Progressive Property in Action: The Land Reform (Scotland) Act, Part I – An American Perspective

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The Debate

• Progressive/Social Obligation Theorists
  – Property is about relationships.
  – Individuals are dependent on community.
  – Property law is a conversation that should aim at producing more human flourishing.
  – Property law should be dynamic; embrace complexity, contingency and contextualism.

• Information Cost/Exclusion Theorists
  – Property is about “thing-ownership.”
  – Individuals are more or less autonomous, rational, preference maximizing units.
  – Property is a machine that produces good enough outcomes.
  – Property law should be stable; favor simplicity and predictability.
The Debate

• Progressive/Social Obligation Theorists
  – Embrace open textured standards and ex post, contextualized decision making.
  – Focus on “land’s complexity” and “land’s memory” and not just monetary value.
  – Consider “land virtues” – e.g., industry, justice and humility.
    • Aristotle and Virtue Ethics.

• Information Cost/Exclusion Theorists
  – Embrace ex ante, crystalline rules that reduce information processing costs for duty holders and third parties.
  – The owner’s basic right to exclude and determine use is at the core of property law.
  – Exceptions to exclusion--i.e., governance (carefully tailored, contextualized decision making)—are at the periphery.
The Debate

- Progressive/Social Obligation Theorists
  - Property law should serve “plural and incommensurable values,” including:
    - human flourishing,
    - human freedom,
    - a free and democratic society in which everyone is treated with equal dignity and respect,
    - preservation of our natural and human environment for needs of future generations.

- Information Cost/Exclusion Theorists.
  - Property law should focus on means, not ends.
  - Its big comparative advantage is its
    - “in rem” quality,
    - its ability to solve problems wholesale,
    - to speak in modular, informationally dense ways to a wide range of anonymous and heterogeneous actors.
Other Voices

• Reciprocity Theorists
  – Emphasize “right to exit” as hallmark of liberal property.
  – Limits on right to exclude or exclusive authority over use only justified by some long term, reciprocal pay-off or advantage for property owner.

• Exclusive Use Theorists
  – Central value of property is not formalistic, boundary-drawing right to exclude, but exclusive authority of property owners to make decisions or set agendas about use of a resource.
  – Owners are like political sovereigns.
Why Forces Led to Enactment of the LRSA (Part 1)?

- Limitations Inherent in Scots Common Law: Public rights of way, community rights, trespass, implied or express permission

- Historical Memory

- Preliminary Studies; Extraordinary Consensus Building

- Devolution
Why is the LRSA More “Progressive” than the CROW Act?

• LRSA
  – Incredible Geographic Reach: All land in Scotland subject to several narrow exclusions and one uncertain exception.
  
  – The right of responsible access is very broad: More or less unlimited range of access activities possible.
  
  – “Advisory approach” to requests for land management exemptions: Short temporal safe harbor and then consultation.

• CROW Act
  – Tightly Defined Geographic Reach: Only Mapped Open Country (mountain, moor, heath or down) and now Coastal Land.
  
  – A fairly narrow right of open air recreation: take a walk, have a picnic and go home!
  
  – Broader landowner rights to seek unilateral exemption orders for land management purposes.
The Significance of the New LRSA Case Law

• The Sufficient Adjacent Land Cases – Emergence of the Property Specific Objective Test (PSOT):
  – Gloag v. Perth & Kinross Council
  – Snowie v. Stirling Council
  – Ross v. Stirling Council
  – Forbes v. Fife Council
  – Creelman v. Argyll and Bute Council
The Significance of the New Case Law

• Barriers, Section 14 and Zoning to Regulate Irresponsible Access Taking – Combating Demoralization Costs
  – Aviemore Highland Resort Ltd v. Cairngorns National Park Authority
  – Forbes v. Fife Council
  – Tuley v. Highland Council
What Have Been the Primary Benefits of the LRSA Part I?

• More actual access taking of all kinds.

• More citizen engagement in creating new avenues for public access—core paths etc.

• Dialogue between landowners/land managers and access takers about virtuous land management and virtuous access taking.

• A great leap forward in property law design and imagination.
What Have Been the Primary Costs of the LRSA?

• Costs of establishing, publicizing and enforcing access rights.

• Uncertainty for land owners and access takers given vagueness of standards.

• Uncertain and burdensome litigation costs for landowners and councils charged with enforcing access rights.
  – May keep litigation relatively infrequent.
What Can the US Learn from the LRSA (Part I)?

- It is possible to create a property regime that embraces a social obligation norm and a series of virtue oriented standards without sacrificing all of the information processing efficiencies and coordination benefits associated with a property law architecture founded on a core commitment to the right to exclude.

- Key: Replace the ex ante presumption in favor of the right to exclude with a robust, ex ante presumption in favor of responsible access.
What would an LR(US)A Do?

• It would only change the outcome of some of our most famous trespass and access cases.
  – Maybe Presault v. United States, 100 F.3d 1525 (Fed. Cir. 1996); Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005); Mathews v. Bay Head Improvement Ass’n, 471 A.2d 355; and Cenac v. Public Access Water Rights Ass’n, 851 So.2d 1006 (La. 2003).
What would an LR(US)A Do?

• But it would de-stabilize, and maybe catalyze, American thinking about property in very productive ways.

  – It might help us move well beyond the current, largely binary debate that risks ossifying property law thought.