

Access to the Countryside: The Tragedy of the House of Commons

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Abstract

The Countryside and Rights of Way Act 2000 (the CRoW Act) serves as an example of the way in which ideology can frequently become a casualty of realpolitik. Wider access to the countryside was a pillar of Labour Party general election manifestos from the 1950s until the introduction of the CRoW Act. This article examines the antecedents and emergence of this statute to determine whether the eventual form of the rights of access under the CRoW Act represent a missed opportunity to grant public rights over private land.

Introduction

In October 2015, walkers and access campaigners marked the ten year anniversary of the implementation of the open access provisions of the Countryside and Rights of Way Act 2000 (the CRoW Act). [These provisions give walkers a qualified 'right to roam' over land that has been classified as mountain, moor, heath, down or registered common land without the fear of being ejected as a trespasser.](#)¹ The history of campaigns to improve access to the countryside begins with the Liberal Chartists of the early Nineteenth Century, who campaigned for rights over urban property as an act of charity to the poor but put little pressure on landowners. The second campaign for rights of access took place in the late Nineteenth Century, and can be observed in the repeated attempts by James Bryce MP to introduce an Access to Mountains Act. The rights in property that followed the Second World War took a different form to the earlier charitable rights. As well as providing some access to the countryside, the rights granted under statutes such as the 1949 National Parks and Access to the Countryside Act recognised that the environmental value of property was a public right that should also be protected.

¹ [Countryside and Rights of Way Act 2000 s. 2](#)

It is possible to identify these rights as a clear antecedent of the CRoW Act, insofar as they balance rights over property with greater measures for the protection of the environment. This post-War legislation in particular took place alongside an emergent ‘rights revolution,’ where policymakers identified the importance of property rights beyond those of an individual owner.² The emergence of the CRoW Act owes much to this developing debate on the nature of private property, but was not an unqualified victory for the access lobby. ~~Whilst~~ ~~the~~ ~~campaigns~~ ~~to~~ ~~introduce~~ ~~open~~ ~~access~~ ~~have~~ ~~a~~ ~~long~~ ~~history~~ ~~in~~ ~~the~~ ~~politics~~ ~~of~~ ~~the~~ ~~Labour~~ ~~Party,~~ ~~and~~ ~~many~~ ~~of~~ ~~the~~ ~~earliest~~ ~~rambling~~ ~~clubs~~ ~~and~~ ~~access~~ ~~campaigns~~ ~~grew~~ ~~out~~ ~~of~~ ~~the~~ ~~socialist~~ ~~Clarion~~ ~~Clubs~~ ~~of~~ ~~the~~ ~~industrial~~ ~~cities~~ ~~during~~ ~~the~~ ~~inter-War~~ ~~years.~~ ~~These~~ ~~rambling~~ ~~clubs~~ ~~campaigned~~ ~~alongside~~ ~~early~~ ~~Labour~~ ~~MPs~~ ~~for~~ ~~wider~~ ~~access~~ ~~to~~ ~~the~~ ~~countryside,~~ ~~with~~ ~~some~~ ~~limited~~ ~~success~~ ~~in~~ ~~the~~ ~~Access~~ ~~to~~ ~~Mountains~~ ~~Act~~ ~~1939.~~³ ~~the~~ ~~Whilst~~ ~~the~~ ~~spirit~~ ~~of~~ ~~the~~ ~~CRoW~~ ~~Act~~ ~~invoked~~ ~~the~~ ~~memory~~ ~~of~~ ~~these~~ ~~early~~ ~~access~~ ~~campaigns,~~ ~~the~~ provisions and implementation of ~~the~~ ~~this~~ Act were rooted firmly in the politics of New Labour. As a result, the CRoW Act grew into an unwieldy and flawed statute which navigated an awkward path between open access and landowner protection. The general thesis of this article, and its central thread, is that whilst the struggle for access to land began in political ideology, it ended in political expediency with a statute of considerable compromise.

The Political Pedigree of CRoW

The CRoW Bill was introduced to the House of Commons by the Environment Minister, Michael Meacher. The Minister drew on a proud history of political reform led by the Labour Party that had included the post-war legislation on National Parks and Access to

² See, for example: B Ackerman ‘The Rise of World Constitutionalism’ (1997) 83 Virginia Law Review 771

³ See n. 44 below. See also B Mayfield ‘Access to Land’ (2010) 31 Statute Law Review 63

the Countryside and the creation of the Welfare State.⁴ He claimed that the CRoW Act ‘brings to reality the dream of Lloyd George that nobody should be a trespasser in the land of their birth’.⁵ Mr Meacher also contended that the Bill ‘finally achieves the aims and aspirations of the great post-war Labour legislation.’⁶ In fact, the history of the Parliamentary campaign for wider rights of access to the countryside can be dated back at least as far as James Bryce’s Access to Mountains (Scotland) Bill of 1884, which was the first legislative attempt to introduce a ‘right to roam’ over open countryside.⁷ More recent campaigns had been led by campaigners on the left wing of the Labour Party. These included the MP Paddy Tipping, who based his 1996 Access to the Countryside Private Member’s Bill on a draft prepared by the Ramblers’ Association.⁸

The new right of access under the CRoW Act extended to mountain, moor, heath, down and registered common land. There were significant powers of closure given to landowners, allowing them to apply to close their land to walkers for several days out of the year. Similarly, the public use of access land is controlled and carefully managed by new rules and bylaws and a statutory ‘countryside code’. Rather than pursuing a socialist policy that handed unqualified rights to the people, the Government had placed itself in an intermediary, managerial role between land owners and walkers.

The rights provided by the CRoW Act might have built upon the spirit of the post-War social reforms, but were brought in by a Labour government that had also promised to

⁴ National Parks and Access to the Countryside Act 1949

⁵ HC Deb 20th March 2000 c 720

⁶ *ibid*

⁷ Access to Mountains (Scotland) HC Bill (1883/84) [47 Vict]

⁸ Access to the Countryside HC Bill (1997/98) [54]

enhance ‘personal prosperity’ in addition to the common good.⁹ The party had promised that ‘the policies of 1997 cannot be those of 1947 or 1967,’ contending that ‘Government and industry must work together.’¹⁰ The rewording of Clause Four of the Labour Party Constitution had also marked a move away from the ‘old left’, towards a centre-left approach which cooperated with private industry. The provisions of the CRoW Act demonstrate that this legislation was a statute of compromise between landowners, agriculture and those who campaigned for wider rights of access. By doing so, the Government eventually produced a flawed statute that would do little to inconvenience landowners, but also did little to enhance the rights of the public over private land.

The provisions brought into force by the CRoW Act fall under two broad headings. The first of these is public access and the second is environmental protection. The access provisions of the Act give walkers a ‘right to roam’ over mountain, moor, heath, down and registered common land, whilst the sections providing environmental protection include new provisions to conserve Sites of Special Scientific Interest and to protect wildlife from ‘reckless disturbance.’¹¹ In this respect, the CRoW Act combines the redistribution of limited property rights with a clear allocation of responsibilities.

Despite the balanced nature of these rights, it was the ‘right to roam’ that caused the greatest political division. During the debate that followed the Second Reading of the CRoW Bill, the Conservative Shadow Agriculture Minister James Paice argued that:

⁹ Labour Party ‘New Labour: because Britain deserves better’ (London: The Labour Party, 1996), p10

¹⁰ *ibid* p3

¹¹ Countryside and Rights of Way Act 2000 s 81

The right to roam is based not on a putative enjoyment of the countryside, but on one thing and one thing alone: that most evil of human traits, envy. It is based on envy of private property and a belief that land should be available to everyone and that no one should have the right to restrict access to it.¹²

His contention is representative of many of the early statements made in opposition to the Bill. The right to restrict access has been advanced by some theorists as a central right in property, and by those who argue that much of the value of ownership is lost once a landowner loses the right to exclude.¹³ Paice's arguments in relation to the redistribution of property rights were unfounded. The rights created by the CRoW Act are neither a deprivation of property nor a radical new right, but represent a compromise between universal access to land and total exclusion from all but established roads and footpaths. This principle of balanced rights in property is not new, as the new rights of access supplement a range of existing access rights which already included these footpaths and bridleways. The Act is not a successor to the socialist claims on land campaigned for by groups such as the Diggers or the Kinder Scout mass trespassers, but neither was it simply an initiative to facilitate charity, or to gift temporary access rights which can readily be withdrawn.¹⁴

Public health and permissive rights in the early Nineteenth Century

¹² HC Deb 20th March 2000, c 767

¹³ See, for example, J Waldron, 'The Right to Private Property' (Oxford: Clarendon, 1990) Chapter 2

¹⁴ The Diggers, or 'true Levellers', proposed a radical solution to the inequality of property ownership. Their 1649 occupation of St George's Hill in Weybridge was an active element in the campaign to redistribute property and property rights. The Diggers campaigned for the equal distribution of land, for industry, agriculture and forestry to operate communally and for rents to be abolished. The Digger movement was quashed almost as soon as it had begun, though the message of their campaigns would have made Seventeenth and Eighteenth Century landowners uneasy. See, for example: G Alylmer, 'The Diggers in Their Own Time', in A. Bradstock, (ed.), *Winstanley and the Diggers 1649-1999* (London: Cass, 2000), p 8. [See also n. 29 on the Kinder Scout Mass Trespass.](#)

The movement identified by Michael Meacher really begins with the campaign by Chartist MPs of the early Nineteenth Century to secure greater access to land for the purposes of public health, happiness and social cohesion. The parliamentary debates on access during the first half of the Nineteenth Century demonstrate that the intentions of the Chartists were essentially charitable, relying upon the willing of landowners to grant a permissive right over their land. The grant of a permissive right left the original property rights intact, with landowners retaining the power to exclude.

The earliest Parliamentary debates on the subject of access to the countryside began in the 1830s. It is no coincidence that these early plans to provide open recreational space for the health and enjoyment of inhabitants of the cities emerged around this time, alongside other notable legislation such as the 1832 Reform Act and the Factory Act of 1833. In 1833, a report was prepared by the Select Committee on Public Walks, in order to ‘consider the best means of securing open spaces in the vicinity of populous towns, as public walks and places of exercise.’¹⁵

The principal benefits of wider access to recreation space, as recognised by the Government of 1833, can be categorised under two headings. The first of these was public health, and it is notable that the 1833 report was commissioned in the wake of a number of serious outbreaks of cholera. Approximately 32,000 people died as a result of the outbreak of 1831 to 1832, and widespread rioting and civil unrest followed the spread of cholera around the provincial cities.¹⁶ Of particular interest to the government was the promotion of ‘the health and comfort

¹⁵ Report from the Select Committee on Public Walks HC (1832-33) 448

¹⁶ A Wohl, ‘Endangered Lives: Public Health in Victorian Britain’, (Cambridge: Cambridge University Press, 1983) p 119

of the inhabitants' of these cities.¹⁷ The report also noted the significant expansion of the provincial industrial towns as well as the growth in population within the city of London.¹⁸

The second concern of the 1833 Public Walk Committee was the preservation of order, and in particular the alleviation of alcoholism among the inhabitants of the inner cities. The committee's report argued that the allocation of open space 'for the amusement... of the humbler classes' would prevent the locals from indulging in 'low and debasing pleasures.'¹⁹ This was regarded as a particular problem among workmen, who were known to frequent 'drinking houses, dog fights, and boxing matches.'²⁰ The Liberal MP Joseph Brotherton was among those giving evidence to the select committee. Brotherton had been a longstanding campaigner for the establishment of public parks, particularly around his constituency of Salford.²¹

The recommendations of the committee were incorporated into the 1837 Public Walks and Institutions Bill, which was created to improve 'the health, morals, instruction and enjoyments of the people.'²² In addition to the establishment of public walks, the Bill provided for the creation of new playgrounds, museums and libraries. Joseph Brotherton was among the MPs who supported the 1837 Bill, which was seen as an important measure to alleviate the problem of drunkenness among the working class living in urban areas. During an earlier Parliamentary debate on the value and availability of public walks, the MP Henry

¹⁷ *ibid*

¹⁸ Report from the Select Committee on Public Walks HC (1832-33) 448

¹⁹ *ibid*, p 8

²⁰ *ibid*

²¹ See D. Thompson, 'The Chartists: Popular Politics in the Industrial Revolution', (Aldershot: Wildwood, 1986)

²² Public Walks and Institutions HC Bill (1836-37) 7 Will IV

Gaily Knight supported the Bill as a way in which the provision of English open space could be brought to a par with that in other European countries. He also argued that public parks could provide a great leveller among classes, contending:

Sir, I am convinced that when the operatives of this metropolis, released from their toil by the blessed institution of the Sabbath... catch a sight in our parks of that aristocracy which they will never be taught, because they will never have reason, to hate, I am convinced that it gives them a pleasure the more, and I know from experience that those who are more favoured by fortune derive an heartfelt satisfaction from the sight of the happy faces of their more humble brethren.²³

The passage above betrays the true intentions of this statute, demonstrating that the Government hoped to sooth class conflict by providing public walks and common areas that could be enjoyed by all classes. The continuing themes of public health and the advancement of the quality of life for inhabitants of the cities can be observed in these early proposals, as well as in the later debates on open access. On its passage through parliament, the proposed legislation to provide more public walks became attached to wider plans to fund public museums and libraries. The House of Commons debate suggests that together, these provisions were regarded as a panacea against drunkenness and poor health in the inner cities. The proposals themselves were supported and driven by the Liberal MPs who emerged from the North of England after the electoral reform of the 1830s, and have at their heart the language of charity and temperance rather than the language of rights. This is exemplified by

²³ HC Deb 4th May 1836 c 609

the language of MPs such as Brotherton, who promoted the Bill as a law which would ‘rescue’ workers ‘from the evils resulting from an undue indulgence in the use of ardent spirits.’²⁴ In contrast to the later demands for a right to roam over private land, and to the redistributive proposals that had once been put advanced by the Diggers, these early proposals allowed landowners to mingle with the working man on the landowners’ terms. The Chartists did not ask for any significant sacrifice of private property. The provision of money for parks and museums was not a radical redistribution of private land, but an act of political charity.

Even the Chartists among the Liberal MPs who led the early movement to provide greater access to public walks were anxious to defend themselves against claims that they supported a socialist redistribution of property. This was evident from the fictionalised ‘conversation’ in a pamphlet issued by the Finsbury Tract Society in 1839, a document which was written to enlighten its readers on the aims of the Chartist movement. In this tract, ‘Mr Doubtful’ asks the Radical ‘where is the clause for the distribution of property? Have you forgotten that?’ To this the Radical replies: ‘that is a base and slanderous calumny,’ repudiating any claims that the Charter would redistribute private property.²⁵ In fact, the Chartists aimed for a more subtle separation between property, politics and power. By demanding votes for all men, and by removing the requirement of property ownership as a qualification for the right to sit in Parliament, the aim was to redistribute political influence rather than property itself.

²⁴ HC Deb 14th July 1835 c 577

²⁵ ‘The Question “What is a Chartist” Answered’: Tract issued by the Finsbury Tract Society, 1839 in D Thompson, ‘The Early Chartists’ (London: Macmillan, 1971) p 89

The debates on public space, recreation and self-improvement were to lead to two separate Acts of Parliament. The earliest of these was the Museums Act 1845, which dealt with the education of the working classes. The aims of these liberal reformers were continued with the 1848 Public Health Act, which ‘empowered local administrative bodies to establish ‘public walks’ and ‘means of exercise for the middle and humbler classes.’²⁶ Three parks were established in Manchester and Salford, though the legislation had little lasting legacy outside the North West of England.²⁷ The provision of access in the 1830s and 1840s was essentially a charitable movement supported by friends of the poor. Whilst the debate demonstrates the connections which the politicians of the age made between public health and public walks, it was not until 1884 that access rights were debated as an ideological end in themselves. The continued primacy of private property during this period was identified by rambling activist Tom Stephenson, who noted that ‘this municipal benevolence should perhaps be put into context by bearing in mind that three years before the Select Committee reported, Kinder Scout and the adjacent moors had been enclosed.’²⁸ [The enclosure of Kinder Scout would eventually lead to one of the most celebrated protests in the history of the disparate groups which made up the early access movement. The famous Kinder Scout mass trespass of 1932 was organised by the British Sport Workers Federation, who had grown disenchanted with the inaction of the multiple bodies which formed the Ramblers’ Associations of the time.](#)²⁹ [As a result of the mass trespass, the more established associations were keen to distance themselves from the militant actions of the Federation and from the Marxist sympathies of its members. The trespass is now celebrated as an important date for](#)

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²⁶ F Clark, ‘Nineteenth-Century Public Parks from 1830’ (1973), 1, 3, Garden History, 31

²⁷ T Stephenson ‘Forbidden Land: The Struggle for Access to Mountain and Moorland’ (Manchester: Manchester University Press, 1989) p 64

²⁸ *ibid.* Specifically, this land was enclosed through the Inclosure Act 1848. These enclosures of common land had begun in the Fifteenth Century, and in some areas were to continue until the early Twentieth Century

²⁹ [-Stephenson, above n 27, p 154](#)

[the access lobby, and the Ramblers' Association have organised celebrations for each major anniversary of the event.](#)

The Victorian absolutists

Although the charitable rights granted by the Chartists of the 1830s might have had a positive effect on the wellbeing of the urban poor, these charitable gifts of land use did not require a division or redistribution of property rights to the disenfranchised labouring classes. The relationship between power, property and the law in Victorian England was intractable, with landed property attracting the greatest esteem and power of all.³⁰ These Victorian property laws continued to protect the rights of the possessor of land as well as those of an owner, closely connecting ownership with control. This philosophy combines with the inherent difficulties in identifying the legal owner of certain types of property, resulting in 'relative title' disputes such as *Asher v Whitlock*³¹ and *Elwes v Brigg Gas Company*.³²

The relationship between urbanisation, property and power in Victorian politics is exemplified in *The Mayor, Aldermen and Burgesses of the Boroughs of Bradford v Pickles*.³³ The decision in *Pickles v Bradford* demonstrates the extent to which Victorian property law respected a landowner's ability to control the use of his land. The landowner, Pickles, had control and ownership of the land on which the Many Wells Spring emerged. This spring had for many years been the sole water supply to the growing city of Bradford. In 1890, Pickles

³⁰ See, for example: A Offer, 'Property and Politics 1870-1914, Landownership, Law, Ideology and Urban Development in England' (Cambridge: Cambridge University Press, 1981) p 2

³¹ (1865) LR1 QB1

³² (1886) 33 Ch D 562

³³ [1895] AC 587. For an excellent analysis of this case see: M. Taggart, 'Private Property and Abuse of Rights in Victorian England' (Oxford: Oxford University Press, 2002)

began work to divert the supply of water away from the reservoir, in the expectation that he could obtain money through payment for reinstatement or purchase of the supply. The City Fathers would not give in to these demands, considering this behaviour to be 'vexatious, extortionate, amounting to blackmail, and maliciously motivated to harm the public water supply.'³⁴

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The dispute between Pickles and Bradford was taken to the House of Lords, who rejected the doctrine of the 'abuse of rights.' Taggart noted that the case was an 'illustration of the Nineteenth Century judges' solicitude towards private property' and that this 'illustrates the potency of common law principle that wherever possible...statutes will be interpreted by the courts to protect the property interests of individuals.'³⁵ The case demonstrates the way in which Victorian absolutism conflicted with the needs of the growing industrial population. It is clear that significant developments would be required, and attitudes changed, before the law reflected the requirements of society.³⁶

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For absolutists such as Blackstone, the private ownership of property was both an inevitable result of changes in society and an important catalyst for the development of society. Blackstone famously claimed that the right of property was a 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.³⁷ Whilst Blackstone recognised the importance of private property, his justifications come close to suggesting that private

³⁴ *ibid* p 25

³⁵ *ibid* p 3

³⁶ An alternative reading of this case can be found in D Campbell, 'Gathering the Water: Abuse of rights after the recognition of government failure', (2010) *J. Juris*, 487

³⁷ W Blackstone, 'Commentaries on the Laws of England Volume Two', (Chicago, University of Chicago Press, 1979) p 2

property is little more than a necessary evil, rather than a right that should be protected for its own sake.

To modern property lawyers, the case of *Bradford v Pickles* appears anachronistic, or at least as a high water mark of Victorian Absolutism. Almost forty years earlier, cases such as *re Penny and the South Eastern Railway Co.* reflected a changing judicial attitude towards absolutism.³⁸ This could be seen as the erosion of absolute property rights through industrialisation and competing rights in land, though it may be more proper to conclude that the notion of absolutism was an illusion, and that political expediency will frequently trump any absolute claim in land.³⁹ This illusion becomes particularly apparent at times of social and technological change, or when environmental issues place greater public demands on private property.⁴⁰

The connection between industrialisation and more diverse demands on land was also noted by Atiyah. He described the way in which rapid industrialisation produced the “dark, satanic mills” which were creating the new wealth on which people lived.⁴¹ Life in the industrial towns was unpleasant for many Nineteenth Century labourers, but the author contended that ‘by the middle of the century evidence of greater prosperity began to appear even amongst the working classes,’ leading to the ‘emergence of the possibility of a really prosperous urban proletariat.’⁴² As the article discusses below, it was the increasing wealth

³⁸ (1857) 119 E.R. 1390

³⁹ For further discussion on the illusory nature of ownership, and of *re Penny and the South Eastern Railway Co.*, see: K Gray ‘Property in Thin Air’ (1991) 50 CLJ 252 – 307

⁴⁰ See n.58 below

⁴¹ P S Atiyah, ‘The Rise and Fall of Freedom of Contract’, (Oxford University Press: Oxford, 1979) p 225

⁴² *ibid* , p 226

and influence of these industrial classes which was to put new pressure on the countryside and to challenge the absolute power of private property ownership.

The politics of the Access to Mountains Bill represents a greater recognition of the injustices created when land and property is jealously guarded by adherents to absolutist notion of landownership. The proposed rights were to represent a move away from absolute rights in property which may be gifted to others, and towards claims for a significant redistribution of rights. This legislation would have provided rights for their own sake, and rights which could not be taken away by an owner. As such, the Access to Mountains (Scotland) Bill of 1884 represented the first serious legislative attempt to introduce a 'right to roam' over open countryside.⁴³ The Bill itself was introduced by James Bryce, the Liberal Member of Parliament for Tower Hamlets and later for Aberdeen South. Bryce's Bill was proposed every year between 1884 and 1914, though during this time it evolved from the Access to Mountains (Scotland) Bill into the Access to Mountains Bill, with the proposed right extending to England. The Bill got as far as a second reading in 1888 and was passed in principle in 1892, following which the Bill 'sunk into the background of politics.'⁴⁴

James Bryce is notable as an early advocate of open access, as well as an Oxford academic and former Ambassador to the United States. He has been described as 'a polymathic geologist, botanist, classicist, lawyer and historian.'⁴⁵ A vocal campaigner against enclosure, Bryce campaigned for the preservation of rights over commons and public parks as well as additional rights over open country. As well as proposing the Access to Mountains

⁴³ Access to Mountains (Scotland) HC Bill (1883/84) [47 Vict]

⁴⁴ HC Deb 15th May 1908, c 1440

⁴⁵ M Shoard, 'A Right to Roam: Should we open up Britain's countryside?' (Oxford: Oxford University Press, 1999) p 169

Bill he left his mark on the Canadian Rockies, where Mount Bryce was named in his honour.⁴⁶ Bryce's transatlantic career would have given him an insight into the development of property law in North America as well as in England. The colonisation of Canada during the Nineteenth Century exemplifies a system of property law that was developed to address competing land rights from the outset, by legislators with an ability to reflect on the nature and form of English land law.⁴⁷

Bryce saw his Bill as a measure that would provide access for education and self-improvement. In contrast with the public parks movement of the early Eighteenth Century, the contemporary language of debate reveals that access campaigners were also beginning to regard access as a virtue for its own sake. The Liberal MP Sir Charles Trevelyan, for example, described the exclusion of walkers from Scottish land as a 'social scandal, grotesque in its enormity.'⁴⁸ In common with the debate on access to public walks in the 1830s, members of the Commons were keen to draw attention to the generous arrangements for wider access in other European countries. Trevelyan was a supporter of the Bill during its Second Reading in 1908. In his speech before the Commons he drew attention to the rapid urbanisation that had taken place since the 1830s. He contended that 'sixty years ago, when their fathers were free to wander all over the wild places of England and Scotland, only thirty five per cent of the population lived in towns; now seventy five per cent lived in towns.'⁴⁹

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⁴⁶ C. Harvie, 'Bryce, James, Viscount Bryce (1838–1922)', Oxford Dictionary of National Biography, (Oxford: University Press 2004)

⁴⁷ For the history and consequences of this, see: T. Flanagan et al, (eds.), 'Beyond the Indian Act, Restoring Aboriginal Property Rights' (2nd ed.), (Montreal, McGill-Queen's University Press, 2011)

⁴⁸ HC Deb 15th May 1908, c 1440. The exclusion of the Scottish people from the land was a particularly contentious issue following the Highland clearances of the late Eighteenth Century, which were not quickly forgotten. During this period many highland crofters were cleared from the land to make way for sheep farming. Disputes over clearances and land rights were to escalate to the burning of crofts and the use of violence against those who resisted. See: J. Prebble, 'The Highland Clearances', (London, Penguin, 1969) p 49

⁴⁹ HC Deb 15th May 1908, c 1440

Trevelyan went so far as to argue that ‘there was no country in the world except our own where any serious barriers were placed upon people going out into country districts.’⁵⁰ He went on to ask ‘who had ever been forbidden to wander over an Alp? Who had ever been threatened with interdict in the Appenines? Who had ever been warned off the rocks of Tyrol? Who had ever been prosecuted for trespassing among Norwegian mountains?’⁵¹

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—The open access provisions of the Access to Mountains Bill would have provided access to ‘mountain land, moor or waste land’ and allowed people to ‘walk along the bed or bank of any river, stream, or lake.’⁵² Additional rights included an early forerunner of the ‘right to paddle’ now campaigned for by the British Canoe Union, giving visitors the right to ‘ride in any boat, coracle, or canoe upon any river or lake.’⁵³ These broad new rights of access would never come into force, as the Bill was subject to drastic revision on its final passage through Parliament. As a result of this, the 1939 Access to Mountains Act was once criticised as having become ‘so mauled, mangled and amended by Parliament as to become a monstrous, unrecognisable changeling, not an access to mountains bill, but a landowners’ protection bill.’⁵⁴ Fortunately for the access lobby this Act was never put into effect. Its provisions were repealed by the National Parks and Access to the Countryside Act 1949.

The politics of the Access to Mountains Bills, and the resulting Act, represent a clash between landowners and the potential users of an emergent ‘right to roam’. The damage caused to the Bill on its passage through Parliament may be regarded as indicative of the

⁵⁰ *ibid*

⁵¹ *ibid*

⁵² Access to Mountains (Scotland) HC Bill (1883/84) [47 Vict]

⁵³ Access to Mountains (Scotland) HC Bill (1883/84) [47 Vict] For details on the current campaign by the British Canoe Union see www.riversaccess.org (9/5/16)

⁵⁴ Stephenson, above n 27, p 165

landed hegemony which existed at this time. This was in spite of the Liberal attempts to reduce the power of the aristocracy, contrasting with many other social measures passed between the Wars. Between the reading of the 1883 Access to Mountains Bill and the passage of the 1939 Access to Mountains Act, Parliament had also brought into force the far reaching and significant 1925 Law of Property Acts. This legislation had some significance for rights of access, with Section 159 of the Act allowing 'rights of access for air and exercise' over common land. The Act did not apply to all common land however, and the right of owners to exclude walkers from this land was defended by farming interests up to the passage of the CRoW Act.

Post-War developments

The next legislative development was a significant one, which demonstrates the influence of a Post-War Consensus on the laws relating to access and conservation. This legislation emerged from a political climate where legislators had begun to recognise the value of access rights as an end in themselves, and that the protection of the environment was also as a worthy objective. The introduction of National Parks legislation was an important milestone for conservation and access.⁵⁵ The concept of National Parks in the UK can be traced back to the proposals of the Addison Committee of 1929.⁵⁶ The committee's work was incubated for the duration of the War, and it was not until the 1949 National Parks and Access to the Countryside Act that these proposals became law. The 1949 Act is in many respects a clear antecedent to the CRoW Act, and has been described as 'the first comprehensive piece of legislation concerned with the protection and enjoyment of our

⁵⁵ National Parks and Access to the Countryside Act 1949

⁵⁶ See, for example: J Mair and J Delafons, 'The Policy Origins of Britain's National Parks: The Addison Committee 1929-31', (2001), 16, *Planning Perspectives*, 307

countryside for the enjoyment of the public at large.’⁵⁷ As Johnson notes, the War caused ‘traditional opposition’ to be ‘swept away in a surge of enthusiasm for making a reality of wartime visions.’⁵⁸ Whilst this Act was being debated in the House of Lords, Lord Macdonald praised this unifying aspect of the earlier legislation, noting that:

Conduct prejudicial to the countryside is dealt with in a manner that should safeguard the amenities and, what is equally important and no less necessary, should help to educate the town dweller—a most necessary thing, I admit—in a manner that will add to his knowledge without lessening his enjoyment of the countryside.⁵⁹

Lord MacDonald also noted that he was ‘greatly encouraged in the knowledge that this measure does not lead to Party divisions.’⁶⁰ This is a contention that suggests that these balanced rights of access were not subject to the same critique of the CRow Act that would later be advanced by Conservative MPs such as James Paice.⁶¹ MacDonald went on to contend that:

I have always felt that legislation which did not divide on purely Party political lines was easier to pilot through the House. I have also felt that perhaps the best legislation placed on the Statute Book has been legislation of that kind, where

⁵⁷ J Blunden and N Curry, ‘A People’s Charter’, (London: HMSO, 1990) p 1

⁵⁸ W Johnson, ‘Public Parks on Private Land in England and Wales’, (Baltimore: Johns Hopkins Press, 1971) p 22

⁵⁹ HL Deb 18th October 1949 c 878

⁶⁰ *ibid*

⁶¹ See n. 12 above

Party feelings were not aroused over much, where Party differences were not over-emphasised and where there was a great amount of common agreement.⁶²

By the late 1940s, the overzealous gamekeepers once battled by activists from the Ramblers' Association were beginning to look like an anachronism. The change in attitude of these 'guardians' of the countryside was noted during the House of Lords debate on the 1949 National Parks and Access to the Countryside Act, when Lord Macdonald observed that 'the attitude of the farmer or farm bailiff to an occasional trespasser, however, is much better and much wiser than it was in my boyhood days.'⁶³ He went on to explain that:

Many a time in those days I would wander into a field to pick blackberries or indulge in some such innocent pastime, but before long I had to take to my heels at top speed, pursued by an irate farmer or farm bailiff, and were it not for the fact that the pace of the pursued was faster than the pace of the farmer or farm bailiff, I would have been caught many times.⁶⁴

Lord Macdonald felt that these attitudes had changed significantly before the introduction of the 1949 Act, and related a further anecdote from a visit to Snowdonia. Conversing with a farmer, he noticed a group of men entering his land to pick mushrooms. Macdonald alerted the farmer to the trespass, but was told: 'Yes, but mushrooms are a rarity.

⁶² HL Deb 18th October 1949 c 878

⁶³ *ibid*

⁶⁴ *ibid*

You can hardly object to them picking a few.’⁶⁵ Speaking in the Lord’s, he observed that ‘that was not the attitude of the farmer in my boyhood days. Things have improved since then, even among the farmers.’⁶⁶

The early clashes between landowners and land users were not simply about class conflict, but represented an uncomfortable relationship between landowners and those who wanted access to land. The changing nature of landownership and exclusion that was observed by Lord Macdonald is indicative of a broader consensus on the value of land to the wider population, and the recognition that a landowner should not exercise the power to exclude for its own sake. Whilst the justifications for private property are frequently based on the uses which a landowner can make of this property, legislation to provide access to land identifies and facilitates additional uses of the same turf. The debates on the introduction of legislation to provide open access have therefore opened a rift between land owners and advocates of access, where ideological battles are fought over the same physical terrain.

—The exclusion of walkers from private land is not solely about political power but also concerns the attachment between private property and personal identity. Whilst access law does not constitute a complete deprivation of land, the legislation does include some small deprivation of the ability to exclude.⁶⁷ Theorists have recognised that for some types of land the dichotomy between public and private property should never be applied absolutely. Planning and environmental laws have established a framework which limits an owner’s use

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ See, for example: S Munzer, ‘A Theory of Property’, (Cambridge: Cambridge University Press, 1990)

of land, in recognition of the wider importance of this property beyond the owner.⁶⁸ In this way, the enjoyment and conservation of public resources is able to transcend the hegemony of property ownership. Viewed through this lens, public access to land is not a deprivation of property rights, but an extension of a landowner's responsibility to the public at large.⁶⁹

Access to common land

The penultimate political movement to secure access to open country can be identified in the discussions of the Common Land Forum, which investigated the potential of providing greater access to the countryside through rights of access to registered common land. The Common Land Forum was established by the Countryside Commission in 1983 as an instrument of cooperation, to form a potential consensus on the opening of common land to wider access. The Common Land Forum was itself heavily influenced by the earlier 1958 Royal Commission on Common Land. The earlier Commission advised that common land was 'the last reserve of uncommitted land in England and Wales' and that this land 'ought to be preserved in the public interest.'⁷⁰ The Commission recognised the value of common land for agriculture, as well as the potential for open access to this land to provide a significant public benefit. In particular the report noted that 'the public interest embraces both the creation of wider facilities for public access and an increase in the productivity of the land.'⁷¹ In making its recommendations, the Commission noted the need to balance the interests of conservation, agriculture and access. The importance of intensive management was also

⁶⁸ See, for example: M Radin, 'Reinterpreting Property', (Chicago: University of Chicago Press, 1993)

⁶⁹ Some culturally significant features of the environment have even been recognised with separate legal personality. The potential of such agreements to transcend any model of property theory based on ownership is beyond the scope of this article. See, for example, the Whanganui River agreement in New Zealand: <https://www.govt.nz/organisations/office-of-treaty-settlements/9/5/16>

⁷⁰ Report of the Royal Commission on Common Land, HC (1958), p. 403. The recommendations of this Commission led to the introduction of the Commons Registration Act 1965, which provided new rules for the registration of commons as well as town and village greens.

⁷¹ Report of the Common Land Forum, HC (1986) p 9

recognised, and the 1986 report of the Common Land Forum noted that ‘conserving the beauty of many of our commons and their flora and fauna could not be achieved simply by letting nature run its course.’⁷²

Both reports included the additional recommendation that the right of open access be extended to common land. The 1986 report reflects the frequently cited concerns of landowner organisations such as the National Farmers’ Union (NFU) and Country Landowners’ Association (CLA).⁷³ The report notes that ‘while not against the principles of public access,’ the CLA were ‘concerned with the widely-used form of words “universal public access.”’⁷⁴ The CLA had also argued that commons management schemes should reflect the different interests found in the different types of common land, and that public access should not be permitted to interfere with the necessary management schemes.⁷⁵ This language is reflective of the need for balance between landowners and land users and returns to the pervasive theme that land managers are vital for the continued maintenance of environmentally sensitive areas of moorland.

Similar concerns were raised by the NFU, who argued that many of their members’ farming interests were ‘dependent upon the continued existence of common grazing rights.’⁷⁶ The NFU were described as ‘strongly opposed to their being a universal right of public access to all common land.’⁷⁷ The NFU also argued that ‘in appropriate cases, compensation should

⁷² *ibid*

⁷³ The latter was renamed the Country Land and Business Association in 2001

⁷⁴ *ibid*, p 10

⁷⁵ *ibid*

⁷⁶ *ibid*

⁷⁷ *ibid*

be available'.⁷⁸ It is worth noting the exceptional variety of land uses associated with common land, and the potential risk that a general right of access might have had a disproportionately serious effect on farmers who used the land for the grazing of sheep. This could have placed a substantial burden on the sheep farmers of Wales, raising the argument that the burden of access was not being shared equally between different types of agriculture or land use.

These arguments on compensation and exceptions were balanced by the supporters of open access. Both the Ramblers' Association and Open Spaces Society were represented on the 1986 committee, and these groups argued strongly for 'a right founded in law'.⁷⁹ The access advocates argued against the strict regulations for land management proposed by the NFU and CLA. It was suggested that 'restrictions should be exceptional', and should not interfere with any existing rights of access.⁸⁰ The defensive position taken by the Ramblers and Open Spaces Society is suggestive of concerns that legislation introducing wider rights of access might alternatively have been used as a vehicle for the introduction of further restrictions on the existing access to footpaths and bridleways.

The report itself suggested that there was a sufficient degree of consensus to legislate on wider rights of access to common land, where these rights were balanced by the interests of conservationists and land managers. The 1999 research paper on the CRoW Bill claims that following these recommendations, 'the Conservative government initially thought that all

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ *ibid*

interest groups were satisfied with the idea and planned to legislate on common land.’⁸¹ The paper goes on to contend that it was the formation of the Moorland Association, in 1986, which was to derail this earlier attempt at open access on common land. The members of the Association were generally opposed to opening their land to a broader right to roam and were particularly concerned about the possible effects on grouse moors.⁸²

The influence of the Moorland Association appears to have persuaded the government to move away from a legislative approach to access, and to support an alternative arrangement where landowners negotiated with other interested parties in order to form a consensus on access. This negotiation might have led to the introduction of permissive schemes of access, an arrangement which was endorsed by many other representatives of the landowning interests. The efficacy of these voluntary arrangements was criticised in the 1999 report, which noted that statutory rights of access were negotiated for only twenty percent of this land, and that there were no records to determine which land had been opened under private, voluntary arrangements.⁸³

~~The debates on access to common land are heavily influenced by the language of husbandry and custodianship. This is demonstrated by the continued insistence of the NFU and CLA that common land was important for its productivity, and the assertion that public access could harm agricultural interests in this environment. This argument continued the debate on the use and management of common pool resources. A central text in this debate is Hardin’s ‘Tragedy of the Commons,’ in which the author sets out the dangers of the~~

⁸¹ C Barclay, Research Paper 99/23, ‘Right to Roam Bill’, (London: House of Commons Library, 1999) p 23

⁸² *ibid*

⁸³ *ibid*

exploitation of common pool resources and the consequence of self interest over the common good.⁸⁴

The most recent laws on access have evolved alongside the legislation on rights of common. Christopher Rogers' article, 'Reversing the Tragedy of the Commons,' investigates the advantages of the new Commons Act 2006, compared to the inefficacy of the Commons Registration Act 1965.⁸⁵ The Commons Act 2006, among other things, brings in a new form of local regulation through the commons councils. These councils have the power to make bylaws for the management of common land and to encourage cooperation at a local level. Rogers discusses the implications for sustainability, and critiques Hardin's thesis. Whilst Radin formulated a model of property theory where responsibilities to the wider environment were not recognised as existing as part of an owner's rights, Rogers examines a form of property law where the use and ownership of property is governed by custom and practice rather than by the exercise of absolute and definable rights.

The Access Debate under New Labour

The introduction of a 'right to roam' was a longstanding promise made by the Labour Party. Better provision of access to the countryside had been included in most of the Labour Party General Election manifestos published between 1950 and 1997.⁸⁶ The Labour Party

⁸⁴ G. Hardin, 'The Tragedy of the Commons,' (1968), 162, *Science*, 1243

⁸⁵ C. Rogers, 'Reversing the Tragedy of the Commons,' (2010), 73, 3, *The Modern Law Review*, 461

⁸⁶ Specifically, in the following manifestos:

Labour Party, (1950), *Let us win through together*, The Labour Party, London

Labour Party, (1959), *Britain Belongs to You*, The Labour Party, London

Labour Party, (1964), *The New Britain*, The Labour Party, London

Labour Party, (1966), *Time for Decision*, The Labour Party, London

Labour Party, (1970), *Now Britain's Strong - Let's Make it Great to Live In*, The Labour Party, London

Labour Party, (1983), *The New Hope for Britain*, The Labour Party, London

Manifesto of 1997 carried the pledge that the party would provide ‘greater freedom for people to explore our open countryside.’⁸⁷ This promise now included the *caveat* that the provision of access required the counterbalance of responsibility, with the manifesto stating that ‘we will not, however, permit any abuse of a right to greater access.’⁸⁸

This was to be a ‘New’ Labour Government that had frequently sought to distance itself from the policies of ‘old’ Labour. Rather, it advocated a new politics which came to be known as the ‘Third Way.’ Many of the provisions of the CRoW Act demonstrate the extent to which the legislation is rooted in this new politics rather than in the politics of old Labour. The form of the CRoW Act is indicative of a Government that wanted to balance the interests of the competing groups which contested the same physical terrain.

Many of the broad values of this new politics were set out in Tony Blair’s pamphlet on ‘The Third Way’, in which he identified the New Labour Party as representing the core values of ‘equal worth’, ‘opportunity for all’, ‘responsibility’ and ‘community.’⁸⁹ He also put forward four policy objectives. Blair contended that his party should build ‘a strong civil society enshrining rights and responsibilities, where the government is a partner to strong communities’ and wanted ‘a modern government based on partnership and decentralisation, where democracy is deepened to suit the modern age.’⁹⁰ Of these objectives the second and third are particularly relevant. These aims are reflected in the increased powers of statutory

Labour Party, (1987), *Britain will win with Labour*, The Labour Party, London

Labour Party, (1992), *It's time to get Britain working again*, The Labour Party, London

Labour Party, (1997), *New Labour because Britain deserves better*, The Labour Party, London

⁸⁷ Labour Party, (1997), *New Labour because Britain deserves better*, The Labour Party, London, p.30

⁸⁸ *ibid*

⁸⁹ T Blair (1998), ‘The Third Way: New Politics for the New Century’, Fabian Society, London

⁹⁰ *ibid*, p. 7

bodies and local authorities, and in the complex web of cooperation, accountability and consultation put in place by the CRoW.

This form of language was often deployed to contrast apparently conflicting policies.⁹¹ Fairclough describes such statements as employing language which sets out objectives to ‘not only’ achieve one thing ‘but also’ a second.⁹² In the case of the CRoW Act, this was legislation that was brought in ‘not only’ to open the countryside to wider access, ‘but also’ to protect it. These apparently contrasting objectives are common within the policies of New Labour and are reflected in much of the language employed by the Government at this time.

The balance between environmental rights and access rights can also be observed in Section 86 of the CRoW Act. Under this section, the Secretary of State or National Assembly for Wales is able to create orders to establish ‘conservation boards’ to carry out certain functions in relation to an area of outstanding natural beauty.⁹³ Under the provisions of Subsection 1, the enhancement of economic interests need not be attempted if this is likely to be to the detriment of environmental interests. This reflects the philosophy that has become known as the Sandford Principle, which states that ‘where irreconcilable conflicts exist between conservation and public enjoyment, then conservation interests should take priority.’⁹⁴

⁹¹ N Fairclough ‘New Labour, New Language?’ (London: Routledge, 2000) p. 44

⁹² *ibid.*, p. 10

⁹³ S 86 (1)

⁹⁴ Report of the National Park Policies Review Committee, (London: HMSO, 1974)

The influence of the new Labour Government on economic policy has been described as a depoliticisation of the economy, and ‘the process of placing at one remove the political character of decision making.’⁹⁵ The eventual form of the CRoW Act might best be described as a depoliticised form of access. This allowed New Labour to distance and differentiate themselves from ‘old’ Labour values on access and landownership, as part of a sustained campaign based on the belief that ‘electoral success was...dependent on the party’s ability to differentiate itself from old Labour.’⁹⁶ Not only were Labour able to push a highly symbolic statute through Parliament, they were able to present the new law as a compromise between access, the environment and the rural economy. As the article concludes below, once the Government had framed the debate as an exercise in environmental responsibility and protection, many of the issues associated with access to the countryside became no longer the property of the political left or political right, but the common property of the political centre ground.

The 1997 Labour Party General Election Manifesto had built upon the assurances of the balanced right discussed above with the additional claim to recognise the economic difficulties of the countryside. The manifesto discussed the role of the countryside as a ‘great national asset, a part of our heritage which calls for careful stewardship. This must be balanced, however, with the needs of the people who live and work in rural areas.’⁹⁷ It is of note that the 1997 Labour Party manifesto did not make the explicit promise that access would be provided through a prescriptive statutory scheme. The provision of new access rights on the scale of the CRoW Act was by no means inevitable and the introduction of the

⁹⁵ P Burnham, ‘New Labour and Depoliticisation’ (2001) 3, 2, *British Journal of Politics and International Relations* 127 p 136

⁹⁶ *ibid.*, p 144

⁹⁷ Labour Party ‘New Labour because Britain deserves better’ (London: The Labour Party 1997). The promise of a balanced right of access is a pervasive theme, and reflects those elements of ‘Third Way’ politics that aim to provide legislation that can balance competing rights.

Act relied upon the support of a number of Labour MPs who had a longstanding agenda in favour of wider access.

Whilst the Labour Party appeared to be broadly in favour of wider access, the Conservative Party Manifesto of 1997 put forward the clearest policy on this issue. Their manifesto promised to ‘encourage managed public access to private land – in agreement with farmers and landowners – but strongly resist a general right to roam, which would damage the countryside and violate the right to private property.’⁹⁸ The manifesto argued that rural policy must ‘strike a balance,’ ‘our rural communities must not become rural museums, but remain vibrant places to live and work.’⁹⁹

The breadth of the provisions of the CRoW Act reflects the fact that the promises made for the countryside by the Conservative and Labour parties on the brink of the 1997 election were broadly similar. Both parties intended to improve the life and economics of the countryside, a subject that was of increased importance in the wake of a number of agricultural crises. Where the ideologies of the two parties differed was in the appropriate way to manage the countryside and implement access law. The Conservative proposal that the responsibility for access should lie in voluntary schemes positioned landowners as ‘custodians of the countryside’. The continued support for this approach was reflected in the speeches by the many Conservative MPs who represented rural constituencies which were critical of the CRoW Act.

⁹⁸ Conservative Party, (1997) *You Can Only be Sure With the Conservatives*, Conservative Central Office, London, p.42

⁹⁹ *ibid* p.41

The Jaws of Victory

The voluntary, permissive access rights which emerged from the debates of the Commons Council were not sufficient to placate the supporters of wider access. From within the political left there emerged a number of figures within the Labour Party who exercised their own influence on the emergence and form of the legislation. Up to, and immediately following, the 1997 General Election, these Labour MPs continued their own attempts to lobby for wider rights of access through the introduction of Private Member's Bills. These campaigns can be argued to have pushed the Labour Government in the direction of legislation, and to have challenged the permissive rights that had become the norm.

One such campaigner was the Labour MP Paddy Tipping. Mr Tipping had a long involvement with the Ramblers' Association, and based his 1996 Access to the Countryside Private Member's Bill on a draft prepared by the Ramblers'.¹⁰⁰ Mr Tipping's Bill contained a similar definition of open country to that within the National Parks and Access to the Countryside Act, a definition which was eventually used in the CRoW Act. The earlier Bill would have provided access to cliff, foreshore, woodland and the banks of rivers and canals, as well as granting rights over open country. The Bill was generally well received by the Labour Party, though there was opposition from the Conservative Government of the time.

The spirit of the Access to the Countryside Bill was to provide balanced, partial access, an idea which Shoard identified as 'partialism,' as opposed to the 'universalism' of earlier

¹⁰⁰ Access to the Countryside HC Bill (1997/98) [54]

campaigns.¹⁰¹ This balanced approach was eventually reflected in the CRoW Act, and represents a movement away from the demands for an absolute right of access towards some form of compromise. Despite the nature of this compromise, these earlier attempts at open access represent the positive attitude towards open access on the left of the Labour Party.

Following the victory of a Labour Government in the 1997 General Election, many advocates of open access might have assumed that a new law on access to the countryside was a virtual certainty. In spite of these beliefs, the Government Research Paper published after the Second reading of the Right to Roam Bill contains statements which suggest that the New Labour Government of 1997 was originally lukewarm on the provision of access to open country.¹⁰² Rather than directly pursuing a statutory right to roam, the Government proposed two alternative means of achieving wider access to the countryside.¹⁰³ The first of these was through the expansion of existing voluntary schemes, whilst the second would have compelled owners to open land through statutory intervention. There was an existing precedent for landowners to provide access voluntarily, and research commissioned by the Countryside Agency estimated that voluntary access arrangements had opened around four per cent of land in England and Wales. It was therefore suggested that open access might be provided through voluntary schemes rather than through legislation.¹⁰⁴

Whilst the Government was investigating the options to provide wider access, a number of Labour MPs were continuing their personal efforts to introduce a statutory right of

¹⁰¹ M Shoard, 'A Right to Roam: Should we open up Britain's countryside?' (Oxford, Oxford University Press, 1999), 278

¹⁰² E Ares and G Allen (2000), Research Paper 00/31, *The Countryside and Rights of Way Bill: Access and Rights of Way*, House of Commons Library, London

¹⁰³ *ibid* p.14

¹⁰⁴ *ibid*

access. The value of the campaigns by Labour backbenchers is demonstrated by the substance of the CRoW Act, which eventually came to reflect these earlier access Bills. The access provisions of the CRoW Act in its present form are largely based on the principles of open access included in Gordon Prentice's Right to Roam Bill, which was presented to Parliament in January 1999 following years of campaigning for such a law.¹⁰⁵ The wording of Prentice's Bill was, in turn, based upon the earlier Ten Minute Rule Bill introduced by fellow Labour MP Paddy Tipping, also a staunch supporter of the right to roam.¹⁰⁶

The Government carried out a wide consultation process for interested groups before legislating on wider access. The consultation paper set out four possible methods of providing wider rights of access over open country. These four options were essentially a combination of two different voluntary and statutory schemes. The first option was an 'incentive-led voluntary approach.'¹⁰⁷ This scheme would have provided encouragement for landowners to open land to access, but would not have taken the radical step of compelling land to be opened. The second possibility was the use of 'access compulsion orders,' which would have introduced a more prescriptive scheme.¹⁰⁸ The third option involved a combination of voluntary and permissive access, whilst the fourth option would have legislated in favour of access, but allowed landowners the option to restrict access in certain circumstances.¹⁰⁹

The Government also commissioned the environmental consultants Entec to assess the cost of these alternative means of providing access. Entec calculated that a system whereby

¹⁰⁵ Right to Roam HC Bill (1998-99) [16]

¹⁰⁶ Access to the Countryside HC Bill (1997/98) [54]

¹⁰⁷ E Ares and G Allen (2000), Research Paper 00/31, *The Countryside and Rights of Way Bill: Access and Rights of Way*, House of Commons Library, London, p.15

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

landowners were compelled to open their land would be the most cost effective way of providing open access.¹¹⁰ According to Entec, the most expensive option would be the incentive-led approach. The additional cost of such a scheme was due to the incentive payments to landowners.¹¹¹

Although Gordon Prentice's Right to Roam Bill was eventually withdrawn in deference to the Government's own Bill, the debate during the second reading of the Right to Roam Bill gave the Environment Secretary Michael Meacher a further opportunity to present the Government's reasons for choosing a statutory right of access. Meacher's reasons were twofold. The first was that a statutory scheme would be considerably cheaper: Meacher noted that 'the consultants showed that a voluntary right of access would probably cost four times as much as a statutory right.'¹¹² The second reason for introducing a statutory right of access was that the existing voluntary schemes had not delivered wider access on the scale which had been expected. Mr Meacher also noted that an additional failure of many voluntary schemes was that they could not 'deliver permanence.'¹¹³ The permanence of any future access arrangements was one of the Government's 'key criteria' for access which had been set out in the original consultation paper on widening access.¹¹⁴

The opposition of groups such as the Country Land and Business Association (CLA) to a scheme of compulsion had relied heavily on the efficacy of these voluntary arrangements. For this reason the burden of demonstrating that access could be provided

¹¹⁰ *ibid*, p.16

¹¹¹ *ibid*

¹¹² HC Deb 26th March 1999 c 700 in *ibid* p.17

¹¹³ *ibid*

¹¹⁴ HC Deb 26th March 1999 c 700 in *ibid* p.16

through voluntary schemes had largely fallen upon the CLA during the consultation process. The failure of the CLA to make a reasonable case for private, voluntary arrangements can therefore be seen as one of the greatest failings of the lobby against open access. The blame for these failures does not lie entirely with the relevant interest groups however, as the implementation of voluntary rights relies on the cooperation of landowners and their willingness to participate in such schemes.

Despite criticism by Conservative MPs and rural interest groups, The Government was keen to present CRoW as a passive right that did not impinge on private property. This was scheme of compulsion, but it had an extremely light touch. Michael Meacher noted that:

The Government [had] taken into account the limited nature of the new right of access; its application only to land which is undeveloped and not used for intensive agricultural purposes; the continued ability of landowners to develop and use their land after the introduction of the right; and the extensive provision made for closure of land for land management and other reasons.¹¹⁵

He contended that as a result of these measures, 'landowners will not suffer significant losses or costs as a result of a new right of access such as would warrant the provision of compensation.'¹¹⁶ Not all Labour MPs believed that the Government should tread so lightly on the property rights of the landed, with the Labour MP Andrew Bennett arguing that that 'if members of the CLA want to develop that conflict, there will be lots of

¹¹⁵ HC Deb 17 March 1999 c 670

¹¹⁶ *ibid*

other people who will start to say, “We should question their rights of ownership.”¹¹⁷ Bennett drew on a history of the landowning aristocracy that dated to the Norman Conquest, advancing the argument that among the ‘many people who own big estates in the countryside, their ownership actually came about as a result of successful war crimes.’¹¹⁸

The greatest practical problem for the implementation of the CRoW Act was the mapping of mountain, moor heath and down. The practicalities of this mapping process were to extend the debate several years beyond the enactment of the Act. The initial debate was concerned with the technical rules around the classification of land and the potential difficulties which were recognised by opposition MPs such as Owen Paterson. Paterson contended that ‘many crops in the spring look like grass’ and asked whether ‘a field of grass that is being grown for silage or hay [would be classified as] cultivated land.’¹¹⁹ In the Standing Committee on the CRoW Bill, David Heath noted that ‘it [would] be difficult to provide a comprehensive and acceptable list that includes all of what we understand to be farmed land.’¹²⁰ On the subject of improved grassland, he argued that: ‘those areas will cause more trouble than any other. What the walker perceives to be an extension of natural growth, but which, as the farmer knows, is the product of hard labour, will cause disputes unless the definition is clarified.’¹²¹

¹¹⁷ HC Deb 20th March 2000 c 740

¹¹⁸ HC Deb 20th March 2000 c 740. Bennett’s language during this debate is similar to that of Marion Shoard, and her argument that the exclusion of the people from the land began with the Norman Conquest in 1066. See: M Shoard (1999), ‘A Right to Roam: Should we open up Britain’s Countryside?’ Oxford University Press, Oxford, p 3.

¹¹⁹ HC Deb 20th March 2000 c 786

¹²⁰ SC Deb 6th April 2000 c 160

¹²¹ *ibid*

A further potential problem was the unintended consequence of landowners developing parcels of open country to prevent its inclusion on the map. The possibility of this occurrence was bolstered by the Law Society's argument that access land should not be immune from development.¹²² Gordon Prentice warned that 'the present wording of the Bill seems to encourage anyone who owns down or moor land to go and cultivate it because that is the way to get it excepted.'¹²³ For landowners, the official identification of possible access land as improved or semi-improved was potentially problematic. Balances were put in place through the appeal process against classification, though the relatively small number of appeals suggests that few landowners have pursued this channel. For those that have, the process has been a bitter one where the right of access is disputed by other interested groups.¹²⁴

These problems were compounded by the speed and imprecision of the mapping process. The mapping required under the CRoW Act came under two heads, these being the mapping of open country and the mapping of existing rights of way. The former was essential to give effect to the new access rights, whilst the latter can be regarded as a compromise to landowners who required certainty in the existing rights over their land. It was considered wise to include a time limit for the publication of the maps of open country. The 1999 research paper noted 'the experience of the 1949 Act, which required county councils to produce maps of rights of way. These maps are still not complete some 50 years later.'¹²⁵ The importance of the correct, timely and accurate mapping of rights of way is increased in the light of the provisions of the CRoW Act. Part of the legislation was intended to lend a degree

¹²² DETR, (2000), *Improving Rights of Way in England and Wales, Analysis of Responses to Consultation Paper*, HMSO, London, c 6

¹²³ SC Deb 6th April 2000 c 161

¹²⁴ See -- (2005) 'Block around the rock', *The Guardian*, March 9th

<http://www.theguardian.com/society/2005/mar/09/environment.ruralaffairs>

¹²⁵ C Barclay (1999), Research Paper 99/23, *Right to Roam Bill*, House of Commons Library, London, p. 25

of finality to existing rights of way but created the potential risk that de facto rights of way that were not mapped might be obliterated by the statutory provisions. The ‘Lost Byways’ project was intended to identify and map forgotten rights of way, though its efficacy was heavily criticised by the press.¹²⁶

The CRoW Act was, perhaps, a failed attempt to serve two masters. In November 2000, shortly before the Act was brought into force, the Government published the White Paper *Our Countryside: the future*.¹²⁷ This paper set out the plan for a countryside which balanced the economic rights of residents with the rights of the population as a whole. The White Paper can also be regarded as a rebuttal of the claims that this was an urban Government which was indifferent to the difficulties of the countryside, and as an attempt to counter recent negative publicity in publications such as *Farmer’s Weekly*.¹²⁸ The paper identified ten methods through which the Government would ‘make a difference’ to rural communities, the eighth of which was to ‘ensure everyone can enjoy an accessible countryside.’¹²⁹ The breadth of the provisions of the CRoW Act was reflected in the number of times these provisions receive a mention in this document. Among other issues, the Act was said to improve the management of SSSI’s,¹³⁰ to provide a right of access to common land,¹³¹ to increase biodiversity,¹³² to reduce wildlife crime,¹³³ to increase ‘the enjoyment of

¹²⁶ A project undertaken by Natural England to research and map any ‘forgotten’ rights of way. See: de S Bruxelles and V Elliot, (2008), ‘£15m project was meant to find ancient paths but lost its way’ *The Times*, March 5th

¹²⁷ Department for the Environment, Transport and the Regions (2000) Cm 4909, *Our Countryside: the future*, Stationery Office, London

¹²⁸ I Davis (2000), ‘Prescott Dismisses CROW Bill Dissent’, *Farmers Weekly*, September 29th

¹²⁹ Department for the Environment, Transport and the Regions (2000) Cm 4909, *Our Countryside: the future*, Stationery Office, London, p.7

¹³⁰ *ibid*, p119

¹³¹ *ibid* p114

¹³² *ibid* p123

¹³³ *ibid* p124

the countryside¹³⁴ and to remove obstructions from rights of way.¹³⁵ Through this White Paper the provisions of the CRoW Act were presented as a panacea for the problems of the countryside and a key part of New Labour's plans to demonstrate their credentials with rural constituents.

Conclusions

The genealogy of CRoW presented by New Labour was a misleading pedigree. The early history of access demonstrates a passage through three distinct periods. The first of these was an age of landed power and wealth, where rights of ownership brought an absolute right to exclude. The clear disparity between the landed and the dispossessed was first answered by charitable landowners who volunteered some rights for the benefit of the poor. These permissive rights were not adequate, and this inadequacy led to demands for far reaching reforms to property law and property rights. The final stage in the history of access demonstrates a movement away from charity towards the language of rights. In particular, the legislation that was passed after the Second World War established a trend for combining access rights with conservation. This post-War legislation demonstrates the recognition of a balanced form of property rights which emerged from the desire to combine environmental protection with wider access. The eventual form of the CRoW Act was presented as a successor to this rights movement but was ultimately a missed opportunity.

¹³⁴ *ibid* p133

¹³⁵ *ibid* p135

Power and property are closely entwined, and many forms of power are maintained through tacit means. Whilst walkers may have a right to roam over mountain, moorland, heath and down, the way in which these rights are exercised are still mediated by the owners of land. The codification of a statutory right to roam was a positive development, but a walker by a roadside in Dartmoor would observe the same landscape that existed before the CRoW Act came into force, and this is not a landscape that was ever conducive to wider access. The legal history of access to land demonstrates that property rights were never absolute, but the social history of access demonstrates that the relationship between people and property is not shaped by the law alone. However it was presented, the qualified rights provided by CRoW are a heavily mediated interaction with land that is far from empowered freedom. The CRoW Act might have opened a window on private land but it was never intended to open the doors.