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Abstract

In his essay 'Holy Landscape: Israel, Palestine and the American Wilderness',¹ W.J.T. Mitchell explores what he terms the 'paradoxical relation between landscape and idolatry'. Defining idolatry as a false god that displaces the true one with a material image, Mitchell contends that extreme Zionism has transformed the landscape of Israel into an idol where the visible and unrepresentable God is made visible and material.² He asserts that landscape here stands for more than ideology. As an idol it condenses ideology into a potent stereotype for mass consumptionan idolatry of place.³

Keywords

W.J.T. Mitchell, Israel, Palestine, idolatry of place, Zionism, idolatry of land, USA, private land ownership, legal rights, legislations

Disciplines

Land Use Law | Law | Legal Theory | Place and Environment | Religion | Religion Law | Sociology of Religion

IDOLATRY OF LAND

*Georgette Chapman Poindexter**

Woe to those who join house to house,
 who add field to field,
 until there is no more room,
and you are made to dwell alone
 in the midst of the land.

Isaiah 5:8

In his essay 'Holy Landscape: Israel, Palestine and the American Wilderness',¹ W.J.T. Mitchell explores what he terms the 'paradoxical relation between landscape and idolatry'. Defining idolatry as a false god that displaces the true one with a material image, Mitchell contends that extreme Zionism has transformed the landscape of Israel into an idol where the visible and unrepresentable God is made visible and material.² He asserts that landscape here stands for more than ideology. As an idol it condenses ideology into a potent stereotype for mass consumption—an idolatry of place.³

It is from this springboard I wish to jump in discussing what I will term an idolatry of land. Just as the 'place' of Israel is idolized in Zionism, private ownership of land can be idolized in the United States. Cultural norms threaten to transform home and hearth into a visible and material idol. The idolatry of land by the landowners evidences itself in richly textured social patterns. From meticulous attention to lawn and flowerbed (the deity of the ride-on mower) to joining forces with former adversaries such as environmentalists to promote legislation limiting sprawl (the deity of open space), landowners worship their plots.

However, culture cannot stand alone in encouraging idolatry. Property ownership cuts into the legalities of constitutional, property, or contract rights. Legal rights in the USA can reinforce the importance of private land ownership. The right to own real property free from governmental interference stands as a basic constitutional privilege in the United States. In this communal society, however, private property must co-exist with public interest. The question of what is, or is not, permissible governmental land regulation creates a tension between private property rights

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¹ W.J.T. Mitchell, 'Holy Landscape: Israel, Palestine, and the American Wilderness', *Critical Inquiry*, (2000) 26, 193.

² *Ibid.*, at 219.

³ *Ibid.*, at 205.

and public interest. Identification and resolution of this tension, in a manner to decrease the possibility of idolatry, are the focus of this chapter.

This chapter will explore the idolatry of land from several vantage points. First the religious significance of idolatry will be discussed. Far more than an admonition of graven images, the biblical definition and proscription of idolatry extend to the worship of land. I will draw upon the work of theologians and biblical scholars who have written extensively on the religious prohibitions of land worship. Working from the basis that land is a gift to be shared, not dominated, idolatry can be avoided by instilling the values of neighbourliness and limiting private control.

Next I will turn to how the legal system in the United States facilitates (if not encourages) such idolatry. Private property rights are vehicles of wealth creation in a capitalist nation, and owning a home is a primary path to wealth accumulation.⁴ As compared with other material possessions, land ownership has a special legal status that gives rise to the possibility of idolatry.⁵

In this chapter I will examine ways in which idolatry manifests itself in modern US land use law. One example is the multiplicity of local governments all with duplicative powers exercised over very small jurisdictions. Another illustration is the work of so-called 'property rights' proponents who seek severely to limit (if not deny) the right of the government to regulate land. These topics are unified in a discussion of the anti-sprawl movement that seeks to limit growth in suburban areas. While on the face of it this is an environmental issue, current suburban landowners are major forces in promoting the legislation for selfish reasons. The land that they worship, their home, is threatened by ever-increasing development. Having 'gotten' their land, their goal is to maintain the status quo without development that threatens the image of heaven they have crafted for themselves.

⁴ R.K. Schuster, 'Lending Discrimination: Is the Secondary Market Helping to Make the "American Dream" a Reality?' (2000-1) 36 *Gonz. L. Rev.* 153, 154. See also, R. Briffault, 'Our Localism: Part II—Localism and Legal Theory' (1990) 90 *Colum. L. Rev.* 346, 438 ('suburban zoning makes it more difficult for less affluent people to buy homes, thereby restricting their access to the major source of wealth and equity appreciation available to most Americans and reinforcing the wealth differences between homeowners and non-owners').

⁵ e.g., strict due-process rules on dispossession (foreclosure), registration requirements, etc.

Idolatry

The commandment against idolatry⁶ is of great importance for biblical ethics.⁷ A false god that displaces the true one with a material image leads inexorably to the violation of every commandment.⁸ While the idea of idolatry conjures up an image of the film 'The Ten Commandments' with Edward G. Robinson cavorting with a golden calf, in reality the bible contains numerous proscriptions on Man's desire to control and own land. For example, Leviticus warns that Man cannot own land; it belongs to a higher power and we are but 'strangers and sojourners' in the land.⁹ According to the Bible, above all, land is a gift from God. The Bible views this gift: (1) as the basis for communal interaction and (2) as the basis of power.

LAND AS A COMMUNAL GIFT

The gift of the land of Israel is conditioned on a promise of neighbourliness. Walter Brueggemann notes that in biblical Israel Man resolved to keep the condition and accept the land on the terms of the covenant.¹⁰ This covenant of neighbourliness will be reconsidered as we examine the relative rights among and between landowners in modern US society. Explicit in the gift of land in the Bible is the willingness to share with others. This runs counter to some notions of private property rights in the USA and other countries.

Just as Moses faced issues of social relationships in Deuteronomy,¹¹ we confront our social covenant with land today. According to one biblical scholar, 'either the neighbour is honoured, respected and cared for in terms of social policy and social practice, or deep human losses and pathologies arise that threaten us all. As Moses understood so well, there is no escape from this either/or, not by might, not by wealth, not by technological sophistication.'¹² In this interpretation, land is a social contract, not a one-dimensional piece of real estate. If we strip away the social aspect we lose the covenant that underlies the gift of ownership.

⁶ In discussing idolatry I certainly do not hold myself out as a biblical scholar. This section serves to introduce the notion that attachment to land can be deeply rooted in the Judaeo-Christian belief system.

⁷ W. Harrelson, 'Decalogue' in J. Childress and J. Macquarrie (eds.), *The Westminster Dictionary of Christian Ethics* (Westminster, 1967) at 146.

⁸ See Matt 22:37. Idolatry is one sin God will not forgive. The others, killing, stealing, lying, are concerned with people's relations with one another and can be justified by God. Idolatry is a sin against God and is an absolute crime: n. 1 above, at 219.

⁹ 'The land shall not be sold in perpetuity, for the land is mine; for you are strangers and sojourners with me. And in all the country you possess, you shall grant a redemption of the land' Lev. 25:23-24 RSV.

¹⁰ W. Brueggemann, *The Covenanted Self* (Minneapolis, Minn., 1999) at 105.

¹¹ *Ibid.*, at 105.

¹² *Ibid.*, at 106.

The consequence of breaking the covenant of neighbourliness transforms property ownership into idolatry.

CONTROL OF THE LAND

The Bible also cautions us about equating power with control of land. Power based upon ownership of land tempts us to forget the biblical admonition that land is a gift.¹³ A claim of ownership brings with it the power to exclude, the power to sell, the power to control.¹⁴ 'Those who claim or aspire to power . . . tend to be those who claim the right to own or control land.'¹⁵ Brueggeman contends that to reconcile this contradiction requires a biblically legitimate form of land management that is consistent with the condition of land as a gift.¹⁶

Whether manifest as an imperialistic idolatry (taking land as your own) or a boundary idolatry (excluding others from your land), an unchecked power to control land disregards the concept of land as a gift. The legal fiction of *terra nullius* (a land without inhabitants) empowered colonial imperialists to claim land as their own.¹⁷ In modern times, even though imperialistic idolatry has fallen into disfavour, boundary idolatry remains in the USA, forcing a confrontation with the same tensions as in ancient Israel. The theological promise of the gift is juxtaposed against the practical reality of control and power to exclude.¹⁸

When the legal structure encourages self-determinative control over land, landowners begin to consider land not as a gift from god but rather a right purchased from the State. As this control evolves into a fundamental principle of law (the right to own one's home free from governmental or third-party intrusion) it is easy to see how home and hearth

¹³ W. Brueggemann, *The Land* (Philadelphia, Penn., 1977) at 61. 'Torah exists so that Israel will not forget whose land it is and how it was given to use. Only the landed are tempted to forget.'

¹⁴ Consider the confrontation between Ahab and Naboth in 1 Kings 21. Ahab regards land as a tradeable commodity thinking that everything (including land) can be bought, sold, traded, and conquered. Naboth regards the land as an inalienable gift. For more discussion of this passage see Brueggemann, n. 13 above, at 93.

¹⁵ N.C. Habel, *This Land is Mine* (Minneapolis, Minn., 1995), at 142.

¹⁶ Brueggemann, n. 13 above, at 74.

¹⁷ Habel, n. 15 above, at 3. There is an abundance of legal scholarship on the topic of *terra nullius*. See, generally, J.T. Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996; A. Berman, 'The Noumea Accords: Emancipation or Colonial Harness?' (2001) 36 *Texas International Law Journal* 277, 283 (noting the doctrine has been universally condemned). For a discussion of this doctrine in Australian law see B.A. Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24 *Melbourne University Law Review* 893. For a discussion of the doctrine in Asian colonialism see W.B. Heflin, 'Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart' (2000) 1 *Asian-Pacific Law & Policy Journal* 1, 6. See also S. Whatmore, 'De/Territorializing Possession', in this vol.

¹⁸ Brueggemann, n. 10 above, 100.

can become material idols. Idolatry of land presents problems that stretch wider than theology. For example, private control and exclusivity threaten to remove environmental issues from public discourse. It may also exacerbate negative externalities that arise when political jurisdictions can close themselves off from the wider regional community.

The next step in the examination of the idolatry of land in the United States is how the legal system in the USA defines and limits self-determinative exclusive control over land. The crux of the analysis will be to discern whether the legal structure facilitates idolatry by abdicating control (power) and exclusivity (neighbourliness) to private/individual interests. Although there are countless ways in which to dissect this theme I have chosen three broad areas for discussion: zoning, the property rights movement, and sprawl.

Zoning

If forced to select one word to describe the US system of zoning (the regulation of the use and the intensity of use of land), the choice is clear: fragmented. The fragmentation of the metropolitan area is distinctly American with deep historical roots.¹⁹ Each state grants local governments the right to enact zoning regulations. As a result, the nation's more than 39,000 local governments each has its own set of zoning laws.²⁰

This system stemmed from the early years of American independence when distrust of central government coupled with a desire to bring government closer to the people. Leaders such as Thomas Jefferson advocated fragmented, decentralized, local governments.²¹ The hope was that the local landowners would control these decentralized governments more intimately than central government.²² This shift replaced the English feudal system of tenure (the right to occupy) as the central premiss of land law. Land ownership became the principle from which US real property law evolves.²³

¹⁹ For a discussion of the uniqueness of the US system see G.R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* (Albany, NY, 1991) at 165.

²⁰ In 1997 there were 19,372 municipal governments and 16,629 towns/townships: *1997 Census of Governments*. Vol. 1, Government Organization (US Census Bureau, issued Aug. 1999). Table 3—Local Governments and Public School Systems by Type and State: 1997.

²¹ Alexis de Tocqueville traced this preference for a decentralized government to pre-Revolutionary times. In a society where revolution is preceded by a relatively egalitarian State, there is a desire for a more decentralized government. See A. de Tocqueville, *Democracy in America* (R.D. Heffner (ed.), New York, 1956) at 297. For a more in-depth analysis of this point see G.C. Poindexter, 'Collective Individualism: Deconstructing the Legal City' (1997) 145 *U Pa. L Rev.* 607, 624.

²² R. Matthews, *The Radical Politics of Thomas Jefferson* (Lawrence, Kansas, 1984) at 82.

²³ See D. Thomas, 'Anglo American Land Law', Part III, (1999) 34 *Real Prop. Probate & Trust J.* 443, 449 for analysis of tenure versus ownership. In his comparison of US and

Decentralized local government concentrates zoning decisions in the hands of locally elected officials. Fragmentation of local government hands the reins of control to landowners, not to a far off (politically and geographically) central government.²⁴ Since zoning control is so intensely local, it encourages dominance of self-interest rather than the interest of the wider community. Nowhere is this practice more evident than in the NIMBY (Not In My Back Yard) syndrome. For example many municipalities 'zone out' or do not permit undesirable land uses (heavy industrial, waste facilities, low-income housing). The suburban municipalities engage in a conscious parallelism²⁵ to exclude and promote disjunctive land-use decisions that serve only the needs of the local residents and discourage co-ordinated regional planning.²⁶

Fragmented local government encourages identification of self with place, integrating the value of place with self-value. The 'right' address, the 'right' town, identifies an individual's place in society.²⁷ Using an olive tree as a metaphor for spatial identification, author Thomas Friedman comments:

Olive trees are important. They represent everything that roots us, anchors us, identifies us and locates us in the world. . . . Olive trees are what give us the warmth of family, the joy of individuality. . . . We fight so intensely at times over

UK land-use law, John Delafons notes that as the great leasehold estates were broken up after the Revolution, 'freehold land ownership became the accepted right of the citizen': J. Delafons, *Land Use Controls in the United States* (Cambridge, Mass., 1969) at 16.

²⁴ Note that this is in contrast to the British system of land-use planning and zoning where central government controls the process. The Town and Country Planning Act of 1990 creates the structure of the planning system. The Secretary of State is charged with the duty of assuring consistency and continuity in the framing and execution of a national planning and land-use policy. Even regional zoning is elusive in the USA. I stress the differentiation between zoning regionally and planning regionally. Regional planning occurs often in coastal zone acts and other environmental overlays. Regional zoning is rare. The Model Municipal Planning Code has a section on Regional Planning which would permit, but certainly not require, co-operative zoning between municipalities. See, e.g. Chap. 30 of the Pennsylvania Municipalities Planning Code. Even regional planning, however, is not accepted as a universal truth. There is not consensus that state legislatures should mandate regional planning. See B.W. Ohm, 'Reforming Land Planning Legislation at the Dawn of the 21st Century' (2000) 32 *Urban Lawyer* 181, 183.

²⁵ The term conscious parallelism comes from antitrust doctrine. It refers to the unco-ordinated, but identical, pricing decisions of competitors through tacit agreements. See R. Frieden, 'Does a Hierarchical Internet Necessitate Multilateral Intervention?' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 361, 387; R.A. Cass and K.N. Hylton, 'Antitrust Intent' (2001) 74 *Southern California Law Review* 657, 669. Of course the opposite occurs when several local municipalities are vying to be chosen for the site of a desirable use. Because local taxes support local government, local governments are forced to offer similar packages to woo a prospective business.

²⁶ Furthermore, some commentators contend that this lack of co-ordinated planning encourages sprawl, a topic taken up later in this chap. For a discussion of the linkage between fragmentation and sprawl see E. Razin and M. Rosentraub, 'Are Fragmentation and Sprawl Interlinked?', *Urban Affairs Review*, (2000) 35, 821.

²⁷ See Poindexter, n. 21 above.

olive trees because, at their best, they provide the feelings of self esteem and belonging that are as essential for human survival as food in the belly.²⁸

However attractive local control and olive trees may be, though, when land-use decisions are so extraordinarily fragmented and isolated, they threaten to lose sight of the covenant of neighbourliness to those outside the delineated local boundaries.²⁹ The threat occurs when self-interested control over the land works to the detriment of those without power or control.³⁰ Local control permits citizens broad latitude to be both protectionist and isolationist, but fails to require internalization of the negative externalities of their zoning decisions.³¹ Forcing those without power to bear the negative burdens of local zoning decisions permits control to dominate over neighbourliness, and thus encourages idolatry of land.

Property Rights

Zoning, even when done at the level of government closest to the citizenry, forces a tension between individual property rights and the police power of governmental regulation. When one considers the centrality of private property rights in the United States, the existence of *any* zoning statutes may be surprising.³² In fact, in many state constitutions the right to acquire, possess, and protect property stands along the traditional rights of life, liberty, and the pursuit of happiness.³³ If home-ownership is the cornerstone of the American Dream, private property rights have been called its essential foundation.³⁴ However, if one follows the doctrine of the property rights movement to its natural conclusion, it strips away the communal right in property in favour of the individual—

²⁸ T.L. Friedman, *The Lexus and the Olive Tree* (New York, 2000) at 31.

²⁹ Friedman, *ibid.*, notes the same danger: “[b]ut while olive trees are essential to our very being, an attachment to one’s olive trees, when taken to excess, can lead us into forging identities, bonds and communities based on the exclusion of others”: at 32.

³⁰ See Brueggemann, n. 13 above, at 65. “The task for the landed is care for the brother and sister who have no standing ground in the community. They are without land and so without power.”

³¹ An externality occurs when the actions of one person or institution may affect the welfare of another in ways that cannot be regulated by private agreements among the affected parties. E. Mills, *Urban Economics* (New York, NY, 1994), 167–8. This argument is prevalent in the discussion of municipal fair share for regional low-income housing begun in the Mount Laurel decisions: see *Hills Dev. Co. v. Township of Bernard*, 510 A 2d 621 (NJ 1986) (*Mount Laurel III*). The fair share concept was codified in New Jersey in the Fair Housing Act NJ Stat. Ann. 52:27D-301–329.

³² One commentator even called land-use controls in the USA ‘hardly more than an historical accident’. See, Delafons, n. 23 above, at 106.

³³ *Ibid.*, at 23.

³⁴ C. Bolick, ‘Subverting the American Dream; Government Dictated “Smart Growth” Is Unwise and Unconstitutional’ (2000) 148 *U Pa. L Rev.* 859.

coming dangerously close to severing the covenant of neighbourliness and exalting the power of control.

Property rights advocates promote two goals: (1) minimizing regulation of property that reduces its value or restricts use and (2) ensuring that property owners will be compensated for loss in value due to regulation.³⁵ The movement epitomizes the aggressive individualism³⁶ that has come to romanticize the central role of private property in US land-use law. Opponents of the property rights movement charge that the inappropriate use of the takings clause does not promote property rights. Instead it promotes the rights of a few at the expense of the majority of property owners.³⁷

The issue is not whether private property rights exist in the USA. Clearly they do. But these rights function within the wider context of community and the public interest. The focus, then, should be on the tension between unfettered private property rights and the recognition of public interest in private property. It would be a mistake to approach this distinction from an all-or-nothing perspective. Property rights are correlative; property law is the examination of the conflicts and resolutions between holders of different sets of rights within a piece of property.³⁸ Relevant for our discussion of idolatry is the tipping point on this continuum of private and public rights at which the covenant of land as a gift is broken.

The epicentre of delineating private and public property rights in the USA is the Fifth Amendment prohibition on the governmental taking of property without compensation.³⁹ Condemnation (or 'taking') of land by the government requires payment to the landowner. However, the thorny question is whether regulatory limitations on the use of private property also require compensation. Because notions of the supremacy of private property resonate so well with a traditional Lockean view on property, it is tempting to assume such rights always existed in US jurisprudential history.⁴⁰ However, this is not the case. The principle of compensation for regulatory loss had little constitutional significance at

³⁵ L. Oswald, 'Property Rights Legislation and the Police Power' 37 *Am. Bus. LJ* 527, 536.

³⁶ Delafons, n. 23 above, at 5 ('[a]n aggressive individualism remains a lively reminder that people came to America as a land of opportunity. There is a real antagonism toward anyone who presumes to limit a man's right to do as he pleases with his own property').

³⁷ T. Dowling, 'Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment' (2000) 148 *U Pa. L Rev.* 873, 887; Oswald, n. 35 above at 537.

³⁸ See J.L. Oakes, 'Property Rights in Constitutional Analysis Today' in J.W. Ely Jr. (ed.), *Property Rights in American History* (New York and London, 1997), vi, at 146-7. Another way of viewing the situation is treating property not as a right but rather as a basis for expectation. See C.M. Rose, 'Property as the Keystone Right?' in *ibid.*, at 222. I find this position distorted, however, as it places too little emphasis on the inherent rights of private ownership and shifts too much to the communal obligation of stewardship to the landowner.

³⁹ US Constitution, Art. V.

⁴⁰ Oswald, n. 35 above, at 562.

the time of the Revolution, and precedents for the takings clause of the Fifth Amendment were scant.⁴¹ In fact, there were no reported cases of its adjudication in Federal Court for nearly the first 100 years after it became law in 1791.⁴² Progressively, though, through application of the 'affectation doctrine',⁴³ then limitation of regulation based on police power,⁴⁴ then broadening of government powers absent arbitrariness,⁴⁵ then restricting regulatory power that destroys economic value,⁴⁶ the US courts have struggled mightily to delineate the proper boundary between public and private.⁴⁷

Despite its inauspicious beginnings and wavering favour with the US Supreme Court, advocates of private property rights began to turn the political and legal tide in their direction in the late twentieth century. After a prolonged period of 'judicial abdication' constitutional protection of private property and the takings clause took centre stage in several decisions.⁴⁸ The property rights movement counted successes in *Lucas v. S. Carolina Coastal Commission*,⁴⁹ *Nollan v. California Coastal Commission*,⁵⁰ and *Dolan v. Tigard*⁵¹ as erecting the barrier between private property rights and governmental intrusion through regulation.

In the legislature, Federal property rights legislation was dutifully introduced every congressional session in the 1990s, but was never enacted.⁵² On the state level, from 1991 to 1996, twenty-six states enacted property rights legislation.⁵³ However, as the decade came to a close the movement sputtered out. Although some continued to press the 'hot button' of property rights,⁵⁴ and egregious regulatory discretion was curtailed,⁵⁵ the mantra of property rights had lost nearly all of its legal and

⁴¹ J. Brigham, *Property and the Politics of Entitlement* (Philadelphia, Penn., 1990) at 24; W.M. Treanor, 'The Original Understanding of the Takings Clause and the Political Process' (1995) 95 *Colum. L Rev.* 782, 785.

⁴² M.J. Holland, 'Ill-assorted Musings about Regulatory Takings and Constitutional Law' (1998) 77 *Or. L Rev.* 949, 950.

⁴³ First pronounced in *Munn v. Illinois*, 94 US 113 (1876), later overruled in *Nebbia v. New York*, 291 US 502 (1934). The affectation doctrine signalled the court's willingness to expand the government's right to regulate industry if the public good is affected.

⁴⁴ See *Lochner v. New York*, 198 US 45 (1905) and *Pennsylvania Coal v. Mahon*, 260 US 393 (1922).

⁴⁵ See *West Coast Hotel v. Parrish*, 300 US 379 (1937).

⁴⁶ *Lucas v. S. Carolina Coastal Commission*, 505 US 1003 (1992).

⁴⁷ For a more in-depth analysis of this topic see G.C. Poindexter, 'Light Air or Manhattanization: Communal Aesthetics in Zoning Central City Real Estate Development' (1998) 78 *Boston University Law Rev.* 445.

⁴⁸ Holland, n. 42 above, at 971.

⁴⁹ 505 US 1003 (1992).

⁵⁰ 483 US 825 (1987).

⁵¹ 512 US 374 (1994).

⁵² Oswald, n. 35 above, at 527.

⁵³ B.W. Ohm, 'Reforming Land Planning Legislation at the Dawn of the 21st Century' (2000) 32 *Urban Lawyer* 181, 188.

⁵⁴ P. Salkin, 'Smart Growth at Century's End: The State of the States' (1999) 31 *Urb. Law.* 601, 644.

⁵⁵ e.g., in *City of Monterey v. Del Monte Dunes*, 526 US 687 (1999), the Court held that the repeated rejections of a proposal could give rise to a compensable taking.

most of its political clout. The much-awaited 'higher scrutiny' for land-use regulation and 'sweeping vindication' of private land rights never occurred.⁵⁶ Whether for political reasons (the Clinton administration), ideological change (a move in the country toward a more centrist approach to government), or changes in legal thought (a lessening of the sharp battle between critical legal studies and law and economics), the movement was no longer a driving concern by the end of the century.⁵⁷

Going back to what the US Supreme Court stated 165 years ago in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*: '[w]hile the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation'.⁵⁸ Although new constitutional standards, such as the rough proportionality test in *Dolan*, did appear to signal an eagerness on the part of the Court to cut back on the importance of community rights, subsequent decisions (such as *Del Monte Dunes*) dispelled this impression by limiting application of the new test only in the case of exactions.⁵⁹ Land-use regulation, despite attacks from the property rights movement, continues to contain a significant component of the right of the public in private property. In this respect US law has worked to prevent (or at least not facilitate) the idolatry of land. While retaining the boundary between public and private,⁶⁰ land-use law in the USA has respected the porous nature of the line. The ramifications of individual decisions may seep through the line and affect those outside the decision-making circle. But the rights of the community still limit individual choice.

This jurisprudential back and forth demonstrates that property rights do not and cannot exist in a void—untouched and unbounded. Property

⁵⁶ For a property rights view contemporaneous with the *Lucas* decision see S.J. Eagle and W.H. Mellor III, 'Regulatory Takings after the Supreme Court's 1991–92 Term: An Evolving Return to Property Rights' (1992) 29 *Cal. W L Rev.* 209, 210, 236; for a more recent assessment see Bolick, n. 34 above.

⁵⁷ See Holland, n. 42 above, at 972 for reasons why the movement gained momentum in earlier years. See also J. Walter, 'The Property Rights Bust', *Governing Magazine*, June 1999, 38 (noting that the private property rights laws passed in the mid-1990s have turned out to have little impact); V. Sutton, 'Constitutional Taking Doctrine—Did Lucas Really Make a Difference?' (2001) 18 *Pace Envtl. L Rev.* 505 (questioning the impact of the property rights movement).

⁵⁸ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 US 420 (1837).

⁵⁹ *City of Monterey v. Del Monte Dunes*, n. 55 above, at 1635

⁶⁰ See C. Reich, 'The New Property' in Ely (ed.), n. 38 above, at 771: '[p]roperty is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. With that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference'.

rights are aggregates of correlative rights and responsibilities.⁶¹ Although the rhetoric of the property rights movement resounds with what others have termed a heroic autonomy,⁶² hegemony of this heroic autonomy fails to recognize that property rights are built upon a social construct depending upon the cooperation of others. Respect for this social structure keeps the covenant of the gift of land. As with zoning, idolatry will take hold in the absence of outside, community-based interest in private property.

Sprawl

A discussion of sprawl ties together zoning and private property rights. As suburbanization accelerated in the USA in the late 1950s and early 1960s, so did the disdain of the planning community for what it termed 'sprawl'.⁶³ In 1970, for the first time, suburban residents outnumbered city residents in metropolitan areas of the United States.⁶⁴ In 1999 over 60 per cent of the housing units in the US metropolitan areas were located in the suburbs.⁶⁵ The suburban century⁶⁶ is under way.

Land consumption even outpaced suburbanization. According to a 2000 GAO (Government Accounting Office) study, between 1970 and 1990 the amount of developed land in metropolitan areas grew by 75 per cent while the population grew by 31 per cent.⁶⁷ This mismatch is what contributes to sprawl. Loosely defined, sprawl is uncontrolled and unplanned suburban and ex-urban growth that devours free space further and further from the city centre, changing meadows into housing developments and farmland to strip malls. Sprawl takes advantage of the lack of regional zoning to orchestrate growth, and relies on private property rights incentives in developing vacant land.

As suburban development burgeoned over the years, planners, suburban residents and environmentalists joined together under the umbrella of 'smart growth'⁶⁸ to limit further sprawl. The morally attractive

⁶¹ Oakes, n. 38 above.

⁶² Rose, n. 38 above, at 257.

⁶³ Sprawl as a planning term did not enter the literature until the late 1950s or early 1960s. See R. Burchell and N. Shad, 'The Evolution of the Sprawl Debate in the United States' (1999) 5 *Hastings W NWJ Envtl. L & Pol'y* 137, 140.

⁶⁴ 1970 Census of Population, vol. 1, table 34.

⁶⁵ Of the 218,606,870 people living in metropolitan areas, 136,348,919 lived outside the city centre. See Metropolitan Area and Central City Estimates for 1 July 1999 (release date Oct. 2000), US Census.

⁶⁶ William Schneider, 'The Suburban Century Begins', *The Atlantic*, July 1992, at 33.

⁶⁷ 'Community Development: Local Growth Issues—Federal Opportunities and Challenges', *United States General Accounting Office Report*, 6 Sept. 2000, 80.

⁶⁸ Smart growth is an initiative of the American Planning Association, the Department of Housing and Urban Development, the Henry M. Jackson Foundation, the National Resource Defense Council, and the Surface Transportation Policy Project. There is a 'tool kit' for policy-makers that attempts to promote growth that is compact, walkable, and transit accessible and will ultimately compete better with sprawl in policy

arguments of the environmentalists and planners (preservation of green space, lowering dependence on automobile use, etc.)⁶⁹ mask the somewhat selfish motivations that may be ascribed to suburbanites. Why might suburban homeowners work feverishly to stop sprawl?⁷⁰ Considering that most Americans live in what once may have been considered sprawl, this fight is about pitting the 'we got ours' against the 'we want some toos'.⁷¹ Once people move to the suburbs they eagerly roll up the welcome mat and work to prevent burdens associated with other people following their lead.⁷² Suburban residents, while mimicking the mantra of environmentalism, are motivated by preserving the way of life they bought into when they moved to the suburbs rather than by more altruistic reasons.⁷³ They do not treasure the farm down the road *sine qua non*. Rather they loathe the notion of sharing the roads, schools, and grocery stores with the newly arrived residents who bought houses on the subdivided former farmland.

The definition and existence of sprawl lie in the eye of the beholder. Although the issue of sprawl has been raised outside the United States,⁷⁴

forums and in the market place: see Burchell and Shad, n. 63 above, 159. For examples of state initiatives of smart growth see P. Salkin, 'Smart Growth at Century's End: The State of the States' (1999) 31 *Urban Lawyer* 601.

⁶⁹ On the other hand some assign a more venal motive to the environmentalists. Some 'view anti-sprawl initiatives as reflecting political opportunism and anti car and anti suburb animus rather than actual societal need': W. Buzbee, 'Urban Sprawl, Federalism and the Problem of Institutional Complexity' (1999) 68 *Fordham L Rev.* 57, 60.

⁷⁰ Some commentators question the willingness of suburban landowners actively to fight sprawl: '[l]ittle reason exists, however, to anticipate that citizens will invest heavily in sprawl correcting policy. For most citizens, the cost of such political participation would quickly exceed the costs of suffering ill associated with sprawl': W. Buzbee, 'Sprawl's Political Economy and the Case for a Metropolitan Green Space Initiative' (2000) 32 *Urban Lawyer* 367, 374.

⁷¹ M.A. Wolf, 'Environmental Law Slogans for the New Millennium' (2000) 30 *Environmental Law Reporter* 10283, 10284.

⁷² Bolick, n. 34 above, at 863.

⁷³ To test this hypothesis think about how many protestors of a proposed development do NOT live in close proximity. If environmental motivations were the true underpinning of activism the demonstrators should be willing to protest regionally, statewide, even nationally. As some commentators noted: '[i]n sum the majority of the American public is not unhappy with the current pattern of development in metropolitan areas—it simply can no longer afford it. Thus, the primary concern about sprawl development, at a time when the average American is satisfied with its outcome, is cost.': Burchell and Shad, n. 63 above.

⁷⁴ e.g. in Seoul municipal build-up increased 54% and agricultural land declined by over 58% between 1979 and 1991. See K.G. Kim, 'Flood Hazard in Seoul: A Preliminary Assessment' in J.K. Mitchell (ed.), *Crucibles of Hazard: Mega-cities and Disasters in Transition* (Tokyo, New York, 1999) at 98. Mexico City has become a paradigm of 'fast anarchic urban growth during the second half of the twentieth century': S. Puente, *Social Vulnerability to Disasters in Mexico City: An Assessment Method* (Tokyo, New York 1999) at 298. Sprawl is the dominant characteristic for the Japanese cities of Tokyo, Osaka and Nagoya. See A. Sorensen, 'Land Readjustment, Urban Planning, and Urban Sprawl in the Tokyo Metropolitan Area', *Urban Studies*, (1999) 36, 2333, 2334. Officials decry the declining quality of life in London due to sprawl. See D.J. Parker, *Disaster Response*

low density, one of the intrinsic characteristics of sprawl, is contextual.⁷⁵ The aspiration to the isolated house as the 'American middle-class ideal',⁷⁶ combined with the 'prairie psychology'⁷⁷ that comes with the confidence that land supply is unbounded, has produced a sense of entitlement to a four-bedroom, 2.5-bath, centre-hall colonial house on a one-acre tract of suburban land. This is not sprawl—this is the American way.

Leaving aside the political⁷⁸ and economic⁷⁹ impetus pushing residents into the suburbs, the search for idolatry forces the focus back on the importance of land ownership as underpinning the shift to suburban living.⁸⁰ Suburbanization is the revealed preference on the part of the American consumer.⁸¹ While certainly not ignoring the role of governmental intervention in promoting or shaping this private preference,⁸² America's preference for the suburbs cannot simply be an artefact of public subsidy. Suburbanization occurred long before the 'usual suspects'⁸³ of governmental intervention appeared.⁸⁴ The laws and subsidies may have provided a substantial push, but the pull of consumer demand is what feeds the drive to populate ever-widening reaches of the major metropolitan areas.

Perhaps it is the desire to be surrounded by grass, trees, flowers—all in a controlled setting of course. Americans have a love affair with their suburban lawns. '[I]f we look below the surface, our love of lawn is more

in London: A Case of Learning Constrained by History and Experience (Tokyo, New York, 1999) at 197.

⁷⁵ US population density is far lower than that of comparative countries in Europe and Asia. See *United Nations World Population, 1998* (United Nations Department of Economic and Social Affairs, www.undp.org/popin/wdtrends/p98/hp98awld.htm (visited 1 July 2001)). See also Burchell and Shad, n. 63 above, 140 ('[d]ensities in the US overall are roughly one tenth what they are in Western Europe; in turn, Western European density is much lower than that of Japan and only a fraction of what is found in such location as Hong Kong and Indonesia').

⁷⁶ K. Jackson, *Crabgrass Frontier* (Oxford, 1985) at 52.

⁷⁷ Delafons, n. 23 above, at 4.

⁷⁸ e.g. the federal subsidy inherent in highway planning and income tax benefits. For a more in-depth discussion see Jackson, n. 76 above, at 292 ff.; Buzbee, n. 69 above, at 109.

⁷⁹ e.g. the Tiebout hypothesis that citizens look for the community that best meets their appetite for taxes and services: C. Tiebout, 'A Pure Theory of Local Expenditures', *J Pol. Econ.*, (1956) 64, 416, 418. See also G.C. Poindexter, 'Towards a Legal Framework for Regional Redistribution of Poverty Related Expenses' (1995) 47 *Washington Univ. J. of Urban and Contemporary Law* 3, 10.

⁸⁰ Of course one can own land within a city. One can even own real property without owning land (a condominium). However, it is a cultural phenomenon to aspire to a house surrounded by land.

⁸¹ For a discussion of the suburbs as revealed consumer preference see Poindexter, n. 21 above, at 612 ff. See also Buzbee, n. 70 above, at 369.

⁸² Buzbee, n. 69 above, 66.

⁸³ Highways, interest deductions for home mortgages, redlining.

⁸⁴ American suburbs can be traced to the mid-19th century: F.H. Bormann, D. Balmori, and G. Geballe, *Redesigning the American Lawn* (New Haven, Conn., 1993) at 22.

complicated. It involves aesthetics, economics, psychology, and especially history.⁸⁵ The lawn, carrying the English connotations of nature with it, became a symbol of prestige in the nineteenth-century suburbs.⁸⁶ With the advent of the lawnmower in 1830, a well-manicured lawn was available to the masses.⁸⁷ Today, the suburban lawn has been accused of being both a social and maintenance tyrant.⁸⁸ It demands adherence to meticulous care regimes to avoid becoming the neighbourhood pariah with unkempt grass. It encourages the deification of the ride-on mower.

The maniacal attention to lawn along with the 'fenceless state'⁸⁹ of suburbia can be used as a metaphor for the tension between the individual right to private property and the social interconnectedness of all property. It begs the question: who owns your front lawn—you or your neighbourhood? This same question can be posed in discussing sprawl. If we scrape aside the environmental arguments (which, in large part, constitute entrepreneurial politics⁹⁰), the sprawl discussion is about whether private land rights (to subdivide and sell at will) will triumph over communal interest of present residents to maintain the status quo. It appears to be the same public/private argument that emerges in most regulatory analyses where the public interest is the communal good.

There is an interesting twist to this discussion, though. Superficially current suburbanites march under the banner of the public good of green space preservation. In truth they are more interested in protecting their own private rights, which they construe as a right not only in their fee-owned property but also a right to community status quo. The public interest has been privatized. The notion of land as a communal good has been warped to limit the use of the good only to those presently in control. This eviscerates the neighbourliness aspect and reduces the argu-

⁸⁵ *Redesigning the American Lawn*, n. 84 above, at 9.

⁸⁶ *Ibid.*, at 22.

⁸⁷ The lawnmower was invented in 1830 by an Englishman named Edwin Budding; F.E.H. Schroeder, *Front Yard America* (Bowling Green, Ohio, 1993) at 45; Bormann, Balmori, Geballe, n. 84 above, at 23.

⁸⁸ See Schroeder, n. 87 above, at 124 ('American lawns are tyrannical in two ways, social tyranny and maintenance tyranny'). See also Bormann, Balmori, Geballe, n. 84 above at 6 ('[t]he well kept front lawns roll down the street providing open space and beautiful vistas. In this ideal, the grass sward is as pure as possible, mowed two inches high, and free from dandelions and other insidious intruders').

⁸⁹ Schroeder, n. 87 above, at 99 (the fenceless state of American suburbs did not appear until after 1870). Contrast this with the invention of the sunken fence in Europe about 1690. The sunken fence (a deep trench between properties) allowed a vista to the horizon unimpeded by fences but kept livestock from roaming. See Bormann, Balmori, Geballe, n. 84 above, at 15.

⁹⁰ A disaster or crisis (real or perceived) encourages politicians to engage in 'entrepreneurial politics' and ride the issue for their own political gain. For a more in-depth discussion see Buzbee, n. 69 above, at 130. See also Wolf, n. 71 above, 10283, 10286 ('[w]ith this new acceptance of environmental ideals comes a new political figure—the instant environmental activist').

ment to a battle between competing private interests. The public interest of the wider community is relegated to the silent sidelines because it has no voice due to the circumscribed locality of zoning decisions.

The privatization of public good introduces the deity of Open Space. Legally speaking the deity of Open Space is a paradoxical god. Landowners not only want control over the use of their own land but also want control over the use of adjoining property. This expands our notion of what is property to include what I call 'communal private property'. A cousin to nuisance,⁹¹ communal private property permits control by an affected community to prohibit actions that would alter a communal way of life.

This notion hits two opposite walls. First of all, what may be communal private property to the rest of the area's landowners is an infringement of someone's right to use his or her own private property. This outside control on private property may be condoned with a nod towards the importance of community good at the expense of private gain. However, the idea of communal private property falters at the other end of the spectrum, where the rights of the wider community reside. When the definition of community is limited to present neighbours, it ignores the needs and rights of those who wish to purchase land but are kept out. This limitation is not so easily dismissed because the covenant of neighbourliness must include others outside the present community.⁹²

When neighbourliness becomes an exclusive (rather than inclusive) term, the conflict with the biblical imperative surfaces. This tension highlights a flaw in US land-use law: what to do with land that is not needed for a purely public use (such as a park) but nonetheless should be protected from development.⁹³ Although there are various theories of how to value public good expressed as an exaction on development,⁹⁴ public good in the sprawl discussion is inflated by the value attributable to communal private property. Therefore, attempting, for example, to recapture this inflated public value through a land tax for converting farmland to other uses produces an imperfect fit.⁹⁵

⁹¹ Giving one property owner the right to enjoin actions offsite that cause harm or damage to his/her property.

⁹² This goes back to the biblical imperative that land is a gift that must be shared. The task for the landed is care for the brother and sister (characterized as the poor, the stranger, the sojourner, the widow, and orphan, and the Levite). 'This diverse list has one feature of community. They are those who have no standing ground in the community. They are without land and so without power and consequently without dignity': Brueggemann, n. 13 above, at 65.

⁹³ For a comparison of UK and US law on this topic see Delafons, n. 23 above, at 95.

⁹⁴ e.g. *Dolan v. Tigard* 114 S. Ct. 2309 (1994) imposes a 'rough proportionality' test. For a discussion of alternative valuation see D.T. Kendall and J.E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan' (1995) 81 *Va. L Rev.* 1801.

⁹⁵ New Jersey, Maryland, and Connecticut were among the first states to pass use value preferences for taxing farmland. See J. Brigham, *Property and the Politics of Entitlement* (Philadelphia, Penn., 1990) at 47.

These types of attempts are imperfect because they impose a cost on the wrong side of the ledger. The flaw exists because we have not found a way to place a value on what is being lost through the imperative of neighbourliness. The value of sharing is not embodied in the land subject to regulation. It is not to be found in the increased value when a piece of land is converted from farmland to residential. Nor is it the value of truly public goods. Rather, it is the value embedded in the property of the existing landowners who bought land in reliance upon maintenance of the status quo, i.e. the endowment effect. Present landowners value the loss of open space more than prospective landowners value the gain of purchasing developed land.⁹⁶ It is this endowment value that is lost in the quest for neighbourliness.

As the anti-growth jargon continues to shift to a more euphemistic 'smart growth'⁹⁷ or 'liveable community'⁹⁸ campaign, suburban landowners confuse their endowment value in maintaining the status quo with the communal imperative that land is a gift to be shared. To fit the anti-sprawl movement into the idolatry framework, true public interest (such as environmentalism that benefits the wider society) must be separated from a communal private interest that benefits only a select few. For example, permitting higher density use (such as cluster housing and neo-traditional development) retains more open space than traditional low-density use, while at the same time not stopping all growth. This serves the public good of environmentalism, willingly sacrificing the endowment value of communal private property.

Conclusion

Mitchell asserts that 'space is a practiced [*sic*] place, a site activated by movements, actions, narratives and signs'.⁹⁹ Land is likewise a practiced place. It is activated by social interaction, cultural significance of place-based identity, and by law. Idolatry flourishes when the law fails to champion the rights of the community. However, given the historical and societal importance of private ownership of land it would be a mistake to underestimate the central role private property plays.

⁹⁶ C.R. Sunstein, 'Human Behavior and the Law of Work' (2001) 87 *Va. L Rev.* 205, 221; see also G.C. Poindexter, 'Light, Air or Manhattanization' (1998) 78 *BU Law Rev.* 445, 500 (the endowment effect is the difference between an owner's bid price and an owner's asking price); Buzbee, n. 69 above, at 106 ('[a]ctual psychological research reveals that people are generally risk averse and value what they have against loss more than they value similar potential gains').

⁹⁷ See Wolf, n. 71 above, at 10283 (contending that 'if it were truth in advertising it would be smart anti-growth').

⁹⁸ See B.W. Ohm, 'Reforming Land Planning Legislation at the Dawn of the 21st Century' (2000) 32 *Urban Lawyer* 181, 205.

⁹⁹ W.J.T. Mitchell, 'Holy Landscape: Israel, Palestine, and the American Wilderness', *Critical Inquiry*, (2000) 26, 193, 198 (quoting Michel de Certeau).

Not surprisingly, balance is the key. The concepts of power (through control) and gift (through neighbourliness) hang in the balance. These seemingly single, separate notions intertwine in the US legal system in a complex way. Notwithstanding the complexity both concepts must be given due respect to ensure that private rights are respected, but only to the point that recognition of the common good restricts idolatry.

The answer to this dilemma will be to encourage private rights up to the point of suborning idolatry. Any point less fails to recognize the quasi-religious attachment to land in the USA. Any point further threatens to strip away the covenant of land as a gift to be shared. Land ownership in the United States is more than a legal right; it is a social obligation.