Land Conservation in a Changing World

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CHAPTER 2

European Beginnings: Conservation, the Common Law, and the Commons

In their 1,300 years of cultural ascendency, the Classical civilizations of Greece and Rome left a mixed legacy of environmental consciousness and little actual conservation of land and natural resources. The Greeks fostered the beginnings of western philosophy and science which at least acknowledged the damage of deforestation; and the Greeks continued the Sumerian sacred grove tradition. The Romans appreciated Lucretius' *De Rerum Natura* (*On the Nature of Things*, 55 B.C.E), *De Rurum Natura* was an attack on the evils and delusions of superstition and an exploration of natural phenomena. Virgil's *Georgics* (39.B.C.E) was an influential celebration of Roman agriculture and rural life. Until he Roman Empire becme officially Christian, Romans tended to ignore the sacred groves of the surrounding "barbarians" whom they conquered and controlled. On the negative side, Classical civilization was responsible for, and mostly ignored, wholesale deforestation in their homelands and heedless forest clearance in their occupied territories.

The Middle Ages in northern Europe and, especially, in England provide the earliest substantive record of land conservation in the sense of intentionally setting land aside in its natural condition to conserve and enhance its natural resource values. Between the sack of Rome by Germanic tribes twice in the fifth century and again in the mid-sixth century and the Italian Renaissance in 1500 C.E., the Middle Ages were "an interregnum between the glorious peaks of ancient Rome and the classical revival."[1] Formerly known as the Dark Ages, in part because so little of the history and literature of the Classical period had survived outside of monasteries and was little read by mostly illiterate ordinary people., this period became the seedbed of European literature, philosophy, and law – as well as conservation. While bands of

pre-feudal "barbarians" struggled for territory, and relatively small rulers with vaunting ambition competed with more brutality than honor to form stable kingdoms, hundreds of largely self-sufficient monastic groups throughout Europe made gradual advances in horticulture, agriculture, and forestry even as they secured and transcribed Classical learning.[2]

Sacred Groves and Gardens

As we discussed in Chapter 1, the early civilizations of the Middle East and southern Europe set aside sacred groves and gardens. These were generally small and scattered and few remnants of that period have survived. Christians scorned and proscribed the practice, except in their own monasteries.

Outside of the cloisters, in the "pagan" and "barbarian" worlds, sacred groves were common. The Celts of Central Europe, who settled Ireland and England by 600 B.C.E., and other Germanic peoples set aside many sacred groves, within which they carried out rituals that scandalized and angered Christians.[3]. Like the Classical groves, these were small, perhaps within a wall, often encircling a shrine, a spring, or a well. Perhaps they were a cultural reaction to the extensive forest clearances that resumed in the Middle Ages as population increased. For example, the Celts and others were rapidly reducing England's forested area before 500 B.C.E., "almost half a millennium before the Romans even arrived."[4] The Romans continued clearing English woodlands for fuel, building materials, and for agricultural fields. London and other growing settlements were voracious and demanding in their need for wood, but many sacred groves remained in less populous areas. Although few of the thousands of groves survived Christian anger and proscription, the idea of trees as sacred persists in folk culture and practice to this day. In parts of Ireland and Scotland, for example, people who claim Celtic ancestry still tie cloth ribbons, *Clooties,* to branches in trees associated with sacred wells.[5]

Clooties tied to branches at Madron Well, Cornwall

Views of wild nature in the Middle Ages

St. Augustine of Hippo (354-430), author of the *Confessions of Augustine* and *City of God* (426) was the greatest of the early Christian philosophers; He endeavored to reconcile Christian teachings with the Greek Neo-Platonism and he succeeded in constructing a firm intellectual and theological structure for the Roman Catholic Church and for its later reformation in the Protestantism of the French Reformer John Calvin (1509-1564). As the Christianization of the British Isles proceeded, the Judeo-Christian view of nature, based upon the Bible and articulated most rigorously by Augustine, became the established view. It displaced earlier Celtic, Saxon, Danish, and other pre-Christian or "pagan" views. In brief, the Christian view of nature had the following main points (expressed here imperfectly and incompletely).

1. God is the Creator of heaven and earth, but his creation (nature) is not the same as God himself.

2. God set mankind above nature and gave him dominion over nature and stewardship of it.

3. As punishment for the original sin in the Garden of Eden, God cursed mankind and the earth.

4. Mankind's unremitting toil to procreate, subdue nature and domesticate animals was God's punishment for Adam's sin. That punishment also extended to nature itself; for example, to snakes, insects, and other unloved creatures.

5. Mankind's dominion is not a license to damage or contaminate God's work; mankind's role is stewardship.

6. God is in the nature he created. We should admire the beauty of nature as God's work, but not the point where we mistake nature for God himself, as the pagans did.[6]

These six points will not earn us a degree in theology, and they leave out Noah's role as the savior of mankind and living things and Christ's role as the redeemer who offers believers a pathway to heaven, but they are the main points. Few ordinary people in the Middle Ages were able to read the Bible or the Classics. Resistant to the theology of creation and the threats of

hell, the old folk legends, myths, and beliefs never fully disappeared, perhaps because they remained more immediate and comprehensible than the Judeo Christian /Platonic fusion offered by the Christian priests and St. Augustine.

Beowulf and Sir Gawain

Two early English writings of the Middle Age, *Beowulf* (c. 700 – 1000) and *Sir Gawain and the Green Knigh*t (c. 1400) convey the pervasive medieval sense of wild nature as a forbidding, harsh, and dangerous landscape of lurking, nearly overwhelming evil. In *Beowulf*, while the Ring-Dane warriors celebrate in their warm hall, the monster Grendel lurks and seethes outside in the dark fens. Grendel and his mother personify the wilderness, with its irredeemable evil, brutality, darkness, and chaos.[7]

In *Sir Gawain and the Green Knight,* the Green Knight enters the warm and congenial castle as a well-formed and perfectly armored near-giant, in a body of green, dressed entirely in green. He appears to come in peace, but soon challenges the King to behead him. Gawain takes up the challenge on behalf of the King and the knights and whacks off the Green Knight's head clean with one blow of his axe. The Green Knight picks up his head, cradles it in his arm, and leaves the castle reminding Gawain that he is on his honor to fulfill the second part of the challenge, that is to seek out the Green Knight in a year's time, and to offer his own head for the Green Knight to lop off. Gawain's lonely chivalric quest to find the Green Knight is in the deed of winter.

> . . .the place you head for holds a hidden peril.
> In that wilderness lives a wildman, the worst in the world,
> he is brooding and brutal and loves bludgeoning humans.
> . . .
> And it's at the green chapel where this grizzliness goes on,
> and to pass through the place unscathed is impossible,
> for he deals out death blows by dint of his hands,
> a man without measure who shows no mercy.[8]

The translator, Simon Armitage, sees this very early Saxon legend as a metaphor of continuing relevance to us, faced with our own need to reach an accommodation with natural forces, about which we have our own imperfect understanding and, at times, apprehension akin to terror.

> The Gawain poet had never head of climate change and was not a prophet anticipating the onset of global warming. But medieval society lived hand-in-hand with nature, and nature was as much an enemy as a friend…. The knight who throws down the challenge is both ghostly and real. Supernatural, yes, but also flesh and blood. He is something in the likeness of ourselves …. Gawain must negotiate a deal with a man who wears the colors of leaves and the fields. He must strike an honest bargain with this manifestation of nature, and his future depends on it.[9]

In contrast, St. Bernard (1090-1153), Benedictine monk and abbot, expressed an unusual degree of sympathy and affiliation for nature and landscape. Following St. Augustine (354-430), he saw nature as God's beautiful and useful creation. By fully appreciating and studying plants and animals, one learns about God. "Believe me, I have discovered that you will find more in the forests than in the books; trees and stones will teach you what no teacher permits you to hear."[10] Bernard founded and led the Cistercian monastery of Clairvaux, France, where he became famous for his preaching, He found special delight in the cloister's humanized, productive, pastoral landscape that, through the monks' work, completed God's creation, as God had directed. Clarence J. Glacken (1909-1989), geographer and environmental historian, writes,

> Implicit in [St. Bernard's view of nature] is the idea of man as a partner with God, sharing in, changing, and improving the creation to his own best uses because these accomplishments are for the greater glory of God. It would seem that the monks thought their labor had re-created paradise, in the transformation of a chaotic and disordered wilderness.[11]

St. Francis (1182-1226), founder of the Franciscan order, set forth a practical ideal of stewardship of nature and care of animals that continues to inspire naturalists and animal welfare advocates as well as his admirer, Francis, the current Pope. While acknowledging St.

Francis's sincerity and influence, historian of environmental thought Peter Coates observes that Francis' environmental philosophy remained confined by the walls of the Garden of Eden.[12] Man was given Biblical dominion over the earth; not an equal partnership with nature. It would be some time before western philosophy would entertain though seldom embrace, even today, the possibility that mankind is as much an integral part of nature as a caretaker or master, holding himself apart from, and superior to, nature.

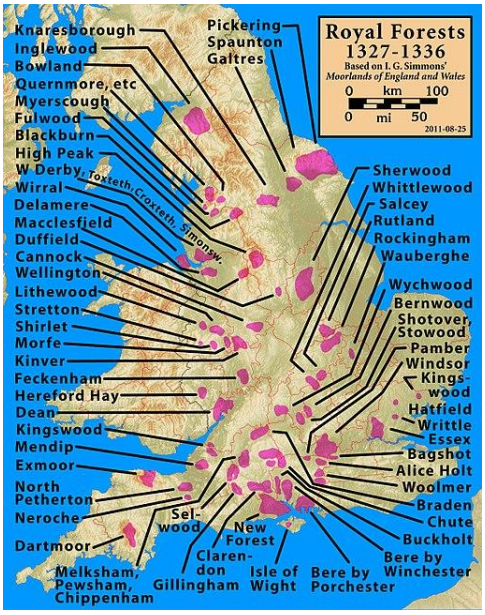
Royal Forests

Thirteen years after the Battle of Hastings in 1066 and the Norman Conquest of England, William the Conqueror (1028-1087), known to both his Norman rivals and conquered subjects as "William the Bastard," declared (*afforested*) great swatches of English land as Royal Forests. William loved hunting and eating prodigious amounts of wild game and needed a reliable source throughout his kingdom. He may have been legitimately concerned about the shrinking woodlands in Europe and England, but personal convenience and political domination were surely the greater motivation.

The Royal Forests and William's accompanying Forest Law covered approximately one-third of the land area of England. These Royal Forests included moors, heaths, wetlands, even farms and sometimes small villages within the broad "forest" designation. The term "forest" , following the French term "foret,", meant an area, including a large woodland, designated and controlled by law and regulation as a royal hunting ground. [13] The purpose was to protect for royal or noble use, a range of habitats needed by favorite game and to accommodate the frequent royal hunts themselves. At least as important as the King's sport and dinner table, proclamation of huge areas as Royal Forests helped William to assert and maintain control over a conquered people. Including the defeated and disinherited English lords and knights. [14] Similar medieval forest laws were promulgated in France and Germany, at first protecting the forests of feudal nobles rather than kings although enforcement of such forest laws was generally lighter than in England.

William's Forest Law was new to England. Although poaching in the Anglo-Saxon period had been illegal on royal lands and on the nobles' own hunting preserves, Anglo-Saxon kings did

not set aside huge forests beyond their own royal seats with their own systems of law and draconian penalties for violations. In general, William's Norman rule imposed greater royal prerogatives, and a much tighter, more centralized feudal structure than its Anglo-Saxon predecessors and European counterparts.



English Royal Forests, 259 years after the Battle of Hastings.

One of the largest Royal Forests was the New Forest in south central England, between Salisbury and Isle of Wight, on the English Channel. In a large wedge-shaped block west of Southampton, it comprised about 150 square miles in area, half of which had been cleared or was still naturally open; the remainder, thinly-settled, agriculturally unproductive land considered "waste."

William's Forest Law was extremely unpopular. Wholesale designation of large tracts erased several villages and many active farms and inconvenienced or displaced and led to the impoverishment of people in these areas. Although the designated areas were lightly settled and generally unproductive for agriculture, stories of unjust appropriation, displacement, depopulation and impoverishment contributed to seething discontent by former nobles as well as peasants and commons.

Within these huge areas of royal control, commoners continued to clear small areas for agriculture and to cut and remove wood for fuel. If caught, offenders were assessed a fine, usually small, for having done so. Poaching was another matter entirely, for which mutilation was the common penalty. Although such draconian sentences were sometimes enforced by the courts, W.G. Hoskins[15] points out that fines generally functioned as licenses to carry on certain customary, small scale activities within the Royal Forests. The combined revenues from myriad small fines were important to the crown.

Upon William's death, the *Anglo-Saxon Chronicle* summed up the popular reaction to the Forest Law:

He set apart a vast deer preserve and imposed laws concerning it.
Whoever slew a hart or a hind
Was to be blinded.
He forbade the killing of harts.
For he loved the stags as dearly
As though he had been their father.
Hares, also, he decreed should go unmolested.
The rich complained and the poor lamented.
But he was too relentless to care though all might hate him.
And they were compelled, if they wanted
To keep their lives and their lands
And their goods and the favour of the king
To submit themselves wholly to his will.[16]

Like William's other royal forests, the New Forest contracted significantly as portions, especially agriculturally viable lands, were gradually released from designation, "deforested" (not necessarily cut, but simply removed from the forest designation) at the request of surrounding estate owners or to enhance the Crown's finances with the proceeds of rents or sales. The New Forest remains, now designated a "National Character Area," as the core of the New Forest National Park of 219 square miles, larger than the original New Forest, about 100 miles

Today's New Forest National Park. The wooded remains of the original New Forest are shown in green.

southwest of London.[17] The ecological significance of this diverse rural landscape is high, as is its recreational value to the people of Greater London.

Under William's increasingly arbitrary and tyrannical successors, the Forest Law became a searing grievance for barons and commoners alike. A regulatory scheme this extensive had to be administered locally; the result was a system open to abuse and favoritism. In addition, peasants and "commoners"[18] often asserted prior rights under English Common Law to cut wood, graze animals, harvest fruits and nuts, and so on, thus tangling the courts in endless minor disputes. As imposed by William's successors, the continuing and increasing disruptions caused by the Forest Law stirred widespread rancor on the part of nobles and peasants alike. The resulting Magna Carta, extracted from a furious and reluctant King John (1166 – 1216) at the Battle of Runnymede in 1215, also modified provisions of the Forest Law and restored some limited rights of access and use. The Magna Carta was followed by a separate Charter of the Forest, signed by the late King John's very young son, Henry III, in 1217. The Forest Charter, containing seventeen provisions relaxing Williams's Forest Law, and requiring that some of the forests since William be withdrawn from forest designation, except the King's own property. The most important provision for the subject of this chapter mandated that forests designated under Henry II be examined by a committee of knights and, upon their recommendation, removed from designation. Forests established by King Richard or John were required to be removed from designation at once. This is important because it established, as a constitutional matter, that kings could not establish forests by will.

The Forest Charter also lessened the penalty for taking venison in a Royal Forest; no longer could the penalty be the loss of life or a limb and established fairer procedures for the forest courts and the forest officers (foresters). The Charter also restored several traditional common rights in the remaining Royal Forest, including the rights to keep eyries of hawks, to gather honey, to pasture pigs, and to create a mill, fishpond, dam, ditch, lime pit, even arable land, within the Forest, provided that a neighbor was not damaged. The most important provisions to the subject of this chapter mandated that additional forests created under Henry II be examined by a committee of knights, and, upon their recommendation, removed from forest designation; it also mandated that any forests created by Kings Richard or John be

removed from designation at once. This required examination of the additional forests established an important Constitutional principle: a king could no longer create forests at his royal will, overriding law. In other words, although all titles derived from the King, he could not override those titles by arbitrarily designating Royal Forests.[19]

Over time, the primary purpose of the royal forests shifted, from political leverage and the king's personal convenience and political machinations , to timber for machines of siege warfare and naval vessels, and materials for royal building projects. After World War II, remaining royal forests were opened to the public; many became the cores of English National Parks. At long last, the Forest Law itself was repealed in 1971 and replaced by the Wild Creatures and Forest Laws Act

In the Middle Ages, English and European forest laws, as well as sacred groves and monasteries, served to some extent as a restraint on forest clearing; although monasteries themselves were responsible for clearing large expanses for agriculture. Despite these restraints, Aberth estimates that by the end of the medieval period, the forest cover of central Europe had been reduced from roughly 70% to less than half, while France went from being over half to one quarter forested."[20] As Aberth summarizes,

> Clearly the cultural record tells us that medieval people valued the greenwood for more than just timber, firewood, fencing, or plant extracts. There was a certain, magical ethos to the forest, a land of the other, a wild place where the beast and the heathen gods roam, an alternative landscape where man could leave his civilized straightjacket behind. One imagines that there will always be room for the forest within our human value system so long as this mental thought-world about the woods from the Middle Ages persists. [21]

From this "alternative landscape" the myths of the Green Man and the legends of Robin Hood emerged.

Whited suggests that by the 13th century a co-evolution process was taking place as Europeans, recognizing the vital importance of their forests, instituted "purposeful techniques

of management." As she puts it, "Patterns of coevolution between humans and woodlands thus tended in various ways to balance during the Middle Ages, as humans learned to mesh their uses with the ecological productivity of naturel organisms and processes."[22] For example, "French King Charles V (1338-1380) in 1376 required woodcutters leave [trees] as 'seed bearers' for natural regeneration" following cutting; and the managers of the city forest in Nurnberg, Germany were "selecting seeds of pine and fir for germination and eventual plantation."[23]

Throughout Europe in the Middle Ages, feudal rulers continued to set aside forest reserves for fuelwood, timber and hunting. The need for ship's timber and masts became critical as deforestation continued and kingdoms developed navies. Pragmatic management of these forest reserves anticipated the scientific forestry of the nineteenth century. These reserves were intended to supply naval timber on a permanent basis; habitat protection became a side benefit, nevertheless significant. Limitations on cutting and poaching – however unjust in the peasants' view – had the effect of preserving forest habitats and protecting them, in many cases, for eons.

The Medieval Foundation of Property Law

The common law of property, protecting one's physical body and life itself as well as personal possessions, and real estate, is central to English common law. It is the common law of property that provides the legal framework for the protections that we call land conservation as well as for the development of the landscape and exploitation of natural resources.

Germanic Anglo-Saxons migrated into Britain from the east in the 5th and 6th centuries, C.E., following the Roman withdrawal from its far-flung northern outpost. Intent on settlement, they pushed the indigenous Celts to the west into Wales and north into Scotland. Their law, brought from Germany, provided the concept of *alloidial* title (from the Latin via German, ("al"or all + "od", the ancient word for an estate; in other words, the entire estate). It meant the ownership, occupancy, and defense of one's land-holding without obligations to, or protection from, a superior lord. It also provided for the feudal system of tenancy of property under a lord, or the king. Tenancy, the normal title under feudalism, required service – military

service was particularly important – to the lord or the king; in return the tenant could expect protection. Monastery and church properties, including the colleges, were normally held in "alloidium;" although such titles could be arbitrarily appropriated by the sovereign.

Befitting a warlike culture, Anglo-Saxon and Norman property law emphasized possession. If one lost personal property, let's say a horse in the woods, it would be hard to argue that that the person who found it, harnessed and fed it and then rode it into town, was not the lawful owner. Houses and castles were not likely to wander off into someone else's possession, but a neglected woodlot or marsh might be possessed by a neighbor for years before the absentee owner realized it. Then the owner would have to dislodge the squatter, often by physical means, and be prepared to justify and defend that action by proving one's lawful ownership in court. From that not-uncommon situation emerged the doctrine of adverse possession, which requires open, notorious, hostile, and continuous possession for a stated number of years before the persistent and clever "squatter" can claim ownership in the courts.

Europeans inherited the Roman concept of *usufruct* from the Romans. The term derives from the Latin "*usus*, use and *fructus,* fruits. Under usufruct, the title (ownership) of a property could involve one or more, often many, rights held by others. A person might have an easement (right-of-way) across her property; there may be tenants of her farm; villagers may have grazing rights to the commons and the woodland or wood cutting rights for fuel or building materials. Tenants might have the right to apples or other fruits in the common. Tenants might have tenancy for a period of years or their lifetimes; tenancy might be inheritable by family members. These nested rights often became quite complicated. As an alternative to pitched battle between claimants, judges had the frequent chore of untangling these claims, thus developing the Common Law case by case.

In England, these various rights were called *estates*." All the various estates in a property added up to the whole bundle of ownership and use rights for the property. Following William, all land in England fundamentally was owned by the crown, though there had been many competing "crowns" until Alfred the Great (849-899) became the dominant ruler by his death. A *freehold* estate represented the highest form of tenancy of land under the lord of the manor, not ownership of the land itself. Even the lord was a tenant of his overlord, who was a

tenant of his overlord, all the way up the ladder of tenancies to the king or queen who strove to be lord (or lady) of all he or she could defend or conquer and hold. A freeholder could transfer his l his tenancy to another person, or to his heirs in his will, as provided by the custom of the manor and Common Law.

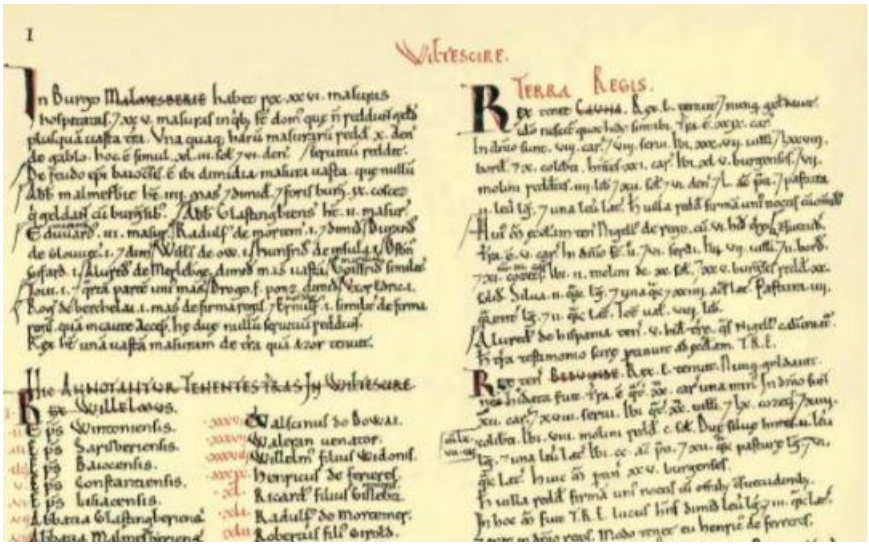
Much later, in the late nineteenth century, legal scholars introduced a more tangible er concept for "usufruct" and "estate". This concept compares the rights of full ownership and use to a bundle of sticks—the complete bundle or rights equals full ownership. Each stick in the bundle represents a separable estate, use or a right that can be held by the freeholder or by someone else. The three main rights or sticks in the bundle are the right to possess and use; the right to exclude others; and the right to transfer by gift, sale, or inheritance to family member or others. Other sticks in the bundle include: water rights, mineral rights, woodcutting andr grazing rights, farming rights, access easements; rights to subdivide; rights to lease; and so on. In feudal monarchies, the king or queen held most of the bundles in the kingdom; and the barons and lords held mainly the leasehold and sublease sticks.

Norman rule was a major historical and cultural shock, transforming England in many ways beyond William's proclamation of royal forests. Shortly after the Battle of Hastings, William claimed all the land of England and much of Wales as property of the Crown -- a fundamental change from the perspective of the Anglo-Saxon barons. However, for most ordinary people who were already tenants of some lord or other, the ownership change at first meant little more than learning the French name of one's new lord and enough French to understand his orders. William quickly replaced most of the surviving Anglo-Saxon barons with Norman lords and warriors who had supported the Conquest; few Anglo-Saxon barons were retained. William gave large estates to Norman lords in exchange for their oaths of allegiance. Over time, the structure of English feudalism became more tightly organized, layered like a pyramid with the king at the top, the lords below, with peasants and slaves at the bottom. Each layer owed fealty to the layer above and was responsible for protecting and respecting the layer below, except that little protection or respect was left for the slaves. Fealty included service (work and military) and a percentage of the annual crop. In exchange for their oath of allegiance to the King and their lords, Anglo-Saxon freemen were permitted to continue as

tenants, knowing that any serious infraction or failure to perform an obligation could end their tenancy and reduce their status to that of a landless peasant or worse. William nominally outlawed slavery of Christian men, and prohibited the export of slaves to France, but slavery persisted for generations after the Conquest. In the Domesday book of 1086, slaves were listed as possessions, representing about 10% of the English population.

The Domesday Book

In 1085, William ordered that all property in the Norman-held territory of England be recorded and classified according to its ownership, tenancy, and detailed type. The resulting "Domesday Book" (1085 – 1086), originally called *Book of the Day of Assessment,* stands as a signature advance in the administration of the kingdom's property law and a precursor to today's deed books hat hold true copies of deeds, easements, trusts, and other real estate documents in our modern computerized registries of deeds. "Domesday" meant final authority on property ownership, as on the Biblical Judgment Day.[24] Its scope and detail were an important advance over property recording and assessment systems anywhere in Europe.



Domesday Book, portion of the Wiltshire entry. The indented columns contain indormation on tenancies.

The main purpose was to determine who owed taxes to the Crown and to provide a basis for systematic taxation throughout the realm.

The two-year Domesday process involved judicial hearings at the shire (county) level at which landowners presented evidence of their titles and testified to their ownership. This gave owners an opportunity to contest claims with their own evidence, thus leading to resolutions of

many old disputes. The Domesday Book reinforced the common-law principle that titles to land must be written down and recorded, and that one's ownership of land are a matter of public record – a principle that remains the law of the land. Every state in the U.S. had adopted a Statute of Frauds laying out the conditions for deeds and related documents. In fact, the principle of recordation was even broader: as virtually everyone but the king was a tenant of someone, the Domesday Book recorded leaseholds as well as ownership.

Common Law as the foundation for land ownership, development, and conservation

English Common Law[25] emerged in the hundred-year period following the Norman Conquest. "Common law" means the law developed through court decisions and precedents rather than through statutes and regulations. Originally, it was based on custom and customary practice as interpreted and applied by appointed judges. It was and is the law applied throughout the portions of England and Wales subject to the Norman Conquest, and later additions to Norman rule. It was a hybrid of Saxon law brought from Germany, Danelaw brought by the Vikings, and the Norman law of France, which in turn was based on an amalgam of Viking and Frankish customs. It travelled to North America with the English settlers.

William did not impose the Norman law at once or as a whole; he did not wish to incite more resistance or create more chaos than had already followed the Conquest. He was quick to reassure his subjects that the prior Anglo-Saxon law of the late King Edward the Confessor (c. 1005 – 1066), would remain substantially in force. Much of the system of local manor courts and "hundred courts" (an administrative division under the shire or county) was retained. In general, small disputes within a manor were heard in the manor courts; disputes involving freemen (holders of inheritable tenancies) were heard in the hundred courts. The king reserved the right to intervene in any case involving a freehold. Judges continued to follow basic legal principles and precedents, a key feature of common law, in deciding cases. Much of the work of courts had to do with property disputes: tenancy, ownership, rights of use, and inheritance. Following the Conquest, especially under William's grandson, Henry II, the court system was gradually centralized under the Crown. As decisions were collected and reported in writing, Common Law became more national in character. Over time, ironically, it became fiendishly

rigid in its rules and processes, even as the economy and society became more vibrant and complex. The rules for written pleadings became intricate and exacting, testing the ability of trained lawyers to prepare their clients' pleas (*complaints,* in our terminology) for court consideration. That gave rise to the highly educated and expensive legal profession on which we all rely at one time or another, as well as to the fecund and derisive genre of worldwide humor, the lawyer joke.

Common law defined the basic rights of landowners

Respect for the rights of landowners to use their land as they see fit is at the heart of the common law. A related principle is that restraints on the rights of landowners to dispose of their property by sale or gift as they see fit should be avoided. At Runnymede in 1215, the English barons and their commoner allies had faced off against King John to establish private property rights, including the rights of all men and women to enforce common principles of justice and property rights against the King's excesses. The King considered the use and disposition of any piece of property to be his royal prerogative; and he disregarded the rights of commoners to use portions of their lord's property for grazing, cultivation, collecting fuel wood, or hunting. The Magna Carta was a charter or contract between the king and "the community of the realm" "applying in all things and places forever",[26] but it did not did not settle the question of royal power overnight – and issues of property rights, restrictions, easements, covenants, and trusts continue to be a tug of war today.

In some of the world, these issues are still "settled" by violence as often as by legal principles or judges. In modern Europe and America, these issues are generally settled by courts – though the expense and difficulty of litigating a property dispute against a wealthy or powerful neighbor or landlord still biases the law's application in favor of landowners making relatively unfettered use of their private property.

The issue of perpetuity

The issue of perpetuity in Common Law led to conflicts between the rights of owners to do what they wished with their property during their lives and even after their deaths, and the

rights of heirs and other successors in title to be free of unreasonable restraints on their ownership and use of property given or sold to them. Only the sovereign held property forever. Landowners – today as in the Middle Ages – often wish to bind their property beyond their lifetimes so that it will be used in certain ways, or will be held by specific, pre-selected individuals, families, or institutions subject to often complex traditions. Lawyers developed trusts to ensure that property would remain in their families for as long as possible under the law, and not be possessed and claimed by rivals.[27]

It is a delicious irony that the feudal courts, wrestling with these intricate and tangled property issues while tightly bound by the feudal system, managed to establish the foundations for today's private property rights in our dynamic capitalist economies. Access easements were, and are, generally considered to be permanent, 'running with the land' (from owner to owner) forever as integral to the property served or benefitted by essential easements. Similarly, covenants and restrictions on appurtenant (adjacent) land generally run with the land forever, with some exceptions. However, restrictions and easements in gross (held by non-appurtenant parties) were and are disfavored by the law as they had the effect of disrupting the relatively free use of and disposition of land by successive owners. While certain mechanisms like access easements were accepted as generally beneficial, others like easements in gross and trusts were constrained. Living under absolute rulers was strain enough; not even lords wanted to live under their predecessors' dictates and whims beyond death.

Common law suspicion of trusts and the issue of perpetuities

For hundreds of years, common law courts were suspicious of property trusts that, in effect, allowed the landowner to control the use and disposition of property in his or her absence or after an owner's death. Because of this medieval principle, reinforced by modern experience, most of our states have rules against perpetuities,[28] meaning that non-appurtenant easements, covenants, and restrictions have a maximum term of years, with conservation easements and certain access easements as the major exception. For example, in Massachusetts, the nearly unreadable law of deed restrictions confuses many lawyers and almost everyone else who tries to parse the many-layered language. Basically, negative

easements in gross and deed covenants and restrictions must be re-recorded by their holders every twenty years after the first thirty years – up to a definite maximum stated in the document and short of forever. If an end point is not stated, or if perpetuity is claimed, then the easement will expire after the first thirty years. There are some exceptions, including deeds to charities and to governmental bodies.

Weakness of many covenants and restrictions.

Even if a negative easement, covenant, or restriction is appurtenant and thereby qualified to run with the land, there are many weaknesses that can be exploited by owners who feel that their rights or businesses are unduly constrained. In the case of negative easements, covenants, and restrictions, the ability to enforce may be limited to the original parties to the transaction or may be invalidated if a court finds that the encumbrance no longer is in the public interest as defined by the court. While the provision may remain on the books until its statutory time limit (if any) expires, it quickly becomes a dead letter without the ability to enforce it in court.

These and other limitations and weaknesses of covenants and restrictions, especially those held in gross, had serious consequences for the modern land trust movement when organizations wished to help landowners protect their land against development in perpetuity. Doing so required an entirely new set of tools and laws allowing perpetual restrictions or easements to be held "in gross", meaning held by a qualifying organization that does not own property adjacent to the restricted property.

Trusts

Under a trust, an individual "*trustor,"* names one or more "*trustees,"* to hold his/her property, subject to duties to protect it during the trustor's lifetime or after his/her death, for the benefit of one or more named beneficiaries. Feudal lords and their knights resorted to trusts (then known as "uses") to take charge of their property while they were called away to join a Crusade. With very poor means of communication at great distances and in time of war, it was sometimes impossible for the lord or knight to make necessary decisions in real time; or

god forbid, upon his death from disease or in battle. Both fates were all too common, even if the Crusader turned out to be relatively successful, which was far from a sure thing in those dangerous times. Having obtained a horse, suit of armor, and a trusty squire, the knight would convey his property to a trustee or trustees, usually a close friend or an attorney, to hold and manage the knight's property in his absence and to ensure, if he failed to return, that the property would devolve to the specific family members or other successors named in the trust. For a very long time, medieval courts were suspicious of such trusts. Although they often benefited the local courts' most respected and powerful supplicants, they directly contradicted one of the basic principles of common law, that actual physical possession determined ownership. The common-law courts resisted these trusts as attempts to circumvent Common Law by allowing the control by a "dead hand" (or *mortmain)* in feudal society.

Because it was in the Crown's and the Church's interests to attract willing and wealthy participants to a Crusade, the king's "conscience," – the Lord Chancellor and, later, the Court of Chancery – were willing to take these trust case, and other cases that could not be fairly considered under common law principles. The Chancellor or Court of Chancery could apply more flexible principles of "equity" (fairness) to the case. [29] Thus, when the common law failed to make common sense, the equity courts, could make things right. For example, under Common Law, the usual remedy in property disputes was limited to a monetary payment to cover damages; in contrast, under principles of equity, the Chancery could issue an injunction to prevent the damage from occurring or to stop it in its tracks.[30] For hundreds of years, and even now in some jurisdictions, a parallel system of separate common law and equity courts existed, each with its own principles of adjudication. Except in a few states, the two systems have been merged into one.

Placing land in family trusts and its impact on conservation

Today, large estates and farms are often placed in family trusts to avoid high estate taxes on valuable property after death, to keep the property in the family for as long as possible (subject to the Rule of Perpetuities), and to provide for an orderly decision-making and succession of family members as trustees (and managers) from one generation to the next.

Trusts can be effective in overseeing and protecting an important property as a family headquarters or retreat, but their time is limited by the Rule of Perpetuities and they can be difficult to renew and replace. Depending on the trust's specific terms and purposes, negotiating a conservation easement may be difficult or impossible if multiple beneficiaries cannot agree. Typically, a valuable, well-managed property will have appreciated greatly during the term of the trust, often becoming so valuable in dollar terms that multiple beneficiaries (of different generations, levels of wealth, life styles, values, and geographic locations) cannot agree on its disposition or on a conservation plan. When the trust expires, the property often must be fragmented among the beneficiaries or simply sold to the highest bidder, with the proceeds going to the beneficiaries (and their lawyers).

Relationship of Common Law to modern conservation

Most importantly for our subject, the principles of common law, as incorporated in and modified by statutory law (which is printed in the voluminous statute books of each state) provides the laws of ownership and use of real estate, as well as the laws of nuisance and trespass that protect owners from their neighbors. It also deals with covenants, property restrictions, and easements and the means for their enforcement; as well as the rules for options, rights-of-first-refusal, purchase-and-sale agreements, closings, mortgages, life estates, inheritance, trusts including public trusts and charitable trusts; and the principles of adverse possession and eminent domain, and other topics. Although, as will be discussed in a later chapter, conservation easements required new laws to be passed by state legislatures to establish their perpetual status and to remove common law limitations on the enforcement of restrictions, the language and concepts of conservation easements and their enforcement are rooted in the long history of the common law of property. Where conservation easements depart from common law precepts, the documents must make the legal foundation those departures clear. If the justification for a legal department is not correct and clear, judges may assume that the common law and statutory law of covenants and easements applies, with all their difficulties and limitations.

Usufruct, and the Common Law

In the Middle Ages, and until quite recently in human history, most people spent most of their days growing food for themselves and their families. After market economies developed, farmers struggled to produce a sufficient surplus beyond their needs to provide cash income for their families. In addition, the medieval vassals had to produce a sufficient crop to meet their own needs and to share the required portion with their lord. In nucleated villages, the usual medieval settlement pattern, villagers cultivated small plots adjacent to their cottages, but did not hold sufficient land as individuals for supplying fuel or grazing their livestock – sheep, goats, or cows. The common law recognized, and even encouraged "'usufruct" in land, which in England was termed "estates" in land. The Merriam-Webster definition of usufruct is: "the legal right of using and enjoying the fruits of profits of something belonging to another." In other words, usufruct is the concept of separating one or more rights in land from the the concept of separating one or more of the rights of ownership from the total was the concept of rights in land from the full assemblage of ownership rights. As we have discussed, estates were rights in land that were held by Lord C, subject to Lord B, possibly subject to Lord A, all subject to the crown. One could have the freehold interest (in other words, the "fief" or the "fee"), which primarily means that one could occupy and use the property with the additional right to pass on the property to one's children (usually to the eldest living son) or other heirs as allowed by law. In some cases, one might have a lesser fee interest that could only be passed along to one's children, but not to other heirs. As preservation of the family was a fundamental feudal value, the right to will one's land to one's children was of paramount importance. Normally, tenancies other than freeholds ran for a lifetime, after which re-granting the tenancy became the lord's decision; this gave the lord a great deal of power over the behavior and loyalty of his vassals. Generally, if the freeholder continued to have direct heirs, male or female, and if the lord and his heirs faithfully provided the required feudal services to his higher lord in the feudal structure and did not accumulate excessive debt, the lord could expect to keep the ownership, occupancy, and management of property within his family for a very long time, if not indefinitely. That is, if war or other

disaster, such as accident, disease, or the whims of a dissatisfied or power-mad baron or king, did not bend the chain of title back to the king.

Usufruct was a medieval concept and it is in everyday use today. Two examples will suffice. Every owner of a single-family home must grant a permanent easement to the power company in order to obtain electricity, and an easement to the gas company in order to obtain natural gas. Along the Appalachian Trail from Georgia to Maine, almost every landowner over whose land the trail passes has given or, under the government's right of eminent domain, has sold a permanent easement for non-vehicular passage and for trail maintenance, including the right to remove vegetation within the width of the easement.

The Medieval Commons

The typical medieval village was "owned" as part of the local lord's manor, in other words, as part of the lord's estate. Usually the village included a church and parsonage, on land granted to the church, various workshops and a mill and granary, generally part of the lord's estate operated by tenants of the lord trying to make a profit with their independent businesses. Buildings could be constructed and "owned" by their occupants, but the land underneath was generally held by the lord, who usually was in turn a tenant of a higher lord. Today's ground leases derive from this practice. The houses were on small lots with small kitchen gardens with an animal shed meant for subsistence farming. With their "fiefs", residents had rights to narrow strips of arable land outside the village for growing grain and other food crops in a set rotation. Associated with their "fiefs", villagers typically had rights in less arable land, often including heaths and marshes to graze their livestock, primarily sheep and cows. Villagers shared rights to graze livestock on the common pasture; often the lord had rights to the same common pasture. Cows themselves made no such distinctions.

In some villages, the common would be a green in the village center, like the later New England town greens (New Haven) or town commons (Boston); in others it would be located at some distance from the center of the village, but still accessible to its people. Some commons were shared by more than one village. In addition, villagers typically shared rights to pasture pigs seasonally in the lord's woods for the acorns and other nuts, ("the mast") as well as to cut

wood for fuel or for building materials. Frequently, the commons included rights to graze on the lord's own fields following harvest and when they lay fallow in rotation with other fields. See Figure 1 in this chapter's Appendix, diagramming the typical arrangement of a medieval manor, including its commons and small village.

Deeds and leases to property, as well as unwritten custom of the manor (which could be vague and troublesome), defined these common rights. The lord held title to his estate, as a freehold or more limited title, subject on the one hand to these common rights; and subject on the other hand to the services, including military, and tax payments required by his or her lord at the next level of the ascending pyramid. Remember that all feudal titles were ultimately subject to the crown; all lords and barons were ultimately tenants of the crown. By law and custom, adjustments in rights to the common woods, fields, or wastes required agreement of the lord's tenants; disagreements among tenants frequently landed in the local manor court, whose justice was generally the lord of the manor. Serious disputes between the lord and his tenants would be heard by a shire or hundreds court with the power to approve a settlement between the lord and commoners or to rule in favor of one of the parties to the dispute. Of course, the local lords would be known to, and have strong influence upon, the shire and hundred courts.

Those who held common rights were known as "commoners", which was also a broader term applying to anyone who was not royalty, nobility, or clergy.[31] Commoners were a cross section of the middling and lower orders of village society making legally established or customary use of the common fields, pastures, and woodlands owned by the lord of the manor. Freemen were considered to be commoners if they held rights to the commons.

It is not surprising that management of common pasture or fields would pose difficulties. After all, a growing number of people from different backgrounds with different skills, but all with rights, often overlapping, depended on the common fields, meadows, pastures, wetlands, and woodland. Some held recognized legal rights to use the commons; others had made customary use of these resources for generations and thought of that long history as constituting rights. The details of medieval management are mostly a matter of educated guesswork, this was not a highly literate age in England. The earliest written

documentation of commons management was in the mid-13th century.[32] What does seem clear is this: communal management of the commons generally worked over hundreds of centuries. Disputes did occur, of course, and the courts were available to resolve them; but local tradition and custom were strong and change was slow. If the lord wished to enclose certain pastures, he needed to obtain permission from the commoners who had rights to those pastures. If he could not negotiate voluntary settlements with the commoners, he would have to ask the court to resolve the matter. As agricultural practices improved in the later Middle Ages, incentives increased for lords to undertake enclosure, and the rate and extent of enclosure increased. Compensation of some kind to the commoners to release their rights was often necessary, but that of often did not prevent displacement of commoners and serious hardship for the community. The claims of some scholars that such enclosures were primarily to protect common grazing lands from over-exploitation by the commoners must be viewed with skepticism. Claims that the enclosures were to improve productivity and profitability for the lords are probably closer to the truth.

Tragedy of the commons – or not

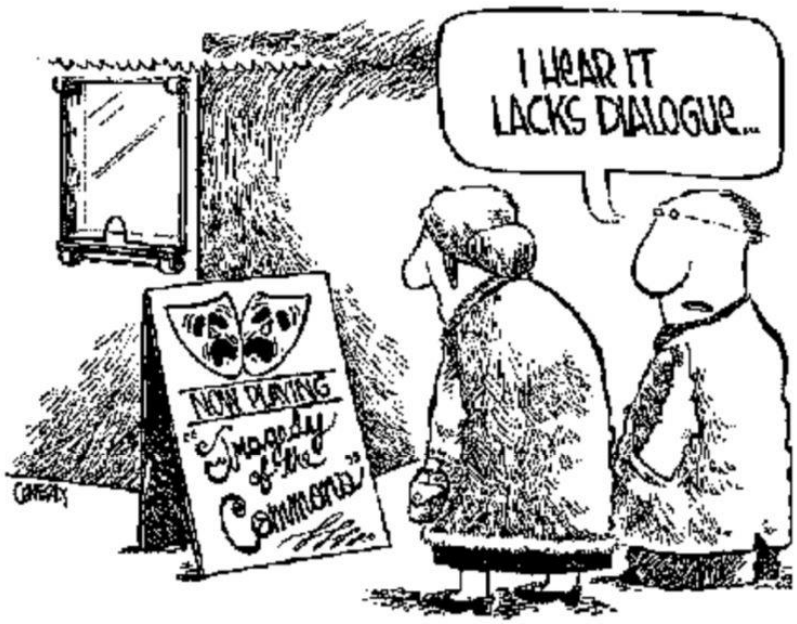
In 1968, Garrett Hardin, a well-regarded professor of ecology at the University of California, Berkeley, published a ground-breaking, controversial paper in the highly-respected journal *Science.* Stepping well beyond the boundaries of his ecological specialty, Hardin called for global limitations on child-bearing rights to prevent the world's growing population from destroying the earth's natural resource base. It was an unusual philosophical and political statement in one of the most distinguished journals in the world of science, and it raised a firestorm of debate across the disciplines of economics, demography, political science, anthropology, sociology, conservation, public policy, international relations, and game theory. To dramatize his point he needed a simple metaphor to dramatize what he saw as the inevitability of global overpopulation –unless society was able to impose effective measures to limit the all-too-human propensity to produce more children than necessary to replace their parents.

With proper acknowledgements, Hardin borrowed and distilled arguments from a little-known 1833 pamphlet by William Forster Lloyd (1794-1852), an Oxford mathematician and economist concerned about nineteenth century over-population of England. Lloyd had employed the medieval common pasture as a quasi-historical metaphor, in which the commoners were driven by the sum of their individual, self-interested, economic decisions (more animals = greater wealth) to exceed the natural grazing limits of the pasture. The inescapable consequence would be an over-grazed, ruined pasture for all. Hardin coined the phrase "tragedy of the commons" for the inevitable, ruinous consequences of over-population in a world of limited resources. He also applied the metaphor to other types of common property: western American rangelands, global fisheries, the erosion of values visitors seek in our National Parks, and the problems of air or water pollution. As Hardin described his grim model:

> The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point the inherent logic of the commons remorselessly generates tragedy.
>
> As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is utility to me of adding one more head to the herd? …. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.*[33]*

According to Hardin, each herdsman makes the same calculation without communicating to others: an additional beast will add to his yield of meat, milk, or wool; the

damage that beast causes will be borne by the commoners as a group. The result is a badly overgrazed pasture from which no one benefits. To Hardin, the clear answer to this dilemma is that enclosure, regulation, and/or privatization of the commons through "mutual coercion, mutually agreed upon" are the only solutions to human overpopulation as well. He sees human history as the progressive abandonment of the commons, first the commons in food-gathering, then the commons in waste disposal, and soon the commons in "breeding". He grants that this process results in some level of fairness, but "the alternative of the commons is too horrible to contemplate. Injustice is preferable to total ruin."[34]



Tragedy of he Commons. Dave Coverly cartoon.

There was little new in Hardin's analysis; Aristotle had recognized the problem of common property in *Politics* Book II, Chapter 3: "Everyone thinks chiefly of his own; hardly at all of the common interest." [35]H. Scott Gordon, Professor of Economics at Indiana University, published *The Economic Theory of a Common-Property Resource, The Fishery*[36] in 1954 and stated that the analysis of common property issues could be applied "generally to all cases where natural resources are owned in common and exploited under conditions of individualistic competition." But Hardin's phrase, "tragedy of the commons," his interdisciplinary approach, and the application of the lessons of the commons to the looming threat of a "population bomb," dramatized the issue. The result since has been an enormous multi-disciplinary literature on the question of the commons and its management, regulation, or privatization to conserve common-property resources.

While few have denied that common-property resources, like grazing land, fisheries, air and water, parks and open space (all known as "open-access" commons) are often exploited and abused, many critics pointed out that Hardin's model of the medieval pasture was overly simplified and historically inaccurate. Unlike the atmosphere and the ocean, the medieval common was not open to everyone. It was owned by the lord of the manor of which it was a part; access to it was by rights included in the tenants' holdings or by long-established customary use. Use was regulated by the community, often in fine detail, and enforced by the manor court and community officials. The results were not always perfect – the landlord tended to dominate arrangements and the courts and communal enforcement sometimes broke down and had to be restored; but communal management of the local commons lasted for hundreds of years until the changing economics of agriculture made the common-field system unworkable. The economic advantages of raising sheep and of other forms of more profitable agriculture led landlords to enclose the grazing commons into large farms to meet the needs of a growing population in the 17th and 18th centuries. In this sense, although Hardin's anthropology and sense of history were shaky, agricultural history supports his conclusion – common rights eventually had to give way to modern methods to feed the world. Moreover, the surge in carbon emissions since the industrial revolution supports his more fundamental conclusion, that stabilization of the world's population is critical to the future of the planet.

One of Hardin's incisive critics, Susan Jane Buck Cox[37] describes in detail the sociology of the typical English commons. She points out that the medieval commons were managed and overseen to ensure that overgrazing and other problems did not occur or were corrected. Cox also points out that violations did occur, and that some communities were better than others in managing their local commons. She also points out that the landlords were in a favorable position as owners to influence management and enforcement. By simplifying the historical and social context, Hardin employed a misleading metaphor and applied it the complex issue of human population. Other critics have pointed out that Hardin's assessment of marginal benefits and costs was incomplete. For example, an additional grazing animal did not come free to the commoner – the added animal required additional expense and labor to raise and would

require additional hay in the winter, a limited commodity in the Middle Ages, as the hay had to come from the commoner's own small home fields.

Having described Hardin's inaccuracies, Cox emphasizes that issues of common property resources are of

> . . .great and continuing concern. How those issues are dealt with depends in large part on our perceptions of the disposition of similar issues in the past. If we misunderstand the true nature of the commons, we also misunderstand the implication of the demise of the traditional commons systems. Perhaps what existed in fact was not a 'tragedy of the commons' but rather a triumph: that for hundreds of years . . . land was managed successfully by communities. That the system failed to survive the industrial revolution, agrarian reform, and transfigured farming practices is hardly to be wondered at.*[38]*

Cox concludes: "Our reexamination of the commons requires a dual focus. The first is to search for the ideas and practices which led to successful communing for centuries and to try to find lessons and practices for our own times."[39]

Enclosure and the Commons

This brings us to the fate of the English commons over more than 800 years of enclosure of the common fields and pastures; and the lessons for land conservation. Enclosure in the most general sense means the physical or legal appropriation of a common-property resource for private ownership or use. Think of the open medieval fields being fenced, trenched, and hedged to keep farm animals in and unauthorized users out. Enclosures began in the 13th century on a small scale here and there, at first as a means of clarifying or reshaping field boundaries and enlarging ownership. They could be related to the lord's plans for agricultural improvement and greater productivity and profit – such as draining a wet area or converting woodland to pasture or farm fields. The initiative generally came from the local lord wanting to improve the agricultural yield of the manor and thereby to increase the economic value of his holdings – and his personal wealth. He had to persuade the commoners who held rights in the

property to be enclosed; but not all the users of the commons could document their customary rights, and the lord had various ways of being persuasive, including but not limited to the payment of monetary compensation for the common rights that would be erased. Many commoners' rights were held by custom and could not be documented at all or without great expense. Often, compensation was inadequate to replace the rights lost. If the compensation included ownership of separate parcels, often they were inadequate in size or quality to support the commoner's family.

While enclosure and enlargement of the medieval fields was often necessary as a response to growing demand and changes in agricultural practices, the loss of the commons could be a tragedy -- *for the commoners*. Sometimes whole villages were displaced or impoverished by the enclosure. Small, relatively simple enclosures might be done with informal or formal permission; more complicated, larger enclosures required a hearing and approval by a court, often one predisposed to favor the lord's position. Following a controversial enclosure, perceptions of heavy-handedness or outright injustice on the part of the lord could fester for r many years and even generations, leading to serious bitterness and even unrest and violence.

Welsh uplands showing piecemeal woodland clearing and enclosure from medieval times to the present.

Commoners often found themselves relegated to fens and barely arable wastes, and often had to rebuild their cottages in their new locations. The grievances of the Levelers of the Civil War period, 1642-1646, and the Diggers of 1649-50 were in part the result of the enclosure movement. Fearing unrest, the Crown in the Tudor era tended to resist the lords' desires for forced enclosures; but the pressures of modernization were relentless.

As population growth resumed after the Black Death of 1349, agricultural practices improved, and a market economy strengthened with the growth of towns and cities, the scale and pace of enclosure increased. As enclosure petitions became larger and more complex, they more often required hearings at the shire courts, frequent legal appeals, and decisions by higher courts. Enclosures reached their height between the 18th and mid-19th centuries as Parliament got in the act and decided much larger enclosures by specific legislation after study by appointed commissioners. Parliament approve thousands of enclosure plans in this period.

Our tradition of land conservation is, in part, a continuation of the movement to protect common pastures, meadows, wetlands, forests and footpaths against enclosure and privatization. As Chapter 4 describes in more detail, enclosure during the 18th and 19th centuries, in the context of the agricultural and industrial revolutions, increasingly created conflicts that rippled far beyond the sites involved. While the direct losers in an enclosure plan might be the smaller commoners, many others who were accustomed to the enjoyment and use of locally important commons and their footpaths could be indirect losers. They did not have legal rights to compensation for the loss of accessible open space and footpaths, but they felt their losses keenly and made them known loudly, persistently, and effectively.

Now, to make the link to today's conservation. When a developer purchases land that has been used and enjoyed customarily by neighbors or the community, even if their use has been limited to passive visual enjoyment of the local meadow or woods, those affected react as their commoner ancestors did – they often fight that "enclosure" in any way possible. Turning that around, enclosure -- we would call this "conservation" -- of a landscape meadow or woods -- for a park may displace the farmers and loggers who have been making their living from that property. In other ways, conservation can itself be a form of enclosure that displaces its current occupants and users from the conserved land. William the Conqueror enclosed many thousands of acres of English forest and countryside for exclusive royal use, erasing traditional rights of access as well as small villages, and allegedly displacing and impoverishing their populations. Similarly, both Yellowstone and Yosemite parks enclosed vast areas for enjoyment by the public, thereby displacing Native Americans who had been using the parks for their ancestral purposes as well as poor squatters and others unable to assert land claims. National parks

around the world have continued that questionable tradition of displacement in the name of conservation and biodiversity. On a much smaller scale, conservationists, private land trusts, and conservation organizations have conducted another kind of enclosure, posting thousands of acres against hunting, exacerbating the problem of wildlife management and disease control. Where organizations have protected land through conservation easements, some land trusts have agreed to enforce "no hunting, trapping, or fishing" restrictions desired by the landowners granting the easement. Carrying out donors' wishes, organizations sometimes have facilitated the closure of neighborhood pathways, trails, beaches. In some communities and regions, these kinds of well-intentioned conservation-enclosure have created opposition to proposed conservation or a backlash against conservation after it occurs.

Protected land, a virtual commons

On a happier note, land trusts and conservation agencies, often working together, have protected millions of acres that remain available to the public for compatible uses as some combination of hunting and fishing, hiking, skiing, nature study, and other often seasonal hunting, hiking, and passive and active recreation by the public, and they have created public rights of access and use. In short, conservation has been part of the complicated and many-sided history of the commons and enclosure since the beginning of conservation organizations and agencies in the 19th century; regrettably, not always with the unintended social consequences of enclosure in mind.

Summary

This chapter has reached back to the sacred groves of Greece and Rome and the royal forests of the Middle Ages to identify the earliest definitive examples of intentional land conservation. Sacred groves were designated by "pagans" in many parts of the world and have been defended by their communities over centuries. In today's India, for example, scientists are celebrating, and communities defending, remnant sacred groves and forests as sanctuaries of surprising biodiversity. Indigenous communities defend similar places in Asia, Europe, and Africa. Royal forests were declared by European monarchs to preserve and extend preserves

for royal hunting and recreation (and to establish, reinforce, and maintain their feudal control), with some understanding that royal game needed a range of habitats in which to thrive. Royal forest designations limited or extinguished prior common rights for grazing, wood cutting, and hunting – a consequence repeated many times in the modern world when wildlife sanctuaries and large nature reserves have been set aside without obtaining support of their long-standing occupants and neighbors.

We touched on the issue of perpetuity, to which we shall return in the discussion of conservation easements in Chapter 9; and to the related issue of intergenerational justice in Chapter 15. It is perhaps surprising that the common law of the Middle Ages, during which religion and feudalism militated against change in the structure of society, was not friendly to the concept of perpetuity applied to landholding. The church, monarchies (if not the durability of specific rulers and ruling families), and the structure of feudalism were seen as perpetual, like nature itself, but common law resisted attempts through trusts and other legal arrangements to enable perpetual succession of property according to the wishes of its present owners. Even in the height of feudalism, courts did not want to enforce the often onerous, and sometimes eccentric "dead hand" (*mortmain)* of feudal owners. That opposition to control of the "dead hand" re-emerged in the 1970s, when "perpetual" conservation easements were introduced. That opposition continues today in some quarters.

Continuing the theme of the English commons, we examined Garrett Hardin's gripping but inapt metaphor of the overgrazed medieval commons to dramatize the global threat of overpopulation. While the metaphor was at best an exaggeration, it was at worst a flagrant misrepresentation of successful communal management of the English commons over many centuries. From the perspective of conservation, Hardin's "tragedy" is a two-sided sword. It strongly implies that only privatization or governmental ownership of the natural landscape would prevent misuse and exploitation. That view tended to justify the private and public conservation movement as the more reliable engines of land protection, and may have led to underuse of local, community-based regulation in defense of forests and other ecological resources. At the same time, "tragedy" as a metaphor for the vulnerability of the fundamental environmental commons – such as the atmosphere, oceans, ground water and aquifers, natural

habitats, forests, farmland – focused attention on the widespread, unsustainable exploitation and misuse of open-source environmental resources. One of the unfortunate and erroneous messages of the "tragedy" was its implication that sustainable environmental management is beyond the capabilities of indigenous peoples and their communities. Perhaps the most important result of the Hardin controversy is the attention given by social scientists, economists, ecologists, and environmental managers to models for effective community-based management of natural resources, protected lands, and open access resources such as the oceans and atmosphere.

Endnotes

[1] Norman R. Cantor (1999), "The Middle Ages and Identity" in Norman R. Cantor, ed., *The Encyclopedia of the Middle Ages* (New York: Viking Penguin).
[2] See Tamara L. Whited (2005), *An Environmental History of Northern Europe*, (Santa Barbara: ABC CLIO), 50.
[3] John Aberth (2014), *An Environmental History of the Middle Ages: The Crucible of Nature* (New York: Routledge), 79.
[4] Aberth, Ibid, 86.
[5] "Clootie Well," Wikipedia. https://en.wikipedia.org/wiki/Clootie_well. Retrieved 1-10-2018.
[6] My oversimplification is drawn from Clarence J. Glacken (1967*), Traces on the Rhodian Shore: Nature and Culture in Western Thought from Ancient Times to the End of the Eighteenth Century*, Chapters 4 and 5; Charles L. Redman (1999), *Human Impact on Ancient Environments* Chapter 2, "Attitudes Toward the Environment." (Tucson: University of Arizona Press); Max Oelschlaeger (1991), *The Idea of Wilderness*, Chapters 1 and 2 (New Haven: Yale University Press), 1-67; and Peter Coates (1998), *Nature: Western Attitudes since Ancient Times,* Chapter 3 (Berkeley: University of California Press), 40-55.
[7] *Beowulf* (2000; c. 540-1,000), translated by Seamus Heaney (New York: Farrar, Strauss and Giroux, 7-10.
[8] *Sir Gawain and the Green Knight: A New Verse Translation* (2007*).* Simon Armitage, trans. (New York: W.W. Norton), 160. I'm indebted to Jon Roush of Portland for suggesting the use of the Beowulf and Sir Gawain references to sharpen my point about medieval attitudes towards nature and wilderness. Many years ago, Jon taught medieval English literature at nearby Reed College. He later became Executive Vice President of The Nature Conservancy during its period of national expansion under Patrick Noonan. Still later in a remarkably vigorous and eclectic life, he served as President of the Wilderness Society, and now as a Board member of the Western Rivers Conservancy.
[9] Ibid, 12.
[10]Quoted in Clarence J. Glacken (1967), 213.
[11] Glacken, *Ibid.*, 214.
[12] Peter Coates (1998), 46-47.
[13] Charles R. Young (1979), *The Royal Forests of Medieval England* (Philadelphia: University of Pennsylvania Press), 2.
[14] Peter Coates, 46-47.
[15] W. G. Hoskins (1970;1955), *The Making of the English Landscape* (Harmondsworth: Penguin), 93-98.
[16]*Anglo-Saxon Chronicle* (1953), G.M. Garmonsway, ed. and trans. (London: J, M. Dent & Co.), 221. The Saxon monks who wrote the Chronicle were no fans of William the Conqueror. Modern historians have taken a more

moderate view of the consequences, especially in terms of the numbers of villages and farms erased. There is general agreement that afforestation on such a large scale was disruptive. In fact, under William's successors, afforestation was rolled back under pressure from barons and commoners and many farms were restored to their former uses.

[17] The name "National Park" can be misleading. English national parks are quite different from the American model. An English national park is protected by a kind of special zoning rather than by national ownership.

[18] "Commoners" is the general term, anyone not entitled to sit in the House of Lords; includes the middle and merchant classes; peasants mean the lowest class of farmers, many of whom retained rights to the "commons" which included pastures, forests, and wasteland available to the community regardless specific ownership.

[19] For the Forest Charter, see the National Archives transcript available at *Charter of the Forest* (1225; 1217), Transcript in the National Archives. http://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/17. Also see the summary in Charles R. Young (1979), *The Royal Forests of Medieval England* (Philadelphia: University of Pennsylvania Press), 68-70. Instead of draconian physical punishment, the maximum would be a fine. If the violator would not pay the fine, he could be imprisoned for a year and one day. If no one would put up surety (bond) for him, "he must abjure the realm." Abjure the realm means to renounce one's country, in which case, one would have no rights under law, still not a good situation.

[20] Aberth, 97.

[21] Aberth, 136.

[22] Whited, 58.

[23] Ibid., 56.

[24] Cantor 146.

[25] This discussion of the common law is based on the following resources: Theodore F.T. Plunkett (1956), *A Concise History of the Common Law* (Boston: Little Brown); Arthur R. Hogue (1966), *Origins of the Common Law* (Indianapolis: Liberty); A.W.P. Simpson (1986), *A History of the Land Law* (Oxford: Clarendon Press); John Hudson (1996), *The Formation of the Common Law in England from the Norman Conquest to Magna Carta* (London: Longman); "Common Law" in Farlex, *The Free Dictionary*. http://enclyclopedia.thefreedictionary.com/common+law, Retrieved 1-23-2017.; Thomas W. Merrill and Henry E. Smith (2010), *Property* (New York: Oxford University Press).

[26] Robert Tombs (2014), *The English and Their History* (New York: Vintage Books), 73-76.

[27] The model rule of perpetuities can be found at http://www.uniformlaws.org/ActSummary.aspx?title=Statutory%20Rule%20Against%20Perpetuities .

[28] The common law rule of perpetuities limits family trusts to twenty-one years beyond the lives in being when the trust was created, plus periods of gestation. In the case of a family in which the youngest member is unborn, the trust is limited to 9 months of gestation, plus that youngest child's lifetime, plus 21 years. If that person lives to 100 years, the trust will expire in 121 years and nine months. Of course, by agreement of the beneficiaries of the trust, a new trust could be created before or upon expiration of the first trust, but that can be quite difficult if not impossible when there are multiple beneficiaries of different generations, with varying amounts of wealth, and with conflicting needs and wants.

[29] Although principles of equity eventually found their way into common law courts, the two parallel systems existed in England until the 1870s. American courts generally dealt with common law, statutory law, and equity in the same court system, but the State of Delaware continues with separate, parallel court of equity.

[30] This has a modern echo. Conservation easements are worded carefully to provide for full restoration of the damaged premises, rather than to limit remedies to monetary damages alone. Reference needed.

[31] For a post-feudal example: Winston Churchill, was an untitled commoner, though he was born in Blenheim Palace as grandson of the 7th Duke of Marlborough, one of the great dukes of nineteenth century England. Late in life, he was offered an inheritable title, but he refused it so as not to interfere with his son, Randolph's political career. Later in life, Winston was knighted by the Queen, hence the honorary title of "Sir".

[32] Cox, Susan Jane Buck (1985). "No tragedy of the commons." *Environmental Ethics*, 7(1), 55.

[33] Garrett Hardin (1968). "The Tragedy of the Commons." Originally published in *Science* 162 (1968): 1243-48. Collected in John A. Baden and Douglas S Noonan (1998), *Managing the Commons*, Second Edition (Bloomington: Indiana University Press), 3-16.
[34] Hardin, Ibid., 7.
[35] Aristotle quoted in Badan and Noonan (1998), xv.
[36] H. Scott Gordon (1954), "The Economic Theory of a Common-Property Resource: The Fishery." *Journal of Political Economy,* Vol. 62, No. 2 (April), 124-142.
[37] Susan Jane Buck Cox (1985), "No Tragedy of the Commons", *Environmental Ethics* 7, Spring 1985, 49-61.
[38] Ibid., 60-61.
[39] Ibid., 61.

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