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On Private Property: Finding Common Ground on the Ownership of Land, by Eric T. Freyfogle and Buying Nature: The Limits of Land Acquisition as a Conservation Strategy, 1780-2004, by Sally K. Fairfax, Lauren Gwin, & Laura A. Watt

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BOOK REVIEWS

THE STATE OF THE NATURAL RESOURCES LITERATURE

On Private Property and Buying Nature: A Review Essay by Martin Nie

On Private Property: Finding Common Ground on the Ownership of Land. By Eric T. Freyfogle. Boston: Beacon Press, 2007. Pp. 186. \$24.95 cloth.

Buying Nature: The Limits of Land Acquisition as a Conservation Strategy, 1780–2004. By Sally K. Fairfax, Lauren Gwin, Mary Ann King, Leigh Raymond & Laura A. Watt. Cambridge: The MIT Press, 2005. Pp. 379. \$25.00 paper.

It seems trite, especially during an election season, to suggest that we are in need of a national-level discussion of some hot political or policy issue. But this suggestion cannot be made strongly enough when it comes to the question of what it means to own private property in the twenty-first century. From my vantage point in Montana, property-related issues dominate the political landscape. These include conflicts regarding subdivision and development, takings, land-use planning, corporate timberland divestment, stream access, wildlife management, and myriad others. As evident elsewhere, discussion of these issues is often frustratingly superficial, ahistorical, and uncritical to say the least. Though central to these conflicts, the issue of private property is usually obscured, muddled, or somehow completely missing from their debate and analysis. If asked to moderate a more constructive discussion, I would place *On Private Property* and *Buying Nature* on my required reading list. Though not all readers will agree with their arguments and analysis, both books work their way through complicated issues in a very helpful fashion. In doing so, they challenge readers to think differently about the conservation of private lands and raise questions that must be addressed sooner or later.

On Private Property, written by the prolific Eric T. Freyfogle, is in some respects a follow-up to his *The Land We Share*, published by Island Press in 2003, which is among the most thoughtful and well-crafted books about private property that I have ever read. This time around, Freyfogle takes on some of the more challenging issues not specifically addressed in his earlier work, such as the question of land access. As he usually does, Freyfogle mixes some largely forgotten history and case law to examine the under-reported: that the right to exclude has not been absolute in American law and that many southern and New England residents once had legal rights to roam on unenclosed and uncultivated lands. Working on several levels, Freyfogle uses this chapter, as he does with others, to emphasize the dynamic nature of property and its all-important relationship to democratic governance and shifting social and environmental values.

Property, for Freyfogle, is inherently a social institution and a tool to be used for improving the social good. When it fails to be useful for society, it is time to devise new ownership rules and property norms. He then considers what these new rules might look like and who should be responsible for making them. In this regard, Freyfogle is harsh on the role played by the courts and the limitations and political implications of takings jurisprudence. The framing of property conflicts as a legal issue about takings and just compensation under the Constitution "accounts for a sizable portion of our problem," says Freyfogle. The issues, he says, are mostly about the meaning of property, not the Constitution, and the "Supreme Court has spent no time thinking about the best way to define private rights in land."

One of the most engaging themes emphasized throughout the book is to clearly show why there is often no "pro-property rights" position that can be taken in most disputes because property rights reside on more than one side. Several colorful legal cases are used to illustrate why the law must eventually choose sides. This simple but significant point has the potential of recasting the sometimes shrill and simplistic property rights debate pitting individual landowners against big government. Freyfogle convinces readers that a better story, and one more helpful in finding common ground, includes more characters, from landowning neighbors and future generations to the public's wildlife and water.

Freyfogle's new book also helps us situate several recent property-based conflicts that have emerged in recent years, from the use of eminent domain and the *Kelo* decision to Oregon's Measure 37. Freyfogle gets to the bottom of these and other issues by asking the most critical questions. For example, should there be a right to develop land? And when should we pay landowners not to develop or harm land? Freyfogle works his way through these loaded issues with care and concision, and does so in a very readable and conversational fashion. The result makes for a very illuminating and enjoyable book.

This is not to say, however, that the book shies from controversy. Like his other writing, including *Why Conservation Is Failing and How It Can Regain Ground*, published by Yale University Press in 2006, Freyfogle connects property law and theory to conservation strategy. Take, for example, his discussion of the land trust movement and its efforts to buy land threatened with development and land-use harm. They are doing more than preserving land, he says,

They are tinkering with the institution of private property, and in ways that are not good. It is not good to pay landowners to halt harmful activities. It is not good in the long-run to purchase development rights that lawmakers ought to curtail through legal change. Once property norms are recalibrated to serve the common good, *then* land trust can come in and pay landowners to go beyond what the law requires.

Today's great need is to get clear on what landowners should be able to do. In that important work, indiscriminate payment programs can make matters worse.

Freyfogle makes his case here, but when it comes to the limits of land acquisition as a conservation strategy, it is hard to compete with *Buying Nature*. The impressive multi-authored book traces the strategy's lineage from 1780 to 2004. This definitive work makes several important contributions. First, it carefully explains the increasing complexity of conserved landscapes that are often "mosaics" consisting of public and private claims. Using several cases and examples, the authors show how "multiple agents now own partial interests in a single parcel of land for a wide variety of purposes that are often in conflict." While the authors believe that these mosaics are a net positive development, their analysis demonstrates the challenges they pose to public accountability. And make no mistake about it, there is a public side to private conservation transactions, often in the form of tax breaks and other *public* policy incentives. This intermingling of public and private rights is a subject analyzed by several of these authors in other published scholarship, and their knowledge benefits their analysis in this endeavor as well.

Buying Nature nicely situates the land acquisition strategy in its historical and political context and examines full and partial (conservation easements) acquisitions. The analysis is very sharp and pays particular attention to shifting notions of property law and theory. Take, for example, the standard "bundle of sticks" metaphor used to discuss property rights: it helps explain the logic of the modern conservation easement and another central theme of the book, that acquisition and the ownership of property is no guarantee of control.

Background on the 1985 Farm Bill demonstrates the book's typical helpful political analysis. Not only do the authors cover the obvious importance of this funding source and its various conservation programs, but they also explain its fascinating relationship to international trade law (in terms of subsidies and cross-compliance) and the key role it played in expanding land trusts. This sort of insight appears frequently and assists readers in placing very detailed examples and cases in their appropriate political context.

Several important cases are surveyed throughout the book, with a focus on some of the more high-profile acquisition deals in American history. More recent "megadeals," like timberland purchases in the northern forests of New England, are also covered. Though careful to note exceptions, their research shows that "willing sellers will most likely always define the agenda." Acquisition emphasizes the needs of sellers, in other words, and the authors analyze the implications.

The most central lesson here is that there are significant limits to the land acquisition strategy. Not only is the approach terribly expensive, but the philosophy on which it is built raises troubling questions about property

norms and the future role of government regulation. On this point, the authors share common ground with Freyfogle. They argue that "we neither can nor should 'buy' our way out of all or even most of our conservation problems." Federal funding for acquisitions will likely remain limited in the future. But perhaps more important, they note, is the message sent by the acquisition strategy to landowners, so "even if we could print enough money, it would be an error to do so." They further explain,

An undue reliance on acquisition, particularly to avoid the messy and unpopular process of enforcing regulations, is a grave error. Land ownership entails both rights and responsibilities, and it includes at a minimum the duty to avoid harming one's neighbors. The more society compensates landowners for conservation, the more landowners will sensibly conclude that in the absence of such payments, they are entitled to develop their parcels to the detriment of society.

In this vein, the authors close their analysis by briefly exploring a few regulatory options that might be used in the future, including eminent domain and other unpleasant coercive devices. Undoubtedly, such points, emphasized in both books, will be contested by some readers on political and ideological grounds. And other readers may be sympathetic to the argument but still have doubts about the feasibility of finding our regulatory resolve in the near future, so will continue to support land acquisitions as a way to solve immediate threats posed by private land development. But on whatever side one stands, both of these books force readers to sharpen their arguments and think more critically about this increasingly popular conservation strategy.

Buying Nature is exactly the sort of serious scholarship and policy analysis needed at the moment. It focuses on real-world conservation problems and what can be done about them. It is comprehensive, critical, grounded, and fair-minded. Thankfully, there is an increasing amount of legal and policy work focused on environmental policy strategies and tools and the interactions between them. There is an urgent need to consider how such approaches as government regulation, litigation, acquisition, collaboration, and other strategies interact with one another and can best be used to protect the environment. *Buying Nature* advances this important effort and sets the stage for more like-minded inquiry.

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