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SKETCHES FOR A HAMILTONIAN VERNACULAR AS A SOCIAL FUNCTION OF PROPERTY

*Nestor M. Davidson**

INTRODUCTION

When Léon Duguit laid out his concept of the social function of property in his Buenos Aires lectures a century ago, he had in mind not only the general idea that ownership entails obligation, but also a quite specific kind of affirmative duty. To Duguit, the particular role that owners play in society requires that they put their property to productive use for the sake of social solidarity.¹ If owners fail to live up to this developmental imperative, Duguit argued, the state can enforce a mandate to do so as it would any other internal aspect of property law.²

Although scholars in the United States have explored versions of the social function of property, the vision that emerges from this nascent discourse tends to ground the obligations of ownership in conceptions of shared sacrifice and interpersonal reliance.³ These are undeniably important and under-appreciated currents in the jurisprudence, highlighting both the relational nature of property rights as well as the adaptability of the common law principle of *sic utere tuo ut alienum non laedas* that property rights are limited by the obligation not to use property to harm others.

Understandings of the social function that parallel the particular texture of Duguit's productive obligation, however, have received less attention in the United States. This is curious, because one of the earliest and strongest conceptions of ownership in the United States reflected just this kind of developmental norm. Like Duguit's social solidarity, the common law conception that property rights must foster the good of the community

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1. See LÉON DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* [CHANGES OF PRINCIPLE IN THE FIELD OF LIBERTY, CONTRACT, LIABILITY, AND PROPERTY] (1912), translated in *THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans., 1918).

2. *Id.* at 133–34. For overviews of Duguit's articulation of the social function of property, see generally Sheila R. Foster & Daniel Bonilla, *Introduction to The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 1003 (2011); M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT'L L.* 191 (2010).

3. See generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *CORNELL L. REV.* 745 (2009); Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1988).

reflected in the equally hoary maxim *salus populi suprema lex*—the welfare of the people is supreme—had what historian William Fisher describes as a “meaningful and powerful” influence on property law in the era between the Revolution and the Civil War.⁴ The conception of welfare that the *salus populi* demanded quite often affirmatively required owners to actively use property, and correspondingly supported an affirmative state role in social ordering through private property to set the terms of that developmental imperative.⁵

This productivity-oriented social function contrasts in many ways with two other conceptions of property that continue to frame the modern U.S. discourse.⁶ The first is the possessive–individualist tradition centered on market property that reflects the classical liberal absolutism against which Duguit was reacting.⁷ The second conception is a civic republican tradition that emphasizes property’s role in promoting civic virtue and ensuring social order.⁸ Although these conceptions are far from hermetic, and interact throughout U.S. history, a third tradition has been explicitly entrepreneurial in that it relies on market forces, but has not venerated vested rights as an overarching bar to disrupting existing market structures.⁹

Conceptions of property rights in the United States that trace back to the earliest days of the Republic are often associated—approvingly or disparagingly—with members of the Founding generation, in symbolic gestures that, for all of their reductionism, serve to highlight their provenance and continuity.¹⁰ Thus, for example, Jennifer Nedelsky associates the classical liberal view with James Madison,¹¹ although Madison’s views on property were, like most of his contemporaries, varied.¹² Similarly, the contrapuntal civic republican tradition is often traced to Thomas Jefferson’s yeoman vision,¹³ although, again, Jefferson held views on property that are not easy to reduce to a monistic vision.¹⁴

4. William W. Fisher III, *Making Sense of Madison: Nedelsky on Private Property*, 19 LAW & SOC. INQUIRY 547, 555 (1993). For a general discussion of the *salus populi* principle and its role in early U.S. property, see WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

5. See *infra* text accompanying notes 69–90.

6. See generally GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997).

7. See *id.* at 12.

8. *Id.* at 13.

9. See *id.* at 185–210.

10. Cf. Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society,”* 79 S. CAL. L. REV. 45, 45–48 (2005) (discussing the contemporary relevance of Founding-era concepts of property and society).

11. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 185–87, 207–08* (1990).

12. See Fisher, *supra* note 4, at 555.

13. See, e.g., Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 470 (1976).

14. See ALEXANDER, *supra* note 6, at 41–42.

With caution, then, about the challenge of translating from the foreign country that is the past,¹⁵ it is possible to link elements of the *salus populi* productive norm in early U.S. property law to a third, and less often invoked, member of the Founding generation: Alexander Hamilton.¹⁶ Hamilton, the first U.S. Treasury Secretary, laid the foundation for an active state that would create the conditions for a modern industrial economy. More than any other of his contemporaries, Hamilton harnessed an awakening national government to spur development and establish financial markets. Hamilton did so, however, in ways that sublimated individual initiative to the good of a nascent national community.

Hamilton, as befits the breadth of his views, is often associated with the individualist–commodity view of property,¹⁷ and there is much to this association.¹⁸ Conversely, there is a republican strain of social ordering in much of the embodiment of the Hamiltonian perspective that followed in the first decades of the nineteenth century, albeit more a commercial than a civic strain.¹⁹ It is possible, however, to understand this tradition as Willard Hurst and other historians have, as a distinctive U.S. cultural development that sought to harness the energy of the individual to increase the common wealth.²⁰ The corresponding vision of property was less focused on freedom from the state in the classical liberal sense or limitations on ownership that flow from harm-focused equal liberty reflected in *sic utere*. Rather it sought to put property to its highest and best use for the benefit of the community, with corresponding doctrines that resolved disputes less in favor of vested rights than in ways that tended to increase development.²¹ Hamilton’s entrepreneurial vision of a vigorous state unleashing and harnessing individual initiative for the common good thus inverted Adam Smith’s invisible hand and its corresponding minimal, contractualist state.²²

This approach to the obligations of ownership has been obscured to some extent in the contemporary discourse, but nonetheless recurs—with ambivalence—in the doctrine. To give one example, this kind of

15. Cf. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525–26 (1995) (aptly warning about historical claims that have reductive simplicity).

16. See James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 483–84 (1978).

17. See, e.g., Arthur McEvoy, *Markets and Ethics in U.S. Property Law*, in WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS 94, 96 (Harvey Jacobs ed., 1991); see also ALEXANDER, *supra* note 6, at 77 (describing Hamilton’s *Report on Public Credit* as “pure commodity thought”).

18. See WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 74 (1977).

19. See ALEXANDER, *supra* note 6, at 12–13.

20. See *infra* text accompanying notes 69–90.

21. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 9 (1956).

22. See CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 179 (1964) (“The release of individual energies was so important to bring about that [Hamilton] preferred the open hand of authority rather than the hidden hand of chance to hold the lever.”).

developmental imperative formed an important backdrop to the affirmation of the role of eminent domain in economic development upheld in *Kelo v. City of New London*.²³ Beyond individual disputes, active state ordering of property to enhance development is reflected in a variety of current initiatives at all levels of government that go beyond setting what Joseph Singer has called the “minimum standards.”²⁴ These initiatives, as Hamilton’s policies did, invest in the predicates for active ownership, such as infrastructure and education. Thus, when historian Richard Wright recently criticized proposals for a national high-speed rail initiative by disparagingly invoking the federal government’s nineteenth century promotion of the transcontinental railroad,²⁵ it was a timely reminder not only of the endurance of this vision of property, but of the controversies it generates.

This historical ground has been well plowed, but is worth revisiting as interest in the social function of property is beginning to make the leap from Europe to Latin America to the United States. This Essay, accordingly, re-examines the Hamiltonian legacy, not to mount a normative defense of the tradition, but rather to highlight its relevance to a comparative understanding of the social function. The Essay begins with a discussion of the methodological implications of social function theory, focusing on Duguit’s empiricism. It then turns to Hamilton’s vision as an antecedent to the commonwealth norm in antebellum jurisprudence, which might be understood as a distinctive vernacular understanding of the productivity obligation that Duguit associated with ownership. The Essay concludes by noting echoes of this obligation in contemporary debates about private property and the role of the state in defining the institution.

I. METHODOLOGICAL ROOTS: THE VERNACULAR IN THE SOCIAL FUNCTION

Methodologically, classic liberal conceptions of property tend to reflect a hierarchy of values and assertions about the division between the state and the individual embodied in property that ignores history and culture. If property is understood as a pre-political, natural right, that understanding in turn assumes that there is one overriding purpose for property, with a normative function of shielding individual liberty from the state. This is a moral framework largely abstracted from the practical reality of how property is lived and was part of what Duguit was reacting to in his critique of property as a subjective right.²⁶ It carries a corresponding understanding of the interaction between the individual and the state instantiated through property that likewise obscures context. Indeed, what is striking about

23. 545 U.S. 469 (2005).

24. See generally Joseph W. Singer, *Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL’Y REV. 139 (2008).

25. See Richard Wright, *Fast Train to Nowhere*, N.Y. TIMES, Apr. 24, 2011, at WK9.

26. See Foster & Bonilla, *supra* note 2, at 1005–06 (discussing Duguit’s empiricism).

descriptions of property in classic liberal terms is the not infrequent assertion of universality and absoluteness.²⁷

By contrast, as a methodological matter, social function theory inherently recognizes the pluralism of what Hanoach Dagan recently called “property institutions.”²⁸ An emphasis on the *social* in property’s function, by definition, makes clear that what society may require of an owner is always grounded in a particular culture and specific social, economic, and political conditions. As Duguit noted in his Buenos Aires lecture, “I am of those who think that law is much less the work of the legislator than the constant and spontaneous product of events,” and that by “the nature of things and the force of events and practical needs new legal conceptions are constantly forming.”²⁹ Duguit’s approach to property was thus self-consciously empirical, seeking to divine legal rules from social reality.³⁰

In this way, the social function of property can be thought of as a found object, with distinctive, local, often unmediated understandings embodied in law. This legal residue is akin to the way that vernacular architecture uses local resources to represent spontaneous, contextual responses to local conditions. As Frank Lloyd Wright noted, such architecture grows “in response to actual needs, fitted into environment by people who [know] no better than to fit them with native feeling.”³¹ Vernacularity thus emphasizes indigenous solutions to common design problems, resulting in a “strong community identity . . . that is manifest in distinctive qualities and results in recognized patterns of everyday language.”³² Such architecture reflects organically generated responses to local conditions,³³ ““on the principal criteria of expression of site and climate, expression of form and function, expression of materials and skills.””³⁴

This is a fruitful metaphor for the equally organic response to political, economic, and cultural forces that guide the development of the social

27. See, e.g., Mirow, *supra* note 2, at 193 (“[O]wners can do anything they like with what they own . . . [And] the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no *positive* duties on an owner.” (quoting F.H. LAWSON & BERNARD RUDDEN, *THE LAW OF PROPERTY* 90 (3d ed. 2002))). Similarly, when Blackstone famously described property as sole and despotic dominion, he prefaced the thought with the universalist proposition that nothing “so generally strikes the imagination, and engages the affections of mankind.” 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

28. See HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS*, at xvii (2011).

29. See DUGUIT, *supra* note 1, at 66.

30. See Mirow, *supra* note 2, at 200–01.

31. Quoted in PAUL OLIVER, *DWELLINGS: THE VERNACULAR HOUSE WORLD WIDE* 9 (2003).

32. THOMAS CARTER & ELIZABETH COLLINS CROMLEY, *INVITATION TO VERNACULAR ARCHITECTURE: A GUIDE TO THE STUDY OF ORDINARY BUILDINGS AND LANDSCAPES* 8 (2005).

33. See generally BERNARD RUDOFSKY, *ARCHITECTURE WITHOUT ARCHITECTS: A SHORT INTRODUCTION TO NON-PEDIGREED ARCHITECTURE* (1964).

34. OLIVER, *supra* note 31, at 11 (quoting Sybil Moholy-Nagy); see also Roderick J. Lawrence, *Learning from the Vernacular: Basic Principles for Sustaining Human Habitats*, in *VERNACULAR ARCHITECTURE IN THE TWENTY-FIRST CENTURY: THEORY, EDUCATION AND PRACTICE* 110 (Lindsay Asquith & Marcel Vellinga eds., 2006) (“Vernacular buildings are human constructs that result from the interrelations between ecological, economic, material, political and social factors.”).

function in property law. Every society must confront certain recurring points of tension inherent in private property. These include the balance between individual freedom, collective responsibility, and limitations on harm, as well as incentives for productive activity, recognition of personal connection to property, and others. Society confronts these tensions through the resolution of individual disputes, with legal institutions that inherently draw on the values and imperatives of a given historical context. As a result, there is no singular social function—there cannot be—and no possibility of a transcendent, unified theory of what that function should be. Rather every legal system must perpetually balance the plural values represented in property. There may be some continuity and stability in the institutional arrangements instantiated through property,³⁵ but as with material resources and local conditions in architecture, the process of contestation leaves a vernacular residue on those structures that reveal starkly localized resolutions.

When the vernacular is channeled through professional elites, it can produce a hybrid that melds instinct and expertise, with indigeneity incorporating broader influences. Frank Lloyd Wright's supposedly ur-domestic U.S. prairie architecture, for example, borrowed from the British Arts and Crafts movement and traditional Japanese architecture.³⁶ So too, when legal institutions struggle to make sense of the felt needs of a culture at a given moment, are spontaneous resolutions channeled through professional norms. Nonetheless, the process still involves culture taking the raw materials available to it and making pragmatic accommodations that settle into recognizable patterns.³⁷

Duguit, grounded in early twentieth-century Continental culture, understood property's social function to mean social solidarity or interdependence.³⁸ He posited a kind of historical progression in which subjective right had given way in "modern communities"³⁹ to the "ever-stricter interdependence of the various elements that compose the social community."⁴⁰ Duguit understood social solidarity as a question of role differentiation, and he argued that the unique place that owners occupy in society generates an obligation to put property to productive use. As Duguit framed it, an owner,

35. Cf. Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1644–55 (2008) (discussing property forms as stable platforms for legal innovation).

36. See HAMILTON'S REPUBLIC: READINGS IN THE AMERICAN DEMOCRATIC NATIONALIST TRADITION, at xx (Michael Lind ed., 1997).

37. Methodologically, analogizing the emergence of the social function to a kind of vernacular echoes Bruce Ackerman's "ordinary observer" perspective on property. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10–20 (1977). The analogy, however, recognizes more contingency to the norms reflected in the resolution of property conflicts than Ackerman did.

38. See DUGUIT, *supra* note 1, at 75 (citing the sociological work of Emile Durkheim); see also Mirow, *supra* note 2, at 202 (discussing Durkheim's influence on Duguit).

39. DUGUIT, *supra* note 1, at 129.

40. *Id.*

by reason simply of his possession, is enabled thereby to accomplish a certain work where others can not. He alone can increase the general stock of wealth by putting his capital to use. For social reasons he is under a duty, therefore, to perform this work and society will protect his acts only if he accomplishes it and in the measure in which he accomplishes it.⁴¹

As those norms have emerged, modern social obligation theorists in the United States have begun exploring the duties of ownership. Joseph Singer, for example, has focused on obligations that flow from reliance and the embedded nature of social relations.⁴² For Gregory Alexander, the social obligation norm in the United States is best understood in light of a normative commitment to human flourishing.⁴³ In application of this commitment, Alexander focuses on what he described as “collective restrictions of property interests,”⁴⁴ with paradigm examples found in nonconsensual transfers and use restrictions.⁴⁵

These are important correctives to classic liberal absolutism and healthy reminders of the pluralism of the social function in the United States, but they tend not to focus on what Sheila Foster and Daniel Bonilla call Duguit’s normative commitment to a “rule of productivity.”⁴⁶ Duguit himself acknowledged that, notwithstanding his commitment to empiricism, he could point to little evidence of his social solidarity view in practice in contemporary law.⁴⁷ But in the early development of property law in the United States, in the era between the Revolution and the Civil War, there was in active practice a vein in the jurisprudence that reflected this very imperative.

II. A HAMILTONIAN VERNACULAR

The vernacular understanding of property as carrying an obligation toward productivity reflects a tradition that can be traced back to the balance that Alexander Hamilton sought to strike between civic obligation and individual initiative. Hamilton can certainly be described, as he was by a recent biographer, as “the prophet of the capitalist revolution,”⁴⁸ but Hamiltonian dynamism reflected a conception of social obligation that

41. *Id.* at 133–34.

42. *See generally* Singer, *supra* note 3.

43. *See generally* Alexander, *supra* note 3.

44. *Id.* at 752.

45. *See id.* at 775–91 (canvassing what Alexander describes as “entitlement sacrifices” and “use sacrifices”).

46. *See* Foster & Bonilla, *supra* note 2, at 1005.

47. DUGUIT, *supra* note 1, at 135 (“The objection does not embarrass me. From the fact that the law does not yet directly force the owner to cultivate his land or repair his houses or utilize his capital, it cannot be concluded that the idea of social function has not yet supplanted the idea of a subjective right of property.”). Duguit’s answer to this objection was that no such law had appeared because the need had not yet arisen. *Id.* How that puzzling absence justified his view of the actual social function of ownership embodied in law is not clear.

48. RON CHERNOW, *ALEXANDER HAMILTON* 6 (2004).

actively sought to harness ownership by disrupting the established order where necessary and fostering productive property over entrenchment.

A. *Hamilton's Vision in the Federalist Papers and the Reports*

As with all members of the Founding generation, it is perilous to attempt to tie a singular strain in U.S. intellectual history to Hamilton. As Jefferson famously wrote of Hamilton, "without numbers, he is an host within himself."⁴⁹ Hamilton certainly cast a certain jaundiced eye on human nature and had little faith in the virtues of an engaged citizenry, accepting generally that prosperity required engaging those already endowed with wealth.⁵⁰ Hamilton is thus easy to pillory as a closet aristocrat and some kind of unreconstructed mercantilist, but his ideas about the state's nature were, like those of his contemporaries, more nuanced. While not every element of this tradition traces directly to Hamilton's writings and the policies he advocated, certain core principles can be identified with the Founding Father who most directly advocated a vigorous central government to transform the United States from an agricultural colony into an "Empire of Commerce."⁵¹

Hamilton authored roughly two-thirds of the *Federalist Papers*, and his views on harnessing entrepreneurial energy were evident in his case for a strong national government. For example, in *Federalist No. 12*, Hamilton defended the proposed federal government's power to tax and to impose duties on imports, arguing that the "prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth."⁵² Likewise, in *Federalist No. 30*, Hamilton argued that "money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."⁵³ Hamilton saw the confluence of public good and market incentives, but did so in the context of a polemic in favor of a vigorous government that would put these incentives to use to forge a new nation.

It was in Hamilton's work as Treasury Secretary that his vision of the entrepreneurial state, with its implications for property, came most fully into view. In a series of seminal reports and opinions he authored in 1790 and 1791,⁵⁴ Hamilton articulated a fiscal policy built on his forceful

49. Quoted in ROSSITER, *supra* note 22, at 3.

50. See Katz, *supra* note 13, at 485–86 (quoting Hamilton's argument before the New York Ratifying Convention that the "vices" of the "wealthy" are "probably more favorable to the prosperity of the state, than those of the indigent; and partake less of moral depravity").

51. ALEXANDER, *supra* note 6, at 75.

52. THE FEDERALIST NO. 12 (Alexander Hamilton).

53. THE FEDERALIST NO. 30 (Alexander Hamilton).

54. Hurst cites a corpus of work from 1790 and 1791 that outlined Hamilton's vision while Secretary of the Treasury: the *Report Relative to a Provision for the Support of Public Credit*, which advocated funding national and state debts; the *First Report on the Further Provision Necessary for Establishing Public Credit*, on a federal excise tax; the *Second Report on the Further Provision Necessary for Establishing Public Credit*, recommending a

interpretation of national powers to tax, spend, borrow, and provide a money supply.⁵⁵ In each of these areas, Hamilton framed his policies in terms of the potential for a vigorous national government to play a unique role in generating private capital, diversifying the nation's economic base, protecting fledgling domestic industries, making strategic investments in public goods, and, throughout, harnessing these interventions to expand the resources available for future growth.

In his *Report Relative to a Provision for the Support of Public Credit*, for example, Hamilton argued that funding public securities was necessary to create a liquid money supply, which would then energize private capital for the benefit of the new nation.⁵⁶ Public debt, supported through the taxing power, would serve as security for private borrowing that would otherwise never materialize. Hamilton saw the impending failure of a central sector of the new economy and crafted an aggressive plan to shore up what would have otherwise been a crippling credit crisis.⁵⁷

Likewise, in his *Report on the Subject of Manufactures*, Hamilton articulated the need for strong protection for an industrial economy, borrowing Adam Smith's division of labor theory and using it to build the case for an active state role.⁵⁸ To Hamilton, supporting manufacturing in a then-agricultural economy would "not only occasion a positive [sic] augmentation of the Produce and Revenue of the Society," but also "contribute essentially to rendering them greater than they could possibly be without such [support]."⁵⁹ Hamilton's argument rested on specialization and the use of technology that would engage a broader base of employment and encourage immigration.⁶⁰ This, in turn, would best utilize the range of talents in society, create a greater scope for enterprise, and (so the politician in Hamilton had to note for a skeptical agrarian audience) increase the value of agriculture.⁶¹ To these ends, Hamilton advocated a range of trade, tax,

national bank, and a corresponding opinion rendered at request of the President on the constitutionality of legislation to create a national bank; and, finally, the *Report on the Subject of Manufactures*, advocating a pro-manufacturing federal policy. See Hurst, *supra* note 16, at 488.

55. See *id.* at 489–90.

56. THE REPORT RELATIVE TO A PROVISION FOR THE SUPPORT OF PUBLIC CREDIT (Jan. 14, 1791) [hereinafter REPORT ON PUBLIC CREDIT], reprinted in 6 PAPERS OF ALEXANDER HAMILTON 65 [hereinafter PAH].

57. Hamilton grounded his argument, particularly for funding at face value debts that might have been purchased at steep discounts, in part on the value of certainty for holders of debt. See *id.* at 73–78. Hamilton thus certainly understood instrumental reasons for the sanctity of property at the same time his policies presaged a massive shift from older, land-based forms of wealth to new property based on manufacturing and financial assets.

58. See *supra* note 22.

59. REPORT ON THE SUBJECT OF MANUFACTURES (Dec. 5, 1791), reprinted in 10 PAH 249.

60. *Id.* Hamilton did argue that one advantage of manufacturing was that it would enable women and children, "persons who would otherwise be idle (and in many cases a burthen on the community)," to come more easily into the workforce. *Id.* at 253. Needless to say, this advocacy for the labor of children ("many of them," Hamilton noted with favor, "of a very tender age," *id.*) is anachronistic, but was hardly out of the ordinary in the eighteenth century.

61. *Id.* at 249.

and investment policies, including internal improvements, direct subsidies, research support, and import protections.⁶²

Hamilton's functionalism reflected his grave doubts about the ability of market forces to fulfill their function, particularly in a new nation competing with strong foreign powers. As Hamilton argued in his *Report on the Subject of Manufactures*, there were "very cogent reasons" to believe that industry needed federal assistance, given

the strong influence of habit and the spirit of imitation—the fear of want of success in untried enterprises—the intrinsic difficulties incident to first essays towards a competition with those who have previously attained to perfection in the business to be attempted—the bounties premiums and other artificial encouragements, with which foreign nations second the exertions of their own Citizens in the branches, in which they are to be rivalled.⁶³

What emerges from the range of Hamilton's work in this era is a vision that drew on the power of an active, vigorous state to guide, protect, and structure the market to foster, quite literally, the common wealth.⁶⁴ This was not a vision—for all of Hamilton's recognition of the instrumental value of honoring the public debt (and the sanctity of contract more generally)—that inherently privileged vested rights in order to promote a market economy as such, but rather that favored entrepreneurship and productivity. This vision had implications for the construction of property law in the United States.⁶⁵ Ownership was not a passive activity or a basis for preserving social order, but rather an affirmative tool to harness entrepreneurship for the sake of collective development.⁶⁶

In advancing Hamilton's policies, with the creation of a national bank, the assumption of Revolutionary Era state debt, and the funding of federal debt, the objects of property were expanded from land to more abstract,

62. *See generally id.*

63. *Id.* at 266.

64. Hamilton may have personally favored more libertarian approaches to the market, but his pragmatism recognized the necessity of intervention. In 1801, Hamilton responded to critics of his plans by noting that

[t]o suggestions of the last kind, the adepts of the new-school have a ready answer: *Industry will succeed and prosper in proportion as it is left to the exertions of individual enterprise.* This favorite dogma, when taken as a general rule, is true; but as an exclusive one, it is false, and leads to error in the administration of public affairs. In matters of industry, human enterprise ought, doubtless, to be left free in the main, not fettered by too much regulation; but practical politicians know that it may be beneficially stimulated by prudent aids and encouragements on the part of the Government.

THE EXAMINATION NO. III (Dec. 24, 1801), *reprinted in* 25 PAH 467.

65. On an abstract level, the Hamiltonian program was explicitly utilitarian. *See* GERALD STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 25 (1970) (quoting Hamilton's observation that "utility is the prime end of all laws"). The exercise in this Essay, however, is not to limn a generalist approach to property but rather to undertake something of the opposite: to work from traces in the U.S. discourse of property to isolate one vernacular understanding of a social function.

66. *See* Hurst, *supra* note 16, at 522–33 (discussing Hamilton's view that advancing the national public interest required accepting a measure of benefit to certain elements of the private sector, particularly entrepreneurs, over others).

mobile, dynamic sources of wealth. In Hamilton's broader program of economic development through finance and infrastructure investments, moreover, there was recognition of the intertwining of individual initiative and state support. Instrumentally, property was not sacrosanct for its own sake; rather, Hamilton's vision required the active use of property and a national government that could match that ambition.⁶⁷ It has frequently been noted that Hamilton's vision, of all of the Founders, most prefigured the modern state into which the United States grew,⁶⁸ and this understanding of the active harnessing of individual initiative was a distinctive, novel conception at the time.

B. Commonwealth and the Release of Energy as a Social Function

The kernels of the productivity social function that Hamilton sought to unleash grew widely in property law in the first half of the nineteenth century, as the developing nation embraced doctrines that shaped ownership to advance an understanding of the common good that included an affirmative obligation to use resources productively.⁶⁹ Across a number of domains, property law and policy recognized an imperative that reversed the Lockean labor–reward paradigm. Instead of being granted property

67. As Willard Hurst noted, "Hamilton believed with wholehearted fervor that the public interest required not simply a national government well endowed with authority, but a government in hands that would use that authority with creative energy." *Id.* at 486. It is beyond the scope of this Essay to elaborate on the intersection between what Hamilton's vision meant for property and federalism. Suffice it to say that Hamilton had a distinctly national perspective while, in the antebellum period, much of the locus of property doctrine that reflected the social vision Hamilton articulated was at the state level.

68. See, e.g., HAMILTON'S REPUBLIC, *supra* note 36, at xiv ("[H]owever powerful Jeffersonian rhetoric remains in American public discourse, it is the Hamiltonians who have won the major struggles to determine what kind of country the United States would be.").

69. Cf. Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 830 (1993) (noting that for Hamilton, property rights were instrumentally linked to what Hurst would call the "release of energy," harnessing the self-interested pursuit of wealth for national development).

This is not to suggest that structuring private property to recognize an affirmative obligation to utilize property for the collective benefit of the community began with Hamilton. It was a central feature of property law in the Colonial era as well. As John Hart noted:

Colonial lawmakers often regulated private landowners' usage of their land in order to secure public benefits, not merely to prevent harm to health and safety. Indeed, the public benefits pursued by such legislative action included some that consisted essentially of benefits for other private landowners. Legislatures often attempted to influence or control the development of land for particular productive purposes thought to be in the public good. Legislatures compelled owners of undeveloped land to develop it, beyond what was required by the original grants, and compelled owners of wetlands to participate in drainage projects. Owners risked losing preexisting mineral rights if they failed to conduct their mining with sufficient promptness. Owners of land suitable for iron forges risked losing their land if they declined to erect such forges themselves. In towns and cities, landowners were constrained by measures intended to channel the spatial pattern of development, to optimize the density of habitation, to promote development of certain kinds of land, and to implement aesthetic goals.

John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257 (1996).

rights in recognition of work done in a pre-political, natural-rights sense, property rights were recognized upon the condition—implied or explicit—that work must be done.⁷⁰

As Willard Hurst famously described this ethos, it was not “the jealous limitation of the power of the state, but the release of individual creative energy that was the dominant value.”⁷¹ Thus, where “legal regulation or compulsion might promote the greater release of . . . energ[y],” policymakers in the United States “had no hesitancy in making affirmative use of law.”⁷² As Hurst put it, “[T]here was nothing merely negative about the tone of life in the nineteenth-century United States. . . . We were a people going places in a hurry. Men in that frame of mind are not likely to be thinking only of the condition of their brakes.”⁷³ Thus, the focus of the law was not on “protecting those who sought the law’s shelter simply for what they had; our enthusiasm ran rather to those who wanted the law’s help positively to bring things about.”⁷⁴

Hurst cites, for example, the way that bankruptcy law, which developed originally to protect creditors, came to emphasize instead the means through which debtors could be rehabilitated to venture in business again.⁷⁵ Similarly, debtor relief legislation and corporate franchise cases in this era sacrificed vested rights in favor of state action to foster further enterprise. Hurst quotes Justice Taney’s decision in *Charles River Bridge v. Warren Bridge*,⁷⁶ which he describes as capturing this gestalt of “property as an institution of growth rather than merely of security.”⁷⁷

Cases throughout the early nineteenth century resolved conflicts between more or less productive uses of common resources in ways that subordinated vested rights. This can be seen, for example, in mill cases where courts in the nineteenth century began validating the right of private millers to flood neighboring land without consent (albeit with

70. Eric Claeys has argued for a kind of Lockean account of property grounded in what he sees as purposive use that satisfies life conveniences, as opposed to an absolute right to exclude. See Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1398–404 (2010). It is beyond the scope of this Essay to engage directly with Claeys’ argument; it is worth noting, however, the apparent tension within the natural rights tradition between absolutism and dynamism, in light of the strains in early U.S. property law that favored the productive impulse over exclusionary norms.

71. HURST, *supra* note 21, at 7.

72. *Id.*

73. *Id.* at 9.

74. *Id.* at 10.

75. *Id.* at 26.

76. 36 U.S. 420 (1837).

77. HURST, *supra* note 21, at 27–28 (“While the rights of private property are sacredly guarded, we must not forget, that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation.” (quoting *Charles River Bridge*, 36 U.S. at 422)). This view about the centrality of productivity in this era is not without its critics. See Harry N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744, 752 (1970); see also ALEXANDER, *supra* note 6, at 185–210 (challenging Hurst’s narrative). This is a reminder that the productivity obligation was by no means the only approach to property during that era and that this historical record is far from self-evident.

compensation), and later expanded this right to a variety of manufacturing enterprises.⁷⁸ In water law more generally, common law doctrines that protected owners against interference with resources in their natural conditions began to yield to conceptions of reasonable use and public benefit with an explicitly pro-development orientation.⁷⁹

A similar theme runs through the delegation of the eminent domain power to private industry and the broader recognition of a private right of condemnation in some states.⁸⁰ As Harry Scheiber argued, courts across the country in the first half of the nineteenth century validated the delegation of eminent domain power on “turnpike, bridge, canal, and railroad companies.”⁸¹ Courts had also recognized a variety of facilitating doctrines that made the use of eminent domain by the state easier, including offsets to lower the cost of delegated condemnation and the power to alter the scope of projects once commenced, notwithstanding objections from neighbors.⁸² Private delegations of eminent domain carried these powers with them, Scheiber notes.⁸³

Public infrastructure, much of it developed through mixed public and private enterprises, also invoked the common good to foster active use of property in the face of assertions that such use interfered with existing rights. For example, what William Novak described as the “early American transportation revolution” came with doctrines such as injunctions against interference with public lands and ways and uncompensated damage—*damnum absque injuria*—where public infrastructure caused consequential harm to private property.⁸⁴

Hamiltonian dynamism was reflected in early public land policy as well, where congressional acceptance of the western lands previously held by Virginia and the Louisiana Purchase brought the federal government into possession of vast tracts of land.⁸⁵ The policy of alienating public lands is often understood as either expanding the class of landholders in a Jeffersonian vein or as privatizing the public domain.⁸⁶ Hamilton sought to dispose of public lands in large part to raise revenue,⁸⁷ but also to develop an explicitly national community and ensure the most advantageous use of that community’s collective resources. Again, private ownership in this disposition was tied to a bargain in that it relied on productivity. This thrust of national public lands policy expanded in the early decades of the nineteenth century, as federal public lands were used not only for direct

78. See generally Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HIST. 232 (1973).

79. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 32–33 (1977).

80. See Scheiber, *supra* note 78, at 235–40.

81. *Id.* at 237.

82. *Id.*

83. *Id.*

84. See NOVAK, *supra* note 4, at 128–29.

85. See Paul W. Gates, *An Overview of American Land Policy*, 50 AGRIC. HIST. 213, 219 (1976); Hurst, *supra* note 16, at 536 n.140.

86. See, e.g., McEvoy, *supra* note 17, at 96–97.

87. See generally Gates, *supra* note 85.

development, but also for creating the infrastructure necessary to release individual initiative, including support for education, interstate commerce, and active migration.⁸⁸

Across the range of doctrines, commonwealth norms and the *salus populi* principle were understood to be internal, inherent aspects of property, not external impositions on an otherwise well-demarcated private sphere.⁸⁹ Thus, the needs of the community were intrinsic to law's recognition of property rights, with courts comfortably recognizing a variety of regulatory and developmental imperatives.⁹⁰

In short, in the early development of property law in the United States, an organic perspective emerged under which an active government intervened to foster growth and favor entrepreneurship over entrenchment. This all-too-brief excursion flattens a great deal of rich history, and sidesteps myriad debates about the forces that shaped these norms in property law. Indeed, this strain in the jurisprudence has been examined by legal historians for what it reveals about interest group politics, democratic theory, and the history of regulation, among other perspectives. It can also be understood, however, as a vernacular social function that, for all of its controversy, represented a contextual response to the felt necessities of a newly developing nation.

III. CONTEMPORARY ECHOES OF A HAMILTONIAN SOCIAL FUNCTION

In the contemporary dialectic between property as negative liberty and the obligations of ownership, the harnessing of individual energy by an active state for the good of the community has faded as a distinctive, articulated trope. In practice, however, a vision of property that affirmatively harnesses ownership for collective development has never really gone away in the United States.⁹¹

These historical echoes, for example, may provide a way to understand the pedigree of current controversies over the use of eminent domain for economic development upheld in *Kelo v. City of New London*.⁹² In their

88. *Id.*

89. See NOVAK, *supra* note 4, at 9–10, 21–22.

90. *Id.* at 21.

91. This discussion moves from early nineteenth-century property developments to the present day without delving into the many significant developments in between. It remains conventional wisdom that the Supreme Court in the period between the Civil War and the New Deal constitutionalized much of the classical liberal view of property, although the cross-currents were much more complex than a simple formalist turn, and earlier commonwealth conceptions continued to play a significant role in property law. See ALEXANDER, *supra* note 6, at 248–76. Likewise, post-New Deal acceptance of the limits of property rights in the modern administrative state has been a prevailing, but not absolute, sentiment, and the pull of classical conceptions remains strong. Nonetheless, it should suffice to note that the developmental imperative that seemed so evident in the early evolution of property law in the United States tends to receive less attention in contemporary debates.

92. 545 U.S. 469 (2005). In *Kelo*, the Supreme Court reviewed the constitutionality under the Public Use Clause of the exercise of the power of eminent domain delegated to the New London Development Corporation, a private, non-profit community development

dissents in *Kelo*, both Justice O'Connor and Justice Thomas emphasized the violence to fundamental norms of private property that they saw in the decision. As Justice O'Connor phrased it, the *Kelo* majority abandoned the "long-held, basic limitation on government power" that bars a compensated transfer from one private owner to another "who will use it in a way that the legislature deems more beneficial to the public."⁹³ Justice Thomas went even further, arguing that the Framers had embodied in the Fifth Amendment Blackstone's assertion that "'the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.'"⁹⁴

The *Kelo* majority, and to a certain extent Justice Kennedy in his concurrence, responded to these assertions by emphasizing the importance of judicial deference and the political process underpinnings of governmental discretion.⁹⁵ Another way to understand what *Kelo* represents, however, can be found in Justice Stevens's citation to nineteenth- and early twentieth-century cases involving disputes over resistance to governmental support for private development. To bolster his interpretation of the Court's longstanding view of the breadth of public use, Justice Stevens cited early mill cases that allowed private developers to flood neighbors,⁹⁶ cases involving private takings to promote the working of important industries,⁹⁷ and other examples of private productive use favored in law over assertions of the right to exclude or to be free from other interference.⁹⁸

organization. The Corporation had been tasked with redeveloping the economically distressed Fort Trumbull neighborhood at the center of New London, Connecticut from a largely residential neighborhood into a mixed-use development. *See id.* at 473–75.

93. *Id.* at 494 (O'Connor, J., dissenting).

94. *Id.* at 505 (Thomas, J., dissenting) (quoting 1 BLACKSTONE, *supra* note 27, at *135); *see also id.* at 510 ("Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. 'So great . . . is the regard of the law for private property,' he explained, 'that it will not authorize the least violation of it; no, not even for the general good of the whole community.'" (quoting 1 BLACKSTONE, *supra* note 27, at *135)).

95. *Id.* at 477–78 (majority opinion) (noting that although it would violate the Public Use Clause "to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," the exercise of eminent domain in *Kelo* would have been "executed pursuant to a 'carefully considered' development plan"); *id.* at 491 (Kennedy, J., concurring) ("A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit . . .").

96. *See id.* at 479 n.8 (majority opinion) (citing Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 619–24 (1940)).

97. *See id.* ("The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. . . . The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.") (quoting *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 409–10 (1876)).

98. *See id.* at 480 (citing *Strickley v. Highland Boy Gold Mining Co.* 200 U.S. 527, 531–32 (1906) (affirming a mining company's transport of ore over another's private property); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896) (upholding an

These cases are significant not because they support the outcome in *Kelo*, which was doctrinally unremarkable in light of modern public use jurisprudence stretching back more than half a century.⁹⁹ Instead, they are significant because they reaffirm the continuity of the essentially Hamiltonian insight about the obligation of owners to advance the commonwealth in a particular entrepreneurially oriented way. Thus, collective decisions to force the productive use of property—to obligate owners to expand the common resources available to the community—are at least as deeply rooted in U.S. culture as the Lockean absolutism that sent Justice O'Connor and Justice Thomas into paroxysms in their dissents.

It is fair to ask what can normatively justify the sacrifices that the plaintiffs in *Kelo* were required to make.¹⁰⁰ The point here is not to defend the merits of what New London did in prioritizing the potential to create greater opportunity in a severely economically distressed community over the plaintiffs' attachment to their homes. Rather, the point is to recognize that an understanding of the obligations of ownership that privileges productive use has a long pedigree in the culture of property in the United States.

Framed as a vernacular U.S. understanding of the obligations of ownership, it is possible to see Hamiltonian echoes in other current property-related policy disputes beyond local economic development. Controversies over the Federal Communications Commission's (FCC) allocation of rights to the electromagnetic spectrum, for example, have been compared to similar questions about the balance between market forces and private entitlements in public lands.¹⁰¹ As the FCC is now contemplating reallocating spectrum from broadcast television to more productive wireless communications services,¹⁰² the FCC's arguments for the public interest in redirecting this resource, staked by certain incumbents, toward more productive use is supporting active ownership in a way that would likely have sounded familiar to Hamilton.¹⁰³

Federal investments in the predicates for national growth and the productive use of property in a Hamiltonian vein continue to meet claims of

irrigation district's sale for the nonpayment of assessments of an owner unwillingly included in the district)).

99. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

100. See, e.g., Alexander, *supra* note 3, at 781–82.

101. See, e.g., Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705 (1999).

102. See *Innovation in the Broad Television Bands: Allocations, Channel Sharing & Improvements to VHF*, 19 FCC Rcd. 16,498 (Nov. 30, 2010) (notice of proposed rulemaking).

103. See, e.g., *id.* at 16,502 ("It is essential to our nation's economic future that the demand for a robust mobile broadband infrastructure is met."). Not surprisingly, spectrum reallocation has sparked age-old arguments about the threat to vested rights and existing entitlements. See Edward Wyatt, *A Clash over the Airways*, N.Y. TIMES, Apr. 22, 2011, at B1.

undue interference with private property.¹⁰⁴ High-speed interstate rail lines, green infrastructure such as a new national energy grid and energy retrofit financing, federal investments in education, and many other policies are contemporary echoes of the vision of an engaged national community intervening to push markets toward collectively beneficial outcomes.¹⁰⁵ Indeed, national attention remains focused on stimulus policy as a whole,¹⁰⁶ which is a continuing source of controversy.¹⁰⁷

In the end, solutions that policymakers reach for in pragmatically solving recurring problems continue to inform our understanding of the social function of property. In the broader culture, commentators have argued for the continuing relevance of a distinctive tradition that stretches back to Hamilton,¹⁰⁸ and that tradition carries with it a correspondingly distinctive vision of the obligations of ownership that has been a part of the U.S. discourse, for better or worse, from the outset.

CONCLUSION

The idea of the social function of property does not yet come easily to mind when discussing property in the United States, although that is beginning to change. Substantively, however, Duguit's conception of the obligation to put property to productive use for the sake of social solidarity is not entirely unfamiliar in the U.S. culture of property. This Essay's rough sketch of a Hamiltonian tradition that includes an impulse towards productivity does not, of course, map on to Duguit's perspective in all of its particulars, which is hardly surprising. To take seriously the imbedded nature of the social function means looking less for universal norms and more for the granularity of the solutions that a given culture develops to a set of particular challenges. Nonetheless, the extent to which this strain in the jurisprudence resonates with the essential elements of Duguit's understanding is striking.¹⁰⁹ In this tradition, the good of the community and the commonwealth were inherent in the meaning of property, not imposed on a pre-political right, which meant that ownership included

104. See, e.g., Charles Rowley, *Socialism, Not Keynesian Economics, Motivates the Obama Administration*, CHARLES ROWLEY'S BLOG (July 12, 2010, 5:37 PM), <http://charlesrowley.wordpress.com/2010/07/12/socialism-not-keynesian-economics-motivates-the-obama-administration/>.

105. This is not to claim the broad sweep of Keynesian economic policy for the realm of the Hamiltonian tradition, but rather to highlight a few contemporary flashpoints with parallels to Hamilton's developmental program.

106. See, e.g., Michael Cragg & Joseph E. Stiglitz, *Should the Government Invest, or Try to Spur Private Investment?*, 8 *ECONOMISTS' VOICE* 1 (2011).

107. See, e.g., Editorial, *The Stimulus Tragedy*, *WALL ST. J.*, Feb. 7–8, 2009, at A10.

108. See Debate, *The Two-Party System Is Making America Ungovernable*, INTELLIGENCE SQUARED U.S. (Feb. 15, 2011, 7:13 PM), <http://intelligencesquaredus.org/wp-content/uploads/Two-party-021511.pdf> (statement of David Brooks) (“[W]e’ve got two parties in this country, but we’ve got three movements. The first . . . believes in using government to enhance equality. The second . . . believes in limited government to enhance freedom. But starting . . . with Alexander Hamilton . . . [another] believed in limited but energetic government to enhance social mobility, to give people the tools to compete.”).

109. See Foster & Bonilla, *supra* note 2, at 1008–10.

affirmative obligations, among which was a kind of dynamism that favored productivity.

Identifying this entrepreneurial approach to dynamic property as a U.S. vernacular social function is not to defend its normative desirability. It is a point well taken that focusing on increasing the resources available to the community obscures the important distributional questions that must follow.¹¹⁰ There is much to be said, moreover, for the alienation that can flow from alienability,¹¹¹ and the harms—social and environmental—that a developmental imperative can bring are manifest.¹¹² But those appropriate notes of caution should not obscure the comparative point that in grappling with what the social function of property might mean in the U.S. context, it is instructive to find echoes of Duguit and remember that for all of the particular distinctiveness of each legal culture, there are commonalities as well.

110. See Alexander, *supra* note 3, at 778 n.127 (“[A] gain in social wealth, considered just in itself and apart from its costs or other good or bad consequences, is no gain at all.” (quoting RONALD DWORKIN, *A MATTER OF PRINCIPLE* 246 (1985))).

111. See ALEXANDER, *supra* note 6, at 35–36.

112. See, e.g., John Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 569, 584–86 (1996).