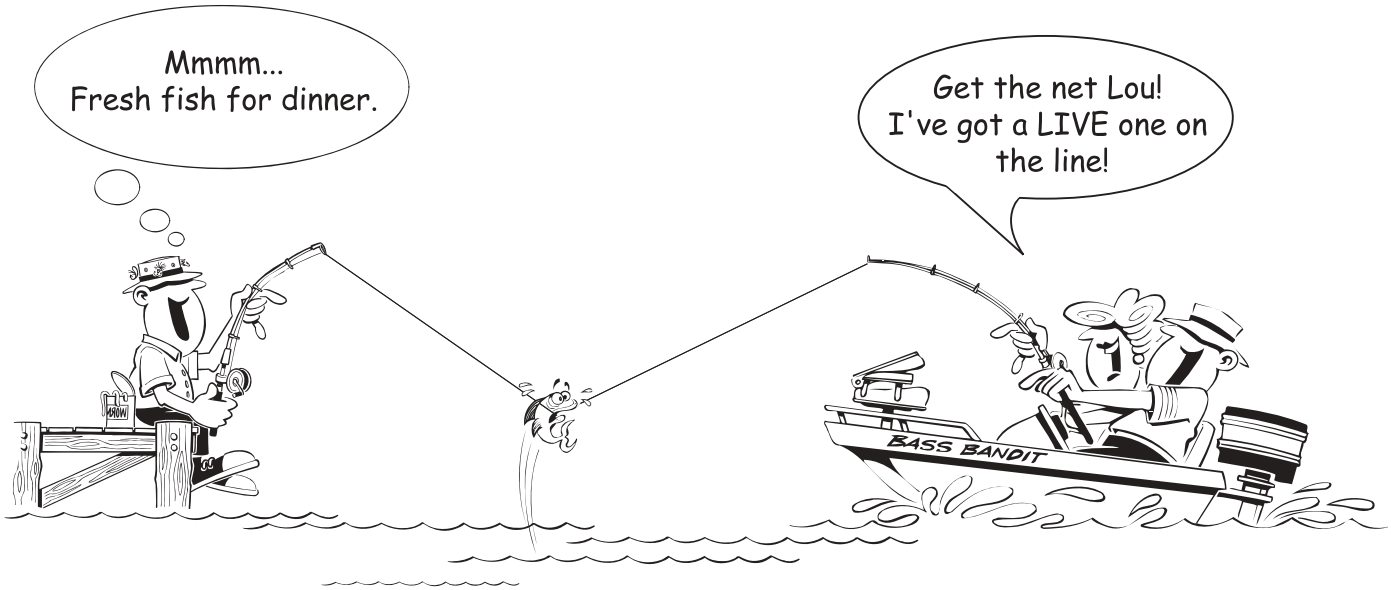

PROPERTY RIGHTS:

A PRIMER

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University of Idaho
College of Agricultural and Life Sciences

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Technical Editor: Kathleen Painter

Property Rights: A Primer

Edited by Neil Meyer

Table of Contents . . . . . .Page

Introduction to Property Rights

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We all have opinions about property rights. Many of us are surprised when we meet someone with a different point of view about property rights. Certainly there is not one, universal view of property rights today.

Property actually refers to the right to a stream of benefits from a given set of resources. In the U.S., access to those benefits is controlled in four basic ways: private ownership plus three forms of public ownership—open access, closed access, and state.

Where do property rights come from?

Property rights come from culture and community. A person living totally apart from others, on a remote island, for instance, or in the American West of the early nineteenth century, does not need to worry about property rights. When people come together, however, the need for specific arrangements about property ownership becomes apparent. This group or community then defines and enforces rules of access to the benefits that come from owning land or other property.

Who really owns my property?

"This land is mine, mine to use and enjoy, mine to treat as I wish," is a common sentiment among many owners concerning their rights to land. This is called the "human territorial imperative." Landowners obviously possess many rights in the properties they hold, but do they really have all the rights they claim? Various actions by governments and courts in recent years suggest that private owners' property rights are shared with the public, and that these rights are limited and can change over time. We are all part of a society that defines our rights and has the power to redefine them over time.

What are property rights?

- Property rights establish relationships among participants in any social and economic system. "Property" is actually the stream of benefits from a particular resource. The "right" to that stream of benefits is an expression of the relative power of the bearer. Ownership of a property right commands certain responses from other people that are enforced by the government and culture.
  Producers who own a hundred acres of cropland are entitled to the returns from their property, management skills, and good sense. They are protected from trespass by their neighbors and by agents of the state. The production from their land, or stream of benefits, is theirs to sell or give away as they see fit.
- Property rights are a function of what others are willing to acknowledge. A property owner's actions are limited by the expectations and rights of other people, as formally sanctioned and sustained in law.
  The boundary between an obligation and a right varies. Patterns of rights and obligations reflect prevailing judgments about fairness, based on people's values. Government has the overall responsibility to protect public health and safety, and to promote general welfare through selective exercise of discretion that sustains quality of life (Libby, 1994, p. 1000).
- Property rights can be likened to a bundle of sticks, with each stick representing a right, or a stream of benefits (Fig. 1). The bundle expands as sticks are added and it contracts as they are taken away. Important sticks, for example, may be the right to sell, to mortgage, to subdivide, to lease, and to grant easements.

The culture or community that grants the rights also reserves a number of sticks for its own use. The most common rights reserved by the community as a whole are the right to tax, the right to claim property for public use, the right to control the type of private use, and the right to dispose of the property in case of death. More recently, issues such as water quality protection, species preservation, and even the preservation of visual landscape have also been withdrawn from the individual owner's property rights bundle.

Governments, acting for the public and for society as a whole, have long exercised the power to tax private properties. They also have the time-honored right to take property for public use under eminent domain, with just compensation. Police powers can be used in making and enforcing regulations that affect owners and their use of land (Barlowe, R., 1990, Southern Rural Development Center).

In addition to the formal rights of government, communities can use other powers to influence private property owners. These other powers include public spending, public ownership power, and public opinion.

History shows that concepts of property that were accepted in the past change with new conditions and the passing of time. Early communities treated land and other natural resources as a communal resource held in joint ownership. Under feudalism, every person's status in society was directly related to the rights that person held in land. The distribution of those rights differed greatly from the ones we have today, but they are important because they provide the basis for our present concept of property rights.

How are property rights defined?

Five legal terms come down to us from the feudal era. These terms—property, fee, estate, interest, and right—have similar meanings and can generally be used as substitutes for each other. "Fee simple" ownership signifies that the owner enjoys all the rights one can hold in property.

Many citizens still cherish the individualistic views that were popular on the American Frontier. However, review of the many programs adopted by local, state, and federal governments in recent decades indicates that, as a society, we have moved towards acceptance of a larger role for government. The reasons for this change over the past 200 years include increasing population, rising incomes and standards of living, more competition for available resources, rising literacy rates, wider suffrage (women and minorities have the right to vote), and conservation and environmental concerns.

From a historical point of view, it appears that the rights we hold in property spring from society. Individuals may believe that their rights are God-given or endowed by natural law, but in practice, the nature of one's rights depends upon the interpretations accepted by the society in which we live. Rights are real only when the sovereign power or government, which acts as the agent of society, recognizes them and is willing to defend and enforce them.

Subtractions from fee simple owner-

ship do not necessarily mean that property has less value, or that it provides fewer satisfactions to its owners. Residential easements that deliver power and water while putting utility underground usually enhance property values. The same can be said for covenants and zoning rules that protect landscape views, control noise levels, or affect architecture. More recently, the right to pollute air and water has been taken away from individual owners.

Why are property rights important?

Because property rights are culturally defined and enforced and because different groups gain and lose power, no one can be certain how far the current movement will go to broaden public powers over private property. The interests of different groups vary greatly. Those seeing private ownership as an opportunity for making money and acquiring wealth have obvious reasons for trying to stop or reverse the trend toward more public power. Others, who view land as a scarce and fragile resource, the use of which is closely intertwined with community concerns, argue for even more public supervision. Most Americans' attitudes lie between these two points.

With the prospect of stronger demands and pressures for public programs to direct land use, individual owners may very well fear that attitude changes will strip them of certain rights.

A growing sentiment for wider acceptance of a public trust view of rights calls for recognition that the rights enjoyed by owners of private property are balanced by their responsibilities. It is to society's advantage that owners use land for productive purposes. Owners have the responsibility to use land, or other streams of benefits, in ways that do not cause injury or loss of benefits to others or work against the basic interests of others in the community.

What is common property?

Common property is joint ownership of a stream of benefits. Management of common property cases is more complicated and often becomes controversial because groups and individuals have different values and opinions about how to manage a given resource. Many property rights conflicts today concern management of commonly owned resources.

What are the different types of common property?

Ownership and management are often confused when the term common property is used. Everyone is familiar with the concept of private property. Other types of property regimes include open access, communal, and state or governmental.

Open access property has no governance, and everyone can use and take part of the benefit stream. This situation of uncontrolled use often results in deterioration of the resource. Fishing on the open seas is an example of this management regime.

Communal management of property means it is jointly owned but there are limits to access and use of the benefit stream. Those who jointly own the resource exercise control over use of the benefit stream. Many New England lobster fisheries are managed in this manner.

Governmental managers make decisions and rules for access and use of benefit streams to state-owned property. Rules for use and allocation of the benefits from publicly owned property often become controversial, for example, grazing and logging on public lands in the western U.S. The same is true for public parks in all areas of the U.S.

Final points

- Property is a benefit that a society and a culture agree to protect.
- A property right is a claim to the benefits or stream of benefits derived from the property.

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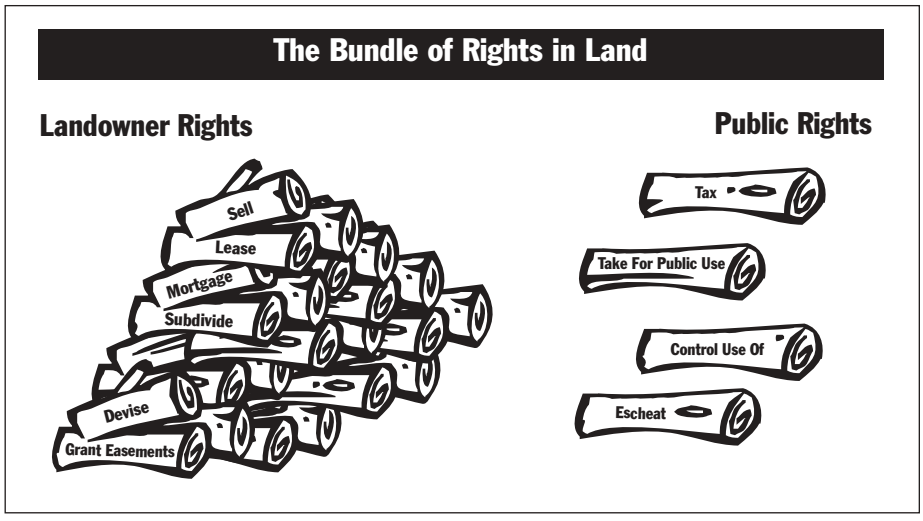
Table 1. Characteristics of different property rights

Type of property	Ownership	Management	Access	Enforcement
Private	Individual	Individual	Closed	Society/Law
Public				
Open access	All members	No one	All members	No one
Closed access	Group members	Group members	Group members	Group members
Government	Government	Government	All	Government

Figure 1. Bundle of property rights



Property and Property Rights

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Introduction

Stories of property rights conflicts are regularly on the front page of local newspapers—landowners criticizing the government for excessive regulations; neighbors complaining about environmental or health problems created by adjoining land uses; environmentalist and others berating both government and industry for losses of prime agricultural land, wilderness areas, wildlife habitat, and scenic rivers. In the past, parties have gone to court, seeking a legal ruling that some private property right or important public interest was being threatened. The resulting rulings frequently satisfied neither the disputants nor the public in general.

In the western United States, these conflicts often focus on publicly held lands. Federal lands represent more than forty percent of land ownership in Alaska, Arizona, California, Oregon, Idaho, Nevada, Utah, and Wyoming. Mining, forestry, grazing, recreation, and environmental interests often clash regarding how well publicly-held resources (e.g., waters, lands, wildlife) are faring, who should participate in the management decisions, and what (if any) private or collective property rights exist in these resources. Some politicians and social commentators suggest that these resources might be better managed if legal title was transferred into private hands (privatization). Others have challenged these contentions.

It is easy to dismiss these very public and sometimes rancorous disputes. These disputes are often clothed in words and phrases such as "private property rights," "takings," "public health and safety," "sustainability," "public trust" and "protection of future generations." These terms are often simply dismissed as interest groups manipulating language in an attempt to capture public opinion for their own purposes. To do so is a mistake, however, because it seems clear that principles beyond self-interest motivate many of the disputants. Indeed the expenditures and personal risks made by Mr. Hedge and others participating in the sagebrush rebellion in the West seem to only make sense if we accept the premise that they are motivated by principles other than or in addition to self-interest, narrowly defined. The same can be said about many agency, environmental, and industry representatives. We will explore this point in even greater detail in subsequent papers.

It is probably more accurate to say that many of these disputes turn on fundamental confusion regarding three things: 1) what principles should motivate government policy regarding natural resources; 2) what property rights exist in disputed resources; and 3) how effective are different private and public property management systems in achieving these ends.

First, even professionals disagree on the content and meaning of specific types of property rights. For example, some economists refer to resources, not subject to any ownership or control, as "common property;" others call the same things "open access" resources and use the term "common property resource" to refer to property that is jointly owned and/or managed by more than one person or organization.

Second, interest group members do not necessarily agree among themselves on the principles or solutions that should be applied in particular disputes. Books and articles discussing public lands and the sagebrush rebellion point out that some permittees and policy makers favored privatizing publicly-held lands, claiming such a move would maximize public welfare. Others favored privatization, not because of its social welfare impact but rather because it would formally recognize what they saw as "rights" already held by the user (a rights-based justification). In the end, Secretary Watts rejected privatization and adopted a "good neighbor policy" under which title was retained by the federal government but greater management control was transferred to permittees. Commentators suggest this policy was justified using both efficiency and rights-based principles.

Third, as we indicated above, disputants often make broad generalizations—both favorable and unfavorable—regarding the effectiveness of public and private management of natural resources. A better understanding of the effectiveness of particular property and management regimes might go a long way in resolving some of these disputes.

The objective of this series of papers is to facilitate public dialogue by identifying and clarifying the underlying terms, principles, and positions readers may encounter in the current natural resource and property debate. Whenever possible, readers will be presented with research exploring the effectiveness of particular property and management regimes in dealing with specific resources. Though some claims may be shown to be unsupported by current data or legal reasoning, our primary purpose is not to act as judges.

This series is organized in the following fashion. In this, the first paper, we will briefly describe some the principles and terms found in the current property debate. In the remaining papers the writers will illustrate how these principles and terms can be used to understand and critically examine public policy debates in such areas as:

- Property rights and land use planning
- Property rights and environmental law
- Property rights and public lands
- Property rights and aboriginal lands

There are some limitations to our approach. We believe establishing a common vocabulary is crucial to facilitate dialogue. Nevertheless, as we indicated above, there is no common agreement among professionals. Readers should be aware of this fact when reviewing the bibliography. We must also reiterate that we will draw no conclusions regarding which property regime or management system is best. Our primary purpose is to facilitate understanding, not act as judges. Moreover, many of our statements will be generalizations. In a series of short papers it is impossible to fully summarize the rich and varied backgrounds and principles underlying each interest group's position. We hope the bibliography attached to each paper will allow readers to delve more deeply into the conflicting views.

Recognizing these problems, we ask readers to suspend judgment until each argument is presented. In this way readers can better understand what motivates those with whom they might agree or disagree. Sometimes a conclusion that an opponent's argument "does not make sense" may simply mean we are using a different measure of "sense" than they. We also ask readers to think

about other possible principles, arguments, and solutions we may have missed in our brief summaries. In doing so, readers may find mutually acceptable solutions to similar problems in their community.

Illustrating the language of "property" and "property rights" conflicts

In a famous early American case, Pierson v. Post, 3 Gaine 175 (N.Y. 1805), the plaintiff, Post, claimed: "[B]eing in possession of certain dogs and hounds under his command, did, 'upon a certain wild, and uninhabited, unpossessed and wasteland, called the beach, find and start one of those noxious beings called a fox,' and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did in the sight of Post, to prevent his catching the same, kill and carry it off." Post sued Pierson, claiming a property right in the fox. How should the court have ruled?

Definitions of "property" and "property rights"

Black's Law Dictionary defines property as: "That which is peculiar or proper to one person; that which belongs exclusively to one. In a strict legal sense, an aggregate of rights which are guaranteed and protected by government."

Similarly, Webster's Ninth New Collegiate Dictionary provides us with a few definitions: "property...2a: something owned or possessed, specif.: a piece of real estate; b: the exclusive right to possess, enjoy, and dispose of a thing: OWNERSHIP; c: something to which a person has a legal title; d: one (as a performer) under contract whose work is esp. valuable..." and

"property right…a legal right or interest in or against specific property."

The terms "property" and "property rights" under these definitions refer not to a "thing"—the fox in the above example—but rather to the real relationship among people regarding the thing. Thus the issue in Post is "Did Post have a right enforceable by a court to take the fox and did Pierson have an equivalent duty to not interfere with Post's hunting?"

What does it mean when we say a person has "property rights"?

Legal and economic commentators frequently indicate that property consists not of a singIe right but rather—as the definitions above suggest—an aggregation or bundle of rights. Unfortunately, the same commentators often mean different things when they refer to this bundle of rights.

The property estate: the "bundle of rights" as a special concept

The term "bundle of rights" is sometimes used in a special or physical sense, particularly when referring to real property. For example, different persons may have legal title to the mineral, air, water, and/or surface rights associated with land at a particular location. That is, a property "owner" may have a right to build on or cultivate the land (the surface estate) but not to remove its rock, oil and gas, or coal without first obtaining permission from the mineral estate "owner."

This same special concept can be employed in other contexts. For example, the court in Post held that Post would have a "property right" in the fox if he had physical custody of it. Similarly, some states have held that a property right attaches to oil and gas, water, and other movable (sometimes called "fugitive") resources when they are in possession of a particular party.

The ownership interest

Recently some commentators have sought to separate the ownership interest into its component parts. For example, McCay divides ownership interest into two parts:

- Title: Who has legal title to the property.
- Management: Who determines how the property may be used.

McCay is not entirely clear as to what particular rights are contained in each of these two categories. For example, we might further subdivide the "title interest" (our label) into the rights to exclude others, use or receive benefits from its use, and/or transfer legal title to another.

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Why Property Rights?

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Property rights are essential to the exchange process because they define the opportunities available to people within an economic system. People must clearly understand what they are buying or selling, what the product or service is, and the flow of rights and opportunities that go with a tangible exchange.

Property is not the tangible thing being bought or sold. What is exchanged is the right to use a stream of benefits from that property or object in some way, and there are always limits to those rights. You have the right, for example, to slice up a tomato and put it in a sandwich but not to throw the tomato at somebody with whom you happen to disagree. Similarly, the owner of a piece of real estate may own the right to do some things on and with that land, but not to do other things.

While the notion of property rights is essential to transactions in any kind of a market context, those rights are separate and defined, and they may differ from one transaction to another.

Rights as social agreement

A right exists only if you and others in society, collectively and reinforced by the state, accept, acknowledge, and agree to its existence. University of Wisconsin agricultural economist Dan Bromley has said, "Rights are not relationships between me and an object, but between me and others with respect to that object."

Rights to property, then, exist only in a publicly sanctioned context within the social system in which there is general acceptance of the right being exercised. Once social acceptance is accomplished, the state reinforces and ensures the relationship between ownership and exercise of the associated rights. Without enforcement, rights have very little substance and essentially cannot be exercised.

Rights are limited by what you and others will agree is acceptable. My right to do something is a function of what you're going to let me get away with, both in a formal sense and in a less formal sense.

Property rights are transferable

In order for a market to function, rights to the flow of benefits associated with a tangible object must be transferable from one person to another. They

may be transferred collectively or separately. Mineral rights may not include surface rights. Your rights to use water adjacent to your land are limited by the impact your actions may have on other people who are also dependent on that water.

Rights differ according to circumstance

The property rights movement most familiar to people in the United States today relates to real property (land) and to the flow of services that comes from land ownership.

A landowner has certain exclusive rights that others cannot exercise. These rights are not absolute, however. Members of the general public may have interests that impose limits on a property owner's rights. The interest of non-owners is reflected in the institutions and policies that evolve around the flow of services, the flow of goods, and the flow of opportunities from a piece of land that are not necessarily limited to the person who holds the land title.

When a property owner's income from a piece of land is compromised by public actions of some kind, for example, by a new law, does the owner have a right to compensation because the government has taken away a land use opportunity? Or is the government reclaiming rights that were granted to the owner when demand for land services were different?

Range policy in the western United States is a good example of these questions. Rights in range land were granted at a time when it was clearly in the public interest for private individuals to invest in and operate those resources for the income generated by raising beef or wool. More recently, there is interest in resource services other than the commodity values associated with cattle or sheep. Government is saying, "We're going to take back from you the right that we gave you years ago."

Debates over "the public interest" frequently call for a reallocation, or a rethinking of the distribution of rights in real property. Whether a change of property rights is a cost or a benefit really depends on one's point of view and the existing allocation of property rights.

Two basic lines of argument exist on this question. First is the natural rights theory, which asserts that ownership arises from the natural order of things and is not subject to the whims of government. That is, land becomes property through the effort of an individual to make that land generate income and produce something of monetary value. According to this argument, the owner has an inherent right to that land because of the efforts that turned the basic resource into a flow of services, with value associated to them. This is a prominent theory of property rights in many current discussions.

The second argument regards ownership and property as a social convention, something created by people to accomplish community purposes. According to this view, property ownership is a function of human institutions that establish sets of land services for society. No set of rights is natural or permanent. All are relative to prevailing views about natural resources and land services that come from those resources.

Common property

Rights to property are complicated in some cases by the character of the process that creates those rights. What Garret Hardin has famously called the "tragedy of the commons," really describes open access to a set of resources. There is an important distinction between common property resources and open access resources. Hardin overlooks the reality that both formal and informal rules govern the use of property that is held in common by a group of like-minded individuals. These rules encourage stewardship of the land or resource and discourage exploitation.

The lobster fishery along the coast of Maine is one example of common property. A set of formal rules exists about the size of lobsters that can be taken, but the real governance of that lobster fishery is the informal way that lobster fishers themselves keep track of each other.

It would be impossible for me, as someone from "away," to come to Winter Harbor, Maine, put out a string of lobster traps, and expect to get anything out of it. I could get the license, but the other lobster fishers in that town would not take kindly to an interloper; eventually my traps would disappear. My ability to make an income would be compromised because I am not part of the community that is attempting to gain a living from those resources.

Within the coastal lobster fishery, people know that their fishing is restricted to a certain part of the coastline. No one goes from one harbor to the next. The boat numbers are known, as are the color of the traps. There is a strong, informal system governing that fishery, which has sustained it for a long time, and there is a clear incentive for stewardship. Everyone in the community with a license to fish gains, even though their rights are interspersed.

Open access

Garrett Hardin, in fact, described open access resources. When rights to a resource are thrown wide open without formal or informal restrictions, it is difficult to separate one user from another, to avoid overuse, or to encourage stewardship. Unrestricted access may cause loss of quality.

Publicly owned

Publicly owned resources are another category. Government can acquire property rights, or opportunities, from individuals either through market transaction, eminent domain, or some other way. The government then manages the resource for the public at large and decides the mix of services to be generated.

Public trust

The public trust is a particularly interesting doctrine in law that asserts the right of government to protect the unorganized public from actions taken by individuals in the private sector, or from the arbitrary actions of other governments. In other words, according to the doctrine of public trust, it is the responsibility of government to protect the quality of the Great Lakes, the quality of the oceans, and the quality of other water resources because those resources are fundamental to the public good. The same can be said for air quality and public health.

The resources are used by individuals, but ultimately there are safeguards that allow government to step in and monitor the way they are used, to protect the public trust. In California, actions on development were restricted near Mono Lake to protect the quality of the land and water making up that resource. Acting in the public trust, government stepped in to protect the basic environmental and scenic quality of the lake and adjacent lands.

Perhaps the public trust doctrine could be applied to protection of the basic productivity of farmland, requiring that it be preserved not only for the next generation, the next ten, twenty, or even thirty years, but for all future generations. Perhaps there is some overriding, compelling obligation of government to shepherd that resource. The public trust is an important concept to explore in resource policy.

Current status

No set of property rights is permanent. The distribution of rights reflects

the interest of non-owners as developed through public policies of various kinds, and these policies change with time. Certainly, no set of property rights is absolute. It is fair to say, however, that the current distribution of opportunity and rights is sanctioned and protected by the government.

Property rights protection statutes are being discussed around the country, with citizens calling for a statutory approach that would require any deprivation in value be compensated. Only Florida and Texas have mandatory compensation when private rights are compromised by public action. Of the others, eighteen or so require that governments weigh the property rights consequences before enacting new laws. Under the U.S. and state constitutions, owners cannot be deprived of property without due process and just compensation. The existing structure has some sanctions and is protected in law.

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Why Property Rights Matter!

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For purposes of this discussion, property rights are all of the laws, rules, customs, conventions, and presumptions that influence the social and economic behavior of individuals or groups as they act in society. No distinction is made between property rights and institutions; they are synonymous and the words are interchangeable. The emphasis is on exchange.

The market is not an exchange of goods but rather an exchange of claims. The futures market makes that clear. One wishes to possess only the claims to wheat or pork bellies—the property rights—not the boxcars of commodities.

If all exchange is with respect to property claims, where does the property come from? "It's mine, I can do what I want with it!" is a common cry of children at play. It's also the cry of the landowner whose farm has been in the family for generations and who now wants to establish an intensive hog operation without community interference. But what makes it "mine?"

Origins of property

According to John Locke, property comes from the incorporation of labor into something that creates value. For example, argues Locke, the value incorporated into nuts by the effort put forth to gather them from the forest floor makes those nuts the property of the gatherer. However, by the same logic, the person who snatches the bundle of nuts from the gatherer and flees the scene becomes the proper owner of the nuts. The thief incorporates superior guile and swiftness into the value of the nuts.

We are also quick to assert that property is established by law, but according to J.F.A. Taylor, the law and police only preserve property, they cannot establish it. For example, the property right with respect to custody of the children was awarded to their mother in the rancorous divorce of a friend. My friend resolved not to pursue his grievances with his ex-wife through his daughters and told me he would say nothing about their mother that he could not justify to them when they were 25 years old. The ex-wife did not similarly restrain herself, however, and her relationship with the daughters deteriorated as they defended their father against her deprecations.

Things became so acrimonious between the mother and daughters that by mutual agreement of all family members the girls went to live with their father. The courts still held that the mother was custodial parent while the girls lived with their father.

By their mutual agreement the family created a new set of rights, contrary to the court's ruling. Of course, had the mother not agreed, the courts would have preserved her custodial care and the girls making their home with her.

In addition to clarifying the relationship of rights to the law, the example above also illustrates the point that Taylor makes about the origins of property. "It's mine!" not because I assert it, but because you agree. "My right of property in a thing depends not upon my claim to it, but precisely upon your readiness to admit my claim as privileged," says Taylor.

This is the paradox: your property rights in anything depend, not on your claims, but on others' acknowledgement and forbearance, which may or may not be codified in law. This radical sense that all property in a degree is "public" is the fundamental basis, says Taylor, of all peaceable intercourse between people. There is no property without community. This is a concept not fully understood by some in the "property rights" movement around the country.

Formal and informal property rights

As indicated earlier, some property rights are formal, and codified in law, administrative rules, and practices, while others are customary and informal, mostly unconscious and embedded in culture or habit. According to John R. Commons, "If we endeavor to find a universal circumstance, common to all behavior known as institutional, we may define an institution as collective action in control, liberation, and expansion of individual action." In another reference, Commons states that institutions, or rights, "order the relationships between people."

One of the most graphic institutions, or property rights, is the line down the

middle of the road. Its physical presence helps you know your place vis-a-vis the other users of the road. To get some sense of the effectiveness of the physical aspects of this institution, one need only drive a newly paved road without any lines on a dark, rainy night. Examined further, the line represents a set of legal arrangements that can result in a ticket from the police if you pass another car when the line is solid.

The effective functioning of the line as an institution depends on more than its physical attributes and the formal legal rules related to use of the road. It also depends on public understanding, to such a degree that the rules have become a part of our culture. Step off the curb and look to the left for oncoming traffic in London. The red, double-decker bus coming from the right will remind you that there is something else at work in addition to law.

Interdependence of people

So long as everyone is in agreement, keeping either to the left or to the right of the center line in the road is equally convenient in predicting where the other guy will be. The tougher property rights issues are when there is disagreement about what is convenient—who owns the land where the road might go; how it can be acquired for that purpose; and whether there is need to protect swamps in its path.

Property rights are needed because people are interdependent. Property rights sort out the conflicts that come from that interdependence and provide predictability about outcomes—part of the stability function of rights in a society. The conflicts, or interdependencies, between people are influenced, or even partly determined by, people's relationships to things.

Attributes of things

The physical characteristics, or attributes, of things make a real difference in relationships among people and in the property rights that may be useful in ordering those relationships. Different attributes create different types of interdependencies, which lead to different choices of property rights.

Choice

Frequently, alternative rights, or institutions, will achieve similar outcomes. Speed limit signs, "children at play" signs, and speed control bumps are all intended to order the relationships between children at play and drivers of cars through the neighborhood. Each has advantages and disadvantages in achieving the desired relationship—prevention of accidents involving children while keeping the road useable for transportation. Groups will argue over the choice of the institution even when all agree that some degree of speed limit in the neighborhood is essential.

Open market economies are not free
Property rights in practice

Debate about property rights frequently refers to specific legal or administrative rights that are codified in law. Rights that are culturally or informally enforced, however, are a neglected area worthy of consideration, particularly the rights implicit in market transactions that make it possible for the market to function. Some of these rights are formal, but many are informal and embedded in culture.

As an illustration of how the attributes of things matter in relationships, consider the following communication between Canadian authorities and the commander of a U.S. Navy ship off the coast of Newfoundland in October, 1995:

Americans: Please divert your course 15 degrees to the North to avoid a collision.

Canadians: Recommend you divert your course 15 degrees to the South to avoid a collision.

Americans: This is the Captain of a U.S. Navy ship. I say again, divert your course.

Canadians: No. I say again, you divert your course.

Americans: This is the aircraft carrier U.S.S. Lincoln, the second-largest ship in the United States' Atlantic Fleet. We are accompanied by three destroyers, three cruisers, and numerous support vessels. I demand that you change your course 15 degrees North, That's one-five degrees North, or counter measures will be undertaken to ensure the safety of this ship.

Canadians: This is a lighthouse. Your call.

No matter the relative authority of the individuals in command, the physical attributes of their charges determine the outcome of the conflict in the relationship. Lighthouses don't divert their course.

James Fallows says, in his book *More Like Us*, "In the long run, a society's strength depends on the way that ordinary people voluntarily behave. Ordinary people matter because there are so many of them. Voluntary behavior matters because it's too hard to supervise them all of the time. This voluntary behavior is what I mean by 'culture.'"

Our own rhetoric about our economic system is one reason it is difficult to see the voluntary behavior, or culturally based property rights, that helps make our economy function. Consider the following quote from an article on Albania in the Wall Street Journal of March 4, 1998:

"While pyramid schemes are common in post-communist countries, they grew to more than $1 billion in Albania, swallowing a small economy, which lacked the basic regulatory institutions common in the free market."

The sentence is contradictory. The rhetoric is wrong. The trouble in Albania is that there are free markets, and free markets do not describe what we have or want in the United States. That internally inconsistent statement in the most prominent economic newspaper in the U.S. suggests that many misunderstand the real basis of a market economy.

The changes in Eastern Europe and the former Soviet Union offer a perspective on our own economic system. Economists and non-economists alike give evidence of misunderstanding our own market system and its underlying basis in persistently calling it a free market system rather than an open market economy.

Informal property rights including a general lawfulness and trustworthiness are necessary to the successful functioning of our economy. Broken knees are a substitute to secure contracts where mafia or black market organizations operate in the absence of trust and/or a willingness to follow commercial law. The same system operates in our society in the underground economy, where normal property rights don't function.

In Taylor's terms, this is another example of an absence of covenant, or community. There are no property rights to permit any transactions beyond cash exchange under the rule of caveat emptor ("let the buyer beware"), which applies to both the buyer and the seller. Currency and commodities alone do not constitute a market.

A market exchanges claims, and the existence of claims is contingent upon some sense of community, something more than physical possession of the good. Community requires a degree of civility, trustworthiness, and goodwill.

New rights

As a society grows and develops, new rights emerge to control and manage advances in technology. New technology means new things, new interdependencies between people, and thus new rights.

Without new technology, however, the only way to achieve development is to create new rights that bring more productivity, or more satisfaction from better use of existing resources. It is like-

ly that new covenants about the use of other resources will come in informal agreements that expand people's radius of trust and control over their destiny.

Al Schmid's book, *Property, Power and Public Choice,* lists a set of attributes that he argues creates different types of relationships between people.

- **Incompatible use:** Like apples—if you eat it, I can't.
- **Exclusion costs:** Children can make money selling apples or lemonade, but they probably won't do as well selling views of their snow sculptures.
- **Economies of scale:** I like hamburgers and fries, but I also like hummus. I have to make hummus at home, because it isn't generally available in the grocery store. Because of others' shared tastes and fast food scale economies, the unit cost of hamburgers and fries is low. For exactly the opposite reasons, the per unit cost of hummus is high.
- **Joint impact:** People prefer to live next to a conservation area instead of a landfill.
- **Transaction costs:** It's what small claims court is about.
- **Surpluses and peak loads:** Retired people, without kids at home, take vacations when schools are in session, demand is low, and therefore, so are prices. Prices vary by season. Pricing is a property right.

Summary

The lay community tends to view property rights as rights in land. In recent years, the general public has acknowledged the notion of intellectual property rights to cover the results of creative efforts—from computer programs to popular songs—but such views of property rights are much too limiting.

Here we've considered property rights to be all the laws, rules, customs, conventions, and presumptions that influence the social and economic behavior of individuals or groups as they relate or act in society. John R. Commons's notion is that property rights are collective action in control, liberation, and expansion of individual action. Property rights are necessary because we get into each other's hair.

"No free lunch," is a fundamental precept of economists. Much more interesting, however, is who prepares lunch, serves lunch, sets the menu, and pays for the lunch. That's the domain of property rights.

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Property Rights in Historical Perspective

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In a recent speech, the president of the American Farm Bureau complained that "rats and bats, bugs and weeds are claiming title to our lands." He argued that restrictions imposed by laws such as the Endangered Species Act amounted to a "taking" of the property rights of farmers and ranchers. He apparently believes that property rights are absolute and self-defining: if farmers can't do what they want on their property, then their rights must have been infringed.

Most constitutional provisions, however, are not absolute. The second amendment, for example, clearly states that we have a right to bear arms, but no one questions the government's right to prevent your neighbors from arming themselves with nerve gas or nuclear weapons. Thus, "arms" is not a self-defining concept and is certainly not absolute.

At some point, lines must be drawn and terms defined. We must go outside the words themselves to determine their meaning. History is one place we can get that context.

History shows that property rights have evolved over time. Our recognition of property rights has not been linear, but schizophrenic and dynamic in nature.

On one hand, we firmly believe that people should be able to do what they want with the property they own. The desire to maintain strong property rights protection is based not only on utilitarian grounds (that is, we need to protect property to give people incentive to produce), but also on fairness grounds (if you worked hard to get the property, you should be able to use it).

On the other hand, we hold an equally strong conviction that there is a public interest in how property is used, and at some point, the public's interest outweighs the individual's rights.

The Federalist perspective

Both of those perspectives are well represented in history, beginning with the framers of the Constitution. On one side was classical liberalism, embodied in Federalist thinkers such as James Madison, who believed that individual property rights were of crucial importance and deserved stringent protection. "Government," Madison said, "is instituted no less for the protection of property than of individuals."

Federalists understood that other

rights were of no use unless property was safe. Arthur Lee, of Virginia, said that "the right of property is the guardian of every other right, and to deprive people of it is in fact to deprive them of their liberty." For example, the right of free speech would be worthless if the government could threaten your property in retaliation.

The Republican perspective

Colonial republicans, such as Thomas Jefferson and Benjamin Franklin, placed more emphasis on the limitations of individual property rights. Of course, they believed strongly in property—Jefferson maintained that the key to democracy was a nation populated by small landowners secure in their possessions.

They also believed that property itself is a creature of society, and is therefore subject to limitations imposed for the public good. Jefferson, for example, had been to France and had seen rich landowners' fields lying idle while poor people starved. In a letter to Madison, Jefferson declared that in that case, private property rights had been taken too far: Property is "the common stock of all men to live on and use," he concluded.

Franklin had a similar opinion: "Private property is a creature of society and is subject to the calls of that society where its necessity shall require it." They recognized that property exists in the first place only because we agree as a society to respect a person's claims. Therefore, to protect the broader community, society has the right to limit the use of property.

Dynamic debate

These fundamentally different ways of viewing property have been imbedded in the U.S. Constitution from its inception and are nicely described by Professor Philbrick: "One was looking to individualism to save society. The other was looking to society to save the individual."

The same sort of debate, between individualism and society, goes on today over topics like welfare, social security, gun control, and affirmative action. Viewpoints stressing individual rights can be traced back to the Federalists, while those stressing society's interests are rooted in the colonial Republicans.

Property rights should really be understood as a balance between these competing interests. Several Supreme Court decisions illustrate how our legal decisions have favored one side or the other at various times in history.

Legal history

Mugler vs. Kansas, 123 U.S. 623, 8 S.Ct. 273 (1887) In the 1880s Kansas passed a prohibition law against the manufacture or sale of alcoholic beverages. This was not good for Mugler, who owned a brewery. He sued the state, claiming the law had destroyed the value of his property, and was therefore a "taking" of property in violation of the constitution.

The Supreme Court rejected that claim. Justice Harlan wrote that society must be able to control the use of property for the general good and that property is held under an implied obligation that its use not be injurious to the community. At this time, the Republican philosophy—that property is a creature of society and therefore its use can be limited—was more persuasive to the Court.

Pennsylvania Coal vs. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922) This landmark case adopted instead the Federalist philosophy, articulated in the majority opinion by Justice Oliver Wendell Holmes. The case involved the Kohler Act, by which Pennsylvania prevented coal companies from mining coal in such a way as to cause the subsidence of the surface. That seems like a reasonable thing to want to prevent, and Holmes did not deny it, but he believed that the law deprived the coal companies of their property interest in the coal that must now be left unmined.

The coal companies had purchased the mineral interests from the surface owners. Now the government had come along and basically transferred the interest back, without compensation. That it might be a good law is irrelevant, Holmes said: if society wants this done, it must pay the individual whose property is taken. This view is reminiscent of the Federalist position, stressing individual rights over society's interests.

Justice Brandeis wrote a powerful dissent that echoed the Republican viewpoint. Brandeis argued that society must be able to limit property uses that are harmful, without having to pay the owner. As Jefferson and Franklin might have said, he noted that property is held always subject to an implied limitation that its use not be injurious to the public.

Penn Central Transportation Co. vs New York City, 438 U.S. 104, 988 S.Ct. 2646 (1978) Fifty years later, this case involved a modern example of property limitation: New York City's landmark preservation law. Penn Central claimed the law basically prohibited them from building an office tower on top of the Grand Central Station, which they said resulted in a taking of their property.

Justice Brennan wrote the majority opinion, and once again the Republican position won out. Brennan relied on Mugler and held that the public's interest in preserving landmarks outweighed the harm to the landowner. Justice Rehnquist, in dissent, followed the Federalist philosophy and found that even though this might be a very good law, the restriction on private property was too great and required compensation to the landowner be sustained.

Keystone Bituminous Coal Assoc vs De Benedictus, 480 U.S. 470, 107 S.Ct. 1232, (1987) This case is fascinating because the facts appear to be virtually identical to those in Pennsylvania Coal some 60 years before. Again, it involved a Pennsylvania law prohibiting coal mining that could cause subsidence. It provides a good illustration of the ebb and flow of viewpoints, because the Court decided the opposite way.

The majority opinion relied on the Republican philosophy of the public good. Justice Stevens emphasized the public interest in preventing the harm of subsidence, holding that it outweighed the private property interest in the coal. Justice Rehnquist again dissented, stressing the Federalist view that property rights cannot be trampled even for public good.

Lucas vs South Carolina Coastal Commission, 505 U.S. 1003, 112 S.Ct. 2886 (1992) Just six years later, Rehnquist's Federalist position prevailed due to some major changes in the Court's composition. The Lucas case involved some restrictions on some beachfront lots on the South Carolina coast. Lucas claimed that the restrictions imposed by the state to prevent erosion and for other environmental reasons totally destroyed his property interest. Justice Scalia, writing the majority opinion, said that if property interests are destroyed, they must be paid for, no matter how beneficial the restrictions. Justices Brennan and Stevens, whose Republican view was ascendant in Keystone and Penn Central, now wrote in dissent that the prevention of harmful property uses should not require compensation.

A healthy balance

The two philosophies have seesawed back and forth in our jurisprudence: Republican view in 1887, Federalist in 1922, back to Republican in the 1970s and 80s. Now the Federalist position is once again dominant.

We must conclude that both views

are legitimate parts of our constitutional culture. Neither one is absolute—there is a balance between them that makes it difficult to predict the outcome of a particular case. The balance is probably a healthy one, as neither the individual nor society should be allowed to go unchecked, and both philosophies are so clearly a part of our culture.

Evolving rights

History also teaches us that property rights are constantly evolving to fit the changing conditions of society. There has never been an absolute "right" to do anything with property. Restrictions result from evolving societal needs.

After the great fire of the 1600s in London, stringent restrictions were placed on the type and location of new buildings. When the fear of highwaymen reached a peak, the English government outlawed bushes and trees near the roads where the robbers could hide. The public need for safety justified private property limitations.

In America, property rights were rightfully emphasized by an overwhelmingly agrarian society in which eighty percent of the people derived their living from the land. Government restrictions on property were naturally suspect, given the desire of Americans to be free of the feudal tendencies and the oppression of the English crown.

But as the nature of the economy changed, property rights changed with it. Jobs and benefits, or stock ownership, became just as important as land. The law changed to give employees some protection and to recognize intangible property as well as real property.

As the information age has evolved, we have seen additional changes in property. Trademarks and copyrights may be far more valuable than land. The framers of the Constitution could not have foreseen property rights in Internet web sites, body parts, and fertilized human eggs, and yet we must adapt their ideas to fit these new realities.

History teaches that what we mean by "property" and "property rights" has never been set in stone. Instead, our recognition of these interests is constantly evolving—what may have been allowed yesterday may be unacceptable to society today. Particularly in the environmental area, the absolutist view of property rights seems misplaced—what we see as the proper use of land (and therefore the "right" of the property owner) is bound to reflect the constantly changing needs of our society.

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Common Property and Natural Resource Management

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Introduction

In the United States, property typically belongs in one of two classes: private or public (state). Another form, common property, has elements of both private and public property. Common property is found worldwide in natural resource management, most notably in fisheries management. In contemporary economics literature, the term common property is often confused with open access property. Open access property lacks any defined ownership so that the resource is open to harvest or use by anyone wishing to exploit it.

This paper attempts to define common property within the American perspective of property and to look at how other cultures manage common property resources. Examples will be presented of the effects of shifting resource management from common property to either private or public property. While much of the literature on common property focuses on fisheries, there are examples of common property management regimes for grazing, communal forests, irrigation, and groundwater, among other resources. Finally, the authors discuss the use of common property as a means to manage land and natural resources to achieve optimal utilization in American society.

Although property rights issues are often considered the domain of economists and lawyers, this paper demonstrates that anthropologists, sociologists, and other social scientists have provided much research into property rights in general, and common property in particular. Furthermore, treating property rights as strictly a matter of economics and law often results in exploitation of natural resources. It can also erode or destroy local cultures that have effectively managed these natural resources through common property management regimes.

Property rights terminology

The American Heritage Dictionary of the English Language (Morris, 1981) defines terminology as, "The vocabulary of technical terms and usage appropriate to a particular trade, science or art; nomenclature." Terminology is the essence of communication within and between disciplines. When incorrect terminology is used, concepts, theories, issues, and solutions will be distorted and misunderstood. The commons and common property have been subject to a variety of academic studies by biologists, economists, sociologists, anthropologists, geographers, lawyers, and historians, each with their own terminology. The commons and common property are frequently misunderstood concepts in natural resources and economics literature. The precise definition of common property varies among scholars. However, most definitions of common property rights include these elements: 1) A well-defined group of co-owners, who 2) develop and adhere to a well-defined management regime that includes 3) proscribed access by owners and exclusion of non-owners, and 4) rights and duties of owners with regards to rates of use of the common property resource (Bromley 1991; McCay 1996; Swaney 1990; Feeny et al. 1990).

Common property is frequently con-

fused with open access property, in which the resource is available to anyone who can access and use it. Swaney (1990) and others suggest that the Latin term *res nullius* be used to describe open access or non-property and that *res communes* be used to describe common property. The confusion between the commons and open access has led to notable misunderstandings within contemporary natural resource users. For example, in *The Tragedy of the Commons*, Hardin (1968) confuses open access for common property using an example of an overgrazed meadow. This single citation has been used by a number of policymakers in determining natural resource management schemes. A natural resource management scheme reflective of Hardin's findings will likely lead to privatization or a strong government role (McCay, 1997).

Increased government involvement in property use will likely place limits in the way property rights may be used. Any reduction in property rights is called attenuation (Quiggin, 1988). Attenuation of common property is a likely consequence of accepting Hardin's tragedy of the commons as fact. Limited work has been done in the United States to manage natural resources within a common property regime, despite numerous examples of successful natural resource management as common property. Historically, failure to recognize common property has led to exploitation of resources as described by Brox (1990) in the northern Norway fishery and Matthews (1995) in the collapse of the Grand Banks fishery off Newfoundland. Another example is the disregard of Native American common property rights throughout the course of the settlement of the United States (Swaney, 1990).

Property is, in fact, the right to a stream of benefits. It includes the right to exclude others. Property is a reflection of the culture where it is recognized. Property rights in western culture have evolved to assist in the harvest of limited resources, usually for economic purposes. However, cultures less driven by economics may define property primarily to support resource sustainability and community survival (Quiggin, 1988 and Matthews, 1995).

Generally, four categories of property rights are recognized: open access, common property, private property, and state (public) property (Ostrom, 1985; Bromley, 1991; Feeney et al., 1990). Open access and common property have been described above. Under state property rights, the government is vested with sole rights to the resource, including resource access and the rate of use, if applicable. Private property vests the individual with rights to exclude others from the benefits stream and to use it at a rate and in a manner determined by the individual. Private property is a cornerstone of contemporary economic and legal systems in the United States and most western societies. It is the property rights regime that best fits economic analysis. Private property has a specific, defined rights structure consisting of universality, exclusivity, transferability and enforceability (Swaney, 1990). Private property ownership is most often associated with readily degraded resources like agricultural lands, grazing and forest lands.

Common property ownership is most frequently associated with transient resources like fish, wildlife, groundwater, and irrigation water (Ostrom, 1990). The common property management regime used in the Swiss Alps exists within a land ownership system where private and common property exists side by side. Factors that favor common property management regime include: 1) a low value of production per unit of land, 2) low dependability/frequency of use and yield from the resource, 3) a low potential for improvement or intensification of the common property resource, 4) a large area of land needed for effective use of the resource, and 5) large groups of owners needed for capital investment activities (Ostrom, 1990).

Property management systems

Property is more than an object and, in fact, considering property as an object has led to confusion. Bromley (1991) describes property as a benefit that society agrees to protect. Property rights are claims to a benefit stream (access and use of a natural resource). McCay (1996) separates property rights from property management regimes. It is a useful concept, especially when studying or designing common property systems. The different types of property have been described above. However, McCay describes four management regimes that are separate institutions from property rights. The management regimes include: laissez-faire (frequently associated with open access), market regulation (most commonly related to private property rights), user governance (where local-level decision-making manages a common pool resource), and state governance (property over which the state governs, irregardless of ownership). Separating property rights and property management regimes is useful when dealing with common property. Common property management regimes will be discussed later.

An important distinction between common property and private property is how ownership changes. Private property rights may be readily and voluntarily exchanged between owners. For example, under private property regimes the individual owner may sell portions of the private property, such as mineral rights. However, if that same private land was in Nebraska or Oklahoma and had groundwater irrigation wells (recognized by state governments as common property), the water rights could not be sold without also selling the land (Emel and Brooks, 1988). Common property rights are generally tied to the community of common property owners; unlike private property, access and use cannot be exchanged separately.

Methods of property exchange have important consequences. One type of property exchange occurs voluntarily between individuals within a property rights structure as described above. This exchange of property rights is typical of a private property market. The second type of property exchange occurs when there is a change in the structure of property rights, such as when common property becomes private property (Quiggin, 1988). Changes in property rights structure usually result from government action, such as when the United States extended the economic exclusion zone from 12 miles to 200 miles from coastal areas, thereby creating common property rights from previous open access resources. Privatization of state property in Russia, eastern European countries, China, and Mexico are further examples of changing property rights structure. These changes in property structure demonstrate that property rights are not static and that the consequences of changing property rights are significant. Consider, for example, the privatizing of open access, commons, and state property. The bene-

Table 1. Property management systems defined by type of property ownership

Management system	Owner
Laissez-faire	Open access
Market regulation	Private property
User governance	Closed access common pool
State governance	State governance for all owners

fit to the individual gaining the private property rights from previous open access, commons, or state property can lead to less than optimal resource use or resource exploitation.

The role of economic development through the privatization of state property was a central feature in the United States Homestead Laws (Anderson and Hill, 1990). Of course, the public property disposed through homesteading had originally been common property of various Native Americans until economic exploitation for furs and other resources shifted these unrecognized common property resources into *de facto* open access and then public property. Government take-over of open access and common property may be viewed as necessary for some resource management, such as mineral extraction and the expansion of a coastal 200-mile economic exclusion zone for fisheries management. However, government take-over of private property rights is universally considered an economic and legal travesty. It is notable that existing rights of displaced indigenous and local common property owners seldom receive consideration and the injustices they suffer are rarely recognized when property rights structures change in favor of economic ventures (Berkes, 1985, and Swaney, 1990).

Common property concepts and terminology

An understanding of common property concepts and terminology is necessary in order to protect existing sustainable common property resources, or to structure common property regimes for natural resource management. Rights refer to actions authorized by law or convention, while rules are prescriptions that authorize action. Common property carries two clearly recognized rights: access or exclusion, and withdrawal or harvest. These rights clearly distinguish common property from open access property. Every right has a rule authorizing particular actions in the use of that right (Schlager and Ostrom 1992). Rules should be clear, with little room for interpretation. For example, Emil and Brooks (1988) describe groundwater rules in the American High Plains, including the proviso that groundwater wells must be spaced 1,230 feet apart. Common property rules are often this specific in order to avoid misinterpretation.

Ostrom (1990) describes three types of rules used in common property institutions: operational rules (concerned with appropriating, monitoring, and day-to-day enforcing use of common property); collective rules (involving management, policymaking, and adjudication of common property resources); and constitutional rules (concerned with formulation, adjudication, and modification of the fundamental common property process). Under common property ownership, all changes to common property rules are carried out in formal and informal forums open to all the common property owners of the resource in question.

The fact that rules are not written or are not recognized by a governmental body makes no difference, as long as the common property users adhere to the rules. Economic development of natural resources held as common property often begins with non-owners disregarding or discounting the rights of common property owners and failing to follow common property rules. The recent demise of Newfoundland's near shore fishery (Matthews, 1995) and the settlement of the western United States are examples of economic expansion at the expense of unrecognized common property rights and rules. Again the result is unsustainable resource use and community deterioration (Swaney, 1990; Feeny et al, 1990; Matthews, 1995; McCay, 1996).

Property rights may be facts of law and enforced by government. These are *de jure* rights. These *de jure* rights appeal to economists and others who wish to have a definable, predictable view of resource access and use. However, these *de jure* rights often discredit local knowledge and local common property management regimes.

In other situations, natural resource users may develop and enforce informal rights among themselves without any government recognition, in which case the rights are *de facto*. *De facto* rights are important because they have worked in many areas and they are likely to provide rules that best fit the local environment and economy. Recognizing the value of *de facto* rights will increase policymakers' awareness of the value of local knowledge in natural resource management. Finally, *de facto* rights and rules are self-enforced, so they are cheaper to administer (Schlanger and Ostrom, 1992). There are a number of examples of *de facto* rights that have become *de jure* rights over time, as government has accepted the conventional knowledge of common property management regimes (Ostrom, 1990).

Government involvement with common property management regimes may threaten these management regimes. One example of government interference is the change in structure of property from common property to state property under the guise of environmental protection. Feeney et al. (1990) describe the government of Nepal's attempt to halt deforestation of its recently nationalized forests by converting *de facto* common property forests into state property. Lacking resources to enforce government access and use restrictions, the forests became open access and deforestation accelerated.

Ultimately, the government re-established the common property rights to forests (thereby creating *de jure* common property rights). The failure of resource protection when governments expropriate common property managed resources has been observed numerous times (Ostrom 1990).

Buck (1989) and Lambert (1995) discuss the evolution of western ranchers grazing livestock on public lands. The ranchers arrived soon after the government created *de facto* open access to previously common property of Native Americans. Development of the western livestock industry resulted in conflicts within grazing users for the limited grazing lands. Eventually some of the rangeland was *de jure* designated public (state) lands. Ranchers utilized the land under a common property management regime for a number of years although the land was under public property ownership.

Recent conflicts with non-ranchers have centered on two critical issues of public property: access and use. Government managers and persons excluded by the livestock owners have focused on the issues of their right to access public rangeland and the use of public resources such as water and plants by livestock. The conflict has centered on use and access of public property managed as a *de facto* common property management regime. The ironic result of this conflict has been to strengthen the livestock owners' *de facto* common property management regimes: they were allocated grazing rights to public lands.

The success or failure of any property rights structure to protect resources is more a feature of the ability to regulate access and use of the property than whether the property is private, commons or state property (Feeny et al., 1990). Ostrom (1990) proposes eight principles found in studying common property management regimes that have lasted for centuries. These principles include:

1) Clearly defined boundaries of access and use

2) Relevance of rules to local resource conditions
3) Collective choice arrangement for decision-making
4) Effective monitoring of access and uses of the common property resource
5) Graduated sanctions for violators of rules
6) Conflict resolution mechanisms
7) Minimal recognition of rights to organize by external authorities
8) Nested management of larger common property systems (each layer of management fits within the higher management layer)

These principles expand the previously mentioned attributes of common property management, including self-government at the local level of a commonly used resource in a way to exclude outsiders, and involves the recognition, monitoring and enforcing of rules to use the common resource.

Common property and natural resource management

Sustainability is an inherent feature of common property. Hardin's *Tragedy of the Commons* greatly contributed to the confusion between open access and common property. More importantly, it discredited the sustainability and value of local knowledge intrinsic to common property management regimes. Common property resources have several elements that foster sustainability, including the ecology of the resource, the technology used to extract the resource, and community values. The resource may only be available within the community for a limited period. The ecology of the resource will aid in its sustainable extraction. For example, the transient nature of fish enable nearshore fishermen to access the resource for a limited time with their limited nearshore fishing resources.

Common property management rules reflect community values and usually concentrate on how, when, and where common property resource use may occur (Wilson, 1996; Schlager and Ostrom, 1992; Matthews, 1995; Berkes, 1985). In contrast, centralized government sets limits to resource extraction based on arbitrary, although biologically based, quotas. Because fish are by nature transient and the access to most fish stocks is seasonal, fisheries lend themselves well to common property management regimes from the standpoint of ecological sustainability.

Technology and common property

Technology is an important feature of common property regimes. As long as all the owners have the same technology, access and use of the property is equitable. However, if individual common property owners use more efficient technology to access and harvest the resource, the regime will deteriorate unless the rules change. The unequal adaptation of more efficient technology by a limited group of common property owners is called vertical growth by Brox (1990). He describes a common property groundwater resource in India. Increased population using a traditionally dug well to access groundwater had no adverse impact on the existing water users' access to the groundwater. However, when government assisted some of the landowners with deep well water withdrawal technology as part of an agricultural development project, groundwater levels dropped to the point that owners lacking the new technology lost access to the water. Matthews (1995) likewise notes that technological improvements (larger fishing boats with greater trip capability and more sophisticated fish-finding and catch gear) were a major factor in the collapse of the Newfoundland coast fishery.

Matthews and others note the impact that changing economic and political conditions have on common property regimes. When common property owners adopt different economic values, the common property regimen must either adapt or privatization will likely occur. Studies of the medieval commons note that the commons worked well (Feeny et al. 1990). However, the shift from subsistence to production agriculture led to the privatization of the medieval commons (Quiggin, 1988).

Whether a common property regime will survive changes in technology, economics, and ecology is largely a feature of the strength of the values of the common property owners. The fact that so many common property management regimes exist, whether *de jure* or *de facto*, is proof of the potential of common property management regimes in sustainable natural resource management (Ostrom, 1990). In 1995, the state of Maine recognized the *de facto* common property regime of the nearshore lobster fishing to develop *de jure* lobster fisheries that include democratic involvement and grassroots oversight (Wilson, 1996). Local communities and groups with some claim to a valuable resource will be motivated to effectively develop and manage the resource if allowed (McCay, 1996, and Feeny et al., 1990).

The development of such a common property management regime requires grassroots involvement and self-governance. Such community management regimes should include the features of common property listed previously. The rules of access and use of communally managed claims must be clear and based on local knowledge.

Shared values and a common interest in local natural resources will foster voluntary compliance of common property management rules (Swaney, 1990). Shared norms reduce the direct cost of monitoring and enforcing common property rules. The role of community values in monitoring and preventing theft of common property resources is influenced by the number of owners, the cost of monitoring, the benefit from stealing, the punishment if caught stealing, and the reward for monitors who uncover stealing (Ostrom, 1990).

Conflicts are unavoidable, but conflicts within common property owners should be dealt with quickly, fairly, and openly (Quiggins, 1988). Sharing information and open communication within the group of common property users will reduce conflicts and uncertainties and increase common interests (Swaney, 1990). Ostrom's (1990) studies of long-time common property resources reported that extensive norms evolved that defined proper behavior and enabled individual common property users with many interdependencies to avoid conflict. More importantly, however, was homogeneity among all common property users with regard to assets, skills, knowledge, ethnicity, and any other divisive feature within the group. Within a local area, the use of common property management regimes can be an effective tool to manage natural resources.

Common property regimes have been used effectively in both the United States and other countries. This management regime is not a panacea for natural resource conflicts. It will only work to the extent that the local community and the holders of property claims agree to participate. However, the success of the system in fishing management, grazing, and groundwater management warrants its consideration in a wide variety of natural resource and environmental quality situations. Conflicts regarding environmental quality, watershed management, and forest management may benefit from utilization of common property management regimes.

Conclusions

Common property resources exist in an uncertain and complex environment. Unlike open access resources, common property resources have a defined user group with limited access. They also have locally constituted usage rules that are monitored and enforced within the framework of community norms. Common property resources are by nature a sustainable, self-governing institution that reflects community values. Rules for monitoring and enforcing access and use of common property resources are developed over a long period of time. These rules are developed in formal and informal forums open to all common property resource owners. In the United States, existing common property resources include fisheries, irrigation and groundwater systems, and western grazing lands.

Although successful, long-term common property resources generally exist within homogenous communities, common property management regimes could be crafted to fit the diversity of users found in local natural resource management in this country. The Tragedy of the Commons has fueled an unfounded fear that local users will exploit and destroy common property resources. As a result, decision-makers have either privatized common property resources or made them public property with a strong government role. Privatizing common property resources does not guarantee sustainable use and it will exclude former common property users. Centralized government management of public property resources often disregards years of local management knowledge, resulting in costly or ineffective monitoring. Government management may also implement unilateral sanctions, alienating local users and increasing monitoring and enforcement costs. Common property management regimes have the proven potential to assist local users in self governance and in developing rules of access and use of local natural resources, whether a common property resource or publicly owned resource. As the cost and role of governance come under continued scrutiny, the role of common property management regimes may become increasingly valuable in providing sustainable use of natural resources for a nominal public investment. Ultimately, the success of a common property management regime rests on the local community.

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Economics of Property Rights

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Economics and law

Of the four basic economic approaches to property rights, the first and most well known is the economic analysis of law, primarily common law, but also statutory or constitutional law as it pertains to property. Here the economic model is applied to analyze the way individual agents respond to incentives generated by alternative rights structures.

This aspect of law and economics is not concerned so much with the economic system as with the legal system and the evaluation of the incentives for efficient behavior generated by alternative legal rules. For example, suppose that a new, upstream factory that dumps waste into a river causes substantial damage to the crops of downstream farmers. Suppose that the crop damage is valued at a million dollars and that the cost of abating the nuisance is two million dollars. The "first in time" rule, a traditional, common law rule for dealing with nuisances, states that the person who is there first has the property right.

This rule would protect the interest of the farmers, because they were there first. If this protection takes the form of an injunction, the factory would be forced either to abate the nuisance or to shut down, thereby generating an inefficient outcome.

If the protection of the farmers came under a liability rule, however, the situation would be very different. The factory could continue to pollute so long as it compensated the farmers for their damage. Faced with a choice between abating and compensating, the factory

owner would obviously do the latter, thereby generating an efficient outcome.

Property rights and economics

A second approach to the economics of property is a growing body of literature focusing on the impact of property rights on the economic system. Much of this work is positive rather than normative in nature, entailing descriptions of property rights, institutions, their origins, evolution, and effects.

For example, the economic condition of American Indian tribes is very much an issue today. A study by Gary Libecap and Ronald Johnson about a decade and a half ago suggests that the U.S. Department of the Interior and the Navaho Tribal Council Policies established a system of private property rights on Navajo lands in such a way that, in spite of a private property rights regime, the rights remained defacto common. Very small plots were assigned to each family. The transaction costs associated with fencing and/or consolidation of these grazing lands so as to achieve economies of scale were incredibly high. The result was erosion of grazing lands, reduced income per sheep, and a mass exodus from the traditional practice of sheep farming into the regular work force or onto the welfare rolls. This private property system destroyed the very form of pastoral native culture that it was designed to preserve.

Common pool fisheries are another area that has been a source of contention among various interest groups over a long period of time. The common pool problem is well known. Elimination of the common pool appears to accomplish the goals both of certain environmental activists, who are against overfishing, and those in favor of resource use that maximizes wealth.

Even fisheries economists have usually ignored the often-substantial cost of enforcing private rights structures, at least until recently. In the case of ocean fisheries under U.S. control, enforcement costs runs into the hundreds of millions of dollars per year. Economists have only recently begun to analyze the enforcement costs associated with alternative rights regimes.

Continuity versus change

A third approach comes from the recognition that property rights create winners and losers. Changes in circumstance influence the relative opportunity costs of different courses of action and of different structures of rights (particularly the existing one), giving rise to pressures for change in property rights regimes and, of course, countervailing pressures for continuity. This is the old problem of continuity versus change. It occurs at both the judicial and legislative levels and is examined from several perspectives in the law and economics literature.

An example of this problem would be harvesting beaver pelts in Labrador. Prior to the arrival of Europeans, native tribesmen held beaver habitats as common property. Sometime after the arrival of the European, however, these habitats became private property. There are different stories about what changed and why, but an economic explanation is that because of the European settlements, European markets became accessible. The resulting increase in the value of beaver pelts made it worthwhile, then, to establish private property rights over that which had previously been held in common.

According to economists, the costs associated with establishing private rights were not worth incurring prior to the opening of the European market.

Positive/normative dichotomy

Wrapped up within all the preceding perspectives is a fourth: the positive/normative dichotomy. This is the attempt to come to grips with the legal-economic nexus on the one hand, and to prescribe particular property rights relationships on the other. Within the law and economics community the latter is often based on efficiency or wealth maximization. This normative baggage is responsible for the vast majority of hostility towards law and economics and public choice approaches to property rights analysis, and to law and economics generally.

But this "efficiency as justice" line of thinking is not one that ought to be casually tossed aside. The Coase theorem tells us that individuals will bargain around initial rights assignments to an efficient allocation so long as transaction costs don't preclude them from doing so. We will end up being at this particular point regardless of how rights are assigned. People will arrive at that point voluntarily, through negotiation, irrespective of initial rights assignments. If this is the outcome to which individuals would voluntarily agree if transaction costs did not preclude them from doing so, then why shouldn't the courts assist them in attaining this outcome via judicial fiat?

Much of the normative criticism of law and economics is misplaced in the sense that it fails to recognize both the diversity of approaches in economics (approaches that are sometimes complimentary and sometimes competing) and the fact that no normative conclusions necessarily follow from law and economics.

While the vast majority of the economic analysis of rights, normatively done, is couched in terms of efficiency, the economic approach also provides a great deal of insight into the effect of alternative property rights regimes on the distribution of income and wealth, among other issues.

Behavior

There are several important issues facing legal economic analysis, and, by extension, the economics of property rights. Some of the more interesting recent literature in law and economics and economics of property rights concerns the behavioral underpinnings of the theory. The economic analysis of law developed largely as a body of deductive theory. Its empirical validity was placed foursquare on the shoulders of the economic theory of choice, accompanied by the standard axiom of behavioral transitivity. If we grant that the economic theory of choice is empirically robust in standard economic contexts, the question is whether the assumed transitivity is accurate for behavior within the legal arena. The Coase Theorem (if transaction costs are relatively low people will tend to negotiate to relatively efficient positions) and the "doing what comes naturally" justification for the efficiency criteria previously mentioned both turn on the validity of this depiction of individual behavior and the transitivity of the choice axiom into the legal arena.

The experimental and empirical literature assessing the propensity of agents to bargain along the lines suggested by the Coase Theorem have generated very mixed returns. Several sets of experiments undertaken by Betsy Hoffman and Matthew Spitzer, at times with others, showed that agents do indeed, when transaction costs are very low, have a high propensity to bargain to the wealth-maximizing outcome, including cases in which a sort of quasi-experimental externality is introduced into the process.

Even in these relatively sterile environments with practically no transaction costs, however, efficiency is only maintained about 93 percent of the time. Equally interesting is the fact that the Hoffman and Spitzer experiments reveal behavior that is very much at odds with the dictates of individual rationality, even in the presence of efficient bargains. That is, individuals

exhibit something less than individual rationality, failing to take full advantage of the opportunities for gain open to them, exhibiting behavior that seems to be more Lockeian in nature than utilitarian.

Still other experiments show that endowment effects significantly impact the willingness of agents to bargain. It appears that entitlement creates an endowment effect and reduces one's willingness to effectively bargain, essentially by increasing one's reservation price. This has particular import for the economics of property rights. The fact that parties have litigated over the rights in question can create particularly strong attachment, or feelings of entitlement, on the part of the individual assigned the rights. In addition, the rights in question are often unique. If what was being contested could be easily obtained from other sources, litigation would be unlikely in the first place.

The normative prescriptions of law and economics basically rest on the Coase Theorem. The preference for property rules verses liability rules when transaction costs are low presupposes that individuals would bargain around the property rule to an efficient outcome. Of course, the whole efficiency criterion in law and economics gets a great deal of its justification from the behavioral-based idea that courts should facilitate allowing people to do what they would do naturally of their own volition if the law did not prevent them from doing so. Extensive and rapidly accumulating literature calls into question the behavioral underpinnings of law and economics, and is stimulating a push towards a new, more behaviorally grounded approach to the field—one with a more accurate depiction of agent behavior that nonetheless employs many of the basic tools of economic analysis.

Valuation and choice

Another significant issue here is that of valuation and choice. The relationship between government and property has bound up within it, inexorably, the notion of choice. The government's basic role is to determine who will have rights, and to what extent, and who will be exposed to the exercise of those rights by others. As such, the role of government here is critically involved in the process of valuation, evident both in the choice of criteria upon which rights are to be based, and the application of the criteria.

Any natural rights-based resolutions are necessarily affected by the meaning given to the term "natural" within the legal decision-making process. We face very similar problems with the application of the efficiency criterion, which involves the use of circular reasoning. Efficiency can only be determined by an evaluation of benefits and costs, but benefits and costs themselves are a function of rights. Therefore, to determine rights based on efficiency is to reason in a circle because one cannot examine efficiency without granting privileges for a certain set of rights, which in turn generate a certain set of benefits and costs.

Another problem associated with the efficiency criterion involves the calculation of benefits and costs. The amount of knowledge required of government policymakers is simply too great to sustain the efficiency argument and belies the simplicity that is often ascribed to it.

Personal perspective

In my view, ultimately, rights are rights because government protects them. The others are interests, norms, whatever you want to call them, but rights are rights because government protects them. Let me quote Bentham: "There are no rights anterior to the law."

Lockeian and other notions of property that attempt to provide an extra-governmental justification for rights are normative theories describing how government ought to act rather than positive theories describing the origins of rights. Claims that rights somehow are pre-existent or adhere in nature and thus ought to be protected by government are wrong; these interests are not rights unless they are given government protection.

Government is an inevitable and necessary component of the economic system. There is no such thing as more-versus-less government intervention in the economy. There is only government giving rights to this group versus government giving rights to that group. The only question is to whom shall government give the rights, and this is just as true within a market system as it is with any other. That is, government is the basis for the market.

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State Property: Wildlife, lands, and open spaces in Colorado

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Management of natural resources on behalf of citizens is among the most important and daunting tasks facing states. The state defends the rights and responsibilities of its citizens from regional and national claims. It also saves the citizenry from itself by managing individual property rights to benefit the state as a whole. Wildlife, open spaces, view scapes, water quality and quantity, land use, cultural and archeological heritage, and extraction of mineral wealth all fall within the auspices of state governments to one extent or another. Zoning, taxes, regulations, licenses, use permits, and other tools are available to the state to influence the behavior of individuals regarding the management of the state's natural heritage. States aspire to tailor its tools to reflect the needs of the natural resource base and the unique composition and outlook of its citizenry. Policies that prove effective in one context may not work as well under other conditions. The policies and examples reviewed here are specific to the state of Colorado. However, an illustration of the Colorado experience should be useful to states encountering similar natural resource policy challenges, particularly in the American West.

Factors affecting the identification and management of Colorado State property

This state's great outdoor amenities and western lifestyle, in conjunction with other factors, have created an economic boom in much of Colorado. Colorado is in transition from an economy based primarily on mineral extraction and agriculture to a more diverse economic base, including service industries based on natural resources (e.g., tourism), hi-tech or "clean industry" (e.g., Hewlett Packard, Merrill Lynch, Level 3 Communications, and Sun Microsystems), traditional and custom agriculture, and an increasing role in providing medical and other services to retirees. Some 42 percent of Colorado lands is directly managed by the state (3 million acres) or federal government (25 million acres). According to the 1996 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, more than one million residents and out-of-state visitors hunted, fished or watched wildlife in Colorado in 1996, spending a total of $2.6 billion.

Colorado's population has grown from 3.2 million in 1990 to 4.3 million people today. About three-fourths of the people live in the I-25 corridor within about 25 miles of the foothills of the Rocky Mountains. Several of the nation's fastest growing counties are located in Colorado. The state population is predicted to increase by 2 percent annually through the year 2001, compared to about 1 percent nationwide. Colorado personal incomes are predicted to increase by 5 to 7 percent, annually, through the year 2001, outpacing the United States average by about 1 percent. Similarly, Colorado employment is expected to grow from 2 to 4 percent annually over the period, compared to 1 to 2 percent nationwide. Retail sales and, unfortunately, inflation in Colorado are expected to follow similar patterns (State of Colorado, 1998). More people, jobs, and income mean increased demand for outdoor recreation and increasing stress on the state's natural resources.

Like much of the western United States, Colorado was settled in the traditions of the Old West. A curious mix of adventurers, risk-takers, explorers, entrepreneurs, and other "fringe elements" provided the human milieu that began to form the cultural, legal, and economic institutions of the West. Self-sufficiency and staunch individualism were rewarded in this environment. These values pervade the culture of the West even today, and influence the appropriateness and effectiveness of the natural resource management tools that are available to western states.

Rapid economic development has not been without costs. Conflicts between new residents and those with somewhat deeper roots, between urban or suburbanites and rural people, between agriculturists and urbanites, between developers and "no growthers," and between agriculturalists and recreationists are increasing in many areas of Colorado and in the West. The natural resource base is stressed. Infrastructure is stressed. The very way of life that brought people to Colorado is threatened. As a result, innovative solutions to land use and natural resource management have been sought in Colorado.

The appropriate role for state property

The goods and services provided by Colorado's natural resources may fall completely, partially, or not at all under the control of a branch of the state government. Traditionally, citizens of the state have strongly supported the notion that only those things (e.g., land, minerals, wildlife) that are not privately owned and controlled may be appropriate for government ownership or control at some level (municipality, county, state, or federal). Moreover, only when the public good at whatever level can clearly be shown to outweigh the private good should complete or partial control of privately owned natural resources be wrested from the owner. Public schools, parks, forests, wildlife, police protection, groundwater supplies, clean air, prairie, city and mountain vistas, and roadways are common examples of public property demonstrating some degree of state control (e.g., McCloskey, 1985; Oakerson, 1992). Indeed, our judicial and legislative systems could also be considered local, state, and federal level public property. The state sets speed limits, automotive emissions standards, and legal blood alcohol levels. It regulates the transportation of toxic substances, implements regular road maintenance, and administers driving tests in order to decrease the risk of injury or death to its citizens on its roadways.

Even the purist of private goods has some characteristics of a public good and, therefore, has some need for management as public property. Alar apples, irradiated strawberries, organic lettuce, e-coli in hamburgers, "Made in the USA" and "Fat Free" labels, "generic" drugs, "kosher" and graded beef are examples of the public good aspects of otherwise highly private products. Through its support and its votes, the public provides the financial wherewithal to influence the behavior of its individual constituents to improve the wellbeing of the whole.

In Colorado, the most local, most

individual, available, and effective form of management is preferred. As a result, only those goods and services that cannot be adequately provided to the state's citizens by individuals, localities, or counties, in that order, fall within the generally accepted role of the state. In turn, it is the responsibility of the state to maintain control over its natural resources against claims from other states or the national government, unless it can be shown that alternative management is strongly in the regional or national interest. For example, the headwaters of the Colorado, Arkansas, Platte rivers, and the Rio Grande lie within the state of Colorado. The state, on behalf of its citizens, negotiates the proportion of the water from these rivers to which it has legal claim relative to the claims of other concerned states, including Kansas, Nebraska, Texas, New Mexico, Nevada, and California.

Current structure for the management of Colorado State natural resource property

The Colorado Department of Natural Resources (DNR) is the state government agency primarily responsible for management of geology, soils, mineral and energy resources, water, parks, wildlife, forests, plains, and open spaces. The DNR includes the divisions of Parks, Wildlife, Water Resources, Minerals and Geology, the Geological Survey, State Land Board, Soil Conservation Board, Oil and Gas Conservation Commission, and the Avalanche Information Center.

Colorado State Parks manages the state's forty parks. The division's mission is to meet the needs of visitors today while protecting our parklands for the future. Camping, fishing, hiking, and watersports draw nearly 12 million visitors per year to Colorado's state parks. User fees are charged at all Colorado State Parks. Entrance fees for state parks are not designed to maximize revenue. Rather, they are kept low to maximize visitation for a given level of services. The perspective is that access to parks is among the rights afforded to all citizens. Hunting licenses are commonly allocated by lottery for similar reasons.

Colorado State Parks also houses the Colorado Natural Areas Program, a system for identifying and seeking protection for unique natural areas in Colorado, and the State Trails Program, a system for developing and managing trail use. In addition, Parks oversees all boat, snowmobile, and off-highway vehicle registration as well as regulating state river outfitters. A five-member Parks Board establishes regulations for this division.

The Colorado Oil and Gas Conservation Commission is charged with promoting responsible development through the efficient exploration and production of oil and gas resources and the prevention of waste. It also protects public health, safety and welfare, the environment, and the correlative rights of mineral owners. This division is responsible for mineral and energy development, policy, regulation, and planning.

The Division of Water Resources provides services to the water users in the state of Colorado. The major functions of the office include surface water administration, dam safety, groundwater well permitting and administration, and hydrographic data collection and analysis.

The State Soil Conservation Board provides oversight and technical assistance to Colorado's 78 soil conservation districts. It also oversees the state's living snow fence program, provides guidance on stream bank erosion and riparian concerns, assists farmers and ranchers on various water and energy efficiency programs, and helps sponsor Camp Rocky, an outdoor environmental program. Soil conservation districts have the responsibility to inventory the natural resource concerns within their areas and to develop a plan to address these concerns.

The Division of Wildlife manages the state's 960 wildlife species. It regulates hunting and fishing activities by issuing licenses and enforcing regulations. The Division also manages more than 230 wildlife areas for public recreation, conducts research to improve wildlife management activities, provides technical assistance to private and other public landowners concerning wildlife and habitat management, and develops programs to protect and recover threatened and endangered species, including acquiring, monitoring, and enforcing conservation easements against privately managed lands. Wildlife regulations are established by the eight-member Wildlife Commission appointed by the governor. The Commission is also responsible for buying or leasing property for habitat and public access and for approving the Division's annual budget proposals. The Division receives no state tax revenue.

Examples of natural resource management policies currently in place

Through a number of policy measures, the Colorado state government encourages lower level government and individual management. Through these policies, the state exerts some partial claim over the dispensation of natural resources within Colorado through use incentives or regulations, but leaves management to more local authorities. The legal system and culture of the state often require that these initiatives be locally-driven, incentive-based, and voluntary. Three programs for the management of wildlife, lands, and critical habitats are in place in Colorado: the Great Outdoors Colorado Trust Fund; the State Land Board's Stewardship Trust; and the Habitat Partnership Program.

The Great Outdoors Colorado Trust Fund

The Great Outdoors Colorado Trust Fund (GOCO), which was established in 1992 by constitutional amendment, is charged with making matching fund grants to local governments, park and recreation districts, and non-profit land protection organizations to facilitate the purchase and protection of land. Programs include trail construction, environmental education, park promotion, wildlife, outdoor recreation, and open space, wildlife, and river preservation.

State Land Board

The Colorado State Board of Land Commissioners, or State Land Board, was established along with statehood in 1876. The federal government gave the state approximately 3 million acres of surface rights and 4 million acres of mineral rights, primarily intended to provide support for public education. These rights are managed by five part-time citizen commissioners and a staff of 29 to benefit the School Trust and seven smaller trusts. Most of the surface acres are leased for farm and ranch use.

In 1996, Colorado voters amended the state constitution to redefine the Land Board's mission. Recognizing the intergenerational nature of the School Trust and of potential land management alternatives, the Land Board is directed to designate from 295,000 to 300,000 acres of trust lands into a special trust called The Stewardship Trust. The Stewardship Trust lands are to be managed to preserve their natural value for future generations of Colorado children. These lands had to be designated by January 1, 2001. More than 600,000 acres were nominated for Trust designation during the 3-month nominating period ending March 31, 1998.

Maintaining future land use options through land value preservation is an objective of the Stewardship Trust. However, trust designation does not

necessarily imply physical preservation of the lands or their attendant resources in pristine open space. Trust land may be leased, sold, or exchanged, although Amendment 16 requires the Board to include provisions for the protection of natural values within any contractual arrangement regarding the dispensation of Trust lands.

Habitat Partnership Program

The Colorado Division of Wildlife has been liable for wildlife damage to private property since 1931. The Division has been liable for rangeland forage damage since 1979, but the statute was ineffectively implemented. Authorized by the Colorado Wildlife Commission, the Habitat Partnership Program (HPP) began in 1990 to help alleviate crop, rangeland forage, and fence conflicts between big game animals and livestock on private and public lands.

The HPP seeks to develop partnerships among landowners, land managers, outdoor enthusiasts, the public, and the Division of Wildlife in order to resolve their conflicts. It hopes to ensure appropriate public involvement, on a local basis, in identifying range management problems and recommending solutions supported by adequate financial resources. The program strives to ensure that private land habitat issues are considered in management plans for big game herds.

Summary and conclusions

Natural resources, including fish, wildlife, parklands, open spaces, soil, water, and critical habitats, are among the greatest and most daunting property management responsibilities afforded to states. Intra- and interstate conflicts over the management of natural resources are particularly contentious in the American West.

Due to the cultural heritage of the West, state-level policies to manage natural resource property are more likely to be accepted and adopted if they are locally-driven, incentive-based, and voluntary, with Colorado being a case in point. Crafting innovative solutions to resolve property-based conflicts among individuals, localities, states, and federal authorities will continue to occupy policymakers, researchers, and lay citizens for the foreseeable future. Through a discussion of state property rights issues, management structure, and some of the policies and programs in Colorado, further innovations and solutions might be facilitated.

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Property Rights: A philosophical perspective

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Philosophical discussions of property rights are a subclass of problems that come up in the development of general philosophical theories about rights. For philosophers, property rights raise issues that differ from the problems encountered with other sorts of rights. Many of the "property rights" referenced by institutional economists would be thought of as rights by philosophers, but not property rights. This may simply be a terminology difference between the disciplines of philosophy and economics. But the approach in philosophy is to begin with a general discussion of rights, then to discuss property rights as a subclass.

What is a right?

A person has a right to X, whether X is a good, a service, or even an action or activity, if and only if that person can make a valid claim to X. That's the basic logical definition of a right in philosophy. What philosophers find interesting about this definition is the "valid claim" part, because rights can be validated on a number of different bases. The three most commonly mentioned bases for validation are:

- Legal rights that are validated by the law, including common law.
- Customary rights that are valid "just because," for example, expecting to be served next if you're at the front of the line. That's a pretty robust customary right in the United States, but perhaps not so robust in other parts of the world.
- Moral rights that are normative claims about what sorts of rights people have in a normative sense or in a moral sense. Our convention is to say that people have moral rights even in cases where those rights are frequently violated or where there's a failure of legal institutions or customary norms to make those rights effective and certainly in cases where there's no enforcement of those rights.

Philosophers tend to be most interested in moral rights. Certain conventions in the way that philosophers utilize rights terminology can be confusing to social scientists and legal scholars. In law and social science, asserting that a right exists typically means that people actually do adjust behavior in accordance with the claims that are made by the rights holder. But it is typical to say that people "have moral rights" even when it is not in fact typical for these rights to be observed or respected by others. Thus, while legal or customary rights can be operationally defined in terms of conduct and expectations, moral rights depend wholly on their validating principles.

Non-interference and opportunity rights

There are two broad classes of moral rights and, although there isn't much standardization in the terminology, the distinction between them marks an important and robust difference in the way that philosophers discuss rights in moral theory.

Non-interference rights protect your person and your freedom. As the name implies, they are rights that allow the rights holder to claim that others should not interfere with the rights holder in exercising certain powers or undertaking certain activities. They constrain others from acting in ways that would harm you or prevent you from exercising a personal liberty. Standard rights such as freedom of speech and security of person are examples of non-interference rights. "My right to swing my fist ends at the tip of your nose" illustrates the relationship between liberty and non-interference. These rights establish constraints that are extremely important for individuals to have meaningful lives. They could be established on the basis of a social contract agreement, a consent basis, or strictly an enlightened self-interest kind of argument.

The duties required by these rights are negative, which means that they require other people not to perform certain sorts of actions. They don't require you to do anything on my behalf or anything on behalf of society at large, but they require you to refrain from certain sorts of actions. Non-interference rights are sometimes called negative rights.

Opportunity rights reflect a broader set of rights, or entitlements. Examples include the right to education or healthcare. These rights do require somebody else to do something on behalf of the rights holder. Paying taxes is, of course, the most controversial thing that people are required to do. Entitlements, or opportunity rights, are established by different kinds of normative arguments, appealing to notions of fairness and equal opportunity, and require action on the part of others.

One group of theorists, who usually call themselves libertarians, essentially hold that non-interference is the limit of rights that can and should be enforced by a state apparatus. A second group, often appealing to principles of fairness, basically argues that we don't have a just society until certain opportunity rights are guaranteed into the mix.

A third philosophical group is called the utilitarian school. For utilitarians, the costs and benefits at the end are what really matter. If it's too costly to provide opportunities, it shouldn't be done. Similarly, if it's too costly to constrain rights to purely non-interference considerations, it shouldn't be done either. Most philosophers who describe themselves as rights theorists probably would not be utilitarians.

Property rights

Philosophers generally think of property rights as a sub-class of non-interference rights that are protecting a person's use or disposal of private property against interference by others. Rights in the form of basic liberties, such as freedom of speech, are not property rights. Rights are also created by promises, for example, but philosophers do not think of these of as property rights. What are the characteristics that distinguish property rights from other valid claims to non-interfence? One of the key notions is alienability.

Property rights are alienable rights. Transferable may be just as good a term, but the word alienable was pretty clear within the context of eighteenth century philosophy. Alienable rights could be transferred from one person to another. These were the rights to control and use for a productive purpose the benefits associated with certain goods and services. These rights could be given away, or perhaps bought and sold, but even though they could be alienated from the person who held them the rights still retain the capacity to make valid claims.

Typically, promises do not create property rights for philosophers, because the rights that are created by making an ordinary promise are not transferable. Suppose I promise to meet Pat for dinner but Larry decides he wants to have dinner with me and asks Pat for how much would she sell that promise. Generally speaking, I have to keep my promise to Pat, but if she decides to sell that promise to Larry, my promise is not considered to be valid anymore. Here I am citing a customary basis for distinguishing between a property right and a different sort of right. My promise to Pat entails some duties on my behalf and allows her to make a valid claim against me, but this would not be thought of as an alienable sort of claim.

Certainly, basic liberties are thought to be inalienable rights. I can't sell or transfer my right to speak freely. I can agree as a matter of promise not to say something, not to object to a particular claim, or not to speak out in defense of a right that I may actually have, but I cannot sell a right that is inherently only mine. Each of us has an individual right to freedom of speech, and although we can negotiate about what we will say, we cannot transfer that right from one person to another.

Of course there is a tendency to use the phrase "inalienable rights" from the Declaration of Independence in connection with property rights. Most people who argue that property rights are inalienable in this sense are probably just focusing on the fact that they are non-interference rights, or noting their centrality and more fundamental character with respect to other kinds of public goods and opportunities.

What makes the claim based on a property right valid?

Philosophers, of course, are most interested in justifications of property claims that stress morality. In this connection John Locke's chapter on property from the 2nd Treatise on Government simply can't be avoided. It is difficult to overstate the importance of those 30 pages in the way philosophers continue to look at property rights. Both in his political philosophy and his epistemology, Locke was less interested in building a system than he was in mid-level theory, in finding points where arguments with a lot of very different, fundamental beginnings converge. In practical issues, such as forming governments or conducting scientific research, we can build institutions from this mid-level agreement without settling all of our fundamental differences, which may be religious and impossible to settle.

Four key claims from Locke's argument each establish a different foundation for making normative judgments about property. In a brilliant piece of philosophical work, Locke gives a convincing reason for thinking that these all converge on a central theme. Actually, I don't think his argument works but I do admire its sophistication.

The first claim is that property rights are natural rights. Locke was working in the natural law tradition. He thought that in some sense these rights were woven into the fabric of the universe. Second, property rights are essential to liberty. Third, property rights promote efficiency, in exactly the way that most economists understand efficiency. And finally, he stresses that property rights are limited by equality, so that one would be limited in the acquisition and the extension of property rights by a principle of equality.

We are left with a question, which is where I think the property rights debate in philosophy has been ever since Locke: Do these criteria entail a coher-

ent theory of rights, or does each criterion establish an independent and perhaps contradictory standard for violating rights claims? Let's examine each of the criteria in a little more detail.

Natural Law The main idea in natural law is that the rationale for moral principles is naturally evident to any rational person. With respect to property rights, it is plausible to think that that highly rival and excludable goods will "naturally" be treated as items of property, while goods that are non-rival or with high exclusion costs will not tend to be treated as items that are owned and exchanged according to a regime of property rights. Non-rival and non-excludable goods, such as a public park, clean air, or public defense, cannot be easily placed under the control of a private rights holder, however. They are "held in common," the phrase that Locke actually uses. So the natural law criterion would suggest that goods such as an apple, a house, or even permission (a ticket) to enter a theater and watch a performance might naturally come to be regarded as items of private property, while goods such as air, ideas or sunshine would not.

Liberty A second type of criterion for establishing the validity of a property claim is to argue that property rights are important for the protection of personal liberty. Locke writes that each person has a property right in his or her own person, that in some sense we own ourselves or some right about ourselves. Because of this property right, as we invest our labor into the extraction or manufacture of natural resources, we create a property right in the finished good. In failing to recognize a laborer's valid claim over the manufactured item, you essentially put the laborer into forced servitude, a violation of liberty, which philosophically is usually thought of as a more fundamental right.

Another argument for validating property rights as protecting personal liberty is set forth by Kant. Although not regarded as a great theorist of property rights, Kant would argue that it is immoral for people to regard either themselves or others merely as a means to some further end. One cannot morally regard oneself or others as simply tools for getting something done. One has to respect the integrity and autonomy of the individual. Respect for persons translates into respect for the claims that others would make to control the use of things that they have made or otherwise fairly acquired. Thus property rights are valid when failing to respect such claims is a failure to respect the freedom and autonomy of another person.

Locke and Kant are somewhat similar in the way that they arrive at arguments for respecting property. People who have invested labor in the manufacture of a particular good deserve respect for Kant, and taking that labor with compensation would be a form of disrespect. But Kant clearly wouldn't support Locke's view that we have a property right in our own person. For Kant, it's a mistake to think there is any moral theory that validates the notion that human beings are property. Plausibly this means that it is always immoral to regard human beings as a form of property. Property rights are alienable rights to use in pursuit of other human purposes, and exploiting the labor of others is to regard them as a mere means to an end.

Efficiency We could develop a justification of property rights by arguing that property claims are justified when doing so produces "the greatest good for the greatest number," that is, when they promote efficiency. Locke clearly thought that a system of property rights would enhance productivity in agriculture. "He that encloses ten acres of land and produces more than a hundred left in common may be truly said to return 90 acres to mankind." Richard Epstein, a more modern theorist, has basically the same argument. "Like all rights, property rights are justified to the degree that they promote the health, wealth, and satisfaction of every individual, all things considered." Where Epstein differs from Locke is his treatment of rivalry and excludability; he felt these factors have a tremendous influence on the social benefits and costs that are generated.

Equality It is also possible to argue that property rights should promote not efficiency, but some other social good, such as equality. Locke says, "Each person has an equal right to acquire property up to the point that it limits another's ability to do so." On this view, property systems are valid when they are equalizing. The point at which they cease to equalize is also the point at which they cease to be valid.

Philosophical systems for justifying property rights

We have four possible arguments that might be put forward to validate a property claim on moral grounds. Let us now look at how these principles would be used in a general philosophical approach to questions in ethics. As already noted, natural law is an approach to morals stressing the way that moral principles are naturally evident to rational people. Utilitarians see all rights, including property rights, as arbitrary social conventions, or legal rules, that are validated in terms of their effects or consequences on individual health and welfare. Utilitarians would be interested in whether the institutionalization of a given property right promotes the most efficient distribution of costs and benefits for society as a whole. Thus, the efficiency criterion becomes the key to a utilitarian approach to property.

Then there are views that take rights to be very fundamental to moral philosophy. Libertarian philosophy, another fairly systematic approach to the question of justifying property rights, asserts that the non-interference right is mandatory and absolute. As such, it is appropriate to use state power to enforce non-interference rights. Other moral principles must be left to the discretion of individuals. A libertarian would thus be most impressed by the liberty argument, that property rights are crucial to protecting individual liberties. Finally, we have an egalitarian view that stresses the need to provide every person in society with equal opportunities. This is an area of some of the hottest action in philosophical work on property. Followers of John Rawls have the view that his difference principle provides a new approach to property rights: "Systems of property rights are justified only when they tend to improve the lot and promote the interests of the worst-off group in society."

Contemporary philosophers would expect that people taking each of these basic viewpoints will reach very different conclusions about which claims are valid, and will subsequently have very different views about the moral justification of property. Those who are inclined toward egalitarianism may be most hostile to the general notion of private property, while those who are inclined toward libertarianism may be most accepting.

Locke's view

In contrast to these approaches, each of which sees these principles as at least potentially in conflict with one another, Locke himself seemed to think that all were mutually compatible, and that all could be (and should be) satisfied under the social contract. The key to social contract arguments is that people with somewhat different philosophical starting points will agree on rules for the organization of society.

We can see how certain strands of Locke's view on property rights can be woven together fairly easily. In natural law, rivalry and excludability are important because they are natural characteristics of goods. In utilitarian theories they are important because they entail costs and benefits. Up to a point, at least, we would expect utilitarians to agree with natural law theorists about the definition of property rights.

But why would we expect libertarians or egalitarians to wind up at the same place? The idea that institutions such as enclosure and money could actually increase the amount of wealth available throughout society may have been at the root of Locke's belief that his view of property was commensurate with egalitarianism. What is more, he thought that the discovery of new lands in America made natural resources into free goods that were simply there for the taking. With respect to the connection between efficiency and liberty, one key to Locke's view may be a reliance on the labor theory of value. If the value of a good can be reduced to the labor invested in it, then the utilitarian calculation of cost and benefit will match up with property rights designed to protect each laborer's contribution to the manufacture or creation of the good. But with the advent of neo-classical economics, utility is not calculated in terms of labor, and we should expect the rationales for utilitarian and libertarian views of property to diverge.

Summary

Philosophers make a broad distinction between moral theories (such as utilitarianism) that validate a rights claim in terms of the consequences that follow from its general observance, and moral theories (such as those of Locke or Kant) that validate rights on the ground of protecting liberty or autonomy. Property rights are, in either case, a subclass of non-interference rights dealing specifically with control and exchange of alienable goods. Economic approaches to property rights are easily accommodated within utilitarian moral theory, and an economic analysis of efficiency can be readily applied within a utilitarian argument on the validity of specific property rights. Libertarian, natural law, and egalitarian approaches use a different logic for validating property claims, though they might converge with utilitarian arguments to support a given configuration of property rights in specific cases. Whenever these multiple rationales for assigning and validating property rights converge, the particular configuration of property rights will be regarded as ethically well supported. Whenever they diverge, property claims are likely to be contested on ethical grounds.

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A property rights primer

- The economy is an exchange of claims, or property rights, not of things.
- Property rights have their origin in some sense of community or some level of agreement among people.
- Property rights are collectively (publicly) chosen.
- Some property rights are formal, codified in law, administrative rules, and practice. Other property rights are customary, informal, mostly unconscious, and embedded in culture or habit.
- Property rights order the relationships among people.
- Property rights are needed because people are interdependent and often conflict.
- Conflicts that arise out of interdependencies among people are influenced, or even partly determined by, people's relationships to things.
- Attributes of things create different types of interdependencies, which lead to different choices of property rights.
- Alternative rights, or institutions, will resolve conflicts in different ways with different performances and different distributions of costs and benefits.
- New things (technological changes) may create new relationships, and new rights may emerge. New things certainly create new opportunities.
- It may be possible to create new rights and thus development without technical change.

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