

## THE (NARROW) PUBLIC-PRIVATE DIVIDE

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Half Public, Half Private, One West

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I want to talk this morning about land and about the ownership and use of it. And I'd like to ask you, insofar as you can, to set aside what you know about the subject, the assumptions you have, and to approach this topic freshly. I propose that we begin with the land itself, undivided and unused, and pause to consider it a moment. Put a river in our imaginary landscape, coursing through the scene. And let's insert a few hills or mountains, some patches of trees, some fish, and wildlife. It's a good place to live, with reasonably fertile soil, maybe a fair amount of rain, some timber and rock for building. Nature is at work here, with its cycles of wind and water, of birth and death, of nutrients coursing through the system, and of plants and animals that, in their ceaseless competition, have formed a resilient biotic community.

Now let's add people to the picture, people who are not just passing through but who plan to stay, to make their homes and draw sustenance. To do that they obviously have to use the land. Perhaps there won't be many troubles as they go about doing this, if the land is abundant and reasonably uniform in its attractiveness. But these assumptions aren't realistic, so let's modify them. Let's assume that the land is expansive but it differs widely in its natural features. Some places are far better than others to build homes. Some places are rich in wildlife, or have more fertile soil or bountiful grasses. Some lands are next to the river and have good water, while others are higher and drier.

The people arriving here face a question: How are they to organize themselves so as to

use the lands successfully? If person A takes over one tract of land, making exclusive use of it, then other people will be unable to use it. That is, if we let A take over a particular piece of land, we have necessarily limited the ability, or we might say the liberty, of everyone else to use it. When everyone can use all land freely, the liberty of all is equal. But the moment we give A special control over a tract of land then we've done two things: we've increased the liberty of A, and we've decreased the liberty of everyone else.

Back to the question: how might the people in this land organize their affairs, so as to make effective use of the lands? The question is difficult and the possible answers countless. The people could divide the land into lots of small pieces, or they might instead keep the land undivided. They might use the land by working in groups or they might use it as individuals. A particular tract of land could end up, not with one user, but with several people holding use rights in it. One person might have the right to graze animals, while someone else had rights to use the timber, hunt wild animals, extract water or merely walk across the land. Use rights could go to families instead of individuals. They could be limited in duration or unlimited. A user might or might not be required to pay into a common fund. Perhaps some places will be set aside and not actively used by anyone. To add to the complexity, let's recognize that land uses by one person can easily disrupt the activities of other people, and so there are countless questions about how the use rights of A fit together with the use rights of B, in terms of how ensuing conflicts will be resolved.

As the people go about deciding how to use this bountiful land they'll no doubt consider the human side of the issue, the human needs for food, fiber, and shelter, as well as their desires for recreation and social interaction. Some of these human needs are basic to all people, but

many will depend upon the peculiarities of the arriving people, in terms of their social values and social structures, their religious beliefs, their senses of individual autonomy and equality, how much they value privacy, what weight they give to future generations, and so on. Along with these human considerations will be the many factors that relate to nature itself, to the variations in the land and its ecological functioning. Some lands will tolerate human use without much effect, other lands will not. Some lands will have special value in supporting other life or sustaining ecological processes. Parts of the river could provide good fish spawning grounds, for instance. Particular hillsides could be subject to rapid erosion. Predators in the region could play critical ecological roles. Good land use will take into account these natural variations.

As the people think about their work they will be wise to explore all of these factors. Even so, they will make mistakes. Much about the land's natural features will be unknown or misunderstood. As for the people, their numbers no doubt will change, and so will their technology and their values and dreams. Patterns of land use that make good sense at one time might not make good sense later. Change is inevitable, on both the human and the natural side. As people alter the land, they may come to see it differently. Parts of nature they once viewed as common or unimportant may become scarce or otherwise highly valued. If the people prosper, they may perceive the land in less utilitarian terms. They might become concerned, not just about the land's ability to feed their stomachs and furnish heat, but its aesthetic appearance and its ability to sustain other life forms. If our people are particularly wise they will anticipate such change by crafting mechanisms to adjust their land-use and ownership patterns.

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Let us set this scene aside and turn to three others, which we can sketch more quickly.

Scene one: Hunter Albert for years has used a vast forest to find game for his family's table. He is a skilled hunter, and knows animal ways. One day he departs home to enter the forest and is greeted by conspicuous no-hunting signs. Albert asks what this is all about, and he receives an answer: the land is now privately owned, and the owner wants Albert to stay out. Albert goes away, but the next morning he rises early and re-enters the forest to hunt, without gaining permission. As he leaves around mid-day police officers stop him. He is arrested for trespassing and taken to a police station.

Scene two: Farmer Barbara has lived on bottomland for many years, growing food for home use and for the market. She grazes cattle and sheep on several pastures. One morning she rises to find the air filled with smoke and soot. Investigating, she learns that neighbors upwind are burning their fields. They've gone into the business of producing grass seed, and need to burn their fields regularly to do so. As she investigates, she realizes that the burning not only sends smoke and soot into her house but significantly affects grassland birds that inhabit the region. When she makes inquiries at the natural history survey she is told that wide-spread burning is likely to stimulate many ecological changes. Insect species could rise in number, perhaps to pest levels, harming Barbara's crops. The grass growers are likely using chemicals to keep out weeds, and the pesticides will also have ecological effects on plants, insects, birds, and rodents. But the truth is, one scientist says, we really don't know what will happen, given the complexity of everything. Discouraged, Barbara drives home. On the way, she thinks about her long-held plan to divide her far pasture into building lots to sell for vacation homes. She fears

her land will now be worth much less, if buyers must put up with smoke and if their homes look out, not upon natural-looking grasslands, but monocultural fields.

Scene three, further back in time. Harold is the head of an extended family clan, which tills its land using oxen. The land has been productive and yields a good surplus. One fall day armed men on horseback show up, carrying a strange banner. They are knights in the service of a nobleman named William, and they announce sternly that William has proclaimed himself owner of all he surveys. Henceforth, they assert, all land will be held subject to William's superior rights as lord and owner. All tillers of land will owe one-half of their produce to William, in recognition of his superior rights. They'll also owe ten percent of their produce to the new church that William is constructing; a distant cousin of William's will be the local priest. As Harold contemplates the new situation, his eye on the horsemen and their suits of armor, he quickly calculates what this will mean. His entire farm surplus will be gone. He and his family will be reduced to bare subsistence. But what can he do about it, when William and his men hold the power?

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What do these stories have to tell us, about land ownership and about the categories of lands commonly called public and private? What do they say about the way property ownership works, as an institution? There are several lessons, some rather obvious—so obvious, perhaps, that we overlook them; several of them less so.

For starters, land ownership in anything like the form that we know it is a morally problematic institution in that it rests on the assertion of coercive power, on the exercise of

public or state power. When the new owner of the forest erects no trespassing signs and then arrests hunter Albert, he is obviously restricting Albert's liberties. Albert's freedom has gone down. It has gone down, not ultimately because of what the new forest owner has done, but because of the public power that the new owner is able to wield. The law has vested this power in the forest owner, putting police and courts at his beck and call. Private ownership, in short, is all about the exercise of state power.

Now, an exercise of state power like this—physically taking Albert into custody—requires a good explanation to support it. It needs to be morally legitimate. It isn't right to seize Albert and deprive him of liberty without good cause. We could say, of course, that Albert was arrested because he violated someone's property rights. But that's not a real answer, it is merely a paraphrase of the moral question. Why is it morally legitimate for one person to possess property rights that include this power? Why is it legitimate for one person to be empowered to summon police and have another person seized? Private property is the name we give to the power, not the justification for that power.

Our scene involving hunter Albert shows how private property reduces the liberties of people who don't own land. Our second scene, involving hunter Barbara, shows how the exercise of property rights by one person can conflict with the exercise of similar rights by another. Property rights are interdependent, and land-use conflicts arise regularly. A legal regime necessarily requires rules or processes to resolve the disputes landowners inevitably have. Somehow, the law needs to supply an answer here, deciding whether an intensive land use—in this case, burning the field and applying pesticides—will or will not be permitted when it conflicts with the desires of Barbara and her land-owning neighbors to be free of interference. Most land-

use laws, in fact, are designed to do just this, to resolve disputes among landowners and thereby protect particular property values. As lawmakers resolve these disputes, there really is no pro-private property approach for them to take. Property rights lie on both sides of the dispute. Individual liberty lies on both sides. Somehow, lawmakers have to decide whether to allow the intensive land use or whether instead to protect the more sensitive land use.

Then there is our tale of Harold, and of marauding William who by fiat takes over an entire country. Conquests like this happened, of course, and they could prove harsh for the people on the land. William's property regime, instituted coercively, was essentially a way for him to control the people and extract wealth from them. His property regime, that is, included a substantial element of theft; it was a mechanism to seize the labors of others. In this simple, somewhat ahistoric tale, almost everyone would agree that Harold has been mistreated, his produce seized and his family reduced to poverty. But what would we say a few decades or generations later, when the system has become more familiar? William and his family are now peasants or serfs. Their lands are now controlled by their lord, who in turn fits within a feudal hierarchy. Perhaps the lord has sold his vast estates to some other lord, who now justifies the whole arrangement on the ground that he has paid for the lands—as he has. At some point, does the unfairness disappear or does it always remain? What if William's grandchildren rise up in revolt, and refuse to pay rent on the ground that property is theft? Is it morally right for local constables to arrest them for withholding rent, or would the arrest be a continuation of William's original moral wrong?

Let me draw these points together. Property is a form of power, and it is power not really over land but over other people. To own land is to restrict what other people do and perhaps to

demand tribute from them. Property, in short, has a dark, coercive side to it; it expands the liberties and the powers of landowners but does so necessarily by restricting the liberties and economic options of other people.

Second, this power is necessarily a public power because it ultimately rests upon a landowner's ability to call upon police, courts, and even prisons to enforce his rights. We call property a form of private power, but it is misleading to do so. Ultimately, it is public power that private individuals are able to invoke.

Third, the exercise of power like this is morally problematic and therefore needs justifying. And again, the justification we're talking about is a justification for restricting the liberty of people like hunter Albert, or farmer Barbara, or yeoman Harold. Why is it legitimate to curtail the liberty of these people using state power? We need a good answer, and we can't just point to the property rights as justification because it is the property rights themselves that need justifying.

These days, the kind of state power that supports private property is based on law, not military force. Private property exists to the extent it is authorized and supported by law. Maybe the law is morally legitimate, maybe it isn't, but it is law that defines private rights. Take away the law, take away the public power, and the property rights no longer exist.

One final point, based on our story of yeoman Harold: The power arrangement put into effect in that story, with William on top and with intermediate lords spread over the land, is of course a feudal hierarchy. As ruler, William exercised what we today would view as two distinct forms of power, although our distinction would have made little sense to him. We distinguish between the *proprietary* power that comes from property ownership and the power that comes by

exercising governmental authority, what is called public or *sovereign* power. When William the Conqueror took over England, proprietary and sovereign powers were fully mixed. His control over England's land brought him control over England's people. Were we to start with William's day nearly a thousand years ago and come forward to the present we would see a long, uneven separation of these two sources of power. Slowly, erratically, the powers we label proprietary became separated from those what we view as sovereign or governmental. Our tendency now is to assume that this separation became total, that private property exists in a private realm and differs in kind from public or governmental power. But of course it doesn't. Private property rests upon public power and entails the exercise of that power.

As proprietary and sovereign powers split apart in England, most of the king's powers fell rather easily into one category or another, but some of them did not. An example of categorical uncertainty arose in the case of navigable waterways. The king owned the land beneath navigable waterways as one of his royal prerogatives. But did he own this land as he might own a farm, or was it instead owned in some public or sovereign capacity? The same issue arose with respect to the king's rights over wildlife and beaches. If the King's powers over these lands were sovereign then the public had claims to them, and they were subject to laws enacted by Parliament. If they were proprietary powers, then they belonged to the king personally and could be kept for personal use or sold.

Making matters more complex were the countless English common lands, for centuries subject to the claims of various people, usually residents of a local area. Common lands were subject to use, not by the public, but by a defined group of people, often villagers. Rights to use the town commons were typically defined with precision. These rights were not private property

as we understand the term, because they entailed no exclusive control over any space. On the other hand, the common lands were not public lands because they weren't open to the public generally.

As England marched to the present, economic forces pressed against medieval land-use patterns. Among the powerful changes were the waves of land enclosure that took place, mostly between the seventeenth and nineteenth centuries. One type of enclosure occurred when a lord decided to get rid of the small farms on his land, consolidating and enclosing his fields and devoting them to sheep. To do this he evicted tenants, who often resisted bitterly. The other type of enclosure took place on what had been common lands, subject to use rights by commoners. These enclosures were authorized by Acts of Parliament and ostensibly entailed payments to the evicted commoners, but commoners resisted nonetheless because their economic and social lives were being upset. Enclosures that involved evicting tenants might strike us as legitimate exercises of a landowner's rights. But we need to remember that the feudal system was morally problematic. The tenants being evicted were the great, great, great grandchildren of yeoman Harold, who labored under a system that could be harsh and oppressive. In terms of the country's overall economy, the waves of enclosure might have made good sense; economically, the new land uses were often more efficient. But the unfairness remained.

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With this behind us, let's turn to the two categories of property that are familiar to us: public land and private land. They seem like different things, but how different are they? How wide is the divide? The points covered thus far help frame the answer.

Both public and private property are forms of power, meaning power that some people exercise over other people.

Both are defined by law and indeed are creatures of law.

Both forms of property are morally problematic in that they entail the coercive restriction of individual liberty. Both therefore need justification to remain legitimate. And property has not always been legitimate. It's been oppressive. It's involved outright theft. It has, of course, also been splendidly useful and morally sound.

When we turn to the laws that govern uses of private and public lands what we find is that, like all other laws, they are properly enacted only when lawmakers endeavor sincerely to foster the good of everyone, landowners and landless alike. Lawmakers are supposed to legislate for the common good, not for the benefit of any faction. Property laws are no different. Property is legitimate to the extent that it is consistent with and fosters the shared good.

This last point might seem surprising, accustomed as we are to think about private property as an individual right of some sort, something that government is supposed to defend. After all, our constitutions contain protections for property, including protections against government invasion. So how can property be a product of legislative act?

These are vital questions. They need answers, and they have answers, though they would take time to review. A key piece to note is that the common good is often furthered by creating and protecting individual rights in land. That is, individual private property can be a useful tool for fostering the good of people collectively. Moreover, private property works well only when owners enjoy reasonable stability in their rights. Lawmakers just can't change the rules of ownership at will; if they do, the benefits of the institution decline. Individual property interests,

then, need some protection. Nevertheless, it remains true that property is legitimate only when the governing laws promote the common good. It becomes illegitimate, even oppressive, when it allows owners to frustrate the common good, whether by harming other individuals or infringing public interests. Only secondarily is property an individual right.

The specific subject I've raised here—about the moral justification of property—is a complicated one. Indeed, the whole institution of private property is complex, more so than we usually realize. It's also fascinating to study, in terms of its history, its varied manifestations, and the ways diverse peoples have talked about it. The powers and obligations of land ownership have varied greatly, in time and place. The ideas we now embrace are very much the product of our time.

Back to the public-private divide. So far, I've highlighted some essential ways that public and private lands are the same: they are forms of power, they derive from law, they are morally problematic, they're justified only when they foster the common good. The two categories are thus similar; the divide between them is narrow. It is simply not the case that private rights exist apart from law, or that they foster private interests apart from the public good, or that they are a form of private power that is independent of public power.

How then do they differ, the public and the private, because surely they do?

To get at their differences, we can return to our opening scene, with our people entering their new land. As the people gaze upon the landscape, thinking about what to do, they confront three questions.

First, how are they going to use these lands to foster their collective good?

Second, who is going to use which lands?

And third, who gets to make the decisions?

These are the vital questions, both for the first people who enter a place and for each generation thereafter. By keeping the questions front and center we can get at the differences between public and private lands.

Let's start with the third question, who gets to decide. Decisions about public lands are mostly made by public decision-makers. But not completely so. Public decision-makers are often influenced by private parties who want to use the lands. Indeed, private involvement in public-lands processes is extensive, too extensive some people say. When we turn to private lands, the equation is flipped but again not one-sided. Private owners have greater say in land-use decisions but lawmakers commonly play important roles; again, too important some say. In many settings, private lands are also subject to restrictions imposed by other private citizens; by a homeowners association, for instance. In both cases, then, public and private influences intermingle. So varied is this intermingling that we don't really have two categories of lands. We have more of a continuum, with some lands more subject to public control and some lands more subject to private control. Always it is a matter of degree.

As for the question of how the land is used, once again we see more of a continuum or mixture rather than distinct types. On public land we have nature preserves, intensively used parks, grazing, logging, mining, office buildings, stores, and so on. On private lands we find pretty much the same, less in the way of nature reserves and more in the form of intensive land uses, particularly residences. Without maps or signs it can be hard to tell public from private.

As for the "who gets to use," we have the same story. Private lands are used by private actors almost entirely. But activities on public lands also involve private actors. Logging,

grazing, timber harvesting, mining, recreation—all are undertaken by private parties, usually at some private initiative. So again, the differences are ones of degree only.

Consider, for a moment, the typical residential subdivision lot, an example of what we would call private property. The owner's use of the lot is probably subject to severe limits as a result of restrictive covenants, enforceable by neighbors. Permanent easements could allow public utilities or even private entities to enter the land and use it for specified purposes. Zoning laws could limit activities, or even prescribe affirmative duties such as shoveling snow, maintaining fences or keeping weeds trimmed. When we get down to it, the owner of this residential lot might really have only a single, narrowly defined use right in the land—the right to use the land for a single-family home. That is all.

Compare this carefully prescribed residential-use right with a similar right to use what we term public land, perhaps a BLM grazing permit or a federal oil and gas lease. Here, too, we have a private property right, and it is carefully tailored by law. So how different is the BLM grazing permit from the homeowner's use right? There are differences, to be sure, yet both are specifically tailored use rights, both defined by law, and both crafted, one hopes, so that the private activities promote the common good.

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The categories that we know as public and private land have not always been around, certainly not in anything like the way we commonly think of them. For decades after the United States was formed it was assumed that pretty much all public domain land would pass into private hands, and it wasn't particularly clear that the government as landowner had rights that

were more extensive than any other landowner. As for private land, there was a long period, varying among the states, during which rural areas were mostly an open commons, where people could roam, hunt, forage, graze livestock, and collect firewood without the landowner's permission. The landowner's right to exclude was largely limited to areas that had been fenced in or cultivated. Indeed, in most rural areas the woods was one great commons, and it made little difference what land was public and what land was private.

During the nineteenth century, private property rights changed considerably in terms of the powers that landowners possessed. Rights to exclude outsiders increased, particularly on unenclosed rural lands. Rights to use the land intensively also rose, even when the new, industrial land uses harmed surrounding lands. By the late nineteenth century, the idea arose, really for the first time, that landowners could largely do whatever they wanted, so long as they didn't cause visible, substantial harm to other people. This was a distinctly pro-industrial vision of private property, quite different from the agrarian approach to property that prevailed a century earlier. Necessarily this new approach to ownership meant that sensitive land uses were no longer well protected against interference by noisy, industrial neighbors.

By the year 1900, private landowners were empowered by law to do many things that were widely viewed as unwise if not destructive. Not surprisingly, private property came under attack because of this, not only from the new generation of conservationists concerned about overcut forests and degraded waterways but from other progressive reformers as well, particularly in cities. As many people saw matters, property law gave landowners too much power to act selfishly. Mining companies and meat-packers polluted waterways; rising industries were degrading residential areas; soil washed away while fires spread through cutover

forests.

One tool reformers used to address the ills of private ownership was land-use regulation, a form of public control with a long history in America, dating back to early colonial settlement. A new, more comprehensive approach to land-use control arose with the coming of modern zoning laws, which divided urban areas into zones and prescribed the uses permissible in each zone. Regulation, though, was not the only response to private property's ills. Also welling up was a call for the nation to hold on to its public lands and to manage them for the long-term public good. If private owners weren't going to use their lands sensibly—if they were going to cut down the Northwoods and plow up the Plains to create a Dust Bowl—then the public would have to look to public lands for amenities such as healthy forests, unpolluted rivers, and pleasing recreational spaces. And so the call went out to hold on to public lands, to halt the era of land disposal. It was a momentous decision—taken not at once but over several decades—for a nation that had no initial thought of staying in the land-owning business.

The point here is an important one, and too rarely noted. We have retained expansive public lands in the West in large part because of the perceived failings of private property. When private landowners can degrade their lands and get away with it—even though private property is supposed to support the common good—then it's understandable that people will want more public land, and that they'll want their public lands protected from being used the same way that private lands are used. Public land was the remedy for private irresponsibility.

The lesson that reformers learned early in the twentieth century was not the only one they could have learned. But it was the obvious lesson, given prevailing ideas about private property. The assumption of the day was that private owners could degrade their lands if they chose; they

could strip their trees, plow fragile soil, and dig up minerals, all with little regard for the land's long-term health. The danger appeared unmistakable in the Dust Bowl decade of the 1930s, when homesteaders on the Plains plowed land that should have remained in grass. We call that disaster a natural one, but the problem was caused by people, not nature, as many reformers could readily see. And the solution, they said, was to halt further land disposition and create a federal Grazing Service. Whenever possible, the government would also buy back degraded wheat fields and return them to pasture.

In terms of land-use, reformers assessed the scene accurately: semi-arid land should be grazed, not plowed. Where reformers fell short was in their assumption that grazing could be assured only by means of public ownership. They didn't see that land could be turned over to private hands subject to a legal restriction that it not be plowed. Private property is a more flexible arrangement than they understood; it need not give landowners freedom to misuse what they own. Public ownership was not the only remedy.

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The public-private divide as an intellectual framework, as a way of thinking about our current land-use regime, is distinctly unhelpful today. It implies that some lands can be used solely for an owner's benefit, and some can be used for the good of everyone, yet that division makes little sense. The public has a legitimate interest in how all lands are used. No land use takes place in isolation, given how lands are interconnected ecologically, socially, and economically. As for public lands, many are needed to serve distinctly public purposes, but many are not. Or rather, many publicly owned lands would not be needed to serve public purposes if

we could be confident that, when placed in private hands, the private uses would comport with the common good.

We find ourselves today, I think, burdened with several lousy ideas, which we would do well to alter or discard.

The most lousy idea is that private property includes the right to use the land any way an owner wants, without regard for public implications. Left to do what they want, private owners too often degrade land. The pull of the market is not enough to promote sound land uses.

A second lousy idea, also in need of change, is that the only way to promote healthy lands is to keep them in public hands. This simply isn't true, however understandable the idea was when it first arose.

Third is the idea that we can sensibly define private property rights without taking nature into account; the idea that property rights in a tract of land—in the hypothetical Blackacre or Greenacre, as law students would term it—can be defined in the abstract, without regard for the land's natural features and with how the land might sensibly be used. Land parcels differ greatly, and their differences affect how we can safely use them. In defining land-use rights we need to take nature into account more than we have, just as, in cities, we pay attention to surrounding land uses. And we are doing so, paying attention to nature, albeit slowly and in ways that arouse controversy. Private rights are now much different in wetlands and floodplains, on barrier islands and beaches, on sloping hills subject to erosion, in forests and critical wildlife habitat, and along riparian corridors. It is easy to view our complex legal regime as simply a collection of isolated laws and regulations, each aimed at a specific environmental problem. But the laws and regulations form a pattern. They reveal a distinct trend toward tailoring private

rights to take nature into account. Slowly, painfully, we're turning to nature to help us decide, not just how to use lands, but how we define the legal rights that landowners possess.

In my view, we have too much public land today. We also have pernicious, unjust ideas about what private property entails. And these two problems are very much linked. We have one problem because we have the other, and we can't deal with one unless we deal with both.

How might we deal with these problems? What would things look like if we replaced our lousy ideas with more sensible ones, with ideas based not upon a presumed chasm between public and private but instead on a recognized need to combine public and private nearly everywhere?

The virtue of private ownership is that it designates particular people as land stewards, charged with looking after the land and putting it to good use. Private ownership can protect privacy, provide incentives for economic enterprise, and add ballast to civil states. Public ownership is better able to consider the long term and can assess land uses in broader spatial contexts. Government can resist market pressures to misuse land, and it can manage lands to provide an array of public goods that make little economic sense for individual owners. Both forms of ownership, of course, can and do fall short of the ideal. Private owners are often not good stewards: their perspectives are too short, they ignore ecological ripple effects, and their isolated decisions can produce chaotic land-use patterns. Government agencies are buffeted by political winds, and have trouble saying no to powerful groups. Their decisions can be painfully inefficient.

The public needs to play an important role in the ways all lands are used. Without public influence, property uses can harm the common good. Public involvement could take many

forms—not just public ownership, as Dust Bowl reformers assumed. It could be expressed in laws that prescribe the basic scope of private rights that an owner holds. This method is used, for instance, in the federal statutes that prescribe the precise rights that BLM grazers obtain and in the laws of public and private nuisance. Public involvement instead could take the slightly different form of land-use regulation. It might also take forms that are less obviously public. Examples here include restrictive covenants, the limits and duties imposed by homeowners' associations, and restrictions that come through resource-management cooperatives. Then there is the public involvement in the form of economic incentives, whether funded by taxpayers or private donors.

These familiar ways of combining public and private need to be understood as merely illustrations of what is possible, perhaps as precursors of more effective methods that await our courage and imagination. Consider, for instance, a grazing arrangement, the Tilbuster Commons, that has been put together in eastern Australia. Under it, private landowners lease their lands to a grazing cooperative that they collectively manage. Their combined lands are worked in concert—like open-field farms of centuries ago—with their herds mingled. By working jointly they can employ a larger spatial perspective in their land management, thereby reducing one of the main defects of traditional private ownership. In the United States, we have similar examples of cooperative land management, such as the pooling and unitization schemes that govern oil fields and water management schemes orchestrated by water conservancy districts. Safe-harbor and candidate-conservation agreements under the Endangered Species Act offer useful precedents, as do the experiences federal agencies have had managing grazing, timber harvesting, and mining on federal lands. The new Forest Service program involving Stewardship

Contracts illustrates a willingness to try new forms, and could prove a step in the right direction. Across the West, there's talk about connecting private and public grazing lands in ways that view them as integrated management units. Again, though, these are just hints of what is possible when we step back and imagine new ways to combine public and private.

For the vast majority of lands, where we need to head (and are heading, haltingly) is toward blended landscapes, in which private actors possess use rights that are loosely tailored to protect the public interest. These use rights are forms of private property, but they bear little resemblance to the industrial, ownership-as-absolute-dominion ideal that arose in the nineteenth century. Tailored use rights have existed for years on public lands. There, we're likely to see an expansion of these use rights so that private holders can plan over longer time periods and can take broader responsibility for the land, subject to duties to take good care of it. These private use rights on public lands won't typically be exclusive; the land might remain open to public recreational use, for instance, and a holder of timber or grazing rights might need to defer to someone else who holds mining rights. But public recreational rights might be more limited than today; they might be limited to public hiking on defined trails, without ATVs, snowmobiles or even mountain bikes. In addition, the holder of a private use right might have the power and duty to halt destructive trespasses.

Tailored use rights could look much the same when they exist on private land. For a look into the future there, we can consider the case of timber harvesting in a state that is aggressive in regulating forestry to protect nature. In such a state, a forest owner could be restricted by law from harvesting trees along waterways or near residential areas. A forestry practices statute could require the owner to preserve the diversity of tree species and ages, while limiting

harvesting methods and imposing duties to replant. Perhaps the forest owner has already sold hunting rights to a local hunting club, and perhaps an old railroad right of way or mining road is used as a public hiking trail. Perhaps there's even a conservation easement on the land. When everything is put together, our hypothetical private forest already might look a lot like a public forest, in terms of the legal rights that the timber company holds and the ways multiple uses are mixed.

As we look ahead we are likely to see new ways in which the public interest is identified and protected. We will rely less on distant governments and instead make greater use of novel, collective-management arrangements that are closer to the land. We're also likely to have the public interest refined and promoted by multiple levels of government, which pay attention to differing spatial scales. Perhaps we'll even see more arrangements that involve collaboration, cooperation, and adaptive management, undertaken by people whose roles blend the public and private, groups of people who vaguely resemble the managers of the old town commons, for instance, or today's homeowner's association: groups that are essentially private in operation but that are recognized by law and subject to legal constraint.

There will always be confusion and arguments about where the public good lies. We therefore need good processes for resolving such arguments and making them as productive as possible. And of course laws can never be exact enough to prescribe good land use, much less require it. So there will remain important roles for education and individual experimentation. With luck, our disagreements will become less contentious and more fruitful, more aimed, not at defending outdated notions of public and private, but instead at the real question at hand: how should we inhabit this bountiful land, for ourselves, our descendants, and the entire web of life?

I predict for the future a marked reduction in what we now term public lands. But this can happen only if we undergo an equally marked reduction in our passionate adherence to outdated visions of private ownership. The better we protect the public interest in private lands, the less need we will have for overtly public lands. What needs to take place, though, is not a shift of land from the public side over to the private side. We need instead an end to the categories themselves. We need a rise of new, intermediate forms of land-management, and then a shift of lands from both sides of the divide into the center.

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Let me close by returning to my opening scene, with our people gazing onto the new landscape. Coming as they are to a new land these people have flexibility in deciding how to use the landscape. They can take nature into account. They can require that land uses be consistent with the continued health and fertility of the land. They can consider carefully how best to craft use rights so that their settlement is as prosperous and satisfying as it can be.

We are not approaching our lands today with this kind of freshness. We have a long history, and lots of expectations that have been formed. These expectations cannot be ignored. But we would be foolish to let the past weigh so heavily that we didn't think clearly about our many possibilities. Private property is an evolving, organic, socially constructed institution. It has changed greatly over time—our ancestors changed it—and it can change again, to meet our current needs. Public ownership is also an evolving institution, and it too need not remain as it is.

Whatever name we give to it, land ownership is inherently a social arrangement and at

the center of it, always, is a core question: how best can we serve the communal interest? What arrangement of land uses and property rights would be most helpful for us as a people? That's what we're after. And if we're willing to look upon issues freshly, if we're willing to put down the burdens of the past, if we're willing to reconsider old practices and old ways—doing all of this in good faith and with respect for one another—then we just might produce the landscapes we want.