Private Property Rights
A Look at Its History and Future

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Private property rights is a sore subject for many landowners, especially among those who have owned land for a generation or more. In fact, the perception of sovereignty is a function of tenure: the longer land has been owned by a family, the stronger its ties to the land, and the more threatened the family becomes when someone brings up the subject of rights. Yet, the history of private property in the U.S. is fascinating, and our view in this country of an individual's rights is far more liberal than in most other countries (I use the term "liberal" in the context of interpretation, not in the context of "liberal" versus "conservative"). In many European countries, for instance, an individual can own land and can benefit from it, but his ability to make decisions about how the land is used is limited, far more so than here in the U.S. In China (and most other third-world countries around the world), there is no such thing as private real property. An individual can own crops and trees, but the land is publicly owned. Virtually the entire population of the world lives on land it does not own, but in our country, such is not the case. Americans enjoy real property rights that are far more generous when compared to the rest of the world. So, why then is it such a sore subject?

Thomas Jefferson is largely credited with espousing sovereignty for private property in the U.S. when he said more than 200 years ago: "Nothing is ours, which another may deprive us of." Property-rights advocates argue that Jefferson's words are as true today as then. However, most of us forget that he lived during a time when the colonists were telling the King of England to mind his own business. Then, a lack of sovereignty meant subjugation, and the ownership of property by all men was tangible proof that the American people no longer answered to the King. To own land and make it productive, according to Jefferson, is the right of every American.

The colonists of the mid-18th century, virtually all of whom were second and third generations of the original emigrants, were unwilling to be bridled by the King who offered few services in exchange for taxes. The Revolutionary War was about land, to a great degree: does the King say who goes where, or do local people make those decisions? When the dust settled, the colonists had severed ties with the monarchy, but the legal system under which property rights were defined–an enduring legacy of the King of England–mostly stayed with us.

For almost 100 years following the War for Independence, virtually every debate in Congress was about land and property rights, but little was changed in terms of the interpretation of rights. During this period, land was about the only valuable asset available to the U.S., and Congress used this asset as its currency. For example, a Vermonter by the name of Justin Morrill convinced Congress in 1862 to create a nationwide system of universities, funded not with cash, but with land. Known even today as the "land-grant universities," virtually all of the state colleges (or at least one in each state) got their first major appropriation in land.

So prevalent were land grants among Americans that for a period during the first hundred years following the Revolution, land grants were a more common form of currency than gold or paper money. A land grant, written on parchment, frequently folded and dog-eared might change hands to settle a debt many times before landing in the possession of a farmer who filed a claim for title and actually took ownership of th eland. Once claimed, the title to land

guaranteed that farmer essentially the same rights available to a pre-war colonist. To this day, our interpretation of private real property rights, based on English common law, is little changed.

The one essential difference between property law in England 200 years ago and the American Colonists' application of the laws was that a colonist was not bound by primogeniture, a hold-over rule from feudal law that restricted transfers of ownership. Under the concept of primogeniture, the entire real estate of an English landlord passed to only one heir: his first-born son, or to the closest consanguine male (father, brother, uncle, cousin, and so on). It was not uncommon for an eldest daughter to see her father's lands inherited by a late-born, five-year-old brother; or if her father never sired any sons, the land might go to her uncle. If the uncle predeceased her father, the estate might end up in the hands of a male cousin.

Primogeniture evolved in feudal times as a way for the King's lands to pass within families of nobility, but since the King was under no obligation to share his interests, the lords had no rights to divide the estates entrusted to them. The concept survived evolution from feudal law, because it prevented fragmentation of productive lands and also maintained a relatively easy method of gathering taxes. It did not survive in the American colonies, because the emigrants to the new world were mostly families of expatriates–children forced to leave their homelands because only one of their ranks could inherit the family wealth. Given the circumstances, it is unsurprising that primogeniture was left behind and the colonists embraced the rights to transfer ownership to whomever the current owner wished.

Real property differs from other personal property in the sense that it is immobile, so the acquisition of land is really the acquisition of rights. The sum of these rights today, also known as the "bundle of rights," define a person's interests in land. These include the following: the rights of use, occupancy, cultivation, and exploration; the rights to minerals (including the right to extract them); the rights to sell or assign interests in land (such as in the case of selling timber); the rights to license or lease; the rights to develop, to devise, and inherit; the rights to dedicate, give away, and share; the rights to mortgage and exercise a lien; and the rights to trade or exchange land. Notwithstanding this list of rights, our interpretation of the bundle of rights is intended to be inclusive. That is to say, even rights that are not specifically described, such as the right to pick berries, is implicit. However–and this is a key point, the very substance of the debate about private real property rights–the exercise of the bundle of rights is subject to limitations the state may impose for the sake of protecting the public's interests. Private property rights are not absolute. In the U.S., public authorities have reserved essentially the same rights as those originally reserved by the King.

In exchange for the state's willingness to defend an owner's property, it reserves interests in those lands, including the right to tax land; the right to take land for public use with just compensation (also known as "eminent domain"–sort of sounds like the King talking, doesn't it?); the right to control use to ensure protection of the public's interests; and–when an owner dies without a will and no known legal heirs–the right of escheat, i.e. to take possession of the land.

In the U.S., states also own wildlife that inhabits private lands, much as the King reserved the rights to wildlife on lands of his kingdom. A landowner can harvest wildlife but only with a proper license from the state and during the appropriate season. Rules about game licenses vary by state, but the point is that no one but the state owns wild animals until they have been harvested.

It is not too surprising that most of the debate about private property rights is on deciding when the public's interests are at stake, what constitutes a "taking" or rights, and how to figure "just" compensation. For example, does a landowner have the right to install a hazardous-waste processing facility? Probably not, but the answer depends on the extent to which the public is protected from any negative impacts that might result from this decision. If the answer is no, does this constitute a "taking " of the owner's rights? And if so, what is "just " compensation for denying these rights?

More likely, the situation is reversed: the state offers to buy land for such a facility. If the owner refuses to sell, the state condemns the current uses of the land and exercises its right of eminent domain (in the name of public welfare, of course). What is just compensation for a taking in this instance? Not what you would expect. Most often, compensation is limited to reimbursing the owner for the value (and future value) of the land's current use. If it is hay land with a beautiful view, just compensation covers the value of the land for hay, not the potential loss from

selling the land as a future homesite.

Federal, state, and local laws can change the way people use their lands, but most often these statutes are intended to protect current uses while avoiding property conversions that might prove costly for the community in the future. It is ironic that many of the people who complain the loudest about erosion of private property rights are the ones who invariably want to retain the option of selling out to the highest bidder, for whatever use, and regardless of the cost to others in the community. Converting productive farm and forest lands to non-agricultural uses at a rate that threatens the very fabric which supports productive lands would have seemed suicidal to Thomas Jefferson, whom–I'm guessing if he were here to see it–would have been tempted to say: "We have nothing if we deprive ourselves."

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