AGRARIAN PRODUCTION AND THE RIGHT TO EXCLUDE IN EARLY AMERICA

a preliminary and tentative interpretation

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(draft of February 13, 2006, notes largely omitted)

I

Landowners in the United States today possess extensive, nearly complete, powers to exclude outsiders from their lands. So accepted is this right that many view it as an indispensable element of ownership. For most of America's history, though, the situation was quite different. Particularly in the antebellum era and earlier, landowners enjoyed only limited rights to exclude. Owners of land often could exclude people and wandering livestock only from lands they had fenced and/or cultivated. This rule had vast economic, social, and political consequences, given the openness of America's landscapes. Its effects were particularly important in the American South–the region that most uniformly restricted this right. In that region, Texas included, fewer than 10 percent of lands were fenced or cultivated in 1850–varying from above 20 percent in Maryland, Virginia, Delaware, and Kentucky to less than 1 percent in Texas and Florida.[2] A full right to exclude was thus the exception for lands, not the norm. In other states at the time, landowners often possessed greater powers to exclude, at least to keep out wandering livestock. But local custom could sanction public uses of unfenced lands, particularly by hunters, and trespass actions could be hard to win. Everywhere, cultural and economic considerations could keep landowners from barring entry by neighbors.

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[2]Forrest McDonald & Grady McWhiney, "The South from Self-Sufficiency to Peonage: An Interpretation," *Am. Hist. Rev.* 85:5 (1980), 1099.

To phrase this arrangement in this manner–in terms of right to exclude–is to view it from the landowner's perspective. It is to define the arrangement in terms of a legal right that is incomplete. An alternative approach is to assess it from the other side, in terms of rights possessed by the public to enter and use otherwise private lands. From the first perspective the closing of rural lands gave landowners what they implicitly deserved all along; it added the missing piece in their bundle of rights. From the other side, the closing of rural lands involved the termination or seizure without compensation of valuable use rights held by others. When we use this second, less common perspective a number of questions immediately arise. What rights did the public have, and which members of the public held them? Were these rights securely fixed by law or were they based on local customs that courts might or might not uphold? Indeed, were the public's use rights based on little more than the inaction of landowners, who could exclude whenever they chose? Finally, how were these land-use rights embedded in larger social, economic, and intellectual orders?

Though its details are not really known, the long-term story of rural land-use rights is easy to relate. Step by step, landowners gained greater powers to exclude people and animals. This legal change unfolded in varied ways in different places–not just state by state but county by county and even at smaller spatial scales. No doubt it was viewed quite differently by the many people it affected. There were winners and losers. Political power played a role in the shift, just as the shift, once completed, itself realigned political relations.

These land-tenure arrangements are not well remembered, certainly not by legal scholars and courts. Nor is mention made of them in standard surveys of property law, including those that devote substantial space to history. Indeed, to judge from casebooks commonly used in law schools, land ownership has always included, and perhaps by definition includes, something close to a total right to exclude. In the 1980s, legal journals began circulating claims that land ownership inherently included the right to exclude, and that this stick in the bundle of entitlements was specially protected by the Constitution. Few scholars dissented or pointed to the nation's long embrace of a much-different rule. These claims were based on several U.S. Supreme Court

decisions that were, in fact, more carefully phrased; the Court talked narrowly about an inherent landowner right to resist "permanent physical invasions" of the land. In common parlance, though, this power became the right to exclude. In the soon-popular interpretation, this specific right enjoyed greater constitutional protection than other landowner rights.

America's historical record contains extensive evidence that rural lands were long open to public uses of various types. Hunting and fishing were freely allowed. So was the grazing of livestock and public travel.[3] Public uses presumably included a variety of foraging activities, including the collection of firewood, but these activities so rarely drew sustained comment that evidence is anecdotal and hard to find. Public uses of rural lands varied in time and space–that much is clear–and there is much that awaits learning. Little is known, too, as to how these use rights were understood by various people and how and why they changed over time. The issue of change is especially important if we are to figure out why many of these rights diminished and even ended. What were the forces at work? Economics no doubt played a key role. But economic forces create cross currents, at once pressing landowners to seek greater rights to exclude and pressing public users to defend their rights vigorously. As with any legal change, we need to see who controlled the law-making processes. And in the case of private property–an institution that Americans hold dear–we need to attend particularly to the influence of inherited ideas. The more revered an institution is, the more citizens are likely to avoid tinkering with its core content. In the case of private land, however, what was that core content, and whose view of it should take precedence? Liberal individualism was on the rise, but this cultural strand also pushed both ways–encouraging landowners to demand greater rights while encouraging the landless poor to defend their liberties to use open spaces. The development, overall, was complex.

Writing late in the 19th century, Oliver Wendell Holmes offered one interpretation of the prevailing land-tenure arrangements in rural areas. "The strict rule of the English common law as to entry upon a close," Holmes stated in a Supreme Court ruling, "must be taken to be mitigated

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[3]On livestock conflicts in early America, see Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford U. P., 2004).

by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country."[4] Holmes recorded these rural land-use practices and at the same time fit them into known legal categories. Rights to use unenclosed areas, Holmes asserted, were based on local custom–which is to say on arrangements that did not amount to law. Users possessed merely a "license,"a form of non-proprietary right subject to termination at any time. Whenever the landowner saw fit, she could prohibit further entry. As a matter of property rights, in short, the arrangement was simple. The landowner held property rights; public users of unenclosed land did not.

Holmes was an ardent defender of the common law. By viewing rural land uses this way he stuck close to that body English law, which gave landowners broad powers to exclude outsiders. What Holmes did not note was that many states had expressly altered this law. In those states, the rights of rural wanderers were not mere licenses. Holmes also failed to note that the common law as expressed by England's royal courts was not the only understanding in early America as to what ownership entailed. Land ownership was a contested idea. All Americans might support private property (and want more of it personally), but they held conflicting views about what qualified as property and the appropriate powers of owners. A distinctly different conception of ownership was apparently common among Americans whose lineage traced to the northern and western parts of Britain and Ireland. In regions of Britain controlled by Celtic peoples–often hostile to English ideas–land-use arrangements differed widely from the norms espoused in Westminster. We must be slow, then, to accept Holmes's understanding of the situation, even if it became the standard explanation. To make sense of the record we need to look carefully and be open to alternatives.

British historians have long studied the waves of land-tenure change known as enclosure. Movements to enclose lands occurred in Britain over several centuries (sixteenth to nineteenth, mostly), ushering in substantial change to land-use practices. Some enclosure took place when

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[4]McKee v. Gratz, 260 U.S. 127, 136 (1892).

owners of scattered strips of land exchanged them with neighbors to form single, larger tracts that the owner could physically enclose. More controversial were the enclosure steps taken by larger landowners to rid their lands of users who possessed tenurial property rights of one type or another in them. Then there were the Parliamentary-approved steps taken to enclose common lands by directly eliminating individual use rights in them, often through the issuance of allotments to excluded users. These latter forms of enclosure draw particular attention from historians because they squeezed out small holders involuntarily. Overall, enclosure brought economic gains. But the social dislocation was considerable and many enclosures were unfair. In any event, enclosures transformed the rural landscape, pushing rural dwellers into cities and fueling industrialization.

Given the prominence of this British history, one wonders why American historians do not also speak of an enclosure movement in the United States. The fact of enclosure is undeniable. Landowners across the country evicted public users who had hunted, fished, foraged, and grazed livestock on their lands. Given how much of the country was open to public use–by local residents if not always outsiders–this enclosure effort would seem to constitute a major chapter in U.S. history. Yet it does not, except among historians of Western grazing. When the issue does draw notice it is often framed as a technical dispute over fencing: Who should bear the cost of constructing fences, either the livestock owner or the cultivator who wants to keep animals away? But far more was at stake. Why, then, the relative silence on this issue? This question, too, fits into the larger inquiry. Is it possible that the issue's relative invisibility is part and parcel of the very reason why the enclosure itself took place without greater fanfare? That is, might the intellectual currents and power arrangements that allowed enclosure to take place without greater resistance also explain why historians and legal scholars have mostly overlooked the process?

One enclosure story that historians do occasionally tell–a story largely ignored here–has to do with the partial enclosure of town commons established in New England and elsewhere. Many town studies have recorded shifting use practices on these commons and charted the steps taken by towns to fragment them. When discussed, though, this issue is typically viewed as

discrete–involving only lands expressly set aside as commons–and not part of a larger story about declining public rights generally. Disputes over one town commons are recounted in a recent study[5] into a well-known judicial ruling on property rights–the 1805 decision by the New York Supreme Court in *Pierson v. Post*.[6] The dispute involved the ownership of a dead fox, which Post had started and was chasing until Pierson intervened and killed it. An illustrious judicial panel in a split decision ruled that ownership of a wild fox on an "unpossessed and waste land" went to the first person to take physical possession of it; the hunter (Post) did not gain ownership just by hot pursuit and an apparent ability to consummate the capture. The ruling is commonly viewed as dealing with the origins of private rights in an unowned object. According to Bethany R. Berger, however–whose study is now the most detailed–the dispute arose on a town commons (in Southampton, New York, at the west end of Long Island) and really had to do with rights to use that commons. Pierson belonged to a long-established family that held original rights in the commons. Post belonged to a newer and newly wealthy family that lacked such rights. As Berger explains, Southampton was founded by English settlers from Lynn, Massachusetts, who immediately designated lands as commons. As early as 1648, though, they divided rights in the commons among current property owners in a way that excluded later arrivals from automatically acquiring use-rights. (All members of the public, though, possessed rights to use rivers for fishing, fowling, and navigation.) Over time, portions of the Southampton commons were broken off. As the local population grew a declining proportion of residents held rights to use it, giving rise to conflict. Post's attempt to hunt foxes on the commons added another layer to this conflict: would the commons "be used for leisure activities of the wealthy or to support the agricultural pursuits of the town's original settlers."

Similar stories could be told about other lands set aside as town commons or otherwise unallocated to families. Some portions were removed from commons status and conveyed to

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[5]Bethany R. Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post*" (forthcoming).

[6]3 Caines R. 175, 2 Am. Dec. 264 (1805).

individuals. This enclosure movement–less pronounced than in England–deserves a better telling. In terms of acres involved, though, this enclosure chapter surely is trivial compared to the enclosures that took place on lands initially granted to individual owners. That is the story that needs telling. It affected not hundreds of acres here and there but hundreds of millions almost everywhere.

II

In the early 1850s, a train in Alabama collided with and killed a cow that had wandered onto its tracks. A state statute made the railroad liable for the death of livestock unless the company could show that "the killing was the result of accident, which could not have been controlled by the company by the exercise of the greatest degree of diligence and care." The incident was not unusual, nor was it presumably unusual for the railroad to resist liability by claiming the animal had trespassed. On appeal in the case, the Alabama Supreme Court admitted that the animal's wandering qualified as trespass under the English common law. But that part of the common law, the court reminded readers, was never adopted in Alabama. Under the laws that did apply, both common law and statute, the unenclosed lands of the state were a "common pasture for the cattle and stock of every citizen."[7]

A few years later a similar dispute reached the highest court in Georgia. This time the dead animal was a horse. Again, the railroad asserted that the animal was trespassing. Though state law was clear the court nonetheless paused to explain how drastically the railroad's proposed revision of land-tenure relations conflicted with the economic and legal regime then in effect:

> Such Law as this [labeling the horse a trespasser] would require a revolution in our people's habits of thoughts and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the "wire grass," without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of

[7]Nashville & Chattanooga Railroad Co. v. Peacock, 25 Ala. 229 (1854).

trespassers. We do not think that such is the Law.[8]

The railroad industry challenged this established rule more forcefully in a dispute that reached the highest court of Mississippi in 1856.[9] The railroad used the dispute as a test case and pressed hard for a change in the law. The railroad's lawyers briefed the matter exhaustively; plaintiff's counsel responded in kind. Counsel for the railroad pointed to the English common law of trespass and noted that several Northern states applied it. There, landowners could insist that livestock stay off their lands. An animal owner was liable for any damage caused by a trespass and had no remedy if a train killed an animal. Realizing the importance of the case–and attempting, one suspects, to gain visibility for himself–the plaintiff's lawyer, George L. Potter, elevated the stakes. He opened by challenging the moral status of corporations and the industrial ethos they represented:

> I suppose the case will be argued for [the railroad] on the broad ground that this is an age of progress, and all are bound to stand aside at the hazard of consequences from collisions with the fast men of the age. The theory of the defence was, that the common law–the old feudal rule–prevails here, and the owner of stock is bound to keep them fenced in–that they are trespassers on the range. That defendants–a railroad corporation–has a charter privilege to run at unlimited speed, and is bound to meet the exactions of this manifest-destiny era of progress; and, in a word, that the whole community is to act in subservience to the antics of a railroad company, incorporated for the supposed good of that community.

In Potter's view, the railroad was attempting to avoid "the observance of those great rules of social duty which are the very bulwark of society," inaugurating "a corporate despotism."

> The [railroad's] argument proceeds to the bold length, that the public is become the slave of this corporation, created for its convenience; and I must say, they are able to show decisions, but no law, for this strange assertion. They cite the English rule to show, that a beast, straying upon a railroad track, is a trespasser; and then cite certain American railroad mania decisions, which declare the company not liable, though such beast is destroyed by its gross negligence. It is needless to say all such decisions are a gross perversion of the English law; and they were never heard of until the courts made the "fast trains" their seats of justice.

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[8]Macon & Western Railroad Co. v. Lester, 30 Ga. 911 (1860).

[9]Vicksburg & Jackson R. Co. v. Patton, 2 George 156, 31 Miss. 156 (Miss. Err. & App. 1856).

Not content with arguments of law and policy Potter wove into his presentation a threat. If the court sided with the railroad, he predicted, Mississippi livestock owners might respond with justice of their own–as similar grazers had done in Michigan–with "secret organizations for the destruction of tracks and depots, attempts to throw off trains, &c."

In its opinion siding with the livestock owner, the Mississippi high court surveyed decisions from other states, noting the split among them. It also presented utilitarian arguments based on the lower overall cost of fencing animals out rather than in. The circumstances in Mississippi, the court emphasized, were much different from those in England, as were the customs and understandings of the people:

> This State is comparatively new, and, for the most part, sparsely populated, with large bodies of woodlands and prairies, which have never been enclosed, lying in the neighborhoods of the plantations of our citizens, and which, by common consent, have been understood, from the early settlement of the State, to be a common of pasture, or in the phrase of the people, the "range," to which large numbers of cattle, hogs, and other animals in the neighborhood, not of a dangerous or unlawful character, have been permitted to resort.

A private owner of land, the court made clear, could fence in his lands at any time, "but until he does so, by the universal understanding and usage of the people they are regarded as commons of pasture, for the range of cattle and other stock of the neighborhood." Thus, the common law of ths state, together with various fencing statutes enacted by the legislature, clearly recognized "the right of any owner of horses, cattle, or other stock, to put them in the range, which means the unfenced wood lands, or other pasture lands in the neighborhood."

One way to gauge the effect of this legal rule is to look at the land that it covered–the vast majority of the antebellum South. Another measure is to consider the value of Southern livestock. One pair of historians, dismayed by the long-standing focus of historians on cotton, offer the following summary:

> The value of Southern livestock in 1860 was twice that of the year's cotton crop and approximately as much as the value of all Southern crops combined. At first the comparison may seem inappropriate, since only about one-fifth of the animals were slaughtered for market. Another three-fifths of the hogs, however, were slaughtered for home consumption, which means that the value of the annual swine "crop" was 80 percent

> of the total value. Moreover, virtually all of the gross sales of livestock was net profit, whereas the profit margin in crops was relatively slender and uncertain.[10]

Most livestock production, apparently, sustained household economies. But enough production was diverted to markets to support an entire category of livestock workers–the drovers who collected animals and led them to market, often over long distances. They, too, used the rural landscape as a commons, delivering animals to market and feeding them along the way.[11]

Wandering livestock apparently posed the most conflict between landowners and other users of open lands. But the public's use of unenclosed land went well beyond grazing. In a much-cited study of upland Georgia in the decades before and after the Civil War, Steven Hahn found evidence of widespread public uses of open lands for various foraging activities.[12] Other scholars have found similar evidence. So long as they could use these unenclosed lands, rural dwellers could survive owning little or no land of their own. For many, this freedom undoubtedly fueled senses of economic and social independence. It also stimulated political pressures (largely successful) to eliminate land-ownership requirements for suffrage.

Probably second in importance to livestock grazing among these public uses was hunting. If we can judge from disputes that wound up in court, landowners were less concerned about hunters and lost game than they were about the horses that hunters rode and their accompanying dogs. Hunters on horseback could damage crops and disturb farm operations. One such conflict reached the South Carolina Supreme Court in 1818.[13] The facts were simple and stark. A hunter

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[10]Forrest McDonald & Grady McWhiney, "The South from Self-Sufficiency to Peonage: An Interpretation," *Am. Hist. Rev.* 85:5 (1980), 1106-07.

[11]Forrest McDonald & Grady McWhiney, "The Antebellum Southern Herdsman: A Reinterpretation," *J. South. Hist.* 41:2 (1975), 159-60.

[12]Steven Hahn, The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia Upcountry, 1850-1890 (New York: Oxford U. P., 1983), 58-63; Steven Hahn, "Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South," *Radical Hist. Rev.* 26 (1982), 37-64.

[13]M'Conico v. Singleton, 9 S.C.L. (2 Mill.) 244 (S.C. 1818).

on horseback arrived at the edge of "unenclosed and unimproved lands." The landowner, on the scene, ordered the hunter to keep off. The hunter disobeyed and the landowner sued in civil trespass, only to lose at trial and again on appeal. The resulting legal opinion is noteworthy because the court resolved the dispute based not on any limitation on the rights of the landowner but on the hunter's positive right to enter. At issue, the court announced, was "the right to hunt on unenclosed and uncultivated lands," a right that "has never been disputed, and . . . has been universally exercised from the first settlement of the country up to the present time." This right to use open lands, the court related, was a source of food and raiment for "a great portion" of the state's citizens. From the beginning, "the forest was regarded as a common, in which they entered at pleasure." So important was this right that, "obedient as our ancestors were to the laws of the country, a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege." Apparently this public right was broad; on enclosed lands the very grass itself, the court explained, was regarded as "common property." That this was a positive right of citizens the court made clear in its concluding paragraph. Given this legal status, "the dissent or disapprobation of the [land] owner" made no difference. "It never entered the mind of any man, that a right which the law gives, can be defeated at the mere will and caprice of an individual."

South Carolina law remained stable for decades, yet we can detect in a ruling from 1847 a shift in reasoning; a hint of what was to come.[14] The later case involved unusual facts: the private land was an island (eight miles by three-quarter miles) and the owner occasionally charged people fees to hunt on it. A hunter entered the land and killed a deer without the owner's consent; the landowner sued for trespass. In its ruling, the court reasserted that citizens held secure rights to hunt on unenclosed land, but it quickly turned its attention to the idea of "enclosure." Was the water surrounding the island, the court asked, sufficient to qualify as an enclosure so as to defeat this right to hunt? The court sought guidance in the state's fencing law on livestock, which treated a "deep, navigable stream" as equivalent to a fence. The right to hunt stemmed from the same

[14]Fripp v. Hasell, 32 S.C.L. (1 Strob.) 173 (S.C. App. 1847).

common law rule as the right to graze livestock on the range. It thus made sense, the court reasoned, that a waterway that was a fence for one purpose was an enclosure for the other. Because the waterway qualified as an enclosure, the island was enclosed and the hunter had trespassed. On the surface the reasoning seemed sound, but it concealed an important shift in thinking. The fencing law dealt with *cultivated* fields; when surrounded by navigable waterways, these fields did not require fencing. The island in this dispute, however, was *uncultivated*, which was to say unimproved. In the court's view, a fence seemed even less necessary when the island was uncultivated; after all, there were no crops to protect. But this raised the question: Why was the fence required? If its purpose was to protect crops then the court's reasoning made sense. But it made no sense if the rationale for fencing was quite different–to demonstrate that the owner had mixed labor with the land and improved it, thereby securing his moral claim.

Hunting cases such as these rarely produced reported appellate opinions. Still, we have plentiful evidence that rural areas were commonly open to hunting and that citizens cherished their right to hunt.[15] In its 1777 state constitution, Vermont guaranteed to all citizens the "liberty, in seasonable times, to hunt and fowl on the land they hold, and on other lands not inclosed."[16] (It similarly protected a right to fish on all "boatable" waters, regardless of ownership.) Pennsylvania included in its constitution a right to hunt on open lands,[17] and the state's delegation to the Constitutional Convention proposed to add the provision to the federal constitution.[18] In a study

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[15]*E.g.,* Stuart A. Marks, *Southern Hunting in Black and White: Nature, History, and Ritual in a Carolina Community* (Princeton: Princeton U.P., 1991).

[16]The provision is discussed and applied, in a dispute that turned on the meaning of "inclosed," in Payne v. Gould, 52 A. 421 (Vt. 1902).

[17]William Penn's Frame of Government of 1683 granted to colonists the "liberty to fowl and hunt upon the lands they hold, and all other lands therein not enclosed; and to fish, in all waters in the said lands." Frame of Government of Pennsyvlania §XXII (1683), reprinted in 8 Sources and Documents of United States Constitutions 263, 266 (William F. Swindler, ed 1979).

[18]Thomas A. Lund, *American Wildlife Law* (Berkeley: University of California Press, 1980), p. 25.

of Kentucky in the late eighteenth and early nineteenth century, Stephen Aron found widespread public uses of rural lands for open hunting.[19] Anecdotal evidence from elsewhere abounds.

Particularly engaging evidence on rural hunting comes from the famous memoir of William Elliott, *Carolina Sports by Land and Water*, first published in 1846. Writing as "Venator" and "Piscator" Elliott regaled readers with his exploits of devil-fishing and wildcat hunting. He could see, though, that wild game was declining and that the era of the open-range would soon have to end. The main cause of game disappearance, he reported, was habitat loss, particularly deforestation and increased cattle grazing in woods. A further cause was the rise of market hunters who served hotels and the "private tables of luxurious citizens." Elliott confirmed that "the right to hunt wild animals" was "held by the great body of the people, whether landholders or otherwise, as one of their franchises." The practical effect of this right, he explained, was that a man's rural land was "no longer his, (except in a qualified sense,) unless he encloses it. In other respects, it is his neighbors' or any bodys.'" The public could graze animals and harry an owner's livestock with hunting dogs. So entrenched was the right to hunt, Elliott reported, that some people desired "to extend it to enclosed lands, unconditionally,–or, at least, maintain their right to pursue the game thereon, when started without the enclosure." Even when lands were enclosed owners had trouble halting public users. Proof of trespass was hard to present, juries were "exceedingly benevolent," and the "the penalty insufficient to deter from a repetition of the offence." Though a devout hunter and wanderer, Elliott recognized that things could not continue. Unless laws changed, landowners would be unable to protect and preserve game on their lands and the noble sport of hunting would end.[20]

Related to this hunting right was the similar right of citizens to fish and gather mollusks in navigable waterways. Disputes here related to private land when they dealt with the definition of

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[19]Stephen Aron, "Pigs and Hunters: 'Rights in the Woods' on the Trans-Appalachian Frontier," in Andrew R.L. Clayton & Fredrika J. Teute, eds., *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750-1830* (Chapel Hill: U. N.C. Press, 1998).

[20]William Elliott, *Carolina Sports by Land & Water, including the Incidents of Devil-Fishing* (New York: Arno Press, facsimile ed. 1967), 166-72.

navigability and with rights to use the foreshore–the area between high and low tides. American states deviated from the English rule by including as navigable all waterways that were navigable in fact, not just those subject to the tides. These were open to public use without regard for ownership of the underlying land–not just for fishing but for fowling and, in some states, trapping. The public could also forage on privately owned land in the foreshore. Thus, in an 1811 ruling a Connecticut court clarified public rights to collect shellfish. Even when the foreshore was privately owned, the court ruled, "every subject" possessed the right to dig for shellfish.[21] Similar rulings protected the public's right to harvest seaweed on privately owned foreshore.

Stray judicial rulings on other land-use questions help round out this antebellum understanding of the unenclosed landscape. Two unusual decisions came out of South Carolina. One, from 1831, involved a landowner who sued the colonel of a militia company for using his unenclosed land as a mustering ground. The court had little trouble with the general idea: "Until inclosed, or appropriated in some other way to the owner's exclusive use, [the owner] is regarded as permitting it to be used as a common for hunting, pasture, and militia training." What troubled the court was the militia's removal of "a hundred or a hundred and fifty old field pine-saplings." Yet this conduct, the court decided, was merely incidental to the use of the land as a mustering ground and therefore also lawful. This was true, the court announced, at least so long as the landowner did not object in advance to the tree cutting.[22] Four years earlier the same court similarly upheld the right of road commissioners to remove private trees when needed for roadways. This time, the court needed to find an alternative legal theory to uphold the action since the trees were enclosed by fence. The court justified the tree cutting on the ground that every land grant included "a tacit reservation" of public rights to use timber for road building. Only in the case of ornamental and cultivated trees could the landowner object.[23]

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[21]Peck v. Lockwood, 5 Day 22 (Conn. 1811).

[22]Law v. Nettles, 2 Bail. 447, 18 S.C.L. 447 (S.C. App. 1831).

[23]Eaves v. Terry, 4 McCord 125, 15 S.C.L. 125 (S.C. App. 1827).

The pro-development ethic displayed in this last road-building case showed up in many settings in early America, often having to do with the siting of watermills. An unusual illustration of this developmental ethic–important because of the idea's proponent–arose in Virginia around 1790. James Madison, then penning the Bill of Rights, proposed to the Virginia legislature a bill to promote mining in the state. Under the bill, any person accompanied by a justice of the peace could enter private land and prospect for minerals. If any were found, the discoverer had rights to mine them, subject only to an obligation to pay for surface damages to the land.

The larger story that includes these various installments has not been fully told. The overall course of the story, though, is known. By the late nineteenth century, public use rights had declined nearly everywhere. Western ranges remained open and public hunting was still widely accepted. But public rights were in retreat. One place where they remained strong was in northern New England, according to Richard Judd in his history of early conservation efforts.[24] Many residents engaged in foraging in the vast expanses of forest, mostly owned by large timber companies. Others used forests to sustain a flourishing tourist trade, including hunting guides who took customers deep onto private lands. Early in the twentieth century the whole arrangement was called into question in Maine when the state proposed to regulate timber harvesting. In their efforts to resist regulation major forest owners pointed to these public uses, threatening to challenge them. Their efforts largely worked; Maine refrained from regulating timber harvesting while the timber companies agreed to allow public forest uses to continue without interference. Commercial blueberry cultivators in the region were unwilling to make such a compromise, however. The public had a right to gather berries in the forest, the cultivators admitted, but that right did not extend to stealing blueberries from cultivated fields.

We can end our survey with a tale from the Adirondacks. An eccentric and reclusive millionaire from outside the area, Orrando P. Dexter purchased an enclave of 7,000 forested acres. Local residents had long used the land to hunt, fish, and collect firewood as a matter of

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[24]Richard W. Judd, *Common Lands, Common People: The Origins of Conservation in Northern New England* (1997), 58-120.

customary right. Upon taking title Dexter rimmed his estate with no-trespassing signs. When local residents ignored the signs Dexter issued warnings and then prosecuted for unlawful entry. On a chilly September afternoon in 1903, while driving his buggy down his lengthy driveway, Dexter was shot in the back and killed. According to an historical account, "even the local school children knew the name of the murderer, but no charges were ever filed."[25]

Public use rights, so common when the nineteenth century began, did not end simply because men like Dexter created private retreats. Powerful economic forces were at work. According to one historical study, the open ranges of the South largely ended when it became cheaper to fence-in livestock rather than fencing them out.[26] Many citizens were spending less time on foraging and other subsistence production and more time on market-centered activities, particularly as good roads and railroads permeated their regions. (This force, according to Altina L. Waller, largely motivated the notorious Hatfield-McCoy feud along the Kentucky-West Virginia border in the 1870s and 1880s.[27]) Deforestation also played a part: when timber for fencing because scarce and expensive, pressure mounted to save cultivators from the high cost. The sheer expansion of cultivation no doubt played a major role as did political factors, including continuous pressures from railroads to keep livestock under control. To varying degrees, we can assume, aesthetics fit in, too: wandering livestock could leave a landscape looking ill-tended to the dismay of local boosters. If Steven Hahn is correct, the closing of the range in the post-war South was linked to deliberate efforts to keep freedmen in states of economic dependence.

Along with these largely material factors, it seems, were a constellation of intellectual ones. Ideas were also at work in this assault on public rights, particularly ideas linked to law,

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[25]Phillip G. Terrie, *Contested Terrain: A New History of Nature and People in the Adirondacks* (Syracuse, NY: Syracuse U.P., 1997), 123.

[26]Shawn Everett Kantor & J. Morgan Kousser, "Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South," *J. So. Hist.* 59:2 (1993), 201-42.

[27]Altina L. Waller, *Feud: Hatfields, McCoys, and Social Change in Appalachia, 1860-1900* (Chapel Hill: University of North Carolina Press, 1988).

individual rights, and the vital institution of private property. It is to these intellectual currents that I want to pay particular attention. How did ideas about using rural lands fit together with the legal and political ideals of the era? And what ideas and intellectual currents either motivated or facilitated this realignment of land-use rights? Going further: Could these currents help explain why enclosure entailed so little resistance and why legal scholars and American historians ever since have shortchanged it? To judge from most writing, the end of the open-range was not just economically inevitable but morally and intellectually proper. If this was the widespread assumption, can we identify why it was so–and whether and how the ideas underlying that assumption might still shape our thought today?

III

One place to start, in unraveling ideas about property and land use, is with the idea of a "right to property." Property was important to America's founders, and has been ever since. Yet what has "property" meant over time, particularly when understood as an individual right? The historical record is murky, and understandably so. Many proponents of a right to property have likely had only vague notions about the term, or assumed that audiences understood the right the same way they did. One influential interpretation of the right of property centered on a person's ability to gain access to it.[28] According to William B. Scott, the "right to property" in late eighteenth-century ideology was perhaps preeminently a right to *acquire* property readily; a right of opportunity, not merely a defense of property already owned.[29] Thomas Jefferson is remembered for his comments about the desirability of widespread ownership. Yet Jefferson was equally emphatic on the need to break-up large landholdings and otherwise help the landless gain

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[28]Discussed in Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* (Washington, DC: Island Press, 2003), 52-55.

[29]William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington, IN: University of Indiana Press, 1977), 36-58.

control of their economic lives. “Whenever there is in any country, uncultivated lands and unemployed poor,” Jefferson asserted, “it is clear that the laws of property have been so far extended as to violate natural right.” In his draft constitution for Virginia, Jefferson included a provision granting to “every person of full age” a right to 50 acres of land if the person did not own and had not owned that much land. (Virginia rejected Jefferson’s provision; Georgia implemented it.) 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.”

This idea of a right to easy access has a lengthy history in the United States. Homestead laws incorporated it, as did policies of selling public land at low cost. Acreage limitations were routinely included in public land laws to curtail speculation and reserve land for ordinary citizens. Early in the twentieth century, Gifford Pinchot used the rhetoric to justify his top-down conservation policies, particularly waterway development. Underlying property-as-access was the widespread desire of Americans to gain economic and political independence, to acquire a “competency” or homestead sufficient to avoid domination by others. When the right to property is understood this way, it easily supports public rights in unenclosed lands. And as Jefferson’s quote indicates, the reasoning can call into question the moral legitimacy of ownership rights of large landowners who neither enclose nor improve what they own. A failure to enclose could indicate, and often did, that they owner had more land than he needed. Land hoarding could violate the “right to property” of the landless.

Ideas such as these, if widely held, would have helped justify public use rights in early America. Similarly, the decline of these ideas over time–from literal moral commands into something vaguer and more nostalgic–could have helped pave the way for growing landowner rights to exclude. When the landless poor held a right of access to land, they could use that right to counter the interests of owners of unenclosed lands. As that right of access lost popular support, the only property right left was the landowner’s.

This first line of thought–the “right to property” as a right of access–is linked to a second

one, also seemingly important: the natural-rights reasoning that provided the moral foundation for all land ownership. Hardly had English settlers stepped ashore in America than they began using natural-rights reasoning to question the legitimacy of Indian land claims.[30] By English standards Indians did not use land intensively nor did they fence it. The labor theory of ownership was known and linked to the rightful possession of land, even before Locke. Because Indians had not mixed their labor with their lands–at least not enough labor and not in ways that colonists understood–they really did not own them. It was thus morally legitimate for colonists to take them away. Supporting this dispossession was another, related line of natural-rights thinking: the idea that a person could rightfully own only so much land as he needed and could use. These strands of thought, present from the beginning, apparently retained a hold on the frontier mind, where the dispossession of Indians continued. But how seriously did settlers take this reasoning, and to what extent did they also apply it to property claims of white settlers? Natural-rights reasoning apparently mingled with frontier resentment at large land grants made to absentee owners. To at least some Americans, the property claims of such owners were suspect when their lands were left unimproved and unenclosed. One bit of evidence on the issue comes from a study of land-use practices in portions of southeastern Delaware in the late eighteenth and early nineteenth centuries.[31] In this region of mixed farms and forests, local people distinguished clearly between two types of land–cultivated farm areas and untended forests–and held quite different ideas about rights to use them even though all were privately held. Farms were used exclusively by their owners; forests were subject to extensive, entrenched public use rights.

This strand of moral rights reasoning no doubt played some role in the many statutory requirements that homesteaders use or develop their homestead claims in order to gain title to

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[30]Wilcomb E. Washburn, "The Moral and Legal Justifications for Dispossessing the Indians," in James Morton Smith, ed., *Seventeenth-Century America: Essays in Colonial History* (New York: W.W. Norton, 1972), 15-32. The persistence of this reasoning in frontier Kentucky is noted in Aron, *supra* note 19.

[31]Bernard L. Herman, *The Stolen House* (Charlottesville: University of Virginia Press, 1992).

them. It showed up even more clearly in statutes and measures that colonies and early states used to seize private lands that had gone unimproved or unused.[32] Good sites for water-powered mills could be seized if an owner did not develop them.[33] In the West, according to an important study by David B. Schorr, this reasoning played a role in the emergence of the prior appropriation system of water allocation, which gave water only to those users who actually diverted the water and applied it to a beneficial use; water could not be claimed by non-using speculators who simply acquired tracts of riparian land.[34] In 1872 and again in 1882, West Virginia enacted statutes that authorized the state to reclaim lands on which no improvements had been made; although the statutes were aimed at challenging large speculative grants they applied much more broadly.[35]

This natural-rights reasoning would have called into question landowner rights in unimproved and unenclosed lands. Owners may have held title, but their moral claims remained incomplete until they mixed labor with the land. Until then, the public might properly enter the lands and use them. As the nineteenth century progressed, this natural rights reasoning became more controversial. The labor theory was taken up by social reformers, who pressed economic-justice claims on behalf of employees, tenants, and even slaves to the fruits of their labor. Recoiling from these claims, defenders of the industrial age resorted to utilitarian justifications for private land ownership–justifications that did not require owners to improve their lands. Karl Marx's prominent use of the labor theory apparently had little effect in the United States, but

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[32]John F. Hart, "Forfeiture of Unimproved Land in the Early Republic," *U. Ill. L. Rev.* (1997), 435-51.

[33]John F. Hart, "The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property," *Am. J. Legal Hist.* 39 (1995), 1-14; *ibid*, "Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859," *J. Legal Studies* 27 (1998), 455-71.

[34]David B. Schorr, "Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights," *Ecology L. Q.* 32:1 (2005), 3.

[35]Altina L. Waller, *Feud: Hatfields, McCoys, and Social Change in Appalachia, 1860-1900* (Chapel Hill: University of North Carolina Press, 1988), 148-49.

Henry George's writings certainly did. George used the labor theory to explain why landowners did not really deserve to claim rises in land values caused by the efforts of other landowners and surrounding communities. If vacant land rose in value because a city was built around it, why should the landowner claim that value, George asked? The value was created by the community and the community should benefit from it.

This declining popularity of natural-rights reasoning gives rise to a second interpretive hypothesis: Did the power of natural-rights reasoning help support public-use rights in early America, and did the decline of this reasoning during the nineteenth century then help landowners gain broader rights to exclude from unimproved and even unneeded lands?

From natural rights we can take the small step to the ideal of liberty and its similarly shifting meanings in America. Like property, liberty was a core American value. Yet, what did it mean at various times and to various people? In discussions about private property today, liberty seems to reside on one side–the landowner's. Thus, liberty goes down when regulations restrict what an owner can do. Americans of two centuries ago, however, knew better than this. Liberty came in many forms and land ownership itself entailed a substantial loss of liberty. When landowners erected no-trespassing signs the liberty of people to use the countryside went down. During the revolutionary era, according to Michael Kammen, an important strand of liberty was the right of citizens collectively to make laws for their well-being.[36] This was what "self-rule" was about–not a negative, individual liberty to resist government but a positive, collective power of people to govern themselves. When early Americans talked about their nation as a land of liberty, they clearly meant a land where citizens possessed positive liberties to undertake activities not possible in England. Thus, in England a person needed to own land and possess wealth in order to hunt; not so in America, where all citizens possessed the positive liberty to hunt on open lands everywhere. The scope and popularity of this reasoning needs investigating. Evidence suggests that it represented an influential line of thought.

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[36]Michael Kammen, *Spheres of Liberty: Changing Perceptions of Liberty in American Culture* (Madison: Univ. of Wisc. Press, 1986).

Over the course of the nineteenth century ideas of liberty shifted. Liberty became more individual and less collective. It became more negative rather than positive–freedom from, rather than freedom to. By the mid-nineteenth century, ideals of Jacksonian democracy had taken root, based on minimal government and unrestricted access to economic opportunities. With ideas of liberty evolving in this way life seemed to be dividing into two spheres–public and private–at least as people understood things. The effects of this division, in the ways people understood property, were profound.[37] Within legal thought, property was increasingly viewed as a private entitlement that arose and existed in a private realm. Governments, courts said, had broad "police powers" to regulate this private property in the public interest. But that regulatory power was a public power, existing in the public realm, and when exercised it curtailed the scope of private rights. This was new reasoning, and it incorporated and strengthened a new way of understanding land ownership. For private property to exist in a separate private realm, then it somehow had to arise outside the law, fully formed. It could not be a product of government grants and public lawmaking; it could not have social origins. Inevitably, this line of reasoning fueled the growth of abstract thinking about ownership, based on deductive reasoning from first principles. This intellectual shift, too, had profound implications. The obvious first principles to use, in constructing an abstract idea of property, were those of the English common law. It was from such abstract principles that ownership norms arose, not–as had been true for centuries–from actual land-use practices and customary understandings embraced by real communities of land users. In all likelihood, these various intellectual currents came together to make the enclosure movement in America easier: the rise of abstract legal reasoning; new notions of negative, individual liberty; the intellectual separation of public and private spheres; and the quest of lawyers to turn law into a logical, respectable science.

These shifting intellectual currents were hardly motivated by intellectuals alone, idly debating the world. Economic forces were at work, and strong interests sought control of law-

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[37]I discuss the issue in *The Land We Share: Private Property and the Common Good* (Washington, DC: Island Press, 2003), 79-84.

making processes. Here the story is somewhat better known though questions remain. In some way the decline of public rights in unenclosed lands fits into the larger, much discussed story of the transition to capitalism in America. We need to be careful, though, in deciding how enclosure fits into that transition. Where it fits depends upon how we define capitalism and what we view as evidence of it. Both landowners and public users showed capitalist and pre-capitalist tendencies. When Southern livestock producers increased their herds to sell on the market, they arguably moved toward greater capitalism. So, too, did landowners who sought to close their lands so they could use them more intensively. Resort owners in New England promoted market capitalism when they built hotels and hired guides to take wealthy New Yorkers into the wildlands owned by other people. On their side, forest owners did the same when they sought to manage forests for greater commercial yields and resisted outside interference.

A sound economic interpretation of enclosure would likely pay particular attention to the significant ways that property law was revised in the nineteenth century to promote industrialization. This was an important legal transformation, assessed in the valuable legal history writings of Willard Hurst, Morton Horwitz, and William Fisher.[38] During the nineteenth century, these historians relate, American property law changed in ways that allowed landowners to use their lands more intensively. At the same time–necessarily and correspondingly–the law diminished the rights of owners to complain when their neighbors' intensive land uses caused them harm. This shift took place in many corners of the law–riparian rights, drainage law, rights to block air and light. It particularly showed up in the new, industry-slanted applications of the longstanding "do-no-harm" principle, which formed the core of public and private nuisance rules. This principle remained strong in legal reasoning, unchanged in phrasing: landowners could act as they pleased so long as they harmed no one else. But the practical applications of the principle

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[38]Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harv. U. Press, 1977); James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: Univ. of Wisc. Press, 1956); William Weston Fisher III, "The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880," Ph.D. diss., Harvard University, 1991.

changed significantly as courts redefined "harm" in ways that narrowed its scope. This legal shift, like most, was erratic and uneven across the country. But the trend was nonetheless clear. New, intensive land users were allowed greater rights to pollute, make noise, and redirect hydrologic flows, even when their actions harmed surrounding people.

One way to summarize this revision in property law is to describe it as a shift from an agrarian perspective to an industrial one. The agrarian view of property protected above all the owner's right of quiet enjoyment: A landowner who quietly enjoyed his land should be free from disruption by others. In theory, a landowner who possessed vast, unenclosed lands was not disrupted in his quiet enjoyment when other people made use of her open lands. As the century wore on, this agrarian perspective faded considerably–no doubt because industrial activities did interfere with the quiet enjoyment of neighbors. In its place rose a new idea: that the core right of owners was instead the right to halt physical invasions of their spaces. This was the legal right industries valued most, for it allowed them to keep people off their lands. More study here is needed, yet one suspects that the legal literature of the late nineteenth century bears this out: defenders of the new industrial order embraced the right to exclude as a replacement for the older right of quiet enjoyment. As they did so, the law shifted from a perspective in which public use rights made sense, to one in which they did not.

Particularly in Horwitz' version of this nineteenth-century legal transformation, industrial interests played a key role by influencing lawmaking processes. By gaining power they were able to push property law in directions they favored. As this shift in lawmaking power was taking place, another one was also unfolding. It too had relevance for rural land-use rights. This was the gradual shift in legal power over land and land-use rules from the most local level to higher levels–to the county and the state. State governments in many ways asserted control over land-use practices; for instance, by passing laws protecting wildlife species, controlling hunting, and setting up mechanisms to close off public ranges. Local government jobs–the ones that often had greatest influence on land uses–were coming under the control of county-level rulers, linked to county-seat business interests. Also, local decisions were being reviewed more carefully for compliance with

law. These trends give us a further hypothesis to consider: local lawmakers were more likely to respect customary land-use practices, and their political decline weakened these practices. In the common view of local leaders, the open range helped secure social bonds and patterns of deference while indirectly providing relief for the most poor. In the view of distant lawmakers, we can guess, disputes involving landed property rights were properly resolved by reference to property law alone. Local context was not important.

IV

These, then, were some of the intellectual currents that were apparently intertwined with the gradual loss of public land use rights–currents relating to shifting definitions of the right to property; the declining influence of natural rights reasoning; shifting understandings about liberty; and the rise of a more industrial, centralized idea of owning land. To these ideas, as causal factors, we can add the declining importance of subsistence-type land uses and the declining (though hardly disappearing) sense that individual independence was protected best when a person could live directly off the land, immune from market pressures. On this last point (according to Michael Merrill), many rural Americans fiercely protected their economic independence, not by cutting themselves off from the market and opportunities for gain, but by holding tight to ways of living that allowed them to meet household needs first before they produced for the market.[39] Over time, more and more Americans became dependent on the market for nearly all of their needs. It became harder for them to understand, much less support politically, the ideals of rural dwellers who held fiercely to subsistence-type autonomy. So long as the national economy created new jobs, even at low pay, the loss of such direct land-use rights did not seem so critical. Related to this decline in subsistence-living was an ongoing change in the ways most people saw nature and

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[39]Michael Merrill, "Putting 'Capitalism' in Its Place: A Review of Recent Literature," *Wm. & Mary. Q.*, 3d ser. LII:2 (1995), 315-326. A more recent survey is Naomi R. Lamoreaux, "Rethinking the Transition to Capitalism in the Early American Northeast," *J. Am. Hist.* (Sept. 2003), 437-461.

valued its parts. When food came only from cultivated crops and domesticated animals–as it did for more and more people–it became harder to see wild nature has having much value. Nature was what people pushed aside in their efforts to make the land produce, not where they gained sustenance.

In combination, these many factors go far in explaining why enclosure took place in rural America. Yet when we add the pieces together something remains missing, something having to do with the ways people understood private property as a *legal* arrangement.

Private property was an economic and social arrangement, yet it was, when people talked about it, even more a legal one. To own land was to possess legal rights over a part of nature. As Americans debated land-tenure issues, necessarily they were obligated to select and debate legal conceptions about property; it was not enough to talk about the costs of fencing and the virtues of competing modes of agrarian production. To recognize this reality–to recognize the vital importance of legal ideas in elevating certain land-tenure arrangements over other arrangements–is to get to perhaps the most important, missing piece in the overall story of enclosure in America. Even more, it may get us to the main reason why enclosure has gone so little noted, and why legal scholars in particular have viewed the process as inevitable and inevitably right.

When English settlers came to North America they brought with them a wide variety of land-use practices and land-tenure ideas (how wide is perhaps not really known). Those practices began the land-tenure system in America–locally controlled, bottom-up, and varied in its countless details. In Britain, these local practices had largely solidified into binding customs, often embodied in tenurial relations that the law respected. The rights of commoners were grounded in law. No doubt the greatest reform ever in Anglo-American property law took place as settlers crossed the Atlantic, leaving behind, or figuratively throwing overboard, countless, complex forms of land tenure. By the time English law took root in America–particularly in its highest courts–a radical simplification had taken place in property. The widely varied, long-standing practices and understandings in England had been greatly simplified into a relatively unified idea of what

ownership was all about. The idea that became dominant, importantly, was the idea endorsed and propounded by the royal central courts of England. Americans referred to this as the common law, but it was in fact less common and dominant in England, much less in Scotland and Ireland, than American commentary suggested. Particularly excluded from it were the land-use practices of Celtic peoples, who embraced the open range and recognized far greater public rights to use the countryside. These Celtic practices wielded influence in the back areas of the American colonies, from Pennsylvania southward–areas heavily populated by Scots, Irish, and (most importantly) the Scotch-Irish.[40]

An important part of our enclosure story, then, has to do with the dominance of Anglican ideas about land use, mostly from the central courts, over competing ideas and customary practices entered the New World. This dominance was made easier and more natural because the regions of early America that shaped legal thought were precisely those areas settled by people who came from parts of England–East Anglia, many of them–which most embraced Anglican ideals.[41] The legal influence of these regions was considerable. New England states were the first to begin publishing reports of their rulings, which circulated widely. Courts from New York and northward (Massachusetts in particular) exerted inordinate influence in the shaping of early American law. America's treatise writers largely came from this region (though with a few prominent exceptions). We can note, too, that the lawyers and judges whose views counted most were mostly city dwellers in long-settled areas of the country, far from the open ranges. Inevitably early courts scrambled for precedents to use in crafting their judicial opinions. As they did so, they turned to the only reports available–from the central English courts and then New England. By the eve of the Revolution American society had undergone a distinct process of "Anglicization." Perhaps in no sphere was this more pronounced than in the law and legal culture.

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[40]Grady McWhiney & Forrest McDonald, "Celtic Origins of Southern Herding Practices," *J. So. Hist.* 51:2 (1985), 165-82.

[41]The origins and differing cultures of various immigrants from Britain are discussed in David Hackett Fischer, *Albion's Seed: Four British Folkways to America* (New York: Oxford U. P., 1989).

After the Revolution, America flirted with the idea of rejecting the common law in favor of the civil law. For a time English precedents were rarely cited. But that era soon ended. By the early nineteenth century the common law reigned supreme, which meant the common law as understood by England's central courts and interpreted chiefly by coastal-area, urban, largely Northeastern judges. Local practices and customs existed in America, many of them strong, economically important, and fiercely defended. But these practices lived outside the dominant centers of legal culture. Just as important, these practices lacked something essential in order for them to survive: The lacked an intellectual framework that could protect them against the power of the competing English common law. Proponents of the open range had no way to talk about their practices that really carried weight in legal arguments. Courts were willing to assert (and routinely did) that the common law applied in America only to the extent consistent with local circumstances and needs. But this was a weak move, intellectually. For courts, the choice was between applying the common law and not applying; either accept the intellectually coherent, well-crafted common law or reject it. What defenders of common rights failed to do–and here we get to the key point–was craft an alternative legal structure that explained and justified these common rights. They failed, that is, to give courts a choice between the common law on one side and a positive, alternative legal theory of land tenure on the other. Public users claimed to have specific use rights in unenclosed lands, but they did not develop a legal theory that elevated these use rights into positive property entitlements. They asserted a "right to hunt," but what type of right was this and how did it fit into the law?

This intellectual failing was probably of vast importance. It left the pro-open-range stance in a position of intellectual weakness. Common rights were based on customary practices or local understandings, not on a structure of well-considered ideas. In practical terms, courts were thus left without a good way to resolve disputes over the exact terms of public use rights. What were courts to do when public use rights needed adjustment in some way–as they did–to curtail the most destructive practices? Possessed of a positive theory of public use rights they might have explained precisely what rights the public had in open lands. They could have narrowed and

clarified those rights to reduce conflict (in terms of which animals could be grazed, how many, whether hunting could take place on horseback, how much firewood could be collected, and the like). In short, aided by a positive theory of public use rights courts they could have resolved public-landowner conflicts while still retaining the most valuable use rights. But courts did not have such a theory. Lacking one, they stumbled. Their only choice was either to apply the common law or not apply it. To apply the common law was to undercut any legal basis for public use rights. To refuse to apply the common law was to allow public uses nearly without limit. Neither choice allowed for a sensitive, context-dependent accommodation of conflicting interests. In the end, many courts protected public rights until the costs of doing so became too high.

As the nineteenth century wore on, the power of the common law grew for various reasons, unrelated to land. As published judicial rulings accumulated, courts were increasingly prone to base their decisions on these legal precedents rather than on natural law, first principles of justice, and other extra-legal considerations–local custom included. Also important here was the desire of my legal thinkers to turn law into a science, based on formalistic reasoning. Law existed on the fringe of the academy and was not viewed as a serious intellectual pursuit. To make it one, legal scholars sought to mimic the methods of laboratory science. From prior judicial rulings they distilled abstract legal rules that they could then apply to future cases by means of deductive reasoning. In this process of shifting to first principles and abstract, top-down reasoning, local considerations were easily overlooked. The alternative to this approach was the one that relied instead on bottom-up, inductive processes, paying attention to countless details–to the land itself, to local people and their needs, to economics, culture, customs, and social arrangements. In legal lore the common law itself was originally based on customary practices, but by the late nineteenth century its borrowing from custom had been stopped. The common law had become a positivist set of rules based on abstract principles and applied with logical rigor.

We can sum up these legal considerations this way. The common law of property gained ascendancy in nineteenth-century America, pushing aside public rights to use open places, in important part because defenders of public rights simply never produced an alternative conception

of land ownership. In the absence of such a conception, the rights of the public fit uneasily into legal thought. In England, public rights long ago had solidified into a maze of specific property entitlements–to put one cow on the town commons, or to cut a specific amount of firewood in a specific place. These were property rights, and protected by law. In America, the public's rights never made this essential leap into the status of property. Courts occasionally spoke of them as "rights," but what type of right were they? How did they fit into the law? No answer was ever forthcoming. In the end, courts one by one picked up the only line of legal reasoning that seemed to fit–the one that Oliver Wendell Holmes would summarize in his 1892 opinion. Public rights to use the countryside were mere licenses, nothing more. At any time landowners could terminate them. Because these were not property rights, public users really never lost much as the common law took hold–or so it seemed to lawyers. Public use rights were merely a temporary phase as areas became settled and real property law took hold. Legally they were insignificant. In the history of law, they were easily overlooked.

We can see this whole process more easily when we compare the plight of these rural land uses with the quite different legal trajectories of the few public rights that did gain express legal protection; that did rise up to check the hegemony of the common law. American courts overtly recognized public rights to use waterways, including rights to fish and fowl in them–even in waterbodies that flowed on private land.[42] Another example was the prior appropriation water system in the West. Under it, public users of the open-range could seize and claim water, notwithstanding the contrary common-law claims of riparian landowners. As a more minor example we can cite the willingness of courts to craft a distinct legal right of family members to visit ancestral graves located on the private land of another, without the landowner's consent.[43]

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[42]This recognition hardly avoided all disputes over them, however, particularly in the case of waterway obstructions. *E.g.,* "Dams, Fish, and Farmers: Defense of Public Rights in Eighteenth-Century Rhode Island," in Steven Hahn & Jonathan Prude, *The Countryside in the Age of Capitalist Transformation: Essays in the Social History of Rural America* (Chapel Hill: U.N.C. Press, 1985).

[43]Alfred L. Brophy, "Grave Matters: The Ancient Rights of the Graveyard" (forthcoming).

These specific rights survived because courts took the all-important step, elevating the rights from the status of fairness and custom into distinct legal entitlements.

V.

America underwent a major enclosure movement. It was a movement we have largely overlooked, and we have done so for one of the major reasons why it took place–because the closing of rural lands to public use seemed inevitably right under the only coherent way available to us to think about it. In the legal mind, public use rights had no secure home. Lacking one, they were easily and properly pushed aside. Many citizens resisted the shift, to be sure, but they had no legal vocabulary to use in expressing their dissent. Though not lawyers, they too were frustrated by the shortcomings of legal thought.

This outcome showed a lack of intellectual flexibility. And it is a deficiency that continues to afflict American society today. Guided by it, we assume that property falls into two distinct categories–public and private–not realizing that these are best understood as distant poles, with many intermediate positions in between.[44] Similarly, we have grave trouble making sense of the legal status of wild animals on private land; how can we conserve them, if this requires limits on the common law rights of landowners? We talk vaguely about animals being owned by states in trust for the people, but this kind of language rests uneasily when the only familiar options are private property and state-owned property. Conservation groups hold gatherings to talk about such topics as "the forest commons," but we have little understanding what this might mean.[45] Looking ahead, we have sound reasons to shift to land-tenure arrangements in which multiple individuals and groups have rights to use the same lands at the same time–akin to the multiple-use

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[44]Eric T. Freyfogle, "Goodbye to the Public-Private Divide," *Envt. Law* (forthcoming March 2006).

[45]This deficiency is discussed in Wendell Berry, "Private Property and the Common Wealth," in his *Another Turn of the Crank* (Washington, D.C.: Counterpoint Press, 1995), 46-63 (address delivered at a conference in Richmond, Kentucky, on "The Forest Commons").

arrangements on many federal lands. But we have trouble thinking about these arrangements when private property so instinctively means one owner with full rights to exclude.

This brings us to perhaps the most costly legacy of the common law's ascendency–the way it inhibits our ability to take nature into account in our norms of land ownership. Our environmental problems cry out for a redefinition of land ownership. We need to reshape property rights so that landowners use their lands in ways that make ecological sense, given the land's natural features.[46] More than it does, context needs to count if we are to craft landscapes that are socially and ecologically sound. Standing in the way, though, is the abstract, common law thinking of the late nineteenth century. Shaded by its influence, we can hardly imagine that landowner rights might be restricted by local features and local conditions. And so the final question: Can we widen our imaginations today by looking back in time, to recover older, alternative ways of thinking about land-use? The abstract common law did not always govern our landscapes. It need not do so today.

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[46]Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* (Washington, DC: Island Press, 2003).