

## PROPERTY AND LIBERTY

*Eric T. Freyfogle\**

*Private property and liberty, particularly in the case of privately owned land, are intertwined more complexly than we commonly realize. When we study how private property operates in daily life, looking at the full array of land-use conflicts, what we see is that private rights backed by state power are as apt to restrict liberty as they are to promote it. To understand the multiple, contradictory ways that property is linked to liberty is to see why we cannot start with the idea of liberty, or with any conception of natural rights, and produce from it a working, morally justified system of private property. To produce such a system, we need to start instead in a much different place, looking to the various ways that private property can foster the common good. Ultimately, lawmakers crafting and updating a scheme of private property must choose among the many types of liberty that they want to secure, based on their assessment of the common good. Only after they have done that, choosing among the options and paying attention to overall social utility, can we see how private property promotes liberty. These observations have considerable relevance to the ways we think and talk about property, land-use regulations, and takings jurisprudence.*

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*One who administers constitutional law should multiply his skepticisms to avoid reading into vague words like "liberty" his private convictions or prejudices of his class.<sup>1</sup>*

*Oliver Wendell Holmes*

*The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty.<sup>2</sup>*

*Abraham Lincoln*

In the ongoing discussion about private property and whether government does or does not respect it adequately, it is widely assumed (i) that property is an essential component or protection of individual liberty, and (ii) that liberty increases in fullness the more firmly we protect property

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\* Max L. Rowe Professor of Law, University of Illinois.

<sup>1</sup> Letter from Oliver Wendell Holmes to Sir Frederick Pollock (June 23, 1906), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 127 (Mark DeWolfe Howe ed., 2d ed. 1961).

<sup>2</sup> 7 ABRAHAM LINCOLN, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in THE COLLECTED WORKS OF ABRAHAM LINCOLN 302 (Roy P. Basler ed., 1953).

against governmental restrictions or invasions.<sup>3</sup> These are influential assumptions, and they undergird much of our scholarly talk and worries about the plight of private property in an era of extensive land-use regulation. These assumptions, like all foundational assumptions, deserve a close look.<sup>4</sup> Do these assumptions adequately capture the ways private property and liberty are linked? How should the links between property and liberty influence the ways we understand private land and evaluate the legitimacy of land-use rules?<sup>5</sup>

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<sup>3</sup> Prominent writings exalting the roles of property in promoting liberty include JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* (1993); JAMES V. DELONG, *PROPERTY MATTERS* (1997); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS: PRIVATE PROPERTY*]; MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); TIBOR R. MACHAN, *THE RIGHT TO PRIVATE PROPERTY* (2002); LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION (Ellen Frankel Paul & Howard Dickman eds., 1989); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999); AYN RAND, *THE VIRTUE OF SELFISHNESS* (1964); TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA* (2006); BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION* (1997); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 32 (1997); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

<sup>4</sup> The ideas in this paper reiterate and expand upon discussions contained in earlier works of mine. See generally ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007) [hereinafter FREYFOGLE, *ON PRIVATE PROPERTY*]; ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003) [hereinafter FREYFOGLE, *THE LAND WE SHARE*].

<sup>5</sup> For the most part, my critique in this article is of secondary writing that pays attention largely or exclusively to the ways that private property aids the owner, and the critique discounts, if not ignores, the morally problematic elements of the institution (its effects on non-owners, for instance) and pays little or no attention to the land's physical features and its ecological functioning. There are, to be sure, major writings that view property more broadly and complexly. E.g., JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* (1994); BRIAN DONAHUE, *RECLAIMING THE COMMONS: COMMUNITY FARMS AND FORESTS IN A NEW ENGLAND TOWN* (1999); ROBERT JAY GOLDSTEIN, *ECOLOGY AND ENVIRONMENTAL ETHICS: GREEN WOOD IN THE BUNDLE OF STICKS* (2004); WHO OWNS AMERICA?: *SOCIAL CONFLICT OVER PROPERTY RIGHTS* (Harvey M. Jacobs ed., 1998); JOHN HANSON MITCHELL, *TRESPASSING: AN INQUIRY INTO THE PRIVATE OWNERSHIP OF LAND* (1998); Erazim V. Kohak, *Possessing, Owning, Belonging*, in *BEYOND THE WELFARE STATE* 155–71 (Irving Howe ed., 1982); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993); CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994); JOSEPH SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999); MARION SHOARD, *A RIGHT TO ROAM* (1999); JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003) [hereinafter UNDERKUFFLER, *THE IDEA OF PROPERTY*]; Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927 (2000); Lynton K. Caldwell, *Rights of Ownership or Rights of Use? — The Need for a New Conceptual Basis of Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974); Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773 (2002); Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039 (1973); Markku

In the typical tale used to frame discussions about private property rights, an individual landowner is pitted in battle against a government regulatory body. The landowner wants to exercise her individual liberty by using her land in some way; the government body, desirous of promoting some public conservation goal, opposes the proposed land use and deploys a law to restrict it.<sup>6</sup> Liberty, that is, appears to inhabit one side of the conflict, the private side, and government regulation invades or restricts it. By implication, liberty increases in scope the more the law allows the landowner to act as she wants, free of restraint. Logically in this view, liberty achieves its zenith when an owner can use her land however she likes and can halt all interferences with her conduct.<sup>7</sup> Full liberty of this type may not be possible; for practical and policy reasons, government might reasonably restrict what a landowner can do. In the event government does this, however, liberty can continue to enjoy protection, albeit diminished, so long as the landowner gets compensated for her economic loss. Thus, if we would only open our pocketbooks to pay for property value declines brought on by law, then we could both achieve our public land-use goals and preserve liberty.

This, it appears, is the widespread assumption about property and liberty. Is it true?

This Article explores the links between property and liberty, which are in fact more numerous and complex than commonly assumed. It seeks to recapture this complexity and, with it, to gain insights on the institution of private property, how it relates to law, and how regulations affect core cultural values. The inquiry here ranges widely and probes the most basic components of property as an institution. In doing so, it invites the reader to reconsider fundamentals. Readers might be warned that the argument proceeds by many steps; the Article is not easily skimmed.

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Oksanen, *Nature as Property: Environmental Ethics and the Institution of Ownership* (June 26, 1998) (unpublished academic dissertation, University of Turku, Finland) (on file with the Harvard Law School Library); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996); Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J. L. & JURISPRUDENCE 161 (1996); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998).

<sup>6</sup> The cases involving such facts are literally countless. *E.g.*, *Mansoldo v. State*, 898 A.2d 1018 (N.J. 2006) (addressing denial of construction permit to landowner under regulation restricting development in designated floodplain); *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 1006442 (Mich. Ct. App. Apr. 18, 2006) (requiring compensation for denial of right to build on ecologically fragile lakefront dunes); *Coast Range Conifers, LLC v. State ex rel. Or. State Bd. of Forestry*, 117 P.3d 990 (Or. 2005) (discussing a regulation limiting the right to clear-cut trees in bald eagle habitat); *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718 (Pa. 2003) (finding unlawful a zoning rule barring conversion of golf course into intensive development in heavily congested area); *Harris v. Zoning Comm'n of New Milford*, 788 A.2d 1239 (Conn. 2002) (addressing a challenge to a zoning ordinance excluding ecologically sensitive lands from minimum lot size calculations).

<sup>7</sup> A common qualification here is that the rights of one landowner are limited to those consistent with equal rights for other landowners. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1569 (2003). However, this qualification tells us little or nothing about the extent and types of liberty that ownership entails. *See infra* note 146.

Part I identifies the many links between property and liberty. By property I mean, conventionally, the complex legal institution that empowers owners to use parts of nature and to limit uses of those parts by others. As for liberty, I use the term in its full sense, including both positive as well as negative liberty (freedom to act as well as freedom from interference) and liberty both for individuals alone and for groups of people in concert. The many ways property and liberty interact are exposed using a sequence of land-use disputes that arise in an imaginary landscape, a place — much like real-world places — in which land uses are intertwined economically, socially, and ecologically. The basic conclusion is that property can enhance particular forms of liberty, but only at the expense of constraining other forms of liberty. Part II brings law into the picture, explaining how private property cannot exist without law and without a scheme of governmental, or at least social, protection. An owner's property rights are therefore necessarily defined by the decisions of lawmakers. The core component of private property, I argue, is not the right to use land, nor is it exactly the right to exclude. It is instead the right to halt interferences with one's use of land. Lawmakers can define this right (and have done so) in widely varied ways. As they do so, basic policy considerations are at stake.

Part III offers a perspective on prevailing assumptions and on the subject overall by considering briefly a far different land-use arrangement: the land-tenure rules of early Ireland. This unusual land-use scheme supplies a counterpoint, usefully illustrating the varied choices that lawmakers might make and the varied forms of liberty that a private property scheme could promote. Part IV adds further perspective by probing a longstanding distinction that frames much of our thinking about land-use conflicts: the distinction between proprietary and sovereign powers, which in turn gives rise to a presumed distinction between laws that *define* or protect property rights and laws that *regulate* the exercise of these rights. The claim here is that the definition–regulation distinction is blurry at best, and distinctly confusing. Property does not exist in some private realm apart from governmental action; it is, as Part II explains, the result of government action. Proprietary powers, that is, arise out of and are dependent upon the exercise of sovereign powers. And private rights are created and shaped by all manner of lawmaking actions — common law, statutes, and regulations, federal as well as state. The growing confusion on this subject today is illustrated by looking quickly at the shifting ways that first-year property texts have explained the law of private nuisance: once viewed (rightly) as a source of property, nuisance law is now often viewed quite differently, as a type of restraint on, or invasion of, property rights.

The ideas presented here differ noticeably from assumptions that guide much property scholarship today, particularly scholarship that reflects libertarian or natural-rights reasoning. Parts V and VI turn to this scholarship, to probe whether either form of thought can begin with a vision of the autonomous individual and give rise, through logical reasoning, to a sensible scheme of private property rights. Part V critiques libertarian and natural-

rights thinking generally, concluding that it rests not on any understanding of individual rights, but instead on political and economic views about social policy — that is, on embedded policy arguments about the best ways for the law to promote overall social welfare. Part VI pays special attention to the writings of Robert Nozick, concluding that his influential writing on private ownership ultimately can justify the institution only by means of considering overall social utility. Like other libertarian and natural-rights theorists, he is unable to defend private property as an individual right that trumps social concerns; to the contrary, he defends property by reference to the ways that it can, when well conceived, promote overall social welfare.

The final Part draws the argument to a close. Private property is a social creation, arising out of law, and is inevitably justified (given its interferences with liberty) only to the extent that it benefits people collectively, non-owners as well as owners. As lawmakers craft the institution to promote social welfare, they inevitably must choose among the types of liberty that they want to protect and enhance: that is my main conclusion. Lawmakers must make choices as they craft the elements of private ownership, and only once they have done so can we see which forms of liberty are honored and protected. Thus, private property promotes individual liberty only secondarily, as a result of lawmaking, and this protection of liberty is morally legitimate only when, and to the extent that, it generates collective gain.

#### I. LIBERTY AND PRIVATE LAND

*No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts en bloc. Liberty is not defined. Its limits are not mapped and charted. How shall they be known?*<sup>8</sup>

*Benjamin N. Cardozo*

*Property belongs to a family of words that, if we can free them from the denigrations that shallow politics and social fashion have imposed on them, are the words, the ideas, that govern our connections with the world and with one another: property, proper, appropriate, propriety.*<sup>9</sup>

*Wendell Berry*

Imagine a world without legally protected rights in land. People in this world are free to wander as they like and take what they want. Among them is a citizen named Anna, who stakes out a personal claim to a particular land parcel. Assuming that other people go along with Anna's territorial claim

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<sup>8</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 76 (1921).

<sup>9</sup> WENDELL BERRY, *Whose Head is the Farmer Using? Whose Head is Using the Farmer?*, in *MEETING THE EXPECTATIONS OF THE LAND* 19, 30 (Wes Jackson, Wendell Berry & Bruce Colman eds., 1984).

and assuming too that private ownership here means total control over land, how does Anna's land claim affect individual liberty?

From Anna's perspective, plainly, liberty has been enhanced. She can now use her land parcel any way she wants, free of interference. She can plant or build or otherwise put the land to use, confident that she can reap the resulting gains. She can also escape onto her land and get away from other people. Before her property arose, Anna could freely use her chosen land but lacked any legal power to halt disruptions and competing uses by other people. Possessed of property rights, she now has that power. Thus, the essence of property — the key property entitlement — is the right of quiet enjoyment, the legal ability — not just the physical might — to keep others from interfering with one's acts.

From Anna's point of view, private property has expanded liberty, but to get an overall assessment we also need to consider the effects of Anna's conduct on other people. Before Anna acted, other residents could roam the land that she now claims, taking whatever they wanted. In this mythical, pre-social age, as Thomas Paine explained in his radical attack on private rights, *Agrarian Justice*, "the earth, in its natural, uncultivated state was, and ever would have continued to be, *the common property of the human race.*" As co-owners of the land, all people could use all parts of it.<sup>10</sup> After Anna asserts personal control, however, other people can no longer enter Anna's land parcel. Their own liberties, that is, have declined, and inevitably so, given that Anna's new right to halt interferences is nothing more or less than a power to restrict the liberties of other people.<sup>11</sup> Landless people, of course, might themselves one day become landowners. But if and when they do, their own property claims will similarly reduce the liberties of all other people, including Anna when she roams beyond her individual land parcel.

How we add up the gains and losses here is a debatable matter. We would need to study the scene carefully to compute a net assessment, looking at all of the people who are implicated and in what ways. If land is plentiful, Anna's enhanced liberty might exceed the combined losses of liberty of all other people. The others might have little need to use Anna's land if other land is abundant. But the reverse could just as easily be true if land is scarce or Anna's land has special value (if it includes, for instance, access to much-needed water). In any event, the calculus of liberty could well change over time as populations rise, resources decline, and public values evolve.

Assume now that Bart stakes out a territory next to Anna, and that both Anna and Bart begin using their lands. Anna's use is a quiet, settled one; Bart's competing use is noisy and disruptive. Anna complains that Bart is undercutting her ability to enjoy her land quietly, without disturbance.

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<sup>10</sup> THOMAS PAINE, *Agrarian Justice*, in THE THOMAS PAINE READER 471, 476 (Michael Foot & Isaac Kramnick eds., 1987).

<sup>11</sup> A classic look at the plight of the poor and landless in a world controlled by private property is GEORGE ORWELL, *DOWN AND OUT IN PARIS AND LONDON* (1933).

Given this harm to Anna, the question arises: should the prevailing property law allow Bart to proceed? If Anna cannot obtain relief, halting Bart's intensive activities, then her liberty as landowner has gone down. She can no longer use her lands free of interference, which, as noted, is the key property entitlement. On the other side, if we do allow Anna to shut down Bart's noisy operation, then Bart's land-use options have declined. His liberty as landowner is now less than it was before.

In some fashion a property law regime needs to resolve disputes like this, which arise, of course, in countless factual permutations. It needs to decide, before or after a land-use dispute arises, whether to favor Anna or Bart. Whichever way the law comes down, the liberty of one party is enhanced and the liberty of the other declines.<sup>12</sup> To permit intensive land uses is to deny protection for sensitive uses; to protect the sensitive is to withhold protection for the intensive. Thus, at this second stage of the story, just as at the first one, the recognition of private rights alters liberty in contradictory ways, however we define those rights.

Let us now suppose that Carl, another neighbor, wants to use his private land in a way that is possible only if he can drain excess water from it. To do that, he needs to run a drainage line across Bart's property. Bart, though, refuses to give consent. Can Carl acquire his needed easement against Bart's wishes by paying Bart its fair market value? Does Carl have a power of private condemnation?<sup>13</sup>

If the law's answer is yes, then Bart's freedom to act without interference has again been diminished. His liberty has declined. But just as

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<sup>12</sup> In practice, the number of ways of resolving such disputes is rather limited. Four methods are used most often, alone or in combination: (1) a *first-in-time rule* that privileges the earlier of the competing uses; (2) a *reasonable use rule*, which allows all reasonable activities to continue (and which, in the case of two activities that are both reasonable, essentially favors the one that is more intensive over the more sensitive use); (3) a *nature-as-baseline rule*, which allows only those uses consistent with the maintenance of the natural features of "incidents" of land (e.g., the natural flow theory of riparian water rights and the similar rule used in drainage); and (4) an *accommodation rule*, which looks to see which party can more easily reduce the conflict by making changes in its activities. Less often used is the correlative rights variant, which seeks to resolve the dispute by dividing a resource into equal shares. Also available, and perhaps growing in popularity, is the approach that creates (or stimulates the creation of) a user-management group and vests power in this governance mechanism to resolve land- or resource-use disputes. The issue is considered in ERIC T. FREYFOGLE, *NATURAL RESOURCES LAW: PRIVATE RIGHTS AND COLLECTIVE GOVERNANCE* (2007). See *id.* at 23.

<sup>13</sup> For an illustration of state law authorizing private condemnation, see COLO. CONST. art. XVI, § 7:

All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

*Id.* In *Clark v. Nash*, 198 U.S. 361 (1905), the Supreme Court upheld the private condemnation of an irrigation ditch across private land to serve only the plaintiff, against a challenge that it did not involve a "public use" within the meaning of the just compensation clause. Private condemnation in western states, with a proposal for modest reform, is considered in Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651 (2008).

before, this reduction on Bart's side is matched by an increase in Carl's liberty to use his land however he sees fit. If drainage is essential to Carl's desired land use, then a law that gives Bart the power to block Carl's project — a project that would have been possible in a property-less world, albeit without legal protection — becomes for Carl a serious loss of liberty.<sup>14</sup> The power of private condemnation gives Carl the liberty that he has otherwise lost.

Let us now add to the imaginary scene a river running through the lands of Anna, Bart, Carl, and others. Downstream is landowner Dana, who fishes from the river, diverts drinking water, and otherwise puts the river to regular use. Dana's river uses, it turns out, are being degraded by the actions of upstream owners. Upstream drainage is accelerating rainwater runoff. The rapid runoff worsens flooding and degrades streambanks. Polluted runoff from upstream diminishes water quality, harms aquatic life, and narrows the river's human uses.<sup>15</sup>

Dana can protect herself from these harms, she realizes, only with legal help. To get it, she solicits neighbors to push for new laws protecting riparian corridors. Without new laws, her land-use options, and hence her individual liberty, will decline given the harms caused by the upstream drainage and pollution. Implicated here too is Dana's *positive* liberty to engage with fellow citizens in collective self-governance, the liberty so exalted in America's Revolutionary Era.<sup>16</sup> Dana exercises this liberty when she joins with neighbors to protect her riverine home. On the other side, if land-use controls are constitutionally impermissible — if they are void *ab initio* — this collective-governance liberty will markedly decrease.

In due course, let us assume, a law is enacted protecting wetlands from drainage and filling. Landowner Earl, restricted by the law, demands payment because the drainage ban costs him money. The new law, Earl com-

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<sup>14</sup> See, e.g., *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006) (denying county the power to condemn a right of way to install a water line to a private electric generating facility).

<sup>15</sup> See *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975) (enforcing the right of a riparian landowner to be free of unreasonable water pollution).

<sup>16</sup> See Joyce Appleby, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s*, at 16–17 (1984); MICHAEL KAMMEN, *SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE* 33–38 (1986). On the distinction between positive (or political, or civic republican) liberty and negative liberty, see ISAIAH BERLIN, *LIBERTY* 30–54, 166–217 (H. Hardy ed., 2002). In her work, Appleby clarifies the multiple meanings that liberty had late in the eighteenth century:

Probably the least familiar concept of liberty used then was that most common to us — that is, liberty as personal freedom bounded only by such limits as are necessary if others are to enjoy the same extensive personal freedom. Before the Revolution liberty more often referred to a corporate body's right of self-determination. Within countless communities the ambit of freedom might well be circumscribed, yet men would speak of sacrificing their lives for liberty — the liberty of the group to have local control.

APPLEBY, *supra*, at 16.



plains, forces him to use his land in a way that confers benefits on others.<sup>17</sup> Landowner Dana openly disputes Earl's complaint. Far from requiring Earl to confer a communal benefit, Dana counters, the law merely insists that Earl avoid imposing harms on people downstream.<sup>18</sup> Their argument becomes heated. Bumper stickers get printed.

In this last dispute, as in earlier ones, liberty lives on both sides. If Earl cannot drain and divert water, his personal liberty as landowner is diminished. On the other side, if taxpayers must compensate Earl for his lost income, then their own liberty is adversely affected. Taxes are involuntary from the taxpayer's point of view. Like land-use rules, tax levies reduce the liberty of owners to use their belongings — their cash — as they see fit.<sup>19</sup> Moreover, to the extent that collective governance is expensive or impossible due to Earl's property rights, then Dana and her neighbors lose some of their liberties to govern their homes democratically.

One final installment: Dana and others, worried about the overall landscape's degradation, endorse the moral view that people living today ought to act in ways that keep the land healthy for later generations.<sup>20</sup> Dana is particularly concerned about loss of topsoil and declines in biological diversity, the bases of terrestrial productivity. Her moral claim is that we owe duties to future generations to protect the land's fertility and diversity, duties that make sense, she tells people, only when understood as collective obligations rather than individual ones.

Soon, Dana's moral claim gains majority support. As this sense of collective moral duty wells up, the local legislature enacts laws protecting habitat on private lands and banning private actions that erode or degrade topsoil.<sup>21</sup> Predictably, some landowners dissent. They attack the new laws because the laws diminish both their personal land-use options and their freedoms to act upon their own, chosen moral views, in which humans have

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<sup>17</sup> See, e.g., *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970) (invalidating wetlands protection law as an unconstitutional taking on the ground that it forces a landowner to confer a benefit on the surrounding public).

<sup>18</sup> See, e.g., *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (upholding wetlands protection law on the ground that it halts a landowner from harming the public).

<sup>19</sup> In the estimation of libertarian writer Robert Nozick, taxation of earnings is also properly characterized as a form of forced labor. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 169, 172 (1974).

<sup>20</sup> Important works include *EARTHBOUND: NEW INTRODUCTORY ESSAYS IN ENVIRONMENTAL ETHICS* (Tom Regan ed., 1984); EUGENE HARGROVE, *FOUNDATIONS OF ENVIRONMENTAL ETHICS* (1996); BRYAN NORTON, *WHY PRESERVE NATURAL VARIETY?* (1987); *THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY* (Bryan Norton ed., 1986); *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* (Ernest Partridge ed., 1981); HOLMES ROLSTON III, *ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD* (1988); HOLMES ROLSTON III, *PHILOSOPHY GONE WILD: ESSAYS IN ENVIRONMENTAL ETHICS* (1986); CHRISTOPHER STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987); EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* (1989).

<sup>21</sup> See, e.g., *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276 (Iowa 1979) (upholding validity of land-use regulations protecting topsoil); *Barrett v. State*, 116 N.E. 99 (N.Y. 1917) (immunizing state from liability for laws protecting beaver and beaver habitat on private land).

the right to consume nature at will. These landowners deny the moral claims that the majority embraces.

Dana responds forcefully to their dissent: Yes, she contends, you dissenting landowners do face restrictions on your freedom to act as you see fit as individuals. But if we in the majority cannot adopt laws protecting soil and wildlife habitat, then we shall have no way to fulfill our shared moral duties. If valued liberty includes the positive power to choose and pursue a vision of the good life — as surely it must, to some degree — then a constitutional ban on conservation laws undercuts the positive liberties of the law-making majority. It interferes, that is, with our power of self rule. And if we must pay to get you to care for the land in the way we deem appropriate, what then happens to the liberty of taxpayers? As for your particular moral view about human domination, the law cannot allow you to act any way you want without itself staking out a particular moral stance. There is, in truth, no morally neutral place for the law to hide. Either the law endorses land degradation by allowing it, as you propose, or it endorses a more conservative moral attitude by limiting owners to ecologically sound land uses. A choice must be made, and the majority should be the one to make it, not the autonomous landowner.

## II. LIBERTY AND LAW

*America! America!  
God mend thine every flaw,  
Confirm thy soul in self control,  
Thy liberty in law.*

*Katherine Lee Bates, "America the Beautiful"*

*[W]here there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law.<sup>22</sup>*

*John Locke*

These various hypothetical land-use conflicts make clear, or ought to, a point that was once well settled but has now become murky: private property, and hence the liberty it protects, is necessarily a creature of law. It is, in a democracy, a product of the exercise of sovereign power by the people as a whole.<sup>23</sup>

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<sup>22</sup> JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT § 57, at 219 (George Routledge & Sons 1884) (1690).

<sup>23</sup> As the influential utilitarian theorist Jeremy Bentham put it: "Property and law were born together, and die together. Before laws were made there was no property; take away laws and property ceases." Jeremy Bentham, *The Security and Equality of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 38 (C.B. MacPherson ed., 1978). According to Benjamin Franklin, property was a "creature of society" and thus "subject to the calls of that society, whenever its necessities shall require it, even to its last farthing." James M. McElfish Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environ-*

Anna's private ownership rights did not begin when she laid claim to her land parcel. They arose only later, when other people agreed to respect her claim and when she gained the legal tools to protect it.<sup>24</sup> At root, property in land is the legal ability of an owner to draw upon state powers to protect a territorial claim. Without such an ability, and without the political

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*ment*, 24 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,231, 10,234 (1994). In Franklin's view, a person's right to property extended only to the minimum needed for subsistence, "but all property superfluous to such purposes," [Franklin] argued, "is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it, whenever the welfare of the public shall demand such disposition. He that does not like civil society on these terms," asserted Franklin, "let him retire and live among savages." WILLIAM B. SCOTT, *IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY* 21–22 (1977). As C.B. MacPherson notes in his useful survey of property thought, property is inherently political and requires for its existence a body to enforce the laws governing it. C.B. MacPherson, *The Meaning of Property*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 1, 3 (C.B. MacPherson ed., 1978). Franklin's view of property's social origins was endorsed in the nineteenth century by such figures as Francis Bowen, Joseph Story, Daniel Webster, and Henry Clay; Jefferson said the same with respect to property rights in land. See DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 124–25 (Harvard Univ. Press 1998) (1987).

One recent inquiry into property and liberty directly challenges the link between property and law, contending that "Bentham is almost certainly wrong that property arises wholly from law." Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 *WM. & MARY L. REV.* 1849, 1851 (2007). Their claim apparently rests on a belief that the institution of property simply will not operate successfully unless private rights possess a moral grounding independent of law. Why this is so is not made clear. After all, similar claims are not made in the instance of other bodies of law (corporate law, labor law, tax law, and so on). Why cannot property also operate successfully simply by force of law? Merrill and Smith do not explain the origin of property's proposed moral value; they propose neither a "theory of the origins of property" nor "any fully developed theory of the content of such a morality." *Id.* at 1850. They assert that "pragmatism is too uncertain" to provide a foundation for property, yet the considerations that guide their thinking appear to be pragmatic ones — property needs a moral basis because it would not otherwise fulfill the (narrow) objectives that they believe it ought to fulfill. Ultimately, their argument rests on the claim that pragmatism and thus social lawmaking are too unreliable, whereas a solid foundation for property can be based upon "widely accepted" moral intuitions that are "very simple" yet "robust." *Id.* at 1851–52. It seems unlikely, though, that simple moral intuitions can resolve the various clashes of interest discussed below. Moreover, moral intuitions cannot reasonably account for the wide variations in ownership regimes that have existed in the United States and elsewhere unless we assume that they are every bit as tenuous and transient as pragmatic calculations.

<sup>24</sup> Hardly had theorists come up with the idea of property rights arising in a state of nature, with government then constituted to protect private rights, than critics pointed out the major flaws in the reasoning. An early, visible critic in England was Robert Filmer, chief defender of the power of the Stuart kings in the mid-seventeenth century (and the object of attack of John Locke's famous writings on property). Filmer pointed to the lack of any evidence that original people had ever actually consented to the arrangement of private property, and wondered also why people living in his day would be bound by their consent. Under this reasoning, Filmer contended, individuals of his day remained at liberty to resume the community of nature and to assert their equal rights to the property of their neighbors. See RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 152–53 (1951). The idea that government was created to protect pre-existing property rights is often attributed to the late sixteenth-century French philosopher, Jean Bodin. Like Filmer, Bodin's task was to support the Crown's powers over property. He embraced a curious explanation for the existence of private property. Given (as he assumed) that the state existed to protect property (and exercise control over it), property simply had to exist, because otherwise the state would have no reason for existence. See *id.* at 118–20.

community that necessarily comes first and that secures that ability, we have only the lawless, unpropertied world of might-makes-right. To talk about property in a world without collective governance — in a pre-social world of nature — is therefore simply nonsense.

Also clear from these tales is how private property can expand the liberty of some only by limiting it for others.<sup>25</sup> Typically, for the liberty of one person to rise, the liberty of another person must fall. In a lawless world, people can do as they please but no law protects what they do. Francis can plant crops but runs the risk that Gregory will harvest them first. The essential element of private property, then, is not chiefly the liberty to use land; people had that liberty all along. It is instead the power to halt interferences, the power of a landowner to restrict the interfering actions of everyone else. To re-emphasize: we speak here of *legal* power supported by a constituted government, not merely of the *physical* power of might-makes-right.<sup>26</sup> Property is inherently a social institution based on the exercise of political power.

A world in which Anna alone has property rights, of course, makes little sense. We need to add to the story other landowners and widely applicable property norms, to make the story real. When we do that, adding along with them the land-use disputes they inevitably foment, it becomes evident how individual liberty as a guiding light helps hardly at all in crafting property laws. In case after case, on issue after issue, liberty lies on both sides. For instance, do we allow intensive land uses or protect sensitive ones? Do we allow landowners to drain and pollute or instead protect their

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<sup>25</sup> Given this practical truth, it is hard to make sense of claims such as Omer Lee Reed's about liberty and property that, "properly understood, the two terms are virtually synonymous." O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L L. 673, 674 (2003).

In their recent essay on property and morality, Professors Merrill and Smith largely ignore the ways one person's use of private land necessarily affects other people. They thus are able to embrace a moral view of property that presents private rights as unproblematic. See Merrill & Smith, *supra* note 23. In an essay presented at the same conference, Professor Carol Rose hints that the moral landscape of property is more complex, yet her survey of the moral objections to private property similarly shortchanges the various considerations taken up here, including the many ways that the exercise of rights by individual owners can adversely affect others. See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007); see also *id.* at 1903–04 (setting aside moral considerations relating to "externality" and "exclusivity").

<sup>26</sup> Historian Robert Gordon has offered a similar observation in his analysis of the paradox in eighteenth-century Anglo-American thought created by the popularity of the Blackstonian "property-as-absolute-dominion" strand of political theory existing side by side with the real-world legal system, in which the rights of owners were severely fragmented, shared, restricted, and constrained:

It is truly a tribute to the power of ideology to structure perceptions of reality that in public speech "property," except among the propertyless, could come to be presented as unambiguously a condition of personal autonomy and liberty, without having the audience immediately summon to mind its authoritarian connotations as well. Despite the assiduous efforts of Marxist and legal realist critics, "property" is still to this day heard as univocally expressive of autonomy and liberty.

Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 101 (John Brewer & Susan Staves eds., 1995).

rights to protest flooding and fishkills? Do we give owners the right to resist involuntary takings, even when money is paid, or do we allow seizures to take place? Do we allow landowners collectively to make decisions about the shared use of their interconnected lands, or do we force them instead to act alone, thereby rendering infeasible many visions of the good life? To these questions, the idea of liberty alone provides no answers.

To get answers, policy choices must be made. What forms of liberty should we protect, and which ones should we curtail? What land uses do we want to stimulate, and what land uses are less important? Even within a single culture, answers tend to vary over time. Short as it is, America's history illustrates this point.

Policy preferences, generation upon generation, have overtly shaped the evolving American law governing disputes among neighboring landowners, between the Annas and Barts of each historical era. This is what historians tell us, and the evidence is plentiful. Before the coming of industrialism, American law largely resolved conflicts by favoring land uses that were sensitive or that came first in time, at the expense of later, more intensive land uses. *Sic utere tuo* — do no harm — was the cardinal principle of land ownership, and it was apparently taken literally in land-use disputes. Under it, Anna could have complained about Bart's intensive activity; her liberty of quiet enjoyment would have trumped his liberty of intensive use. As best we can tell, this was what ownership meant in the Revolutionary Era: the right of landowners, with a fair degree of absoluteness, to remain undisturbed by their neighbors.<sup>27</sup> Then along came industrialism and its siren call to allow landowners to use their lands more forcefully, creating noises and vibrations, blocking waterways, and otherwise causing disruptions. The right to use land intensively went up while the opposing right to quiet enjoyment declined.<sup>28</sup> Development and industrial activity were the preferences of the day, according to majority sentiment.<sup>29</sup>

In the case of landowners in American history who have wanted to invade and use their neighbors' land, they have normally had to gain permis-

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<sup>27</sup> Sir William Blackstone expressed the point clearly:

As to nuisance to one's *lands* . . . if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also . . . it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course . . . or, in short, to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbor. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others as we would they should do unto ourselves."

3 WILLIAM BLACKSTONE, COMMENTARIES \*217–18.

<sup>28</sup> William Weston Fisher III, *The Law of the Land: An Intellectual History of American Property Doctrine, 1776–1880* (Sept. 1991) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library).

<sup>29</sup> FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 65–77. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

sion from neighbors to do so. But not always.<sup>30</sup> In many land-use settings, for instance, colonies and states authorized their citizens or governments to condemn rights of way across neighboring lands or even to seize lands of peculiar value to facilitate their economic activities.<sup>31</sup> In the nineteenth century, many states allowed condemnation of an easement over a neighbor's land when the easement was needed to complete a corridor of some sort — a railroad line, a drainage ditch, an irrigation channel or a right of access.<sup>32</sup> Less common were state laws that allowed the seizure of either unused mining deposits on private lands or riparian sites specially suited for water-powered mills.<sup>33</sup> As historian Harry Scheiber explains, such laws were expressly designed to promote economic growth and thus community well-being.<sup>34</sup> Bending to the development ethos of the era, courts stretched definitions of “public use” to uphold the constitutionality of the condemnation laws.<sup>35</sup> Colorado was among the states that took things a step further, expressly authorizing, in its state constitution, private condemnation designed to facilitate efficient resource exploitation.<sup>36</sup>

As for the landowner's right to exclude — viewed today as a key to private land ownership — lawmakers 200 years ago saw nothing sacred about it when it clashed with important liberties of non-owners.<sup>37</sup> Vermont was among the many states that protected the “liberty” of public hunters to

<sup>30</sup> I consider the issue more fully in Chapter Two, *The Lost Right to Roam*, of FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 29–60.

<sup>31</sup> See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1260–63, 1265–67 (1996) [hereinafter Hart, *Colonial*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1116–30 (2000) [hereinafter Hart, *Republic*]. Were the issue not so well settled as a matter of constitutional law, it would be worth revisiting the entire “public use” language in the Fifth Amendment. Read literally, the language merely requires just compensation when property is taken for a public use. It neither prohibits takings for private use nor requires public compensation for them. A ridiculous reading? Perhaps not. Madison, the author of the provision, would have been well aware of laws authorizing private takings. He would have known, too, that the practice in the case of such takings was for the taking party to provide the compensation. If the practice was, in fact, well settled and uncontroversial, why mention it in any constitution? The only problematic arrangement was when government took the land for public use, where the payment of compensation was not automatic. In the case of the federal government at least, Madison thought it should be.

<sup>32</sup> HURST, *supra* note 29, at 63–64; THEODORE STEINBERG, *NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND 177–81* (1991); Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HIST. 232, 237–40 (1973).

<sup>33</sup> For examples of laws allowing the seizure of mining deposits or riparian sites, see Hart, *Colonial*, *supra* note 31, at 1265–67; Hart, *Republic*, *supra* note 31, at 1116–17, 1119–21; John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719–1859*, 27 J. LEGAL STUD. 455, 456–61 (1998); John F. Hart, *The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 2–18 (1995).

<sup>34</sup> Scheiber, *supra* note 32, at 235–40, 243–44.

<sup>35</sup> Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329 (Donald Fleming & Bernard Bailyn eds., 1971).

<sup>36</sup> COLO. CONST. art. XVI, § 7. For text of § 7, see *supra* note 13.

<sup>37</sup> See FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 29–60.

enter unenclosed private land, despite a landowner's objection.<sup>38</sup> In the classic decision of *M'Conico v. Singleton* from 1818, a rural South Carolina landowner tried to exclude public hunters from entering his private land.<sup>39</sup> The state court, though, scoffed at the entire notion that a private landowner might hold such legal power. The forest was a commons, the court reminded readers. Members of the public had the right to hunt in it, unless and until the land was physically enclosed or cultivated at considerable landowner expense. The wishes of the landowner were simply irrelevant. "The time has been," the South Carolina tribunal observed, "when, in all probability, . . . a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege."<sup>40</sup>

Hunting was a positive liberty held by all citizens in early America, unlike in aristocratic England, where only the wealthy could hunt. In the South on the eve of the Civil War, this legal arrangement gave to the public open access to over eighty percent of all lands.<sup>41</sup> To be sure, American landowners could certainly control their lands. But their power of control extended only to the point where it collided with this public liberty.<sup>42</sup> In other ways, also, unimproved rural land was less protected than land that an owner

<sup>38</sup> VT. CONST. of 1777, ch. 2, § XXXIX ("[T]he inhabitants of this State, shall have liberty to hunt and fowl, in seasonable times on the lands they hold, and on other lands (not enclosed); . . .").

<sup>39</sup> 9 S.C.L. (2 Mill) 244 (S.C. 1818).

<sup>40</sup> *Id.* A Georgia court at around the same time similarly ridiculed the idea that English game laws, reserving game for the king and particular landowners, could carry over into the Americas:

How then could [English game law] apply to a country which was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer to rove, or the tree to grow; and where was the aristocracy whose privileges were to be secured?

*State v. Campbell*, T.U.P. Charl. 166, 167–68 (Ga. Super. Ct. 1808). According to the leading historian of early American wildlife law, "the abundance of wild animals" in America and the freedom of all to hunt them "were important symbols of liberty" when Americans compared their land with Europe. JAMES A. TOBIN, WHO OWNS THE WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 4 (1981). A glimpse at the situation in the late nineteenth century is offered in RICHARD W. JUDD, COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND 216–17 (1997), where the arrival of sport hunters from urban areas and the imposition of new state game laws came into tension with longstanding local ideas of wildlife as commonly owned, "a concept that justified public trespass on unenclosed private lands."

<sup>41</sup> Various historians have made estimates of the extent of unenclosed land in the South in the years before the Civil War. See Forrest McDonald & Grady McWhiney, *The South from Self-Sufficiency to Peonage: An Interpretation*, 85 AM. HIST. REV. 1095, 1099 (1980) (concluding that fewer than ten percent of all Southern lands were under cultivation and therefore closed to public use in 1850); see also SAM BOWERS HILLIARD, HOG MEAT AND HOECAKE: FOOD SUPPLY IN THE OLD SOUTH, 1840–1860, at 74 (1972) ("Together nonfarm land and unimproved farmland added up to an almost incredible 87 percent of the land area in 1850 and nearly 82 percent even in 1860.").

<sup>42</sup> See, e.g., *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229 (1854) (confirming that unenclosed countryside was open to public use); *Macon & Western R.R. Co. v. Lester*, 30 Ga. 911 (1960) (same); see also FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 29–60.

improved or otherwise put to active use.<sup>43</sup> The guiding light here was not liberty as such. Rather, it was a particular type of liberty — the liberty of citizens generally to use the open countryside.<sup>44</sup>

A useful lesson to extract from these early right-to-exclude decisions, particularly given the current status of regulatory takings law,<sup>45</sup> is that the power to exclude is quite different from the power to halt interferences with one's ongoing activities.<sup>46</sup> In terms of the protection it offers, the right to exclude is both a greater and a lesser power than the right to halt interferences. Early American law protected against interferences with one's lawful activities; indeed, the right to halt interferences — the right to quiet enjoyment — apparently was the ultimate landowner right.<sup>47</sup> For various reasons, however, mostly grounded in policy and natural-rights reasoning, eighteenth- and early nineteenth-century law offered much less protection against harmless physical invasions.<sup>48</sup> When an invasion caused a landowner no lasting harm, the liberty of the wandering citizen could appear more worthy. Social class issues lay just below the surface in such disputes. Wandering hunters and fishers, like those who took firewood, berries, nuts, and wild forbs, often embraced subsistence-level economic lives of the type that characterized the frontier. Particularly in the early nineteenth century, the law many times favored hunters, livestock raisers, and foragers in disputes with owners of unenclosed land.<sup>49</sup> In the clash of competing claims of liberty, lawmakers often favored the claims of landless citizens who wanted to make free use of the unenclosed countryside over the competing claims of landowners who wanted to exclude.

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<sup>43</sup> Public uses apparently included ordinary travel, collecting downed firewood, foraging for berries, nuts, and mushrooms, and, of greatest economic importance, grazing livestock. See FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 29–57.

<sup>44</sup> See *id.*

<sup>45</sup> Under current decisions interpreting the just compensation clause of the Fifth Amendment, any “permanent physical occupation” of private land amounts to a taking of property requiring compensation. The requirement applies to actions of government that open private land to public use. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). A decision three years later, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), repeatedly used the more carefully crafted right to gain compensation for “permanent physical occupation.” That expression then became formulaic, and was routinely expressed as one of the *per se* regulatory takings tests. *E.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Eastern Enters. v. Apfel*, 524 U.S. 498, 530 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 539 (1992). The Court's most recent ruling used the apparently synonymous term “permanent physical invasion,” citing the above rulings. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). The principle is considered in Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 735 (1998).

<sup>46</sup> Perhaps of particular value in assessing the right to exclude and the original meaning of the just compensation clause is the fact that James Madison, sole author of the clause (which was not requested by any of the ratifying states), drafted for the Virginia legislature at approximately the same time a statute confirming that public hunters had the liberty to hunt on unenclosed private land. Hart, *Republic*, *supra* note 31, at 1137.

<sup>47</sup> FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 56–58.

<sup>48</sup> For a consideration of the natural-rights limits drawn upon by John Locke, see generally GOPAL SREENIVASAN, *THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY* (1995).

<sup>49</sup> FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 38–44.



Then there were the early state laws respecting the positive liberties of landowners, in particular their liberty to act in concert with neighbors to achieve landscape-scale goals, despite objections from a minority of neighbors.<sup>50</sup> Various state statutes authorized privately-initiated regional drainage projects despite the dissent of a minority of affected owners.<sup>51</sup> Under a Connecticut statute, later made applicable to the Northwest Territory, owners of five-sixths of the farmland in a region (later reduced to two-thirds) could assemble the entire region into a single land-management unit, subject to communal control.<sup>52</sup> By the time of the Texas oil boom of 1900, it was easy for lawmakers to find precedents for the new pooling and unitization laws, which allowed landowners in producing oil fields to make management decisions about their fields as a whole, without the approval of all of the overlying landowners.<sup>53</sup> Here, too, policy rationales (chiefly industrial productivity) helped lawmakers decide which liberties to protect and which to sacrifice. Often, positive, collective liberties were favored over negative, individual liberties.

### III. INTERLUDE: THE CASE OF EARLY IRELAND

*All property relations in the past have continually been subject to historical change consequent upon the change in historical conditions.*<sup>54</sup>

*Karl Marx*

*Given the choice between freedom and more land, any [medieval English] villager would have chosen land. Land, in fact, was the real freedom.*<sup>55</sup>

*Joseph and Francis Gies*

One way to gain clarity on these observations about the widely varied ways that property can promote particular forms of liberty over competing ones is to study how liberty and property once came together in a culture distant in time, place, and economy from our own. A useful, well-explored example is that of pre-modern Ireland, before the coming of the Normans

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<sup>50</sup> My argument here does not depend upon the existence of any clear line between positive and negative liberty, nor does it preclude the existence of either a third category that might join the two or an overarching vision of liberty that encompasses them fully. A useful inquiry into the forms of liberty containing many valuable citations is John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115 (2002). Also useful as an introduction to the philosophy literature on legal liberty is Heidi M. Hurd, *Liberty in Law*, 21 L. & PHIL. 385 (2002).

<sup>51</sup> Hart, *Colonial*, *supra* note 31, at 1268–72; Hart, *Republic*, *supra* note 31, at 1117–19.

<sup>52</sup> Hart, *Republic*, *supra* note 31, at 1122–23, 1145–47.

<sup>53</sup> 4 BRUCE M. KRAMER & PATRICK H. MARTIN, *THE LAW OF POOLING AND UNITIZATION* § 30 (3d ed. 1983).

<sup>54</sup> KARL MARX, *CAPITAL, THE COMMUNIST MANIFESTO AND OTHER WRITINGS* 335 (Modern Library 1932) (1848).

<sup>55</sup> JOSEPH & FRANCES GIES, *LIFE IN A MEDIEVAL CASTLE* 156 (1974).

and feudalism. Many Irish law texts give evidence of the physical and legal landscape in the centuries before 1200. To study them is to see, not just a working property system far different from our own, but a system in which lawmakers understood and acted upon the full range of individual liberties. In the clashes of competing liberty interests, they made choices quite different from those made by lawmakers today.

Largely because of translation problems, nineteenth-century political theorists erroneously concluded that land in early Ireland was owned in common by all members of a tribal group (which averaged in size, according to one rough estimate, about 3000 people).<sup>56</sup> Subsequent study, linguistic as much as legal, has yielded a different, more nuanced depiction of how private rights were defined and allocated. According to a leading survey, "early Irish society clearly attached great importance to the principle of the private ownership of property, and even extended it to mines and fishing rights."<sup>57</sup> Common ownership, in short, was not the norm. Yet, to say that a particular culture embraces private ownership is to offer only the broadest hint of how landed property rights are held, given the wide variety of arrangements that societies have created over time.<sup>58</sup> We need to look carefully to see how private rights were defined and allocated. In the case of early Ireland, the nine basic land-tenure principles were these:

1. *Tribal Jurisdiction.* The approximately 150 tribal groups that existed in Ireland exercised strict control over their particular geographic territories.<sup>59</sup> Thus, the island as a whole was distinctly fragmented into jurisdictions. Daily life of individual tribal members was circumscribed by the boundaries of their tribe's area. Indeed, except for specific, limited purposes, even free men could not travel outside their home territory unless they belonged to one of the learned classes.<sup>60</sup>

2. *Ownership by Kinship Groups.* While individual tribal groups did hold considerable land in common, available for use by most tribal members, the valuable farmlands were mostly owned privately. Good farmland was held by kinship groups — that is, descendants through the male line of a great-grandfather<sup>61</sup> — and divided up for separate use among members of the kinship group.<sup>62</sup> Individual farmers retained the product of their shares of kinship land, except for the obligatory portions owed to lord, king, and

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<sup>56</sup> FERGUS KELLY, *A GUIDE TO EARLY IRISH LAW* 4, 105 (1988). The translation problem had to do with the Irish word for "kinship group," which was erroneously translated to mean "tribe," so that the shared rights that kinship members had in their kinship lands was interpreted as rights that all tribal members had in tribal lands.

<sup>57</sup> *Id.* at 105.

<sup>58</sup> A useful compilation of historical and anthropological materials (though distinctly influenced by the author's obvious political stance) is PIPES, *supra* note 3.

<sup>59</sup> Many tribes did pay tribute to larger, more powerful ones so that governance of the land was not quite as fragmented as the number of tribes might suggest. See KELLY, *supra* note 56, at 4–5.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.* at 100–01.

church.<sup>63</sup> Other kinship members, however, also had influence over the ways these individually owned lands were used. For instance, sales of land by one owner were possible only with the approval of other kinship group members.<sup>64</sup> Also, if one farmer neglected to keep a fence in repair or otherwise misused land, a kinsman could be forced by neighbors to remedy the deficiency.<sup>65</sup> Under applicable rules of inheritance, a more populous line of the extended kinship group could apparently force the sharing or redistribution of kinship land held by a less populous line within the group.<sup>66</sup>

3. *Kinship Rights to Purchased Land.* Through his labor and savings, an individual farmer was permitted to buy additional land that would not be kinship land. Nonetheless, even with respect to this land, his kin were entitled to a share of the land when it was ultimately sold or bequeathed.<sup>67</sup>

4. *Rental and Inheritance from Lords.* Larger landholders (lords of varying levels) commonly made their personal lands available for use by “clients,” who in exchange owed the landowner various rental payments and had to perform services. Clients, though, had unusual rights so long as they fulfilled their obligations. For instance, a “base client,” the most common form of clientage, had the right to claim ownership of his rented land upon the lord’s death if he had paid rent on the land for at least seven years.<sup>68</sup>

5. *Rights of Women Owners.* In the case of land inherited by a woman, the woman’s kinship group retained certain legal rights and could claim a portion of the land upon the woman’s death.<sup>69</sup>

6. *Rights to Common Lands and Lands of Others.* All “law-abiding” members of a tribe had rights to use tribal common lands. In addition and perhaps most surprising, they had legal rights to enter upon and make use of the lands held by kinship groups other than their own. These broader, shared rights included “such minor concessions as a quick dip of a fishing net in a stream, collecting enough wood to cook a meal, cutting rods for a bier, collecting hazel-nuts, etc.”<sup>70</sup> Shared rights also included the right to hunt and trap on private land without the owner’s consent, although the right to construct traps without permission was apparently quite limited (particularly to dig pits or erect spikes to trap wandering deer). According to a “legendary judgement — reputedly the first judgement delivered in Ireland” — a landowner was entitled to the belly of any deer that outside hunters brought

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<sup>63</sup> *Id.* at 3 (payments to church), 4 (to king), 29–30, 32 (to lord), 100 (ability of farmer to use excess farm income to acquire more land).

<sup>64</sup> *Id.* at 100.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 104.

<sup>67</sup> *See id.* at 100–01.

<sup>68</sup> *Id.* at 29. In the case of a “free client” — an arrangement about which less is known — the client had greater freedom to terminate the relationship without cost at any time, but the client had no right to claim the land upon the lord’s death, no matter how long rent was paid. *Id.* at 33.

<sup>69</sup> *See id.* at 14.

<sup>70</sup> *Id.* at 106.

down by dogs on his personal land, while the rest of the deer was divided among the hunters and the dog owners.<sup>71</sup>

7. *Rights to Shores.* In the case of land adjacent to the sea, property rights were fragmented as follows: (i) tribal members collectively shared edible seaweed and whales that washed ashore; (ii) other edible produce from the sea went to the landowner; while (iii) treasure or other goods that came from "beyond nine waves from the shore" belonged to the first one to find them.<sup>72</sup>

8. *Interrelated Land Rights.* In various ways, the property rights of an individual owner were distinctly interconnected with the legal rights of his neighbors. When necessary, for instance, an individual landowner could cut a mill-race across the land of his neighbor so long as he paid proper compensation. An owner could also enter his neighbor's land to use a bridge, to erect a fishing weir, and when necessary to drive cattle, all without the neighbor's consent. Fruit that fell on the land of a neighbor was divided between the two landowners according to a specific formula.<sup>73</sup>

9. *Crossing Lands.* Finally, tribal members apparently could freely travel over the land of other tribal members. Movement was generally not limited within the tribal confines (as it was, as noted in Principle 1 above, between tribal boundaries). The only known restrictions on physical movement were designed to protect personal privacy. Thus, fines were levied against a person who looked into the house of another without being invited, crossed a man's courtyard, or opened his door without permission.<sup>74</sup> As for duties and responsibilities of landowners, a householder was obligated by law to provide hospitality to any freeman, subject only to modest limits. Indeed, a monastery that was rude enough to turn guests away could lose its legal status and have its buildings damaged or destroyed without compensation.<sup>75</sup>

These nine principles outline the complex, culturally rooted land-tenure system that applied in Ireland on the eve of Norman takeover. To study it, or any one of the many property regimes like it, is to see a mixture of individual and shared rights, defined, we can assume, in ways at least roughly suited to the people, their physical landscapes, and the values and preferences of their lawmakers. To dissect the system is to see the various choices that the lawmakers necessarily made, as again and again they honored one form of liberty at the expense of a competing one. Thus, Irish law defined private land rights in ways that severely curtailed, but did not eliminate, the rights of tribal members to wander and make use of all tribal lands. Individual owners could control their lands but they faced limits on sale and misuse. One landowner could turn to his neighbor's land and make use of it in ways

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<sup>71</sup> *Id.* at 107.

<sup>72</sup> *Id.* at 107-08.

<sup>73</sup> *See id.* at 108-09.

<sup>74</sup> *Id.* at 110.

<sup>75</sup> *See id.* at 36, 139-40.

that promoted the more full and efficient use of all lands. Necessarily, these protected positive liberties limited the negative exclusion rights of all landowners.

#### IV. REGULATION, NUISANCE, AND LANDOWNER RIGHTS

*When the mainstream [eighteenth-century] Whigs spoke of defending the liberties of the people, they invariably meant protecting the privileges of men of substance.*<sup>76</sup>

Michael Kammen

*[C]ivil government . . . is in reality instituted for the defence of the rich against the poor, or of those with some property against those who have none at all.*<sup>77</sup>

Adam Smith

Memory of direct, landscape-scale governance by private owners<sup>78</sup> has now largely faded in American culture, except in a few, narrowly defined legal settings (involving, for instance, homeowners associations and unitization in oil and gas fields). We have forgotten how landowners generations ago often possessed legal powers to restrain their neighbors' actions (that is, to restrain one another), and in particular natural settings (and usually with the payment of private compensation) even to put neighboring lands to affirmative use, all by way of making better use of their own lands.<sup>79</sup>

One reason for this memory loss, one suspects, is that scholars now writing about property rights usually approach the issue from the direction of constitutional law, economics, or some other particular field, and fail to give due attention to private property's complexity and its rich, varied history. In truth, we know less about property law than we think we do, Supreme Court Justices included.<sup>80</sup> A bigger reason, though, may be that the positive liberty of collective self-control is a function now performed mostly by civil governments, not by landowners acting directly. The control of land uses at the landscape scale is viewed as an exercise of the *public* police power, not an exercise of *private* liberty by neighboring landowners acting together, out to control the landscapes that they inhabit. Private control does live on; in many homeowners associations and irrigation districts it thrives. Yet landowners generally have few recognized ways to get together collectively, as private owners rather than merely citizen voters, to impose order on their shared natural homes.

<sup>76</sup> KAMMEN, *supra* note 16, at 25.

<sup>77</sup> ADAM SMITH, *THE WEALTH OF NATIONS* 771 (Modern Library 1994) (1776).

<sup>78</sup> See *supra* text accompanying notes 50–53.

<sup>79</sup> See, e.g., *Bridle Bit Ranch v. Basin Elec. Power Coop.*, 118 P.3d 996 (Wyo. 2005) (private condemnation of easements).

<sup>80</sup> See Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,313, 10,319–21 (2001) (noting apparent deficiencies in the Supreme Court's understanding of the complexities of state property law).

In the political arena, land-use regulations are supported by no constituency more strongly than landowners themselves. This fact alone should put us on notice about the ways regulations work. Regulations operate to protect and implement the longstanding right of landowners to the quiet enjoyment of what they own. Most landowners, to be sure, do not think of regulations this way, as extensions of their individual landowner rights. But the rules nonetheless serve this protective function. They provide the necessary means, in the congested landscapes of today, for owners to protect their liberties against new, undesired land uses. And they operate just like other legally-protected landowner powers: one landowner's exercise of liberty gains protection at the expense of the liberties of others.

Today, land-use *regulations* are typically viewed by scholars and ordinary citizens alike as somehow different in kind from property *laws*. The former control the use of, or cut into, private landowner rights. The latter define those rights while protecting basic liberties.<sup>81</sup> But this distinction among laws does not withstand testing. Regulations, as we know, are simply particular forms of law, serving the same basic functions as other laws. They build upon the old *sic utere tuo*, do-no-harm principle of land ownership, which courts over time have transformed into a wide-ranging "police" power to enact laws in the public interest.<sup>82</sup> A regulation, just as much as any other property law (trespass, for instance), implements the collective decisions of lawmakers about which landowner liberties to protect and which liberties to sacrifice. The true differences between regulations and other laws, often rather minor, usually have to do with the practical matters of spatial scale, level of detail, and temporal duration.<sup>83</sup>

The confusion on this point, about the ties between regulation and landowner liberties, has deep roots in legal history, running back, really, to the medieval time when the English Crown's proprietary and sovereign powers were fused. In the centuries after the Norman Conquest, the king basically owned all land indirectly and held all government powers.<sup>84</sup> Our present distinction between property and government powers, familiar to the ancient Romans, was largely absent. A rough line, though, was needed between

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<sup>81</sup> This is a foundational element of much writing on property, particularly writing influenced by libertarian and free-market assumptions. The assumption is particularly vivid and curious in the advocacy of "free market environmentalists," who call on lawmakers to revise property laws significantly so as to create and clarify private rights, particularly in nature, while at the same time viewing lawmakers as manifestly untrustworthy to engage in the similar task of land-use regulation. See, e.g., TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (rev. ed. 2000).

<sup>82</sup> See, e.g., LEONARD LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

<sup>83</sup> FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 174–77. This point is ably developed in Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533 (2007), in the course of explaining why the two supposed solutions to the tragedy of the commons — privatization and public regulation — are in fact one solution, both based on governmental action to rearrange use rights in the commons.

<sup>84</sup> DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW* 98–100, 203–11 (2002).

these two types of power if individual liberty and democracy were to have room to root and grow in the Anglo-American world. That is, we had to create two loose categories, the public and the private, if individualism and private rights as we know them were going to thrive without undue interference. Yet, like all dichotomies, the public-private divide causes trouble when we carry it too far, as we have done in the arena of private property and land use.

In most cases, property rights exist and are defined initially by public laws, statutes and common law. These structural laws differ only in degree from land-use regulations. That is, the legal work of *defining* and *redefining* property rights over time — an essential task, if private property is to exist at all — is not materially different from the legal work of *regulating* land uses. It is thus inapt to draw a sharp public-private line here that private rights, created by property law, reside in a private realm of proprietary power, while land-use regulations are exercises of sovereign power that reside and are enforced in a separate public realm. Both bodies of law tell people how they can use land. Both prescribe when and how owners can complain about interferences. And both protect and implement the positive liberties that ownership includes. To own *private* land is to exercise *public* power. In short, proprietary and sovereign power are necessarily intertwined.<sup>85</sup>

In terms of our scholarship and other forms of clear thinking about private property, this confusion and lost history carry high costs. Indeed, so unsteady has property law scholarship become of late that many legal scholars would likely have trouble explaining to students what it means to own land, or even to know where in the law to look for an answer. What bodies of law tell us about the content of private ownership? Is all law in combination relevant, from all levels of government? Do we look instead to some subset of these laws? And is it to the law of today that we ascribe private rights or law from some time in the past?

Too often we assume — not just legal scholars but many others — that land ownership is determined by the common law alone, as if statutes and regulations adopted over time have not really altered it. But what manner of jurisprudence is this? The common law, we know perfectly well, is subject to repeal. State statutes can and do alter it. Federal laws, in turn, can override it. It makes little sense, then, to look to the common law alone, or to common law as trivially altered by some small subset of statutes, to learn about land ownership. And yet sometimes we do so, usually without comment.

We can find evidence of today's confusion about the legal basis of land ownership by looking at the ways contemporary property casebooks present the common law of nuisance. According to a rising number of authors, nuisance is best categorized as a government-imposed land-use restraint. It is, students are told, an example of a public-law provision (albeit based on com-

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<sup>85</sup> FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 174; Morris Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 13 (1927).

mon law), which interferes with the liberties that an owner otherwise possesses in the private sphere.<sup>86</sup> Yet how can this be?

To treat nuisance this way is to assume that, absent such a public-law limitation, ownership would entail the right to act as one saw fit, regardless of consequences. It is to assume that private property is all about intensive use, and not at all about the legal right to complain about interferences. Anglo-American history, though, tells us otherwise. Indeed, it tells us almost exactly the opposite — that in disputes between landowners over conflicting uses, the intensive land use generations ago routinely lost.

Far from being a land-use constraint arising out of the public sphere, nuisance law (that is, the *sic utere tuo* principle) is the very essence of what it means to own. It is the rule that gives a landowner the key entitlement to private property: the right to complain about interferences with one's use and enjoyment.<sup>87</sup> It is chiefly a source of property rights, not a limit on them.

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<sup>86</sup> E.g., J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 75, 102 (3d ed. 2007) (presenting nuisance as a state-imposed restriction on land-use); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 758 (5th ed. 2007) (presenting nuisance as an "intrusion by the State into individual land-use decisions," though it is in part, though not entirely, a "private" land-use control rather than strictly a public one); R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 844 (2d ed. 2006) (nuisance as a form of judicial land-use control); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 739 (2009) (presenting nuisance as a tool of private land-use control). CHARLES DONAHUE ET AL., PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 855 (3d ed. 1993), presents nuisance as the best known instance of the more general, *sic utere tuo* do-no-harm rule, which is itself a limit on fee simple absolute ownership. JON W. BRUCE & JAMES W. ELY, JR., MODERN PROPERTY LAW 625–27 (6th ed. 2007), presents nuisance as the law that prescribes and limits the landowner's freedom of use. EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 545 (5th ed. 2006), mixes the older and newer approaches by presenting nuisance as a body of law that restricts land ownership but does so to protect the neighbor's rights. RICHARD H. CHUSED, CASES, MATERIALS, AND PROBLEMS IN PROPERTY 869 (2d ed. 1999), uses nuisance law to illustrate law-and-economics reasoning. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 937–38 (2007), suggests that nuisance provides further protection for a landowner's right to exclude while also contributing to a governance regime that resolves land-use disputes. JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 498, 613 (8th ed. 2002), suggests (in discussing *Rose v. Chaikin*, 187 N.J. Super. 210 (N.J. Super. Ct. Ch. Div. 1982)) that a landowner who halted a neighbor's interfering land-use activity in essence acquired a servitude-like interest in the neighbor's land. In the most recent edition the authors shifted their approach, presenting nuisance as the law, and created a qualified right "to be free from unreasonable interference resulting from the use of adjacent or near-by land." JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 673 (9th ed. 2008).

<sup>87</sup> Several casebooks and the leading property hornbook present nuisance in this more traditional, accurate way. See GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 125 (2d ed. 2002) (arguing that nuisance law prescribes a "dimension" of land ownership, illustrating and protecting an owner's right to make "reasonable use" of what he owns); EDWARD E. CHASE, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 916 (2002) (identifying nuisance as the body of law that establishes the landowner's "natural right" to enjoy land free of unreasonable interference, and categorizing it as a companion of the right to exclude); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 287, 296 (1998) (arguing that nuisance along with trespass establishes the landowner's right to exclude); ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 414 (2d ed. 1993) (explaining that nuisance law prescribes a right incident to possession of property — the right to be free of nuisances by neighbors).



When landowner Anna first laid claim to her tract, *sic utere tuo* was not chiefly a restriction on what she could do. To the contrary, along with the law of trespass it formed the basis of her right; it created her sphere of liberty.<sup>88</sup> Without nuisance law, she would have no protection against indirect interferences with her activities, which is to say that her property rights would have been vastly less. Today, we continue to view the law of trespass in this way. Trespass is a key to landowner power, rather than a limitation on what landowners can do.<sup>89</sup> Why, then, do we have trouble seeing nuisance in the same way, as a source of landowner power, as a source of Anna's liberty? Why do we treat it instead as a limit on the liberty of Bart, Carl, and the other landowners?

To answer this last question we need to identify and open up for discussion the particular policy implications of this shift in the way casebooks portray private nuisance. When nuisance is viewed as a land-use restriction, nuisance law appears to reduce property rights, and the more activities nuisance law bans, the more anti-property it is. Thus, to relax nuisance law, making a nuisance harder to prove in court, would seem to *increase* private rights — a desirable outcome in a culture that loves property.<sup>90</sup> On the other hand, when nuisance is understood as the very essence of private property, as the chief tool that creates a landowner's sphere of liberty, then to relax nuisance law would seem to do just the opposite: *reduce* private rights. For developers, factory owners, builders, industrial farmers — and, one might guess, the law professors who side with them — the choice between these options is clear.

## V. LIBERTARIANISM AND NATURAL LAW

*That property is political is evident. The idea of an enforceable claim implies that there be some body to enforce it.*<sup>91</sup>

C. B. MacPherson

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<sup>88</sup> See FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 204–06 (discussing the role of nuisance law in the creation of “land-owner freedom”). Professor J.B. Ruhl is perhaps the leading scholar explaining how a reformulated body of nuisance law could greatly aid efforts to protect the ecological functioning and biological composition of landscapes, thereby sustaining the various ecosystem services that they provide. See, e.g., J.B. Ruhl, *Making Nuisance Ecological*, 58 *CASE W. RES. L. REV.* 753 (2008).

<sup>89</sup> But see DAVID CRUMP ET AL., *PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES* 553 (2d ed. 2008) (claiming that trespass law “could arguably be considered a form of land use control,” given that it prohibits a landowner from dumping waste on a neighbor's land).

<sup>90</sup> Thus, Richard Epstein favors formulating nuisance law so as to limit it largely to settings in which one landowner has physically invaded another; this would nearly collapse nuisance into trespass law and largely eliminate its role in protecting quiet enjoyment. EPSTEIN, *TAKINGS: PRIVATE PROPERTY*, *supra* note 3, at 120–25, 230–38; see also Epstein, *The “Necessary” History of Property and Liberty*, 6 *CHAP. L. REV.* 1 (2003) [hereinafter Epstein, *Necessary*].

<sup>91</sup> MacPherson, *supra* note 23, at 4.

*Will we suddenly, to our chagrin, see the core concepts of our culture as "alibis" that institutional power has always used to gain control over the politics, economy, and finally the ecology of the world?*<sup>92</sup>

Christopher Manes

This brings us to the present, and to the mounting embrace today by free-market advocates of either (or both) a libertarian position on private property or a natural-rights view of property's origins. Neither position is new, but they apparently enjoy more support today than they have in over a century. What can it mean to have a libertarian or pro-liberty view of property, given the contradictory ways that property and liberty are intertwined? Whose liberty are we talking about, and whose liberty are we going to ignore? Similarly, in the case of property-as-natural-right: which landowner powers are natural, and which ones should we deem unnatural?

*Libertarianism.* As for the libertarian position, these questions are easy to answer because libertarians are so lucid in expressing their views. We can frame the libertarian perspective around four basic points:

1. *Negative Liberty.* For libertarians, liberty is defined *negatively*, as the right of individuals to be free of outside interference. Liberty's various *positive* components are lopped off.<sup>93</sup> Included in the pruning are not just rights of landowners to condemn private easements on neighboring land, but any right to engage with a majority of neighbors in collective land management for the common good.<sup>94</sup>

2. *Freedom from Government.* Liberty is also defined narrowly (*contra* Locke) in terms of freedom from *government* action, rather than freedom from *private* interference. Thus, when Bart's intensive land use disrupts Anna, no liberty is infringed because Bart is a private actor, not a public one. If the law instead favored Anna and halted Bart, however, then liberty would be disrupted, since government would be doing the disrupting. As with the first point, we have here a massive contraction of what landowner liberty has meant and could mean. Plainly overlooked, in drawing this policy-based

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<sup>92</sup> CHRISTOPHER MANES, GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION 41 (1990).

<sup>93</sup> The critics of purely negative liberty have been many. *E.g.*, BERLIN, *supra* note 16, at 37 ("It is doubtless well to remember that belief in negative freedom is compatible with, and (so far as ideas influence conduct) has played its part in generating, great and lasting social evils.").

<sup>94</sup> Thus, Richard Epstein breezily asserts as a matter of obvious wisdom that "[n]o one would agree . . . to a system wherein an individual could pay the legislature a fixed sum of money to condemn property that it would then turn over to him." *See* Epstein, *Necessary*, *supra* note 90, at 10. Perhaps Epstein's own history is faulty; perhaps instead he merely presumes (rightly, in all likelihood) that few readers will know the contrary truth. In any event, he overlooks the fact that property systems (including our own) have routinely and happily included provisions authorizing what is essentially private condemnation. *See* Scheiber, *supra* note 32, at 237-40; Scheiber, *supra* note 35 (recording willingness of courts in nineteenth-century America to bend "public use" to allow condemnation to promote private enterprise); sources cited and discussion *supra* note 13 (citing Colorado provision authorizing private condemnation and Supreme Court ruling upholding it).

line between government and private interferences with liberty, is the fact that Bart's power to act as landowner is itself based on a state-created law.<sup>95</sup> Bart's particular land-based activity might be privately selected, but the power he wields as owner is based on law and state control. Thus, a law that protects Bart's intensive land use is every bit as much a government act as would be a law that protected Anna's sensitive activities by restricting Bart. As Benjamin Franklin, Jeremy Bentham, and numerous other writers on property have pointed out, law and property go hand in hand; take away the law and government power and property rights disappear.<sup>96</sup> Public action and private right are inextricably joined.

3. *Focus on Liberties of Landowners.* Next, there is the libertarian tendency to think of liberty as residing solely with the *landowner* when a dispute arises with *non-owners*. Thus, a public liberty to hunt of the type proclaimed in *M'Conico* and other early law cases makes no sense for libertarians when it conflicts with a landowner's liberty to exclude.<sup>97</sup> Liberty means the liberty of landowners, not the liberty of the wandering landless. At one time, the liberty to gain sustenance from rural land was exceedingly important in America.<sup>98</sup> To the professed liberty lovers of today, this liberty is forgotten.

4. *Rejection of Responsibility to Future Generations.* Finally, there is the firm rejection by libertarians of the notion that government, in writing property-related laws, can legitimately incorporate a majority-supported moral vision along the lines of a duty to protect land for future generations. For libertarians, such a moral claim is suitable only for voluntary adoption by individuals. To take this stance, of course, is to leave individuals as such unable to fulfill those felt moral duties that require collective action by nearly everyone to carry out. For the law to pay no attention to future generations is hardly a morally neutral stance. To the contrary, it reflects a social determination that the future does not count, morally or prudentially.

Merely to identify these four points is to see that libertarian property is based on distinct value choices. This is inevitable, given that liberty alone, as we have seen, leads pretty much nowhere when trying to craft a property

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<sup>95</sup> It is only by overlooking this fact, as well as the liberties of non-owners and taxpayers, that Richard Epstein could make a statement such as the following:

Once a court believes in the basic proposition that the purpose of government is to protect ordered liberty in all aspects of life, then there is only one way in which it can undertake constitutional interpretation. It must first begin with a broad presumption in favor of the protection of liberty and property, and then require the state to show some strong justification as to why that liberty ought to be limited or abridged.

Epstein, *Necessary*, *supra* note 90, at 27–28. Because property for Epstein seems to exist in the abstract, and does not depend upon law or state enforcement, he sees no need to justify the use of state power by landowners to restrict the liberties of other people. One wonders what happens if a state fails to provide any legal protection for property; not a problem, one should think, if property (as Epstein contends) can exist without law or state.

<sup>96</sup> See sources cited and discussion *supra* note 23.

<sup>97</sup> See *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244 (S.C. 1818).

<sup>98</sup> FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 4, at 44–45.

regime. Something like the following policy preferences, again four in number, seem to motivate and shape today's version of libertarian sentiment:

1. *Favored Uses of Land.* Libertarians favor intensive, industrial land uses over sensitive ones. When land uses clash, they typically side with business over the quiet household.

2. *No Intrinsic Value to Nature.* Libertarians view man (and woman) as the conqueror of nature, free and able to alter land as he (or she) sees fit. Neither nature itself nor future generations meaningfully constrain that use. Because nature is so subject to human control, it is easy and logical to see land parcels and other pieces of nature as ecologically discrete, separate commodities rather than an ecologically integrated whole. The only land-use spillover effects worth noting and taking into account are the visible, physical ones that cause obvious harm. The law might properly recognize these blatant externalities and deal with them in some way. Otherwise, ecological interconnections are irrelevant.

3. *No Dependence on Public Goods or Government.* The autonomous individual, whose independence is so protected by libertarian thought, apparently is a person who can achieve his vision of the good life either by autonomous actions or by voluntary combinations with other people. Put otherwise, no important part of a person's vision of the good life, except for the maintenance of public order and national defense, requires collective governmental action to carry out. We can phrase this point, further, in purely economic terms: the libertarian's hypothetical individual holds little interest in most "public goods," including ecologically healthy and aesthetically pleasing landscapes, which require government action to bring about.

4. *Preference for Owners.* Finally, there is the policy preference of libertarians for the individual landowner over non-owners. This is perhaps the most obvious policy choice of all. In clashes along this front, non-owners possess no liberty of any relevance, except the liberty ultimately to join the ranks of property owners, when and if they can. It is only by ignoring non-owners that we can view property as a clear enhancement of overall liberty.

What deserves emphasis here, in this summary of libertarian policy positions, is not the validity or invalidity of the positions as such, though they warrant a critical look. Instead, it is how, on each of the above four points, the libertarian view uses the alluring ideal of liberty to package what is, in reality, a particular set of ideological values. And it is these values, not any concept of liberty, that give libertarian thought its form. Were we to take away these chosen values, the "pro-liberty position" would lose all content. We would be back to a complex mixture of contradictory observations about property and liberty, with no way of resolving key issues.

*Natural rights/law.* Just as ideas of liberty alone fail to give us anything like today's libertarian perspective of property, so too they fail to sup-

port any particular natural right to property.<sup>99</sup> The rhetoric about a natural right to property, that is, has no meaning, apart from the meaning that free-market, libertarian advocates invest in it.

The idea of property-as-natural-right, rather than as civic convention, has ebbed and flowed in Anglo-American thought. Over the centuries, natural-rights reasoning has appealed mostly to people who have distrusted their governments and feared that government would interfere with their private rights. When people instead can count on government to act properly, in terms of endorsing their own views and perhaps even helping them gain more land, then property can be warmly embraced as a conventional right, subject to redefinition by lawmakers with sovereign powers. In English and American history, the church, the Crown, and parliamentary defenders have all, over time, switched sides on this issue, based on prevailing political winds.<sup>100</sup>

When we keep in mind the many forms that private property can take, in terms of relative landowner rights, it is difficult, if not impossible, to construct an argument that “nature” has any particular property scheme in mind.<sup>101</sup> It is just as difficult, given the variation that property schemes have taken, to assert that we can start with property as an abstract *idea* and then construct an actual property regime based on it. Indeed, we cannot even take a single step in the direction of constructing a property rights scheme based on the idea of property without immediately having to make policy choices. If we started with property as an idea, would we end up with something like private property as we know it in the United States today, like the landscape in pre-Norman Ireland,<sup>102</sup> like the much-studied mix of individual and collective use rights of the Algonquian Indians in early seventeenth century Massachusetts,<sup>103</sup> or something radically different from all of these?<sup>104</sup> Deep within many Americans may be a sense that property surely has some core meaning, recognized in all times and places. But in the case of land at least, the record says otherwise. Property regimes are almost infinitely varied.

To the extent that property-as-natural-right had a clear meaning in late eighteenth-century America, it chiefly meant an individual’s right to acquire land for subsistence living on easy terms, according to historian William

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<sup>99</sup> E.g., Adam Mossoff, *What is Property? Putting the Pieces Together*, 45 ARIZ. L. REV. 371 (2003).

<sup>100</sup> SCHLATTER, *supra* note 24, at 47–161; RODGERS, *supra* note 23, at 45–79, 122–30, 151–53.

<sup>101</sup> If it did, would it not tend to favor nature’s own wild creatures when they collide with pulsing bulldozers? See ERIC T. FREYFOGLE, *BOUNDED PEOPLE, BOUNDLESS LANDS: ENVISIONING A NEW LAND ETHIC* 107–08 (1998) (identifying strand of property thought that views nature as indirect lawgiver).

<sup>102</sup> See *supra* Part III.

<sup>103</sup> See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 34–53 (1983).

<sup>104</sup> A recent attempt along these lines is presented in UNDERKUFFLER, *THE IDEA OF PROPERTY*, *supra* note 5.

Scott.<sup>105</sup> Thomas Jefferson embraced this right strongly, and to implement it called on his home state to distribute free land to all landless adult white males.<sup>106</sup> In Jefferson's view, according to historian Joyce Appleby, governments "did not exist to protect property but rather to promote access to property or, more broadly speaking, opportunity."<sup>107</sup> James Madison embraced similar reasoning during debates over the Bill of Rights. He proposed that the Bill add to the Preamble of the Constitution an express right of acquiring and using property.<sup>108</sup> In later years, homestead laws implemented a version of the same ideal, as did arid-lands reclamation projects early in the twentieth century.<sup>109</sup> These days, the idea of property-as-easy-access appears in weakened form as a right to affordable housing and, even more faintly, in the agrarian strand of conservation thought.<sup>110</sup>

Advocates of natural rights these days have in mind, of course, a property right that has little or nothing to do with Jefferson's much-contested agrarian claim. Nor does the natural-rights claim offered today have much in common with the more famous natural-rights reasoning of John Locke from a century earlier. Locke embraced a labor-theory version of natural rights, which tied ownership claims to the value that a claimant added to an item through his personal labor. The difficulty with this reasoning, from today's natural-rights perspective, is that it provides under modern circumstances not a shield to *defend* landed property rights so much as a weapon to *attack* them, particularly large landholdings and the powers of landlords and factory owners. Locke's theory authorized ownership only when a person mixed labor with land and created essentially all of the land's value as a result of the labor. He offered no protection for the value of the land itself, and expressly limited his theory to situations in which land was so plentiful that anyone who wanted could seize land for free. Nineteenth-century reformers could see clearly the potential for using the labor theory to challenge factory owners, slave holders, and other large landowners in their claims to the products of the labors of others, slaves included.<sup>111</sup> As reformers did this

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<sup>105</sup> SCOTT, *supra* note 23, at 36–50. A similar conclusion is reached in PAUL K. CONKIN, *SELF-EVIDENT TRUTHS* 112 (1974) ("In its ideal sense, and the only sense at all related to natural rights, property included access to a part of nature needed for sustenance and used productively, as well as to the resultant products of one's labor.").

<sup>106</sup> See Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 470 (1976). Jefferson's views are also considered in GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 33–36 (1997).

<sup>107</sup> Joyce Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?*, 29 WM. & MARY Q. 287, 297 (1982).

<sup>108</sup> See Hart, *Republic*, *supra* note 31, at 1135.

<sup>109</sup> See Paul W. Gates, *An Overview of American Land Policy*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 121, 124–31 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988).

<sup>110</sup> On the agrarian view of property rights, see WENDELL BERRY, *ANOTHER TURN OF THE CRANK* 46–63 (1995).

<sup>111</sup> See SCOTT, *supra* note 23, at 59–70 (describing the use of natural-rights reasoning to press for land reform and to challenge all ownership claims not based on actual use and occupation); *id.* at 80–90 (describing the use of natural-rights reasoning to press for fundamental

— including, most famously, Karl Marx and (in the United States) Henry George — they repeated some of the arguments that colonial Americans had used to justify dispossessing Indians of their lands.<sup>112</sup> Even Locke, out to defend private rights, limited an owner's land to the amount he needed and could use.<sup>113</sup> Perhaps most importantly for today's property debates, which mostly deal with landowners who want to develop bare land, Locke's theory gave no rationale why a person could even own bare land, given the lack of any labor-based value in it.

If we want to give meaning to the idea of a natural law of land ownership, an obvious place to turn for guidance is the civilian legal theorists of early modern Europe — the writers of the great age on natural-law thinking in the sixteenth to eighteenth centuries.<sup>114</sup> But we need to ask, before doing so: why should we grant special privilege to the culture-bound speculations of these particular writers, over all others in different times and cultures? Did these European theorists enjoy some special insights into nature that no other writers have had? An alternative tack on natural rights is proposed by Professor Douglas Kmiec, a prominent natural-law academic. In his notable essay *The Coherence of the Natural Law of Property*, Kmiec defines natural law as “the highest expression of human reason . . . implanted by God in the heart of man.”<sup>115</sup> In the case of property, Kmiec asserts, the “precepts and principles” of natural law “are applicable everywhere and at all times” and “cannot be denied,” though they operate only “at a fairly high level of generality.”<sup>116</sup> Fortunately, Kmiec explains, these precepts and principles are easy to find, for they were embedded years ago in the common law of England.<sup>117</sup>

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changes in terms of property ownership); *id.* at 94–101 (describing the use of natural-rights reasoning to attack slavery).

<sup>112</sup> A common argument used against Indians was that they had inadequately “improved” lands, and thus had no right to claim ownership of them. See Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians*, in SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 15, 22–32 (James Morton Smith ed., 1972); see also SCOTT, *supra* note 23, at 15–16. As Scott notes, the same argument was used to challenge the property rights of owners who held more land than they could use and to justify the public's rights to hunt and forage on unenclosed private land. *Id.* at 16–18. Evidence of this thinking early in the nineteenth century is offered in Stephen Aron, *Pigs and Hunters: “Rights in the Woods” on the Trans-Appalachian Frontier*, in CONTACT POINTS: AMERICAN FRONTIERS FROM THE MOHAWK VALLEY TO THE MISSISSIPPI, 1750–1830, at 203 (Andrew R.L. Clayton & Frederika J. Teute eds., 1998).

<sup>113</sup> Locke's ideas of property are expressed principally in JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 203–16 (P. Laslett ed., 1988) (1690). They are usefully considered in LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 32–56 (1997); ALAN J. RYAN, PROPERTY AND POLITICAL THEORY 14–48 (1984); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1120–27 (1996).

<sup>114</sup> See SCHLATTER, *supra* note 24, at 77–238.

<sup>115</sup> Douglas Kmiec, *The Coherence of the Common Law*, 26 VAL. U. L. REV. 367, 368 (1991) (citations omitted).

<sup>116</sup> *Id.* at 370.

<sup>117</sup> *Id.* at 368.

Contentions such as these by Kmiec, with their pronounced ethnic and religious slants, are frankly hard to take seriously. Are we to presume that God was an Englishman, or was it merely that English lawmakers, above all other humans, then and since, have had the religious sensitivity required to peer clearly into their reason-filled hearts (aided, Kmiec adds, “by [Christian] religious belief, and the revealed law of the Bible”<sup>118</sup>)? If we are to turn, not to our hearts, but to the English common law for guidance on nature, to what version of the common law and in what century are we to look? The English common law of property, it hardly needs saying, changed radically over the centuries. Should we look to the time of COKE ON LITTLETON (1628), the classic text on land by the father of the common law, or might we go back even further to Littleton’s day (circa 1481)? Is earlier better?<sup>119</sup> On the other hand, if reason embedded in natural law was discerned only slowly by English lawmakers, did it reach its culmination in the eighteenth or nineteenth centuries,<sup>120</sup> or did it continue to gain clarity with the enactment of the Town and Country Planning Act of 1947, which largely stripped landowners of their development rights?<sup>121</sup>

Perhaps the more pertinent point, in response to Kmiec, is to note that a thorough study of landed property rights over time and place might well yield hardly a single precept or principle of private ownership that applied “everywhere and at all times.” The suspicion, of course, is that somehow, when studying various property regimes, we are supposed to ignore ninety-eight percent of all these property regimes as misguided, including, presumably, the work of the very-Christian Irish monks nine centuries ago.<sup>122</sup> And on a final and different note, we might ask, when proving natural law, what

<sup>118</sup> *Id.*

<sup>119</sup> Were we to return to the early days of American settlement by the English, we would find a world in which the variety of legal understandings and assumptions was quite varied, with the common law mixed in with various competing views. The variety of early American legal cultures is considered in Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 L. & SOC. INQUIRY 315 (2001). A classic study in early New England is Julius Goebel, *King’s Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

<sup>120</sup> As for the situation in the eighteenth century, historian Robert Gordon summarizes it as follows:

The real building-blocks of basic eighteenth-century social and economic institutions were not absolute dominion rights but, instead, property rights fragmented and split among many holders; property rights held and managed collectively by many owners; property relations of dependence and subordination; property subject to arbitrary and discretionary direction or destruction at the will of others; property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes; property destabilized by fluctuating and conflicting regimes of legal regulation.

Gordon, *supra* note 26, at 96.

<sup>121</sup> The statute and its application are considered in KAREN JONES, *CONSERVATION AND LAND USE* (2000), and PETER MARREN, *NATURE CONSERVATION* (2002).

<sup>122</sup> Kmiec’s use of the adjective “natural” comports with earlier usages in political rhetoric. See, e.g., RODGERS, *supra* note 23, at 49 (“In its most common eighteenth-century employment, the word ‘natural’ amounted to hardly more than a fashionably resonant term of



are we to make of the fact that nature itself, in all its biological and geophysical complexity, apparently plays no role in the lawmaking?<sup>123</sup> If we really had a property system based on nature, would it contain rules that took nature into account and protected its biological parts and ecological functioning, or would it, as Kmiec suggests, allow humans to alter nature as they see fit?

With these points made, we can sum up: Just as libertarian ideas about property do not arise logically from the idea of liberty, so too natural-rights reasoning does not build on any well-grounded vision of the natural order. It arises instead simply from a set of policy preferences, drawn from today's political and cultural scene. In the so-called natural law approach to property, as with the similar libertarian approach, we see a preference for business and industry over quiet, settled land uses; a preference for owners over non-owners; a disdain for worries about nature, future generations, and ecological interconnections; and an embedded belief that individual action and voluntary combinations can bring on the good life, if one simply has enough money.

## VI. ROBERT NOZICK AND SOCIAL UTILITY

*The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one.*<sup>124</sup>

Abraham Lincoln

*We wonder if the liberty was land*

*We wonder if the liberty was grass*

*Greening ahead of us: grazed beyond horizons. . . .*<sup>125</sup>

Archibald MacLeish

As a final installment in the story of liberty and property, we can turn to the property-related ideas contained in Robert Nozick's leading libertarian work, *Anarchy, State, and Utopia*.<sup>126</sup> In his book, Nozick purports to con-

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emphasis. . . . A handy term to plaster into virtually any assertion, the word's vagueness and its versatility were part and parcel of each other.").

<sup>123</sup> A law of landed property rights that began with real nature, not socially constructed ideas about humanity, might well commence from the position announced in the celebrated decision in *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). The court there suggested that landowners had secure rights only to make "natural uses" of their lands, which is to say uses that did not require a fundamental change in the land's ecological functioning. The issue is considered in Joseph Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 LAND USE & ENVTL. L. REV. 279 (1998).

<sup>124</sup> LINCOLN, *supra* note 2, at 301.

<sup>125</sup> ARCHIBALD MACLEISH, *LAND OF THE FREE* 49-50 (1938).

<sup>126</sup> NOZICK, *supra* note 19. A similar, less forceful libertarian argument for property is offered by CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* (2007). Fried pushes aside all forms of liberty other than negative individual liberty, thus avoiding the land-use conflicts considered here. See, e.g., *id.* at 66-67 (defining liberty as interference with a

struct a natural-rights theory for property and other individual rights. When we look closely at the property-related details in his book, however, we find something far different: a scheme of landed property rights that is justified and given shape by calculations of social utility. To understand why Nozick resorts to utility considerations in order to define and justify private property is to see, yet more clearly, the insurmountable troubles that confront any effort to base property rights solely on liberty or natural law.<sup>127</sup> Nozick also leads us, perhaps paradoxically, to the point where we can begin constructing a much different understanding of private rights in nature, one in which liberty is the product of the law-making effort, not the foundation stone for it.

Nozick's strident call for minimal government arises from his initial claim that people in a state of nature hold individual rights. Where these rights come from we are not really told. Nozick admits the importance of finding a secure moral base for them, but he decides in his book not to take on the job himself; he leaves it for others to provide the necessary founda-

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single individual). Indeed, this focus is sufficiently exclusive that, when discussing a hypothetical law expanding the public's liberty to use beaches, he can describe it entirely in terms of the loss of negative liberty by the owner of a beach with no mention of the effects on public users. *Id.* at 153–55. Like Nozick, Fried largely skips over the origins of individual rights, noting only that they may have had something to do with pre-social shared understandings, some of which ripened “by a long tradition” into “natural rights.” *Id.* at 70, 80. Fried also cites Locke's reasoning, without noting the round criticisms of it. *Id.* at 79–80. Fried does observe at one point that “property hurts liberty by limiting the liberty of some as it establishes the liberty of others.” *Id.* at 148. This observation, though, comes in a single, narrow context: when essentially all land is owned privately and homeless people have no place to go, leaving them “humiliated, dependent, and lack[ing] any real opportunity to enjoy the individuality of which liberty is the normative manifestation.” *Id.* The interconnection of liberties apparently does not arise simply when landowner Anna excludes outsiders. Anna's action is simply a denial of positive liberty, not negative. Yet Fried fails to maintain the positive-negative liberty distinction with consistency. A zoning law that keeps out a Wal-Mart would, in his view, violate the liberty of shoppers who would like to shop there — a liberty that seems more positive than negative. *See id.* at 28–30, 36–39, 172–75.

<sup>127</sup> Perhaps better known within the legal community is Richard A. Epstein's 1985 libertarian tract, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*. Epstein variously employs both natural-rights reasoning and utilitarian assertions to support the particular kind of property rights system that he prefers: one in which individuals as such have maximum freedom to use property as they see fit, subject only to a minimal obligation to avoid physically disturbing neighbors. Though he overtly mixes in utilitarian language and criticizes Nozick for failure to do so, Epstein's utilitarian asides are unsupported by a calculation of overall social utility or even a recognition of the many ways that private property affects overall welfare. *See EPSTEIN, TAKINGS: PRIVATE PROPERTY*, *supra* note 3, at 334–38. He does not recognize the power of people collectively to undertake such a calculation, nor admit that other observers might calculate utility in a manner far differently than he. His utilitarian language, that is, functions mostly as window dressing on an otherwise natural-rights-based property vision. While recognizing that property is a social arrangement in the sense that one owner's claim of rights affects others, Epstein avoids the obvious conclusion: that an adequate justification for property must explain why the people affected by an owner's property claim should recognize it. *See id.* at vii–viii. Without such an explanation, we are left with the *ipse dixit* claim that property rights arise in a state of nature, and that other people are, like it or not, duty-bound to recognize an owner's claim. Epstein's view, in short, has no logical order to it, and he assumes that readers are unfamiliar with the many critical writings about property published over the past few centuries.

tion.<sup>128</sup> John Locke, Nozick recounts, managed to write his influential seventeenth-century text on property and liberty without providing “anything remotely resembling a satisfactory explanation of the status and basis of the law of nature.”<sup>129</sup> If the great Locke could skip this difficult first step, it seems, so too can other property theorists. Nozick begins his work, then, with the *assumption* that a law of nature exists and that individuals as such hold strong moral rights under it.<sup>130</sup>

Nozick’s lack of a natural-rights theory is particularly troubling in the context of landed property rights. If we had such a moral theory, it might supply the much-needed answers to the questions set forth above about how we calibrate the relative rights of landowners Anna, Bart, Carl, and their neighbors. A theory might tell us, for instance, whether an owner’s secure right is to use land intensively or instead to be protected in a sensitive land use, and whether a landowner can enter his neighbor’s land to construct a needed drainage ditch or whether, to the contrary, the neighbor has a right to block such an entry. Lacking any theory, we are cast adrift in the quest for answers. We are left, it seems, to chart our own path, deciding as we see fit which forms of liberty to foster and which ones to sacrifice.

In Nozick’s world, borrowed from John Locke, landowners in a pre-political state of nature can gain rights to private property. Such an arrangement never existed, Nozick admits; human society did not evolve this way.<sup>131</sup> But Nozick nonetheless finds it useful to start with this counterfactual assumption anyway.

Like Locke (although with many details different), Nozick asserts that property rights arise when an individual mixes his labor with a thing and adds value to it. It is human labor, then, that supplies the necessary “principle of justice in acquisition.”<sup>132</sup> This first step, it turns out, is far easier for Nozick than it was for Locke, because Locke assumed that humans originally owned all land in common. In Nozick’s fictional world, land is unowned. As Locke saw things, it was a daunting task to explain why the co-owners of a piece of land should give their consent when one among them wanted to take (that is, steal) a land parcel out of the common pool.

<sup>128</sup> See Nozick, *supra* note 19, at 9.

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 35–36 (“It is [ . . . ] difficult to prove that people count for something!”).

<sup>131</sup> See *id.* at 8–9. While Nozick admits that the Lockean state-of-nature story is counterfactual — no such society arose in the manner Locke described — he nonetheless asserts society “could have arisen” this way, and thus it is appropriate to take the tale seriously. *Id.* at 9. If by “could have arisen,” Nozick intends a claim of historical plausibility, he needs in fairness to offer evidence to support the point, for it is not obvious. Without evidence (and with hundreds of counterexamples), it would seem more apt to view Locke’s state-of-nature tale as entirely fictional and inconceivable. Because property is inherently a social arrangement and necessarily exists only when an independent power is available to sustain it, it is not logically possible for property to exist in a world that has no organized governance system. At bottom, Nozick, like others who use Locke’s tale, confuses property with a might-makes-right system of the powerful dominating the weak — an arrangement that, of course, could and did exist in a state of nature.

<sup>132</sup> *Id.* at 174.

Why should everyone else give consent? In Nozick's world in contrast, other people do not co-own the property at the initial step, and thus have less cause to object. For Nozick, original acquisition is just, so long as the acquisition of land by one person satisfies a single requirement: it does not leave other people worse off.<sup>133</sup>

To craft a legitimate, working system of private property, two foundational tasks are essential. First, we must explain why Anna's claim of property should be honored by Bart, Carl, and Dana, given that their own liberty is curtailed by Anna's claim (whether or not they co-own the property that Anna takes). Then there is the second, more complex task of deciding what it means to own land in terms of the many detailed rights of ownership.

As for the first task, Nozick claims to base his moral justification for private property on natural law and thus on individual moral rights. But when we look closely, we see that he encounters trouble doing so. To justify Anna's claim of property, we need to show at a minimum, as Nozick states, that Bart, Carl, Dana, and everyone else are no worse off than they were before.<sup>134</sup> But how to do this, based solely on Anna's natural rights, given

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<sup>133</sup> *Id.* at 175–82. Professor Richard Epstein reduces this challenge even further by suggesting that property is validly held by anyone who takes first possession of it. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979). Rather than attempt to ground this claim in moral theory, Epstein supports it by asserting that the rule was embraced by the common law of England, which America's founders viewed so favorably. *Id.* at 1221–23. Indeed, he says, first possession was the “only possible way” to establish property ownership at common law. *Id.* at 1222. Although Epstein's claim has gained currency, see, e.g., Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985), it is based on a misreading of English law. Epstein supports his claim with merely a single decision — the American wild-animal decision of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805). See Epstein, *supra*, at 1224. Rose supplements this citation with a reference to Blackstone, but she cites not Blackstone's summary of English law but his political theorizing about how humans existed in a pre-social world. See Rose, *supra*, at 74 (citing 2 BLACKSTONE, *supra* note 27, at \*8). The story Blackstone tells about English law could hardly be more different: virtually nothing was available for first taking. Land came solely from the Crown (though he discusses a trivial loophole, fully closed by his day). 2 BLACKSTONE, *supra* note 27, at \*257. The many categories of incorporeal hereditaments (Blackstone lists ten types, including advowsons, tithes, offices, dignities, and franchises, *id.* at \*21), were also not available for first occupancy. Even in the case of the final category of property, tangible personal property, almost no title was based on first possession. In the case of wildlife, nearly all valuable species (including whales, sturgeons, and all game species) belonged to the Crown; in any event, a hunter who trespassed on private land had to turn the captured animal over to the landowner (and the penalty for hunting in royal forests was far worse). See *id.* at \*414–18; *Blades v. Higgs*, 11 H.L. Cas. 621, 11 Eng. Rep. 1474 (H.L. 1865); GOBLE & FREYFOGLE, *supra* note 84, at 203–19. In the case of abandoned personalty, nearly all valuable items were claimed by the King, and not available for taking at law (though presumably actual practice differed). First in time, it turns out, was chiefly used as a way of resolving disputes between private landowners involving uses of resources such as groundwater, light, and (later) petroleum; even here, the right to acquire water or light was based on landownership, which came from the Crown. It was also used in allocating fish (other than royal fish) in waterways subject to the tides (and hence covered by the Crown's sovereign claims) except when the King granted exclusive fishing rights to a private person. Perhaps the reason, then, why the court in *Pierson v. Post* was unable, despite diligent searches, to find prior English precedent supporting its first-in-time ruling was chiefly because the rule had so little application in the courtroom.

<sup>134</sup> NOZICK, *supra* note 19, at 175, 178.

that Bart, Carl, and Dana have natural rights of their own? If Bart, Carl, and Dana are harmed by Anna's action, where is the justice in it?

To support the justice of Anna's claim, Nozick notes the various ways that a scheme of private property can be helpful to society at large, including to people who own no property.<sup>135</sup> The ownership of land by some, he asserts, might well leave Bart, Carl, and Dana better off, even though they have had their liberties to wander and use the land curtailed. Overall social utility, that is, can rise when a private property system functions well.

Yet this is dangerous ground. Nozick, of course, wants nothing to do with a justification of private rights based on the shifting sands of utility. To ward off that danger, he emphatically asserts that his utilitarian comments are not being used to *justify* Anna's property right, which arose from nature. They are being used instead merely to *defeat* the claims of Bart, Carl, and Dana that Anna's right has harmed them, and hence is morally illegitimate.<sup>136</sup>

But this is mere legerdemain. As Locke well knew, the whole challenge of justifying property is to explain why Anna should have the right to restrict the liberties of Bart, Carl, and Dana. Most of the time Nozick realizes that as well.<sup>137</sup> Anna's property in a meaningful, legal sense arises only when Bart, Carl, and Dana have shown up and agreed to recognize her claim. And again, why should they do so? Nozick's answer for this question — the key justification challenge of property — is entirely utilitarian. They should do so because the society of which they are a part will be better off with private property than without it.

As for Nozick's natural-rights claim, then, we find that it hangs precariously at the beginning of his narrative about property's origins. It occupies center stage only during the fictional period in which Anna lives alone in a world of nature and thus needs no property rights. The moment other people show up and Anna actually needs property rights, the natural-rights reasoning disappears and utility takes over. As we have seen, property is inherently a social arrangement, and it makes no sense to talk about property rights in a world inhabited by only one person. Once we see that reality, we can see also that Nozick's argument about property has nothing to do with

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<sup>135</sup> *Id.* at 175–77.

<sup>136</sup> *See id.* at 177.

<sup>137</sup> *See, e.g., id.* at 178. Nozick asserts repeatedly that Anna's acquisition of property from the unowned stock would be unjust if it leaves others worse off, as it always would, absent other factors, given that the others are "no longer at liberty to use the thing" that Anna has taken. The "no worse off" rule, then, is the key component of his "principle of justice in acquisition." *Id.* Yet, when it comes time to avert the charge of utilitarianism, Nozick assumes without comment (and as a quick aside in the middle of a lengthy paragraph) that somehow Anna's property right is morally justified even before we get to the "no worse off" test; that is, apparently, it is justified without complying with the principle of justice in acquisition. *See id.* at 177. Until we comply with the "no worse off" test, however — or gain social consent, which Nozick does not presume — then we have not gotten Anna to the point where she actually *owns* any property; at most, and to draw an exceedingly fine (and useless) line, we have *presumed* a natural right of property but given Anna no legitimate means of ever exercising it.

natural rights. It is based on the ways private property contributes to overall social well-being.

The logical place to begin a property narrative is not in a fictional, pre-social era but with a group of people, interacting socially, who decide to create individual property rights as a means of furthering their shared goals.<sup>138</sup> Were Nozick to begin at this point he would be left with no means of portraying private property as a natural right; his natural reasoning would disappear. From the beginning of his story to the end, utility would rule.

Writing in the seventeenth century, John Locke avoided considerations of utility by severely limiting private rights with his now-famous proviso (and other, oft-forgotten natural law limits): no one who mixes labor with a thing can claim it, Locke admitted, if the thing is not so plentiful, and so available for all others, that everyone else can do the same.<sup>139</sup> Nozick, by replacing Locke's restrictive limits with his own more relaxed ones based on calculations of overall social utility, effectively gives up the idea of property as a natural right. It has become a product of social convention, and is thus dependent for its validity on its ongoing ability to promote the common good.

Having examined Nozick's difficulties in justifying private property, we can turn to the second major task in crafting a property regime: deciding upon the rights and limitations of individual ownership. On this task as on the first one, what we find is that Nozick again resorts to social utility rather than natural law to supply the necessary answers.

Like other libertarian and free-market writers on property, Nozick shows little understanding of the natural world. He ignores not just the complex interconnection but also the biological and geophysical interdependence of land parcels. Nozick's hypothetical land parcels, like those used in economic models, are detached from any real place.<sup>140</sup> By stripping the land of its many details, he overlooks nearly all forms of land-use conflict and thus avoids the inherent difficulties of resolving them. Importantly, though, Nozick does recognize one way that a land use by Anna might conflict with a land use by neighbor Bart. He considers the case where Anna's land use generates visible pollution that harms Bart.<sup>141</sup> It is a simple example of conflicting land uses, lacking the complexity of most real-world conflicts. Yet it is adequate to let us know how Nozick would go about resolving the entire category of land-use disputes.<sup>142</sup>

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<sup>138</sup> I offer an alternative property story, begun from this point, in FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 157–78. I do not mean to suggest that the processes of creating and allocating property were routinely free of violence and duress, or, by today's standards, fair.

<sup>139</sup> See BECKER, *supra* note 113.

<sup>140</sup> I elaborate upon this complaint in the context of narrow economic writing on law in ERIC T. FREYFOGLE, *Private Land Made (Too) Simple*, 33 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,155 (2003).

<sup>141</sup> See NOZICK, *supra* note 19, at 79–81.

<sup>142</sup> Better than a simple pollution case would be a hypothetical in which both the boundary-crossing element and the harmfulness of the conduct are more ambiguous: (i) Anna plants

The question posed is this: should landowner Anna have liberty to pollute in Nozick's natural-rights scheme, or should landowner Bart instead enjoy the liberty to halt the pollution or recover damages for the harm? Liberty lies on both sides. Somehow lawmakers must choose between them.

Two ideas in Nozick's moral analysis might at first glance appear to help resolve this simple dispute — his "nonaggression rule," which generally bars one individual from acting aggressively toward another,<sup>143</sup> and his "boundary crossing" rule, which similarly (and with many exceptions) bars one person from crossing the moral boundaries of another person.<sup>144</sup> Nozick realizes, however, that these rules are not up to the job of producing sensible answers to transboundary pollution problems. Taken literally, the two rules would bar all pollution, and indeed all forms of interference, however slight. However sensible such a rule might have been in a rural, pre-industrial world, it would make no sense today, as Nozick is quick to note.<sup>145</sup> Some level of pollution, some level of aggression or boundary crossing, must be allowed. But how do we set the level of permissible transboundary harm? How do we craft a law of pollution control, in the process recognizing the liberty of one owner while restricting the liberty of the other?<sup>146</sup>

To answer these questions, Nozick does what he inevitably must. He turns, once again, to a calculation of overall social utility. To craft a pollution control law — and by implication, to resolve all other land-use disputes — we should undertake a cost-benefit analysis. We must look at the overall benefits of the pollution compared with the overall costs. Having done that, Nozick explains, we then need to decide, based on general notions of fairness, whether to require polluters to compensate their victims. The fair answer for Nozick is to require compensation in pretty much all cases.<sup>147</sup>

And thus we arrive at the bottom of things in the case of the two tasks involved in justifying and constructing a private property system. Landowner Anna's power to restrict the liberties of other citizens is justified entirely based upon the grounds of social utility. Similarly, Anna's powers to pollute and engage in other socially disruptive activities are calibrated by the

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a garden on the edge of her property and Bart then constructs a useful tall fence that casts the garden into shade, ruining the crops; (ii) Anna builds a berm on her land in a way that halts the natural drainage of surface water from Bart's land, causing the water to back up and flood Bart's land; or (iii) Anna kills all the wolves crossing her land and thus depletes the predator population, leading to an increase in deer that then cause damage by overbrowsing Bart's land.

<sup>143</sup> Nozick, *supra* note 19, at 33–36.

<sup>144</sup> *Id.* at 71.

<sup>145</sup> See *id.* at 79 ("Presumably, it should permit [some] polluting activities.").

<sup>146</sup> It should hardly need adding that the principle of equality also does not resolve any of the various land-use disputes. Thus, the frequently heard claim that we should protect "maximum landowner liberty consistent with equal rights for other landowners" provides no light. To say that Anna and Bart have the same rights tells us nothing about the substantive content of those rights. Even standing alone, the idea of treating Anna and Bart equally is subject to vagaries in application. As citizens Anna and Bart may be equal, but what about when their lands are much different? Which differences can the law properly take into account? Equality alone, of course, cannot tell us.

<sup>147</sup> Nozick, *supra* note 19, at 79–81.

extent to which they each create a net social benefit. Social utility governs at both stages. Locke and natural law have been pushed aside. In sum, for us to know what can be owned and what it means to own, we first need to undertake utilitarian calculations. Only after we have made such calculations can we define the property rights that Anna owns. And it is only at this last step that we can then, based upon Anna's property rights, see clearly what liberties Anna possesses as landowner and which ones she does not.

Ultimately, it turns out, Anna's protected liberties are established at the last step of the intellectual journey, not at the first. They are the outcome of a property rights regime that has been crafted, first and foremost, to fulfill social needs.

## VII. EPILOGUE: LIBERTY'S RIGHTFUL ROLE

The main conclusion that we have reached, approaching it from various angles and theorists, is that liberty alone is simply not able to furnish us with a clear property regime. Neither liberty as an idea, nor any claim of natural law or natural rights, offers a moral justification for private land ownership. Neither gives us a tool or mechanism for resolving the countless issues that arise as we try to give clarity to the entitlements of land ownership.

Having reached this conclusion, a sobering one perhaps for many readers, it seems appropriate to return to the beginning and to ask what role then liberty should play in setting up a property system. Surely liberty has a role, a big one, given that property can protect and extend individual liberty in such vital, valuable ways. If liberty alone is not enough to craft a property regime, what other tools do we need? Where, ultimately, does liberty fit into the system of private property?

Private property, to reiterate, is a massive restriction on the liberty of all people, particularly in landscapes where nearly everything is owned. That was Thomas Paine's point.<sup>148</sup> All such restrictions on liberty are problematic in the sense that they require for legitimacy an adequate moral justification. In the case of private property, the task of justification calls for a rationale persuasive to all categories of people, to owners and non-owners alike. To serve us fully, a property justification would need to go further, telling us not just that private property can legitimately exist but what forms property might appropriately take.

The most weighty rationale for property — really the only convincing rationale in the case of land — is based not on individual liberty or natural rights but on the consequences that flow from various property regimes,<sup>149</sup> just as Robert Nozick reluctantly realized.<sup>150</sup> Property is good, that is, because of the good things that it brings. It is good when and to the extent it

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<sup>148</sup> PAINE, *supra* note 10, at 476–77.

<sup>149</sup> See NOZICK, *supra* note 19, at 177.

<sup>150</sup> See FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 118–24.



yields overall benefits, widely spread, for people generally. It is not good, and hence is morally illegitimate, when its effect overall is to cause harm.<sup>151</sup>

How private property's effects are evaluated overall — what is considered a cost, what a benefit, and how they all sum up — depends on the surrounding society, with its circumstances, values, and hopes. Change the society, change the circumstances and values, and a property system that once made sense might no longer do so. On this point we only need to note a few obvious differences: a system that allows owners to use land intensively serves far different values, and fosters far different land-use patterns, than does a system that protects sensitive land uses. Similarly, a system in which landowners collectively can develop joint plans for their landscapes can lead to far different land-use patterns than one in which landowners can act only alone or in voluntary combinations.

What then happens to liberty? Is it lost in the utilitarian shuffle? Have individual rights faded away?

Private property can be a highly useful institution for a society as a whole; this is both an important conclusion and the beginning point in crafting a system of property.<sup>152</sup> If property's virtues are sometimes overstated, they are nonetheless substantial. Property works best, in turn, when it does create and protect spheres of individual liberty. If we want people to plant in the spring, we need to protect their liberty to harvest in the fall. If we want them to build homes or factories, we need similarly to protect their liberty to use their structures once built. If we want a stable civil society, or one in which personal privacy enjoys protection, then we might favor property forms and distribution patterns that achieve these goals as well. In a recent useful essay, Professor Ben Barros elaborates upon these points, commenting on how a well-structured system of property can create a zone of individual autonomy; it can promote freedom by dispersing power and it can help people to gain access to the physical resources they need to enjoy reasonable

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<sup>151</sup> Importantly, each landowner's power requires testing independently, to see whether it brings overall social benefits. It is simply not apt to use a property-is-better-than-no-property line of reasoning to defend an industrial view in which landowners are empowered to inflict harm on neighbors and the surrounding community. A more refined inquiry is needed to settle upon the most socially productive mix of landowner rights and responsibilities.

<sup>152</sup> Antebellum defenders of property, having turned away from natural rights and state-of-nature reasoning, were often quick to expound on the institution's pragmatic values. In the view of Francis Lieber in 1841, private property was "the nourisher of man and the cement of society; the incentive of individual industry, and broad foundation of general prosperity; it is the basis of social advancement, the support of knowledge, and a mirror in which man beholds his rights." Francis Lieber, *ESSAYS ON PROPERTY AND LABOR: AS CONNECTED WITH NATURAL LAW AND THE CONSTITUTION OF SOCIETY* 192 (1841), *quoted in* RODGERS, *supra* note 23, at 128. According to Rodgers, "[r]hetoric of this sort, ubiquitous in the antebellum North, pushed property beyond the status of inherited right . . . and hitched it to the wagons of democratic destiny, individual ambition, progress, and economic growth. To call this a utilitarian defense of property is to employ too spare a name. Private property was no mere useful contrivance; it was God's engine for the advancement of civilization itself." RODGERS, *supra* note 23, at 128.

freedom.<sup>153</sup> These considerations are highly relevant in fashioning a system of private property.

On the other hand, the landscape-scale repercussions of property rights are many, and details count for much. When considering the propriety of recognizing a private right in a particular setting it is a mistake to stop the inquiry at the level of broad generalization. It is a mistake, that is, to resolve contentious issues of private rights by noting the benefits that come from property as a whole, without narrowing the vision to consider more particularly the costs and benefits that arise from the specific property right at issue. Should a farmer have the right to use land in a way that erodes or degrades the soil? Similarly, should an owner of critical, unusual wildlife habitat have the right to alter it in ways that greatly harm resident wildlife? Questions such as these can only be handled by assessments that consider them in their narrow contexts. It slants and distorts the inquiry to assert simply that property cannot function if landowners have no right to use what they own. It also slants and distorts the inquiry to speak merely of the answers that prior generations would have given to these specific questions. We can come up with our own answers, and indeed we are morally impelled to do so given that a particular property right becomes illegitimate when its exercise brings net harm.

Cost-benefit calculations, so important in crafting a system of property rights, become even more challenging when we recognize (as we must) that many of property's benefits come only when ownership norms are relatively stable. Many of the benefits society gets, especially the benefit of economic productivity, are weakened when landowners are unsure about their future rights and are reluctant to make long-term investments in their lands. Yet this need for stability in legal rights is merely another factor to add to the overall policy assessment of costs and benefits. To encourage a farmer to plant in the spring, as noted, we need to protect the right to harvest in the fall. But do we need to promise the right to build houses on the land a decade later?<sup>154</sup>

Those who would give stability greater weight — a characteristic trait, of course, of people who like things just as they are — need to explain when and why stability should override countervailing considerations. They need to explain why we ought to keep current laws in place, given that property arrangements can become morally illegitimate when circumstances and public values shift. When social utility is the guiding light, society itself is the proper decisionmaking authority. No individual alone should wield the power to make decisions that affect the whole. Society itself should be the entity that sets the rules of ownership through its democratic lawmaking processes. It is simply not right to shortchange this exercise of sovereign,

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<sup>153</sup> See D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J. L. & LIBERTY 36 (2009).

<sup>154</sup> See FREYFOGLE, *THE LAND WE SHARE*, *supra* note 4, at 241–48.

democratic power, as libertarians and natural-rights theorists would have us do.

Details here can be and should be debated in terms of what types of liberty we ought to protect, when, and for how long, and the touchstone, again, should be whether or not the recognition of a particular liberty, at the expense of competing liberties, would or would not promote the common good. The answers we produce will inevitably be tentative. Nonetheless, the bottom line on property and liberty ought to be clear: *Property law should protect liberty when and to the extent that the recognition of liberty promotes the common good.* This is the governing principle, the tool that enables us to decide which forms of liberty to protect and which forms to sacrifice. Liberty, in short, should be a dependent variable. Liberty does not define property. To the contrary, it is property that defines liberty.<sup>155</sup> Individual rights should not guide public lawmaking, when it comes to land ownership. Public lawmaking should define the scope of individual liberties. Our liberties as landowners are set by law, and inevitably so. A particular law, of course, might well prove unwise. It might elevate an unimportant liberty over a more valuable one, frustrating the capacity of our land ownership regime to promote the common good as fully as it might. But the rightful complaint in such an instance is not the tedious, unhelpful claim that the law invades liberty or a person's natural right. It is instead the more robust, pertinent complaint we level against unwise laws in all settings: it is bad public policy, and we ought to change it.

In the end, libertarian and rights-based reasoning needs to be understood for what it is — a rhetorical form for advocating certain policy choices in the public arena. It is a long-established American practice, to use rights rhetoric to talk about, and obfuscate, issues of social importance.<sup>156</sup> It is a long-established rhetorical tradition, but a lamentable one all the same.

Opponents of libertarian values could well counter this rhetoric with their own liberty-based rhetoric. They could construct their own ecological, community-sensitive version of property-as-liberty, and point to the forms of positive liberty, to the way private acts can invade liberty, and to the higher justice of liberty as collective, democratic self-rule. But might we be better off, instead, to set down such blunt tools and to talk more directly about the

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<sup>155</sup> My comments here (as throughout) deal with liberties in using land, not other types of liberties. As Heidi Hurd notes, many philosophers resist the notion that liberties are or should be dependent on law for their existence and scope. Hurd, *supra* note 50, at 390 n.3. My claim here is that private land is a different case, because (i) it necessarily depends for its existence on affirmative legal action and on the state's willingness to make its coercive powers available to private actors, and (ii) because the recognition of a right (liberty) in one person necessarily entails restrictions on the liberties of others — which is to say I reject the assumption that begins this article.

<sup>156</sup> See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (discussing how America's rights rhetoric oppresses the creativity that is needed to solve the country's most pressing social problems); RODGERS, *supra* note 23, at 219–24.

important policy choices that we face, about the kinds of landscapes we want to inhabit, and about the kinds of communities we would like to form?

So flexible is private property that it can help us achieve a wide variety of public goals. But private ownership is merely a tool. It is the means. Though we do it often and passionately, it makes little sense to argue about the means with no talk about the desired ends. The tail wags the dog, and it is little wonder that our debates about private property seem to get nowhere.