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GOODBYE TO THE PUBLIC-PRIVATE DIVIDE

Author(s): Eric T. Freyfogle

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# SYMPOSIUM ESSAYS

## GOODBYE TO THE PUBLIC-PRIVATE DIVIDE

BY

ERIC T. FREYFOGLE\*

*In the West today, a presumed chasm exists between public and privately owned lands. But how different are these land categories, in terms of how lands are used, who uses them, and how management decisions are made? In this wide-ranging essay, Eric Freyfogle challenges this perception of the legal landscape. Both ownership forms are based on law, both entail the use of public power, and both are morally legitimate only insofar as they promote the common good. The two ownership forms also share a history, in that the national decision to retain massive public lands had much to do with misuses of private lands and with the vision of private ownership, created in the nineteenth century, that gave landowners vast powers to degrade what they owned. In a provocative vision of the nation's future, Freyfogle calls for a radical narrowing of the public-private divide, in practice and in our thinking; for the replacement of current "lousy ideas" about ownership forms with new, locally based mechanisms that respect private use rights in nature while also ensuring that all land uses promote the common good.*

To live well on land has long been a challenge and a hope for people everywhere. It is the "oldest task in human history,"<sup>1</sup> Aldo Leopold claimed,

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\* © Eric T. Freyfogle, 2006. Max L. Rowe Professor of Law, University of Illinois. Professor Freyfogle is the author of over six dozen articles on property, natural resources, and environmental law and policy, as well as several books including *The Land We Share: Private Property and the Common Good* (2003) and *Why Conservation is Failing and How It Can Regain Ground* (forthcoming Yale University Press).

<sup>1</sup> Aldo Leopold, *Engineering and Conservation*, in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD* 249, 254 (Susan L. Flader & J. Baird Callicott eds., 1991) (originally written in 1938 and delivered as a lecture to the University of Wisconsin College of Engineering).

and he was in a position to know as a careful student of the land and the ways various peoples had misused it. In America today, we are having trouble at that task, according to many conservationists. A major cause of our trouble is the institution of private property rights in land. Too many landowners use their lands in ways that undercut the collective good, and their property rights shield them from accountability. In the American West we hear another complaint about land ownership, having to do with the massive federal land holdings. Federally owned lands are also being misused, many allege. Some say too many federal lands are off limits to the kinds of extractive land uses that produce jobs. Others contend that publicly owned lands should serve public purposes alone, and that the public's prime needs are to promote wild species and ecological processes while supplying places for recreation.

I want to address this subject of land ownership, with particular regard for the division between private and public lands. Given how lands mingle in the West, private with public, it is not possible to talk about one form of ownership except in relation to the other. So after exploring the institution of ownership generally, I propose to set these forms of ownership side by side to see how different they really are, asking why the two forms exist and whether the future of one form of ownership might depend closely upon the future of the other. Is it possible that the problems of one ownership form are linked to the problems of the other? Indeed, is it possible that the simple division of lands between private and public is itself a problem?

## I.

The place to begin is with the private form of ownership. We need to pry open the institution of private rights in land and look at its inner workings. If we can do that, probing why private property exists and what it is supposed to accomplish, we can gain a sense of how property has changed over time and where it is heading today. Armed with that understanding, we can then turn to public ownership, to figure out how public land differs and why it too exists.

To start, let us set aside essentially everything that we know about land ownership and begin simply with the land itself, a natural scene. Imagine a valley somewhere, vast in extent and empty of people. Insert a river, meandering through the scene, along with a few hills or mountains, some patches of trees, and some fish and wildlife. It is a good place to live, with reasonably fertile soil, maybe a fair amount of rain, some timber and rock for building. Nature is at work, with its cycles of wind and water, of birth and death, of nutrients coursing through the system, and of plants and animals that, in their ceaseless competition, have formed a resilient biotic community.

Now let us add people to the picture, perhaps perched on a hillside looking out over the plain. These people have arrived from afar and plan to stay, settling in and making their homes. To do that, they obviously have to use the land. Perhaps they will not have many troubles as they go about their work, if the land is abundant and reasonably uniform in its attractiveness.

But these assumptions are not realistic, so let us modify them. Let us assume the land is expansive but differs widely in its natural features. Some places are far better than others to build homes. Some places are rich in wildlife, or have more fertile soil, or bountiful grasses. Some lands are next to the river and have good water, while others are higher and drier.

These arriving people face a question: how are they to organize themselves so as to use the landscape successfully? If person A takes over one tract of land, making exclusive use of it, then other people will be unable to use the tract. That is, if we let A claim ownership over a particular piece of land, we have necessarily limited the ability, or we might say the liberty, of everyone else to use it. When everyone can use all land freely, the liberty of all is equal. But the moment we give A special control over a tract of land then we have done two things: we have increased the liberty of A, and we have decreased the liberty of everyone else.

Back to the question: how might the people organize their affairs to make effective use of the lands? The question is difficult and the possible answers countless. The people could divide the land into numerous small pieces, or they might instead keep the land undivided. They might use the land by laboring in teams or they might use it as individuals. A particular tract of land could end up, not with one user, but with several people holding use rights in it. One person might gain the right to graze animals, for instance, while someone else holds rights to use the timber, hunt wild animals, extract water, or merely walk across the land. Use rights could go to families instead of individuals. They could be limited in duration or unlimited. Perhaps some places will be set aside and not actively used by anyone. To add to the complexity, let us recognize that one person's land uses can easily disrupt the activities of other people, and so there are countless questions about how the use rights of A fit together with the use rights of B and how the ensuing conflicts will be resolved.

As the people go about deciding how to use this bountiful land they will no doubt consider the human side of the issue—their needs for food, fiber, and shelter, as well as their desires for recreation and social interaction. Some needs are basic to all people, but many needs will depend upon the peculiarities of the arriving people, including their social values and structures, their religious beliefs, their senses of individual autonomy and equality, how much they value privacy, what weight they give to future generations, and so on. Along with these human needs will be the many factors that relate to nature itself, to the variations in the land and its ecological functioning. Some lands will tolerate human use without much effect; other lands will not. Some lands will have special value in supporting wildlife or sustaining ecological processes. Good land use will take these natural variations into account.

As the people think about their work they will be wise to explore all of these factors. Even so, they will make mistakes. Much about the land's natural features and functions will be unknown or misunderstood. As for the people, their numbers no doubt will change, and so will their technology, their values, and their dreams. Patterns of land use that make good sense at one time might not make good sense years later. Change is inevitable, on

both the human and the natural sides. As people alter the land, they may come to see it differently. Parts of nature they once viewed as common or unimportant may become scarce or otherwise highly valued. If our people are particularly wise they will anticipate such change by crafting mechanisms to adjust their patterns of owning and using land over time.

Let us set this scene aside and turn to three others, which we can sketch more quickly. Scene One: Hunter Albert for years has used a vast forest to find game for his family's table. He is a skilled hunter, and knows animal ways. One day he leaves home to enter the forest and is greeted by conspicuous "no hunting" signs. Albert asks what this is all about, and he receives an answer: the land is now privately owned, and the owner wants Albert to stay out. Albert goes away, but the next morning he rises early and re-enters the forest to hunt without gaining permission. As he leaves around mid-day, police officers stop him. The officers arrest him for trespassing and take him to a police station.

Scene Two: Farmer Barbara has lived on bottomland for many years, growing food for home use and for the market. She grazes cattle and sheep on several pastures. One morning she rises to find the air filled with smoke and soot. Investigating, she learns that neighbors upwind are burning their fields. They have gone into the business of producing grass seed, and need to burn their fields regularly to do so. As she investigates, she realizes that the grass burning not only sends smoke and soot into her house but significantly affects grassland birds that inhabit the region. When she makes inquiries at the state natural history survey she is told that wide-spread burning is likely to stimulate many ecological changes. Insect species could rise in number, perhaps to pest levels, harming Barbara's crops. The grass growers are likely using chemicals to keep out weeds. These pesticides will also have ecological effects on plants, insects, birds, and rodents. But the truth, according to one scientist, is we really do not know what will happen as a result of the new grass seed business, given the ecological complexity of the bottomlands. Discouraged, Barbara drives home. On the way, she thinks about her long-held plan to divide her far pasture into building lots to sell for vacation homes. She fears her land will be worth much less if buyers must put up with smoke and soot and if their homes look out, not upon natural-looking grasslands, but on monocultural fields.

Scene Three, further back in time: Harold is the head of an extended family clan, which tills its land using oxen. The land has been productive and yields a good surplus. One fall day armed men on horseback show up, carrying a strange banner. They are knights in the service of a nobleman named William, and they announce sternly that William has proclaimed himself owner of all he surveys. Henceforth, the knights assert, all land will be held subject to William's superior rights as lord and owner. All tillers of land will owe one-half of their produce to William in recognition of his superior rights. The tillers will also owe ten percent of their produce to the new church that William is constructing; a cousin of William's will be the local priest. As Harold contemplates the new situation, his eye on the horsemen and their weapons, he quickly calculates what this will mean. His entire farm surplus will be gone. He and his family will be reduced to bare

subsistence. But what can he do about it, when William and his men hold the power?

## II.

What do these stories tell us about land ownership and about the categories of lands commonly called public and private? What do they say about the way property ownership works, as an institution?

For starters, land ownership, in anything like the form we know it, is a morally problematic institution in that it rests on the assertion of coercive power—that is, on the exercise of *public* or *state* power. When the new forest owner erects “no trespassing” signs and then arrests hunter Albert, he is obviously restricting Albert’s liberties. Albert’s freedom has diminished. It has diminished, not ultimately because of what the forest owner has done, but because of the public power that the new owner wields. The law has vested this power in the forest owner, putting police and courts at his beck and call. Private ownership, in short, is all about the exercise of state power.

Now, an exercise of state power like this—physically taking Albert into custody—requires a good explanation to support it. It needs to be morally legitimate. It is not right to seize Albert and deprive him of liberty without good cause. Of course, we could say that Albert was arrested because he violated someone’s property rights. But that is not a real answer, it is merely a paraphrase of the moral question. Why is it morally legitimate for one person to possess property rights that include this coercive power? Private property is the name we give to the power, not the justification for that power.

Our first scene involving hunter Albert shows how private property reduces the liberties of people who do not own land. Our second scene, involving farmer Barbara, shows how the exercise of rights by one property owner can conflict with the exercise of similar rights by another owner. Property rights are interdependent, and land-use conflicts arise regularly. A legal regime necessarily requires rules or processes to resolve the disputes that landowners regularly have. Somehow, the law needs to supply an answer here, deciding whether an intensive land use—in this case, burning grass stubble and applying pesticide—will or will not be permitted when it conflicts with the desires of Barbara and her land-owning neighbors to be free of interference. These are not easy disputes, and we need to recognize that, in resolving them, there really is no pro-private property approach that we can take. Property rights lie on both sides of the dispute. Individual liberties lie on both sides of the dispute. The decision is not whether to protect private property: it is to decide what form of private property to protect.

Then there is our tale of Harold, and of marauding William, who takes over an entire country by fiat. Conquests like this happened, of course, and they could prove harsh for the people on the land. William’s feudal property regime, instituted coercively, was essentially a way for him to control the people and to extract wealth from them. His “property regime” included a substantial element of theft. In this simple, rather ahistoric tale, almost

everyone would agree that Harold has been mistreated, his farm produce seized, and his family reduced to poverty. But what would we say a few decades or generations later when this new land-holding system has become more familiar? Harold and his family are now peasants or serfs. Their lands are now controlled by their lord, securely in power. Perhaps the initial lord has sold his vast estates to some new lord, who now justifies the whole coercive arrangement on the ground that he has paid money for the lands—as he has. At some point, does the unfairness of it all disappear or does the unfairness always remain? What if Harold's grandchildren rise up in revolt and refuse to pay rent on the ground that property is theft? Is it morally right for local constables to arrest them for withholding rent, or would the arrest be a continuation of William's original moral wrong?

Let me draw these various points together. First, private property is a form of power over *people*, not *land*. To own land is to restrict what other people can do and sometimes to demand tribute from them. Property, in short, has a dark, coercive side. It expands the liberties and the powers of landowners but does so by necessarily restricting the liberties and economic options of other people. Second, this power is necessarily a *public* power because it ultimately rests upon a landowner's ability to call upon police, courts, and even prisons to enforce his rights. We call property a form of private power, but it is misleading to do so. Ultimately, it is public power that private individuals are able to invoke. Third, the exercise of power like this is morally problematic and therefore needs justification. Again, the justification we are talking about is a justification for restricting the liberty of people like hunter Albert, farmer Barbara, and yeoman Harold. Why is it legitimate to curtail the liberty of these people using state power? We need a good answer, and we can not just point to the property rights as justification because it is the property rights themselves that need justifying.

These days, the kind of state power that supports private property is based on law, not military force. Private property exists to the extent it is authorized and supported by law. Maybe the law is morally legitimate, maybe it is not. But it is law that defines private rights. Take away the law, take away the public power, and the property rights no longer exist.<sup>2</sup>

This brings us to a final point, based on our tale of yeoman Harold. The power arrangement put into effect in that story, with William on top and with intermediate lords spread over the land, is recognizable as a feudal hierarchy. As ruler, William exercised what we now view as two distinct forms of power, although the distinction would have made little sense to William. We distinguish between the *proprietary* power that comes from property ownership and the power that comes instead by exercising governmental authority, what is called public or *sovereign* power. When William the Conqueror took over England, proprietary and sovereign powers were fully mixed. His control over England's land brought him control over England's people. Were we to start in William's day nearly a thousand years ago and come forward to the present, we would see a long, uneven

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<sup>2</sup> This point is firmly established in American jurisprudence. See, e.g., *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657 (1927) (noting the Fourteenth Amendment "affords no protection to supposed rights of property which the state courts determine to be nonexistent").

separation of these two sources of power. Slowly and erratically, the powers we label proprietary became separated from those that we view as sovereign or governmental.<sup>3</sup> Our tendency is to assume that this separation became total, that private property exists in a private realm and differs in kind from public or governmental power. But, of course, it does not. Private property rests upon public power and entails the exercise of that power.

As proprietary and sovereign powers split apart in England, most of the king's powers fell rather easily into one category or another, but some did not. Navigable waterways, for instance, resisted categorization.<sup>4</sup> The king owned the land beneath navigable waterways as a royal prerogative. But did he own this land as he might own a farm, or was it instead owned in some public or sovereign capacity? The same issue arose with respect to the king's rights over wildlife and beaches. If the king's powers over these resources were sovereign then the public had claims to them and Parliament could regulate them. If the king's powers were proprietary, then the resources belonged to the king personally and could be kept for exclusive personal use or sold.

Making matters more complex were the countless English common lands, for centuries subject to the claims of various people, usually residents of a local area.<sup>5</sup> Common lands were subject to use, not by the public, but by a defined group of people, often villagers. Rights to use the town commons were typically defined with precision. These rights were not private property, as we understand the term, because they entailed no exclusive control over any space. On the other hand, the common lands were not public lands because they were not open to the public generally.

As England marched to the present, economic forces pressed against medieval land-use patterns. Among the powerful changes were the waves of land enclosure that took place, mostly between the sixteenth and nineteenth centuries.<sup>6</sup> One type of enclosure occurred when a lord decided to get rid of the small farms on his land, consolidating and enclosing his fields and devoting them to sheep. To do this the lord evicted tenants, who often resisted bitterly. The other main type of enclosure took place on what had been common lands, subject to use rights by commoners.<sup>7</sup> These latter

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<sup>3</sup> Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 820–22 (2005).

<sup>4</sup> *Id.* at 824–29.

<sup>5</sup> See EDWARD P. THOMPSON, *CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE* 97–184 (1993) (discussing “Custom, Law and Common Right”).

<sup>6</sup> See *Id.* at 106–14; see also MARK OVERTON, *AGRICULTURAL REVOLUTION IN ENGLAND: THE TRANSFORMATION OF THE AGRARIAN ECONOMY 1500–1850*, 147–67 (1996) (discussing the enclosure process by which England transformed property rights in the late 15th Century through the 19th Century); G. E. MINGAY, *LAND AND SOCIETY IN ENGLAND 1750–1980*, 35–46 (1994) (discussing the process of enclosure).

<sup>7</sup> The term “enclosure” included various other ways in which open landscapes were transformed into discrete fields, surrounded by high fences (or enclosures). In medieval open-field farming systems, individual landowners (who held their lands subject to a lord, of course) often possessed individual rights in various small, scattered tracts of land, intermingled with similar tracts of land owned by their neighbors. Much of the farming was done communally, or at least according to work schedules agreed upon by the village members. One form of enclosure took place when the small farmers exchanged lands with one another, allowing each



enclosures were authorized by Acts of Parliament and ostensibly entailed payments to the evicted commoner (often in the form of land allotments rather than cash), but commoners resisted nonetheless because their economic and social lives were being upset. Enclosures that involved evicting tenants might strike us as legitimate exercises of a landowner's rights. But we need to remember that the feudal system was morally problematic. The tenants being evicted were the great, great, great grandchildren of yeoman Harold, who labored under a system that could be harsh and oppressive. In terms of the country's overall economy, the waves of enclosure might have made good sense; that is, economically the new land uses were often more efficient. But the unfairness and social dislocation nonetheless remained.

### III.

With this behind us, let us turn to the two categories of property that are familiar to us: public land and private land. They seem like different things, but how different are they? The points covered thus far help frame the answer. Both public and private property are forms of power, meaning power that some people exercise over other people. Both are defined by law, and indeed both are creatures of law. Both forms of property, public and private, are morally problematic in that they entail the coercive restriction of individual liberty. Both therefore need justification to remain legitimate.

When we turn to the laws that govern uses of private and public lands we find that, like all other laws, such laws are rightly enacted only when lawmakers are attempting sincerely to foster the good of everyone, landowners and the landless alike. Lawmakers are supposed to legislate for the common good, not for the benefit of any faction. Property laws are no different. Property is legitimate to the extent that it fosters the shared good.

This last point might seem surprising. We are accustomed to think about private property as an individual right of some sort, something that government is supposed to defend. After all, our constitutions contain protections for property, including protections against government invasion. So how can property be a *product* of legislative act?

This is a vital question. It needs and has an answer, though it would take time to review.<sup>8</sup> A key piece of the overall answer is that the creation and protection of individual rights in land often furthers the common good. That is, individual private property can be a useful tool for fostering the good of people collectively. Moreover, private property works well only when owners enjoy reasonable stability in their rights. Lawmakers cannot just change the rules of ownership at will; if they do, the overall benefits of the institution decline. Individual property interests, then, need some

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to end up with a single, contiguous land-holding, which could then be enclosed and used separately. Many times, one owner would buy out another, just as use rights in common lands were bought out by the owner trying to enclose the commons. See OVERTON, *supra* note 6, at 147–48 (discussing the various meanings of the “blanket term ‘enclosure’”).

<sup>8</sup> I offer an answer in ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 101–32 (2003).

protection. Nevertheless, it remains true that property is legitimate only when the governing laws promote the common good. Property becomes illegitimate—even oppressive—when property rights allow owners to frustrate the common good, whether by harming other individuals or infringing public interests. Only secondarily is property an individual right.

The specific subject I've raised here—the moral justification of property—is a complicated one. Indeed, the whole institution of private property is complex. Private property is also fascinating to study in terms of its history, its varied manifestations, and the ways diverse peoples have talked about it. The powers and obligations of land ownership have varied greatly, in time and place. The ideas we embrace, in the United States of 2006, are the product of our time.

Back to the public-private divide. So far, I have highlighted essential ways that public and private lands are the same: rights to control these lands are forms of power; these powers derive from law; these laws are morally problematic; and the laws are justified only when they foster the common good. The two categories are thus similar and the divide between them is narrow. It is simply not the case that private rights exist apart from law, or foster private interests apart from the public good, or exist as a form of private power that is independent of public power.

How then do the public and the private differ, because surely they do? To get at their differences, we can return to our opening scene, with our people entering their new land. As the people gaze upon the landscape, thinking about how they will inhabit the landscape, they confront three questions. First, *how* are they going to use these lands to foster their collective good? Second, *who* is going to *use* which lands? And third, *who gets to make the decisions?* These are the vital questions, both for the first people who enter a place and for each generation that follows. By keeping the questions front and center we can get at the differences between public and private lands.

The biggest difference between private and public land has to do with management power over the land. Who gets to decide land uses? Decisions about *public* lands are mostly made by public decisionmakers, but not completely so. Public decisionmakers are often influenced by private parties who want to use the lands. Indeed, private involvement in public-lands processes is extensive, too extensive some people say. When we turn to *private* lands, the equation is flipped but again is not one-sided. Private owners have greater say in land-use decisions but lawmakers commonly play important roles; again, too important, some people say. In many settings, private lands are also subject to limits imposed by other private citizens—by a homeowners' association, for instance. In both cases, then, public and private influences intermingle. So varied is this intermingling that we do not really have two categories of lands. We have a continuum with some lands more subject to public control and some lands more subject to private control. Yet control of either type is always a matter of degree.

On the question of how the land is used, we also see a continuum or mixture of uses rather than two distinct types. On public land we have nature preserves, intensively used parks, grazing, logging, mining, office

buildings, stores, and so on. On private lands we find pretty much the same, less in the way of nature reserves and more in the form of intensive land uses, particularly residential uses. Without maps or signs, though, it is often hard to tell public from private.

We get even greater overlap when we consider who actually uses the land. Private lands are used by private actors almost exclusively. But activities on public lands also involve private actors; indeed, private parties are the primary users of public lands. Logging, grazing, mining, recreation—all are undertaken on public lands by private parties, usually at some private initiative. So again, in terms of land use, the differences between public and private actors are ones of degree. The public and the private overlap.

Consider, for a moment, the typical residential subdivision lot, a familiar form of private property. The owner's use of the lot is probably subject to severe limits as a result of restrictive covenants, enforceable by neighbors. Permanent easements might allow public utilities or even private entities to enter this residential lot and use it for specified purposes. Zoning laws could limit activities, or even prescribe affirmative duties such as shoveling snow, maintaining fences, or keeping weeds trimmed. When we get down to it, the owner of this lot might really have only a single, narrowly defined use right in the land at all: a specific right to use the land for a single-family home.

Compare this carefully prescribed residential-use right with a similar right to use public land, such as a Bureau of Land Management (BLM) grazing permit or a federal oil and gas lease. Here, too, we have a private property right, and it is carefully tailored by law. So how different is the BLM grazing permit from the homeowner's use right? There are differences, to be sure, yet both are specifically tailored use rights, both are largely defined by law, and both are crafted, one hopes, so that the private activities promote the common good.

#### IV.

The categories that we know as public and private land have not always been around, certainly not in anything like the way we commonly think of them. For decades after the United States arose, it was assumed that pretty much all public domain land would pass into private hands. It was not even particularly clear that the government's rights as landowner were more extensive than any other landowner's.<sup>9</sup> As for private land, there was a long period during which rural areas were mostly an open commons where people could roam, hunt, forage, graze livestock, and collect firewood without the landowner's permission.<sup>10</sup> In fact, the landowner's right to

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<sup>9</sup> See GEORGE C. COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 49–51, 182–84 (5th ed. 2002) (tracing the evolution of congressional power under the Property Clause from early suggestions that federal rights were no more expansive than those of a private owner to the broad congressional power recognized today).

<sup>10</sup> Only small pieces of this important story have been told. Glimpses are offered in RICHARD W. JUDD, *COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND* 28–56 (1997) (noting the widespread and often disorganized public use of unfenced

exclude was largely limited to areas that were fenced or cultivated. In most rural areas the woods were one great commons.<sup>11</sup> It made little difference what land was public and what land was private.

During the nineteenth century, private property rights in the United States changed considerably with respect to the powers that landowners possessed.<sup>12</sup> A landowner's rights to exclude outsiders expanded, particularly on unenclosed rural lands. A landowner's rights to use the land intensively also expanded, even when the new, industrial land uses harmed surrounding lands. By the mid to late nineteenth century, the idea emerged, really for the first time, that landowners could largely do whatever they wanted so long as they didn't cause visible, substantial harm to other people. This was a distinctly *pro-industrial* vision of private property, quite different from the *agrarian* approach to property ownership that prevailed a century earlier and that limited the ways landowners could use their lands. Necessarily, this new pro-industry approach to ownership meant that sensitive land uses were no longer well protected against interference by noisy, industrial neighbors. Over the nineteenth century, a landowner's *right to use* the land intensively expanded, while the landowner's *right to halt interferences* contracted.

By the year 1900, the law empowered private landowners to do many things that were widely deemed unwise or destructive. Not surprisingly, private property came under attack. Criticism came, not only from the new generation of conservationists concerned about overcut forests and degraded waterways,<sup>13</sup> but also from other progressive reformers,

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and unimproved private land in early New England); STUART A. MARKS, *SOUTHERN HUNTING IN BLACK AND WHITE: NATURE, HISTORY, AND RITUAL IN A CAROLINA COMMUNITY* 32 (1991) (describing the antebellum era during which "[o]pen land, which encompassed most of the land in the South, was considered as common property for hunting, fishing, and grazing"); Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 *RADICAL HIST. REV.* 37, 38–43 (1982) (noting that unfenced land was considered open to public grazing and hunting in the antebellum south and for some decades thereafter). Public rights to use the countryside were most firmly established in the South. For instance, *Macon & Western Railroad Co. v. Lester*, 30 Ga. 911 (1860), involved a horse owner who sought to recover damages for the death of his horse by a train. The court summarily dismissed the railroad's claim that it should escape liability because the horse was trespassing on its tracks:

Such law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow to range in the woods nor to graze on the old fields, or the 'wire grass,' without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law.

*Id.* at 914.

<sup>11</sup> See *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 246 (1818) (describing the forest as a commons at the time of the first European settlement of South Carolina).

<sup>12</sup> See FREYFOGLE, *supra* note 8, at 65–84 and sources cited therein.

<sup>13</sup> See JUDD, *supra* note 10, at 102–03 (noting that "a wave of land speculation at the end of the century crystallized these apprehensions into a conservation movement"); see also SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920*, at 122–46 (1959) (describing how concerns over the wasteful use of forests and waterways stimulated conservation efforts at the federal level).

particularly in cities.<sup>14</sup> As many people saw matters, property law gave landowners too much power to act selfishly. Mining companies and meatpackers polluted waterways; rising industries were degrading residential areas; fertile soil washed away while fires spread through cutover forests. Things needed to change. Private property had become a serious problem.<sup>15</sup>

One tool reformers used to address the ills of private ownership was land-use regulation, a form of public control with a long history in America dating back to early colonial settlement.<sup>16</sup> A new, more comprehensive approach to land-use control arose with the coming of modern zoning laws, which divided urban areas into zones and prescribed the uses permissible in each.<sup>17</sup> Regulation, though, was not the only response to private property's ills. Also welling up was a call for the nation to hold on to its public lands and to manage these lands for the long-term public good. If private owners were not going to use their lands sensibly—that is, if they were going to cut down the Northwoods and plow up the Plains to create the Dust Bowl—then the public would have to look to public lands for amenities such as healthy forests, unpolluted rivers, and pleasing recreational spaces. And so the call went out. Hold on to public lands. Halt the era of land disposal. It was a momentous decision—taken not at once but over several decades—for a nation that had not intended to stay in the landowning business.<sup>18</sup>

The point here is an important one, worthy of emphasis: *We have retained expansive public lands in the West in large part because of the perceived failings of private property.*<sup>19</sup> When private landowners can degrade their lands and get away with it, even though private property is supposed to support the common good, then it is understandable that people will want more public land, and that they will want their public lands protected from being used in the same ways that private lands are used. *Public* land was the remedy for *private* irresponsibility.

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<sup>14</sup> See ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 47–75 (1993) (chronicling various urban reformers and their work on industrial health issues); see also AMERICAN ENVIRONMENTALISM: THE FORMATIVE PERIOD, 1860–1915, at 111–82 (Donald Worster ed., 1973) (collecting early essays by four authors discussing the urban environment).

<sup>15</sup> Donald Worster, *Private, Public, Personal: Americans and the Land*, in *THE WEALTH OF NATURE: ENVIRONMENTAL HISTORY AND THE ECOLOGICAL IMAGINATION* 95, 103 (1993) (“The conservation movement emerged out of discontent with an intensely private approach to land ownership and rights. It has been an effort to define and assert broader communitarian values, some idea of a public interest transcending the wants and desires of a strictly individualistic calculus.”).

<sup>16</sup> The early history of land-use regulation is surveyed in John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

<sup>17</sup> See RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 269–284 (1996) (discussing the evolution of modern zoning laws that designate permissible uses for different zones).

<sup>18</sup> The story is recounted in E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900–50* (1951).

<sup>19</sup> The idea is expressed, although not quite in these words, in Worster, *supra* note 15, at 103–04.

This lesson that reformers learned early in the twentieth century was not the only lesson they could have learned. But it was the obvious lesson, given the then-prevailing ideas about the powers that private landowners possessed. The assumption of the day was that private owners could degrade their lands if they chose. They could strip their trees, plow fragile soil, and dig up minerals, all with little regard for the land's long-term health. The darkside of this individual liberty appeared unmistakable in the Dust Bowl decade of the 1930s, when homesteaders plowed land that should have remained in grass.<sup>20</sup> We call the Dust Bowl a natural disaster, but the problem was caused by people, not nature, as thoughtful reformers at the time could readily see. And the solution, reformers said, was to halt further land disposition and to create a federal Grazing Service. Whenever it was possible, the government would also buy back degraded private wheat fields and return them to publicly managed pasture.<sup>21</sup>

In terms of land-use errors, reformers in the 1930s were assessing the situation accurately: semi-arid land should be grazed, not plowed. Where the reformers fell short in their understanding was in assuming that grazing could be assured only on lands that the public owned. They did not understand that land could be turned over to private hands subject to a legal requirement that the land not be plowed. Private property is a more flexible arrangement than the reformers understood; it need not give landowners freedom to misuse what they own. Public land ownership was not the only remedy for misuses of private land.

## V.

The public-private divide as an intellectual framework, as a way of thinking about our current land-use regime, is distinctly unhelpful today. It implies that some lands can be used solely for an owner's benefit while others are used for the good of everyone. Yet that division makes little sense. The public has a legitimate interest in how *all* lands are used. No land use takes place in isolation. As for public lands, many are needed to serve distinctly public purposes, but most are not. Or rather, most publicly owned lands would not be needed to serve public activities if we could be confident that, when the land is placed into private hands, private uses would comport with the common good.

We find ourselves today, I think, burdened with several lousy ideas that we would do well to alter or discard.

The first and most pressing of these lousy ideas is that private property includes the right to use the land any way an owner wants, without regard

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<sup>20</sup> See DONALD WORSTER, *DUST BOWL: THE SOUTHERN PLAINS IN THE 1930s*, at 87–97 (1979) (discussing economic incentives for “sodbusters” to expand across the plains).

<sup>21</sup> See U.S. DEPT. OF AGRIC., ECON. RESEARCH SERV., *AGRICULTURAL ECONOMIC REPORT NO. 85, THE LAND UTILIZATION PROGRAM 1934 TO 1964: ORIGIN, DEVELOPMENT AND PRESENT STATUS 1–40* (1965) (recounting the history of the land utilization program that acquired poor agricultural land and transferred it to other public and private uses); see also WILLIAM D. ROWLEY, M.L. WILSON AND THE CAMPAIGN FOR THE DOMESTIC ALLOTMENT 133–34 (1970) (outlining Wilson's efforts to remove poor land from farm production).

for public implications. This is not an accurate statement of law or history, nor is it remotely good public policy.

A second lousy idea in need of change is that the only way to promote healthy lands is to keep them in public hands. Neither is this true, however understandable the idea was when it first arose about a century ago.

A third lousy idea is that we can sensibly define the property rights a landowner possesses without taking nature into account. The idea here is that property rights in a tract of land—in the hypothetical Blackacre or Greenacre, as law students would label it—can be defined in the abstract without regard for the land's natural features. Land parcels in fact differ greatly, and the differences in their natural features affect how we can safely use them. In defining land-use rights we need to take nature into account. And we are doing so, albeit slowly and in ways that arouse controversy. The private rights of landowners are now much different in wetlands and floodplains, on barrier islands and beaches, on sloping hills subject to erosion, in forests and critical wildlife habitat, and along riparian corridors. It is easy to view our complex legal regime today as simply a collection of isolated federal, state, and local laws and regulations, each aimed at some specific environmental problem or land-use concern. But the laws and regulations collectively do form a pattern. They reveal a distinct trend of looking to nature itself to help us decide not just how to use lands, but also how to define the legal rights that landowners possess.<sup>22</sup>

In my view, we have too much public land today. We also have misguided ideas about what private property entails. And the two problems are linked. We have one problem because we have the other, and we can not deal with one unless we deal with both.

So how might we deal with these problems? What would things look like if we replaced our lousy land-use ideas with more sensible ones, with ideas based not upon a presumed chasm between public and private but instead on a recognized need to combine public and private nearly everywhere, on all lands?

The virtue of private ownership is that it designates particular people as land stewards, charged with looking after the land and putting it to good use. Private ownership can protect privacy, provide incentives for economic enterprise, and add ballast to civil states. Public ownership, on the other side, is better able to consider the long-term and can assess land uses in broader spatial contexts. Government can resist market pressures to misuse land, and it can manage lands to provide an array of public goods that make little economic sense for individual owners. Of course, both forms of ownership can and do fall short of the ideal. Private owners are often not good stewards: their perspectives are too short, they ignore ecological ripple effects, and their isolated decisions can produce chaotic land-use patterns. Government agencies, on their side, are buffeted by political winds and have trouble saying no to powerful groups. Their decisions can be painfully slow and inefficient.

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<sup>22</sup> I consider this and other major trends having to do with ownership rights in nature in Eric T. Freyfogle, *Community and the Market in Modern American Property Law*, in LAND, PROPERTY, AND THE ENVIRONMENT 382, 395–401 (John F. Richards ed., 2002).

The main challenge we face today in attempting to live well on land—attempting to succeed at the “oldest task in human history”—is coming up with better ways of combining public and private on the same piece of land. The public has a legitimate interest in the way all land is used, private land very much included. In the case of private land—as our current land-use squabbles illustrate—we are having trouble finding good ways to protect that public interest without undercutting the vital benefits we all get from a scheme of widespread private ownership. How do we protect the public’s interest while at the same time retaining the important benefits we get from a private property system? That is the question. We need better answers.

This need to protect the public’s interest in private land is particularly vital because it goes to heart of private property’s legitimacy. As I noted, private property in land isn’t morally legitimate when it allows owners to harm the public good. After all, why should we deploy our police and courts to support private action that harms the community? That simply is not right.

No law, of course, can ever be so precise as to prescribe the exact ways that land should be used. Laws are crude tools, and they can do little more than restrict the most harmful practices. To get truly good land use, landowners have to want to conserve. They need to know the nuts and bolts of sound, conservative land use as applied to their own lands. That said, though, there is a lot of room to improve the *institutional* context of private land use so as to increase the influence of public values in private land-use decisionmaking. And the place to begin, in asserting this public interest, is with the basic rights that landowners possess. If plowing a hillside can lead to degradation, harming the public as well as the landowner, then why should the landowner have the legal right to plow? Why should that be a component of a landowner’s bundle of entitlements?

New laws could better protect the public interest. We could call these laws property laws, or we could call them regulations; it makes little difference. We could also protect the public interest using mechanisms that are less obviously public. Examples here include restrictive covenants, rules imposed by homeowners; associations, and restrictions that come through resource-management cooperatives. There is also the public involvement in private decisions that takes the form of economic incentives to use land in publicly good ways, whether funded by taxpayers or private donors.

These familiar ways of combining public and private, though, need to be understood as merely illustrations of what is possible, perhaps as precursors of more effective methods that await our courage and imagination. Consider, for instance, a grazing arrangement, the Tilbuster Commons, that has been put together in eastern Australia.<sup>23</sup> Under it, private landowners lease their private lands to a collectively managed grazing cooperative. Their combined lands are worked in concert—like open-field farms of centuries ago—with their animal herds mingled. By working jointly, the grazers can employ a

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<sup>23</sup> See SIMA WILLIAMSON, DAVID BRUNCKHORST & GERARD KELLY, *REINVENTING THE COMMON: CROSS-BOUNDARY FARMING FOR A SUSTAINABLE FUTURE* 22–30 (2003) (describing the efforts of landowners in the Tilbuster Commons to establish common eco-management strategies which extend beyond their individual boundary fences).



larger spatial perspective in their land management, thereby reducing one of the main defects of traditional private ownership. Here in the United States, we have similar examples of cooperative land management, such as the pooling and unitization schemes that govern oil fields<sup>24</sup> and water-management schemes orchestrated by water conservancy districts.<sup>25</sup> Safe-harbor and candidate-conservation agreements under the Endangered Species Act<sup>26</sup> offer useful precedents,<sup>27</sup> as do federal agencies' experiences managing grazing, timber harvesting, and mining on federal lands. The new Forest Service program involving Stewardship Contracts illustrates a willingness to try new public-private land management forms, and could prove to be a step in the right direction.<sup>28</sup> Across the West, there is talk about connecting private and public grazing lands in ways that view them as integrated management units. Again, though, these are just hints of what is possible when we stop thinking about land as either public or private and instead look for new ways to combine public and private on all lands.

For the vast majority of lands, where we need to head (and are heading, albeit haltingly) is toward blended landscapes, in which private actors possess use rights that are loosely tailored to protect the public interest. These use rights are forms of private property, but they bear little resemblance to the industrial, ownership-as-absolute-dominion ideal of private property that arose in the nineteenth century. Tailored use rights have existed for years on public lands. On public lands, we are likely to see an expansion of these use rights so that private holders can plan over longer time periods and can take broader responsibility for the land, subject to duties to take good care of it. These private use rights on public lands will not typically be exclusive; the land might remain open to public recreational use, for instance, and a holder of timber or grazing rights might need to defer to someone else who holds mining rights. But public recreational rights might be more limited than today; they might be limited to public hiking on defined trails, without ATVs, snowmobiles, or even mountain bikes. In addition, the holder of a private use right might have the power and duty to halt destructive trespasses.

Tailored use rights could look pretty much the same when they exist on private land. For a look into the future of private-lands ownership, we might consider the case of timber harvesting in a state that is aggressive in

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<sup>24</sup> See generally OWEN L. ANDERSON ET AL., *HEMINGWAY OIL AND GAS LAW AND TAXATION* 386–99 (4th ed. 2004) (detailing the formation, legal basis, and effect of pooling agreements in oil and gas production).

<sup>25</sup> See generally Barton H. Thompson, *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 671 (1993) (discussing markets and local institutions, an example of which is a conservancy district, to promote efficiency and environmental goals in water distribution).

<sup>26</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

<sup>27</sup> These developments and others under the Endangered Species Act are surveyed in J.B. Ruhl, *Endangered Species Act Innovations in the Post-Babbittian Era—Are There Any?*, 14 DUKE ENVTL. L. & POL'Y F. 419 (2004).

<sup>28</sup> See Stewardship End Result Contracting Policy, 69 Fed. Reg. 4107 (Jan. 28, 2004) (giving notice of issuance of United States Forest Service interim directive governing stewardship contracting).

regulating forestry to protect nature.<sup>29</sup> In such a state, a forest owner today could be restricted by law from harvesting trees along waterways or near residential areas. A state forestry practices statute could require the owner to preserve the diversity of tree species and ages, while limiting harvesting methods and imposing duties to replant. Perhaps the forest owner has already sold hunting rights to a local hunting club, and perhaps an old railroad right of way or mining road is used as a public hiking trail. Perhaps there is even a conservation easement on the land. When we put all these elements together, our hypothetical private forest already might look a lot like a public forest in terms of the legal rights that the timber company holds and the ways multiple uses are mixed.

As we look ahead we are likely to see new ways in which the public interest in land is identified and protected. We will rely less on distant governments and instead make greater use of novel collective-management arrangements that are closer to the land. We are also likely to have the public interest refined and promoted by multiple levels of government that pay attention to differing spatial scales. Perhaps we will even see more arrangements that involve collaboration, cooperation, and adaptive management undertaken by groups of people whose roles blend the public and private, groups like today's homeowners' associations that are essentially private in operation but recognized by law and subject to legal constraint.

I predict for the future a marked reduction in public lands as we now know them. This will be good news to some. But this can and should only happen if we also experience an equally marked reduction in our passionate embrace of outdated ideas about private land ownership—that is, if we have an even greater reduction in private lands as we now know them. The better we protect the public interest in private lands, the less need we will have for overtly public lands. We do not need a shift of land from one type of ownership to the other. We need instead an end to the categories themselves. We need to craft new, intermediate forms of land management, and shift lands from both sides into the center.

## VI.

Let me close by returning to my principal points. First, public land and private land are really not all that different in the American West when we look at them closely in terms of: 1) who uses them, 2) how they are used, 3) how use rights are defined, 4) who makes decisions, 5) the need for moral justification for the governing laws, and 6) the ultimate duty to limit uses so as to foster the common good. We do not have two categories of land. We instead have a wide ranging continuum of public and private interests on the same lands. And that is the way it should be. Indeed, we need even more and

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<sup>29</sup> A critical look at California's forestry regime is offered in Thomas N. Lippe & Kathy Bailey, *Regulation of Logging on Private Land in California Under Governor Gray Davis*, 31 GOLDEN GATE U. L. REV. 351 (2001).

better-crafted blends of public and private interests, which do a better job taking advantage of the best elements of both private and public ownership.

Second, we need largely to cleanse our minds of these two categories, for the categorization has itself caused distinct problems in our thinking about land and land uses. Problems in our thinking in turn have led to needless conflict and some bad land-use decisions. We have only one category: land. The public has a legitimate interest in how all land is used. By the same token, the principal users of lands are almost always private users, and there are good reasons why private use rights in land might be defined as forms of private property.

If we want, then, a simple image of land, it should be this: The land is owned ultimately by the sovereign people collectively, the *demos*, and managed for the common good. But private parties have use rights in this land. We thus have two items to discuss for nearly all lands: What should private use rights look like, and what mechanisms should we develop to ensure that these use rights and the management of lands generally promote the common good—use rights and collective management regimes. Those are our topics and our challenges for all lands. The possibilities are countless; the room for improvement is vast. We need to get to work.