Privatizing Public Lands: A Bad Idea

Scott Lehmann
Religious prophets and ethical philosophers have of course at all times been mostly reactionaries, defending the old against the new principles.¹

I. Introduction

The Sagebrush Rebellion of the late 1970s was waged by a loose coalition of Western politicians and economic interests—mostly ranchers—under the banner of states’ rights. Their official complaint was that the Western states had not really been admitted to the Union on an “equal footing” with the original thirteen states, as stipulated in their statehood acts: The original states had secured title to all the Crown lands within their boundaries, whereas states created from federal territory were given much less, typically a few sections per township (“school lands”) for the support of public education. This line of argument, if sound, would have supported state claims to nearly all federal land. But the Sagebrush Rebels were willing to settle for less—the transfer of Bureau of Land Management (BLM) land to the states—because appeals to states’ rights and “New Federalism” were largely window dressing.

The Rebellion was animated not by discomfort with perceived legal inconsistencies or by federalist ideology, but rather by the perception that outsiders were gaining the upper hand over traditional users in influencing federal land policy and management. The Carter Administration’s “hit list” of western water projects, its top-down promotion of a mobile basing system for the MX missile in Nevada and Utah and a massive synthetic fuels development program in Colorado, and anecdotes about high-handed federal land managers, all made the federal government a convenient target. Underlying all the wrangling, however, was scarcity. Having long had their way on federal lands, traditional grazing, mining, and logging interests now had to compete with those who asserted interests in recreation, wilderness and other environmental values, national security, energy independence, and fiscal responsibility. Ranchers and others pushed for federal-to-state land transfers because they anticipated better treatment from local statehouses—or, having raised a ruckus, better treatment from Washington. In any case, enthusiasm for federal-to-state land transfers subsided in the early 1980s as it became clear to the Sagebrush Rebels that Interior Secretary James Watt was “a good guy.”²

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Recalling the fate of Nevada's school lands, some critics of the transfer proposal warned that, should BLM land become state property, much of it would eventually end up in private hands. Other critics, however, faulted the proposal precisely because it interposed state ownership between federal and private ownership. Rather than advocate transfer to the states (which, in their view would merely relocate the problem of scarcity), these critics urged privatization, which, they claimed, would solve the scarcity problem efficiently. Some of them pushed for privatization from within the Reagan Administration, though with little success. The Administration did propose a modest Asset Management Program to dispose of "surplus" lands, but it was doomed by Congressional opposition and Watt's advocacy. A Presidential Commission on Privatization was established, but even it directed most of its attention to deregulation.

I review this recent history because it is already in re-runs. The Sagebrush Rebellion has been succeeded by the County Movement, which aims at local control of federal land policy. In 1980, dissatisfaction with government led to the "Reagan Revolution;" in 1994, a similarly dissatisfied electorate delivered Congress to Republicans pledged to end business as usual. It will certainly not be business as usual on the public lands, if some Members have their way. Bills have been introduced to transfer BLM land to the states; to give Tongass National Forest to the state of Alaska; to direct the Secretary of the Interior to determine whether certain units of the National Park System might not be better administered "through partnerships or direct management by states, local governments, other agencies, or the private sector," and to establish an independent commission, which, along with drawing up a plan for consolidating the BLM and the Forest Service (USFS), is charged with reviewing the patterns of federal, state, and local public and private ownership and control of land and considering possible transfers of land ... for the purpose of allowing the most efficient and consistent management of the land and its resources. Outside of Congress, calls for privatizing public lands are again being heard.

Though wholesale privatization seems quite unlikely, no one can know how this episode will play out. Clearly, privatizing public lands is not as unthinkable as it seemed even a few years ago, and now seems a safe time to give it some critical attention. Those who dismiss the idea out of hand are, I think, both wrong and unwise. There is more to be said for privatization than such critics might imagine, and sooner or later they are likely to be embarrassed by their ignorance. On the other hand, there is a lot less to be said for privatization than some advocates claim. Indeed, it seems to me quite a bad idea.

I argue here that what appears to be the fundamental argument for privatization—the efficiency argument, which justifies privatization as promoting the efficient allocation of resources—is seriously flawed. Insofar as this argument does present the case that advocates have made for privatizing public lands, they have not yet given us good reason to think that such lands should be privatized. Moreover, the weaknesses of the efficiency argument also raise obstacles to arguing for privatization on other grounds and ultimately provide openings for opponents of privatization to defend public lands and the current management system. Finally, some of the criticism of privatization developed here applies as well to marketization. Under marketization, public lands are retained in public ownership, but their resources are to be allocated as if they were privately held. That is, they are to be allocated as if by a market. Since the rationale for marketization is efficiency, problems with the efficiency argument are also obstacles to justifying marketization.

II. The Efficiency Argument

Of the relatively small number of people who are unhappy with federal land management (this is my view from the East, anyway) most are dissatisfied because they don't like what it delivers. These people have a vision of how certain public lands should be used, a vision which federal management does not realize. This group includes both environmentalists who think the Clinton Administration's spotted owl recovery plan for the Northwest doesn't go far enough and timber activists who think it goes too far.

Though privatization advocates sometimes advertize themselves as environmentalists, they

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9. Terry Anderson and Donald Leal, for example, regard themselves as free-market environmentalists. A biographical note in their book, TERRY ANDERSON AND DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 192 (1991), describes them as "avid outdoorsmen who ... are dedicated to sound natural resource management and to the environmental principles set forth in this book."
Privatization advocates do not present their case quite this simply. So, before criticizing the efficiency argument, I shall fill it out by locating the premises within their writings.

III. Elaboration of the Efficiency Argument

According to Richard Stroup and John Baden, "the world is populated by self-interested individuals constantly seeking ways to make themselves better off." This is P1. Because "the forces of simple self-interest are relentless," we cannot "rewire" people so that the public interest becomes self-interest. But "better institutional arrangements can provide incentives that channel the efforts of imperfect men into productive and efficient, rather than destructive, activities." In particular, Terry Anderson and Donald Leal maintain that "good resource stewardship depends on how well social institutions harness self-interest through individual incentives."16

In the view of privatization advocates, private ownership of resources is the best institutional solution to this problem. Given P4 and P5, this is P2, provided "most efficiently employed" is relativized to institutions, i.e., understood to be qualified "relative to what other systems could achieve." It is supported by positive considerations from economics and negative considerations from public choice theory. The former remind us of the productivity of exchange, among other things; the latter allege that collective management incorporates incentives for inefficiency.

If private property rights have the characteristics mentioned in P2, then I will do well by doing

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The Efficiency Argument

Premise 1 ["P1"] – Individuals are self-interested.
Premise 2 ["P2"] – If individuals are self-interested, resources will be most efficiently employed if they are privately owned, ownership being characterized by property rights that are well-defined and non-overlapping, secure, and transferable.
Premise 3 ["P3"] – Privatization would create such rights in the resources of public lands.
Premise 4 ["P4"] – Resources are more efficiently employed as their use better satisfies the desires of consumers.
Premise 5 ["P5"] – Situations are better as the desires of consumers are better satisfied.

Conclusion ["C"] – Public lands should be privatized.

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10. James M. Buchanan, The Limits of Liberty 2 (1975). By "situation," Buchanan appears to mean social institutions rather than outcomes but he says later: "It is impossible for an external observer to lay down criteria for 'goodness' independently of the process through which results or outcomes are attained. . . . [T]he extent that individuals are observed to be responding freely within the minimally required conditions of mutual tolerance and respect, any outcome that emerges merits classification as 'good,' regardless of its precise descriptive content." Id. at 6.


12. Stroup & Baden, supra note 11, at 55.

13. Id. at 26.

14. Id. at 29.

15. Id. at 43.

16. ANDERSON & LEAL, supra note 9, at 4.
good, via production and exchange. Transferable rights underlie exchange, which enables consumers to trade up by exchanging resources they own (such as their labor) for those they’d rather have (such as something to eat). Secure rights allow for productive investment rather than having to capture benefits through consumption (for example, without a secure right to the fruits of his labor, a farmer might be better off eating his seed corn than planting a crop). Where it is unclear what license rights confer, such rights remain ill-defined and encourage wasteful conflict. Where rights overlap, exercise of mine conflicts with exercise of another’s, so my consumption and production may harm others: because of such spillovers, I may no longer do good by doing well. Doing well is getting what I prefer (better satisfying my desires), doing good is enabling others to get what they prefer (better satisfying their desires). As Stroup and Baden put it, “[u]nder this system, individuals gain by doing what others desire most; they do well for themselves when they do good for others.” Since people know their own desires and preferences best, it’s hard to see how we could improve upon it.

By contrast, collective management separates “authority from responsibility,” permitting individuals to shift to others the costs of attaining desired allocations of public resources. In consequence, taxpayers at large help bankroll many public land users, whether they be ranchers grazing cattle on BLM allotments at below-market fees, or backpackers hiking in Wilderness Areas at no charge. More importantly, the system encourages “transfer activity,” in which interested parties expend time, ingenuity, and money trying to enlarge their slice of the pie at others’ expense, rather than in more productive activities that would enlarge the whole pie. Since the individuals who enjoy the benefits are generally not the same as those who pay the costs, they have little to lose by pushing for more benefits than they are willing to pay for. So, it is likely that costs often exceed benefits and that resources are accordingly misallocated. Anderson and Leal, for example, suggest that, because “those who benefit from wildlife preservation [in the Arctic National Wildlife Refuge] do not have to pay the opportunity costs of forgone energy production, they will demand ‘too much’ wildlife habitat.” Add self-interested legislators and bureaucrats, using the political system to advance their own interests, unchecked by a “rationally ignorant” citizenry, and things look pretty bad. Even if we suspend disbelief and imagine these folks to be selfless servants of the public good, there is no way for them to get the information about the desires and preferences of the public required in order to allocate resources efficiently.

While no entirely satisfactory account of efficiency is given in the privatization literature, there is little doubt about the commitment of privatization advocates to this ideal. Thus, B. Delworth Gardner speaks of “the efficiency norm,” and Anderson and Leal argue that “the important question [regarding the Arctic National Wildlife Refuge] is whether all costs are internalized so that efficient levels of oil production and environmental amenities are chosen.” Concerning the content and worth of efficiency, Baden and Dean Lueck tell us that “… an economic system is efficient if resources are allocated so that no one can be made better off without making at least one person worse off. It is difficult to think of a more worthy goal.” The first of these claims is a somewhat imprecise rendering of the so-called Pareto criterion of efficiency, which is one elaboration of P4. The second claim approximates P5, provided that “better off” and “worse off” are understood more precisely in terms of individual preference, so that one is better off with allocation 2 than with allocation 1 if one prefers what one receives from 2 to what one receives from 1.

17. STRoup & BAdEN, supra note 11, at 5.
18. Id. at 41. “In order to be useful and beneficial to society as a whole, an institution must relate authority—that is, command over resources—to personal responsibility for the costs and benefits that flow from decisions.” Id. at 26-27. “[I]n the public sector…those who make policy decisions do not bear all the costs of those decisions.” Id. at 42.
19. Id. at 13.
20. ANDERSON & LEAL, supra note 9, at 15.
21. For development of this idea, see Buchanan, supra note 10, at 156-61; William Niskanen, Bureaucracy and Representative Government (1971); Richard McKenzie & Gordon Tullock, The New World of Economics 196-210 (1975) (Bureaucratic Entrepreneurs).
22. Stroup & Baden, supra note 11, at 44; Anderson & Leal, supra note 9, at 15. Ignorance is rational if gaining knowledge is costly relative to its likely benefits. But each citizen is just one among many and cannot reasonably expect to have much influence on policy.
23. Anderson and Leal observe that the economic models employed by the USFS and the BLM cannot produce efficient allocations without information about the values that individuals place on resources, and they doubt that such values can be revealed by anything other than “voluntary trades.” Anderson & Leal, supra note 9, at 13.
25. Anderson & Leal, supra note 9, at 82.
IV. Criticism of the Efficiency Argument

Turning now to criticism of efficiency argument, I note in passing a slight logical problem: the conclusion does not quite follow from the premises. The argument is consequentialist: it assumes that once we know which course of action has the best overall consequences, we know what we ought to do. Some people deny this. One who asserts rights against forced abortion or sterilization, while at the same time conceding that China has a very serious population problem that can't be solved without effectively limiting family size provides a good example. The problem for such non-consequentialists is coming up with something that looks more important than consequences, properly assessed. I don't see any way of doing so in this case, so I shall not pursue this line of attack further. The point, however, suggests a different line of defense for privatization, namely, make a convincing non-consequentialist case for private property rights. I shall briefly consider this idea later.

Logic aside, there remain numerous substantive deficiencies with the argument: with the possible exception of P4, which can be regarded as partially characterizing the technical notion of efficiency, all of the premises are dubious. I begin with familiar reminders of market failure.

Spillovers are excluded by non-overlapping property rights, but this just assumes the problem away. It is a pity that God didn't undertake Creation with the argument from efficiency in mind, but He evidently didn't. There just is no way to divide this world up so that what one property owner does with his property does not affect what others do with theirs (unless, of course, we make everything the property of one person). So P3 is simply false.

Privatization advocates may concede as much, but they will object that collective management cannot be rationalized as a corrective to the spillovers that inevitably arise in a private property regime. They claim that public land management also produces spillovers, which in their view dwarf any that may be anticipated, were public lands to be privatized (consider, for example, large-scale subsidized logging in the Tongass National Forest, once again being promoted by the Alaska Congressional delegation, which has a negative impact on fisheries and recreation). Privatization advocates go on to suggest that we could use covenants to head off whatever significant spillovers privatization might be expected to visit upon us.28

This response essentially saves P3 by strengthening P2: in place of unattainable non-overlapping property rights, we have rights that don't overlap in certain respects. Since private property is no longer idealized, P2's claim that such a system allocates resources more efficiently than alternative systems is stronger and consequently more dubious. Is it really obvious that private firms like Louisiana Pacific or Champion International would do better in the spillover department than the USFS, were they to control the National Forests? Are we prepared to say they would do better simply because recreationists, say, would no longer have any defensible claim to enjoy what were formerly National Forests and therefore could not be injured by their destruction?29 The suggestion that covenants be employed to limit spillovers strikes me as odd, coming from people who claim to have read Hayek. It is difficult to imagine how covenants could adequately substitute for judgment informed by local knowledge. Moreover, it is not clear how an adequate system of covenants encumbering private property would differ from the current system of regulated private use of public property, except perhaps in being even more cumbersome and litigious. Finally, a showing that the current system produces significant spillovers, or invests too much in preventing insignificant ones, or tends itself to substitute regulation by the book for informed judgment, will suggest reform rather than revolution—at least to those who are not ideologues.

Another problem for P2 is transaction costs. The costs of acquiring information and setting up an exchange may block productive movement of resources, particularly where (a) each of a large number of people would derive a relatively small benefit, or where (b) it is difficult to determine or collect what people are actually willing to pay (or exchange) for benefits. Public goods, which cannot be provided to one consumer without being provided to every consumer, are standard illustrations of problem (b), and they often exemplify (a) as well. Wilderness, for example, has some value to many people who will never visit it. Perhaps aggregate willingness-to-pay for wilderness preservation, both by visitors and non-visiters, exceeds what others are in one way or another willing to pay for development, so that preservation is efficient (by one standard measure). But unless the private owner

28. Thus Barney Dowdle suggests that easements could be used to secure a different mix of multiple-use outputs than would be produced if government timberlands were privatized. Barney Dowdle, The Case for Privatizing Government Owned Timberlands, in PRIVATE RIGHTS AND PUBLIC LANDS 71, 82 (Phillip N. Truluck ed., 1983).

29. "When large investors, clubs, partnerships, and corporations can purchase tracts large enough to incorporate what otherwise would be external effects, then the externalities are internalized." SEGUR & BADER, supra note 11, at 124.
has some way to collect this sum, development may prevail. By contrast, the current system has in place mechanisms for acquiring such information and effecting the required allocations.

Gardner speaks for privatization advocates generally in dismissing this objection as "largely a ruse to justify political allocations of the kind now extant."30 As in the case of spillovers, advocates of privatization concede the general point, but maintain that the collective-management cure is worse than the disease. If public goods tend to be undersupplied by the market, they tend to be oversupplied by the political process, where demands bear no relation to willingness-to-pay. Thus Anderson and Leal question the quality of information acquired through public hearings, letters to Congress, public opinion surveys, and the like.31 Consider, for example, the recent regional hearings on BLM wilderness in Utah. Those who choose to testify or to comment are not a representative sample of the population. In any case, "talk is cheap,"32 especially when directed to securing benefits for oneself while shifting costs to others.

What's missing here, however, is a good reason to believe that the distortions introduced by misinformation are more significant than those induced by the friction of transaction costs. Instead of providing such a reason Anderson and Leal speculate that entrepreneurs would figure out how to profit by reducing these costs.33 They suggest that environmental organizations like the Wilderness Society could cast in this role, inasmuch as they convert dispersed concern for wilderness values into funds for the organization to spend on acquiring land and easements. This is a pretty flabby response, but what else can you do? As Anderson and Leal concede, there is simply "no way of knowing whether the efficiency effects of an understatement [of amenity values due to free-rider problems] will be greater than those of an overstatement in the political arena where the provision of amenities is subsidized."34 This is an awkward admission for those advancing the efficiency argument to have to make.

Anderson and Leal suggest that only "voluntary trades" can reveal "the subjective values that humans place on alternative resource use,"35 but where resources end up in a free market reflects not only the preferences of consumers but their ability to pay. Each has an initial bundle of resources, which they may attempt to improve by exchange. Some will do a lot better than others, depending upon the contents of that initial bundle. If I don't have what others want (maybe all I can offer is unskilled labor), I'm not going to do too well in satisfying my desires. None of the standard explanations of P4 embodies any concern for equity, that is, for reducing disparities in the distribution of goods and services to consumers or for assuring some minimum level of consumption. So, P5 seems to say that equity doesn't matter. Some features of the present public land management system, which provides many services at below cost, might be regarded as addressing equity concerns. What privatization dating from the colonial era has brought to the East Coast is very expensive waterfront property, yet you don't have to be a multi-millionaire to enjoy Thoreau's walk from Nauset to Provincetown: you can do it for free in Cape Cod National Seashore.

Privatization advocates do not think much of appeals to equity, which they regard as a "more subjective goal"36 than efficiency. In fact, Stroup and Baden worry about equity primarily because "[i]f the market system fails to distribute costs and benefits in ways that are considered equitable, individuals may seek alternative methods of influencing that distribution."37 In particular, they worry that appeals to equity might be used, as above, to argue against privatizing public lands. They could of course respond that public land policies such as free parks and recreation, below-market grazing fees, and subsidized logging are not very efficient ways to achieve equity: instead, they look more like welfare for the middle class. We might possibly do better for the poor if we simply transferred some income to them, perhaps income raised by the sale of public lands. However, this response appears to confuse what might be done with what will in fact be done and overlooks the political reality that, in this country, the only way to assure that the poor receive anything is to give it to the middle class as well.

Spillovers, transaction costs, and equity are familiar grounds for criticism in policy analysis. I now turn to some problems with the efficiency argument which may be less familiar.

The efficiency argument justifies privatization as an efficiency improvement over the current system. It maintains that, were public lands to be privatized, resources would be more efficiently employed than they now are, in the sense that the

30. Gardner, supra note 24, at 175.
31. Anderson & Leal, supra note 9, at 92.
32. Id. at 83.
33. Id. at 21.
34. Id. at 95.
35. Id. at 13.
37. Id.
desires of consumers would be better satisfied than they now are. The problem is that none of the standard explications of "better satisfies the desires of consumers" in P4 give us good reason to think this is so, while some of them give us good reason to think it is just false.

If allocations of resources are to be judged in terms of desire-satisfaction, then they must be individuated in part by who gets what. Each allocation ultimately delivers to each consumer a bundle of goods. In line with P1's assumption of self-interested individuals, we think of each consumer as having well-behaved selfish preferences over bundles, i.e., preferences which do not depend upon what others get. How do we compare allocations about which different consumers have different preferences? Which better satisfies the desires of consumers? What we encounter here is a version of the notorious problem of making sense of interpersonal utility comparisons.

We may try to evade this problem by adopting the Pareto criterion: allocation 2 improves on allocation 1 if and only if no consumer prefers 1 bundle to her 2-bundle and at least one consumer prefers his 2-bundle to his 1-bundle. But this understanding of P4 dooms the efficiency argument, because many people are going to prefer what the current system now delivers to what privatization would deliver. There may well be Pareto improvements over the current allocation of public lands and resources, but privatization will not deliver them. Perhaps an analogy will help make the point. When I hike in the mountains, I do not like to have to climb down in order to climb up, and I have done some pretty dumb things to avoid this. Higher points you can reach without descending are analogous to Pareto improvements. Climbing to the top of the mountain is like attaining a Pareto optimal allocation. There may, of course, be higher peaks—other Pareto optimal allocations—but you cannot reach them from there without descending: they are, as it were, Pareto inaccessible. The allocations promised by privatization advocates are similar to these other peaks.

If your climbing goal is to reach the highest point you can, you ought to be willing to sacrifice some elevation to gain more. The efficiency analog is that society, like an individual, should accept some disappointment of desires in order to secure their greater overall satisfaction. We need a criterion of efficiency improvement which will allow us to count at least some shifts from 1 to 2 (hereafter "1-to-2") as improvements even though some consumers prefer 1-to-2. The basic idea is that of regaining the lost elevation and then some: a shift shall count as an improvement if the winners can fully compensate the losers and still be winners. Unfortunately, the standard ways of making this out—the Kaldor criterion, or its consumer-surplus variants, or a positive net-benefits test derived from them—do not do much to advance the efficiency argument.

First, these standards are of doubtful coherence: we can quickly dream up cases in which both 1-to-2 and 2-to-1 count as improvements. Since it makes no sense to say that allocation 2 satisfies desires better than allocation 1 and conversely, an improvement standard that implies as much cannot be an acceptable explication of P4. Second, to the extent that losses are reckoned in terms of minimum willingness to accept compensation—that is, to the extent that losses or costs are taken seriously—the efficiency argument may be no better off than it was with the Pareto criterion. For those for whom there is no acceptable substitute for what the current regime delivers to them can name their price, privatization is going to be effectively vetoed. Of course, this problem can be assumed away by holding that reasonably cheap substitutes are always available, regardless of what people claim. But then we are either no longer talking about the real world or we have abandoned the idea that people know their own interests best.

Let me put the second point somewhat differently. Privatization advocates like to contrast transactions in the free market, which proceed only with the "willing consent" of parties to them, with the "wealth transfers" engineered by government. The privatization of public lands, however, will be a transfer to which some people will not willingly consent. Some who now enjoy the use of public lands, whether to restore their spirits or to keep
food on the table, will lose. The new private owners will exclude them or charge them more for use. Can we imagine that people would willingly consent to such a loss? Moreover, privatization will apparently not increase efficiency. This does not mean we shouldn’t do it. But it does mean that the efficiency argument does not provide the rationale.

I turn now to P1. As noted above, self-interest is typically understood in terms of selfish consumer preferences. But this makes P1 false. I don’t know anyone who is interested only in the contents of his consumption bundle, and I suspect that such people exist only in the imagination of economists. Buchanan may have pursued a career in economics because it seemed to him “better than plowing,” but “better” here cannot mean more remunerative: he did not choose the academy over the farm because he expected thereby to maximize his income.43 Similarly, it would be silly and insulting to suggest that those who advocate privatization do so with a similar expectation. Sometimes “self-interest” is given a broader reading, as when Stroup and Baden explain that “[t]o assert that individuals are primarily motivated by self-interest merely suggests that when individuals evaluate the projected impact of an action, their first question is, ‘How will that action affect the things I value?’”44 However, since this is true of saints as well as sinners, it is much too weak to support their claims about self-interest driving transfer activity and bureaucratic expansion. Instead, they need to argue that while we may have all sorts of interests, the claims of self are much stronger.

Unfortunately, it is not clear where such a self is to be found, given that all of us assume various roles whose demands frequently conflict. This makes it difficult even to give clear sense to the notion of “claims of self,” which seems required if we are to maintain that such claims are supreme. In addition to being a husband and parent, I teach philosophy, engage in scholarly research in fields remote from the courses I teach, serve on a couple of University committees, play in and write program notes for a community orchestra, follow and comment on a variety of local, state, national, international issues, and so forth. Privatization advocates seem to think that behind all these personae is a self—the real me—which assumes these roles, like so many suits of clothes, to advance its interests and which resolves all conflicts between roles in its favor. This picture strikes me as complete fantasy. What we get when we strip away these roles is not a controlling self, but nothing at all (or perhaps, as in The Wizard of Oz, nothing much). It’s like trying to come up with a notion of the soul that owes nothing to the body. Conflicts between roles are of course resolved by decisions we make, and we may say, if we like, that these decisions reveal the self. But the self that is revealed in this way is not much like the creature assumed by privatization advocates.

An important class of interests that cannot be assimilated to desires for bundles of commodities consists of what Joseph Sax calls “collective values”45 and Mark Sagoff calls “citizen interests.”46 These are desires that a collective—the body politic, perhaps—behave in certain ways. Suppose I don’t just want the Arctic National Wildlife Refuge preserved as wilderness, so that I have the option of seeing it in its present wild and undiminished state someday, but that I do want the nation to do it in recognition of the part that wilderness has played in our history and cultural imagination. Suppose I also want to help bring this about by participating in the political processes by which we make such decisions. Such desires cannot, as a matter of logic, be satisfied under privatization (it’s the distinction between wanting your daughter to do the dishes and merely wanting them done). Since they are not desires for consumption goods, these desires of consumers are simply ignored in the standard explanations of P4. Moreover, if you take collective values or citizen interests seriously, disputes over the use of public lands will look less like unproductive wrangling over division of the pie and more like a necessary part of the process of determining the nation’s values.

My final criticisms of the efficiency argument are directed at P5. Readers of journals like Environmental Ethics47 will find this premise very odd indeed, inasmuch as P5 seems to assume that only humans count for anything. They will ask, “What about wildlife, trees, rivers, ecosystems? Are these really no more than resources, worth something only insofar as they satisfy human desires? Don’t they have some inherent or intrinsic worth, which gives them some moral claim on us in their own right?” While I have some sympathy for this view, I shall not advance it here. Let us assume, with privatization advocates, that public lands are resources and that our problem is to devise institutions that enable us to get the most out of them.

44. STRoup & BADEN, supra note 11, at 4.
47. See, for example, Nicholas Agar, Valuing Species and Valuing Individuals, 17 ENVIRONMENTAL ETHICS 397 (1995).
Still, we may not get the most out of things if we think of them as resources which are there for us. I imagine that most people have children in large part because they expect to derive happiness from the experience. But thinking of your children as instruments to your own happiness is a recipe for misery all around; you will almost certainly end up a lot happier if you forget about your happiness and attend to theirs.48 Some of the resources of public lands may be a bit like children in this respect. Many people value wilderness for the type of experience it affords. John Muir, recalling a solo trek to the Sierra's Mt. Ritter in 1872, on which he very nearly perished, writes: "In so wild and so beautiful a region was spent my first day, every sight and sound inspiring, leading one far out of himself, yet feeding and building up his individuality."49 It is the experience of something that is "other" but not alien, something that has unfolded according to its own design, something that is utterly indifferent to our successes or failures, something which is emphatically not there for us. This experience is not available to one who regards the wilderness merely as a resource. To the extent that privatization encourages us to regard a wilderness as a commodity which exists to satisfy our desires, privatization is counterproductive. If, for example, your wilderness experience is purchased in the free market like so many fir 2x4s, you may be distracted by such questions as "Am I really getting my money's worth here?" (The same point can, I think, be raised against proposals by Randal O'Toole and others that such experiences be rationed by price.50)

The most glaring deficiency of P5, however, is that it makes no demands whatever on the content of desires. When we seek, as P5 directs, to best satisfy the desires of consumers and to consider what institutional arrangements would do so, we take desires as given. The social task is to better satisfy desires, not to better them. But better satisfying desires makes sense only if the desires are worthwhile to begin with. If my idea of the good life is a life of dissipation, then I'm better off if I don't get what I want. And so is society, on the individualistic assumption that societies are better off as their members are better off.

When Socrates asked, "How should we live?", it was not because he lived a couple of thousand years before the modern theory of the consumer was developed. The answer provided by it—"As high in your preference ranking as your income allows"—would not have satisfied him and it shouldn't satisfy us either. For his question is really, "What preferences should I have?" Surely there is a distinction between what I'm interested in (what I desire) and what's in my interest (what's desirable for me). The most vivid examples are addictions or compulsions of various sorts. Yet all of us, I'm sure, have desires we'd be better off without. We need all the help we can get in revealing and modifying them.

A possible response to this objection, suggested by what some privatization advocates say, is simply to deny the distinction between what I desire and what's desirable for me. Your judgment that a life of dissipation is undesirable, despite my desire for it, simply reflects your own desires. Anderson and Leal suggest this view when they write of the "subjective values that humans place on alternative resource use."51 They tell us that "None of these values is right or wrong; each simply represents a special interest."52 This response, I think, is neither plausible nor wise. It is not plausible, because it makes nonsense of something that seems to make perfectly good sense: namely, wondering if what I in fact want is really worth having, if it is really what I ought to want. It is not wise, because the normative claims of the efficiency argument—C and P5—then tell us nothing about what is desirable but merely something about the desires and preferences of whoever makes these claims. The force of the argument is then only that, should you happen to believe P1-P4 and happen to prefer situations in which the desires of consumers are better satisfied (this preference being no better or worse than any other), you then ought (logically) to prefer privatization.

A less catastrophic response is to admit the distinction, but to suggest that it is not relevant here. This amounts to maintaining that privatization would have no negative effect upon the content of desires. I think this is false. Public lands, it seems to me, have a role in bettering desires, both via the processes by which we collectively decide how they are to be used and the uses to which these processes lead. Like families, schools, libraries, museums, concert halls, and opera houses, public lands are educational institutions.

48. An instance of the so-called paradox of happiness: those who seek happiness generally end up with a lot less of it than those who don't.


50. Randal O'Toole, Reforming the Forest Service (1988). In O'Toole's vision of reform, "allocation between uses of the National Forests would be based on willingness to pay." Id. at 205.

51. Anderson & Leal, supra note 9, at 13.

52. Id. at 82.
If you want to influence the way in which public resources are used, you must join with others of like mind, present a case for your favored use, and respond to those who differ. All of these exert pressure toward more critical reflection on our preferences, and none is present in commercial transactions. When privatization advocates look at public land disputes, they see unproductive transfer activity; when they look at the free market, they see productive exchange. These judgments are sensible if preferences are taken as given and worth satisfying. If, however, our concern is to better these preferences, then it is the reverse judgments that are sensible: free exchange of private resources is unproductive, whereas disputes—at least civil disputes—over the use of public resources are productive.

In the view of Anderson and Leal, “citizens ‘hire’ politicians or bureaucrats to produce certain goods and services” and must then confront the problem of assuring that “the state is producing the desired bundle of public goods.” They assume that each of us brings to the political process well-defined preferences over private bundles that include public goods. These preferences, together with income and prices, yield (in theory) well-defined individual willingness-to-pay schedules for varying amounts of such goods, which permit us to imagine that there are efficient levels of these goods and to ask how we might structure the state so as to deliver levels that are in that neighborhood. This all seems to me a case of art—in the form of elegant economic models—dictating to life. The preferences that people have about public goods are very largely formed in the process of public deliberation and debate about their provision; they are not antecedent to it. To what, for example, do we owe the current interest in wilderness? Not to instruction at home or the blandishments of outfitters, but to public policies that, in effect, saved some wilderness for us and to public deliberation and debate about their provision; they are not antecedent to it. To what, for example, do we owe the current interest in wilderness? Not to instruction at home or the blandishments of outfitters, but to public policies that, in effect, saved some wilderness for us and to public debate over its fate.

Moreover, many of the public resource allocations represented in National Parks and Wilderness Areas, grazing policy, timber policy, etc. can be regarded as reflecting a collective determination that certain things are desirable but, at the same time, threatened by market forces—that is, threatened by desires. If we value them, we must remove them from the market. To elaborate:

Suppose we reflect that it’s a good thing for people to be taken out of themselves once in a while and observe that exposure to the otherness of the natural world is a particularly effective way of achieving this detachment; and suppose we note that the market system encourages neither detachment nor the desire for it, and indeed that satisfying consumer desires for lumber, minerals, vacation homes, etc., requires subjugating nature. Then we might well consider setting aside National Parks and Wilderness Areas, limiting recreational development of them, banning overflights by aircraft, enforcing pristine air-quality standards for them, using devices other than price of admission to ration their use, etc.

Or suppose we reflect that it’s good for people to compare others’ sacrifices with their own, to reflect on the uses and abuses of power, to wonder about human progress and their own contribution—or lack thereof—to it. Then perhaps we’d do better to preserve historic battlefields as memorials rather than letting the real-estate market convert them into shopping malls and planned recreational communities.

Or suppose we conclude that individuals and individuality flourish in communities and ways of life with links to the past or roots in the land; and suppose we notice that these are threatened by what John Wesley Powell called the rapacity of individuals, which the market does little to discourage. Then we may turn to historical zoning and subsidized but regulated grazing of federal lands.

V. A Non-Consequentialist Case for Property Rights

This concludes my criticism of the efficiency argument. Its deficiencies do not show that its conclusion is false, though many of them, I think, stand in the way of showing that it is true. To see how such obstacles arise, let us briefly consider how one might argue for private property rights without appealing, as does the efficiency argument, to their beneficial consequences. If such a case could be made, we might have an argument for privatization that bypasses the objections to the efficiency argument.

However, this is more easily imagined than achieved, since the standard justifications for property rights are consequentialist. John Locke, for example, appeals to the benefits of dividing common

53. Id. at 17.

property into mine and thine and to the beneficence of the Creator: "God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed that he meant it should always remain common and uncultivated." Rights in general are sometimes rationalized in terms of a Hobbesian social contract among self-interested individuals: the correct rules governing social interactions are those that individuals would, on the basis of rational self-interest, agree among themselves to live by. This makes property rights, which would presumably be written into such a contract, appear to derive from a promise to abide by its terms. But of course this promise is entirely fictitious and in any case is rationalized by expected consequences: the contracting individuals are selfinterested and expect to be better off, if they live by the rules, than they are in the state of nature.

One's rights define a sphere of free action, where others may not enter uninvited. While freedom is usually taken to be instrumentally valuable (as when Hayek argues that freedom enables individuals to use their own local knowledge—and, through exchange, the local knowledge of others—for their own benefit), this is not the only possible view. Buchanan, for example, holds that individual freedom is not to be valued merely "as an instrumental element in attaining economic or cultural bliss." He is not very forthcoming about why one should hold such a view, why it is not just a quirky "private preference." However, his remark that, without rights respected by others, "an individual, as such, could hardly be said to exist" suggests a Kantian outlook, in which free individual choices create value. Freedom, secured by individual rights, permits one to choose and pursue one's own ends, rather than remaining so much material—a mere resource—for others. For Immanuel Kant, it is the selection and pursuit of particular ends by rational agents that gives those ends value; only if my desires are mine in the sense of issuing from my rational nature are they worth satisfying. Freedom not only enlarges our command of means but is required to make our ends ours and worth the application of means to achieve.

There is a lot of murkiness here, but it is at least clear that, for Kant, not every desire corresponds to an end worth achieving. My wanting something does not give me a reason to get it unless my desire issues from my rational nature. Urges and cravings, whether creatures of the subconscious or of advertisers, will not pass this test. Among the imperatives of rationality for Kant are charity and excellence: a rational agent cannot be indifferent to the welfare of others, nor can it neglect the development of its own gifts and talents. Kant's arguments are, as so often, obscure, so it is not clear whether one should follow him here. But the basic idea seems to be that the freedom to choose, to author one's own life, carries with it a weighty responsibility: it is not something to be squandered. With this, I should hope, we can all agree.

But if so, we must again confront the problem, raised against P5, of desires for what is undesirable, here in the form of desires that are unworthy of our nature and opportunities. Paradoxically, no one who takes freedom seriously can agree that anything goes, or be comfortable with the idea of simply giving everyone rights and then stepping aside to let them act as they will, constrained only by the rights of others. Instead, such a person will wrestle with the problem of how to encourage the wise use of freedom without at the same time destroying it. I have suggested above that supplementing the private realm with a public realm, encouraging in various ways critical reflection on the difference between what's desired and what's desirable, might be part of its solution. Privatization advocates will not like this solution, but what can they offer in its place?

VI. Marketization

I turn now to marketization. Marketization, in the present context, is the idea that even federal


56. In Hayek's view, free societies have evolved to solve the problem of ignorance: each of us is ignorant "of much that helps him to achieve his aims." Friedrich A. Hayek, The Constitution of Liberty 22 (1960). By affirming "the maximum of opportunity for unknown individuals to learn of facts that we ourselves are yet unaware of and to make use of this knowledge in their actions," such societies utilize "more knowledge than any one individual possesses or than it is possible to synthesize intellectually." Id. at 30.

57. Buchanan, supra note 10, at 2. Elsewhere he tells us that "the wealth of nations" as such, has never commanded my attention save as a valued by-product of an effectively free society.

58. Buchanan, supra note 10, at 1. He suggests that it follows from the "basic premise" that "each man counts for one," id. at 2, but this just moves the problem there. Unfortunately, he also describes his commitment as "methodological," id. at 1, as though to say, "if you share my private preference here, you will be interested in what I have to say in the following pages."

59. Id. at 10.

60. With enough imagination, such a view may be extracted from Kant's notoriously difficult Groundwork for the Metaphysics of Morals (James W. Ellington, trans., 1931) (1785).

61. See Kant's third and fourth examples of the application of the respect-for-persons version of the Categorical Imperative. Id. at 37.
lands are to be retained in public ownership, we should in one way or another let the market allocate their resources. For example, grazing rights might be sold at auction, or grazing fees might be set by resource economists who take into account prevailing fees for comparable private forage. Marketization has the same goal as privatization, namely, the more efficient use of public resources. Theoretically at least, marketization could address the spillover and transaction cost problems I raised against the efficiency argument: hire enough clever resource economists and the allocation of public resources could be as if by a perfect market. Perhaps equity concerns could be addressed as well. But other problems with the efficiency argument persist as problems for marketization. It is just as unclear how marketization would improve upon the current system, if improvement is to be understood in terms of efficiency. Citizen interests are ignored, just as they are by privatization, because efficiency has no place for them. And basing management decisions on aggregate willingness-to-pay assumes that current tastes are to be gratified rather than elevated.

The prophets of the environmental movement would never have allowed that the worth of their ideas could be judged by aggregate willingness-to-pay to see them implemented. So it's really quite bizarre to find some of their disciples endorsing marketization. Muir's reaction to sheep in the meadows around Merced Lake in Yosemite was, "The money changers are [are] in the temple." Environmentalists who call for raising federal grazing fees to market rates seem to be saying, "It's OK, as long as they pay market rates for the space." Now, of course, what these environmentalists think is that market rates will force the money changers out of the temple, and perhaps that's so. But this is a very risky line of attack on the problem of overgrazing. For once you appeal to aggregate willingness-to-pay, you are stuck with it. And it is by no means clear that aggregate willingness-to-pay for preservation, say in the Arctic National Wildlife Refuge, is going to exceed aggregate willingness-to-pay for development.

This problem owes nothing to transaction costs or other imperfections in real markets, and therefore cannot be fixed by simulating perfect markets. What makes "free market environmentalism" close to an oxymoron is not so much the imperfections of real markets as the fact that efficiency has no necessary connection to environmental values and is in many cases inimical to it. An instructive example is Anderson and Leal's efficiency defense of 19th century logging practices, which most environmentalists would consider simply a reductio ad absurdum of the notion of efficiency.

Whether marketization would be worse for environmental values than privatization is not clear. I've noted that marketization could, theoretically, get around some of the transaction-cost barriers to environmental preservation in the free market. However, under marketization, willingness-to-pay rules, unchecked by willingness-to-accept. The resources of public lands will be put to whatever use people are, in aggregate, willing to pay most for, and that the use may not be preservation. In its 1885 report to the New York Legislature recommending the creation of what became the Adirondack Park, the Sargent Commission claimed that "private ownership means—sooner or later—forest destruction." Since "later" covers a lot of time, I don't know whether this is false, but there appear to be counter-examples. However, those that come to mind are not profit-maximizing timber and paper corporations, whose behavior indeed often suggests a "basic incompatibility of our economic system with forestry," as Jerry Bley of Maine's Northern Forest Lands Council puts it. Rather they are those owners who care more about the woods than about profits—and can afford to do so. Ownership is power, and some resource owners exercise it wisely. Of course, by refusing bids they "pay" the opportunity costs for satisfying their strange preferences, but this is rather different from having to come up with the money.

Contrary to Anderson and Leal's suggestion, the incentives for good forestry provided by the opportunity to collect recreation fees from hunters and others...
are generally inadequate. As corporate raiders know, there's more money to be made by clear-cutting and high grading and then subdividing the miserable remains for recreational development. More generally, conservation makes economic sense only if interest rates are sufficiently low. And the problem for the forests and other resources of the public lands is that marketization of public land policy promises us economic sense, free of the distortions introduced by owners with their idiosyncratic tastes.

It may be possible to avoid such conclusions if "marketization" is understood in a weaker sense. We might (a) turn to the market as a means to achieve certain social ends, the choice of which is not surrendered to the market, or we might (b) let the market decide on the ends as well, holding that whatever allocation of resources the market produces is the one we ought to have. Both (a) and (b) might be termed "marketization." (b), the stronger variety, is assumed in my criticism above. The weaker version, (a), is seen in schemes to control air pollution or to preserve fisheries by setting up a market in tradable emission allowances (TEAs) or individual transferable quotas (ITOs). Here we decide how much pollution, or how large a catch, is acceptable, and then issue permits in one-unit denominations for that amount. Such TEAs (or ITOs) may then be exchanged among would-be polluters (or fishermen), with the result that the desired level of pollution (or harvest) is attained at least cost. The desired level need not be the efficient level. The efficient level of air pollution is reached when the marginal cost of abatement equals its marginal benefit; we might decide we want cleaner air. If interest rates are sufficiently high, net benefits might be maximized by taking all the fish right now, thereby destroying the fishery; we might prefer a sustainable harvest.

Public land management might be marketized in the weak sense in various ways. For example, where nominal admission fees now encourage overcrowding in some National Parks, we might decide how many visitors are consistent with a "quality park experience" and set fees high enough to discourage more. More generally, we might settle on some public lands than for others. Some readers will have noticed that my examples were not designed to bring this out. I think it is true that a stronger case can be made for privatizing most BLM land or marketizing its management than for privatizing Grand Canyon National Park or marketizing its management. But one can admit that a case is

69. For a general discussion, see Daniel Fife, Killing the Goose, ENVIRONMENT, April 1971, at 20. For a specific case, see ANDESSON & LEAL, supra note 9, at 47.
70. For a warning of hidden costs in the form of undesirable side effects, see STEVEN KELMAN, WHAT PRICE INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 27 (1981) (Ethical theory and the
stronger without admitting that it is strong, and this one seems to me pretty weak.

Moreover, the weaknesses of the efficiency argument supply general reasons for having public lands, whose management is not surrendered to the "wisdom of the market." Such reasons obviously fall short of justifying the current pattern of federal land holdings and management regimes, whose history owes little to such considerations. Still, the current pattern is where we are. It represents a large political investment and grounds many expectations. The burden of proof rests with those who would alter it. This burden may be relatively easy to meet in some cases, such as land trades to consolidate scattered holdings (checkerboard lands) or to eliminate non-conforming in-holdings (such as patented mining claims or school-land sections in National Parks or Wilderness Areas). In other cases, such as large-scale transfers of federal land to the states, it is much more difficult.

As a state employee myself, I am bemused by the currently fashionable idea that the states can generally do better than the federal government in delivering services. One cannot help suspecting that the appeal to federalism is little more than a cloak for dismantling federal programs like Aid To Families With Dependent Children or Medicaid. Federal agencies tend to be better funded and better staffed with better people than corresponding state agencies. State legislatures are even more vulnerable to lobbyists than is the national legislature, because state legislators, unlike their federal counterparts, generally cannot call on a professional staff or on resources similar to the Congressional Budget Office or Office of Technology Assessment for independent assessment of the effects of contemplated legislation. Finally, state issues tend to get less attention from the media and the citizenry than do local and federal issues.

Transferring federal lands to the states may empower state citizens, but it would disenfranchise the rest of us. My Congressman pays some small heed to my views on federal grazing policy, but writing the Governor of Nevada would be a complete waste of time. State and local governments often lack the financial resources to manage land or other properties well—or the political will to do so. Why is state-owned range in Utah in even worse shape than that managed by the BLM? Because the State of Utah won't invest any money in it. Why does the federal government end up managing urban open space, such as New York's Gateway National Recreation Area, or historical properties of local interest, such as the Wier Farm National Historic Site in Connecticut? Because, again, neither the City of New York nor the State of Connecticut is willing to steward the resource. Finally, most federal land is in the West, and that presents a problem. At present, Western states appear to compete for the distinction of electing the most unenlightened Congressional delegations on public-land issues. We owe the absence of dams in the Grand Canyon not to Western Congressmen but to people like John Saylor of Pennsylvania. Today, the national interest in wilderness values on BLM land in Utah is represented not by the Utah delegation but by Congressman Maurice Hinchley of New York. Such examples are easily multiplied, and they belie the easy assurances that Westerners have a "special bond" with the land that would make Western states fine stewards of public lands.

General appeals to "special bonds," the virtues of federalism, and the like do not justify transferring federal land to the states, any more than appeals to economic efficiency, consumer sovereignty, individual freedom, and the like justify privatization or marketization. It is too easy to expose the shaky foundations and limitations of such appeals. If there are good reasons for intergovernmental transfers or for privatization, they are of a different type.

73. One impetus for the proposed review of the National Park System, supra note 7, is the idea that the system has accumulated numerous units that lack national significance. See JAMES RIDENOUR, THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES (1994).
74. During the 1965 legislative hearings on the dam proposal, Congressman Morris Udall (D-AZ) asked at one point "[H]ow many cabdrivers, carpenters, and bricklayers, and ordinary God-fearing taxpaying citizens are members of the Sierra Club?" Lower Colorado River Basin Project: Hearings on H.R.4671 Before the Committee on Interior and Insular Affairs, 89th Cong., 1st Sess. 645 (1965) (statement of Committee Member Moms Udall (D-AZ)).
75. Hinchley's bill, H.R.1500, would designate as BLM Wilderness the 5.7 million acres proposed by the Utah Wilderness Coalition. The Coalition's proposal is based on an ambitious citizen inventory of BLM lands undertaken after the agency's own perfunctory review. H.R. 1500, 104th Cong., 1st Sess. (1995). A rival bill introduced by James Hansen (R-UT), H.R.1745, would designate 1.8 million acres (the BLM's recommendation was 1.9 million); allow roads, pipelines, and the like on them; and prohibit management of any other BLM lands for mineral exploration and development in Tony Knowles, ORAL ALASKA WILDLIFE REFUGE, N.Y. TIMES, Nov. 20, 1995, at A15. Alaskans do indeed have a "special bond" with the land: each receives an annual Permanent Fund Dividend from interest earned on oil lease revenues deposited in the Alaska Permanent Fund. The Fund is established by Article IX, Section 15 of the State Constitution. Dividends are distributed under provisions of Title 33, Chapter 23 of the state statutes. For discussion, see GERARD A. MACDonALD AND THOMAS A. MOREHOUSE, ALASKA POLITICAL AND GOVERNMENT 63 (1994).
and scale. The Catholic Archdiocese of Denver would like to construct affordable housing for ski industry workers in Summit County, Colorado, where they otherwise cannot afford to live. Perhaps this would indeed be the highest and best use of a few acres of National Forest or BLM land. Sterling Forest, a privately owned 20,000 acre tract of forest within 40 miles of New York City, is going to be developed unless the federal government contributes some money to help the states of New York and New Jersey buy it. Perhaps auctioning off 56,000 acres of National Grasslands in Oklahoma is the only politically feasible way to preserve the Forest, given the opposition of "Western lawmakers who contend that the Federal Government already owns too much land and...Republican leaders who have objected to the failure to find offsetting costs." To the resolution of such questions, appeals to the relative efficiency of markets or of state and local governments are likely to contribute nothing, at best.

