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The Culture of Owning

Americans have been altering the definition of property rights to reflect changing times since Thomas Jefferson's day. Given our evolving understanding of the health of the land, the moment is ripe to do so again.

It was a calamitous time, the 1930s, out on the land as well as in the cities. The crisis was most visibly an economic and social one: the soup lines, the Hoover camps, the migrant Okies. But it was more than that, or so it appeared to poet Archibald MacLeish and observers like him. American culture itself was in trouble, particularly on the Great Plains where plows, aridity, and human dreams had combined to create massive, billowing dust clouds that darkened skies a thousand miles eastward. Bad land use was one cause of the Dust Bowl, obvious to all who could see. But beneath that was a system of private property rights that allowed landowners to misuse nature, plowing land that should have been left in grass. And beneath that, getting to the heart of things MacLeish questioned, was America's concept of liberty, defined by too many as an individual's right to be left alone.

In "The Land of the Free," his much-acclaimed poem that appeared in 1938 with wrenching Depression-era images by Dorothea Lange, Margaret Bourke-White, and other WPA photographers, MacLeish would probe this concept of liberty, so tied to America's self image. Liberty as individual autonomy, as the right to do as one pleased, seemed to depend upon open land, available for the taking. The land, though, had largely run out, and now it was blowing away.

We wonder if the liberty was land
We wonder if the liberty was grass
Greening ahead of us: grazed beyond horizons

So long as the grass remained alive and lay to the west, in an open landscape full of opportunity, liberty might prevail. But what happened when the last of the land was taken and the last of the grass turned under?

MacLeish's chief fear was that the loss of open land would threaten American democracy, precisely the fear that Thomas Jefferson had expressed generations earlier. If democracy was based on liberty and liberty was based on land, would democracy decline as the landless population rose? Jefferson's fear led him not just to expand the nation with the Louisiana Purchase but to push hard for the widespread distribution of land. "Legislators cannot invent too many devices for subdividing property," Jefferson advised. "It is not too soon to provide by every possible means that as few as possible shall be without a little portion of land."

Today's twenty-first-century fears about democracy take different forms and are probably better founded. But MacLeish was right about the troubling links between liberty, ownership, and land degradation. The established culture of owning, MacLeish recounted in his poem, had left a trail of its many failings. In the Midwest there were the vast Northwoods, now cut over and burning:

Millions of acres of stumps to remember the past by—
To remember the Upper Peninsula hushed with pines:
To remember the hemlocks singing in Wisconsin:
To remember over the water the birches remembering

In hilly lands everywhere, there were the gullies formed by the "rest-less rain" and the eroding soil, the land leaving "under our feet and our hands." When liberty was understood as the freedom to plow land, regardless of nature, the consequences would prove ill, for land and people. America needed a new understanding of liberty, MacLeish believed, based not on the right to be left alone but on something far different, leading in turn to new legal rules about the ownership of land.

The cultural problems MacLeish identified are by no means gone, and they have much to do with America's continuing land-use ills. Although less dramatically than during the Dust Bowl, bad land use still plagues our countryside, silting rivers, diminishing wildlife, creating hypoxic dead zones in waterways and oceans, and turning ecologically complex forests into monocultural plantations. Many people work hard attacking the ill effects of these environmental problems, but rarely do we cut to their cultural roots. These land uses are protected by a concept of liberty that largely retains the definition it had in the Dust Bowl: the right of individuals to use their land with little restraint. When we do see through this misguided myth, we come upon the outlines of a far better orientation toward land, private property, and liberty.

By the early 1990s the nation's push to protect ecologically sensitive lands had largely stalled. Soil erosion control measures had literally gained ground since the 1930s, as had efforts to expand wildlife refuges. In 1964, the Wilderness Act both culminated the effort to protect wild places and set the stage for expanded set-asides in the 1970s and 1980s. Indeed, progress had occurred on many fronts: floodplain protection ordinances, coastal-zone development restrictions, pollution-control and pesticide laws, wildlife protections on national forests, the Alaska Lands Act—all had promoted the land's healing and health. But a new sentiment was on the rise—or rather, a resurgence of an old sentiment—which came to political expression in a squabble fomented by then-Vice President Dan Quayle, having to do with the term "wetlands" as used in the federal Clean Water Act. Existing law defined wetlands in terms of the dominant plants that a parcel possessed. If land was covered chiefly by plants that required saturated soils to grow, then it qualified as a wetland and received the protection of federal wetlands law, even if the land surface was mostly dry.

Allying himself with developers who resisted this science-based definition, Quayle pushed for a radical cutback in the law's protective coverage. A wetland, he urged, should be underwater a good part of the time, science be damned. Before the law could apply to a particular land parcel, he proposed, government needed to show that the land had standing water two consecutive weeks every year. Had the test been adopted (it was not), millions of acres would have lost legal protection and the rate of wetlands destruction would have gone up.

For Quayle, liberty was the freedom of a landowner to develop land as she saw fit, just as it had been for Dust Bowl farmers. The land, of course, was private property, and as Quayle understood the institution of property, it existed chiefly to protect liberty of precisely this leave-me-alone type. The grasses he talked about were more likely *Carex* or *Spartina* than the buffalo grass of western Kansas, yet his respect for them was no greater than what the Dust Bowl farmers showed for the short-grass prairie.

Quayle's defense of individual liberty did more than just challenge specific rules on wetlands. Indirectly it also bolstered resistance to a principle that had guided environmental protection efforts for a quarter century: the idea that those who harm the environment should be held responsible for their actions. In the pollution context this principle is known as "polluter pays," and it requires polluters either to compensate for the damage they cause or buy the technology needed to control it. The same idea logically applies to land uses. Wetlands play key roles in filtering pollution and are ecologically connected in complex ways to surrounding lands and waters. When wetlands are filled, pollution levels rise, flooding increases, and wildlife suffers.

Beginning in the 1970s, the "polluter-pays" principle informed new laws governing many forms of pollution, yet it encountered tougher going in the land-use arena. Landowners strongly resisted taking responsibility for the polluted runoff their land uses caused. They also resisted accountability when they destroyed wildlife habitat, altered water flows, and let their topsoil slide into waterways and reservoirs. Rhetorically, landowners framed their resistance in terms of liberty and private property. Environmental laws limited their liberty to do as they pleased, interfering with their rights as landowners to make profitable uses of their lands. To bolster their defense, landowners also crafted a different policy argument, one that soon echoed loudly throughout the land: Sound land use that conserved resources, landowners asserted, brought benefits to the public. When a landowner practiced conservation, the entire community enjoyed the resulting gains, not the landowner alone. When trees were preserved along rivers they provided good shade to help cold-water fish species. When farms retained pastures and hayfields, they slowed drainage and aided grassland birds. Given these widespread benefits, the landowner groups argued, shouldn't the community in fairness shoulder the associated costs?

In the legal literature, this policy question has been around for years, and its resolution centers on what is termed the "harm-benefit test." The test goes like this: If a law tells a landowner to stop a harmful activity, the landowner has no cause to complain. The law is halting bad behavior (industrial air pollution, for instance), which the public has every right to deter. But when a law goes beyond that, telling a landowner that she has to use her land in a way that benefits the public, then the landowner ought to be paid for the costs of compliance. The public is being benefited; the public should pay.

This harm-benefit test is easy to apply in many specific settings. A landowner who spews toxic pollution in the river can be told to stop and cannot expect payment. When a landowner instead is asked to donate land for a public park, the case falls clearly on the other side; compensation is due. But where did wetlands protection fit in? Did a law compel the owner to devote lands to wetland uses such as open space, flood buffering, and wildlife habitat, therefore promoting an array of public goods? Or did it, by stopping the potential loss of those benefits, halt a harm?

Vice President Quayle stood among those who believed that land ownership included the inherent right to develop land, with little regard for its natural features. Land was land, and the rights of ownership took no account of its variability. Conservation advocates for their part largely labored on the specific issues of the day: on floodplains, barrier islands, steep slopes, or whatever issue was drawing lawmakers' attention. As they pushed hard for limits on using sensitive lands they were nonetheless challenging assumptions about the meaning of owning land, yet rarely did conservationists frame their visions more fundamentally, in terms of the basic elements that private ownership should entail.

Today's observers, looking back upon the Dust Bowl, have little trouble seeing through some of the myths at work then, myths about individual power, the self-regulating market, and the human control of nature. But too many of the Dust Bowl myths are still clouding our vision, making it hard to perceive the path to healthier lands. Indeed, on issues relating to private land, some conservation efforts are heading us in the wrong cultural direction. Far from advancing us toward a sensible, ecologically informed understanding of private ownership, they are strengthening ideas of ownership that are distinctly miscast.

Many of the conservation problems on which America has made the least progress are those related to land—from the control of polluted runoff to urban sprawl to the protection of wildlife habitat. With 60 percent of the nation in private hands (more if Alaska is excluded), these lingering problems are inextricably linked to unwise private behavior. To promote conservation by private landowners, society must demand that they use their lands better. But the moment that idea rises up it collides with the cultural ideals of liberty and private property, as they are now understood. And from this collision it is but a short step to the now-popular claim that good land use benefits taxpayers and so should be funded by them.

This view of things is being bolstered by well-intentioned conservation strategies, used by governments and private groups. Encouraged by federal payment programs, farmers increasingly expect money whenever conservation measures reduce their crop yields. When development would harm a particular landscape, the growing practice is to avert it by buying up "development rights" or purchasing a conservation easement. And rather than banning landowners from destroying critical wildlife habitat (a ban that's quite legal under the federal Endangered Species Act), the Fish and Wildlife

Service is now prone to pay them to leave the habitat alone, sometimes under long-term leases that include payments exceeding the land's total value. A message is embedded in these payment schemes, and it's coming through loud and clear: To own land is to have the right to degrade it ecologically. Payments are based on this assumption, and they help solidify and perpetuate it. Payments make far less sense, and can become distinctly problematic, when the assumption is set aside.

Hardly any institution is more in need of critical thought than private ownership. It is, in truth, a more flexible, value-laden, communal institution than people realize. Over the generations the rights of landowners have been redefined, again and again, in an evolutionary shift that still goes on.

In northern Idaho today, landowners grow bluegrass to harvest for seed. To produce lush grasses the growers burn their fields after the harvest. Predictably, the burning produces smoke and soot that annoys neighbors. In June 2002, some of them went to court to assert their own property rights and to protect the particular liberty that was most important to them, the liberty to be free of such disturbances. It was a classic case, and a timely one. Liberty lay on both sides of the dispute: the liberty to use land as you see fit and the liberty to protect yourself when your neighbor's actions cause harm. As the dispute would soon show, yet another type of liberty also was present: the liberty of citizens to come together to make laws for the governance of their interconnected landscapes.

To avoid liability under Idaho's trespass-and-nuisance law, the grass growers turned to the political realm for protection. Aided by Republican Governor Dirk Kempthorne, the growers convinced the state legislature to enact a statute that exempted them from liability for damages caused by their burning. In their nuisance suit, then still pending in court, the neighbors promptly challenged this new statute's constitutionality, claiming that it took away their own property rights by authorizing physical interferences with their lands. The trial court agreed, but in August 2004 the Idaho Supreme Court reversed the lower court, siding with the grass growers. Property rights, the high court proclaimed, are based upon state law, and it is entirely proper for the legislature to change that law. If the legislature wants to favor grass growers over their smoke-harmed neighbors it has every right to do so. Like all law, property law is subject to revision, even in its fundamentals.

The judicial ruling in *Moon v. North Idaho Farmers Association* is useful in revealing starkly how private property works and, implicitly, why it exists. Just as the Idaho Supreme Court explained, lawmakers wield ample power to control the mix of rights that ownership entails. The U.S. Constitution does protect property rights, but to a smaller extent than people typically assume. It is not a serious check on today's lawmakers as they reconsider and reconfigure the limited rights that landowners ought to possess. The way that property rights of neighbors are necessarily intertwined within a landscape is also clear here: The law can protect one owner's liberty (here, the grass grower's) only by curtailing the liberties of others (the neighboring landowners).

In the common view, property exists only to protect the liberty of the owner, who can use her rights as a shield to ward off complaints about her behavior. Property does work this way, but as an explanation of the institution it is seriously incomplete and begins at the wrong end. Whenever the law recognizes private property rights it enables an owner to draw upon the coercive engines of the state—its police, courts, and prisons—to restrict the liberties of other people. Private property, that is, arises out of the curtailment by landowners of the liberties of all other people. For one owner's liberty to go up, the liberties of others must go down. This clash of competing liberties is easy to see when a landowner exercises her right to exclude outsiders: When the no trespassing sign goes up, the liberty of hikers goes down. The same interconnection runs through other elements of land ownership, and in pretty much the same way. To favor Idaho's grass growers and their profits is to reduce the liberty of neighbors to enjoy clean air; to protect the neighbors is to reduce the liberty of the growers. In such disputes—indeed, in the vast majority of property disputes—there is no true "pro-liberty" or "pro-property" position that one can take.

To see this point is to realize why property cannot be defined sensibly by starting with the idea that it is first and foremost an individual right. The beginning point has historically been elsewhere, in an understanding of the common good. Is the public interest furthered by allowing grass burning or, instead, by protecting homeowners in their quiet enjoyment of the land? Only when political processes have decided upon the public interest and where it lies can we then revise the rights of landowners so that they promote that common good.

Americans have largely forgotten the links between property rights and the common good, a principle once regularly summed up with the Latin phrase *salus populi suprema lex est*—the good of the people is the supreme law. Private property, in truth, is a morally problematic institution in that it gives owners the legal power to harm or restrict the liberties of other people. Such uses of public power are legitimate, as philosophers have asserted for centuries, only when a valid moral justification exists to support them. Dominant myths notwithstanding, it's been clear for generations that the only sound way to justify private rights in land is to point to the contributions property makes to the common good. That's what the Idaho legislature had in mind, or so one hopes, when it decided to favor the grass growers—it made a political choice that defined the common good as being best served by the freedom to burn fallow fields. The legislature's decision can be challenged on policy grounds, to be sure. But what ought to be clear is the primacy of the common good in resolving the dispute. Lawmakers have the right and, indeed, the moral duty to revise property laws, keeping them in line with society's changing needs and its evolving visions of the common good.

The American "right to property" has had varied meanings over time; to the founders of the nation the phrase's multiple meanings were quite different from those of today. Even greater change has taken place in the mix of rights and responsibilities that ownership entails. But ownership has never included the right to conduct activities that are deemed harmful to others. The Latin phrase for this do-no-harm rule, *sic utere tuo ut alienum non laedas,* literally commanded that an owner cause no harm, either to other landowners or to the surrounding community. Over the generations lawmakers have given varied content to this rule. Inevitably, what one generation has found harmful another has sometimes viewed otherwise, and vice versa. Does private ownership include the legal right to fill wetlands, to burn bluegrass, or to plow the prairie in semiarid lands? The answer is as simple as it is incomplete. It does if lawmakers say it does; it does if, on balance, the recognition of this right would, in the estimation of elected officials, foster the commonweal.

In the recent past American law has allowed landowners to alter nature freely; it has defined property rights in abstract terms, independent of the land's features. Developing land, taming the frontier—these were at one time deemed to be unalloyed public goods. So we thought, and so our law said. Yet, if property law and the culture of owning could change to permit and encourage industrial land uses, despite the harm they caused, so too could they change to embrace today's far different values and circumstances. Property is a shifting, socially responsive institution. It is up to people today to decide the kind of property system that best serves their collective needs; it is up to them to decide what forms of liberty private property will promote.

As he ended his poem, Archibald MacLeish hinted at the answer to the question he raised: What could liberty mean when the land ran out? He suggested that the future required Americans to relinquish the idea of liberty as individual license to act as one pleased and to embrace the liberty that Thomas Jefferson and his colleagues had rated so highly a century and a half earlier, the liberty of free citizens to make rules for their shared life. In the Dust Bowl, MacLeish could see, Americans had failed to exercise sensibly this collective, positive form of liberty. Individual farmers had made mistakes, but the failure of the Dust Bowl was at root a collective one, for it was a failure of lawmakers who allowed private owners to use their lands in ways that harmed the good of the whole.

MacLeish's form of liberty, of course, is exercised often in many realms of lawmaking. But landowners could exercise it more effectively. An intriguing step in that direction is being taken in Montana, where state law now allows 60 percent of the landowners in a region to petition their county to set up a planning and zoning district to keep out unwanted development, even over the objections of a minority of landowners. In the Bozeman Pass area, a critical wildlife corridor, landowners in 2002 invited the Sonoran Institute to help them with this process. The announced aim of their effort: "To establish a permanent zoning district in the Bozeman Pass that protects the rural agricultural character and natural values of the area and builds citizen leadership in county growth management efforts." That is precisely the liberty that MacLeish had in mind, and it may lead to new American ideas about ownership.

As for the kinds of changes that might be made to the rights of landowners, most evident is the need for lawmakers to keep doing what they have long done: implementing new ideas that reflect our greater understanding of what constitutes land-use harm, new applications of the old *sic utere tuo,* do-no-harm rule of ownership. Filling a wetland can easily qualify as harm, and be banned as such. Stripping trees along a waterway, altering natural drainage in a significant way, plowing an erodible hillside, building on unstable slopes, ripping up rare wildlife habitat—these and similar forms of ecological degradation can also be viewed as harms. At times and places we already see them that way. But the cultural resistance is strong, and today's conservation payment programs, public and private, suggest that we are now backtracking. To buy lands for the public to use is entirely reasonable, but to pay to halt damaging behavior is to honor and entrench ideas about ownership that are outdated and pernicious.

As new laws reflecting our new understanding of the common good are put into place, they will produce new applications of the longstanding harm-benefit test. Once particular land uses are deemed harmful, then laws that command better behavior and activities will not be viewed as unfairly seizing public benefits from aggrieved private landowners; they'll be viewed as halting harmful activities, just as property law has done for centuries.

Well-crafted laws that consider the great variations in nature will also have the good effect of tailoring landowner rights to the land itself. It is ecological foolishness to define landowner rights as if all tracts of land were alike. Rights in wetlands should not be the same as those in high and dry fields; rights in sloping lands or in biologically rich habitats need not be defined as if these natural conditions did not exist.

It is not just in clear cases of land degradation, though, where changes in property law might take place. The landowner's right to develop is by no means beyond scrutiny. So long as legislatures are evenhanded in their work they may significantly reduce development rights, just as lawmakers in other countries have done over decades. It is also not clear why landowners should enjoy the strong right to exclude outsiders that they now do. This right has not always been recognized, even in the United States. In some countries, such as Sweden and Great Britain, the public enjoys a right to roam and landowners can only exclude people to halt actual interferences with their land uses.

In the push for new laws, however, we would do well as a people to remember the Dust Bowl and the failure of the generation then in charge to foster new ideas of ownership. Property law is not a separate component in the land-use equation. It is intertwined with and dependent upon the larger culture and America's ideals. New land-use laws simply cannot outpace American culture, not by much and not for long. And so there is the need to work on the meanings of liberty and equality and on America's ingrained, costly practice of viewing nature in fragmented terms rather than as the complex, interconnected systems we know them to be. Let us recover modes of liberty that have to do with collective governance, as MacLeish suggested, and with the right to live in healthy places. Let us evolve a sense of equality that respects the equal moral worth of people while also respecting the great variety in our lands.

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