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The Enclosure of America

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Abstract

Legal memory in the United States has largely forgotten that most of America's landscape was open to public use well into the nineteenth century. Up until the Civil War and even after, landowners in many regions could exclude the public only from lands that they took the time and expense either to fence or cultivate. In the eyes of many, the public held affirmative use rights in these open lands; the landowner's desire to exclude was irrelevant. This paper explores the range of public uses of lands in early America. It considers how and why enclosure occurred and why historians and legal scholars have largely overlooked this chapter in American history. The answers have to do with shifting ideas about the "right to property," with the diminishing force of natural law, with narrowing ideas of liberty, and with ongoing economic and social change, particularly the coming of industrialization and its growing demand for wage labor. On top of these explanations was a general failure of defenders of the open countryside to find legal ways to talk about and structure the public's use rights. Many states were willing to set aside the common law of trespass, and did so for generations. Yet, defenders of the open countryside never produced an alternative legal vocabulary to protect these public use rights, except in specific, narrow circumstances; they never found a way to incorporate these public use rights into enduring law. Influential judges and treatise writers, largely urban and Eastern, viewed public rural-land rights with contempt. Their interpretation of the situation gained ascendancy by the late nineteenth century, and it has prevailed ever since.

THE ENCLOSURE OF AMERICA

Eric T. Freyfogle[1]

Legal memory in the United States has largely forgotten that most of America's landscape was open to public use well into the nineteenth century. Up until the Civil War and even after, landowners in many regions could exclude the public only from lands that they took the time and expense either to fence or cultivate. In the eyes of many, the public held affirmative use rights in these open lands; the landowner's desire to exclude was irrelevant. This paper explores the range of public uses of lands in early America. It considers how and why enclosure occurred and why historians and legal scholars have largely overlooked this chapter in American history. The answers have to do with shifting ideas about the "right to property," with the diminishing force of natural law, with narrowing ideas of liberty, and with ongoing economic and social change, particularly the coming of industrialization and its growing demand for wage labor. On top of these explanations was a general failure of defenders of the open countryside to find legal ways to talk about and structure the public's use rights. Many states were willing to set aside the common law of trespass, and did so for generations. Yet, defenders of the open countryside never produced an alternative legal vocabulary to protect these public use rights, except in specific, narrow circumstances; they never found a way to incorporate these public use rights into enduring law. Influential judges and treatise writers, largely urban and Eastern, viewed public rural-land rights with contempt. Their interpretation of the situation gained ascendancy by the late nineteenth century, and it has prevailed ever since.

I. PROLOGUE

In the early 1850s, a train in Alabama collided with and killed a cow that had wandered onto the railroad tracks. An Alabama statute made the railroad liable for the death of all livestock unless the railroad could show that "the killing was the result of accident, which could not have

[1]Max L. Rowe Professor of Law, University of Illinois College of Law. My thanks go to Tom Green, Richard Ross, Bruce Smith, and Eric Stoykovich for offering thoughtful comments on a draft of this article. I'm grateful also to the Yale Program in Agrarian Studies and Professor James Scott for inviting me to address the topic and providing such a stimulating opportunity to air my ideas. A shorter version of this article is appearing as chapter two of ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (Boston: Beacon Press, 2007).

been controlled by the company by the exercise of the greatest degree of diligence and care."[2] The incident was not unusual; livestock got killed all the time. Nor was it unusual for the railroad to resist liability by claiming the animal had trespassed on its tracks. When the resulting law suit by the animal owner reached the Alabama Supreme Court, the court, as expected, ruled in favor of the livestock owner and against the railroad. The high 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 the legal community, had never taken effect in Alabama. Alabama's property scheme had always had been quite different. Both at common law and by statute, the entire state was a "common pasture for the cattle and stock of every citizen"[3] except for those isolated enclaves that individuals had fenced at rather great cost. The public had rights to graze animals on all unenclosed lands. The cow was therefore not trespassing and the railroad had to pay for its death.

A few years later a similar legal dispute reached the highest court in Georgia.[4] This time the dead animal was a horse. Again, the railroad asserted that the animal was trespassing. Though Georgia law was clear on the issue, just as in Alabama, the court nonetheless took time to explain how drastically the railroad's proposed revision of land-tenure relations clashed with the economic and legal regimes that prevailed in the state. As the court saw it, the railroad was recommending a major change, not just in property rights, but in the way Georgians inhabited their landscapes:

> 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

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

[3]*Id.*

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

trespassers. We do not think that such is the Law.[5]

In Georgia as in Alabama, members of the public could use the countryside as long as they did not invade fenced areas or interfere with what landowners were doing. The public possessed legal rights to roam.

II. RIGHTS TO EXCLUDE, RIGHTS TO ROAM

A century and a half after these railroad-livestock disputes, landowners in the United States hold extensive powers to exclude outsiders from their lands, without regard for fencing. The exceptions are mostly minor, some relating to emergencies;[6] some to public uses of waterways[7]; and some embedded in various natural-resource law regimes.[8] So accepted is this right overall that many view it as indispensable to land ownership. Yet, for many generations landowners in America enjoyed only limited rights to bar entry by outsiders. Particularly in the antebellum era and earlier, owners of land often could exclude people and wandering livestock

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[5]*Id.* at 914.

[6]*E.g.,* People v. Ray, 21 Cal.4th 464, 981 P.2d 928 (1999)(entry by police).

[7]*E.g.,* State v. McIlroy, 268 Ark. 227, 595 S.W.2d 659 (1980)(expanding the definition of navigability under state law to allow public access to previously private waterway segments); State v. Head, 498 S.E.2d 389 (S.C. App. 1997)(artificial extension of navigable channels becomes a part of the navigable channel, despite landowner's wishes, and thus open to public use).

[8]*E.g.,* Continental Resources, Inc. v. Farrar Oil Co., 559 N.W.2d 841 (N.D. 1997)(subsurface entry by horizontal drilling for oil); State v. Corbin, 343 N.W.2d 874 (Minn. App. 1984)(right of hunter to enter to retrieve game); Beacham v. Lake Zurich Property Owners Assn., 526 N.E.2d 154 ((ll. 1988)(use of surface of nonnavigable lake on private land); Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004)(public access to naturally expanding body of water); Park County Commissioners v. Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002)(rights of holders of water rights to use natural passageways for water on land surface and below surface); Hull v. Harker, 106 N.W. 629 (Ia 1906)(entry to clean out established drainage ditch). Also relevant are the powers of government to invade land indirectly by way of lawful government actions conducted elsewhere. E.g., City of Birmingham v. Brown, __ So.2d __ (Ala. 2007)(city not liable for flooding of private land caused by the installation of subdivision drainage system).

only from lands that they took the time and expense to fence and/or cultivate.

This land-tenure arrangement had vast economic, social, and political consequences, given the openness of America's many landscapes and the high cost of fencing. Its effects were particularly important in the American South, the region that most uniformly embraced the arrangement. 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.[9] A full right to exclude was thus the exception for private lands, not the norm. As historian Stephanie McMurry put it in her study of early South Carolina, "fences demarcated exceptional and delimited spaces in an otherwise open terrain."[10] In other states at the time, landowners often possessed greater powers to exclude the public from unfenced areas, at least to keep out wandering livestock. But local custom could sanction public uses of such lands, particularly by hunters, and trespass actions could be hard to win.[11] Everywhere, cultural and economic considerations could keep landowners from barring entry by neighbors.

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, which better captures the sentiment of many contemporaries, is to assess things in terms of rights possessed by the public to enter and use otherwise private lands. From the first perspective, the closing of America's rural lands gave landowners what they implicitly deserved all along. From the other side, the closure involved

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[9]Forrest McDonald & Grady McWhiney, *The South from Self-Sufficiency to Peonage: An Interpretation*, 85 AM. HIST. REV. 1099 (1980). A slightly different assessment is offered in SAM BOWERS HILLIARD, HOG MEAT AND HOECAKE: FOOD SUPPLY IN THE OLD SOUTH, 1840-1860, 74 (1972)("Together nonfarm land and unimproved farmland added up to an almost incredible 87 percent of the land area in 1850 and nearly 82 percent even in 1860.")

[10]STEPHANIE MCMURRY, MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS & THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY 10 (1995). The most complete study is R. Ben Brown, *The Southern Range: A Study in Nineteenth Century Law and Society*, Ph.D. diss., University of Michigan, 1993.

[11]*See* text at notes 62-63, *infra.*

something much different. It meant the termination, or seizure without compensation, of valuable land-use rights held by other people. When we use this second, less common perspective a number of useful questions arise. What rights did the public apparently have in early America, and which members of the public held them? Were these rights securely fixed by law or were they based on local customs, which courts might or might not uphold? Finally, how were these land-use rights embedded in larger social, economic, and intellectual orders?

Though its details are not fully known, the long-term story of land-use rights is easy to relate. Step by step, landowners gained greater powers to exclude people and animals without fencing. This legal change, so far as we can tell, unfolded in varied ways in different places, not just state by state but county by county, and even at smaller spatial scales. No doubt the process was viewed quite differently by the many people it affected, the 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 today, 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.[12] 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. By the 1990s, legal journals were 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 Bill of Rights of 1791.[13] Few scholars challenged the wisdom or historical grounding of these claims. Scholars based their generalizations on several

[12]The issue is overlooked even in such otherwise comprehensive, multi-volume surveys of property law as THE AMERICAN LAW OF PROPERTY and THOMPSON ON REAL PROPERTY. Lawrence Friedman's influential survey of American law, largely focused on the nineteenth century, makes no mention of trespass or land-access issues when reviewing changes in land law during the antebellum era. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 230-245 (2d ed. 1985).

[13]*E.g.,* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). A prominent exception was Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NORTHWESTERN L. REV. 1283 (1996).

U.S. Supreme Court rulings, which were, in fact, more carefully phrased. When it addressed the particular issue, the Supreme Court talked narrowly about an inherent landowner right to resist "permanent physical occupations" of the land.[14] In common parlance, though, this power became the right to exclude. It was a legal right that somehow seemed more important than any other.[15]

America's historical record contains ample evidence that our continental predecessors saw the rural landscape very differently than we do now. Hunting and fishing were rather freely allowed.[16] So were the grazing of livestock and public travel.[17] Public uses also apparently included a variety of foraging activities, including the collection of firewood and gathering herbs and berries, though these activities drew so little comment that historical evidence is hard to find. Public uses varied in time and space, and there is much that awaits learning. Little is known, also, as to how these use rights were understood by various people and how and why their understandings changed over time.

This issue of change–in actual practices and in prevailing ideas–is especially important if we are to figure out why these rights mostly ended. What were the forces at work? Economics no doubt played a key role as lands became more valuable and livestock growers wanted to control

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[14]In its initial ruling on the subject, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), the Court did use the expression "right to exclude," though without defining the right with any precision. A decision three years later, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982), repeatedly used the more carefully crafted right to gain compensation for "permanent physical occupations." That expression then became formulaic, and is routinely expressed as one of the per se regulatory takings tests. *E.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); Eastern Enterprises v. Apfel, 524 U.S. 498, 530 (1998); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992); Yee v. City of Escondido, 503 U.S. 519, 538 (1992). The Court's most recent ruling used the apparently synonymous term "permanent physical invasion," citing the above rulings. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).

[15]*E.g.*, Merrill, *supra* note 13 (arguing that the right to exclude "is more than just 'one of the most essential' constituents of property–it is the sine qua non").

[16]*See* text at notes 49-63, *infra.*

[17]*See* text at notes 37-46, *infra.* On livestock conflicts in colonial America, see VIRGINIA DEJOHN ANDERSON, CREATURES OF EMPIRE: HOW DOMESTIC ANIMALS TRANSFORMED EARLY AMERICA (2004).

the breeding of their animals. But economic forces create cross currents. If they pressed antebellum landowners to seek greater rights to exclude, they also encouraged public users to defend their rights vigorously. To do justice to the subject we need to see who controlled the law-making processes at the time, whether big landowners or politicians who appealed to the landless. We also need to pay attention to the ways people were influenced by inherited cultural ideals. 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 would take precedence? Liberal individualism, to be sure, 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.

Writing in 1922, Oliver Wendell Holmes offered one interpretation of land-tenure arrangements in rural areas. "The strict rule of the English common law as to entry upon a close," Holmes stated in *McKee v. Gratz*, "must be taken to be mitigated 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."[18]

Holmes testified to the existence of 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 was to say on arrangements that did not amount to law. Public users possessed merely a license to use such areas, a form of non-proprietary right subject to termination at any time. Whenever the landowner saw fit, accordingly, she could prohibit further entry simply by withdrawing consent. The landowner, in short, held property rights while public users of unenclosed land did not. The closing of the rural countryside was simply a matter of landowners gradually asserting, and gaining the incentive to assert, a property right they had always possessed.

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

Of New England stock, Justice Holmes was an ardent defender of the common law.[19] By viewing rural land uses as he did he stuck close to that body of English law, which gave landowners broad powers to exclude outsiders without regard for physical enclosure. What Holmes overlooked was that many states had expressly altered this legal inheritance generations earlier.[20] In them, the rights of rural wanderers had been far stronger than 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.[21] Land ownership was a contested idea, culturally and legally. Americans might all have supported private property and sought more of it personally, but they held conflicting views about what qualified as property and about the appropriate powers of landowners.[22] A distinctly different conception of ownership was apparently common among Americans whose lineage traced to the northern and western parts of Britain and Ireland, regions of Britain often hostile to ideas put forth by Westminster's courts.[23] We must be slow, then, to accept Holmes's understanding of the situation, even if it became the standard explanation. We need to look carefully at the record and be open to alternatives.

British historians have long studied the waves of land-tenure change known as enclosure.[24] Movements to enclose lands occurred in Britain over several centuries, mostly

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[19]Holmes was the author, most famously, of the classic work, THE COMMON LAW (1881)

[20]*See* text at notes 37-84, *infra*.

[21]*See* text at notes 3-5, *supra*, and 40-72, *infra*.

[22]The variety of legal cultures during the first century of settlement is considered in CHRISTOPHER L. TOMLINS & BRUCE H. MANN, EDS., THE MANY LEGALITIES OF EARLY AMERICA (2001); Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrustions on the American Mainland in the Seventeenth Century*, 26 L. & SOC. INQUIRY 315 (2001). A classic study in early New England is Julius Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

[23]Grady McWhiney & Forrest McDonald, *Celtic Origins of Southern Herding Practices*, 51 J. SO. HIST. 165 (1985).

[24]*E.g*, MARK OVERTON, AGRICULTURAL REVOLUTION IN ENGLAND: THE TRANSFORMATION OF THE AGRARIAN ECONOMY, 1500-1850, 147-67 (1996); G.E. MINGAY, LAND AND SOCIETY IN ENGLAND, 1750-1980, 35-46 (1994); J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE

sixteenth to nineteenth, ushering in substantial change to land-use practices. Some enclosure took place when 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 and sparked protests.[25] Overall, enclosure in Britain 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.[26]

Given the prominence of this British history, one wonders why historians do not speak of a similar 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 for generations. Given the vastness of lands once 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[27] and, to a

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AND SOCIAL CHANGE IN ENGLAND, 1700-1820 (1993), *passim*.

[25]E.P. THOMPSON, CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE 108-84 (1993).

[26]The forces changing the rural countryside in England (and America) were by no means limited to enclosure. As Raymond Williams has explained:

> Again, as the economy develops, enclosure can never really be isolated from the mainstream of land improvements, of changes in methods of production, or price-movements, and of those more general changes in property relationships which were all flowing in the same direction: an extension of cultivated land but also a concentration of ownership into the hands of a minority.

RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 97 (1973).

[27]*E.g.*, Yasuhide Kawashima, *Fence Laws on the Great Plains, 1865-1900*, in ELISABETH A. CAWTHON & DAVID E. NARRETT, EDS., ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE 100-119 (1994); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A*

lesser degree, the post-bellum South.[28] When the issue does draw notice it is often framed as a technical dispute over fencing and who should bear the cost of constructing them, whether the livestock owner or the cultivator wanting to exclude.[29] 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 it?

One enclosure story that historians do occasionally tell, a story only mentioned here, has to do with the partial enclosure of town commons established in New England and elsewhere. Several town studies have recorded shifting use practices on these commons and charted the steps taken by towns to fragment them.[30] 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[31] into a well-known judicial ruling on property rights, the 1805 decision by the New York Supreme Court in *Pierson v. Post*.[32] The dispute involved the ownership of a dead fox,

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Study of the American West, 18 J. L. & ECON. 163 (1975). A study focused on more recent practices is ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[28]*E.g.*, SHAWN EVERETT KANTOR, POLITICS AND PROPERTY RIGHTS: THE CLOSING OF THE OPEN RANGE IN THE POSTBELLUM SOUTH (1998); J. Crawford King, Jr., *The Closing of the Southern Range: An Exploratory Study*, 48 J. SO. HISTORY 53 (1982).

[29]This assumption drives Shawn Everett Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. SO. HIST. 201-42 (1993).

[30]I consider most of the town studies in Review Essay, *Land Use and the Study of Early American History*, 94 YALE L.J. 717 (1985).

[31]Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 DUKE L. J. 1089 (2006).

[32]3 Caines R. 175, 2 Am. Dec. 264 (1805).

which Post had started and chased until Pierson intervened to kill 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 simply by his hot pursuit and his apparent ability and intent to consummate the capture. The ruling is commonly viewed as dealing with the origins of private rights in an unowned object.[33] According to Bethany R. Berger, however–whose study is now the most detailed[34]–the dispute arose on a town commons (in Southampton, New York, at the west end of Long Island) and really had to do with contested rights to use that commons. Pierson belonged to a long-established agricultural family that held original rights in the commons. Post belonged to a newer and newly wealthy family, its money derived from trade, which lacked such rights. As Berger explains, Southampton was founded by English settlers from Lynn, Massachusetts, who immediately designated particular lands as commons. As early as 1648, the settlers divided rights in the commons among current property owners in a way that excluded later arrivals from automatically acquiring use-rights in it.[35] (All members of the public, though, possessed rights to use rivers for fishing, fowling, and navigation.) As Southampton's population grew, a declining proportion of residents held rights to use the town commons, giving rise to conflict. Post's attempt to hunt foxes on the commons added a further 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."[36]

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[33]Berger, *supra* note 29, at 1090. An alternative interpretation, which views the legal issue from the perspective of society as an issue of resource allocation, is offered in ERIC T. FREYFOGLE, NATURAL RESOURCES LAW: PRIVATE RIGHTS AND COLLECTIVE GOVERNANCE 188-95 (2007).

[34]A further new study, Andrea McDowell, *Legal Fictions in* Pierson v. Post, 105 Mich. L. Rev. 735 (2007), considers the dispute in terms of the legal categories used and the court's decision to treat the conflict under property rather than tort law. The larger context of wildlife capture, and capture generally, is ably considered in Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005).

[35]Berger, *supra* note 29, at 1113-14.

[36]*Id*. at 1095.

Similar stories could be told about other lands set aside as town commons or otherwise unallocated to families. Portions of many tracts were removed from formal commons status and conveyed to individuals. This enclosure movement, less pronounced than in England, deserves a better telling. In terms of acres involved in it, 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 most needs attention. It affected not hundreds of acres here and there but hundreds of millions, continent wide.

III. LIFE IN A FREE COUNTRY

The railroad industry that brought the livestock-damage cases to the supreme courts of Alabama and Georgia mounted a particularly forceful challenge to business as usual in another lawsuit, arising in Mississippi in 1856.[37] In this case, the railroad defendant pressed hard to get the Mississippi Supreme Court to change the state's law of property, closing the open range. The railroad's lawyers briefed the relevant legal and policy issues 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 were then applying it. In those jurisdictions, landowners could insist that livestock stay off their lands. When a straying animal caused harm the animal owner was liable for the damage. If a train killed an animal, its owner got no relief.

Realizing the importance of the case–and attempting, one suspects, to gain notoriety for himself–the animal-owner's lawyer, George L. Potter, raised the stakes. He opened his oral argument before the supreme court, not by talking about animals and trains, but by questioning 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

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

> 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 [sic] 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.[38]

In attorney 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." It sought to inaugurate "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.[39]

Not content with arguments of law and policy Potter wove into his presentation an unmistakable threat. If the court sided with the railroad, he predicted, Mississippi livestock owners might respond with rough-and-ready 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, which sided with the livestock owner and against the railroad, 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

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[38]31 Miss. at 169-70.

[39]*Id.*

fencing them in. The key point, though, was that circumstances in Mississippi were simply much different from those in England, as were the customs and expectations of the people. It made sense for the law also to be different:

> 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.[40]

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 this 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.[41] 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

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[40] *Id.*, at 185.

[41] *See* text at note 9, *supra.*

> 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.[42]

Most livestock production 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. These drovers, too, used the rural landscape as a commons, delivering animals to distant market and feeding them along the way.[43]

Much of the evidence we have about livestock grazing comes from the South, but there is plentiful evidence to suggest that similar patterns of behavior prevailed elsewhere, well into the nineteenth century.[44] A prominent visitor to Illinois around 1820, John Woods, reported to his readers back in England on the practices that prevailed there:

> Cows are generally suffered to run in the wood, and return to their calves mornings and evenings, when they are partly milked, and the calves have the remainder of the milk. . . . Beasts, sheep, and pigs are all marked in their ears, by cutting and notching them, in all possible directions and forms, to the great disfigurement of many of them; yet these marks are absolutely necessary in this wild country, where every person's stock run at large, and they are not sometimes seen by their owners for several months, so that without some lasting mark it would be utterly impossible to know them.[45]

The same story came out of California, where courts heard cases similar to those in the antebellum South. One such case, involving a horse killed by a railroad, reached the California Supreme Court in 1859. The court took no time to dismiss the allegation of trespass:

> The rule of common law which required owners of cattle to keep them confined to their own close has never prevailed in California. Before the discovery of the gold mines this

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[42]McDonald & McWhiney, *supra* note 9, at 1106-07.

[43]Forrest McDonald & Grady McWhiney, *The Antebellum Southern Herdsman: A Reinterpretation*, 41 J. SOUTH. HIST. 159-60 (1960).

[44]*E.g.*, Charles Post, *The Agrarian Origins of U.S. Capitalism: The Transformation of the Northern Countryside Before the Civil War*, 22 J. OF PEASANT STUDIES 416 (1995).

[45]JOHN WOODS, TWO YEARS' RESIDENCE ON THE ENGLISH PRAIRIE OF ILLINOIS 132-134 (1968 ed.; originally published 1822).

> was exclusively a grazing country; its only wealth consisting in vast herds of cattle, which were pastured exclusively upon uninclosed lands. This custom continued to prevail after the acquisition of the country by the United States [in 1850], and has been in various instances recognized by the Legislature.[46]

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, historian Steven Hahn found evidence of widespread public uses of open lands for various foraging activities.[47] Other scholars have reported similar evidence from elsewhere.[48] So long as they could use these unenclosed lands, rural dwellers could survive owning little or no land of their own. They could live freely, without being under the thumb of anyone else. For many of them, this freedom undoubtedly fueled a sense of economic and social independence. It also stimulated continued political pressures to eliminate land-ownership requirements for suffrage. By the eve of the Civil War, nearly all adult white males could vote, regardless of land ownership.

Probably second in importance to livestock grazing among public uses of the countryside was hunting. If we can judge from the rare disputes that wound up in court, landowners were less concerned about hunters and lost game than they were about the horses hunters rode and their accompanying dogs. Hunters on horseback could damage crops and disturb farm operations. One

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[46]Waters v. Moss, 12 Cal. 535 (1859).

[47]STEVEN HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850-1890 58-63 (1983); Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 RADICAL HIST. REV. 37-64 (1982). Indirect support for widespread foraging also comes from the classic study of food practices in the South, which included substantial products from the natural landscape. SAM BOWERS HILLIARD, *supra* note 9. Also useful, reading between the lines, is the disdainful account of "poor white trash" and their tendency to live off the land in DANIEL R. HUNDLEY, SOCIAL RELATIONS IN OUR SOUTHERN STATES 261-73 (1860).

[48]E.g., 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 (1998).

legal dispute reached the South Carolina Supreme Court in 1818.[49] The facts were simple and stark. A hunter 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 particularly noteworthy because the supreme court resolved the dispute based, not on any limitation on the rights the landowner possessed, but instead on the hunter's positive right to enter the land.

At issue in the case, the South Carolina court announced, was "the right to hunt on unenclosed and uncultivated lands," a legal right that "has never been disputed, and . . . has been universally exercised from the first settlement of the country up to the present time."[50] 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."[51]

South Carolina law remained stable for decades, yet we can detect in a judicial ruling from 1847 a shift in legal reasoning, a hint of what was to come.[52] The 1847 case involved unusual facts: the private land was an island, eight miles by three-quarter miles, and its owner

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

[50]*Id*.

[51]*Id*. at 246.

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

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; that fact remained true. 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 public 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 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 therefore had trespassed.[53]

On the surface the court's reasoning seemed sound, but it concealed a 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–a big difference in moral and cultural terms.[54] 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 reasoning raised a critical 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 instead was quite different, to demonstrate that the owner had mixed labor with the land and improved it, thereby securing his moral claim. If that was the reason, then uncultivated land required a fence, and perhaps even then the landowner couldn't keep public hunters away.

Hunting cases produced few reported appellate opinions. Rarely did a dispute involve enough money for people to hire lawyers and take cases up on appeal. Still, we have plentiful evidence that rural areas were typically open to public hunting and that citizens cherished their right to hunt, one of the freedoms that defined America.[55] In its 1777 state constitution, Vermont

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[53] *Id.* at 177.

[54] *See* text at notes 85-114, *infra.*

[55] *E.g.*, STUART A. MARKS, SOUTHERN HUNTING IN BLACK AND WHITE: NATURE, HISTORY, AND

guaranteed to all citizens the "liberty, in seasonable times, to hunt and fowl on the land they hold, and on other lands not inclosed."[56] 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,[57] and the state's delegation to the Constitutional Convention proposed to add the provision to the federal constitution.[58] In a study of Kentucky in the late eighteenth and early nineteenth century, historian Stephen Aron found widespread public uses of rural lands for open hunting.[59] John Woods reported similar evidence in his 1822 book on southeastern Illinois:

> The time for sporting lasts from the 1st of January to the last day of December, as every person has a right of sporting, on all unenclosed land, for all sorts of wild animals and game, without any license of qualifications as to property. . . . Many of the Americans will hardly credit you, if you inform them, there is any country in the world where one order of men are allowed to kill and eat game, to the exclusion of all others. But when you tell them that the occupiers of land are frequently among this number, they lose all patience, and declare, they would not submit to be so imposed on.[60]

Historian John Mack Faragher, in his study of early settlement in central Illinois, found the same practices:

> Sugar Creek [a region in central Illinois] farmers, like their ancestors and counterparts

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RITUAL IN A CAROLINA COMMUNITY (1991).

[56]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).

[57]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 Pennsylvania §XXII (1683), reprinted in WILLIAM F. SWINDLER, ED., 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 263, 266 (1979).

[58]THOMAS A. LUND, AMERICAN WILDLIFE LAW 25 (1980).

[59]Aron, *supra* note 48.

[60]JOHN WOODS, *supra* note 45, at 204.

> throughout the nation, utilized important rural productive resources in common with their neighbors. Custom allowed farmers, for example, to hunt game for their own use though they might be in the woodlands owned by someone else. Hogs running wild in the timber and surviving on the mast paid no heed to property lines. And despite an 1831 prohibition against "stealing" timber from unclaimed congress land, settlers acted as if the resource of these acres belonged to the neighborhood in common and helped themselves, "hooking" whatever timber they needed.[61]

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 along the Atlantic coast and that the era of the open-range, there at least, would soon have to end. The main cause of game disappearance, Elliott reported, was loss of necessary wildlife habitat, 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 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 at will and harry an owner's livestock with hunting dogs.[62]

So entrenched was the public's 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

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[61]JAMES MACK FARAGHER, SUGAR CREEK: LIFE ON THE ILLINOIS PRAIRIE 132 (1986).

[62]WILLIAM ELLIOTT, CAROLINA SPORTS BY LAND & WATER, INCLUDING THE INCIDENTS OF DEVIL-FISHING 166-72 (facsimile ed. 1967).

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 as they were. Unless laws changed, landowners would be unable to protect and preserve game on their lands and the noble sport of hunting would end.[63]

Related to the 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 navigability and with rights to use the foreshore–the area between high and low tides. American states deviated from the English practice by including, as navigable, all waterways that were navigable in fact, not just those subject to the ebb and flow of ocean tides. These waterways were open to public use without regard for who owned the underlying land, not just for fishing but for fowling and, in some states, trapping.[64] The public could also forage and gather seaweed on privately owned land in the foreshore.[65] Thus, in an 1811 ruling a Connecticut court clarified public rights to collect shellfish. Even when the foreshore was privately owned, the court explained, "every subject" possessed the right to dig for shellfish.[66]

Stray judicial rulings on other land-use questions help round out this quick look at the ways antebellum Americans used the open countryside. Two unusual decisions came out of South Carolina. One, from 1831, involved a landowner who sued the colonel of a militia

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[63]*Id.* Elliott's career and book are considered in STEPHANIE MCCURRY, *supra* note 10, at 6-10, 15-17.

[64]DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 287-99, 311-13 (2002).

[65]E.g., Mather v. Chapman, 40 Conn. 382 (1873). The standard treatise remains STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO (3d ed. 1888). Two useful commentaries, reflecting differing policy perspectives, are Comment, 31 MICH. L. REV. 1134 (1933) and Winthrop Taylor, *The Seashore and the People*, 10 Cornell L. Q. 303 (1925). The contemporary importance of the issue, chiefly in terms of recreational activities, can be seen in such decisions as Glass v. Goeckel, 703 N.W.2d 58 (Mich. 2005)(recognizing public rights of access to beaches of Great Lakes up to the mean high water mark).

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

company for using his unenclosed land, without permission, 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."[67] What troubled the court was not the assembly and marching on the private land, but rather the militia's removal of "a hundred or a hundred and fifty old field pine-saplings." Yet, even this destructive conduct, the court decided, was merely incidental to the use of the land as a mustering ground. It was thus lawful, at least so long as the landowner did not object in advance to the tree cutting.[68] Four years earlier the same court similarly upheld the right of road commissioners to remove private trees when needed for roadways.[69] 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.[70]

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 arose in Virginia around 1790. The state enacted a statute to promote mining. Under it, any person accompanied by a justice of the peace could enter private land and prospect for minerals, without the owner's consent. If any minerals were found, the discoverer had rights to mine them, subject only to an obligation to pay the landowner for surface damages to the land.[71] At the same time and for decades thereafter various states featured statutes that authorized super-majorities of landowners in poorly drained regions to

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

[68]*Id.* at 448.

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

[70]*Id.* at 127.

[71]John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NORTHWESTERN U. L. REV. 1099, 1121 (2000).

undertaken regional drainage projects despite the objections of individual landowners and at their expense.[72]

By the late nineteenth century, public use rights had declined nearly everywhere in the United States. Western ranges remained open and public hunting was still widely accepted in much of the country.[73] But public rights overall 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 in the late nineteenth century.[74] Many New Englanders engaged in foraging in the vast expanses of forest, which were owned mostly by large timber companies. Other local people used the forests to sustain a flourishing tourist trade. Hunting guides, for instance, took their customers deep onto private lands, without getting permission. Early in the twentieth century the whole arrangement was called into question in Maine when the state proposed to regulate methods of timber harvesting. In an effort to resist regulation, major forest owners pointed to these public uses of their lands, threatening to challenge their legality. Their efforts largely worked: The state of Maine refrained from regulating timber harvesting while the timber companies, in exchange, agreed to allow public forest uses to continue without interference. Commercial blueberry cultivators in the region, though, were unwilling to make such a

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[72]*Id*. at 1117-18.

[73]The mixed state of open grazing can be seen in two rulings from the era. In State v. Johnson, 7 Wyo. 512, 54 P. 502 (1898), the court viewed it "very well settled that the mere roaming of cattle and other domestic animals upon uninclosed private lands in the Western country does not constitute trespass." The state claimed that a different rule applied in the case of sheep, which did not roam freely but were under the intentional control of a shepherd. The court avoided the issue and rejected the trespass claim on the ground that the shepherd in the case merely drove his sheep across the unenclosed land of the complaining landowner to get to a railway station and destroyed "only so much of the grass as such a band of sheep would ordinarily destroy in passing over it." Similarly, the Iowa court in Harrison v. Adamson, 76 Iowa 337, 41 N.W. 34 (1888), agreed that no trespass occurred when cattle were allowed to run at large on unenclosed land. But it was "quite a different thing" when cattle under the control of a herdsmen, not running at large, were "driven and kept upon uninclosed land against the will of the land-owner, and with full knowledge of the owner of the cattle."

[74]RICHARD W. JUDD, COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND 58-120 (1997).

compromise. The public did have a right to gather wild berries in privately owned forests, the cultivators admitted. But that right did not extend to stealing blueberries from cultivated fields.

We can conclude 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 at the beginning of the twentieth century. Local residents had long used this private land to hunt, fish, and collect firewood, as a matter of 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 people 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."[75]

IV. CLOSING THE COUNTRYSIDE

Public use rights in the countryside, so common when the nineteenth century began, did not end simply because men like Dexter created private retreats. Powerful economic forces were at work.[76] 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.[77] Many citizens were spending less time on foraging and subsistence production and more time on market-centered activities, particularly as turnpikes and railroads helped them get their goods to market.[78] As they

[75]PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS 123 (1997).

[76]Two pertinent studies are ALAN KULIKOFF, THE AGRARIAN ORIGINS OF AMERICAN CAPITALISM (1992) and WALTER LIGHT, INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY (1995).

[77]Kantor & Kousser, *supra* note 29.

[78]*E.g.*, Richard Lyman Bushman, *Markets and Composite Farms in Early America,* 55 Wm. & Mary Q. (3d Ser.) 351 (1998); Robert A. Gross, *Culture and Cultivation: Agriculture and Society in Thoreau's Concord,* 69 J. AM. HIST. 42 (1982).

turned to market activities, they had less need to use the rural countryside and were willing to let landowners assert greater control.[79] This economic trend, according to historian Altina L. Waller, largely motivated the notorious Hatfield-McCoy feud along the Kentucky-West Virginia border in the 1870s and 1880s.[80]

Deforestation also played a part in various regions. As timber for fencing became scarce and expensive, pressure mounted to save cultivators from the high cost of building fences to keep livestock out.[81] The sheer expansion of cultivation as rural populations grew no doubt played a further role.[82] Market-oriented growers were interested in getting the law changed, joining with the railroads, which exerted continuous pressures to keep livestock under control.[83] To varying degrees, aesthetics also fit in to this mix: Wandering livestock, rooting hogs in particular, could leave a landscape looking particularly messy, to the dismay of local boosters. Finally, according to historian Steven Hahn, the closing of the open range in the post-war South was linked to deliberate efforts by whites to keep freedmen in conditions of economic dependence. If freed slaves could not survive economically, letting their hogs run in the woods, hunting, and collecting wild food, then they would have to quit roaming and agree to become tenant farmers picking cotton. New property laws helped Southern cotton growers deal with their

[79]Also relevant was the pressure of population on the land and the rising difficulty of gaining ready access to land, a reality that began in Eastern states late in the colonial period. DAVID B. DANBOM, BORN IN THE COUNTRY: A HISTORY OF RURAL AMERICA 53-59 (1995); DAVID B. DAVIS, ANTEBELLUM AMERICAN CULTURE: AN INTERPRETIVE ANTHOLOGY 129-144 (1979).

[80]ALTINA L. WALLER, FEUD: HATFIELDS, MCCOYS, AND SOCIAL CHANGE IN APPALACHIA, 1860-1900 (1988).

[81]E.g., BERNARD L. HERMAN, THE STOLEN HOUSE (1992); STEVEN HAHN, *supra* note 47.

[82]The role of increasing population in the decline of rural land use options in Britain is stressed in RAYMOND WILLIAMS, *supra* note 26, at 96.

[83]The influence of railroads in the transformation of property law (and private law generally) is considered in HOWARD SCHWEBER, THE CREATION OF THE COMMON LAW, 1850-1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP (2004).

"labor problem."[84]

These various factors all help explain why states gradually changed their laws, giving landowners greater powers to exclude and depriving the public of its rural use rights. Yet, the factors just mentioned, mostly economic, do not seem to tell the whole story. Along with these economic factors were a number of changes taking places in the ideas that people embraced, and in the ways they saw the world. Many of their shifting ideas were linked to law, to theories of individual rights, and to the vital institution of private property. These factors also fit into the story. They shed light on America's key cultural values, which lie at the heart of today's property debates.

A. The Right to Property

One place to start, in this attempt to unravel nineteenth-century ideas about private property and land use, is with the idea of a "right to property." Property was important to America's founders and has been important to most Americans ever since. Yet, what has "property" meant over time, particularly when understood as an individual right? The historical record is murky, and for understandable reasons. Many proponents of a right to property have likely had only vague notions about what they meant, or they have assumed that audiences understood the right the same way they did.

One widely held interpretation of the right of property centered on a person's ability to gain access to it.[85] According to historian 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.[86] This is what Thomas Jefferson

[84]STEVEN HAHN, *supra* note 47.

[85]Discussed in ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 52-55 (2003).

[86]WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 36-58 (1977).

largely had in mind as a "right to property."[87] Widespread land ownership helped promote democracy, Jefferson thought.[88] Landowners were more stable, reliable citizens, better able to resist the pleas of demagogues and to work for the common good.[89] This preference for widespread ownership and independence led Jefferson to propose a variety of legal reforms to make land readily available, turning the right to property into a practical reality. He fought to eliminate the last vestiges of feudal tenurial property relations, in which landowners held their rights subordinate to some lord, and to institute across-the-board free, allodial ownership.[90] He opposed primogeniture to help break up property holdings as well as the institution of entail, under which lands were securely kept within a family line with the present generation unable to sell it.[91]

Most revealing, in terms of Jefferson's views on property, were his ideas about making land freely available to all adults, including a proposed constitutional provision for Virginia to give "every person of free age" 50 acres of land if he neither owned nor had owned that much.[92] He encouraged governments to use every means possible to break up large landholdings and to make land readily available to ordinary citizens. While in France he specifically complained that the large private landholdings of some people were leaving it hard for others to acquire land. "Whenever there is in any country," he contended, "uncultivated land and unemployed poor, it is

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[87]Jefferson's views are considered in GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, 33-36 (1997); Stanley Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. OF L. & ECON. 467 (1976).

[88]WILLIAM B. SCOTT, *supra* note 86, at 57-58.

[89]The cultural ideology is considered in GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 70-73 (1970 ed.).

[90]Katz, *supra* note 87, 471.

[91]GREGORY S. ALEXANDER, *supra* note 87, at 34.

[92]Katz, *supra* note 87, at 470.

clear that the laws of property have been so far extended as to violate natural right."[93] The private holding of uncultivated land by the wealthy, that is, violated the natural right to property of the landless. In Jefferson's view, according to historian Joyce Appleby, governments "did not exist to protect property but rather to promote access to property or more broadly speaking, opportunity."[94] 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."[95] And by "acquiring," he did not mean, nor did Jefferson, simply buying land at the prevailing market price.

This idea of a individual right to easy access has had a lengthy history in the United States. Homestead laws incorporated it, as did the federal practice of selling public land at low cost. Acreage limitations (often 160 acres) were routinely included in public land laws to curtail speculation and to reserve land for use by families who intended to stay put. During the days of Theodore Roosevelt, early in the twentieth century, forester Gifford Pinchot used this same rhetoric to justify getting the federal government involved in conservation, particularly in the business of building dams and big irrigation works to open-up new lands for families to settle.[96]

Underlying this property-as-access ideal was a widespread American desire: People wanted to gain economic and political independence; to acquire a "competency" (as they put it) or homestead, big enough so that wealthy people could not dominate them. When the right to property is understood this way, it makes ready sense for the public to be able to use the unenclosed countryside, even when lands are privately owned. This was especially true when

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[93]*Quoted in id.*, at 480 (from letter dated October 28, 1785).

[94]Joyce Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?,* 29 WM. & MARY Q. 287, 297 (1982).

[95]Hart, *supra* note 71, at 1135.

[96]GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION (1909); CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM (2001); J. Leonard Bates, *Fulfilling American Democracy: The Conservation Movement, 1907-1921,* 44 Miss. Valley Hist. Rev. 29 (1957).

rural lands were owned by wealthy, absent landlords who may have gained land titles through questionable means. As Jefferson's thinking illustrates, right-of-access reasoning can call into question the moral legitimacy of ownership rights of large landowners who fail to enclose or improve their lands. A failure to enclose could indicate that the owner had more land than he really needed. Unenclosed land could seem morally questionable, a form of second-class property entitled to less protection.

Ideas such as these, if widely held, would have helped justify the public's right to use the open countryside in early America. And the decline of these ideas over time–from literal moral commands and shared aspirations into something vaguer and more nostalgic–could well have paved the way for an expanding landowner right to exclude. When the landless poor held a right of access to land, they could use that right to counter the interests of big landowners. But as that right of access lost popular support, as people began to think of the "right to property" in new ways, the only property right left was the landowner's.

B. The Declining Influence of Natural Law

This first line of thought–the "right to property" as a right of access–is linked to a second one, the natural-rights reasoning that once 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.[97] By English standards Indians did not use land intensively, nor did they even fence it. The labor theory of ownership was known and linked to the rightful possession of land, even before John Locke wrote in the late seventeenth century.[98] 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, or so

[97]Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians*, in JAMES MORTON SMITH, ED., SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 15-32 (1972).

[98]WILLIAM B. SCOTT, *supra* note 86, at 15-16.

many colonists thought. It was thus morally legitimate for colonists to take their lands away, or at least this moral claim made otherwise questionable land acquisitions appear more fair. Supporting this dispossession of Indians 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.[99] This was the well-known "need and use" limitation of natural law, which had been around for centuries and was much discussed by medieval church writers.[100]

These strands of moral reasoning apparently retained a firm hold on the frontier mind, where the eviction of Indians continued.[101] But how seriously did settlers take this reasoning? And to what extent did they also apply it to expansive property claims of white settlers? Natural-rights reasoning did apparently mingle with frontier resentment at large land grants made to absentee owners. To at least some Americans, the property claims of absentee owners were suspect when their lands were left unimproved and unenclosed. A debate in colonial Massachusetts in 1722 highlighted the issue: Joseph Morgan contended that all private ownership in excess of the "need and use" limitation was a violation of natural justice; Samuel Stoddard, in reply, contended that the limitation only applied to Indian land.[102] A further bit of evidence comes from a study of land-use practices in portions of southeastern Delaware in the late eighteenth and early nineteenth centuries.[103] In this region of mixed farms and forests, local people distinguished clearly between two types of private land–cultivated farm areas and untended forests–and they held quite different ideas about rights to use these two land types.

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[99]*Id.* at 15-21.

[100]The natural law reasoning at the time focused chiefly on the presumed laws that prevailed in nature. It had not yet been transformed into rules that gave rise to individual rights, as would happen in the seventeenth century. The evolution of thought on property is recounted Also use in RICHARD B. SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 47-123 (1951). ful and more focused on legal theorists is Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L.REV. 691 (1938).

[101]The persistence of this reasoning in frontier Kentucky is noted in Aron, *supra* note 48.

[102]WILLIAM B. SCOTT, *supra* note 86, at 17-18.

[103]BERNARD L. HERMAN, *supra* note 81.

Farms were used exclusively by their owners; private forests, in contrast, were subject to extensive, entrenched public use rights.

This strand of moral-rights reasoning no doubt played a role in the many federal statutes that required homesteaders to develop their homestead claims in order to gain title to them. (The idea was not new in the nineteenth century, we might note; colonial Virginia in 1700 required people claiming land under the headright system to build a house and plant a crop on their land within three years or else forfeit it to the colony.[104]) The reasoning showed up even more starkly in statutes that colonies and early states used to seize private lands that had gone unimproved.[105] Good riverside sites for water-powered mills, for instance, could be seized if the land owner did not build a mill.[106] In the West, according to an important study by David B. Schorr, this agrarian reasoning played a role in the emergence of the new, prior appropriation system of water allocation, under which any person could gain a property right in water, regardless of land ownership, simply by diverting the water from the river and applying it to a "beneficial" use. This new approach to water allowed people to gain water rights even when they did not own any land, or held no land that fronted a river or lake. It also meant that land speculators could not buy all the river-front land and thereby gain control of all the water, so valuable in arid lands. [107] In 1872 and again in 1882, West Virginia enacted statutes that authorized state agents to reclaim lands on which no improvements had been made; the statutes were aimed at large, speculative land grants but they applied much more broadly.[108] In the 1892 federal elections, the newly

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[104]WILLIAM B. SCOTT, *supra* note 86, at 7.

[105]John F. Hart, *Forfeiture of Unimproved Land in the Early Republic*, 1997 U. ILL. L. REV. 435-51.

[106]John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1 (1995); *ibid*, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. LEGAL STUDIES 455 (1998).

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

[108]ALTINA L. WALLER, *supra* note 80, at 148-49.

formed Populist Party included in its national platform a call for government to reclaim from railroads and other corporations all lands that they held in excess of their actual needs.[109]

This natural-rights reasoning logically cast doubt on the kinds of legal rights that landowners could have in unimproved and unenclosed lands. Owners might hold legal title, but their moral claims remained incomplete until they mixed labor with the land. Up to that point, members of the public might enter the lands and use them. As the nineteenth century wore on, however, this natural rights reasoning became more controversial.[110] The labor theory of ownership was taken up by social reformers, who used it to press economic-justice claims on behalf of employees, farm tenants, and even slaves, to the fruits of their labor.[111] Recoiling from these seemingly radical claims, defenders of the industrial age shifted intellectual ground. They began using utilitarian arguments to support private land ownership–a line of moral reasoning, based on overall social utility, which did not distinguish between improved and unimproved lands and thus did not require owners to enclose or cultivate their tracts.[112]

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[109]WILLIAM B. SCOTT, *supra* note 86, at 188.

[110]In England, the labor theory of value and natural rights reasoning generally were largely cast aside by the end of the eighteenth century. The labor theory was put to continued, different use by the rising generation of classical economists, but even English economists dropped it by the mid-nineteenth century. RICHARD SCHLATTER, *supra* note 100, at 181-84. In the United States, professional theorists had largely abandoned natural rights reasoning by the end of the first third of the nineteenth century, although the ideology remained embedded in popular culture. *Id.* at 201-03.

[111]WILLIAM B. SCOTT, *supra* note 86, at 59-70 (use of natural rights reasoning to press for land reform, and to challenge all ownership claims not based on actual use and occupation); 80-90 (used to press for fundamental changes in terms of property ownership); 94-101 (used to attack slavery). Among the property theorists using natural rights reasoning to challenge the property rights of Northern capitalists was George Fitzhugh, the most prominent defender of slavery. RICHARD SCHLATTER, *supra* note 100, at 202-23. Fitzhugh was among the strongest voices urging that private property was a massive and inherent interference with liberty and equality, an argument he used to attack the alleged superiority of the Northern economic and political arrangement. GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS 222-224 (C.Vann Woodward ed., 1960).

[112]RICHARD SCHLATTER, *supra* note 100, at 201, 239-255.

In England, the labor theory gained prominence late in the nineteenth century in the hands of Karl Marx, who used it to challenge the capitalist order. More prominent in the United States were the reform writings of economist-reformer Henry George. George used the labor theory–also late in the nineteenth century–to explain why landowners did not really deserve to claim the rises in land values that were created by the efforts of other landowners and surrounding communities.[113] When vacant land rose in value because a city was built around it, George asked, why should the landowner get to claim that monetary value? When the value was created by what other people did on their lands–by the surrounding community–then the community in fairness, he asserted, should benefit from it. George's ideas clearly struck a responsive chord, to judge from the many "single-tax" and Henry George clubs that soon rose up. His chief book, *Progress and Poverty*, was read by perhaps 6 million people by 1906. As historian Willard Hurst recorded:

> Peddled in railway coaches and by candy "butchers" along with the paperback joke books and thrillers of the day, Henry George's *Progress and Poverty* (1879) evidently responded to some pervasive, deep-felt need to probe and grasp for more understanding of cause and effect in social relations.[114]

George's popularity stimulated a strong counter-reaction among defenders of the status quo. By then, most of them had dropped natural-rights and labor-theory reasoning as justifications for private property. Private property made sense, they claimed, because of the good benefits that it produced for society as a whole. Utilitarian thinking paid little attention to whether or not landowners had enclosed and fenced their lands. Land was a commodity, and its marketability rose when private rights were abstractly defined.

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[113]JOHN L. THOMAS, ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD AND THE ADVERSARY TRADITION (1983); WILLIAM B. SCOTT, *supra* note 86, 181-86.

[114]JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 74 (1956).

C. Shifting Ideas of Liberty

What we are looking for here is the intellectual context of nineteenth-century land use practices, and the shifting ideas and cultural values that surrounded and facilitated the closing of the rural landscape. Clearly, the decline of natural-rights reasoning had something to do with it. A related line of cultural thought that played a similar role, out on the land, was the important ideal of liberty, which underwent an evolution of its own during the early decades of America's development.

Like private property, liberty was a core American value. Indeed, the Revolutionary War was led by the champions of liberty. Yet, what did liberty mean to these Revolutionaries and to the people who inherited the benefits of their struggles? In discussions about private property today, liberty seems to reside on one side–the side of the private owner. Liberty, we assume, goes down when regulations restrict what an owner can do.[115] Americans of two centuries ago, however, knew better than this, or at least they thought differently. Liberty, they sensed, came in many forms, and land ownership itself entailed a substantial loss of liberty as well as a gain. When landowners erected no-trespassing signs the liberty of people to use the countryside went down, a truth that many early Americans experienced directly as they tried to travel and to gain sustenance from their landscapes.

During the Revolutionary Era, according to historian Michael Kammen, an important strand of liberty was the right of citizens to get together collectively to make laws for their well-being.[116] This was what "self-rule" was mostly about in the minds of Revolutionaries, not a n*egative, individual* liberty to resist government but a *positive, collective* power of people to

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[115]I consider the issue in ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007) and in a forthcoming essay, *Property and Liberty*. One contemporary legal commentary who displays the older, once-dominant understanding of property as both a curtailment and an expansion of liberty is Joseph William Singer, *supra* note 13.

[116]MICHAEL KAMMEN, SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE 33-38 (1986). A similar view is offered in JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S, 16-17 (1984).

govern themselves.[117] 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. The point was often illustrated this way: 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.[118]

Over the course of the nineteenth century ideas about liberty shifted in the United States, even as people held high the old liberty banners and sang the old songs. Liberty became more about individual options and less about collective powers. It became more negative rather than positive, freedom *from* rather than freedom *to*. By the mid-nineteenth century, ideals of Jacksonian democracy had taken firm root in the countryside, based on minimal government and unrestricted access to economic opportunities.[119] Acting on the impulse, several states reduced their requirements for admission to the bar to the point where men could become licensed lawyers with literally no education and no testing.[120]

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 terms of how people understood property, were profound.[121] Property was increasingly viewed as a private entitlement that arose and existed in a private realm. Governments, courts said, had broad

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[117]ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995).

[118]JAMES A. TOBER, WHO OWNS WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA (1981).

[119]Despite the rhetoric and the considerable expansion of legal opportunities, the various states retained strong traditions of government regulation of economic activities, as explained in WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAND & REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

[120]ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

[121]The issue is considered in FREYFOGLE, *supra* note 85, at 79-84.

"police powers" to regulate this private property in the public interest.[122] 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 legal reasoning, and in complex ways it incorporated and gave strength to a new way of thinking about private ownership. If private property in fact existed in a separate, private realm, then private rights somehow had to arise *outside* the law, fully formed. Property rights could not be a product of government grants and public lawmaking; they could not have been created by something that government did. Inevitably, this line of public-private reasoning further fueled the growth of abstract thinking about ownership, based on deductive reasoning from first principles. If property arose apart from government, if it was an individual right that arose in the mists of time before lawmakers came along, then the way to get clear about the rights of landowners was to start with basic principles or axioms of individual liberty and equality, and then to reason logically to a scheme of rights. These rights, then, would exist apart from government, with government bound to protect them. It made sense, or so it seemed, to talk about property rights in abstract, paying no attention to actual lands, to actual people, and to the customs and expectations of people who live in real places. Abstract deductive reasoning like this also seemed to fuel simplistic ideas about ownership. Understandings became more black and white. If a landowner had a right to exclude, then it was logically absolute.

D. The Rise of Industrialization

The various intellectual trends noted thus far–the new ideas about the "right to property"; the declining influence of natural-law reasoning; the rise of new, more individualistic notions of liberty; and the separation of life into private and public realms–all surely played roles in the

[122]The classic ruling on police power was Lemuel Shaw's opinion in Commonwealth v. Alger, 61 Mass. 53 (1851). The larger, more complex context is considered in WILLIAM J. NOVAK, *supra* note 119, at 71-81; HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER (1983), *passim*.

closing or enclosure of America's countryside. That closure began, in many places, early in the nineteenth century. And it continues, really, to this day, most visibly on issues of public hunting and whether the law presumes a landowner's consent to public entry.[123] Ideas, of course, did not arise and change form in the abstract. And it would be wrong for us to assume that new rules of land use were motivated entirely by culture and ideas. Economic forces, as we have observed, were also at work. Indeed, in the view of some historians, heirs to the materialist interpretations of historian Charles Beard a century ago, economic forces were nearly all important.

In some way, this decline of public rights to use unenclosed lands fits into the larger American story about of the transition to market capitalism in the nineteenth century. This is a transition that historians have studied at length.[124] We need to be careful, though, in presuming how enclosure fits into that critical evolution. Where it fits depends upon how we define capitalism. Both landowners and public users showed capitalist and pre-capitalist tendencies.[125] When Southern livestock producers, users of the open range, increased their herds to sell on the market, they arguably moved toward greater capitalism. But so too did landowners who sought to close their rural lands so they could use them more intensively, particularly to control livestock breeding and engage in agricultural "improvement."[126] In New England, similarly,

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[123]*E.g.*, Benson v. State, 710 N.W.2d 131 (S.D. 2006) (upholding constitutionality of statute that removes criminal sanction for hunting small game birds along public highway easements despite landowner's posting against hunting); Park County Commissioners v. Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002) (upholding powers of water rights owners to enter and use adjacent private land without landowner's permission).

[124]Naomi R. Lamoreaux, *Rethinking the Transition to Capitalism in the Early American Northeast*, J. AM. HIST. 437-61 (2003); Michael Merrill, *Putting "Capitalism" in Its Place: A Review of Recent Literature*, 52 WM. & MARY. Q. 315 (3d ser., 1995); Allan Kulikoff, *The Transition to Capitalism in Rural America*, 46 WM. & MARY. Q 120 (3d. ser., 1989); James A. Henretta, *Families and Farms: Mentalite in Pre-Industrial America*, 35 WM. & MARY Q. 3 (3d ser., 1978); Bushman, *supra* note 78; Gross, *supra* note 78.

[125]JOHN T. CUMBLER, REASONABLE USE: THE PEOPLE, THE ENVIRONMENT, AND THE STATE, NEW ENGLAND 1790-1930 (2001); THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND (1991).

[126]STEVEN STOLL, LARDING THE LEAN EARTH: SOIL AND SOCIETY IN NINETEENTH-CENTURY

resort owners promoted market capitalism when they built hotels and hired guides to take wealthy New Yorkers into the wildlands owned by other people. On the other side, though, private owners of the forest did the same when they sought to manage the forests for greater commercial yields and resisted outside interference. Capitalist tendencies, that is, pushed in both directions, keeping lands open and closing them.[127]

A full economic interpretation of enclosure would likely pay particular attention also to the 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.[128] During the nineteenth century, these historians tell us, American property law changed in ways that allowed landowners to use their lands more intensively. At the same time, 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–water 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.[129] 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 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

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AMERICA (2002).

[127]RICHARD W. JUDD, *supra* note 74.

[128]MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); William Weston Fisher III, "The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880," Ph.D. diss., Harvard University, 1991.

[129]The shifting applications of the principle, in the context of property and natural resources law, is considered in FREYFOGLE, *supra* note 33, at 255-86.

actions harmed surrounding people.

One corner of the law that underwent this transformation was the law of riparian water rights as applied in the Eastern half of the United States. The legal situation as the nineteenth century dawned was summed up by the New Jersey Supreme Court in a 1795 ruling, *Merritt v. Parker*.[130] A purchaser of land, the court explained in its ruling, possessed the legal right to use water flowing over and alongside his land, but he could use the water flow only "in its natural state" and had no right "to stop or divert it to the prejudice of another." A waterway should flow in its natural channel without being disrupted, by diversions or pollution. The goal of this legal rule was to allow each riparian landowner to enjoy the river in its natural condition, even though this meant riparians generally had only severely circumscribed rights to use water. So "perfectly reasonable" was this rule and so "firmly settled" was it "as a doctrine of the land," the New Jersey court stated, that the legal rule "should never be abandoned or departed from."[131] Despite the court's wish, though, other tribunals soon began changing water law, giving landowners greater rights to divert and consume water, even pollute it severely and block water flows and fish migrations, all in the name of promoting new industrial activities. Courts rewrote water law to allow landowners to undertake "reasonable" uses of waterways even when their uses disrupted the natural flow. Downstream property owners simply had to tolerate the ensuing harms.[132]

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 his open lands. Where was the

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[130]Merritt v. Parker, 1 N.J.L. 526, 1 Coxe 460 (N.J. 1795).

[131]1 N.J.L. at 530; 1 Coxe at 463.

[132]MORTON J. HORWITZ, *supra* note 128, at 34-42; T.E. Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1 (1970); T.E. Lauer, *The Common Law Background of the Riparian Doctrine*, 28 MO. L. REV. 60 (1963); Samuel C. Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CAL. L. REV. 245 (1918).

harm, if the owner was not using what he owned? As the 19th century wore on, this agrarian perspective faded considerably, no doubt because industrial activities *did* interfere with the quiet enjoyment of neighboring owners. A new idea rose up to replace this agrarian emphasis on the right to quiet enjoyment. The new idea was that the core right of owners was instead the right to halt physical invasions of their spaces; the right to exclude. This was the legal right that industries valued most, because it allowed them to keep people off their lands. Historians need to do more work here, yet the legal literature of the late nineteenth century appears to bear 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 Morton Horwitz' interpretation of this nineteenth-century legal transformation, industrial interests played a key role by influencing lawmaking processes.[133] Industrialists and their powerful financial and legal supporters were able to push property law in the 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 of government to higher levels, to the county and the state.[134] State governments asserted control over land-use practices; for instance, by passing laws protecting wildlife species, by controlling hunting, and by indirectly closing off public ranges. The work that local governments formerly performed–the tasks that often had greatest influence on land uses–were becoming controlled by county-level administrators, who were linked to county-seat business interests. In addition, local land-use decisions made by justices of the peace and petty livestock control officers were being reviewed more carefully for compliance with state law.

These final trends give us yet another hypothesis to consider when explaining the closing of rural America. Local lawmakers were more likely to respect customary land-use practices, and

[133]MORTON J. HORWITZ, *supra* note 128, at xiv-xvi.

[134]The shift was at the heart of the Appalachian story told by ALTINA L. WALLER, *supra* note 80.

their political decline weakened these practices. As many local leaders saw things, the open range helped secure social bonds and patterns of social deference, tying the landless to larger landowners. The arrangement provided sustenance for the most poor, who could live off the land and did not have to soak up tax money for poor relief.[135] As political and legal power moved to higher levels of government, these local social arrangements lost importance. State law displaced local practice.

V. THE JUGGERNAUT OF THE COMMON LAW

These, then, were some of the intellectual currents that were apparently intertwined with the gradual loss of public land use rights. To these ideas developments 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.[136] On this last point, according to historian 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.[137] Over time, though, 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 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

[135]Evidence that open lands were viewed as a form of poor relief is offered in BERNARD L. HERMAN, *supra* note 80.

[136]ALAN KULIKOFF, *supra* note 76; Bushman, *supra* note 78; Gross, *supra* note 78.

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.[138] 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 on-the-ground land use practices and land-tenure ideas.[139] 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.[140] 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.

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[137]Merrill, *supra* note 124.

[138]The language and ideas used in legal discourse about property, particularly in elite literature, are considered in GREGORY S. ALEXANDER, *supra* note 87, *passim*.

[139]Tomlins, *supra* note 22; Freyfogle, *supra* note 30.

[140]E.P. THOMPSON, *supra* note 25, 97-184; Peter King, *Gleaners, Farmers and the Failure of Legal Sanctions in England* 1750-1850, 125 PAST & PRESENT 116 (1989).

By the time English law took root in America, particularly in state supreme 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.[141]

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 that also 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.[142] The legal influence of these regions was considerable. New England states were the first to begin publishing reports of their rulings, which circulated widely.[143] Courts from

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[141]Grady McWhiney & Forrest McDonald, *Celtic Origins of Southern Herding Practices*, 51 J. SO. HIST. 165 (1985). Open-range cattle herding also built upon cultural practices familiar to African immigrants and upon practices common in Spanish-influenced portions of the Western hemisphere (which reached the United States by way of the West Indies and Spanish Florida). The literature as of 1991 is surveyed in Mart A. Stewart, *"Whether Wast, Deodand, or Stray": Cattle, Culture, and the Environment in Early Georgia*, 65 AGRIC. HIST. 1, 4 (1991).

[142]The origins and differing cultures of various immigrants from Britain are discussed in DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS TO AMERICA (1989). The debate about Fischer's provocative thesis is traced in Tomlins, *supra* note 22.

[143]The beginnings in 1789 are recounted in Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. Legal Hist. 297 (1972). Connecticut gave the enterprise encouragement with a statute enacted in 1785 that required judges to write and retain opinions on law matters. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 42

New York and northward (Massachusetts in particular) exerted inordinate influence in the shaping of early American law. America's treatise writers also largely came from this region, although with a few prominent exceptions. Prominent among them was James Kent on New York, whose self-appointed task, working with his friend and fellow treatise writer, Joseph Story, was "to make American law a 'learned law' rooted in the English common law."[144] As John H. Langbein explains,

> Kent subscribed to the standard caveat that American courts should not apply English law in circumstances in which American conditions rendered it inappropriate. For Kent and persons of his persuasion, however, the presumption lay strongly with the inherited English law. Writing to Simeon Baldwin in 1786, the youthful Kent disclosed that he had "a much higher veneration for the English common law than for our own decisions because . . . the English decisions were pronounced by Judges of vastly higher erudition and skill in the knowledge of the common law."[145]

We can note, too, that the lawyers and judges whose views counted most were chiefly 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.[146] By the eve of the Revolution American society had undergone a distinct process of "Anglicization."[147] Perhaps in no sphere was this more pronounced than in the law and legal culture.

(1990).

[144]John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 570 (1993).

[145]*Id.* at 568-69 (citations omitted).

[146]As of 1800, most American jurisdictions still relied "almost exclusively" on legal precedents from England. *Id.* at 573-74.

[147]John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in STANLEY N. KATZ & JOHN M. MURRIN, EDS., COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT (3d. Ed 1983).

After the Revolution, America flirted with the idea of rejecting the common law in favor of the civil law.[148] 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 local practices lacked something essential in order for them to survive: They 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 accepting the intellectually coherent, well-crafted common law or rejecting it.[149]

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,"[150] but what type of right was this and how did it fit into the law?

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[148]Richard Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649 (1992); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966).

[149]An argument on the continued influence of custom in England's courts, through the nineteenth century and beyond, is offered in Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993).

[150]*See* text at notes 49-63, *supra.*

This intellectual failing was probably of vast importance. It left the pro-open-range stance in a position of intellectual vulnerability. 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, for instance of which animals could be grazed and how many, whether hunting could take place on horseback, and how much firewood could be collected). In short, aided by a positive theory of public use rights courts could have resolved public-landowner conflicts while still retaining the most valuable use rights. But courts did not have such a theory. And 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 simply became too high.

As the nineteenth century unfolded, 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.[151] 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

[151] *E.g.*, Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education,* 17 LAW & HIST. REV. 17 (1999); Michael H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginnings of Anti-Formalism in American Legal Theory*, 5 VERMONT L. REV. 27 (1980).

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 largely stopped. The common law had become mostly 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 much earlier 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.[152] These were property rights, and protected by law. In America, the public's customary 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 1922 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. In the history of law, they were easily overlooked.

We can see this whole process more clearly when we compare the plight of these rural

[152]E.P. THOMPSON, *supra* note 25, at 97-143.

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.[153] 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 property entitlements of riparian landowners.[154] 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.[155] 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.[156]

VI. LOOKING AHEAD (AND BEHIND)

In the mid 1790s, an elderly and ailing Thomas Paine presented a provocative proposal to the citizens of France and the world. In *Agrarian Justice*, one of his final major writings, he

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[153]This recognition hardly avoided all disputes over them, however, particularly in the case of waterway obstructions. *E.g.*, THEODORE STEINBERG, *supra* note 125; Gary Kulik, *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 25 (1985).

[154]The classic ruling is Coffin v. The Left Hand Ditch Co., 6 Colo. 443 (1882), which inaugurated the "pure appropriation" approach to water allocation, granting property rights to free-roaming water users at the expense of the owners of riparian land. The basic idea of allocating water based on first in time, rather than land ownership, began in California. Eric T. Freyfogle, Lux v. Haggin *and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485 (1986)(considering California water decisions from 1850 through 1886).

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

[156]A further instructive example is provided by the rights retained by Indian tribes to hunt and fish on lands ceded to the United States under various treaties. These customary rights gained legal status by virtue of the various treaties, and typically take precedence over the ownership rights of private landowners. *E.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Winans, 198 U.S. 371 (1905).

addressed the unfairness as he saw it of the private property regime associated with "civilization," and he proposed steps to rectify it.[157] The unfairness could be seen, Paine said, by comparing the present age of opulence mixed with abject poverty with early times, when people lived more simply yet no one went truly hungry. Poor people lived better in hunter-gatherer days, he asserted, than they did in the big cities of late eighteenth-century Europe. Private property was the direct cause of the problem because it deprived people of their original shares in nature. The landless could no longer gain sustenance directly from nature, but were beholden to the people who now owned the land. It was a "proposition not to be controverted," Paine explained,

> that the earth, in its natural, uncultivated state was, and ever would have continued to be, *the common property of the human race*. In that state every man would have been born to property. He would have been a joint life proprietor with the rest in the property of the soil, and in all its natural productions, vegetable and animal.[158]

At this point cultivation came along. Necessarily the earth was divided into private shares, through a process that deprived people of their common land-use rights. In the age of cultivation people mixed their labor with the land, adding value to it. In moral terms this labor gave them an entitlement to the improvements they made, but not to the land itself. Yet it was "impossible to separate the improvement made by cultivation from the earth itself, upon which that improvement is made." The solution was not to deprive cultivators of their labor; they deserved to keep that value, Paine explained. Rather, the solution was to pay people for what they had lost. The cultivators who claimed exclusive control of parts of the old commons should pay a "ground-rent" to the common fund.

> Cultivation is at least one of the greatest natural improvements ever made by human invention. It has given to created earth a tenfold value. But the landed monopoly that

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[157]Thomas Paine, *Agrarian Justice*, in MICHAEL FOOT & ISAAC KRAMNICK, EDS., THE THOMAS PAINE READER 471 (1987).

[158]*Id.* at 476.

> began with it has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, an indemnification for that loss, and has thereby created a species of poverty and wretchedness that did not exist before.[159]

Paine followed his critique with a proposed remedy. His plan was as follows:

> To create a national fund, out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property. . . . It is proposed that the payments . . . be made to every person, rich or poor. It is best to make it so, to prevent invidious distinctions. It is also right it should be so, because it is in lieu of the natural inheritance, which, as a right, belongs to every man, over and above the property he may have created, or inherited from those who did.[160]

Paine proposed to fund this payment scheme out of an inheritance tax, which would take, for the state, 10% of all estates when wealth passed from one generation to the next.

Paine's criticism of the property system was only one of many that social critics have offered in recent centuries.[161] In his day, Paine was hardly alone in recognizing that landless people had hard lives when land produced most of the wealth. Why did some people own the land and others did not, he and others asked? In many cases, he knew, land simply passed down within families, generation to generation. Some people were born into families with land; most people, the unlucky ones, were not. This wealth differential had nothing to do with the labor or virtue of the people themselves. The scheme was unfair, and the unfairness became more stark when the present age of inequality was compared with an early age when people shared the land.

Paine's critique seems harsh to us today, so familiar and unquestioned has land

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[159] *Id*. at 477.

[160] *Id*. at 477-78.

[161] WILLIAM B. SCOTT, *supra* note 86, *passim*.

ownership become. Yet to recover his full criticism, we need to realize that landownership in Paine's time was in fact less constraining of the landless than it is today. When Paine wrote, the landless could still use most of the countryside for a variety of purposes. What they could not do was plant crops and build houses. Presumably his outrage would have risen had he lived to see the landless poor lose the few rights they then retained, the right to graze animals, hunt, and forage in the vast, open countrysides. Paine was already troubled by the way private property rights curtailed the liberty of the landless. Why should they agree to this morally problematic arrangement, which depended ultimately on law and public power? At the time, though, private property had not yet worked its full power. The enclosure of North America had not yet run its course.

The United States underwent a major enclosure movement, mostly over the course of the nineteenth century. It was a movement that entailed the end of customary land use practices, and thus a version of what one commentator, speaking critically of the similar movement in England, termed the "transition from custom to crime."[162] We have largely overlooked this movement, and 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 contemporary citizens resisted the shift, sometimes violently.[163] 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.

What, then, might all this mean for the right to exclude in twenty-first century America? Is the historical record anything more than a curiosity or trigger for nostalgia? Should we look at it as we might a mid-nineteenth century home, with its wood-burning stove, outhouse, and livestock penned in the back? Or does it have more value?

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[162]ROBERT BUSHAWAY, BY RITE: CUSTOM, CEREMONY AND COMMUNITY IN ENGLAND, 1700-1880, 209 (1982).

[163]THEODORE STEINBERG, *supra* note 125.

For starters, this record makes clear that the right to exclude has not been absolute in American law, nor is it an inherent or necessary part of land ownership. Judging from history, private ownership can function perfectly well with landowner's possessing a limited right to keep outsiders away. Surely it makes no sense to claim that the Bill of Rights, adopted in 1791, implicitly protects a right to exclude that simply did not exist, and was not supported, at the time. To say these things, though, is to leave open the core policy question. What right to exclude should landowners possess? Are there good reasons to make it close to absolute? Alternatively, could we have trespass rules that vary from place to place, not just among the states, but perhaps at more local levels? After all, development restrictions are finely tailored at the local level by zoning boards and the like. Why not have variations in the right to exclude, much as we did a century and a half ago?

A key point to keep in mind on the right to exclude is the important distinction between the right to exclude and the related but nonetheless distinct legal right of landowners to halt interferences with their activities. Private property does not work unless an owner can use land without disruption.[164] An owner is not likely to plant crops in the spring without an assurance of the right to harvest without interference. On the other hand, a right to halt interferences is not the same as an unqualified right to exclude people from one's lands. A right to halt interferences means a right to stop people from disrupting what an owner actually does. To get to a full right to exclude we need another argument, some further reason why a landowner should need to halt invasions that do not interfere.

One answer is to talk about invasions of privacy. Landowners need and deserve reasonable privacy protection. People snooping close to one's house are invading privacy. On the other hand, people who enter a forest or grassland, far from any dwelling, are not really doing that. A further explanation for a full right to exclude might be that an owner wants freedom to initiate a new land use without resistance. Yet, this meritorious concern still also does not get us to a full right to exclude. It merely means that, when the landowner's new activity

[164]FREYFOGLE, *supra* note 115, 96-101.

starts, activities by others would need to halt. A final argument is simply economic. The landowner could want to get paid if anyone uses his land. The desire here is certainly understandable, but does it justify a complete right to exclude? We need to be careful when answering to keep in mind the conflicting desires of other people. We need to remember, that is, that private property restricts the liberties of other people and that its restrictions, all of them, require sound moral justification. The central question is not simply why a landowner would want to exclude outsiders; that is easy to answer. It is instead why outsiders should consent to a legal regime in which they can be excluded. The question resists a simple answer.

We can conclude by considering a dispute that came before the high court of Wisconsin a decade ago.[165] A business, Steenberg Homes, had a mobile home to deliver to a purchaser's rural lot. Steenberg Homes had two options for delivering and setting up the home. One option was to follow a road that was then covered by seven feet of snow. The road contained a sharp curve, and would have required the company to set the home on "rollers" so it could be maneuvered around the curve. The alternative was to cut straight across the frozen rural farm land of Harvey and Lois Jacque, an elderly couple retired from farming who owned 170 acres. Steenberg Homes several times asked the Jacques whether they could cross their land to deliver the mobile. The Jacques said no. Steenberg Homes offered to pay for the use of the land, but the Jacques contended that it was not a question of money.

Steenberg Homes tried to get the mobile home down the road, but ultimately cut a path in the snow across the Jacques' field. When the Jacques complained to the local government, the company was fined $30 for trespassing. The Jacques then filed suit in court, seeking damages for the trespass. At court the Jacques admitted that they had not been harmed, and they asked only for a recovery of $1 as symbolic money damages. They also asked for, however, an award of $100,000 for punitive damages because of the intentional wrongdoing of Steenberg Homes. They won their case.

The ruling in *Jacque v. Steenberg Homes* no doubt makes sense to many Americans, so

[165]Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d (1997).

accustomed are we to believe that ownership includes the right to exclude. But exactly why did the Jacques have the power to tell Steenberg Homes to stay away? Why did they possess a legal right to be so uncooperative? No question of privacy was involved, Steenberg Homes was not knocking down crops or otherwise interfering with a land use, and it offered to pay rent. So why, then, should the Jacques have the right to refuse payment and force the company to use a costly, dangerous route? A land-owning neighbor, a member of the same community, was paying the unneeded extra costs. Ultimately, what overall benefit did society obtain by recognizing the Jacques' desire to exclude? The question went unasked, perhaps because the judges, like most of us, could not imagine and did not remember a different legal world.