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## Civic virtue and public policy: Discerning the particulars of reforming the General Mining Law of 1872

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**CIVIC VIRTUE AND PUBLIC POLICY:  
DISCERNING THE PARTICULARS OF  
REFORMING THE GENERAL  
MINING LAW OF 1872**

by

**Scott Fitzgerald Murray**

**A thesis submitted in partial fulfillment  
of the requirements for the degree of**

**Master of Arts**

in

**Ethics and Policy Studies**

**Department of Political Science  
University of Nevada, Las Vegas  
May 1997**

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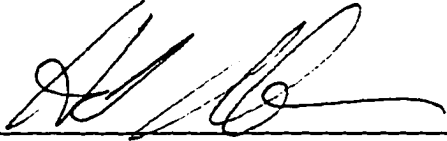
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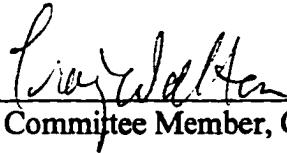
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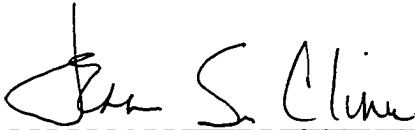
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May 1997

## ABSTRACT

How ought we, both as a society and as individuals, to reason about public policy matters? This question is examined for the purposes of analyzing the General Mining Law of 1872 and advocating reforms to this public lands law anachronism. Drawing from Aristotle and David Hume, individuals of good character, acting as citizens in pursuit of the public good through historically informed self-government deliberate best about public policy matters. It is through the exercise of civic virtue, which civic republican government encourages, that incremental and acceptable solutions to public policy problems are most likely to be found. When examined using a more formative civic virtue-based public philosophy, strong ethical arguments can be made for reforming the General Mining Law. After discerning the particulars and identifying its morally salient features, this Law does not stand up to modern concerns for economic efficiency and environmental quality. It requires major reform.



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## ACKNOWLEDGEMENTS

Three years ago, I arrived in Las Vegas, family in faithful tow as is so often the case for those who proudly serve in our nation's armed forces, driven by an incredibly strong desire for more knowledge, the seeds of which were sewn over fifteen years ago while growing up in and around Fort Lauderdale, Florida. My insatiable desire to learn is no less than an unending personal quest. This work is a tangible result of my never-ending quest. I sincerely hope those who read these many pages take away, as I have from countless hours of research and writing, one very important conclusion: It is not the act, itself, where one finds or judges virtue. Rather, it is in the decision to act where virtue is or is not most present.

Many people have had a hand in the writing of this work, many without even knowing it. Therefore, some thanks are in order. To my parents, Don and Jane Murray, I am who I am today in large part because of you both and the love and example you gave Elizabeth and me. To the many teachers, instructors, and friends I have had the pleasure of learning from and with while attending St. Thomas Aquinas High School, the United States Air Force Academy, and University of Nevada, Las Vegas, you have enlightened and fueled my quest. To my co-workers at the United States Air Force Weapons School, your support, counsel, and conversation have been invaluable. As I depart Nellis Air Force Base, you will thankfully now no longer have to endure Dutch's endless ramblings about ethics, Aristotle, and David Hume.

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To my children, Christiane and Peter, you are the blessings that motivate me. Thank you for understanding when Daddy had to go study. May you someday read these pages and begin your own quests, whatever they may be.

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**To my children,  
Christiane and Peter**

## CHAPTER ONE

### INTRODUCTION

What is right is not derived from the rule, but the rule arises from our knowledge of what is right.

— Julius Paulus, Third Century Roman Jurist

A man does what he must — in spite of personal consequences, in spite of obstacles and dangers and pressures — and that is the basis of all human morality.

— President John F. Kennedy

This thesis is about how we, both as a society and as individuals, ought to reason about public policy matters. More specifically, to this end, it is about the growing need for the exercise of civic virtue in the everyday public policymaking arena. These two themes, one broad and the other more specific, are used interchangeably throughout this work. My chosen area of analysis is hardrock mining law in the United States today. The application of a civic virtue-based public philosophy to this policy area forms the genesis of my arguments for an ethically sound justification to reform the General Mining Law of 1872.<sup>1</sup> No doubt, the reader is immediately confronted with a difficult leap of academic faith. How could United States hardrock mining law reform, one might ask, in any way be ethically justified using a civic virtue-based public philosophy as a policy reform fulcrum? In light of this question, my most important task is to assist the reader

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<sup>1</sup> Hereafter referenced as the GML throughout this work.

of this work in making this unique analytical leap. Only then will the mining law reforms advocated in this work be accepted as sound and good from both an ethical and a rational public policymaking perspective.

Why should anyone attempt to justify ethically reforms to a public policy issue like mining law? In the spirit of the words of Julius Paulus, as previously cited, and as a preliminary to my in-depth discussion of a public philosophy based on civic virtue, a brief survey of modern times helps put this emerging relationship between ethics and public policy into a much brighter light. There are many events taking place around us or events in which we ourselves are active participants that speak volumes about the state of public and private ethical discourse in our society today. These types of events are what cause me to reflect and attempt to genuinely discern the particulars in ways I previously did not know how or choose to do. Civic virtue, as the reader shall see, is as much a journey as it is a destination.

Before his match against an IBM supercomputer, world chess champion Gary Kasparov was asked to compare the overall capacity of the human mind to compete aptly against a supercomputer at chess. He responded, “We humans don’t have in our head a fixed list; we feel the most important things to evaluate.”<sup>2</sup> Unspoken but understood from Kasparov’s answer is the presence of a practically infinite list of chess move options in the microchips of a supercomputer but its inability to feel while evaluating that list.

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<sup>2</sup> Bruce Weber, “The Chess World Braces for One Landmark Match,” *New York Times*, 9 February 1996, A1.

Kasparov went on to win his match versus the supercomputer but his comment on the human condition is certainly more lasting.

Elsewhere across the globe, poet Vaclav Havel, during his inaugural address as the first freely elected president of the Czech Republic in 1994, bestowed on his countrymen a very insightful observation. "In everyone," he said, "there is some longing for humanity's rightful dignity, for moral integrity, for a sense that transcends the world of existence."<sup>3</sup> Given his long, personal history of oppression and incarceration under the former Communist regime of Czechoslovakia, President Havel's statement illustrates the personal moral realizations that many are coming to about the roles of public and private ethics in Western society today.

There are many more examples relevant to the role of ethics in our society that are much less grandiose than either Kasparov or Havel's. Many different people and diverse publications are echoing very similar ethical themes. William J. Bennett's three books, *The Book of Virtues*, *The Children's Book of Virtues*, and *The Moral Compass*, have been on the *New York Times* best-seller listings for a chronological total of more than five years up through the present-day. When Bennett actively speaks out about the home as "our children's first moral training ground" and about the responsibility of parents to

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<sup>3</sup> Quoted by Margaret Thatcher in "The Moral Foundations of Society." Originally published in IMPRIMIS, a publication of Hillsdale College, Hillsdale, Michigan. Reprinted in the *Las Vegas Review-Journal*, 15 October 1995, 1K.



actively conduct “character training” with their children, many people sit up and take notice.<sup>4</sup>

Over the airways, one of the most successful nationally syndicated radio talk shows in the United States today is “The Dr. Laura Schelessinger Show.” More than ten million listeners tune in daily on over 250 radio stations nationwide. The show’s rapid ratings ascent and growing popularity clearly illustrate that her impassioned plea for a renewed emphasis on what she calls the “three C’s” of personal decisionmaking — character, courage, and conscience — appear extremely attractive to Americans.<sup>5</sup> In her most recent book, Schelessinger assails the detestation she believes is held by many in our society whereby individual feelings reign supreme, private virtues are always “relative,” and where there is no judgment and little conscience exercised by individuals or society in general.<sup>6</sup> This decline in private virtues has external ramifications. She further believes the nation’s moral climate has become “overwhelmingly selective, permissive, and relativistic.” Consequently, the basic public moral habits of society are rapidly falling by the wayside.<sup>7</sup>

References to public and private moral themes in modern times are diverse in kind yet they are increasingly becoming a more consistent occurrence. In the spring of 1996, *U.S. News and World Report* began its annual survey of America’s best graduate schools

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<sup>4</sup> William J. Bennett, “Bring Back Values,” *USA Weekend*, 17-19 November 1995, 22-3.

<sup>5</sup> James K. Glassman, “A Moralist on the Air,” *The Weekly Standard*, 6 May 1996, 38.

<sup>6</sup> Laura Schelessinger, *How Could You Do That! The Abdication of Character, Courage, and Conscience* (New York: HarperCollins Publishers, 1996), 4-5.

<sup>7</sup> *Ibid.*, 27-28.

with the following headline: “A Move to Ethics: More Emphasis on Teaching Right from Wrong.”<sup>8</sup> Months later, many of the nation’s sportswriters proudly attributed the root origin of Evander Holyfield’s surprise championship boxing victory over former title holder Mike Tyson simply to the former’s better character. Lady Margaret Thatcher, the former prime minister of the United Kingdom, recently wrote that, “The most important problems we have to tackle today are problems, ultimately, having to do with the moral foundations of society.”<sup>9</sup> Again, Thatcher is echoing the moral theme that the decline in private virtues is having a profound effect on public life. It is, therefore, extremely easy to understand why *U.S. News and World Report* ran a cover story in the summer of 1996 entitled “How to Raise a Moral Child.”<sup>10</sup> The meanings of words like “character,” “virtues,” “morality,” and “ethics” and the roles these ideals play in our society are on the minds of the American people today. This thesis seeks to add “civic virtue” to this ethical lexicon.

It is important, at this point, to expose the reader to the definition of civic virtue upon which this work hinges. If, as Aristotle wrote, a polis, through vibrant political interaction, aims at the highest, most comprehensive good, namely the good life<sup>11</sup> or “the highest attainable good through action,”<sup>12</sup> then civic virtue is that quality in its citizens that allows them to actively participate in reaching that end. More specifically, civic

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<sup>8</sup> *U.S. News and World Report*, 18 March 1996, 79.

<sup>9</sup> Margaret Thatcher, “The Moral Foundations of Society.”

<sup>10</sup> *U.S. News and World Report*, 3 June 1996.

<sup>11</sup> Aristotle, *The Politics*, trans. Ernest Barker (London: Oxford University Press, 1946), 1278b15.

<sup>12</sup> *Ibid.*, *Nicomachean Ethics*, trans. Martin Ostwald (Englewood Cliffs, New Jersey: Prentice Hall, 1962), 1095a16.

virtue is the public way of discerning and acting — formed and guided by experience, practice, and habit — that aims to better the polis and oneself. Through the exercise of civic virtue, the need for the polis to address the question of whether or not the government should be neutral with regard to the public pursuit of the good life should be eliminated. Individuals of sound, good character acting as citizens in the common pursuit of the public good through the exercise of historically informed self-government deliberate best about public policy matters. In so doing, these individuals exercise civic virtue. They possess the trait of public moral excellence. They are the ones who will most likely find good, sound solutions to public policy problems, and their best membership in the community.

If the reader is still unconvinced about the reemergence of public ethical themes in society today, witness some of the political rhetoric that took place during the 1996 United States presidential campaign. *Time* described the two national parties' conventions as overflowing "virtuefests" that drew on a "wellspring of bigthink" from both liberal and conservative authors alike. Bob Dole's reoccurring theme was "reviving old values." Bill Clinton countered with a theme of "protecting our values."<sup>13</sup> Both parties were well aware that they had to actively chase the values vote in pursuit of victory.<sup>14</sup> *USA Today* examined speeches by both candidates during the campaign's

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<sup>13</sup> Robert Wright, "The False Politics of Values," *Time*, 9 September 1996, 42.

<sup>14</sup> See *USA Today's* two-part series, "Chasing the Values Vote: Morality Issues Matter More" by Patricia Edmonds and Ann Oldenburg, 6-7 August 1996, for a more in-depth discussion of these questions during the 1996 U.S. presidential campaign.

summer months and found an inordinate number of uses of many seemingly political catch phrases dealing with character, virtues, and values. These phrases included “mainstream values and virtues,” “common-sense values,” “opportunity, responsibility, and community,” and community of values,” to name but a few.<sup>15</sup> This Clinton and Dole presidential campaign rhetoric, in a much broader sense, reflects the reemergence of ethical themes and language in the United States today. William J. Bennett addressed this reemergence of ethics in American politics in a recent opinion editorial entitled “Why Character Matters”:

It should matter to the American people whether a president’s word is reliable or not; whether a president and his administration are well-known for dissembling and obfuscating; whether an administration is characterized by ethical misconduct, or whether a president and his administration engage in abuses of power, obstruction of justice or the withholding of documents.<sup>16</sup>

Recent Gallop polling data reinforces this growing trend within the American electorate where individuals are more actively attempting to publicly discern the ethical particulars in our political processes and about our political leaders. Nine of ten Americans said President Clinton and Bob Dole’s “stands on moral values” would be “important to earning their vote.” More significantly, in my view, three of five Americans said “government should promote moral values.”<sup>17</sup> This latter finding is critical to the rebirth and reinforcement of civic virtue in our political process. In the end,

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<sup>15</sup> Patricia Edmonds and Ann Oldenburg, “Election ’96: A Battle of ‘Family Values’,” *USA Today*, 7 August 1996, 4A.

<sup>16</sup> William J. Bennett, “Why Character Matters,” Empower America press release. Reprinted in *Newsweek*, 21 October 1996.

<sup>17</sup> Edmonds and Oldenburg, “Chasing the Values Vote,” *USA Today*, 6 August 1996, 4A.

former Vice President Dan Quayle points us in the direction of renewed civic virtue when he says, “We can’t expect to make serious moral progress through presidential ballots. We need to do it through everyday conversations we have with friends and neighbors and co-workers.”<sup>18</sup>

Given the reemergence of ethical themes in American politics today, this thesis seizes the opportunity to introduce a civic virtue-based public philosophy into public conversations about mining law reform at all levels of political interaction. It defines the way we ought to reason rightly about a particular public policy matter, namely mining law reform, and public policy matters in a much larger sense. Numerous other opportunities exist for the application of a more civic virtue-based public philosophy to other public policy issues. Unfortunately, these other issues are beyond the scope of this work. Therefore, any further applications of this public policymaking theme are left solely up to the reader.

In the chapters that follow, I build a case for the much needed and long overdue reform of the GML and conclude with specific mining law reform proposals. The GML is a law most characterize as “incongruous with modern notions of public land management.”<sup>19</sup> However, the process of reforming the GML has been a difficult journey. The traditional American model of rational political decisionmaking, where different inputs are evaluated by policy actors for their strengths and weaknesses under

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<sup>18</sup> As quoted in Edmonds and Oldenburg, “Chasing the Values Vote.”

<sup>19</sup> Mark Squillace, “The Enduring Vitality of the General Mining Law of 1872,” *Environmental Law Reporter* 18 (July 1988): 10261.

the auspices of modern cost-benefit analysis, and where one kind of policy output or reform is the result, does not fully apply in this thesis. This work advocates incremental solutions rather than idealized ones that all too often result from this traditional rational model. Fundamentally, policy reforms should result from a political process where policy actors reason from the central premise of a civic virtue-based public philosophy. Therefore, this work applies a civic virtue-based public philosophy to the issue of hardrock mining law reform in order to answer the larger question of how we, as a society and as individuals, ought to reason about public policy matters.

Chapter Two, “The Law, the Industry and the Environment,” consists of my interpretation of the pertinent facts pertaining to this public policy issue. It first explains and summarizes the provisions of the GML as it exists today in the United States Code. It then examines the general status and health of the mining industry in the western United States. It concludes with an examination of current policy statements regarding environmental stewardship presently being touted by the nation’s political leaders, the press, and mining law reform policy interest groups. This chapter provides the common reference baseline for all subsequent chapters.

Chapter Three, “Mining Law Reform: Multiple Perspectives,” examines the GML reform question from the many different perspectives of involved policy actors. These include the perspectives of legislators in the 103rd and 104th Congresses, the executive branch, mining industry executives and lobbyists, environmentalists, fiscal conservatives, the media and other participants in the GML reform debate. These

differing perspectives help to explain the presence of the current legislative stalemate surrounding the mining law reform issue. I rely greatly on Deborah A. Stone's analysis of the rational decisionmaking model in her book, *Policy Paradox and Political Reason*, in order to identify, wade through, and analyze the political language of the GML reform stalemate to find common ground upon which an achievable compromise can be based. This type of higher-level reflection about the policy-making process is very desirable. By recognizing that we pay a price as a public society for the continued existence of policy stalemates, like GML reform, and for our inability to deal with them effectively, we have very good reasons for seeking to understand them more deeply.<sup>20</sup> This higher level of understanding is critical to breaking policy stalemates.

In Chapter Four, "Breaking the Stalemate: Renewing the Civic Republican Tradition," Michael J. Sandel's recent book, *Democracy's Discontent: America in Search of a Public Philosophy*, is used as a springboard for addressing a much larger debate taking place within contemporary American political discourse under which the mining law reform stalemate plays itself out. It is a debate between those who advocate a return to a more civic republican tradition of government and those who hold for the continuation or greater expansion of a governing philosophy based on the classic liberal tradition or liberal individualism. This ongoing public dialogue seeks to address the fundamental question of how ought we to reason about public policy matters. It is in this

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<sup>20</sup> Donald A. Schön and Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (New York: BasicBooks, 1994), 9.

chapter where the exercise of civic virtue is first introduced as the cornerstone upon which a civic republican tradition of government should be built. According to Sandel, the civic republican themes of character, citizenship, and self-government are the main public philosophy elements that combine to encourage the exercise of civic virtue. They are the basis for public understanding of public policymaking in our political system today.

Having confirmed the presence of a GML reform stalemate in the United States today and then proposed a civic virtue-based public philosophy as the most promising means for resolving it, Chapter Five, “Civic Virtue and Mining Law Reform,” lays out more specifically what civic virtue is and why it should be the centerpiece of good, sound public policymaking. This chapter is the heart and soul of this work. In it, the civic republican themes of character, citizenship, and self-government that encourage the formation of civic virtue in the citizens of the polis are examined. Using these themes, I then construct ethical arguments that advocate sound, good, achievable reform of the 1872 GML.

A public philosophy based on civic virtue demands that three philosophical elements be addressed. First, policy participants must possess or aspire to possess good character. Second, as citizens, we must engage one another and debate the presence of David Hume’s “standard of taste” in society relating to the public good. Finally, all policy players must understand the historical background and evolution of a particular policy that includes past, present, and future policy objectives.



Aristotle's concept of practical wisdom and, more recently, Nancy Sherman's interpretation of this Aristotelian characteristic in her book, *The Fabric of Character*, form the basis for my discussion of the importance of character in a civic virtue-based public philosophy. Irrespective of the policy issue at hand, the individual character of policymaking participants must be sound and good in an Aristotelian sense. Citizenship has been described as the moral bond of the public good. Any reform to United States mining laws cannot neglect environmental questions of stewardship and multiple-use. As a result, I propose an environmental policy ethic as the standard of taste that forms the moral bonds of good citizenship pertaining to this issue. It is an ethic most should agree on as the public good relating to the issue of mining law reform. I depend greatly on David Hume's arguments advocating the presence of a "standard of taste" in society to examine the critical elements of modern-day ethical land use. Finally, I identify one's personal experience and the historical background and evolution of policy as key elements to the exercise of successful self-government. Without these elements serving as common reference points, the exercise of virtuous self-government will not likely be possible. Aristotle's views on experience as part of practical wisdom together with Hume and others' writings on the significance of history greatly inform my discussion of self-government as an element of civic virtue-based public philosophy.

Chapter Six, "A Brief History of United States Public Land Policies, United States Mining Law and Nineteenth Century Mining in the American West," is an abbreviated history of the GML as part of United States public land policies since 1785

and of mining in the American West during the nineteenth century. It provides the reader with some final essential elements of information necessary to accept and support any modern-day mining law reform proposals. The GML is not a public lands legal anomaly. Rather, it and the miners it affected are part of an important era in American history that first dealt with public land policy questions. These nineteenth century answers to public lands questions still impact us today. Knowing why the law was passed and who were the people the law impacted are just as important to exercising civic virtue as knowing what the law specifically entails and whom it impacts today.

Based now on a common understanding of the exercise of civic virtue and a knowledge of the policy particulars, Chapter Seven, “Proposals for Reform: Civic Virtue in Action,” reveals my proposals for GML reform. These proposals include payment by mining companies of both fair market value prices for public lands and royalties on mining profits, specific reclamation standards for hardrock mining sites, and new ethical standards for multiple use of public lands. These mining law reform proposals are certainly not new to the debate surrounding this public policy issue. However, through the exercise of civic virtue, they appear to be the kinds of reasonable conclusions that should be reached through the acts of formative deliberation and choice this work so strongly advocates.

This thesis addresses a very serious question in American politics today — How we, both as a society and as individuals, ought to reason about public policy matters? — using the 1872 GML, or what its most vocal reform advocate calls the “most scandalous

anachronism” within the United States Code today,<sup>21</sup> as the primary object of my analysis. The answer to this larger question can be found through the public embrace of a philosophy derived from the civic republican tradition and based on the exercise of civic virtue. Individuals of sound and good character acting as citizens in pursuit of the public good through the exercise of historically informed self-government deliberate best about public policy matters. These are the individuals who will likely find good, sound solutions to public policy issues and problems. My strong advocacy of the exercise of civic virtue may not provide overwhelming or incontrovertible justification for the exercise of ethical reasoning throughout the public policy process. This is not my intent. Those reflective enough to ask the question I have proposed, however, are also the most likely, I believe, to appreciate a civic virtue-based public philosophy as its best and most achievable answer.

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<sup>21</sup> Congress, Senate, Senator Dale Bumpers of Arkansas, 104th Cong., 1st sess., *Congressional Record* (8 August 1995), S11866.

## CHAPTER TWO

### THE LAW, THE INDUSTRY AND THE ENVIRONMENT

If it can't be grown, it has to be mined.

— Nevada Mining Association Bumper Sticker

There can be no delusion more fatal to the nation than the delusion that profit, or business prosperity, is sufficient in judging any business or political question.

— President Theodore Roosevelt

United States public lands policies from colonial times through the 1930s were characterized by strong federal legislative support of two fundamental principles: settlement and economic development. These principles were openly encouraged through the transfer of public lands to the private sector at minimal or no cost. Homesteaders, land speculators, veterans, railroad companies, agricultural colleges, and hardrock miners were all benefactors of this public lands policy.<sup>1</sup> As Frederick Jackson Turner described the nation's public lands policies in 1903, "These free lands promoted individualism, economic equality, freedom to rise and democracy ... In a word, free lands meant free opportunity."<sup>2</sup>

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<sup>1</sup> "Federal Mining Law," *Congressional Digest* 73:3 (March 1994): 72.

<sup>2</sup> As quoted by Roy M. Robbins in *Our Landed Heritage: The Public Domain 1776-1936* (Lincoln, Nebraska: University of Nebraska Press, 1962), vii.

## THE GENERAL MINING LAW OF 1872

In 1872, the United States Congress ended over two decades of debate about the scope and content of a federal law that would manage and regulate extraction of the nation's hardrock mineral wealth. In the end, key Western lawmakers from both houses of Congress took the various mining codes of individual states, territories, and mining districts and molded them into what is known today as the General Mining Law of 1872.<sup>3</sup> Passed in the wake of the Homestead Act of 1862 during the post-Civil War era, the GML embodied the frontier spirit of the American West and the independence of its miners. It has survived the closing of the public domain, the rise of the modern environmental movement, and, throughout the twentieth century, the continual evolution of federal land and resource management policies.<sup>4</sup> Today, it is a law that reflects the days when Western land and mineral resources seemed boundless, and when no amount of free land or minerals seemed too great a price to ensure the settlement and economic development of the West. Its vitality over the 125 years since its passage is admirable from simply a public policy perspective. But it would, no doubt, greatly surprise its authors and benefactors alike to learn of its stalwart longevity as the twenty-first century fast approaches.

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<sup>3</sup> The historical background pertaining to the development and passage of the General Mining Law of 1872 is explored in greater depth within Chapter Six of this work.

<sup>4</sup> John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, D.C.: Resources for the Future, Inc., 1987), 3.

Before examining the specific provisions of the GML, it is important to understand what mining law generally sets out to accomplish and why it is a necessary public policy issue. Mining law sets the rules governing the ownership of mineral deposits and the relation between miners and other users of lands while, at the same time, providing for government enforcement of those rules. It reflects the fact that each mineral deposit has a specific and definable location. The miner always has the choice as to developing a particular deposit, but when the choice is made, the location of the mine becomes an irrevocable legal fact. The choice to locate a mine in a particular location is almost never a hasty one, because only a few mineral deposits have the long-term economic prerequisites for development. The rules established by mining law are therefore of vital importance. On the one hand, no individual or corporate miner can afford to invest in mineral discovery and development unless they have security of land tenure during the period of time necessary for extraction and production of minerals from whatever deposits may be found. On the other hand, the rules must also be such that the interests of the general public and the government are adequately protected.<sup>5</sup> In summary, mining law in the United States creates a mechanism for conveying federal lands into private ownership for mineral production within the context of established federal land use planning policies.<sup>6</sup>

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<sup>5</sup> Eugene N. Cameron, *At the Crossroads: The Mineral Problems of the United States* (New York: John Willey & Sons, 1986), 204.

<sup>6</sup> John L. Dobra and Paul R. Thomas, *The U.S. Gold Industry 1994* (Reno, Nevada: Mackay School of Mines, 1995), 24.

Not surprisingly, the Congressional debate over disposal of mineral public lands in the United States began in earnest with the arrival of the first Congressional delegation from the State of Nevada in January of 1865. Both the Senate and House of Representatives formed permanent Committees on Mines and Mining within one month of the arrival of the Nevada delegation. Both were chaired by Nevada lawmakers.<sup>7</sup> The nation's first national mining law was passed on July 26, 1866. It applied only to underground or lode mining of minerals in firm bedrock. On July 9, 1870, Congress passed a similar statute that placed above-ground or placer mining of minerals in unconsolidated surficial materials under the jurisdiction of federal law. By the beginning of the Forty-second Congress in 1871, the need to unify and refine these two distinct mining laws was apparent to Western lawmakers for both technical mineral prospecting and savvy political reasons,<sup>8</sup> not the least of which was to legally validate the never-ending stream of trespasses by anxious prospectors onto the public lands.

Entitled "An Act to Promote the Development of the Mining Resources of the United States" and signed into law by President Ulysses S. Grant on May 10, 1872, the GML states "that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploitation and purchase."<sup>9</sup> According to Senator Aaron A. Sargent of California, who strongly

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<sup>7</sup> Russell R. Elliot, *Servant of Power: A Political Biography of Senator William M. Stewart* (Reno, Nevada: University of Nevada Press, 1983), 47.

<sup>8</sup> Benjamin Horace Hibbard, *A History of the Public Lands Policies*, 2nd ed. (Madison, Wisconsin: University of Wisconsin Press, 1965), 515-7. This book was originally published in 1924.

<sup>9</sup> U.S. Department of the Interior, *The United States Mining Laws* (Washington, DC: Government Printing Office, 1885), 9.

advocated passage of the GML, it was public policy necessary to encourage the settlement of the arid West and to assure miners the rewards of their discoveries:

We are inducing miners to purchase their claims, so that large amounts of money are thereby brought into the Treasury of the United States, causing the miners to settle themselves permanently, to improve and establish homes, to go down deeper in the earth, to dig further into the hills, and in every way to improve their condition, and to build up the communities and States where they reside.<sup>10</sup>

While some have characterized the GML as a law enacted simply to “stop people from killing each other” over mining claims,<sup>11</sup> it is extremely important to understand what the GML is and what it is not. The GML is a land tenure law passed under the auspices of the great nineteenth century American homestead tradition to encourage the discovery, delineation, and development of mineral deposits beneath federal lands. It is not, nor was it ever intended to be, an environmental law or a source of substantial federal revenue. These latter characterizations are used primarily by modern-day mining law reform advocates.

The GML sets the strikingly broad policy of allowing any United States citizen or persons who have declared their intention to become citizens to freely prospect for minerals on public lands without any advance notice to or permission from the federal government with the promise of unfettered disposition of any valuable hardrock minerals

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<sup>10</sup> Congress, Senate, Senator Aaron A. Sargent of California, 42nd Cong., 2nd sess., *Congressional Globe* (23 January 1872), 534.

<sup>11</sup> Bill Condit, Senior Majority Staff Assistant, U.S. House of Representatives Natural Resources Committee, interview by author, 30 July 1996.



discovered.<sup>12</sup> Over the years, “citizens” has been broadly construed by judicial review to encompass minors, corporations, unincorporated associations, and governmental entities, as well as the traditional western miner. These are key interpretations addressed by modern GML reform efforts.

The GML codifies four fundamental mining principles, largely derived from the Spanish Royal Code of 1783,<sup>13</sup> that regulated local mining district practices of the nineteenth century. They were free access, self-initiation, security of title, and due diligence. The principle of free access guarantees a miner’s right to mine on public lands. The corresponding right to extract and develop any minerals found are also implied in the principle of free access. Not all public lands are open to location of mining claims. Up until the passage of the Federal Land Policy and Management Act (FLPMA) in 1976, the president had sweeping authority to withdraw public lands from the operation of various public land laws. Indeed, this authority has been exercised with much frequency by presidents in the twentieth century. However, with the passage of the FLPMA, Congress more strictly limited this presidential power. Congress has always maintained the authority to withdraw public lands by statute at any time with the approval of the president. These presidential and congressional powers to withdraw public lands remain the law of the land, having withstood many judicial challenges through the years. Most

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<sup>12</sup> This summary of GML provisions is taken from the following sources: Mark Squillace, “The Enduring Vitality of the General Mining Law of 1872,” *Environmental Law Reporter* 18 (July 1988): 10261-70 passim and “Federal Mining Law,” *Congressional Digest* 73:3 (March 1994): 72-3.

<sup>13</sup> Robert F. Burford, “The Mining Law of 1872: Hard-Rock Mineral Industry Scrutinizes Legal Foundations,” *Geotimes*, March 1990, 18.

recently, in September 1996, President Clinton, acting under powers granted him by the Antiquities Act of 1906, withdrew, via Executive Order, 1.7 million acres of public lands in southern Utah from the operation of various public land laws, including the GML, to create the controversial Grand Staircase-Escalante National Monument.<sup>14</sup>

The initial question confronting the individual or corporate miner is whether the land on which he is prospecting is open to location under the propositions of the GML and other public land laws. If the lands are open, the miner may proceed directly onto public lands and carry out all necessary prospecting activities.

Even though the GML principle of free access has become increasingly at odds with modern concerns for the environment over the past several decades, prior approval from the federal government to enter open public lands for mineral prospecting still need not be obtained. This is the GML principle of self-initiation. Historically, the act of mineral prospecting and the subsequent confirmation of a valuable mineral discovery are often very difficult and expensive processes. For today's miners, hardrock minerals deposits are relatively rare, small, and usually well concealed. Therefore, the principle of self-initiation has never been the object of serious GML reform efforts.

The GML principle of security of title is more complicated. The right to extract minerals is initiated by the search for and discovery of a valuable mineral deposit. This is followed by the legal location and filing of a mining claim. The discovery, location,

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<sup>14</sup> See Hal Rothman, *Preserving Different Pasts: The American National Monuments* (Urbana, Illinois: University of Illinois Press, 1989) for additional historical examples of public lands withdrawals.

recording, and maintenance of the claim guarantees the claim holder legal security against hostile takings or claim-jumping by any other party in the eyes of the law. Most importantly, under the principle of security of title, the individual or corporate miner possesses the right to take outright title to the public lands encompassed by the claim. The GML limits the size of each mineral claim to no more than 160 acres per individual claim. Additional provisions of the GML allow the mining prospector to swing his claim around the point of discovery in order to determine the total size of the claim as well as to determine the surface apex of a lode claim. The GML further requires that the mine location “be distinctly marked on the ground so that its boundaries can be readily traced.”<sup>15</sup> Location documentation requirements have evolved over time to include the filing of location certificates with the corresponding county property records offices and the Bureau of Land Management within ninety days of the claim location.

The right to gain title to a mineral claim, or, in other words, to assume legal ownership from the United States Government of public lands that contain extractable and economically viable minerals, is executed under the GML patent procedures. Mining patents are fee-simple title to land and all the minerals it might contain. Once a patent is granted by the federal government, it is irrevocable under GML provisions. The land is permanently removed from the public domain unless the government buys it back from the claim holder at market price. Furthermore, the claim holder pays no royalties to the federal government on any and all hardrock minerals extracted from the land because the

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<sup>15</sup> *The United States Mining Laws*, 10.

claim holder now owns the land. Under prices still legally binding today under the GML, the United States government must sell these mining patents to claim holders for no more than \$5.00 per acre. It should be noted that these prices were almost 400% higher than the price of \$1.25 per acre for agricultural public lands sold in 1872 under the provisions of other public land laws.

A short synopsis of some modern patents pending and fees collected under the provisions of the GML helps put its principle of security of title into a more modern perspective. In 1988, for example, the United States government received \$4,500 for twenty mining patents which legally transferred title to land valued between \$13 and \$47 million due to its postulated mineral content. As of March 1994, there were over 583 patent applications pending that, when executed, would transfer over 200,000 acres of public lands for a fraction of their worth in minerals such as gold, silver, and copper. In a more recent 1995 case, the Secretary of Interior transferred title for 1,850 acres of land holding an estimated \$11 billion in gold to a large, international mining conglomerate at the GML price of \$5.00 per acre for a total federal revenue of \$9,250.<sup>16</sup>

The final principle upon which the GML is founded is due diligence. The law requires claim holders to annually perform \$100 worth of development-related work on their claims. The GML calls this assessment work. The purpose of this requirement was to encourage the continued development of mineral resources and to ensure that claimants

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<sup>16</sup> Keith White, "Senate Approves Craig's Change to Mining Laws," *Las Vegas Sun*, 9 August 1995, A8.

were acting in good faith, with the intention of developing a working mine in a timely fashion. In 1976, the FLPMA added a federal filing requirement for assessment work. Failure to file this assessment results in the forfeiture of any and all claims. The sheer number of mining claims on public lands, however, makes enforcement of this legal provision next to impossible for Bureau of Land Management inspectors. As a result, the principle of due diligence is also being assailed by GML reform advocates.

One additional aspect of the due diligence principle is important to understanding the modern application of GML provisions. Because the discovery of valuable minerals is the linchpin of any GML valid claim, a strict interpretation of the statute would provide no protection for a prospector before such a discovery is made. It is here where the courts have stepped in and interpreted the GML due diligence provision to include the common law doctrine of *pedis possessio*. The *pedis possessio* doctrine protects a mining claimant against other claimants. In effect, it allows an individual or a corporate prospector to maintain claims against any and all third parties in the absence of a valid GML mineral discovery, as long as discovery is diligently pursued and occupancy of the land is continuously maintained. According to Eugene Cameron, for most of the twentieth century, almost without exception, all mineral exploration on United States public lands has been based on this concept.<sup>17</sup> More specifically, according to the mining industry's leading trade organization, the National Mining Association, seventy to eighty percent of all suspected mineral discoveries are brought to the attention of larger mining

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<sup>17</sup> Cameron, 210.

companies by small miners or prospectors. Under the *pedis possessio* doctrine, in return for the mineral rights, large mining firms pay royalties and rent or a one time discovery fee to the original finder.<sup>18</sup>

In summary, the GML codifies four fundamental mining principles: free access, self-initiation, security of title, and due diligence. All remain part of the United States Code today although some legislative and executive restrictions have been added over the years. Efforts to reform the GML cannot escape addressing these historic mining principles. Their influence on mining law reform efforts remains powerful, having been successfully tested in the courts throughout the twentieth century. According to the former Secretary of the Interior under President Reagan, Donald P. Hodel,

It is absolutely essential ... that we provide access to public lands for prospecting and development of minerals, and that we preserve the essential features of the Mining Law of 1872. The legacy of the old prospector lives on, stronger than ever. We should endeavor to make the principles of the Mining Law our guideposts for minerals development in the twenty-first century.<sup>19</sup>

## THE MINING INDUSTRY TODAY

Make no mistake. The hardrock mining industry in the United States today is big business. At the most recent Northwest Mining Association Conference in Spokane, Washington, mineral economist Douglas Silver lauded the industry's successful year in 1996. "Business is being conducted at a very healthy clip," said Silver, "New jobs are

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<sup>18</sup> Margaret E. Kriz, "Hard Rock Realities," *National Journal*, 13 July 1991, 1747.

<sup>19</sup> Donald P. Hodel, "Introduction," in *The Mining Law of 1872: A Legal and Historical Analysis* (Washington, D.C.: National Legal Center for the Public Interest, 1989), xiii.

being created, new services are being provided. All-in-all, it has been a magnificent year for the industry in the United States”<sup>20</sup> In a recent newspaper series dealing with new mineral extraction technologies being developed by the mining industry, a Newmont Mining Corporation senior vice president was quoted as saying, “It’s an extremely exciting time to be in the minerals industry. For so many years, the industry was stagnant. But there have been amazing technological advances in the past ten to twenty years.”<sup>21</sup> These technological advances allow mining companies to seek patents to public lands under provisions of the GML where none would ever have been considered only a decade ago. New mining technologies, actively applied on GML patented lands, are encouraging rapid growth in the United States mining industry. Barring any radical changes to the GML, these historically high levels of mineral production are forecast to continue well into the next century.

Gold is the hardrock mining industry’s most visible poster child. The centuries-old attraction of gold has not lost any of its luster during the 1990’s. Despite volatile price levels, its reputation as a safe haven investment during times of economic or social upheaval, its enduring decorative value, and its developing industrial applications all combine to ensure strong demand for this most precious of the precious metals for the foreseeable future. According to statistics published in August 1996 by the Nevada Bureau of Mines and Geology, 10.5 million troy ounces of gold worth \$4 billion were

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<sup>20</sup> “Miners Meet in Spokane,” *Las Vegas Sun*, 6 December 1996, 1D.

<sup>21</sup> Allison Calkins, “Mining Gold Turns to Scientific World,” *Las Vegas Sun*, 29 September 1996, 5D.

extracted from commercial mines in the United States during the calendar year 1995.

This represents a ten-fold increase over 1980 totals. The State of Nevada accounted for 65% of the 1995 total, 6.825 million troy ounces. In addition, within fifteen years, the United States is forecast by most industry analysts to emerge as the world's largest gold producer, surpassing South Africa.<sup>22</sup>

Nevada is the center of action for the gold mining industry in the United States. According to Mike Doyle, president of the Nevada Mining Association, "Mining is alive and well. It's big business in Nevada and it has an excellent future. Nevada is considered a world-class exploration site — we just keep finding more. There's at least a twenty-year supply."<sup>23</sup> Seven of the world's top ten gold mining corporations have operations in Nevada on land patented under the provisions of the GML. Most notably, these include Barrick Gold Corporation, Newmont Mining Corporation, Placer Dome, Inc., and Santa Fe Pacific Gold Corporation. The industry is an integral part of the Nevada economy. In 1995, the gold mining industry generated \$113 million in Nevada state and local taxes.<sup>24</sup> According to the Nevada Department of Employment Security, over 13,700 workers are directly employed by the industry in Nevada. Another 44,280

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<sup>22</sup> "U.S. Becoming Largest Gold Producer," *Las Vegas Review-Journal*, 28 July 1996, 7C.

<sup>23</sup> Ruthie Deskin, "Mining Resurgence a Reminder of State's Rich History," *Las Vegas Sun*, 10 September 1996, 1A.

<sup>24</sup> John G. Edwards, "Mining Industry Shines Brightly throughout State," *Las Vegas Review-Journal*, 10 December 1995, 5-6L.



jobs are in businesses that regularly supply or service the industry. These numbers are surpassed only by the Nevada gaming industry.<sup>25</sup>

In the nation as a whole, according to United States Bureau of Economic Analysis 1993 statistics, the hardrock mining industry had a direct employment impact on more than 90,000 jobs throughout the country. Ninety-two percent of these jobs were located in the Western states. The total value of gold production in the Western states during 1993 was just over \$3.5 billion. Total earnings by mining companies in the Western states during 1993 were estimated at approximately \$2.1 billion<sup>26</sup> Certainly, these are very large numbers indeed but the hardrock mining industry still remains one of the smallest components of the total United States gross national product (GNP). From 1985 through 1990, the industry contributed only 0.07 percent to the total GNP. In many Western states, however, the mining industry represents up to fifty times more in terms of gross state product.<sup>27</sup>

How does the mining industry compare to other industrial sectors in the United States with regard to overall profitability? The average annual return on equity for major North American companies producing precious minerals in the United States is lower than that of most other U.S. durable and nondurable manufacturing industries. However,

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<sup>25</sup> Keith Rodgers, "Mining the Store: Nevada's Precious Metal Mining Booms," *Las Vegas Review-Journal*, 29 June 1996, 1-2B.

<sup>26</sup> Dobra and Thomas, 9. For this purpose of this work, the Western states consist of the following: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Washington.

<sup>27</sup> Burford, 18.

the mining industry has generated positive returns of three to fifteen percent during nine of the past ten years.<sup>28</sup>

Despite promising intermediate and long-term economic growth forecasts and the many ongoing exploration efforts to find the next inevitable valuable deposit, the mining industry has its problems. There is the growing public perception that the GML is a gross form of corporate welfare for mining companies. Mineral deposits, it could be argued, are becoming harder to discover. Production costs are steadily increasing at a rate comparable to the national inflation rate. Mining profits will always be tied to fluctuating precious metal prices and other market forces. However, all these hurdles rank well below the problem of balancing environmental concerns with the ability of the mining industry to operate profitably. In a policy statement released by the Northwest Mining Association, they said the industry was increasingly being hurt from a strongly negative environmental image.<sup>29</sup> This negative image led a market-research firm, after polling 1,000 registered voters in 1990, to recommend that the American Mining Congress<sup>30</sup> conduct the debate over reforming the GML “outside of public view.”<sup>31</sup> The well-known saga of the Summitville Gold Mine in Colorado’s San Juan Mountains, with its vivid examples of environmental abuse, is at the heart of these negative perceptions. Just as recently as November 25, 1996, the American Broadcasting Corporation aired a segment

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<sup>28</sup> *Ibid.*, 4.

<sup>29</sup> *USA Today*, 2 December 1996, 3A.

<sup>30</sup> The American Mining Congress officially changed its name to the National Mining Association in July 1996.

<sup>31</sup> Joan Hamilton, “Fields of Dust,” *Sierra*, January/February 1993, 52.

on its national news program, "World News Tonight," calling for GML reforms in which two minutes of the three minute report were devoted entirely to retelling the story of the Summitville Gold Mine.

In 1984, Galactic Resources of Vancouver, British Columbia, through a subsidiary known as the Summitville Consolidated Mining Company, began open-pit mining of gold ore using a controversial cyanide heap-leaching process at a site near Summitville, Colorado. The company spent \$200 million to rebuild the mine out of various historical underground workings originally begun in 1870 and mined sporadically up through 1973. In 1990, the company was fined \$100,000 by the federal government for spilling cyanide-laced water into the Alamosa River. By 1991, however, the mine had produced only \$120 million in net gold sales. Summitville Consolidated declared bankruptcy in December 1992. Galactic Resources did the same in January 1993. The cyanide heap-leaching ponds that were left behind when the mine was abandoned created a severe environmental hazard not only in the immediate areas surrounding the mine but also to underground water reservoirs in the region. At the request of the state of Colorado, the United States Environmental Protection Agency (EPA) took over the site under the guidelines of the federal Superfund statute and began environmental remediation procedures by July 1993.

The most conservative estimates put the total cost of cleaning up the Summitville mine at \$152 million. As of August 1996, the EPA had spent just over \$100 million employing fifty-five full-time workers at a cost of \$33,000 per day with work expected to

continue for up to another two years. Damage to the underground water sources that occurred prior to 1993 could not be repaired. All work is currently geared towards preventing further underground water contamination and run-off of cyanide-laced water at the site into the headwaters of the Rio Grande. In late-August 1996, the United States government filed suit in a Canadian court against the former president and chief executive officer of Galactic Resources and Summitville Consolidated in order to recover the costs of the Summitville mine clean-up. The suit is currently pending.<sup>32</sup>

Summitville is just one of about fifty mining sites that are included on the EPA's Superfund listing. These sites are a large public relations concern for the mining industry. At the same time, they represent a potentially severe financial burden as well. As one GML reform advocate puts it, "In the long run, the failure to get hold of these environmental issues is going to cost far more than the dollars lost because of royalties or lack of getting fair market value for the land."<sup>33</sup>

The hardrock mining industry in the United States is certainly at a crossroads. It has developed a large, efficient, and economically viable capital base that is fundamentally sound and sustainable well into the twenty-first century. It generates tens of thousands of jobs, billions of dollars in output and exports, and hundreds of millions of dollars in household income, corporate, and state property and sales taxes.<sup>34</sup> From an

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<sup>32</sup> This short synopsis of the Summitville mine story is taken from three sources: "The Summitville Story," *The Northern Miner*, 2 September 1996, 2; "EPA Pounces over Summitville," *Mining Journal*, 30 August 1996, 1; and Robert H. Boyle, "This Land is Mine Land," *Outdoor Life*, August 1994, 52-4.

<sup>33</sup> Philip M. Hocker in Margaret E. Kriz, "Hard Rock Realities," *National Journal*, 13 July 1991, 1745.

<sup>34</sup> Dobra and Thomas, 31.

industry perspective, however, this prosperity is threatened by the growing image of environmental neglect by the industry and the unknowns of potential GML reforms. If Congress passes reasonable and sound GML reforms within the framework of a civic virtue-based public philosophy, as this work argues for, then the industry will likely continue to prosper. If, however, the GML is reformed without regard for the civic virtue this work proposes, then the industry could quite possibly mine out its patented reserves, end efforts at new mineral exploration and shift its capital to less politically volatile international havens.

#### MODERN ENVIRONMENTAL CONCERNS

Annually, each April 22nd, the commemoration of Earth Day presents a visible opportunity for the nation's politicians and special interest groups to express their particular views on the state of the environment in the United States and around the world. In 1996, the presidential election also provided an additional opportunity for candidates to step up to the environmental advocacy podium. These types of political statements inevitably reveal the ongoing struggle in the United States between concerned environmentalism and two other cherished American standards, namely freedom and economic growth. These values, more often than not, clash when one weighs the utility of any proposed environmental legislation. It is one thing to want clean air and water. According to environmental activist polls, eighty percent of Americans call themselves

“environmentalists.”<sup>35</sup> It is an altogether different thing when these desires are counterbalanced by the historical American emphasis on property rights and the more recent policy of multiple-use access to public lands. The mining law reform debate is not immune from these conflicts of competing environmental and political views.

President Clinton believes there is no evidence that environmental protection has hurt our economy at all. He worries more that the Republican-controlled Congress will continue to cut environmental enforcement funds.<sup>36</sup> In the 1996 presidential election, he seized on this issue and made it part of his constant campaign refrain, “Medicare, Medicaid, education and the environment.”<sup>37</sup> Many observers expect President Clinton to make a strong commitment to the environment into one of the major themes of his second presidential term.

Carol M. Browner, President Clinton’s EPA Administrator, believes that “there is an awful lot to be proud of” when one examines the nation’s environmental record over the past twenty-five years, but, at the same time, “there is a lot left to be done.” Significantly, however, she carefully qualifies the possible scope of prospective environmental solutions. “We have to find common-sense, cost-effective solutions,” she believes, “to environmental problems on an industry-by-industry, place-by-place basis.”<sup>38</sup>

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<sup>35</sup> Mary H. Cooper, “Environmental Movement at 25,” [<http://www.aol.com>; keyword: CQ], *Congressional Quarterly*, 29 April 1995.

<sup>36</sup> President Bill Clinton, “Remarks by the President on the Environment,” [<http://www.whitehouse.gov>], White House press release, Baltimore, Maryland, 8 August 1995.

<sup>37</sup> Charles Oliver, “A New Push on the Environment,” [<http://www.aol.com>; keyword: IBD], *Investor’s Business Daily*, 5 December 1996.

<sup>38</sup> Cooper, “Environmental Movement at 25.”

These words are certainly meant to leave open the doors to bipartisan environmental reform solutions on a variety of environmental issues.

Other prominent Democrats see the issue as much more black and white. They describe key Republican congressional committee chairmen as openly carrying “environmental-destruction credentials.” One in particular, Republican Senator Larry Craig, is described as someone who “hasn’t seen a tree he doesn’t believe would look better as a two-by-four or a pile of sawdust.”<sup>39</sup>

Republicans, too, desire recognition for their positions on environmental issues. In a recent House Republican Policy Committee statement, they declared their support for “environmentally responsible economic development” that draws on the heritage of President Teddy Roosevelt.<sup>40</sup> In order to enact this type of legislation, Speaker of the House Newt Gingrich suggests a new approach. He believes “a highly centralized command bureaucracy” tries to impose its judgment on environmental legislation “with almost no knowledge of local conditions.” To counter this problem, Gingrich calls for a “common-sense approach rather than legalisms.”<sup>41</sup> To this end, the Speaker created a House Republican Task Force on the Environment and strongly supported the creation of the National Institute on the Environment, both during the 104th Congress.<sup>42</sup>

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<sup>39</sup> Mike O’Callaghan, “Where I Stand: 105th Congress Aims at your Health and Environment,” *Las Vegas Sun*, 30 January 1997, 1A.

<sup>40</sup> Congress, House of Representatives, Republican Policy Committee Policy Perspective, “The Challenge to Our Earth: Progress at Home, Environmental Disaster Abroad,” 104th Cong., 2nd sess., 21 April 1996.

<sup>41</sup> Cooper, “Environmental Movement at 25.”

<sup>42</sup> Oliver, “A New Push on the Environment.”

The similarities between Gingrich and Browner's remarks point toward the development of new alliances in the drive for environmentally responsible legislation. Environmentalists and free-market economists are beginning to find common ground. Federal subsidies for natural resources, including the GML, are their common target. Free-market proponents believe these subsidies drive up the federal deficit and distort markets. Environmentalists say they encourage misuse of public lands and cause irreversible damage to the environment. While stark public policy choices like jobs versus the environment and clean air versus a growing economy have been past points of contention, these new alliances may be changing the way the nation looks at national environmental policy.<sup>43</sup>

One prominent moderate Republican, Senator John McCain of Arizona, recently made statements calling for the immediate exploitation of the common ground that now seems apparent in the halls of Congress. "Our nation's continued prosperity," said Senator McCain, "hinges on our ability to solve environmental problems and sustain the natural resources on which we depend." Furthermore, according to Senator McCain, the only way Republicans can hope to remain the majority party in Congress is by "faithfully fulfilling our stewardship responsibilities" with regard to environmental questions.<sup>44</sup>

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<sup>43</sup> Idem, "A Common Cause on Subsidies: Free-Marketeers, Greens Line Up to Trim Them," *Investor's Business Daily*, 24 January 1997, A1.

<sup>44</sup> U.S. Senator John McCain of Arizona, "Nature Is Not a Liberal Plot," *New York Times*, 22 November 1996.



A concerned group of Republicans has taken up Senator McCain's call. In the summer of 1995, Republicans for Environmental Protection (REP) America was formed as the first national grassroots organization of Republicans dedicated to environmental protection. In their charter, they proclaim their shared deep concern for the environment. They also recognize that a healthy economy is the basis for our national prosperity. These two convictions allow REP America to definitively state, "We insist that a healthy economy can and must be achieved without doing harm to our environment."<sup>45</sup> REP America's policy goals are quite clear. They want the Republican Party to repudiate its short-sighted, anti-conservation, corporate welfare platform provisions and embrace efforts to preserve our natural heritage and protect the environment.<sup>46</sup> What is clear from the many environmental policy positions examined here is the growing call to transcend political partisanship and develop a common environmental ethic. A public philosophy guided by civic virtue would allow those willing to participate to thoughtfully embrace this new ethical vision towards environmental policy.<sup>47</sup>

This drive towards common environmental ground has many obstacles to overcome. One of the most visible is the efforts to reform environmental education in the nation's schools. From kindergarten to graduate school, a full-bore effort has been launched to educate a new generation of Americans on the need to achieve a sustainable

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<sup>45</sup> Republicans for Environmental Protection America Membership Pamphlet, 1996.

<sup>46</sup> Martha A. Marks and Jim DiPeso, "Eco-Gluttons? Not These Republicans," *Christian Science Monitor*, 1 October 1996.

<sup>47</sup> I will take up the question of a new environmental ethic in Chapter Five of this work.

society, that is one that consumes no more natural resources than are needed for future generations.<sup>48</sup> Most would agree that this is a good thing for the nation. The problem is that many of the texts now in use reflect the sensationalism of the mass media and environmental activists who use Rachel Carson's *Silent Spring* as if it were a biblical text. Some call this "ecocultism."<sup>49</sup> What is needed is civic virtue-based education vice green indoctrination of the nation's citizens at all educational levels.

Environmental concerns are at the heart of efforts to reform the GML. Secretary of the Interior Bruce Babbitt acknowledged these concerns when he addressed the nation's largest mining industry lobbyist group, the American Mining Congress, in 1993. He called for the mining industry and the Clinton Administration to conduct "reasonable discussions" on GML reform which recognized first and foremost that environmental issues, land tenure issues, and royalty issues were "inextricably tied together." Any attempt to reform the GML that did not address all these issues would be, in his words, "inconceivable." Most importantly, Secretary Babbitt recognized that the relationship between mining and the environment was unique.

There are a lot of people friendly to the environmental movement — of which I am a part — who don't fully understand that [mineral use] is one resource that is a site-specific resource and is a little different from agriculture or growing trees. Minerals are where you find them and the necessary incentives and procedures to make sure that the mineral industry is healthy and strong are a little different from some of the other resource industries.<sup>50</sup>

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<sup>48</sup> Cooper, "Environmental Movement at 25."

<sup>49</sup> Michael Satchell, "Dangerous Waters? Why Environmental Education Is under Attack in the Nation's Schools," *U.S. News and World Report*, 10 June 1996, 63.

<sup>50</sup> Bruce Babbitt, "Endangered Species Act and Mining Law Will Be Major Priorities at Interior," *American Mining Congress Journal* 79:3 (March 1993): 11.

While Secretary Babbitt's statements were welcome news to the industry, they remained well short of official mining industry position statements concerning environmental quality. In their "1993 Declaration of Policy," the American Mining Congress (AMC) said that the industry was committed to the "protection of public health and the environment through responsible management of natural resources." However, national environmental policy should center on achieving these goals only after first "recognizing that attainment of other important societal goals requires a viable domestic mining industry." The AMC qualifies this delicate balance between national environmental policy and societal goals as follows:

Major new environmental programs should be adopted only upon scientifically demonstrated risk to public health and the environment. Congress should balance competing societal goals when reauthorizing existing laws, adopting new environmental programs and considering international trade and environmental agreements, so that the costs, including the cumulative effects on the international competitiveness of American industries, are commensurate with reduction in risk to be attained.<sup>51</sup>

In other words, the domestic mining industry requires different environmental standards and may not survive without them. An anonymous mining industry lawyer recently characterized this somewhat arrogant AMC position in a different light. "We don't impact the environment," said the lawyer, "We remove it."<sup>52</sup>

One must be careful though to wrongfully assume that the mining industry possesses unmatched environmental freedoms with regard to public lands. It is true that

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<sup>51</sup> "1993 Declaration of Policy," *American Mining Congress Journal* 79: 3 (March 1993): 17.

<sup>52</sup> Robert H. Boyle, "This Land Is Mine Land," *Outdoor Life*, August 1994, 50.

the GML does not protect the environment. This was not a concern of legislators in 1872. However, the mining industry would argue that the GML has not been changed to address environmental issues because other legislation already does that effectively.<sup>53</sup> A vast array of federal legislation passed in the last twenty-five years applies directly to the mining industry. Additionally, many states have environmental laws that also impact the mining industry. Beginning with the National Environmental Policy Act of 1970, the Nevada Mining Association counts seventeen federal environmental statutes that affect mining operations in the state of Nevada.<sup>54</sup> These include such well-known legislation as the National Environmental Protection Act of 1969, Endangered Species Act of 1973, the Safe Drinking Water Act of 1974, the National Forest Management Act of 1976, and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 that created the EPA "Superfund."

In the end, it is clear that efforts to reform the GML are part of a much larger public policy debate. Ardent environmentalists demand a significant decrease or total elimination of all commercial uses of public lands. Companies and their workers who use public lands for their grazing, mining, and timber livelihoods not only want continued access to public lands but also support federal subsidies to their industries. Fiscal conservatives bring their economic arguments to the table and claim that the federal

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<sup>53</sup> Richard E. Blubaugh, "1872 Mining Law: Time for Clarification and Affirmation," *Geotimes*, April 1992, 6.

<sup>54</sup> "Environmental Laws Affecting Mining Activities" in *The General Mining Law: A Mining Industry Briefing Book on the General Mining Law* (Reno, Nevada: Nevada Mining Association, 1995), 19-22.

government cannot continue federal subsidies to these industries if it is to maintain an economic course toward fiscal responsibility.

Both the environmentalists and the fiscal conservatives have strong arguments for reform and the political influence to affect policy changes. For example, various environmental lobbying groups specifically targeted three freshman Republican congressmen and two congresswomen for defeat in the 1996 congressional elections solely on the basis of their positions on various environmental issues. Only Helen Chenoweth of Idaho survived their challenge. Andrea Seastrand of California, Randy Tate of Washington, Fred Heineman of North Carolina, and Dick Chrysler of Michigan were all defeated.<sup>55</sup> On a different but no less powerful front, long-term federal economic considerations are also the subject of much debate. With the advent of the balanced budget amendment debate and a strong desire on the part of Congress to find revenue sources for the federal government without raising taxes, fiscal responsibility is the most visible legislative theme in Washington today.

Given these modern environmental and economic considerations, the public lands industries find themselves immersed in complex public policy debates where serious questions must be addressed. For the mining industry, the question is not whether the GML needs to be reformed. Rather, the question on the table is what type of GML reform can be agreed upon, successfully guided through Congress, and signed by the President. If we, as a society and as individuals, ought to reason about public policy

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<sup>55</sup> Susan B. Garland, "Come Winter, A Greener Hill?" *Business Week*, 15 April 1996, 66.

**matters through the exercise of civic virtue, then the answers to these environmental, fiscal responsibility, and mining law reform questions can be found through a renewed emphasis on a more traditional American public philosophy.**

## CHAPTER THREE

### MINING LAW REFORM: MULTIPLE PERSPECTIVES

In February 1979, the United States Comptroller General forwarded a key report to both the United States Senate and the House of Representatives that contained the first specific recommendations by a federal agency for reforming the General Mining Law of 1872 since 1952. The report emphatically called the GML “outdated with respect to contemporary concerns for environmental quality and properly balanced use of public lands.” Yet, after proposing sweeping GML reform, the report’s conclusion, quite possibly unintentionally, set the stage for the next seventeen years of mining law reform debate. The report concluded, “The General Accounting Office proposes revisions to the 1872 Mining Law to bring it in concert with contemporary values, but also recommends retention of provisions that encourage exploration and development by the private sector.”<sup>1</sup> The resulting legislative stalemate surrounding GML reform that has occurred in the United States Congress since 1979 clearly is evidence that these two broad mining law policy goals are seen by rational advocates on most sides of this public policy issue as mutually exclusive.

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<sup>1</sup> U.S. General Accounting Office, Report to the Congress of the United States by the Comptroller General, “Mining Law Reform and Balanced Resource Management,” (Washington, D.C.: Government Printing Office, 1979), i.

This chapter examines the different policy perspectives that interact and conflict within the debate for the purpose of establishing the actual existence of a GML reform legislative stalemate that continues through the present day. The following chapter proposes a means of breaking this stalemate. However, without the recognition that a stalemate does exist, any attempt to open up the process to a civic virtue-based public philosophy would be fruitless and the GML reform stalemate could likely continue indefinitely.

These multiple GML reform perspectives continuously feed the legislative stalemate preventing an attainable compromise. The sources of the different policy reform positions in this work include the many variations of GML reform legislation introduced during the first session of the 104th Congress in 1995, the *Congressional Record*, and various newspaper articles, editorials, media reports, and interest group policy statements all dealing directly with mining law reform.

Deborah A. Stone<sup>2</sup> characterizes policy positions as essentially “strategically crafted arguments.”<sup>3</sup> In this chapter, I represent the different mining law reform policy positions as such and, in the process, show that these often mutually exclusive positions create the current policy reform stalemate that is the GML reform debate. These

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<sup>2</sup> I rely greatly on Stone’s policy paradox framework for policy analysis to compare these multiple policy perspectives and to show how the various GML reform arguments are formed. Stone provides a unique approach for examining the GML reform policy problem. I am, therefore, obligated to briefly explain Stone’s policy analysis framework in order to establish a baseline for my examination of the different GML reform perspectives.

<sup>3</sup> Deborah A. Stone, *Policy Paradox and Political Reason* (New York: HarperCollins Publishers, 1988), 4.



arguments are inherently mutually exclusive because of the strong tendency exhibited by national legislators and various policy advocates alike to invoke the “rational policy analysis model” when examining opposing points of view in the mining law reform debate. The result is an “intractable policy controversy” that is “highly resistant to resolution by appeal to evidence, research, or reasoned argument.”<sup>4</sup>

Before examining Stone’s policy analysis framework and the particular GML reform political arguments, it is important to understand Schön and Martin’s recent differentiation between policy disagreements and policy controversies because this thesis deals exclusively with the latter. This work purposely characterizes the GML reform debate as a stalemate. This is due, in large part, to my interpretation of Schön and Rein’s work. They define a policy disagreement as a dispute in which “the parties to contention are able to resolve the questions at the heart of their disputes by examining the facts of the situation.” Policy controversies, in contrast, are immune to this type of resolution hence their intractable and enduring nature. Why? First, the parties to a stalemate tend to differ significantly as to what facts are particularly relevant. Second, even when the parties to a controversy focus their attention on the same set of facts surrounding an issue, they tend to develop and strongly advocate different interpretations of the same facts. Schön and Rein identify the hallmark of policy controversies as situations where “minimal standards of reasonable discourse” fail to enable the differing parties to resolve

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<sup>4</sup> Donald A. Schön and Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (New York: BasicBooks, 1994), xi.

their dispute by “recourse to evidence or argumentation.”<sup>5</sup> The GML reform debate is just such a policy controversy.

### POLICY PARADOX: A POLICY ANALYSIS FRAMEWORK

Stone developed her policy paradox framework to challenge the utility of the more traditional methodology of policy analysis known as the “rational policy analysis model.” She views efforts by political scientists, public administrators, lawyers, and policy analysts to rescue policy analysis from the “irrationalities and indignities of politics” and, thereby, conduct policy analysis using “rational, analytical, and scientific methods” as misguided and practically impossible. She argues that politics and policies are beyond the reach of rational analytic methods because the strategically crafted arguments of modern politics, by nature, create paradoxes.<sup>6</sup> As a result, stalemates do occur and are fundamental to the policy-making process. Her policy paradox framework for analysis seeks to create a means by which the inherent irrationality of politics is not simply written off because it does not neatly fit the rational model of policy analysis.

Stone creates her policy paradox framework by redefining the three characteristics inherent to the popular rational framework. First, rational reasoning, or reasoning by definition of objectives and analysis of alternatives, is replaced by political reasoning. She defines political reasoning as “reasoning by metaphor and analogy” rather than by

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<sup>5</sup> Ibid., 3-5.

<sup>6</sup> Stone, 4.

the four well-defined steps of the rational approach.<sup>7</sup> More specifically, political reasoning is trying to get others to see a situation as one thing rather than another or “strategic portrayal for policy’s sake.”<sup>8</sup>

Second, Stone characterizes the predominant model of society not as a rational market, where individuals have relatively fixed, independent preferences for policies, but rather as a political community or polis.<sup>9</sup> In the polis, the self-interest of the market approach is superseded by the concept of the public interest or common good. If public policy is about communities trying to achieve something as communities, then the public interest represents those goals on which there is consensus in a given community. In communities, people are constantly discussing what their definition of the public interest is while simultaneously trying to convert others to their point of view.<sup>10</sup> Policy consensus, then, is typically the result of this kind of sound political interaction among the citizens of the polis.

Lastly, Stone questions the production model of policy making in the rational approach. In the production model, policy is created in “a fairly orderly sequence of stages, almost as if on an assembly line.” For Stone, this model fails to capture what she sees as the essence of policy making in the polis, namely the struggle over ideas.<sup>11</sup> Rather

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<sup>7</sup> Stone defines the four steps of the traditional rational approach as follows: 1) Identify objectives; 2) Identify alternative courses of action for achieving objectives; 3) Predict and evaluate the possible consequences of each alternative; and 4) Select the alternative that maximizes the attainment of objectives; Ibid., 5.

<sup>8</sup> Ibid., 6.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 15.

<sup>11</sup> Ibid., 7.

than describing policy as analogous to an automobile assembly line, Stone probably sees the process more like making pork sausage. In short, it is a constant struggle predominantly over the definition of ideals that guide the way people behave.<sup>12</sup> In the polis, policy reform occurs primarily through the interaction of ideas. Acceptable solutions, according to Stone, are the desired result because problems can never be definitively solved.<sup>13</sup>

Further critiquing the rational model, Stone examines the three elements of policy arguments: goals, problems, and solutions. Policy goals are “enduring values of community life that give rise to controversy over particular issues.” They are not the specific goals of particular policy issues. Stone identifies at least four major values that are at work when a policy goal is proposed, namely equity, efficiency, security, and liberty. Stone calls these goals “motherhood issues.” Everyone is for them when they are debated and discussed in the abstract. However, when citizens of the polis are pressed to define exactly what they mean, they will inevitably disagree. Essentially, Stone concludes, behind every policy issue there is a contest over “conflicting though equally plausible conceptions of the same abstract goal.” In order for policy reform to take place, the contradictory interpretations of the motherhood issues that citizens of the polis bring to the policy table must be reconciled.<sup>14</sup> The policy paradox occurs because these goals unite people while simultaneously dividing them. Despite the conflicting interpretations

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid., 25.

<sup>14</sup> Ibid., 9.

of these goals, people expend great energy trying to convince others that their interpretation best fulfills the spirit of the larger goal to which everyone is presumed, in principle, to agree.<sup>15</sup>

Problem definition is how citizens of the polis know there is a disparity between policy goals and the current state of affairs that needs to be addressed by the political community.<sup>16</sup> For the rationalist, a problem definition is “a statement of a goal and the discrepancy between it and the status quo;” it is a “matter of observation and arithmetic — measuring the difference between two states of affairs.”<sup>17</sup> In Stone’s model, there are always conflicting interpretations of policy goals in the polis. Therefore, problem definitions are “strategic representation of situations” or strategically crafted arguments. The ability to objectively define any given problem is unachievable because any description of a situation is merely a portrayal based upon a particular interpretation. Most importantly for Stone, problem definitions are constructed to win the most people to one’s side and the most leverage over one’s critics and, therefore, cannot be objective as any good rationalist would have us believe.<sup>18</sup> Stone describes many ways in which problems are defined in the polis. These include using symbols, numbers, causes, interests, and decisions. Participants in the mining law reform debate draw on many of these problem definition mechanisms because they are the tools of policy advocates.

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<sup>15</sup> Ibid., 29.

<sup>16</sup> Ibid., 9.

<sup>17</sup> Ibid., 106.

<sup>18</sup> Ibid.

Policy solutions or policy instruments, according to Stone, are merely temporary resolutions of conflict in the polis. They represent a set of changing ground rules within which political conflict and policy reform efforts continue.<sup>19</sup> They are in no way permanent. If they were, then there would be no need to reform the GML. Rather, policy solutions are “strategies for structuring relationships and coordinating behavior to achieve collective purposes.” At their most basic level, policy solutions are levers used in the polis to change behavior and policy.<sup>20</sup> Stone identifies five different forms of policy solutions: inducements, rules, facts, rights, and powers. Many of the GML reforms introduced during the 104th Congress and advocated by various debate participants fit into these solution categories.

Stone’s policy paradox framework for policy analysis rightfully challenges the most commonly held views of rationalists because it seeks to include, not exclude, the inherent irrationality of politics. If ever an issue appeared on the face of it to be irrational, mining law reform is certainly it. Policy analysis is, at its core, political argument and not simply the rational application of objective scientific claims. Why? Because, as Stone emphatically states, political concepts are paradoxes. They have contradictory meanings that by the simple application of the rational model of policy-making ought to be mutually exclusive but by political reason are not.<sup>21</sup> An examination

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<sup>19</sup> *Ibid.*, 10.

<sup>20</sup> *Ibid.*, 208.

<sup>21</sup> *Ibid.*, 10.

of current efforts to reform the GML and the political language that informs the GML reform debate clearly supports the usefulness of Stone's policy paradox approach.

### THE LANGUAGE OF GML REFORM

On November 16, 1993, a debate took place during the 103rd Congress in the United States House of Representatives over passage of House Resolution (H.R.) 322, the Mineral Exploration and Development Act of 1993. The bill was supported by a cross-section of fiscal conservatives and environmentally sensitive mining law reform advocates. It was opposed by Western lawmakers largely because it dismantled historically sacrosanct mining principles and threatened mining industry jobs in the West. The language of this particular GML reform debate, however, provides the novice new to this public policy area with a better understanding of the many political positions that converge to fuel this particular legislative stalemate.<sup>22</sup>

Led by Representatives Nick J. Rahall II, Democrat of West Virginia, and George Miller, Democrat of California, supporters of H.R. 322 grounded their reform argument in the characterization of the GML as "a relic of an era long since gone," the "Jurassic Park of all federal laws," and "the grand-daddy of all perks." They saw the law as the "last vestige of frontier-era legislation" whereby Congress sought "to encourage the settlement of the West by the generous provision of subsidies." They vividly described the legacy of the GML as one of "poisoned streams, abandoned waste dumps, and

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<sup>22</sup> All of the following references to the H.R. 322 debate in this section are taken from "Mining and Public Lands," *Congressional Digest* 73:3 (March 1994): 78-95 passim.

mutilated landscapes.” H.R. 322 was good, reasonable legislation, they concluded, because it updated public lands mining law “to reflect modern business, environmental, and federal land use management practices.” H.R. 322 would replace the “something-for-nothing tradition” of the past with legislation that established “a workable balance of planning, review, and security for taxpayers, the government, and the [mining] industry itself.” For the first time since 1872, these reformers insisted, mining law would operate in the world of “modern age resource management” and encourage hardrock mining in an “environmentally sound manner.”

The GML reform advocates’ strategy was quite simple. A victim of its many years, they believed that the GML was undeniably archaic and, therefore, bad legislation. Furthermore, it gave large corporations, many of them foreign-owned, unfair federal subsidies with little or no return to the taxpayer. Benefits for the few at the expense of the many would now be declared unacceptable. Worse yet, the GML encouraged environmental abuse on public lands on an unprecedented scale. These main points combined to form the strategic argument to radically reform the GML.

Western state opponents, not to be outdone, strategically crafted their argument against this particular set of GML reforms by recalling the common idiom — the devil is in the details. Led by Representatives Barbara F. Vucanovich, Republican of Nevada, and John Kyl, Republican of Arizona, they recalled that America was built on the premise that “if a person worked hard, the government would reward such work.” With the passage of the GML, the government said, “if you’ve got the gumption to go out and risk



your money, your time, and your labor to find minerals important to our country, we'll reward those who are successful by allowing you to employ Americans." For these legislators, H.R. 322 was "punitive legislative overkill" that would "discourage anyone from ever developing a mine on public land." As a result, it was "an attack on jobs." While the "concepts" in H.R. 322 were right, the details were "extreme, unworkable, and unreasonable" for the nation's mining industry. If passed, the bill would "spell doom for the hardrock mining industry and, with it, its thousands of high-wage jobs, its multibillion dollar contribution to the national economy, and America's leadership position in this important industry."

These Western lawmakers expounded an argument that supported traditional mining principles with minor changes to the GML but not at the expense of "America's international competitiveness" or American jobs. Furthermore, because the GML "does not immunize miners from one single environmental law," efforts to reform the law should, in their view, be focused on the question of how to fairly tap the mining industry as a federal revenue source while not overburdening the industry with more and more environmental and reclamation bureaucratic Washington regulations.

In the end, H.R. 322 passed the House, on November 18, 1993, by a vote of 316 to 108 but later fell victim to a filibuster by Western senators in the United States Senate. The language of the GML reform debate and the accompanying legislative stalemate, however, lived on into the 104th Congress.

## MINING LAW REFORM AND THE 104th CONGRESS

By May 1995, there were no less than five separate bills, three in the United States Senate and two in the House of Representatives, introduced solely for the purpose of reforming the GML during the first session of the 104th Congress.<sup>23</sup> None of these bills was passed by their respective congressional chamber. In point of fact, all of these bills actually never left their respective congressional committees or subcommittees. GML reform measures were also included in two broader bills, the Fiscal Year 1996 Department of the Interior Appropriations Act and the Budget-Balancing Reconciliation Act of 1996. President Clinton vetoed both of these bills for a variety of presidential policy reasons. Subsequently, the Republican-led Congress attempted and failed to override both vetoes.<sup>24</sup> Using Stone's policy paradox approach to policy analysis, an examination of each GML reform bill and the comments of senators and representatives as reflected in the *Congressional Record* and other public sources make possible an increased understanding of the particulars surrounding the current stalemate.

In January 1995, Representative Nick J. Rahall II introduced H.R. 357, a sweeping GML reform measure, with some very sharp words on the floor of the House. Rahall painted a very bleak picture of the current state of affairs. "In 1995," he

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<sup>23</sup> The proposed 104th Congress mining law reform bills and their primary sponsors are as follows: H.R. 357, "Mineral Exploration and Development Act," Nick J. Rahall II (Democrat-West Virginia); S. 504, "Mineral Exploration and Development Act," Dale Bumpers (Democrat-Arkansas); S. 506, "Mining Law Reform Act," Larry Craig (Republican-Idaho); S. 639, "Locatable Mineral Mining Reform Act," Ben Campbell (Republican-Colorado); and H.R. 1580, "Mining Law Reform Act," Don Young (Republican-Alaska).

<sup>24</sup> This summary of the status of 1872 Mining Law reform legislation in the 104th Congress is taken from various issues of *Congressional Quarterly Weekly Report*, May 1995 through January 1996.

proclaimed, “it is not the lone prospector of old, pick in hand, accompanied by his trusty pack mule, who is staking mining claims. It is large corporations, many of them foreign-controlled, who are mining gold owned by the people of the United States” paying “fast-food hamburger prices” for this valuable public land. Most importantly, the staggering legacy of these mining operations is “poisoned streams, abandoned waste dumps, and maimed landscapes.” In essence, Rahall’s definition of the policy reform goal was two-fold. First, he defined it as a fairness question occurring at highway robbery proportions by mostly foreign-controlled corporations. Second, he characterized the current mining policy outcome as a series of unacceptable environmental outcomes. As if to concede that these metaphors were not enough to spur passage of his bill, he made a special appeal to the new Republican House members and their new emphasis on “fiscal austerity” found in the “Contract with America,” Speaker of the House Newt Gingrich’s new Republican-controlled House of Representatives agenda blueprint.<sup>25</sup>

H.R. 357’s “Findings and Purposes” introduction was more to point. “At one time,” the bill began, “the 1872 Mining Law promoted the development of the West and provided a framework for the exploitation of federal mineral resources.” However, through various minor revisions of the law, the Congress recognized that the public interest was no longer being advanced under the “archaic features of the 1872 Mining Law.” The GML does not “foster the efficient and diligent development of mineral

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<sup>25</sup> Congress, House of Representatives, Representative Rahall of West Virginia introducing H.R. 357, Mineral Exploration and Development Act of 1995, 104th Cong., 1st sess., *Congressional Record* (4 January 1995), E26.

resources.” It does not provide for a financial return to the American people through the “principles of multiple use.” Much of the lands mined in accordance with the GML remain unreclaimed and, therefore, “pose a threat to the public health, safety, and general welfare and to environmental quality” because this destroys or diminishes “the utility of public domain lands” and leaves to “future generations a new legacy of environmental hazards.”<sup>26</sup>

The specific mining law reform goals found in the Rahall Act, replete with the kinds of “motherhood goals” Stone describes,<sup>27</sup> were stated as follows:

- to devise a more *socially, fiscally, and environmentally responsible regime* to govern the use of public domain lands for the exploration and development of hardrock minerals;
- to provide for a *fair return* to the public for the use of public domain lands for hardrock mineral activities;
- to foster the *diligent development* of hardrock mineral resources on public domain lands in a manner compatible with other resource values and environmental quality;
- to promote the restoration of mined areas left without *adequate reclamation* and which endanger the health and safety of the public;
- to assure that *appropriate procedures* are provided for *public participation* in the development, revision, and enforcement of regulations, standards, and programs established under this Act;
- to exercise the full reach of Federal constitutional powers to ensure the *protection of the public interest* through the effective control of hardrock mineral exploration and development activities.<sup>28</sup>

In March 1995, Senator Dale Bumpers, Democrat of Arkansas,<sup>29</sup> reintroduced, for the fourth time in his twenty-four year Senate career, a GML reform bill, this time known

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<sup>26</sup> Congress, House of Representatives, H.R. 357, Mineral Exploration and Development Act of 1995, 104th Cong., 1st sess., Sec. 2.

<sup>27</sup> Italics added by the author.

<sup>28</sup> Ibid.

as S. 504, that closely mirrored its House H.R. 357 counterpart. On the Senate floor, Bumpers stated that, due to the “abominable anachronism that is the Mining Law of 1872,” between \$1 and \$4 billion worth of gold and other hardrock minerals are removed from our public lands every year. This is especially frustrating, he continued, because, “the taxpayers, the very owners of the public lands, don’t even receive one red cent in return” and “many of the top hardrock mining companies in this country are foreign-owned.” Bumpers concluded his remarks by declaring emphatically that “no government in its right mind, especially a government that is in debt \$4.6 trillion, would give away the public domain and the billions of dollars worth of hardrock minerals for [as little as] \$2.50 an acre. Unhappily, we are crazy enough to do just that.”<sup>30</sup>

Rahall’s H.R. 357 and Bumpers’ S. 504 together represented one paradigm of the mining law reform issue. Their strategically crafted arguments predominantly appealed to one’s sense of personal outrage. They used symbols like the lone mining prospector of old and contrasted it with the multi-billion dollar, foreign-owned corporation of today’s West. Rahall identified environmental quality as a key element of the problem description and tied this to the obligations of present citizens in this country to those of future generations. They both also attempted to tie in GML reform to the new fiscally conservative agenda and decisions made by the Republican-controlled Congress.

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<sup>29</sup> Paul Greenberg, in his book, *No Surprises: Two Decades of Clinton-Watching* (Washington, DC: Brassey’s, 1996), 7, describes Senator Bumpers as having been able to give his public service “the stamp of character.” He also states that Senator Bumpers “comes across as a confessing man, not a politician on the make.”

<sup>30</sup> Congress, Senate, Senator Bumpers of Arkansas introducing S. 504, Mineral Exploration and Development Act of 1995, 104th Cong., 1st sess., *Congressional Record* (6 March 1995), S3523.

Undoubtedly, their hope was to identify these areas as the common goals or areas for agreement upon which solutions to the inadequacies of present-day mining law could be based.

The particulars of the Rahall and Bumpers' bills were sweeping and one-sided from the mining industry perspective. They called for the imposition of a new gross royalty tax on hardrock mining profits ranging from eight to twelve percent. Furthermore, they instituted a policy of paying fair market value for the public lands in question. They created reclamation standards for Western mines and a clean-up fund in order to finance past mining industry environmental transgressions. Lastly, they established procedures for the federal Bureau of Land Management to investigate past GML land acquisition abuses.

Two days after Senator Bumpers' introduction of S. 504, Senator Larry Craig, Republican of Idaho, introduced a different, more Western and mining industry-friendly version of GML reform known as S. 506. The Craig Act would have specifically amended the general mining laws "to provide a reasonable royalty from hardrock mineral activities on Federal lands and to specify reclamation requirements for hardrock mineral activities on Federal lands."<sup>31</sup> In S. 506, Congress would find and declare, in the spirit of Stone's "motherhood goals"<sup>32</sup> the following mining law reform goals:

- a *secure and reliable supply of locatable (hardrock) minerals* is essential to the industrial base of the United States, national security, and balance of trade;

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<sup>31</sup> Congress, Senate, S. 506, Mining Law Reform Act of 1995, 104th Cong., 1st sess., 1.

<sup>32</sup> Italics added by the author.

- many of the deposits of hardrock minerals ... on Federal lands ... are difficult and expensive to discover, mine, extract, and process;
- the national need for hardrock minerals will continue to expand, and without a strong mining industry the demand for the minerals will exceed domestic sources of supply;
- mining ... is an extremely high-risk, capital-intensive endeavor, which, to attract necessary investment, requires certainty and predictability in access to Federal lands ... and in the rights of owners of mining claims;
- it is in the national interest to *foster and encourage private enterprise* in the development of a domestic minerals industry to *maintain and create high-paying jobs and ... taxes* paid by the mining industry in the United States;
- the diversity in terrain, climate, biological, chemical, and other physical conditions ... requires that *reclamation standards* be tailored to local and regional conditions;
- there are extensive Federal and State environmental standards that apply to mining operations on Federal lands;
- changes in the general mining laws ... to provide more *direct economic return* to the United States and *greater protection of public resources* are desirable, so long as the changes do not act as a disincentive to development of minerals, adversely affect employment in the mining industry, interfere with a secure and reliable domestic supply of minerals, or adversely affect the *balance of trade* of the United States.<sup>33</sup>

Despite what, on the surface, appear to be several conflicting goals within the Craig Act, Senator Pete Domenici, Republican of New Mexico, offered his support for the bill on the Senate floor with some very well thought-out words. S. 506 represented “reasonable and responsible” mining law reform which fulfilled two policy goals, first, “to maintain mining and mining jobs,” and second, “to provide for a healthy environment.” More to the point, Domenici continued, the Craig Act “affirms that mining activities are subject to at least fifteen Federal laws designed to protect the environment. This legislation promotes and requires environmentally sensitive

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<sup>33</sup> Ibid., 2-5.

reclamation.” On the question of royalties, Domenici expressed his great concern for the imposition of royalty fees on what mining operations extract from the ground. He stated that these royalties will be “an added cost in jobs to an industry that often faces difficult economic times.” Despite these probable job losses, Domenici supported the imposition of a “net” royalty that allowed for some specific costs of hardrock mineral production to be deducted prior to the royalty being assessed. Domenici cited several unnamed studies, which demonstrate that a net royalty is “the most reasonable method of assuring that the taxpayers will receive a return for the production of minerals on Federal lands,” as support for the limited royalty provisions within the Craig Act.<sup>34</sup>

Senator Craig’s bill was supported by the Mineral Resources Alliance (MRA), a Washington, DC, lobbying group which represents more than 2,000 mining organizations, companies, and individuals nationwide who support “balanced and responsible changes to the U.S. mining law.” MRA President Jack Gerard characterized the bill as striking an appropriate balance between “preserving good-paying American mining jobs, ensuring strong environmental protections, and generating a fair return to the federal government.”<sup>35</sup> The National Mining Association (NMA), which represents the coal and hardrock mining industry at large, welcomed the bill, as well. “This legislation proposes true reform while offering a balance between environmental

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<sup>34</sup> Congress, Senate, Senator Domenici of New Mexico supporting S. 506, Mining Law Reform Act of 1995, 104th Cong., 1st sess., *Congressional Record* (8 March 1995), E6919.

<sup>35</sup> “Miners Back Bipartisan Mining Law Reform,” [<http://www.aol.com>], PRNewswire, 7 March 1995.



concerns and economic realities,” said a NMA spokesman.<sup>36</sup> Both MRA and NMA support for the Craig Act were surprising because the bill imposed royalties on mining corporation profits for the first time in the history of United States public lands mining law. Historically, these mining interest groups never supported mining law reform containing royalty provisions.

Two additional GML reform bills were also introduced by other members of the 104th Congress. Senators Ben Campbell, Republican of Colorado, and Bennett Johnston, Democrat of Louisiana, introduced S. 639, the Locatable Mineral Mining Reform Act of 1995, on March 27, 1995. It sought a bipartisan compromise on the royalties issue by proposing different gross royalties for each type of hardrock mineral. For example, the royalty on gold profits would be higher than that on silver or copper. However, the bill was never considered because S. 504 and S. 506 advocates saw no room for such a compromise.

On May 9, 1995, Representatives Young, Republican of Alaska, Vucanovich of Nevada, and Crapo, Republican of Idaho, introduced a House version of S. 506 known as H.R. 1580, the Mining Law Reform Act of 1995. It closely mirrored S. 506 except for two key provisions. First, it mandated that mining companies conduct mineral activities “in good faith” as judged by the Secretary of the Interior. Failure to do so would result in the land reverting to Federal control without reparations.<sup>37</sup> Second, H.R. 1580

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<sup>36</sup> “Senate Republicans Aim to Ease Mining Law,” [<http://www.aol.com>], Reuters, 8 March 1995.

<sup>37</sup> Congress, House of Representatives, H.R. 1580, Mining Law Reform Act of 1995, 104th Cong., 1st sess., 5.

emphasized that all mining operations on United States public lands would be conducted “in compliance with Federal and state environmental regulations.” This legislative intent was further supported by a listing of forty-five different Federal environmental laws and regulations within the Act itself under which hardrock mining operations on public land currently operate.<sup>38</sup> In a press conference following the introduction of the bill, Representative Vucanovich said, “We should support the development of mineral deposits in an environmentally sound manner while giving a fair return to the taxpayer.”<sup>39</sup> The House never acted on this bill or H.R. 357. However, bills proposing a balanced Federal budget and the fiscal year 1996 appropriations bills became the primary mechanisms for GML reform during the latter months of the 104th Congress’ first session.

S. 506, S. 639, and H.R. 1580 represent the mining law reform version of the Stone paradigm. The advocates of these bills agree with those on the opposite side of the issue that the common goals of GML reform should be ones of equity and fairness. They also agree that the GML needs to be modernized. However, their strategically crafted GML reform argument defines the problem with regard to the interests involved. According to them, the interests involved are the mining companies and their employees, those whose livelihood depends on a thriving mining industry, and, to a larger extent, the American people as a whole. Their overriding symbol is economic prosperity. All acceptable solutions for these reform advocates center around incremental changes to the

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<sup>38</sup> Ibid., 23-25.

GML that do not upset the economic balance they claim exists in Western mining regions.

President Clinton first commented publicly on the issue of mining law reform during a press conference in Billings, Montana, on May 31, 1995. At this time, five different mining law reform bills had been proposed in Congress. When asked about the opinion held by many westerners that his administration acts as an antagonist with regard to Western natural resource issues and not as an administration seeking answers to tough questions like timber, grazing, and mining law reforms, the President took strong exception to the question. With regard to mining law reform, he said, "I just simply believe that the Mining Law of 1872 needs to be modernized. I don't think that it's served the public interest very well, but I don't think we should do it to the extent that we put people out of business ... I think it's a mistake to take an extremist position on one side or the other."<sup>40</sup> These words did little to break the legislative stalemate.

As the possibility for a GML reform act appeared more and more remote, advocates for reform turned up their rhetoric. In a letter to the editor of the *Washington Post*, Representative Vucanovich defended prudent mining law reform. Citing that the mining industry provides 120,000 "good, high-paying jobs" and another three million people are indirectly employed by industries that support mining, Vucanovich declared that Congress should pass mining law reform legislation that "reaffirms the importance of

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<sup>39</sup> Brian Hartman, "Vucanovich Pushes Mining Bill," *Las Vegas Sun*, 12 May 1995, 10A.

<sup>40</sup> "President Clinton on Natural Resources," [http://www.aol.com], Reuters, 31 May 1995.

mining in an environmentally conscience [sic] manner.”<sup>41</sup> Vice President Al Gore took a different tone when he proclaimed at a press conference that congressional Republicans were conducting a “jihad” or holy war against the nation’s environmental protection policies. Using mining law reform as an example, the Vice President said that Republicans “have invited the lobbyists to walk right into the halls of Congress, they’ve held their chairs, given them a pen, and invited them to rewrite all of our environmental laws.” He concluded by characterizing the situation as a “disgraceful episode in American history.”<sup>42</sup>

The comments of the President, Vice President, and Representative Vucanovich illustrate the difficulty of maintaining a consistent argument while attempting political reform. The President and Vucanovich’s language is what Stone would expect from policy makers seeking areas of agreement and then acceptable policy solutions. Conversely, Vice President Gore’s comments seem to give credence to an extreme reform position that President Clinton and Vucanovich are trying to avoid. Also, their comments reinforce attempts to define the problem using environmental symbols and economic analogies.

In August 1995, the Senate approved an amendment to the fiscal year 1996 Department of the Interior Appropriations Act, sponsored by Senator Craig, which both ended a one-year moratorium on the issuing of patents in accordance with the GML and

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<sup>41</sup> U.S. Representative Barbara F. Vucanovich, “Letter to the Editor,” *Washington Post*, 17 July 1995, A16.

<sup>42</sup> “Gore: GOP Engaging in Jihad,” *Las Vegas Review-Journal*, 6 October 1995, A10.

changed the patent price from the maximum of \$5.00 per acre to “fair market value.” The measure did not institute any royalties on hardrock minerals as had been introduced by all five previous mining law reform measures in the 104th Congress. Some House members, sensing that the possibility of any compromise on mining law reform was remote, had reinstated the patent moratorium the week prior.<sup>43</sup> The debate in the Senate on August 8, 1995, clearly showed why the stalemate surrounding reform of the GML appears to a rationalist to be unbreakable and irreconcilable. The GML reform debate is a policy controversy because, on the one hand, not all the participants agree on what are the pertinent facts. On the other, reform advocates continue to interpret the agreed upon goals, and Stone’s “motherhood issues,” very differently.

When proposing an amendment to counter Senator Craig’s that would continue the patent moratorium until meaningful mining law reform could be passed by the Congress, Senator Bumpers repeated his claim to bring some “sanity and reason” into the debate and end the “scandalous anachronism” that is the GML. Namely, over the 124 years of its existence, 3.2 million acres of public lands have been sold at no more than \$5.00 per acre. The American taxpayer has received no return on these sales except for what is estimated to be up to \$70 billion in reclamation costs for abandoned mining sites. Meanwhile, the mining companies have extracted \$241 billion worth of hardrock minerals from public lands. Bumpers believed this to be the most egregious example of

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<sup>43</sup> Kevin White, “Senate Approves Craig’s Change to Mining Laws,” *Las Vegas Sun*, 9 August 1995, 8A.

“corporate welfare” in our country today. He described repeated examples of mining law abuses like the speculator who bought 160 acres of Forest Service land near Keystone Ski Resort, Colorado, in 1983, for \$400 under the auspices of GML provisions. Seven months later, he sold the land to the resort for expansion of their skiing area for over \$500,000. “Simply put,” said Bumpers, “the mining companies have a stranglehold on this body!” We have the dubious distinction, Bumpers concluded, “of giving away \$15.5 billion in minerals that belong to the taxpayers of this country, while we are trying to balance the budget by the year 2002.”<sup>44</sup>

Senator Murkowski, Republican of Alaska, Chairman of the Senate Energy and Natural Resources Committee, responded to the Bumpers amendment simply by saying, “This is an issue ultimately of whether we are going to depend on imported minerals coming into this country and export our dollars and export our jobs, or are going to be able to continue to sustain a mining industry that provides high-paying jobs in this country.”<sup>45</sup> Senator Craig summed up his amendment as a statement “that mining of public resources for the value of our country, our mineral estate, our industrial base, and for employment is a good public policy.”<sup>46</sup>

Ultimately, the Craig Amendment was removed from the House-Senate Interior and Natural Resources Conference Committee report and a one-year moratorium on

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<sup>44</sup> Congress, Senate, Senator Bumpers of Arkansas, 104th Cong., 1st sess., *Congressional Record* (8 August 1995), S11866-9.

<sup>45</sup> *Ibid.*, Senator Murkowski of Alaska, S11869.

<sup>46</sup> *Ibid.*, Senator Craig of Idaho, S11872.

mining patents issued in accordance with the GML was included in the appropriations bill in its place. For a variety of additional reasons, President Clinton vetoed the Fiscal Year 1996 Interior Appropriations Act on December 18, 1995, thereby leaving mining law reform legislation once again in limbo. Advocates on both sides of the mining law reform question had one more opportunity during the first session of the 104th Congress to reach a compromise.

Shortly before President Clinton's veto of the Interior Appropriations Act, *CQ Weekly Report* characterized the status of mining law reform as having "wide agreement that the law needs updating but strong disagreement about the best course to take."<sup>47</sup> The 104th Congress attempted to reach final agreement on GML reform as part of the balanced budget debate. The Budget-Balancing Reconciliation Act of 1995, known as H.R. 2491, included extensive mining law reform provisions. Unfortunately, the spirit of compromise surrounding other issues in the balanced budget debate did not extend to mining law reform. The mining law reform provisions of H.R. 2491 were essentially taken verbatim from the Craig Act.<sup>48</sup> The Craig Act was never voted on by the full Senate and it failed to address the concerns of those advocating major mining law reform like Senator Bumpers and Representative Rahall. Once again, mining law reform, as attached to a larger bill dealing with a larger controversial political debate, was killed by a presidential veto. President Clinton vetoed H.R. 2491 on January 5, 1996.

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<sup>47</sup> *CQ Weekly Report*, 16 December 1995, 3795.

<sup>48</sup> Congress, House of Representatives, H.R. 2491, Budget-Balancing Reconciliation Act of 1995, 104th Cong., 1st sess., Section 9501, 630-2.

The issue of mining law reform can certainly be characterized as a “policy paradox.” The two issue paradigms hold seemingly contradictory realities. Western Republicans and Democrats say the low-cost land and no royalties provisions of the GML available to mining companies spur economic development and job growth. They are willing, however, to modernize these provisions. At the same time, fiscal conservatives and environmentalists say these low-cost land sales are a federal giveaway and represent unnecessary corporate welfare. They view GML modernization efforts as neglecting the real problems of public lands stewardship, environmental quality, and fiscal responsibility. Yet, as contradictory as these positions may seem, both can be and continue to be defended as truths by the strategically crafted arguments representing the two different paradigms.

#### MINING LAW REFORM: OTHER PERSPECTIVES

The United States Congress is not the only forum where GML reform is being debated. Different GML reform perspectives are found in the press releases of concerned interest groups and lobbyists, in the print and television media, and in the writings of vocal, single issue-oriented individual reform advocates. Because GML reform is a highly contentious and regional legislative issue, interest groups and informed individuals alike all bring strategically crafted arguments to the debate. These positions, like those debated in Congress, greatly contribute to the GML reform stalemate.

Interest groups represent a particularly interesting paradox unto themselves. Scholarly research in the 1980s indicated that more and more citizens were increasingly



looking toward interest groups to speak for them in the political process as the complexity of our society encouraged a sort of lobbying advocacy explosion.<sup>49</sup> At the same time, popular sentiment maintained that dealings between lobbyists and our elected representatives “subvert the public good” because these lobbyists manipulate the political process to ensure that legislation matches their particular policy designs.<sup>50</sup> Both of these sentiments lead one to conclude that interest group lobbyists are, either rightly or wrongly, very influential in our political system.

There are three primary interest groups that expend large amounts of financial resources in order to influence the GML reform debate in the United States Congress and across the nation, particularly the American West. The NMA, a trade association formed in 1996 by the merger of the American Mining Congress and the National Coal Association, and the MRA, the primary interest group for more than 2,000 mining companies and industry organizations, represent the mining industry at-large, including both American and foreign-owned companies and various other mining-dependent industries. The Mineral Policy Center (MPC) is a national environmental organization that works to protect the environment from mining damage and reform the GML. All of these interest groups are headquartered in Washington, D.C.

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<sup>49</sup> Raymond A. Gustenson, review of *The Interest Group Society*, by Jeffrey M. Berry, In *The American Political Science Review* 79:1 (March 1985): 198-9.

<sup>50</sup> James M. DeMarco, “Lobbying the Legislature in the Republic: Why Lobbying Reform is Unimportant,” *Notre Dame Journal of Law, Ethics, and Public Policy* 8:1 (Spring 1994): 599-601.

Both the NMA and the MRA view the GML as a statute that fueled the United States industrial revolution and helped give birth to the American West. It is this historical interpretation they seek to exploit when they advocate particular GML reforms. Witness the language contained in a recent NMA press release. “A growing and independent America,” begins the document, “needs and demands the minerals and metals miners provide in as safe and environmentally sensitive a manner as possible ... For the United States to remain a viable world leader and to ensure that American citizens continue to enjoy a high standard of living, the vast mineral and raw material potential of the public domain must play a key role.” Therefore, the press release concludes, any GML reforms must not impose “the heavy burden of regulatory overload [that] could smother the entrepreneurial spirit that helped transform our nation from an agrarian wilderness into the world’s leading economic power.”<sup>51</sup>

The mining industry, according to its chief lobbyist, the MRA’s Jack Gerard, is “waiting at the bargaining table” to support responsible use of public lands while protecting the future of the mining industry.<sup>52</sup> Specifically, the mining industry has supported “reasonable proposals” to update the GML “without throwing thousands of Americans out of work” for the past two years.<sup>53</sup> It is through this kind of public policy

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<sup>51</sup> “Mining Facts Are Worth Digging For,” National Mining Association Press Release, June 1995.

<sup>52</sup> Jon Christensen, “Babbitt Attacks Mining’s Gold Heists,” *High Country News*, 30 May 1995, 5.

<sup>53</sup> Jack Gerard, “Letter to the Editor,” *USA Today*, 7 October 1994, 10A.

lens that the NMA and MRA perceive GML reform advocates as attempting to deliver “a fatal blow” to their “productive and vital domestic industry.”<sup>54</sup>

Philip M. Hocker, president of the MPC, believes the GML is “one of the most egregious examples of corporate welfare on the books” today.<sup>55</sup> His organization, co-founded by the former Secretary of the Interior throughout both the Kennedy and Johnson administrations, Stewart Udall, is solely dedicated to bringing “mineral activities under the same system of regulation and public participation which applies to other comparable projects on the public domain.”<sup>56</sup> Furthermore, the MPC works to eliminate the special exemptions for mining that have been written into recent environmental laws and regulations. First and foremost, according to Hocker, when it comes to public policy dealing with the public domain, the American people have a right to environmental protection and fair value for their public resources. While recognizing the needs of the mineral industry for secure property interests and protection of its capital investment in exploration and acquired mineral rights, the Center places a higher priority on the public’s interest in a sound and efficient national minerals industry achieved simultaneously with sound environmental protection.<sup>57</sup>

Most recently, the MPC has characterized Congressional attempts by Western legislators to reform the “Last American Dinosaur” as simply “sham legislation.”<sup>58</sup> They

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<sup>54</sup> “Saving American Jobs,” Mineral Resource Alliance facsimile to Secretary of Interior Bruce Babbitt, 4 May 1993.

<sup>55</sup> Philip M. Hocker, “Digging a Gold Mine from the Treasury,” *Washington Post*, 7 July 1995, A21.

<sup>56</sup> Idem, “An Introduction to the Mineral Policy Center,” *Clementine* 1:1 (Autumn 1988): 2-4.

<sup>57</sup> Ibid.

<sup>58</sup> Mineral Policy Center press release, 16 October 1995.

are shams, according to Hocker, because real policy change only occurs as a response to actual problems around the country, “not because some people in Washington talk about it a lot.”<sup>59</sup> No one is a more visible GML reform advocate than Philip Hocker and these are the MPC positions he consistently holds during congressional hearing after congressional hearing.

Outside the Washington, D.C. beltway, many other interest groups and concerned individuals contribute to the GML reform debate. One of the most vocal critics of the 1872 GML is Robert Redford, the renowned Hollywood motion picture actor. Because of his high visibility in the public spotlight, Redford uses this stage as an opportunity to influence environmental and public lands usage policies. In 1994, Redford wrote an opinion-editorial piece that appeared in the *New York Times* in which he publicly called for radical GML reforms in the interest of “sound economic and environmental policy.” He further stated that only three in 10,000 Western jobs depend on public lands mining — a figure largely disputed by the mining industry. In the end, according to Redford, the GML-brokered arrangement between the mining industry and the federal government must be changed. Why? Because it is an arrangement “that benefits large corporations at the expense of the land, the water, and the taxpayers, and one that is resulting in the systematic mutilation of our [public] lands.”<sup>60</sup> More recently, Redford has expounded on his argument to reform the GML by linking the need for reform with what he believes is

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<sup>59</sup> Hocker, “An Introduction to the Mineral Policy Center,” 4.

<sup>60</sup> Robert Redford, “The Gold in Our Hills,” *New York Times*, 21 February 1994, A17.

the true economic future of the West. Given the fact that GML reform would cost Western jobs, Redford believes that this is both unavoidable and desirable because mining, like oil, gas, and timber, is part of Western history and not part of its future. "The economy of today's West," says Redford, "is tied to its spectacular natural treasures and the quality of life that comes with them."<sup>61</sup>

Still others seek to contribute to the debate. Rebecca R. Wodder, president of the environmental group American Rivers, writes, "Our elected officials should not sit idle while a foreign syndicate exploits our most precious natural resources and threatens the world's first national park [Yellowstone National Park in Wyoming]."<sup>62</sup> Some special interest environmental groups have taken to running full-page ads in one of the nation's most highly respected newspaper, *The New York Times*. Jointly, the Natural Resources Defense Council and the Southern Utah Wilderness Alliance proclaimed:

This land is whose land? The American people's or a foreign mining company's? After all, this land was made for you and me. Don't let the special interests take it away!<sup>63</sup>

In the same light, the Southwest Forest Alliance called for an end to the "archaic corporate welfare" and "billion dollar special interest rip-off" that is the 1872 GML. Why is Congress continuing to allow the "selling out [of] America's birthright?" According to the Alliance, it is because a few Western members of Congress, who

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<sup>61</sup> Idem, "Not a Fair Deal," *USA Weekend*, 3-5 November 1995, 6.

<sup>62</sup> Rebecca R. Wodder, "Letter to the Editor," *Washington Post*, 17 July 1995, A16.

<sup>63</sup> *New York Times*, 21 February 1996, A11.

receive sizable contributions from the mining industry, have always managed to “thwart reform.”<sup>64</sup>

Within the executive branch of the federal government under President Clinton, Secretary of Interior Bruce Babbitt has been the most vocal advocate for major GML reform. The incessant “back and forth” between the Secretary and those who support the mining industry’s reform positions is often the primary stage upon which the GML reform debate takes place. After all, Congress cannot and does not debate GML reform every day. Such was the case in the spring of 1996.

In April and May 1996, Secretary Babbitt staged two very symbolic GML-mandated mining patent signing ceremonies in Washington, D.C. On April 15, 1996, Secretary Babbitt conveyed title to forty acres of Arizona public land to a local gypsum mining company for a payment of only \$40. Interior Department geologists estimate that the land holds approximately \$85 million worth of gypsum. Upon signing the patent transfer, Secretary Babbitt said that, “Giving away public lands and minerals in these days when citizens are being asked by Congress to give up more and more essential services is an outrage.” Until the time when Congress reforms the 1872 GML, Babbitt continued, “I must continue to sign away our nation’s mineral wealth for peanuts.”<sup>65</sup> The mining industry was quick to respond to the Secretary’s comments.

Secretary Babbitt should know that minerals have no worth if left in the ground undiscovered in the hundreds of millions of acres of unused land controlled by the federal government. They only attain value after they are discovered and produced.

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<sup>64</sup> Ibid., 15 April 1996, A11.

<sup>65</sup> United States Department of the Interior press release, 15 April 1996.

And they won't be produced unless it is by the significant investment and financial risk undertaken by the mining industry. Only after a mining company has invested tens of millions of dollars to discover them and hundreds of millions of dollars to develop and operate a mine will the federal government, and thus the American people, realize a return from these minerals through the payment of taxes on economic activities.<sup>66</sup>

The second and much more dramatic title transfer occurred in May. On this occasion, Secretary Babbitt signed a mining patent to 1,800 acres of public land in Nevada for the Canadian-owned mining corporation, Barrick Goldstrike Mines. Under GML provisions, this patent allowed Barrick to pay the federal government \$9,000 for title to land containing, according to industry estimates, nearly \$10 billion in gold. Calling it the "biggest rip-off since the Yankees stole Babe Ruth from the Red Sox for pocket change" and the "biggest gold heist since the days of Butch Cassidy," Babbitt reluctantly obeyed a court order to execute the transfer. "These folks stole it fair and square," said the Secretary. "The West has long since been settled," he continued, "but the giveaways continue unabated."<sup>67</sup>

This particular mining patent transfer generated heated responses from Western newspaper editorial boards and mining industry executives alike. Citing the Secretary's "flair for melodramatic exaggeration," the *Rocky Mountain News* called Babbitt's news conference "rabble-rousing rubbish." The *News* identified the real purpose of Babbitt's "purple rhetoric" as one of imposing a royalty on the gross profits of the mining industry. Whether or not a royalty of up to 12.5% would cost Western jobs is a question "worthy of

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<sup>66</sup> National Mining Association press release, 15 April 1996.

<sup>67</sup> Christensen, 5.

reasoned debate.” However, concluded the *News* editorial board, “It is clear that such a debate is just about the last thing that interests [Secretary Babbitt].”<sup>68</sup> *The Denver Post* characterized Babbitt’s comments as “loaded language” yet recognized that the GML “seems obsolete today.” It is important to note, according to the *Post*, that while the mining industry has resisted the notion of the imposition of a gross royalty tax, they have also “generally embraced the need for better reclamation guarantees and other environmental safeguards.” Therefore, concludes the *Post*, the issue no longer seems to be a question of whether to impose royalties and change the mining patent process. Rather, “it’s how high to set the fees and at what stage of production they should apply.”<sup>69</sup>

Four mining industry presidents and chief executive officers<sup>70</sup> responded to the *Post* editorial. They described Secretary Babbitt’s news conference as “long on one-liners and short on substance.” In an effort to set the record straight, they laid out the mining industry’s position on reforming the GML as follows:

The [mining] industry is prepared to pay a fair royalty on the production of gold from public lands ... [However], if the royalty is too high, ... the costs of producing gold will increase to the point that mining companies will not be able to make a profit. Some mines will close; the opening of some new mines will be prevented and exploration and development will be diverted overseas. The net result: a loss of jobs, knowledge, taxes, economic development in this country, revenues to the federal treasury from royalties on gold mining and an increase in the U.S. trade deficit as gold production decreases ... The industry is prepared to address this issue

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<sup>68</sup> “Demonizing Gold Companies,” *Rocky Mountain News*, 19 May 1996, 56A.

<sup>69</sup> “Babbitt Was Right to Raise Mining Royalty Question,” *Denver Post*, 19 May 1996, 6B.

<sup>70</sup> Richard C. Kraus, President, Echo Bay Mines, Gordon R. Parker, Chairman, Newmont Mining Corporation, Robert L. Zerga, President and CEO, Independence Mining Company, Inc., and Milton H. Ward, President and CEO, Amax Gold Inc.



in a way that preserves land security for those willing to take the considerable risk necessary to develop gold on public lands, and at the same time gives taxpayers a fair return for the use of their resources ... We hope that reasonableness can prevail and that the [GML] is reformed in a way that provides the greatest benefit to the American public while allowing gold mining to continue on public lands.<sup>71</sup>

Others responded more bluntly to the situation. According to one Colorado resident, the true cost of patenting land for mining gold is as high as \$10,000 per acre after exploration costs are factored in. "Think about it!" he continues, "If [public land] is available for \$5 per acre, why aren't we all out staking claims?" In the end, if the GML reform legislation that Secretary Babbitt supports is passed, "the Western mining industry will be taxed and regulated out of existence."<sup>72</sup> Another Colorado resident doubts the true end results of a new mining royalty. "Even with a royalty provision, overall net revenue realized by the U.S. government may be less than would be generated with no royalty attached."<sup>73</sup>

Three additional national newspaper editorials add to the GML reform debate. Back in 1994, the *New York Times* identified what it called a "historical leniency toward the private use of public resources" as the driving force during any public lands reform debate.<sup>74</sup> In 1995, *USA Today* used the opportunity of President Clinton's summer vacation to Yellowstone National Park to call for GML reform in order to "stop miners from plundering public land and leaving a mess for taxpayers to clean up." "We can't

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<sup>71</sup> "Industry Leaders Call for Responsible Reform of Mining Law," *Denver Post*, 29 May 1996.

<sup>72</sup> Alex Bissett, "Letter to the Editor," *Denver Post*, 29 May 1996.

<sup>73</sup> David J. May, "Letter to the Editor," *Denver Post*, 29 May 1996.

<sup>74</sup> "Reform for the Public Lands," *New York Times*, 11 August 1994, A14.

afford the toxic perils of poorly regulated mining,” the editors concluded. “And we sure can’t afford to keep giving away all our gold just because someone is brazen enough to ask for it.”<sup>75</sup> Finally, in early 1996, *The Washington Times* uncovered a gross inconsistency within the Clinton Administration. The *Times* discovered that, at the same time Secretary Babbitt is touting a 5% or greater gross royalty tax on mining industry profits, Vice President Al Gore only charges a 4% net royalty on zinc mining profits to a company that mines on private Gore family land in Carthage, Tennessee. “If the deal is good enough for Mr. Gore,” asks the *Times*, “why isn’t it good enough for Interior Secretary Bruce Babbitt?” The editorial concludes, “Mr. Babbitt needn’t take [the mining industry’s] word when it comes to mining income. All he has to do is ask the Gores.”<sup>76</sup>

The American Broadcasting Corporation recently devoted a *World News Tonight* “It’s Your Money” recurring segment to the question of GML reform. Correspondent John Martin called the GML “a golden giveaway” and “the oldest form of corporate welfare.” He reported that in 1995 and 1996 alone, the federal government sold public lands in three Western states, Arizona, Idaho, and Nevada, containing an estimated \$15 billion in hardrock minerals to mostly foreign-owned mining companies for a total federal revenue of only \$16,000. In the report, Secretary Babbitt said, “All we’re asking for is a reasonable and fair return.” A mining industry official responded, “The time has come for the imposition of a royalty. The question is now how much.” Of particular

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<sup>75</sup> “Stop Mineral Giveaways,” *USA Today*, 31 August 1995, 12A.

<sup>76</sup> “Bruce Babbitt as Gold Digger,” *Washington Times*, 25 January 1996.

note, over half of the three minute news segment was devoted to a quick synopsis of the Summitville, Colorado, mining disaster and its long-term effects on local ranchers and water quality.<sup>77</sup>

A final GML reform position needs to be addressed here, as well. In the spirit of the so-called “Sagebrush Rebellion,” many view efforts to reform public lands policy as an attack directly upon the traditional Western states’ standard of living and the citizens who choose their life’s work in industries like mining, ranching, and logging. Born in the early 1980s, the Sagebrush Rebellion was a direct response to the widely held perception in the West that the federal public lands management policies during the 1970s exhibited “a distinct bias in favor of environmental preservation.”<sup>78</sup> The goal of the movement was “to force a realignment within the public land policy arena.”<sup>79</sup> The movement and its goals continue today albeit with less coherent organization and policy statements.

William Perry Pendley is a leading spokesman for what was formerly known as the Sagebrush Rebellion and is today often referred to as the “War on the West” movement. He strongly views attempts to reform the GML not as a necessary debate over the royalties questions but as a debate about whether mining in the West is going to be permitted at all. The main problem, according to Pendley, is that the GML “lends itself to the visual media — abandoned mine sites, tailing ponds, and other alleged

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<sup>77</sup> “It’s Your Money,” *World News Tonight*, American Broadcasting Corporation, 25 November 1996.

<sup>78</sup> R. McGregor Cawley, *Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics* (Lawrence, Kansas: University of Kansas Press, 1993), 90.

<sup>79</sup> *Ibid.*, 142.

horribles.” In the end, Pendley and many others believe attempts at GML reform are simply a “purposeful, planned, and carefully orchestrated assault” by environmental groups to disrupt a significant portion of the economy of the West in the interest of an unachievable and undesirable new environmental ethic.<sup>80</sup> While Pendley’s positions and those taken by others in the same regard are flawed, they continue to influence the GML reform debate.

These positions are flawed because lost in their rhetoric is a neglect for one basic legal fact. At no time have the Western public lands belonged directly to the states. They were acquired through treaty, conquest, and purchase by the federal government acting on behalf of all of the citizens of the United States.<sup>81</sup> The implications of the public lands history are examined further in Chapter Six of this work.

As one can see, the GML reform debate exemplifies what Stone calls a policy paradox. Beginning with the congressional debate and continuing through many of the GML reform perspectives previously discussed, there is some common agreement. Yet, despite this apparent agreement, no acceptable GML reform compromise has been reached. This is due to the failure of all interested parties to recognize the stalemate for what it truly is — a policy controversy. By applying Stone’s framework, policy participants could more easily make this recognition and move on to successfully breaking the stalemate.

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<sup>80</sup> William Perry Pendley, *War on the West: Government's Tyranny on America's Great Frontier* (Washington, D.C.: Regnery Publishing, Inc., 1995), 141-56 passim.

<sup>81</sup> Christopher A. Wood, “A War on the West,” *Las Vegas Review-Journal*, 14 May 1995, 1C.

## STONE'S FRAMEWORK APPLIED

Stone's main contribution to the field of analyzing public policy making is illustrated through the previous examination of mining law reform efforts in and around the first session of the 104th Congress and the various other GML reform positions. Namely, because politics has such a central role in the definition and solution of policy problems like mining law reform, it is extremely difficult to capture and understand the process strictly using the traditional rational model. The tendency of the "rational policy analysis model" has been to de-emphasize the role politics plays in actual policy making. Specifically, Stone's aim is to show that policy goals, problem definitions, and problem solutions can be reasonably challenged such that all forms of analysis are reduced from objective, rational, scientific claims to political claims. So then, what does Stone's policy paradox framework tell us about the current state of mining law reform efforts in our large polis?

Most importantly, Stone's approach illustrates that there are major arguments which must be reconciled before any acceptable GML reform solution can be reached. Disregarding for the purposes of this work the particular rules and legislative maneuvers that are unique in our national legislative branch and their probable effect on any attempt at argument reconciliation, the strategically crafted arguments that define the mining law reform policy paradox center around fiscal austerity and responsibility, economic prosperity, profit margins, and environmental quality. These goals, in Stone's terminology, are known as motherhood issues. All sides usually agree and support them

in the abstract. However, the current mining law reform policy debate is characterized by contradictory interpretations of these issues. What is occurring is the political struggle over conflicting though equally plausible conceptions of the same goal. Therefore, it is clear that rational analysis of these central mining law reform goals is impossible using the traditional model.

Mining law reform advocates use symbols and numbers as an integral part of their attempts to define the problem. An examination of these tactics illustrates Stone's policy paradox framework in action. Symbols allow individuals to read themselves into the problem at hand.<sup>82</sup> Their effectiveness depends on how people interpret, use, and respond to them. Stone states that most people do not have a "coherent and logically consistent set of beliefs about policy issues and choices."<sup>83</sup> Therefore, symbols provide the mechanism through which "diverse motivations, expectations, and values are synchronized to make collective action possible."<sup>84</sup>

Stone identifies three different types of symbols commonly used in political decision making. All three can be found within attempts to reform the GML. Senator Bumpers tells of the land prospector who got a large financial return after gaining title to land adjacent to Keystone Ski Resort under provisions of the GML. Stone calls this a synecdoche where the whole problem is represented by one of its parts. It is an attempt to

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<sup>82</sup> Stone, 126.

<sup>83</sup> Ibid.

<sup>84</sup> Charles D. Elder and Roger W. Cobb, *The Political Uses of Symbols* (New York: Longman, 1983) in Stone, 123.

reduce the scope of the problem and make it more manageable. The use of this type of symbol, however, suspends critical thinking on the matter at hand by trying to describe a large-scale problem from a single example.<sup>85</sup> No one can deny the aptness of Senator Bumpers' synecdoche. It did occur. However, mining law reform has to address much larger issues. If all agree on these types of isolated abuses as most do with regard to land speculation under the auspices of the GML, then the use of this type of symbol is wasted effort because it brings us no closer to any resolution of the problem.

Representative Rahall's description of the GML land patent prices as the same as a fast-food hamburger is an example of a metaphor used as a symbol. In this case, the implied comparison is vivid imagery. Two dollars and fifty cents can buy you a hamburger and one acre of United States public land for the purpose of mining exploration and extraction. Yet, the comparison is not reasonable given the complexities of the issues at hand.

The most common uses of symbols in the mining law reform debate revolve around stories of environmental and economic decline. Representative Rahall's description of poisoned streams, abandoned waste dumps, and maimed landscapes illustrates one form of debatable decline associated with the current mining law provisions. Senator Murkowski and Representative Vucanovich's predictions of lost jobs and economic decline illustrate another equally debatable symbol. The chances for

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<sup>85</sup> Stone, 116-117.

meaningful mining law reform rest upon the resolution of these types of ambiguous symbolic stories of decline.

The use of numbers is another example of problem definition mechanism. In the mining law reform debate, there are plenty of numbers thrown around and, in most cases, they are very large and difficult to comprehend. Numbers are another form of symbols. Measuring and debating the size of a phenomenon, according to Stone, is one of the most prominent forms of discourse in public policy.<sup>86</sup> The simple act of measuring something implies that this something is important enough to be considered as part of the policy debate. Therefore, within the mining law reform debate, when one examines what is being counted, it becomes obvious what the major points of contention are and how they are supported by numbers.

The two major uses of numbers by advocates of mining law reform measures deal with jobs and the value of extracted hardrock minerals. The mining industry consists of 120,000 “good, high-paying jobs” according to Representative Vucanovich. In addition, another three million jobs indirectly depend on the mining industry for their continued livelihood. Senator Bumpers counters these job numbers with much larger ones. According to his calculations, a total of \$241 billion worth of hardrock minerals have been extracted from United States public lands since 1872. Furthermore, this number grows by \$1 to 4 billion every year. Both of the above claims demand closer examination.

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<sup>86</sup> Ibid., 130.



The total employment figures for the mining industry in this country are straightforward calculations, previously gathered by the United States Bureau of Mines.<sup>87</sup> However, the number of jobs indirectly dependent on the mining industry is a much more subjective figure. How one defines “indirectly dependent” greatly influences the size of this figure. Vucanovich, no doubt, cites this number in an attempt to define an interest group. If their voices became part of the mining law reform debate, then the chances for compromise would greatly improve. It would take the debate out of an exclusive group called the mining industry. Vucanovich is attempting to create an artificial community that can have a larger and more influential voice in any mining law reform policy changes.

The use of these particular numbers by Senator Bumpers is an interesting tactic. Undoubtedly, many individuals have problems comprehending such large measurements. If the federal government is over \$4.6 trillion in debt, then what impact would a 12.5% royalty on \$1 to 4 billion have on the problem? In this case, the impact appears negligible. The use of numbers in this regard only complicates the problem. In truth, they do illustrate somewhat of a “something for nothing” phenomenon, but, beyond that, they do not inform us as to whether such a royalty is a good idea or not, and therefore, do not contribute usefully to the policy debate.

Policy reform is a struggle over ideas and claims about facts. These are reasoning questions. In the case of mining law reform, these ideas and claims form two distinct

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<sup>87</sup> Congress eliminated this Department of the Interior bureau in 1995.

paradigms. Symbols and numbers, while seeming to contribute to a policy solution through informing reasoned debate and compromise, appear to only complicate the problem. The rational policy analysis model tends to use symbols and numbers at face value. Stone's policy paradox framework illustrates why this tendency does not contribute to finding acceptable policy solutions.

Stone's policy paradox approach to analyzing public policymaking certainly helps put the mining law reform stalemate into a new perspective. It conveys the difficulty involved when trying to conduct public policy reform using only the traditional "rational policy analysis model." More times than not, it gets the decision maker nowhere nearer to acceptable conclusions. Stone's goal is to elevate politics back to some higher analytical framework. If this is accomplished, then acceptable policy outcome is more likely to result. The simple truth is that policy making is much less tidy than many analysts would have us believe.

The mining law reform paradigms previously discussed represent very diverse views of the same policy question. Any near-term resolution of the mining law reform issue rests on the ability of each side to influence those who have yet to make up their minds. The central question remains, "What is the reasonable conclusion to the mining law reform policy debate?" Suffice it to say that any mining law reform policy solutions would likely be in error if they did not result from the kind of policy process where politics and the political nature of the issue are not taken into account. The exercise of

**civic virtue through a more reflective and formative political process provides a means to the desired policy ends. Stone's approach, in the end, calls for this type of policy debate.**

## CHAPTER FOUR

### BREAKING THE STALEMATE: RENEWING THE CIVIC REPUBLICAN TRADITION

Tis virtue that we aim at, hard virtue, and not the subtle arts of shifting.

— John Locke

The possibility of progress begins when you call the problem by its right name.

— Ancient Chinese Proverb

The mining law reform legislative impasse present at the conclusion of the 104th Congress, as previously discussed, is, quite frankly, a symptom of a much deeper discontent with American politics and the task of forming public policy in the country as a whole. While addressing this strong sense of discontent among Americans, President Clinton recently described the nation as being in an unexplained national “funk.”<sup>1</sup> Others have characterized Americans as being “genuinely ambivalent about public life.”<sup>2</sup> Most recently, Harvard philosopher and political scientist Michael J. Sandel has captured and expanded upon President Clinton’s characterization by depicting the state of the nation as fraught with unprecedented levels of anxiety and frustration. Sandel attributes this

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<sup>1</sup> President Bill Clinton quoted in Michael J. Sandel, “America’s Search for a New Public Philosophy,” *The Atlantic Monthly* 277:3 (March 1996): 57. This article is an excellent synopsis of Sandel’s most recent book, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1996).

<sup>2</sup> Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler and Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (New York: Harper & Row, 1986), 250.

malaise to the fact that Americans fear, both individually and collectively, that they are losing control of the forces that govern their lives. He finds a strong sense in the country that the moral fabric of community, from family to neighborhood to nation, is unraveling around us. Sandel, therefore, calls for a renewed examination of the basic assumptions about character, citizenship and self-government that inform our public life. Only then can we, as a nation, address the deep discontent which so completely characterizes our public philosophy.<sup>3</sup>

These questions about character, citizenship and self-government, brought primarily to the forefront by Sandel,<sup>4</sup> are central to a much larger debate taking place within contemporary American political discourse. This debate primarily plays itself out between those who advocate a return to a more civic republican tradition of government and those who hold for the continuation or greater expansion of a governing philosophy based on the classic liberal tradition or liberal individualism. This public philosophical dialogue, at its core, seeks to answer one fundamental question, "How ought we, as a society, to reason about public policy matters?" Most answers to this question revolve around either a civic republican or liberal interpretation of individual freedom in modern society. Attempts to reform the General Mining Law of 1872 cannot and should not take place separate from this most fundamental of questions. Public policy reform is doomed

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<sup>3</sup> Sandel, *Democracy's Discontent*, 3-4.

<sup>4</sup> See "Charlie Rose," Public Broadcasting System, 28 June 1996; John Leo, "Forget Lincoln, What About Me?" *U.S. News & World Report*, 29 April 1996, 23; Fouad Ajami, "Virtues not Found on Talk Shows," *U.S. News & World Report*, 15 April 1996, 65; "Booknotes with Michael J. Sandel," Cable-Satellite Public Affairs Network, 19 May 1996; "Cambridge Forum with Michael J. Sandel," Cable-Satellite Public Affairs Network, 30 March 1997.

to be unsound and fail in the long-term if this larger civic republicanism versus classical liberalism philosophical debate is neglected by reformers. It is critical, as we shall see, for all concerned parties who wish to construct good mining law reform, in an Aristotelian sense, to conduct their debate within the confines of the civic republican versus liberal governing framework and to specifically address civic republican issues. This political framework forces all participants to address the more formative questions that lie at the heart of America's discontent with government and the art of making public policy.

Before progressing, some key terms must be clarified before examining these two governing philosophies. It is important to note that the terms "civic republicanism" and "classical liberalism," that characterize the two sides of this historical political debate, are not directly analogous to the two major American political parties. Upon closer examination, both the Republican Party and Democratic Party primarily represent two different interpretations of the same classical liberal tradition. In general, the policies each party advocates reflect their willingness to continue or possibly expand our modern liberal tradition of government albeit by either conservative supply-side economic or liberal rights-based policy means.<sup>5</sup> While they differ on who the most effective provider of opportunity is — Democrats would say the state, Republicans would say the market —

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<sup>5</sup> See Sandel, "America's Search for a New Public Philosophy," 58, for a similar view of modern conservatives and liberals with respect to the classical liberal tradition.

both answers are wholly individualistic outlooks of the liberal tradition.<sup>6</sup> They do not reflect the civic republican principles of character, citizenship, and self-government.

American history is steeped with eloquent deliberation about both the civic republican and classical liberal governing traditions. Reexamination by twentieth century scholars of the debate surrounding the ratification of the United States Constitution has revealed attempts by both the Federalists and Anti-Federalists to address these traditions and their accompanying philosophical questions.<sup>7</sup> The insightful observations of Alexis de Tocqueville in his *Democracy in America* (1835-1840) rekindled this debate in the latter part of the nineteenth century. The political and ideological partnerships of Theodore Roosevelt with Herbert Croly and Woodrow Wilson with Louis D. Brandeis and their visions for the future of the nation in the Progressive era were grounded in their strong interpretations of primarily the civic republican tradition. President Franklin D. Roosevelt's New Deal programs of the 1930s were specific responses to decaying economic conditions in the country that thrust the classical liberal tradition to the forefront of how government operates to this very day. President Lyndon B. Johnson's Great Society of the 1960s sought to greatly expand the reach of the classical liberal

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<sup>6</sup> Bellah, "Community Properly Understood: A Defense of Democratic Communitarianism," *The Responsive Community* 6:1 (Winter 1995/96): 51.

<sup>7</sup> See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York: Harcourt Brace Jovanovich, 1955); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1967); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, North Carolina: University of North Carolina Press, 1969); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, New Jersey: Princeton University Press, 1975); Richard C. Sinopoli, *The Foundations of American Citizenship* (New York: Oxford University Press, 1992).

tradition as begun under Franklin Roosevelt. John Rawls, with the publication of his *A Theory of Justice* (1972), gave classical liberalism its most recent philosophical statement<sup>8</sup> and, therefore, set the stage for the current debate.

The policy debates and legislative stalemates of the Reagan, Bush, and Clinton presidencies together with the emergence of organized groups like the Communitarian Network, Democratic Leadership Council, and Christian Coalition as political and moral forces in the country have again brought the civic republicanism and classical liberalism disputation to the forefront. Some would argue that this debate is taking place only within academic circles on university campuses or amidst the rhetoric in political think-tank journals. This is just not the case. One only has to observe and feel the deep discontent which Sandel describes to know that basic questions about public policy deliberation, citizenship, and the shaping of a common future in this country demand a renewed examination of the public philosophies each of the two American governing traditions embody. This is the “central debate in Anglo-American political theory” today.<sup>9</sup>

Public policy debates require engagement, enrichment of knowledge, recognition of ambiguity, and collaboration by citizens, both individually and collectively. The emergence of the classical liberal tradition as the dominant means of governing this nation during the twentieth century has created a culture heavily influenced by large

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<sup>8</sup> Sandel, *Democracy's Discontent*, 290.

<sup>9</sup> Susan Moller Okin in Daniel Bell, *Communitarianism and Its Critics* (Oxford, United Kingdom: Clarendon Press, 1993), 2.



economic interests and by those who place individual rights on a higher pedestal above community or collective rights. Ordinary citizens, lacking both the financial resources and scholarly knowledge to participate in the debate, promptly take a back seat in the political arena. This citizen retreat has led to a public philosophy characterized by advocacy of extremes, hostility, and confrontation.<sup>10</sup> The “politics of civic virtue”<sup>11</sup> must be rediscovered. In the case of the GML, good, sound reform can only come about through more informed recognition of and stricter adherence to more formative civic republican principles.

These basic civic republican principles have important historical roots. To be understood fully, they must be contrasted with the dominant modern tradition of liberal individualism. This chapter describes the civic republican tradition using a compare and contrast methodology. Furthermore, it introduces the fundamental principles of character, citizenship, and self-government that thrive within civic republicanism and upon which this work relies in order to discern the particulars of reforming the GML. These principles have strong moral dimensions which inform good public policy making and encourage the politics of civic virtue. Therefore, if we are to determine how best to reason about public policy matters like mining law reform, then how we come to know and exemplify these principles will surely dictate our success or failure as a society.

Classical liberalism or liberal individualism is the “reigning public philosophy” in

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<sup>10</sup> See David D. Chrislip, “The Failure of Traditional Politics,” *National Civic Review* 82:3 (Summer 1993): 234-45 passim, for amplification on the “contest of organized economic interests.”

<sup>11</sup> Sandel, *Democracy's Discontent*, 6.

America today. It is what seems to the informed observer to be the “permanent feature of the American political tradition.”<sup>12</sup> In short, the classical liberal tradition holds that government power should be restricted by preeminent individual rights and remain neutral toward the moral views its citizens espouse. Given the classic liberal assertion that people invariably will disagree about the best way to live, the government, therefore, should not affirm through legislative statute or law enforcement any particular vision of the good life. Government, instead, provides a framework of rights that respects its citizens as free and independent selves, capable of choosing their values and ends. The right to private property and the liberty to choose one’s own ultimate goals in life reign supreme under the liberal individualistic method of governing. Classical liberalism, then, asserts “the priority of fair procedures over particular ends.”<sup>13</sup> Under this tradition, the public philosophy that informs contemporary American politics might then be characterized as resulting in the “procedural republic”<sup>14</sup> that is our modern government. As one political commentator recently observed, “Modern politics conceives of man not as a political creature fulfilled by life in a well-ordered polity, but as a solitary ‘self’ and it aims only to regulate selfishness.”<sup>15</sup> In America today, it appears that “republican goods are constrained by liberal rights.”<sup>16</sup>

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<sup>12</sup> Idem, “America’s Search for a New Public Philosophy,” 58.

<sup>13</sup> Idem, *Democracy’s Discontent*, 4-5; For a summary of classical liberalism, see also Alan Zundel, “The Past, Present and Future of Civic Republicanism,” Unpublished paper first presented at the American Political Science Association Annual Meeting, Chicago, Illinois, August 1995, 4.

<sup>14</sup> Credited to Judith N. Shklar by Sandel, *Democracy’s Discontent*, 353n3.

<sup>15</sup> George F. Will, *Suddenly: The American Ideal Abroad and at Home 1986-1990* (New York: The Free Press, 1990), 215.

<sup>16</sup> Sinopoli, 5.

The priority of individual rights, the ideal of neutrality, and the conception of persons as freely choosing, unencumbered selves, taken together form the liberal foundation of our procedural republic. The most prominent expression of these liberal tenets is found in constitutional law. If liberalism places the right before the good, then the United States Supreme Court presides over the enforcement of this classic liberal anthem. The Court consistently defines and refines the rights that constrain majority rule. It tries to identify these rights in a way that does not presuppose any particular conception of the good life. The Court also increasingly interprets the requirement of neutrality as expressing or advancing a conception of persons as free and independent selves.<sup>17</sup> This modern activism is far removed from the kind of judicial power Tocqueville described as the norm in nineteenth century America. He saw one of America's great strengths to be that judicial power pronounced only on particular cases and not on general principles.<sup>18</sup> The judicial system that Tocqueville observed did not hand down free-standing decisions and it was not detached from the moral sentiments of the people.

The Supreme Court decisions of the twentieth century and the resulting liberal constitutionalism reflect the type of classical liberal tradition John Rawls advocates. For Rawls, individual rights are the "highest-order interest" and the power of self-determination is the oil that allows the liberal tradition to function smoothly. Rawls sees the primary role of government as providing a fair framework for individuals to seek the

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<sup>17</sup> Sandel, *Democracy's Discontent*, 28.

<sup>18</sup> Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: HarperPerennial, 1969), Volume 1, Part I, Chapter 6, 100.

good in their own way. Government, therefore, acts unjustly when it presumes to say what is valuable in life, thus restricting people's capacity for self-determination.<sup>19</sup>

The expansion of self-interest politics in the twentieth century has resulted, according to Sandel, in the "triumph of the procedural republic."<sup>20</sup> As recently as forty years ago, laws routinely embodied the principles and views of a common good arising from the citizenry. With the triumph of liberal individualism, those kinds of laws are now denounced as biased or attempts to legislate morality. Because the classical liberal tradition of governing demands government neutrality toward the moral views of its citizens, moral issues are routinely bracketed, pushed aside, and excluded from political debate. Public policy is now fashioned within a framework where priority is given to individual rights, autonomy, privacy, and personal choice. The search for the Aristotelian good life through politics has yielded to the search for more and more individual rights.<sup>21</sup>

The civic republican principles of character, citizenship, public virtue, and community self-government are victims of this late-twentieth century search for individual rights. In eighteenth and nineteenth century America, public policy cultivated virtue in the public realm because of the belief in and emphasis placed on these civic republican ideals by government executives and legislators alike. Times have certainly changed. Where once our democracy was justified by the virtues it cultivated in its

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<sup>19</sup> Bell, 3-4.

<sup>20</sup> Sandel, *Democracy's Discontent*, 274.

<sup>21</sup> See John Leo's "Forget Lincoln, What About Me?" and Sandel, *Democracy's Discontent*, chapters 2-4 passim for a more in-depth examination of the priority given individual rights, autonomy, privacy, and choice with regard to current public policy issues like abortion and free speech.

citizens and the formative way of life it promoted, today this justification is found through the enforcement of the right of each person to respect and concern as an individual, capable of choosing their own ends.<sup>22</sup> This major change in the priorities of our democracy has allowed some to reflect more deeply on the liberal tradition of the twentieth century and identify its most glaring weakness, namely that it does not sufficiently take into account “the importance of community for personal identity, moral and political thinking, and judgments about our well-being in the contemporary world.”<sup>23</sup>

Robert N. Bellah has written extensively on the importance of community. The word “community,” according to Bellah, carries both positive and negative connotations. Generally, for most, it is associated with feelings of warmth, friendship, and acceptance. For others, the word arouses suspicion implying “the abandonment of ethical universalism” or “the withdrawal into closed particularistic loyalties.”<sup>24</sup> Its most meaningful definition, however, is more philosophical. Societies can never be based solely on striving to maximize the opportunities of individuals. They must also be communities with shared public virtues and goals. For Bellah, consensus need not rule over individual rights. “A good community,” he writes, “is one in which there is argument, even conflict, about the meaning of the shared values and goals.” More importantly, he continues, “[A community] is a form of intelligent, reflective life, in which there is indeed consensus, but where consensus can be challenged and changed

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<sup>22</sup> Sandel, *Democracy's Discontent*, 52.

<sup>23</sup> Bell, 4.

<sup>24</sup> Bellah, “Community Properly Understood: A Defense of Democratic Communitarianism,” 49.

over time.”<sup>25</sup> This important point is revisited later in this work using David Hume’s concept of the “standard of taste.”

Certainly, we cannot today fully revive the sentimentality of the Jeffersonian agrarian model of government or the small, efficient political structures of New England townships that enthralled Tocqueville. But we ought to recall the great civic ideals that Jefferson, Tocqueville, and others wrote about to find “an antidote to the moral emptiness of contemporary politics.”<sup>26</sup>

In his *Notes on the State of Virginia* (1787), Thomas Jefferson vehemently argued against an American economy based solely on large-scale domestic manufacturing and industrialization. He instead advocated a more simple, agrarian economic model. Why? His argument was grounded upon civic republican ideals. Jefferson deeply worried that working for wages in a large-scale manufacturing sector would undermine the independence of citizens to form the communities and practice the self-government that republican citizenship requires. This lack of independence would subsequently “suffocate the germ of virtue” which an agrarian way of life would naturally encourage. “It is the manners and spirit of the people,” he wrote, “which preserve a republic in vigour.” In the end, quite obviously, Jefferson’s agrarian economic model did not prevail. However, the republican ideal that public policy should cultivate the qualities of character which make citizens well-suited to self-government survived and became part

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<sup>25</sup> Ibid., 50.

<sup>26</sup> Ajami, 65.

of American political discourse up through the Progressive Era of the early twentieth century.<sup>27</sup>

While Jefferson emphasized the benefits of civic virtue as exercised by individual citizens, united by their attachment to communities, on the strength of the nation, Tocqueville observed and wrote about the American passion for self-government. He may have been overly infatuated with New England townships, but his observations on democracy in nineteenth century America help identify the deeply rooted themes of civic republicanism in our country. Politics, for Tocqueville, was “a sphere for the free play of intelligence.”<sup>28</sup> In the United States, he saw politics born at the most local of levels — the New England township. What he observed at this level of political interaction made up the bricks that constructed the American political system. America’s political foundation began here. Local communities were organized before counties, counties before states, and states before the Union itself.<sup>29</sup>

“In America,” Tocqueville wrote, “municipal rights and duties concur in forming municipal spirit.”<sup>30</sup> Sandel would certainly agree although he would likely expand on Tocqueville and say that a clear understanding of the common good combined with the goodness of an individual’s character concur in forming civic virtue or public spirit. Tocqueville’s description of the typical New Englander is clearly what Sandel sees as lacking in communities today. Tocqueville described the New Englander as attached to

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<sup>27</sup> Sandel, *Democracy's Discontent*, 124-5.

<sup>28</sup> Tocqueville, Volume 1, Part I, Chapter 2, 47.

<sup>29</sup> *Ibid.*, 44.

<sup>30</sup> *Ibid.*, Chapter 5, 68.

his township not so much because he was born there but because he saw the township as “a free, strong corporation of which he is part and which is worth the trouble of trying to direct.” Furthermore, this attachment to community for the New Englander is strong and independent because the citizens shares in its management. The New Englander “invests his ambition and his future in it.” And, finally, in the end, he “accumulates clear, practical ideas about the nature of his duties and the extent of his rights.”<sup>31</sup>

Tocqueville’s vision of the role of citizens in politics clearly is in conflict with the liberal, rights-based tradition of government to which Sandel and others are calling attention. The priority of community over the individual is one of the strengths of the American political system Tocqueville so admired. Witness this Tocqueville observation: “No one in the United States has pretended that, in a free country, a man has the right to do everything; on the contrary, more varied social obligations have been imposed on him than elsewhere.”<sup>32</sup>

Tocqueville concludes his examination of the New England township and the civic virtue it represents with some very insightful words. He observed that citizens of the United States “care about each of their country’s interests as if it were their own.” The individual takes pride in the nation. The successes of the nation seem his own work. The citizen “rejoices in the general prosperity from which he profits.” In summary, Americans have “a sort of selflessness” which makes them care for the country as a

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<sup>31</sup> Ibid., 68-70.

<sup>32</sup> Ibid., 72.



whole.<sup>33</sup> This vision of government, as described by Tocqueville, lies at the heart of the civic republican tradition.

It is very important to understand the importance of Tocqueville's observations. What he witnessed and described in nineteenth century America formed the basis for political debate during the Progressive Era. It also represents the basis upon which Sandel advocates solutions to America's modern discontent. A brief examination of the economic debate during the Progressive Era will help illuminate our understanding of a time when the civic republican tradition was the dominant theme in the American political system.

According to Sandel, over the course of the twentieth century the notion that government should shape the moral and civic character of its citizens gave way to the notion that government should be neutral towards the virtues its citizens espouse, and respect each person's capacity to choose their own ends.<sup>34</sup> This shift in political priorities and vision is what fuels today's discontent with American democracy. In the last decades of the nineteenth century and the first decades of the twentieth century, Americans commonly held the view that freedom was fully exemplified by the sharing of governing responsibilities in a political community that controls its own fate, in other words, self-government. The single prerequisite for the exercise of self-government was citizens who identified sufficiently with their communities to think and act with a view toward the common good.

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<sup>33</sup> Ibid., 95.

<sup>34</sup> Sandel, *Democracy's Discontent*, 201.

Rapid industrialization and the growth of big business in the Progressive Era threatened the ability of Americans to discern public virtues. The presidential election of 1912, which pitted Woodrow Wilson against Theodore Roosevelt, took place in this time when Americans regularly asked themselves questions like what economic arrangements were hospitable to the kind of self-government their freedom allowed them to exercise. In addition, Americans asked how the public life of community might continue to cultivate and encourage both the qualities of individual character and the larger civic virtue of citizenship that self-government requires. Occurring with these questions as a backdrop, the Wilson-Roosevelt presidential contest represented the last great civic republican debate this country had on a national scale. For present purposes, it also represents a time when Americans debated very similar questions and exhibited equally strong feelings of discontent.

Then as now, Americans saw a growing disconnect between their public identities and the way their economic life was actually organized. Taken together, these conditions gave rise to fears concerning the prospect of continued self-government. The threat to self-government took two major forms. First, there was the perception that giant corporations were becoming too powerful economically. Second, there was the apparently rapid erosion of traditional forms of authority and community that had been such an integral part of the lives of Americans through the nation's first century. Sandel summarizes the prevailing feelings of the time as follows:

Taken together, these developments undermined the conditions that made self-government possible. A national economy dominated by vast corporations diminished the autonomy of local communities, traditionally the site of self-

government. Meanwhile, the growth of large, impersonal cities, teeming with immigrants, poverty, and disorder, led many to fear that Americans lacked sufficient moral and civic cohesiveness to govern according to a shared conception of the good life.<sup>35</sup>

Wilson and Roosevelt were the orators of this civic republican debate. Louis D. Brandeis and Herbert Croly were its philosophers. How each side addressed the economic threat to self-government which they perceived big business to represent illustrates how a political debate can take place within a civic republican framework.

Brandeis was very concerned about the “civic consequences of economic arrangements.” More specifically, he viewed large corporations as threats to self-government because they “eroded the moral and civic capacities that allowed their workers to think and act as citizens” largely through their control of industrial wages. For Brandeis, citizens capable of self-government could only flourish in an industrial democracy where workers participated in management and shared responsibilities for running the business.<sup>36</sup> This theme of “broadening the ownership of productive property” is a benchmark of the nation’s civic republican heritage.<sup>37</sup>

Wilson took up Brandeis’ theme and lamented the impacts of large-scale capitalism on the moral and civic character of Americans. He believed large corporations “disempowered local communities” and, most importantly, “discouraged the independence, initiative, and enterprise that equipped citizens for self-government.” Together, Wilson and Brandeis believed that “decentralizing economic power was

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<sup>35</sup> Ibid., 205.

<sup>36</sup> Sandel, *Democracy’s Discontent*, 211-4.

<sup>37</sup> See Zundel, “The Past, Present and Future of Civic Republicanism,” 20.

essential to preserving the communities that cultivated the virtues self-government required.”<sup>38</sup>

Roosevelt and Croly agreed with Wilson and Brandeis on the problems posed by the growing influence of big business on republican self-government. They, too, worried about the consequences of economic arrangements and sought to cultivate in Americans the qualities of character essential to self-government. They differed with Wilson and Brandeis, however, on the solution to the problem. Theirs was a nationalist solution vice a decentralized solution. Croly specifically called for “accepting the scale of modern industrial organization and for enlarging the capacity of national democratic institutions to control it.” American government had reached a turning point, in Croly’s view, where more rather than less centralization was required to maintain our self-government roots. The Jeffersonian tradition of dispersed power would now be replaced by “an intensification of the national life” that would serve democracy by “cultivating citizens capable of governing an economy and society now national in scale.”<sup>39</sup>

The detailed economic reforms advocated by both sides in the 1912 presidential debate are not as important, for present purposes, as understanding the civic republican tradition both sides represented. What is critical is the formative nature of public policy at the heart of these arguments. Despite their differences, both sides viewed public policies through a civic republican lens that always focused on their tendency to promote or erode the moral qualities that self-government requires of its citizens. Croly believed

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<sup>38</sup> Sandel, *Democracy's Discontent*, 214-6.

<sup>39</sup> *Ibid.*, 216-20.

democracy had as its highest purpose the moral and civic improvement of the people. “Its superiority,” he wrote, “must be based upon the fact that democracy is the best possible translation into political and social terms of an authoritative and comprehensive moral idea.”<sup>40</sup>

The political debates over economic policy in contemporary America do not resemble these formative arguments of the Progressive Era. They are simply, to use Sandel’s characterization, procedural arguments grounded in our government’s liberal view of the world. Democrats see economic policy as guided by the demands of Rawls’ concept of distributive justice. Republicans counter with policies grounded in supply-side theories that supposedly bode well for future economic growth. Both views, however, are essentially individual rights-based themes of the same classic liberal tradition. They both neglect the civic role of government as a promoter of public virtue.

The forthcoming chapter examines the civic republican themes of character, citizenship, and self-government as the basis for public understanding or as agreed upon common reference points for today’s discontented citizens. The answer to the fundamental question of this thesis, namely “How we, as individuals and as a society, ought to reason about public policy matters?” begins with these republican principles. Aristotelian good, sound mining law reform is achievable, in large part, because of the growing desire of most Americans to rethink our liberal, rights-based public philosophy.

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<sup>40</sup> Ibid., 220.

## CHAPTER FIVE

### CIVIC VIRTUE AND MINING LAW REFORM

Deliberation is your character on-line.  
— Craig Walton

No man can entirely detach himself from the past.  
— Alexis de Tocqueville

The answer to the central question of this work, “How ought we, as both a society and as individuals, to reason about public policy matters?” is based upon the premise that citizens in our society can and should exercise civic virtue. Recall that civic virtue is sound public discernment and action, informed by personal experience, practice, and habit, aimed at bettering the larger polis and oneself. Citizens who exercise civic virtue exhibit the trait of moral excellence in their public lives. Derived from the formative civic republican tradition of government as previously discussed, a civic virtue-based political system encourages individuals of good and sound character to act together as citizens in pursuit of the public good through the exercise of historically informed self-government and to deliberate best about public policy matters. It is through the collective exercise of deliberation and discernment of the public particulars that good, sound solutions to public policy questions, like mining law reform, are most likely found and agreed to by policy participants. This is the politics of civic virtue in action. It is the journey and destination, the higher goal this work so strongly advocates.

If a civic virtue-based public philosophy does offer the greatest potential to finding good, sound solutions to public policy stalemates, then the question remains, “What are the formative civic republican themes upon which this civic virtue-based public philosophy is founded?” Michael J. Sandel has identified three individual civic republican themes — character, citizenship, and self-government — as the centerpieces around which a civic virtue-based public philosophy works best. Sound public policymaking in this light encourages public policy participants to address these three themes in order to reach acceptable policy solutions. This chapter examines these three civic republican themes for the purpose of constructing a sound, ethical justification to reform the General Mining Law of 1872. These civic republican themes require both the formation and exercise of civic virtue by the citizens of the polis. When the issue of GML reform is finally addressed within a civic virtue-based public philosophy, then achievable and acceptable solutions to the mining law reform stalemate become a matter of discerning the issue particulars and sound deliberation.

### CHARACTER AND PRACTICAL WISDOM

Character is the first civic republican theme identified by Sandel. It is the foundation upon which good citizenship and successful self-government are built. What is it, though, that allows one individual to characterize another as either possessing or not possessing good, moral character? And, most important to this work, why is character the foundation of a civic virtue-based public philosophy?

To simply describe someone as possessing or not possessing civic virtue leaves important questions unanswered. These types of characterization carry with them important moral baggage and, therefore, cannot and should not be made lightly. To do so directly implies that an individual possesses or does not possess good moral character. Put another way, an individual who exercises civic virtue in their public life possesses the capacity (1) to discern the particulars of a given situation or problem and (2) to deliberate well before making a moral choice. Without these capacities, the exercise of civic virtue becomes mere folly. Character, for Aristotle throughout his discussion of practical wisdom in his *Nicomachean Ethics*, and later reexamined by Nancy Sherman in her book, *The Fabric of Character: Aristotle's Theory of Virtue*, very much has to do with a person's enduring traits, attitudes, sensibilities, and beliefs that affect how they see, act, and live in the polis. The presence of good or bad character in an individual explains not only why they acted or did not act in a particular way, but also greatly informs us as to why they can or cannot be counted on to act in a particular way in the future. Most importantly, our character gives us a "special sort of accountability and pattern to action."<sup>1</sup>

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<sup>1</sup> Nancy Sherman, *The Fabric of Character: Aristotle's Theory of Virtue* (Oxford, United Kingdom: Clarendon Press, 1989), 1. The long process by which I have come to understand Aristotle and, more specifically his writings on character and practical wisdom, are greatly influenced by Sherman's book and by personal discussions I have had with Dr. Craig Walton, Professor of Philosophy, University of Nevada, Las Vegas. For me, personally, three years of graduate study has tended to blur the lines somewhat between what Aristotle and Sherman have written and what Dr. Walton and I have discussed. In this light, I shall endeavor to properly cite Aristotle and Sherman to the best of my ability.



Others continue to contribute to our understanding of Aristotle's original examination of character and what he called practical wisdom. Stephen L. Carter recently described good character as the "courage of our convictions" or the "willingness to act." More specifically, a person of sound character exhibits a high degree of "moral reflectiveness." To possess good character, according to Carter, means living with and embracing an ongoing struggle. This struggle entails discerning what is right and what is wrong, acting on what you have discerned, and saying openly that you are acting on your understanding of right from wrong.<sup>2</sup> For Carter, as well for Aristotle, Sherman and others, the moral struggle itself is at least as important as the resulting act or decision. It is this capacity to conduct the struggle of both discerning the means to an end or multiple ends and deliberating well that are the essential prerequisites for the exercise of civic virtue. If the genesis of good, sound public policy begins with a civic virtue-based public philosophy, then, by extrapolation, practical wisdom and character are the primary building blocks for conducting our political affairs under such a philosophy.

In his *Nicomachean Ethics*, Aristotle addresses the question, "Why do I choose to do  $x$ ?" His answer is three-fold. I do  $x$  because of sense perception, desire, or intellectual intuition.<sup>3</sup> Sense perception is part of the nonrational soul and is, therefore, not guided by

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<sup>2</sup> Stephen L. Carter, *Integrity* (New York: Basic Books, 1996), 7.

<sup>3</sup> Aristotle, *Nicomachean Ethics*, trans. Martin Ostwald, (Englewood Cliffs, New Jersey: Prentice Hall, 1962), 1098b3.

reason. It originates no rational action since animals have sense perception but no sense of action.<sup>4</sup> Desire and intellectual intuition belong to the rational part of the soul and their relationship is complex enough to require further examination. Practical wisdom and character are rooted here, within the rational part of the soul.

Aristotle addresses these relationships within the rational soul as follows:

Moral virtue is a characteristic involving choice, and since choice is a deliberate desire, it follows that, if the choice is to be good, the reasoning must be true and the desire correct; that is, reasoning must affirm what desire pursues. This then is the kind of thought and the kind of truth that is practical and concerned with action ... The starting point of choice, however, is desire and reasoning directed towards some end.<sup>5</sup>

It should be clear that Aristotle sees moral virtue as an excellence of character resulting from personal choices and reinforced by habituation. An individual cannot make such a choice without desire, intellectual intuition and reason. It appears, as well, that Aristotle places desire prior to the exercise of right reason. Sherman interprets Aristotle on this point by stating, "The claim is that desire accepts some proposition — that *x* is good — and accepts it in a way that motivates."<sup>6</sup> As Aristotle says, we take or perceive things to be good. The calculative element of the soul, namely, intellectual intuition, therefore, affirms what desire chooses to pursue.

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<sup>4</sup> Ibid., 1139a5-20.

<sup>5</sup> Ibid., 1139a23-33.

<sup>6</sup> Sherman, 63.

Aristotle uses this relationship between desire and reason to qualify the starting point of moral action or what the Greeks called *eupraxia*.

Good and bad action in human conduct are not possible without thought and character. Now thought alone moves nothing; only thought which is directed to some end and concerned with action can do so ... Only the goal of action is an end in the unqualified sense: for the good life is an end, and desire is directed toward this. Therefore, choice is either intelligence [practical wisdom] motivated by desire or desire operating through thought [reason], and it is as a combination of these two that man is a starting point of action.<sup>7</sup>

The question that Aristotle next addresses concerns the known faculties of reason. He identifies specific elements of reason as particular answers, given the circumstances, to the question, "How does the soul grasp or attain the truth?" They are: pure science or theoretical wisdom, art or applied science, and practical wisdom.<sup>8</sup>

Scientific knowledge is essentially what we know through methods and experimentation of that which cannot be otherwise than it is. All scientific knowledge is teachable and, therefore, is capable of being learned. Knowledge gained through science is "a capacity for demonstration" that becomes an "acquired possession firmly established in the mind."<sup>9</sup> Pure science or theoretical wisdom is basic insight into universal and necessary truths. All science begins from fundamental principles. It is the "knowledge of what is helpful to us." It is comprised of both scientific knowledge and intelligence which allows an individual to apprehend this knowledge. Aristotle calls it "the science of

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<sup>7</sup> Aristotle, *Nicomachean Ethics*, 1139a34-1139b6.

<sup>8</sup> *Ibid.*, 1139b15.

<sup>9</sup> *Ibid.*, 1139b18-35.

the things that are valued most highly.”<sup>10</sup> Intelligence is the faculty of the rational soul that apprehends these fundamental principles.<sup>11</sup> It allows one to firmly grasp the complex whole with all of its parts here, to grasp first principles.

Art or applied science is essentially “a characteristic or trained ability of rationally producing.” Examples of art would include something as complex as architecture or something as basic as rug-making or basket-weaving. Art deals with production and not action and is “a characteristic of producing under the guidance of reason.”<sup>12</sup>

The most important and complex faculty through which an individual grasps or attains the truth is practical wisdom. As defined by Aristotle, practical wisdom is “a truthful rational characteristic of acting in matters involving what is good for man.” It is “an excellence or virtue and not an art.” Practical wisdom is not a trained ability because it cannot be forgotten. It is, first and foremost, “concerned with human affairs and with matters about which deliberation is possible.” It deals with (1) intelligence or the sizing up the situation, discernment, salience, (2) deliberation before acting, and (3) the choice to act. Practical wisdom goes far beyond the rational application of universals or that knowledge gained from scientific study or found deep in one’s memory. It is the trait

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<sup>10</sup> Ibid., 1141a15-1141b9.

<sup>11</sup> Ibid., 1140b31-1141a8.

<sup>12</sup> Ibid., 1140a1-23.

Aristotle believes says the most about the man when he writes, “The most characteristic function of a man of practical wisdom is to deliberate well.”<sup>13</sup>

What elevates practical wisdom to the top of the rational soul is that “it must also be familiar with particulars, since it is concerned with action and action has to do with particulars.”<sup>14</sup> It is the discernment of these important particulars that Sherman and others strongly emphasize and this chapter explores further. Most importantly, for Aristotle and for the purposes of the analysis here, if “right reason in moral matters is practical wisdom,”<sup>15</sup> then a man of practical wisdom possesses the capacity of deliberating well about what is good and advantageous for the individual, himself, and for society, as a whole.<sup>16</sup> Therefore, good, moral policy formation or reform cannot take place without the virtue of practical wisdom discerning the particulars, deliberating well, and making the decisions or choices.

It should be clear from these brief descriptions of what Aristotle identified as the rational elements of the soul which allow one to grasp and attain the truth that he appears very eager to distinguish practical wisdom from other virtues. Sherman helps to interpret Aristotle’s efforts in this regard quite clearly. Scientific knowledge or *episteme* is the “kind of knowledge which has as its subject-matter unqualified and unchanging truths.” Art or *techne*, in contrast, is knowledge of what is produced by one’s efforts. The

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<sup>13</sup> Ibid., 1140b20-24 and 1141b8-10.

<sup>14</sup> Ibid., 1141b14.

<sup>15</sup> Ibid., 1144b28.

<sup>16</sup> Ibid., 1140a25 and 1140b9.

reasoning characteristic of such productions of art, known as *poieseis*, is fundamentally distinct, for Aristotle, from the reasoning characteristic of action or *praxis*. The outcome of the former is external, and of the latter, internal. The larger worth of *praxis* or reasoning through practical wisdom is the state being exemplified and not simply achieving planned results. “Productions have ends extrinsic to the producing, while the ends of *praxeis* are immanent in *praxeis*.”<sup>17</sup> In summary, the purpose of designing a building or performing a scientific experiment is the building itself or the observable results of the experiment. By contrast, the purpose of performing a virtuous act or making a moral decision is the moral being, the character of the agent, rather than only the end results.

The preeminent stature that both character and practical wisdom have in Aristotle’s theory of virtue should be quite clear to most readers of the *Nicomachean Ethics*. It provides evidence of their important relationship. In Book VI, Aristotle writes, “It is not possible to be fully good without having practical wisdom or to be a man of practical wisdom without having excellence of character.”<sup>18</sup> He continues, “As soon as he possesses this single virtue of practical wisdom, he will possess all the rest.”<sup>19</sup> And, finally, Aristotle concludes Book VI with the following, “For [moral] virtue determines

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<sup>17</sup> Sherman, 3n2.

<sup>18</sup> Aristotle, *Nicomachean Ethics*, 1144b31-32.

<sup>19</sup> *Ibid.*, 1145a1-2.

the end and practical wisdom makes us do what is conducive to the end.”<sup>20</sup> Practical wisdom allows us the means to the end while practical folly, then, logically does not.

There remains three key aspects of Aristotle’s concept of practical wisdom, for the purposes of this work, that must be explored in more detail, namely, (1) deliberation about the general and particular, (2) the relationship between character and the discernment of the particulars, and (3) the role of personal experience in the exercise of practical wisdom. These three areas are very interrelated. First, let us examine Aristotle on deliberation. Martha Nussbaum describes Aristotelian deliberation as “a flexible movement back and forth between particular and general.”<sup>21</sup> The composition of the “particular and general” about which we deliberate is very specific for Aristotle. “We do deliberate about things that are in our power and can be realized in action ... There can be no deliberation in any science ... Rather, we deliberate about matters which are done through our own agency.”<sup>22</sup> Most importantly for the exercise of practical wisdom, “Deliberation, then, operates in matters that hold good as a general rule.”<sup>23</sup>

Nussbaum explains this relation between deliberation and practical wisdom and the presence of general rules further. When Aristotle says, “Practical wisdom is not concerned with universals only; it must also recognize particulars, for it is practical, and practice concerns particulars,”<sup>24</sup> he is implying that there are guidelines useful to the

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<sup>20</sup> Ibid., 1145a5.

<sup>21</sup> Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, United Kingdom: Cambridge University Press, 1986), 316.

<sup>22</sup> Aristotle, *Nicomachean Ethics*, 1112a32-1112b3.

<sup>23</sup> Ibid., 1112b7.

<sup>24</sup> Ibid., 1141b4-16.

ongoing process of moral development. These are important because good virtues are not relative or open to questions of personal choice. People not yet in possession of practical wisdom, like the very young or inexperienced, need to follow rules that summarize the wise judgments of others. Even for the “virtuous adults” of sound moral character, rules or universals “guide us tentatively in our approach to the particular, helping us to pick out its salient features.”<sup>25</sup> Furthermore, these general rules are necessary because we are not always good judges in all cases. But as Nussbaum explains, “practical wisdom uses rules [or universals] only as summaries or guides; it must itself be flexible, ready for surprise, prepared to see, resourceful at improvisation.”<sup>26</sup> The trained judgment of an individual of virtuous character will be able to identify the salient features that are morally relevant and recognize that they are as such and to what extent a general rule is or is not applicable.<sup>27</sup>

This being the case, Aristotle stresses that the crucial prerequisite for deliberation and practical wisdom is a “long experience of life that yields an ability to understand and grasp the salient features, the practical meaning, of the concrete particulars.”<sup>28</sup> For when we discern the particulars and deliberate well, we form a more specific and determinate description adding to our own description of inductive or empirical generalizations over time.<sup>29</sup> Anyone who has thought about an ethical decision knows that being told what our society generally thinks we ought to do does not settle our decision. We must reach our

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<sup>25</sup> Nussbaum, 304-5.

<sup>26</sup> Ibid.

<sup>27</sup> “Translator’s Notes,” Aristotle’s *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, Indiana: Hackett Publishing Company, Inc., 1985), 418.

<sup>28</sup> Nussbaum, 304-5.

<sup>29</sup> Irwin, 418.



own conclusions. This is why Nussbaum describes Aristotelian deliberation as universal rules guided by particular perception<sup>30</sup> or the discernment of the particulars.

Sherman moves Nussbaum's analysis to a more Aristotelian conclusion. She states that our deliberation and judgment of particular cases and our knowledge of how to "compose the scene" is "itself part of the moral response" rather than only the tying of a particular to its universal. She continues,

Discerning the morally salient features of a situation is part of expressing virtue and part of the morally appropriate response. Pursuing the ends of virtue does not begin with making choices, but with recognizing the circumstances relevant to specific ends. In this sense, character is expressed in what one *sees* as much as what one *does* [Sherman's emphasis]. Knowing how to discern the particulars, Aristotle stresses, is a mark of virtue.<sup>31</sup>

The key to deciding how to act, then, is first acknowledging that a given situation permits or requires action. In fact, connecting discernment to deliberation and choice may be said to be at the core of practical thinking — if done well, practical wisdom; if done poorly, folly. The decision to act arises from a reading of the circumstances, the discernment of the particulars in the context of one's character and knowledge to date.<sup>32</sup> This approach to the particulars is itself "part of the virtuous response." For Aristotle, how to see becomes as much a matter of personal inquiry as what to do.<sup>33</sup> Sherman expands on this point when she states, "The stage of construal and discrimination needs

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<sup>30</sup> Nussbaum, 291.

<sup>31</sup> Sherman, 3-4.

<sup>32</sup> *Ibid.*, 29.

<sup>33</sup> *Ibid.*, 30.

to be distinguished from the moment of decision.”<sup>34</sup> It is how character, through deliberation, choice, and the exercise of practical wisdom or folly, is or is not exhibited by individual moral agents, or, more broadly stated, citizens of the polis.

Finally, what role does experience play in the exercise of practical wisdom and the exemplification of character? Sherman is very clear on this point. She writes, “Wisdom awaits the gradual development of experience.”<sup>35</sup> Indeed, she later makes this point even stronger: “In the *Nicomachean Ethics*, [Experience] is a precursor to the possession of character states and practical reason.”<sup>36</sup> Sherman summarizes the views of Aristotle on experience, taken from his *De Anima*, very concisely. For Aristotle, experience is not merely a way of remembering the past but is also a way of managing the future in light of the past. It is a level of cognition combining memory with a firm grasp of directly or indirectly observed patterns. Experience organizes the past in such a way that we gain a familiarity and imaginative feel for what may lie ahead. It steers us in our future encounters.<sup>37</sup> As one key component to the exercise of practical wisdom, we are obligated to expand our experiences at every opportunity. One cannot possess good, sound character in an Aristotelian sense without continually living and embracing life’s moments and learning from the resulting experiences. When Sherman states, “Ethical perception requires methods by which we can correct and expand our point of view,”<sup>38</sup>

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<sup>34</sup> Ibid., 35-6.

<sup>35</sup> Ibid., 53.

<sup>36</sup> Ibid., 192.

<sup>37</sup> Ibid., 191.

<sup>38</sup> Ibid., 35.

she leaves the door open for experience and then some. A heightened appreciation of the historical past is elevated in this work as having a higher, more important role in expanding our point of view. History can become and is a vital extension of experience.

There is no level of experience, however, that will allow one to know how to choose correctly on every occasion with regard to all circumstances. What is crucial, according to Sherman, is an important recognition of the limits of one's personal experience and a prompt acknowledgment that one may need external assistance.<sup>39</sup> Having made this admission, one is able to see that Aristotle's practical wisdom possesses collaborative characteristics. Aristotle writes, "Surely one's own good cannot exist without household management nor without a political system."<sup>40</sup> In addition, Sherman further interprets Aristotle to say that "practical wisdom must include political wisdom in a significant way."<sup>41</sup> Deliberation and choice, then, become prerequisites for and outcomes of community living, as well as for the exercise of practical wisdom based on sound moral character. Sherman identifies important implications here: "If good living is cooperative, then the experience and expertise required for virtuous action need not reside separately in each individual, but can be borrowed from others."<sup>42</sup> As shall be argued later in this chapter using the writings of David Hume and others, experience and expertise can be borrowed from both contemporary and historical others.

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<sup>39</sup> Ibid., 53.

<sup>40</sup> Aristotle, *Nicomachean Ethics*, 1142a9.

<sup>41</sup> Sherman, 54.

<sup>42</sup> Ibid.

The search for sound, achievable mining law reform ultimately begins with the character of the individual policy reform participants. It is their good moral character, through the rational exercise of practical wisdom, that allows them to discover the morally salient features of the mining law reform stalemate, to compose the appropriate scene, to discern the issue particulars, and, therefore, deliberate best about this public policy problem. Sound moral character is crucial to finding the means to an ends of a policy controversy, like mining law reform, in a formative, civic virtue-based political system.

#### CITIZENSHIP AND A STANDARD OF TASTE

The civic republican tradition of government strongly emphasizes the need for vibrant public life constantly enriched and perpetuated through the exercise of civic virtue by its citizens. This condition of public life in the polis cultivates strong citizenship through particular ties and attachments. As Sandel explains it, "Citizenship requires certain habits and dispositions, a concern for the whole, an orientation to the common good."<sup>43</sup> Sandel's observation raises pivotal questions: Where does a concern for the whole come from? What is the common good with regard to the mining law reform issue? What type of habits and dispositions does formative civic republican citizenship require in order to deliberate well about mining law reform? These questions lead to the important issue particulars about the public good, environmental ethics, and ethical land

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<sup>43</sup> Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1996), 117.

use. Mining law reform, debated within a civic virtue-based political system, cannot and should not shy away from such questions.

Discussions about the common or public good are essentially debates about the presence or nonexistence of a state of public morality. When a scholar recently stated that, "Citizenship is the basis of the common good," he was strongly implying that people's responsibilities to their fellow citizens, as members of the same society, are, first and foremost, moral responsibilities.<sup>44</sup> This is public morality in action. It should be a consideration in any public policy debate. Alexis de Tocqueville recognized as much over one hundred years ago in his *Democracy in America*. He wrote, "Apart from material interests, men have ideas and feelings. For a confederation to last for long, the diverse peoples forming it must share a homogeneous civilization as well as common needs."<sup>45</sup>

Before examining what Sandel describes as a "concern for the whole" and the origins of this concern, it is important to identify some unique characterizations about the common good. If one accepts that a common or public good can, does, and should exist, then, according to Drew Christiansen, S.J., one must acknowledge four distinct conclusions about the public good to also hold true, as well. First, the common good requires a different vision of political life than the politics of self-interest, or what Sandel

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<sup>44</sup> Bill Jordon, *The Common Good: Citizenship, Morality, and Self-Interest* (Oxford, United Kingdom: Basil Blackwell, 1989), 67.

<sup>45</sup> Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: HarperPerennial, 1969), Volume 1, Part I, Chapter 6, 167.

calls the “procedural republic,” offers. Second, the common good replaces the pursuit of individual interest with the promotion of a common quality of life. Third, the common good requires self-limitation for the sake of everyone’s profit. Finally, the common good embodies a distinctive vision of how to conduct politics.<sup>46</sup> Citizens of the polis, while exercising civic virtue, must actively seek out and embrace the common good under the civic republican political tradition.

This is not to say that the common good, once established and embraced by citizens of a society, never changes. Pope John Paul I believed that the common good in a polis requires “continual revision” of social, economic, and political arrangements. Why? Because, most importantly, the common good always aims at “optimal moral outcomes.”<sup>47</sup> The exercise of civic virtue, then, is what encourages and allows these moral updates or revisions to take place. Particulars can and do change. Good Aristotelian discernment and deliberation recognizes this and adapts accordingly.

Where does the concern for the whole or common good come from? How does it come to exist? The answers to these questions are rooted in the discovery and acceptance of what eighteenth century philosopher and historian David Hume called “a standard of taste” in a polis. For the purposes of this work, “taste,” in the Humean sense, is defined as the ability of individuals to discern moral qualities. Witness the following observation

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<sup>46</sup> Drew Christiansen, S.J., “The Common Good and the Politics of Self-Interest,” in *Beyond Individualism: Toward a Retrieval of Moral Discourse in America*, ed. Donald L. Gelp, S.J. (Notre Dame, Indiana: University of Notre Dame Press, 1989), 72.

<sup>47</sup> *Ibid.*, 78.

about America made by Tocqueville: “In the United States, the majority is chiefly composed of peaceful citizens who by taste or interest sincerely desire the well-being of the country.”<sup>48</sup> At a time when undeniably the civic republican tradition of government flourished in this country, Tocqueville identified and commended the presence of a standard of taste as exercised by Americans with regard to the common good of the nation as a whole. This Tocqueville characterization strongly reflects Humean thought.

In 1741, Hume published an essay entitled, “Of the Standard of Taste” that spoke directly to those who believed that a “great variety of Taste [prevailed] in the world.”<sup>49</sup> Hume saw things quite differently. He attributed this perception of great variety in taste to the strong tendency of men to transfer their differing sentiments in matters of the physical, namely that of beauty and deformity, to matters of opinion and science. Quite to the contrary, Hume believed that in matters of opinion and science, the case was quite the opposite and that “the difference among men is there oftener found to lie in generals rather than in particulars.”<sup>50</sup> More specifically, Hume believed “... that amidst all the variety and caprice of taste, there are certain general principles of approbation or blame, whose influence a careful eye may trace in all operations of the mind.”<sup>51</sup> He thought it very “natural for us to seek a *Standard of Taste* [Hume’s emphasis]; a rule by which the

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<sup>48</sup> Tocqueville, Volume I, Part II, Chapter 1, 173.

<sup>49</sup> David Hume, “Of the Standard of Taste,” in *Selected Essays*, eds. Stephen Copley and Andrew Edgar (Oxford, United Kingdom: Oxford University Press, 1993), 133.

<sup>50</sup> *Ibid.*, 134.

<sup>51</sup> *Ibid.*, 140.

various sentiments of men may be reconciled; at least a decision afforded confirming one sentiment, and condemning another.”<sup>52</sup>

Unfortunately, Hume saw a critical limitation to society’s acceptance and action in accordance with a standard of taste in moral matters. Great unanimity in a standard of taste was then and is now a lofty goal. Hume’s critical limitation was the soundness of an individual’s character and his or her ability to discern the particulars and deliberate well, as previously discussed. Hume wrote, “Though the principles of taste be universal, and nearly, if not entirely, the same in all men; yet few are qualified to give judgment ... or establish their own sentiment.”<sup>53</sup> Hume continues, “Whether any particular person be endowed with good sense and a delicate imagination ... may often be the subject of dispute ... but that such a character is valuable and estimable, will be agreed in by all mankind.”<sup>54</sup> Hume was hopeful about the ability of individuals in a society to agree to and live by a standard of taste: “In reality, the difficulty of finding, even in particulars, the standard of taste, is not so great as it is represented.”<sup>55</sup> Yet Hume still believed the presence of “men of delicate taste” to be rare and that these men were only distinguishable in society “by the soundness of their understanding and the superiority of their [virtues].”<sup>56</sup>

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<sup>52</sup> Ibid., 136.

<sup>53</sup> Ibid., 147.

<sup>54</sup> Ibid., 148.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., 149.



In the end, for Hume, “our endeavors to fix a standard of taste, and reconcile the discordant apprehensions of men” are constantly challenged by “the different humors of particular men” and “the particular manners and opinions of our age and country.”<sup>57</sup> We now come full circle. Hume rested the ability of a society to find and embrace a standard of taste on (1) the presence or lack of good moral character in its citizens and (2) deliberations and choice about the common good that are particular to a given day and age. Moral “criticism”<sup>58</sup> and the art of history, for Hume, promote the development of character and the quality of civic deliberation. A concern for the whole greatly depends on these two conditions.

#### ETHICAL LAND USE

Historian Gertrude Himmelfarb recently observed that there is a great “reluctance to speak the language of morality” in society today, both privately and publicly. This “failure of moral nerve” has resulted in moral principles and judgments being excluded from both public discourse and private conduct.<sup>59</sup> The encouragement and exercise of civic virtue that this work hinges upon reintroduces moral language into public discourse and allows public policy participants to address questions of Hume’s standard of taste from a more traditional and formative civic republican perspective. Therefore, if one wants to know what the public or common good is with regard to mining law reform,

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<sup>57</sup> Ibid.

<sup>58</sup> Moral criticism: moral analysis and commentary.

<sup>59</sup> Gertrude Himmelfarb, *The De-Moralization of Society: From Victorian Virtues to Modern Values* (New York: Alfred A. Knopf, 1995), 240-1.

they must first identify the relevant moral issues, discern the issue particulars, and deliberate well before making public policy choices. There are at least two distinct moral issues that must be addressed in order to find acceptable solutions to the mining law reform stalemate: fiscal responsibility and environmental ethics. Civic republican citizenship requires that these moral issues be addressed before any agreement on the common good can be reached. Specific, fiscally responsible mining law reform solutions are proposed in Chapter Seven of this work. They stem directly from conclusions about the civic republican versus classical liberalism traditions of government as previously discussed in Chapter Four of this work. Moral questions pertaining to environmental ethics will now be addressed.

Aldo Leopold's 1949 essay, "The Land-Ethic," has through the years become the single starting point for most discussions about environmental ethics. While often characterized as "overly holistic"<sup>60</sup> by some, Leopold does correctly introduce the idea of community into the larger ethical land use debate. It is from the basic conceptions about our community where the common good can be found.

The land-ethic simply enlarges the boundaries of community to include soils, waters, plants, animals, or collectively: the land. A land-ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.<sup>61</sup>

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<sup>60</sup> J. Baird Callicot, "The Conceptual Foundations of the Land Ethic," in *The Environmental Ethics and Policy Book*, eds. Donald Vandevor and Christine Pierce (Belmont, California: Wadsworth Publishing Company, 1994), 151.

<sup>61</sup> Aldo Leopold, "The Land-Ethic," in *A Sand County Almanac* (New York: Oxford University Press, 1949), 204.

By proposing that our community at-large or the polis place the “land” on an equal footing with human beings, Leopold stakes out a radical position. However, he correctly attempts, for the first time in the new field of environmental ethics, to expand our moral consideration to include the natural world. His essay advocates an ethical realignment that, if accepted, would greatly influence our understanding of the common good. It correctly expands our moral consideration of environmental questions thus adding to the particulars that need examination during good deliberation and before choice. Leopold is very straightforward about the environmental ethic realignment he advocates.

We abuse the land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect ... That land is a community is the basic concept of ecology, but that land is to be loved and respected is an extension of ethics.<sup>62</sup>

The problem is that land use today is not generally seen as involving questions of propriety, that is to say conformity with accepted standards of behavior. Rather, land use today is a matter of expediency or self-interest, not of right and wrong. In the case of mining law reform, the particulars are not being properly discerned. Therefore, a long-lasting policy stalemate or controversy has resulted. The proper acceptance of ethical land use standards in public policy debates would reinforce the existence of an ecological conscience, the ability to compose the scene and discern the particulars of environmental questions. Informed civic virtue with regard to environmental questions, like mining law

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<sup>62</sup> Ibid., *A Sand County Almanac*, viii.

reform, would, then, seem to encourage a common good whereby citizens develop strong convictions to maintain the health of the land through conservation given its many possible uses. Health is the capacity of the land for self-renewal. Conservation is our effort to understand and preserve this critical capacity.

Recent polling data seems to reflect a deep concern for the health of the environment on the part of many Americans. A 1994 Roper Starch Worldwide poll indicated forty-seven percent of Americans “feel passionately about the environment” and rated environmental pollution and abuses as “very serious threats” to the country as a whole. Analysts of this polling data concluded that the environment had now become a “core value” to most Americans and that majorities believed that a clean environment is not incompatible with economic growth. The analysts then correctly point out that while the public can set high goals, namely, in this case, a clean environment with continued economic growth, they do not know how to achieve them.<sup>63</sup>

How would this issue be addressed in a more formative civic virtue-based political system? It appears clear that individuals in our society have identified a clean environment together with continued economic growth as public goods. In other words, the public has identified and generally agreed to the ends that policy makers should work to achieve. The exercise of civic virtue, then, demands that the public think about the means to this end, as well. The particulars may well reveal the possibility of compromise

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<sup>63</sup> Richard Morin, “A Lighter Shade of Green,” *Washington Post National Weekly Edition*, 5-11 June 1995, 37.

where none has existed before with these two apparently conflicting public goods. In the end, the habits and dispositions that civic republican citizenship requires begin with good moral character informed by personal and historically informed experience.

Decisions about land use are inherently ethical judgments that involve ethical choices. Those involved in land-use decisions must realize that ethical judgments are not optional. Civic virtue demands they be addressed. As Timothy Beatley writes, “The failure to view a land-use decision as involving ethical choice is itself a de facto form of ethical judgment.” Most land-use decisions, Beatley continues, “are of the de facto sort because they are defined in narrow technical, economic, or legal terms.”<sup>64</sup> Mining law reform is of the de facto sort that Beatley identifies. While most citizens of our polis are confronted by and ought to be concerned with land-use issues, certain individuals are inevitably more involved in such issues and, therefore, tend to make most of the decisions. A civic virtue-based public philosophy broadens the scope and encourages more individuals to become involved in ethical land-use decisions. Civic republican citizenship, through an increased awareness of the particulars and the composed moral scene, consists of citizen involvement in the public policy-making process at the most optimum levels.

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<sup>64</sup> Timothy Beatley, *Ethical Land Use: Principles of Policy and Planning* (Baltimore, Maryland: John Hopkins Press, 1994), 4.

## SELF-GOVERNMENT AND THE ROLE OF HISTORY

Self-government, within the civic republican tradition, requires that citizens of sound moral character identify sufficiently with their communities and the larger polis in order to think and act with a view toward the public good. This goes beyond the traditional means of participating in our political system like voting or writing a letter to one's congressman or senator. Self-government requires something much more. As Sandel writes, "[Self-government] means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community."<sup>65</sup> It is within the act of deliberation that a key and often neglected element of self-government resides. Sandel alludes to it when he says, "But to deliberate well ... requires a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake."<sup>66</sup> A knowledge of public affairs and the accompanying sense of belonging, concern for the whole, and moral bond with the community are all rooted in history — the past policy or community history and the personal experiences of citizens. The exercise of civic virtue demands an increased appreciation for the past grounded in both personal and written history. It is David Hume who appears to first make this connection between history and the understanding of and commitment to the public good that formative civic republican self-government requires.

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<sup>65</sup> Sandel, 5.

<sup>66</sup> Ibid.

Certainly, civic republican self-government is more complex than simply an understanding of past history. Successful self-government requires that mechanisms for action be in place or be created to fit the situation. It also requires a strong willingness on the part of citizens to simply get involved. Tocqueville observed as much when he wrote, “First among the general principles on which modern constitutions rest [is] the participation of the people in public affairs.”<sup>67</sup> These mechanisms of participation are beyond the scope of this work. What is addressed here, however, is why a knowledge of history is so crucial to the exercise of civic virtue that fruitful self-government requires.

In his book, *The Idea of History*, R. G. Collingwood states, “Philosophy cannot separate the study of knowing from the study of what is known.”<sup>68</sup> Collingwood characterizes history as a special science and a special form of thought. It attempts to answer questions about human nature and human actions done in the past. Collingwood makes the following argument to support his claims:

It is generally thought to be of importance to man that he should know himself: where knowing himself means knowing not merely personal peculiarities, the things which distinguish him from other men, but his nature as man ... Knowing yourself means knowing what you can do; and since nobody knows what he can do until he tries, the only clue to what man can do is what man has done. The value of history, then, is that it teaches us what man has done and thus what man is.<sup>69</sup>

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<sup>67</sup> Tocqueville, Volume 1, Part I, Chapter 2, 43.

<sup>68</sup> R. G. Collingwood, *The Idea of History*, ed. T.M. Knox (Oxford, United Kingdom: Clarendon Press, 1946), 3.

<sup>69</sup> *Ibid.*, 10.

History, then, according to T.M. Knox, is for “human self-knowledge” and, therefore, it is the study of human affairs.<sup>70</sup> For Collingwood and Knox, the study of history produces results no less entitled to be called knowledge than those of the traditional natural sciences.

Time and again, Collingwood continues to expound upon views on the study of history similar to those of David Hume over 200 years earlier. Hume believed history had the unique characteristic of allowing us to become “acquainted with human affairs without diminishing in the least from the most delicate sentiments of virtue.”<sup>71</sup> It “improves our sensibilities” and “renders the mind incapable of the rougher and more boisterous emotions.”<sup>72</sup> For Hume, the study of history has these characteristics because it “extends our experience to all past ages ... making them contribute as much to our improvement in wisdom as if they had actually lain under our observation.”<sup>73</sup> Hume also wrote that self-knowledge required references to others beside ourselves and that this is history. “Men [must] always consider the sentiments of others in their judgment of themselves.”<sup>74</sup>

This being the case, Hume bestows a great obligation upon historians when he describes them as “the true friends of virtue.” For Hume, historians are able to meet this

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<sup>70</sup> “Editor’s Preface,” Collingwood, *The Idea of History*, ix.

<sup>71</sup> Hume, “Of the Study of History,” in *Essays: Moral, Political, and Literary* (Oxford, United Kingdom: Oxford University Press, 1963), 561.

<sup>72</sup> Idem, “Of the Delicacy of Taste and Passion,” in *Selected Essays*, eds. Stephen Copley and Andrew Edgar (Oxford, United Kingdom: Oxford University Press, 1993), 12.

<sup>73</sup> Idem, “Of the Study of History,” 561.

<sup>74</sup> Idem, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, revised by P. H. Nidditch (Oxford, United Kingdom: Clarendon Press, 1978), 303.



obligation because they are “sufficiently interested in the characters and events to have a lively sentiment of blame or praise, and, at the same time, have no particular interest or concern to pervert their judgment.”<sup>75</sup>

Why does Hume elevate the study of history, or “historical understanding,”<sup>76</sup> to such a high level of philosophical importance? A closer examination of Hume’s view on human nature and his description of the strongest sentiment, that of sympathy, go far in answering this question. Hume’s views on human nature and sympathy provide his conception of the historical past with a major role in the exercise of Aristotle’s practical wisdom, the development of moral character, and the self-government resulting from civic virtue.

Hume states in his *Treatise* that “the study of history confirms the reasonings of true philosophy.”<sup>77</sup> He could only make such a statement because of his strong belief in the uniformity of human nature. This is not uniformity in the truest sense of the word. Yet, Hume’s concept of the uniformity of human nature does capture the spirit of human understanding.

It is beneficial, at this point, to recall Hume’s writings on this subject from his *Enquiry Concerning the Human Understanding*:

Mankind are so much the same, in all times and places, that history informs us of nothing new or strange in this particular. Its chief use is only to discover the constant and universal principles of human nature, by showing men in all varieties of

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<sup>75</sup> Idem, “Of the Study of History,” 562.

<sup>76</sup> Donald W. Livingston, *Hume’s Philosophy of Common Life* (Chicago: University of Chicago Press, 1982), 210.

<sup>77</sup> Hume, *A Treatise of Human Nature*, 562.

circumstances and situations, and furnishing us with materials from which we may form our observations and become acquainted with the regular springs of human action and behaviour.<sup>78</sup>

For Hume, human nature exhibits “constant conjunctions.” Its principles are unchanging. Livingston is quick to qualify the degree of uniformity throughout human nature that Hume is defending here as modest. At best, it is uniformity of the sort that most everyone can and should agree on. Human nature consists of “a set of powers, dispositions, and tendencies picked out by a uniform experience of their effects.”<sup>79</sup> Recall here more of Hume’s first *Enquiry*:

Hence likewise the benefit of that experience, acquired by long life and a variety of business and company, [is] to instruct us in the principles of human nature, and regulate our future conduct, as well as speculation.<sup>80</sup>

Hume justified his assessment of human nature as follows:

But were there no uniformity in human actions ... it [would be] impossible to collect any general observations concerning mankind; and no experience, however accurately digested by reflection, would ever serve to any purpose.<sup>81</sup>

Hume’s principle of the uniformity of human nature is cogent only on a very general level of abstraction. For Livingston, “A more concrete understanding would require reference to external conditions which modify and give concrete content to the principle.”<sup>82</sup> What Livingston is interpreting here about Hume, Nancy Sherman and

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<sup>78</sup> Idem, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, ed. L. A. Selby-Bigge (Oxford, United Kingdom: Clarendon Press, 1962), 83.

<sup>79</sup> Livingston, 216.

<sup>80</sup> Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 84.

<sup>81</sup> Ibid., 85.

<sup>82</sup> Livingston, 217.

Martha Nussbaum linked to practical wisdom and discerning the particulars. Hume, like Aristotle, seems willing to admit to the general and defer the particulars to the individual. Hume's mechanism for examining the particulars is through what he believed to be the most powerful sentiment, that of sympathy. Hume states his views on the importance of the particulars as follows:

We must not, however, expect that this uniformity of human actions should be carried to such a length as that all men, in the same circumstances, will always act precisely in the same manner, without making any allowance for the diversity of characters, prejudices, and opinions. Such a uniformity in every particular is found in no part of nature. On the contrary, from observing the variety of conduct in different men, we are enabled to form a greater variety of maxims, which still suppose a degree of uniformity and regularity.<sup>83</sup>

Hume uses an interesting example to illustrate his methodology on the proper way to understand human nature that places this discussion into the proper perspective. He recounts that the Rhine River flows north and that the Rhone River flows south, yet both spring from the same mountain despite their opposite flow directions. "The different inclinations of the ground, on which they run, cause all the difference of their courses."<sup>84</sup>

The sentiment of sympathy is best known as the central theme of, what James Farr characterizes as, Hume's "moral sense" theory of ethics.<sup>85</sup> Livingston calls sympathy "the unifying principle of human nature" for Hume.<sup>86</sup> Both Farr and Livingston agree that the key to the sentiment of sympathy is communication. Hume remarks early in

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<sup>83</sup> Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 85.

<sup>84</sup> *Ibid.*, 333.

<sup>85</sup> James Farr, "Hume, Hermeneutics, and History: A 'Sympathetic' Account," *History and Theory* 17:3 (1978): 289.

<sup>86</sup> Livingston, 222.

Book II of his *Treatise* that nothing is more remarkable than “that propensity we have to sympathize with others, and to receive by communications their inclinations and sentiments, however different from or even contrary to our own.”<sup>87</sup>

Sympathy, as a major principle of public and private communication, is central to civic republican self-government. If we agree that history is a form of communication between days past and the present-day, then a view of human nature, grounded in Hume, and the sentiment of sympathy combine to allow us to “experience” the past and apply its lessons to the present as part of the exercise of civic virtue. Hume’s sentiment of sympathy has great scope and application. The communications it can address are many, namely feelings, sentiments, affections, passions, emotions, and pleasures and pains — all taken from Hume’s writings. Furthermore, through sympathy, we receive and understand others’ opinions, principles, concerns, inclinations, motives, reasons, and interests. These characteristics of sympathy as a principle of communication lead Farr to conclude that the sentiment sympathy is the “language of judgment.”<sup>88</sup>

Therefore, if the sentiment of sympathy is our language of judgment, then Hume’s integration of sympathy with the uniformity of human nature becomes more clear. In order for sympathy to assist in our assessment of human nature, “all that is necessary is that people be able to recognize the goods that other people pursue.”<sup>89</sup> Sympathy in each of us for past personalities and contemporary persons allows us to develop and

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<sup>87</sup> Hume, *A Treatise of Human Nature*, 316.

<sup>88</sup> Farr, 291.

<sup>89</sup> Livingston, 222.

understand Aristotle's general and then turn our attention to the particulars with some larger context for their necessary evaluation.

These key components of Hume's philosophy, namely human nature and sympathy, allow one to acknowledge the great importance he places on the conception of the historical past and its role in moral decision-making. It is by our very nature that we are able to study the past and gain, in a larger moral sense, from that study. Hume's conception of the historical is not presided over by a model of simple explanation or translation whereby any historian states emphatically that *x* happened because and only because of *y*. More importantly, Hume's model is one of perception. Given what we know and understand about the uniformity of human nature and our capacity for sympathy with past persons and events, then Hume's historical understanding is a matter of "seeing certain sorts of things properly" or "bringing things into focus."<sup>90</sup> This is a critical part of discerning the particulars and deliberation during the exercise of civic virtue. Hume provides this additional connection between our conception of the historical and sympathy:

The perusal of history seems a calm entertainment; but would be no entertainment at all, did not our hearts beat with correspondent movements to those which are described by the historian.<sup>91</sup>

This analysis of the important role of the historical in civic republican self-government would be incomplete without an examination of Hume's writings on the role

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<sup>90</sup> Ibid., 232.

<sup>91</sup> Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 223.

of experience. As stated previously, a heightened appreciation of the historical should be implicitly understood within Aristotle's experience component of practical wisdom. This relationship is found in Hume's writings, as well. Of particular note, like Aristotle before him and Sherman after him, Hume contrasts the roles of reason and experience in discerning the particulars. Hume makes the following important distinction:

Reason may form very plausible conjectures with regard to the consequences of such a particular conduct in such particular circumstances; it is still supposed imperfect, without the assistance of experience, which is alone able to give stability and certainty to the maxims, derived from study and reflection.<sup>92</sup>

In other words, conjecture is only a logical possibility until experience and history lend detail and weight to this choice versus that choice.

Hume describes experience as "the foundation of our inference and conclusion."

So when he writes that experience "carries us beyond our memory and senses and assures us of matters of fact which happened in the most distant places and most remote ages," he strongly advocates a specific role for historical understanding to supplement and improve our personal experiences. The study of history, then, for Hume, complements the experience that he sees as such a mandatory part of the self:

There is no man so young and unexperienced, as not to have formed, from observation, many general and just maxims concerning human affairs and the conduct of life; but it must be confessed, that, when a man comes to put these into practice, he will be extremely liable to error, till time and farther experience both enlarge these maxims, and teach him their proper use and application.<sup>93</sup>

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<sup>92</sup> Ibid., 44n.

<sup>93</sup> Ibid., 45n.

Hume states in his *Treatise* that “experience is the true standard by which the veracity of men is judged.”<sup>94</sup> If this is true, then a heightened understanding of the historical past cannot help but improve our standard of measurement and our ability to compose the moral scene. This is the role of history for Hume. Not so coincidentally, Hume was also a prolific historian as well as a moral philosopher. Therefore, there is a mechanism to confirm this analysis from his written historical works.

Hume’s *History of England* has been characterized by one scholar as “written for the curious about their past.” More specifically, it is “discursive in the sense that it is designed to generate conversation and reflection among its readers and to encourage them to engage in the delightful business of making judgments about those who have taken part in past events.”<sup>95</sup> This kind of history leads one to judge what Sherman describes as a “salient feature of a situation.” History, or at least the kind written by Hume, allows the individual to take into consideration more relevant information. It is part of the practical wisdom and character equation. Hume’s historical works can be studied by reflection with the kind of remote view which allows one to enlarge their personal view and make distant comparisons.<sup>96</sup> These abilities to discern the particulars and deliberate well are what Sherman and Nussbaum think Aristotle holds to be such a critical part of exercising practical wisdom.

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<sup>94</sup> Hume, *A Treatise of Human Nature*, 113.

<sup>95</sup> Nicholas Phillipson, *Hume* (New York: St. Martin’s Press, 1989), 140.

<sup>96</sup> Craig Walton, “Hume and Jefferson on the Uses of History,” in *Hume: A Re-Evaluation*, eds. Donald W. Livingston and James T. King (New York: Fordham University Press, 1976), 398.

It is the reflective feature of Hume's *History* that makes it so unique and suitable for the analysis here. If a heightened level of historical understanding of the past is truly a critical part of the experience required for the exercise of practical wisdom, then Hume's work provides us with an excellent example of written history. While a more thorough examination of Hume's *History of England* is beyond the scope of this work, it should be clear that when Sherman writes that ethical perception and the discernment of the particulars require methods by which we can correct and expand our point of view, she may well have in mind the kind of history that David Hume so eloquently wrote.

In a civic virtue-based political system, the sound moral character of policy participants and their common understanding of the public good makes the exercise of successful self-government possible. Civic republican self-government requires a knowledge of public affairs that is lacking without a heightened understanding of past history. Aristotle strongly emphasized the importance of personal experience as a necessary prerequisite for sound practical wisdom. Hume, based upon his concepts of human nature and the sentiment of sympathy, expanded upon the views of Aristotle and saw history as a means of benefiting in the present from the personal experiences of others in the past.

Aristotle's and Hume's conclusions with regard to personal experience and history can be seen in modern-day writings on the subject, as well. In 1996, the United States Department of Education in its "National Standards for History," stated the following largely civic republican conclusion:



Knowledge of history is the precondition of political intelligence. Without history, a society shares no common memory of where it has been, of what its core values are, or what decisions in the past account for present circumstances.<sup>97</sup>

Documentary filmmaker and noted historian Ken Burns has also voiced similar sentiments. Because our past is so inextricably linked to our future, Burns makes this conclusion about the role of history in our society: "History is the interaction between ourselves and the past and the way we interpret those echoes and voices says much about us."<sup>98</sup>

Efforts to find sound and achievable mining law reform solutions cannot neglect the history of the issue. This history is as much a part of discerning the particulars as any testimony given at a GML reform congressional hearing. The history of hardrock mining in the United States, the mining law that guides it, and historical efforts to reform mining law all provide elements of the moral scene from which an ethical justification to change the current system has its roots. Chapter Six provides this essential historical information to the reader of this work.

#### MINING LAW REFORM: AN ETHICAL JUSTIFICATION

A civic virtue-based political system encourages individuals of good moral character, acting together as citizens in pursuit of the public good through the exercise of historically informed self-government, to deliberate best about public policy matters.

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<sup>97</sup> Gil Klein, "Student's Knowledge of History Almost a Thing of the Past," *Knight-Ridder Newspapers, Las Vegas Review-Journal*, 28 July 1996, 12B.

<sup>98</sup> Ken Burns, "Embrace History," *USA Today*, 3 July 1996, 13A.

This kind of political system addresses directly the major question of this work, namely, “How ought we, as both a society and as individuals, to reason about public policy matters?” The challenge of this chapter has been to provide, at times, the highly theoretical and abstract analysis and theory construction with regard to civic virtue in preparation for the shift to identifying specific policy solutions. Specific proposals for reforming the GML are contained in Chapter Seven of this work. There are larger ramifications of the politics of civic virtue, however, when applied to the mining law reform issue and environmental ethics. In the end, if the genesis of policy formation and reform lies in the exercise of civic virtue, then what is the ethical justification to reform the 1872 GML?

It should be clear that the notion of the public good and the character required to exercise civic virtue that bring us to achieving this good are not solely ethical considerations dealing with the individual. They deal with social institutions, as well. Collingwood notes that social institutions are historical things “which create moral problems only in so far as they are already the expression of moral ideas.”<sup>99</sup> Therefore, civic virtue and practical wisdom, that Aristotle says flows from and makes possible sound moral character, must also apply to social and political groups and institutions.

This chapter argued that moral policy decisions hinge on the exercise of civic virtue that is informed by one’s practical wisdom, a concern for the whole, and a knowledge of the historical past. The discussion of Aristotle’s theory of virtue centered

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<sup>99</sup> Collingwood, 330-1.

around how one apprehends the particulars. We found that this is accomplished through the deliberative process known as perception. Nussbaum observes that “good deliberation accommodates itself to the shape that it finds, responsively and with respect to complexity.”<sup>100</sup> Our notion of the common good and a knowledge of history both add to the complexity but certainly not to the degree of hindering deliberation and the exercise of practical wisdom through one’s character.

Hume’s conception of the historical allows us to expand our deliberation and consider both the general and the particulars of the past. Through a Humean understanding of human nature and the sentiment of sympathy, the person who exercises civic virtue can reflect upon and demonstrate a level of historical understanding that assists in the never-ending exercise of practical wisdom. Sherman characterizes Aristotle’s relationship between virtue and practical wisdom as follows, “Virtue sets the end and practical wisdom promotes it.” Furthermore, “We [must] appreciate that full virtue cannot even be possessed without practical wisdom ... and practical wisdom reciprocally requires virtue.”<sup>101</sup> This being the case, if the level of heightened historical understanding, that Hume advocates, improves on one’s experience and, therefore, assists in the exercise of practical wisdom and the discernment of the particulars that sets the end or goal, then the study of history promotes virtue, as well.

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<sup>100</sup> Martha C. Nussbaum, “The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality,” in *Proceedings of the Boston Area Colloquium in Ancient Philosophy*, ed. John Cleary (University Press of America, 1985), 174.

<sup>101</sup> Sherman, 91.

Nussbaum writes of the relationship between practical wisdom and legislative laws as follows:

Principles are authoritative only insofar as they are correct; but they are correct only insofar as they do not err with regard to the particulars ... The law is authoritative insofar as it is a summary of wise decisions. It is therefore appropriate to supplement it with new wise decisions made on the spot; and it is also appropriate to correct it where it diverges from what a good judge would do in this case .<sup>102</sup>

Hers is a political world where individuals deliberate well, perceive, discern, experience, study the past, and exercise good citizenship. It is the world where mining law reform can best be achieved.

Aristotle and Hume have some very important common ground. This chapter has attempted to connect the two appropriately in order to show that the genesis of policy formation or reform starts before deciding how to act. It begins with the recognition that action is required. The study of history is required for the exercise of civic virtue because it adds to our experience, which in turn is critical to our ongoing deliberation and subsequent choices.

As Hume states:

In every situation or incident, there are many particular and seemingly minute circumstances, which the man of greatest talent is, at first, apt to overlook, though on them the justness of his conclusions, and consequently the prudence of his conduct, entirely depend.<sup>103</sup>

The particulars hold the key to the soundness, the moral excellence of our character. Our

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<sup>102</sup> Ibid., 173-4.

<sup>103</sup> Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, 45n.

conduct may well depend on our ability to discern the particulars in complex situations. What is clear is that a sound conception of the appropriate history is a vital part of the moral and intellectual discipline required for the making of sound policies, both personal and public.

The ethical justifications in this work for reforming the 1872 GML firmly rest upon three very interrelated principles. First, policy makers and citizens alike must be of good moral character and possess the capacity and willingness to discern the particulars of a given policy area. This is the well from which civic virtue springs. Chapters Two and Three of this work consist of the issue particulars that I have discerned in and about the issue of mining law reform. Given the particulars as presented, most should agree to the need for GML reform. Second, the history of a particular policy is itself part of the moral equation. It, too, is a particular that cannot be neglected.<sup>104</sup> Finally, policy formation or reform must be in accordance with the public good or an agreed to concern for the whole. There is common ground in the field of environmental ethics that provides this framework for civic republican citizenship. Like with the specific issue of mining law reform, this environmental ethic common ground has its roots in discerning the particulars.

It is often very easy in the polis to reach agreement on abstract and impersonal goals. The difficulty comes in getting people to agree on specific policies to implement the abstract and impersonal. Deborah Stone says as much and, therefore, she gives us a

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<sup>104</sup> See Chapter Six for an in-depth discussion of the history of United States mining law.

framework for understanding policy analysis to overcome this often very strong tendency. If we accept the Aristotelian dictum that the end of ethics is not knowing but doing, it follows that the purpose of environmental ethics, in a formative civic virtue-based political system, is to tell us how to act with respect to the environment. In this light, what can we, as good citizens in our society, agree on with regard to the environment and our corresponding responsibilities of stewardship, conservation, and multiple-use?<sup>105</sup>

There are three points of common ground in the polis that cannot be neglected. First, ecological processes, the environment, and their maintenance are valuable to society. Therefore, their protection should be a very high priority for the citizens of the polis. Whether this is because human beings need them to survive or for the sake of these things themselves does not matter in the long term. A civic virtue-based political system helps to stop this kind of endless debate about why something ought to be done in the face of widespread agreement on what ought to be done.

Second, undeniably, human beings and the natural world that is our environment are very much interrelated. We have a right to be here living on the Earth as well as a moral obligation not to destroy essential ecological processes and the environment.

Lastly, Leopold's land-ethic notwithstanding, there is no environmentally correct way of doing things. Different ways of life are appropriate for different environments.

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<sup>105</sup> My conclusions here are loosely drawn from an essay by Allistar S. Gunn, "Can Ethics Save the World?," in *Ethics and Environmental Policy: Theory Meets Practice* eds. Frederick Ferrè and Peter Hartel (Athens, Georgia: University of Georgia Press, 1994), 195-216 passim. I am deeply indebted to his analysis for assisting me in reaching these broader conclusions.

Even if there were one correct way, the time spent trying to convince everyone to adopt it would appear to be time wasted. Therefore, we must exercise civic virtue in support of environmentally sound policy.

We need an environmental ethic in the sense that we need to incorporate environmental sustainability into our culture.<sup>106</sup> In a civic virtue-based political system, this observation speaks directly to the commitment to the public good that good citizenship requires. The time is now for mining law reform because the salient features of the issue have been exposed. Individuals of good, sound moral character can and should realize as much and take appropriate action. Viewed under the guise of a formative civic virtue-based public philosophy, achievable and acceptable mining law reform is, in large part, a matter of discerning the issue particulars, agreeing to a shared history, and deliberating well.

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<sup>106</sup> Gunn, 211.

## CHAPTER SIX

### A BRIEF HISTORY OF UNITED STATES PUBLIC LANDS POLICIES, UNITED STATES MINING LAW, AND NINETEENTH CENTURY MINING IN THE AMERICAN WEST

True history must be actively sought and protected.  
— Ken Burns

Before advocating specific mining law reforms, informed by the discernment of the particulars that the exercise of civic virtue requires, a thorough history of United States public lands policies and mining in the American West is needed to appreciate the positions taken by Aristotle on personal experience as part of practical wisdom and Hume on the proper place of history within one's moral being. A public philosophy, based upon the exercise of civic virtue, cannot exist without an increased appreciation for the past, both personal or written history. At its most fundamental level, the civic virtue required for the conduct of formative civic republican self-government is grounded upon the knowledge of public affairs by participating citizens of sound moral characters. This knowledge of public affairs begins with a knowledge of history.

In the case of mining law reform, any discussion of current issues is practically sterile without an appreciation for the era that generated the practice of holding open federal land and its minerals to mining claims. As with any statute, the General Mining Law of 1872 represents "a snapshot of the social, economic, technological, and political



forces then at work.”<sup>1</sup> These older times influence, and in many cases determine, the range of our actions today.

## NINETEENTH CENTURY MINING IN THE AMERICAN WEST

Just as cattlemen were the pioneers of the Great Plains, prospectors and miners were the major pioneers of the American West.<sup>2</sup> Historians have traditionally given insufficient attention to the mining men and the sacrifices they made in the expansion and development of the western mineral industry and the American Far West, in general.<sup>3</sup>

From James Marshall’s 1848 discovery of gold at Sutter’s Mill in the Sierra Nevada mountains of California to Tombstone, South Dakota, in the rugged Black Hills some thirty years later, men migrated west with the great expectations of never having to say, “Gold is where I ain’t!”<sup>4</sup> or the like. To supply these miners’ wants and desires, merchants, packers, teamsters, stagecoach lines, saloon keepers, gambling halls, and brothels, to name but a few, brought their services to each new mining settlement.<sup>5</sup> If the mining claims proved fruitful, these settlements soon became communities. Yet, the severe volatility of the mining industry remained a hard reality. Mining ventures usually persisted only as long as the mineral ore merited the high costs of extraction.<sup>6</sup> As quickly

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<sup>1</sup> John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, D.C.: Resources for the Future, Inc., 1987), 11.

<sup>2</sup> Rodman Wilson Paul, *Mining Frontiers of the Far West 1848-1880* (New York: Holt, Rinehart and Winston, 1963), 2.

<sup>3</sup> Ronald C. Brown, *Hard-Rock Miners: The Intermountain West, 1860-1920* (College Station, Texas: Texas A&M University Press, 1979), 81.

<sup>4</sup> Paul, 1.

<sup>5</sup> *Ibid.*, 2.

<sup>6</sup> Brown, 9.

as these mining communities sprang up, they could also turn into ghost towns replete with the memories of lost and found dreams of mineral riches. The inherent uncertainty of mining meant that, without warning, the entire community structure could dissolve as people raced off in pursuit of the next mineral bonanza.<sup>7</sup> Despite the extremely speculative nature of the mining industry, wherever miners went, modern civilization followed them, thus endowing the Western territories, and the future states, with their first predominantly permanent population.<sup>8</sup>

Who was the typical miner and why did he come west? Most miners and prospectors were not the fabled “bearded sourdough” mythological figure with his “faithful though cantankerous burro.”<sup>9</sup> These western pioneers were usually men, younger than thirty years of age, vigorous bachelors, with little or no possessions. They had no tangible attachments to any sort of a community and, therefore, had absolutely no aversion to pulling up their stakes and moving on at a moment’s notice.<sup>10</sup> In fact, miners in the nineteenth century rarely enjoyed steady jobs with steady incomes in stable communities.<sup>11</sup> Yet, something called men westward to pursue the unknown in what was at the time one of the nation’s most dangerous occupations.

The basic governmental and societal units in the mining regions of the West were the mining camps that grew up spontaneously and autonomously. Quite surprisingly,

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<sup>7</sup> Ibid., 35.

<sup>8</sup> Paul, viii.

<sup>9</sup> Brown, xiii.

<sup>10</sup> Ibid., 11.

<sup>11</sup> Ibid., xiii.

these camps were quite orderly, even with the distinct possibility of vigilante justice for those who claim-jumped. Miners, like their businessman counterparts in the East, needed a reasonably defined structure, “a set of accepted norms,” to protect their claims into which they had sunk their labor and materials.<sup>12</sup>

They came to the inhospitable Far West for many reasons. There was, of course, the gold rush phenomenon which fed on the “rags to riches” dreams of most immigrant men. Greatly publicized financial inducements by mining and railroad companies together with wages nearly two to five times greater than Eastern industry or Midwestern agriculture lured many, as well. The West also offered many an escape from unpleasant or notorious pasts, welcome post-Civil War social and psychological relief, and untainted, fresh mountain air for those with health concerns.<sup>13</sup> Each June brought an annual influx of college students ready for a summer of easy wages and experiences that no Eastern news daily could properly prepare them for in terms of the harshness of the environment and, ironically, the sense of humor of the professional miners.<sup>14</sup>

Geologists call the huge highland formed by the Rocky Mountains on the east and the Sierra Nevada and Cascade ranges on the west the “cordilleran portion of North America.”<sup>15</sup> This is a region of great distances, high, intractable terrain, deep canyons, weary miles of arid plateau, extreme temperatures, and seasonably low rainfall.<sup>16</sup> As fate

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<sup>12</sup> Charles K. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, D.C.: Island Press, 1992), 38.

<sup>13</sup> *Ibid.*, 3-7.

<sup>14</sup> *Ibid.*, 26.

<sup>15</sup> Paul, 3.

<sup>16</sup> Brown, 12-3.

and nature would have it, it was in the mountainous rather than the level parts of the cordilleran West where the mineral wealth was to be found. The mineral veins that plunged downward to great depths from the surface became the primary target of most mining operations. By the late nineteenth century, lode or underground mining below bedrock, made up eighty percent of the industry as a whole. Placer mining success stories, or the recovery of ore freed when a vein is exposed to the elements and eroded away, like the find at Sutter's Mill, became few and very far between.<sup>17</sup> While never vanishing from the landscape of the West, quick and easy placer mine strikes were always fleeting and did not influence the formation of mining communities nearly as much as steady lode mining operations in terms of the community's longevity and infrastructure.

Looking back, the significant historical images of mining in the American West are four-fold. First, the willingness of miners to embrace innovation using new industrial and mechanical techniques brought Western cities like San Francisco and Denver to the forefront as financial centers in the relatively young nation. These innovative mining techniques and procedures required and received large capital investments from many sources usually centered in the growing towns and cities of the West. Second, mining in the West fostered the swift development of labor unions in the region. Hardrock miners lived in the same industrial world as their textile and machinery worker counterparts in the East. The case has been made, however, that their world was inherently more dangerous than other industrial workers in the growing country. The birth of labor unions

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<sup>17</sup> Mark Wyman, *Hard Rock Epic: Western Miners and the Industrial Revolution, 1860-1910* (Berkeley, California: University of California Press, 1979), 6.

in the West happened, in large part, to address the safety and workmen's compensation issues of the mining industry. Third, despite what to many seemed a vigilante image, miners established a tradition of lawful conduct in their communities, especially with regard for the legal status of mining discoveries and claims. This legal tradition was embodied within the 1872 GML, the subject of this work, whose provisions remain largely in effect today. Finally, mining in the West brought public domain environmental issues on to the public agenda.<sup>18</sup>

The Comstock Lode in Nevada, which experienced its heyday from 1859 through 1880, represents an excellent example of how some of these lasting legacies of the western mineral industry became so significant. While California's mining achievements in the 1850s have an enduring significance because they represent the first lessons learned in precious metal mining, the Nevada's Comstock Lode became, in essence, the mining graduate school. Miners initially learned the basics of industrial mining techniques in California. While mining the Comstock Lode, however, miners discovered how to mine precious minerals at greater depths on a very large scale, how to use powerful and intricate machinery, how to employ large numbers of employees, how to cope with metals more complex than placer gold and extract valuable ore from mineral waste materials, and, significant in terms of the modern-day emphasis on mining site

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<sup>18</sup> I draw these conclusions from my readings of the Brown, Paul, and Wyman books, all excellent sources for the study of nineteenth century mining in the American Far West.

reclamation and environmental laws, the extent to which large scale mining operations could and did cause serious environmental problems.<sup>19</sup>

Mining industrialization techniques included dynamite, air drills, electricity, hoisting cables, underground railroads, drainage tunnels, square-set timbering, block caving techniques, and open-pit mining.<sup>20</sup> These innovative techniques came at great cost. By 1880, within the Comstock Lode, five dollars of investment and work were required to extract one dollar of ore.<sup>21</sup> This discrepancy between capital investment and profit margins remains largely in effect today. The immediate impact of the mining industrial revolution in the West was the fast rise of the large and powerful mining corporation that could fund large-scale investment for fleeting mineral profits.

“Glorified prospect holes” worked by one or two individual miners gave way to large “extractories” employing hundreds and hundreds of men.<sup>22</sup> In bonanza mining districts like the Comstock Lode, small mines were gradually acquired by larger corporations or were consolidated to promote operating efficiency and lessen the threat of industrial type litigation.<sup>23</sup> This acquisition and consolidation process gradually transferred the economic control of a mining community to some distant city where investment requirements could be met more readily and on a much larger scale.<sup>24</sup> In essence, due to the incredible technological mining requirements needed to mine the

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<sup>19</sup> Paul, 57-8.

<sup>20</sup> Brown, 81.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 64.

<sup>23</sup> Ibid.

<sup>24</sup> Wyman, 30.

Comstock Lode, the small miners who made most of the original discoveries could not meet the costs or provide the diverse mining skills necessary for financial success. The inability of the small prospector to meet these challenges led to the appearance of large, well-financed Eastern and foreign speculators.<sup>25</sup>

By the turn of the century, mining in the West had become big business to stay. “Labor-intensive” small mines had given way to “technologically-intensive” large mines.<sup>26</sup> A common symbol of the Western pioneer era had been the lone prospector, independent and motivated by dreams of wealth and riches. By 1910, it was clearly evident that this lone, financially independent prospector had almost passed completely from the Western scene.<sup>27</sup>

With the size and complexity of lode mining increasing dramatically, the dangers to the health and safety of individual mine workers greatly increased as well. The strenuous activities of drilling, blasting, and tramping mining rail cars in man-made caverns spawned a special kind of arrogance that was always tempered by the dread of impending disaster possibly around every turn.<sup>28</sup> Like a lingering shadow, great danger followed a miner wherever he went and in whatever he did. The most common source of accidents among miners came from falling objects. Working hastily underground, miners were often injured by falling rocks, equipment, and other miscellaneous hazards.<sup>29</sup> If

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<sup>25</sup> James W. Hulse, *The Silver State: Nevada's Heritage Reinterpreted* (Reno, Nevada: University of Nevada Press, 1991), 76.

<sup>26</sup> *Ibid.*, 257.

<sup>27</sup> *Ibid.*, 256.

<sup>28</sup> Brown, 74.

<sup>29</sup> *Ibid.*, 76.

falling objects did not injure the miner, he was by no means out of the woods. “Miner’s consumption” or silicosis, a life-threatening respiratory ailment of the time, threatened the long-term health of any individual who ventured into the mining caverns for any prolonged period of time day after day.<sup>30</sup>

Mining towns were also notorious for their high cost of living. Typical wages ranged from three to five dollars per day or twenty-five cents per hour. The typical living expenses of a single miner in a typical western mining town could approach \$125 per month.<sup>31</sup> This made for very tight budgets for most thereby eliminating the glamorous illusion of a day’s hard work followed by a night of whisky and craps. In addition, there were no set rules for how many days per week or hours per day any given miner would work.

These health and safety issues combined with wage and work day fairness claims gave rise to the formation of mining labor unions. Once the inherent movement from prospect hole to prospect hole was replaced with large scale, permanent mining establishments, the formation of a lasting union could finally take place.<sup>32</sup> By 1867, all Comstock Lode mining operations were organized into one union. With this union framework established, mine owners began to give in. For the mining companies, the riches of mining were so great, the work so dangerous, and the living expenses so high in the western mountains and desert, higher wages became a necessity to keep the industry

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<sup>30</sup> *Ibid.*, 93.

<sup>31</sup> *Ibid.*, 101-11.

<sup>32</sup> Wyman, 153.



afloat. By 1872, all the major Comstock Lode mining companies had succumbed to the wage and safety demands of their union employees.<sup>33</sup>

By 1880, actually defining who was a “miner” became not a very simple prospect. This occurred primarily because lode mining, itself, had become a very complex operation involving much more than merely digging for hardrock minerals.<sup>34</sup> Knowledge of geology and engineering were now equally important before the Earth would reveal its mineral wealth.<sup>35</sup> Timbermen, carpenters, water boys, and various classes of supervisors, to name but a few, all became integral parts of any large scale mining operation. The inclusion of these types of workers and scientists as union members at the time solidified the strength of mining labor unions up through the present-day.<sup>36</sup> Mining in the West truly consisted of a heterogeneous labor force.<sup>37</sup>

Legal traditions evolving from the great Western mining boom of the late nineteenth century were mixed. As previously discussed, the GML embodies four basic principles that were derived from the practices found in the miners’ codes in the West: self-initiation, free access to and across public lands, security of title to the mineral deposits, and due diligence.<sup>38</sup> These were sound principles, formed by a common law legal tradition, that were subsequently adopted as federal law by the United States Congress in 1866 and amended by the GML of 1872. These laws “institutionalized what

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<sup>33</sup> Ibid., 156-8.

<sup>34</sup> Ibid., 160-1.

<sup>35</sup> Ibid., 256.

<sup>36</sup> Ibid., 161.

<sup>37</sup> Ibid., 58.

<sup>38</sup> “Federal Mining Law,” *Congressional Digest* 73:4 (March 1994): 72. Previously examined in-depth in Chapter Two of this work.

the mining fraternity was doing in the desert West.” They gave legal validity to mining district regulations that were enacted on the spot and approved the principle that miners could preempt parts of the public domain and its waters simply by laying claim and making use of them accordingly.<sup>39</sup> While commenting on western mining legal traditions in 1865, United States Supreme Court Chief Justice Salmon P. Chase conceded, “Under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.”<sup>40</sup>

Such glowing words could not be used to describe the state of liability law in the mining West. The strict enforcement of British common law liability practices, first transplanted in the East and later to the West, created a region of “law-made anarchy” so far as the hazards of the mining industry were concerned. Common law doctrines such as assumed risk, contributory negligence, and the fellow servant rule of persons engaged in a common pursuit would go unchanged until well into the twentieth century, quite to the detriment of individual miners injured on the job due to the negligence of others.<sup>41</sup>

While the age of conservation and environmental activism was decades away, visitors to the mining West in the late nineteenth century immediately became aware of the results of a booming mining economy. The pungent fumes of human and animal waste, rotting garbage, and decaying organic material always preceded one’s arrival to

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<sup>39</sup> Hulse, 103.

<sup>40</sup> Paul, 171.

<sup>41</sup> Wyman, 120-2.

the mining community itself.<sup>42</sup> Once there, the visitor would likely see a total disregard for the landscape as a whole. This may have been an unavoidable consequence of western mining communities at the time. Yet, reports of the eroding beauty of the West due to mining grew more numerous by the turn of the century. Actual federal government regulation of the industry, however, would not occur until well into the twentieth century.

Nineteenth century mining in the American West is a diverse and colorful story. Its heritage cannot easily be reduced to one generalization. However, to its credit, the mining industry brought a sudden introduction of people, capital, transportation, and commerce where none had existed previously.<sup>43</sup> The West would never be the same, in large part, because of the mineral industry. With the growth of mining induced civilization in the West came many other problems as well. The history of public domain policy and mining law reform efforts is full of examples where attempts to address these problems were made, both successfully and unsuccessfully. Yet, all things being equal, if any one characteristic stood out in common within the mining West, it was its inherent instability.<sup>44</sup> This nineteenth century heritage lingers throughout the mining industry today, somewhat muted perhaps, but still very much present.<sup>45</sup> Mining in the West was then and still is today a fleeting proposition. Today, the West is littered with ghost towns

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<sup>42</sup> Brown, 21.

<sup>43</sup> Paul, 195.

<sup>44</sup> *Ibid.*, 196.

<sup>45</sup> Duane A. Smith, *Mining America: The Industry and the Environment, 1800-1980* (Lawrence, Kansas: University Press of Kansas, 1987), 169.

and abandoned mines to which a large part of the region owes the debt of its fledgling and eventually very successful beginnings.<sup>46</sup>

#### UNITED STATES PUBLIC LANDS POLICIES: 1785 - PRESENT

The phrase “public domain” continues to mean a great many things to many different people. Key to any working definition of the phrase is the particular historical period of time that one is studying or concerned with. Originally, the “public domain” referred to all lands ceded by the states to the Federal Government up through 1784 following the Revolutionary War. By the beginning of the twentieth century, this definition had expanded to include all land for which the Federal Government held rights of eminent domain and ownership.<sup>47</sup> This included the land “acquired by the government through cession from the original states, by exploration, by treaty with the Indian tribes, and by treaty and purchase from foreign powers.”<sup>48</sup> From the dawn of the conservation age around 1900 up through the national environmental acts of the 1970s, the definition of the United States public domain would undergo a series of lasting changes.

The history of the United States public domain and its public lands policies can be broken down into two overlapping yet unique periods of our nation’s history. First, from the birth of the nation up through the beginning of the twentieth century, the history centers around the struggles between squatterism and speculation, poor men versus men

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<sup>46</sup> Paul, 196.

<sup>47</sup> Roy M. Robbins, *Our Landed Heritage: The Public Domain 1776-1936* (Lincoln, Nebraska: University of Nebraska Press, 1962), 5.

<sup>48</sup> Louise E. Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies, 1900-1950* (Stanford, California: Stanford University Press, 1951), 313.

of wealth with strong profit motives, and free land versus land for sale.<sup>49</sup> Second, from the beginnings of the conservation movement under President Theodore Roosevelt and the creation of the Bureau of Land Management in 1946 up through the environmental activism of the 1970s and the present day, the history is one of constant friction between the forces of the public lands industries who advocate the continuation of the process of settlement and development and the growing number of informed citizens who maintain that “the equity of the public in valuable resources which [remain] should not be dissipated.”<sup>50</sup>

In the former period, frontiersmen demanded continued free access to the public domain. At the same time, “the forces of established order” held that free land, open to public ownership, would destroy the economic and political principles upon which the nation was founded.<sup>51</sup> It was clear that the West held an array of natural resources that could support settlement of the region and boost the national economy. The chosen means to achieve these ends during the first half of our nation’s history was for the federal government to “open the gates, step back, and allow American ingenuity to take over.” The main thrust of public lands policy at the time could be characterized as the “transfer [of] public resources into private hands on a wholesale basis in order to conquer nature.”<sup>52</sup> Public lands policy became a serious political issue that a country of such vast

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<sup>49</sup> Robbins, 9.

<sup>50</sup> Peffer, 5.

<sup>51</sup> Robbins, 10.

<sup>52</sup> Wilkinson, 18.

size had never grappled with before on such a large degree in the history of Western civilization.

In the latter period, rising tides of conservationism and environmental activism began to question whether the traditional public lands industries, like mining, grazing, and timber, had outlived their federal subsidies. The perception began to evolve that public lands policies were simply programs of government-sponsored “private dominance over the public domain”<sup>53</sup> and many new public lands policies were adopted that were in line with this perception.

The history of United States mining law cannot and should not be separated from the larger history of the public domain and public lands policies. The mining industry, itself, has been characterized as “a molding force in the evolution of the American social order”<sup>54</sup> and, therefore, integral in the larger history of the country. The historical evolution of the more encompassing public lands policies is what gives rise to some of the strongest calls for GML reform today. The history of United States public domain and its public lands policies provides the essential historical common ground and knowledge of past public affairs that is necessary to discuss and analyze present-day mining law reform efforts.

From 1785 through 1850, the squatter versus speculator struggle played itself out among an almost endless series of congressional laws and compromises. The vast land

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<sup>53</sup> Ralph Nader, “Foreword,” in *Public Domain, Private Dominion: A History of Public Mineral Policy in America* by Carl J. Mayer and George A. Riley (San Francisco, California: Sierra Club Books, 1985), ix.

<sup>54</sup> Ray Allen Billington, “Foreword,” in Paul, viii.

belonging to the new nation was its most “promising asset.”<sup>55</sup> Once Congress had initially decided on a land-for-sale vice a free lands settlement policy, over the strong objections of Thomas Jefferson,<sup>56</sup> the key public lands issues became the price per acre that the lands were to be sold at and the minimum and maximum sizes of these tracts of land at the time of purchase. At stake was land of untold wealth and potential. The question on the table for the new nation was who would inherit the benefits of the land? Squatters wanted low land prices, small minimum purchase sizes, and a system of credit for purchasing land. Speculators had the same demands, yet they would settle for larger minimum purchase sizes. After all, by the nature of their trade, they could afford to pay greater amounts for larger tracts of land.

The first attempt by the national government to address the public domain disposition question was the Ordinance of 1785. Called “the wisest and most influential of all the acts of the Revolutionary period” by some,<sup>57</sup> it instituted, for the first time, a land for sale or credit policy for all Western lands relinquished by the original thirteen colonies at the time of the ratification of the Articles of Confederation. Recall that western lands at this period in our history meant lands west of the Appalachian Mountains to include the Great Lakes region, the Ohio River basin, and lands east of the Mississippi River. While certainly exhibiting a comparatively democratic character in

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<sup>55</sup> Benjamin Horace Hibbard, *A History of the Public Lands Policies* (Madison, Wisconsin: The University of Wisconsin Press, 1965), 1. This book was originally published by MacMillian Company, New York, New York, in 1924.

<sup>56</sup> Jefferson said, “By selling land you will disgust them and cause an avulsion of them from the common union. They will settle the lands in spite of everyone.” Hibbard, 4.

<sup>57</sup> Payson J. Treat in Robbins, 8.

terms of land policy, ultimately, the Ordinance was judged a policy failure by most because pioneers and settlers found little in its provisions that was very attractive or advantageous to them. They could not compete with the financial resources of speculators at land auctions thereby forcing them to buy land on very unattractive two year credit terms or simply resort to squatterism.<sup>58</sup> The Ordinance of 1785 set into motion the “constant friction between the squatter and the speculator” whereby each sought indulgences from the federal government on the pretext that he was doing more than the other in developing the nation’s resources and settling the West.<sup>59</sup>

In the end, the opening up of Western lands stimulated a strong frontier spirit described by noted public lands historian Roy Robbins as “a peculiar democratic influence, likely to be arrogant, daring, dangerous, and even uncontrollable.”<sup>60</sup> This frontier spirit, or what historian Benjamin Horace Hibbard called the “spirit of national development,” greatly overshadowed the desire of the federal government to make the public domain a source of immediate federal revenue.<sup>61</sup> This reluctance to use the sale of public lands as a source of immediate income for the United States treasury remains up through the present-day.

The federal government next attempted to address the question of public lands disposition, using the experiences gained from the Ordinance of 1785, with the Land Act of 1800. Championed by William Henry Harrison, the first Northwest Territory delegate

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<sup>58</sup> Robbins, 9.

<sup>59</sup> *Ibid.*, 10.

<sup>60</sup> *Ibid.*, 9-10.

<sup>61</sup> Hibbard, 5-6.



to assume the position of chairman of the House Land Committee,<sup>62</sup> it instituted a much more liberal four year credit system for the purchase of public lands and greatly reduced the required minimum purchase size by half down to 320 acres. In addition, this Act established the administrative machinery of surveying and record keeping that would blossom into a formidable portion of the federal bureaucracy in the years to come.<sup>63</sup> In 1803, Ohio became the first state to be admitted into the Union that was originally made up entirely of public lands. The Land Act of 1800, like its Ordinance of 1785 predecessor, was also judged a failure at the time. The credit system did not work and, over the next twenty years, Congress passed public lands credit relief acts almost as regularly as it did annual appropriations bills.<sup>64</sup>

By the Panic of 1819, the federal government had extended over \$44 million in credit for public lands purchases with less than half of this amount having been paid back under the original terms of the loan. Credit had unmistakably become the lifeblood of opportunity for both squatters and speculators alike.<sup>65</sup> The Land Reform Act of 1820 sought to address these credit problems by reducing the price of land from \$2 to \$1.25 per acre and reducing the minimum purchase allowed to eighty acres. Most importantly, all credit provisions for purchasing public lands were eliminated.<sup>66</sup> This attempt at public lands policy reform, however, did not address the questions of previously obtained credit

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<sup>62</sup> *Ibid.*, 70.

<sup>63</sup> Robbins, 17-9.

<sup>64</sup> *Ibid.*, 25.

<sup>65</sup> *Ibid.*, 32.

<sup>66</sup> *Ibid.*, 34.

and the failure of individuals to pay their debts. The Land Reform Act of 1820, then, effectively brought the whole population of the new American frontier to the brink of ruin. Responding to this unfavorable situation, between 1821 and 1832, Congress passed a total of eleven public lands credit relief acts thereby effectively nullifying the no credit provisions of the 1820 Act.<sup>67</sup>

The presidential election of 1840 contested by Whig William Henry Harrison and Democrat Martin Van Buren represented a landmark for public lands policy in the United States. For the first time, public sentiment relative to the disposition of the public domain reached a pinnacle and greatly influenced the debate at the highest national levels.<sup>68</sup> It became apparent to most that it was in the interest of the country to settle the new territories as soon as possible with “industrious inhabitants.” Furthermore, the general public came to the realization that the nation’s public lands were not and could not be used as a source of revenue for the national government.<sup>69</sup> Said one United States Senator, land sale laws were “opposed to the moral sense of the people.”<sup>70</sup> Citizens in the Eastern states were generally opposed to land policies that accelerated the growth of an already rapidly developing West. Given the appearance that these land policies favored Western development over that in the East, their opposition was understandable.<sup>71</sup> Yet, in

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<sup>67</sup> Ibid., 38-9.

<sup>68</sup> George M. Stephenson, *The Political History of the Public Lands from 1840 to 1862: From Pre-emption to Homestead* (New York: Russell and Russell, 1917), 42. This book was reissued in 1967 by the same publisher.

<sup>69</sup> Ibid., 20.

<sup>70</sup> Senator Lyon of Michigan in Stephenson, 22.

<sup>71</sup> Ibid., 24.

the end, Harrison was elected President and public land policies that favored the fledgling West were the immediate result.

By 1841, the question of preemption rights for squatters on land that they had already settled reached an inevitable conclusion. The Distribution-Preemption Act of 1841 recognized that all settlements prior to purchase would no longer be considered trespassing. The Act provided that any individual could now venture forth upon the vast public domain and stake a claim to the exclusion of all others. The minimum size of any claim remained eighty acres. The maximum size of the claim was set at 160 acres. The price of \$1.25 per acre established by the Land Reform Act of 1820 remained in effect. Ten percent of the land sales proceeds would also be equally returned to all the States. A very cursory set of criteria, such as citizenship or the intention thereof, was established to codify who specifically could take advantage of the Act's very liberal settlement provisions. One important restriction, however, was put into effect. No one person could be the proprietor of more than 320 acres in any one State or territory.<sup>72</sup> With this restriction, Congress effectively sought to diminish the inherent financial advantage that speculators had over settlers.

The Distribution-Preemption Act was the "capstone in the democratization of the public land system" and represented a victory for the pioneer West over the more established Eastern order of society.<sup>73</sup> One United States Senator called it a declaration of

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<sup>72</sup> Robbins, 89-90.

<sup>73</sup> *Ibid.*, 91.

“the custom of common law of the settler.”<sup>74</sup> Its passage is at least as important, in terms of historically significant public lands policy, as the more well-known Homestead Act that Congress would pass some twenty-one years later. Robbins summarizes the significance of this Act as follows:

- Congress, at last, regarded the settlement of the public domain as more desirable than the revenue that might be obtained from selling it;
- Congress intended that the public domain should not fall into the hands of those who already had enough land or the capital to buy large tracts of land in one place;
- The public domain should be settled in small tracts so as to extend the blessing of cheap land to the greatest possible number;
- Finally, the unofficial designation of “squatter” was hereafter eliminated and the settler should be protected from all intrusion and allowed a reasonable time to earn or gather together a sum sufficient to buy the land.<sup>75</sup>

Whether the Distribution-Preemption Act would serve as the strong deterrent to land speculation that Congress had hoped for turned out to be wishful thinking. In this, it did not succeed. It did, however, fuel the rising homestead mentality.<sup>76</sup> The desire for profit is the strongest of capitalistic motives. However, the Distribution-Preemption Act was the most significant public domain law ever passed by Congress to date. It represented the fulfillment of the prophecy Thomas Jefferson made in 1782.<sup>77</sup> Free land or homesteading was the logical next step for Congress to take. On January 4, 1844, the first homestead measure was introduced into Congress. It did not pass.<sup>78</sup> However, the stage was set for eighteen years of national debate on the question of free land.

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<sup>74</sup> Senator Smith of Indiana in Hibbard, 163.

<sup>75</sup> Robbins, 91.

<sup>76</sup> Stephenson, 72.

<sup>77</sup> See earlier note 53 in this chapter.

<sup>78</sup> Robbins, 105.

By the 1850s, many factors had come to exert strong influence on the debate surrounding the disposition of public lands in the West. European migration to the United States was reaching its highest levels. Land and geological surveys of the West now amounted to a wealth of motivational information for future pioneers. Large amounts of lead, copper, zinc, and coal deposits had been discovered throughout the region. Transportation improvements in the East, specifically river and rail travel, made getting to frontier stepping off points in Missouri and Iowa relatively easy and cheap. Most importantly, however, gold was discovered at Sutter's Mill in California in 1848.<sup>79</sup> These factors all contributed to an intense growing desire on the part of many would-be pioneers to move west and to move west fast. Public domain policies would now be greatly influenced by those seeking untold riches and their manifest destiny.

Mining and timber interests in the West owned by Eastern corporate interests provided the spark for increased westward migration and the rise of the industrial corporation as a major player in public domain politics. With the passage of the Mineral Land Act of 1846, the federal government adopted, for the first time, a policy of encouragement for the new mining industry in the West.<sup>80</sup> A combination of settlers anxious for development and corporations hungry for profit forced Congress to abandon the sixty year old policy of the federal leasing system with regard to mineral-laden public lands. The age of natural resources exploitation had arrived. Every major public lands

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<sup>79</sup> Ibid., 141-8.

<sup>80</sup> Ibid., 143.

policy up to this time had specifically exempted public domain mineral lands from permanent entry by the general public.<sup>81</sup>

The California gold rush inaugurated a period of over fifteen years where Congress stood by and watched its mineral lands policy fall victim to the often insatiable search for precious metals. Eastern business interests thwarted all attempts to institute some degree of federal mineral regulation. The allure of hardrock riches provided a “business stimulant of incalculable value.”<sup>82</sup> While initially the placer, or surface, miner reigned supreme throughout the West, mining corporations were gradually getting their foot in a door that by 1872 would soon remain permanently open. Fueled by new settlement laws which supplemented the Distribution-Preemption Act, congressional efforts to encourage the steady population of vacant western lands were largely very successful.<sup>83</sup>

These efforts included land grants or giveaways for internal improvements, to include canal building, river improvements, drainage of swamp land, as well as for rewards to military veterans, the encouragement of education through sites for school building, and various other private enterprises. This was public lands policy to encourage citizen action in reaching the goal of “conscious development of the nation.”<sup>84</sup>

Of all the congressional efforts during this period to encourage western development, most, if not all, paled in comparison to the vast amount of land granted to

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<sup>81</sup> Ibid., 150-1.

<sup>82</sup> Ibid., 152.

<sup>83</sup> Ibid.

<sup>84</sup> Hibbard, 267.

the railroad companies.<sup>85</sup> Between 1850 and 1871, Congress granted away some 129 million acres of the public domain for the construction of railroad lines throughout the West.<sup>86</sup> Together with the mining and timber interests, the railroad corporations solidified the outcome of many financial ventures by capital investors throughout the West during the years to come.

In 1845, President James K. Polk told Congress during his annual State of the Union Address that “[Public] lands remain unsold because they are of inferior quality ... [therefore, the prices of these lands] should be reduced in order to let the poor buy them.”<sup>87</sup> That same year, the Commissioner of the General Land Office, the forerunner of today’s Bureau of Land Management, advocated a disposition system by which the public lands might be rated according to their value. After all, he believed, the whole object of public domain policy was the settlement of unoccupied territory. Federal revenue was incidental to the larger goal. A graduated system of pricing would encourage both land sales and Western settlement while, at the same time, ending the hypocrisy by which the best, most promising land sold for the same price as arid, relatively useless land.<sup>88</sup>

By 1854, a rousing debate was taking place in Congress with regard to the future direction of public lands policy. Western calls for free land and a homestead law<sup>89</sup> were countered with Eastern proposals for a more graduated land sales policy. An unlikely

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<sup>85</sup> Robbins, 159.

<sup>86</sup> Ibid., 163.

<sup>87</sup> Ibid., 94-5.

<sup>88</sup> Hibbard, 299.

<sup>89</sup> Homestead bills had been defeated in Congress on four separate occasions between 1841 and 1854. Hibbard, 300.

alliance between Eastern capital interests and Western agricultural interests strongly lobbied Congress to pass a public lands graduation law. Despite scathing editorials by Horace Greeley and a new political movement called the Land Reform Party, Congress passed the Graduation Act of 1854. Under its provisions, land that had been on the market for ten years or more and remained unsold was to be sold for one dollar per acre, fifteen years or more for seventy-five cents per acre, twenty years or more twenty-five cents per acre, and thirty years or more for twelve and one half cents per acre. The Act did not apply to mineral lands and preemption was extended to all lands subject to the new graduation policy.<sup>90</sup>

At the time, the Graduation Act was the best achievable concession Congress could give the public lands Western states.<sup>91</sup> The direct impact of the Graduation Act, however, was, once again, far from the intent of Congress. The Act effectively swung the ever competitive land purchase advantage back to the speculators and greatly decreased the level of desired settlement in the West by pioneers and farmers. Settlers just could not compete. Ultimately, the most lasting heritage of the Graduation Act was to fuel the homestead fire.<sup>92</sup> By the time it was repealed in 1862, over twenty-six million acres of good public lands, not inferior arid lands, had been sold for \$1.25 per acre or less. The average price per acre paid was just thirty-two cents.<sup>93</sup> Therefore, it can be said, in many

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<sup>90</sup> Robbins, 169-70.

<sup>91</sup> Hibbard, 300.

<sup>92</sup> Robbins, 171.

<sup>93</sup> Hibbard, 304.



respects, that the Graduation Act was more liberal than the more often hailed Homestead Act that would be enacted some eight years later.<sup>94</sup>

By the 1860s, the federal policies of dumping land onto the market by means of extensive grants to railroad companies for transportation improvements, the graduation prices of the 1854 Act, and the throwing open of the mineral lands through the 1846 Mineral Land Act all contributed to a boom of speculator buying that had to be addressed. The individual settler and his family were being squeezed out of the frontier settlement process. Consequently, the homestead sentiment continued to mount, like a rising tide, until it threatened to break through despite “every possible makeshift the opposition could devise to withstand it.”<sup>95</sup> Westerners did not consider homesteading as a sacrifice on the part of the federal government. To them, it was “a plain act of justice.”<sup>96</sup> With the election of Abraham Lincoln as President and a Congress now void of Southern representation, the Civil War period provided the first opportunity for the nation’s public domain policy to fully embrace the homesteading ideal.

In spite of the war-driven industrial prosperity and the drain of manpower into the federal army, there was still a large surplus population in Eastern cities during the 1860s. Horace Greeley urged people through his speeches and writings to urgently make a home in the broad and fertile West. In 1862, due to the secession from the Union of Southern States, there existed, for the first time, the majority in Congress needed to pass a

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<sup>94</sup> Robbins, 171.

<sup>95</sup> Stephenson, 148.

<sup>96</sup> *Ibid.*, 166.

homestead act. Lincoln's pre-inauguration position of two years earlier could now be put into practice. In 1860, he said, "I am in favor of settling the wild lands into small parcels so that every poor man may have a home." The Homestead Act of 1862 extended to the same class of people included in the Distribution-Preemption Act twenty-one years earlier the right to a homestead of free land, not to exceed 160 acres, on the surveyed public domain. Title to the land could then be secured by continuous residence, improvement of the land over five years, and a small twenty-six or thirty-four dollar fee depending on the area of the claim.<sup>97</sup> Over seventy-five years of land-for-sale public lands policy came to an abrupt end. Hibbard described the Act as an inevitable conclusion to a long chain of events:

As a nation, we were destined to arrive at the point of granting free land to settlers. It was at once a manifestation of strength and weakness of a developing democracy. Immediately, the democratic form of government as manifested in America was too weak to handle its public lands in a way designed to bring into its treasury any considerable price for unused land.<sup>98</sup>

The Homestead Act has been heralded by some as the greatest democratic measure in all of United States history. Said Canada's *Montreal Herald*, "No endowment on so magnificent a scale has ever been conferred on the moneyless [sic] sons of labor, not of one country, but of the civilized world."<sup>99</sup> Certainly, it was a landmark public lands and social policy. However, while many touted it as "the most comprehensive policy for the encouragement of immigration which has perhaps ever been devised," the

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<sup>97</sup> Robbins, 206-7.

<sup>98</sup> Hibbard, 408.

<sup>99</sup> Robbins, 209.

fact that the government had vigorously begun the practice of granting large tracts of public lands to speculators and corporations years earlier called these grand proclamations into serious question. Whether the settler could seize upon the opportunities granted him under the Homestead Act remained to be seen. If good, cheap western land suddenly became scarce, could the settler continue to be the pioneer the federal government wanted to encourage?<sup>100</sup>

Only fifteen years after the passage of the Homestead Act, the General Land Office reported to Congress that, except where irrigation was easily possible, “title to the public lands cannot be honestly acquired under the homestead-laws.” Cultivation and improvement were practically impossible on the remaining public lands and, even when instituted, were very often without positive results.<sup>101</sup> As things turned out, the great weakness of the Homestead Act was its “utter inadaptability to parts of the country for which it was not designed,”<sup>102</sup> namely the semi-arid high desert and forested regions of the West.

It is during this time period in which the realization that the Homestead Act was the capstone of a vanishing era took hold throughout Congress and the country. The majority of public domain laws passed by Congress from 1862 through the turn of the century dealt primarily with trying to encourage the settlement of the inhospitable cordilleran West where annual rainfall was too low to permit crops to flourish and

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<sup>100</sup> Ibid.

<sup>101</sup> Peffer, 9.

<sup>102</sup> Hibbard, 409.

mountains were too rugged for cultivation or any other practical uses other than grazing and mining.

The determination of the majority Republican Party in Congress at the time to settle the vacant lands of the West cannot be overstated. This “determination meant nothing less than an agreement to develop and exploit the remaining resources of the public domain.”<sup>103</sup> Without any formal classification system for the nation’s remaining public domain, Congress proceeded to pass many laws that would not have been passed had a more careful survey and classification of the public lands been made. The results of these laws were two-fold. First, the public domain was thrown wide open to increasing exploitation and speculation by a rapidly growing corporate America. Second, the seeds for a coming age of conservation and environmentalism were planted.

Acts such as the GML of 1872, the Timber Culture Act of 1873, the Desert Land Act of 1877, and the Timber and Stone Act of 1878 all sought to spread the larger homestead mentality amongst the most possible settlers and speed up the settlement of the Rocky Mountains region and the arid Great Basin. Most of these laws were designed and passed to favor the settler, but their administration and operation did not bestow the desired effect. Instead, these public lands laws encouraged the exact opposite by granting the industrial and well-financed corporations almost insurmountable advantages when it came to actually settling in these harsher regions of the country. Ironically, Congress and

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<sup>103</sup> Robbins, 215.

President Ulysses S. Grant established Yellowstone as the nation's first national park in 1872.

In 1875, W.B. Hazen, a freelance journalist, wrote in *North American Review* that the country was “rapidly approaching the time when the landless and homeless [could no longer hope to] acquire both lands and homes merely by settling them.” He reluctantly concluded, “We have come to a time ... where land for nothing is no cheaper than good land at \$30 an acre.”<sup>104</sup> Responding to these increasingly negative perceptions, Congress authorized the formation of the Public Lands Commission in 1879. The eventual findings of this Commission constituted “the most comprehensive study of the public domain ever made.”<sup>105</sup> The Commission recommended that a classification system of the land be rapidly adopted to consist of “arable, irrigable, pasturage, timber, and mineral” categories.<sup>106</sup> The Commission's recommendations, however, went largely unheeded by an increasingly hostile Congress. The most lasting effect of the Commission was “to attract wider attention to the approaching exhaustion of the arable public lands.”<sup>107</sup>

The national debate over possible revisions to or the repeal of previous public lands laws continued at a leisurely legislative pace until 1891. The Revision Act of 1891, in the most concise manner imaginable for a normally verbose Congress, repealed the Timber Culture Act, the Desert Land Act, the Timber and Stone Act, and the Distribution-Preemption Act to include all of its many revisions. It also extended the

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<sup>104</sup> Ibid., 270.

<sup>105</sup> Peffer, 12.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid., 14.

time required for commutation under the Homestead Act to seven years vice the previous five. Notably absent were any revisions to or a repeal of the GML. The Revision Act also gave the President, for the first time in United States history, the authority to set aside areas of timber lands as national parks.<sup>108</sup> This provision for the setting aside of national parks also represented the first notable attempt by the federal government to address public domain preservation and conservation questions.

By the turn of the century, the process of public lands settlement and public domain politics could best be characterized as a time when “the greatest opportunities that the common man of any nation ever possessed disappeared with the passing of the arable frontier of America.”<sup>109</sup> The public domain that still remained open to settlement was vast in sheer acreage, but the opportunities for anyone of lesser means to share in its blessings had all but passed into the realm of stories of days gone by told to children by their parents and grandparents. The next chapter of the history of the United States public domain would not be one of friction between settlers and speculators or between the rich and the poor. Rather, it would be one of industrialists and agriculturists versus conservationists and environmentalists with the government assuming the role of a very interested and active third party.

“Almost coincident with the passing of the American frontier,” learned men and women in the late nineteenth century began to realize that the country’s natural resources were being exploited at such a rapid rate that the time was near when these resources

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<sup>108</sup> Robbins, 296-7.

<sup>109</sup> *Ibid.*, 297.

would soon be under the control of but a select few. These few typically had neither regard for the proper utilization and conservation of the land and its resources nor any respect for the few laws that tried to maintain some degree of federal regulation.<sup>110</sup> In this light, Robbins concluded the following:

The agency most responsible for this exploitation was not the individual farmer who typified the earlier period of American history, but the corporation which with abundant capital at its disposal was able to appropriate large areas of valuable land and often to exact an exorbitant tribute from the people who were attempting to build up the civilization of the country.<sup>111</sup>

Not until after the “railroad magnate, the cattle king, the mining baron, and the lumber monarch” had reached a capitalistic level commensurable with their eastern industrial counterparts did the government finally pass legislation that could be characterized as addressing preservation and conservation issues.<sup>112</sup> The question had rather suddenly become one of whether a wider public good would be served by the retention of title to public lands that possessed “extraordinary natural values” by the federal government?<sup>113</sup>

Two strong historical forces combined to lay the groundwork for what became known as the conservation movement. Both the rapid industrialization of the country and the abrupt realization by Americans around the turn of the century that the last timber frontier of America had possibly been reached combined to bring the issue of timber

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<sup>110</sup> *Ibid.*, 301.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Peffer, 15.

resource preservation to the forefront of the national agenda.<sup>114</sup> On February 22, 1897, President Grover Cleveland, by Executive Order in accordance with the Revision Act of 1891, created thirteen national forest reserves that encompassed over twenty-one million acres of western public lands.<sup>115</sup> In the four months that followed, a debate raged in Congress that became known as the “most heated land controversy since the days when the homestead issue had divided the nation.” Motivated by their absolute outrage at President Cleveland’s unprecedented action, Western Congressional members refused to allow funding for the creation of the forest reserves. By June 4, 1897, Congress reached its first compromise pertaining to a public lands conservation issue of any sort. Shortly after his inauguration, President McKinley signed a bill into law that allowed mining and agriculture to continue on the Cleveland forest reserves. Free access to timber for homesteaders was also continued. The forest reserves were, then, fully funded and the federal government was now officially in the business of forest preservation.<sup>116</sup>

For the next thirty years, the President, Congress, and the nation would debate and act upon various issues that pertained to the remaining Western public lands. President Theodore Roosevelt, together with his Secretary of the Interior, James R. Garfield, and Gifford Pinchot, his Chief Forester of the United States, established the nation’s first comprehensive national conservation policy.<sup>117</sup> Notably, time after time, President Roosevelt was able to bring together varied Eastern and Western interests in support of

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<sup>114</sup> Robbins, 302 and Peffer, 14.

<sup>115</sup> Robbins, 314.

<sup>116</sup> Ibid., 324.

<sup>117</sup> Ibid., 337.



many working agreements which established conservation programs that looked not “to the immediate present but many years into the future.”<sup>118</sup> Not only did the Roosevelt Administration begin looking at the need for conservation of irreplaceable resources like timber and mineral lands, but they also encouraged the development of other resources like irrigation lands, waterways, and hydroelectric power.<sup>119</sup> The National Reclamation Act of 1902 federally-sponsored and fully funded the process of new irrigation for the arid western lands. Yet, despite all of the Roosevelt Administration public lands conservation and preservation initiatives, the movement was not supported by most Western Congressional delegations and the Western populace at-large.

The first fifty years of twentieth century federal public domain policy were a never-ending balancing act between conservationists, on the one hand, and a Congress that continued to seek viable means of encouragement for the continued settlement of arid areas of the West, on the other. Laws such as the Antiquities Act of 1906 and the Withdrawal Act of 1910 were passed to appease conservationists over the objections of Westerners. The Antiquities Act provided for the “preservation of points of natural and historical interest on the public lands.”<sup>120</sup> President Clinton most recently used this act to create a new national monument in southern Utah. The Withdrawal Act gave the Secretary of the Interior the power to withdraw public lands from settlement until such time Congress permanently authorized such withdrawals by statute.<sup>121</sup> However well-

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<sup>118</sup> Ibid., 336.

<sup>119</sup> Ibid., 337-8.

<sup>120</sup> Peffer, 107.

<sup>121</sup> Ibid., 115.

intentioned these laws appeared, they showed Congress' lack of understanding at the time when it came to questions about the future disposition of the public domain. It has been said that these laws were merely reservation measures and not conservation measures. While officially sanctioning the principle of federal withdrawal of public lands, Congress continued to make no provisions for the use and long-term disposition of the withdrawn lands.<sup>122</sup>

Historian Louise Peffer characterized the situation at the time as this: While the federal government was the owner of vast public lands, it did not itself "propose to undertake the various operations necessary to develop them." The choices for Congress appeared clear. Either the federal government would have to rescind most of its land withdrawals and let individual and corporate interests develop them accordingly or it would have to accept the alternative of leasing them to interested parties for the purposes of development.<sup>123</sup>

The public lands leasing debate came to a conclusion with the passage of the Mineral Leasing Act and the Water Power Act, both signed into law in 1920. The Mineral Leasing Act removed nonmetallic minerals, like oil, coal, and natural gas, out from under the auspices of the 1872 GML. Public lands containing these nonmetallic minerals would now be leased from the federal government at a price and a royalty would be collected on all profits made. The Water Power Act did the same for public lands with

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<sup>122</sup> *Ibid.*, 118.

<sup>123</sup> *Ibid.*

hydroelectric potential.<sup>124</sup> The passage of these two laws allowed the process begun by the Withdrawal Act of 1910 to reach a logical conclusion. These laws recognized, for the first time, the preeminent right of the government to the public domain as permanent and “as a trusteeship for the whole people” rather than simply as a temporary title holder awaiting disposition of the land.<sup>125</sup>

The age-old question of how the federal government would continue to encourage settlement in the arid West culminated with the passage of the Taylor Grazing Act in 1934. Mineral, water, and forest public domain issues had been addressed. Agricultural opportunities on the public lands had all but diminished to little or none. The major public domain issue became the disposition of grazing in the West. Through a series of laws, namely the Kindred Act of 1904, the Enlarged Homestead Act of 1909, and the Stock-Grazing Homestead Act of 1916, Congress attempted to find a balance between grass lands conservation and the expansion of grazing tracts on the public lands to such a size as to make cattle ranching a profitable business.

The Taylor Grazing Act effectively put the Department of the Interior in the business of administration of the nation’s grazing lands by granting the Secretary the authority to create and lease grazing districts on the public lands.<sup>126</sup> Within one year of the passage of the Taylor Grazing Act, President Franklin Roosevelt, through executive orders, effectively closed the public domain to future settlement as it had occurred since

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<sup>124</sup> *Ibid.*, 131.

<sup>125</sup> *Peffer*, 132.

<sup>126</sup> *Robbins*, 421.

the Constitutional Convention. He withdrew for classification all public lands in twelve Western states.<sup>127</sup> At last, an official federal classification system for the remaining public lands, first recommended by the Public Lands Commission in 1879, was established. The previously open public domain had become a permanently closed national domain. In light of the GML, however, was it actually closed? As Robbins states, “The land of opportunity — opportunity as measured in terms of free land — had officially closed its doors. America had come of age.”<sup>128</sup>

Peffer suggests that the actual “closing of the public domain” occurred on July 16, 1946. That was the date the General Land Office merged with the Grazing Service to form the federal Bureau of Land Management.<sup>129</sup> Issues of states rights, grazing fees, and mining patents still remained open questions, but the free land homesteading ideal was now but a memory.

Up through 1970, the only public lands debate in Congress typically centered around the frequent accusations by conservationists and environmentalists that miners, ranchers, or loggers, to name but a few, were becoming “too proprietary in their attitudes toward the public domain property.” The outcry over specific abuses on public lands would eventually bring the issue onto the national agenda. An answer to the problem was usually found relatively quickly with the responsible federal government agency and the accused land user working out a solution to the situation as best they could under existing

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<sup>127</sup> Peffer, 224 and Robbins, 423.

<sup>128</sup> Robbins, 423.

<sup>129</sup> Peffer, 313.

federal laws.<sup>130</sup> The environmental and public land management legislation of the 1960s and 1970s radically changed what had become the standard sequence of events for public lands disposition questions.

The closing of the public domain and the passing of the American frontier are two separate issues. There is a historical tendency to lump the two together.<sup>131</sup> This is a great mistake. The facts reveal, however, that many years before the Taylor Grazing Act or President Franklin Roosevelt's public lands classification and withdrawal executive orders, the American frontier was closed to all but the most hardy risk-takers.

Homesteading was next to impossible on the remaining public lands after 1900. It just took the Congress almost forty years to face the facts and begin to classify the nation's public lands in terms of "wise-use." With the passage of the National Environmental Protection Act of 1969 and the Federal Land Policy and Management Act of 1976, the public domain landscape effectively changed. These changes would be at the heart of many more public lands controversies in the coming years. The "Sagebrush Rebellion" of the early 1980s is an example of just such a controversy.

In 1978, President Jimmy Carter invoked provisions of the Antiquities Act of 1906 and withdrew fifty-six million acres of public lands from future development and industrial exploitation, tracts of land roughly equal in size to the state of Minnesota, to form seventeen new national monuments in state of Alaska.<sup>132</sup> Environmentalists hailed

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<sup>130</sup> Ibid., 311.

<sup>131</sup> Ibid., 338.

<sup>132</sup> R. McGregor Cawley, *Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics* (Lawrence, Kansas: University of Kansas Press, 1993), 85.

the President's decision. Western lawmakers saw it as a dangerous omen of things to come.

On July 4, 1980, 300 citizens of Grand County, Utah, marched behind a bulldozer laden with bumper stickers that said, "Sagebrush Rebel!" The bulldozer-led group proceeded to plow a new road into a newly created federal wilderness study area. The chairman of the Grand County Commission had incited the march with a speech in which he said, "We will take control of our destiny in Southeastern Utah and not delegate it to the bureaucracy." The "cancerous" growth of the federal bureaucracy had to be checked because it continually failed to listen to the people.<sup>133</sup>

These are two separate events that help to identify the origins of what became known as the Sagebrush Rebellion. By 1980, a rather vocal but inherently unorganized political movement had sprung up to express the dissatisfaction of a diverse number of people with various federal public lands policies. The vast public domain in the West had become the political arena for "regional and intergovernmental tensions." The source of this regional discontent was a strong belief on the part of many Westerners that the federal public lands management policies during the 1970s exhibited "a distinct bias in favor of environmental preservation."<sup>134</sup>

The larger goal of the Sagebrush Rebellion, according to Cawley, was "to force a realignment within the public land policy arena."<sup>135</sup> While the nation's public lands

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<sup>133</sup> Ibid., 5.

<sup>134</sup> Ibid., 90.

<sup>135</sup> Ibid., 142.

continue, for the most part, to be administered under laws passed in the 1960s and 70s, the Sagebrush Rebellion was successful in some key ways. Virtually every federal land policy, except notably the GML, underwent challenge and reconsideration by the late-1980s. Conservation and environmental regulations are now, for the most part, held up to the “wise-use” standard that Gifford Pinchot had articulated over seventy years hence when Theodore Roosevelt was president. The rules for most public lands politics have effectively changed. While the “organized” Sagebrush Rebellion ultimately fell victim to a series of judicial decisions with regard to constitutional questions of states rights and public lands ownership, the movement did transform the way in which public domain policy dialogue is conducted in this country.<sup>136</sup>

As recently as the 1996 election, the issue of public lands disposition found its way on to the political agenda. In this election, fifty-six percent of the voting citizens of Nevada approved an amendment to the state constitution that removes a disclaimer giving the federal government all rights to unappropriated public lands. Nevada consists of eighty-seven percent federal public lands, fifty-two percent of which falls into this indisposed category. Comments by Representative-elect Jim Gibbons, Republican of Nevada, with regard to the new amendment, not surprisingly echo the themes of the history of United States public lands. He was quoted as saying:

I think if the public says this is what we want, then we must do it, and I support the idea. I’ve always been a supporter that the public lands belong to the people ... This is a traditional western state issue. The problem are [sic] liberal Easterners who do not understand that they entered the union having control of their own state and

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<sup>136</sup> Ibid., 168.

having control of the public lands in their state. Now they're jealously refusing those of us who have large areas of public land to have control over it.<sup>137</sup>

Notwithstanding some historical inaccuracies in Representative-elect Gibbons' statement, his sentiments echo those of many Westerners today. Public lands policy questions have historically been and continue to be regional issues. During the 1990s, attempts at resolving these issues at the federal level have usually failed and the public lands policy stalemate that results continues apparently unabated. The public domain may be officially closed but its history runs deep.

#### UNITED STATES MINING LAW: 1780 - PRESENT

The history of mining law in the United States is a much shorter narrative than the history of United States public lands policies. The antecedents of our nation's mining law certainly can be traced back centuries, if not millennia.<sup>138</sup> The four basic mining principles, which were codified by the GML, have deep historical roots that extend well before the founding of our nation. Throughout history, systems of mining laws have traditionally regarded mineral wealth as "vested in public ownership" and have viewed the function of government as providing access to and encouragement for the exploitation of these resources. Because mining carries with it potentially great personal and financial

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<sup>137</sup> Michelle DeArmond, "Public Lands Question Rests with Congress," Associated Press, *Las Vegas Sun*, 15 November 1996, 8A

<sup>138</sup> Leshy, 9.



risk, incentives to mine in the face of these risks traditionally have been provided by the government.<sup>139</sup>

The actual history of mining law in the United States begins with the Land Ordinance of 1785. In the tradition of the crown charters that had governed the original American colonies, this Act reserved for the new government “one-third part of all gold, silver, lead and copper mines, to be sold or otherwise disposed of as Congress shall hereafter direct.”<sup>140</sup> The issue did not become a matter for further legislation until initially after the Louisiana Purchase in 1803 and, more importantly, following the signing of the Treaty of Guadalupe-Hildago in 1848 that ended the Mexican War and added a sizable amount of territory containing untold amounts of valuable minerals to the western United States.

The period between 1803 and 1848 is significant for two reasons. First, it was during this time that the initial federal policy of leasing mineral-rich public lands was adopted. Lead mining in the Indiana Territory and copper mining in the Great Lakes region were subsequently governed by leasing policies passed by Congress in 1807. This system ultimately failed, however, mainly due to excess fraud and speculation.<sup>141</sup> By 1839, Congress sought a change to the mineral leasing system and asked that the President “cause to be prepared a plan for the disposal of the public mineral lands.”<sup>142</sup> Six

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<sup>139</sup> John C. Lacy, “Historical Overview of the Mining Law: The Miners’ Law Becomes Law,” in *The Mining Law of 1872: A Legal and Historical Analysis* (Washington, D.C.: National Legal Center for the Public Interest, 1989), 13.

<sup>140</sup> Hibbard, 512.

<sup>141</sup> Russell R. Elliot, *Servant of Power: A Political Biography of Senator William M. Stewart* (Reno, Nevada: University of Nevada Press, 1983), 49.

<sup>142</sup> Hibbard, 513.

years later, President James K. Polk, believing the current mineral leasing system to be “radically defective” and fraught with “frequent litigation,”<sup>143</sup> recommended that the lands be sold to private interests, with the federal government reserving the right to a royalty. By the spring of 1847, public lands containing copper, lead, iron, and salt were open for sale.<sup>144</sup>

Second, by 1846, Congress had embarked on a road towards establishing a more definitive mineral lands policy. The problem was that it took twenty years to adopt this policy. It is clear that Congress had always viewed the public lands as consisting of one of two categories — mineral or non-mineral lands. Mineral lands were always exempt from disposal under the various preemption, homestead, railroad, and other granting acts. As John Leshy writes, “Though Uncle Sam was generous in land disposal, he drew the line at the really valuable lands, possibly hoping to reap rewards in the future.”<sup>145</sup> Yet despite their unique classification, a policy for the disposal of public lands containing hardrock minerals like gold and silver would not be adopted until 1866. No one knows the specific reasons for this delay. Perhaps they were reserved for revenue purposes. Perhaps they were reserved for national security considerations. Perhaps they were reserved to prevent “a windfall to the grantees, many of whom, by design or circumstance, were already treated generously in the disposal of federal lands.” Or perhaps the policy was simply one of a “conservative hedge against uncertainty,”

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<sup>143</sup> *Ibid.*, 513-4.

<sup>144</sup> Elliot, 49.

<sup>145</sup> Leshy, 10.

allowing the decision about what to specifically do with valuable public lands to be postponed until more information became available.<sup>146</sup> Whatever the reasons for the delay, even the discovery of gold in California in 1848 could not move the Congress to action.

While the news of James Marshall's discovery blazed throughout the West, it took another six months for the news to travel east back to Washington.<sup>147</sup> Almost immediately, Senator Sidney Breese of Illinois introduced a bill to "ascertain land titles in California and New Mexico" with the long-term objective being the sale of the mineral lands in two-acre rectangular plots. Expansionist Senator Thomas Hart Benton of Missouri countered the Breese bill with a proposal urging that the mineral lands be worked as freely and as swiftly as possible. He argued that Western development, not revenue, should be the goal in controlling these new mineral lands. The Benton bill marked the beginning of the "free mining" debate in the United States.<sup>148</sup>

The situation in California was urgent. The time and the chemistry of the attitudes of the day sparked what has been called "the greatest voluntary human migration in world history."<sup>149</sup> Faced with pure opportunity for a truly fresh start, "there may well never have been anything to equal this vigorous, booming westward movement."<sup>150</sup>

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<sup>146</sup> Ibid., 10-1.

<sup>147</sup> Wilkinson, 35.

<sup>148</sup> Elliot, 49-50.

<sup>149</sup> Lacy, 17.

<sup>150</sup> Wilkinson, 35.

California's population went from an estimated 14,000 at the time gold was discovered to 100,000 by the end of 1849 and then to over 200,000 by 1852.<sup>151</sup>

When these forty-niners arrived in California, they found no legal structure controlling the mines and an absence of specific laws pertaining to mining on public lands. Without the legal means to establish and work mineral claims, these prospectors essentially became squatters or trespassers, depending on your perspective, and adopted local mining codes that were loosely based upon Spanish rules transplanted north by Mexican miners, English common law practiced by Midwest mining communities, and simple common sense.<sup>152</sup> Miners' district meetings became the basis of Western mining practices. It was here that the miners of a particular community adopted rules for determining mining titles to property, the use of water, and the handling of disputes, to name but a few pertinent issues of the day.<sup>153</sup> As John Leshy has pointed out, lest one be tempted to marvel at this frontier democracy, these miners were not typically "ruffians or outcast adventurers." Rather, they were from "the more respectable reaches of society, better educated and better off, on the average, than their neighbors back home."<sup>154</sup>

While the specific time and date of the first miners' district meeting held in California is not known, by 1851, these meetings were a common occurrence. In December, 1852, a miners' meeting was held in Nevada County, California, that

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<sup>151</sup> Paul, *California Gold: The Beginning of Mining in the Far West* (Cambridge, Massachusetts: Harvard University Press, 1947), 25.

<sup>152</sup> Wilkinson, 38-9.

<sup>153</sup> Elliot, 7.

<sup>154</sup> Leshy, 13.

established how one would assume title to a mineral lode or vein. Significantly, the chairman of this meeting was William M. Stewart, the future senator from the state of Nevada and the author of the nation's first federal mining law in 1866.<sup>155</sup> In the end, the failure of Congress to address the mining law issue until after the Civil War only served "to add credibility, if not official sanction, to [the] law-making efforts of the miners" throughout the West, but predominantly in California and Nevada.<sup>156</sup> This being the case, the possibility of a public lands mineral policy different than what was eventually passed by Congress was remote, at best.

By 1865, as the issue moved to the forefront of the national agenda,<sup>157</sup> there were two sides to the mining law debate. Congressman George Julian of Indiana led the legislative movement to subdivide and sell all gold and silver mineral public lands at auction to the highest bidder. With some restrictions on the possible development of mining monopolies and a mechanism to allow ordinary claimants the opportunity to purchase land on a credit system, Julian's legislation sought both revenue for the federal government to retire its Civil War debts and "stability to the mineral industry by changing its short-lived, migratory character" and promoting more permanent settlement.<sup>158</sup>

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<sup>155</sup> Elliot, 51.

<sup>156</sup> Lacy, 30.

<sup>157</sup> Leshy reports that President Lincoln "pondered the question of western mining" on the afternoon of the day he was assassinated. Leshy, 14.

<sup>158</sup> Elliot, 51-2 and Wilkinson, 42.

Senator Stewart of Nevada advocated a different policy. In the spirit of the mining codes that he had helped develop and defend throughout local and state courts as a lawyer in the West, Stewart favored a simple legislative ratification of the status quo with the added inducement of giving the miner outright title to the land at a nominal price. As Stewart said on the Senate floor:

This bill is a simple confirmation of the existing conditions of things in the mining regions, leaving everything where it was, endorsing the mining rules. It simply adopts and perfects the existing system allowing these people to enjoy their property without being subject to the fluctuation created now by agitations in Congress.<sup>159</sup>

Through his ingenious use of existing parliamentary procedures in Congress, Stewart was able to move his bill through the House of Representatives, much to the dismay of Julian and his colleagues. While Stewart's actual authorship of the 1866 mining law has been called into question by some, there is no doubt that its successful passage was due, in large part, to his leadership and resourcefulness. The Stewart bill was actually included in another separate bill pertaining to canals on public lands. On July 26, 1866, the nation's first mining law legislation became law, under the somewhat unusual title of "An Act granting the Right of Way to Ditch and Canal Owners over Public Lands."<sup>160</sup> History, however, records the law as the Mining Law of 1866.

Almost incredibly by today's standards, notes Wilkinson, the 1866 law zoned more than a billion acres of the American West for mining of lode or vein deposits.<sup>161</sup> At the same time, it served as a "miners' Magna Carta" since it both legalized what under

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<sup>159</sup> Leshy, 15.

<sup>160</sup> Elliot, 54 and Leshy, 15.

<sup>161</sup> Wilkinson, 42.

the current public lands policies of the United States would have been a trespass and affirmed the legal status of local mining district regulations that were based on squatter sovereignty.<sup>162</sup> Most importantly, it recognized the principle of free mining as the law of the land, a miners' homesteading law that we still live under to this day. Senator Stewart found the right words for the moment on the Senate floor, "[The miner] has given the honest toil of his life to discover wealth which when [now] found is protected by no higher law that that enacted by himself under the implied sanction of a just and generous government."<sup>163</sup>

In 1870, another mining law, similar to the 1866 Act, was passed to extend the nation's mining law to placer or surface mineral deposits. On May 10, 1872, the GML, as we know it today, was signed into law both to tie up some of the legal loose ends and supplement the workings of the previous two acts. It did contain one notable change that would have a dramatic effect on the operation of the law in the many years to come. Instead of "mineral lands" being open to exploration and purchase, the law now applied to "valuable mineral deposits." This established a qualitative basis for the validity of mining claims in the future.<sup>164</sup> However written, the GML would soon become known as the "most durable of all federal land and resource laws."<sup>165</sup>

In the aftermath of the GML passage, it became readily apparent to many what the law's legacy would be although no one is known to have gone on record predicting its

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<sup>162</sup> Elliot, 55.

<sup>163</sup> Wilkinson, 42.

<sup>164</sup> Lacy, 40.

<sup>165</sup> Leshy, 16.

eventual 125-year longevity. Almost immediately, state and federal courts faced what they called the “Herculean task” of interpreting and making legal sense of the GML.<sup>166</sup> The Public Lands Commission of 1879 made several recommendations to amend the GML to correct these legal problems but they went unheeded.<sup>167</sup> President Theodore Roosevelt even tried to reform the GML to no avail.

Over the years, the scope of the GML has been limited by Congress in response to various movements to soften the law. The primary changes have been the transfer of some of the minerals mined previously under GML provisions to a leasing system, the removal of some public lands from operation under the GML, and the increase in the administrative regulation of the law to diminish some of the long-term, adverse environmental effects of free and open public lands mining.<sup>168</sup>

The most significant limitation came in 1920 with the passage of the Mineral Leasing Act of 1920. Faced with the prospect of having to repurchase the very oil or coal it had virtually given away, Congress withdrew certain fuel and fertilizer minerals from the operation of the GML. These minerals included oil, coal, natural gas, phosphate, sodium, and sulfur. All mining claims for these minerals located prior to the 1920 act remained valid except those for oil or oil shale.<sup>169</sup>

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<sup>166</sup> Ibid., 287.

<sup>167</sup> Ibid., 288.

<sup>168</sup> Wilkinson, 50.

<sup>169</sup> Mark Squillace, “The Enduring Vitality of the General Mining Law of 1872,” *Environmental Law Reporter* 18 (July 1988): 10267.



Lacy summarizes the history of amendments and changes to the GML and the calls for mining law reform as falling into one of two categories:

- Those areas of the law creating conflict between individual miners in the interpretation of the law;
- Those areas of the law creating conflict between the miners and the United States.<sup>170</sup>

At least three major laws have been passed by Congress to address the conflicts of the former variety. Conflicts of the latter variety are where questions of environmental protection and fiscal responsibility play themselves out. It is here where most of the current GML reform controversy dwells.

The GML is not and was never intended to be an environmental law. Over the years, environmental and public lands multiple-use legislation, like the Wilderness Act of 1964, the National Environmental Protection Act of 1969, and the Federal Land Policy and Management Act of 1976, have naturally come into direct conflict with the GML. This represents an excellent example of when modern laws passed under a different understanding of the public good come into conflict with a land-tenure law passed 125 years ago. The strongest calls for GML reform are born out of this conflict. At present, as this work has addressed, GML reform remains an unresolved stalemate between the mining interests and various other environmental and fiscal conservative organizations. All of these groups have their advocates on Capitol Hill.

As just one example of the controversy, an area of conflict has arisen over the “valuable mineral deposits” clause in the GML. Could it be, ask some GML reform

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<sup>170</sup> Lacy, 41.

advocates, that the public lands in question are more valuable to the American public if they were not mined? If yes, then these lands should be withdrawn from operation under the GML. Fundamentally, however, this is a yet to be resolved land-use question.

The history of United States mining law, in summary, closely mirrors that of the larger United States public lands policies up through the middle of this century. The federal government actively promoted the private exploration and development of the mineral wealth of the public lands by adopting the free mining principle. One recent scholar of mining law and the environment has even gone so far to conclude that the mineral policies of the federal government were conceived and continue to be based upon a single premise, one dating back to Roman times, namely, mineral exploration and development hold preference over all other uses of the land because they represent the highest economic use.<sup>171</sup> Whether this is true or not is a question open for debate. Regardless, beginning in the 1960s and up through the present day, many Americans have revisited the GML and do not like what they see. For the past twenty years, most recently in the 104th Congress, efforts to reform or abolish the GML have been on the public agenda. Despite these efforts, the GML remains essentially as much a part of the Federal Code as it was in 1872.

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<sup>171</sup> Smith, 47.

## CHAPTER SEVEN

### PROPOSALS FOR MINING LAW REFORM: CIVIC VIRTUE IN ACTION

#### INTRODUCTION

This thesis began with the question, “How ought we, both as a society and as individuals, to reason about public policy matters?” The answer, woven throughout the chapters of this work, is through the exercise of civic virtue, where civic virtue is the public way of discerning and acting — formed by experience, practice, and habit — that aims to better the polis and oneself. In the formative civic republican political tradition, the exercise of civic virtue eliminates the need for the polis to address questions of whether or not the government should be neutral with regard to the public pursuit of the Aristotelian good life. As Sandel writes, “Republican government cannot be neutral toward the moral character of its citizens or the ends they pursue.”<sup>1</sup> Government must participate in the formation of the character of its citizens because this allows for the exercise of civic virtue on which the government so much depends. Individuals of sound moral character, acting as citizens in the common pursuit of the public good through the exercise of historically informed self-government, deliberate best about public policy matters. In doing so, these individuals exercise civic virtue. They actively exhibit the

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<sup>1</sup> Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1996), 127.

trait of public moral excellence. They are the ones who will most likely find good, sound solutions to public policy problems like mining law reform.

The public policy problem examined in this thesis is mining law reform. If we ought to reason about public policy matters through the exercise of civic virtue, then, given the mining law reform issue as examined in this work, the reader should be able to reach some reform conclusions about this issue. The issue particulars and the morally salient features have been discerned in the hope of aiding the reader to compose their own scene and to encourage the deliberation that is required in order to reach achievable and acceptable mining law reform policy outcomes. The particulars of this issue are many and the scene is complex, yet how better to advocate the exercise of civic virtue in the civic republican political tradition than by writing a deliberative work that reaches informed conclusions? The civic virtues of character, citizenship, and self-government all depend on this deliberative process. The exercise of civic virtue hinges on one's ability to discern the particulars and infer from them morally and historically sound conclusions.

#### LESHY AND WILKINSON

There are two individuals who, I believe, have discerned the particulars of the mining law reform issue. Their works are cited throughout this thesis. Both John D. Leshy and Charles F. Wilkinson have written extensively on this issue and their conclusions are noteworthy for two reasons. First, they have composed their scenes from very different perspectives. Leshy, an Eastern university-educated lawyer, has held

various positions in and around government including Solicitor General for the Department of Interior in the Clinton Administration. Wilkinson, a Western university-educated lawyer, practices law in the Pacific Northwest. His professional life has been dedicated to public lands law cases and issues. Second, and most importantly, despite their different views of the mining law issue, their deliberations have brought them to remarkably similar conclusions. While this work does not purport to be in the same league as their writing on the issue, it has proceeded along similar lines and, not surprisingly, has also reached similar conclusions.

While recognizing that the nation owes a great debt to the General Mining Law of 1872 because of the industry it spawned and heritage it nourished, Leshy believes that, in today's day and age, there is no room for such continued sentimentality. He believes the GML violates the "modern ethic" of society in two important ways. First, the GML does not contribute to the level of fiscal conservation and economic efficiency demanded of our federal government today. Second, the GML does not lend itself to the renewed concern for the quality of the environment born at the turn of the century and fostered through the present day. Leshy recognizes that these concerns for economic efficiency and environmental quality emanate from different sources and are not fully reconcilable. At the same time, however, they appear to be the two principal engines currently driving natural resource policymaking throughout the country. The question, for Leshy, then

becomes, “How does the GML stand up under these ethical considerations?” As this work has shown, the answer is not very well.<sup>2</sup>

Leshy writes that the GML is increasingly an obstacle to economic efficiency because of its outdated provisions for the exploration and development of minerals on federal lands. In addition, the GML’s free mining and patent principles are an obstacle to sound, good environmental protection.<sup>3</sup> Leshy states that reform of the GML can only occur through compromise among the many differing interests. Yet the attainment of compromise is hindered by the law itself. Its subject is complex and its text is arcane. Moreover, its text has been supplanted countless times by judicial and administrative action. The result is a law that not many understand at the higher level needed for compromise to be reached.<sup>4</sup> As he states, his task in writing his book is “to make [the GML] more accessible for the uninitiated.”<sup>5</sup>

While short on identifying specific reforms, Leshy’s work is an important contribution to the process of breaking the mining law reform legislative stalemate because he provides some of the essential particulars needed for one’s deliberation and choice. These particulars have been integrated throughout this work. They have greatly informed me in my conclusions.

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<sup>2</sup> John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, D.C.: Resources for the Future, Inc., 1987), 4.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, 6.

<sup>5</sup> *Ibid.*, 7.

For Wilkinson, the GML is one of his “Lords of Yesterday.” That is to say one of the remaining nineteenth century laws, policies, and ideals that remains in effect due in large part to “inertia, powerful lobbying forces, and lack of public awareness.”<sup>6</sup> It exemplifies public lands policy at a time when there seemed to be no limit to nature’s ability to “produce still more material goods with few negative consequences.” According to Wilkinson, the GML fit the needs of the frontier West but appears “radical and extreme by modern lights.” It is clear that the fact that a nineteenth century law may have been right for its own time does not settle the question of whether it is right for our time.<sup>7</sup>

There is certainly a point and circumstances under which a mining company should be able to explore the Western public lands, lay claim to a discovery, and begin their mining operation. No one should deny this logical process. Mining is an essential American industry. However, as Wilkinson rightly points out, the public must make fundamental policy judgments before then.<sup>8</sup> They must discern the issue particulars and deliberate as individuals of moral character exercising good citizenship through historically informed self-government. The exercise of civic virtue in the civic republican political tradition encourages that these public judgments be made and be made well. However, one reason the GML seems to perpetuate itself is because the

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<sup>6</sup> Charles K. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, D.C.: Island Press, 1992), 17.

<sup>7</sup> *Ibid.*, 19-20.

<sup>8</sup> *Ibid.*, 24.

deliberations and public judgments about the issue were made long ago by a distant and unfamiliar society. Having a kind of momentum all its own, the GML has continued as a means of providing a federal government subsidy where one is arguably no longer needed.

Wilkinson identifies five root principles for guiding Western land and resource policy that are extremely beneficial to this work. They are principles that influence the public good with regard to public lands issues reached through good discernment and deliberation. Wilkinson characterizes them as a set of “broadly stated precepts held by most people concerned with the American West.” They encompass national policies, local prerogatives, market economics, social concerns, and environmental ethics. These root principles are:

- Sustainable development for future generations;
- Equal respect for traditional extraction uses and modern nonconsumptive uses like wildlife, recreation, and wilderness;
- Resource development that promotes healthy, stable, and lasting communities;
- Fair return for resources developed;
- Limited government subsidies to private industry.<sup>9</sup>

#### SOUND, ACHIEVABLE REFORM PROPOSALS

If Wilkinson’s root principles represent the public good with regard to twenty-first century public lands policies, and I believe they do, then discernment of the issue particulars through good deliberation lead me to advocate five specific GML reforms. These reforms, I believe, regulate mining activities in a manner compatible with use of

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<sup>9</sup> Ibid., 17.



the same land for other purposes; encourage mineral production to meet the nation's needs; prevent waste and promote conservation of mineral resources; minimize environmental and economic costs to society; assure reclamation of disturbed lands; and insure a fair market return to the public.

First, the GML self-initiation rights and patent system should remain in place. Elimination of these provisions would deprive the mining industry of their most basic rights that exist to offset the inherent discovery and financial risks. These rights are important because they provide sufficient protection to the miner to encourage prospecting and, therefore, the discovery of mineral deposits that might not otherwise be found. Instances of mineral patent abuses are rare despite publicity to the contrary. The payment of fair market value for the mining claim land at the time the patent is issued would eliminate the possibility of continued patent abuses. Since most mineral development takes place in areas where the value of the surface land is minimal compared to the costs of placing a mine into production, the payment of fair market value for the land would not, in most cases, constitute a substantial burden upon the economies of the mining operation.

Second, a fair royalty on mining industry net profits should be instituted. This reform measure recognizes that the federal government is entitled to some remuneration when mineral resources are taken from the public lands and sold at a profit. Recognizing that mining companies do pay state and federal income, sales and corporate taxes, to name just a few, the permanent removal of a non-renewable mineral resource from public

lands does mandate an additional payment to the federal treasury and the American people. The perception, however, that the mining industry does not pay their “fair share” is growing stronger and, therefore, must be addressed. A net royalty is the proper policy because it recognizes the risks involved in the discovery of hardrock minerals, the costs that are unique to each deposit and the industry, as a whole, and the fact that the public lands national assets are only undeveloped minerals with nominal value until they are developed and processed. A net royalty of two to four percent has been supported by various mining industry officials in the past.

Third, the concept of multiple use should be endorsed through federal statute. This concept recognizes that federal lands should be managed so that recreation, wilderness, timbering, grazing, and mining can coexist. The federal lands belong to all of the American people and should be utilized in a variety of ways that benefit as many people as possible. While endorsing the concept of multiple use, resources need to be allocated for the administration of this policy. The single use policy advocated by environmental groups only accounts for the currently identified mineral resources. The multiple use policy allows for the possible future identification of previously undiscovered minerals on public lands. In order for mining to occur on public lands, adequate prospecting and geological data must be obtained before the proper use of the public land is determined.

Fourth, when a federal net royalty on mining profits is instituted, a large percentage of these funds should be dedicated to a federal fund for the reclamation of

previously abandoned mining sites. The actual number of abandoned mining sites that require reclamation is a subject of great debate. Therefore, an inventory of these sites should also be initiated by the federal government. This inventory should be a cooperative effort between the mining industry and other interested organizations. Within the current framework of governing regulations, mine abandonments, like Summitville, Colorado, should not occur as often as it has in the past. In order to prevent mine abandonment from occurring, however rare it is, a requirement that a bond be posted sufficient in amount to permit the recovery of reclamation costs should also be instituted.

Fifth, and lastly, there is a major need for clarification with regard to current federal environmental policies and their applicability to the nation's mining law. While the GML predates all current federal environmental legislation and their administrative policies, the mining industry must still conduct its activities on public lands in accordance with these laws. Mining operations that have shutdown prior to the enactment of current environmental legislation are still regulated under the broad-based Superfund Act. Provisions to define operating and reclamation standards to be met by achieving compliance with applicable federal and state environmental laws should be adopted. The mining industry is far more aware of the environmental impacts of the industry than it has been in the past. Modern mining practices minimize disturbance and make reclamation a more straight-forward task. Adding another layer of environmental statutes with an

amended GML would most likely cause confusion, additional administrative burdens, and added costs to an already capital-intensive industry.

\* \* \*

These mining law reform measures pull together the wisdom from the past deliberations of others while introducing more recent proposals, as well. They are not new and are certainly not unique to this work. However, they are offered for two reasons. First, the possibility does exist for the mining law reform stalemate to be broken if the right combination of reform measures can be found. The mining industry is not the villain in this multiple act, public lands “play.” The federal government encouraged mining in so many direct and indirect ways for the past 125 years that the miner cannot be blamed for assuming this support would continue unabated. The mining industry and the American people must willingly assume the burden of stewardship for our public lands and their natural resources. My proposals offer many possible options and opportunities for compromise.

Second, and in conclusion, given the exercise of civic virtue that I advocate and all the issue particulars as discerned throughout this work, these reform proposals should appear to the reader to be Aristotelian good, deliberative reform conclusions. We, both as a society and as individuals, ought to reason about public policy matters through the exercise of civic virtue. These GML reforms represent the kinds of formative solutions individuals of sound moral character acting as citizens in the common pursuit of the

public good through the exercise of historically informed self-government should likely reach with regard to this particular public policy issue.

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