

# 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.
  - Not *Jacques v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).
  - Probably not *State v. Shack*, 277 A.2d 369 (N.J. 1971).
  - 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.