

THE LAND USE - ENVIRONMENTAL LAW DISTINCTION: A GEO-FEMINIST CRITIQUE

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The ability of thought to transcend the circumstances in which it finds itself, its urge to create “other worlds,” is surely one source of our present environmental problems. It is also the wellspring of a hope that we might overcome such problems.¹

To the vast majority of lawyers the areas of land use planning and environmental regulation are distinct. The subjects are treated in separate courses in law schools, zoning ordinances differ from environmental laws, and professionals are identified as land use planners or environmental consultants. The distinction between land use and environmental regulation is also relevant in case law. It can be crucial in preemption cases and can also arise in sovereign immunity, intervention and standing disputes. Additionally, the distinction has surfaced in *Chevron* determinations and, in a subtle yet important way, it plays a role in regulatory takings cases.

Yet the persistent application of the distinction is both artificial and antiquated, impeding efforts to improve ecological well-being. History admittedly offers a partial explanation for the distinction, but that alone provides scant reason to accept it with a precedential nod. This is especially true today, when the dichotomy is being questioned and blurred in numerous ways. Instead, what is called for is a searching and critical examination.

Undoubtedly, there are many ways to analyze the distinction between land use and environmental regulation. Critiques based on feminism and geography offer two meaningful approaches. A feminist critique suggests that the distinction is an outgrowth of the male-female dualism that plagues western thought. Once characterized in

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1. MICK SMITH, AN ETHICS OF PLACE: RADICAL ECOLOGY, POSTMODERNITY AND SOCIAL THEORY 1 (2001).

this manner, the dichotomy can be shown to result in abstraction, homogenization and the domination of nature. To the extent the distinction severs decision-making from local ecological conditions, it can also be criticized from a geographic perspective. A geographic critique is also useful since the distinction often severs decision-making processes from local ecological conditions that are experienced by nearby residents. A geo-feminist critique integrates these two arguments into a more comprehensive attack against the abstract dualism that troubles the distinction.

Eliminating the distinction will not leave judges, legislators, environmental attorneys and land use planners adrift. Instead, their decision-making can be enlightened by an awareness that land use choices inevitably impact the environment and that significant local input ensures that environmentally sustainable choices are made. A decision-making paradigm based on sustainable environmental planning in the context of a particular land use scheme would merge issues traditionally associated with land use and environmental regulation and would respond favorably to the geo-feminist critique of the status quo.

This thesis could certainly be labeled radical, and as such is one that critics may summarily dismiss.² However, this article's critique is only one of many ways to challenge a distinction that is already dissolving. The geo-feminist critique raises property rights concerns as well, and for that reason a strong thread of property theory is woven throughout this article. Ultimately, the contextualized, integrative alternative approach to land use and environmental regulation which is suggested here reflects a new social construct of property rights—one that goes beyond the “background principles” test of *Lucas*.³

The history that gave rise to the land use planning-environmental regulation distinction (which from this point forward will be referred to as the land use-enviro distinction) and relevant case law are reviewed in the first two parts of this article. A discussion of various trends and non-feminist, non-geographic critiques that anticipate the distinction's demise follows. The next three sections of the article explore feminist, geographical, and geo-feminist analyses as viable critiques of the distinction. Finally, the article promotes contextualized

2. See Keith Hirokawa, *Some Pragmatic Observations about Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225, 227, 236-39 (2001) (describing ecofeminism as a radical perspective).

3. See *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992); *infra* text accompanying notes 122–26.

sustainable planning as a viable alternative and considers its impact on the type of cases that have traditionally relied on the distinction.

I. HISTORY

The land use-enviro dichotomy is largely an outgrowth of history. The two fields developed separately, each enjoying a heyday during different decades of the twentieth century. They also evolved as abstract areas of law in the sense that their foundations were largely disconnected from land-related concerns. While it is true that environmental regulation targets problems with natural resources and is arguably concerned with the land to some degree, its history has been focused predominantly on social policies rather than the land itself. While it is true that the complexity of land use and environmental regulation has grown over the years, and that overlap between them is becoming more common, nevertheless land use and environmental law remain distinct.

One common ground between land use and environmental regulation is their entanglement with property law. This is not surprising given the dominance of property rights issues in land use and environmental decision-making.⁴ Not only is legislation routinely crafted with property rights in mind, but charges of regulatory takings are often leveled against zoning ordinances and environmental laws.⁵ Although it is not the purpose of this article to provide an exhaustive analysis of the property-environment debate, a few remarks regarding the history of property rights will provide a helpful context for the balance of this historical survey.

Property law, of course, pre-dates land use and environmental regulation, which are themselves “as old as the hills.”⁶ The history relevant to this article, however, begins in the nineteenth century. By that time the natural law conception of property had been discarded in favor of a socially constructed model, built upon the idea that

4. See Hirokawa, *supra* note 2, at 233 (“[A]lthough the property right is likely not a fundamental principle supporting environmental law, environmental law nonetheless operates in the context of, and subject to, the pervasiveness of the property paradigm.”).

5. Two recent examples are *Town of Flower Mound v. Stafford Estates, Ltd. P’ship*, 71 S.W. 3d 18 (Tex. App. 2002) (successful challenge brought against a plat approval law) and *Gazza v. N. Y. Dep’t of Env’tl. Conservation*, 679 N.E. 2d 1035 (N.Y. 1997) (building variance denial due to wetlands regulation held not a taking).

6. Marc R. Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43, 59 (1997).

property rights exist to serve social goals.⁷ The Enlightenment had much to do with this view of property. Beginning in the seventeenth century, philosophers focused on humans rather than nature; a disdain for religion led to confidence in the triumph of human reason, science and technology.⁸ Intellectual freedom, toleration, equality and community were viewed as necessary for society's progression. These ideals eventually led to the rise of capitalism and the marketplace, where the autonomous individual reigned.⁹ In time, the Enlightenment practice of scientific inquiry was applied to law;¹⁰ concepts such as freedom of contract emerged, transforming private property rights.¹¹

The policies initially advanced by the law of property included the promotion of economic growth and the protection of investments and privacy.¹² Those objectives have not remained fixed, however. Over time, advances in science, technology and moral attitudes have led to changes in property norms.¹³ The evolution has been slow, a product of deliberate negotiation at various institutional levels, yet change has occurred.¹⁴ In the process, property law has become more intricate and socially responsive than ever.¹⁵

Land use statutes grew out of the common law's limits on property, most notably the restrictions imposed by nuisance law.¹⁶ Zoning

7. Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L. Q.* 574, 575-76 (1999). In contrast, Thomas Hobbes, writing during the seventeenth century, focused on natural law, and observed that the ordered operation of a state depended on "a rational system of rules derived by the application of logic and deductive syllogistic reasoning to a set of definitions, names, and meanings derived from experience." CAROLYN MERCHANT, *THE DEATH OF NATURE* 213-14 (1980).

8. David M. Warner, *Time for a New Enlightenment*, 34 *AM. BUS. L.J.* 455, 460 (1997).

9. See *Id.* at 474. Professor Warner argues that the vestiges of the Enlightenment have left us with an amoral world of science and self-gratification. *Id.* at 475-76. The rise of pre-industrial capitalism in England occurred during the late sixteenth and early seventeenth centuries, at a time when the patriarchal family was an important social institution. MERCHANT, *supra* note 7, at 173-78. It was the age of Francis Bacon, who championed the scientific method and the idea of man's conquest of nature. *Id.* at 169-72. "The Baconian program, so important to the rise of Western science, contained within it a set of attitudes about nature and the scientist that reinforced the tendencies toward growth and progress inherent in early capitalism." *Id.* at 185.

10. Warner, *supra* note 8, at 473.

11. *Id.* at 475.

12. See Freyfogle, *supra* note 7, at 583.

13. Poirier, *supra* note 6, at 48; Freyfogle, *supra* note 7, at 577-78.

14. Poirier, *supra* note 6, at 48.

15. See Freyfogle, *supra* note 7, at 578.

16. Robert H. Cutting, "One Man's Ceiling is Another Man's Floor": Property Rights as the Double-Edged Sword, 31 *ENVTL. L.* 8, 861 (2001).

laws—the original land use statutes—represented the first legislative efforts targeting externalities.¹⁷ Beginning in the early twentieth century, Euclidian-style ordinances were enacted by local governments with state authorization. Today, the vast majority of land use law-making continues to be accomplished at the local level with state support.¹⁸

As it is traditionally described, the history of land use reflects a move away from a decentralized system, which allowed private landowners to make their own land use decisions, to one that is increasingly regulated and centralized.¹⁹ By 1930's, land use laws were ubiquitous. These early zoning efforts effectively codified nuisance law.²⁰ Provisions that segregated land uses, restricted building heights, and mandated setbacks were common.²¹ Incompatible land uses were the main focus of these ordinances, but noise and odors were also targeted. As the twentieth century progressed, land use regulations targeted broader interests, including the protection of property values, population control,²² and historic preservation.²³ Aesthetic zoning has also become popular, as have ordinances that address environmental concerns.²⁴ Today's land use regulation has, in many ways, moved well beyond nuisance prevention and increasingly strives to protect public amenities.²⁵ In the process, private land ownership has taken on a public character.²⁶

Recently, this familiar history of land use law has been called into question. Scholarship reveals that, as early as the colonial period, private property in America was subject to intrusive land use regula-

17. *Id.* at 859.

18. Jerold S. Kayden, *National Land Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J. L. & POL'Y 445, 449 (2000). Zoning authority arises from a state's police powers, which allow it and local governments to promulgate regulations to protect human health, safety and welfare. John R. Nolon, *The Importance of Local Environmental Law*, 5 PACE CENTER FOR ENVTL. L. STUDIES 1, 4 (2001).

19. Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L. J. 95, 96 (2000).

20. Kayden, *supra* note 18, at 461.

21. Nolon, *supra* note 18, at 4.

22. Nolon, *supra* note 18, at 4.

23. Cutting, *supra* note 16, at 861.

24. *Id.*; Morriss & Meiners, *supra* note 19, at 96.

25. Melvyn R. Durchslag, *Village of Euclid v. Ambler Realty Co., Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE WEST. RES. L. REV. 645, 646-47 (2001).

26. *Id.*

tion.²⁷ Restrictions during the eighteenth century were extensive, a fact which challenges the widely-held belief that, barring the creation of a nuisance, colonial landowners were generally free to do whatever they wished with their land.²⁸ Early laws included those that imposed aesthetic requirements and others that effected forfeitures of private land that was left undeveloped.²⁹ Many of these restrictions were not merely aimed at preventing nuisances, but rather sought “to exact positive benefits from landowners that would be useful to others in the community.”³⁰ Rather than being considered wholly autonomous individuals, landowners of this period were more akin to stewards who used their land for public as well as private purposes.³¹ Further, there was a clear understanding of the difference between land use regulation—which was deemed permissible—and physical appropriation of land—which was compensable.³² This revised picture of early land use regulation raises important questions about current constitutional jurisprudence that is so highly protective of private property rights.³³

The very local focus of land use regulation was on the brink of dramatic change in the early 1970’s. Building upon the passage of the National Environmental Policy Act (NEPA),³⁴ Senator Henry Jackson led the fight for legislation that would have provided funding for states to plan in conformance with national land use guidelines.³⁵ Despite support from many sources, including the Nixon administration,

27. See John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 N.W. U. L. REV. 1099 (2000). Professor Joseph Sax has noted this reality as well. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1453 (1993).

28. See Hart, *supra* note 27, at 1104.

29. *Id.* at 1123-26. Other laws allowed private mill owners to use or condemn adjoining private lands under certain conditions, authorized a majority of wetland landowners to impose their desire to drain property on their neighbors, compelled private lands to be used for mining, enforced cooperation to create and maintain common fields, and intruded into the lives of landowners who let their land lay idle. See generally *id.* at 1107-31.

30. *Id.* at 1130, 1149.

31. *Id.* at 1131.

32. *Id.* at 1139. Hart further demonstrates that aggressive land use regulation continued after the formation of the Republic into the territorial period. *Id.* at 1143-44.

33. *Id.* at 1104. Hart notes that the free and unfettered use of property notion has wrongly informed takings jurisprudence since *Pennsylvania Coal v. Mahon*. *Id.* See also Sax, *supra* note 27, at 1453 (“[P]rivatization was never as complete as is often assumed today.”).

34. NEPA announces a national environmental policy and requires federal agencies to consider the environmental impact of major projects. See 42 U.S.C. §§ 4331-32 (1994).

35. Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land-Use Legislation*, 28 URB. LAW. 7, 9-14 (1996).

the effort failed to garner sufficient congressional support.³⁶ The collapse of Senator Jackson's initiative and the rejection of national land use planning represented a critical step in the nation's land use and environmental history. Thereafter, thoughts of a national, comprehensive land use framework were cast aside in favor of media-specific pollution control legislation. The era of federal environmental law was underway.

The advent of environmental law in America thus occurred several decades after land use regulation was firmly in place, but once the environmental agenda took hold, laws were promulgated with remarkable speed.³⁷ The Commerce Clause provided constitutional authority for the new legislation,³⁸ and there were strong philosophical underpinnings as well. Rachel Carson's influence cannot be understated. Her belief in a basic human right to be free from man-made toxins, in the need to protect species and habitat diversity, and in a moral obligation to protect the natural environment resonated with the American public.³⁹ The writings of ecologist Aldo Leopold were also persuasive.⁴⁰ Some have characterized America's embrace of environmentalism as heroic, comparing Congress' rescue of the environment from destruction to the eurocentric theme of conquest and valor.⁴¹

Environmental law, like land use law, has grown in sophistication during its five decade-plus history. Its earliest efforts were directed at

36. *Id.* at 32–35. The Nixon administration's proposal was more limited; it would have focused state planning on selective area planning, instituting federal oversight only for areas of critical concern. *Id.* at 19–24.

37. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 105–07 (3d ed. 2000) (calling the years between 1970 and 1980 the “fourth phase” of federal environmental law and listing ten environmental statutes enacted during that decade alone: NEPA; the Clean Air Act; the Clean Water Act; the Federal Insecticide, Fungicide & Rodenticide Act; the Ocean Dumping Act; the Endangered Species Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; and the Comprehensive Environmental Response, Compensation and Liability Act).

38. See Peter M. Manus, *Natural Resource Damages from Rachel Carson's Perspective: A Rite of Spring in American Environmentalism*, 37 WM. & MARY L. REV. 381, 393 (1996).

39. See *id.* at 391–92.

40. See ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW, AND SOCIETY 7 (2d ed. 1998) (citing Leopold's 1948 book, *A Sand County Almanac*).

41. See Kayden, *supra* note 18, at 258–59. This view is just one example of the patriarchy that has played a dominant role in the land use-environmental regulation area. See *infra* text at notes 181–85.

conservation and the preservation of wilderness areas.⁴² During this era, new regulations protected private property and the economy by keeping them separate from environmental decision-making.⁴³ Later laws targeted pollution in specific media, resulting in today's familiar corpus of environmental statutes.⁴⁴ The legal framework was initially directed at public health rather than land use concerns,⁴⁵ but as the law moved into areas such as waste disposal, wetland development and preservation of green space, land use restrictions were more frequently included in environmental regulations.⁴⁶ Despite this development, the current federal environmental law complex falls far short of a coordinated and comprehensive land use system.⁴⁷

Throughout its maturation, environmental law has kept private property interests largely intact,⁴⁸ helping to service what Professor Joseph Sax refers to as the "transformative economy."⁴⁹ Under environmentalism as it ultimately developed, land remains passive, and landowners retain a great deal of freedom to transform it however they wish.⁵⁰ This separation of environmental regulation from the land has engendered the abstraction alluded to earlier, by divorcing the environment from personal experience.⁵¹

When measured against the foundational philosophies of Rachel Carson and Aldo Leopold, the federal environmental regulatory system is less than satisfying. It is replete with command and control laws that conserve resources and limit the discharge of pollutants. Existing legislation regulates what people do but in no way requires a philosophical shift.⁵² Critics charge that environmentalism has been "mainstreamed," fashioned by an elitism that seeks to protect those who live in suburbs and rural areas from the ills of the city.⁵³ They point to the lack of effort to link the environment with the economy

42. Robert R. M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L. J. 23, 38 (1996); Sax, *supra* note 27, at 1443-44; *see also* PERCIVAL ET AL., *supra* note 37, at 101.

43. *See* Sax, *supra* note 27, at 1443-44.

44. *See* Verchick, *supra* note 42, at 38, 46.

45. *See* Kayden, *supra* note 18, at 461.

46. *Id.* at 461-62.

47. *Id.* at 472.

48. *See* Sax, *supra* note 27, at 1444.

49. *Id.* at 1442.

50. *Id.*

51. *See* Verchick, *supra* note 42, at 46-47.

52. Peter M. Manus, *The Owl, the Indian, the Feminist, and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 271 (1996)].

53. *Id.* at 285-86.

or social equity.⁵⁴ Instead, the majority of environmental laws are one dimensional, resulting in narrowly-focused and linear decision-making.⁵⁵ If anything, today's environmental law has retreated from early environmental initiatives that seemed to embrace an ecologically-based philosophy.⁵⁶

Land use regulation and environmental law thus developed on two different tracks, beginning at two different times. And despite areas of overlap, the present regulatory system retains the distinction between land use and environmental regulation. The failure of the present regulatory system to more fully confront its interface with property rights further contributes to the awkward and artificial bifurcation in existence today. The result is a legal framework that often fails to consider the land and people who are directly affected by the laws. This is perhaps the greatest failure of the land use-enviro distinction, but it is one that can be addressed by a more integrative approach.

II. APPLICATIONS

The legal implications of the land use-enviro distinction are numerous and often significant. The following examples represent a mere sampling of the many ways the distinction colors decisions affecting the environment. It plays a role in preemption cases, where courts respond by parsing statutes in strained and often contradictory ways. A similar response is undertaken in sovereign immunity and *Chevron* disputes. The dichotomy can also arise in standing and intervention cases, leading courts to focus not only on statutory meaning, but also on the disputing parties' interests. And in a more indirect but important way, the distinction plays a role in regulatory takings cases. In all these situations, the distinction provides judges with a tool of abstraction that allows them to preserve the status quo while hindering ecologically sound decision-making.

In the federal preemption case of *California Coastal Commission v. Granite Rock Co.*, the Supreme Court was asked to determine whether the Coastal Commission's permit requirement was pre-

54. See J.B. Ruhl, *Sustainable Development; A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 32–34 (1999). Professor Ruhl suggests that environmental law is divided between resourcism—a policy relying on market forces to channel the consumption of resources and environmental protection—and environmentalism—which relies instead on more collective approaches. *Id.* at 34.

55. See *id.* at 46, 48.

56. See Manus, *supra* note 38, at 431.

empted by various federal land use statutes and Forest Service regulations.⁵⁷ The Court held that Granite Rock, having already obtained Forest Service permission to mine limestone on federal lands, was required to obtain a permit from the Commission.⁵⁸

Justice O'Connor, writing for the Court, rejected Granite Rock's argument that the state permit requirement was preempted, reasoning that the Commission, through its permit scheme, sought to impose environmental restrictions while the Forest Service was concerned with regulating land use.⁵⁹ In highlighting the distinction Justice O'Connor wrote:

The line between environmental regulation and land use planning will not always be bright However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.⁶⁰

The Court held that the state could engage in reasonable environmental regulation without being preempted by the federal land use laws at issue.⁶¹ Importantly, the Court believed Congress recognized the distinction and showed no intent to preempt state regulation.⁶²

Justice Powell, dissenting, questioned whether Congress understood the distinction between land use and environmental regulation. He found the majority's distinction to be illogical and based on an erroneous interpretation of the statutes:

A section [of a statute] mandating consideration of environmental standards in the formulation of land use plans does not demonstrate a general separation between 'land use planning' and 'environmental regulation.' Rather, [the statute] recognizes that the Secretary's land use planning will affect the environment, and thus directs the Secretary to comply with certain pollution standards.⁶³

Justices Scalia and White also dissented. They applied the distinction without elaboration, but felt the state permit was preempted

57. 480 U.S. 572, 575 (1987). Traditional preemption analysis looks to see whether there is a congressional intent to occupy the field, whether state law either conflicts with federal law, or whether it impedes Congressional objectives. *Id.* at 581.

58. *Id.* at 576, 581-87.

59. *Id.* at 582.

60. *Id.* at 587.

61. *Id.* at 589.

62. *Id.* at 588, 589-93.

63. *Id.* at 601.

because, in their view, the Commission's permit authority was related to land use control rather than environmental regulation.⁶⁴

On its face the distinction appears to offer a workable preemption test, but *Granite Rock* illustrates its weaknesses. First, a distinction-oriented test is unpredictable; those justices who recognized the distinction arrived at different views of the same statutory scheme. Second, the distinction defies logic; it is folly to mince words in order to separate land use and environmental terminology when the reality is that land use decisions invariably affect the environment.

Professor Eric Freyfogle has analyzed *Granite Rock* in terms of institutional competence, inquiring whether it is best for state or federal institutions to have the authority to regulate private actions on federal lands.⁶⁵ He argues that any distinction between land use and environmental regulations is vague and uncertain, and warns that it can lead to inconsistent decisions and manipulation by the regulated community.⁶⁶ Instead of placing similar disputes in the hands of courts, he suggests that preemption decisions should be made at the lowest level, where local federal agency personnel make the ultimate land use decisions.⁶⁷ Under a local, site-specific analysis, preemption would occur only when a determination is made that federal regulations should operate to the exclusion of state and local law.⁶⁸

The flaw of *Granite Rock* is not merely its reliance on a vague distinction that is both illogical and difficult to apply, but also its failure to allow preemption questions to be addressed by those closest to the dispute and the land in question. The Court's preemption analysis, which instead unfolds at higher and more abstract levels, frustrates the creativity and flexibility that could be achieved by local decision-making.⁶⁹

64. *Id.* at 607-08.

65. See Eric T. Freyfogle, *Granite Rock: Institutional Competence and the State Role in Federal Land Planning*, 59 U. COLO. L. REV. 475 (1988).

66. *Id.* at 477, 480. For example, the same law could prohibit uses in one area and allow them in others, rendering it unreasonable environmental regulation in one instance and reasonable in the next. In addition, an entity might purposely create situations where a local law would prohibit activity. Professor Freyfogle also points out that the rule of *Granite Rock* would deem a state law that puts a marginally financially viable operation out of business unreasonable and thus preempted, while no preemption would exist if the same law was applied to an economically viable concern. *Id.* at 480-81.

67. *Id.* at 477.

68. *Id.*

69. *Id.* at 514-15. For other preemption cases that rely on the distinction, see *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47 (D. Me. 2000) (dealing with state environmental board's imposition of state's site law on nuclear power company's transfer of spent nu-

Chevron disputes raise the same concerns. Under the traditional *Chevron* analysis, courts will defer to a reasonable agency interpretation of a federal statute if the law is silent on the issue.⁷⁰ In the recent case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court held that the Corps' Migratory Bird Rule, as applied to isolated gravel pits, exceeded the Corps' jurisdiction under the Clean Water Act.⁷¹ The respondents argued for agency deference under *Chevron* because of the Clean Water Act's silence regarding the Corps' power over isolated, non-navigable wetlands.⁷² The Court refused the invitation to defer, reasoning that caution is called for when an agency's interpretation of a statute nears the limits of congressional power. This can occur when a statutory interpretation authorizes the federal government to encroach on powers traditionally reserved for the states.⁷³ Applying this limitation, the Court reasoned that allowing the Corps to extend its jurisdiction to isolated gravel pits under the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use."⁷⁴ Even though the Corps' jurisdiction arose under the Clean Water Act—clearly an environmental statute—the Court characterized the Migratory Bird Rule as a land use measure.

It is reasonable to ask whether the result would have been the same if the Court had determined that the Migratory Bird Rule, as interpreted by the Corps, was an environmental, rather than a land use, regulation. Because the federal government has broad authority to deal with environmental matters under the Commerce Clause,⁷⁵ it is possible that the Court might have shown greater deference to the agency had the rule been characterized as environmental. Under that portrayal, there would be less danger of the agency treading on an

clear fuel to a new storage facility) and *Ogden Environmental Services v. San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988) (holding RCRA preempted city's denial of a conditional use permit to federal permittee which sought to build an advanced-technology incinerator in the city).

70. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The *Chevron* two-step analysis first inquires whether Congressional intent is clearly reflected in the statutory language. If so, the court will determine the meaning of the language. However, if the intent is unclear, the court will proceed to *Chevron's* second step and defer to an agency's reasonable interpretation of the law. See PLATER ET AL., *supra* note 40, at 429.

71. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

72. *Id.* at 172.

73. *Id.* at 172-73.

74. *Id.* at 174.

75. See *supra* text accompanying note 38.

area of state power. Thus, in cases involving federal agency interpretation of a statute that could be characterized as either a land use or an environmental measure, the former construction arguably allows courts to be less deferential to the agency than if the provision was characterized as an environmental regulation. And, as in preemption cases, the ultimate decision rests on statutory construction.

The preemption and *Chevron* examples illustrate how the judiciary resolves land use-enviro distinction issues by resorting to statutory interpretation. There are other examples as well. In *Friends of the Earth v. United States Navy*,⁷⁶ the Navy challenged FOE's suit by arguing that it was protected by sovereign immunity under the Clean Water Act. The Navy planned to construct a new port facility and had been issued a city permit under Washington state's Shoreline Management Act. FOE sued to have the permitting decision reviewed and to enjoin the Navy from spending any funds on the project under the 1987 National Defense Authorization Act prior to the completion of the review process.⁷⁷ The Navy acknowledged that the Clean Water Act waives the federal government's sovereign immunity as far as state water pollution regulation is concerned,⁷⁸ but argued that the state permit requirement was part of a state land use program and therefore immunity was not waived.⁷⁹ The court reviewed the relevant statutory language and held that the state's implementation of the Coastal Zone Management Act through its Shoreline Management Act represented a "mixed" program that incorporated both land use and environmental measures. Because the statute addressed water pollution to some degree, sovereign immunity was waived.⁸⁰

The distinction can arise in other contexts as well, leading courts to focus not only on statutory language but also on the interests of the parties. For example, the distinction could become relevant when seeking intervention under Federal Rule of Civil Procedure 24(a)(2).⁸¹ One of the rule's requirements is that the applicant show

76. 841 F.2d 929 (9th Cir. 1988).

77. *Id.* at 929-30.

78. *Id.* at 934-35. The pertinent sections of the Clean Water Act are 33 U.S.C. §§ 1323 and 1344(t) (2000).

79. *Id.* at 935.

80. *Id.* at 935-36.

81. *See* *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 56 (D. Me. 2000). Federal Rule of Civil Procedure 24 (a) (2) provides, "Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the

that its interest will not be adequately represented by existing parties.⁸² The rule requires a court to determine whether an applicant's interest is identical to that of one of the parties; if so, intervention will be denied.⁸³ The distinction between land use and environmental regulation could become relevant in cases involving a state environmental agency's permitting of a new facility. If an organization promoting wise land use sought to intervene in such a dispute, it could argue that its land use interests are distinct from the environmental concerns of the state environmental board. If a court agreed, intervention would be allowed. On the other hand, under a strict application of the distinction, a party devoted to environmental causes might be prevented from intervening. In both situations, courts would make their decisions in the abstract, by focusing only on the characterizations of the organizations' interests. In the latter situation, however, there is a risk that diverse perspectives specific to the people and locale at issue would be unrepresented.

The distinction could be applied in a similar manner in standing disputes arising under the Administrative Procedure Act (APA).⁸⁴ In order to bring an action under the APA a plaintiff must demonstrate standing under Article III of the Constitution and also claim an injury that is within the zone of interests protected by the statute that has allegedly been violated.⁸⁵ To determine whether this test is met, a court will ask whether "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."⁸⁶ The test is not a demanding one; there is no requirement that the statute must indicate an intent to benefit the particular plaintiff.⁸⁷ Nevertheless, strict adherence to the distinction could prevent an environmental plaintiff from gaining APA standing for an alleged violation of a federal land use provision, or prevent a plaintiff organization devoted to land use issues from suing under a federal environmental

disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

82. *Maine Yankee*, 107 F. Supp. at 56 (citing *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989)).

83. *Id.* at 56.

84. 5 U.S.C. § 702 (2000). The APA allows individuals to bring suit to redress agency wrongdoing.

85. See *Friends of the Earth*, 841 F.2d at 931-32.

86. *Id.* at 932 (quoting *Clark v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

87. *Id.*

law. In either case, a court will examine the party's interests to determine if they are aligned with those of the relevant statute. If a court is convinced that the plaintiff's interests are only marginally related to those addressed by the statute, APA standing will not exist. Once again, the decision would not necessarily be tied to the specific land and people at issue, but would rest instead on the statute's terminology and a determination of the plaintiff's generalized interests.

In a more far-reaching way, the distinction lurks in regulatory takings cases. As enunciated by the Supreme Court in *Lucas v. South Carolina Coastal Council*, a regulatory taking occurs and compensation must be paid unless a regulation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁸⁸ Pursuant to this test, a land use regulation that prohibits all economically beneficial use of land will be valid only if based on pre-existing common law nuisance principles. In most instances the ordinary regulation of industry, including most environmental regulation, will not raise taking concerns. However, states cannot require owners to leave their land in its natural state in order to protect an endangered ecosystem unless compensation is paid, since that type of involvement would exceed the reach of traditional nuisance law.⁸⁹

Professor Sax points out that that the *Lucas* Court chose to protect the customary view of property rights rather than adopt one that is more sensitive to ecological needs. He also suggests that the case set up a dichotomy between laws that seek to maintain land in its natural state and those that are traditionally seen as derived from the police power.⁹⁰ Under *Lucas*, conventional land use laws such as zoning ordinances will not violate the takings clause.⁹¹ On the other hand, environmental laws devoted to the preservation of ecosystems or species may be invalid. Thus, under *Lucas*, regulatory taking disputes may hinge on the land use-enviro distinction. The Court merely colored the distinction differently, as one between nuisance-based and all other land use laws.

88. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (accepting the argument of a private property owner who claimed that a state restriction on wetlands development deprived him of the entire economic value of his land).

89. See Sax, *supra* note 27, at 1438. *Lucas* authorizes confiscatory land use regulation only when the prohibited uses are "not part of [an owner's] title to begin with." 505 U.S. at 1027.

90. *Id.* at 1439, 1441.

91. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926), the case that validated zoning, Justice Sutherland reasoned that nuisance law is helpful in determining whether regulatory land use ordinances are permissible under the police power.

Professor Sax suggests yet another distinction. He writes that Justice Scalia's decision protects the transformative economic view of property rights—one that sees land as passive and that allows land owners to transform their land however they wish. The Court refused to adopt a nature-based economic view of property—one that sees land as active and that respects ecosystem services and boundaries.⁹² Again, there is an analogy between Sax' property dichotomy and the land use-enviro distinction. Land use decisions are based on choices that determine how land will be used. Those decisions typically serve the transformative economy because land use decision-makers see land as passive, in need of human order and development. Environmental decisions, although tied to various social policies, bear at least some relationship to land. Environmental regulation thus serves the economy of nature, especially those laws that encourage ecosystem management. The transformative-ecological distinction in property rights that Professor Sax draws corresponds not only to the *Lucas* test but also to the law's distinction between land use and environmental regulation. And as he makes clear, it is a distinction that can lead to ecologically unsound decisions.⁹³

This brief review of the legal implications of the land use-enviro distinction leads to four conclusions. First, the distinction is not one that has little practical effect. Rather it is implicated in a number of legal settings where it can have critical impact. Second, the distinction presents a formalistic test that is questionable in logic and unpredictable in application. Third, it stifles ecologically sound decision-making by providing courts with an abstract mechanism focused on statutory language, legislative intent, and the generalized interests of the parties rather than encouraging consideration of the specific locality and diverse interests which will be impacted by the decision. Finally, the continued application of the distinction works to preserve the dominant role of property rights in environmental law.

III. REALITIES

There are many indications that the land use–enviro distinction is losing force, despite its ongoing presence in the law. For example, a number of the familiar criticisms of mainstream environmentalism indirectly raise questions about the distinction.⁹⁴ In general, current

92. Sax, *supra* note 27, at 1441-42.

93. *Id.* at 1454-55.

94. The term “mainstream environmentalism” is borrowed from Professor Peter Manus, who uses it to describe the current state of federal environmental law, which he sees as driven

regulatory programs permit a certain amount of pollution and authorize enforcement actions against those who exceed the limits.⁹⁵ The focus is on the reduction of the total amount of pollution rather than its distribution.⁹⁶ This approach has been attacked as one-dimensional, costly, ineffective and troubled by conflicting laws.⁹⁷

There are other concerns as well. Those who approached environmental policy believing the earth's resources would somehow replenish themselves have begun to acknowledge that environmental decisions must become less concerned with protecting the economy and more mindful of nature's limitations.⁹⁸ An awareness has emerged that the nature-serves-mankind perspective must change.⁹⁹ On other fronts, advocates point to environmental law's failure to incorporate ecological concerns and human-oriented issues such as urban blight, housing problems, and environmental justice.¹⁰⁰ Importantly, many of the social ills that are now seen as integral to environmental decision-making are tied directly to unwise land use decisions.¹⁰¹

A different critique suggests that environmentalism has purposely evolved in ways that avoid greater self-sacrifice and behavior modification.¹⁰² “[C]ourts and legislators work to segregate and narrowly define environmental issues and decisions as a means of insulating and thus protecting the environmental cause from its persistent threat, the erosion of selflessness.”¹⁰³ One way this trend has manifested itself is in environmental law's hierarchical system, which continues to separate property rights from environmental interests.¹⁰⁴

The land use-enviro distinction allows the current system to persevere despite its numerous critics. The distinction is hard-wired into the deliberative process at the legislative and judicial levels, and by

by the market system and having a diluted political philosophy. See Manus, *supra* note 52, at 252-55. More generally, he uses the term to describe the environmental movement that evolved since the early 1960's and the body of law that currently dominates federal environmental regulation. *Id.* at 255 n. 29.

95. See Cutting, *supra* note 16, at 830-31.

96. See Verchick, *supra* note 42, at 66.

97. See Ruhl, *supra* note 54, at 43; Daly, *supra* note 35, at 8.

98. Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 349 (1992).

99. Warner, *supra* note 8, at 456.

100. See Daly, *supra* note 35, at 8; Manus, *supra* note 38, at 431.

101. See Daly, *supra* note 35, at 8-9.

102. See Manus, *supra* note 52, at 251-52.

103. *Id.* at 252.

104. See *id.* at 296.

keeping environmental matters separate from land use issues, it sets up a paradigm of exclusion rather than inclusion. Further, it frustrates the implementation of more integrated frameworks through which land use decisions could be made with a broad socio-ecological sensitivity.

Intricate legal tests and compartmentalization are endemic in mainstream environmentalism, so perhaps the longevity of the land use-enviro distinction should come as no surprise.¹⁰⁵ But it should be remembered that early in the environmental movement there was an opportunity to adopt a more holistic approach to the nation's land use and environmental problems. Those who lobbied for national land use legislation in the early 1970's recognized that land use and environmental decisions were linked:

To a very great extent all environmental management decisions are ultimately related to land use decisions. All environmental problems are outgrowths of land use patterns. The collective land use decisions which we make today and in the future will dictate our success in providing the American people with a quality life in quality surroundings.¹⁰⁶

Rather than being widely accepted, the distinction between land use and environmental measures was questioned in the earliest days of the environmental movement. Current scholarship similarly points out that "the intersection of environmental and land-use policy is becoming increasingly apparent."¹⁰⁷ There is a realization that land use problems are environmental problems and that local land use decisions often have environmental impacts beyond the area in which the land is located.¹⁰⁸

There are promising signs that environmental law is beginning to look beyond its traditional boundaries and embrace more integrative policies.¹⁰⁹ Efforts are being made to include broader social interests

105. Two of the many examples of environmental law's narrow focus and complexity include RCRA's solid waste definitional rules and the regulations governing new source review under the Clean Air Act. See respectively 42 U.S.C. § 6903 (27) (1994) and accompanying regulations at 40 C.F.R. § 261.2 (2001), and 42 U.S.C. § 7503 (1994) and accompanying regulations at 40 C.F.R. §§ 60.1-60.19 (2001).

106. See Daly, *supra* note 35, at 15 (quoting COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, BACKGROUND PAPERS ON PAST AND PENDING LEGISLATION AND THE ROLES OF THE EXECUTIVE BRANCH, CONGRESS, AND THE STATES IN LAND USE POLICY AND PLANNING, 92ND CONG., 2D SESS. (1972)).

107. See Kayden, *supra* note 18, at 456, 461-62.

108. See Freyfogle, *supra* note 7, at 580.

109. See Manus, *supra* note 52, at 298-99. Professor Manus hopes that environmental law will rediscover its more holistic and interconnected foundations, making it more aligned with Rachel Carson's philosophy. *Id.* at 299.

in environmental decision-making. More and more, environmental initiatives reflect an ecosystem awareness, where “[l]and is in service, [where] it is part of a community where single ownership of an ecological service is rare . . . and where [l]and has a dual purpose, both transformative and ecological.”¹¹⁰ At the same time, Americans are beginning to accept the idea that their behavior must change if the environment is to be preserved.¹¹¹

The gradual shift towards an awareness of the linkage between land use and environmental regulation has led to what some describe as “an unnoticed revolution” in the federal government’s regulation of development.¹¹² Increasingly, the federal government is taking steps to address the unfortunate results of misguided land use decisions.¹¹³ Some argue that the sum of those efforts, reflected in environmental, public land, transportation and housing laws, has established a de facto national land use planning scheme.¹¹⁴ Although the federal government’s involvement in land use is admittedly greater than many might realize, it still falls short of representing a coordinated national solution.¹¹⁵

Nevertheless, the federal government’s involvement in land use regulation has expanded, and as this has occurred states and local governments have become more active in environmental regulation. Current zoning ordinances now accomplish far more than prevention of the types of nuisances that underpinned *Euclid*. Local laws routinely address environmental matters such as wetland regulation and the preservation of green space and historic sites.¹¹⁶ This development, which has largely occurred within the last decade, suggests the emergence of a local environmental ethic.¹¹⁷ Even more certain is the

110. See Sax, *supra* note 27, at 1445 (listing this as one of a number of characteristics of the economy of nature).

111. Manus, *supra* note 52, at 298-99; Sagoff, *supra* note 98, at 351-52

112. See Peter A. Buchsbaum, James E. Brookshire & Roger Platt, *The Federal Government and Land Use: The Not So Quiet Evolution Continues*, 28 URB. LAW. 517 (1996).

113. JOHN NOLON, WELL GROUNDED; USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 15 (ELI 2001).

114. Kayden, *supra* note 18, at 453.

115. Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 URB. LAW. 589, 593 (1993). Mr. Buchsbaum mentions the land use components of the Clean Water Act’s wetlands regulation and various provisions of the Clean Air Act and the Intermodal Surface Transportation Efficiency Act. *Id.* at 593, 623-25.

116. See Durschlag, *supra* note 25, at 646-47; see also Morriss & Meiners, *supra* note 19 at 96 (ultimately arguing that the common law is a preferable alternative to complex land use planning).

117. See Nolon, *supra* note 18, at 4.

reality that it is increasingly difficult to label local laws as either purely land use or purely environmental measures.¹¹⁸

The apparent conflux of federal and local laws that deal with land use and environmental issues only enhances the confusion regarding the intersection of federal environmental laws and local land use laws.¹¹⁹ Yet it is clear that land use planning is becoming more common at the federal level and that environmental regulation is appearing more frequently at the local level.¹²⁰ At the very least this convergence suggests that the land use-enviro distinction is blurring.

Developments in property theory have accompanied the shift in land use and environmental regulation.¹²¹ Arguments have been made that property norms have undergone an ecological transformation of sorts, becoming less abstract and more closely tied to land and community.¹²² It is suggested that “land health” has become one of the many goals that property law now serves, in addition to the protection of privacy and investments and the promotion of economic growth.¹²³ Property law’s response to environmental concerns reflects the social side of property, and in particular the American public’s growing acceptance of a balance between property and environmental rights.¹²⁴ It additionally reflects the reality that decisions regarding both property and environmental issues are ultimately about the distribution of rights.¹²⁵ Although this development has met with resistance at the judicial level,¹²⁶ there is little doubt that property law is being wooed by ecosystem demands.

118. See Freyfogle, *supra* note 65, at 487.

119. See NOLON, *supra* note 113, at 6.

120. See generally, Kayden, *supra* note 18.

121. This is not surprising, given the flexibility of the law in general and property law in particular. The idea that property rights are static and inviolate defies the history of property law; over time, private property rights have been restricted in various ways, responding to advances in science, changing morals and new technology. See Poirier, *supra* note 6, at 48. The changing goals of political forces ultimately shape the rights and obligations of property law. Freyfogle, *supra* note 7, at 578.

122. See generally Freyfogle, *supra* note 7, at 578.

123. *Id.* at 583-84. Professor Freyfogle suggests the emergence of a land ethic of care and ecological sensitivity. For an article discussing contrasting land ethics at work in the United States, see Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439 (1994).

124. See Poirier, *supra* note 6, at 56, 85.

125. *Id.* at 44.

126. See generally Sax, *supra* note 27. Professor Sax recognizes that ecological perspectives are becoming more prevalent and questions why the *Lucas* court failed to accommodate the economy of nature in some way in its decision. *Id.* at 1446. Sax believes property law is now

This re-shaping of property is evident in some of the more concrete examples of the distinction's dissolution. At the local level are smart growth initiatives that attack sprawl by channeling growth in ways that leave large expanses of the natural environment undisturbed.¹²⁷ Other examples include floating and overlay zones, including planned unit developments (PUDs), transferable development rights (TDRs), and other forms of incentive zoning.¹²⁸ All of these examples, which to varying degrees restrict the free development of property, have been utilized at least in part to protect environmental amenities.

There are state level examples as well, including NEPA-like laws that have been enacted in a number of jurisdictions. New York's State Environmental Quality Review Act (SEQRA), for example, requires local agencies to prepare environmental impact assessments for various projects.¹²⁹ An alternative approach has been taken by Pennsylvania, which recently amended its Municipalities Planning Code to require the state Department of Environmental Protection to take comprehensive planning and zoning ordinances into account when making permitting decisions.¹³⁰ Like the local examples, these state initiatives inject environmental concerns into property and land use decision-making.

Undoubtedly, the most significant example of the demise of the land use-enviro distinction is the global move toward sustainable development. Both the Rio Declaration and Agenda 21 call for integrated decision-making that would require the substantive integration

moving toward a response to ecosystem sensitivities, signaling an era when property rights will serve both the transformative and ecological economies. *Id.* at 1445.

127. *See* NOLON *supra* note 113, at 38-39.

128. *See generally id.* at 207-58.

129. *See id.* at 183; N.Y. ENVIR. CONSER. §§ 8-0101 et seq. (2002). SEQRA's purpose is "to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhanced human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." *Id.* at § 8-0101.

130. 53 P.S. § 10619.2 (a) (West Supp. 2002). The pertinent language provides that state agencies "shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the . . . permitting of . . . facilities." *Id.* Reliance on land use planning and zoning ordinance information is limited to situations where comprehensive zoning, joint zoning, or cooperative municipal agreements are in place. *See* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION POLICY OFFICE, POLICY FOR CONSIDERATION OF LOCAL COMPREHENSIVE PLANS AND ZONING ORDINANCES IN DEP REVIEW OF PERMITS FOR FACILITIES AND INFRASTRUCTURE, Document 012-0200-001, 1-2 (June 8, 2002).

of social, economic, and environmental issues.¹³¹ These principles were strongly endorsed by President Clinton's Commission on Sustainable Development, which expressed a need to replace past practices with a decision-making model that embraces the economy, environment, and social equity.¹³²

The goal of sustainable development is to achieve "a timeless, spatially seamless fusion—not separation—of environment, economy, and equity."¹³³ It stands in sharp contrast to the resource-directed environmentalism of today, which focuses on what is good for the current economy and individual environmental problems. The implementation of sustainable development will alter this paradigm in a complex way by seeking the "optimum maximization" of environment, economy, and equity at one place and at one time. It will further require repeated evaluation of decisions on various geographic and time scales.¹³⁴ Public participation and creativity will be part of the process, as will a reformulation of property law that integrates environmental, social and economic issues.¹³⁵ Sustainable development may be a long way from replacing mainstream environmentalism, but it is clear that the concept of sustainability is changing the regulatory landscape in ways that will further erode the land use-enviro distinction.¹³⁶

IV. FEMINISM

The legal picture that emerges from the foregoing discussion is hardly one where land use, environmental and property laws are discrete. Instead, the land use-enviro distinction appears to be crumbling, and property theory—if not its norms—is responding to this breakdown. This article might end here, since the eradication of the distinction seems certain. However, the metamorphosis from distinction to integration begs for a more searching analysis. Feminism offers one lens through which the distinction's demise can be more closely examined.

131. See John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 50 (1998). The Rio Declaration and Agenda 21 were drafted at the 1992 Earth Summit, convened in Rio de Janeiro. *Id.* at 3.

132. See Ruhl, *supra* note 54, at 39-40 (suggesting an algorithm to implement sustainable development).

133. *Id.* at 32.

134. See *id.* at 57.

135. See Dernbach, *supra* note 131, at 65, 80.

136. To put it in the words of Professor Ruhl, "Environmentalism is dead. Long live sustainable development." Ruhl, *supra* note 54, at 33.

Feminism has been described as “a self-consciously critical stance toward the existing order with respect to the various ways it affects different women ‘as women.’”¹³⁷ It becomes the voice of the “other” within what it sees as a patriarchal society.¹³⁸ An expansive view of feminism does not limit its focus to social domination based on sex; rather, it searches for domination of all kinds, including man’s domination of the natural environment.¹³⁹ It is a perspective that can help analyze and improve the law and one that has been applied to many legal areas.¹⁴⁰

While traditional legal methodology seeks predictability and certainty, feminist legal methods value flexibility in legal rules and seek to identify missing points of view.¹⁴¹ Three such methods are often associated with feminism: asking the “woman question,” feminist practical reasoning, and consciousness raising.¹⁴²

Asking the woman question strives to uncover gender implications in apparently neutral laws, revealing how those laws ignore women’s experiences. The goal of the questioning is to uncover male bias and demonstrate that it is not inevitable. Even though the interrogation is partially substantive, it is nevertheless a legal method; there is no requirement that the ultimate decision must favor women.¹⁴³ Further, biases that are uncovered need not be intentional; what is important is that neutrality should never be assumed.¹⁴⁴ When directed at environmental justice issues, liberal feminist questioning has revealed that decisions regarding the location of polluting facilities are often made with little effort to incorporate the values and experiences of women and minorities.¹⁴⁵

137. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833 (1990).

138. See Ynestra King, *The Ecology of Feminism and the Feminism of Ecology*, in HEALING THE WOUNDS: THE PROMISE OF ECOFEMINISM 20 (Judith Plant, ed. 1989) [hereinafter HEALING THE WOUNDS]. From a feminist perspective both women and nature are the “others”—those who are subordinated by male domination and scientific and technological domination. See *id.* at 21.

139. *Id.* at 20.

140. See Bartlett, *supra* note 137, at 835, 842-43 (including criminal law, employment law, and contracts law).

141. *Id.* at 832.

142. *Id.* at 829. Professor Robert Verchick identifies the same three methods, but refers to them as unmasking patriarchy, contextual reasoning, and consciousness-raising. See Verchick, *supra* note 42, at 31.

143. See Bartlett, *supra* note 137, at 837, 845-46.

144. See Verchick, *supra* note 42, at 36.

145. *Id.* at 37.

Feminist practical reasoning incorporates the perspectives uncovered by other feminist methods; it is suspicious of bright line rules and enlarges the scope of factors that are relevant to decision-making.¹⁴⁶ It rejects “the monolithic community often assumed in male accounts of practical reasoning and seeks to identify perspectives not represented in the dominant culture”¹⁴⁷ A focus on context is key.¹⁴⁸ It is a method that erodes the distinction between the objective and subjective,¹⁴⁹ that applies to diverse legal problems, and that can uncover gender oppression and isolation.¹⁵⁰ When applied to environmental justice, feminist practical reasoning has been shown to encompass the perspectives of minorities who see connections between their health, living conditions, and the environment. Traditional legal methods had long overlooked these viewpoints, resulting in numerous examples of distributive injustice.¹⁵¹ Feminist practical reasoning, or contextual reasoning, expands the scope of environmentalism and offers a new way to look at environmental problems.¹⁵²

Consciousness-raising, the third feminist method, seeks shared experience. It is “an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences.”¹⁵³ A collective, non-hierarchical effort is part of the process, as is greater public participation at the community level.¹⁵⁴ This method can enhance knowledge and is capable of being implemented in formal and informal ways.¹⁵⁵

146. *Id.* at 43. This method is achieved by imagining the experiences of affected women, looking at the issue from the bottom up. The idea is to consider many affected communities and merge the emotional experience of women and marginalized individuals with more abstract legal analysis. *Id.* at 45; *see also* Bartlett, *supra* note 137, at 854–55, 863.

147. *See* Bartlett, *supra* note 137, at 855.

148. *See* Verchick, *supra* note 42, at 43–45.

149. *Id.* at 45.

150. *See* Bartlett, *supra* note 137, at 858.

151. *See, e.g.,* Tseming Yang, *Melding Civil Rights and Environmentalism; Finding Environmental Justice’s Place in Environmental Regulation*, 26 HARV. ENV’T L. REV. 5, 17–27 (2002). Studies show that toxic waste sites were often located in predominantly African and Hispanic American communities, significantly greater penalties for violations of hazardous waste laws were imposed in predominantly white communities, and overtly racist membership policies existed in the early days of the Sierra Club, among other examples. *Id.*

152. *See* Verchick, *supra* note 42, at 46. Contextual reasoning reveals that some people understand the environment to include the home and workplace, not merely the natural media outside. *Id.* at 46–47.

153. *See* Bartlett, *supra* note 137, at 863–64.

154. *See* Verchick, *supra* note 42, at 52–53.

155. *Id.* at 864. Small groups, public meetings, art and the media are just a few examples of how consciousness-raising can occur. *Id.*

In the environmental justice area, consciousness-raising can be accomplished through various means of community education.¹⁵⁶

Posing the woman question in relation to the land use-enviro distinction queries whether neutral factors such as private property rights, history, or state and local government prerogatives account for the distinction's existence, or whether the distinction can be traced to some form of gender oppression or isolation. Feminist scholarship suggests that patriarchy does, in part, motivate the distinction.

The feminist tradition posits that Western culture places both women and nature in the background, denying men's dependence on them.¹⁵⁷ It further sees misogyny as the basis for the man-culture/woman-nature divide.¹⁵⁸ Within this system man transcends both woman and nature, which are dominated and excluded.¹⁵⁹ The domination and transcendence of nature under this model make environmental issues a concern of feminism.¹⁶⁰

Feminism targets the man-woman dualism that values masculine interests over feminine concerns and that fails to recognize any overlap between the two. Dualism does more than separate men from women; it creates a world in which issues associated with dominant masculine values are elevated above issues associated with the feminine concerns of the excluded and suppressed.¹⁶¹ This bifurcation is apparent in the Enlightenment's separation of the mind from the body and nature, and in its companion concepts of objectivity, impartiality, and the rejection of emotion.¹⁶² Devotees of mechanism, notably Francis Bacon, became engaged in a related quest to impose order on the natural environment, leading to what Carolyn Merchant described as "the death of nature."¹⁶³ This quest for order fueled the emergence of centralized government and industrial regulation in seventeenth century Europe.¹⁶⁴ Masculine domination, and the re-

156. *See id.* at 52-53 (noting that community education, or "grassroots consciousness-raising," results in a "dynamic and interactive network of citizen activists").

157. VAL PLUMWOOD, *FEMINISM AND THE MASTERY OF NATURE* 21 (1993).

158. King, *supra* note 138, at 19.

159. PLUMWOOD, *supra* note 157, at 22-23.

160. *Id.*

161. *See id.* at 31. Professor Plumwood defines dualism as "the process by which contrasting concepts (for example masculine and feminine gender identities) are formed by domination and subordination and constructed as oppositional and exclusive." *Id.*

162. *See generally id.* at 108-20.

163. *See* MERCHANT, *supra* note 7, at 193 (arguing the Scientific Revolution removed the "animistic, organic assumptions about the cosmos").

164. *Id.* at 205.

lated separation of man and nature thus form the basis of dualism.¹⁶⁵ It is a philosophy of hyper-separation, radical exclusion and polarization that in many ways remains in place today.¹⁶⁶

The ramifications of dualism are significant. One result is instrumentalism, the dominant figure's use of the oppressed as a means to an end. At its most extreme, dualist instrumentalism dictates that dominant male interests use women as wives and child-bearers while nature is used to service masculine needs.¹⁶⁷ Another result of dualism is homogenization, which discounts diversity by seeing dominated interests as interchangeable. Women are considered to be all alike; and water and air, no matter where situated, are regulated in a similar way.¹⁶⁸ A third effect of dualism is a moral one. Ethics are held and defined by the dominant party, in this case, the white male. In the most simplified setting, the dominant party discards the concerns of inferior others that might otherwise place restraints on him. The others are perceived as having no needs of their own, leaving little room for sympathy. The result is a moral dualism.¹⁶⁹

These ramifications of dualism have left the western world with economic, scientific, and technological perspectives that fail to fully value natural resources. Instead, nature's value and diversity are often ignored by the transcendent dominant view.¹⁷⁰ Not surprisingly, the scientific revolution and the rise of capitalism have been linked to this philosophy.¹⁷¹ The hyper-separation of man and nature, which

165. See PLUMWOOD, *supra* note 157, at 42-44. Much of the fabric of dualism was woven by the Greek philosophers; the Enlightenment may have refined the fabric, but did not create it. *Id.* at 71-75. Further, Platonic thought, which embraced dualism, was later reflected in Christian doctrine and the pre-Enlightenment thought of the West. By the time of Descartes, there was a clear separation between the mind and body, the rational and nature, and both body and nature were seen as inferior to the rational sphere of the mind. *Id.* at 71-75, 89.

166. See *id.* at 48-49.

167. *Id.* at 53.

168. See *id.* at 53-55. The Clean Air Act's National Ambient Air Quality Standards, which are nationally uniform, are an example. See 42 U.S.C. § 109 (2000). Related to homogenization is the patriarchal goal of universalization. During the colonial era, conquering nations promoted development, with a goal of having the conquered nations remake themselves in the image of the West. See Vandana Shiva, *Development, Ecology, and Women*, in HEALING THE WOUNDS, *supra* note 138, at 80.

169. PLUMWOOD, *supra* note 157, at 145-46.

170. *Id.* at 70, 101. Science sees the world mathematically, objectively. Quantities, not quality of life, matters. We see this in NAAQS, TMDLs, LAER, RACT, MACT, and BACT, just to name a few of environmental law's uniform, data-based acronyms. See also Corinne Kumar D'Souza, *A New Movement, A New Hope: East Wind, West Wind, and the Wind from the South*, in HEALING THE WOUNDS, *supra* note 138, at 30-31.

171. PLUMWOOD, *supra* note 157, at 111; see also MERCHANT, *supra* note 7, at 173-78.

was retained through much of the twentieth century, still guides industrial development and makes it difficult, if not impossible, to see man as part of nature.¹⁷² The result is the absence of a sense of continuity with the earth or connection with place.¹⁷³

Ecofeminism more closely addresses the impact of patriarchy and dualism on nature by linking feminism with environmental issues.¹⁷⁴ This perspective rejects the notion that women and nature are inferior, and analyzes environmental degradation by considering the connections between the oppression of women and the domination of nature.¹⁷⁵ To ecofeminists, mainstream environmentalism's reliance on the sciences and traditionally masculine agendas render it "ecologically dysfunctional."¹⁷⁶ Particularly disturbing is environmentalism's systemic linear thinking, which fails to account for the interdependencies that abound in the natural world.¹⁷⁷ Development is seen as a social illness that fails to embrace feminine values by marginalizing the realities of conservation and ecology. More pointedly, the pro-development agenda is perceived as patriarchal, valuing dollars over quality-of-life and rejecting the sustaining roles of both women and nature.¹⁷⁸

Where does all this lead in relation to the land use-enviro distinction and the woman question? One way to approach the distinction is to see it as drawing a line between development and conservation. Land use decisions determine what can be built where; environmental decisions determine how to keep air, water, and land clean. The drive to impose order on the landscape through land use decisions—building roads and planning industrial parks or residential subdivisions—is a masculine endeavor. On the other hand, environmental initiatives—such as clean air regulations and biodiversity protection—can be characterized as feminist responses that seek to acknowledge connections between natural resources and human survival. Viewed in

172. See PLUMWOOD, *supra* note 157, at 70-71; MERCHANT, *supra* note 7, at 291.

173. PLUMWOOD, *supra* note 157, at 103. This is so despite today's clear acceptance of human dependency on nature and the knowledge that to deny nature is foolish. *Id.* at 94.

174. "Ecofeminists believe that patriarchy—men's mistreatment and subordination of women—and environmental despoliation are linked." Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1222 (1991).

175. See PLUMWOOD, *supra* note 157, at 35-36; King, *supra* note 138, at 24.

176. See Rosemary Radford Ruether, *Toward an Ecological-Feminist Theology of Nature*, in HEALING THE WOUNDS, *supra* note 138, at 148 (explaining that systems of dominance and control fail to appreciate the "larger relational patterns within which particular facts stand.").

177. See *id.* at 148-49.

178. See Shiva, *supra* note 168, at 82-83.

this way, the distinction pits the male (development) against the female (nature). Further, while land use decisions are routinely made by zoning boards that are often male-dominated, environmental decisions have been greatly influenced by the writing of women, notably Rachel Carson,¹⁷⁹ and continue to be informed by diverse grass roots organizations that promote the interests of women and nature.¹⁸⁰

Yet the mere characterization of the land use-enviro distinction as a male-female dichotomy is not enough. The woman question seeks to uncover bias in the distinction; thus the question becomes whether the male-female separation can be linked to oppression. It is not difficult to respond that bias does support the land use-enviro distinction. It is reflected in the law's long-standing recognition of state and local government authority over land use matters,¹⁸¹ a principle that leads courts to adopt a hands-off attitude when reviewing local land use decisions.¹⁸² The presumption of validity afforded local land use decisions, coupled with the patriarchal nature of land use controls, creates a danger that concerns about ecosystem health will be suppressed. Whenever that risk becomes a reality, land use decisions—driven by masculine values—will dominate environmental efforts.

Research also suggests that male decision-makers are more likely to accept risk if they stand to benefit from their decision. At the same time, women and minority groups tend to be more vulnerable to environmental risks.¹⁸³ It is not hard to imagine how these risk-related tendencies might result in land use decisions that neglect feminine and environmental values. Land use choices that boast commercial benefits are likely to be embraced by male decision-makers despite environmental risks that would concern women and minorities. Thus, the selection of economically attractive land use alternatives may well carry a danger of gender and minority oppression.

179. See generally Manus, *supra* note 38.

180. See, e.g., Verchick, *supra* note 42, at 27 (describing the environmental justice movement as a feminist movement). Professor Verchick repeatedly states that political, business and bureaucratic institutions remain dominated by men. *Id.* at 79, 82.

181. State authority to enact land use regulations is grounded in established nuisance law. *Lucas*, 505 U.S. at 1031.

182. See, e.g., *Goldberg v. Richmond Heights City Council*, 690 N.E.2d 510, 514 (Ohio 1998) (noting the presumption in favor of state land use regulations: "A zoning regulation is presumed to be constitutional unless determined . . . to be clearly arbitrary and unreasonable without substantial relation to the public health, safety, morals, or general welfare of the community.").

183. Verchick, *supra* note 42, at 80 (citing James Flynn, et al., *Gender, Race, and Perception of Environmental Health Risks*, 14 RISK ANALYSIS 1101, 1106 (1994)).

Patriarchy is also apparent in the land use-enviro distinction's tendency to pit property rights against community rights. Land use devices bestow individual rights on property owners by allowing them to use their land in various ways. Environmental regulation, on the other hand, almost always imposes limitations, restricting property rights in ways that make them more communitarian.¹⁸⁴ The law's current embrace of property rights and disaffection for communal notions of property allows masculine values associated with land use and development to prevail over feminine environmental and communal values. This outcome reveals yet another way that the land use-enviro distinction masks dualism.

To the extent the distinction leads courts to engage in abstract analysis by focusing on statutory language to the exclusion of local concerns, bias is revealed yet again. The art of statutory interpretation occurs purely in the courtroom, in the realm of mind and reason; concerns related to local ecosystems and their inhabitants do not frequently enter this arena. Thus the routine application of the distinction privileges abstract rationalization over the contextualized domain of feminine, nature-oriented values.

Unmasking the distinction's patriarchy also reveals what Professor Margaret Radin calls "institutional bad coherence," which occurs when society's institutions "uniformly exhibit the bad conception of things," even though viable alternatives exist.¹⁸⁵ Entrenched distinctions in the law exemplify bad coherence, presenting feminists with the opportunity to transform the law by including oppressed perspectives.¹⁸⁶ The land use-enviro distinction, which is both reflective of patriarchy and institutionally entrenched, is a prime example of the type of bad coherence that invites feminists to become agents of legal change.

The second feminist legal method, contextual or feminine practical reasoning, also sheds light on the distinction. Here, diverse and conflicting perspectives are actively sought in order to collect new facts that can contribute to rule making. Ideally, this methodology results in more responsive and flexible rules.¹⁸⁷ In a dispute where the

184. See *supra* text accompanying notes 122-24.

185. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 68 S. CAL. L. REV. 1699, 1721 (1990).

186. *Id.* Professor Radin uses the example of the final days of coverture, when legal institutions treated women as inferior to their husbands. *Id.*

187. See Bartlett, *supra* note 137, at 851-52 (explaining how feminine practical reasoning uses rules as signposts that help reconcile past wisdom with fresh facts).

land use-enviro distinction plays a role, this method would seek perspectives from all stakeholders. In a preemption scenario, for example, a court might be asked to do more than simply engage in abstract statutory construction to determine whether the competing interests at issue are either land use-related or environmentally based. In addition, a court might be invited to consider the patriarchy inherent in the system and to be receptive to the idea of listening to other voices. These would include the voices of people who live where the decision will have its greatest impact, groups who argue on behalf of the local environment, and individuals who will implement the project. Under this type of deliberation, the preemption doctrine would remain intact, but the land use-enviro distinction would dissolve as the analysis becomes less abstract and more flexible to accommodate concrete and diverse interests.

Consciousness-raising can also be used to confront the distinction. This feminist method seeks to enhance knowledge,¹⁸⁸ and there are at least two ways in which this can occur. First, local inhabitants can become more informed about decisions that will affect their surroundings. This increased awareness can be realized through educational initiatives, informal get-togethers or more structured events. In addition, the knowledge that is gained from these efforts can be brought to the attention of decision-makers. Utilizing this method will both increase public participation and ground decisions closer to the locality where the impact will be felt.

While the application of feminist methods illustrates the validity and value of a feminist critique of the land use-enviro distinction, the application has an important ethical dimension as well. As mentioned, the ethics of dualism are those of dominant masculine interests that fail to perceive or sympathize with suppressed viewpoints.¹⁸⁹ The western ethical model has been criticized by feminists and others,¹⁹⁰ who point out that the dominant cultural ethic is both linear and homocentric.¹⁹¹ The ethics of ecofeminism challenge this view by emphasizing the significance of nature, the interconnections between all

188. *Id.* at 863 – 64.

189. *See supra* text accompanying note 170.

190. *See* PLUMWOOD, *supra* note 157, at 152. *See generally* Comment, Jon K. Abdoney, *Environmental Ethics: The Geography of the Soul*, 27 CUMB. L. REV. 1217 (1996-97) (suggesting that environmental ethics should become more geographically contextualized); Sagoff, *supra* note 98 (noting the need for an ethic focused on community, integration and care).

191. *See supra* text accompanying notes 176-77 (Ruether).

living things, and the need to show compassion for the powerless.¹⁹² It is a value-based ethical response, including principles of respect, accountability and harmony.¹⁹³

A feminist ethical critique would address dualism in a number of ways, primarily by recognizing the value of diverse input from those who have been excluded, and by adopting an integrative and non-hierarchical system of thought.¹⁹⁴ Defeating dualism will require “not just recognition of difference, but recognition of a complex, interacting pattern of both continuity and difference.”¹⁹⁵ The challenge will be to allow for differentiation without creating a hierarchy, and to understand that all living things possess an extended teleology, but with valuable differences.¹⁹⁶ Humans must see themselves as unique but not separate from nature, and must understand that their ability to change nature is matched by nature’s own forces.¹⁹⁷

The ethical shift away from dualism will require cultivating an ethic of concern for the perspectives of those who traditionally have been dominated. Moral choices must be made based on concerns for both humans and nature,¹⁹⁸ replacing the traditional masculine, autonomous and rational actor with a more integrated ecological self.¹⁹⁹ Rather than disregarding differences and adopting formulaic solutions, which is the norm in traditional environmental ethics, the new self would recognize diverse needs and impose limits on the self.²⁰⁰ There would be an ethic of cooperation, balance and mutuality, of interaction between humans and nature.²⁰¹ The new self would

192. See Starhawk, *Feminist, Earth-Based Spirituality and Ecofeminism*, in HEALING THE WOUNDS, *supra* note 138, at 177-80.

193. See Margo Adair & Sharon Howell, *The Subjective Side of Power*, in HEALING THE WOUNDS, *supra* note 138, at 226 (stating that the principles of respect, accountability, and harmony must become the core of our efforts to collectively effectuate change); see also Warner, *supra* note 8, at 482.

194. See PLUMWOOD, *supra* note 157, at 59. Professor Plumwood’s proposal to overcome a “dualised identity” includes five steps: 1) a recognition of the individual contributions of the backgrounded other; 2) the adoption of an integrated model rather than one of exclusion; 3) exploration of the stories of the other rather than its qualities; 4) respect for and understanding of the values and needs of the other; and 5) acknowledgement of diversity among the other. *Id.*

195. *Id.* at 67.

196. *Id.* at 135.

197. *Id.* at 137.

198. *Id.* at 151 (differentiating between the human self-interest (egoism) and a human interest in others (altruism), and encouraging the adoption of a combination of these two theories).

199. *Id.* at 154-55.

200. *Id.* at 157 (adopting a view of “mutuality” in which both kinship and difference are recognized and embraced).

201. *Id.* at 164.

be called upon to cultivate the virtues of “care, respect, gratitude, sensitivity, reverence and friendship.”²⁰²

A virtue-based ethical system envisioning an ecological self is one way to defeat dualism. Its concepts are at once local and contextualized rather than abstract, allowing for particularity without losing human identity.²⁰³ This new focus does not dispense with abstract reasoning altogether: “The expulsion of the master identity from the western construction of reason requires not the abandonment of reason itself, but an effort to instal (sic) another, less hierarchical, more democratic and plural identity in its place.”²⁰⁴

The ecofeminist ethical model adds to the critique of the land use-enviro distinction in a meaningful way, helping to ground a response to the dualism inherent in the dichotomy. A virtue-based ethic tied to an ecological self challenges the existence of the distinction. Its core concepts of context, inclusion, integration, care and respect suggest that any decision having an impact on natural resources has an ethical dimension. Importantly, the ethical response would not view land use and environmental protection measures as distinct. Rather, land use decisions would be based on contextualized, integrative decision-making that incorporates concern and respect for the natural environment with the values and needs of those who live and work nearby.

Before leaving the feminist critique it must be pointed out that utilizing feminist methodologies to expose the distinction’s patriarchy is vulnerable to the argument that there is no male-female dualism in the distinction at all. It is often argued that mainstream environmentalism is itself rampant with patriarchy, suggesting that the land use-enviro distinction is merely a dichotomy that separates two male systems.²⁰⁵ The history of environmental law is, to some extent, reflective of patriarchy. President Theodore Roosevelt’s early preservation efforts, for example, isolated large areas of the outdoors for recreation that was typically associated with masculine endeavors. Additionally,

202. *Id.* at 182-83.

203. *Id.* at 183-85. “Any new conception of human identity would need to make allowances for the variety of human commitments to and human caring relations for the limitless variety of beings in nature, as well as providing for alternative visions and ethical frameworks which may be highly regionalized and particularized.” *Id.*

204. *Id.* at 189.

205. See Verchick, *supra* note 42, at 39-40, 62 (advancing the notion that the current environmental regulatory structure perpetuated values and policies with which white men were more comfortable, thereby “locking out” women and racial minorities from involvement in the structure); Delgado, *supra* note 174, at 1226; Warner, *supra* note 8, at 481-82.

the current system of environmental law, with its endless list of acronyms and data-driven risk-benefit analyses, is a system that reflects masculine ideals.²⁰⁶ A male bias can also be seen in environmental law's separation of environmental media from personal experience, in its objective of reducing pollution in the aggregate rather than through the achievement of distributive justice, and in risk assessment's reliance on data dealing with pollution's effects on the average white male.²⁰⁷ Even some of the more creative moments in environmental law, notably the resurrection of the public trust doctrine, have been characterized as patriarchal.²⁰⁸ More generally, one observer has pointed out that the problem with mainstream environmentalism is "that *man* measures what is good for the environment, and any time man is the measure, selfishness and expediency loom large in the calculation."²⁰⁹

These criticisms pose a fundamental, but not insurmountable hurdle for the feminist critique. First, it must be remembered that the theoretical underpinnings of environmental law are undeniably feminine. As noted, the philosophy of Rachel Carson included a moral edge combined with a focus on ecological connections and respect for biodiversity.²¹⁰ The writings of influential ecologists such as Aldo Leopold similarly emphasized the value of nature's diversity and the need to make ethically sound land use decisions.²¹¹ Further, women's issues such as reproductive health are often addressed in environmental scholarship,²¹² and many of the grass-roots organizations that launch environmental causes are dominated by women.²¹³ Even

206. See Verchick, *supra* note 42, at 39-40.

207. See *id.* at 66.

208. See Delgado, *supra* note 174, at 1221-23 (pointing to the public trust doctrine in particular, characterizing the trust as a male instrument and arguing that that the doctrine works to the exclusion of ecofeminists and deep ecologists).

209. See Warner, *supra* note 8, at 481.

210. See Manus, *supra* note 38, at 387, 391-92.

211. See generally ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (Oxford University Press ed.1948). Leopold's often quoted observation notes that "[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." *Id.* at 240.

212. See, e.g., Geetanjali Misra et al., *Poor Reproductive Health and Environmental Degradation; Outcomes of Women's Low Status in India*, 6 *COLO. J. INT'L ENVTL. L. & POL'Y* 273 (1995).

213. See Verchick, *supra* note 42, at 23-24; see also Barbara Epstein, *Ecofeminism and Grass-Roots Environmentalism in the United States*, in *INTRODUCTION TO TOXIC STRUGGLES; THE THEORY & PRACTICE OF ENVIRONMENTAL JUSTICE* 144 (Richard Hofrichter, ed., 1993); Tannetje Bryant & Keith Akers, *Environmental Controls in Vietnam*, 29 *ENVTL.* 133, 144 (1999) (noting women's group work to heighten awareness of environmental problems in Vietnam).

though some of environmentalism's feminist underpinnings have eroded in the past decade,²¹⁴ they have not vanished altogether. NEPA's focus on integrative decision-making and CERCLA's allocation of damages for natural resource degradation are two examples that remain intact.²¹⁵ Further, the view of environmentalism endorsed here, which would re-invigorate environmental law by returning to and building upon concepts associated with feminism, is one that departs from the mainstream agenda.

Second, even if environmental law suffers to some extent from male bias, it is nevertheless feminine when compared to land use law. As mentioned, land use decisions are made predominantly by men and for the most part deal with the development of land. The focus on domination, order, and commerce place land use decisions clearly on the masculine side of the spectrum. On the other hand, environmental law—despite any perceived patriarchal flaws—seeks to protect the natural environment and its biodiversity, interests that have been and remain the concern of feminists.

Finally, although liberal feminism might argue that the land use-enviro distinction presents a classic double bind that requires a radical response, a pragmatic feminist approach would willingly search for a less drastic, yet beneficial solution.²¹⁶ Professor Margaret Radin has shown that even though it may be necessary to rectify the subordination of women in order to get past this type of double bind, pragmatic choices can be made in the interim.²¹⁷ Pragmatic feminism refuses to eliminate male patriarchy by holding out oppressed interests as special; rather it treats all parties involved with care and justice and recognizes that some choices are preferable even though they may not

214. See Manus, *supra* note 52, at 288. (citing backlashes against the Clean Water Act's wetlands program and the Endangered Species Act). *Id.* at 253-254.

215. See 42 U.S.C. § 4332 (A) (2000) (“[all agencies of the federal government shall] utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment”); 42 U.S.C. § 9607 (a)(4)(C) (2000) (“any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . damages for injury to, destruction of, or loss of natural resources. . .”).

216. See Radin, *supra* note 185, at 1704 (“The pragmatist solution is to confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most.”). A double bind occurs when both the allowance and prohibition of certain activities by the law would harm women. *Id.* at 1699-1700.

217. See *id.* at 1699-1700 (“We must look carefully at the non-ideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.”).

be ideal from a radical feminist perspective.²¹⁸ The patriarchy that shadows both sides of the land use-enviro distinction is thus not an impediment to the feminist critique; rather it can be adequately addressed by a realistic and pragmatic response.

V. GEOGRAPHY

The geographic critique of the land use-enviro distinction focuses on its abstractions, specifically its failure to be tied to space and place. Unlike feminism, geography's challenge is not based on oppression; rather, it targets the abstraction inherent in the current legal approach. Like feminism, however, a geographic critique suggests that the distinction should be replaced by a legal framework that is more closely tied to place and ecosystem health.

The perspectives of place, space and scale are key to geographers, who rely on various epistemologies, including positivism, realism, iterative approaches, feminism and postmodernism.²¹⁹ Regardless of approach, geography focuses on spatial representation in various manifestations while seeking to synthesize human activity and the physical environment.²²⁰ The phenomena that give places character are of interest to geography as are interdependencies between places.²²¹

Applied geography has been helpful in the resolution of land use and environmental issues such as siting determinations and stream restoration projects.²²² In applications like these, geographers are able to examine context and connections,²²³ manage data, and provide technology and unique perspectives. Their services enable decision-makers to focus on relevant "connections in complex systems and the importance of locations and arrangements."²²⁴

Geography theory is also beginning to have an impact on other academic disciplines. For example, geographic critique is becoming more commonplace in the law. It is a foundation of critical space

218. *Id.* at 1718.

219. REDISCOVERING GEOGRAPHY: NEW RELEVANCE FOR SCIENCE AND SOCIETY 28–29 (National Academy Press 1997) (explaining the variety of epistemologies employed in geographic inquiry).

220. *Id.* at 44-45 (noting the merits of different epistemologies in synthesizing human activity).

221. *Id.* at 30, 91-92.

222. *See id.* at 109, 111 (explaining the impact of geographic data on urban policy and resource management).

223. *Id.* at 145.

224. *Id.* at 135, 162.

theory, which questions the law's indeterminacy and uncertain boundaries.²²⁵ It is also apparent in the increasing amount of legal scholarship that calls attention to the importance of place and context.²²⁶ As used here, the term "place" combines the concepts of nature, space and environment with personal experience. It is a word that "combines the meaning we associate with nature and the utility we associate with the environment. It fosters respect for our surroundings that arises from harmony, partnership, and intimacy."²²⁷ It is a personal and deeply felt concept that combines feeling with locale.

As has been made clear, the concepts of context and place are not unique to geography. They are shared by feminism and pragmatism,²²⁸ and are reflected in the place-based perspective of environmental ethics.²²⁹ Environmental ethicists believe that once an area is accepted as a place, moral and cultural obligations arise, fostering a sense of community.²³⁰ Ecofeminist ethicists would agree; their virtue-ethics and ideal of the ecological self involve similar commitments to particular places and inhabitants.²³¹

225. See generally Robert R. M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Environmental Law*, 73 TUL. L. REV. 739 (1999).

226. A brief Westlaw search retrieved a large number of articles focused on place. Among them were Holly Doremus, *The Special Importance of Ordinary Places*, 23 SPG ENVIRONS ENVTL. L. & POL'Y J. 3 (2000) (arguing for the more general environmental protection of land and resources); Dune Lankard, *Sacred Places; Indian Rights After the Exxon Valdez Oil Spill*, 10 FORDHAM ENVTL. L.J. 371 (1999) (observing the particular importance of land to a tribal group); Wendy Lee Anderson, Anne Cottrell & Rebecca Fisher, *Lost Landscapes and Failed Economies: The Search for a Value of Place by Thomas Michael Power*, 24 ECOL. L.Q. 377 (Book Review 1997) (examining the economic impact and value of the environment as place); John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment* 15 UCLA J. ENVTL. L. & POL'Y 1 (1996-97) (noting the peculiar environmental interests of buildings and structures); and Mark Sagoff, *supra* note 98. See also Nancy Perkins Spyke, *Charm in the City: Thoughts on Urban Ecosystem Management*, 16 FLA. ST. U. J. LAND USE & ENVTL. L. 153 (2001) (arguing for a place-based approach to urban ecosystem management).

227. Sagoff, *supra* note 98, at 389.

228. See Radin, *supra* note 185, at 1707.

229. See generally Abdoney, *supra* note 190; see also Sagoff, *supra* note 98, at 388, 392-93. Environmental ethicists reject the idea that man is the measure of all things. See Warner, *supra* note 8, at 481.

230. See Sagoff, *supra* note 98, at 388 (applying Hannah Arendt's philosophy to environmentalism).

231. See Plumwood, *supra* note 157, at 186 ("[Ecological selfhood]. . . must be seen rather as an attempt to obtain a new human and a new social identity in relation to nature which challenges this dominant instrumental conception, and its associated social relations."); see also Dorothy Dinnerstein, *Survival on Earth: The Meaning of Feminism*, and Helen Forsey, *Community—Meeting our Deepest Needs*, in HEALING THE WOUNDS, *supra* note 138, at 194, 231

Place-based thinking has been offered as a more generalized fix for land use and property law. In this regard, it has been suggested that concern for community expectations and place can lead to more mature property and land use laws.²³² This type of contextualization would represent a significant departure from the traditional dualistic approach, which analyzes land use decisions through individual autonomy and which may exclude environmental concerns. However, geography can help achieve a new focus by making place and community more common factors in land use and environmental decision-making.²³³

Compartmentalized and dualistic thinking has come under increasing fire as the absurdity of separating humans from environment and nature from culture has been exposed.²³⁴ Yet the disconnect between humans and place has been evident throughout much of American history. From the colonial era into the early twentieth century, nature was seen as something to be conquered. Even today, industry operates for the most part without any linkage between production and place.²³⁵

In the legal realm, negation of place is illustrated by the law's reliance on abstract rules to address distinct environmental issues. One example is the use of trust law to address the degradation of public environmental amenities.²³⁶ It has also been argued that the law governing local waste flow regulation ignores geographic space,²³⁷ and that the law is becoming less sensitive to the environmental values of

(“The core meaning of feminism, I am saying, lies, at this point, in its relation to earthly life’s survival.”).

232. See Freyfogle, *supra* note 7, at 582, 590. Community is often tied to locale or “situatedness” and is thus closely related to place. See Poirier, *supra* note 6, at 48.

233. See REDISCOVERING GEOGRAPHY, *supra* note 219, at 30 (noting that geographers must consider flows of people and materials, in addition to the physical characteristics of place and the interrelationships between places).

234. See e.g., Abdoney, *supra* note 190, at 1232; Sagoff, *supra* note 98, at 356-58, 411-16.

235. See Sagoff, *supra* note 98, at 368 (noting that many common industries, from insurance to education to technology, are not related to any natural resources or natural advantage).

236. See Delgado, *supra* note 174, at 1214-15. (arguing that the public trust doctrine is essentially conservative, both unable to provide a satisfactory mechanism for experimenting with more innovative approaches to environmental problems, and out of step with more contemporary understandings of environmental conservation).

237. See Verchick, *supra* note 225, at 754-56. Professor Verchick notes the Supreme Courts’ invocation of the dormant commerce clause to strike down locally oriented waste-disposal or flow-control ordinances, but points out that locality has been an important consideration in issues of standing. *Id.* at 770-74.

native Americans.²³⁸ In other areas of environmental regulation, laws target threats to water, air, and wilderness without integrating personal experience and locale,²³⁹ leading to pronouncements that Congress is oblivious to the importance of place.²⁴⁰

Both land use and environmental regulation are thus susceptible to the argument that they have ignored geography. Property law has come under similar attack, despite the increasingly loud voice of property rights activists who oppose laws altering the status quo.²⁴¹ The property rights movement endorses the idea that more strongly-defined property rights are needed to address the institutional failures that are at the root of environmental problems.²⁴² Supporters argue that the injection of environmental protection measures into land use laws makes planning more complex and property rights less certain, subjecting landowners to the whim of local planners.²⁴³ Interestingly, their primary targets are ecosystem-based regulations,²⁴⁴ the very local and place-based laws that geography would endorse.

Yet others would argue that property law must respond to environmental concerns by developing a stronger sensitivity for place.²⁴⁵ A new property regime would reinforce the idea that property law functions to serve not only individual values, but also community interests.²⁴⁶ It would seek to translate community expectations into property ownership norms, contextualizing them within the place that

238. See Manus, *supra* note 52, at 261-66 (noting the trend, especially since the 1980s, of the Supreme Court to limit tribal sovereignty in the context of land regulation).

239. See Verchick, *supra* note 42, at 46 (noting that grassroots organizations typically view traditionally non-environmental problems, from lead paint to workplace chemical exposures to street crime, as “environmental”).

240. See REDISCOVERING GEOGRAPHY, *supra* note 219, at 120.

241. See Cutting, *supra* note 16, at 834.

242. See GOVERNMENT VS. ENVIRONMENT ix – x (Donald R. Leal & Robert E. Meiners ed. 2002).

243. See Morriss & Meiners, *supra* note 19, at 96, 122-36 (arguing for a greater protection of private property by way of the common law, which they view as flexible and protective of individual autonomy, as opposed to centralized planning measures).

244. See Michael Greve, *Debate: Faction and the Environment*, 21 ECOL. L. Q. 528, 528-29, 532 (1994) (arguing that the law’s acceptance of ecological protection would compromise private property interests by mandating broad-based public participation, deference to goal-oriented statutory language and regulatory takings, and liberal standing, but concluding that recent Supreme Court jurisprudence has retreated from the “ecological, statist paradigm”).

245. See, e.g., Sax, *supra* note 27, at 1451-53 (arguing for ecosystem awareness in takings disputes); Cutting, *supra* note 16, at 831, 851 (suggesting a cubist model that would deal with environmental externalities at the place where they occur).

246. See Freyfogle, *supra* note 7, at 579 (arguing that private property exists to serve communal needs, and that the community is often well served by recognizing strong individual property rights – to the extent that these rights are in accord with community wishes).

is the community.²⁴⁷ Such a system would season traditional property doctrine with an increased ecological understanding; it would de-emphasize individual dominion and control over property, favor increased public participation, and reflect ecosystem-wide and place-based interests.²⁴⁸

The geographic critique of land use, environmental, and property law exposes the folly of maintaining the land use-enviro distinction. Geography's emphasis on place attacks the distinction's abstraction at its core by arguing for a more grounded analysis. Once place is incorporated into land use planning and environmental decision-making, the differences between the two will be obscured. Under such a framework, both activities would address how particular land can be used. Any decision about what can be done with the land would necessarily take into account ecological and community concerns. Like feminism, geography raises valid questions about the land use-enviro distinction and suggests the need for a unified approach.

Getting decision-makers to accept the idea that geography is not merely descriptive but is of analytical and technical worth will be a challenge.²⁴⁹ Getting them to actually use geography's concept of place in land use, environmental, and property regulation will be even more difficult. Yet there are a number of ways the transition can begin. Ecosystem and regional planning are already more feasible due to advances in technology.²⁵⁰ Geographic Imaging Systems (GIS) technology allows computers to assemble, store, manipulate and display geographic data, making it particularly useful in monitoring natural resources and showing trends over time.²⁵¹ Additionally, geographers can do more to help decision-makers by conducting research on nonlinear dynamics, analyzing the relationship between physical and human geography, and undertaking multi-disciplinary projects.²⁵²

Courts, too, need to consider the importance of local geography when appropriate. Lawyers can strive to make judges more geographically astute by focusing attention on ecosystems and by ensur-

247. *Id.* at 582.

248. *See Sax, supra* note 27, at 1451, 1455 (noting the Supreme Court's recognition of an ecological perspective on property rights, and its rejection of that view in favor of an "outdated view of property").

249. *See REDISCOVERING GEOGRAPHY, supra* note 219, at 139.

250. *See Daly, supra* note 35, at 37-38.

251. *See REDISCOVERING GEOGRAPHY, supra* note 219, at 58,-63 (detailing actual or potential uses of GIS technology, including identifying of disease clusters, planning infrastructure improvements, and reapportioning political districts).

252. *See id.* at 168 (recommending context-driven, "cross-cutting" projects).

ing that the voices of those who are concerned with place are heard.²⁵³ When appropriate, courts should be deferential to the positions of decision-makers at the levels closest to the place at issue.²⁵⁴ Litigation alternatives should also be explored and, when possible, judges should encourage site-specific negotiation as a way to inject geographic and community interests into decision-making.²⁵⁵ In short, the abstract market ideology should be tempered by a geographic sensitivity, and opportunities for public participation should be taken advantage of at the local level.²⁵⁶ Only in this way will place assume importance in the judicial decision-making process.²⁵⁷

VI. GEO-FEMINISM

Both feminism and geography call into question the land use-enviro distinction, but they do so in different ways. Feminism challenges the distinction's domination and isolation of nature, while geography points to its failure to take into account community and place. These seemingly divergent viewpoints can be harmonized into a geo-feminist critique that offers a more expansive response.

The geographic tradition has been challenged by feminists who argue that it, too, is steeped in patriarchy and dualism.²⁵⁸ Geographers take pride in their detachment and transcendent vision and strive for objectivity and universality.²⁵⁹ To feminists this leaves little room for specificity in geography; its language is "transparent, characterless, neutral . . ."²⁶⁰ Nevertheless, objectivity continues to dominate geography, reinforcing dualism and rendering other perspectives meaningless.²⁶¹ The discipline is thus plagued with patriarchy, even though its bias may be unintentional.²⁶²

253. See Verchick, *supra* note 225, at 774.

254. See Freyfogle, *supra* note 65, at 477, 495-97 (discussing preemption of nonfederal environmental laws and regulations).

255. See Poirier, *supra* note 6, at 71 (arguing that focused conflict resolution is more likely to promote the community interest).

256. See Verchick, *supra* note 225, at 786.

257. See Freyfogle, *supra* note 65, at 506-07 (arguing that state and local governments should be given a larger role in environmental regulation).

258. See Gillian Rose, *FEMINISM & GEOGRAPHY: THE LIMITS OF GEOGRAPHICAL KNOWLEDGE* 3-4 (1993).

259. *Id.* at 7.

260. *Id.* at 8.

261. *Id.* at 9. Geography views public space as male and private space as female and further reinforces dualism in its separation of work and home. *Id.* at 18, 120.

262. See *id.* at 10.

Feminist geographers believe that the nature of women's experiences creates a social reality and subjectivity that differs from that of men.²⁶³ They argue that geography's concept of space is the result of a masculine bias and that different kinds of space can be revealed through diverse identities.²⁶⁴ They point out that geographic fieldwork is traditionally seen as a heroic, masculine endeavor,²⁶⁵ and that geographers routinely use feminine pronouns to refer to cities.²⁶⁶ Various schools within the discipline, notably time geography and humanist geography, arguably suffer from a male bias that stems from their failure to accurately perceive or represent other viewpoints.²⁶⁷ Thus "[c]oncepts of place and space are implicitly gendered in geographical discourse."²⁶⁸

Feminist geography, which attempts to address the problems of this masculine tradition, is an "ambivalent discourse straddling both the need to represent women and the need to speak of differences among women."²⁶⁹ The landscape it envisions does not reflect a "male gaze,"²⁷⁰ but instead produces a "locus of relationships."²⁷¹ The emerging feminist geography offers a sense of space that is "multidimensional, shifting, and contingent." It seeks both what is represented and what is missing,²⁷² recognizing a complex space that is both multi-dimensional and paradoxical, oscillating between the center and margin.²⁷³

A geo-feminist perspective merges the principal arguments of the feminist and geographic critiques. It stresses the importance of seeking out the voices of the excluded and oppressed while at the same time focusing on place. The place that emerges is a complex and changing one, rather than one restricted by traditional masculine viewpoints. Geo-feminism would fault the land use-enviro distinction

263. *Id.* at 26.

264. *Id.* at 37–38. Geography's "[t]ransparent space . . . denies the possibility of different spaces being known by other subjects." *Id.* at 40.

265. *Id.* at 70.

266. *Id.* at 69.

267. *Id.* at 44–45, 88. Professor Rose states that time geography focuses on "social-scientific masculinity" and thus represses the feminized other, while humanist geography acknowledges the Other but sees it through "masculinist notions of Woman." *Id.* at 44–45.

268. *Id.* at 62.

269. *Id.* at 116.

270. *Id.* at 99.

271. *Id.* at 112.

272. *Id.* at 140.

273. *Id.* at 152–54.

for being abstract and divorced from place. It would mold a new conception of place as one of “plurilocality,” which demands an imaginative and open search for local identity.²⁷⁴ Decisions on how land is to be used would be tied to distinct places identified through environmental, social and economic interests. There would be no distinction between land use and environmental issues; rather, all relevant parameters would be addressed in decisions regarding the land and all voices would be heard.

VII. PROPOSALS AND CONCLUSION

The dualism and abstraction inherent in the status quo can be eradicated only by adjusting decision-making at all levels. An increased reliance on the principles of sustainable development and ecosystem planning is crucial. Broad-based public participation and citizen educational outreach must also play a role. Interdisciplinary, holistic approaches that welcome input from geographers, sociologists, economists and environmentalists will be required.

These techniques cannot merely be layered onto the entrenched system as window dressing for the status quo. Rather, erasing the land use-enviro distinction will require a philosophical shift. No longer can humans be thought of as divorced from their surroundings. No longer can there be a universal, patriarchal view of what it means to be living in a space. No longer can there be a refusal to relinquish, or at least share, some of the sticks in the sacrosanct bundle of property rights.²⁷⁵

An ethical shift will also be required. One way this could be accomplished would be to encourage the consideration of ecofeminism’s of ecological self and virtue ethics;²⁷⁶ another would be to make land health the underpinning of all decisions affecting land use.²⁷⁷ Returning to the philosophy of Rachel Carson,²⁷⁸ or building on the conception of place as oscillating and paradoxical²⁷⁹ are two other options. The point is not that there is only one ethical direction in which

274. *Id.* at 151.

275. *See, e.g.*, Robert J. Goldstein, *Green Wood in the Bundle of Sticks; Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998).

276. *See supra* text accompanying notes 198-202.

277. *See supra* text accompanying notes 122-24.

278. *See supra* text accompanying note 39.

279. *See supra* text accompanying notes 272-73.

to move, but that several options exist that offer practical alternatives.²⁸⁰

Local, state and federal planners can begin to implement contextualized sustainable planning by revising their decision-making procedures to accommodate diverse interests and focus on place. But how would the proposed vision impact the courts, particularly in cases dealing with the issues visited earlier in this article? Assuming that an ecological awareness and respect for place is encouraged in the judiciary, preemption cases would be guided by the principle that land use decisions must be determined holistically, with a respect for the place and the people that are being impacted. Traditional land use and environmental concerns would be relevant, but so would social factors. Rather than resting decisions solely on stale and abstract statutory analysis, courts would seek a resolution that best allows all concerns to become part of the decision. Competing federal and state laws would be read together with a goal of achieving integrated sustainable planning. A determination of federal preemption would be the exception; instead, a sustainable solution coordinated between all governmental and private stakeholders would become the norm.

With respect to *Chevron* applications, courts would not automatically refuse to defer to agency interpretation of environmental statutes simply because of threatened encroachment on state land use powers. Instead, agency land use determinations would be recognized as intertwined with and inseparable from environmental policy decisions. Courts would be more willing to balance interests and defer to agency expertise. Similarly, when sovereign immunity questions arise, courts would be receptive to statutory interpretations that reflect the reality that land use and environmental objectives are inseparable.

The “zone of interests” standing test under the APA could likewise be approached with the understanding that any law addressing land use affects local environmental, social, and economic interests. Such a liberal understanding of the zone of interests requirement would allow more relevant voices to be heard, facilitating the eradication of the land use-enviro distinction. Similarly, parties would be allowed to intervene under Federal Rule of Civil Procedure 24 as long as their interests, which might not otherwise be given voice, represent any of the issues falling within the integrated model endorsed here.

280. See *supra* text accompanying notes 216-17.

The impact on regulatory takings cases would undoubtedly be the most substantial. The background principles of property law that authorize land use regulation should be seen as flexible enough to further the goals of the community and the surrounding ecosystem as well as private ownership and development. Instead of a bright line test tied to pre-existing nuisance limitations and the traditional idea of land use controls, courts should engage in a more contextualized balancing of environmental, social, and economic needs.

As shown earlier, there are a number of current initiatives that have begun to challenge the land use-enviro distinction. The suggestions mentioned here would take a further, if more difficult step to end the dualism and abstraction embodied in the distinction. In this next phase ecological, social, and economic goals would be deemed crucial to each land use decision, and all decision-makers would adjust their legal methodology accordingly. The new integrated paradigm would embrace place-based, ecological ethics, and would rely on input from all stakeholders.

The value of the geo-feminist critique is two-fold. It negates any distinction between land use and environmental decisions and thus lends support to existing initiatives that blur the distinction. More importantly, and borrowing Mick Smith's words from this article's outset, it offers an "other world" that can enrich those measures and inspire new initiatives in the pursuit of integrated and contextualized land use decision-making.