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MAJOR ISSUES IN REAL PROPERTY LAW

Quintin Johnstone

Much of real property law in the United States is relatively stable and noncontroversial, with modest changes occasionally occurring, mostly at the periphery of long-established concepts. This is consistent with reliance needs of the market in land and of family succession interests in land.¹ Important segments of real property law, however, are both controversial and volatile, reflecting serious unresolved issues facing American society. This article explores some of these issues; those that are attracting a high degree of popular attention.² Each issue is briefly outlined, common issue characteristics are considered, and then legal responses to the issues are discussed, stressing the various controls imposed by government and conditions influencing government in selecting particular controls. This is followed by a future prospects section covering possible developments in issues and controls and, finally, some conclusions.

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1. Willard Hurst refers to these reliance needs as "security of expectation," without which, he says, the market could not exist. Hurst, *Legal Elements in United States History*, in *LAW IN AMERICAN HISTORY* 3, 28, 31 (D. Fleming & B. Bailyn eds. 1971).

2. The issue-attention concept as a focus of inquiry is stressed by the economist Anthony Downs in an essay, *The Issue-Attention Cycle and the Political Economy of Improving Our Environment*, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROL* 9 (J. Bain & W. Ilchman eds. 1972). See also Downs, *Up and Down With Ecology—The "Issue-Attention Cycle,"* 28 *PUB. INTEREST* 38 (1972).

High-attention issues tend to produce high incidences of legal change, as law making bodies, legislatures in particular, respond to pressures for action on the issues. This is very noticeable with the law of real property, and major movement in that law is heavily centered on the high-attention issues discussed in this article. These issues are key points in the development of real property law, and an understanding of the issues is essential to an understanding of this development. Comprehension can be complicated by the numerous, varied, and changeable legal responses of government to the issues, with so many subtle adaptations to political realities. Issue comprehension can be complicated further by the possibility that the issues may change somewhat through time as new threats emerge, affected interest group policies shift, and new solutions are proposed or attempted. This flexibility and tremendous range in legal responses also contribute to making legal aspects of high-attention land issues an unusually favorable focus for analyzing the government control process, an essential feature of any legal system.

In the analysis that follows, real property is defined broadly, although in terms consistent with how the concept often is viewed today. Real property for purposes of this article is considered to be legal rights and duties in relation to land. Land is broadly defined to mean space and its relatively fixed contents: the earth's surface and subsurface, space a reasonable distance above the earth's surface, manmade structures, and natural resources such as growing plants of all kinds, bodies of water, and minerals in place. Real property rights and duties pertain to land use, development, ownership, and security for credit extension. The law of real property is concerned not only with individual land parcels in isolation but with relationships of parcels to one another, frequently networks of parcels over a wide area. So conceived, the law of real property is crucial to how society allocates and controls much of the physical world around us.

I. HIGH-ATTENTION LAND ISSUES

The line between what is and is not a high-attention land issue is an arbitrary one but, clearly, the issues below qualify. They are widely reported by the media, frequently debated in the political arena, have been chronic for a substantial period of time, and create concern and often fervent partisanship in large segments of the population.³ High-

3. The concern and partisanship may, of course, not be entirely rational. As Downs points out, in some instances the popular concern may result in part from an explosion of ridiculous and exaggerated rhetoric concerning the subject, as with some aspects of environmental pollution in his opinion. Downs, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROL*, *supra* note 2, at 13.

attention issues are inherently contentious and as to each issue controversy tends to break down into a series of questions that adds substance to the issue and highlights its complexity and intractability, especially intractability as to solutions. Frequently there is consensus that the issue is important and troublesome, but influential interest groups are in sharp opposition over what solutions should be sought. Disagreement often turns on who should bear the cost, economic or otherwise, of solution efforts. Tension and ferment over the issues generate persistent efforts to modify legal approaches, and these efforts, when successful, commonly result in legal changes inadequate to eliminate the conflict, thus, the issue attention remains high.

Following the brief description of each issue below, examples are given of controversial questions related to the issue—questions that help in understanding why the issue is contentious and not easily resolved. The questions also indicate how deeply and often subtly imbedded are the issues in their social settings, and it is obvious that serious efforts to resolve the issues may have major ripple effects on these settings.

Housing for the poor. Much of the housing occupied by the poor is substandard by conventionally acceptable criteria and, frequently, individual unit occupancy is by more persons than is generally considered desirable. This problem is exacerbated for the minority poor, particularly blacks and Hispanics. In addition, the poor in urban areas are heavily concentrated in residential neighborhoods with exceptionally high rates of crime and delinquency and with schools below average in student performance. The highly undesirable social environment of many poverty neighborhoods is an increasingly serious aspect of housing for the poor. In very large cities, poverty neighborhoods also are remote from expanding suburban job markets. The housing situation is most desperate for a very visible and growing number of poor persons, the homeless. These are a diverse group of destitute people, many who are mentally ill or drug or alcohol dependent. They wander the city streets and sleep in the open, in railroad or bus terminals, in abandoned buildings, or in public shelters. Controversial questions concerning housing for the poor include: does trickle down without subsidy adequately take care of low-income housing or are substantial subsidies necessary; should government financing of housing aid to the poor have a high priority or should greater emphasis be placed on what may be more essential needs such as food, job training, health care, and day care; should government housing aid concentrate on publicly owned housing or on rent supplements in privately owned units; and should public housing projects be restricted only to those among the poor who

are good neighbors and abide by lease terms, and, if so, where should problem individuals and families be housed?⁴

Urban growth. With minor exceptions, American urban areas are increasing in population and in total space covered by urban improvements. Three-quarters of the United States' population now lives in metropolitan areas,⁵ and a growing number live within convenient commuting range of such areas. Growth is generally outward into the extending fringes of suburban communities and in central business districts. A high percentage of new industry is located in the suburbs and there is a continuing move of mostly middle-class and affluent persons to the suburbs. Additional retail outlets, commonly in large shopping centers, keep springing up in suburban locations to serve this population. Many office structures also have been built in the suburbs for corporate management staffs and for doctors, lawyers, and other professionals. Central business districts in most cities recently have gone through considerable redevelopment, with expanded new office building capacity and also some new construction and remodeling in efforts to retain retail and entertainment businesses. Since the 1930s, new public housing for the poor has been built, below demand but still considerable in many cities. Construction of such housing largely ended by the 1980s. The typical growth activity in American urban areas is in the suburbs, especially at the urban-rural fringe, and in central city downtown areas. Central cities increasingly are occupied by the resident poor, extensively concentrated in segregated ghettos, and by daytime white collar office employees, a high percentage of whom are suburban commuters. Some suburban communities have grown so rapidly there has been an appreciable time lag in providing public services and such infrastructure as sewers, roads, and school buildings. In central cities, infrastructure has commonly deteriorated, with breakdowns, inconveniences, and shabby appearances that reduce the amenity level of central city living. Controversies over urban growth have centered on such questions as how much government should pay, directly and indirectly, for central business district redevelopment;

4. On housing for the poor, see A. DOWNS, *RENTAL HOUSING IN THE NINETEEN EIGHTIES* (1983); INCLUSIONARY ZONING MOVES DOWNTOWN (D. Merriam, D. Brower, & P. Tegeler eds. 1985); F. REDBURN & T. BUSS, *RESPONDING TO AMERICA'S HOMELESS: PUBLIC POLICY ALTERNATIVES* (1986); HOUSING AMERICA'S POOR (P. Salins ed. 1987); I. WELFELD, *WHERE WE LIVE: A SOCIAL HISTORY OF AMERICAN HOUSING* (1988); Meehan, *Low-Income Housing: The Ownership Question*, 45 J. HOUSING 105 (1988); Starr, *Twenty Years of Housing Programs*, 81 PUB. INTEREST 82 (1985); Swanstrom, *No Room at the Inn: Housing Policy and the Homeless*, 35 WASH. U. J. URBAN & CONTEMP. L. 81 (1989).

5. U.S. Dept. of Commerce, Bureau of Census, *Statistical Abstract of the United States*, table 22 (1989) [hereinafter *Statistical Abstract*].

should government channel and restrain urban growth to prevent costly urban sprawl, inadequate infrastructure, areas of incompatible uses, and decline of central cities; should government seek to break up and prevent segregated central city enclaves for the poor and segregated suburban enclaves for the rich in some places and various subsets of the middle class in others; and should local governments be deterred from competing with one another for high property tax developments, large-scale employers, and low public cost residents?⁶

Home ownership. Home ownership is a high priority value in American society for families and even many singles. It is something that those who do not own their own homes aspire to and those that do prize very highly. It is seen as a mark of status, as enhancing one's sense of belonging to a community, and as providing greater control over one's living environment and one's future. It is also seen as a good investment to make, given the usual appreciation in home prices, and there are favorable income tax deductions for property taxes and mortgage interest payments—an encouragement to occupant home ownership. Those who own their own homes are considered more likely to keep their premises in good repair and to take an active part in preserving and expanding neighborhood amenities. Many Americans, however, who want to buy a home of their own cannot afford it or at least cannot afford it for any available place they consider acceptable. Their problem is likely to be that they cannot make a sufficient downpayment or their prospective income is too low or prospective expenses too high to qualify them for mortgage financing. If they are racial or ethnic minorities this can magnify their difficulties. Satisfying home ownership demand in many cities also has resulted in extensive conversion of rental units in apartment buildings to condominiums or cooperatives. This has contributed to severe shortages of rental housing, higher rents for remaining rental units, and dislocation hardships on displaced tenants. Questions, of course, have been raised about how this issue should be dealt with, including a very basic one: home ownership is not a necessity but a luxury, so should not the matter be left solely with the market, a control medium that through

6. On urban growth, see J. DEGROVE, *LAND, GROWTH AND POLITICS* (1984); N. SMITH & P. WILLIAMS, *THE GENTRIFICATION OF THE CITY* (1986); *GROWTH MANAGEMENT: STAYING ON TARGET?* (D. Porter ed. 1986); *Symposium: Dilemmas in Growth Management*, 50 J. AM. PLAN. A. 403 (1984); Cloar, *Who Speaks for Growth Centers?*, URB. LAND, Nov. 1988, at 10; Downs, *Traffic Congestion and Growth Limitation Policies*, URB. LAND, Sept. 1987, at 38; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

competition among developers and among lenders effectively provides home purchase opportunities to all who present reasonable possibilities for ultimate payment, a half million or more new home buyers each year? More specifically, does home ownership have sufficient social merit to justify government's providing major benefits to those who own their own homes, benefits not available to tenants?⁷

Environmental pollution. The natural environment—soil, air, and water—has been and is continuing to be polluted in ways that are threatening to human health and some claim even to the long-term survivability of the human species. The sources of pollution are numerous—everyone to some extent is a polluter. The most serious sources, however, are automobile emissions, many industries—among them coal-burning electric utility generation plants and oil refineries, local government sewage and trash disposal operations, and applications by farmers of chemical fertilizers and pesticides. Polluting substances include many kinds of industrial, transportation, and household toxic waste; medical waste; negligently leaked petroleum and other toxic products; agricultural fertilizers and pesticides; and some building materials. Most pollutants are human health risks or threats to plant and animal life. Some polluting substances are biodegradable and their harmful qualities largely disappear in a comparatively short time; other pollutants remain permanently toxic and are difficult or impossible to clean up under many circumstances if concentrations exceed the danger point. Recently the threat of pollutants to the earth's ozone layer has been widely publicized, a threat that could have very negative consequences for human health, as well as extensive global disruption from warming of the earth's atmosphere. Controversial pollution control questions include: who should be obligated to pay for clean up, especially when polluters cannot be identified or have long been out of business; what preventive measures should be imposed when the result could be plant shutdowns and unemployment, substantial cost increases passed on to consumers, or substantial government costs passed on to taxpayers; and given limited scientific knowledge of the cost or un-

7. On the home ownership issue, see NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE (1988); U.S. DEPT. OF HOUSING AND URBAN DEV., THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES: A NATIONAL STUDY OF SCOPE, CAUSES AND IMPACTS (1980); Hoeflich and Malloy, *The Shattered Dream of American Housing Policy—The Need for Reform*, 26 B.C.L. REV. 655 (1985); Meehan, *supra* note 4.

certainty of some kinds of pollution testing, how extensive and serious are the risks in many polluted settings?⁸

Siting of highly objectionable land uses. A variety of land uses are considered extremely undesirable by neighbors or prospective neighbors, hence siting can be highly controversial. Illustrative of such obnoxiously perceived uses are nuclear reactors; garbage and other waste landfills; waste incineration plants; jails and prisons; mental hospitals; drug treatment centers; shelters for the homeless; and half-way houses for the mentally retarded, recovering mental patients, or recently discharged prisoners. Questions raised about uses of this kind are: whether the use itself is necessary or even desirable, for example nuclear reactors; should more emphasis be placed on hazardous waste reduction, reuse, and recycling as distinct from its disposal at storage sites; do added costs and access inconvenience justify not siting these uses in distant remote places; and are the benefits to half-way house residents living in normal middle-class neighborhoods sufficient to outweigh the objections of nearby neighbors?⁹

Energy. Energy production and distribution is an obviously important land use, and the location of energy production facilities and distribution systems are significant factors in the location of many other kinds of land development. Energy consumption patterns also can influence land use and development, including the location and design of many kinds of land improvements. The United States is the largest energy consuming nation in the world. Domestic energy consumption in the United States has increased tremendously over the past fifty years, and threatens to increase still further despite dwindling known reserves of two principal energy sources—oil and gas—and very strong

8. On environmental pollution, see CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 1982, chs. 2-4 (1982); J. TURNER & D. MUSICK, AMERICAN DILEMMAS, A SOCIOLOGICAL INTERPRETATION OF ENDURING SOCIAL ISSUES ch. 12 (1985); *Special Issue: Acid Rain*, 6 J. ENERGY L. & POL'Y 297 (1985); *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458 (1986); Keene, *Managing Agricultural Pollution*, 11 ECOLOGY L.Q. 135 (1983); Comment, *Municipal Garbage Disposal: A Problem We Cannot Ignore*, 9 J. ENERGY L. & POL'Y 213 (1989).

9. On siting of highly objectionable land uses, see M. DEAR & S. TAYLOR, NOT ON OUR STREET: COMMUNITY ATTITUDES TO MENTAL HEALTH CARE (1982); RESOLVING LOCATIONAL CONFLICT (R. Lake ed. 1987); M. O'HARE, L. BACON, & D. SANDERSON, FACILITY SITING AND PUBLIC OPPOSITION (1983); *Siting of Hazardous Waste Facilities and Transportation of Hazardous Substances: A Law and Policy Forum*, 17 NAT. RESOURCES LAW. 427 (1984); Note, *Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810 (1986).

opposition to expansion of nuclear energy production. Not surprisingly, energy costs have been increasing faster than the overall inflation rate. The energy situation is made more troublesome by the fact that all major energy sources currently being utilized, except hydroelectric power, are serious pollution producers. There are many controversial questions raised by the energy issue, including what attempts should be made by government to mandate or encourage energy conservation, and should government fund in a major way an expansion in the most benign forms of energy: hydroelectric, solar, and ocean current? Also, should nuclear energy production in the United States be abandoned as too risky even though many foreign countries are expanding nuclear power production, with world-wide catastrophe risks, and should foreign oil and gas imports be decreased in favor of domestic American production to prevent recession in the oil and gas producing and refining states, or should the reverse course be followed to assure adequate future supplies in case military or political crises cut off foreign imports? Further, should expansion of domestic oil and gas exploration be encouraged by government, as inevitably this will increase known reserves, and should this be done in national parks, government-owned wilderness areas, and offshore despite the pollution risk and the risk to wildlife?¹⁰

Agricultural productivity and profitability. Approximately 13 % of the land surface in the United States is used annually for growing crops and vast additional acreage is used for grazing animals to produce meat, milk, wool, and hides. Although the number of persons in the United States engaged in farming has declined tremendously in recent decades,¹¹ the total value of farm output in constant dollars has increased.¹² With mechanization of many agricultural operations, new forms of fertilizer, increased use of irrigation, and improved plant and animal types, production has expanded sufficiently to meet heavy domestic and foreign demand—an unmarketable surplus remaining of some commodities. Agriculture is a particularly precarious industry,

10. On the energy issue, see J. ADAMS, *AN ENVIRONMENTAL AGENDA FOR THE FUTURE* ch. 4 (1986); CONSERVATION FOUNDATION, *supra* note 8, at ch. 5; ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS (C. Goodwin ed. 1981); P. MACAVOY, *ENERGY POLICY: AN ECONOMIC ANALYSIS* (1983); McGrath, *Natural Gas: In Turmoil and Transition*, 5 J. ENERGY L. & POL'Y 197 (1984); Rhodes, *Implementing Federal Solar Policy: Learning From the Nuclear Power Experience*, 3 J. ENERGY L. & POL'Y 189 (1983).

11. The U.S. farm population is now only about five million, whereas in 1960 it was over fifteen million. Statistical Abstract, *supra* note 5, table 1075.

12. The total value of U.S. farm output in constant 1982 dollars was 135 billion dollars in 1960, 165 billion dollars in 1987. *Id.*, table 1094.

given the uncertainties of weather, fluctuating world markets influenced by foreign governments' protection of their own producers, risks of soil depletion, and the credit crunch encountered by many American producers in bad years when trying to meet debt payments on land, animal, and machinery purchases. Government in the United States always has been particularly solicitous of American agriculture and there is a long history of government financial aid to farmers, ranchers, and milk producers, with very costly federal price supports of one kind or another in modern times. The agricultural issue has generated extensive controversy over such questions as whether the market, without intervention by government in this country, should control prices on domestically produced agricultural commodities, irrespective of what foreign governments do to aid their producers; should government try to preserve the present market share of family farms worked principally by owners and their immediate family members even when big corporate interests operating much larger farm acreage often are more efficient; should government agricultural price support programs that result in government acquisition of massive amounts of surplus commodities be continued, and if so, how should government dispose of the surpluses; what should be done to reduce long-term harmful consequences from overgrazing, lack of crop rotation, use of chemical fertilizer and pesticides, and water table threatening irrigation; and should urbanization of highly productive agricultural land be more extensively restricted?¹³

Wilderness area use and development. Much of the United States remains much as it was prior to human settlement. This includes many of the nation's forests, grasslands, wetlands, and coastal strips. These areas are concentrated in the West and Alaska, but such areas exist in all parts of the nation. Some are vast tracts of hundreds of thousands of acres, some are smaller parcels hedged in by adjoining urbanized or agricultural areas. As used here, the term wilderness refers to lands and bodies of water with little or no human development, retained

13. On agricultural productivity and profitability, see *Agricultural Law Symposium*, 3 N. ILL. U.L. REV. 253 (1983); *Symposium on Agricultural Law*, 38 ALA. L. REV. 501 (1987); *Symposium on Agricultural Law*, 34 U. KAN. L. REV. 411 (1986); Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521; Coggins, *Livestock Grazing on the Public Lands: Lessons from the Failure of Official Conservation*, 20 GONZ. L. REV. 749 (1984-85); Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443 (1982); Learn, Martin & McCalla, *American Farm Subsidies: A Bumper Crop*, 84 PUB. INTEREST 66 (1986); Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures*, 21 WASHBURN L.J. 478 (1982); Note, *The Overlooked Farm Crisis: Our Rapidly Depleting Water Supply*, 61 NOTRE DAME L. REV. 454 (1986).

largely in their natural state, and with very limited or infrequent human use.¹⁴ The federal government retains title to a high proportion of this wilderness-like land, which it administers through a complex of agencies, the most important being various bureaus and services within the Department of the Interior. On a smaller scale, many of the states also own and control substantial acreage of wilderness lands. In addition, extensive holdings of such lands are in private ownership, often as timber or mineral extraction reserves. Considerable controversy surrounds development of wilderness areas, and typical questions are: whether multiple uses should be permitted in such areas, only a prescribed single use, or no human use; should a substantial proportion of these lands owned by the federal government be disposed of to the states or private interests; should the federal government add considerably to its current wilderness area holdings; to the extent that government transfers title or extraction or user rights to its wilderness lands, under what circumstances should transferees pay at or near the market price for the interests they are acquiring; and what steps, if any, should be taken to protect species of wildlife in danger of extinction when such wildlife is dependent on wilderness areas?¹⁵

14. The term wilderness has many shades of meaning, a number of which are discussed in R. NASH, *WILDERNESS AND THE AMERICAN MIND* 1-7 (3d ed. 1982). Ambiguity of the term is even evident in this rather long definition of wilderness in the 1964 Wilderness Act, 16 U.S.C. § 1131(c) (1985):

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

15. On wilderness-type areas see J. ADAMS, *supra* note 10, at chs. 7, 10; C. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* (1982); *RETHINKING THE FEDERAL LANDS* (S. Brubaker ed. 1984); *FEDERAL LANDS POLICY* (P. Foss ed. 1987); J. WONDOLLECK, *PUBLIC LANDS CONFLICT AND RESOLUTION: MANAGING NATIONAL FOREST DISPUTES* (1988); *Symposium on Federal Forest Law and Policy*, 17 ENVTL. L. 365 (1987); Edwards, *Keeping Wilderness Areas Wild: Legal Tools for Management*, 6 VA. J. NAT. RESOURCES L. 101 (1986); Linder, *"Are All Species Created Equal?" and Other Questions Shaping Wildlife Law*, 12 HARV. ENVTL. L.

II. ISSUE CHARACTERISTICS

The above issues vary considerably in their spatial relationships and the kinds of questions they raise, but they have important elements in common other than just the high-attention they have attracted and the responses they have received from law makers and implementors. They are all chronic in the sense that they have persisted for a lengthy period of time without being resolved sufficiently to dispel the high-attention they attract or the controversy they engender. It is possible for high-attention land issues to fade into obscurity or disappear entirely, but these have not. All of the described issues, however, are subject to fluctuation in prominence and in their popular priority relative to one another and to non-land related issues. It has been claimed that high-attention issues go through cycles, rising and falling in discernable stages.¹⁶ Empirical proof of issue progression through precise stages is a difficult exercise but there is some validation;¹⁷ it is obvious that many issues gain substantial popular recognition followed by government action and then a fall-off in popular interest often accompanied by a decline or abandonment of the government action.¹⁸

Among land issues once very conspicuous on the American scene that later faded from prominence or disappeared are: what inducements should be offered and conditions imposed for settlement of virgin lands

REV. 157 (1988); Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985).

16. See Downs, *The Issue-Attention Cycle and the Political Economy of Improving Our Environment*, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROL* (J. Bain & W. Ilchman eds. 1972), in which five stages of the issue-attention cycle are outlined: (1) the pre-problem stage, (2) alarmed discovery and euphoric enthusiasm, (3) realizing the cost of significant progress, (4) gradual decline of intense public interest, and (5) the post problem stage.

A theory of stages has also been advanced for statutory evolution, data being drawn from environmental legislation. Elliott, Ackerman, & Millian, *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985). A theory of evolutionary stages in government control over natural resources also is advanced in Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361. Legal evolution, identifying stages as they become apparent, is advocated by Robert Clark as a focus of legal scholarship. See Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981). For a negative view on the Clark position, see Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284 (1981).

17. See Peters & Hogwood, *In Search of the Issue-Attention Cycle*, 47 J. POL. 238 (1985).

18. *Id.*

in furtherance of westward nation building—of high interest from the eighteenth century through the nineteenth century; where should canals be built and how should they be financed—prominent in the pre-Civil War Period; and how to deal with the tremendous volume of mortgage and property tax defaults in rural areas—prominent in the Great Depression of the 1930s. Some of the current high-attention land issues also have fluctuated substantially in prominence during the recent past. A dramatic example of this is energy, which attracted tremendous consideration following the Arab oil embargo of 1973, with interest gradually subsiding when oil production and distribution world-wide became more assured and consumers became adjusted to higher prices for petroleum products. Another example is the recent escalation of interest in pollution as new pollution threats became known and as a succession of highly publicized polluting disasters occurred. Still another example is housing for the poor, some aspects of which have created tremendous added interest in the issue. One such aspect is the great increase in numbers of highly visible urban homeless. Another is the expanded rate of violent crime, vandalism, and commercial drug trafficking in poor neighborhoods, focusing attention on neighborhood life, an important feature of housing for any group, most particularly the poor.

Another feature common to the land issues considered above is that they directly impinge on the economic or other interests of large blocks of consumers and householders, and all the issues are presented in terms that ordinary people can understand and care about. Business interests, the political elite, research specialists, and public interest and civil rights organizations may have a stake in the issues but it is the issues' mass appeal that gives them their high-attention characteristic.

Still another feature that the issues discussed above, or most of them, have in common is that in important respects they are the result of the same underlying forces. Major social issues always are prompted and shaped by an amalgam of causes but some causes generally can be identified as particularly significant. As to the issues under consideration here, demographic forces have been important contributing determinants by creating tremendous new or added pressures on land use and development. The population of the United States has increased steadily and substantially and continues to do so, with some areas increasing much more rapidly than others.¹⁹ Accommodation to such population changes has required vast amounts of new construction, energy supply, and agricultural output; has accelerated physical deterioration and obsolescence; and has added to pollution and to demands made on wilderness areas. As population increases, land and natural resources become increasingly scarce in relation to their many

19. See *infra* notes 79-81 and accompanying text.

potential uses and the allocation function becomes more complex and difficult.

Another factor that has increased land use and development pressures is the prevalent American view, often converted into policy and practice, that expanding the per capita gross national product should be a priority objective of business and government. A widely held corollary of this view is that expanding production faster than population growth will give more to all segments of the population and make redistribution to the poor less necessary or even unnecessary.²⁰ This added emphasis on production has helped intensify land use and development by such means as more factory buildings, more mineral and timber production, and more use of irrigation and chemical fertilizer in farming. To the extent that it has benefitted American consumers, the production emphasis also has enabled consumers to acquire more goods, housing, and space-related services, and has been a major factor in increasing the American standard of living. It has, however, contributed substantially to serious pollution, ecological disruption, and adverse natural resource depletion.

A quite different set of forces that has been a significant contributing cause to several of the issues described above is the degree and form of stratification in the society, with a tremendous gap between top and bottom and many gradations based on wealth, class, race and ethnic background, occupation, and age. Social stratification is a crucial contributing factor, particularly to the importance and shaping of the housing for the poor and urban growth issues, with such conditions as quality of individual housing units and resident makeup, security, and neighborhood amenities determined in large measure by social stratification forces.

Technological advances and advances in scientific knowledge also have had major causative effects on formulation and prominence of social issues. Examples of technological changes that have had a great impact on some high-attention land issues are transportation improvements, such as automobiles, trucks, and aircraft, which have been so significant in reshaping patterns of land use and development, as well as being among the principal sources of air and noise pollution. Other technological advances having major high-attention land issue impacts

20. The validity of this view as to the antipoverty effects of economic growth is explored in Danziger & Gottschalk, *Do Rising Tides Lift All Boats? The Impact of Secular and Cyclical Changes on Poverty*, 76 AM. ECON. REV. 405 (1986), concluding that economic growth has been the primary source of poverty reduction in the past but is unlikely to reduce poverty substantially in the near future. On the nature and significance of economic growth, see also Penner, *Economic Growth*, in CHALLENGE TO LEADERSHIP, ECONOMIC AND SOCIAL ISSUES FOR THE NEXT DECADE ch. 3 (I. Sawhill ed. 1988).

are: industrial automation, which has influenced patterns of urban growth, increased energy consumption, and pushed many industrial workers into unemployment and poverty with resulting housing problems; agricultural mechanization, which has increased the size of farms, increased the profitability but also the capital costs and risks of American agriculture, and has been a prime cause of farm workers moving to cities, many to urban ghettos; and low-cost air conditioning, which has been an important contributing factor to growth and development of the southern tier of states. Scientific advances have been behind most technological improvements, but increased scientific knowledge also has been a major factor in highlighting pollution risks and risks in siting nuclear installations and waste disposal facilities.

Catastrophes and accidents on a large scale have been common influences, too, on high-attention land issues, heightening concern often for long periods of time. Three Mile Island and Chernobyl focused world-wide attention on nuclear reactor siting and pollution risks; Bhopal and some lesser chemical plant fires or explosions did the same for chemical plant risks; the Exxon Valdez oil leak accident off the Alaskan coast provided unprecedented publicity to the risks of relying heavily on ships to transport vast quantities of oil; the 1969 spill off the California coast near Santa Barbara attracted tremendous attention to pollution dangers of off-shore oil extraction; the drought of 1988 pointed up the vulnerability of American agriculture in a bad crop year. As these examples indicate, disasters dramatically heighten issue attention and provide vivid reminders that tend to perpetuate interest and shape issue responses.

Disasters are accidental means of influencing issue attention, but can such attention consciously be manipulated, including intentional turning attention up or down? The answer is that it can be, and issue manipulation by politicians, government agencies, business, and cause organizations is common. Presidents of the United States, state governors, and big city mayors have been particularly effective in consciously influencing public opinion and concern on land issues.²¹ So

21. Examples are legion. Major political figures regularly seek enhanced public attention and support for the agendas they seek to further, and this involves publicly taking stands and pushing positions on issues, often land issues. President Bush's campaign promises on the environment and his post-campaign follow-up are examples of such issue manipulation. The Franklin Roosevelt New Deal and the Lyndon Johnson Great Society, both having low-income housing components, also are examples. Many big city mayors made urban renewal, in one guise or another, a program they pushed; and it is common for mayors, and sometimes for state governors, to seek popular support for their stands on the property tax, often advocating no increase or rationalizing what they claim is the great need for at least modest increases.

have individual prominent legislators, legislators acting collectively, and even courts, most notably the Supreme Court of the United States.²²

Issue formulation and advocacy are essential aspects of government, with heightening of popular attention on issues and solutions urged by proponents commonplace in the governing process. Private interest groups and their representatives are active in this process as well, including such specialists in public opinion manipulation as the print and broadcast media, trade and professional associations, public relations and advertising firms, and so-called public interest organizations. It is a regular part of their job to convey a message to the public on issues and to broaden and intensify popular interest on issues with which they are concerned. All high-attention land issues regularly are subjects of such manipulative efforts.

In determining how land issues are shaped and the degree of attention they receive, still another set of influences is pervasive and often crucial. This set of influences, present in all sorts of issue formulation and advocacy, consists of moral judgments, widely shared in the society, about broad categories of behavior. These judgments are beliefs about what is morally preferable, in some instances even morally mandated, in situations frequently arising in the society, beliefs often held with intensity and sense of mission. Of relevance to high-attention land issues are such widely shared beliefs as: that racial and ethnic discrimination is wrong; that the society should provide aid and assistance to the disadvantaged, including housing when necessary; that government should treat human health and safety as a super priority; that home ownership is a benefit the society should encourage; that open and competitive markets, with little government interference, should be established and maintained to secure optimal social results from the economy; and that vast areas should be preserved in their pristine natural condition because they are beneficial to humans and because, in the opinion of some, this is an obligation to the natural order of things. Another widely shared belief of special relevance to high-attention land issues is that land development generally should be encouraged because of its employment, property tax, and productivity benefits. This belief, however, is less extensively held or held with more

22. For example, it is quite evident from the various opinions handed down in the recent U.S. Supreme Court takings cases that the justices were interested in shaping views, both within and without the legal profession, on the important matters involved in those cases. The recent takings cases are carefully reviewed in Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1 (1988). Given the extensive interest in major cases decided by judges, appellate judges in particular, it is to be expected that judges generally, through their holdings and opinions, will seek to influence popular and professional views on issues arising in the important cases they decide. In effect, issue manipulation is inherent in the American judicial role.

qualifications than in generations past.²³ Clearly, beliefs and judgments of the sort mentioned can readily conflict with one another, and major differences exist as to how far each should be pushed. But we all hold personal moral beliefs concerning land as well as other issues, usually colored by how we perceive that the world around us functions. When many other persons hold the same beliefs, these collective judgments can have a major bearing on creating the form and prominence of high-attention issues.

III. LEGAL RESPONSES TO ISSUES

Each of the high-attention land issues considered above has generated an extensive body of law and one to which all levels of government—federal, state, and local—make significant contributions. This multigovernment involvement increases control diversity, as some controls apply nationally, some even internationally, but many apply only in individual states or localities. Overall, however, there is a high degree of federal government dominance of the control process directed at high-attention land issues. The big moves commonly come from federal sources. Furthermore, legislatures, the federal Congress in particular, generally are the principal government instrumentalities imposing controls and establishing control policies, aided in many spheres by administrative and enforcement agencies to which legislatures have assigned major responsibilities. The courts make a significant enforcement contribution in relation to high-attention land issues, but apart from constitutional determinations that may be of great import, their law and policy making is limited largely to the essential but lesser roles of construing ambiguous statutes and administrative regulations and making modest revisions in common law principles.

Controls responsive to high-attention land issues also tend to be unusually volatile, making these issues among the most active points of change in the entire massive and diverse field of real property law. The very nature of these issues, characteristics such as the urgency with which they are viewed, the hard questions they raise, the controversy that surrounds them, and the basic social forces that have brought them into being, all contribute to this high incidence of legal change. Such characteristics mean that under present conditions, the issues cannot be resolved to the full satisfaction of the various interest groups concerned, although partial resolution is possible. Demands for change are strong

23. Reduced adherence to the development ethic and resulting consequences are considered in Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). On the evolving stewardship ethic as to land and natural resources, see *Symposium: Stewardship of Land and Natural Resources*, 1986 U. ILL. L. REV. 301.

but opposition also is strong because of the high cost in economic or other value terms of fully acceding to change demands. The demands, however, remain persistent, and given the importance of the issues and the widely perceived merits of the demands, relevant changes in the law frequently are made, but tend to be marginal and not fully satisfactory to proponents or opponents so far as those parties' long-term preferences are concerned. The pressures for change are soon renewed as major issues are not resolved with good prospects for near-future further revisions in the law. Proponents take what they can get, opponents in the short-run must adjust to their losses, but those on both sides stand ready at the next favorable opportunity to push for more of what they want.

There is extraordinary richness and variety in the legally authorized controls utilized by government in efforts to deal with high-attention land issues. The controls readily fall into four general categories, categories extensively resorted to in many circumstances by advanced legal systems: regulation, government subsidies, taxation for control purposes, and government ownership. Under each of these four categories there are subsets of controls that have been utilized in attempts to influence the issues considered by this article. Examples help highlight how diversified is the control spectrum.

Regulation is the most common of the control categories used by government in grappling with high-attention land issues, and the range of regulatory control subsets pertaining to such issues is unusually broad.²⁴ Some of the more important regulatory subsets of controls are the numerous varieties of use restrictions on land and natural resources.²⁵ Others include: required factual disclosures, with or without

24. The scope of government regulation pertaining to high-attention land issues is well illustrated by the detailed coverage of such regulation in the many practitioner-oriented treatises covering land use and environmental subjects. Among the leading specialty treatises of this sort are W. FOX, *FEDERAL REGULATION OF ENERGY* (1983); F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* (1988); J. JUERGENSMEYER & J. WADLEY, *AGRICULTURAL LAW* (1982 & Supp. 1985); D. MANDELKER, J. GERARD, & E. SULLIVAN, *FEDERAL LAND USE LAW* (1989); ROCKY MTN. MIN. L. FOUND., *AMERICAN LAW OF MINING* (2d ed. 1984); W. RODGERS, *ENVIRONMENTAL LAW* (1986); P. ROHAN, *ZONING AND LAND USE CONTROLS* (1989); H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* (1988); N. WILLIAMS, *AMERICAN LAND PLANNING LAW* (1988).

25. *E.g.*, zoning, subdivision regulations, housing codes, building codes, historical preservation requirements, development moratoria, antipollution restrictions, water diversion limitations, nuisance restrictions on land use, nuclear facility siting and licensing requirements, restrictions on exploration and production of oil and natural gas, requirements for surface and shaft mining of coal and other minerals, and import quotas on some foreign agricultural products to benefit American producers. These and many other regulatory forms are given extensive

required factual evaluations;²⁶ restrictions on the validity of conveyances, leases and other land transactions;²⁷ and organizational and operational restrictions on businesses and professions that service land transactions.²⁸ Another regulatory subset, the commonly imposed exaction, requires land owners to pay for land improvements such as public infrastructure, or dedicate interests in other land as a condition to being permitted to develop their own land.²⁹

Regulation generally restricts those on whom the regulation is imposed in a manner contrary to their interests and preferences and with the intended consequence of benefiting others. Those expected to be benefited may be the public at large, often by attempts at furthering abstract values such as esthetics or reverence for nature or by reducing health and safety risks to large indeterminate numbers of persons. Those intended to be benefited, however, may be more narrowly targeted, for instance tenants, prospective homeowners, nearby neighbors, or local taxpayers. Benefits may even entail some private parties

consideration in the treatises cited *supra*, note 24.

26. *E.g.*, federal and state environmental impact statements, D. MANDELKER, *NEPA LAW AND LITIGATION* (1984); S. TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STRATEGY OF ADMINISTRATIVE REFORM* (1984); and disclosure features of some anti-redlining statutes, statutes seeking to prevent geographically-based discrimination by mortgage lenders, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* 809-10 (2d ed. 1985).

27. Much of lease and conveyancing law consists of statutory and common law restrictions on the validity of efforts to transfer interests in land, frequently transfers pertaining to high-attention land interests. *E.g.*, invalidating some contracts or conveyances as against public policy, including adhesion transactions, usury, and extortion laws; implying warranties of habitability and fitness in leases and deeds; restricting rents through rent control; and restricting conversion of rental properties to condominiums and cooperatives.

28. *E.g.*, licensing of real estate brokers; unauthorized practice of law restrictions on nonlawyers in real estate transactions; and charter and other scope of business limitations on banks, thrifts, and other mortgage lending institutions. See Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U.L. REV. 493 (1988).

29. Exactions resemble taxes and may be payable in money or contributions of land or land improvements. They also are referred to as impact fees, linkages, dedications, and fees in lieu of dedications. Some exactions may even be referred to as special assessments. On exactions, see *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. no. 1 (1987); Marcus, *A New Era in Zoning Exactions*, in *INCLUSIONARY ZONING MOVES DOWNTOWN*, *supra* note 4, ch. 14; Taub, *Exactions, Linkages and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1988).

subsidizing other private parties.³⁰ Although many regulatory controls result in economic costs to those regulated, occasional controls have built-in rewards that help compensate for these costs.³¹

Illustrative subsets of government subsidies are grants,³² below

30. "Much evidence indicates that all rent controls, even temperate controls, transfer income from owners to tenants or between various classes of tenants." A. DOWNS, *RESIDENTIAL RENT CONTROLS, AN EVALUATION 2* (1988) (an Urban Land Institute publication). Similar income transfers also characterize some mandatory set-aside ordinances requiring developers of larger residential projects to allocate a percentage of units to low- and moderate-income housing. On such requirements, see 1 P. ROHAN, *supra* note 24, § 3A.02(1); and Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing By Local Government*, 5 URB. L. & POL'Y. 169 (1982). Some linkage arrangements requiring large office developers to build or pay for low- or moderate-income housing have comparable transfer consequences. On these linkages see Taub, *supra* note 29, at 534-49.

31. An example is emissions trading under the Federal Clean Air Act that allows pollutant dischargers who reduce discharges at particular points to receive credits entitling them to relax their obligations at other points. Sale or lease of these credits to other dischargers, conceivably at a profit in some instances, is also possible. On emissions trading, see R. LIROFF, *REFORMING AIR POLLUTION REGULATION: THE TOIL AND TROUBLE OF EPA'S BUBBLE* (1986); T. TIETENBERG, *EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY* (1985); Dudek & Palmisano, *Emissions Trading, Why is this Thoroughbred Hobbled?*, 13 COLUM. J. ENVTL. L. 217 (1988). Another example is profit on land use prior to final amortization of nonconforming uses under zoning laws, in some instances even monopoly profits. See Peterson & McCarthy, *Amortization of Legal Land Use Nonconformities as Regulatory Takings: An Uncertain Future*, 35 WASH. U.J. URB. & CONTEMP. L. 37 (1989); Reynolds, *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 WASH. U.J. URB. & CONTEMP. L. 99, 118-23 (1988). Still another such example is the transferable development right, analyzed in J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* (1974); Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP. PROB. & TR. J. 435 (1986).

32. The federal government has been by far the largest government grant maker, including many grants pertaining to high-attention land issues, although the states and localities have also had grant programs directed at such issues among others. Usual recipients of federal grants have been the states and localities, and such grants have been made for a variety of purposes, such as housing, particularly low-income housing, see D. MANDELKER, *HOUSING SUBSIDIES IN ENGLAND AND THE UNITED STATES* chs. 3-4 (1973); Barron, *New Deals: PHAs as Financiers*, 45 J. HOUSING 75, 75, 77 (1988); Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URB. LAW. 1 (1977). Other purposes include highways and mass transit, 5 P. ROHAN, *supra* note 24, ch. 30; sewage treatment works, 1 F. GRAD, *supra* note 24, § 303(b); coastal zone management, 3 F. GRAD, *supra* note 24, § 12.05(4)(a); and urban renewal, S. GREER, *URBAN RENEWAL AND AMERICAN CITIES, THE DILEMMA OF DEMOCRATIC*

market loans or loans to persons who are unacceptable private market credit risks,³³ price support programs for agricultural commodities,³⁴ and insurance or guarantees below market or involving risks that private business will not take without government financial backing.³⁵ In subsidizing, government may provide full funding for a particular project or program or it may merely supplement private funding, sometimes referred to as public-private partnerships.³⁶ In this latter type arrangement, the monetary share of the private contribution often exceeds by far what the government contributes.

Taxation for control purposes includes both tax preferences and tax disincentives or deterrents, in either instance taxes imposed not just for

INTERVENTION (1965); D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* ch. 17 (2d ed. 1986); *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* (J. Wilson ed. 1966); Taylor, *The Renewal Programme: Promise or Chimera?*, 18 U. TORONTO L.J. 287 (1968). Some scholars have concluded that the system of federal grants as it has evolved undercuts state power to a degree that threatens federalism's values. *E.g.*, Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URB. LAW. 493 (1987).

Federal grants have also been made to individuals. *E.g.*, Section 8 housing grants, Whitman, *supra*, at 55-59; cost sharing of farmers' soil and water conservation efforts, 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 24, ch. 13; and some hazardous waste cleanup costs under Superfund, Sheridan, *How Clean is Clean: Standards for Remedial Actions at Hazardous Waste Sites Under CERCLA*, 6 STAN. ENVTL. L.J. 9, 12-13 (1986-87).

Most government grants have been of money, but in earlier periods, large federal grants of land were made to the states on admission to the union or for specified purposes later. *See* P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* chs. 12-14 (1968). Massive federal land grants were also made to settlers and railroads. *Id.* chs. 14-18.

For their grant making, some government agencies have developed detailed fund allocation, monitoring, and review procedures. At the federal level, these procedures are considered in A.B.A., *SECTION OF PUBLIC CONTRACT LAW, FEDERAL GRANT LAW* (M. Mason, ed. 1982).

33. *E.g.*, Farmers Home Administration loans to farmers, 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 24, § 14.4 (1982).

34. *Id.* ch. 9, § 12.4.

35. *E.g.*, Federal Housing Administration insurance of private residential mortgages and Veterans Administration guarantee of such mortgages, G. NELSON & D. WHITMAN, *supra* note 26, § 11.2; federal crop insurance, 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 24, ch. 15; and bank and thrift institutions' federal deposit insurance, a program helpful in providing mortgage credit, particularly for home purchases, despite its recent severe financial difficulties.

36. On the public-private partnership concept, with illustrative cases in which it has been applied, see *PUBLIC-PRIVATE PARTNERSHIP: NEW OPPORTUNITIES FOR MEETING SOCIAL NEEDS* (H. Brooks, L. Liebman & C. Schelling eds. 1984); Davis, *Public-Private Partnerships: Improving Urban Life*, 36 ACAD. POL. SCI. PROC. 2 (1986).

revenue raising but to influence behavior for other purposes. Taxation can be, and often is intended to be, a potent control device in addition to providing governmental funding. Tax disincentives, taxes designed to discourage behavior by those subject to the tax, are utilized far less often than are tax preferences, tax provisions intended to encourage taxpayer behavior.³⁷ Tax preferences resemble government subsidies in that the government in effect is providing financial aid to those benefited, but the means by which tax preferences are made available and the aid formulas differ from subsidies.

The most important tax preferences of relevance to high-attention land issues are those provided for by the federal income tax and local and state property taxes. Examples from among the many such federal income tax preferences are: homeowner mortgage interest deductions, an inducement to home ownership;³⁸ local and state real property tax deductions, a further inducement to home ownership;³⁹ exemption of interest on certain local and state government bonds, including those financing qualified low-income rental housing and redevelopment of blighted areas;⁴⁰ and the low-income housing credit.⁴¹ Other favorable depreciation provisions of federal income tax laws that encouraged extensive new commercial urban growth construction were repealed by the 1986 Tax Reform Act.⁴² Local and state property tax law preferences of major significance to high-attention land issues include: circuit breakers—property tax burdens reduced or eliminated for low-income persons, including tenants in some states;⁴³ assessment of agricultural

37. An example of a disincentive tax is the Vermont Land Gains Tax, VT. STAT. ANN. tit. 32, § 10001. (1981), designed to discourage speculation in rural land. On this tax, see Baker, *Controlling Land Uses and Prices by Using Special Taxation to Intervene in the Land Market: The Vermont Experiment*, 4 ENVTL. AFF. 427 (1975). A variety of charges to improve environmental quality, some of them in effect taxes, has also been imposed or advocated. These charges are discussed in F. ANDERSON, A. KNEESE, P. REED, R. STEVENSON & S. TAYLOR, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977).

38. 2 B. BITTKER & L. LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 31.2.7 (1989 cum. supp. no. 3).

39. *Id.* vol. 2, § 32.1.3.

40. *Id.* vol. 1, § 15.4.2.

41. *Id.* § 27.5; Goldstein & Edson, *The Tax Credit for Low-Income Housing*, 17 REAL EST. REV. 49 (1987).

42. These real estate depreciation tax shelters and the effect on them of the 1986 Tax Reform Act are briefly described in M. GRAETZ, FEDERAL INCOME TAXATION 1002-03 (2d ed. 1988).

43. J. ARONSON & J. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS 138-39 (4th ed. 1986); Comment, *Circuit-Breaker Legislation: A Practical Approach to Property Tax Relief for Low-Income Households*, 32 TAX LAW. 187 (1978).

and forest land at current use value rather than market value, to encourage continued agricultural and forest usage and restrain urban growth,⁴⁴ and reduced assessments of newly built structures to attract development and encourage growth.⁴⁵

Another preference relates to illegal assessment practices. Local real property assessments in many communities seriously lack uniformity, with substantial disparities among types of properties in the percentage of true value at which land parcels are assessed, despite laws generally requiring uniformity.⁴⁶ Residential properties, particularly owner-occupied homes, often are underassessed consciously and, thus, are given preference by local assessing authorities over other types of properties in these frequent but patently illegal departures from assessment uniformity. The usual reason for this illegal preference is that homeowners in most local communities are powerful political constituencies whose interests are catered to by those in power.

Much of the land in the United States is government owned, approximately one-third of all land in the nation by the federal government, with the states and localities having title to substantial amounts as well. In gross acreage, government land ownership is heavily of undeveloped open space lands, mostly in twelve western states, but government also has title to a tremendous number of land parcels nationwide developed with such improvements as transportation systems, military installations, irrigation facilities, and buildings of all kinds. This ownership is the basis for the fourth category of government control over land relevant to high-attention land issues. Government ownership as a form of control has the advantage that as owner government has broad powers to determine how and by whom its property is used. These powers over land use and alienation, however, have as to many government owned lands and natural resources been limited by restraints government has placed on itself as to what can be

44. R. Barlowe & T. Alter, *Use Value Assessment of Farm and Open Space Land*, MICH. ST. U. RES. REP., Sept. 1976, at 308. Experience with such preferences is discussed in Becker, *Preferential Assessment of Agricultural and Forest Land Under Act 319 of 1974: Entering the Second Decade*, 90 DICK. L. REV. 333 (1985); Note, *Separate Property Tax Classification for Agricultural Land: Cure or Disease?*, 64 NEB. L. REV. 313 (1985).

45. 16 S. FLANAGAN, MCQUILLAN MUNICIPAL CORPORATIONS § 44.75 (3d ed. 1984). A New York statute authorizing reductions in assessments for new multi-unit residential structures in specified areas is analyzed in Note, *Targeting Tax Dollars More Efficiently: Proposed Modifications to the 421-a Real Property Tax Exemption*, 15 FORDHAM URB. L.J. 1077 (1986-87).

46. On lack of assessment uniformity in property tax assessments, see J. ARONSON & J. HILLEY, *supra* note 43, at 128-31.

done with its assets and when, if ever, they may be conveyed.⁴⁷ Despite these restraints, through construction and development on its properties—usually for carrying on government functions, and through leases,⁴⁸ use rights,⁴⁹ and conveyances,⁵⁰ government has exerted

47. *E.g.*, withdrawal of large areas of federally owned lands from permissible oil and gas leasing, W. FOX, *supra* note 24, at 16, 62-63; restrictions on the quantity of timber that may be harvested from national forests, Wilkinson & Anderson, *supra* note 15, at 154-88; grazing limitations on government lands, 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 24, at § 6.4; and limitations on use of wilderness areas, Edwards, *supra* note 15.

48. Mining leases are one such type of lease. On such leases, see Pariser, *Current Issues Relating to Emergency Federal Coal Leasing*, 89 W. VA. L. REV. 593 (1986-87). Other common types of leases on government lands are on-shore and continental shelf oil and gas leases, W. FOX, *supra* note 24, chs. 3-4; and public housing leases to residential tenants, BUREAU OF NAT'L AFFAIRS, GUIDE TO FEDERAL HOUSING PROGRAMS 65-67 (2d ed. 1986). For recent changes in lease terms and other public housing tenants' rights and obligations, see *1988 Developments in Federal Housing Law*, 22 CLEARINGHOUSE REV. 866, 867-71 (1989).

49. *E.g.*, grazing or livestock use permits, 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 24, § 6.4; Coggins, *supra* note 13; special use permits for oil and gas prospecting, J. WONDOLLECK, *supra* note 15, at 51-52; and permits for access to national parks, 3 F. GRAD, *supra* note 24, § 12.03(4)(c).

50. Disposition of government owned lands, for instance, dominated much of American history during the eighteenth and nineteenth centuries. On this disposition of the federal domain, see G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 58-134 (2d ed. 1987); and, generally, P. GATES, *supra* note 32. Whether or not much of the remaining western lands held by the federal government should be conveyed remains controversial. On this controversy, see RETHINKING THE FEDERAL LANDS, *supra* note 15.

Conveyances of some government lands to private parties currently are made at no charge or substantially below market value as an inducement to other government goals being furthered. For example, to encourage prospecting for minerals, the federal government gives those who discover certain valuable hard rock minerals an entitlement to conveyance of the mineral properties for nominal claim fees, with no royalty or other payments due the government on extraction. This long-established entitlement right has been criticized as today unduly favorable to mining interests. See Braunstein, *Natural Environments and Natural Resources: An Economic Analysis and New Interpretation of the General Mining Law*, 32 UCLA L. REV. 1133 (1985). Another example of below market government conveyance is urban homesteading. Under this type of program properties physically abandoned by their owners and usually tax delinquent and in blighted areas are conveyed by cities to homesteaders at little or no charge upon the homesteaders residing on the premises for a prescribed period of time and making substantial repairs. On urban homesteading, see J. HUGHES & K. BLEAKLY, URBAN HOMESTEADING (1975); Note, *Homesteading Urban American After Moore v. Detroit: The Constitutionality of Detroit's Nuisance Abatement Plan and Its Implications for Urban Homesteading Legislation*, 34 WAYNE L. REV. 1609 (1988).

tremendous influence over land bearing on the issues with which this article is concerned. This influence has been greatly enhanced through the power of eminent domain by which government can acquire title to property at a fair price regardless of whether the owner wishes to sell or wishes to sell at the price set. Through the use or threat of this power, government agencies regularly acquire additional land parcels as needed.

Not only is there a very broad range of controls utilized in government approaches to high-attention land issues but typically individual controls, when imposed by law makers, are carefully tailored to accommodate particular needs and pressures. This shaping of controls often reflects a compromise balancing the claims and political power of competing proponents and opponents on any one issue. Such compromises, with their shadings and trade-offs, are most often evident in legislative enactment and administrative rule making processes and in the resulting statutes and rules,⁵¹ but can be detected even in some judicial orders and decisions.⁵² Tailoring of controls involves maneuvering and often bargaining on such variables as the nature and severity of regulation, the amount of subsidy or tax preference, the number and types of persons favorably or unfavorably affected, duration of the controls, sanctions imposed for violation, and who has what kind of access to the enforcement process.

Enforcement is a particularly crucial aspect of government controls because many persons or organizations will not comply unless forced to or unless the risk of coercive procedures is high and the penalty possibilities substantial. Mere enactment of a statute, adoption of a

51. Compromises among positions of concerned interest groups occur during the enactment process of most major legislation. An excellent example of this is wilderness legislation and the political background and legislative history of important wilderness statutes, as set forth in C. ALLIN, *supra* note 15. Illustrative compromises and trade-offs in administrative agency decision making are recounted in detail as to forest management in J. WONDOLLECK, *supra* note 15, and as to the Environmental Protection Agency controversy over scrubber requirements for high sulfur coal burning plants in B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981). Another example in another context is the comprehensive study of an earlier political battle over siting of public housing in Chicago and the ultimate political settlement involving both administrative agency and local legislative action. On this Chicago situation, see M. MEYERSON & E. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST (1955), a study that caused something of a stir politically and intellectually when published.

52. Judicial balancing is one form of control tailoring. The balancing approach, as advocated by one judge, is discussed in Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988). For a critical evaluation of judicial balancing, see Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

regulation, or entry of a judicial decision may not assure compliance with the declared law.⁵³ An occasional law is even promulgated with such inadequate enforcement possibilities as to indicate that the law makers intended it to be largely hortatory and to have no effect beyond their expression of nominal support.⁵⁴ Sanctions may be weak or nonexistent, enforcement agencies grossly understaffed and underfinanced, or enforcement authorities under little compulsion to make serious enforcement efforts. Inherent public concern with high-attention issues, however, makes lax enforcement of controls directed at such issues likely subjects of media comment and criticism that can lead to more vigorous enforcement action. Enforcement prospects also can be enhanced if interested private organizations or individuals with sufficient resources have the legal right to seek compliance by resort to adjudicative bodies.⁵⁵ Enforcement left entirely to government agencies often is more sporadic and less vigorous than if private interests have a major role in initiating and conducting compliance proceedings.

Government usually seeks to deal with high-attention issues by developing a control program focused on a particular aspect of an issue, a particular problem that seems amenable to action. Some programs

53. For a discussion of the many variables in the enforcement process, including the typical high degree of public official discretion as to how and against whom compliance efforts are directed, see K. HAWKINS & J. THOMAS, *ENFORCING REGULATION* (1984). Problems in enforcement of pollution control laws, with special reference to compliance monitoring, are discussed in C. RUSSELL, W. HARRINGTON, & W. VAUGHAN, *ENFORCING POLLUTION CONTROL LAWS* (1986).

54. *E.g.*, property tax statutes in some states requiring full-value assessments but which are universally and flagrantly violated by assessors in many communities. On lack of uniformity in property tax assessments, see *supra* note 46 and accompanying text. Another hortatory example is the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3(b)(3), that "encourages" lenders not to enforce due on sale clauses in mortgages but to permit buyer assumptions at the existing contract rate or below the current market rate.

55. This may involve direct action against violators, private or public, or action to force government officials to take enforcement action. Statutory authorization of citizens' law enforcement suits are particularly common in environmental law. See Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVL. L. REV. 23 (1985); Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U.L. REV. 220 (1987). Some private parties may have the legal right to impose sanctions without initiating judicial or administrative proceedings, *e.g.*, tenant right to withhold rent because of serious housing code violations or the landlord's breach of an implied warranty of habitability, R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 6.43 (1984); and the right to enter the land of another to abate a polluting or other nuisance, 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.18 (2d ed. 1986).

rely exclusively on but one kind of control to achieve their objectives,⁵⁶ others utilize two or more types of controls to increase their effectiveness.⁵⁷ Some programs also are developed and administered by only one level of government, but frequently programs involve extensive cooperation between two levels of government or even among all three.⁵⁸ If local government is involved, state enabling acts usually are required to provide the requisite authorization and these acts commonly prescribe what controls may be imposed and under what circumstances the controls may be imposed.

Many conditions can influence law makers' decisions in selecting particular controls for dealing with high-attention land issues. The relative political power of affected groups often, of course, can be crucial, and how seriously these groups perceive particular issues and how effectively they organize their supporters can be determinative of outcomes. Tenants, homeowners, consumers generally, and poverty groups particularly, are difficult to organize as lobbying forces, but elected government officials commonly are beholden to them and frequently seek voter support by stands taken on land and other issues that the officials think will be looked on with favor by these constituencies. There also are constitutional limits on imposition of controls, of which the often murky doctrine of takings has been especially troublesome in the real property field. Local police power controls over land use have been peculiarly vulnerable to being upset and labeled unconstitutional takings unless adequate compensation is paid to adversely affected property owners, and compensation in these situations government usually will not voluntarily offer.⁵⁹ Other significant constitutional

56. *E.g.*, most of the local government police power controls, such as zoning, subdivision regulations, and building and housing codes, that in most instances rely exclusively on regulation.

57. An example of a multicontrol program is the Superfund Act, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, that imposes regulatory cleanup obligations on private parties but a large government subsidy is available to facilitate the process. On the Superfund Act, see 1A F. GRAD, *supra* note 24, ch. 4A; *Developments in the Law*, *supra* note 8; *Superfund and Hazardous Wastes*, 6 STAN. ENVTL. L.J. 1 (1986). The federal urban renewal program is another example of a multicontrol program and one that combined regulation, government subsidy, government ownership, and in some instances tax preferences. On federal urban renewal see citations on urban renewal, *supra* note 32.

58. *E.g.*, federal funding of state or local regulatory programs for specified land control purposes.

59. On the constitutional doctrine of takings, see Mandelker, Gerard & Sullivan, *supra* note 24, § 2.06; 1 N. WILLIAMS, *supra* note 24, ch. 5A; Fishel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988).

restraints include those on government power to tax, especially equal protection and equal and uniform taxation concepts that limit the extent to which differential tax preferences and burdens may be imposed on persons similarly situated.⁶⁰

In other important respects particular segments of government are limited in the controls they legally may impose. For instance, the states and localities are preempted by the federal government in significant land-related regulatory spheres.⁶¹ Also, states and localities usually are limited to imposing legal controls only over lands within their respective geographical boundaries. Geographical limitations on the legal authority of local governments has been one of the inducements for state intervention with state controls to deal with land problems overlapping local government boundaries.⁶² Cooperation among local governments and development of local or regional government units coterminous with problem areas are alternative approaches that have been made to some metropolitan region and other largely in-state regional problems.⁶³ Geographical limitations on exercise of state government authority has been a similar inducement for the federal government to intervene in land problems transcending state boundaries,⁶⁴ although there recently has been some cutback in such intervention.⁶⁵ Constitutional powers of the federal government, most particularly the commerce power, have proven elastic enough to permit this extensive intervention. Potential effectiveness of particular

60. On constitutional concepts of equal protection and uniformity applicable to taxation of real property, see C. SANDS & M. LIBONATI, *LOCAL GOVERNMENT LAW* §§ 23.10-23.13 (1982); Newman & Feola, *Housing Incentives, A National Perspective*, 21 *URB. LAW.* 307, 326-34 (1989).

61. *E.g.*, radiation protection standards, 2 F. GRAD, *supra* note 24, § 6.02(1)(b); and many activities on federal lands, G. COGGINS & C. WILKINSON, *supra* note 50, at 191, 209-11.

62. There has been considerable movement in recent years toward increased state intervention in control over land use, particularly as to environmental regulation and zoning. See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL, A REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY* (1971); 5 N. WILLIAMS, *supra* note 24, ch. 160.

63. Among these local cooperation and special purpose forms of government are local authorities, special districts, and councils of government. 1 C. SANDS & M. LIBONATI, *supra* note 60, §§ 2.17, -19, -23.

64. Federalization of controls, however, may in some instances result from prospects that federal regulation would be less stringent than that of key states and hence those favoring less stringent regulation force through federal preemption. This arguably is what happened in the initial federalization of environmental law. See Elliott, Ackerman & Millian, *supra* note 16.

65. On federal land control cutbacks, see *infra* notes 85-86 and accompanying text.

government instrumentalities, apart from jurisdictional limitations, can also be a factor in determining where responsibility for carrying out control responsibilities is allocated. In determining where—within a level of government—to assign responsibility for administering controls, legislatures often take into consideration differences among agencies in staff availability, competence, and aggressiveness. Depending on what results the legislature wants, the most qualified and aggressive agency may be selected or avoided in making control assignments.

Cost to government is another factor that can influence law makers' decisions in selecting controls. Some controls are much cheaper to impose than others. Despite the frequent appreciable expense to government of setting up effective enforcement programs for control through regulation, regulation often costs government less than subsidies, tax preferences, or government ownership. Regulatory enforcement techniques can also be adopted that will hold down substantially government enforcement costs. Exclusive or near exclusive reliance on private citizen complaints as a means of initiating enforcement action, rather than government independently mounting compliance investigations, can be one such cost-saving technique. Another is to authorize legally private parties bringing compliance proceedings against other private parties and then rely on such proceedings as the principal means of regulation enforcement.⁶⁶ Government ownership, as well, can be a particularly costly control form to government if it entails government purchase of expensive land parcels or constructing expensive land improvements.

Although frequently the source of political controversy, the federal government, with its tremendous financial resources, has used subsidies extensively as a means of dealing with high-attention land issues, especially in funding low-income housing, infrastructure encouraging to urban growth, clean-ups of environmental pollution, and aiding agricultural profitability.⁶⁷ Some of this subsidy aid has gone directly to private parties; much of it has been channeled through state and local governments.⁶⁸ State and local governments, with much more limited funding and unlike the federal government with little opportunity to engage in protracted deficit financing, have used subsidies far

66. Enforcement efforts directed at securing compliance with consumer benefit laws, including such land-related laws as rent control regulations and building and housing codes, commonly rely heavily on complaints or proceedings brought by private parties. Citizen suits also are important in enforcement of many environmental laws, see *supra* note 55.

67. On federal subsidies, see *supra* notes 32-36 and accompanying text.

68. See *supra* note 32.

less, except in dispersing federal grant and loan funds.⁶⁹ All levels of government have used tax preferences extensively as responses to high-attention land issues.⁷⁰ As control devices, tax preferences often are more acceptable to law makers, the public generally, and even to beneficiaries of the preferences than are subsidies. Subsidies frequently are looked on as undeserved gifts or somewhat tainted handouts; but, illogically perhaps, tax preferences are perceived by many as merited exceptions to government fund-raising efforts, even though the cost to government may be much the same as if subsidies were provided. When strained through the tax laws, the government policy behind the preference may be seen as more worthy or, because our tax laws appear to have so many unfair and inconsistent provisions, as justifiably offsetting inequities imposed elsewhere on affected taxpayers. Those benefiting from tax preferences also may favor them because they usually are less visible than subsidies and their cost to government difficult or impossible to calculate, increasing prospects for long-term preference perpetuation.

Governments commonly are reluctant to use ownership of land and natural resources as control responses to high-attention land issues if they must purchase the properties. Such outlays can be extremely expensive. If the government already owns the land or resources, this acquisition cost problem of course does not exist; the federal government in particular has ownership rights to vast tracts of largely open-space lands to which it has had title since United States' sovereignty over the areas in question was initially asserted. More recently, the federal government has established ownership or somewhat similar rights, as sovereign, to immense areas offshore and above the earth's surface.⁷¹

69. Substantial state subsidy payments have been made to local government related to high-attention land issues, principally for highways, often significant means of channeling urban growth, and for welfare funding, indirect low-income housing aid to the extent welfare payments are used for housing rentals. On state funding transfers to local government, see J. ARONSON & J. HILLEY, *supra* note 43, at 78-85. The states also have been active in below market and other favorable housing finance, much of it to enable owner occupied home purchases. On these housing finance programs, see G. NELSON & D. WHITMAN, *supra* note 26, at 774-76. On local and state housing subsidies, see also Holden & Giles, *Financing Low-Income Housing in the Absence of a Federal Presence*, URB. LAND, June 1988, at 21; Suchman, *State Support for Low-Income Housing*, URB. LAND, Sept. 1987, at 32.

70. See *supra* notes 37-46 and accompanying text.

71. On federal government rights in the outer continental shelf, see 3 F. GRAD, *supra* note 24, § 12.05. The states have ownership of the seabed and its minerals within three miles offshore. *Id.* § 12.05(2)(c). Airspace above what a surface owner may reasonably find needed for surface structure usage is in the public domain and for most purposes subject to federal government control. See

Many of the states also have long held substantial tracts of mostly open-space land, much of it acquired by grant from the federal government at the time of statehood.⁷² Gifts from private sources have been a significant further source of government land acquisition, a number of what are now state parks, for example, were acquired in this manner. Nevertheless, the cost of maintaining donated properties, especially if they are improved, can be a deterrent to government accepting gift offers; and local government may refuse gifts of land if this will result in large property tax losses from the removal of the lands from the tax rolls. When government purchase is deemed desirable, however, it is feasible and acceptable in some circumstances to pass the cost burden on to others. Thus the purchase price may be funded by government through such devices as special assessments or tolls. Those benefiting, then, ultimately pay for the acquisitions. Similarly, acquisition costs may be paid for by those to whom the government resells, land assembly through use of eminent domain occasionally being a primary reason for government acquiring title, as in a number of urban renewal projects.⁷³

Still another factor of significance in government selection of controls for grappling with high-attention land issues is the experience record with particular controls. If a control appears to have been successful elsewhere and to have been accepted without undue objection by those to whom it pertains, its prospects for adoption are enhanced. As adoptions become more widespread, pressure for further adoption is enhanced, the control increasingly seen as essential because so many others have selected it. This kind of momentum was notably present in the rapid spread of such disparate control efforts as zoning, property tax circuit breakers, and implied covenants of habitability. Although emulating the successful or the popular can motivate law makers in selecting controls, so can novelty. A new form of control or an important new feature to an established form, because of its novelty, may be so attractive that it leads to the control's adoption. When existing legal responses to high-attention issues are clearly falling short of expectations or when their costs are being heavily criticized, a new approach may be welcome. It renews the promise of action and is not burdened with a record of disappointment. New conditions may also call for new forms or combinations of controls. Federal low-income housing programs back through the years have been particularly

R. FIXEL, *THE LAW OF AVIATION* ch. 6 (4th ed. 1967).

72. See *supra* note 32.

73. On the importance of government use of eminent domain to assemble urban renewal land parcels, see Taylor, *supra* note 32, at 290.

marked by a succession of novel approaches, new controls often replacing those widely perceived as failures.⁷⁴

In determining whether a particular control has been or is likely to be effective, law makers often realize that the possibility of dysfunctional consequences should be considered. The control may achieve its objective but in doing so cause other adverse effects that on balance may make the control undesirable. So, the quality of low-income housing, for example, may ostensibly be enhanced by building and housing codes providing better safety, health, and amenities. Compliance may be so costly, however, that it forces the landlord to take such housing off the low-income market, with occupancy shifted to those who can afford to pay rents high enough to cover the compliance costs. In the alternative, the landlord may abandon the premises rather than pay to bring them up to code, with the resulting risk of more serious deterioration and required ultimate demolition. What was intended as a boon to low-income occupants, may have the dysfunctional result of lost housing to the low-income market.⁷⁵ Other examples of dysfunctional risks in controls responsive to high-attention land issues are substantial lost tax income from home owner tax preferences,⁷⁶ and restrictions on access to wilderness areas and other public lands that deprive many thousands

74. The long and intricate sequence of federal housing programs this century, most of them aiding low-income housing, are summarized in BUREAU OF NATIONAL AFFAIRS, *GUIDE TO FEDERAL HOUSING PROGRAMS* (2d ed. 1986). A briefer account of these programs appears in McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. J.L. REF. 727 (1987). In environmental law, a similar proliferation of federal enactments has occurred, most of the statutes having been passed in the 1970s and 1980s, and many of those currently in effect having been extensively amended. Seventy current federal statutes pertaining to the environment are briefly reviewed in W. FREEDMAN, *FEDERAL STATUTES ON ENVIRONMENTAL PROTECTION: REGULATION IN THE PUBLIC INTEREST* (1987).

75. This dilemma is discussed in Hartman, Kessler & LeGates, *Municipal Housing Code Enforcement and Low-Income Tenants*, 40 J. AM. INST. PLANNERS 90 (1974); and, when codes are excessively stringent, in Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180 (1963). One possible consequence of stringent building and housing codes is that local officials may refuse to enforce the codes rigorously against such housing, thereby preventing withdrawal of the housing from the low-income market. In effect, such an enforcement policy constitutes informal enforcement zoning, enforcement requiring up-to-code compliance in affluent neighborhoods but not in low-income neighborhoods. Legally authorized formal zoned codes have been proposed as a solution to the housing code dilemma. For a negative view of formal zoned codes, a view presumably applicable to informal enforcement zoning as well, see Abbott, *Housing Policy, Housing Codes, and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 104-08 (1976).

76. *E.g.*, the federal income tax deductibility of home mortgage and property tax payments.

of persons from recreational enjoyment of these areas.⁷⁷ Dysfunctional examples of this sort underscore the point that there are trade-offs in government controls that law makers not only should try to anticipate but frequently do weigh in determining if, on balance, a control should be imposed. Unfortunately, some settings are so complex and predicting control effects so uncertain that dysfunctional consequences may not be apparent until after control imposition.

Whether particular controls are seen as dysfunctional can be affected by the ideological outlook of the observer. Many persons, for instance, view much government regulation as dysfunctional because it creates inefficiencies in market operations, a relatively unrestricted market being perceived as the preferred means of regulating the economy. This view has contributed to the movement for legal deregulation, a movement that may have peaked but has been particularly strong in the 1980s, with at least peripheral effects on some high-attention land issues.⁷⁸

IV. FUTURE PROSPECTS

All the high-attention land issues on which this article focuses are likely to remain matters of high-attention for the indefinite future. Most of the basic forces that have brought these issues into popular prominence seem certain to continue and the issues are sufficiently intractable, and what should be done about them sufficiently controversial, that they will retain a high degree of popular attention and concern long into the future. Trends in population growth and social stratification are particularly important to the future of land issues here under consideration. All indications are that the population of the United States will continue to increase, with consequent added pressures on land use and enhanced risks of environmental deterioration, natural resource depletion, and widespread urban physical decline and obsolescence. The U.S. Census Bureau estimates that from 1990 to 2025, the population of the United States will increase by between 6%

77. On public lands' recreational access restrictions, see G. COGGINS & C. WILKINSON, *supra* note 50, ch. 10.

78. Deregulation, or more accurately reduced regulation, that in recent years has had some effect on high-attention land issues, includes elimination of important legal restrictions on the natural gas industry, savings and loan associations and banks, the trucking industry, and the airlines. On deregulation, see S. BREYER, *REGULATION AND ITS REFORM* (1982); P. MACAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* (1979); D. SWANN, *THE RETREAT OF THE STATE: DEREGULATION AND PRIVATIZATION IN THE UK AND US* ch. 5 (1988); *Managing the Transition to Deregulation*, 44 *LAW & CONTEMP. PROBS.* no. 1 (1981).

and 40%.⁷⁹ In the past sixty years, the nation's population has approximately doubled,⁸⁰ and if it doubles again in the next sixty years, a conceivable possibility, this would result in a population of one-half billion persons by the middle of the next century. Clearly, the population growth rate is a crucial variable for high-attention land issues, and within broad limits one difficult to predict.⁸¹

Most of the present high-attention land issues also seem certain to be heavily influenced by a continuation of current social stratification patterns and especially existence of a sizable poverty segment in the population at the bottom of the social scale. The United States seems increasingly unable or unwilling to reduce the overall percentage of its population in poverty, or to reverse the trend toward an expanded underclass of persons most of whom are persistently dependent on government aid or private charity for minimal survival.⁸² Moreover, the current situation may get worse as available jobs become more skilled; antipathies toward racial minorities, especially those in the underclass, persist; and the culture of poverty further weakened by high incidences of inferior school performance and school dropout, unemployment, crime, drug use, AIDS, and teenage pregnancy. Poverty and the culture of poverty have obvious consequences for land issues such as the amount and quality of housing for the poor; urban growth—new development seldom being aimed at benefiting the poor; home owner-

79. Statistical Abstract, table 14 (1989). Birth, mortality, and net immigration rates are the variables.

80. The 1930 population was 123 million and the 1990 population estimated at about 250 million. *Id.* tables 1, 14. Some states have greatly exceeded the national population growth rate, mostly states in the west. For example, from 1950 to 1987 the population of Nevada increased by 529%, Arizona by 351%, Florida by 334%, California by 161%, Colorado by 149%, Utah by 144%, New Mexico by 120%, and Texas by 118%. *Id.* table 22.

81. The impact of population change on land issues also will be affected by geographical differences. For example, it is expected that percentage population increases will be much greater in the south and west than in the northeast and midwest, and that some states will grow much more rapidly than the national average, among them most of the Pacific and Mountain states, as well as Georgia, Florida, Texas and Vermont. *Id.* table 29, with projections from 1988 to 2010.

82. On poverty and the growing underclass in the United States, see Sawhill, *Poverty and the Underclass*, in CHALLENGE TO LEADERSHIP, ECONOMIC AND SOCIAL ISSUES FOR THE NEXT DECADE ch. 7 (J. Sawhill ed. 1988). Sawhill includes in the underclass "young men who father children with little or no expectation of supporting them. It includes unmarried women on welfare, raising children at taxpayers' expense and passing a life of poverty on to the next generation. It includes men who spurn regular work in favor of more lucrative but less legitimate or conventional means of earning a living, and alienated teenagers who drop out of school and remain semiliterate into their adult years." *Id.* at 227; see also Danziger & Gottschalk, *supra* note 20.

ship—almost invariably beyond the reach of the poor; and siting of objectionable land uses—public housing, shelters for the homeless, and other residential or service facilities for the poor generally being bitterly opposed by middle- and upper-income residents if sought to be located in their neighborhoods.

Although all current high-attention land issues will remain indefinitely matters of prominent popular concern, relative to one another the priority attention they receive will shift. This has occurred in the past and no doubt will occur in the future. Particular issues will rise and fall in attention given them and in the seriousness and urgency with which they are viewed. Precise and accurate predictions about attention fluctuations in particular issues generally is impossible but it seems certain that attention given the energy issue sooner or later will escalate sharply with the inevitable future shortages in oil and gas. The only question is when. Lack of adequate generating capacity in the nation's electric utility installations to meet the growing demands for electricity will add to the impending energy crisis, most threatening in the eastern third of the nation.⁸³ Energy shortages could even overtake the other land issues in attention, prominence and priority. Such shortages, if sufficiently drastic, could have major implications for the urban growth issue, too, with strong support conceivably emerging for more urban development along mass transit corridors and for more compact and intensely used urban spaces. Future energy shortages will also increase pressure to exploit energy resources in wildlife sanctuaries and federal and state parks and forests, accentuating concern with preserving wilderness areas.

Environmental pollution is another issue about which attention is very likely to escalate. New scientific knowledge about the scope and risk of environmental pollution will continue to be discovered and widely disseminated, with recently perceived threats to the ozone layer being one such risk bound to generate tremendous issue attention. Of particular relevance to environmental pollution are expanded population and expanded agricultural and industrial production to provide for a larger population. In addition, if the recent past is a signal of the future, major issue-enhancing pollution disasters will continue to occur with unfortunate frequency.

Not only are existing high-attention land issues likely to continue receiving high attention, but in the future additional issues no doubt will move into the high-attention category. Some land issues that may generate a sufficient degree of concern to move up to becoming high-attention issues, if not already there, are transportation, including what to do about too few airports, insufficient mass transit, and deterioration

83. See P. NAVARRO, *THE DIMMING OF AMERICA* (1985); *The Coming Power Crunch*, U.S. NEWS & WORLD REPORT, June 19, 1989, at 49.

of streets and highways; the cost and availability of rental housing for middle-income persons; and inadequacy of open space recreational facilities, such as parks, playgrounds, beaches, golf courses, and camping grounds. Over the much longer term, conceivable new high-attention land issues are use of the continental shelf as an agricultural and hard mineral source;⁸⁴ protective measures to prevent vast areas of coastline flooding from icecap melting in polar regions; massive reforestation programs to ease global ecological threats; and forced resettlement of persons from heavily overpopulated regions to regions with the land and other resources to support them. Under today's conditions, it may seem unrealistic and even absurd to pose these latter as potential high-attention issues for the United States. In fifty years it may not seem either unrealistic or absurd.

In the years immediately ahead, some important changes also can be anticipated in the controls used to resolve high-attention land issues. Of major significance is the probable continued cutback in federal government financial aid to many of the programs dealing with these issues, cutbacks that in some instances started in the early 1980s or before.⁸⁵ If anticipated inflation is taken into account, programs that receive only moderate increases in nominal dollars will, in all probability, effectively have their funding cut. The likelihood of recurring federal deficits and the inevitability of federal funding priorities for some very high cost outlays—including defense, interest on the national debt, medicare, health, and social security—mean less prospect for federal financial aid to most other kinds of programs, including most of those directed at high-attention land issues.⁸⁶ Some of the shortfall in

84. On the resource potential of the continental shelf and arguments for more state sharing of these resources beyond the three-mile limit, see Note, *A Stitch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851 (1987).

85. Federal grant cutbacks and their implications are considered in Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25 (1988). Determinants of the rise and decline in federal government commitments to urban areas are analyzed in T. GURR & D. KING, *THE STATE AND THE CITY* ch. 4 (1987).

86. Federal government budgetary sources are helpful indicators of past and future federal outlays for functions related to high-attention land issues. These sources declare federal outlays for such functions to be as follows, in billions of dollars, for the years designated:

federal aid will be made up by the states and localities,⁸⁷ but there are very real funding limits on what the states and localities can or will do in this regard.

Federal funding reductions have been one reason for the slowdown, arguably even reversal, of the movement toward centralization in government controls over land that was so pronounced in the 1960s and into the 1970s. With reduced federal financial aid, more of the real power in dealing with high-attention land issues will continue to shift from the federal government to the states and localities.⁸⁸ Furthermore, when federal financial aid is made available, probabilities are that, henceforth, it more frequently will be seed money or leveraged funding to attract other public or private resources in cooperative efforts.

Decline in government financial aid as a response to high-attention land issues is likely to be accompanied by increased reliance on regulation as a government control approach. This generally means substitution of coercion for benefits as the means of inducing adherence to controls, coercion usually being much less costly to government in

	1970	1980	1988 (projected)	1994
Agriculture	5.2	8.8	17.2	8.7
Community and regional development	2.4	11.3	5.3	4.7
Energy	1.0	10.2	2.3	3.1
Ground transportation	4.7	15.3	18.1	15.2
Housing assistance	.5	5.6	13.9	19.0
Mortgage credit and deposit insurance	.1	5.6	15.0	3.2
Natural resource and environment	3.1	13.9	14.6	14.4

For the above figures, see Budget of the United States Government, FY1990, Historical Tables, Table 3.3. These figures are not adjusted for actual or anticipated inflation. In 1988, national defense outlays, the largest functional category in the federal budget, totaled 290 billion dollars, 27% of total federal government outlays of 1.06 trillion dollars. The estimate for 1994 is that the federal national defense outlay will increase to 354 billion dollars, still 27% of a then estimated total federal government outlay of 1.31 trillion dollars. *Id.*

87. *E.g.*, local and state government loans and grants to aid housing developments. See *supra* note 69.

88. Trends in centralization of government power over land use controls are discussed in Popper, *Understanding American Land Use Regulation Since 1970, A Revisionist Interpretation*, 54 J. AM. PLAN. A. 291 (1988). See also F. BOSSELMAN & D. CALLIES, *supra* note 62; Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW. 597 (1988).

economic terms. Yet decline in government financial aid as a form of control could mean somewhat more reliance on those subsets of regulation that encourage control adherence by such benefits as monopoly profits or other rewards not financed by government.⁸⁹ Regulation can induce compliance with government's objectives by offering benefits to those regulated, not just by threatening sanctions.

Significant restrictions on government regulation of land that quite probably will be revised and amplified in the near future are those embodied in the constitutional concept of takings. The judicially declared takings doctrine is too ambiguous, contentious, and important to remain static. Court declared tests vary as to what constitute invalid takings and there long has been uncertainty as to precisely what the tests are and when and how the courts will apply them.⁹⁰ Recent takings cases decided by the United States Supreme Court in land regulation matters reflect changes of direction underway in the takings concept, with an apparent trend toward greater restraint on what regulations government can validly impose on private property owners without adequate compensation for resulting losses to the owners.⁹¹ This trend, if it continues, will make governments more cautious in imposing land regulations in many circumstances because they will not wish to risk having to pay compensation for losses caused by their regulatory efforts. It is clear, however, that there are sharp disagreements within the Court on what changes should be made in the law of takings—disagreements not likely to be resolved easily by the present justices or those coming onto the Court in the foreseeable future. How the concept will evolve is uncertain.

A high-attention land issue control feature that obviously will continue on into the future is periodic emergence of new or drastically revised subsets of controls. The attractions of something different—a novel approach—are so great as to make this development inevitable.⁹² Ingenuity in crafting new controls and substantially reshaping old ones

89. See *supra* note 30 and accompanying text.

90. See *supra* note 59 and accompanying text.

91. For the view that there is a trend, as yet weak, toward greater recognition of constitutional takings principles embracing a neoconservative, classical liberal concept of property, see Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988). Professor Sax is of the opinion, however, that no major move in this direction is likely, no judicial property rights rebellion is on the horizon. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POLY 139 (1988). But there are those who believe that the courts already have moved too far in eroding private property rights and that there is little indication of a corrective change of direction, even considering the recent U.S. Supreme Court takings cases. For this view, see Callies, *supra* note 88.

92. *Supra* note 74 and accompanying text.

seems endless, and changed perceptions of what is needed and what will be effective increase prospects for adoption of innovative new proposals. As in the past, many of these new or reshaped controls, when adopted, no doubt will disappoint their proponents and have little real impact in solving problems they were intended to solve. Others will have great effect. Among new types of controls currently being suggested that seem likely to be adopted are new uses of market incentives as integral elements of control programs. There is strong support for more innovative reliance on market incentives in government efforts to reduce air pollution, and the proposals being made, that to some extent have been adopted for air quality programs, may prove attractive as essential features of other control efforts involving land. Some aspects of controlling water pollution, energy allocation, objectionable land use siting, and wilderness area development seem particularly amenable to market incentive techniques similar to those advocated for controlling air pollution. Among these market incentive proposals are ideas such as granting saleable control exemption rights to entities subject to controls that perform exceptionally well in meeting control objectives, and granting to entities that perform well at one site control exemptions at other sites. It also has been proposed that periodic government auctions of control exemptions be held, exemptions being sufficiently limited in scope to permit control objectives to be met and yet ease control burdens on exemption purchasers. Even trading centers have been proposed at which members of the general public could buy and sell control exemption rights, including futures in such rights.⁹³ Many advantages are claimed for market incentives in limiting air pollution, and presumably similar claims could be made for such incentives if utilized in certain of the other control settings involving land. Some of these claims are that market incentives, properly administered, will reduce government monitoring and enforcement costs; reduce compliance costs to many entities subject to control—a least-cost allocation of control burdens argument; reduce litigation and delay in compliance; and sharpen the public dialogue on control policies.⁹⁴

93. See N.Y. Times, June 14, 1989, at D1, col. 1.

94. On market incentives in controlling air pollution, see Ackerman & Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988); and citations on air emissions control, *supra* note 31. A major argument for market incentives is that greater efficiency would result in the operations of those controlled and in government control administration. However, it has been argued that actual decision making costs and implementation constraints resulting from conflicting interests and values could make these flexible controls in the environmental field, and no doubt other fields, less effective than prevailing command and control regulation—required or proscribed specific conduct. The realities of the control context may make theoretical proposals undesirable. For this view, see Latin, *Ideal Versus*

The enterprise zone is another control format that may be modified to have much greater future impact, especially if political pressures increase to channel growth and prosperity to economically depressed urban communities. The enterprise zone concept was first advanced in England and inspired by the success of entrepreneurial-oriented, low-tax trading enclaves such as Hong Kong. The proposal is to encourage economic revival and growth in selected urban areas that are seriously depressed by turning them into free market manufacturing and trading centers highly favorable to doing business. Expectations are that reduced tax and regulatory restrictions, perhaps with supplemental government subsidies, will bring prosperity to the selected areas and eliminate many of their current problems. The enterprise zone concept has attracted considerable interest in the United States and has resulted in some implementing of state and federal legislation. The zones authorized in this country, however, so far have not been provided with sufficiently beneficial aid packages to achieve much of the concept's potential. The concept still has promise but to be more than tokenism may require greater financial assistance and deregulation than American government to date has been willing to make available.⁹⁵

Land banking is an old idea with little implementation in the United States that also may become attractive in the future. It consists of government acquiring large tracts of generally raw land, preferably at the urban-rural fringe or at prospective new town sites, and then eventually subdividing and selling development lots. Under such a scheme, planning can be more effective, building lot costs potentially lowered, and the government agency involved possibly can make a profit. One disadvantage is that government must incur a large upfront investment cost for the land involved that may not be returned for many years. If funding can be found and objections to government as land speculator and long-term developer overcome, land banking could emerge as a major urban growth control technique.⁹⁶ Illustrative of other new or drastically reshaped controls directed at high-attention land issues and that may ultimately be adopted are tax free bank

Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 STAN. L. REV. 1267 (1985).

95. Enterprise zones are discussed in Bendick & Rasmussen, *Enterprise Zones and Inner-City Economic Revitalization*, in REAGAN AND THE CITIES 97 (G. Peterson & C. Lewis eds. 1986); S. BUTLER, ENTERPRISE ZONES, GREENLINING THE INNER CITIES (1981); Wolf, *An "Essay in Re-Plan": American Enterprise Zones in Practice*, 21 URB. LAW. 29 (1989).

96. A recent discussion of land banking is Stoebeck, *Suburban Land Banking*, 1986 U. ILL. L. REV. 581.

accounts if used to accumulate savings for home purchases;⁹⁷ state infrastructure development banks to finance, through low-income development loans to local government, repair of bridges, sewers, and roads;⁹⁸ and public-private partnership arrangements, with multinational backing, to channel urban growth into new towns with a high technology and perhaps resort and leisure economic base.⁹⁹

V. CONCLUSION

High-attention land issues are of tremendous importance to the law of real property. This is especially so if land is broadly conceived to include not just the earth's surface and improvements constructed on that surface but natural resources and above-surface space as well—the relatively fixed physical world. High-attention land issues reflect serious popular concern and dissension about how our society responds to this physical world. As is true of all important social issues, law is a crucial response to high-attention land issues, and one that seeks to resolve the issues, or at least ameliorate concern and dissension over them, even though in the process it often creates new concern and dissension. The intractability of the issues over long periods of time contributes to the legal responses frequently being modified as pressures for change are channeled through political and legal processes. Legal responses may also be affected by individual issue reformulation and

97. One such proposal is known as the Home Ownership Plan and involves diversion of employee compensation into a bank savings account for employee home purchase purposes, interest on the account to be income tax exempt. The employer is to deposit certain employee pension funds in the account, with the employee's consent, and in addition the employee will allocate to the account ten percent or so of each salary payment. Many middle-income families under such a plan would be able, within a few years, to accumulate enough money for a down payment on a home purchase. It is proposed that only first-time home owners would be eligible to participate in the plan. On the Home Ownership Plan, see Fleming, *Affordable Housing: A New Plan*, 45 J. HOUSING 273 (1988). A variety of other housing-aid programs are emerging under which employers assist their employees to purchase homes. Some of these programs are discussed in Curzan & Carney, *Lack of Affordable Housing Spurs Employer-Supported Housing Programs*, URB. LAND, July 1989, at 5.

98. *E.g.*, proposal of New Jersey Governor Kean. See Kean, *The Environmental Movement in 1985: Between NEPA and 2000*, 10 COLUM. J. ENVTL. L. 199, 209 (1985).

99. The Australians have under serious consideration development of a high technology Australian new town in collaboration with Japanese business and government interests. Various possible versions of such a new town, referred to as a "multi-function polis," are described in *The Multi-Function Polis: Australia's Newest New City Proposal*, 27 AUSTRALIAN PLANNER 4 (1989). If implemented and successful, the multi-function polis concept could spread to other countries.

shifts in an issue's prominence relative to other issues. High-attention land issues are among the most troublesome issues now facing American society. Any adequate understanding of that society requires understanding of its high-attention land issues and the law's responses to them.

There is obvious value in considering high attention land issues comparatively and as a group. They have important common characteristics, including considerable similarity in causation and in the government controls imposed to deal with them. They also are major focal points for change in real property law, volatile segments of a massive legal field that, in general, evolves very slowly. They are where much of the action is in the law of real property, and lawyers and legal scholars must frequently be concerned with aspects of law particularly vulnerable to change. Given their significance, high attention land issues, collectively as well as individually, merit special consideration as major features of real property law.

