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## Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls

Harold J. Krent

Nicholas S. Zeppos

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# Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls

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Harold J. Krent  
Nicholas S. Zeppos

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*Each year, the government sells and leases public assets worth billions of dollars. FCC auctions to allocate rights to electromagnetic spectrum generated over twenty billion dollars within a three-year period, and proceeds from mineral leases, timber sales, and disposition of real estate from defaulting thrifts have surpassed several billion dollars annually.*

*From the taxpayer's perspective, however, government sales and leases have been deplorable. The government has donated valuable resources to preferred claimants, allocated scarce broadcast and oil rights resources by lottery, and sold both public land and mineral rights to private parties at a fraction of the market price. Although the government in disposing assets may have legitimate programmatic, distributional, and social preservationist objectives unrelated to any financial maximization goal, our analysis of three particular disposition schemes—mining claims, grazing fees, and allocation of the electromagnetic spectrum—suggests that those aims too often have masked inefficiency or graft.*

*Existing oversight of agency disposition programs is woefully deficient, and we trace the historical, conceptual, and political roots of the regulatory failure. For a mixture of reasons, Congress exempted asset dispositions from the APA's rulemaking provisions; judicially imposed justiciability requirements have limited participation in adjudications affecting governmental disposition programs; and agencies themselves have declined to permit third parties to question the propriety of various asset dispositions. The inadequate monitoring exacerbates the absence of any market-type discipline as in the private sector.*

*Accordingly, we argue that Congress and agencies should adopt, where possible, schemes to maximize return on assets sold or leased, minimizing the need for external monitoring. Given that the government will still pursue non-financial objectives, we propose that the APA rulemaking exemption for asset disposition be rescinded. We also suggest that courts and agencies permit greater participation in adjudications over transfer of public assets. In light of the shortcomings of judicial review as a monitoring mechanism, however, we recommend*

*amending Executive Order 12,866 to include government disposition of assets within the scope of agency action subject to cost-benefit analysis. The change would help ensure both that agencies justify their departure from financial maximization principles and that they use the most cost-effective means of structuring divestiture programs. Similarly, Congress should amend the Small Business Regulatory Enforcement Fairness Act to permit Congress time to study all major agency disposition initiatives—as with other significant agency rules—before they go into effect. Finally, we also suggest revising the pay-as-you go or PAYGO budget mechanism to include below-market asset sales and leases within the direct spending that must be matched by additional revenue measures. These measures would help promote greater accountability in the disposition of government assets, ultimately resulting in greater return to the Treasury and more effective pursuit of non-monetary goals*

# Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls

Harold J. Krent\*  
Nicholas S. Zeppos\*\*

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\* Professor and Associate Dean, Chicago-Kent College of Law.

\*\* Professor of Law and Associate Provost for Academic Affairs, Vanderbilt University.  
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## INTRODUCTION

The federal government owns in excess of two trillion dollars in assets. The public lands constitute the largest portion of such assets, with the federal government owning approximately fifty percent of the land in eleven Western states, including almost ninety percent of Nevada and Alaska. The federal government also owns billions of dollars in other tangible and intangible assets such as buildings, power plants, control over the electromagnetic spectrum, weapons systems, and patents.<sup>1</sup>

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1. See *infra* note 30 (discussing federal land ownership in the West); OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2000: ANALYTICAL PERSPECTIVES 25 (reporting over two trillion dollars in assets, including gold reserves and other monetary costs) [hereinafter BUDGET].

Government sales and leases of such assets occupy one of the dustiest corners of public law. The sales of land parcels, auctions of apartment buildings, and the lease of mineral rights are not the stuff of which headlines (or law reviews) are made. Congress largely leaves such disposition to the discretion of agency officials, and thus little public oversight accompanies most governmental decisions to sell, lease, or give away governmental assets. Nor are such dispositions of assets subject to market controls. Stock prices do not fall if evidence of inefficiency or graft is uncovered.

The importance of such dispositions, however, should not be overlooked. The potential impact on the economy is staggering. For example, the FCC auctions to allocate rights to electromagnetic spectrum for operators of personal communications systems generated almost twenty-three billion dollars within a thirty-six month period.<sup>2</sup> Proceeds from the sale and lease of other public assets currently exceed billions of dollars annually.<sup>3</sup>

Yet, to date, most government disposition schemes have failed on a grand scale. Inefficiency, interest group influence, and graft abound. The government has donated valuable resources to preferred claimants, allocated scarce broadcast and oil rights resources by lottery, and sold both public land and the rights to the minerals beneath to private entities at a fraction of the market price.<sup>4</sup> The government has also sold timber without any apparent cost-benefit justification,<sup>5</sup> and recently awarded rights to use electromagnetic spectrum worth somewhere between ten and seventy billions of dollars to network broadcast companies for free.<sup>6</sup> If such dispositions were administered on a market-type basis, billions of dollars could be raised annually.

What accounts for the apparent mismanagement and at times virtual give-away of valuable public resources? Part of the answer lies in history. The government initially divested land and mineral rights when they seemed of little value, and when the benefits from spurring private industry clearly outweighed any loss to the public

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2. See, e.g., FEDERAL COMMUNICATIONS COMM'N, FCC REPORT TO CONGRESS ON SPECTRUM AUCTIONS (1997) [hereinafter FCC REPORT]; *FCC Urges Congress to Modify Auction Process*, COMM. TODAY, Oct. 17, 1997.

3. Although no exact figure is possible, fees generated from oil leases on the Outer Continental Shelf approach five billion dollars annually, and timber sales amount to over one billion dollars. Other programs, taken together, generate hundreds of millions of dollars. See Perry R. Hagenstein, *The Federal Lands Today: Uses and Limits*, in RETHINKING THE FEDERAL LANDS 74, 93-94 (Sterling Brubacker ed., 1984).

4. See *infra* notes 91-92.

5. See *infra* note 177.

6. See *infra* text accompanying notes 168-70.

treasury. Change, however, has stripped laws governing disposition of government assets of their original function.

Part of the answer also lies in interest group lobbying. Private entities have successfully lobbied Congress for public resources to subsidize their own financial activities. Interest group influence continues post-enactment, with groups exerting leverage to retain legislative benefits. Moreover, private groups have similarly curried favor with agencies to obtain (or retain) government largesse. Such governmental subsidization reflects the organizational advantages of the few who can benefit at the expense of the less well-organized public.

But part of the answer lies as well with a failure of conceptualization. While Congress has long used its assets to attain a variety of nonfiscal policy goals—principally programmatic and distributional—courts and agencies have viewed sale and lease decisions as property transactions immune from the same scrutiny that would be afforded other agency regulatory efforts. Indeed, the Administrative Procedure Act (“APA”) largely exempts property from its scope;<sup>7</sup> the President has failed to include most asset management determinations within Executive Order 12,866, which regulates major agency initiatives;<sup>8</sup> and Congress has excluded disposition decisions from restraints imposed on other spending and regulatory decisions.<sup>9</sup> Moreover, judges have often refused to permit outsiders to the transactions to participate in the process preceding the decisions, despite the fact that such transactions can have a dramatic effect upon third parties.<sup>10</sup> Understanding government sales and leases as arrows in the government’s quiver of regulatory strategies is critical to formulating a more effective oversight strategy.

No single explanation can possibly cover the countless different government programs to dispose of public assets. The history and goals of the programs sharply diverge. The sale of cars forfeited to law enforcement agencies only faintly resembles allocation of grazing rights to ranchers. Yet common themes, such as problems of rent-seeking and insufficient monitoring, arise in many of the programs, justifying analysis of the government disposition efforts as a group.

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7. See 5 U.S.C. § 553(a)(2) (1994) (exempting from rulemaking matters relating to “public property, loans, grants, benefits or contracts”).

8. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557-61 (1994).

9. See *infra* text accompanying notes 207-18.

10. See *infra* Part III.B.2.c for a discussion of current standing doctrine.

In Part I, we explore the origins of governmental ownership of assets. The government has acquired assets in myriad ways, principally through open market transactions, through its exercise of sovereignty,<sup>11</sup> and through its exercise of regulatory authority.<sup>12</sup> Despite the contrasting avenues through which the government has acquired such assets, we conclude that the manner of origin should not affect the subsequent question of how the government should dispose of the assets. We believe that Article IV of the Constitution, which empowers Congress “to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States,”<sup>13</sup> imposes no significant restraints on the government’s disposition of public property. Principles of majoritarian governance favor severing consideration of how the asset was acquired from the subsequent consideration of how to dispose of the asset once it is no longer needed.

We then consider in Part II what purposes government disposition of assets can serve. In addition to generating revenue, the sale and lease of assets can further a variety of goals. Divestiture or lease can serve programmatic goals such as encouraging mineral production or providing an incentive for individuals to move to less densely settled areas of the country. Or, a lease of government assets can help ensure that the public receives the best service from private use of a scarce asset, whether a national park or band of electromagnetic spectrum. Disposition decisions may also serve distributional goals, empowering economically disadvantaged individuals, or rewarding others such as veterans for past service. Similarly, the disposition decision can implement social preservationist goals by supporting a particularly valued way of life, whether that of small ranchers or individual miners.

In evaluating the efficacy of three prominent disposition schemes, however,—mining claims, grazing fees, and allocation of the broadcast spectrum—we suggest that government sales and leases have suffered from a lack of internal and external safeguards. Government attempts to generate revenue escape any market-type discipline, and government policy concerns in deviating from revenue maximization principles reveal hidden subsidies that are unlikely to

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11. Our government acquired much of its land through conquest and treaty. *See infra* notes 27-30.

12. The recent auctions to allocate use of the electromagnetic spectrum provide a notable example. *See also infra* note 35.

13. U.S. CONST. art. IV, § 3.

serve the public interest. The government's departures from market-based principles have not generated sufficient nonmonetary objectives to justify the loss of revenue to the fisc.<sup>14</sup>

In Part III we analyze the current regulatory terrain to determine why adequate safeguards do not exist. First, insufficient monitoring stems, in part, from interest group politics. Those most directly affected by government disposition determinations—miners seeking minerals on public land, ranchers seeking to graze livestock on public land, or broadcasters seeking electromagnetic bands—can organize effectively to obtain subsidies from Congress. In contrast, each taxpayer stands to lose only minimally in any legislative contest over a particular disposition program. Thus, Congress arguably crafted disposition programs with an eye toward rewarding interest groups that in turn can support influential legislators through campaign contributions and the like. Second, despite the presence of goals other than revenue maximization, Congress, agencies, and courts have all failed in recognizing the regulatory aspects of the sale and lease decision. The APA exempts property transactions from rulemaking constraints, and courts and agencies have limited third party access to much adjudication. Little public participation, therefore, leavens some of the most far reaching agency actions affecting the use of public assets.

Encouraging greater rulemaking would not by itself ensure sufficient monitoring. For example, the Bureau of Land Management permits public input into formulating Resource Allocation Plans, yet the plans do not make the hard trade offs between environmental values and grazing utility in particular geographical areas.<sup>15</sup> Rather, those decisions are reached at the adjudicative stage such as when the agency determines what type of permit to grant.

Greater oversight through public participation is therefore needed at the adjudicative as well as the rulemaking stages. Stringent standing doctrine currently prevents many parties interested in government disposition efforts from shaping individual decisions on permits, leases, or sales. Agencies furthermore have

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14. In this Article, we do not directly consider whether some of the government's assets should be privatized. We are sympathetic with those advocating privatization to the extent that current management schemes are too often suspect, but we are sympathetic as well with some of the non-financial goals that can be pursued through use of government assets—goals that might be much harder to attain if the assets were fully privatized. Once governmental assets are sold, whether land or a piece of electromagnetic spectrum, it is far more difficult to achieve legitimate non-financial policy objectives. Instead, we argue that the government should structure disposition initiatives based more overtly on market principles.

15. See *infra* note 123.

attempted to prevent those who have standing from participating in some disposition efforts.<sup>16</sup> More fundamentally, judicial review of adjudication between claimants and a governmental agency often provides but a scant check. When the government agrees with the claimant about the propriety of a lease term or royalty agreement, no meaningful oversight exists. If market-type mechanisms such as auctions or competitive leases existed, the failure to solicit third-party participation would not be troublesome. Public participation, however, should be encouraged in adjudications in which nonfinancial concerns, whether programmatic or distributional, play a part.

In Part IV, we argue that reform is needed at two levels. First, Congress and agencies should adopt schemes to maximize return on assets sold or leased.<sup>17</sup> When agencies seek to maximize revenue through disposition efforts, external monitoring is not as critical. Political oversight may be needed to ensure that an effective sales program is designed, but not to monitor each subsequent sale or lease. Market mechanisms, whether an auction or competitive lease, constrain the potential for self-interested or arbitrary bureaucratic action. Congress, in other words, should turn to the market to guide agencies' disposition efforts.<sup>18</sup> Second, when nonmonetary concerns take precedence, agencies should allow greater public participation in both rulemaking and adjudication to help ensure that any loss to the Treasury is justified.

Consequently, we make several recommendations for regulatory change that are particularly needed in contexts where market mechanisms insufficiently restrain disposition decisions. First, we advocate greater public participation in shaping such disposition schemes. Rescinding the APA exemption will not by itself guarantee sufficient public participation, but it might have heuristic value in highlighting the regulatory aspects of disposition of government assets. Moreover, greater public participation in adjudications might provide needed monitoring in contexts in which rent-seeking is likely more rife. Second, we urge amending Executive Order 12,866 to include government disposition of assets within the scope of agency

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16. See, e.g., *infra* note 271 and accompanying text.

17. See, e.g., Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994 & Supp. III 1997) (requiring agencies to consider economic impact of regulations on small businesses and making agency explanation subject to judicial review); Exec. Order No. 12,866, §§ 1(a), 1(b)(6), 3 C.F.R. 638, 638-39 (1994), reprinted in 5 U.S.C. § 601 app. at 557 (1994) (requiring agencies to undertake cost-benefit analysis).

18. Cf. Alfred C. Aman, Jr., *Administrative Law For a New Century*, in THE PROVINCE OF ADMINISTRATIVE LAW 90, 112-14 (Michael Taggart ed., 1997) (arguing that globalization will increase the need for administrative law to incorporate market mechanisms).

actions subject to cost-benefit analysis. Amending the Executive Order would require agencies to articulate the purposes underlying sales and leases, clarify the costs and benefits underlying the programs, and encourage the Office of Management and Budget (OMB) to become expert in designing leases and sales. Conversely, Congress should amend the Small Business Regulatory Enforcement Fairness Act of 1996<sup>19</sup> to allow Congress time to study all major agency disposition initiatives—as with other significant agency rules—before they go into effect. Congress should also amend the pay-as-you-go or PAYGO budget mechanism<sup>20</sup> to include below market sales and leases within the direct spending that must be matched by additional revenue measures. Problems undoubtedly would remain, but the changes sketched above—which could be accomplished without the need to design radically different oversight procedures—would help promote greater accountability in the use and disposition of government assets, ultimately resulting in greater financial return to the Treasury and more effective implementation of nonmonetary goals.

### I. GOVERNMENTAL ACQUISITION OF PROPERTY

Government assets today run the gamut from real to intangible property, and from financial to regulatory assets. With respect to land holdings, the government is by far the largest landowner in the nation. The government also owns substantial chattel, including books, furniture, and satellites. The government actively trades in less tangible property, for instance, by buying and selling securities on the open market, and it has rights in intellectual property such as copyrights and patents.<sup>21</sup> Finally, the government itself creates property through its exercise of regulatory authority—selling rights to sulfur dioxide emissions and to the use of the broadcast spectrum—property that we term regulatory assets. Throughout history, the government has sold, leased, and given away all forms of assets.

The origins and uses of such assets plainly differ, as do the reasons for disposition. The history and procedures of grazing fees contrast sharply with the FCC's licensing of electromagnetic spec-

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19. Small Business Regulatory Enforcement Fairness Act of 1996, Tit. II, Pub. L. No. 104-121, 110 Stat. 857, 857-74 (1996). *See infra* text accompanying notes 338-45.

20. 2 U.S.C. § 902 (1994 & Supp. III 1997). *See infra* text accompanying notes 346-49.

21. *See* 35 U.S.C. § 5207(a)(1) (1994) (authorizing government agencies to own patents); *see also* 15 U.S.C. § 3710c(a)(3) (1994) (authorizing royalties to be paid to government inventors).

trum, and HUD's role in selling apartment buildings does not closely resemble the Forest Service's sale of timber located in the National Forests. Accordingly, some may argue that any analysis combining such disparate programs can only obfuscate the issues by failing to provide a sufficiently contextual analysis of each program.

We agree in part. We cannot hope to do justice to the intricacies of various programs, and we are well aware that we may oversimplify the successes and weaknesses of each. Nonetheless, we believe that grouping the government's disposition efforts together is ultimately rewarding. Common themes arise in administering many of the programs, such as problems of rent-seeking, monitoring, and providing for the optimal level of public participation. Furthermore, by examining the disposition programs as a package, we hope to explore whether some pan-agency reforms are possible to limit rent-seeking and maximize the public's return for the sale and lease of government assets.

### *A. Origins of Government Property*

The government has acquired property in divergent ways. Much like private sector entities, it has purchased assets in open market transactions. It has also seized property to satisfy security interests. Unlike private parties, however, it has acquired property through its exercise of sovereignty—in conquest, via treaty, and through regulation. In this section, we explore such diverse routes to ownership, and then inquire whether the way in which the government acquires property should play any role in its subsequent disposition decision.

When the government buys assets in the open market, just as a private entity would, its subsequent decision to sell such assets presumably should be subject to market-type scrutiny. Most open market acquisitions closely mirror activities in the private sector. Agencies buy computers, the Navy buys ships, and the General Services Administration ("GSA") purchases (through eminent domain or otherwise) land on which to build government buildings. Those purchases should be subject to public oversight. When government officials pay too much for goods in the private market—four hundred dollars, for instance, for a hammer<sup>22</sup>—they should be disciplined; and

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22. See Andrew Ferguson, *Beltspeak, Political Jargon in Washington, D.C.*, NAT'L REV., Nov. 18, 1991, at 64 (making reference to rumors of absurd federal spending).

similarly if officials sell a \$400 machine for \$4.00,<sup>23</sup> eyebrows should be raised.

The federal government also acquires property in other ways analogous to private parties. It receives property through bequests,<sup>24</sup> and much like creditors everywhere, the government amasses a substantial amount of property through forfeitures, such as through failure to pay HUD-backed mortgages, or federal taxes.<sup>25</sup> As in private industry, government scientists, military personnel, and physicians have invented technologies and machinery protected by patent laws. The government's decision to divest such property may similarly track that of entities in the private sector. For example, the government has often attempted to maximize revenue when selling cars obtained through forfeiture or rugs seized at customs.<sup>26</sup>

In addition, unlike the typical acquisition in the private sector, the government acquires assets through the exercise of its sovereignty. The government obtained expansive tracts of land at the conclusion of the War for Independence,<sup>27</sup> through the Louisiana Purchase,<sup>28</sup> and through the purchase of Alaskan lands.<sup>29</sup> Through acts of conquest and treaty, the federal government today owns fifty percent of the land in the eleven Western states, including almost ninety percent of Alaska.<sup>30</sup> Some of the federal land has been set aside for parks, some is leased for private development, and a substantial portion—estimated today at 90 million acres—remains unsurveyed.<sup>31</sup> Almost all of the federal government's land is open to mineral development by interested private parties, and much is open to grazing by neighboring ranchers. The government estimates the

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23. See, e.g., Daniel Southerland, *Proposed Sale of California Oil Field Assailed as Government Giveaway*, WASH. POST, Aug. 7, 1995, at A17.

24. See *United States v. Burnison*, 339 U.S. 87, 95 (1950) (holding that, while the United States may receive gifts and bequests, state law can restrict transferor's ability to make such gifts and bequests).

25. Other forfeitures stem from the government's unique law enforcement powers, and thus are unlike acquisitions in the private sector.

26. See *Auction of Seized Items to Raise Cash for Agencies*, L.A. TIMES, July 1, 1999, at B4; see also *Drug Ship Set to be Auctioned*, HOUS. CHRON., May 27, 1999, at B1.

27. See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49-74 (1968).

28. The nation's land was nearly doubled as a result of the purchase. See *id.* at 77.

29. See BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR, PUBLIC LAND STATISTICS 2 (1993) [hereinafter PUBLIC LAND STATISTICS].

30. See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 16 (1992).

31. See PUBLIC LAND STATISTICS, *supra* note 29, at 100.

value of these holdings at over 600 billion dollars.<sup>32</sup> Utilization of the land has a tremendous impact not only on the nation's fisc, but on the economy and environment of the West in particular.

Moreover, unlike entities in the private sector, the government creates a type of property through its exercise of regulatory authority by becoming the stakeholder for scarce resources such as broadcast spectrum rights or landing slots at airports. For instance, consider the problem of sulfur dioxide emissions by private industry. Many regulatory options exist, including command-and-control regulation enforced by citizen suits, civil fines, and criminal sanctions. The option currently selected by the government, however, is to provide market-based incentives for diminished future emissions.<sup>33</sup> The government sets an emission target for prior users, and permits emission rights to be bought and sold on the secondary market. The government certainly does not own the sulfur dioxide emissions in any traditional sense. In the absence of government action, there would not likely be a market to sell or buy such emissions.<sup>34</sup> Nor does the government currently reap any financial benefits from the auctions. Nonetheless, the government could charge others for (or otherwise allocate) the right to emit sulfur dioxide as part of a regulatory scheme for limiting overall emissions. The government in essence has created property through a regulatory or licensing scheme. There is scant limit to such government steps. The government may allocate rights to use any scarce resource that it does not own—whether fish or broadcast medium—and receive recompense, as long as the regulatory scheme itself passes constitutional muster.<sup>35</sup>

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32. See BUDGET, *supra* note 1, at 25; Marion Clawson, *Major Alternatives for Future Management of the Federal Lands*, in *RETHINKING THE FEDERAL LANDS*, *supra* note 3, at 195, 198.

33. See 42 U.S.C. §§ 7651-7651o (1994). The sulfur dioxide auction in March 1995, for instance, generated almost twenty-three million dollars. See *Acid rain auction is successful*, 103 AM. METAL MARKET, Apr. 11, 1995, at 5, available in 1995 WL 8069781. Government regulation in that context represents the flip side of regulation of the electromagnetic spectrum—the government regulates not because of scarcity, but in effect to make pollution more scarce.

34. Even after the auction, private entities may not enjoy a property right in emission allowances. See 42 U.S.C. § 7651b(f). For a discussion, see generally Susan A. Austin, Comment, *Tradable Emissions Programs: Implications Under the Takings Clause*, 26 ENVTL. L. 323 (1996) (concluding that a takings claim in the area of tradable emissions permits is likely to fail).

35. Federal Fishery Management Councils have experimented with transferable quotas of fish. See SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* 15 (1995); see also Thorvaldur Gylfason, *The pros and cons of fishing fees: The case of Iceland*, 33 EUR. FREE TRADE ASS'N BULL. 6 (1992) (arguing for governmental sale of fishing rights in Iceland); Peter Passell, *U.S. Giving Certain Boat Owners Exclusive Rights to Fish Off Coast*, N.Y. TIMES, Apr. 22, 1991, at A1. This regulatory option may represent a back door way for the government to assert a property interest in

### B. *Relevance of Government's Distinctive Role in Acquiring Property*

From the outset, therefore, the government has acquired property in ways quite distinct from the typical private owner.<sup>36</sup> The unique origins of the public land system may, therefore, argue for different priorities in disposing of the land.<sup>37</sup> Some have labeled the government's ownership of such land a public trust, such that the government may use the land only as a necessary means of preserving public values that cannot be furthered through private ownership.<sup>38</sup> Thus, when the government obtains lands through an act of sovereignty, its utilization of such resources arguably should be consistent with a public trust over the land.<sup>39</sup> Similarly if the government acquires an asset through its exercise of regulatory authority, any proceeds arguably should be related to that regulatory objective.<sup>40</sup>

Indeed, restrictions on the federal government's power over public lands have a constitutional dimension. Article IV of the Constitution, which provides in relevant part that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," may impose limits on governmental use of public property.<sup>41</sup> Politicians as well as academics have argued that the federal government enjoys no governmental power over landholdings (unconnected

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items, such as air, that it would otherwise lack constitutional power to seize as property. Only the doctrines of federalism and regulatory takings limit the federal government's power in this respect.

36. The first Congress determined that the proceeds of public land sales were to be used to retire the national debt. The price of land was set at \$2.00 an acre, with the smallest tract to be sold was 640 acres. See Paul W. Gates, *The Federal Lands: Why We Retained Them*, in *RETHINKING THE FEDERAL LANDS*, *supra* note 3, at 35, 37. The federal government has given some 325 million acres to the states, see *PUBLIC LAND STATISTICS*, *supra* note 29, at 4, making each state often the second largest landholder within its boundaries, see George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 *ENVTL. L. J.* 7 (1982).

37. Because of the origins, some today argue that the federal government should cede control of the lands to states and municipalities. See *infra* note 136.

38. See generally Joseph L. Sax, *The Claim for Retention of the Public Lands*, in *RETHINKING THE FEDERAL LANDS*, *supra* note 3, at 125.

39. The trust may benefit states, *cf.* LEGISLATIVE COMM'N OF THE LEGISLATIVE COUNSEL BUREAU, STATE OF NEV., BULLETIN NO. 77-6, MEANS OF DERIVING ADDITIONAL STATE BENEFITS FROM PUBLIC LANDS, at I-39 (1976) (arguing that federal acquisition of public land was to be held in a trust for the benefit of the respective states), or the people themselves. See Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 *U.C. DAVIS L. REV.* 269 (1980).

40. In the sulfur dioxide program, the statute prohibits the federal government from retaining any of the proceeds generated from the auctions. See 42 U.S.C. §§ 7651o(b), 7651o(d)(3)(A) (1994).

41. U.S. CONST. art. IV, § 3. Article I, section 8 vests Congress with the authority to legislate over federal government lands not located within any state, as well as federal lands on which forts and other federal governmental buildings stand. See US CONST. art I, § 8.

to forts, post offices, etc.) within the several states.<sup>42</sup> Rather, the federal government enjoys only the rights of any other land proprietor, which includes the power to sell or lease the land, subject to state law.

As a matter of both policy and constitutional law, however, we reject the argument that the government's use or disposition of property should be limited either by the purpose for which it was obtained, or by an overly crabbed reading of the Constitution. First, as a policy matter, principles of majoritarian governance favor permitting the government flexibility to dispose of such assets irrespective of the original purpose. Society's identity changes over time. Births, deaths, immigration, and emigration all transform the political community. Even if historical context suggests that the government should retain particular lands or devote proceeds from auctions to particular programs, the current majority should be free to reassess objectives.

To be sure, if the federal government unwisely alienates land or other public assets, succeeding generations may be greatly harmed. Once wilderness is plundered, restoring its splendor may prove impossible. Yet, our government continuously makes decisions that may have an adverse impact on generations to follow, whether by failing to take strict enough measures to protect the ozone layer or by spending excessively. The current majority, for better or worse, can harm future generations in a great many ways. Public asset decisions should not be treated any differently from budgetary or environmental decisions generally. Thus, as social conditions change, the government should be able to respond to such changes and alienate property or charge full price for assets under its control despite the historical understandings. Any reliance interests should be taken into account by policymakers, but that reliance should not automatically trump the considered judgment of current leaders. A current majority need not be ruled by the dead hand of majorities past.

An instructive analogy is presented by the government's authority to use property obtained through its power of eminent

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42. See, e.g., David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976) (tracing the development of federal and state power over different classes of federal property); see also *Rights of the States: Hearing on S. 1629, the Tenth Amendment Enforcement Act of 1996 Before the Senate Comm. on Governmental Affairs*, 104th Cong. (1996) (statement of Roger J. Marzulla, lawyer) (criticizing overexpansive interpretation of the federal government's Article IV power over public lands); Jim Fisher, *Court disposes of 17-year-old case of claim jumping*, LEWISTON MORNING TRIB., Sept. 12, 1996, at 6A (addressing view of Idaho politicians).

domain. The federal government can only exercise that power if it plans to use the targeted property for a public purpose.<sup>43</sup> Similarly, the government can only purchase land or charge private entities for the right to use broadcast medium if a public purpose is satisfied.<sup>44</sup> But once the exercise of eminent domain is complete, then the government acquires title to the property and can dispose of the land as it deems proper.<sup>45</sup>

The constitutional argument constraining the federal government's power over federal lands located within states is no more persuasive. Although there is perhaps room to debate the late nineteenth and early twentieth century precedents construing Article IV,<sup>46</sup> the Supreme Court clearly articulated the rule in *Kleppe v. New Mexico* that the federal government's control over federal property under Article IV is "without limitations."<sup>47</sup> There, the Court considered a challenge to Congress's authority to protect wild horses and burros on public lands from state sanctioned destruction. The Court reasoned that "Congress exercises the powers both of a proprietor and of a legislature over the public domain."<sup>48</sup> Moreover, nothing in Arti-

43. The public purpose requirement for eminent domain also is not demanding. *See, e.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-43 (1984) (approving eminent domain for subdivision of large land holdings); *Berman v. Parker*, 348 U.S. 26, 33-34 (1954) (approving use of eminent domain for urban redevelopment).

44. The Equal Protection Clause demands that at least some public purpose be found in every regulatory measure. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976).

45. For instance, years after the federal government established Camp Breckenridge in Kentucky upon property acquired through eminent domain, it decided to close the base and sell mineral rights to the land. The original owners of the tracts sought to rescind the government's prior exercise of eminent domain. In dismissing the case, the Sixth Circuit explained that "[t]he subsequent abandonment of Camp Breckenridge did not affect the validity of the government's title to the land acquired by condemnation. . . . [Rather,] [t]he validity of title is determined by the conditions existing at the time of the taking." *Higginson v. United States*, 384 F.2d 504, 507 (6th Cir. 1967); *see also Beistline v. City of San Diego*, 256 F.2d 421, 424 (9th Cir. 1958) (approving sale of land obtained for municipal airport); *United States v. Three Parcels of Land*, 224 F. Supp. 873, 875-76 (D. Alaska 1963) (holding that the government need not retain seized land as post office).

46. Compare Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 698-723 (1981) (reviewing the early history behind the federal property clauses and critiquing the theories concerning the federal right to own and control public lands), and Engdahl, *supra* note 42, at 310-38, with George Cameron Coggins & A. Dan Tarlock, *Myth as Law: The Erroneous Historical Foundations of Public Land Law* (unpublished manuscript, on file with the *Vanderbilt Law Review*), and Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617, 638-51 (1985) (arguing that the Supreme Court's expansive view of the federal government's property clause power is supported by earlier precedent).

47. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

48. *Id.* at 540.

cle IV turns on the manner in which the federal government acquired the property, and *no* constitutional restriction in any event applies to governmental disposition of interests other than land, whether buildings or the electromagnetic spectrum. Congress, therefore, can utilize its landholdings to further any objective falling within the enumerated powers of the federal government.

In short, therefore, despite the various means by which the government can obtain assets—market exchange, exercise of sovereignty, or regulatory authority—its discretion in divesting those assets should not turn on the way in which the assets were acquired.<sup>49</sup> Instead, the government should be free to utilize or divest such assets as contemporary objectives dictate. And, as we discuss below, the government has sought wide-ranging goals in disposing of government assets.

## II. THE GOVERNMENT'S DISPOSITION DECISION

### A. *Governmental Objectives*

The government has long sought many objectives in selling, leasing, and otherwise disposing of government assets. A promise of property can be a powerful tool in encouraging particular behavior, and a sale or lease may resemble regulation of private conduct far more than its outward trappings would suggest. Although generation of revenue has long been an important consideration in disposing of assets, other goals have existed alongside.

#### 1. Maximizing Return to the Government

Like entities in the private sector, the government often seeks to maximize revenue in selling or leasing assets. The profit motive at times governs FBI sales of seized cars, Customs' auction of seized assets, and the GSA's sale of government property when no longer needed. The government may maximize return for each asset sold or leased.

Asset disposition schemes have had mixed success in maximizing return on the government's assets. Some mechanisms, such as the use of lotteries to give away government assets, have been notori-

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49. Indeed, the first Congress offered the public lands for sale in part to retire the debt from the Revolutionary War.

ous for their departure from revenue-maximizing principles.<sup>50</sup> Similarly, the Mining Act of 1872 gives away valuable mineral rights on public land for a mere pittance.<sup>51</sup> Others, like royalties on coal extraction on public lands, may be much more effective in raising revenue.<sup>52</sup> The trend toward auctions in allocating use of the electromagnetic spectrum and in assigning oil leases on the Outer-Continental Shelf reflects the greater use of efficient mechanisms to maximize revenue, even though disagreement still exists over which specific auction system is optimal in a given context.<sup>53</sup> In part, therefore, government disposition of assets should be evaluated just like any private entity's sale or lease of its assets—does the disposition maximize return to the government?

The government may use resources in a way that maximizes return not on the asset itself but for the economy as a whole. Arguably, land grants for railroads, while failing to maximize return for land,<sup>54</sup> represented a sound investment in the nation's economy. The government's various Homestead Acts reflected an effort to encourage internal migration west in order to develop the nascent economy.<sup>55</sup>

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50. For a discussion of lotteries for onshore oil and gas exploration, see CARL J. MAYER & GEORGE A. RILEY, *PUBLIC DOMAIN, PRIVATE DOMINION: A HISTORY OF PUBLIC MINERAL POLICY IN AMERICA 197-99* (1985). Congress discontinued the lotteries in the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, Title IV, Subtitle B, 101 Stat. 1330-256 (1987) (codified as amended in scattered sections of 30 U.S.C.).

51. See An Act to promote the Development of the mining Resources of the United States § 6, 17 Stat. 91, 92-93 (1872) (codified as amended at 30 U.S.C. § 29 (1994)).

52. For an evaluation of the royalty system, see STEPHEN L. MCDONALD, *THE LEASING OF FEDERAL LANDS FOR FOSSIL FUELS PRODUCTION 98-102* (1979); OFFICE OF TECH. ASSESSMENT, *MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND: CURRENT STATUS AND ISSUES 150-54* (1979) [hereinafter *MANAGEMENT OF FUEL*].

53. See, e.g., RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992); Paul R. Milgrom, *Auction Theory*, in *ADVANCES IN ECONOMIC THEORY: FIFTH WORLD CONGRESS 1* (Truman F. Bewley ed., 1987). The FCC struggled to address the aftermath of its 1996 auctions for "C-block" spectrum. Small firms bid so steeply for the licenses that many subsequently defaulted on installment payments to the FCC. The amount owed was approximately nine billion dollars. The FCC may have erred strategically by granting smaller firms bidding credits or by affording the option of installment payments, which placed the agency in the awkward position of a lending institution. See Sandra Guy, *Irrational Exuberance*, 233 *TELEPHONY* 5 (Sept. 29, 1997); Martin L. Stern & David Rice, *Fallout From the C-Block Debacle Threatens to Cost Small Businesses Their Best Chance to Participate in Spectrum-Based Telecom Services*, *LEGAL TIMES*, Oct. 13, 1997, at S36. For the Congressional Budget Office Report examining the defaults, see CONGRESSIONAL BUDGET OFFICE, *IMPENDING DEFAULTS BY WINNING BIDDERS IN THE FCC'S C BLOCK AUCTION: ISSUES AND OPTIONS* (1997). The FCC was forced to declare a moratorium on the installments due. See *FCC REPORT*, *supra* note 2, at 31.

54. For a discussion, see Coggins & Lindeberg-Johnson, *supra* note 36, at 11-14, & n.75.

55. PAUL J. CULHANE, *PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 76-79* (1981); see also WILKINSON, *supra* note 30, at 19, 247-48.

Similarly, a corporation may sell assets at a below market cost in order to attain some other (legitimate) corporate objective, such as stimulating future demand. Thus, even when the government does not maximize return on a particular asset, it may act in the nation's overall financial interest. Evaluating whether such measures have substantially contributed to the economy's overall growth is quite difficult, and the government's method of accomplishing such goals may still be suspect.<sup>56</sup> Nonetheless, the overall efficiency of any disposition program should consider not only the financial return on the specific asset, but also the impact on the economy as a whole.

Unlike entities in the private sector, however, the government often seeks objectives other than maximizing return on particular assets. Through the sale and lease of assets, the government may effect programmatic, distributional, and social preservation goals. Government disposition efforts therefore must be evaluated under criteria in addition to maximizing financial return on assets.

## 2. Programmatic Interests

In selling and leasing assets, the government seeks various programmatic goals. One goal relates to the market for the asset itself. The government can sell or buy assets merely to affect supply and demand. Financial securities present a case in point. The Federal Open Market Committee ("FOMC") buys and sells government securities to modulate the rate of economic growth and, correspondingly, the inflation rate.<sup>57</sup> Conversely, the government, which has stockpiled particular minerals of strategic importance, such as oil or beryllium, has hesitated selling such assets when no longer of use for fear of depressing the private market.<sup>58</sup> The same has been true for the Resolution Trust Corporation's delay in selling property it seized from failed thrifts—if the government had put all of the properties on

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56. For instance, Congress granted land to railroad interests to stimulate construction of the railroads, but those grants may have been far more generous than necessary to ensure that the lines were completed. See MAYER & RILEY, *supra* note 50, at 120-21; Paul S. Dempsey, *Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species*, 32 AM. U. L. REV. 335 (1983).

57. See Mark F. Bernstein, Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 114-18 (1989) (discussing the operations of the FOMC).

58. Not surprisingly, entrenched interests opposed the move. See John J. Fialka, *Federal Uranium-Enrichment Program Will Be Sold in Public Stock Offering*, WALL ST. J., June 30, 1998, at A20; David Prizinsky, *Pentagon Proposal May Hinder Brush Wellman*, CRAIN'S CLEV. BUS., Aug. 7, 1995, at 3.

the market at one time, the private market would have suffered considerably.<sup>59</sup>

Another type of programmatic objective lies in how a private entity will use an asset sold or leased by the government. When leasing concessions at National Parks, for instance, the government may have a programmatic interest in the type of service provided by the concessionaire, even if one particular company is willing to pay more for the opportunity.<sup>60</sup> Poor service at a National Park does not redound to the government's best interest, even if the concessionaire is paying for the lease at a premium price. The government may therefore select a lessee that does not pay the most for the lease.

The government has also long manifested interest in the type of programs radio stations broadcast.<sup>61</sup> The government awards licenses only after determining which applicant would best serve the public interest based on several factors, including the type of programming and community contacts.<sup>62</sup> Whatever method of allocating licenses the government uses, therefore, may include consideration for the content of the service to be provided by the licensee. Because of the government's interest in how its assets are managed, a sale of some governmental assets may resemble a contracting-out decision more than a traditional sale in the private sector.

Programmatic interests can also be unrelated to the specific asset being auctioned or leased. For instance, in the McKinney Homeless Assistance Act, Congress awarded a preference for groups purchasing vacated military bases if they provided housing for the

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59. It might be prudent for government to divest its assets slowly to maximize return because flooding the market might depress prices radically.

60. See Stephen Sloan Marine Corp., 89-1 Comp. Gen. ¶435 (1989) ("[C]onsiderations of the revenue to the government generated by franchise fees . . . shall be subordinate to the objective of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates."). See generally George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 744-46 (1997) (describing how the National Park Service makes lease decisions based upon a variety of factors including the experience of the offeror, its financial capability, and its ability to serve visitors well).

61. There may be a programmatic concern in the recent auction for personal communications devices: some fear that too high of a purchase price will blunt companies' technological innovation. For a helpful analysis, see Howard A. Shelanski, Video Competition and the Public-Interest Debate (1998) (unpublished manuscript, on file with the *Vanderbilt Law Review*). On the general benefits of privatization, see Roger F. Durant et al., *People, Profits, and Service Delivery: Lessons from the Privatization of British Telecom*, 42 AM. J. POL. SCI. 117 (1998).

62. See generally Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 732-36 (1979) (discussing the FCC's initial broadcast licensing hearing process as a multicriteria choice process).

homeless.<sup>63</sup> Congress seized upon the obsolescence of defense bases as an opportunity to further a goal unconnected to defense spending—helping the homeless. Similarly, under an 1872 Mining Law, any individual or corporation engaged in mining significant mineral deposits on federal land can buy the land for between \$2.50 and \$5 an acre.<sup>64</sup> The statute declares that “all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . .”<sup>65</sup> Congress evidently fashioned the law to encourage internal migration west and to aid the mining industry.<sup>66</sup>

### 3. Distributional Goals

The government also seeks distributional goals in selling and leasing assets.<sup>67</sup> The recent FCC auctions provide an example. Congress feared that, if broadcast spectrum were allocated merely by auction, only large companies whose management structure excluded women and minority groups would hold the licenses for paging and personal communications devices.<sup>68</sup> Thus, the FCC created a series of preferences for minorities and women to facilitate their participation in this sector of the economy. In an early series of auctions, companies that were predominantly owned by minorities or women received a forty percent credit in bidding on the licenses for information technology systems.<sup>69</sup> Such preferences in bidding may

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63. See 42 U.S.C. §§ 11411-11412 (1994). Congress has more recently limited that preference to other federal property that is no longer being used. Preferences for visually impaired persons to operate vending facilities on government property still exist. See 20 U.S.C. § 107-107f (1994 & Supp. III 1997).

64. See An Act to promote the Development of the mining Resources of the United States § 11, 17 Stat. 91, 94-95 (codified as amended at 30 U.S.C. § 37 (1994)). The government uses its assets to support state laws also for programmatic purposes, such as fostering education.

65. 30 U.S.C. §22 (codifying section 1 of Mining Law of 1872).

66. See Carl J. Mayer, Comment, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 648 (1986). The procedures utilized by the government to attain such programmatic goals may or may not be efficient. For instance, the FCC's time consuming comparative hearings into the nature of the planned programming have long been criticized. See Spitzer, *supra* note 62, at 731.

67. The parallel with government loan programs to support veterans and farmers is apparent. Subsidized loans constitute a closely related context in which the government disposes of its assets for non profit-maximizing reasons.

68. See 47 U.S.C. § 309(j)(3)(B) (1994).

69. For the FCC's perspective on its efforts to facilitate participation by companies owned by minorities and women, see FCC REPORT, *supra* note 2, at 27-28. See also Kurt A. Wimmer & Lee J. Tiedrich, *Competitive Bidding & Personal Communications Services: A New Paradigm for Fee Licensing*, 3 COMM-LAW CONSPECTUS 17, 25 (1994).

not cause as much financial loss as first thought.<sup>70</sup> Yet, deciding upon the qualifications of the so-termed designated entities breeds contentiousness, as in other programs, and some restraint on transfer is required to preserve the distributional goals. Analogous preferences have been under heavy fire in the government contracts context,<sup>71</sup> prompting the FCC to suspend and then rescind the preference program.<sup>72</sup>

The government has pursued other distributional goals. For instance, the government rewarded and enticed soldiers with grants of approximately sixty-one million acres after the Revolutionary War, the War of 1812, and the Mexican War.<sup>73</sup> Through sales and leases of assets, the government can therefore attain a number of distributional goals.<sup>74</sup>

#### 4. Social Preservation Goals

In distributing government assets, the government may also hope to attain what might be termed social preservation goals. In the FCC auctions, for instance, Congress granted preferences not only to women and minorities, but also to small businesses. Continued grazing rights on federal land, which have been set at less than one-fourth the market rate,<sup>75</sup> similarly may be seen to as a way (though perhaps myopic) to protect the lifestyle of small ranchers. The congressional Homestead Act promising 160 acres to any citizen who cultivated the land provides another example.<sup>76</sup> Subsidization of

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70. A bidding credit may stimulate competition in the auction if inadequate competition otherwise exists. See Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 766 (1996). Nonetheless, credits to designated entities may ensure that some awards end up in the hands of entities with lower reservation prices. If such firms are less efficient, as the lower reservation price may indicate, then the government will ultimately reap less tax revenue later on. In other words, even if awarding credits stimulates competition in contexts in which competition would otherwise be thin, the overall efficiency gains may be questionable.

71. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications must be reviewed under strict scrutiny).

72. See *In the Matter of Implementation of Section 309(J) of the Communications Act—Competitive Bidding*, Sixth Report and Order, 10 F.C.C.R. 136 (1995). The rescission has been upheld by the D.C. Circuit. See *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633-34 (D.C. Cir. 1996).

73. See LEHMANN, *supra* note 35, at 35.

74. See Gates, *supra* note 36, at 38. Land grants have been used to accomplish other social goals as well, particularly to foster education within the states. See *id.* at 40-41. The government has also subsidized electricity for users in certain rural areas. See Southerland, *supra* note 23, at A17. Users have protested the government's proposal to sell electricity plants because the subsidy would be removed.

75. See WILKINSON, *supra* note 30, at 81.

76. See Gates, *supra* note 36, at 42 (discussing the Homestead Act of 1862).

water rights in various locales may serve an analogous function.<sup>77</sup> Indeed, the government may on occasion sell too much of an asset—as with below market timber sales<sup>78</sup>—in order to attempt to preserve a way of life.

Finally, in contrast to the norm in the private sector, the government retains a financial interest in the identity of the individual or group using the public asset, whether the disposition stemmed from economic, programmatic, distributive, or social preservationist reasons. To the extent the individual or firm uses the asset more efficiently, the national economy benefits. And from a more narrow perspective, the government stands to benefit if the firm deploys the asset wisely, which presumably would lead to greater tax revenue.

### B. Weaknesses of Existing Disposition Schemes

So far, we have suggested that policy goals distinguish the government from actors in the private sector when selling or leasing assets.<sup>79</sup> Monitoring government disposition of assets may be more problematic than in the private sector for two reasons. First, even for market-based transactions, no analogue to shareholder constraints exist.<sup>80</sup> Collective action problems make the prospect of monitoring government disposition of assets by the electorate unlikely, at best. Few citizens were aware of the government's use of lotteries to assign on-shore oil rights, or of the intricacies of the hardrock mining program. Although agencies may benefit the more they realize from each sale, there is no mechanism available comparable to the discipline of the market. The very procedures utilized by agencies in attempting to maximize return on asset value may be inefficient.

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77. See 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 213.01-.05 (1996); WILKINSON, *supra* note 30, at 247-59.

78. See Gary D. Libecap, *Bureaucratic Issues and Environmental Concerns: A Review of the History of Federal Land Ownership and Management*, 15 HARV. J.L. & PUB. POL'Y 467, 484 (1992). Timber sales from national forests provide the economic livelihood of small towns traditionally dependent on logging industries. See WILKINSON, *supra* note 30, at 114.

79. The federal government currently has scores of procedures—statutory and administratively created—to pursue such goals. Each agency disposes of used government property, and many as well oversee the sale or lease of countless other assets. In disposing of government assets, agencies at times have deployed auctions, entered into leases with and without royalties, held lotteries, distributed assets on a first come, first served basis, and utilized ad hoc procedures in making the asset disposition decision.

80. When a private corporation disposes of assets, monitoring does not prove that intractable. The market exerts a potent check on managers selling assets in the private sector. A company's net worth turns in part on the income generated from the sale of such assets, and the price of shares reflects that worth.

Second, in light of the government objectives other than profit-maximization, evaluation of the government's performance is more difficult. Aside from problems of rent-seeking, there is no measure by which to gauge the importance of the 1872 Mining Law in encouraging individuals to develop mining on federal land or of the grazing subsidy to ranching. The methodologies used in pursuing such goals may add substantial hidden costs.

In this section, we analyze three prominent government programs disposing of government assets—the 1872 Mining Law, grazing fees, and auction for electromagnetic spectrum—to assess the efficacy of the current regulatory system for both structuring and monitoring government disposition efforts. In all of the programs, some effort has been made to ensure a satisfactory return on the government's assets, and the programs pursue other objectives—programmatically, distributive, and social preservationist—as well. But the departures from profit maximization are nonetheless striking, and there is reason to question not only how well those other objectives are being accomplished, but also whether such objectives justify the lack of return to public coffers. Taken together, these three examples demonstrate the need for revamping oversight of the government disposition programs.

### 1. 1872 Mining Law

Mining commenced almost immediately upon colonization of the New World by European settlers. In this country, the first successful mining operations focused on coal and lead, with considerable lead mining in Wisconsin, Illinois, and Missouri.<sup>81</sup> In the early nineteenth century, royalties were collected in part by controlling the lead smelting business—licensed smelters agreed to record the amount smelted for each miner.<sup>82</sup> The government experimented with different procedural mechanisms to monitor the royalty system, with varying degrees of success.<sup>83</sup> With the Gold Rush of 1849, mining occupied a more prominent place in the American economy. California's population ballooned from 14,000 in 1848 to 223,000 in 1852.<sup>84</sup> Mining for gold and other minerals extended into Nevada,

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81. See MAYER & RILEY, *supra* note 50, at 21; see also MANAGEMENT OF FUEL, *supra* note 52, at 80.

82. See MAYER & RILEY, *supra* note 50, at 22-23. As the program became more corrupt and controversial, Congress switched paths and authorized sale of the lead mines in 1846. See *id.* at 37.

83. See *id.* at 32-33.

84. See WILKINSON, *supra* note 30, at 35.

Montana, and Idaho, where miners constituted approximately one-third of the population in those areas by the mid-1860s.<sup>85</sup>

To support the mining efforts, and possibly to encourage internal migration west, Congress provided that any "valuable" minerals found on federal land would practically be free for the taking. In a series of statutes culminating in the 1872 Act, which still governs today, Congress provided that no royalties need be paid for minerals extracted from the public lands.<sup>86</sup> A claim can be maintained with \$100 of work per year,<sup>87</sup> and with only \$500 of work, a miner (or corporation) can buy the land outright (assuming a valuable mineral deposit exists) at prices between \$2.50 and \$5.00 an acre.<sup>88</sup> The same law today governs hardrock minerals such as gold, silver, copper, and uranium.<sup>89</sup> The law grants right of access to approximately 750 million acres, or roughly one-third the territory of the entire nation.<sup>90</sup>

From a financial perspective, the law may initially have had success in attracting miners throughout the late nineteenth and early twentieth centuries to help the nation develop an industrial base, but

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85. The miners fashioned rules to govern themselves, in part based on rules from mining camps in the East, in part on Spanish rules, and in part on local custom. Contemporary historical accounts have suggested that the rules were amazingly successful in keeping the peace. See, e.g., CHARLES SHINN, *MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT* (1884). Congress lent the local customs the sanction of federal law shortly after the Civil War. See An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes § 1, 14 Stat. 251, 251 (1866). In *Jennison v. Kirk*, the Supreme Court explained:

Wherever [the miners] went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government . . . These rules bore a marked similarity . . . [a]nd they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege. . . Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands . . .

*Jennison v. Kirk*, 98 U.S. 453, 457 (1878).

86. See WILKINSON, *supra* note 30, at 44.

87. The Act has since been modified. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Tit. X, Subtit. B, 107 Stat. 312, 405 (1993) (amending 30 U.S.C. § 28(f)-(k)).

88. The \$5.00 price is for lode claims, and the \$2.50 price is for placer claims. See 30 U.S.C. §§ 29, 37 (1994). Each claim is limited to twenty acres, but there is no limit on the number of claims each person or entity can file. See *id.* §§ 23, 35. The purchasers receive a patent, which is ownership in fee simple.

89. *Id.* § 21a.

90. See Mayer, *supra* note 66, at 625 n.4. Some public land, such as that obtained through eminent domain, is exempted. See MANAGEMENT OF FUEL, *supra* note 52, at 82 n.3. The President has also exercised the authority to remove particular wilderness lands or other valuable lands from the public domain to prevent mineral exploration. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (upholding President Roosevelt's withdrawal of lands to preserve oil supply); *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288, 1291-93 (9th Cir. 1987) (upholding withdrawal of lands in Grand Canyon National Game Preserve by the Department of Interior).

today the law has three prominent financial weaknesses. First and most obviously, private parties extract huge benefits at the expense of the public at large. Three million acres have been "sold" to private entities under the Mining Law, and countless billions of dollars made by mining interests.<sup>91</sup> To provide one recent example, American Barrick Resources Corporation of Canada in 1994 purchased 1950 acres in Nevada for under \$10,000. The potential value of the gold situated beneath the land exceeds three billion dollars.<sup>92</sup> Unlike other programs to develop minerals on public land,<sup>93</sup> no means—except taxation on profits—is employed to share the private entity's profits.

Second, there are significant collateral costs to mining enterprises that have saddled the public with additional obligations. In mining for hardrock minerals, often the land is stripped, nearby streams polluted, and the water table damaged.<sup>94</sup> Although environmental controls have increased in recent years,<sup>95</sup> there is no formal mechanism to force mining interests to internalize the costs of their operations. Thus the federal government not only foregoes income on the minerals, but it also subsidizes private miners whose mining leaves the public with environmental damage.<sup>96</sup> Moreover, permitting such claims clouds the government's title to land in a sporadic fashion. Should the government decide to withdraw a particular tract of land from the public domain, or should it decide to build a military

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91. See WILKINSON, *supra* note 30, at 49.

92. See Tom Kenworthy, *A Court-Ordered "Gold Heist": Babbitt Uses Federal Land Transfer to Urge Reform of 1872 Mining Act*, WASH. POST, May 17, 1994, at A5. Similarly, 110 acres in Nevada were recently sold to a Danish company for \$275. The value of the minerals underneath has been estimated at close to one billion dollars. See *Citing 1872 Law, Babbitt Sells U.S. Land for \$275*, CHI. TRIB., Sept. 7, 1995, § 1, at 6. The government sold land in the Coronado National Forest to ASARCO for \$1,745 that is estimated to contain 2.9 billion dollars worth of minerals. See *Some "Bearly" Able to Mask Envy*, ROCKY MTN. NEWS, Jan. 7, 1996, at 67A.

93. The government receives royalties on resources such as shale and coal mined on public land. See MANAGEMENT OF FUEL, *supra* note 52, at 145-47. Cf. *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S. Ct. 1719 (1999) (holding reservation of rights in coal by U.S. does not include coalbed methane gas).

94. See, e.g., DAVID SHERIDAN, *HARD ROCK MINING ON THE PUBLIC LAND* 14-15 (1977); WILKINSON, *supra* note 30, at 64; George Cameron Coggins, *Livestock Grazing on the Public Lands: Lessons from the Failure of Official Conservation*, 20 GONZ. L. REV. 749, 753-55 (1984-1985).

95. See WILKINSON, *supra* note 30, at 64-67.

96. See *id.* at 30-32; MAYER & RILEY, *supra* note 50, at 82 (noting the criticisms concerning the environmental effects of the old mining law). Under the current law, mining is the highest use of the public domain, precluding competing uses, unless the Secretary of Interior withdraws the land from mining altogether. See Lynn M. Kornfeld, Comment, *Reclamation of Inactive and Abandoned Hardrock Mine Sites: Remining and Liability Under CERCLA and the CWA*, 69 U. COLO. L. REV. 597, 597-604 (1998); Daphne Werth, Comment, *Where Regulation and Property Rights Collide: Reforming the Hardrock Act of 1872*, 65 U. COLO. L. REV. 427, 445 (1994).

base, it must assess the validity of the mining claims located on the land to determine whether compensation is owed.<sup>97</sup> Given that there are over one million unpatented claims of record, the problem is considerable.<sup>98</sup>

Third, substantial inefficiencies plague the system. From a bureaucratic perspective, the government sustains much administrative cost in operating the mining laws. Before granting a patent, officials must inspect each site to ascertain whether the claim includes a "valuable" deposit.<sup>99</sup> That requirement has proven problematic, with the Secretary of the Interior adopting the position that valuable deposit means that the mineral not only exists, but can be "extracted, removed, and marketed at a profit."<sup>100</sup> Then, before land is sold (or the claim challenged),<sup>101</sup> officials must ensure that sufficient work has been devoted to the claim.<sup>102</sup>

From the miners' perspective as well, the administrative structure of the Act is unfortunate. For instance, miners must devote resources into extracting materials before they even know whether a "valuable" deposit exists, and that term is ambiguous enough to deter some productive efforts.<sup>103</sup> The requirement of work assessment also

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97. Cf. *Kunkes v. United States*, 78 F.3d 1549, 1553 (Fed. Cir. 1996) (discussing government's desire to remove encumbrances from unpatented claims on federal land).

98. See Michael Braunstein, *Natural Environments and Natural Resources: An Economic Analysis and New Interpretation of the General Mining Law*, 32 UCLA L. REV. 1133, 1155-56 (1985); see also Peter Strauss, *Mining Claims on Public Lands: A Study of Interior Department Procedures*, 1974 UTAH L. REV. 185, 189-90. Congress in the Federal Land Policy and Management Act of 1976 required miners for the first time to record their claims with the federal government. See Federal Land Policy and Management Act of 1976 § 314, 43 U.S.C. § 1744 (1994). Prior to that time, recordation was dependent upon state law.

99. See 30 U.S.C. §§ 22, 29 (1994); see also *United States v. Coleman*, 390 U.S. 599, 600 n.1 (1968).

100. *Coleman*, 390 U.S. at 600; see *id.* at 602-03 (upholding Secretary's interpretation as reasonable); see also *Chrisman v. Miller*, 197 U.S. 313, 322-23 (1905) (upholding Secretary's prudent-man test, under which a valuable deposit must be of such a character that a person of ordinary prudence would expend money to develop the deposit). For a discussion of the tension between the two tests, see generally Mayer, *supra* note 66.

101. There has been consistent abuse of the system in which individuals have staked claims and obtained patents in order to build vacation homes, or in order to obtain more land for grazing. See *MANAGEMENT OF FUEL*, *supra* note 52, at 201-03. One enterprising miner staked out a claim near the trail head of the Grand Canyon for the purpose of exacting a toll from visitors. See *Cameron v. United States*, 252 U.S. 450, 454-55 (1920).

102. For the pragmatic difficulties in determining how much work has been devoted to such widely scattered claims, see *MANAGEMENT OF FUEL*, *supra* note 52, at 195-96; Strauss, *supra* note 98, at 226-30. Congress has recently mandated that claimants with more than ten claims pay \$100 per claim in lieu of the assessment work. See 30 U.S.C. § 28f(a). Congress directed that the fee be maintained through 1998. See *id.* The Federal Circuit has rejected a Takings challenge to the new requirement. See *Kunkes*, 78 F.3d at 1554-56.

103. See *MANAGEMENT OF FUEL*, *supra* note 52, at 199; *PUBLIC LAND LAW REVIEW COMM'N, ONE-THIRD OF THE NATION'S LAND* 124 (1970). But see *supra* note 100.

dictates that funds be spent (and the land surface disturbed) even when not required to further the claim. It may be, for instance, that the miners can only amass sufficient funds to mine their claims later, but must expend money in the interim to preserve them.<sup>104</sup>

Nor do the nonmonetary objectives underlying the 1872 law seem pressing today. We doubt that the government still is interested in encouraging internal migration. Moreover, not only do individual miners benefit from the law, as during the Gold Rush, but also so do huge corporations.<sup>105</sup> Corporations can use individuals to aggregate the 20-acre claims for their use. The subsidy to mining interests seems apparent.<sup>106</sup>

Thus, even though the Mining Law of 1872 may have been enacted with the best intentions, and may as well have been successful in early years, today it is less defensible. The government fails to maximize return on its valuable mineral assets, and the programmatic and possibly social preservationist objectives animating the original Act no longer serve the public interest. The Mining Law reflects the danger of rent-seeking by organized interest groups benefiting from public subsidies in the form of virtually free use of minerals discovered on public land.

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104. See Braunstein, *supra* note 98, at 1156-58.

105. See MAYER & RILEY, *supra* note 50, at 84. As an example, in addition to the Barrick purchase, Brush Wellman is now developing mining operations for beryllium on some 2,500 acres of Utah desert, with a potential value of fifteen billion dollars. See Keith Epstein, *Fortune Hidden Under Desert*, CLEV. PLAIN DEALER, May 22, 1994, at A1.

106. In 1994, the Clinton Administration targeted the 1872 law for revision, hoping to end the bonanza for mining interests, though not threatening to disturb vested rights under the program. Interior Secretary Babbitt termed reform one of the primary goals of his stewardship of the Interior Department. See *Reform for the Public Lands*, N.Y. TIMES, Aug. 11, 1993, at A14; Mark Shaffer, *Throw the Bums Out: 2000 Protest Mining Bill*, ARIZ. REPUBLIC, Aug. 29, 1993, at A19. Perhaps predictably, mining interests lobbied long and hard to kill the reform bills. (State representatives have the incentive to retain the mining program because of its role in spurring development within their jurisdictions, while the cost to the Treasury is spread among all jurisdictions.) In contrast, those benefiting from any repeal constitute a classic dispersed majority—taxpayers and anyone down river. Although such individuals might certainly favor repeal and be willing to support repeal measures to some extent, they are at a competitive disadvantage in the lobbying process both because they are less easily identified than the mining interests, and because they have far less at stake than do the defenders of the status quo. More surprisingly, the House came within forty-five votes of exempting one particular mining company, Brush Wellman, from the proposed reforms that would have required higher fees and royalties. See Epstein, *supra* note 105, at A1. With just an estimated \$131,336 in campaign contributions to members of Congress by Brush Wellman executives, lobbyists, and committees, Brush Wellman was almost able to insulate itself and protect its development from any subsequent congressional revision of the law.

## 2. Grazing Fees

The federal government's policy of permitting grazing on public lands by ranchers substantially mirrors the 1872 Mining Law. Both policies grew out of a period in which the federal government encouraged internal migration west, and both arose during a period when land in the West seemed almost boundless. Indeed, ranchers enjoyed more of a history of free grazing on unclaimed public lands than miners had in keeping proceeds of minerals discovered in the public domain.<sup>107</sup> The federal government sanctioned use of federal land for grazing to encourage more rapid settlement of western territories.<sup>108</sup> Recently, it has been estimated that over nineteen thousand ranchers have permits covering approximately 175 million acres<sup>109</sup>—an area as large as California, Oregon, and Washington combined.<sup>110</sup>

The federal government first imposed grazing fees on Forest Service land in the early 1900s. Such fees were upheld by the Supreme Court in *United States v. Grimaud*,<sup>111</sup> much to the dismay of many ranchers.<sup>112</sup> Congress amended the system of grazing rights on all other federal land in 1934.<sup>113</sup> The Taylor Grazing Act established grazing districts and empowered the Secretary of the Interior to make all reasonable rules to carry out the Act's legislative purpose.<sup>114</sup> The Act authorized the Secretary to issue permits to ranchers "upon the payment annually of reasonable fees."<sup>115</sup> Initial grazing fees were set

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107. Spanish conquistadors evidently introduced the cattle industry in the New Mexico Territories as early as 1598. Under Spanish and Mexican rule, landowners by custom enjoyed the right to graze their herds on nearby land if it was owned by the government and unclaimed. After acquisition of the territory from Mexico under the Guadalupe-Hidalgo Treaty, United States leaders encouraged rapid settlement of the land, including access to unsurveyed government land for grazing. Similarly, British settlers introduced cattle into the Oregon territory in the early nineteenth century. The federal government sanctioned use of federal land for grazing after acquiring that territory in the 1840s. See Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 511-18 (1993-94).

108. See *id.* at 514.

109. PUBLIC LAND STATISTICS, *supra* note 29, at 26-28.

110. See Coggins, *supra* note 94, at 750-51; Todd M. Olinger, Comment, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633, 635-37 (1998). Grazing, however, does not occur in all of the land covered by the permits in any given year. See PUBLIC LAND LAW REVIEW COMM'N, *supra* note 103, at 105.

111. *United States v. Grimaud*, 220 U.S. 506, 522 (1911) (upholding penalty for violation of regulation imposing grazing fee permit requirement).

112. See WILKINSON, *supra* note 30, at 92-93.

113. See Act of June 28, 1934, Pub. L. No. 482, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315-315r (1994)).

114. See 43 U.S.C. § 315a.

115. *Id.* § 315b.

at a low level, and statutory preferences were accorded to existing stock interests.<sup>116</sup> The Bureau of Land Management ("BLM") grants permits for a ten-year period, and permit holders receive priority for renewal.<sup>117</sup> Each permit must specify the kind and number of livestock and the times of year in which grazing will take place.<sup>118</sup>

Congress initiated additional reform with enactment of the Federal Land Policy and Management Act of 1976 ("FLPMA").<sup>119</sup> On a rhetorical level, the Act made clear the federal government's intent to retain and control the public domain.<sup>120</sup> To that end, the statute declared the rangeland subject to multiple use management for recreation and wildlife, as well as for livestock.<sup>121</sup> The Act authorized the BLM to include additional conditions in the permit, or in an allotment management plan incorporated in the permit.<sup>122</sup> BLM officials enjoy the flexibility to alter the number of livestock or place of grazing as the seasons unfold. Permittees, however, may now recover for any improvements in the range should their permits be canceled.<sup>123</sup>

From a financial perspective, two critical problems confront the grazing fee program, much as they do the Mining Law of 1872. First, grazing rights have been set at estimates as low as one-fourth the level of grazing rights on private land.<sup>124</sup> The subsidy is steep,

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116. *See id.* The losers in the legislative arena were the nomadic sheepherders who could not establish any preexisting entitlement or preference to graze on particular land. *See Coggins & Lindeberg-Johnson, supra* note 36, at 55-56.

117. *See* Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 *LAND & WATER L. REV.* 571, 574 (1991).

118. *See id.*

119. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1782 (1994 & Supp. III 1997)).

120. *See* 43 U.S.C. § 1701(a)(1) ("The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership . . .").

121. *See id.* § 1701(a)(8). *See* S. 1459, 104th Cong. (1996), and planned revision limiting public involvement.

122. *See* 43 U.S.C. § 1712.

123. The FLPMA directs the BLM to set macro land-use plans, or Resource Management Plans, to implement the multiple use goal of the Act. The area covered typically includes over one million acres and one hundred grazing allotments. BLM has not extensively utilized those plans to change the nature of the grazing permit decisions. *See* Feller, *supra* note 117, at 576-78. Moreover, the 1976 Act neither changed the structure of the permit fee process nor forced ranchers to internalize the social cost of grazing. Congress enacted the Public Rangeland Improvement Act in 1978, setting a fee assessment to keep the permit at below market prices.

124. *See* WILKINSON, *supra* note 30, at 81. Ranchers have at times assigned permits to third parties for substantial gains. *See* George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 *ENVTL. L.* 535, 560 n.177 (1982).

estimated at fifty million dollars annually.<sup>125</sup> Although Congress directed the Department of the Interior that the "reasonable fee" charged shall consist of a grazing fee for the use of the range, and a range component fee,<sup>126</sup> the agency has chosen not to interpret the statute as a revenue producing measure.<sup>127</sup>

Second, overgrazing of the public domain has caused severe environmental harms. Vegetation, wildlife, and riparian zones have all suffered.<sup>128</sup> Officials have characterized over two-thirds of all rangeland administered by the Department of Interior as being in fair or poor condition.<sup>129</sup> The problem of soil erosion is acute in many areas.<sup>130</sup> The federal government assumes expenses for upkeep of the land, including application of insecticides and eradication of coyotes.<sup>131</sup> One problem may be that the below-market prices reduce ranchers' incentives to manage rangeland wisely.<sup>132</sup>

Although grazing on federal lands may support only two or three percent of national foraging needs,<sup>133</sup> those ranchers holding permits rely on the public lands for their livelihoods. The market price of ranches includes the extent of grazing rights (Animal Units per Month, or AUMs) granted by the Department of Interior's Bureau of Land Management. Opposition to reform efforts has been fierce and effective. An early effort to raise fees towards market levels in the 1940s was met by heavy lobbying, culminating in Congress's

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125. See *supra* note 75. Some have calculated lower amounts depending upon exclusion of government indirect costs to support grazing. See *Interior Department Cuts Its Grazing Fees by 30%*, WALL ST. J., Jan. 24, 1996, at A6.

126. See 43 U.S.C. §§ 1751-1753; see also *id.* § 315b.

127. For a history of the ranchers' control over grazing administration, see generally CULHANE, *supra* note 55; PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAINS* (1960).

128. See WILKINSON, *supra* note 30, at 79-80.

129. See *id.* at 111.

130. See *id.* at 79-80; see also Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 525-42 (1997) (describing several different models for assessing the ecological status of rangelands). The Interior Department during the Clinton Administration promulgated regulations to help reverse the deterioration. See 43 C.F.R. §§ 1.477, 1784.0-1 to 1784.6-2, 4100.0-1 to 4180.2 (1995).

131. See Coggins, *supra* note 94, at 757.

132. See WILKINSON, *supra* note 30, at 82. In addition, there may well be inefficiencies in the current permit system. If rainfall is less or greater than predicted in a given year, BLM officials cannot adjust the AUMs accordingly. See LEHMANN, *supra* note 35, at 63. Nonetheless, the cost to help replenish the land exceeds by many times the amount collected through grazing fees. See *Ranchers Get Last Chance to Improve Damaged Land*, THE IDAHO STATESMAN, May 2, 1999, at 10B, available in 1999 WL 15114957 (citing examples such as a \$27,000 repair on ground that brings in \$400 a year in grazing fees).

133. See WILKINSON, *supra* note 30, at 81.

decision to slash the BLM's budget in half.<sup>134</sup> In the 1980s, the so-called Sagebrush Rebellion sought to force the federal government to turn over the public lands to the states.<sup>135</sup> Momentum for divestiture evidently subsided only when proponents realized that the loss of federal control might end the subsidies. Studies demonstrated that states charged more for leasing their lands than did the federal government.<sup>136</sup> More recently, western ranchers have successfully organized to block legislative reform of the grazing fee program, keeping the subsidy intact.<sup>137</sup>

The grazing preferences thus seem haphazard. A small minority of ranchers can take advantage of below market prices, and they unquestionably enjoy some reliance interest in the grazing permits. Yet the financial drain on the Treasury is cognizable, and from a social preservationist or distributive perspective, it is not clear why these particular ranchers merit subsidies.<sup>138</sup>

### 3. FCC Electromagnetic Spectrum

In contrast to the experience in the mining and grazing fee contexts, the federal government historically has not permitted unfettered use of the electromagnetic spectrum. Because multiple uses of the electromagnetic spectrum are incompatible, the FCC has long

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134. See MAYER & RILEY, *supra* note 50, at 94.

135. See LEHMANN, *supra* note 35, at 7.

136. See, e.g., Robert H. Nelson, *The Subsidized Sagebrush: Why the Privatization Movement Failed*, 8 REGULATION 20 (1984). The current movement among those opposed to stringent government controls favors a radical sharing of power, or "wise use" of the land, with most influence to be exerted by municipalities in which the federal government's land lies. See Marianne Lavelle, "Wise-Use" Movement Grows: Activist Counties Battle the Federal Government Over Land-Use Controls, NAT'L L.J., June 5, 1995, at A1. The wise use movement favors congressional enactment of "measures which recognize that private parties legitimately own possessory rights to timber contracts, mining claims, water rights, grazing permits and other claims." THE WISE-USE AGENDA 14 (Alan D. Gotthieb ed., 1989).

137. Although reform had been a centerpiece of Secretary Babbitt's legislative agenda, Republic Senators from the West spearheaded an effort to thwart reform. See, e.g., Adam Clymer, *Rancor Leaves Its Mark on 103d Congress: Senate Passes Desert Bill, After G.O.P.'s 28th Filibuster*, N.Y. TIMES, Oct. 9, 1994, at A1; Charles Siebert, *Toxic*, N.Y. TIMES MAG., July 5, 1998, at 16.

138. The Department of the Interior, in fact, has arguably diverged from the congressional directive by setting low fees and failing to take steps to improve the condition of the rangeland. Congress might, however, benefit from the agency's seeming reluctance to manage the rangeland aggressively. Congress can distance itself from the result while still reaping rewards in the forms of enhanced contributions from those affected. See generally DAVID SCHOENDROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). Indeed, Congress's failure to raise the fees, despite the efforts of Interior Secretary Babbitt, among others, suggests Congress's agreement with the agency's preference for the status quo.

limited use of that spectrum. Under the Communications Act of 1934, the FCC determined allocation of the electromagnetic spectrum for broadcasting on the basis of so-termed comparative hearings as to which application would best serve "the public interest, convenience, and necessity," and no fees were charged.<sup>139</sup> Factors utilized by the Commission in awarding licenses for radio and television stations have included diversification of media control, efficient spectrum use, past broadcast record, proposed programming, financial capability, participation in management by station owners, and minority ownership.<sup>140</sup>

Comparative hearings suffered from a number of drawbacks. First, they were costly, both in terms of resources and time. As the hearings dragged on, the date upon which service could be provided to the public was pushed further back.<sup>141</sup> The FCC also determined that, in terms of the number of hearings required, the preparation needed, and the agency personnel time absorbed, the hearings were excessively expensive.<sup>142</sup>

Second, use of the comparative hearings was normatively questionable. The FCC's ability to determine the best broadcasting for the public was debatable, at best. Even if the agency could make such a call, it may have lacked the power to predict the service that applicants would ultimately provide from the comparative hearings. The open-ended nature of the criteria arguably led to imposition of personal preferences by the Commissioners.<sup>143</sup>

Responding to the criticisms, Congress in 1981 directed the FCC to consider awarding licenses through use of a lottery system.<sup>144</sup> The lottery system succeeded in avoiding some of the bureaucratic delay built into the comparative hearings process.<sup>145</sup> Yet, lotteries drew fire for precipitating a secondary auction.<sup>146</sup> Lottery winners—who oftentimes had no connection to the communications business—

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139. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 328-30 (1945).

140. ; See Spitzer, *supra* note 62, at 734-35; see also William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1, 27 (1997) (arguing that FCC decision to limit alienability of licenses is economically inefficient). See generally Wimmer & Tiedrich, *supra* note 69.

141. See FCC REPORT, *supra* note 2, at 6-7. For example, there were over two hundred requests for the first thirty licenses, and completing the required hearing delayed awards by two years. See *id.* at 5.

142. See *id.* at 8.

143. See Spitzer, *supra* note 62, at 750.

144. See 47 U.S.C. § 309(i) (1994 & Supp. III 1997).

145. See Wimmer & Tiedrich, *supra* note 69, at 18.

146. See *id.*

sold their right to broadcast in the open market, reaping windfalls at the expense of the public at large.<sup>147</sup>

Congress in 1993 authorized the FCC to use auctions in allocating use of the electromagnetic spectrum, at least for uses other than broadcasting.<sup>148</sup> Administratively, the FCC determined which use each part of the spectrum could be devoted to, such as digital television ("DTV") for certain bands, paging services for others, etc. In making these decisions, Congress directed the FCC to consider public interest factors other than maximizing revenue.<sup>149</sup>

The auctions have dramatically altered the way many licenses will be granted. To a large extent, the market—and not the FCC or chance—determines who is to hold a license. Firms that value use of the spectrum most presumably will offer the most for the license.<sup>150</sup> The goals of providing the best service to the public and allocating the license to those entities valuing them most should overlap, if not converge. And, unlike with comparative hearings and lotteries, license holders compensate the public for the valuable commodity they use. The money generated through the auctions has exceeded expectations, with almost twenty-three billion dollars generated for the Treasury in a three-year period.<sup>151</sup>

So far, the auctions can be termed a success story in maximizing return for the government's regulatory assets. The FCC's design and implementation of the auction system can and should be of great aid to other agencies seeking to generate income from the sale or lease of government assets.<sup>152</sup> Indeed, other nations have sought to utilize the FCC innovations—such as the multi-round format—in structuring their auctions.<sup>153</sup>

But the revenue limitations of the auctions are informative as well.<sup>154</sup> First, the FCC made the critical judgment prior to the auctions as to which portion of the spectrum to allocate to which communications service. For example, the FCC allocated television broad-

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147. See, e.g., Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87, 107 (1997).

148. See 47 U.S.C. § 309(j).

149. See *id.* § 309(j)(7)(B).

150. Of course, mistakes can be made in valuation (such as the so-termed winner's curse), and default rates have been high. See *supra* note 53.

151. See *supra* note 2 and accompanying text.

152. See FCC REPORT, *supra* note 2, at 16-25.

153. Mexico has deployed the copyrighted system, and other countries, such as Canada, Guatemala, and Argentina, have expressed interest. See *id.* at 19.

154. In addition, the design of the C-block auction—which led to numerous defaults—may well have been faulty. See *supra* note 53.

casting to one particular band width (54-806 MHz), cellular communications to another width (824-849 and 869-894 MHz), and personal communication services yet to another band (1850-1990 MHz).

The FCC allocation decision may well have prevented even greater return on the government's assets. Applicants bid for licenses to provide specific services rather than for the opportunity to implement some service of their choice on part of the spectrum. For example, if the FCC had auctioned off blocks of spectrum, a winning bidder could have decided whether to use that block for television, personal communications devices, or for cellular communications. Licensees then would have been able to provide the services that the market valued most highly, which would vary according to geography, company technology, and the like. In that way, the government could well have obtained far more from the auctions.<sup>155</sup>

Second, in developing rules to operate the auction, the FCC decided to award what is termed a "pioneer preference" to reward technological innovation. Under the former comparative hearings and lottery systems, companies disclosed their innovations in public applications, but they did not necessarily receive licenses due either to evaluation under the multi-factor inquiry in the comparative hearings, or to the luck involved in the lottery system. Once disclosed, however, competitors could gain the benefits from the losing company's innovations at no cost because of the public disclosure. To remove this potential damper on innovation, the FCC in 1991 created the pioneer preference program designed to accord a "preference" in the application process to any applicant that "has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service."<sup>156</sup> Under the system of comparative hearings and lotteries,

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155. See *Use of the Radio Spectrum: Hearing on S. 652 and H.R. 1555 Before the Senate Comm. on Commerce, Science and Transportation*, 104th Cong. (1995) (statement of Henry Geller, Communicative Fellow at Markle Foundation); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210-11, 242-44 (1982); Howard A. Shelanski & Peter W. Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581, 596 (1998) (relating that the opportunity costs of preventing licensees to convert spectrum use to different purposes likely exceed several hundred million dollars). Criticisms of the auction tack certainly exist. See, e.g., Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 171-75 (1990) (arguing for property rights model); Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 297-98 (1996) (arguing that concerns for efficient, flexible use of spectrum does not necessarily point in the direction of auctions as an allocation method).

156. See 47 C.F.R. § 1.402(a) (1996).

those receiving preferences were exempt from the typical licensing track and guaranteed a license so long as they were otherwise qualified.<sup>157</sup> The FCC, although split internally,<sup>158</sup> initially determined that three of the one hundred applicants merited preferences for licenses of broadband personal communications services.

The congressional authorization for auctions, however, forced the FCC to reassess its initial decision with respect to preferences. The statute directed the Commission to pursue the objectives of "promoting . . . competition [and] efficient and intensive use of the electromagnetic spectrum."<sup>159</sup> In sanctioning auctions, Congress also authorized the agency to continue or disband the pioneer preference program, as it saw fit.<sup>160</sup> Accordingly, the agency convened a new rulemaking to consider the issue. The FCC determined that, despite the move to auctions for the rest of the applicants for broadband personal communication services, the three entities awarded preferences would receive licenses for free. Those licenses covered three of the most important markets in the country, together constituting twenty-five percent of the United States' population.<sup>161</sup> The estimated value of the three licenses was placed somewhere between one-half and one and one-half billion dollars.<sup>162</sup> After considerable protest (and litigation), the FCC reconsidered its decision to award the three companies free licenses, and instead guaranteed the three companies licenses for three years if they agreed to pay a certain percentage (roughly 80-95 percent) of market value.<sup>163</sup> Congress subsequently changed the discount to eighty-five percent for those three firms accorded the preferences and precluded judicial review of the award.<sup>164</sup>

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157. *See id.*

158. See the statements issued by Commissioner Barret and Commissioner Dugan in *In re Amendment of the Comm'n's Rules to Establish New Personal Communications Servs.*, 7 F.C.C.R. 7794 (1992), lamenting the "hairsplitting" inquiry into which company warranted the pioneer preference.

159. 47 U.S.C. § 309(j)(3) (1994 & Supp. III 1997).

160. *See id.* § 309(j)(6)(G) (stating that the amendment should not be construed as prohibiting the agency "from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology").

161. The three licenses covered the Baltimore-Washington, D.C. area awarded to American Personal Communications, a venture funded principally by the Washington Post Co., the Los Angeles area (awarded to Cox Enterprises), and the New York City area (awarded to Omnipoint Communications).

162. *See With Millions at Stake, Dingell Launches PCS Preference Inquiry*, FCC REP., May 19, 1994.

163. *See* 59 Fed. Reg. 42,521 (1994). The percentage was based on valuation per person living in the markets.

164. *See* Uruguay Round Agreements Act § 801, Pub. L. No. 103-465, 108 Stat. 4809, 5051 (1994). The three parties may well have obtained congressional sanction for the preference in

Under the new auctions, however, the efficacy of a pioneer preference is debatable. The new auction method, unlike the comparative hearing and lottery methodologies, will probably not deter innovation. Companies' innovation should determine the value of the licenses to those companies. Thus, the license should be worth more to an entity with the most advanced technology.<sup>165</sup> Moreover, the Commission's decision to guarantee the innovators new licenses, as opposed to granting them a credit in bidding on the licenses, arguably lacks justification. Thus, in three of the ten largest markets in the nation, there was no competitive bidding,<sup>166</sup> and the government may have squandered hundreds of millions of dollars.

Congress's subsequent decision in 1996 to forego auctioning spectrum worth an estimated 15-70 billion dollars was far more egregious.<sup>167</sup> To create an incentive for the broadcast industry to develop digital television, Congress gave to each existing television station one additional channel that could be digitalized to spur development of the more sophisticated technology.<sup>168</sup> Instead of auctioning off such spectrum and then permitting market forces to allocate the spectrum according to public demand, Congress assigned the spectrum to the broadcast industry for a period of some years so that the television stations would offer the sharper digital programming alongside their current analog offering. After a transitional period, the statute envisioned that the broadcasting networks would return the analog spectrum to the FCC for further deployment.<sup>169</sup>

The failure to adhere to a market paradigm for allocating the spectrum is startling. Former Senator Bob Dole called it a "giant corporate welfare program," and William Safire termed it a "ripoff on

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return for the communications giants' efforts to facilitate passage of GATT. The fact that the preclusion provision was inserted into a trade agreement is itself highly suggestive. See William Glaberson, *A dispute over GATT highlights the complex links between newspapers and their corporate parents*, N.Y. TIMES, Dec. 5, 1994, at D7. See generally 140 CONG. REC. S15077-01 (daily ed. Nov. 30, 1994).

165. The FCC has reconsidered whether to award pioneer preferences in future auctions. See *FCC Modifies Pioneer's Preference Program in Accordance with GATT*, PCS NEWS, Mar. 8, 1995, available in 1995 WL 7327248.

166. Moreover, those companies afforded the preferences received a jump on the competition by starting to build personal communications structures before the auction. See *GSM Operators' Welcome First Ever U.S. Member*, FIN. TIMES LIMITED, June 15, 1995.

167. See Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 938-43 (1997) (criticizing Congress for the spectrum giveaway); Edmund L. Andrews, *Digital TV, Dollars and Dissent: The Political Battle Grows Over the Use of New Broadcast Technology*, N.Y. TIMES, Mar. 18, 1996, at D1.

168. See 47 U.S.C. § 336(a) (Supp. III 1997); see also Joel Brinkley, *Congress Asks FCC to Begin Lending Channels for Digital TV Broadcasts*, N.Y. TIMES, June 24, 1996, at D6.

169. See Paul Taylor, *Superhighway Robbery*, NEW REPUBLIC, May 5, 1997, at 20.

a scale vaster than dreamed of by yesteryear's robber barons."<sup>170</sup> No sound reason exists to think that broadcasters lacked the incentive to develop high definition television if they thought it would be profitable. The public interest in ensuring rapid development of high definition television per se is elusive. And, if the market did not favor such initiatives, then the spectrum could have been allocated to other purposes. The congressional action reeks of special interest influence.<sup>171</sup>

Indeed, after receiving the free spectrum, the broadcast networks have started to back away from their pledge of developing high definition television as a priority. Networks determined that each digitalized channel they received for free could be redivided into six analog channels, or into several analog channels with additional space for better television reception or paging devices left over.<sup>172</sup> They argued that using the spectrum for more than just digital television would benefit the public, not to mention bring them more profit.<sup>173</sup> The networks found phable allies in Congress and the FCC.<sup>174</sup> Congress already has relaxed the requirements set in the 1996 Act, minimizing the percentage of the donated spectrum that must be dedicated to digital programming, and delaying the date by which broadcasters must return the spectrum on which they had previously presented analog programming.<sup>175</sup> The recent FCC ruling calls into question the original congressional decisions to give away the spectrum in the first instance.

The FCC auction success story is thus not unblemished. Although the move to a market-based system of allocation should be lauded, the pioneer preference program and HDTV giveaway manifest the same dangers of inefficiency and rent-seeking that have affected

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170. *Id.*

171. *See id.* (explaining legislation by virtue of interest group lobbying as well as the control local broadcasters exert over incumbents seeking reelection); Neil Hickey, *What's at stake in the spectrum war? Only billions of dollars and the future of television*, COLUM. JOURNALISM REV., July 17, 1996, at 39, available in 1996 WL 8772666.

172. *See, e.g.*, David Hatch, *Broadcasters Yielding on HDTV*, CRAIN COMM., Sept. 22, 1997, at 1; Romesh Ratnesar, *A Bandwidth Bonanza: How the networks plan to make even more from a \$70 billion handout*, TIME, Sept. 1, 1997, at 60; Sean Somerville, *Sinclair to shun high definition TV for channels*, BALTIMORE SUN, Aug. 17, 1997, at 1D.

173. *See* 62 Fed. Reg. 26,966, 26,972 (1997). *See generally* 47 C.F.R. pt. 73 (1998) (regulating Radio Broadcast Services).

174. *See also* *Hearing on Digital Television Before the Senate Comm. on Commerce, Science, and Transp.*, 105th Cong. (1997) (statement of Reed E. Hundt, chairman of the FCC) (addressing broadcasters' qualified right to decide how to use additional spectrum).

175. *See* Balanced Budget Act of 1997 § 3002, Pub. L. No. 105-33, 11 Stat. 251, 259 (1997).

other agency disposition programs. Successful auctions only highlight the profligacy of related aspects of telecommunications regulation.

These three examples—mining claims, grazing rights, and allocation of electromagnetic spectrum—only scratch the surface of the myriad disposition programs administered by the government.<sup>176</sup> Each program furthers distinct goals and utilizes different methodology. But the programs illustrate that no checks analogous to market discipline constrain government disposition efforts. The congressional schemes do not direct agencies to seek maximum return on public assets, and interest groups have evidently obtained benefits from Congress and government agencies through use of government resources at below-market prices. The public has not been well informed of such agency disposition efforts and cannot, in any event, gauge the results of agency performance in the business section of the newspaper.

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176. Other examples of agency disposition policies that diverge from Congress's direction exist. For instance, the Forest Service has long conducted below-market timber sales in the National Forests, despite Congress's direction in the National Forest Management Act, that the Service is to balance revenue with recreation and wildlife concerns. See 16 U.S.C. § 1604(g)(3) (1994). See also WILKINSON, *supra* note 30, at 137-69; Libecap, *supra* note 78, at 484. The General Accounting Office ("GAO") reported that the Forest Service lost almost one billion dollars in cutting timber between 1992 and 1995. See *Report Shows Logging Program Costly*, CHI. TRIB., Oct. 3, 1995, § 1, at 8; see also Mark C. Phares, *Below-Cost Timber Sales: Perspective Based on Thirty Years of Environmental Legislation*, 12 PUB. LAND L. REV. 59, 79 (1991) (concluding that "a commitment by the Forest Service to protect all resources and cease being so conscious of the timber resource" provides the best solution to the problem); *Timber road ripoff*, SEATTLE TIMES, June 15, 1998, at B4 (relating that U.S. Forest Service acknowledged losing more than \$88 million in timber sales the previous year). The Forest Service keeps part of the sales for its own use, and funds logging roads from a separate budget. See Phares, *supra*, at 63-64 (discussing the Forest Service's use of funds to build roadways); *Timber Industry Should Pay for Logging Roads*, TIMES-PICAYUNE, Nov. 13, 1997, at B6 (Forest Service subsidized logging industry by paying \$245 million for roads from 1992 to 1994). Thus, the greater the timber yield—even when not cost effective—the more the agency can keep. The Forest Service therefore has insufficient incentive to cut timber only when it is financially prudent to do so, even without considering the incommensurable environmental values threatened by its activities. Cf. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (developing the thesis that agencies strive to maximize their own jurisdiction and wealth); see generally RANDAL O'TOOLE, REFORMING THE FOREST SERVICE (1988). For another example, the Bureau of Reclamation has evidently undercharged consumers and municipalities in the West for their use of government-furnished water. See generally COGGINS & GLICKSMAN, *supra* note 77, § 21.04; Hamilton Candee, *The Broken Promise of Reclamation Reform*, 40 HASTINGS L.J. 657 (1989); Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 CAL. L. REV. 978 (1964); Todd G. Glass, Comment, *The 1992 Omnibus Water Act: Three Rubrics of Reclamation Reform*, 22 ECOLOGY L.Q. 143 (1995).

### III. POLITICAL AND LEGAL OBSTACLES TO REFORM OF GOVERNMENTAL DISPOSITION PROGRAMS

In this part we explore why both political checks and legal controls have failed to reform property dispositions undertaken by federal agencies. Classic forms of monitoring the political branches and administrative agencies have proven to be inadequate for two related reasons. First, there has been a failure in conceptualization. Policymakers and scholars routinely conceptualized most property disposition schemes as distinctly unique actions of sovereignty. Most importantly, they have failed to integrate this area of government activity into more general schemes for controlling and monitoring government agency activity. Second, this neglect and failure in conceptualization only exacerbated structural and institutional barriers to political reform. In other words, given that government property disposition schemes were largely conceptualized as beyond the scope of legal mechanisms for monitoring, it only further legitimized the political trades that marked the disposition process. Indeed, as we discuss below, the failure of conceptualization left in place a political process that virtually assured distortions in results and informational flow to the public.

#### *A. The Structural and Institutional Barriers to Political Reform*

In a multitude of federal government property schemes special interest groups dominate the political process. The few benefit at the expense of the majority. Majority rule obviously does not control. Therefore, at the first level of analysis it is necessary to examine whether formidable collective action problems stand as barriers to political reform.

At the theoretical level it is well understood that collective action problems infect political markets.<sup>177</sup> These collective action dynamics advantage smaller groups with focused, narrow interests in the legislative process. The shared agenda, smaller size, and distribution of meaningful benefits eases the tasks of organizing, ensuring group commitment, and punishing defectors or free riders. In other words, the structural attributes of these groups allow them to more

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177. The vast literature is discussed and extensively critiqued in Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34-55 (1998). The classic work on the economics of group formation is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

easily solve free rider problems.<sup>178</sup> By contrast, the larger diffuse groups will face serious organizational hurdles. Their size significantly increases the costs of communication, strategizing, and policing. Moreover, the great size of the group may make benefits quite small, particularly in comparison to the costs of participating.<sup>179</sup>

Consider the configuration of groups posed by the FCC's early efforts at regulation of broadcasting.<sup>180</sup> Major networks and broadcasters were able to dominate the lawmaking process and, most importantly garner the returns produced by the free use of the electromagnetic spectrum. Obviously the broadcasting interests faced few obstacles in organizing and formulating lobbying strategies in Congress or the FCC.<sup>181</sup> Defections were easily detected and the benefits of group cohesion were large and easily distributed. In sharp contrast, the fiscal losers—the public at large who lost revenues by giving away the spectrum for free—had little incentive to organize. An individual's cost in lost revenue was far too small to make it worthwhile to resist the giveaway. And any efforts undertaken by individual citizens would redound to the benefit of others who did not participate.<sup>182</sup>

Of course, these theoretical predictions of group formation and lobbying are controversial and sometimes contradicted by the data.<sup>183</sup> For example, in broadcasting, public interest groups formed, challenging established interests and the FCC.<sup>184</sup> Whether these groups were able to deploy equal resources was always doubtful.<sup>185</sup> More significantly, however, the reforms sought by these more diffuse pub-

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178. See OLSON, *supra* note 177, at 28-29; see also Croley, *supra* note 177, at 13-22 (describing Olson's theory as well as those who built upon it).

179. See OLSON, *supra* note 177, at 28-29, 35.

180. For an early critique highlighting the anticompetitive character of telecommunications regulation, see generally R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

181. An early history tracing broadcasting dominance is LAWRENCE F. SCHMECKEBIER, *THE FEDERAL RADIO COMMISSION: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* (1932). A more recent account can be found in Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 567 (1997).

182. Public interest groups did arise to attempt to combat the power of the broadcasting interests, yet their success was almost nonexistent. See Hazlett, *supra* note 155, at 154.

183. See Croley, *supra* note 177, at 19 (noting that "[E]xamples even of large lobbying groups are easy to find."); *id.* at 49-50 ("[T]he collective action problem, upon which the public choice theory is built, introduces conceptual indeterminacy into the theory. Whether larger or smaller groups will enjoy a competitive advantage in the market for regulation . . . is simply not clear *a priori*."). A full account of the rise and influence of different interest groups can be found in KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

184. See Shipan, *supra* note 181, at 567.

185. See *id.* at 567-68.

lic interest groups were problematic if not counter-productive to real reform. Public interest groups often accepted as given the departure from market-based solutions—indeed, on occasion pressing for even stronger nonmarket proposals at times including extensive control of broadcasting content.<sup>186</sup> These public interest groups can even be reconceptualized as competing with the broadcast licensees for “ownership” of the license. As much as the broadcaster, the public interest group sought to assert control over the content of the airwaves without paying a market price for a license. Although unheard of at the time, true reform might well have been for an interest group proposing a content format to participate in an auction for a license and test their ideas in both capital and viewing markets. Operating well outside the market forces, however, skirmishes remained against mismatched groups and, when waged, only further rigidified the notion that revenue considerations were irrelevant in the disposition of federal properties.<sup>187</sup>

The interest group dynamics outlined above only partially explain the failure of the political process to reform property disposition schemes. After all, since the beneficiaries of many disposition programs were by nature small in number and often confined geographically, it was necessary for them to garner other substantial legislative supporters to pass programs and to fend off reform efforts. How were these supportive coalitions formed out of discrete groups and their legislative supporters?

Part of the explanation for interest group and legislative acquiescence may arise from classic logrolling that occurs in the legislative process.<sup>188</sup> Those supporting grazing subsidies, for instance, depend upon other groups' support for enacting (or preserving)

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186. See Hazlett, *supra* note 167, at 910-11 (arguing that government's need to assign licenses does not logically carry with it right to control content of licensee's broadcasting). This point has been made for years based upon First Amendment rights of broadcasters. See LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-215 (1987); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1386-1402 (1985).

187. See Hazlett, *supra* note 167, at 931-32 (“[B]ecause non-profit lobbyists rationally perceive federal licensing as an institution affording them a higher return on their human capital, such agents will strongly favor public trusteeship for self-interested reasons.”). See also *id.* at 932 (“This calculus recognizes the essential fact that the public trusteeship approach substitutes political discretion for market allocation, the latter being the alternative wherein rights are assigned via a competitive bidding process.”).

188. See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 31-32 (1997) (describing logrolling on special interest legislation that redistributes benefits); Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 AM. ECON. REV. 1162, 1164 (1992) (noting that logrolling is most common with subsidies and special tax benefits).

the grazing program. Supporters of grazing subsidies may in turn agree to support mining interests in blocking reform of the mining laws in exchange for mining interest support of blocking reform of the grazing programs. This logrolling is entirely rational so long as the gains for the ranchers receiving the grazing subsidies are greater than the revenue losses ranchers bear from the grant of below cost mining claims to their coalition partners.<sup>189</sup> This calculation should typically result in a net gain to both groups since the benefits are concentrated and the costs they bear are distributed among themselves and all citizens.

Although logrolling may be efficient for the coalition partners—ranchers and miners each gain more in benefits than each pays in higher taxes because of their coalition formation—the cumulative trades among all benefiting groups could well lead to net losses to a particular group such as ranchers.<sup>190</sup> While the ranchers may gain from the grazing subsidies, the net cost of all federal property giveaways may require revenue or tax increases on the ranchers that are actually greater than the grazing subsidies. In other words, the per group cost associated with the grant of other benefits could well exceed the per group gain. If that is so, why don't the ranchers simply refuse to participate in the process and forbear from the grazing subsidy to lower their overall tax burden? The problem is that each group is trapped in a prisoner's dilemma.<sup>191</sup> If one group declines to logroll, then it still will likely incur the added tax burden of other groups that are willing to form a majority coalition without generating the legislative subsidy for its own members.<sup>192</sup> For example, the ranchers may decide not to seek grazing subsidies. However, mining interests and broadcasters might form a majority coalition to continue their interests, defecting while the ranchers take on a cooperative strategy. The ranchers will continue to bear the burden of other below-market schemes, made worse by the fact that they have forgone

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189. See Baker & Dinkin, *supra* note 188, at 31 ("Notwithstanding the aggregate welfare loss, this type of vote trading would be attractive to representatives. . . . [T]he terms of each representative's trades, taken alone, might well provide *her own constituents* aggregate benefits that exceed aggregate costs to them.").

190. See *id.* at 32.

191. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 139-40 (1962); Baker & Dinkin, *supra* note 188, at 32-33.

192. Theoretically, all that is required is the formation of a minimal legislative coalition for enactment. See WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32-54 (1962) (developing the concept of minimum winning coalition). As Baker and Dinkin note, however, the empirical proof suggests supermajority enacting coalitions. See Baker & Dinkin, *supra* note 188, at 32 n.31 (discussing literature on the point).

their grazing subsidies to offset their losses. Thus, even if organized groups perceive that rent-seeking ultimately injures their own members, they may persist in striving to minimize that loss by procuring some special benefit for their members.<sup>193</sup>

Congress, therefore, is unlikely to stop the financial bleeding. Every group potentially benefiting from government sales and leases will likely stick together to block substantial reform. Ideally, Congress could counteract the prisoner's dilemma problem and—despite interest group opposition—revise programs designed to sell and lease government property. Congress at times has done just that, and the market-based initiatives such as the auctions of electromagnetic spectrum should be encouraged.<sup>194</sup> But the persistence of grazing rights subsidies and the Mining Law of 1872 suggest that general reform at the congressional level may not be forthcoming.

*B. The Failures in Legal and Administrative Process Controls: The Administrative Procedure Act and its Evolution*

If, as we have argued above, reform through the political process is difficult, it is logical to ask if reform and more effective control and monitoring can occur at the agency level. Here two related strategies are possible. First, the public could be granted rights to participate in agency property proceedings and thereby monitor when Congress fails to monitor or indeed seeks to use its monitoring authority to perpetuate inefficient schemes.<sup>195</sup> Second, courts, through judicial review of agency action, could adopt broader interests and protect the public fisc from agency dispositions that are not controlled by market forces.

Although these options seem viable, we remain pessimistic that legal controls that focus upon greater monitoring through public participation or judicial review are likely to solve the problems we have identified. Our skepticism follows from two concerns distinct to the evolution of legal controls over government property disposition

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193. See generally BUCHANAN & TULLOCK, *supra* note 191, at 139-43; MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 57-58 (1981).

194. Congress, for instance, ended the lottery system in allocating broadcast rights and leases for on-shore oil.

195. That is, the agency bureaucracy might seek to drift away from the original rent-seeking goals and Congress may be called upon to force the agency back to the original redistributionist deal. On legislative oversight of agencies, see generally Hugo Hopenhayn & Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J.L. ECON. & ORG. 196 (1996); Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. POL. SCI. REV. 165 (1984).

schemes. First, the failure to conceptualize government property dispositions as regulatory policymaking is itself a distinct failure of the legal system. As we discuss below, the basic legal charter for controlling and monitoring government agencies—the Administrative Procedure Act (“APA”)—largely exempted this important area. Indeed, if interest groups advantaged by the disposition scheme are as powerful as suggested, there should be reason to doubt the efficacy of legal controls since these same groups will have an impact on the design of these controls. Second, even as the legal regime evolved to include property disposition programs, both old and new limits on the ability of law to allow for effective monitoring became apparent. Below we sketch out these developments in administrative law and their impact on governmental property schemes.

### 1. The Original APA and the Sale, Management, and Disposition of Government Property

Recent historical scholarship has highlighted the lengthy, contentious, and political character of the process that led to the enactment of the APA.<sup>196</sup> Adopted after World War II, but in the long shadow of Roosevelt’s aggressive reconceptualization of federal governmental and executive power, the APA was, in George Shepherd’s terms, a “fierce compromise.”<sup>197</sup> The battle over the APA was fundamentally one of government power over private property and private enterprise, with the question of legal control over agency action central to the debate.<sup>198</sup> Particularly in the context of administrative adjudication, opponents of agency power sought to place both strict procedural and judicial controls over agency decisionmaking.<sup>199</sup> Although less visibly, both the APA drafters<sup>200</sup> and the Supreme

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196. See generally RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

197. See Shepherd, *supra* note 196, at 1557.

198. See *id.* at 1559, 1574-77; see also SHAMIR, *supra* note 196, at 12, 104-05.

199. See Shepherd, *supra* note 196, at 1574, 1582-83 (detailing numerous proposals to control agency adjudication and make it as similar to court litigation as possible). This is reflected in the numerous provisions in the APA that address and detail the procedures for adjudication. See 5 U.S.C. §§ 554-557 (1994).

200. See Shepherd, *supra* note 196, at 1588 (discussing inclusion of provisions on notice and comment rulemaking).

Court<sup>201</sup> expressed considerable concern over broad grants of agency rulemaking powers.

This contentious political struggle to exert legal and judicial control over agency powers entirely bypassed the disposition and management of government property. This neglect can hardly be contributed to either novelty or insignificance. In various enactments and programs predating the New Deal,<sup>202</sup> federal bureaus and agencies had been granted broad powers to sell, manage, or give away government properties. Yet, consistent with our overall theme, the APA as debated and enacted failed to recognize explicitly the regulatory aspects of property sales, management, or disposition, and nowhere attempted to integrate the subject into the APA structure or methodology.

When the APA addresses the management, sale, or disposition of property, it does so largely by exclusion from those provisions that seem designed to ensure legal controls and public participation. By the time of the enactment of the APA, agencies had been authorized to promulgate rules that had prospective effect.<sup>203</sup> Lacking, however, was any general procedure agencies were to follow in adopting these rules. The APA filled this gap primarily through the adoption of procedures for notice and comment rulemaking.<sup>204</sup> Although the rulemaking provisions of the APA drew little attention in the drafting process, the issue of public property was specifically treated. The APA expressly excepts from notice and comment rulemaking "a matter relating to . . . public property, loans, grants, benefits, or contracts."<sup>205</sup> The import of this explicit exclusion is two-fold: first, the drafters of the APA saw no need to subject federal agency decisions on public property to public scrutiny brought about by notice and comment rulemaking; second, it would only be through considerable struggle that the public would be aware of, much less participate in, agency property decisions.<sup>206</sup>

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201. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30, 537-42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-30 (1935); PETER H. IRONS, *THE NEW DEAL LAWYERS* 70-71 (1982) (tracing Court's concerns over proliferation of secret agency rules).

202. See *supra* Part I discussing mining, grazing, and electromagnetic spectrum programs, all predating the New Deal.

203. See *SEC v. Chenery Corp.*, 318 U.S. 80, 86 (1943) (noting power in SEC to proceed by rulemaking to address abuses arising in corporate reorganizations).

204. See 5 U.S.C. § 553.

205. See *id.* § 553(a)(2).

206. Given the attention devoted to the adjudication provisions of the APA it might be expected that Congress expected that government property decisions would be monitored through this formal adjudicative structure. We believe this highly unlikely. First, the formal adjudicatory procedures of the APA are triggered only when an agency statute calls for an

Several reasons explain this legislative oversight and deliberate exclusion of government property.<sup>207</sup> For those drafting the APA the major concern no doubt was protecting the regulated public—primarily private enterprise—from arbitrary and secret administrative action.<sup>208</sup> Thus, the proposed bills no doubt conceived of agency actions as coercive efforts by the government to reach into the affairs of individuals and business. Coming on the heels of the New Deal, the drafters were reacting to a new form of government interference in the market, not to the government's longstanding practices of disposing its property.

In a related historical fashion, the drafters of the APA were legislating against the backdrop of entirely different notions of property rights. Classic government regulations—a charge of an unfair labor practice brought by the NLRB or an enforcement proceeding against a securities underwriting firm—could clearly be understood as touching on traditional property rights.<sup>209</sup> No doubt the constitutional revolution of 1937 altered our conceptions of governmental power to regulate private property rights.<sup>210</sup> Yet that revolution failed to change established notions of what did or did not qualify as a property right. Central to this constitutional vision was the right-privilege distinction.<sup>211</sup> The granting or disposition of money or properties

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agency hearing on the record. See *id.* § 554(a). Second, it rests on the assumption that those with interests in government property were not able to protect existing interests through either informal administrative arrangements or more specific statutory rights. This assumption is doubtful. See CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATIONS POLICY* 120 (1997) (discussing judicial review provisions affecting radio interests in Communications Act). Third, creating formal hearing rights would have simply created monitoring rights for those who were already benefiting from the existing inefficient scheme. In other words, the only potential interests recognized at the time of the enactment of the APA would be program beneficiaries and therefore adjudicative hearings would hardly have been an effective way of combating waste and inefficiencies in government property disposition programs.

207. An earlier comprehensive analysis exists. See Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

208. See Shepherd, *supra* note 196, at 1606-07; Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1134-35 (1997).

209. See *Jones v. SEC*, 298 U.S. 1, 24-25 (1936), in which the Court remarked:

[I]f the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end . . . become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.

210. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 127-34 (2d ed. 1998).

211. See *Bailey v. Richardson*, 182 F.2d 46, 59-60, 61 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The demise of the doctrine can be traced judicially to

owned or created by government action was not entitled to constitutional protection. These were not properties traditionally recognized by the common law, but privileges granted or denied in the government's discretion. It would have indeed seemed odd for the drafters of the APA to have recognized strong property rights in what were then largely perceived of and constructed as government privileges.<sup>212</sup>

Concededly, there were many with a strong interest in how the federal government disposed of its property. Certainly at the time of the APA's adoption, strong interests in mining, grazing, and logging on federal lands were well established. Broadcasting interests were also maturing.<sup>213</sup> But even here, interest group politics explain the APA's failure to address the problem. Because strong interest groups had already formed in a number of areas such as grazing, mining, timber, and broadcasting, their existence and keen interest in government property is not inconsistent with the APA's somewhat dismissive treatment of the topic. It is entirely possible that these groups were quite comfortable shielding agency workings from the protections of the APA.<sup>214</sup> If these groups had already come to influence and control relevant government agencies and bureaus, through either their own actions or with the assistance and intervention of powerful legislators, exclusion from the APA might have been the optimal choice.<sup>215</sup> A different approach, where agency decisions were open and subject to broader participation, would disserve the interest of these groups.

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*Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), and intellectually to Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

212. See Bonfield, *supra* note 207, at 572-73. Interestingly, there was a smattering of cases that sought due process rights for recipients of below-cost use of government property who faced a termination of those rights. A claim for a hearing was almost uniformly rejected. See *Mollohan v. Gray*, 413 F.2d 349, 352-53 (9th Cir. 1969) (upholding cancellation of grazing allotment); *United States v. Walker*, 409 F.2d 477, 481-82 (9th Cir. 1969) (denying mining claim). But see *Adams v. Witmer*, 271 F.2d 29, 32-33 (9th Cir. 1959) (holding that due process requires a hearing before denial of a mining patent). Consistent with our earlier point, see *supra* notes 141-42, we doubt that making hearing rights available for disappointed beneficiaries would be a useful means of eliminating special interest waste in government property programs. Indeed, the point is made dramatically by the fact that the program with the most elaborate hearing rights and judicial review—broadcasting—departed most from market forces.

213. See SHIPAN, *supra* note 206, at 85, 89.

214. See Zeppos, *supra* note 208, at 1131-32 (discussing efforts by drafters to exclude well established agencies—e.g., FTC, Customs Service, Patent Office—from the APA).

215. See McNollgast, *supra* note 196, at 185 (sketching out theoretical literature on ex ante control of procedures to create a favorable decisionmaking environment); see also Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins, *Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 299 (1985).

A final reason for the APA's largely dismissive treatment of the regulatory aspects of property disposition is a pragmatic one. Congress was no doubt concerned about the administrative and financial burdens that would be imposed upon agencies if their property disposition decisions were swept into the more formal decisionmaking models of the APA.<sup>216</sup> Considering the numerous and varied property activities undertaken by the government, it might well have been deemed too costly to equate these actions with the more typical regulatory actions covered by the APA. For the drafters, these costs would be incurred while producing very little in the way of benefits, particularly given the dominant intellectual conceptions of property existing at that time.

## 2. Shifting Trends in Administrative Law

Although the causes of the APA's exclusion and neglect of government property schemes are perhaps less than certain, its effects were not. The exclusion reflects a clear failure in conceptualization. Federal property was simply not part of fashioning regulatory policy. Each disposition scheme became largely a sovereign world, affected less by law than by the exercise of political power by those with the strongest interests in the particular property. This arrangement, however, was far from static. The dominant conceptualization that placed government property schemes outside of broader regulatory policymaking was contingent upon intellectual, political, and economic forces.

Not surprisingly, as the bedrock conceptions of administrative law and process changed, a rethinking of the place of government asset and property dispositions ensued. Four major forces for this change can be identified. First, the original conceptions of the administrative state were closely linked with claims of administrative expertise, political independence, and deference to executive decisionmakers. Early proponents of administrative government relied upon the institutional advantage provided by expert agencies over generalist judges.<sup>217</sup> Clearly, the APA—and the long battle that preceded its enactment—reflects both some distrust of these expertise claims as well as a political dimension to what superficially appeared

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216. See Bonfield, *supra* note 207, at 575.

217. See JAMES H. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); SHAMIR, *supra* note 196, at 103, 134.

to be only a disagreement about institutional competence.<sup>218</sup> Yet the primary justification for administrative government, while imbued with politics at least initially, contained strong institutional claims.

Numerous scholars have analyzed the decline of this expertise model of administrative government.<sup>219</sup> This paradigmatic shift had profound implications for administrative process, and the law generally.<sup>220</sup> Its effect on government property programs, while perhaps less clear, is nonetheless discernible. Certainly for some government property programs, decoupling administrative management from claims of expertise would make them more central to general issues of administrative government. The expertise model was based primarily upon administrators subject to legislative limitations applying specialized knowledge to problems of government.<sup>221</sup> Management of federal lands and forests called for technical application of principles of forestry, agronomy, mining, or hydrology.<sup>222</sup>

The second force of change can be found in the new dominant conception of administrative law. As others have recounted in detail,<sup>223</sup> rejection of an expertise justification for agencies left unanswered many difficult questions about how agencies do or should function. Emphasis was now placed on interest group access to and representation in agency decisionmaking processes.<sup>224</sup> Here the effect on government disposition programs was more obvious. As the focus became interest group representation, the APA neglect became more obvious. Groups could always lobby agency decisionmakers on property decisions, but the emphasis on representation most easily fit into the APA's provisions on informal rulemaking.<sup>225</sup> The notice and comment rulemaking model seemed well-suited for groups to be heard by the agency.<sup>226</sup> Yet, as noted above, the APA specifically excepted

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218. See Shepherd, *supra* note 196, at 1560, 1571-72.

219. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-55 (1997); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-88 (1975).

220. See Merrill, *supra* note 219, at 1055-56.

221. See James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1056-60 (1975).

222. See JAMES C. SCOTT, *SEEING LIKE A STATE* 19-20 (1998) (discussing early efforts to apply scientific principles to forestry management).

223. See sources cited *supra* note 219.

224. See Stewart, *supra* note 219, at 1711-13.

225. See 5 U.S.C. § 553(c) (1994).

226. See Merrill, *supra* note 219, at 1093-94 (discussing evolution of doctrine in D.C. Circuit).

government property from the requirements of notice and comment rulemaking.<sup>227</sup>

Similarly, despite its seemingly narrow scope, the formal adjudication model of the APA was readily molded to the broader interest group representation model.<sup>228</sup> Recognition of the interest of different groups,<sup>229</sup> along with relaxed rules of intervention,<sup>230</sup> allowed for this form of agency action to accommodate more than simple bipolar litigation. Again, however, while not specifically excepted from the APA provisions on formal adjudication, government property programs could be included in this new model only with significant doctrinal innovations.<sup>231</sup>

Of course, this emphasis on interest group representation did not occur in a political or social vacuum. Perhaps defying theoretical predictions,<sup>232</sup> and against the backdrop of attacks on agency competence,<sup>233</sup> groups representing broader public interests in federal government property decisions began to form. For government property decisions, the most important of these were the environmental groups. It is difficult to overstate the effect of the environmental movement on the incremental incorporation of federal property decisions into the evolving administrative law and process.<sup>234</sup> Recognizing that federal land, water, and resource policies dramatically affect the environment, these groups were instrumental in pressing both agencies and Congress to make agency policies more transparent, responsible, and accountable. Sometimes the shift came in the form of newly adopted statutes that largely undid the APA's exclusions.<sup>235</sup> Other

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227. See *supra* note 206.

228. See Merrill, *supra* note 219, at 1064.

229. See *id.*; Stewart, *supra* note 219, at 1760-90.

230. See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-06 (D.C. Cir. 1966).

231. See Merrill, *supra* note 219, at 1097.

232. See Croley, *supra* note 177, at 45-49.

233. See Merrill, *supra* note 219, at 1062-64.

234. Descriptive and theoretical accounts of group formation in the area of environmental protection abound. See RUSSELL HARDIN, *COLLECTIVE ACTION 121* (1982) (explaining group formation by noting small contribution that produces enormous benefits for the environment); SCHLOZMAN & TIERNEY, *supra* note 183.

235. See National Environmental Policy Act of 1969 § 102-04, 42 U.S.C. §§ 4332-4334 (1994); Federal Land Policy Management Act of 1976 § 102(a)(5), 43 U.S.C. § 1701(a)(5); National Forest Management Act of 1976 §§ 6, 11, 16 U.S.C. §§ 1604(d), 1612(a). See generally George Cameron Coggins & Jane Elizabeth Van Dyke, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?* 20 ENVTL. L. 649 (1990).

times, however, agencies voluntarily agreed to subject their decision-making processes to APA procedures.<sup>236</sup>

The third major development that coincided with the incorporation of government property decisions into the broader APA framework was the general critique and reconceptualization of government regulation. Traditional theories of regulation focused upon a public good achievable by the agency, largely through top-down controls and enforcement. Economists challenged the foundations of this approach.<sup>237</sup> Regulation served private, not public, interests. Command and control regulation, even if motivated by the public interest, was inefficient and ineffective.<sup>238</sup> Classic forms of regulation—barriers to entry, market segmentation, and price setting—were now obvious examples of private interests benefiting through government action. While conveniently escaping the more traditional conception of regulation, government property decisions could not avoid charges of private interest influence. If critics of regulation could demonstrate how all banking customers are effectively taxed by the ban on interest-bearing checking accounts—the classic broadly imposed but minimal “tax” collected for the benefit of the few—the same analysis applied to the below-cost sale of federal patents to mining companies or giveaway of broadcast licenses.

Finally, the increased political saliency of the federal budget deficit, along with strict budgeting rules, increased the prominence of federal asset disposition programs.<sup>239</sup> As an initial step, it was important to the inclusion of government property decisions into administrative law to recognize the private gains associated with these schemes. But supplemented by budgetary pressures, the calls for political, legal, and public scrutiny became even more intense. Consider, for example, FCC licensing decisions. Clearly an economic analysis of the early licensing schemes reveals that private broadcasters received enormous financial benefits at little cost and at great

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236. See the waiver by the Department of Agriculture—regulator of federal forests—in *Rodway v. United States Department of Agriculture*, 514 F.2d 809, 813-14 (D.C. Cir. 1975).

237. See Merrill, *supra* note 219, at 1061-62.

238. See GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 114-25 (1975). This transformation is detailed and critiqued in Croley, *supra* note 177, at 42-56.

239. See generally Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998) [hereinafter Garrett, *Harnessing Politics*]; Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998) [hereinafter Garrett, *Structures of Decisionmaking*].

loss of revenue to the government.<sup>240</sup> But so long as the revenue losses are of little political significance, disputes among contentious groups will be focused almost exclusively upon issues of broadcasting content or how to divide the gains. When revenue losses become salient, however, the political battle and licensing scheme will change significantly.<sup>241</sup> Given that tax increases provide an unattractive alternative, the sale of government assets became a logical source of revenue. This, in turn, inspired political leaders to quickly grasp both the range of assets, as well as innovative ways to maximize revenues for these assets.

### 3. Shortcomings of the Maturing Principles of Administrative Law and Monitoring of Government Property Disposition Programs

These trends incorporated government property disposition schemes into the larger debate over regulation and law. The APA depends largely upon public participation in agency processes and the availability of ex post judicial review to serve as mechanisms for monitoring and controlling agency action. Clearly, the same tools have been deployed by entities, groups, and individuals seeking to monitor government property disposition programs. To be sure, there is much to be said in favor of the transformation of the outright neglect or exclusion of government property from basic principles of administrative law to the ultimate inclusion in the central features of administrative law and process. Yet it would be a mistake to see this process as complete or entirely successful. Below we discuss deficiencies in the evolution of administrative law as a means for monitoring agency behavior as well as broader challenges in meshing these maturing principles with the shifting goals of property disposition schemes.

#### *a. The Increased Costs of Monitoring Agency Property Disposition Decisions*

As is clear from our discussion, the federal government makes countless decisions annually that affect the use, disposition, and management of federal properties. The resource generation and

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240. See generally Spitzer, *supra* note 62. See also sources cited *supra* note 168. Media reports on government sales of assets directly link privatization and the budget. See Benjamin A. Holden, *Three Federal Utilities May Be Sold By Year's End Under Bipartisan Plan*, WALL ST. J., Sept. 11, 1995, at A4.

241. See Garrett, *supra* note 239, at 501-02.

allocation decisions for entities, groups, and individuals seeking to monitor these many decisions are formidable. These monitors will obviously seek to identify, influence, and challenge those decisions that are most important to their interests. Implementing such a strategy suggests that the monitoring entity will seek to minimize not only the costs of searching out and learning about these decisions but also the costs of challenging them as well. Unfortunately, the existing legal regime undermines this cost effective strategy.

Three considerations could affect the costs of searching for and learning about agency actions: the public nature of the announcement, the amount of accompanying explanation, and the number of people affected. The greater the amount of all three of these, the lower the costs of search and translation. Translating this economic calculus into administrative agency action makes clear that proposed agency rules are the easiest to detect and understand. Likewise, because the rules are likely to have the broadest impact on agency policy, investment in lobbying and litigation are likely to produce the greatest return.<sup>242</sup> It follows that legal doctrines that deter legal challenges to agency rules will significantly increase monitoring costs. The interested group or entity must now keep track of every rule and every individual disposition decision and see if the latter applies the rule in a harmful way. Moreover, every such harmful decision must now be separately challenged in a court.

Earlier precedents had allowed for preenforcement review of agency rules, which thus significantly decreased costs of monitoring and challenging agency action.<sup>243</sup> In two landmark decisions, however, the Supreme Court held that aggrieved persons or groups must await a decision on a particular parcel of land before seeking judicial review. *Lujan v. National Wildlife Federation (Lujan I)* involved a challenge to the BLM's land withdrawal review program undertaken under the Federal Land Policy and Management Act ("FLPMA").<sup>244</sup> Pursuant to this program, the BLM reclassified various tracts of land and adopted plans to return others to the public domain.<sup>245</sup> The plaintiff, an environmental organization and some of its members, filed an action claiming that the BLM's actions violated the FLPMA, NEPA, and the APA.<sup>246</sup> Plaintiffs alleged that they used land in the vicinity of land

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242. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 224 (1988) (Scalia, J., concurring) (noting that the generality of the rule is central to the definition in 5 U.S.C. § 551(4)).

243. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-48 (1967).

244. See *Lujan v. National Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 875 (1990).

245. See *id.* at 877.

246. See *id.* at 879.

subject to BLM actions.<sup>247</sup> The Court first held that the individuals alleging use of land in the vicinity of areas directly covered by the BLM's actions were not aggrieved by agency action under section 702 of the APA.<sup>248</sup> Absent a specific allegation that the individual's use of the actual land reclassified was affected, no showing of injury could be made.<sup>249</sup>

The Court further concluded that, as to plaintiffs' challenges to other BLM actions, there was simply no "agency action" reviewable by a court.<sup>250</sup> The Court noted that plaintiffs claimed to be challenging a land withdrawal review program undertaken by the BLM. But to the Court there was no such program. Rather, this was simply the characterization plaintiffs had given to a broad and varied series of disconnected actions by the BLM in enforcing and implementing the law. Missing from the plaintiffs' presentation was the ability to identify any particular agency action that was the focus of their request for relief. To be sure, the agency's plans did identify some actions that arguably could fall within the definition of "rule" provided in the APA.<sup>251</sup> But even here the Court suggested that review of a rule must await its application to a particular factual controversy. Review, if it were to proceed, would have to be predicated upon a particular land use decision affecting a specific parcel of land that an individual plaintiff was alleged to have used.

*Lujan I* raises the prospect of agency policies and decisions that are so broad and related but episodic in character as to fall outside of the definition of "agency action" and hence unreviewable. It now seems clear that challenging agency property decisions will require some formal action by the agency that can be understood as a coherent, focused, and integrated measure that is targeted at a specific piece of property. Efforts to string together agency decisions that are related by subject matter, statutory law, or regulatory initiative will in all likelihood not be conceptualized as agency action. Clearly, the Court has adopted the view that "retail" as opposed to

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247. *See id.* at 886.

248. *See id.* at 889.

249. *See id.*

250. Sections 702 to 704 of the APA allow judicial review of final agency action. *See* 5 U.S.C. §§ 702, 704 (1994). The APA, in turn, defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

251. *See id.* § 551(4) (defining "rule" for the purposes of the APA).

"wholesale" challenges will be the accepted form for challenging agency decisions.<sup>252</sup>

The Court reaffirmed the *Lujan I* approach in *Ohio Forestry Ass'n v. Sierra Club*.<sup>253</sup> There the Forest Service, acting pursuant to the National Forest Management Act of 1976, developed land and resource management plans for the Wayne National Forest in southern Ohio. Plans developed under the Act set forth the various permissible uses for the covered forests and required consideration of environmental and commercial interests. The Plan specifically permitted clear-cut logging to take place on a substantial part of the Wayne National Forest.<sup>254</sup> However, while the Plan "sets logging goals [and] selects the areas of the forest that are suited to timber production, . . . it does not itself authorize the cutting of any trees."<sup>255</sup> That can occur only after a sequential process beginning with a specific proposal to harvest, proceeding through a series of hearings and environmental assessments, and ultimately administrative and judicial review.<sup>256</sup> Despite these many steps between the initial plan and actual logging, it was conceded that "the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place."<sup>257</sup>

Plaintiffs challenged the Plan raising claims under the APA, NEPA, and the National Forestry Management Act.<sup>258</sup> The Supreme Court held that the challenge was not ripe for review.<sup>259</sup> On the question of harm, the Court concluded that plaintiffs' environmental interests had in no way been compromised: "the Plan does not give anyone a legal right to cut trees."<sup>260</sup> Likewise, the Plan did not preclude a later challenge to a specific decision to cut timber, which might include an attack on the Plan as well, so long as "the Plan plays a causal role with respect to the future, then-imminent, harm from

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252. The Ninth Circuit has allowed challenges to broader agency decision and rejected the notion that only the individual implementation decisions are subject to judicial review. *See* *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1513-18 (9th Cir. 1992). Whether these cases have any precedential value after *Lujan I* is doubtful.

253. *See* *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-37 (1998).

254. The Wayne National Forest consists of 278 square miles. The plan permitted timber cutting on 197 square miles. *See id.* at 729.

255. *See id.*

256. *See id.* at 729-30 (describing agency processes culminating in permit to cut).

257. *See id.* at 730.

258. *See id.* at 731.

259. *See id.* at 732.

260. *See id.* at 733.

logging.”<sup>261</sup> The Court explicitly acknowledged plaintiffs’ interest in reducing legal expenses by mounting “one legal challenge against the Plan now.”<sup>262</sup> This practical concern was unpersuasive: “[T]he Court has not considered this kind of litigation costsaving sufficient by itself to justify review in a case that would otherwise be unripe.”<sup>263</sup>

Apart from the absence of harm to the plaintiffs, the Court noted that preenforcement review would “hinder agency efforts to refine its policies [and] would require time-consuming judicial consideration of the details of an elaborate, technically based plan.”<sup>264</sup> Conversely, focusing review on a specific harvesting permit would identify the matters in controversy for the Court. Finally, the Court thought it relevant that Congress had in a variety of environmental statutes specifically authorized preenforcement review of rules.<sup>265</sup> The inference for the Court was clear: the absence of any specific reference in the National Forest Management Act reflected a congressional judgment that review await actual plan implementation.<sup>266</sup>

The impact of *Lujan I* and *Ohio Forestry* on judicial review as a mechanism for monitoring agency property management and disposition could be quite significant. Insofar as agencies should be encouraged to adopt broad policies at the rulemaking stage to encourage public participation in the formulation of disposition procedures and priorities, *Lujan I* and *Ohio Forestry* sow doubts as to the reviewability of such agency decisions.<sup>267</sup> Indeed, in this respect *Lujan I*

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261. *See id.* at 734.

262. *See id.*

263. *See id.* at 735

264. *See id.* at 735-36.

265. *See id.* at 737.

266. *See id.*

267. *Lujan I* and *Ohio Forestry* must be read in conjunction with the Court’s decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). There, a coal company sought to challenge the Department of Labor’s regulation authorizing union personnel to participate in safety inspections at a nonunion mine. *See id.* at 204. The coal company brought suit after the agency initiated a civil enforcement proceeding for violation of its regulation. *See id.* at 205. The Court held that the matter was not ripe for review. *See id.* at 207-09. Only after the full administrative proceeding had run its course could review be sought. *See id.* The tension between *Thunder Basin* and *Abbott Laboratories* is obvious. *Thunder Basin* makes clear that even where the government by regulation affects the interest of private property owners, judicial review must ordinarily await full enforcement of the regulation in the particular context. Certainly if the Court requires those with private property rights to seek review only after enforcement, it is unlikely to adopt a more forgiving standard for parties challenging the disposition or regulation of public property. After all, the claims of hardship and individual rights are likely to be perceived as substantially less powerful in the latter context—both for those who complain about excessive development or use (environmentalists or recreational users) as well as those who seek more developments (loggers, ranchers, and mining industry). *See Bennett v. Spear*, 520 U.S. 154 (1997) (jurisdiction over challenges by those seeking economic use to individualized decisions affecting Federal property); *Sweet Home Chapter v.*

and *Ohio Forestry* create perverse incentives for the agency. Agencies will be tempted to adopt broad rules or policies that appear disconnected and episodic or vague in order to avoid judicial review. Such action can only damage the public's presumed goal of adopting a coherent and rational plan for property disposition and management. And, insofar as policy decisions are pushed down to the individual decisionmaking level, public participation becomes more problematic. Groups or individuals with scarce resources may not be able to participate in every individualized proceeding and may even be unaware of the individual dispositions affecting their interests.

*b. Other Hurdles to Public Participation and Monitoring  
Agency Property Decisions*

In light of *Lujan I* and *Ohio Forestry*, efforts to monitor agency property decisions are likely to be shifted to participation in and review of individual adjudicative decisions. But whether this is a useful or efficient device for monitoring agency behavior is a different question. Indeed, a shift to monitoring through public participation in an adjudication may well signal an overall failure of a property disposition scheme.

First, it may well be that those who are the direct beneficiaries of the government's property disposition decisions have little reason to seek full public participation in adjudicative hearings. Indeed, they may well prefer that the decision be made informally and not subject to public scrutiny. To be sure, an entity seeking a mining patent or grazing permit wants to be heard by the agency granting the benefits. Yet it hardly follows that their interest is in a formal public hearing. Indeed, if our overall assessment of government property sales and management is correct—that much of it is riddled with rent-seeking and inefficiencies with substantial revenue loss to the government—it seems that two points follow. First, since the statutory criteria favor the beneficiaries, initial agency decisions contrary to beneficiary interests are likely to be rare. Hence a formal public hearing appealing adverse agency action will be rare as well.<sup>268</sup> Without public hearings, public participation as a means of monitoring is of little use. Indeed, since the beneficiaries of the scheme have developed close

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Babbitt, 515 U.S. 95 (1995) (allowing challenge to application of agency regulation affecting specific piece of property).

268. See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434-35 (1989).

long-term relationships with agency personnel, informal resolution of any conflicts with beneficiaries is likely to be the preferred outcome. In other words, if an interest group is powerful enough to put in place a statutory scheme that allows the group economic advantages in the use or purchase of federal property, it is likely that the scheme will create adequate procedures and standards for preserving those advantages. We would expect that the scheme would be "hardwired" to put in place procedures to make sure that over time bureaucratic drift within the agency would not threaten to withdraw these privileges.<sup>269</sup> Or, if not found in the statutory scheme, we should expect that agency regulations that would give the favored group hearing rights before the agency would be adopted. Again, there is reason to believe that such a pattern appears in federal law.

Consider the actions of agencies responsible for two major federal property programs. The Forest Service proposed elimination of its procedures allowing third parties to participate in decisions on timber sales.<sup>270</sup> The BLM has historically read its regulations to deny third parties the right to participate in the process for renewal or renegotiation of a grazing permit.<sup>271</sup> Indeed, the BLM's position illustrates a potential "bait and switch" strategy growing out of *Lujan I* and *Ohio Forestry*, as well as the way that legal mandates for broader hearing rights are often unnecessary for direct beneficiaries, but critical for interested third parties. The BLM regulates and manages grazing rights and permits at several levels of specificity.<sup>272</sup> At the most general level, the BLM adopts Resource Management Plans ("RMP's") pursuant to the Federal Land Policy and Management Act of 1976.<sup>273</sup> These RMP's set forth the general principles and plans for large areas of land, typically over one million acres. Given the scope and variety of the area covered by an RMP, it is to be expected that they are not rich in detail. They set out only the most general of planning principles. The actual authorization to graze is found in a grazing permit issued under the Taylor Grazing Act.<sup>274</sup> This permit or an allotment management plan ("AMP") that is incorporated into a permit details the terms and conditions of grazing on the federal

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269. See generally Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992).

270. The political battles over the Forest Service's efforts are discussed in Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371 (1993).

271. The matter is fully explored in Feller, *supra* note 117, at 582-86.

272. See *id.* at 574-75.

273. See *id.* at 576.

274. See *id.*

parcel for which permission is given.<sup>275</sup> Each permit typically comes up for renewal every ten years.<sup>276</sup>

In fact, however, the authorization is subject to annual adjustment on virtually every aspect of grazing. In this annual "renegotiation" or renewal, the BLM can set the number of cattle that can be grazed, where the grazing can occur, and any improvement or other conditions found to be necessary. The BLM's own regulations provide for public participation by interested persons when an agency action on a permit takes place.<sup>277</sup> However, the BLM has taken the position that its annual review and adjustment is not an action warranting participation. According to the BLM, only the ten-year renewal constitutes agency action triggering the rights of interested persons.<sup>278</sup>

The beneficiaries of the BLM program—like those in the Forest Service's timber sales—need not enshrine their rights to be heard in formal regulations. Ranchers can participate with the BLM in the annual negotiation affecting grazing rights. While the rancher may well take a risk in this informal renegotiation, the rancher is likely to be overall much better off not requesting a formal hearing and risking the participation of adverse third parties. Moreover, the annual renegotiation leaves the circle of participation closed between the rancher and the agency, a longstanding working relationship.<sup>279</sup>

Adjudication as a monitoring device suffers from a second shortcoming. Relying on the APA model of decisionmaking by adjudication, as well as on the individual statutes calling for a hearing on property dispositions, assumes that nonmarket variables dominate the disposition decision.<sup>280</sup> Accordingly, if any scheme of monitoring agency property dispositions places too much emphasis on public

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275. *See id.*

276. *See* 43 U.S.C. §§ 315b, 1752(a)-(b) (1994).

277. *See* 43 C.F.R. § 4100.0-5 (1998).

278. *See* Feller, *supra* note 117, at 583-86. In an ironic twist, there have been reports that the BLM is using the individual leasing negotiation process to cut back on rancher grazing rights. *See generally* Carl M. Cannon, *The Old-Timers*, NAT'L J., May 22, 1999, at 1386.

279. The D.C. Circuit's recent decision in *Envirocare of Utah, Inc. v. NRC*, No. 98-1426, 1999 U.S. App. LEXIS 26578 (D.C. Cir. Oct. 22, 1999) can only further encourage agencies to deny participation rights to interested third parties. The court there held that even if a party meets the stringent requirements for Article III standing, an agency can deny participation in an agency hearing. Further, the court held that an agency's interpretation of its participation statute is due deference. The court, however, left unresolved whether the same principles controlled the APA's intervention provision, 5 U.S.C. § 555 (1994).

280. *See* Feller, *supra* note 117, at 583-86.

participation in an adjudication, it may well be a strong signal that the scheme is inefficient.<sup>281</sup>

Consider the evolutionary link between the FCC's disposition procedures and its criteria for decisionmaking. When the FCC was required to award licenses under the broad public interest mandate, it utilized the elaborate and cumbersome *Ashbacker*<sup>282</sup> hearings to resolve disputes among competing applicants. As the agency and commentators perceived the shortcomings of employing the amorphous public interest standard, the agency suggested alternative disposition methods such as lotteries and auctions.<sup>283</sup> The auction option presents the many advantages already discussed. It promises revenue to the government; it reduces delay and cost associated with hearings; and it curbs the undue political influence that often times mars the hearings. An auction therefore necessarily eliminates some of the need for adjudication. The agency can proceed by regulation to define how the nonadjudicative methods would work. But absent is the usual more elaborate second step in property disposition—a hearing or some kind of individualized determination for a particular piece of property.

As long as the agency has sufficient incentive and expertise to maximize revenues,<sup>284</sup> there is less need for costly procedural safeguards to accompany the specific sale and lease decisions. For instance, if the agency retains a portion of the proceeds for internal

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281. Similarly, the presence of judicial review of adjudicative orders may suggest an inefficient scheme. See Shipan, *supra* note 181, at 553 (discussing why broadcasting interests may have inserted judicial review provisions into Communication Act). If the only issue in the disposition scheme is who the high bidder was, there may be little reason to authorize judicial review. See, e.g., 12 U.S.C. § 1821(j) (1994) (precluding review of sale of assets by receiver of bank).

282. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333-34 (1946) (holding adjudicative hearing required two applicants for competing license).

283. See *supra* text accompanying notes 144-49.

284. Care must be taken not to give the agency too much interest in the proceeds since that may create incentives to sell assets at below cost. In this context consider the below-cost timber sales undertaken by the Forest Service. Under the program, the agency harvests timber that it then sells on the market. However, the costs of harvesting this timber—labor, road construction, transportation—can exceed the price obtained in the subsequent sale. The Forest Service manages the sale and is allowed to keep some of the proceeds. The obvious question is why an agency would sell timber at a loss? Certainly no private producer would do so (unless as a short-term measure to gain market share). The Forest Service does what no market producer would because, unlike the market producer, the Forest Service is not required to internalize the costs of the timber sales. Congress is quite willing to subsidize the sales for a variety of political and economic considerations. And the Forest Service participates in this inefficient behavior because it receives a financial benefit from the sales. Safeguards are therefore required if the agency is not forced to internalize the costs of its disposition program.

programming,<sup>285</sup> the incentive to maximize revenue is clear, and the likelihood that the agency will subsidize interest groups is less.

*c. Judicial Review as a Monitoring Device: The Inadequacies of Current Standing Doctrine*

A central conclusion of this Article is that, although the government legitimately considers nonmarket factors in selling or disposing of property, there is a danger that the failure to maximize revenues or the failure to balance revenue loss against other non-economic interests is the result of interest group influence, often accompanied by statutory obsolescence or agency capture. The public at large suffers through loss to the Treasury or the irreparable harm to federal property. This loss of revenue and failure to articulate how the foregone revenue has been offset by other values or interests are of the greatest concern and in need of remediation. Yet it is unlikely that this revenue loss to the federal government—and indirectly to citizens—could be a basis for standing.

In a virtually unbroken line of precedent, the Supreme Court has held that a federal taxpayer has no standing to challenge the expenditure of federal monies.<sup>286</sup> More specifically, the Supreme Court has rejected citizen standing to challenge the federal government's decision to dispose of property. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, plaintiffs—a citizen and organization committed to protecting against the establishment of religion—challenged the federal government's decision to give property to a religious college.<sup>287</sup> Plaintiffs alleged that the government's giveaway of property violated the Establishment Clause of the First Amendment.<sup>288</sup> The Court held that plaintiffs lacked standing.<sup>289</sup> The Court concluded that, except in extraordinarily limited circumstances, a plaintiff could not base standing on taxpayer status.<sup>290</sup> The Court reasoned that absent some particular concrete injury, a plaintiff could not complain about the government's

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285. The FCC may become entirely dependent on licensing fees. If an agency becomes too dependent on revenue, it may slight other goals to the end of maximizing revenue. Some have criticized local law enforcement agencies for abusing their forfeiture powers for that end.

286. See *United States v. Richardson*, 418 U.S. 166, 175 (1974); *Frothingham v. Mellon*, 262 U.S. 447, 486-89 (1923).

287. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 468-69 (1982).

288. See *id.* at 469.

289. See *id.* at 482, 486, 489.

290. See *id.* at 476-82.

failure to follow the law.<sup>291</sup> It seems safe to say that, if judicial supervision of agency property disposition and management is to be a relevant part of any scheme of checking the abuse of agency discretion, standing cannot be based on a citizen's right to have the law followed or revenue loss suffered.

Foreclosure of citizen standing to protect against government waste is therefore likely to channel claims for judicial review into two other standing theories. Unfortunately, developments in these two areas are likely to reduce the availability of judicial supervision as a full and meaningful mechanism for monitoring.

First, a party may challenge a government property decision by alleging injury in the interference in use or enjoyment of the property. We tend now to think of actions brought by environmental groups challenging the government's management and development of property as classic cases where standing is based on "use" or "enjoyment" of property.<sup>292</sup> Yet this standing doctrine can be found in earlier challenges to FCC programming decisions.<sup>293</sup> In these cases the groups or individuals alleged no economic interest. Rather, standing was based upon their interest as a "user" of the federal property—i.e., they alleged to have been consumers of radio or television as listeners or viewers.<sup>294</sup> In a landmark decision, the D.C. Circuit upheld standing on the basis that a group or individual had an interest in the content and quality of television broadcasting.<sup>295</sup>

Although the allegation of noneconomic use of federal property as a cognizable Article III injury has become standard in cases involving the wide range of disposal actions, standing in this area has

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291. *See id.* at 486. The Court has made clear its commitment to the standing rules in *Valley Forge*. In *Lujan v. Defenders of Wildlife (Lujan II)*, the Court reaffirmed *Valley Forge*. *See Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 576 (1992). There, plaintiffs invoked the citizen standing provision of the Endangered Species Act seeking to challenge the federal government's decisions to fund certain foreign development projects. *See id.* at 558-59. They predicated standing on the statutory provision conferring upon any citizen the right to sue for violation of the ESA. *See id.* at 571-72. The Court held that Article III does not permit Congress to confer standing on a citizen to police violations of law. *See id.* at 573. Some identification of a particular concrete injury caused by the alleged violation of law was necessary. *See id.* at 576.

292. Earliest expressions of this theory can be found in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), and *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973).

293. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 585-86 (1981); *Action for Children's Television v. FCC*, 999 F.2d 19, 26 (1st Cir. 1993); *Geller v. FCC*, 610 F.2d 973, 976 n.21 (D.C. Cir. 1979).

294. *See WNCN*, 450 U.S. at 585.

295. *See Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966).

proved controversial on an issue that provoked no debate in the FCC cases—has the government's action in fact interfered with the plaintiff's use or enjoyment of the property? Unlike the FCC cases where "use" was simple—merely turning on a television—in the area of land management and sales this has proven to be a significant barrier to standing. Indeed, the two most recent rulings by the Supreme Court in this area jeopardize standing on this basis and hence judicial monitoring by increasing the costs to those who seek to challenge the government's property decisions.

In *Lujan I*, involving plaintiffs' challenge to the BLM's decision to reclassify certain federal lands and to authorize various development activities on those lands, standing was based on allegations that plaintiffs were recreational users of the lands and the authorized development would interfere with that use.<sup>296</sup> While the Court conceded that the recreational injury was an injury recognized under Article III, it went on to reject standing because plaintiffs had failed to allege that they had in fact used the *particular* parcels that were subject to the proposed development.<sup>297</sup> At most, plaintiffs alleged that they hiked in the vicinity of the affected land.<sup>298</sup> For the Court this was insufficient to establish standing for noneconomic injury.<sup>299</sup> It was essential that plaintiffs show that they were users of the actual land reached by the government's action.<sup>300</sup>

The Court reaffirmed this approach to standing in *Lujan II*.<sup>301</sup> There, plaintiffs challenged the Department of Interior's regulation interpreting the Endangered Species Act to apply only to activities occurring in the United States.<sup>302</sup> Pointing to a number of foreign government development projects undertaken with American financial assistance, plaintiffs alleged injury in the loss of species that they sought to observe and study.<sup>303</sup> The Court again found no standing.<sup>304</sup> Plaintiffs alleged only that they had previously gone to visit these countries and observed certain species that were alleged to be threatened by the federal government's support of the development projects.<sup>305</sup> Missing, however, were any claims that plaintiffs had

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296. See *Lujan v. National Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 886 (1990).

297. See *id.* at 889.

298. See *id.*

299. See *id.*

300. See *id.*

301. See *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 562 (1992).

302. See *id.* at 558-59.

303. See *id.* at 562-63.

304. See *id.* at 564.

305. See *id.* at 563-64.

immediate and certain plans to return to these countries and resume their activities.<sup>306</sup> Absent such allegations, the Court found that the plaintiffs failed to show that their injury was immediate rather than speculative and conjectural.<sup>307</sup>

These standing rules significantly alter the economics of filing an action challenging a government property decision. A plaintiff must be found who actually uses or has definite plans to use a particular piece of land or travel to a particular place. This cost alone may not be significant enough to deter suit but other costs are associated with this approach to standing as well. An action can be brought only when a particular parcel of land is affected. General agency rules or plans of use are not ripe for review. Thus, organizations and interested individuals must keep track of what particular parcels or lands are affected and then find a suitable plaintiff who meets the demanding rules of standing. In particular, organizational plaintiffs may be especially affected since they now cannot generally assert that their members use or enjoy the property.<sup>308</sup> It may instead be necessary for them to find individual members who meet those criteria. Not only does this tax organizational resources, but any lack of ability to be an effective monitor through judicial action may well affect the ability of the organization to seek financial support from current and prospective members.<sup>309</sup>

Current standing rules therefore jeopardize the effectiveness of judicial review as an effective monitor of agency property decisions by those with a noneconomic interest in use or enjoyment of the property. This leaves open the possibility of standing and monitoring by someone with a direct economic interest in the property. While these standing rules remain viable as a basis for suit, it is unlikely that this form of review will achieve real reform.

One of the most frequently invoked bases for standing is economic injury caused to a competitor. This sort of injury is in fact well established as a basis for meeting the Article III standing requirements, and was indeed early recognized as a basis for a challenge to the government's disposal of its property. In *FCC v. Sanders Brothers Radio Station* the FCC granted a radio station a license to serve a

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306. See *id.* at 564.

307. See *id.*

308. See *Lujan v. National Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 892-93 & n.4 (1990) (discussing effect of standing and ripeness rules on organizational standing).

309. See generally SCHLOZMAN & TIERNEY, *supra* note 183 (discussing litigation functions of organizations).

particular geographical area.<sup>310</sup> Sanders Brothers Radio owned a station in the same area and obviously did not welcome the competition provided by the new licensee.<sup>311</sup> The Supreme Court held that the competitive harm alleged by Sanders Brothers Radio was a basis for standing to challenge agency action, even though the Communications Act itself made harm to competitors irrelevant in the licensing process.<sup>312</sup> The Court reasoned that this was the optimal solution because competitors were typically the ones to suffer the most harm by the government's action and therefore have the greatest incentive to bring a challenge.<sup>313</sup> In other words, the Court perceived the competitor as a necessary watchdog to oversee and police agency action.

At first glance there is much to be said for competitor standing. The economic injury alleged by competitors is consistent with the Court's obvious preference for economic injury as a basis for Article III standing. Moreover, as the Court pointed out in *Sanders Brothers Radio Station*, the competitor harmed by the government's action typically has the greatest incentive to challenge agency action. A more recent example of competitor standing challenging a government giveaway of property is a challenge by various companies seeking valuable frequency licenses from the FCC to the agency's so-called pioneer preference rule that awards licenses at steep discounts to those entities who have allegedly developed pioneering technology in telecommunications.<sup>314</sup> The challengers—who were denied the pioneer preferences and therefore had to pay substantially more for their licenses—had an obvious incentive to bring the challenge and raised charges of political influence and ex parte lobbying in the below-cost sale of these valuable licenses. The fiscal impact of the FCC's decision for the federal government is indeed significant and the competitor is the obvious person to seek judicial review of the agency's controversial decision. Insofar as we prefer that there be a judicial check on agency decisions, competitors are likely to be the most aggressive challengers. Where a group of individuals has managed to dominate the agency's decisionmaking process and the competitor is excluded from participating, or has no chance of its views being considered or heard, the pathology of agency process is likely to be subject to scrutiny.

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310. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 472 (1940).

311. See *id.* at 471.

312. See *id.* at 475-77.

313. See *id.* at 477.

314. See *Pacific Bell v. FCC*, No. 94-1148, 1994 WL 475062 (D.C. Cir. July 26, 1994), (dismissing case as moot); see also *supra* notes 156-66 and accompanying text.

Although the economic harms and economic incentives associated with competitor standing can provide a natural monitoring device, it nonetheless suffers from two shortcomings as a basis for monitoring. First, in some situations there simply may not be a natural competitor harmed by the government's action. For example, in the areas of mining, grazing, or timber sales there has not been a pattern of competitors who might seek to challenge the free or below-cost use. The reasons for this are not clear but one can speculate as to why this is the case. It may be that in mining or grazing the nature of the activity precludes a natural competitor. Because of geographical ownership patterns, there may not be other ranchers who would also seek to have a permit for the same land. Or with mining—particularly now where the image of the lone prospector with his mule is long gone and much is now done by large entities—it is unlikely that some other company will step forward to assert that it first made the claim. Indeed, if in some of these programs there are few real players seeking to use or develop federal lands, a form of logrolling can occur. No participant to the deal allowing the below-cost or harmful use has an incentive to expose this to the public or have the courts disrupt and monitor the arrangement.

Second, the competitor standing itself may in fact be evidence of a deeply flawed statutory property scheme where below cost dispositions are the rule. The broadcasters complaining in *Sanders Brothers Radio Station* objected to the award of a license to a competitor.<sup>315</sup> The broadcaster did not challenge the basic idea of giving away a valuable government license for free.<sup>316</sup> Nor, of course, could they since the governing statute mandated such a process. Indeed, competitor standing strikes us as a bit of “sour grapes” by the competitor who loses out and who would have gladly taken the license for free if the tables had been turned. Similarly, in the pioneer preference proceeding, the applicants who did not get the pioneer preferences for themselves sought judicial review. In short, the presence of a competitor is no guarantee that any judicial review will lead to effective monitoring. Indeed, the presence of competitor standing sometimes may be strong evidence that the statutory scheme itself is deeply flawed. The challenging competitor is simply seeking to redistribute

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315. See *Sanders Bros.*, 309 U.S. at 477.

316. See *id.* at 476-77.

the fruits of government largesse rather than seeking to alter the basic flaws in the system.<sup>317</sup>

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Reform is needed. Although many agency disposition schemes successfully generate revenue, agencies receive only a fraction of what they could if maximization of revenue were their primary goal. Agencies unquestionably pursue legitimate goals other than raising funds, but nonmarket goals can mask under the table subsidies to private groups. Interest groups have successfully pressured Congress and agencies to dispose of public resources at below market prices. The procedures established in the APA cannot prevent rent-seeking in Congress, and they have failed as well to prevent interest groups from obtaining benefits from agencies. The property exemption from rule-making, and the limited right of third parties to participate in an adjudication, leave agencies' property management decisions largely unfettered. And, restrictive definitions of agency action, ripeness, and standing circumscribe judicial review. As a result, agency disposition decisions too often bypass the checks of public participation and judicial review, both of which are intended to safeguard the public from agency capture and mismanagement.

#### IV. RECOMMENDATIONS FOR REFORM

In light of the above discussion on monitoring the disposition and management of public assets by agencies, revamping agency disposition practices is critical. Ideally, a monitoring scheme could mimic the market oversight mechanism of shareholders so as to prevent wasteful management and the siphoning off of revenue to particular interest groups. Agency managers would face the wrath of shareholders (or some type of analogue) for every botched deal or disclosed subsidy.

A market solution, however, is not always possible due to the programmatic and distributional concerns underlying the government's disposition efforts. Although agency incentives to maximize revenue should be sharpened, a market cannot second-guess the preeminently political tradeoffs between revenue maximization and rights of the homeless or the traditions of Western ranchers. Moreover, even if reform were pushed at one government level—whether

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317. See SHIPAN, *supra* note 206, at 84-95 (providing interest group explanation for judicial review provisions of the Communications Act).

by Congress, the agencies, or the judiciary—intransigence at the other two levels could thwart or at least slow change. Because of the interest group pressures we have addressed, we think the proponents of dramatic change face a significant challenge.

Nonetheless, some beneficial reform—even aside from restructuring government disposition efforts on a market basis<sup>318</sup>—can be attained by subjecting disposition decisions to a variety of oversight mechanisms already considered useful for monitoring more traditionally understood regulation. Once the regulatory nature of government dispositions is recognized, utilizing these monitoring mechanisms could well prove beneficial. The APA rulemaking procedures could govern disposition determinations; OMB and Congress could clear major agency dispositions prior to consummation; and Congress itself could include its disposition determinations within the pay-as-you-go, or PAYGO, framework, which requires each additional spending program to be offset by a new revenue measure. As a package, such changes might go far towards ensuring more accountable governance.

#### *A. Enhancing Public Participation and Judicial Review*

Several recommendations are appropriate. First, we suggest that the APA be amended to delete or significantly alter the provision exempting public property from the requirements of notice-and-comment rulemaking. Government disposition programs, particularly when they are not framed on market principles, require greater public participation and more public scrutiny.

The regulatory character of property management is clear. It makes little sense to exclude from the rulemaking requirements such a large and important part of the federal regulatory apparatus. Moreover, the need for monitoring through public participation is as great—indeed if not greater—here than in the more common regulatory sphere. Monitoring is essential because of the danger that policy initiated due to interest group influence may be adopted without any public participation.

We also recommend along these lines that greater public participation be encouraged where adjudication is used to manage or dispose of public property. Our review of agency management and disposition of property reveals that important policy and fiscal decisions are made in the individual cases and that rulemaking—even

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318. Accordingly, some have suggested converting the Forest Service into a public corporation to enhance fiscal responsibility. See, e.g., O'TOOLE, *supra* note 176.

with broad public participation—cannot resolve all issues. If the public is excluded from these adjudications, it is unlikely that monitoring through public participation can occur. Accordingly, we recommend that agencies amend their regulations to state explicitly that individuals or groups with other than a direct economic interest in the outcome of the adjudication be allowed to participate as “interested persons.” These noneconomic interests could include those who otherwise use the property for recreational or scientific purposes. But more broadly it should include those with relevant information that will assist the agency in its decisionmaking, regardless of whether they actually use the property or are harmed by another’s use.

Finally, we believe that judicial review should continue to play an important role in monitoring agency disposition of assets. Given the potential for interest group influence in both Congress and agencies, judicial review provides another forum to minimize the chance that agency policy initiatives serve private interests at the expense of the general public. Review should only be precluded where Congress has directed the agency to maximize revenue and sufficient incentives exist to entrust the agency with that mission.<sup>319</sup>

### *B. Amending Executive Order No. 12,866*

In light of the shortcomings of judicial review and public participation, however, some other means are necessary to check agency disposition efforts. Political checks external to the agency are warranted.

The Office of Management and Budget (“OMB”) is one plausible monitor and coordinator of agency disposition schemes. Currently, agency disposition schemes escape any systematic presidential oversight. Although major regulatory efforts by agencies (at least those so-termed executive agencies whose heads can be dismissed at will) are subject to scrutiny by OMB under Executive Order 12,866,<sup>320</sup> no comparable means exist to monitor the sale of surplus government furniture, the auctioning of broadcast spectrum rights, or the leasing of oil rights. Such sales, auctions, and leases cannot be characterized as “regulations” as defined in the Order.<sup>321</sup> Although designing an auction system might fall within the purview of the Order, each

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319. See *supra* text accompanying notes 284-85.

320. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 app. at 557-61 (1994).

321. Regulation is defined as “an agency statement of general applicability and future effect which the agency intends to have the force and effect of law . . .” *Id.* at 641.

disposition does not, for it lacks general applicability and future effect. Agency actions implicating hundreds of millions of dollars therefore are not currently subject to the Order. That omission is unfortunate, for centralized coordination might reduce duplication of agency efforts, help prevent agencies from conducting sales that benefit themselves as opposed to the public at large, and generally would illuminate the cost-benefit analysis underlying the various programs.

The current Executive Order<sup>322</sup> mandates that regulations with a projected impact of one hundred million dollars on the economy<sup>323</sup> be forwarded to OMB for analysis prior to promulgation.<sup>324</sup> The Order counsels agencies to identify the problems that they intend to address, consider alternative ways to meet their regulatory goals, assess the costs and benefits of the intended regulation, and base their ultimate decision on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."<sup>325</sup> Moreover, the Order requires agencies at the beginning of the year to forward a regulatory plan to OMB that summarizes each significant planned regulatory action, including alternatives considered and projected costs and benefits.<sup>326</sup> All significant regulations, in other words, must be justified on a cost-benefit basis, but other values may be taken into account in defending the need for regulation.

Upon receipt of agency plans, OMB is to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order . . ."<sup>327</sup> The Order further provides that review generally must be completed within ninety days to avoid the delay that arguably plagued OMB review under the prior schemes.<sup>328</sup> OMB must also provide written explanation if it returns any rule for greater analysis to the agency.<sup>329</sup> Finally, the Order

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322. President Clinton's order followed President Reagan's initiatives with Exec. Order No. 12,291, 3 C.F.R. 128 (1981), and Exec. Order 12,498, 3 C.F.R. 323 (1985).

323. See Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. 638, 641. The Order also includes regulatory actions that "materially alter the budgetary impact of entitlements, grants, user fees, or loan programs." *Id.* § 3(f)(3). But sales or leases evidently do not fall within the traditional notion of entitlements or user fees.

324. See *id.* § 6(a)(3)(A).

325. *Id.* § 1(b)(7).

326. See *id.* § 4(c)(2).

327. *Id.* § 6(b).

328. See THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 282-83 (1991).

329. See Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. 638, 647.

directs that any continuing dispute between OMB and the agency be resolved pursuant to a White House review process.

Presidential oversight of the asset decision pursuant to Executive Order 12,866 could serve several critical functions. First, review would, one hopes, impose greater accountability upon agencies in disposing of government assets. Centralized review could dampen interest group lobbying because of the President's and OMB's relative insulation from interest group pressures. As the only official answerable in the electorate as a whole, the President can ensure that agency policies be more responsive to the public interest. Many have applauded the recent executive orders for that very reason.<sup>330</sup> Of course, the President and OMB are not entirely immune from interest group pressure. The President relies on campaign contributions just like any legislator, and he may be beholden to particular interests for prior efforts on his behalf. But his national constituency diminishes the likelihood of capture by any one focused group.

Centralized review, therefore, might limit the favoritism, or at least perceived favoritism, that marked the FCC's initial determination to award licenses for free under its pioneer preference program, and the Bureau of Land Management's decision to charge such a low rate for grazing fee permits. To be sure, if interest groups unduly influence Congress, OMB review is powerless to counteract that influence, as with the prescribed sale of government lands under the 1872 Mining Law. Yet OMB review can minimize the risk of agency capture by subjecting all disposition schemes to greater scrutiny.<sup>331</sup> And OMB is less likely to be subjected to narrow factional interests than are the agencies. OMB does not have the often longstanding close relationships with particular industries or trade groups that at times affect agencies. Indeed, the current Executive Order minimizes the

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330. See generally Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1 (1994).

331. OMB has itself been criticized—particularly under Vice-President Quayle's tutelage—as being too receptive to interest groups. See MCGARITY, *supra* note 328, at 285-91; Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 171-72 (1991); see also Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 28-35, 55-57 (1984). Even where OMB has tried to monitor programs deemed wasteful, it has not always been successful. See, e.g., Paul A. Sebatier et al., *Hierarchical Controls, Professional Norms, Local Constituencies, and Budget Maximization: An Analysis of U.S. Forest Service Planning Decisions*, 39 AM. J. POL. SCI. 204 (1995) (examining the importance of the OMB, as well as other rules and pressures, in planning decisions of the U.S. Forest Service).

prospect of OMB capture by largely prohibiting and publicizing ex parte contacts.

OMB review would also shed light upon the actual costs and benefits of each disposition scheme. As discussed previously, currently no agency clearly sets out the cost-benefit justifications of its actions. The RTC decision to sell unbundled properties or the FCC determination to honor a pioneer preference would all benefit from a clear articulation of the advantages and disadvantages of the agency's proposed route. Forcing agencies to articulate the financial and policy benefits anticipated from the sale or lease of public assets can only sharpen analysis. If the procedural steps in the Executive Order are followed, OMB and agency officials might be able, for instance, to ascertain the projected costs and benefits of timber cutting sales in particular regions much more accurately than may currently be the case. OMB serves as something of a substitute for a market check on agency action, to further the chance that revenue will be maximized to the taxpayers' advantage.

This is not to suggest that the results of the cost-benefit analysis should control. As this Article suggests, there are pressing governmental policies that may underlie the disposition decision. Social preservationist values are not easily commensurable with questions of dollars and cents. The traditions of ranchers grazing cattle on public lands cannot readily be compared with environmental concerns or with public debt relief. But the costs and benefits of the programmatic or distributional benefits should be known and considered before proceeding with a sale that does not maximize financial return on the government's assets. Cost-benefit analysis should form at least the first stage of the ultimate decision.<sup>332</sup> Only then can the political determination as to whether certain values override the potential loss to the Treasury be reached.

Even if an agency determines that nonfinancial concerns should predominate, OMB review can still help ensure that such goals are implemented in as cost effective a manner as possible. The Order's requirement that alternatives be considered imposes an important safeguard on agencies. Consider, for example, the recent FCC auctions. In implementing distributional goals, the FCC did not award licenses outright to designated entities, such as small businesses or firms owned predominantly by minorities or women. Rather, the FCC awarded a bidding credit, which conceivably stimu-

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332. See generally Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

lated competition for the licenses, and raised the ultimate price received for the license.<sup>333</sup> In contrast, the FCC awarded licenses to those firms receiving pioneer preferences without requiring the firms to participate in the auction. Had the FCC awarded a bidding credit instead, the increased competition may have enhanced the ultimate price received for the licenses—whether or not the licenses were purchased by the pioneers—diminishing the impact of granting the preference on the public fisc. OMB review may help agencies further even programmatic goals efficiently.

Finally, review under Executive Order 12,866 might be beneficial in allowing OMB to lend other agencies generalized expertise in asset divestiture policies. Requiring agencies to submit their planned sales or leases to OMB may permit an informed second opinion on how best to structure such divestiture efforts. The GSA or Customs may administer sales the same way they have for the last ten years—OMB scrutiny might prompt the agencies to consider alternate ways to increase the yield.

Review might also be critical to avoid duplicative efforts. So far, the FCC, for instance, has relied heavily upon outside consultants to help structure the auctions. Their time working with experts has been well spent.<sup>334</sup> When the RTC attempted to structure an auction in the real estate market several years ago, however, it retained a different consulting firm with disastrous results.<sup>335</sup> Moreover, the RTC has sold houses at auctions that have been next door to houses marketed by HUD. Combining forces in holding auctions can minimize administrative costs and achieve economies of scale.<sup>336</sup> OMB could thus serve as a clearinghouse of information to help all agencies

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333. See *supra* Part II.A.3.

334. See SYLVIA NASAR, A BEAUTIFUL MIND: A BIOGRAPHY OF JOHN FORBES NASH, JR., WINNER OF THE NOBEL PRIZE IN ECONOMICS (1994); *Economics Focus: Learning to play the game*, THE ECONOMIST, May 17, 1997, at 86 (describing initial success then setbacks in auction design by economic experts).

335. See RTC OFFICE OF THE INSPECTOR GEN., AUDIT REPORT (1991) (concluding that poor planning led to botched auction). See generally U.S. GEN. ACCOUNTING OFFICE, RESOLUTION TRUST CORPORATION: EFFECTIVENESS OF AUCTION SALES SHOULD BE DEMONSTRATED (1991) (critiquing RTC satellite auction); Joel Achenbach, *Between a Rock and a Hard Sell*, N.Y. TIMES, Apr. 11, 1993, at F1; Robert Sherefkin, *RTC Fire Sale Goes Up in Smoke*, 13 LEGAL TIMES, No. 29, Dec. 17, 1990, at 1.

336. The multi-agency Government Owned Real Estate (GORE) pilot program has attained success by encouraging different agencies to work together in selling government assets, despite each agency's different regulatory scheme. See U.S. GEN. ACCOUNTING OFFICE, REPORT: DEBT COLLECTION, IMPROVED REPORTING NEEDED ON BILLIONS OF DOLLARS IN DELINQUENT DEBT & AGENCY COLLECTION PERFORMANCE (1997), available in <http://www.gao.gov/pbs/pr/gore.htm>; see also *Government Asset Sales* (visited Oct. 25, 1999), <http://www.financenet.gov/financenet/sales> (bringing together government dispositions initiatives).

structure asset sales and leases in ways that maximize return for the public.

On balance, therefore, we urge amending Executive Order 12,866 to include asset disposition determination within the regulatory actions covered in the Order.<sup>337</sup> OMB expertise and generalized perspective should help eliminate inefficiencies and cabin rent-seeking in agency disposition schemes. Because government sale and leases of assets reflect regulatory policies as much as the more familiar command-and-control regulation of the workplace, greater oversight both within and without the executive branch is required to safeguard the public welfare.

### *C. Amending the Regulatory Enforcement Fairness Act*

Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996<sup>338</sup> to provide greater congressional review of agency regulations. Each agency is required to submit final and interim final rules for review by Congress and the General Accounting Office before the final or interim final rules can take effect.<sup>339</sup> The Act defines "rule" by reference to the APA, namely "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy."<sup>340</sup> In addition, the Act requires agencies to submit a concise general statement relating to the rule, and (among other obligations) to make available upon request a cost-benefit analysis defending the rule.<sup>341</sup> The GAO is then to prepare a report on the rule to Congress within fifteen days of receipt.<sup>342</sup> In large part, the regulatory requirement affects only those rules that have an annual effect on the economy of one hundred million dollars or more, result in

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337. See Exec. Order No. 12,866 § 3(d), 3 C.F.R. 636, 641 (1994), *reprinted in* 5 U.S.C. § 601 app. at 557-61 (1994). For the sake of consistency, the one hundred million dollar threshold in the Executive Order should apply to dispositions as well, as long as the amount is calculated based on the fair market value of the assets to be leased or sold. Agencies should proceed slowly when disposing of assets with a value of that magnitude. At a minimum, the FCC auctions, RTC sales, HUD sales, and Department of Interior's sales under the 1872 Mining Law, and leases under the 1920 Mineral Leasing Act and Outer Continental Shelf Act would all fall within the revised Order.

338. See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). That Act is a smaller part of the Contract with America Advancement Act of 1996.

339. See 5 U.S.C. § 801(a)(1)(A) (Supp. III 1997).

340. *Id.* § 804(3) (incorporating 5 U.S.C. § 551(4)).

341. See *id.* § 801(a).

342. See *id.* § 801(a)(2)(A).

a steep increase in prices, or have a significant adverse effect on competition, jobs, investment or productivity.<sup>343</sup>

The Regulatory Enforcement Fairness Act in a sense mirrors OMB oversight under Executive Order 12,866, and indeed its definition of significant rule is congruent with the Executive Order's definition of regulation. Congress should have time to ensure both the efficacy of proposed rules and their consistency with congressional policy before the rules take effect. Through the procedures delineated, Congress will have greater information and ability to assess the impact of agency proposals and determine whether—subject to the usual lobbying—to reject the agency rule before it takes effect.

In turn, agencies, realizing that their proposed regulations must be submitted to Congress before they take effect, may be more careful in crafting rules to minimize the chance for controversy when reviewed by Congress. Agencies may cater to the same interest groups that they believe have Congress's ear, but the Act in any event forces them to defend the regulation on terms that both will help the regulation escape the congressional roadblock and subsequently find judicial sanction. Congress, for its part, cannot as readily pretend that agency regulations had not received congressional approval.<sup>344</sup>

But, just as Executive Order 12,866 apparently exempts disposition decisions from the purview of regulations covered, so does the Regulatory Enforcement Fairness Act. Agency decisions to sell substantial amounts of timber<sup>345</sup> or to forego debt owed from the electromagnetic spectrum auction should be subject to the same congressional review as the more familiar environmental or OSHA regulations. Nonetheless, such determinations cannot be considered rules, for they are not "statement[s] of general or particular applicability." Some agency determinations governing disposition determinations, such as that setting forth a particular auction mechanism, qualify as rules and thus may be subject to the Act. But the sales, leases, or donations themselves will escape such congressional scrutiny. Thus, despite the mixed blessings of the Act,<sup>346</sup> we urge amending the Regulatory Enforcement Fairness Act to include disposition decisions within its scope.

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343. *See id.* § 804(2).

344. Congress also recently considered H.R. 1036, the Congressional Responsibility Act of 1997, which would require Congress to pass on every substantive regulation, apparently of any scope, formulated by an agency.

345. *Cf. supra* note 176.

346. *See generally* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997).

*D. PAYGO Restraints*

Greater judicial and OMB involvement in agency disposition of assets, at least in areas not protected by market checks, would be a welcome reform. Congress, moreover, can monitor agency disposition decisions more directly through mechanisms such as the Regulatory Enforcement Fairness Act. Greater checks on Congress itself would provide a needed complement—restraints on agencies minimize but hardly prevent congressional give-aways. Although we are not sanguine about the political prospects for any such measures, Congress's track record of blocking reform in the mining area and in divesting electromagnetic spectrum highlight the need for further reform.

A central tenet of our analysis is that we should view property disposition decisions as a type of regulation. And, as with other regulations, wasteful disposition decisions can impose considerable hidden expenses on the public. The government can cost the taxpayers as much by donating mineral rights or electromagnetic spectrum as it can by building unneeded bridges, funding inefficient social welfare programs, or by imposing costly regulations on firms. Once this equivalence is understood, then Congress should subject disposition decisions to the same constraints limiting other spending decisions.

For one example, as part of the Budget Enforcement Act of 1990, Congress initiated a pay-as-you-go or PAYGO mechanism.<sup>347</sup> Each new congressional expenditure must be matched either by increased taxation or by legislation generating additional revenues to counteract the increased spending. If Congress fails in any fiscal year to meet new spending with reductions elsewhere, certain direct spending programs are automatically cut.<sup>348</sup> PAYGO strives to prevent new legislation from increasing the budget deficit or cutting into any surplus.

PAYGO, however, applies only to direct spending and revenue legislation, not below-market sales or leases of government assets. The conceptual failure to link disposition decisions such as grazing fee subsidies or below-market timber sales with more conventional direct spending such as agricultural support payments or establishment of new roads in the national forests is unfortunate. Congress has missed, perhaps intentionally, an opportunity to constrain wasteful government practices. Under PAYGO, ironically, below-market

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347. See 2 U.S.C. § 902 (1994 & Supp. III 1997).

348. See generally Garrett, *Harnessing Politics*, *supra* note 239, at 507-14.

dispositions of government assets could be considered the additional revenue needed to offset direct spending. Agencies have sold assets to avoid budget limits in the past.<sup>349</sup> Including below-market dispositions in the congressional expenditures subject to PAYGO<sup>350</sup> would have the salutary effect of forcing Congress more directly to internalize the "losses" from such disposition determinations.<sup>351</sup>

### CONCLUSION

No one reform is likely to convert myriad agency disposition practices to market-type efficiency overnight; nor should it, given the many valuable nonmonetary goals underlying the disparate schemes. Such aims, however, underscore the difficulty in monitoring disposition determinations, highlighting the need for both greater oversight and attention to maximizing the return on public assets. Below-market dispositions of government assets likely rob taxpayers of billions of dollars each year. Given interest group lobbying and the incentives facing both members of Congress and agency bureaucrats, fundamental change cannot be expected shortly.

We have suggested that part of the contemporary failure to monitor government property disposition effectively stems from our political history, and part as well from an outmoded understanding of

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349. See, e.g., Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1481-87 (1997); see also Johanna H. Wald, *The Presidio Trust and our National Parks: Not a model to be Trusted*, 28 GOLDEN GATE U. L. REV. 369, 376-77 (1998).

350. Consideration of more complete budget reform falls outside the scope of this Article. For instance, one critical problem rests with our budget's cash flow premise. See generally Garrett, *Harnessing Politics*, *supra* note 239.

351. For another example of reform at the congressional level, Congress in the Line Item Veto Act, 2 U.S.C. §§ 681, 691-692 (Supp. III 1997), recently invalidated by the Supreme Court, see *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), had sought to minimize "runaway federal spending and a rising national debt." 2 U.S.C. § 691(a). The Act empowered the President to "cancel" certain new direct spending, specific dollar amounts of discretionary budget authority, and limited tax benefits that were signed into law under Article I, section 7 of the Constitution. The Act included discretionary budget authority for items such as new tanks, government buildings, and irrigation projects, as well as direct spending authorized by law other than an appropriation law, such as for farm subsidies or entitlements. See *id.* § 691e(5). The giveaway or subsidized sale of mining rights or of the electromagnetic spectrum, however, escaped the discipline of the Line Item Veto Act. An award of a pioneer preference, or a statute granting a waiver of mining access fees, should be subject to the same constraints as statutes establishing a federal telecommunications research center or construction of a dam in a national forest. The risks of interest group pressure on legislators are comparable in both contexts. Others have suggested a more substantial role for the President in related budget areas. See Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737 (1992).

administrative regulation in this country. Courts and commentators have simply failed to appreciate the imperative to understand disposition decisions as regulation, and to impose oversight mechanisms accordingly. Procedural changes of the type we have sketched above will at least serve the heuristic value of stressing the regulatory nature of what has previously been cordoned off as sale and lease determinations. Property dispositions unquestionably affect behavior as well as the public fisc, and the public would benefit if Congress and the agencies proceeded more openly when selling, leasing, and giving away public property.

