

Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case?

A Comment on Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014)

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Bruce Huber's thoughtful article, "The Durability of Private Claims to Public Property,"¹ is an excellent demonstration of the ways that older uses of the federal public lands continue long past the times they should be expected to expire. But the federal public lands are not necessarily a stand-in for public property in general; most other kinds of public property have far fewer and less intense problems with durable private claims, or indeed with private claims at all. The federal public lands, on the other hand, have a set of particular characteristics that lend themselves to a pattern in which private users first assert and then overstay their entitlements. The problem of durable claims on the public lands is in some ways an instance of the problem of regulatory change, made more acute by the special characteristics of the federal public lands. This commentary flags one of these characteristics in particular: the echoes of a very old concern about the potential linkage between a federal "endowment" of large public lands and autocratic government—a concern that, to some degree, still animates opponents to federal assertions of control over the public lands.

In the spring of 2014, rancher Cliven Bundy, together with a group of self-appointed armed "militiamen," placed himself in a standoff with the Federal Bureau of Land Management (BLM) in southern Nevada. The BLM insisted that Bundy owed over \$1 million in delinquent and current fees for

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1. Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014).

grazing his livestock on federally owned land, but Bundy insisted that grazing on this land should be costless to him and refused to pay. Bundy's group effectively chased off the federal officials and, in doing so, garnered considerable conservative media support—at least until Bundy himself made some extemporaneous and intemperate remarks about the state's African-American population.² Not surprisingly, his reference to alleged welfare freeloading invited comparison to his own considerable outstanding bill for the use of federal property.³

Bundy's set-to with federal officials bears closely on the topic of Bruce Huber's important article on the persistence of private claims to publicly owned property.⁴ In Huber's account, the federal public lands exemplify a situation in which the federal government essentially loses control of federal public lands to pre-existing private claims that then become entrenched. Even when public property is repurposed for all *future* development, Huber argues, the earlier nonconforming claims persist long beyond any plausible legal entitlement. Bundy's case is perhaps an exception to Huber's account insofar as the BLM has kept alive its claims for grazing fees, but it is quite consistent insofar as longtime western cattle ranchers have continued to enjoy "the largesse of a friendly public landlord" (as libertarian law professor James Huffman put it).⁵

Huber argues that many private claims to use public property originated in an earlier era in which the federal government's chief desiderata for the public lands were settlement and resource exploitation, for both economic and defense reasons—the latter at a time when other nations like Great Britain and Russia threatened to make inroads on America's newly acquired lands.⁶ This was the era in which federal management followed what Huber

2. Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. TIMES (Apr. 23, 2014), <http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html>.

3. Ralph Ellis & Greg Botelho, *Rancher Says He's Not Racist, Still Defiant Over Grazing Battle*, CNN (April 25, 2014, 6:16 PM), <http://www.cnn.com/2014/04/24/politics/cliven-bundy-interview> (Bundy responding "I might be" to interviewer's inquiry whether Bundy is a "welfare queen" because his livestock have been "feeding off the government, literally").

4. Huber, *supra* note 1.

5. James Huffman, *Book Review: 'A Climate of Crisis' by Patrick Allitt*, WALL ST. J. (Apr. 23, 2014, 7:06 PM), <http://www.wsj.com/articles/SB10001424052702304512504579496060586409076>.

6. Huber, *supra* note 1, at 996–97.

calls the “open access” model.⁷ Even though resource use patterns were chaotic during this era, there was nothing particularly problematic for government policy about private claims to resources, no matter how long they endured; settlement and rapid development, after all, were the objectives of federal land policy. Beginning in the later nineteenth century, however, the open access model gradually gave way to a “proprietary” model in which the federal government planned to direct the use of the public lands specifically, marking some for conservation and others for other specified uses for which the government should receive due recompense.⁸

But according to Huber, even though the proprietary model now more or less dominates governmental policy concerning the public lands, and even though this model precludes *new* claimants from many of the older types of uses, public land management has been noticeably lenient toward *old* claims that have held over from the open access model. Old leases are renewed and illegal nonconforming uses continue without expulsion or revision. Other nonconforming prior uses even expand in defiance of the new proprietary model.⁹ Huber gives many examples of this pattern, including the ways that local ranchers have controlled federal grazing areas¹⁰—a topic brilliantly exposed in Phillip Foss’s *Politics and Grass*¹¹—and, more recently, the confrontation between federal officials and the defiant holdover permittees of an oystering business in Point Reyes, California.¹² Huber could have given many more. One notorious example is the western “prior appropriation” system of water rights that developed during the Gold Rush era as miners and stockmen trespassed on federal land and took water out of surface streams, in defiance of then-existing federal water laws requiring users of surface waters to leave those waters largely instream.¹³ Indeed, so thoroughly have western water appropriators reversed the older instream rule that the law switched to their side in western states, and appropriation

7. *Id.* at 997.

8. Huber, *supra* note 1, at 1030–32.

9. *Id.* at 1015.

10. *Id.* at 1004–05.

11. PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960).

12. Huber, *supra* note 1, at 1035.

13. For a recent book on the origins of the western “appropriative” water system, see DAVID SCHORR, *THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER* (2012).

spokesmen there have challenged the legality of *any* reservation of water for instream public uses.¹⁴

As Huber observes, the durability of pre-existing private claims creates a number of headaches for public lands management, notably that pre-existing land uses are often inconsistent with conservationist plans, and that they give a kind of unfair, almost monopolistic privilege to “grandfathered” claimants.¹⁵ Huber uses this pattern of persistent private claims as evidence for his argument that there is a large gap in most current theories of the evolution of property rights: these theories presume that the endpoint of evolution consists of private rights, but they give us very little in the way of a theory of property owned by governments.¹⁶

To be sure, aside from evolutionary theories, the topic of public property has not been neglected by any means; property scholars have generated a number of overall theories of public property, most notably in the vast number of works concerning the “public trust” that followed Joseph Sax’s seminal article on that topic over forty years ago.¹⁷ Moreover, the works of Elinor Ostrom and her colleagues have engendered a considerable amount of legal scholarship on commonly held property, which some might think resembles governmentally owned property or evolves into it, and which indeed does overlap with governmental property in some very long-standing instances, such as the age-old water courts in the Spanish province of Valencia.¹⁸ By the same token, scholars like Katrina Wyman have analyzed the institutional factors that influence the direction and scope of publicly regulated resources.¹⁹

14. See, e.g., *Idaho Dept. of Parks v. Idaho Dept. of Water Admin.*, 530 P.2d 924, 928 (Idaho 1974) (rejecting challenge to state agency’s reservations of instream water for environmental purposes).

15. Huber, *supra* note 1, at 1037–38.

16. *Id.* at 1019–20, 1037. For a classic evolutionary account, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

17. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

18. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 71–76 (1990). For a discussion of the impact of Ostrom’s work on American legal academics, see Carol M. Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, 5 INT’L J. COMMONS 28 (2011).

19. See, e.g., Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

But Huber's more specific issue—the persistence of inconsistent private claims on supposedly repurposed public property—does seem to present a rather puzzling gap in current thinking about property and an odd difference between governmentally and individually owned property. A private owner is generally quite capable of changing the purposes of her property without giving particular deference to prior uses, so long as all legal claims are met. If I own a lot and lease it out as a gas station, I can later change my mind, refuse to renew the lease, demolish the existing structure, and build a commercial building on the lot. I have to wait out or buy out the lease term of the existing tenant, and I will have to meet environmental cleanup standards and land use regulations, but I owe nothing to the prior lessee aside from respect for his or her legal lease and perhaps notice of my change of plans. Even the favorable treatment accorded to residential tenants in rent control jurisdictions is a matter of legal obligation on private owners, rather than any “largesse” on the part of those owners.

What, then, is the source of this indulgence toward prior users of public property? That phenomenon differs from the local governmental grandfathering of pre-existing nonconforming uses when land-use regulations change. Regulatory grandfathering also produces vexing long-term holders of anti-environmental uses and monopoly-like privileges for prior claimants.²⁰ But with this more familiar form of grandfathering, the prior claimant is the owner of the property in question and had a legal right to indefinite use prior to the change in regulatory practice; in such cases, grandfathering is effectively an alternative to compensation for a valid entitlement.²¹ This is not true for claims like those of Bundy, whose grazing allowance was time-limited all along, or those of cabin residents in the national parks, whose initial rights do not include year-round residence.

Huber's historical discussion of the federal public lands suggests that past practice is particularly important for those properties. Past entitlements here seem to cast a special shadow on the future, eclipsing the public's current entitlement to take back its property. Accordingly, we have to address the question: why does past practice appear to loom large in the case of the federal public lands?

20. See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1225–28, 1283–87 (2009); Deepa Varadarajan, Note, *Billboards and Big Utilities: Borrowing Land-Use Concepts to Regulate “Nonconforming” Sources Under the Clean Air Act*, 112 YALE L.J. 2553, 2555–56, 2567 (2003).

21. Cf. Varadarajan, *supra* note 20, at 2555.

One possibility is that upon reflection, the phenomenon is illusory. Perhaps public property and private property are not so different with respect to the phenomenon of durable private claims (hereinafter DURPRICLs), and DURPRICLs are not really so unusual after all on *any* kind of property. That is to say, even on private property, I might find it harder to expel my gas station tenant than the formal law suggests, so that private property and public property are alike after all with respect to prior claimants. No matter whether property is public or private, some users that have established themselves and stayed in place for a long time can be hard to shake off. This is certainly true of non-human invaders, like weeds and gophers; these insouciant invaders can create hell for property owners, and the DURPRICL phenomenon for them may occur simply because the owner is incapable of getting rid of them once they have dug in. Some human private tenants can be extraordinarily tenacious too, like the one-time homeowner in Florida who managed to evade foreclosure for well over two decades.²² With a certain modicum of embellishment, a tenant from hell might even become the stuff of a screenplay.²³

Some of these rather unusual cases derive from excessive deployment of tenant or homeowner protection laws, but even aside from those laws, DURPRICLs run through several important areas of ordinary property law. Are not DURPRICLs the essence of the venerable principle of “first in time, first in right”? There are all sorts of explanations for this principle: the superior defensive position of the first taker (rather like established weeds and the gophers); the signal that coming first sends about the intensity of the taker’s desire for the object; the manner in which first takers of different objects might reciprocally respect and defend one another’s holding; and so on.²⁴ Moreover, the user who is not first, but only a longtime possessor, can also be assimilated to the first mover in our property law. The doctrine of

22. See Robbie Whelan, *The 25-Year ‘Foreclosure from Hell’*, WALL ST. J. (Dec. 4, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703865004575648900250047766>.

23. See *PACIFIC HEIGHTS* (20th Century Fox 1990); however, fictional treatments favoring landlords over tenants are rare. See Michael D. Gottesman, *End Game: Understanding the Bitter End of Evictions*, 8 CONN. PUB. INT. L.J. 63, 65 n.18 (2008) (reporting that *Pacific Heights* was the only popular account the author could find that took the side of the landlord).

24. See Carol M. Rose, *The Law Is Nine-Tenths of Possession: An Adage Turned on Its Head*, in *LAW AND ECONOMICS OF POSSESSION* 40, 49–53, 55–57 (Yun-Chien Chang ed., 2015) (describing several explanations for the status of first possession).

adverse possession may allow a longtime resident to displace even a true owner—a widely recognized version of DURPRICLS in American law.

Even so, first possessors are not trespassers, and they do not encroach on anyone else's property. As for adverse possession, this doctrine too has a number of requirements that counteract DURPRICLS. Perhaps most important is the formal or informal requirement that the adverse possessor have some excuse for the trespass—or, as it is more technically described, he or she must have a “claim of right.”²⁵ Successful adverse possession of private property depends in considerable measure on the opinions of ordinary people in the neighborhood and on the jury, and ordinary people do not like willful trespassers.²⁶ By contrast, on the federal public lands adverse possession is technically not permitted at all,²⁷ yet as Huber's article demonstrates, many prior users manage to hang on. These persons, in spite of their legal trespass, often *do* have the approval of their neighbors—or at least some significant portion of them, as the Bundy imbroglio shows. And as Huber's discussion of the Point Reyes controversy also illustrates, users in place may have an additional advantage if they can garner public support: they can leverage it to pressure political decision makers.²⁸

It would seem, then, that DURPRICLS do have considerably more weight on public property than on private property—or, at least, that is the case for the federal public lands. But that “at least” qualification is important: it speaks to a second reason why DURPRICLS seem to occur so regularly on public property.

The second reason for the prevalence of DURPRICLS on public property creates somewhat more of a doubt about Huber's argument: Huber's examples are drawn not from public property generally but from a special type of public property. There is a distinct possibility that the federal public lands are an exceptional and odd version of property owned by the public and managed by governments. Perhaps the DURPRICL phenomenon on the

25. See R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L. Q. 331, 343 (1983).

26. See Rose, *supra* note 24, at 58.

27. See *United States v. California*, 332 U.S. 19, 40 (1947).

28. See Huber, *supra* note 1, at 1035 (describing how the owner of a Point Reyes oyster farm got California Senator Diane Feinstein's backing for an extension of his fishing permit; the effort was ultimately unsuccessful, however, when environmental opponents organized against continued fishing).

federal public lands does deviate substantially from the experience of private property owners. But it might also deviate from the experiences of other kinds of *public* owners.

In fact, governmental bodies take ownership of all kinds of property where DURPRICLs are not at all evident. Governments own waterworks, municipal parks, office buildings, electrical utilities, streets and roads, and in these contexts, governments behave much like other kinds of owners. One does not notice durable private claims on the New Jersey Turnpike, in the Library of Congress Reading Room, or in the Pima County Courthouse.

More than that, governmental property ownership sometimes takes direct aim at prior uses precisely in order to demolish them. In the 1950s and 1960s, urban renewal programs bought up private property in forced sales and then turned it over to developers with the express purpose of getting rid of prior uses, under the sometimes thin veil of “blight” removal.²⁹ In the view of a number of critical commentators at the time, such programs sometimes succeeded all too well, giving rise to the popular and bitter joke that the real name of urban renewal was “Negro removal.”³⁰ And urban renewal was by no means the first such governmental attack on prior uses. Almost a century earlier, New York created its iconic Central Park on land that had previously contained a small African-American community and a number of informal settlers; these people were summarily expelled and their structures demolished.³¹ Whatever one’s assessment of the wisdom or justice of such policies, DURPRICLs were nowhere to be seen in these examples of governmentally owned property; quite the contrary, private claims were ousted, no matter how durable.

All this raises doubts regarding whether the federal public lands are an exemplar of public property more generally. Indeed, the Constitution itself embeds a distinction between what are now considered two major classes of federally owned property: Article I property and Article IV property. The former includes so-called federal “enclaves”—post offices, army bases, governmental office buildings, and other kinds of property that serve direct federal ends. Over time, most of these federal enclaves were either reserved

29. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 46–47 (2003).

30. *Id.* at 47. Justice Clarence Thomas referred to this phrase in his dissent in *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

31. Susan Bennett, “*The Possibility of a Beloved Place*”: *Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 259–61 (2000).

from Article IV public lands or acquired under the auspices of Article I, Section 8, the “necessary and proper” clause,³² although the now-beleaguered Post Office got a clause of its own in Article I.³³ These Article I enclaves have few DURPRICLs. Eudora Welty may have written a story whose protagonist explained “Why I Live at the P.O.,” but there are no other known characters like this at the P.O., or at other Article I property sites either.³⁴

Instead, the DURPRICL phenomenon appears to be an issue regarding just one type of governmentally owned property: Article IV property, which consists of virtually all the other property that the federal government owns. Article IV property applies to the great swaths of property that the federal government acquired in large part by purchase and by war, but for no particular federal purpose.³⁵ As Huber capably describes, Congress originally did leave the public lands in a state of more or less open access for the benefit of early settlers and other exploiters; only later did Congress repurpose these lands for various other ends like parks, forestry, grazing, and oil leasing, as the federal government shifted to a “proprietary” mode of management.

But Article IV lands have always suffered from a certain vagueness and drift. The republic’s early statesmen and politicians were not certain what to do about all this land, a fact perhaps reflected in the buried location of Article IV’s property clause. Section 3, the property clause, is tucked in among other clauses about full faith and credit and extradition, along with the now-disgraced state obligations to return fugitive slaves; in substance, moreover, the section kicks the can down the road by simply saying that Congress is to have authority over the public lands.³⁶ Congress, in the early years, quickly decided on settlement and exploitation as the goal, as Huber

32. U.S. CONST. art. I, § 8.

33. *Id.*

34. EUDORA WELTY, *Why I Live at the P.O.*, in *A CURTAIN OF GREEN* 89 (Harvest Books 1979) (1941).

35. The original public lands derived from the period of the Articles of Confederation, from cessions by the states that had had large western lands as colonies—cessions demanded by the less-endowed states (notably, Maryland) that feared overweening influence by the larger states. *See* Jerry A. O’Callaghan, *1776-84: Catalyst for Nationhood*, 31 *J. FOREST HIST.* 133, 134–138 (1987); George W. Geib, *The Land Ordinance of 1785: A Bicentennial Review*, 81 *IND. MAG. HIST.* 1, 1–3 (1985). Notable later additions include the Louisiana Purchase and the southwestern and western territories acquired after war with Mexico.

36. U.S. CONST. art. IV, § 3.

illustrates, but it wavered between selling these lands and effectively giving them away to audacious early settlers, newly formed states, and powerful interests like timber cutters and railways.³⁷ In the years before the Civil War, the settlement of the public lands was a matter of intense interest in the constitutional debate over slavery.³⁸ But constitutional law scholars today tend to pay little attention to the property clause,³⁹ now apparently a dull thing by comparison to the powerful Article I (congressional powers), the jurisprudentially rich Article III (judicial power), the glamorous First Amendment (freedom of speech, assembly, and religion), or the rights-rich Fourteenth Amendment (due process and equal protection obligations of the states).

So, what is the problem with the Article IV federal public lands? Why has the shift from the open access model to the proprietary model been accompanied by so permissive an attitude about nonconforming uses held over from the past—a phenomenon that really does not affect many other kinds of public property? The remainder of this comment gives four possible answers implicit or explicit in Huber's analysis; some overlapping, but others more intuitively obvious. I would suggest that all of them distinguish the federal public lands from other kinds of public property and thus might weaken Huber's implicit assumption that the federal public lands can stand in as an example of public property generally.

1. *Bigness*. This is the most intuitive reason for permissiveness: the federal public lands occupy an enormous territory, commonly approximated at one-third of the nation, largely situated in the western states and Alaska.⁴⁰

37. See Robert L. Glicksman & George Cameron Coggins, *Hardrock Minerals, Energy Minerals, and Other Resources on the Public Lands: The Evolution of Federal Natural Resource Law*, 33 TULSA L. REV. 765, 777–78 (1998) (citing varied recipients of giveaways of federal public lands in the early republic); see also Patrick Austin Perry, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 280–87 (1996) (describing haphazard and ill-enforced federal land, mineral, and timber laws through the 1870s).

38. See generally Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 36–55 (discussing the infamous Dred Scott case and its denial of Congress's ability to ban slavery in the territories)

39. *Id.* at 6 n.21.

40. See generally PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION (1970).

An area this large raises major challenges for policing. Private property owners are not charged with managing such huge areas, and neither are other governmental owners. New York's Central Park may be large as city parks go, but it is totally dwarfed by the federal public lands in, say, Utah, where the federal public lands comprise sixty-five percent of the state.⁴¹ The sheer size of the federal public lands helps explain why there are private lessees and other permittees on the federal public lands to begin with: management of areas so immense almost necessarily requires delegation to others. In a scenario of limited resources, it makes more sense to direct and police new uses than to try to get rid of old ones, for reasons discussed below.

2. *Heterogeneous constituencies, or public choice.* The federal public lands are not only large, they are also diverse; and with that diversity comes a great diversity in the groups with an interest in the management and use of the lands. But as Huber shows, the intensity of these groups' interests also varies, largely in proportion to their occupation of or proximity to the lands in question.⁴² Furthermore, among those in close proximity to the federal public lands, long-term users are the most intensely interested of all. Like weeds and gophers, already-established users are apt to be much more tenacious than new claimants. This is for psychological reasons: the famous "endowment effect" supposedly makes losing what you have weigh more heavily than gaining some new good.⁴³ There are financial reasons too; existing users often have capital investments that depend on continuing use—and by God, they are going to fight for them.

By contrast, there are many other interested parties who would like to see the public lands devoted to this or that purpose, but their interests are sporadic, relatively small-scale, and they sometimes involve passive uses without major investment; for example, birding. By comparison to, say, a current coal-mining enterprise, how intensely will a scattered set of New

41. Stephen Urquhart, *Protecting Access to Federal Lands: The Roads Less Traveled*, 15 NAT. RESOURCES & ENV'T 192, 192 (2001).

42. See, e.g., Huber, *supra* note 1, at 991 (mining interests' domination of bids for nearby mining sites); *id.* at 1005, 1029 (strength of ranchers' grazing claims on adjacent federal lands); *id.* at 1017–18 (cabin residents' illegal expansion of sites in National Forests).

43. See Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1551–1552 (1998) (describing experiments showing an endowment effect).

Hampshire birders—even birders with expensive binoculars—fight to halt the Wyoming pit mine that has already levelled the bird habitat and bristles with huge, heavy equipment? This classic public choice scenario—concentrated and intense interests versus diffuse and mild ones—was analyzed many years ago by Joe Sax in the famous public trust article that awakened so much interest in the management of the federal public lands.⁴⁴

Once again, consider an ordinary municipal park as an example of a different kind of public property: the scene is one where the dominating constituencies are basically *all* local, instead of a scene in which intense local users are pitted against diffuse and distant ones. People living near the park are likely to have a considerably greater interest in it, but at least there is a nearby pool of potentially interested parties, including other city residents who can actually frequent the park.⁴⁵

3. *Blurred missions.* In the early republic, the purposes to which the Article IV lands would be put were undefined—open access, as Huber says, or, more colloquially, anything goes. But even with the arrival of Huber’s proprietary model, the purposes to which the public lands should be put remain vague. The guiding principle for the lands under the administration of both the Forest Service and the Bureau of Land management is “Multiple Use/Sustained Yield,” commonly known as MUSY.⁴⁶ It is hard to justify—or to dispute—any particular choice under such a latitudinarian standard. Even in lands like the national parks, supposedly administered under a principle of “dominant use,” multiple constituents can drive administrators in contrary directions. Alston Chase some years ago fulminated over the influence of the hunters who wanted Yellowstone National Park to act as a giant elk reserve at the expense of native vegetation and other wildlife.⁴⁷ Meanwhile, ranchers outside the Park push to reduce the size of the Park’s bison

44. Sax, *supra* note 17.

45. See Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 3–4 (2003) (noting the substantial but incomplete influence on Central Park of wealthy nearby residents).

46. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 203–205 (1999).

47. ALSTON CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA’S FIRST NATIONAL PARK 18–37, 50–53 (1986).

herd, whose wanderings, they say, might spread brucellosis to their animals.⁴⁸ Then there are the campers, backpackers, geysers-watchers, biologists, wildlife viewers, snowmobilers, and more and more interests, all of which have their own lists of demands for what the Park should be.

In short, given the cacophony of voices and the blurred purposes of federal public lands, it is not so surprising that prior users can slip off the enforcement radar. Again, a municipal public park like Central Park may have multiple uses and purposes, but by comparison to the federal public lands, Central Park's mission is a laser beam, much reducing the opportunities for private claims altogether, not to speak of durable ones.

4. *And something else: more historical echoes.* Huber's excellent presentation gives readers a history of the federal public lands that illustrates their particular sensitivity to durable claims—although, in my view, that history does not necessarily affect other kinds of public property. I would like to suggest another lingering leftover from the past, one that may still embolden both old and new users of the federal public lands in particular and leave federal officers on the defensive.

In the spirit of Huber's article, I first go back to the early republic, and I consider again why statesmen of that era were so anxious to settle the public lands with private owners—that is to say, why those statesmen were willing in the first place to countenance private claims to the public lands (the predecessors to the claims that have now become DURPRICLs).

Historian Thomas Le Duc once called the early decision to disperse the federal lands to private owners a “fateful” one, but one for which Americans at the time undoubtedly had differing reasons.⁴⁹ Economic and defense reasons clearly loomed large, as Huber argues. Many in the new American republic hoped to use the western lands to pay back the nation's debts and to fund other useful projects. Moreover, their pervasive conviction was that these lands should be devoted to farming, and farming was considered something to be done by private efforts, not governmental ones.⁵⁰

48. Peter Morrisette, *Is There Room for Free-Roaming Bison in Greater Yellowstone?*, 27 *ECOLOGY L.Q.* 467, 477–478 (2000); Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 *LAND & WATER L. REV.* 1 (1993).

49. Thomas Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, in *LAND USE POLICY AND PROBLEMS IN THE UNITED STATES* 3, 4–5 (Howard W. Ottoson ed., 1963).

50. O'Callaghan, *supra* note 35, at 134; Le Duc, *supra* note 49, at 5.

But another, less widespread motivation was also in play as they considered the future of the public lands: the preservation of small-‘R’ republicanism. Given the very sharp historical consciousness of statesmen in the new republic, their knowledge of the English past, and their familiarity with Blackstone’s *Commentaries*, some were certainly aware of the traditional role that a large landed endowment could play in funding a monarchy, and of the way that an endowment could free kings from the need to ask Parliament for taxes.⁵¹ More specifically, they would have known that in the years prior to the outbreak of the English Civil Wars in the mid-seventeenth century, the Stuart monarch Charles I had attempted to squeeze revenues from the royal endowment in order to avoid calling an increasingly rebellious Parliament.⁵²

Charles I’s efforts to avoid Parliament ultimately failed dramatically, but for at least some early Americans, republican prudence added to other reasons for getting the public lands out to private owners rapidly and for assuring the political future of those owners, so as to ward off anything that might approximate a royal domain. One of the new nation’s first and most important acts under the Articles of Confederation was to enact the Northwest Ordinance,⁵³ not only encouraging sale and settlement of the public lands, but also making certain that the western settlers could establish states

51. For historical consciousness, see, e.g., THE FEDERALIST NO. 6 (Alexander Hamilton) (discussing the politics of Henry VIII’s adviser Cardinal Wolsey); FEDERALIST NO. 69 (Alexander Hamilton) (referring to powers of Stuart Kings Charles I and Charles II). See also Blackstone’s remark that “fortunately for the liberty of the subject” British monarchs had dissipated the royal domain, a point that St. George Tucker nailed down in a note to his 1803 edition of *Blackstone’s Commentaries*. 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 306–307 (1803) (citing RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION 10 (1784) to assert that the dissipation of a once-substantial royal domain had made the crown dependent on the people).

52. See KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I 116–120 (1992) (describing Charles’ much-hated efforts to assert control over the royal forests); see also Le Duc, *supra* note 49, at 4–5 (observing that some with long memories in the American founding period “entertained phobias of quitrents, crown lands, and royal forests”); Mark Kishlansky, *Charles I: A Case of Mistaken Identity*, 189 PAST AND PRESENT 41, 41–48 (2005) (describing the longstanding attention riveted on Charles’ downfall as well as his supposed flaws).

53. NORTHWEST ORDINANCE OF 1787, art. V, 1 Stat. 51 n.(a).

of their own on an “equal footing” with existing states.⁵⁴ The 1787 Constitution included a much stronger chief executive—worryingly like a king to some of the Antifederalists, particularly since they thought that the new “consolidated” national government would be too large for genuine republican self-governance.⁵⁵ But the new national government continued the equal footing doctrine for the western lands, a practice that should have allayed lingering concerns about a new kind of royal domain.⁵⁶

Nevertheless, the republican worry about the federal public lands—that they might become a fund to make the federal government independent of the people—continued to surface from time to time. In 1803, the year of the Louisiana Purchase, the Appendix to St. George Tucker’s edition of Blackstone’s *Commentaries* made a pointed comment that all governments, republican as well as monarchic, were subject to this danger.⁵⁷ The issue reignited briefly three decades later among the fierce objections to a Senate proposal that threatened to limit public land sales. In urging continued disposal, South Carolina Senator Robert Hayne cited the danger of government funded by a “permanent national treasury” rather than taxes, “whether to be derived from public lands or from any other source.”⁵⁸ Even Joseph Story referred to the concern of some that the public lands might turn into something like a royal domain, although Story dismissed the concern as insufficiently attentive to the difference between monarchies and our own republican polity.⁵⁹ This response begged the old antifederalist question whether

54. Robert S. Hill, *Federalism, Republicanism, and the Northwest Ordinance*, 18 *PUBLICUS* 41, 47–51 (1988).

55. See Raymond B. Wrabley, Jr., *Anti-Federalism and the Presidency*, 21 *PRESIDENTIAL STUD. Q.* 459, 463–66 (1991) (Antifederalists’ concerns about monarchic features of presidency); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 *NW. U. L. REV.* 74, 89–93 (1989) (Antifederalists’ arguments that proposed national government would be anti-republican).

56. Carolyn Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 *FLA. L. REV.* 557, 562 (1995).

57. Tucker, *supra* note 51, app. 284–285.

58. 21 *REG. DEB.* 33–34 (1830) (statement of Sen. Hayne). Senator Daniel Webster responded that the income from the public lands benefited all the people. *Id.* at 38 (statement of Sen. Webster). See also PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 9–11 (1968) (describing debate).

59. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1320–21, at 196–197 (Boston, Hillard, Gray & Co. 1833).

such a large government could be truly republican, an objection of which Story was well aware.⁶⁰

But memories of an independent domain to fund Stuart tyranny seemed to fade as settlers poured into the western lands—lands that in great part were practically given away. So long as federal landownership seemed a temporary way station on the way to private property, the government's Article IV property could hardly threaten the nation's republican government or the new states' sovereignty, in spite of the minor federal powers left over from territorial days.⁶¹ Once new states were formed, one might think that Article IV federal land ownership was almost like any other kind of private ownership—just that it was private land *manqué*.

But it was precisely the paradigm shift that Huber analyses, from open access to proprietorship, that made federal ownership different from other kinds of ownership. When in the later nineteenth century the federal government started to make plans of its own for its Article IV lands, it also began to argue that the federal landowner was a landowner with a special status.⁶²

What one federal forest lawyer called “antifederalist leanings” against such expansive claims led to constitutional challenges as early as the later nineteenth century, but to little avail.⁶³ Federal claims of special status culminated in the twentieth century in such cases as *Kleppe v. New Mexico*,⁶⁴ which roundly affirmed powers in the federal landowner not granted to other landowners—not because these lands served any enumerated Article I purpose like the post office or national defense or other federal enclave

60. *Id.* § 1280, at 158 (referring to fear at the time of the Louisiana Purchase that the United States had already been too geographically large for a national government).

61. *See* *United States v. Gratiot*, 39 U.S. 526 (1840) (United States could continue to lease rather than sell federal land in Illinois after the territory became a state).

62. *See* *Hunt v. United States*, 278 U.S. 96, 99–100 (1928) (United States was entitled to reduce deer herd to protect national forest despite state game law to the contrary); *United States v. Alford*, 274 U.S. 264 (1927) (United States may protect national forests by prohibiting fires on nearby land); *Camfield v. United States*, 167 U.S. 518, 525–526 (1897) (United States has powers of ordinary landowner on its lands but also the power to prevent effective enclosure of its property by measures akin to police power).

63. Philip P. Wells, *Philip P. Wells in the Forest Service Law Office*, *FOREST HIST.*, Apr. 1972, at 22, 24 (reprint of Letter from Philip P. Wells, Law Officer, U.S. Forest Serv., to Gifford Pinchot, 1st Chief of U.S. Forest Serv. (Mar. 27, 1913)).

64. 426 U.S. 529 (1976).

properties, but simply because these massive lands belonged to the federal government.⁶⁵

Today, these assertions of the special status of Article IV property have fueled an ever-simmering revolt in the western states—the states that contain such large percentages of federal land. The so-called Sagebrush Rebellion of the 1980s, now said to be in a new iteration, often prominently included demands that the federal public lands be granted to the states and localities or to private owners.⁶⁶ The current echo of early republican anxieties sounds in the hatred and distrust of “Washington.” Cliven Bundy’s supporters have been known to sport the white wigs of the revolutionary era and they are fond of claiming support from the Constitution.⁶⁷ As odd and anachronistic as these antics may seem to the rest of the country, Sagebrush westerners sniff something like the odor of a royal domain in the special status of the federal public lands, a domain controlled by dictatorial bureaucrats who hold their region in a subordinate status.

In reality, of course, the federal public lands are very far from generating vast independent revenues for the federal government; quite the contrary, some in Congress have fretted over their lax management for many years.⁶⁸ Moreover, no part of the country has greater access to the federal public lands than the West, and in general no part of the country has bellied up

65. For differing views of this subject, compare, e.g., Appel, *supra* note 38, at 10, 78 (arguing that the federal government has very extensive governmental powers over Article IV lands) to Landever, *supra* note 56, at 572–590 (arguing that the federal government was thought to have limited power under the Property Clause until the twentieth century) and David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 361–362 (1976) (arguing that the federal power over Article IV lands is largely that of an ordinary landowner).

66. See George Cameron Coggins & Doris K. Nagel, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 492–97 (describing origins and various goals of first Sagebrush Rebellion, as well as relations with Reagan Administration). For a more recent iteration, see, e.g., Editorial, *Just What We Don’t Need: A New Sagebrush Rebellion*, L.A. TIMES (Apr. 27, 2014), <http://articles.latimes.com/2014/apr/27/opinion/la-ed-federal-lands-western-states-sagebrush-rebel-20140425> (decrying efforts to remove public lands from federal control).

67. Jaime Fuller, *Everything You Need to Know About the Long Fight Between Cliven Bundy and the Federal Government*, WASH. POST (April 15, 2014, 2:15 PM), <http://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government>.

68. See Gates, *supra* note 58, at 9–11 (describing congressional debate over sale of public lands in 1830); see also Huber, *supra* note 1, at 1027–1029 (discussing late nineteenth-century congressional action to reserve some federal lands and resources).

more readily to the federal trough.⁶⁹ Federal contributions to the western states signal the ways in which the modern federal, state, and local relationships have become more symbiotic than confrontational. For many who regard constitutional law as an evolving venture, federal authority on the public lands may seem a predictable response to the scale of modern environmental and natural resource management demands. But to some, like Cliven Bundy and his militiamen friends, the federal public lands are a constant reminder of the potential ascendancy of distant autocracy. It is not just the executive branch that could seemingly use the public lands to undermine the liberties of the people; it is the entire federal government.

And so, I would suggest, the lingering bogeyman of autocracy offers a rationale and an excuse for DURPRICLs on the Article IV federal lands, adding to the claimants' tenacity and sometimes to their capacity to intimidate. Certainly there are other reasons why the federal landlord is so indulgent to prior uses, including those reasons discussed above: size, diversity, blurry purposes, and susceptibility to concentrated special interests. All these factors make this kind of public property a special case among public properties. But the peculiar political concerns from the past enlarge these factors with a kind of republican righteousness, augmenting the reasons why the Article IV lands have special problems with DURPRICLs.

Bruce Huber's excellent article argues that we need to be cautious about creating new entitlements to use the federal public lands, particularly in connection with renewable energy installations like solar or wind power. These are likely to take up vast stretches of public land, and his history suggests that new permittees might outlast their welcome in the future. His warning for the federal public lands is certainly well taken.

But does his warning apply to other kinds of publicly held property? Take a municipal park: if such property is relatively discrete in size, held for a more specific purpose, and influenced more evenly by the relevant constituencies, it would seem to generate fewer problems with durable private claims—in large part because it would have been far slower to grant any private claims to begin with (I am tempted to say, fewer DURPRICLs because fewer PRICLs).

69. Robert Jerome Glennon, *Federalism as a Regional Issue: "Get Out! And Give Us More Money!"*, 38 ARIZ. L. REV. 829, 837–842 (1996).

An interesting test case for Huber's warning might be the new forms of hybrid property found in environmental trading markets (ETMs), which include cap-and-trade programs that set overall limits to pollution or extraction of a common good like air or water, dividing the usable portion into individual permits and allocating those permits to particular users who may trade the permits to others. ETMs have been created at both the state and federal levels, and in spite of their mixed record, they are currently under much discussion as methods for reducing greenhouse gases.⁷⁰

The best-known and most successful ETMs to date in the United States have been federal, particularly the cap-and-trade program for the acid rain precursor sulfur dioxide (SO₂), along with a scattering of other cap-and-trade programs, including some for fisheries.⁷¹ These federal ETM success stories suggest a pattern akin to, but not exactly the same as, the one that Huber sees in the public lands. In spite of arguments from economists that environmental permits should be allocated initially by auction to the highest bidders, these entitlements have been regularly grandfathered to prior polluters in the case of SO₂⁷² and to the major fishermen in the case of fishing rights.⁷³ The story thus has not been so much one of the durability of prior entitlements as it has been indulgence to those who would otherwise be losers in a regulatory change.

Indeed, the ETM experience suggests that the durability of private claims on Article IV lands can be seen not so much as the exemplar of a problem with public property as an exaggerated instance of a more general resistance to regulatory change—resistance that has to be overcome, if at all, by paying off those who did well in a prior regime. In that sense, Huber's analysis of private claims on federal public lands seems to be a particularly

70. For some examples of state and federal programs aimed at climate change, see Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005); see also Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 293–96 (2000) (discussing mixed record of ETMs as of 2000). For news and reports on the burgeoning development of ETMs and similar programs in a wide variety of environmental areas, see ECOSYSTEM MARKET PLACE, http://www.ecosystemmarketplace.com/pages/dynamic/web.page.php?page_id=7183§ion=about_us&eod=1#pes_5.

71. For examples of fisheries regulated by tradable rights regimes, see Wyman, *supra* note 19, at 164–176 (describing these regimes in U.S. fisheries).

72. Merrill, *supra* note 70, at 284.

73. Dallas DeLuca, *One for Me and One for You: An Analysis of the Initial Allocation of Fishing Quotas*, 13 N.Y.U. ENVTL. L.J. 723, 732–733 (2005).

acute example of a more general pattern, one that has been studied especially by economist Gary Libecap: regulatory regimes cannot change, even for the betterment of the public overall, without taking into account the distributional demands of those who did well under the old regime.⁷⁴

The larger lesson would seem to be that we need to be on the lookout for the kinds of private entitlements that we create with *any* governmentally sponsored program, but most especially where the program is large and difficult to monitor, the purpose is not well-defined, and public choice factors loom large. Unfortunately, Article IV lands exemplify all these characteristics in very large measures, but it is not so clear that other public properties—like the hybrid property right in ETMs—share these special problems of durability.

In particular, other kinds of public property do not share the small-‘R’ republican legacy that echoes in some westerners’ attitudes toward the public lands. Conflicts dating from before the founding of the United States live on in the debates over Article IV public lands, in spite of the centuries that have passed and the practical mutual relationships that have emerged between our national and state or local enterprises. On the federal public lands, in the famous lines penned by William Faulkner, “The past is never dead. It’s not even past.”⁷⁵

74. GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989).

75. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 73 (Vintage Books 2011).