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# Private Property in the Context of Community

By MATTHEW HOFFMAN\*

ABSTRACT. The dominant philosophy of private land ownership—that private property exists for the benefit of its owner and that use and ownership should be determined by market forces—is not the only philosophy in the American tradition. Classical republicanism’s proprietary perspective was equally in favor of private property, but held that private property exists for the benefit of society. This article begins by presenting the proprietary view of private property rights, drawing on the legal scholarship where this perspective has been revived. Next, I use the case of contemporary land reform in Scotland to exemplify the rationale for this perspective. Lastly, I attempt to import the lessons of Scottish land reformers without importing their model, instead considering ways in which private land ownership might be embedded in non-market institutions in the United States.

## Introduction

In the introduction to *A Sand County Almanac*, Aldo Leopold (1949: viii) says that “we abuse land because we regard it as a commodity.” We know what a commodity is—something that is bought and sold in the marketplace and valued in terms of the price it fetches there—but what is wrong with seeing land as a commodity? And what else might it be? Many Americans who, like Aldo Leopold, are concerned about the stewardship of land, are also strong believers in private

\*Assistant Professor, Dept. of Sociology and Economics, University of Southern Maine. Guest Researcher, RURALIS—Institute for Rural and Regional Research, Norwegian University of Science and Technology, Trondheim, Norway. Education: MS and PhD in Rural Sociology from Cornell University. Current research focus: property rights, natural resource governance, and institutions for collaborative decision making in landscapes fragmented by private property. Email: matthew.hoffman@fulbrightmail.org

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property. Wendell Berry (1995: 49), for example, asserts that land “should be divided into small parcels among a lot of small owners.” But does being private property necessarily mean that land needs to be a commodity?

There are many kinds of property other than public and private, and even the distinction between these two categories can be blurry (Geisler 2000). Private property itself can also take different forms, reflecting different ideas about what the institution of property is for. While private property was central to the classical republicanism of the American revolutionary period, the reasons for its importance were very different than those that undergird the commodity perspective today.

The “proprietary” perspective of classical republicanism, in which property rights are expected to enable good citizenship, has experienced a revival in American jurisprudence, raising the question of how it might be enacted in practice (Simon 1991; Rose 1994; Alexander 1997, 1998; Singer 2000a; Freyfogle 2003, 2011; Blomley 2005). The institutional context in which the vision of property as a commodity finds its fullest expression is the free market. In what institutional context would the proprietary vision be expressed?

This article begins by first summarizing criticism of the commodity perspective of land ownership and then presenting the proprietary perspective. Next, I use the example of Scotland’s recent land reform to illustrate the community development rationale for decommodifying land, as well as one institutional mechanism for doing so. Lastly, I open the question of how the proprietary model of private property might be enacted in the United States today.

### **The Commodity View of Property**

“It’s my property, and I can do whatever I want with it!” This popular view of ownership has its roots in a conception of property that tends to assume one easily identifiable person having complete control over a well-defined material sphere. While many variations on this situation are readily accepted, this is still the ideal to which we default in the absence of any further specification. Such a person is said to have title, and the establishment or identification of clear title is thought to be a useful way of organizing and adjudicating conflict regarding property.

This view of property is about boundaries in the world of things—this is mine, and that is yours—as well as complete freedom of action with regard to those things that we own, a conception of property famously described by 18<sup>th</sup>-century legal theorist William Blackstone (1766: 2) as a sphere of “sole and despotic dominion which one man claims and exercises over the external things of this world, in total exclusion of the right of any other individual in the universe.”

What I am referring to in this article as the commodity view of property might be labeled as some variant of economic liberalism. I am deliberately avoiding the term “liberal,” however, on account of how much confusion there is surrounding its use, especially in American popular discourse (Goldfarb 2010). To specify *economic* liberalism would be an injustice to the ideas of its leading intellectual proponents, who insist that the political and economic functions of private property are closely intertwined (Friedman 1962). They assert that economic freedom must be understood as the necessary foundation for political freedom (Hayek 1944). Accordingly, there can be “no personal freedom without economic freedom” (von Mises 1960). From this perspective, private property creates a sphere of personal liberty and serves as a bulwark between the individual and the state or the rest of society. This sphere of personal liberty can be understood in several ways: the possession of private property renders people less dependent on the state and thus less vulnerable to its demands. The more resources lie in the hands of private individuals, the less power the state will have, and the less able it will be to become tyrannical. More fundamentally, private property rights are understood as choice-making rights, the restriction of which in itself is a reduction of personal liberty.

Foster and Bonilla (2011) identify this “classical liberal” view of property as the dominant conception in American culture, one in which property owners have the right to exclude other people and to use their own property without interference, so long as such use does not interfere with the property rights of others. According to this conception of property, landowners are prohibited from causing harm, but they are not generally required to act for the benefit of others. If one person’s private property is to benefit other people, it is expected to do so through the mechanism of market exchange. Thus the idea of freedom in this conception of property is intimately bound up with the notion of free markets.

The economic function of property in the context of a market is two-fold. First, investment and conservation are encouraged when owners can count on receiving the rewards and consequences of their own actions. Second, when ownership may be freely traded, it is expected that resources will gravitate to the most efficient users, resulting in greater wealth creation overall (Deininger and Binswanger 1999; Anderson and McChesney 2003; O'Driscoll Jr. and Hoskins 2003; Boudreaux 2005). Thus the classical liberal view of property fits hand-in-glove with a market paradigm, encouraging the owner of land to “regard it as a commodity,” as Leopold lamented. His assertion that this will result in abuse, however, stands in direct conflict with the notion that private property encourages good stewardship by internalizing the consequences of people’s choices—a question to which we will return.

### **General Criticism of the Commodity View**

The classical liberal or commodity conception of property has come under fire for being “descriptively inaccurate” (Singer 2000b: 5). It has also been criticized for being dysfunctional. This section summarizes the first of these critiques. The next section deals specifically with tensions between private property and the public good.

Whereas the commodity view portrays ownership as a coherent bundle of rights belonging to a titleholder, legal realists point out that these rights may be divided up amongst many people who need not all be titleholders (Singer 2005). The seemingly simple concept of land ownership, for example, is often complicated by a welter of easements, rights of first refusal, mortgages, zoning regulations, and other claims, whereby parties other than the “owner” have rights regarding that property.

The distinction between public and private property is also complicated. Charles Geisler (2000) has drawn attention to the many private rights that individuals have regarding public property, the many public rights that affect private property, and the various estates that are neither exactly public nor private. C. Ford Runge et al. (2000) have pointed out, in the midst of controversy over “takings,” the very great degree to which private property values are the product of public investment.

Even the very materiality of property has been called into question. Charles Reich (1964) argued that government “largess”—such as

services, benefit payments, franchises, contracts, and professional licenses—was coming to replace private ownership as a significant source of wealth and should therefore be recognized as property and protected with the same procedural safeguards. As anyone who has purchased a book by downloading it can appreciate, the tangibility of property is fading.

In our everyday language, we tend to speak of [property] rights as if they were attached to things. Thus we “deposit our money in the bank,” as if we were putting a thing in a place; but really we are creating a complex set of abstract claims against an abstract legal institution. (Grey 1980: 70)

Most fundamentally, the distinction between rights regarding “things” and rights in general is hazy. Private property rights are limited by the entitlements of non-owners, as Joseph Singer (2000a, 2000b) illustrates with the example of public accommodations law, which prevents the owner of a public establishment from refusing service to a customer on the basis of race.

In adjudicating between two conflicting land uses, there is no “pro-property rights” position to take, as the right of property owners to do what they wish with their own property is necessarily curtailed by the rights of other property owners (as well as non-owners). Rather, it becomes clear that property rights are a balancing act, wherein each liberty awarded to one party is created by a corresponding restriction on another (Umbeck 1981; Freyfogle 2003; Singer 2005).

Although property rights are frequently depicted as God-given or a product of natural law, they are a human creation. As Joseph Weintraub, Chief Justice of the Supreme Court of New Jersey, observed: “Property rights serve human values. They are recognized to that end, and are limited by it” (quoted in Singer 2000b: 3). Rather than being sacred and immutable, property rights are described by legal historians as changing over time, with each of these changes being justified on the grounds of instrumentality (Freyfogle 1996; Friedman 2001).

### **The Problem of Public Goods**

Let us return then to private property’s commodity function of promoting the best use of resources by bringing the rewards and costs of land

use decisions home to the decision-making owner, and the concomitant function of markets to deliver benefits from private property to non-owners.

The problem is that many of the essential functions or benefits of landscapes—such as wildlife habitat or hydrological function—cannot be provided by any particular small parcel in isolation, but rather are the combined result of many landowners' decisions over time and need to be managed on a large scale (Forman and Godron 1986; Noss 1987; Olson 1999; Fiege 2005). Adverse effects of local resource use on large ecosystems may not be immediately apparent at the local level (Herring 1990); and practices that may not seem very harmful in each individual case can add up to serious threats when enough people engage in them (Freyfogle 2003).

Many or most of the benefits of rural landscapes have the nature of public goods—and here I mean specifically that they are non-exclusive—which makes it difficult for landowners to be rewarded in the marketplace for providing them. Forest owners facing the decision of whether to invest in the provision of public goods have been described as being “captured in a prisoner’s dilemma” (Glück 2000: 181; see also Slee 2006). A similar situation has long been recognized in the planning literature on urban blight, where it has been observed: “In any deteriorating urban area, it is against the self-interest of any one property owner to rehabilitate his property unless adjacent property owners do so as well” (Mandelker 1965: 27; see also Davis and Whinston 1961; McMillan 1974).

In a reversal of the argument made by Hardin (1968) and Smith (1981) that privatization may be necessary to avoid a “tragedy of the commons,” it may be possible to internalize the effects of decisions by establishing some mechanism of cooperation in order to prevent fragmented decision making. In “The Tyranny of Small Decisions,” economist Alfred Kahn (1966: 24) describes how numerous small decisions taken over time by many people can add up to outcomes that none of those people would have voted for had that outcome “ever been presented for their explicit consideration.”

This divergence between preferred outcomes and personal choices is clearly evident in the housing decisions of people in my home state of Vermont. According to a state-wide poll, about two-thirds of Vermonters think that low-density, automobile-oriented development

outside of existing town centers is becoming a problem and that action should be taken to stop it (Smart Growth Vermont 2009). When asked where they think that new residential development should occur, nearly 90 percent of respondents said that it should be located in existing towns rather than in the countryside. However, when asked where they would like to live if money were no object, nearly two-thirds of these same respondents said that they would purchase a house in countryside. In the absence of any mechanism to internalize the effects of private land use decisions, “the piecemeal nature of private development is typified by a series of individual maximizing decisions the product of which the decision-makers themselves consider unsatisfactory” (McMillan 1974: 411).

Neither contract nor litigation can be used to resolve this situation because, in order for either of these to be useful tools, landowners would have to have the power to either create or withhold the outcome in question. Harms that are the cumulative result of many people’s actions over time can be limited by the state via regulation, but what can be done to encourage actions that add up over time to publicly desired outcomes? How are such outcomes to be identified as desirable? This returns us to the question that Leopold raises. It is clear that the classical liberal model of property—treating land as a commodity—cannot ensure good stewardship, when we think of stewardship as the provision of public goods. But what will?

Consider the full quote from *A Sand County Almanac*:

We 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. (Leopold 1949: viii)

It would certainly be appropriate to interpret this statement from a deep ecology perspective, but, in the context of this discussion, I want to think in human terms about the connection between land, community, and stewardship—to ask what private land could be if not a commodity, and what might guide its use, if not the market.

The tension between land as a commodity and land as a place of social belonging has been a frequent theme in the literature on Scotland (McIntosh et al. 1994; McCrone 1997; Mackenzie 1998, 2004; Mather



1999; MacAskill 1999; Murphy 2009). Even in the United States, property has not always been construed as commodity. In the early years of the new republic, the emergent commodity view of property had to vie with another perspective, sometimes called the proprietary view, which was part and parcel of the civic republicanism of that era.

### **The Proprietarian View**

From the perspective of civic republicanism, the purpose of property is to promote good social order. This view forms a part of the “proprietary” tradition, which says that each person should have those things that are necessary for them to fulfill their role in society (Rose 1994; Alexander 1997, 1998). Like classical liberalism, it is a view that endorses private property, but it does so for very different reasons.

Imagine that a group of people wash up on a desert island, the beach of which is littered with jetsam that does not belong to anyone and to which any of these people might have equal claim. If one of the items on the beach is a case of medical supplies, and if one of the people happens to be trained as a doctor, the proprietary view suggests that it makes sense to give the medical supplies to this person and to prohibit the others from taking or tampering with the supplies. Such an arrangement is necessary in order for the doctor to be able to take on that role and to perform it well for everyone’s benefit.

Yet by attaching property rights to particular roles, rather than to people, an important contingency arises. It would not be appropriate for the doctor to destroy the supplies or to withhold them while refusing to provide medical treatment. If she does not wish to act as doctor, she must relinquish the supplies to somebody who is willing and able to fill that role. Similarly, in order for society to be fed, the farmer must have secure possession of farmland, as well as a certain amount of discretion in management. It is not inconsistent with this model for the farmer to sell the fruits of his or her labor. What would be inappropriate, however, is for him or her to destroy the land or, perhaps, to leave it idle. This is still a species of private property, but whereas the classical model says that property exists for the benefit of the owner, proprietarianism says that property, even private property, exists to serve the public good.

The way in which civic republicanism departs from traditional proprietorship is in the strong emphasis the former places on equality amongst citizens, bearing in mind that notions of who could be a full citizen were less inclusive in the 18<sup>th</sup> century than today. This egalitarian tendency was rooted in the belief that successful democracy requires “competency” on the part of its citizens. In order for a person to act with civic virtue in the public interest, it was believed that he must be neither destitute, in which case he would be obliged to act out of narrow self-interest, nor dependent, in which case his will would be subject to that of another. A certain amount of property was therefore considered appropriate and necessary to the role of citizen (Schwarz 1997).

Thus, the classical liberal and proprietorship perspectives both regard private property as a foundation for liberty, but they diverge in their understanding of what liberty means and what threatens it. Classical liberalism has sought to portray the struggle for liberty as a contest between the individual and the state and to frame private property rights as the foremost bastion of liberty, enabling the individual to carve out a private sphere, free of public influence. Civic republicans, on the other hand, were keenly alert to the ways that unequal distributions of property and concentrated private power might restrict the liberty of individuals. Consequently, they were more concerned with the distribution of property than that its use should be unfettered, and they were more inclined to regard property as something that enables individuals to participate in the public sphere than as a way to shield themselves from it.

Contemporary jurisprudence continues to recognize that “while private property does help separate government and economic power,” thus limiting a government’s potential for tyranny, the concentration of private economic power may result “in the substitution of coercion by the government with coercion by private parties” (Barros 2009: 50). Morris Cohen (1927: 12) illustrated this by observing that “if somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.” So long as ownership of such necessities is widespread, no holder of them is going to

wield very great power in this way, but even the prominent classical liberal Herbert Spencer had to acknowledge that if

the whole globe may become the private domain of a part of its inhabitants; and if, by consequence, the rest of its inhabitants can then [exist] only by consent of the landowners, it is manifest that an exclusive possession of the soil necessitates an infringement of the law of equal freedom. For men who cannot [live] without the leave of others cannot be equally free with those others. (Spencer [1851] 1970: 104)

Leopold expressed a similar sentiment almost a century later, asking: “Of what avail are forty freedoms without a blank spot on the map?” (Leopold 1949: 158). Fortunately, as Joseph Singer (2000a) reminds us, it is not only property owners who have rights—even in and regarding the places that they own. (See, for example, Title II of the U.S. Civil Rights Act of 1964, concerning public accommodations.)<sup>1</sup>

The two strands of American proprietarian thought that I have woven together here are, first, that private property ownership should be widespread, rather than concentrated in too few hands; and second, that the rights of private ownership are not absolute, but rather must be exercised in a manner that is consistent with the public good.

We are apt to assume by default that any restraint on the use of private property is bound to come from the government, but it must be remembered that this is not the case. Aside from litigation between landowners, consider the example of entailments, which private property owners once used to restrict what future owners could do with that property by establishing a predetermined line of inheritance. Each inheritor, like Mr. Bennet in *Pride and Prejudice*, had the use and enjoyment of the property for his or her lifetime, but was quite unable to sell or bequeath the property as the inheritor wished, which also meant that he or she was generally unable to obtain a mortgage. The eventual commodification of such property required judicial or parliamentary intervention—the government in this case acting as the liberator, rather than the restrainer of private property. Similarly, the use of restrictive covenants in the United States to prevent the sale or rental of homes in certain neighborhoods to nonwhites was a private rather than a public form of land use regulation that served to limit the free trade of real estate on the housing market (Dean 1947; Jaffee 2007). Today, the

decommodification of land often relies on private action through the use of trusts and conservation easements rather than the less expensive but politically difficult use of zoning and other regulatory measures.

In the early 19<sup>th</sup> century, the divergence between the proprietary and commodity perspectives on ownership reflected a growing tension between two different visions of society. To the civic republicans, property enabled citizenship, and the public realm was a place for people to cooperate in solving common problems. From the classical liberal perspective, property existed to enable individual freedom, and the public realm was a place where we compete in defense of our private interests.<sup>2</sup> Civic republicans believed that when individuals fail to exercise their property rights in a manner consistent with the public good, the government has a right to intervene on behalf of the public. From the classical liberal perspective, private property rights are sacrosanct and should not be subject to government interference.

As the Industrial Revolution gathered steam throughout the 19<sup>th</sup> century, and the public good came to be defined in terms of economic growth, courts increasingly ruled in favor of industries that stood accused of causing harm (Friedman 2001). Freyfogle (2003) describes how a shift occurred between common and statutory law. As the courts became increasingly permissive of intensive land use, and the harmful effects of industry became more acutely felt, legislatures began to regulate land use more aggressively. This simultaneous expansion of private rights and public power obscured the fact that private property rights are inherently limited by other people's rights—that they are in fact created and defined by limitations on other people's freedom of behavior—making it appear instead as if they are threatened only by government interference:

Law and government would be set apart from ordinary people and given a new, more hostile image. The mutual reliance of individual and community would decline, and liberty would be seen more as immunity from governmental interference and less as freedom to engage with other community members in collective self-governance. (Freyfogle 2003: 80–81)

The tension between proprietorism and the classical model of property evolved into a conflict over the right of government to regulate

private property in the public interest. Private property was in fact heavily regulated throughout the 19<sup>th</sup> century (Novak 1996). But our cultural understanding of property drifted toward the commodity conception.

Property-as-commodity functions in the institutional context of a market. In the classical liberal vision, land use choices are made, with a minimum of regulation, by self-interested individuals in response to price signals determined by supply and demand. In the proprietarian vision, on the other hand, individuals use their property to fulfill a socially beneficial role—but in what institutional context is this vision supposed to find expression?

### **The Incorporation of Land with Definite Institutions**

Karl Polanyi (1957, 1977) describes how, for most of human history, economic behavior was embedded in personal relationships and social institutions. Economic exchanges were also social exchanges, and market mechanisms did not drive the employment of labor and land as inputs to production. Land, he says, was “tied up with organizations of kinship, neighborhood, craft, and creed—with tribe and temple, village, guild, and church” (1957: 178).

In *The Great Transformation*, Polanyi describes the historical process by which economic life in Britain became disembedded from social relationships and markets were created, a process that he claims could not but “disjoint man’s relations and threaten his habitat with annihilation” (1957: 42). Polanyi’s (1957: 234) advocacy of socialism, which he defined as “the tendency inherent in an industrial civilization to transcend the self-regulating market by consciously subordinating it to a democratic society,” is often interpreted as a call for state control of the economy. However, there are passages in which he seems to suggest a more decentralized alternative, as when Polanyi (1957: 251) discusses the decommodification of land:

To remove land from the market is synonymous with the incorporation of land with definite institutions such as the homestead, the cooperative, the factory, the township, the school, the church, parks, wildlife preserves, and so on.

Similarly, William Simon (1991: 1336), in his discussion of “social-republican property,” describes a type of private ownership inextricably bound up with membership in a community.

The distinctive feature of social-republican property is that it is held by private individuals subject to two types of conditions—one requiring that the holder bear a relation of potential active participation in a group or community constituted by the property, and another designed to limit inequality among the members of a group or community.

These conditions function as restraints on alienation and accumulation, inhibiting property’s movement from community to commodity.

Haim Darin-Drabkin (1977: 420) suggested a model of community ownership mixed with individual use rights:

The liberal concept of universal application of individual rights in the sphere of land should result, due to the interrelatedness of different land uses, in the transfer of *ownership* rights to the community in order to assure for everyone individual land-use rights ... [This would enable] planning the use of land according to the long-term needs of society.

As it happens, the model that Darin-Drabkin suggests is very like one that is being implemented in some communities in Scotland today.

The next section of this article will examine the case of community ownership in Scotland as one example of how land may be incorporated in local institutions so as to shift it away from being a commodity, and perhaps toward the role that proprietarians envision for it. My purpose in the following section is not to evaluate the performance of community ownership in Scotland, but rather to show what one alternative to the commodity view looks like in practice and to investigate the rationale for this model in the context of the actual circumstances of its application.

### **Community Ownership of Land in Scotland**

In 1999, the Scottish Parliament convened for the first time in almost 300 years. In its first session, it passed land reform legislation—the Land Reform (Scotland) Act 2003—designed to encourage the transfer of large, private estates to local community ownership. Scottish land

reform is interesting because it differs in several key ways from mainstream ideas about what land reform is for and how it should work.

The dominant philosophy of land reform in academic and policy circles has long been one of breaking large estates up into many small private holdings, each with clear and alienable title, in keeping with the classical liberal view that private ownership will stimulate investment and that markets will encourage efficiency-enhancing transfers, resulting in greater wealth creation overall (Deininger and Binswanger 1999; World Bank Group 2001).

At first glance, the reasons for land reform in Scotland seem typical enough: an acute lack of rural development, especially in the Highlands and islands, has long been associated with highly concentrated patterns of land ownership and abusive or neglectful landlords (Bryden 1999; Hunter 2000). In the late 1990s, more than half of all private land in Scotland was owned by one hundredth of 1 percent of the population (Bryden 1996). One-quarter was held by 66 landowners in estates of 30,700 acres and larger (Wightman 2009). An estate may easily encompass several townships, with everybody in those townships—crofters and shopkeepers alike—being tenants of the estate owner.

But rather than going with the dominant philosophy of land reform and breaking these estates up into numerous private holdings, Scotland's land reform encourages the transfer of large estates to community ownership, such that a not-for-profit community organization becomes the landlord and the estates remain whole.

The Community Right to Buy provision of Scotland's land reform legislation allows communities of fewer than 10,000 persons to register an interest in land, thereby establishing a preemptive right to buy that land should it come up for sale (OPSI 2003). Crofting communities were given the right to force a sale without waiting for their land to come onto the market, and the Land Reform (Scotland) Act 2016 expanded on the 2003 Act by creating a process whereby non-crofting communities can also apply to force a sale if it is in the interest of furthering sustainable community development. A croft is a form of agricultural tenancy unique to the Highlands and islands of Scotland. Crofts are usually small and situated on land of marginal agricultural value. The holder of a croft, a crofter, owns the buildings and other improvements but pays rent to the landlord on whose land the croft is situated.

Crofting tenure is statutory and regulated by the Crofting Commission (2017).

In order to register an interest in land, communities must meet a number of requirements, including the formation of a company limited by guarantee, with a board of directors elected by its members. All adult residents have the right to be voting members. This company is empowered to own and manage land and other property. However, its assets and any income derived from them, do not belong to the members and may not be distributed (except, for example, as reasonable payment for services or goods). The company must manage these assets for the long-term benefit of the geographically defined community for whose sake it was formed. The relationship between tenants and the company is technically the same relationship that existed between them and their previous landlord—except, significantly, that the company must act in accordance with its articles of association and the democratic will of the community.

In order to understand why communities in Scotland have chosen this unusual approach to land reform, I conducted in-depth, loosely structured interviews in nine locations in the Highlands and the Western Isles where land has been transferred to community ownership (Hoffman 2013). The following paragraphs draw on this research.

Community organizations commonly state their purpose as being “to manage the land for the long-term benefit of the community,” with an emphasis on both economic and social development. Interviewees spoke at length about the double challenge of generating development and making sure it happens in a way that benefits the local community. Most of them had very similar explanations about the role of community ownership in meeting these two challenges.

The first thing that community ownership does is enable the development of resources or enterprises that private investors might not find worthwhile. It was frequently pointed out that development is not purely about the creation of successful businesses—it is more fundamentally about the provision of needed goods and services. Businesses that are barely profitable, or that are simply less profitable than competing land uses, might yet provide essential services on which community members depend. Losing the local grocery store or gas station is a significant blow to a remote community. When the community is landlord,



however, it can either develop such enterprises itself or create incentives for outside investment that meets its needs.

The second thing that community ownership does is to keep the benefits of development local. The failure of landlords to spend rents on the estate has long been a grievance of crofters. Under community ownership, both rents and the income from community projects are re-invested.

Numerous objections were raised to the idea of subdividing estates. One is that the sporting rights continue to be a major source of revenue and the commercial viability of game management would be diminished by fragmentation. The management of non-game species and their habitats would likewise be adversely affected. Some assets, such as wind power, can be effectively developed in one spot, but in the absence of community ownership the benefits would not be evenly spread, although many of the detrimental effects would be. It was frequently mentioned that by keeping estates whole, the community would be better able to guide the development process, making sure that resources are developed in ways that complement rather than interfere with the development of other resources.

One might ask: Could some of the functions of the community-organization-as-landlord be carried out by the local government and its planning office? This raises an important point: rural Scotland does not have any local government or local planning (McIntosh et al. 1999; ONS 2004). In my analysis, that is one of the principal reasons for the spread of community ownership. I think it would be fair to say that the main function of land reform in Scotland is the establishment of local democratic governance through the mechanism of community ownership, something that could not be achieved simply by subdividing large estates.

Considering that the traditional purpose of land reform is to stimulate agricultural productivity through a redistribution or clarification of private rights (Prosterman and Hanstad 2003), it is remarkable how little this plays into the Scottish land reform. To understand this, it is important to note that with the passage of the Crofters Act in 1886, crofters were guaranteed a fair rent, ownership of the improvements on their crofts, and protection from eviction. Since the Crofting Reform Act of 1976, they have also had the option of taking full ownership of their

crofts. For these reasons, they do not generally view land reform as something that will enable them to do things with their own property that they could not do otherwise. Rather, they tend to view it as a means for pursuing shared goals.

While Gillanders (1968) and others have argued, on the one hand, that crofts should be amalgamated into more economically viable units, and public policy has, on the other hand, focused on providing assistance to crofters in the form of agricultural improvement grants, both of these approaches betray “a lack of insight into [the] central reality of crofting life” (Hunter 2000: 284). The croft is not primarily a unit of production, but rather a means of connecting people to land and community in the context of a particular way of life.<sup>3</sup> Combining crofts into larger units would run counter to the goal of maintaining the rural population and would undermine crofting as a form of community.<sup>4</sup>

Each of these facets of the Scottish situation help to explain why communities in Scotland have embraced community ownership as a development strategy. Whether or not it is true that the internalizing and allocative functions of private property viewed as a commodity can create the greatest wealth overall, there is little reason to suppose that they will safeguard the well-being of peripheral communities in a world of mobile capital and global markets. The ability to articulate local needs, many of which have the nature of public goods, and to steer the development of resources toward the satisfaction of those needs, requires some mechanism of governance by which private land use can, in some measure, be subjected to local democratic control.

In rural Scotland this is happening via community ownership. Other strategies, however, might elsewhere be used to achieve the same end.

### **From Sole and Despotic Dominion to Property as a Tie of Belonging**

Competing views of property are, in effect, competing normative perspectives on the nature of society. Seeing property as a commodity carries the implication that society should be a market—that the use of property, and the resulting social outcomes, should be guided primarily by market mechanisms. The rejection of this notion compels us to consider other institutions that might guide the use of property. These need not necessarily be government control.

Community ownership in Scotland is not government ownership. On the contrary, it is an attempt by residents to address their own problems by claiming greater power at the local level in a place where there is no local government. The arrangements they have devised bear many similarities to private property ownership in the United States. Crofters own their crofts and can sell them and capture the value of their improvements. Anyone who buys a croft on a community-owned estate needs to pay a ground rent to the community-as-landlord, but this is not so very different than the situation of property owners in the United States who need to pay property taxes to their local government, and who are also subject to zoning and other land use regulations created by that government. In both situations, at least in small-town America, property owners have the opportunity to collaborate with their neighbors in shaping the future of the local landscape through a public planning process. Community ownership in Scotland has enabled the reinvention of democratic local governance. The difference perhaps is that people on a community-owned estate in Scotland know that the possession of land is bound up with membership in a community, whereas American landowners are often surprised and angry when they discover this.

Nevertheless, the abundance of condominiums and homeowner associations demonstrates that Americans have the legal tools, the aptitude, and the need for embedding private property ownership in democratic institutions that facilitate the management of common resources and values. Although such institutions resemble Simon's social-republican property in that they create a "community constituted by the property," they are generally designed for the benefit of the property owners and the maintenance of property values, rather than for advancing the public good by attaching social responsibilities to resource ownership. There are other American institutions, however, that have been designed for these more public purposes. Community land trusts aim to protect housing affordability, while conservation land trusts protect natural resources and, with the use of ground leases and options to purchase at agricultural value, can effectively make the active practice of sustainable agriculture an obligation of farmland tenure (Equity Trust 2009).

Rethinking the nature of property may also lead us to rethink the nature of planning, moving from a model aimed at the geographical

containment of externalities to one that seeks to promote public goods by attaching affirmative obligations to the privilege of property ownership, at least for certain types of property in certain settings.

There are, no doubt, serious cultural impediments to shifting the way that Americans understand private property, but such understandings do shift over time, under the influence of both social and legal change. In Scotland, things have begun to come full circle, as land that was once viewed as the common heritage of the local clan, and that later came to be seen as the personal property of, first, their chief and, then, their landlord, is finally making the transition from commodity back to community.

In the United States, we have a tradition, rooted in the civic republicanism of the revolutionary period, that connects the role of property owner with that of good citizen. As we continue to develop legal and institutional innovations designed to encourage good stewardship, promote community development, and knit together socially and ecologically fragmented landscapes, we can draw on this tradition to foster a shift from seeing the land as real estate to seeing it as a place of belonging that we share with our neighbors.

### Notes

1. Leopold might have appreciated Part 1 of the Land Reform (Scotland) Act 2003, which established a statutory right of responsible public access to most of Scotland's outdoors.

2. Kloppenberg (1987) has argued convincingly that this distinction is overly simplistic in the context of the revolutionary period, at which time there were multiple and competing strands of liberalism, some of which emphasized civic responsibility and must be understood in the context of the political forces to which American revolutionaries were responding, rather than in the market context that shaped liberalism in the 19<sup>th</sup> century.

3. On average, 70 percent of a crofter's household income is from non-croft-based activities (Shucksmith 2008). The Committee of Inquiry on Crofting (2008) acknowledges in its vision for the future that most of crofters' incomes will tend to come from nonagricultural activities. The general sentiment therefore is not to increase the productivity of crofts, but rather to increase the viability of crofting communities through expanded employment opportunities that will supplement rather than enhance farm income.

4. When the number of full-time residents gets too low, maintaining services becomes difficult.

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