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Eric T. Freyfogle

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EIGHT PRINCIPLES FOR PROPERTY RIGHTS IN THE ANTI-SPRAWL AGE

ERIC T. FREYFOGLE*

I. THE PATH TO THE PRESENT

In 1876 in Middlesex, England, a dispute broke out between the occupants of two adjoining houses on Hackney Road. One house, long used as a dwelling, was taken over by timber merchants who rebuilt it for commercial use. The merchants increased the height of the building and proceeded to store piles of timber on the rooftop. Next door lived the plaintiff who used the several fireplaces in his home for both heating and cooking. The effect of the timber merchants' extensive remodeling, along with the stored timber, was to block the winds that naturally blew across the neighborhood rooftops, thereby disrupting the draft of the plaintiff's chimneys. Smoke that had risen up for decades now blew down and into the plaintiff's house. The plaintiff's fireplaces became unusable, and his enjoyment of the house was disturbed.

The plaintiff sought redress in an action in nuisance, and in time, the

* Max L. Rowe Professor of Law, University of Illinois. B.A. 1973, Lehigh University; J.D. 1976, University of Michigan. My thanks go to friends Clark Bullard and Bruce Hannon for offering useful comments on a draft of this article.

One of my chief scholarly aims over the past decade has been to search for ways of conceiving private property rights that are consistent with the history and vital aims of that institution and that foster the long-term health of the land community—a community that includes people as well as all other life forms and the physical parts and processes of the planet. I have sought, and still seek, to combine the American legal tradition and its longstanding concerns with both the persuasive, foundational ideas of ecology, environmental ethics, and environmental history, and a much-needed respect for our vast ignorance about the natural world. I have taken the opportunity posed by this symposium to draw together in brief compass many of the observations and conclusions that I have set forth in various writings over the past half dozen years. Due to this article's close link to my previous writings, which consider points in more detail, my footnotes largely direct readers to those other writings and, indirectly, to the sources cited in them. As in my other writings generally, I focus here not on the details of specific policy options but on foundational issues that scholars typically bypass. In an upcoming article, I lament inattentiveness, which I view as a source of weakness in contemporary scholarship. See generally Eric T. Freyfogle, *Five Paths of Environmental Scholarship*, 1999 U. ILL. L. REV. (forthcoming 1999).

suit made its way through the Common Pleas Division to the Court of Appeal. Out of the case came the opinion entitled *Bryant v. Lefever*,¹ and it provides a revealing glimpse of how late nineteenth-century jurists had come to understand the property rights held by owners of land. The court began its ruling with a lyrical statement of what it meant to own land under the Anglo-American common law:

What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages, as nature would produce them; there is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow; a right that the rain, which would pass over the land, should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it, a right that the wind should not be checked, but should be able to escape freely²

This was the agrarian vision of property, and it made sense in a world where dwellings were scattered, land uses modest, and people grew food on their soil.³ The rule protected homes, small farms, and other sensitive land uses. It secured an owner's quiet enjoyment, not just against government interference, but also against noisy, polluting, or otherwise disruptive land uses by neighbors. By the mid-nineteenth century, though, this agrarian vision no longer comported with the prevailing values and practices of an industrializing culture. A property law scheme that protected one landowner's rights to wind, sun, clean water, and natural drainage, necessarily limited the rights of other landowners to undertake industrial and commercial land uses. For industry to prosper, a different regime of landed property rights was needed, one that allowed an owner to use land intensively and that consequently, limited any right of quiet enjoyment based on the land's natural features.

¹ 4 C.P.D. 172 (1879). *Bryant v. Lefever* is also reported with different introductory notes at 48 Q.B.D. 380. My summary of the facts of the dispute is a conglomeration of the introductory notes from each of the two case reporters.

² 4 C.P.D. at 175-76; 48 Q.B.D. at 381-82.

³ See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 99-101 (1995). See also WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (considering this issue in its regulatory context).

By the time the smoking-chimney dispute reached the Court of Appeal in 1879, this agrarian vision of peaceful coexistence had become qualified in an important way. As the court explained, a landowner still nominally enjoyed the right to the natural incidents of the land.⁴ But that right had been limited by the right of neighboring landowners to engage in common, ordinary, and lawful land uses—uses that were, in the industrializing economy of the day, increasingly disruptive of wind, rain, and light. “[F]or the benefit of the community,” the court explained, landowners “have and must have rights” to use property in whatever ways such property was “commonly and lawfully used.”⁵ So long as a landowner’s activity was “ordinary and lawful” under the evolving standards of the day, a court would not label it a nuisance.⁶ The Court of Appeal employed this rule, in all likelihood, because the rule seemed appropriate to facilitate or at least accommodate the more intensive land uses of the age. In doing so, it embraced, and translated into law, the pro-development sentiments of its day. On the facts of the particular dispute, the timber merchant’s activity fit within the court’s rule. The defendant’s land use was lawful and thus the plaintiff’s case lacked merit.

In two other ways the Court of Appeal’s ruling further protected intensive land users, thereby aiding development and, in the process, changing the bundle of rights that landowners held. Prior decisions often protected agrarian land uses by giving priority in land-use disputes to the land use first in time.⁷ Because intensive uses commonly began later, a rule favoring pre-existing land uses effectively limited where and how intensively industrialization could occur. But as the court in *Bryant* saw matters, an early land use by one owner did not diminish the rights of adjoining landowners; it placed “no greater burden or disability on what the adjoining owners could do, at least with respect to air flows.”⁸ Priority in time, in short, gave a landowner no greater claim to protection, and hence, was irrelevant in resolving disputes. Equally indicative of the court’s pro-development slant was its willingness to take the underlying factual issue away from the jury.⁹ As the jury in *Bryant* saw matters, the timber-erecting landowner had

⁴ See 4 C.P.D. at 177, 48 Q.B.D. at 382.

⁵ See 4 C.P.D. at 176, 48 Q.B.D. at 382.

⁶ See *id.*

⁷ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 32-34 (1977).

⁸ *Bryant v. Lefever*, 4 C.P.D. 172, 175 (1879).

⁹ See *id.* at 179.

engaged in a nuisance, causing harm by reversing the smoke's flow. The appellate court, in sharp contrast, saw the causation chain leading in the opposing direction: "[i]t is the plaintiff who causes the nuisance by lighting a coal fire in the place the chimney of which is placed so near the defendant's wall, that the smoke does not escape Let the plaintiff cease to light his fire, let him move the chimney, let him carry it higher, and there would be no nuisance."¹⁰ It was the plaintiff, not the defendant, who caused the problem. The jury's verdict, accordingly, could not stand.

The legal rules and reasoning that came together in *Bryant v. Lefever* were perfectly suited to aid industrialization, at least when wielded by supportive judges. And for several generations these ideas held sway, both in the United States and England. One can easily trace the reasoning behind the case up through the mid-twentieth century, although courts by then had modified slightly their phrasings. In 1954, for instance, the Supreme Court of Pennsylvania in *Waschak v. Moffat*¹¹ considered whether a coal mine operator committed a nuisance when destructive gases from its waste pile turned neighboring houses black and left area residents sickened.¹² The court began its resolution of the case, as had the court in *Bryant*, by expressing the general rule: a landowner could use land only in ways that did not injure neighbors.¹³ By implication, neighbors had the right to complain if the use and enjoyment of their land was disrupted in any material way. This no-material-injury rule, like the natural-incidents rule applied in *Bryant*, was qualified, however, by the right of each landowner to engage in "the natural use and enjoyment of his own property."¹⁴ So long as the land use was "normal and customary" and caused no intentional injury—so long, that is, as a land use was "reasonable"—no nuisance occurred.¹⁵

On the facts in *Waschak*, the court saw obvious benefit to the community in the mining operation, and the operation was conducted, it believed, in a non-negligent manner. For the court, the community's interest was plain to see: "one's bread is more important than landscape or clear

¹⁰ *Id.*

¹¹ 109 A.2d 310 (Pa. 1954).

¹² Although the majority indicated that paint damage was the only injury the plaintiff suffered, *see Waschak v. Moffat*, 109 A.2d 310, 312 (1954), the dissent characterized the facts differently when it discussed not only paint damage, but tarnishing effects on metals and testimony as to acute toxicity and chronic health effects of hydrogen sulfide gas. *See id.* at 318 (Mussmano, J., dissenting).

¹³ *See id.* at 313-14.

¹⁴ *Id.* at 317.

¹⁵ *See id.*

skies,”¹⁶ it proclaimed, quoting from an earlier ruling. “Without smoke, Pittsburgh would have remained a very pretty *village*.”¹⁷ So ready was the court to protect the coal-operation that it followed the lead of *Bryant* and viewed the issue as a question of law, not one for a jury to assess.

By the time of *Washak*, land and property rights at common law had plainly shifted far from their agrarian roots. Out on the landscape, with its smoky skies and polluted rivers, the change was easy enough to see. In the law reports, however, the judicial writing style masked much of that change, giving a misleading aura of continuity. Landowners were still protected in their quiet enjoyment of the land, just as they had been two centuries earlier, and landowners could engage only in land uses that were natural, customary, lawful, or reasonable. By the twentieth century, however, those words as applied led to far different outcomes than they had generations earlier. They were vague, flexible words, with plenty of room for courts to maneuver within them. There was room to shift the outcomes of land-use disputes to reflect, not just the different policy slants of the judges themselves, but the evolving values of their home cultures.

In retrospect, *Waschak* stood at the end of an era, one of the last decisions to allow intensive industries to run roughshod over neighboring homeowners.¹⁸ One judge in the case, disliking the outcome, wanted to get the jury involved, perhaps sensing that a jury’s assessment would differ markedly from the majority’s.¹⁹ Another dissenting judge challenged the majority more openly: “I do not think that there can be any doubt the constant smell of rotten eggs constitutes a nuisance. If such a condition is not recognized by the law, then the law is the only body that does not so recognize it.”²⁰

Even before *Washak* was handed down, new winds were blowing.²¹ In California, courts were struggling to make sense of a jumbled and

¹⁶ *Id.* at 316 (quoting *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pittsb. Leg. J. 379 (1935)).

¹⁷ *Id.* (quoting *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pittsb. Leg. J. 379 (1935)) (emphasis added).

¹⁸ One of the last, but by no means the final one. See, e.g., *Homewood Fishing Club v. Archer Daniels Midland Co.*, 605 N.E.2d 1140 (Ill. App. Ct. 1992) (setting aside, due to a failure to show negligence, both compensatory and punitive damages awarded against a major industry engaged in knowing, long-term violations of the Clean Water Act).

¹⁹ *Waschak v. Moffat*, 109 A.2d 310, 318 (Pa. 1954) (Jones, J., dissenting).

²⁰ *Id.* at 321 (Musmanno, J., dissenting).

²¹ See Eric T. Freyfogle, *Community and the Market in Modern American Property Law*, in *LAND, PROPERTY, AND THE ENVIRONMENT* (John F. Richards ed., forthcoming 2000).

misguided water rights regime that placed few limits on what water owners could do. Nominally the law limited appropriative rights to uses that were beneficial and reasonable; like landowners, water-rights owners had no absolute rights of use. Under this vague standard, however, even the most consumptive, polluting, and ecologically destructive water uses had seemed beneficial when pro-development values were at their peak. By the 1930s, the state's Supreme Court recognized that change was needed. In terms of verbal formulation, the law remained little changed: a water rights holder was still obligated merely to use water in a way that was socially beneficial. Like the terms "natural," "customary," and "ordinary," however, the term "beneficial" was inherently flexible and responsive. It was linked, like other property norms were linked, to the well being of the overall community, and it shifted along with the court's conception of the common good: "What is a beneficial use, of course," the court explained,

depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.²²

By the final quarter of the twentieth century, decisions like *Washak* had come to seem like relics from a discredited past. Environmental values had become entrenched. Quality-of-life issues demanded that polluters change their ways. With its built-in flexibility, the common law had no trouble accommodating these new values, just as it had shifted easily to accommodate the old ones. One case illustrative of this flexibility, prominent because of its unusual facts, was the Wisconsin Supreme Court's ruling in *Prah v. Maretti*.²³ There, the court considered whether a homeowner with a roof-top solar panel could assert a nuisance claim against a neighboring landowner, whose newly constructed home partially blocked the sun's rays. The dispute was novel, but the court needed no new language to resolve it. No landowner, the court reiterated, has "an absolute or unlimited right to use the land in a way that injures the rights of others. The rights of neighboring

²² See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. 1935).

²³ See 321 N.W.2d 182.

landowners are relative; the uses by one must not unreasonably impair the uses or enjoyment of the other.”²⁴ The key issue, the court said, was simply one of reasonableness—just as the Pennsylvania court in *Waschak* had announced. A landowner’s use rights were limited by a duty to act reasonably, and what was reasonable was determined with a clear focus on the needs of society as a whole. Under the circumstances of the day, a new home that substantially and unnecessarily interfered with a solar collector might well be unreasonable. Decades before, the court admitted frankly, it had embraced a more pro-development slant in its rulings, just as most other courts had done. But that policy, the court said, “of favoring unhindered private development in an expanding economy, [was] no longer in harmony with the realities of our society. The need for easy and rapid development is not as great today as it once was”²⁵ It was wrong to adhere to policy values that had “lost their vigor over the course of the years.”²⁶

II. PROPERTY RIGHTS IN THE ANTI-SPRAWL AGE

These brief scenes from the common law’s long history help establish a context for understanding how private property in coming decades might fit together with the kinds of new regulatory measures that now seem needed to control suburban sprawl and mitigate related land-use problems.

According to a common misunderstanding of property’s legal history, private property began as an absolute, abstract bundle of rights that a landowner could exercise with little or no constraint.²⁷ Those rights remained near total, the tale goes, until the modern era of regulation, when land-use rules cut away the bundle, more and more, to the point where landowners sometimes possessed merely a rind or residue of what they once owned. That story has little basis in history²⁸ yet it remains vibrant, coloring popular understandings of what private ownership ought to mean. It stands as a central element of the individualistic worldview that uses property rights as a tool to undercut unwanted constraints. The popularity of this property myth

²⁴ *Id.* at 187.

²⁵ *Id.* at 190 (citations omitted).

²⁶ *Id.*

²⁷ See John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252 (1996).

²⁸ See *id.* at 1281 (“The first century and a half of private land ownership in America reveals no sign of the later-imagined right of landowners to be let alone as long as they do not harm others [T]he landowner’s right to control and utilize land remained subject to an obligation to further important community objectives.”).

poses a profound challenge to conservation advocates.

Private property is a central institution in American culture. It is one of the pieces that give the nation its identity, and it has helped account both for the vigor of American democracy and the nation's remarkable economic growth. Yet if private property has been a strength and virtue, it has also been a liability. Left alone, landowners too often look after their individual interests and act in ways that undercut the well being of surrounding lands and people.²⁹ Environmental degradation is one of the several disturbing results. Many land uses, appropriate enough in isolation, become problematic when lots of landowners engage in them.³⁰ Particularly over the past century, intensive land uses have spread all across the landscape, giving rise to new forms of ecological degradation. Ecosystem processes are disrupted in ways that threaten the long-term fertility and health of entire regions. Landscape beauty has suffered, and unregulated congestion has helped separate people from nature in ways that diminish human life. Then there are slow-developing problems, unseen by the ordinary landowner, like soil degradation and declining biological diversity.

These land-use environmental problems are, for the most part, ones that landowners acting alone cannot solve. No landowner alone can protect a riparian corridor, keep an aquifer from being polluted, preserve the beauty of a mountainside, keep a wandering animal species from going extinct, solve a watershed's flooding problem, or foster a landscape with appealing recreational opportunities. Sometimes a landowner can improve a problem modestly by using private land wisely. Other times, however, a landowner acting alone is helpless to mitigate a problem. For landowners in the latter category, the question is not whether to forgo land degradation for the common good, it is whether to forgo land degradation merely to cleanse one's conscience, knowing that the community will not materially benefit; or knowing that, if some benefit does accrue, it will largely go to neighbors who continue their degradation.³¹ The problem here is what is sometimes termed the "tyranny of small decisions."³² It is a tyranny that comes, not principally

²⁹ See, e.g., Alison Reiser, *Ecological Preservation as a Public Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 420 (1991) (stating that wetland systems may be degraded by disparate acts separated in space and time).

³⁰ See *id.* at 420-21 (arguing that natural systems are vulnerable to cumulative effects).

³¹ This is one of several points overlooked by commentators who claim that citizens express their "true" values and choices when they make isolated transactions in the market.

³² Reiser, *supra* note 29, at 424.

because people acting alone so often focus on themselves and the short-term—although that is a serious problem—but because people acting separately simply lack the powers and options that communities possess, and lack too the time and knowledge to understand many problems. Most environmental land-use problems, suburban sprawl among them, can be understood and described only on a scale well above the individual land parcel. And they are solvable only by coordinated, collective measures that are equally far reaching.

If solutions to such problems are going to succeed, they need to fit together with the institution of private land ownership. To the extent they change the institution—as inevitably they will—they need to do so in ways that maintain its core values, economically, politically, and socially.³³ To be sure, there is no reason to maintain, and every reason to resist, the now-popular declensionist tale of landed property—of private rights as once absolute, now battered and degraded. The destruction of this myth, however, represents the atypical task where a sledgehammer is the appropriate tool. For the most part, subtle and thoughtful work is needed to reconceive and reshape landed property rights for the new age of regional planning. This is fundamental work, in that it needs to get back to the fundamental bases of the institution: the reasons why private property exists, how it has related over the years to the community today that supports and protects it, and how a community today might rightfully use the institution instrumentally to help achieve its evolving goals.³⁴

How then should private property be conceived today, in an era of increasing concern over landscape-scale problems? What principles might usefully guide the continued evolution of landed property rights in the anti-sprawl age?

1. *Property as an Organic Institution*

For starters, property's history needs to be told better. No historian, of course, can write with full detachment, but many stories of property's past are seriously flawed by any standard, driven by dogma and intended to support policy approaches based on other grounds. Probably the most important lessons of good history are that landowner rights have changed

³³ See Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOL. L. Q. 574, 574 (1999).

³⁴ See ERIC T. FREYFOGLE, BOUNDED PEOPLE, BOUNDLESS LANDS: ENVISIONING A NEW LAND ETHIC 140-44 (1998).

significantly over time, and that they varied from setting to setting.³⁵ To phrase the point differently: property is a living, breathing institution, with ownership norms that evolve right along with other elements of a culture. Sometimes such change occurs overtly, as when statutes are passed and when courts openly rewrite rules, replacing one verbal formulation with another.

But as the cases mentioned in Part I illustrate, important changes often occur without overt shifts in language. They are hidden within the shifting applications of terms such as "reasonable," "ordinary," and "beneficial."

This initial point, that property rights change over time, ought to be so obvious as hardly to warrant comment, and perhaps it would be but for the influence of libertarian and free-market theorists, who have been anxious to transform private property rights into a static bundle of individual rights, immune from democratic tinkering.³⁶ One common aim of such work is to turn landed property rights into a pure market commodity, firmly and clearly bounded and readily transferred.³⁷ As a policy option, there are points to be said for this objective, as well as against it. Bad history, however, only hinders the discussion. Private property has served its purposes well for generations, including its economic purposes, even as lawmakers reshaped it in response to shifting communal needs.³⁸ Those who argue for an end to such flexibility need to explain, better than they have, why the community needs to relinquish its power.

One vital implication of property's organic evolution is that property owners need to base their forward-looking expectations, not just on what the law books say at the time, but on where society and social values are heading. It simply is not reasonable, nor is it fair to other citizens, for a person to buy land based on the law in effect and then expect that law to remain forever unchanged. Land uses, like all other human activities, are subject to evolving

³⁵ See Freyfogle, *supra* note 3, at 97-106. See also, Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOL. L. Q. 631, 641-46 (1996) [hereinafter Freyfogle, *Ethics*] (discussing the rise of Americans' misplaced notions of land and nature as commodities ripe for economic exploitation).

³⁶ See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5 (1985).

³⁷ See TERRY ANDERSON & DONALD LEAL, *FREE MARKET ENVIRONMENTALISM* 20 (1991).

³⁸ This is not to deny, of course, that property rights must enjoy considerable stability to serve their economic functions, nor is it to overlook that benefits accrue from a popular image of property rights as relatively static. Laura S. Underkuffler-Freund discussed the latter point in *Takings and the Nature of Property*, 9 CANADIAN J. L. & JURISPRUDENCE 161 (1996).

legal norms. A landowner's expectations are reasonable and deserve protection only when they are kept in line, not just with the law, but also with prevailing communal values and understandings.³⁹

2. *Ownership and the Common Good*

Along with regaining a better sense of private property's history, there is a need to reattach ownership norms more overtly to the good of the surrounding community. This point, too, ought to require little elaboration, but popular understanding of the point is weak, and libertarian rhetoric has pushed forward a far different understanding.⁴⁰

The standard libertarian story draws, in one way or another, upon the tale told by John Locke: that private property began back when humans lived in a state of nature, and that civil government was created to protect it.⁴¹ Aside from its lack of historical grounding this story makes no sense, given that property is inherently a social institution, one that sets norms for conduct within a social order.⁴² A person can own a thing only if other people recognize that ownership and, typically, only if a communal enforcement mechanism exists to protect it. For such rights to exist, and particularly for an enforcement mechanism to exist, a human community is first needed, one in which people sense shared ties and intermingled fates. Generations ago lawyers knew this perfectly well, for property law as they knew it was merely a collection of remedies (forms of action) such as trespass and nuisance.⁴³ Without such remedies, and the court system that stood ready to dispense them, property at law meant nothing.

Property rights are sanctioned and supported within communities

³⁹ I refer here to expectations about an owner's ability to develop vacant land or to make significant changes in existing land uses; a far different case, calling for far greater protection, is presented when a landowner merely wants to continue an existing use. See Freyfogle, *supra* note 33, at 585-87.

⁴⁰ Professor Epstein's *Takings* provides a conspicuous illustration of such rhetoric, presenting property as a counter-majoritarian individual right that arose solely to protect individuals from governmental action. See EPSTEIN, *supra* note 36, at 5.

⁴¹ See, e.g., *id.* For critiques of libertarian uses of Lockean ideas, especially by Professor Epstein, see Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVT'L. L. 279, 286-92 (1998); Freyfogle, *Ethics*, *supra* note 35, at 633-38.

⁴² See, e.g., Joseph William Singer & Jack M. Beerman, *The Social Origins of Property*, 6 CANADIAN J. L. & JURISPRUDENCE 217, 241 (1993) (discussing the communal origins of land-use norms).

⁴³ For a discussion of the old forms of action and their continued importance, see generally JOSEPH H. KOFFLER & ALISON REPPY, *COMMON LAW PLEADING* (1969).

because community members collectively decide or sense, in one way or another, that a private-property regime will benefit them. Economic scarcity often has something to do with that decision, and so do desires for privacy. Decisions are made, however, not by invisible forces, but by lawmakers acting for a collective people. Communities have little reason to respect and enforce property rights that leave them worse off. When the court in *Bryant* sided with the timber-stacking landowner, it did so “for the benefit of the community”⁴⁴ When the Pennsylvania court protected the polluting coal processor, it did so because of the perceived communal importance of bread over landscape and clear skies. And when the Wisconsin court in *Prah* decided to protect solar panels, it did so because the old, pro-development view was simply no longer good public policy.

Now, to say that private property needs to promote the common good is not to say that a community could not give landowners considerable security in their vested rights. Secure rights can often benefit a community, just as insecure rights can prompt owners to use land unwisely. Secure individual rights, however, are justifiable only by reference to the collective good, not by reference to a mythical, pre-social stage in human history, nor by appeal to an inherent right of property that somehow exists independently of lawmaking processes.

What confuses this issue today is the reality that landowners inevitably belong to multiple communities of differing sizes, from the most local to the national and now, even the global. For generations, land-use issues were sufficiently local that detailed questions were properly the province of local-level lawmakers. State lawmakers had interests, but their concerns were adequately addressed by statewide norms establishing the basic elements of ownership. Today, many local communities lack power to control the economic forces driving land-use decisions. In addition, intensive land uses and greater ecological awareness have led to heightened concerns about the impacts of land uses on landscape-scale, ecosystem processes. In the case of particularly vital elements of the natural world, national and even international communities now routinely express concerns about the ways critical private lands are used.

Much work is still needed to consider how lawmaking power is best allocated among levels of government so that private land-use practices are sufficiently in line with the well being of all levels of community.⁴⁵ One

⁴⁴ *Bryant v. Lefever*, 4 C.P.D. 172, 176 (1879).

⁴⁵ See Freyfogle, *supra* note 33, at 580-82.

commonly held view, based on the subsidiarity principle of international law, is that power is best exercised by the lowest level of government that is willing and able to handle it.⁴⁶ The idea has merit, but even so, it merely supplies a beginning point for what ought to be a pragmatic inquiry into the best means of dividing up the long-term work.

3. *Clarifying the Common Good*

Of course, to speak of the necessary link between private property and the good of a community is to presuppose that there is such a good, however vaguely defined and evolving, and that the common good can supply a polestar for reshaping the entitlements of ownership. That assumption is sometimes a hard one to accept, and no small amount of disagreement surrounds it. In thinking about property, however, it is useful to distinguish disagreements about the nature of the common good from more radical claims that there is no common good apart from the good of individuals conceived separately. Disagreements of the former nature are legitimate and, in all likelihood, never ending. Disagreements of the latter type, however, cut more deeply into communal powers and decision-making processes, and indeed into the very idea of a community-supported system of private rights.

The denial of all concept of the common good is, at bottom, largely inconsistent with the idea of private property in a democratic system, for private property is an inherently social institution and can only arise out of a shared vision of the good. That vision might provide for maximum individual liberty; it might, alternatively, focus more on the achievement of goals and values that require concerted action. Whatever the vision, property law necessarily must perform certain minimal functions. It must define what it means to own land, and to do that it must perform the kind of analysis the courts undertook in *Bryant*, *Waschak*, and *Prah*:

- decide how intensively landowners can develop and use their lands and, correspondingly, when landowners can complain about the conduct of their neighbors;
- draw a similar line between the land-use rights of individual owners, and the rights of the community to complain about external harms that spread widely;

⁴⁶ See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 370-74 (1998).

- decide whether landowners do or do not have the right to destroy or consume what they own, such as the right to till fields in ways that gradually erode or exhaust the soil; and
- decide what rights landowners will have to change natural drainage patterns, to alter existing wildlife habitat and vegetative patterns, and to pollute waters and air.

Where lines such as these are drawn is open to debate. What is certain is that property regimes necessarily must draw the lines somewhere; there is no null or default option that allows government to avoid the issues. And the only basis for drawing them—or rather, the only legitimate basis, given the many illegitimate ones—is the overall good of the lawmaking community.

One of the shortcomings of environmental policy as it begins the new century is that it has paid inadequate attention to overall conservation goals. There has been a particularly disturbing reluctance to phrase goals in terms of the common good.⁴⁷ Like other social movements, the conservation movement has largely drawn upon the nation's prevailing liberal rhetoric, which focuses at the level of the individual, not the community. In the case of the conservation movement this tendency is a surprising one, given that environmental thought draws extensively upon principles of community ecology and interconnection, and given that its depictions of humans in nature portray them, not as autonomous individuals, but as social beings necessarily embedded in social and ecological communities.

To deal successfully with suburban sprawl and other landscape-scale problems, the community's overall good needs to come into far sharper focus, and today's various, interrelated land-use problems need to be discussed, not in terms of conflicting individual interests, but in terms of that shared good. Often the common good is discussed in terms of sustainability or sustainable development—terms that are notoriously vague, and perhaps popular in large part for that very reason.⁴⁸ I have elsewhere argued in favor of land health as an overall goal, one that links ecological-sustainability issues together with issues of ethics and aesthetics, and that incorporates processes for citizens to make choices about their homes.⁴⁹ Aldo Leopold used the phrase "land health," and he proposed it as a goal to unify the disjointed conservation

⁴⁷ For a discussion of this issue in the context of legal scholarship see generally Freyfogle, *supra* note *.

⁴⁸ See FREYFOGLE, *supra* note 34, at 50-51.

⁴⁹ See *id.* at 48-59.

efforts of his day.⁵⁰ Many contemporary commentators have used variants of that phrase, including “ecosystem health” and “integrity.”⁵¹ All such phrases suffer from vagueness, and inevitably so, but they can gain needed detail through specific application.

More important than the exact phrasing of a collective conservation goal is the need to have such a goal; one phrased in terms of the common good and conceived broadly enough to include ecological, ethical, aesthetic, economic, and general quality-of-life issues.

4. *Redefining Land-Use Harm*

A critical need in the dawning century—vital to efforts to deal with sprawl and other landscape-scale issues—is to reaffirm the link between property rights and the common good. Landowners should be viewed as community members, with duties to that community, and communities ought to have the power to set fair yet demanding standards for membership, standards aimed at promoting the good of the entire land community.

One needed reform of property rights is to define land-use harm so that it links more directly and fully to the community's overall conservation goal. Land uses that degrade ecosystems need to be viewed as harmful, and overtly labeled as such, just like industrial pollution is today. Unsustainable forestry, grazing, and tillage practices should all be called into question when they plainly degrade the land's long-term fertility. Particular attention needs to be paid to those harms that arise because the land's carrying capacity is exceeded. In this latter category are harms such as the excessive modification of hydrologic systems, the destruction of wildlife habitat, and various forms of land-cover change. There are also more peculiar harms, harder to categorize, such as the introduction or fostering of invasive alien plant and animal species. The idea of unlawful harm needs to be linked, not only to the functioning of the land ecologically, but also to the quality of present-day human life, so that harm at law can also entail material degradations of shared

⁵⁰ See ALDO LEOPOLD, *The Land-Health Concept and Conservation*, in FOR THE HEALTH OF THE LAND (J. Baird Callicott & Eric T. Freyfogle eds., 1999). I consider Leopold's concept of land health, and its connection to his (perhaps unfortunately) more famous land ethic, in *A Sand County Almanac at 50: Leopold in the New Century*, 30 EVTL. L. REP. __ (forthcoming Jan. 2000).

⁵¹ See generally, e.g., ECOSYSTEM HEALTH: NEW GOALS FOR ENVIRONMENTAL MANAGEMENT (Robert G. Costanza et al. eds., 1992); LAURA WESTRA, AN ENVIRONMENTAL PROPOSAL FOR ETHICS: THE PRINCIPLE OF INTEGRITY (1994).

aesthetic landscapes. Finally, harm needs to focus, not only on how one landowner disturbs neighbors, but how a landowner treats the land that she owns. Soil erosion, for example, is a communal harm, whether or not eroded soil crosses on to a neighbor's land or pollutes a shared waterway. Property law needs to get rid of the notion that landowners inherently possess the right to destroy what they own.

5. *Tailoring Rights to the Land*

One effect of defining land-use harm in ecological terms is that a landowner's bundle of land-use rights becomes tailored to the natural features of the land that is owned.⁵² In a community that embraces an overall goal such as land health, ecosystem integrity, or even sustainable living, land uses need to become consistent with the promotion of those goals. Some lands will be suitable for development; others will not. Some farm fields will be suitable for occasional plowing; others will not. Some wetlands might properly be drained; others should not. In the natural world, parcels of land differ greatly. For humans to live on the land in perpetuity, they need to pay attention to many of those differences. As Wendell Berry and Wes Jackson have eloquently noted, nature must stand as a critical measure for good land use.⁵³

Of course for humans to live and thrive in a place they need to make alterations to the pre-human landscape. There is no need, nor any proposal, to define all human alteration as harmful. What is needed is respect for nature's limits and a sensitivity to place, together with mature reflection on humankind's ethical duties to other life forms, future generations, and the land community as such. Out of such reflection and study can come, however awkwardly and tentatively, an understanding of how a community ought to live in a place, and from that understanding can come a sense of the limits properly placed on private property rights. Some land-use practices, such as abnormal soil erosion, should be viewed as inherently harmful and treated as such. In the case of other land-use harms, however, the question is more one of scale and scope, and ownership norms need tailoring so that landscape-scale limits are shared fairly among similarly situated landowners.

⁵² See Freyfogle, *supra* note 33, at 585.

⁵³ See WENDELL BERRY, *Nature as a Measure*, in WHAT ARE PEOPLE FOR? 204, 204-10 (1990); WES JACKSON, BECOMING NATIVE TO THIS PLACE 61, 61-86 (1994). See also FREYFOGLE, *supra* note 34, at 136-37 ("A wetland isn't the same as a dry field, . . . property law shouldn't treat the two land types as alike.").

The legal community has shown surprising resistance to the idea that property rights might properly arise out of the land itself, with an owner's land-use options limited and shaped by the land's natural features.⁵⁴ Indeed, it remains common for scholars to talk of property rights abstractly, without regard for nature, as if ownership norms in practice had not changed dramatically in recent decades, but they have changed: laws protecting wetlands, forests, flood plains, endangered species habitat, erodible soils, and shifting barrier islands—these and similar laws supply bountiful evidence that land-use rights are already tailored to the land, and have been for years.⁵⁵ Visions of landed property rights as abstract bundles are as inaccurate descriptively as they are misguided normatively. Context already counts, and it needs to count, in particular ways, for even more.⁵⁶ Nature needs to play an even greater role in the lawmaking process.⁵⁷

6. *Sharing the Benefits of Development*

One problem that arises from the above suggestions is that they quickly lead to an awkward place. With land-use harm redefined, with property rights more tailored to the land's natural features, and with communities regulating land uses in furtherance of the common good, landowner rights end up varying significantly from parcel to parcel.⁵⁸ Some lands remain suitable for development and intensive use; other lands are restricted from use, sometimes severely. Not just use options but land values diverge widely, and as more lands are restricted, even greater value attaches to those particular lands that are suitable, and legally marked, for development.

The obvious difficulty here has to do with fairness to landowners. Why should some landowners get to develop and others not? Why should the

⁵⁴ See, e.g., Freyfogle, *supra* note 33 at 585 ("Slowly, and painfully, people are coming to think that landowner rights should somehow depend on the natural features of the parcel owned.").

⁵⁵ See *id.*

⁵⁶ See generally Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529 (1989) (arguing that property rights in nature are becoming more content specific). See, e.g., Freyfogle, *supra* note 33, at 585 ("People are coming to think that landowner rights should somehow depend on the natural features of the parcel owned.").

⁵⁷ I do not mean here that nature alone can supply rules of ownership without the need for interpretation and action by human lawmakers. See Freyfogle, *supra* note 29, 301-03.

⁵⁸ See Freyfogle, *supra* note 33, at 584-86.

gain go to some and not all? And how can these differences in treatment be consistent with the nation's commitment to equal treatment under law?

At one level, these questions are easy to answer. Land-use rights differ because land parcels differ. Development in one place can have impacts that differ markedly from the same development elsewhere.⁵⁹ In the market, location greatly influences land values and land-use possibilities, so the idea is hardly new. At law, the same has also been true, and is becoming more so. Landowners have never had the right to engage in land uses that cause harm, and harm has long been dependent on context. A land use acceptable in one place may be a nuisance in another. Today, the context that needs to count is not just the human context and the built environment, but the natural environment as well.⁶⁰

These answers may suffice for conservationists and ardent community supporters, but they are not fully satisfactory for most citizens. The answers probably justify bans on land uses that plainly appear harmful, such as building homes in a floodplain or draining lands that are obviously wetlands. They do not, however, adequately justify restrictions of activities that are less plainly harmful, such as land uses that are harmful only when too many people engage in them, causing natural and social systems to become overloaded. Particularly in these cases, involving non-obvious harms to the land's carrying capacity, regulatory schemes need to pay especially careful attention to the issue of landowner fairness.

One way to interject more fairness in such a case—although typically not a good way—is to divide the total development load among landowners so that each landowner can develop to a limited extent. This approach is used, for instance, when large minimum lot sizes for home building are used as a way to cap overall construction. The obvious difficulty with this approach is that, while it limits overall land alteration, it fails to locate development in areas that best serve the community's interests. Communities that take this approach cannot focus development around existing infrastructures and otherwise promote compact settlements. This approach works tolerably well only when addressing those types of carrying capacity harm, such as excessive total drainage, where the community is less concerned about where the land alteration takes place.

The reality is that if plans to control sprawl and similar landscape-scale problems are going to succeed, they simply have to exercise a heavy

⁵⁹ See *id.*

⁶⁰ See *id.* at 584-85.

hand, much like urban zoning laws and current bans on developing floodplains. Many landowners need to be told, plain and simple, that they cannot use their lands intensively. Given this politically harsh reality, the issue becomes: should the owners of land not suited for intensive use simply be told to refrain, or should their rights be greater? Should they be compensated in some way or otherwise have a right to participate in the economic gains of development? Would compensation, or a shared participation in development benefits, make a land-use plan fairer, or if not more fair, at least more politically palatable?

This suite of questions is as urgent as it is vital. One appealing resolution is to distinguish among types of lands and landowner activities, imposing outright restrictions on some lands while tempering other restrictions with compensatory benefits. When development in a place causes evident harm in the eyes of most citizens—such as when wetlands are filled—then such lands might simply be restricted outright. Development in such places is harmful, and the law has typically not paid landowners to halt a harm. However, when lands are of a type ecologically suited for development, yet community needs are such that development ought to occur elsewhere, then an outright ban becomes much less fair. In some manner, the owners of such lands ought to participate in the economic gains of development, even though they cannot develop their own lands. In some way they ought to gain compensation for the restraints imposed on them.

The intellectual leap that needs to take place here is to separate the right to develop from the right to participate economically in the development process. In fairness, owners of land suitable for development need to possess the latter right, but they do not need possess the former. One way to implement this idea is through the use of transferable development rights (“TDRs”). Rights to develop could be allocated to all owners of land ecologically suitable for development, with the rights readily transferable.

Rights could be exercised, however, only on lands slated by the community for development. Some landowners would receive development rights but be unable to use them on their own lands; their economic participation in regional development would come by way of selling their rights to others.

Other landowners would receive development rights that they could use on their own lands, but they could fully develop their lands only by purchasing additional development rights from other landowners. In this way, some of the gains in the value of lands suited for development is shifted to the owners of lands not suited for development. As that happens, the regional plan becomes more fair and feasible.

TDRs are not hard to justify when used to protect a landscape's carrying capacity. If overall development in a landscape needs to be constrained (e.g., the amount of land drained, paved, or stripped of natural vegetation), then surely it is legitimate to decide that a landowner has no right to impose more than his fair-share burden of such development on that landscape, with any excessive burden deemed a land-use harm. At common law, landowners had only the right to make reasonable use of the land, with reasonable defined in terms of the communal good. A fair-share limit on development merely gives specific meaning to that longstanding tenet. On the other hand, landowners who are asked to do more than their fair share deserve some recompense for it, and properly developed TDRs can supply that recompense.

The old way of dealing with carrying-capacity harms was simply to allow development to occur until the landscape could handle no more, at which point the line was drawn. Line drawing, however, is politically difficult, particularly when those next in line to develop have large sums at stake. As a consequence, cries of unfairness are often loud. This familiar and often unsuccessful approach to line drawing relies on the time-honored but ethically suspect first-in-time method of allocating resources. Other methods of allocation are often far better, TDR schemes among them.

7. *The Taking of Property*

Landscape-scale planning, like all land-use regulation, occurs under the ominous specter of the Takings Clause,⁶¹ which in a vague and sometimes frightening way limits how far regulators can go. Ultimately, the law of regulatory takings is in the hands of the U.S. Supreme Court, and there is little that regional planners and conservation advocates can do to influence that law. On the other hand, governments are free to compensate landowners even when the Constitution does not require it, and they do need to decide for themselves whether a land-use restriction is or is not fair.

The above ideas about property rights lead to several observations relevant to the regulatory takings morass.

First, a good sense of property's legal history supports the legitimacy of communal efforts to redefine land-use harm, keeping it in line with prevailing values and circumstances. Harm has always been given meaning

⁶¹ U.S. CONST. amend V. The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without *just compensation*." *Id.* (emphasis added).

by a community in light of its current needs, and communities have the legitimate right to restrict land uses that are harmful, without paying compensation.

Second, when assessing the economic impact of a regulation for purposes of deciding whether a taking has occurred, it is useful to recall that landowners at common law did not possess, and do not now possess, the right to use land in unreasonable ways. Hence, the proper starting point for an economic impact assessment is not the assumption that landowners can develop at will. Instead, the starting point is to look at what land uses would be reasonable in light of the community's then-prevailing values and needs.

The proper question should be: to what extent does a regulation interfere with reasonable and natural uses of the land, as determined in light of the community's current values and needs and the overall carrying capacity of the land? Many regulations, in fact, do little more than give specific meaning to the common law's longstanding ban on unreasonable land uses, and hence have no adverse effect on individual private rights.

Third, with a better understanding of the land's carrying capacity limits, as determined in light of the community's well being, it becomes easier to decide when a landowner has been asked to do more than his fair share. The Takings Clause should not stand as a bar to the continued evolution of ownership norms that apply widely to all similarly situated landowners. Its principal aim, rather, should be to protect individual landowners who are unfairly singled out to shoulder more than their shares of the regulatory burden, taking into account differences among land parcels.

Finally, regulatory takings law would be much improved if courts would simply recognize that most takings cases present two issues rather than one: first, what property interests the plaintiff owns, and second, whether those interests have been unfairly taken. To separate the issues of "property" and "takings" is to clarify matters considerably.⁶² Once property is viewed as an evolving, communally responsive institution, and not an abstract, static bundle, it takes work to determine what rights a landowner possesses at any given time. A court cannot simply look to its prior decisions, the writings of seventeenth-century philosophers, or to the radical proposals of present-day libertarian economists. Once enacted, laws banning land-use harms, and laws fairly restricting overall development, become part and parcel of what it means to own land in a given place—just as much as judicial decisions such as *Bryant*, *Waschak*, and *Prah* do. Such laws, accordingly, must be taken

⁶² For further discussion of this point see Freyfogle, *supra* note 3, at 117-21.

into account when deciding the rights a landowner holds. When this is done, the second step of the inquiry, the takings issue, will likely become far more manageable.⁶³ For a court moving to the second step, the pertinent questions will be these:

- whether a landowner has been restricted from using her lands to a greater degree than other owners of ecologically similar lands;
- whether a landowner has been asked to share a burden greater than the burden imposed on other owners of such lands; and
- alternatively, whether a regulation merely halted an activity that the community now deems harmful when undertaken on lands such as those at issue.

These ought to be the principal questions, and they require answering with due recognition for the legitimate needs communities have to embrace new values, to take into account new circumstances and knowledge, and to apply their laws prospectively.

8. *Rhetoric Counts*

In the anti-sprawl age, one of the most vital tasks will be to develop better ways of talking about land ownership. Ownership needs to be described in more communal terms, and linked overtly to the well being of

⁶³ A commonly voiced complaint about this line of reasoning is that a Takings Clause analysis that allows government to rewrite ownership norms effectively removes the Takings Clause as a limit on governmental action. But it should not take much reflection to see that this is not so. Under the approach, the Takings Clause serves to distinguish legitimate changes in ownership norms from government efforts that single out one or a select group of landowners for ill treatment, without any real shift in widely applicable norms. That issue ought to stand as a centerpiece of any takings analysis, but it does not, and will not, until courts more carefully assess the claimant's property rights, before considering whether government has taken them.

If changes in widely applicable ownership norms can be struck down as unlawful takings, one wonders how far back in time courts ought to go in striking down legal changes that fundamentally disadvantaged some landowners (even while they, typically, greatly advantaged others). A prime candidate for invalidation, at this late date, might well be the prior appropriation system of water allocation, which in many states deprived landowners of their riparian water rights. By and large, conservationists might like the idea of returning property law to where it was in 1791, before the industrializing influences of the nineteenth century permitted far more intensive resource use practices. But of course radical writers who seek to turn the clock back generally have no interest in going so far back; their target is about a century later, when the impulses of industrialization had done their work and before countervailing tendencies set in. See Freyfogle, *supra* note 3, at 119 n.138.

the community. To be sure, land is an economic commodity for some purposes, and land does indeed supply independence and privacy to individual landowners. It is true, too, that landowner expectations need a fair degree of protection if private property is to continue fulfilling its economic functions. But a parcel of land is also and irrefutably an arbitrarily defined piece of a natural community, and landowners necessarily become members of these communities, just as they become members, responsible or otherwise, of their surrounding social communities. To belong responsibly to a community is to have duties to it. Talk that admits and explores such duties needs to occur just as often as talk about landowner rights.

Aldo Leopold put this final point most famously in the foreword to his classic, *A Sand County Almanac*: “[w]e abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.”⁶⁴ When Leopold offered this advice he had in mind not merely the nonhuman parts of nature but the all-encompassing land community that includes people within it. It was the long-term health of that entire community, Leopold believed, that deserves our highest respect.

In disputes about private property, rhetoric counts for a great deal. Narrative also counts, and an acute need exists today for narratives that show how a new, more ecologically sensitive understanding of private property can fit together with America’s understanding of itself and its history.⁶⁵ Good talk about private property, well linked to the common good, can be a powerful tool for the work that lies ahead.

⁶⁴ ALDO LEOPOLD, *Foreword to, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* viii (1987).

⁶⁵ For an assessment of a particularly fine ownership narrative—Wendell Berry’s short story, “The Boundary,” see FREYFOGLE, *supra* note 34, at 75-90.