary pretensions. And it is thought that no circumstance has occurred to distinguish materially the British from the Saxon emigration. America was conquered, and her settlements made and firmly established, at the expense of individuals, and not of the British public. Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual. For themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.

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<sup>11</sup> Jefferson to Edmund Pendleton, 13 August 1776, in *Papers of Thomas Jefferson*, ed. Julian P. Boyd et al., 17 vols. to date (Princeton: Princeton University Press, 1950), 1:491; Peterson, *Jefferson and the New Nation*, pp. 16–18.

Noting the right of a Saxon freeman to settle his accounts and move to another realm at his own pleasure without obligation to the lord of his previous domain, Jefferson argues that this is also the case with the British citizens who moved to North America. According to this analogy, England has no more claim over residents of America than Germany has over residents of England. In accordance with Saxon tradition, the lands of North America belong to the people living there and not to the king of England.<sup>12</sup>

Later in the pamphlet, Jefferson expands on this point arguing that the belief that the king owns North America is based on the erroneous claim that feudal law rather than Saxon law applies in British America:

The introduction of the Feudal tenures into the kingdom of England, though antient, is well enough understood to set this matter in a proper light. In the earlier ages of the Saxon settlement feudal holdings were certainly altogether unknown, and very few, if any, had been introduced at the time of the Norman conquest. Our Saxon ancestors held their lands, as they did their personal property, in absolute dominion, disencumbered with any superior, answering nearly to the nature of those possessions which the Feudalists term Allodial: William the Norman first introduced that system generally.

According to Jefferson, William the Conqueror confiscated the lands of those who fell at the Battle of Hastings and these lands legally became subject to feudal duties, "but still much was left in the hands of his Saxon subjects, held of no superior, and not subject to feudal conditions." Later, Norman lawyers found ways to impose feudal burdens on the holders of these lands, "but still they had not been surrendered to the king, they were not derived from his grant, and therefore they were not holden of him." Of this great swindle, Jefferson writes:

A general principle indeed was introduced that 'all lands in England were held either mediately or immediately of the crown': but this was borrowed from those holdings which were truly feudal, and only applied to others for the purposes of illustration. Feudal holdings were therefore but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right. These therefore still form the basis or groundwork of the Common law, to prevail wheresoever the exceptions have not taken place.

Jefferson goes on to claim that this same deception is also being perpetrated on the citizens of British America:

America was not conquered by William the Norman, nor it's lands surrendered to him or any of his successors. Possessions there are undoubtedly of the Allodial

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<sup>12</sup> Thomas Jefferson, "A Summary View of the Rights of British America," in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Viking Press, 1975), pp. 4-5.

nature. Our ancestors however, who migrated hither, were laborers, not lawyers. The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real. . . .

It is not the king, Jefferson declares, but the individual members of a society collectively or their legislature that determine the legal status of land, and, if they fail to act, then, in accordance with the traditions of Saxon freemen, "each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title."<sup>13</sup> Jefferson was addressing issues of great importance in the history of British legal and political philosophy. William the Conqueror had claimed title to all Anglo-Saxon estates, but the claim had never been fully accepted by the defeated Saxons who had continued to view themselves as freemen without any legitimate legal obligation to their Norman rulers beyond what their German heritage had always required. The controversy was still adequately alive in the mid-seventeenth century for Thomas Hobbes, a major British political philosopher, to take up the issue on behalf of the crown. Hobbes writes in the *Leviathan*:

. . . the First Law, is for Division of the Land it selfe: wherein the Sovereign assigneth to every man a portion, according as he, and not according as any Subject, or any number of them, shall judge agreeable to Equity, and the Common Good.

After a long discussion of the ancient Jewish conquest of Israel, Hobbes continues with the specific claim that Jefferson is disputing:

. . . though a People coming into possession of a Land by warre, do not alwaies exterminate the antient inhabitants . . . , but leave to many, or most, or all of them their Estates; yet it is manifest they hold them afterwards, as of the Victors distribution; as the people of *England* held all theirs of *William the Conquerour*.<sup>14</sup>

Jefferson, of course, did not succeed in refuting the claim of the king of England to all land in British America, but by arguing in terms of this old dispute, he gives his position a legal basis which would have strong appeal among Englishmen with Saxon backgrounds, assuring some political support of the American cause in England.

In 1776, Jefferson got the opportunity to try to turn his theory into practice. Although Jefferson is most famous for writing the *Declaration of Independence*, most of his time that year was spent working on his draft of the Virginia constitution and on the reform of various Virginia laws including the land

<sup>13</sup> *Ibid.*, pp. 17–19.

<sup>14</sup> Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (Middlesex, England: Penquin Books, 1968), pt. 1, chap. 24.

reform laws. In his draft constitution, Jefferson included a provision which gave every person of full age the right to fifty acres of land "in full and absolute dominion." In addition, lands previously "holden of the crown in feesimple" and all other lands appropriated in the future were to be "holden in full and absolute dominion, of no superior whatever."<sup>15</sup> Although these provisions were deleted, and similar bills submitted to the legislature failed to pass, Jefferson, nevertheless, did succeed in getting the legislature to abolish the feudal inheritance laws, entail and primogeniture.

In a series of letters exchanged with Edmund Pendleton, the speaker of the House of Delegate, during the summer of 1776, Jefferson expresses his desire to reestablish ancient Saxon law in Virginia. In one letter, after insisting that unoccupied land should neither be rented nor given away in return for military service, Jefferson continues:

Has it not been the practice of all other nations to hold their lands as their personal estate in absolute dominion? Are we not the better for what we have hitherto abolished of the feudal system? Has not every restitution of the antient Saxon laws had happy effects? Is it not now better that we return at once to that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century?

As for the government selling the land, Jefferson was completely opposed. "I am against selling the land at all," he writes to Pendleton, "By selling the lands to them, you will disgust them, and cause an avulsion of them from the common union. They will settle the lands in spite of every body." This prediction proved to be remarkably correct as evidenced by the fact that the next eighty years of American history was cluttered with squatters illegally occupying government land and then demanding compensation for their "improvements" through special preemption laws.<sup>16</sup>

In 1784, when he was appointed to head the land committee in the Congress of the Confederacy, Jefferson had a second opportunity to reestablish the Saxon landholding system. Whether Jefferson tried to take advantage of this opportunity is not known because the report of the committee, called the Ordinance of 1784, contains nothing about allodial rights to land. In addition, it even contains recommendations for the selling of western lands as a source of revenue for the government. It should be noted, however, that in one respect at least the document still has a very definite Saxon ring to it. Jefferson managed to include in his report a recommendation that settlers be permitted to organize themselves into new states on an equal footing with the original colonies. This recommendation, which was retained in the Ordinance of 1787,

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<sup>15</sup> Thomas Jefferson, "Draft Constitution for Virginia," in *Portable Jefferson*, p. 248.

<sup>16</sup> Jefferson to Edmund Pendleton, 13 August 1776, in *Papers of Thomas Jefferson*, 1: 492.

a revised version of the earlier ordinance, not only created the political structure necessary to turn the thirteen colonies into a much larger union of states, but also provided future generations of Americans with an independence and mobility similar to that enjoyed by the early Saxon and German freemen. In his *Summary View* of 1774, as mentioned above, Jefferson had argued that just as the Saxons invading England had had the right to set up an independent government, so British Americans had the right to an independent government in North America. The Ordinances of 1784 and 1787 extended this right to movement and self-determination of American settlers leaving the jurisdiction of established states and moving into the interior of the continent. In large measure, it is thanks to this provision that Americans today are able to move from state to state without any governmental control in the form of visas, passports, immigration quotas, or the like as unhassled by such details as were early German freemen.

The absence of any provisions specifically granting landowners full and absolute dominion over their land, however, does not mean that Jefferson abandoned this conception of landholding or ownership. Privately and in his published writings he continued to champion the right of Americans to small freehold farmsteads. The only major change seems to be that Jefferson stopped trying to justify his position in terms of historical precedents and instead began speaking in moral terms claiming that small independent landholders were the most virtuous citizens any state could ever hope to have. In a letter to John Jay in 1785, Jefferson writes:

Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to it's liberty and interests by the most lasting bands.<sup>17</sup>

In a letter to James Madison in the same year, he adds:

Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from that appropriation. If we do not the fundamental right to labour the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of the state.<sup>18</sup>

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<sup>17</sup> Jefferson to John Jay, 23 August 1785, in *Portable Jefferson*, p. 384.

<sup>18</sup> Jefferson to James Madison, 28 October 1785, in *Portable Jefferson*, p. 397.



In *Notes on the State of Virginia* published in 1787 Jefferson continues in much the same vein:

Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phaenomenon of which no age nor nation has furnished an example. It is the mark set on those, who not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistence, depend for it on the casualties and caprice of customers. Dependance begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition. This, the natural progress and consequence of the arts, has sometimes perhaps been retarded by accidental circumstances: but, generally speaking, the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandman, is the proportion of its unsound to its healthy parts, and is a good-enough barometer whereby to measure its degree of corruption. While we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff.<sup>19</sup>

It is in the context of these remarks that Senator Cole and Senator Ingalls felt the need to convince their colleagues in Congress of the necessity of surveying Yellowstone into lots and opening it to settlement. From their point of view, the moral character of the American people as a whole was at stake. These remarks are probably also the basis for the position of rural landowners today when faced with environmental issues. They are defending the American moral virtues which they have always been told their style of life and independence represents.

Had Jefferson been alive in the late nineteenth century when his views were being cited in opposition to the preservation of Yellowstone or were he alive today to see his Saxon freemen busily sabotaging county planning and zoning, he might have become disillusioned with his faith in the virtues of independent rural landowners. Jefferson, after all, as a result of his purchase of the Natural Bridge, perhaps the first major act of nature preservation in North America, ranks as a very important figure in the history of the nature preservation movement. Unfortunately, however, Jefferson's homesteaders and their modern day descendants did not always retain his aesthetic interest in nature or his respect for sound agricultural management which he interwove with his Saxon land use attitudes to form a balanced land use philosophy.

In part, the callousness and indifference of most rural landowners to environmental matters reflects the insensitivity of ancient Saxon freemen who

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<sup>19</sup> Thomas Jefferson, *Notes on the State of Virginia*, in *Portable Jefferson*, p. 217.

viewed land as something to be used for personal benefit and who, being semi-nomadic, were unconcerned about whether that use would result in irreparable damage to the particular piece of land that they held at any given point in their lives. In addition, however, it can also be traced back to the political philosophy and theory of property of John Locke, a seventeenth-century British philosopher, who had a major impact on the political views of Jefferson and most other American statesmen during the American Revolution and afterwards. This influence is the subject of the next section.

### JOHN LOCKE'S THEORY OF PROPERTY

As noted above, German and Saxon freemen did not have a concept of landownership, but only of landholding. As long as there was plenty of land for everyone's use, they did not concern themselves with exact boundaries. Disputes arose only when two freemen wanted to use the same land at the same time. By the end of the Middle Ages, however, with land in short supply, landholders began enclosing their landholdings to help ensure exclusive use. Enclosure kept the grazing animals of others away and also provided a sign of the landholder's presence and authority. Although enclosure was only a small step towards the concept of landownership, it, nonetheless, proved useful as a pseudo-property concept in early seventeenth-century New England where Puritans were able to justify their occupation of Indian lands on the grounds that the lack of enclosures demonstrated that the lands were vacant. Landownership became an official legal distinction in England after 1660 with the abolishment of feudal dues. The concept of landownership was introduced into British social and political philosophy thirty years later as part of John Locke's theory of property. This theory was presented in detail in Locke's *Two Treatises of Government*, a major work in political philosophy first published in 1690.<sup>20</sup>

Jefferson had immense respect and admiration for Locke and his philosophical writings. On one occasion, he wrote to a friend that Locke was one of the three greatest men that had ever lived—Bacon and Newton being the other two. Jefferson's justification of the American Revolution in "The Declaration of Independence" was borrowed directly from the *Second Treatise*. Many of Jefferson's statements in the document are almost identical to remarks made by Locke. For example, when Jefferson speaks of "life, liberty, and the pursuit of happiness," he is closely paraphrasing Locke's own views. His version differs from Locke's in only one minor respect: Jefferson substitutes for Locke's "enjoyment of property" the more general phrase "the pursuit of happiness,"

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<sup>20</sup> John Locke, *Two Treatises of Government*, ed. Thomas I. Cook (New York and London: Hafner Press, 1947).

a slight change made to recognize other enjoyments in addition to those derived from the ownership of property. Years later, when Jefferson was accused by John Adams and others of having stolen most of his ideas from Locke's writings, he simply acknowledged his debt pointing out that he had been asked to write a defense of the American Revolution in 1776, not to create an entirely new and original political philosophy. He added that he had not referred to Locke's writings when writing "The Declaration of Independence" or consciously tried to paraphrase Locke's remarks. Locke's influence on him, however, had been so strong that without his being fully aware of it, bits and pieces of Locke's own words had found their way into the document.<sup>21</sup>

Although Locke's political philosophy proved to be tailor-made for the American Revolution, it was actually the partisan product of a somewhat earlier period of political turmoil in English history. Locke's *Two Treatises* was written and published near the end of a century characterized by major changes in the British political system. The power of the king and the aristocracy was beginning to give way to the kind of party system which still dominates British and American politics today. Locke had been a theological student at Oxford during Cromwell's dictatorship. During the subsequent reigns of Charles II and James II he was in exile in France and Holland, returning to England during the Glorious Revolution of 1688 with the new rulers, William and Mary. Locke wrote his *Two Treatises* for political purposes. He hoped to justify the revolution settlement and also to help create a political climate favorable to the political party of his late friend, Lord Shaftesbury. This party was an alliance of a few liberal aristocrats with the discontented rich of London and other major towns.

A new theory of property ownership was important to these people. Previously, property rights had been tied to inheritance and to the divine rights of kings. A person owned property because his father and his father's father had owned it and also because at some point, at least theoretically, the property had been given to his family by the king. The king's right to bestow property was based on certain agreements made between God and Adam, and later Noah, in which He gave the entire Earth to the children of God. The king, as a descendant of Adam and more importantly as God's designated agent, served more or less as an executor for the estate. Since the doctrine of the divine rights of the king was being rescinded by act of Parliament, a new theory of property was needed to justify private ownership.

The divine rights of kings had been defended by Robert Filmer in a book titled *Patriarcha*, published posthumously in 1280.<sup>22</sup> The *First Treatise* is a

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<sup>21</sup> Jefferson to John Trumbull, 15 February 1789, in *Portable Jefferson*, pp. 434-35; Locke, *Second Treatise*, sec. 6; Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Alfred A. Knopf, 1960), pp. 24-28.

<sup>22</sup> Robert Filmer, *Patriarcha or the Natural Power of Kings*, in Locke, *Two Treatises*, pp.

direct and all-out attack on Filmer's arguments. The *Second Treatise* develops Locke's own position. It is this position which I am primarily concerned with here.

In the *Second Treatise* Locke bases property rights on the labor of the individual:

Though the Earth, and all inferior Creatures be common to all Men, yet, every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.<sup>23</sup>

This theory of property served Locke's friends well since it made their property rights completely independent of all outside interest. According to Locke, property rights are established without reference to kings, governments, or even the collective rights of other people. If a man mixes his labour with a natural object, then the product is his.

The relevance of Locke's labor theory to the American homestead land use philosophy becomes especially clear when he turns to the subject of land as property:

But the *chief matter of Property* being now not the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth it self* as that which takes in and carries with it all the rest; I think it is plain, that *Property* in that too is acquired as the former. *As much land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose it from the Common. . . . God, when He gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the Earth, *i.e.* improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled, sowed any part of it, thereby annexed to it something that was his *Property*, which another had no Title to, nor could without injury take from him.<sup>24</sup>

In this passage, the right of use and ownership is determined by the farmer's labor. When he mixes his labor with the land, the results are *improvements*, the key term in homesteading days and even today in rural America where the presence of such improvements may qualify landowners for exemption from planning and zoning under a grandfather clause. Since property rights are established on an individual basis independent of a social context, Locke's

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249–310.

<sup>23</sup> Locke, *Second Treatise*, sec. 27.

<sup>24</sup> *Ibid.*, sec. 32.

theory of property also provides the foundation for the landowner's claim that society has little or no role in the management of his land, that nobody has the right to tell him what to do with his property.

Locke reenforces the property owner's independence from societal restraints with an account of the origins of society in which property rights are supposedly more fundamental than society itself. According to Locke, the right to the enjoyment of property is a presocietal *natural right*. It is a natural right because it is a right which a person would have in a state of nature. Locke claims that there was once, at some time in the distant past, a true state of nature in which people possessed property as a result of their labor, but, nevertheless, did not yet have societal relations with one another. This state of nature disappeared when these ancient people decided to form a society, thereby giving up some of their previous powers and rights. They did not, however, Locke emphatically insists, relinquish any of their natural rights to their own property, and the original social contract establishing the society did not give society any authority at all over personal property. In fact, the main reason that society was formed, according to Locke's account, was to make it possible for individuals to enjoy their own property rights more safely and securely. Thus, society's primary task was and allegedly still is to protect private property rights, not to infringe on them. A government which attempts to interfere with an individual's natural and uncontrolled right to the enjoyment of his property, moreover, deserves to be overthrown and the citizens of the society are free to do so at their pleasure. In effect, Locke is arguing along lines completely compatible with the early Saxon and Jeffersonian doctrine that a landowner holds his property in full and absolute dominion without any obligation to a superior.

The similarity of Locke's position to this doctrine invites the conclusion that Locke, like Jefferson, was drawing inspiration from Saxon common law and that Locke's social contract was actually the establishment of the shire or county court by Saxon freemen. Curiously, however, Locke makes no mention of the Saxons in these contexts and, even more curiously, no political philosopher ever seems to have considered the possibility that Locke might have been referring to this period of English history. In his chapter on conquest, nevertheless, Locke does demonstrate (1) that he knew what a freeman was, (2) that he was aware of the legal conflicts resulting from the Norman Conquest, and (3) that he sided with the Saxons in that controversy. In the one paragraph where he mentions the Saxons by name, he flippantly remarks that, even if they did lose their rights as freemen at the time of the conquest, as a result of the subsequent six centuries of intermarriage all Englishmen of Locke's day could claim freeman status through some Norman ancestor and it would "be very hard to prove the contrary."<sup>25</sup> Locke may have chosen not to mention the specifics of Saxon history fearing that if he did so, his political philosophy

might have been treated as nothing more than just another call for a return to Saxon legal precedents. It is hard to imagine, nonetheless, that Locke's readers in the seventeenth century were not aware of these unstated connections considering the ease with which Jefferson saw them eighty years later in colonial North America. It is also possible, of course, that Locke may have been ignorant of the details of Saxon common law and may have simply relied on the popular land use attitudes of his day without being aware of their Saxon origin. At any rate, however, the ultimate result would be the same—a political philosophy which provides philosophical foundations for the ancient Saxon land use attitudes and traditions.

Whether Jefferson derived his own land use philosophy from both Locke and Saxon common law from the very beginning or turned to Locke for additional support after arguing first on Saxon precedent alone is difficult to determine. Jefferson's claim in his *Summary View*, written in 1774, that "each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title" is generally taken to be a sign of Locke's influence though it comes at the end of a long discussion of Saxon law. In any case, however, Locke's presence is indisputable in the passages from various letters and in *Notes on the State of Virginia* written in the 1780s, some of which were quoted in the last section in connection with the moral overtones of Jefferson's position. In all of these, Jefferson speaks repeatedly of the right to "labour the earth" and of the property rights derived from this labor. The introduction of a Christian context in which "those who labour in the earth are the chosen people of God" may also be an indication of Locke's influence, though, of course, the ultimate source in this case is probably the passage in *Genesis* where God commands His people to multiply and to subdue the Earth.<sup>26</sup>

Not everyone in the first half of the nineteenth century shared Jefferson's enthusiasm for land reform based on Saxon common law modified by Locke's theory of property, and for a time the idea of landholding independent of landowning continued to be influential in American political and legal thought. Early versions of the homestead bill before the beginning of the Civil War, for example, often contained inalienability and reversion clauses. According to these, a homesteader had the right to use the land, but could not subdivide it, sell it, or pass it on to his children after his death. These limitations, however, were not compatible with the wishes of potential homesteaders who wanted to be landowners, not just landholders, and, as a result, they were

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<sup>25</sup> *Ibid.*, sec. 177.

<sup>26</sup> Jefferson, "A Summary View of the Rights of British America," in *Portable Jefferson*, p. 19; letters, *ibid.*, p. 384, 397; Jefferson, "Notes on the State of Virginia," *ibid.*, p. 217; Locke, *Second Treatise*, sec. 25–26; *Genesis* 1:28.

not included in the Homestead Act of 1862. It is unlikely that homesteading based entirely on Saxon common law ever had much chance of passing Congress because early nineteenth-century settlers squatting illegally on Western lands and demanding the enactment of special preemption laws had always had landownership as their primary objective.<sup>1</sup>

Because it was probably Locke's theory of property as much as Saxon common law which encouraged American citizens and immigrants to move westward, both should be given a share of the credit for the rapid settlement of the American West which ultimately established a national claim to all the lands west of the Appalachians as far as the Pacific. This past benefit to the American people, nevertheless, should not be the only standard for evaluating this doctrine's continuing value. We must still ask just how well the position is suited to conditions in twentieth-century America.

#### MODERN DIFFICULTIES WITH LOCKE'S POSITION

One obvious problem with Locke's theory today is his claim that there is enough land for everyone.<sup>2</sup> This premise is of fundamental importance to Locke's argument because, if a present or future shortage of land can be established, then any appropriation of land past or present under the procedure Locke recommends, enclosure from the common through labor, is an injustice to those who must remain unpropertied. By Locke's own estimates there was twice as much land at the end of the seventeenth century as all the inhabitants of the Earth could use. To support these calculations Locke pointed to the "in-land, vacant places of America"—places which are now occupied.<sup>3</sup> Since Locke's argument depends on a premise which is now false, Locke would have great difficulty advancing and justifying his position today.

Another problem is Locke's general attitude towards uncultivated land. Locke places almost no value on such land before it is improved and after improvement he says the labor is still the chief factor in any value assessment:

. . . when any one hath computed, he will then see, how much *labour makes the far greatest part of the value* of things we enjoy in this World: And the ground which produces the materials, is scarce to be reckon'd in, as any, or at most, but a very small part of it; So little, that even amongst us, Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *waste* and we shall find the benefit of it amount to little more than nothing.

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<sup>27</sup> Paul W. Gates, *History of Public Land Law Development* (Washington, D. C.: Public Land Law Commission, 1968), pp. 390–93.

<sup>28</sup> Locke, *Second Treatise*, sec. 33.

<sup>29</sup> *Ibid.*, sec. 36.

According to Locke's calculations, 99 to 99.9 percent of the value of land even after it is improved still results from the labor and not the land. Although these absurdly high figures helped strengthen Locke's claim that labor establishes property rights over land, by making it seem that it is primarily the individual's labor mixed with the land rather than the land itself which is owned, such estimates, if presented today, would be considered scientifically false and contrary to common sense.<sup>30</sup>

Locke's land-value attitudes reflect a general desire prevalent in Locke's time as well as today for maximum agricultural productivity. From Locke's point of view, it was inefficient to permit plants and animals to grow naturally on uncultivated land:

... I aske whether in the wild woods and uncultivated waste of America left to Nature, without any improvement, tillage, or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?<sup>31</sup>

The problem, however, is not just productivity and efficiency, but also a general contempt for the quality of the natural products of the Earth. Locke writes with great conviction that "*Bread* is more worth than *Acorns*, *Wine* than *Water*, and *Cloth* or *Silk* than *Leaves*, *Skins* or *Moss*"<sup>32</sup> Even though we might be inclined to agree with Locke's pronouncements in certain contexts, the last two hundred years of the American experience have provided us with new attitudes incompatible with those of Locke and his contemporaries, and apparently completely unknown to them, which place high value on trees, water, animals, and even land itself in a wholly natural and unimproved condition. Unlike Locke, we do not always consider wilderness land or uncultivated land synonymous with waste.

At the very core of Locke's land-value attitudes is his belief that "the Earth, and all that is therein, is given to Men for the Support and Comfort of their being." In one sense, this view is very old, derived from the biblical and Aristotelian claims that the Earth exists for the benefit and use of human beings. At the same time, it is very modern because of Locke's twin emphasis on labor and consumption. Both of these activities are of central importance in communistic and capitalistic political systems, and they became so important precisely because the founders and ideologists of each system originally took their ideas about labor and consumption from Locke's philosophy. In accordance with these ideas, the Earth is nothing more than raw materials waiting to be transformed by labor into consumable products. The Greeks and

<sup>30</sup> *Ibid.*, secs. 42-43.

<sup>31</sup> *Ibid.*, sec. 37.

<sup>32</sup> *Ibid.*, sec. 42.



Romans would have objected to this view on the grounds that labor and consumption are too low and demeaning to be regarded as primary human activities.<sup>33</sup> From a twentieth-century standpoint, given the current emphasis on consumption, the neglect of the aesthetic and scientific (ecological) value of nature seems to be a more fundamental and serious objection to this exploitative view.

The worst result of Locke's property theory is the amoral or asocial attitude which has evolved out of it. Locke's arguments have encouraged landowners to behave in an antisocial manner and to claim that they have no moral obligation to the land itself, or even to the other people in the community who may be affected by what they do with their land. This amoral attitude, which has been noted with dismay by Aldo Leopold, Garrett Hardin, and others, can be traced directly to Locke's political philosophy, even though Locke himself may not have intended to create this effect. The reasons why this moral apathy developed are complex.

First, the divine rights of kings had just been abolished. In accordance with this doctrine, the king had had *ultimate* and *absolute* property rights over all the land in his dominion. He could do whatever he wanted with this land—give it away, take it back, use it himself, or even destroy it as he saw fit. Locke's new theory of property stripped the king of this power and authority and transferred these *ultimate* and *absolute* rights to each and every ordinary property owner. This transfer has been a moral disaster in large part because the king's rights involved moral elements which did not carry over to the new rights of the private landowner. As God's agent on Earth, the king was morally obligated to adhere to the highest standards of right and wrong. Furthermore, the king, as the ruler of the land, had a moral and political obligation to consider the general welfare of his entire kingdom whenever he acted. Of course, kings did not always behave as they should have, but, nevertheless, there were standards recognized by these kings and their subjects as to what constituted proper and kingly moral behavior. Private landowners, however, did not inherit these sorts of obligations. Because they were not instruments of church or state, the idea that they should have moral obligations limiting their actions with regard to their own property does not seem to have come up. The standard which landowners adopted to guide their actions was a purely selfish and egotistical one. Because it involved nothing more than the economic interest of the individual, it was devoid of moral obligation or moral responsibility.

If Locke had been writing in a more politically stable period of English history, it is possible that he might not have developed these views. As men-

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<sup>33</sup> *Ibid.*, sec. 26; for a full discussion of labor and consumption see Hannah Arendt, *The Human Condition* (Chicago and London: University of Chicago Press, 1958), chap. 3.

tioned above, one of the primary reasons that Locke developed his theory of property was to help protect personal property from arbitrary governmental interference. Locke had grown up during the reign of Charles I whose behavior had brought about a civil war and the establishment of the commonwealth under Cromwell. Afterwards, Locke had lived through much of the reigns of Charles II and James II in exile. Thus, with good reason for fearing the uncontrolled power of English kings, Locke sought to put as much power into the hands of the people as he could. The result was a weakening of governmental power without a comparable lessening of governmental responsibility.

This difficulty is revealed momentarily in the *First Treatise* where Locke argues that property owners have the right to destroy their property if they can derive an advantage from doing so. Locke apparently feels compelled to acknowledge the right of property owners to destroy *in general* in order to justify the killing of animals for food but, obviously uneasy about the point he has just made, he adds that the government has the responsibility of making sure that this destruction does not adversely affect the property of others:

Property, whose Original is the Right a Man has to use any of the Inferior Creatures, for Subsistence and Comfort of his life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing, that he has Property in by his use of it, where need requires; but Government being for the Preservation of every Man's Right and Property, by preserving him from the Violence or Injury of others, is for the good of the Governed.<sup>34</sup>

Ironically, the very rights to property which the government is supposed to protect hinder or even prevent the government from carrying out this responsibility.

Theoretically, Locke's qualification of the right to destroy property is compatible with the American conception of checks and balances and it might have provided a *political* solution to the problem, though not a moral one. Unfortunately, however, it has not been carried over into our political and legal system as successfully as the right to destroy. A man certainly has a right in the United States to sue for damages in court after the fact, when the actions of others have clearly injured him or his property, but the right of the government to take preventive action before the damage is done has not been effectively established. It is this preventive action which private landowners are assailing when they assert their right to use and even destroy their land as they see fit without any outside interference. The success of landowners in this area is

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<sup>34</sup> Locke, *First Treatise*, sec. 92; Locke also addresses this point to some degree in the *Second Treatise*, sec. 31, where he writes that "Nothing was made by God for Man to spoil or destroy." Here Locke emphasizes the abundance of the natural things supplied by God and states that human beings who set limits on themselves with their reason will not claim more than their fair share.

amply demonstrated by the great reluctance of most state legislatures to place waste management restrictions on small private *landowners* which have long governed the activities of rural land *developers*.

Government regulation of individual private landowners has been ineffective historically because, from the very beginnings of American government, representation at state and federal levels has nearly always been based on landownership, an approach which has usually assured rural control of the legislature even when most of the citizens in the state lived in urban population centers. Government leaders intent on acting primarily in the interests of landowners could hardly have been expected to play the preventive role which Locke recommends. The unwillingness of legislators to act in this way in the nineteenth century and most of the twentieth, moreover, further contributed to the amoral belief of rural landowners that they can do whatever they want without being concerned about the welfare or rights of others.

When Jefferson attempted to build American society on a Lockean foundation of small landowners, he did so in large measure because he believed that small landowners would make the most virtuous citizens. He failed to foresee, however, that the independence provided by Locke's presocietal natural rights would discourage rather than encourage social responsibility, and, therefore, would contribute little to the development of moral character in American landowners. Since social responsibility is basic to our conception of morality today, the claim of landowners that their special rights relieve them of any obligation or responsibility to the community can be regarded only as both socially and morally reprehensible. The position of such rural landowners is analogous to that of a tyrannical king. Tyranny is always justified, when it is justified at all, by a claim that the tyrant has the *right* to do as he pleases regardless of the consequences. In practice, however, the impact of rural landowners more closely approaches anarchy than tyranny, but only because landowners, though sharing a common desire to preserve their special rights, do not always have common economic interests. As a result, landowners are usually more willing to promote the theoretical rights of their fellow property owners than their specific land use and development projects, which as members of society, they may find objectionable or even despicable—in spite of their Saxon and Lockean heritage rather than because of it.

A landowner cannot justify his position morally except with the extravagant claim that his actions are completely independent and beyond any standard of right and wrong—a claim which Locke, Jefferson, and even Saxon freemen would probably have hesitated to make. Actually, there is only one precedent for such a claim. During the Middle Ages, church philosophers concluded that God was independent of all moral standards. They felt compelled to take this position because moral limitations on God's actions would have conflicted with His omnipotence. Therefore, they reasoned that God's actions created

moral law—i.e., defined moral law—and that theoretically moral law could be radically changed at any moment. Descartes held this position in the seventeenth century, and in the nineteenth and twentieth centuries some atheistic existential philosophers have argued that because God is dead each man is now forced to create his own values through his individual actions. Although this position could be adopted as a defense of the landowner's extraordinary amoral rights, it would probably be distasteful to most landowners. Without it, this aspect of the rural landowners' position may be indefensible.<sup>35</sup>

Today, of course, whenever Locke's theory of property and the heritage of the ancient Saxon freeman surface in county courts, at planning and zoning meetings, and at state and federal hearings on conservation and land management, they still remain a formidable obstacle to constructive political action. As they are normally presented, however, they are certainly not an all-purpose answer to our environmental problems or even a marginally adequate reply to environmental criticism. When a landowner voices a Lockean argument he is consciously or unconsciously trying to evade the land management issues at hand and to shift attention instead to the dogmatic recitation of his special rights as a property owner.

As I noted above, some of Locke's fundamental assumptions and attitudes are either demonstrably false or no longer generally held even among landowners. These difficulties need to be ironed out before the landowners can claim that they are really answering their environmental critics. Furthermore it is likely that, even if the position can be and is modernized, the moral issues will still be unresolved.

As it stands, the force of the rural landowners' arguments depends on their historical associations—their Biblical trappings, the echoes of Locke's political philosophy, the Saxon common-law tradition, the feudal doctrine of the divine rights of kings, and the spirit of the nineteenth-century American land laws. Can they be modernized? That remains to be seen. Until they are, however, landowners, environmentalists, politicians, and ordinary citizens should regard them with some suspicion.

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<sup>35</sup> Jean-Paul Sartre, *Existentialism and Human Emotions*, (New York: Philosophical Library, 1957), pp. 13-18.