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A SEA CHANGE OFF THE COAST OF MAINE: COMMON POOL RESOURCES AS CULTURAL PROPERTY

*Pammela Quinn Saunders**

ABSTRACT

In groundbreaking and award-winning research, social scientists have documented the power of small groups to manage common pool resources (CPRs). That research concludes that collective or communal ownership of CPRs may be optimal in certain circumstances. While group- and community-level rights have also sometimes been conceived in property law terms, these accounts have not focused on whether and how to protect existing groups whose successful management of CPRs has been documented. The idea that such a movement might occur, and what form it should take, is ripe for consideration and evaluation.

In this Article, I use an initiative currently being advanced by a community of Maine lobstermen to create and illustrate a model that might be broadly used for the recognition of group-level property rights in communities, or other groups, that are the de facto stewards of CPRs. Describing both when and how such a community-level right might be recognized and what its substantive contours should be, the Article draws not only from the recent social science research that recognizes the benefits of small group management of CPRs, but also from the growing field of cultural property rights, in which group-level rights have already been embraced in both domestic and international law.

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INTRODUCTION

We're looking at it from a community conservation point of view If we lose control of who fishes the bottom, then we lose the town.

—Clay Philbrook, Matinicus Island lobsterman¹

In the summer of 2009, an argument between two lobstermen in a small Maine community culminated in a shooting.² Predictably, the incident caused serious injury to the victim and resulted in the arrest and indictment of the gunman.³ Somewhat more unusually, it quickly spawned the filing of numerous civil lawsuits.⁴ But one legal consequence was extraordinary. The incident prompted the state of Maine to issue an order imposing a two-week moratorium on lobster fishing in island waters—during the high point of the lobster fishing season—effectively punishing not just the individuals involved, but the entire community in which the shooting occurred.⁵

The notion that a community could or should be punished for an individual's misconduct will not resonate with most American-trained lawyers. This concept appears at odds with some of the most basic tenets underlying the American legal system, in which individual rights and responsibilities are some of its most cherished core values.⁶ While the Western legal concept of

¹ Shlomit Auciello, *Matinicus Sees Lobster Subzone as Key to Survival*, HERALD GAZETTE (Camden, Me.), Aug. 20, 2009, <http://knox.villagesoup.com/print/Print.cfm?StoryID=172845> (internal quotation marks omitted). Members of the Philbrook family have resided on the Island since at least 1830. See DONNA K. ROGERS, *TALES OF MATINICUS ISLAND* 17 (1990); Abby Goodnough, *Seeking Salve for the Wound of an Ailing Industry*, N.Y. TIMES, Aug. 23, 2009, at A16 (noting that Philbrook's ancestors "settled [on Matinicus Island] in the 1820s").

² See generally Goodnough, *supra* note 1.

³ Jim Flannery, *Lobster Wars: 'Good People' Doing Bad Things*, SOUNDINGS (Sept. 22, 2009), <http://www.soundingsonline.com/component/content/article/241232/241232>.

⁴ *Id.*

⁵ *Id.*; Nancy Harmon Jenkins, *Maine Lobster Wars*, ZESTER DAILY (Aug. 9, 2009, 3:53 PM), <http://www.zesterdaily.com/politics/106-maine-lobster-wars.html>.

⁶ THE FEDERALIST NO. 10 (James Madison) (proposing that a strong, centralized republic best protects individuals and the public against special interests of factions); AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 1 (1995) ("[T]he American legal system lacks any theory to handle groups. The dominant legal paradigm in American law is the relationship between individual and state. The company we keep is presumed to be each person's own business, beyond the notice of the law."); Michael Corrado, *Is There an Act Requirement in Criminal Law?*, 142 U. PA. L. REV. 1529, 1529 (1994) ("No one should be punished except for something she does. . . . [S]he shouldn't be punished for what someone else does. . . . Our conduct is what justifies punishing us. One way of expressing this point is to say that there is a voluntary act requirement in the criminal law."); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) ("[O]nly those who are guilty of wrongdoing should be punished. . . ."). *But cf.* U.S. CONST. amend. I (right of free association). It is also at odds with basic tenets of the Judeo-Christian culture of which the U.S. legal system

individual responsibility can be traced back to Biblical times (at least), the uniquely American cultural ideal of rugged individualism, and its equally robust emphasis on individual legal rights, is consistent with American constitutional history and the Federalist distaste for local factions.⁷ The Federalists deliberately created governments at the state and federal (but not local) levels, and vested individuals with rights in the hopes that this design would suppress local groups or factions that might threaten the Republic.⁸

Despite this history, the logic underlying the state of Maine's response to the shooting discussed above becomes understandable when considered in context. The entire lobster fishing community of tiny Matinicus Island, where the incident occurred, was involved in the lobstermen's dispute.⁹ For weeks, the two men had been arguing about whether the gunman's son-in-law, a mainlander, was entitled to trap lobsters on the ocean floor (or, in lobstermen's parlance, "piece of bottom") underlying the waters surrounding Matinicus Island.¹⁰

This argument was only the latest manifestation of the Islanders' tradition of insisting that Mainlanders are not welcome to set lobster traps on "their" bottom.¹¹ The lobstermen of Matinicus Island have routinely and customarily insisted upon maintaining their traditional fishing boundaries against those they consider outsiders.¹² As a result, the territorial boundaries of the

is a part. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 763 n.272 (2008) ("One of the principal innovations of the Old Testament . . . is to introduce the symmetry of its formulation for that of Hammurabi's Code, a millennium earlier, which authorized the punishment of an innocent person (the perpetrator's son or daughter) for the action of the wrongdoer."); see also *Deuteronomy* 24:16 ("The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin."); *Devarim* 24:16 ("Parents shall not be put to death for children, nor children be put to death for parents: a man shall be put to death only for his own crime.").

⁷ See, e.g., CAROL M. ROSE, *Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on "Monarchism" to Modern Localism*, in PROPERTY & PERSUASION 71, 73 (1994) ("[T]he mechanical operation of the whole [constitutional] structure works to impede incursions on individual entitlements.").

⁸ *Id.*

⁹ Goodnough, *supra* note 1. I will use the terms *fisherman/men* and *lobsterman/men* to refer to members of both sexes, since both "[m]en and women [in the lobster industry] alike prefer to be called fishermen, lobstermen, or 'lobster catchers' . . ." JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY 237 n.1 (2003).

¹⁰ Goodnough, *supra* note 1.

¹¹ *Id.*

¹² Flannery, *supra* note 3 ("The century-old practice of [Matinicus I]sland families claiming exclusive lobstering rights to island waters is nowhere in Maine law, but it remains a fact of island life."). As discussed at length, *infra* notes 31–63 and accompanying text, lobster gangs have highly developed rules that members must follow within each gang's territories, as well as intergang rules and norms that result in the protection of

Matinicus Island lobster bottom form the effective borders of the Matinicus Island community, a subculture that defines itself by the work in which its members engage beyond the Island's dryland borders. Now, in the wake of new regulations and other factors that threaten to erase the customary fishing boundary that has defined the Island for more than a century, legal recognition of the community's right to prevent non-Island residents from catching lobsters in waters surrounding the Island may be essential for its own survival.¹³

Indeed, within weeks of the shooting, the Islanders began lobbying for legal recognition of a community-level property interest.¹⁴ The community asked the state to carve out an area surrounding the Island for its residents' exclusive fishing use, an initiative that an Island representative has labeled "a community conservation" effort.¹⁵

More than a decade ago, Professor Carol Rose advocated for new ways of conceiving community-level rights in property law terms.¹⁶ On her list of potential candidates for such recognition were lobster fishing communities like Matinicus Island.¹⁷ Rose identified lobster fishing communities based on their ability to cooperate and successfully self-manage common pool resources (CPRs),¹⁸ as documented in the works of a group of social scientists, led by

customary territorial boundaries. See generally JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 68 (1988).

¹³ Goodnough, *supra* note 1 ("[Matinicus lobstermen] want the state [of Maine] to carve out a restricted zone where only full-time Matinicus residents can catch lobsters, an extraordinary step that the state is now considering to preserve the local livelihood and the island itself. . . . The idea is to make sure that people who are taking lobsters off this piece of bottom are living here on the island," said Clayton Philbrook. . . . 'If we lose control, we fold up and die—that's it.');" *infra* notes 113–15; see also *infra* notes 127–29, 134–36, and accompanying text (discussing recent efforts by Matinicus Island lobstermen to establish a subzone in light of the community's economic need for such action in order to survive).

¹⁴ Auciello, *supra* note 1.

¹⁵ *Id.* (quoting Matinicus lobsterman Clay Philbrook).

¹⁶ Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 139–44 (1998); *id.* at 132 ("[W]e need to consider and refine our thinking about still another and rather different category of property. This category is what I call the 'limited common property' or LCP—property held as a commons among the members of a group, but exclusively vis-à-vis the outside world."). The related idea of how private ownership might be achieved (including, in the concept of "private ownership," the formal recognition of customary group ownership) is the broad subject of a more recent article, which focuses on how various legal obstacles (such as antitrust issues arising from private formalization of customary arrangements) might be overcome. See Jonathan H. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS U. L. REV. 9 (2002).

¹⁷ Rose, *supra* note 16, at 140, 176–78 (arguing that limited common property rights should be recognized in both the environmental and cyberspace contexts).

¹⁸ "Common pool resources" (CPRs) are any good—renewable or nonrenewable, including fish and other wildlife, pastures, forests, light, wind, air—from which it is generally difficult to exclude others. See ACHESON, *supra* note 9, at 9–10. The difficulty of excluding general (common) use is the primary

Professor Elinor Ostrom, who was awarded the 2009 Nobel Prize in Economics based on this work.¹⁹

While Ostrom's work draws conclusions about the feasibility of group management based on case studies of groups or communities that are successful resource managers, neither the CPR literature nor the legal literature analyzes whether it may be normatively desirable to vest formal rights in these groups to further encourage their behavior. Furthermore, while Professor Rose noted the possibility that formal recognition of group-level property rights in such groups might eventually emerge, she did not try to guess *how* or *when* such a movement might occur in practice. But in the wake of the Matinicus Islanders' current effort to gain formal legal recognition of their traditional fishing territory, the idea that such a movement might occur, and what form it should take, is ripe for fulsome consideration and evaluation.

Because law typically evolves incrementally, a group-level right is most likely to emerge as the logical extension of an analogous right that is already well accepted. In fact, one form of group-level property rights has been emerging in both international and domestic law over the past half-century.²⁰ So-called cultural property rights vest groups with collective property rights in objects and certain other property having unique cultural significance. This form of group-level rights is now firmly embedded in U.S. law.

While, to date, cultural property rights have predominantly been viewed as rights held by indigenous communities in cultural objects and a restricted class of other property, such as burial grounds, I propose in this Article that such

characteristic of a CPR; by contrast, at the opposite extreme, "anticommons" may exist when multiple users hold the right to exclude others, thus preventing efficient use of a resource by anyone. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622–23 (1998) (describing anticommons); Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. (forthcoming 2011) (manuscript at 4–5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743651 (describing how the parcel of property required for "utility-scale" renewable fuel infrastructure, such as wind power, creates an anticommons problem because the parcel overlies multiple jurisdictions, each with the right to exclude and stop the project).

¹⁹ Professor Ostrom was awarded the 2009 Nobel Prize in Economics "for her analysis of economic governance, especially the commons." Press Release, The Royal Swedish Acad. of Scis., The Prize in Economic Sciences (Oct. 12, 2009), available at http://nobelprize.org/nobel_prizes/economics/laureates/2009/press.pdf. Some of her most notable works include: ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) [hereinafter OSTROM, GOVERNING THE COMMONS]; ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005) [hereinafter OSTROM, INSTITUTIONAL DIVERSITY]; ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES (1994).

²⁰ LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY 112 (2003) ("The courts have exhibited remarkable receptiveness to public efforts to protect cultural property . . .").

rights provide an excellent model for imagining how to design group-level rights in communities (such as Matinicus Island) that sustainably manage CPRs. While the Matinicus Island community has a long, unique history and distinct subculture, it is not, as the term is generally understood, “indigenous.”²¹ For that reason, this community may bridge the gap between indigenous groups that have already been vested with some collective community rights, and other managers of CPRs that might be logical candidates for such property rights in the future.²²

This Article demonstrates how such a legal right might be recognized. Part I begins by laying out the history of the Matinicus Island lobstermen. This Part relates the extensive history of the customary territorial system that has long defined the Maine lobsterfishery and the conservation ethic that has become a predominant cultural value in the industry, particularly among close-knit groups like the Matinicus Island lobster fishing community.²³ The Part then describes legal regulation of the industry, including the new “comanagement” system and licensing regime, which threatens the Matinicus Island community. It also examines in some detail the recent efforts of Maine island communities, including the current effort of Matinicus Islanders, to seek formal recognition of their fishing territory boundaries.

Part II reviews the growing body of literature demonstrating the efficacy and efficiency of small, close-knit groups. In particular, this Part discusses the demonstrated ability of communities, including Maine lobster fishing communities, to sustainably manage CPRs without legal intervention. The academic literature suggests that fishermen from such communities are

²¹ “The term ‘indigenous peoples’ is usually used in reference to those individuals and groups who are descendants of the original populations residing in a country. . . . [However, n]o single agreed-upon definition of the term ‘indigenous peoples’ exists.” Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 1, 2 (1994).

²² Although I generally refer, as a shorthand concept, to the possibility of a legally recognized “property right” in the traditional fishing bottom surrounding Matinicus Island (and in CPRs more generally), I do not mean to suggest by that phrase that such recognition must include every stick in the traditional “bundle” of full property rights. To the contrary, I generally mean the exclusive right to use this territory for lobster fishing (and the right to exclude other lobstermen from using it for this purpose), but not, for example, the right to alienate. See Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1531 (1989) (“If property law does develop like water law, it will increasingly exist as a collection of use-rights, rights defined in specific contexts and in terms of similar rights held by other people.”).

²³ A somewhat amorphous concept, a “close-knit group” has been defined as “a network in which power is broadly distributed and information pertinent to informal control circulates easily among network members. Typically, close-knit groups are made up of repeat players who can identify one another.” Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 359 (2003) (footnote omitted).

significantly more conservation oriented than their competitors. The Part ends by examining arguments of potential corruptibility and disintegration of community efficacy when formalization or “legalization” of community norms occurs.

Part III then describes the field of cultural property rights. The Part describes various legal regimes in both domestic and international law—including specific international environmental initiatives seeking to protect and harness the sustainable management practices of local communities. This Part also examines the different ways that international treaties and domestic statutes have recognized such rights, and places this movement in the context of the historical recognition of certain group-level rights in the United States.

Part IV merges insights from the previous Parts to analyze claims for formal legal recognition of exclusive rights in a CPR, such as the one currently being advanced by Matinicus Islanders. The Part proposes a framework for analyzing when such recognition is in the public interest and suggests several alternatives for framing formal rights.

I. CASE STUDY: THE LOBSTERMEN OF MATINICUS ISLAND, MAINE

Matinicus Island sits more than twenty miles off the Maine coast, farther offshore than any other Maine island community. The Island has no restaurant or gas station, and residents generally fax their orders to a mainland grocery store.²⁴ In the winter, the ferry serves the Island only once a month.²⁵ There are only about fifty year-round residents on the Island and nearly all of them are full-time lobstermen or in some way dependent on lobster fishing for their livelihood. As in other Maine lobster fishing communities, most Matinicus Islanders have “few if any other ways to make a living.”²⁶ The strongly held view of the Island’s residents—that the continuation of a year-round community is entirely dependent on their continued ability to draw a livelihood from the lobster industry—seems valid.²⁷

²⁴ Clarke Canfield, *Lobstermen: Lobster Wars Rock Remote Maine Island*, LEWISTON MORNING TRIB. (Me.), Sept. 20, 2009, at D6.

²⁵ *Id.*; see also *Maine State Ferry Service: Matinicus Ferry*, MAINEDOT, <http://www.maine.gov/mdot/msfs/matinicus.htm> (last updated Jan. 27, 2011).

²⁶ ACHESON, *supra* note 9, at 78.

²⁷ *Id.* at 54; Flannery, *supra* note 3 (noting that half of the Island’s year-round residents are “serious resident lobstermen”); *id.* (reporting opinion of Maine Marine Patrol Major John Fetterman that “[n]o one out there [on Matinicus Island] can survive a closure [of the lobster fishery]” (internal quotation mark omitted)); Goodnough, *supra* note 1 (noting that the state of Maine “is now considering” taking the “extraordinary step”

While unique in many ways,²⁸ the Matinicus Island community is part of a larger culture of lobster fishing that exists throughout coastal Maine. For more than three decades, this lobster fishing culture of informal, extralegal norms²⁹ has been extensively studied and documented by anthropologist and University of Maine Professor James Acheson.³⁰ These cultural norms exist sometimes alongside and in tandem with, but also separate and apart from, the legal regime that regulates the industry. The community of Matinicus Island can be better understood as part of the complex culture from which it emanates.

A. Regulation of the Maine Lobster Industry

1. Extralegal Rules, Customs, and Informal Practices

Traditionally, Maine lobster fishermen have informally subjected themselves to a system of customary territorial rules. These rules have operated continuously for well over a century and have not significantly abated despite the advent of increasing legal regulation and enforcement over the past several decades.³¹ In theory, all one needs to do in order to go lobster fishing off the coast of Maine is satisfy the requirements for a state license,³² in

of carving out a restricted fishing zone around Matinicus Island in order “to preserve the local livelihood and the island itself”).

²⁸ “Matinicus has been described as not just a place, but more ‘a way of life’” ROGERS, *supra* note 1, at 12.

²⁹ Throughout the Article, I use the term *extralegal* to refer to rules that are not formalized or codified in legal instruments.

³⁰ ACHESON, *supra* note 9, at 11–13 (describing his research). See generally *id.* at 1 (attempting to answer the vexing question of what conditions lead “people [to] overexploit or conserve critical resources” by “focusing on the Maine lobster industry,” which is “one of the most remarkably successful fisheries in the world today”); ACHESON, *supra* note 12, at 1–2 (shattering the “stereotype of the Maine lobster fisherman . . . as the last of the rugged individualists” by showing that “[s]urvival in the Maine lobster-fishing industry depends on ties with fellow lobstermen, the ability to negotiate with lobster dealers, and the sharing of certain skills”); James M. Acheson & Jennifer F. Brewer, *Changes in the Territorial System of the Maine Lobster Industry*, in *THE COMMONS IN THE NEW MILLENNIUM* 37, 56 (Nives Dolšak & Elinor Ostrom eds., 2003) (concluding that “[t]raditional lobstering territories in Maine are changing,” with areas of exclusive fishing decreasing and areas of mixed fishing increasing). Every serious work about the lobster industry relies on Professor Acheson’s works.

³¹ ACHESON, *supra* note 9, at 41–42 (citing *Clans of Lobstermen Threaten Bloodshed*, BRUNSWICK TIMES RECORD (1907)).

³² To obtain a commercial lobster fishing license, one must enter “the apprentice program,” which “consists of a minimum of 24 months, documenting 1,000 hours, 200 fishing days with up to three sponsors AND apprentice/student fishermen must provide documentation of successful completion of a United States Coast Guard approved Fishing Vessel Drill Conductor Course.” ME. DEP’T OF MARINE RES., MAINE LOBSTER APPRENTICESHIP PROGRAM (2011) (emphasis omitted), available at <http://www.maine.gov/dmr/rm/lobster/apprenticebrochure.pdf>. Once the apprenticeship requirements are fulfilled, a prospective licensee is required to “fill out a Zone Declaration Form to declare the lobster zone [he] wish[es] to fish the majority of [his]

practice, a prospective lobster fisherman must jump through substantially more hoops. Local customs and practices determine where lobstermen set traps, as well as how many are set.³³

A Maine lobsterman will almost certainly not succeed unless he is a member of a “harbor gang.” Each harbor gang follows its own set of rules, which may change from season to season as well as over time. These rules are customary and widely, if not universally, observed, but for the most part they have always been wholly extralegal—or, in some cases, were instituted extralegally before being memorialized later in conservation laws.³⁴

While all gangs inhabit informally demarcated territories, there are two distinct types of territory.³⁵ In the first type of territory—so-called nucleated territory—the lobster gangs fish in certain exclusive pockets, usually near the harbor mouth, but overlap the territories of other gangs farther from their home base in nonexclusive areas.³⁶ A perimeter-defended area, by contrast, is exclusive to the gang that fishes it and is defined by distinct boundaries that do not overlap any other gang’s territory. Perimeter-defended areas have become less common and exist today only around some offshore islands (including

traps.” *Id.* If the chosen zone is “limited-entry,” the applicant will then “be placed on the waiting list for that zone based on [his] eligibility date.” *Id.*

³³ Some gangs also enforce stricter rules than those set by the state or federal government in other respects as well. For example, some harbor gangs have established informal trap limits that are stricter than those required by state law or regulation. See ACHESON, *supra* note 9, at 57. And, even before it was mandatory, it was common practice for lobstermen to notch a *V* in breeding stock. See *id.* at 88–90.

³⁴ Two examples of such conservation rules, adopted first by the lobstermen and later enacted into law by the state legislature, are (1) *V*-notching the tails of egg-extruding females so that, when the eggs are not visible, other lobstermen will still know they are breeders and throw them back, and (2) the adoption of lobster trap vents. *Id.*

³⁵ Professor Acheson uses the labels *nucleated* and *perimeter-defended* to describe these types, see *id.* at 29, and I will adopt his terms here too.

³⁶ *Id.* On a map, nucleated territories appear to be a complicated Venn diagram, with each roughly circular or oval territory containing parts that are exclusive to one gang and others overlapping one or more gangs. See, e.g., *id.* at 52 (depicting a map of nucleated fishing areas of the mid-coast region of the Muscongus Bay area).

Professor Acheson describes nucleated territories as providing their members with a strong “sense of ownership” in the small area “close to the mouth of the home harbor,” which “grows progressively weaker the further from the harbor one goes.” *Id.* at 29. By the time one is “[s]everal miles from shore, the sense of territoriality is weak and a good deal of ‘mixed fishing’ takes place.” *Id.* In addition, “[n]ucleated areas have far larger territories, and the gangs controlling them have more fishermen than those in perimeter-defended areas,” which in turn affects and is affected by the social organization of the gangs who fish these different types of territories. *Id.* “People in perimeter-defended areas interact a good deal and know each other very well. . . . In nucleated areas, there is far less interaction.” *Id.*

Matinicus).³⁷ These few remaining perimeter-defended territories encompass a substantially smaller physical area than they did just twenty years ago.³⁸

The diminishing number and size of perimeter-defended territories is attributable in part to increasing encroachment by rival gangs, a practice that has intensified as the total number of lobstermen competing for lobsters has grown. While encroachment has always occurred—with boundary lines shifting over time—the likelihood of successful territorial defense has lessened in recent years.³⁹ Traditionally, if warnings did not suffice to dissuade invading gangs from encroaching, lobster gangs' primary means of defending their informal territories was to illegally cut trap lines on traps set by infiltrating members of rival gangs.⁴⁰ In recent years, however, increased law enforcement measures targeting trap cutting has had a significant deterrent impact.⁴¹ The steep fines and potential to lose one's license—and with it, in many cases, one's sole source of income—have combined to substantially deter lobstermen from defending their traditional territories.⁴²

No one is quite sure exactly how the territorial system originated. Most likely it was the result of usufructuary rights developing over time as individual owners of waterfront properties fished in adjacent waters and gradually developed a sense of ownership.⁴³ These individual "titles" may have eventually evolved into a system of de facto collective ownership of the fishing territory by all the owners of property on a single island or near a harbor.⁴⁴ No record exists to show precisely when this development occurred,

³⁷ *Id.*; see also ACHESON, *supra* note 12, at 79 ("Perimeter-defended areas exist only in the fishing waters surrounding Green Island, Matinicus, Metinic, Monhegan and some of the smaller islands in the Muscle Ridge channel.").

³⁸ ACHESON, *supra* note 9, at 51–56 (describing territorial changes over time).

³⁹ Acheson & Brewer, *supra* note 30, at 56–57.

⁴⁰ *Id.* at 41–42.

⁴¹ *Id.* at 47–48.

⁴² *Id.*; ACHESON, *supra* note 9, at 223 (noting that, in recent years, "fear of losing one's license [has] dissuaded many fishermen from indulging in a lot of trap cutting"). The potential loss of license has had a significant impact despite the relative unlikelihood of being caught by the Marine Patrol, which is broadly dispersed across a large area. See James M. Acheson, *The Lobster Fiefs Revisited: Economic and Ecological Effects of Territoriality in Maine Lobster Fishing*, in *THE QUESTION OF THE COMMONS* 37, 39 (Bonnie J. McCay & James M. Acheson eds., 1987) ("[O]nly thirty-seven state Sea and Shore Fisheries wardens patrol some 2,500 miles of coast . . .").

⁴³ Acheson, *supra* note 42, at 41; see also Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 *ECOLOGY L.Q.* 813, 820 (1997) ("A usufruct is a right to use and enjoy the profits and advantages of something belonging to another.").

⁴⁴ Today, it is more complicated than this, with lobster gang membership correlated to, but not necessarily dependent upon, a connection to the ownership of nearby real property, or at least a strong connection to the local community. See ACHESON, *supra* note 9, at 30–31. The correlation is weaker than it

but even a century ago, a local newspaper was reporting that “the Monhegan fishermen have always looked upon lobster fishing around the island as their exclusive right.”⁴⁵

While the origin of the system of informal rules is murky, the effects are clear. “Many of the rules devised for the lobster industry [effectively] give fishermen property rights over the resource (such as territorial rules), and thus motivate fishermen to conserve.”⁴⁶ This conservation ethic does not correlate with any formal legal initiative. While conservation laws have been on the books in Maine since the nineteenth century, they were basically ignored until after World War II.⁴⁷ Furthermore, after 1934, very few formal legal initiatives occurred until federal involvement in marine resource conservation spurred new regulation at various levels beginning in the 1970s.⁴⁸ Yet, during this same time period, the culture changed and “a marked conservation ethic” developed.⁴⁹ “By the 1990s, the lobster conservation laws became almost self-enforcing.”⁵⁰ This shift has been attributed to a change in attitude among the lobstermen themselves.⁵¹

This marked change in attitude among post-World War II lobstermen likely derived first from the lobstermen’s economic desire to avoid another “bust” like one they had experienced during the Great Depression, when the lobster catch dropped precipitously.⁵² As the catch continued to increase over time, the lobstermen attributed this increase to informal conservation rules they had

used to be: “Over the course of the past half century, it has become easier to enter harbor gangs of nucleated areas. Many people have entered the industry who are not from lobster fishing families, and a lot of people ‘from away’ have succeeded in becoming lobster fishermen.” *See id.* at 31.

⁴⁵ *Id.* at 42 (quoting *Clans of Lobstermen Threaten Bloodshed*, *supra* note 31) (internal quotation marks omitted).

⁴⁶ *Id.* at 6; *see also infra* Part IV (discussing more generally the empirical support for conservation incentives among groups with a strong sense of community).

⁴⁷ Professor Acheson recounts how utter disrespect for the conservation laws permeated the industry during the early part of the twentieth century. *See* ACHESON, *supra* note 9, at 81. The attitude was so prevalent that illegal, undersized lobsters were served at a dinner party held by a state commissioner charged with the management of marine resources (including enforcement of the size laws). *Id.* Once, in a desperate, unsuccessful effort to change this attitude, a Maine Commissioner of Sea and Shore Fisheries closed down the fishery, hoping to send a message to the citizenry, who were, in the Commissioner’s view, overwhelmingly “in favor of the illegal traffic in lobsters.” *Id.* (quoting Letter from Horatio Crie, Comm’r, Sea & Shore Fisheries to Walter Donnell (Mar. 19, 1932), *reprinted in* CORRESPONDENCE OF THE COMMISSIONER OF SEA AND SHORE FISHERIES 1930–1934 (Me. State Archives, Augusta, Maine)) (internal quotation mark omitted).

⁴⁸ *See infra* notes 84–91 and accompanying text.

⁴⁹ ACHESON, *supra* note 9, at 81.

⁵⁰ *Id.*

⁵¹ *Id.* at 162–64.

⁵² *Id.* at 219.

simultaneously adopted, further solidifying the importance of these informal rules in their culture.⁵³ Notably, the traditional boundary system, with its informal group monitoring, became deeply entrenched and flourished during the same time period in which a conservation ethic steadily took hold and increased rapidly.⁵⁴

Because the informal rules that govern lobster gangs lack legal grounding, they are subject to being undermined or overcome by laws or regulations. For example, enforcement by marine patrol of legal prohibitions on trap line cutting has dramatically decreased lobstermen's incentives to defend their informal boundaries.⁵⁵ The impact is so significant that "the entire territorial system is changing and may go out of existence" as a result of stepped-up law enforcement.⁵⁶

This threat to the territorial system is to the detriment of lobster conservation efforts. Though perimeter-defended areas have gotten smaller, and disappeared entirely in fishing areas off the mainland, they provide an ideal environment for the development of effective social controls over group member behavior.⁵⁷ Lobstermen in these communities have "few if any other ways to make a living on these islands."⁵⁸ Accordingly, they have always been and continue to be highly motivated "to preserve these resources for themselves" in order "to make a living, and for future generations, if the community [is] to survive."⁵⁹ It may be that "these factors [have] played a

⁵³ *Id.*

⁵⁴ *See id.* at 222 (contrasting changes in extralegal enforcement of territorial boundaries over the last twenty years with the ease of enforcing boundaries during "most of the past one hundred years"). This culture of conservation extends beyond compliance with existing laws. *See id.* at 88–90 (describing the voluntary effort of lobstermen to cut notches on egged lobsters before it was legally required).

⁵⁵ *Id.* at 222.

⁵⁶ *Id.*

⁵⁷ As will be discussed in Part II, a substantial body of economic and political science literature is devoted to the study of close-knit groups and their ability to develop informal rules to manage CPRs. Some subgroups that make up the informal territorial culture that binds together Maine lobstermen as a subculture better exemplify this than others. In nucleated areas, monitoring is difficult because groups are both widely dispersed and overlapping. *Id.* at 74. Perimeter-defended areas, by contrast, are smaller and tend to be confined to members of isolated—mostly island—communities that are close-knit, with extensive kinship and social ties that extend beyond the fishery and into the daily lives of the lobster gang members and their families. *See id.* at 78 (discussing the example of Monhegan, which has a "strong sense of community" and "where intense interaction aids in developing common goals and values").

⁵⁸ *Id.*

⁵⁹ *Id.*; accord Auciello, *supra* note 1 ("This isn't for what we [current lobstermen] can put in our pockets . . . It's for our grandchildren to have something to put in their pockets." (quoting Matinicus Island lobsterman Clay Philbrook) (internal quotation marks omitted)).

strong [role] in motivating the establishment of territories and limited-entry rules.”⁶⁰

Even after informal rules and norms develop, maintaining them—and thereby maintaining the territories to which they apply—is difficult because it requires collective action.⁶¹ While certain lobster gangs have been highly successful in overcoming this obstacle, most have not. Those that have succeeded have done so in large part because they are affiliated with close-knit communities, whose small size encourages close interaction and monitoring, making them particularly hospitable to coordination and cooperation.⁶² However, whether even these communities can survive the combined impact of the recent legal and technological changes that impact the Maine lobster fishery remains to be seen.⁶³

2. *Formal Legal Regulation*

a. *Statutory Regulation: 1870s–1980s*

While lobsters were caught and consumed locally before the middle of the nineteenth century, there was no commercial lobster industry in Maine before 1840.⁶⁴ Once it emerged, the commercial lobster industry grew quickly with

⁶⁰ ACHESON, *supra* note 9, at 78; *see also id.* at 221–24 (discussing the virtual overlap between a conservation ethic and a low discount rate, which both represent a “willingness to sacrifice present gains for future rewards”).

⁶¹ Social scientists agree that collective action dilemmas are exceedingly difficult obstacles to overcome. Such “dilemmas have received an enormous amount of attention from social scientists, primarily because they describe so many of the most vexing problems plaguing humanity.” *Id.* at 8. It has been said that politics itself is a “study of ways of solving collective action problems.” Michael Taylor, *Cooperation and Rationality: Notes on the Collective Action Problem and Its Solutions*, in *THE LIMITS OF RATIONALITY* 222, 224 (Karen Schweers Cook & Margaret Levi eds., 1990).

⁶² ACHESON, *supra* note 9, at 78–79, 143 (“A strong sense of community appears to play a key role in maintaining rules once they are in place.”).

⁶³ Acheson & Brewer, *supra* note 30, at 56 (concluding that the combination of “trap escalation,” “bigger, better equipped boats,” the passage of “a zone management law,” and stricter “enforcement of laws prohibiting gear molestation” have all combined to “alter[] the cost-benefit ratio of defending traditional boundaries, with the result that the amount of territory held exclusively by harbor gangs has decreased, and the number of areas where mixed fishing takes place has increased”). The demise of small lobster fishing communities may be hastened by the recent downward trend of lobster prices, combined with generally poor economic conditions. *See Goodnough, supra* note 1.

⁶⁴ ACHESON, *supra* note 9, at 82. Some of these communities were in existence well before the lobster industry. For example, one local account states that the population of Matinicus Island in 1810 was roughly double what it is today and that, by 1835, the Island had 192 residents—almost four times its current population. *See ROGERS, supra* note 1, at 16–17. “In 1870 the population of Matinicus reached its peak at two hundred seventy six. After that there would be a steady decline.” *Id.* at 17.

two disparate and competing subindustries developing—the lobster canning business and the live-lobster market. The canning industry preferred to purchase smaller lobsters, which were available at a lower price per pound.⁶⁵ The live-lobster industry had a competing interest in protecting lobsters until they grew large enough to sell to restaurants for individual meals.⁶⁶

When the lobster catch began to decline sharply in the 1860s, the competition between these two subindustries intensified, and each began lobbying for conservation laws primarily aimed at benefitting itself and harming its competitor.⁶⁷ The first law, passed in 1872, forbade the capture of egg-bearing females.⁶⁸ Two years later, the Maine legislature passed another law, the first to limit the size of lobsters that could be captured, making it illegal to take very small lobsters from October to April.⁶⁹ These first laws impacted only the live-lobster industry, not the canneries.⁷⁰ Even so, the live-lobster industry soon grew in size and strength and, by the end of the century, had developed a strong lobby that helped to achieve the passage of several additional laws.⁷¹ Some of these statutes directly targeted cannery operations—for example, making it illegal to can lobsters from August through April—while others increased restrictions on capturing both breeding and younger lobsters.⁷² As their sponsors had hoped, these laws eventually drove the canneries out of business.⁷³

Despite the existence of conservation laws and the absence of any competition from the canning industry, the Maine lobster catch continued to

⁶⁵ ACHESON, *supra* note 9, at 82.

⁶⁶ *Id.* at 82–83.

⁶⁷ *Id.* at 83. These were “conservation” laws in name only, at least insofar as the lobbying industries behind them were concerned. The real motivation behind legislation regulating what size lobsters could legally be taken was not conservation; the point was to harm the competing industry. *Id.* at 82–83.

⁶⁸ An Act to Protect the Spawn or Egg Lobsters in the Waters of Maine, ch. 20, § 1, 1872 Me. Laws 14, 14.

⁶⁹ An Act for the Better Protection of Lobsters in the Waters of Maine, ch. 210, § 1, 1874 Me. Laws 146, 146–47 (less than 10.5 inches).

⁷⁰ Laws protecting large breeding females did not affect an industry that preferred smaller, cheaper lobsters, while the restriction against taking lobsters during the winter months simply shifted the cannery operations to months when the average price of lobster was lower anyway. *See* ACHESON, *supra* note 9, at 82–83.

⁷¹ *Id.* at 84.

⁷² *E.g.*, An Act for the Protection of Lobsters, ch. 96, §§ 1–2, 1879 Me. Laws 114, 114; An Act for the Protection of Lobsters, ch. 138, § 2, 1883 Me. Laws 115, 115–16.

⁷³ ACHESON, *supra* note 9, at 84. All New England lobster canneries had closed before the turn of the century. *See id.* (“These laws made canning so unprofitable that the canneries began to close. . . . In 1895, the legislature passed a law . . . [that] apparently forced the last of the canneries from the state.” (citation omitted)).

decline over the next several decades.⁷⁴ In response, more laws were passed. In 1917, the Maine legislature enacted a law providing that the state would pay market prices to purchase any egg-bearing lobsters in the possession of lobster wholesalers.⁷⁵ State officers would then punch holes in these lobsters' tails and release them.⁷⁶ Lobstermen were prohibited from catching and keeping any "punched" lobsters.⁷⁷

Another legislative effort aimed at restoring the declining lobster population was the passage of the so-called double-gauge law.⁷⁸ The first double-gauge law was enacted in 1934 and imposed a maximum size limit in addition to the already-existing minimum.⁷⁹ By permitting lobstermen to take only medium-sized lobsters, double-gauge laws encourage and allow lobstermen to catch lobsters that are an optimal size from a market perspective, but simultaneously protect very young lobsters as well as the older breeding stock that produce the majority of eggs.⁸⁰

Between the 1930s and the 1970s, few additional legal regulations were enacted. The most significant exception was the 1947 amendment to the 1917

⁷⁴ *Id.* at 80, 84. As discussed, *supra* note 47 and accompanying text, these laws were essentially without effect when they were first enacted; they were ignored by nearly all lobstermen whose widespread refusal to abide by them made enforcement impossible.

⁷⁵ ACHESON, *supra* note 9, at 89 (citing An Act to Amend Section Thirty-Six of Chapter Forty-Five of the Revised Statutes, Relating to the Purchase, Marking and Liberating of Seed Lobsters, ch. 255, 1917 Me. Laws 285). Technically, wholesalers were already forbidden from selling such lobsters, and to the extent they were complying with this rule and putting these lobsters back in the ocean, the new law should not have been necessary. In addition to providing economic incentives to wholesalers, the law had the added benefit of marking breeding stock as such even when they were not extruding eggs. The statute was apparently very successful, with the state of Maine purchasing "60,000 pounds of seed lobster, from the fishermen through dealers, at market prices." *Id.* (quoting 1936 NINTH BIENNIAL REPORT OF THE DEP'T OF SEA AND SHORE FISHERIES OF THE STATE OF MAINE 11) (internal quotation marks omitted).

⁷⁶ *Id.*

⁷⁷ *Id.* (citing 1917 Me. Laws 285).

⁷⁸ The double-gauge law is still in effect albeit in slightly different form than when originally enacted. *See* ME. REV. STAT. tit. 12, § 6431 (2005 & Supp. 2010).

⁷⁹ ACHESON, *supra* note 9, at 88 (citing Alfred Eldon, *Double Gauge Law Passed*, ATLANTIC FISHERMAN, Jan. 7, 1933, at 7); *see also id.* (citing An Act Relating to Measurement of Lobsters, ch. 176, 1935 Me. Laws 388) (double-gauge law passed in 1935). Initial lobbying for a double-gauge law began almost twenty years before its eventual enactment. *See id.* at 86–88 (lobbying for double-gauge law began in or around 1915).

⁸⁰ The breeding potential of a female lobster increases dramatically with size. "A female measuring 3¼ inches on the carapace might be able to extrude five hundred eggs; one 5 inches on the carapace can extrude one hundred thousand at once. Moreover, large lobsters can extrude eggs twice on a single molt or copulation." *Id.* at 196.

law.⁸¹ This amendment prescribed that a “V-shaped” notch be carved into the tail of any egg-bearing female, replacing the punched hole that had been the norm for thirty years.⁸² To help with enforcement, this amendment also permitted the sale of such lobsters to state officials only by individuals with special licenses.⁸³

In the 1970s, a type of lobster trap that contained a vent designed to allow undersized lobsters to escape was invented.⁸⁴ It was soon proposed that the use of this trap design be legally mandated.⁸⁵ The proposed law enjoyed broad support among scientists—and also among lobstermen, who quickly realized that using an escape vent would save them a substantial amount of work ridding traps of undersized lobsters and, at the same time, would increase their catch by making room for a greater number of legal-sized lobsters in each trap.⁸⁶ Many lobstermen began voluntarily using escape vents in their traps before the escape-vent law was enacted in 1978.⁸⁷

More intensive regulation occurred in the 1970s and 1980s following the involvement and interest of the federal government in marine fisheries. Before

⁸¹ As discussed above, the V-notch law was informally expanded during the same post-World War II period when lobstermen independently decided to enhance the effectiveness of the program by voluntarily cutting notches on egged lobsters. *Id.* at 89–90 (describing the increasing popularity among lobstermen to undertake this voluntary effort and noting that this practice is “one of those cases, perhaps rare, where a formal law [has] turned into an informal norm”).

⁸² An Act to Revise the Sea and Shore Fisheries Laws, ch. 332, § 123, 1947 Me. Laws 404, 408.

⁸³ *Id.* In addition to the above legislation, which exists in some form to this day, *see* ME. REV. STAT. tit. 12, § 6436(1) (2005), the only other major legislative enactments during this period were the “seasonal laws,” restricting lobster fishing in many areas during the summer months. ACHESON, *supra* note 9, at 84. Most of these were eventually repealed, perhaps because technology improved to allow summer fishing without an extremely high mortality rate for the catch. *See id.* at 85. The only one that continues to this day is the seasonal restriction on lobster fishing off Monhegan Island. *Id.* By state law, lobster fishing is not permitted in the waters within two miles of the island except between the months of December and June. This law has been in effect for more than a century. *See id.* at 84 (citing An Act to Better Protect the Lobster Industry Within Two Miles from the Shore of Monhegan Island Between the First Day of June and the Twenty-Fifth Day of November of Each Year, ch. 61, 1907 Me. Laws 273). This law allows the lobstermen of Monhegan Island to focus only on fishing during the winter months and only on the highly profitable tourist industry during the summer months (and without worrying about competitors taking lobsters from their territory). *See id.* at 84–85.

⁸⁴ ACHESON, *supra* note 9, at 90.

⁸⁵ *Id.* at 91.

⁸⁶ *Id.* at 90–91.

⁸⁷ *See id.* (citing An Act to Allow Escape of Sublegal Lobsters from Lobster or Crab Traps, ch. 385, 1977 Me. Laws 528). The escape vent law has been modified slightly over the years but has generally retained very broad support throughout the industry and the scientific community. *See id.* at 91.

the 1970s, there was no federal regulation of the lobster fishery.⁸⁸ This changed only after states lobbied the federal government to take action to protect the fisheries from international vessels that had begun to arrive in the waters off of New England in increasing numbers by the 1960s and 1970s, and which had “severely damag[ed] stocks of fish in international waters that had been historically fished by the American fleet.”⁸⁹ The result was the passage of the Fisheries Conservation and Management Act of 1976,⁹⁰ which gave the federal government “the power to regulate all fishing within 200 miles of the United States—including the domestic industry.”⁹¹

b. Comanagement and Other Legal Regulation: 1990s to the Present

From the point of view of the lobster industry, the involvement of the federal government has been generally unwelcome.⁹² Control has shifted back and forth between federal and regional entities since the 1970s.⁹³ Many of the current state-law and regional initiatives are concerted efforts to ward off more intrusive federal intervention.⁹⁴

The major effort in this respect is Maine’s “comanagement” or “zone licensing” system, arguably the most radical and significant shift in the regulation of the lobster industry.⁹⁵ The zone system was established by legislation in 1995 after years of lobbying and debate.⁹⁶ The main features of this system are: (1) demarcated fishing zones, each of which may be primarily fished only by lobstermen with a license for that zone; (2) eligibility criteria to

⁸⁸ See *id.* at 166 (“From the founding of the Republic to the 1970s, fisheries management was completely in the hands of the states.”).

⁸⁹ See *id.* at 167.

⁹⁰ *Id.* at 166.

⁹¹ *Id.* at 167.

⁹² See generally *id.* at 188–91 (describing significant rule changes agreed upon by the lobster industry in an effort to ward off more extensive federal regulation in response to lawsuits brought by environmental activists under the Marine Mammal Protection Act and the Endangered Species Act to prevent endangered whales from being injured or killed from entanglements in lobster gear).

⁹³ *Id.* at 167.

⁹⁴ See *id.* at 166, 191.

⁹⁵ *Id.* at 97.

⁹⁶ *Id.* at 99. While the zone system was entirely new as a legal matter in 1995, a limited entry system has been the de facto norm for more than a century, as discussed below in Part I.A.3. Thus, while “[t]he idea of limited entry came as no shock or surprise, for the industry ha[d] been limiting entry to harbor gangs informally for many decades,” the lobstermen’s “interest focused on who would be allowed to go fishing and who would not. It quickly became apparent that fishermen wanted to exclude those who had traditionally been excluded and include those who had always been granted admission.” ACHESON, *supra* note 12, at 134. As a result of concerns regarding establishing criteria for granting licenses that would preserve the status quo, legislative attempts to regulate lobster fishing were stymied for years. See *id.* at 134–35.

qualify for a commercial license; (3) an apprenticeship program for all new entrants to lobster fishing; (4) trap limits of no more than 1,200 traps per license holder; and (5) a trap-tag system to identify owners of individual traps.⁹⁷

The most significant feature of this comanagement system is the structure established for its governance. As a “bottom-up” system, comanagement aims to vest a great deal of control and governance in the hands of the lobstermen themselves.⁹⁸ Each zone has an elected council composed of zone license holders.⁹⁹ The councils are empowered to propose rules specific to their respective zones.¹⁰⁰ A rule proposed by the zone council is then submitted to a vote of all license holders within the zone.¹⁰¹ If two-thirds of the license holders agree that the rule should be enacted, the council conveys the result to the Commissioner of the Maine Department of Marine Resources who, so long as the rule is “reasonable,” is required to formalize the rule as a departmental regulation that will be enforced by the Marine Patrol.¹⁰²

Most of the zones have taken advantage of the comanagement aspect of the law and enacted zone-level rules. For instance, within a few years, most zones had passed more restrictive trap limits than the statewide maximum, and many had imposed limited-entry rules.¹⁰³ Many of the rules that have been passed are tailored to each zone’s “culture.” For example, in the rural, sparsely populated northeast coast, near the Canadian border, the lobstermen object

⁹⁷ ME. REV. STAT. tit. 12, §§ 6421–6431 (2005 & Supp. 2010). Implementation of the zone management law is primarily left to the discretion of the Commissioner of the Department of Marine Resources, who is generally vested with primary regulatory authority over the lobster fishery. See *ACHESON*, *supra* note 9, at 101–02. Even the number of zones is not set by statute. *Id.* at 102. Instead, the number was established following a study by the implementation committee and input from various factions. *Id.* In 1998, a special taskforce was formed to study the possible creation of subzones and ultimately made a recommendation discouraging them. *Id.* at 50–51.

⁹⁸ Comanagement systems are so called because they envision cooperative management between the manager (e.g., the state) and the entity being managed (in this instance, the lobster industry).

⁹⁹ *ACHESON*, *supra* note 9, at 97.

¹⁰⁰ *Id.* (noting that the 1995 passage of the zone management law empowered the councils to propose the first three rules, while a 1999 amendment further allowed the zone councils to make proposals with respect to the fourth).

¹⁰¹ Specifically, the council can propose four different kinds of rules: (1) a more stringent trap limit, lower than the statewide maximum of 1,200 per license holder; (2) a limit on the number of traps that may be fished on a single line; (3) the times of day that lobster fishing is to be permitted within the zone; and (4) a limit on the number of fishermen that may be admitted as license holders in the zone as older license holders retire. *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 101.

strongly to limited-entry rules, while the denser population on the southern coast feels that limited entry is essential.¹⁰⁴

The zone system, along with its comanagement aspects, is generally considered to be successful.¹⁰⁵ Yet, it has had some unintended results. Defying both the intended and expected outcomes, the number of traps being fished actually increased following the imposition of trap limits.¹⁰⁶ While formal trap limits forced a few individuals to reduce the number they were using, many who had already been fishing fewer traps responded to the legal limit by increasing their trap numbers.¹⁰⁷

Perhaps the biggest potentially negative consequence of the zone system is that it is apparently playing a role in the unraveling of the informal culture that has, for so long, defined the Maine lobster fishery and the communities that depend on it.¹⁰⁸ To be sure, the zone management law may have staved off more intensive federal regulation, which in turn could have had a more dramatic and immediate negative impact. Yet, the comanagement aspect of the zone management system vests formal management in the hands of different groups of lobstermen who work in the same geographic area.¹⁰⁹ While these individuals have much in common, each of the six zones is composed of numerous groups from different harbor gangs that have not traditionally worked together.¹¹⁰ Many of these individuals are direct rivals who are suddenly expected to cooperate.¹¹¹

B. Matinicus Island, Maine: The Community, the Shooting, and the Aftermath

While the advent of comanagement may have warded off more intensive regulation by the federal government, it has helped to discourage the

¹⁰⁴ Several lobstermen from the northern coast noted in interviews that “if the youngsters cannot go fishing, they will have no choice but to move away and the communities, already struggling to maintain their populations, will die.” *Id.* at 111. Professor Acheson notes that this “is one of the most common objections to limited entry in general.” *Id.*

¹⁰⁵ *See, e.g., id.* at 232.

¹⁰⁶ *See id.* at 126–32.

¹⁰⁷ *See id.* It has been theorized that the reason for this reaction was a widespread fear among lobstermen that the law might one day be amended and subject them to lower limits based on their actual usage. *Id.* at 129 (“Many fishermen predicted that the trap-tag information would be used to limit or freeze the number of traps a person could fish.”).

¹⁰⁸ Acheson & Brewer, *supra* note 30, at 39 (“Recent legislation, especially a new zone management law, is causing (along with other factors) profound changes in the territorial system.” (footnote omitted)).

¹⁰⁹ ACHESON, *supra* note 9, at 101–03, 104 (depicting zones on map).

¹¹⁰ *Id.* at 124.

¹¹¹ *Id.*

traditional boundary system. The creation of zones in which legal fishing is permitted outside of traditional group boundaries encourages boundary dissolution and increased mixed fishing.

In general, the number of perimeter-defended territories has decreased markedly, and the few remaining may be on the verge of extinction.¹¹² One of these is Matinicus Island, the very archetype of a small, close-knit community. Located farther from the mainland than any other Maine community, Matinicus Islanders are virtually cut off from face-to-face contact with outsiders for much of the year.¹¹³ The continued existence of this small community of approximately fifty year-round residents depends upon its residents' ability to work together and extract a living from the lobster fishery.¹¹⁴

Like every other lobster gang, the Matinicus Island gang has its own set of informal norms and unwritten rules. For well over a century, one firmly embedded rule has required all Matinicus lobstermen to live on the Island.¹¹⁵ Whether someone has established the requisite "resident" status can be complicated.¹¹⁶ For example, lobsterman Alan Miller owns property on Matinicus Island with his wife, who grew up there.¹¹⁷ His father-in-law is a year-round resident and lobsterman.¹¹⁸ But Miller also maintains a very successful mainland business, as well as a mainland residence, and some Matinicus lobstermen do not accept that he has satisfied the informal residence requirement. As a result, many Islanders do not accept that Miller has a "right" to fish inside their perimeter-defended border, despite the fact that he holds a Zone C license, which gives him the legal right to go lobster fishing throughout midcoast Maine, including in the waters surrounding Matinicus Island.¹¹⁹

¹¹² *Id.* at 55 ("The future of the perimeter-defended islands is a matter of some debate. Some think the perimeter-defended areas are essentially undefendable now. . . . There are many in Maine who believe that we are witnessing a fundamental change in the traditional territorial system."). See generally *id.* at 40–55.

¹¹³ Canfield, *supra* note 24; see also *Maine State Ferry Service: Matinicus Ferry*, *supra* note 25.

¹¹⁴ See *supra* note 27 and accompanying text.

¹¹⁵ Flannery, *supra* note 3 (quoting Professor Acheson).

¹¹⁶ The degree of selectivity, including strict entry rules, may bolster a community member's identity as such. In the constitutional context, associational rights are at their apex when, among other things, there exists "a high degree of selectivity in decisions to begin and maintain the affiliation." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

¹¹⁷ Flannery, *supra* note 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

In 2009, an escalating feud over Miller's "right" to fish Matinicus territory—with Miller and his in-laws on one side and other lobstermen on the other—escalated well beyond a typical boundary dispute.¹²⁰ In late July, after days of rising tension and escalating threats, lobsterman Chris Young was shot in the neck by Miller's father-in-law, Vance Bunker.¹²¹ The shooting occurred in front of a marine patrol officer who was arriving on Miller's boat to investigate a report that Young had threatened Miller earlier in the day.¹²² Criminal charges were filed against Bunker following the incident, and in connection with the criminal case, Bunker was ordered to stay off the Island.¹²³ Young remained hospitalized several weeks later when he filed a civil lawsuit against Bunker.¹²⁴

¹²⁰ *Id.* (quoting Maine Marine Patrol Major John Fetterman, who notes that, while feuds like the one underlying the shooting are nothing new, "in the 30 years that I've been around, this is the first time it has escalated to this level of violence" (internal quotation mark omitted)). The violent culmination of the feud in 2009 comes less than a year after another feud over fishing rights within the Matinicus territory found its way to the Maine legal system. *Id.* In September 2008, Victor Ames sued the Department of Marine Resources and twenty-three Matinicus lobstermen for colluding to keep him from exercising his right to trap lobsters off Matinicus Island. *Id.* Ames, a lifelong Matinicus resident, alleged that he had hired a mainlander to tend his traps while he was recuperating on the mainland following heart surgery. *Id.* Ames claimed that these lobstermen surrounded his employee and threatened to destroy his gear if he came into the Matinicus territory again. *Id.*

¹²¹ Canfield, *supra* note 24; Flannery, *supra* note 3; Goodnough, *supra* note 1. Several of the individuals involved in the argument on the wharf were armed, including Miller's wife and Young's half-brother Weston Ames. Flannery, *supra* note 3. Earlier in the day, Bunker had reportedly used pepper spray to fend off Young. *Id.* All of these individuals are from families who have resided on Matinicus Island for generations. *See* ROGERS, *supra* note 1, at 17 (recounting that members of the Ames family, along with Philbrooks and Youngs, had been on the Island since the nineteenth century but that, by 1950, other old names had been replaced with new ones, including Bunker).

¹²² Canfield, *supra* note 24; Flannery, *supra* note 3; Goodnough, *supra* note 1. The shooting of Young is part of a history that includes other violent interactions between rival gangs. Lobster gangs have been threatening bloodshed for more than a century, as evidenced by newspaper reports dating back to 1907. ACHESON, *supra* note 9, at 41–42 (citing *Clans of Lobstermen Threaten Bloodshed*, *supra* note 31); Canfield, *supra* note 24 ("[O]nce, in Portland Harbor, a crew rammed its boat into another vessel, jumped aboard and struggled with the other crew before being tossed overboard."). Indeed, the shooting is only one of several particularly serious and violent criminal acts perpetrated against lobstermen during the summer of 2009. Clarke Canfield, *Lobster Boats Sunk After Harbor Shooting*, SEACOAST ONLINE (Aug. 6, 2009, 2:00 AM), <http://www.seacoastonline.com/articles/20090806-NEWS-908060405>.

¹²³ Bunker was charged with elevated aggravated assault, released on a \$125,000 bond, and ordered to stay off the island. Flannery, *supra* note 3. Ultimately, Bunker (and his daughter) were acquitted by a mainland jury after claiming that "he fired only because he feared for his daughter's life after Ames grabbed the barrel of the shotgun she was holding." Clarke Canfield, *Maine Lobster Wars Continue a Year After Shooting*, TELEGRAPH (Nashua, N.H.), July 21, 2010, <http://www.nashuatelegraph.com/news/statenewengland/800767-227/maine-lobster-wars-continue-a-year-after.html>.

¹²⁴ The lawsuit sought \$4 million in damages for neurological injuries that allegedly could jeopardize Young's future ability to work. Flannery, *supra* note 3. On May 4, 2011, it was reported that the parties had settled. *See* Heather Steeves, *Matinicus Fishermen Resolve Civil Suit in 2009 Shooting*, BANGOR DAILY NEWS

Just as the feud that led to the shooting involved the entire community and its informal lobster fishing rules, the entire lobster fishing community—and not just the individuals involved—were sanctioned as a result of the violence. In response to the shooting, the Commissioner of the Department of Marine Resources, in an exercise of his regulatory authority over the Maine lobster fishery, closed the area around Matinicus Island for two weeks, thereby effectively suspending the licenses of the entire community for part of the very busy July harvest season.¹²⁵ After only four days, the State agreed to lift the ban to settle a lawsuit brought by the Islanders seeking to enjoin enforcement of the order.¹²⁶

In early August, Matinicus lobstermen met as a group to discuss the overriding problems they faced as a community with no legal right to enforce the perimeter boundary they had always treated as their own.¹²⁷ This meeting resulted in a proposal, submitted to the Department of Marine Resources, to designate a special subzone for their Island.¹²⁸ The proposed subzone would track the informal, perimeter-defended area that has existed for decades and that, by longstanding custom, may only be fished by year-round residents of the Island.¹²⁹

The idea of creating a subzone of this type is not without precedent. Twice before, the state has established subzones, formalizing traditional boundaries around two other islands, Monhegan Island and Swan's Island.¹³⁰ However, following contentious lobbying against the Monhegan Island subzone, the legislature appointed a special committee to study the issue.¹³¹ This committee

(May 4, 2011, 1:03 PM), <http://new.bangordailynews.com/2011/05/04/news/midcoast/matinicus-fishermen-resolve-civil-suit-in-2009-shooting>. The settlement terms were not disclosed. *See id.*

¹²⁵ Flannery, *supra* note 3. The closing led to a legal challenge by the lobstermen seeking an injunction against the State. The lawsuit was quickly settled, with the State agreeing to lift the order and permit fishing again after only a four-day closure. *Id.*

¹²⁶ *Id.*

¹²⁷ Auciello, *supra* note 1; Canfield, *supra* note 24.

¹²⁸ Goodnough, *supra* note 1.

¹²⁹ Auciello, *supra* note 1; Goodnough, *supra* note 1.

¹³⁰ ACHESON, *supra* note 9, at 50–51. For example, the Monhegan subzone law provides that “only fishermen who have passed a special apprenticeship program on Monhegan can obtain a commercial lobster license to fish in the island’s waters.” *Id.* at 61. The apprenticeship program requires “aspiring fishermen” to “spend 150 days on a Monhegan boat.” *Id.* Even if they “pass the apprenticeship program, they cannot go fishing in Monhegan waters until one of the fishermen on the island ceases to fish.” *Id.* The Swan’s Island subzone, by contrast, was created in 1985 after going “through a DMR rule making process.” Auciello, *supra* note 1. While “all licensed lobstermen . . . are eligible to select Swan’s Island as their primary area, . . . in doing so they limit themselves to 475 traps no matter where they choose to set them.” *Id.*

¹³¹ ACHESON, *supra* note 9, at 51.

recommended that no further subzones be created, “reflect[ing] the wishes of the majority of fishermen from mainland harbors, a group that for the past forty years had been expanding the amount of area in which the members placed traps.”¹³²

Even if the committee’s recommendation could be overcome, Matinicus Islanders might still face an uphill battle. The two existing subzones were proposed and granted not as community-level initiatives per se, but as special resource-conservation zones subject to more restrictive rules than those in place throughout the rest of Maine.¹³³ Unlike these subzones, the one proposed by Matinicus Islanders is not explicitly advocated as a resource-conservation initiative; instead, Matinicus Island is asking the state of Maine to create this subzone as a “community conservation” measure.¹³⁴ Because the Island community depends almost exclusively on lobster fishing, Matinicus lobstermen argue that they should not be subjected to the more restrictive trap limits that have been imposed on other subzoned islands.¹³⁵ As Matinicus lobsterman Clay Philbrook has said, unlike some other lobster fishing communities, many of which also have a significant summer tourist industry that lessens their residents’ dependence on the lobster industry, Matinicus Islanders “have nothing else.”¹³⁶

¹³² *Id.* at 224. This recommendation further threatens the survival of perimeter-defended groups—which are already on the decline as a result of the new zone system and increased law enforcement. *Id.* at 51–56. As Professor Acheson notes, “[I]t is ironic to see government officials dedicated to the cause of ‘conservation’ working against the establishment of local-level conservation zones, especially when the fishermen in the two existing zones have proven able and willing to impose very restrictive conservation rules on themselves.” *Id.* at 225.

¹³³ *Id.* at 51, 60–61.

¹³⁴ Auciello, *supra* note 1; see also ACHESON, *supra* note 9, at 61 (describing the conservation rationale underlying the Monhegan subzone). Of course, the Matinicus Islanders’ notion of preserving the fishing bottom for their descendants arguably promotes conservation: one observer of the territorial system notes that it

has worked well to protect islanders’ livelihoods, as well as the lobster stocks. “It’s a means of sustainable fishing,” he says. “It’s a means of conserving fish. . . . If you’re fishing the same bottom year after year, you’re not going to screw it up. . . . You’re going to protect your family’s future.”

Flannery, *supra* note 3 (alterations in original) (quoting Reverend Theodore Hoskins, a former itinerant minister to Matinicus Island).

¹³⁵ Goodnough, *supra* note 1 (“Mr. Philbrook said Matinicus should not have to accept a lower trap limit because its economy is in a more desperate state than Monhegan’s, which benefits from tourism as well as fishing. ‘It’s a different situation,’ [Mr. Philbrook] said. ‘We have nothing else.’”).

¹³⁶ *Id.*; see also ACHESON, *supra* note 9, at 54 (noting that lobster fishing is the only way to make a living in many island communities).

II. COOPERATION AND RESOURCE MANAGEMENT BY SMALL GROUPS

Communities like Matinicus Island, which successfully cooperate to harvest CPRs, are the subjects of studies in a growing social science literature. These researchers, led by Nobel Laureate Elinor Ostrom, have undertaken empirical studies of groups that sustainably manage CPRs without intervention.¹³⁷

More generally, the ability of groups to successfully cooperate and self-regulate has been the focus of a subset of the field of law and economics, often identified as the New Chicago School¹³⁸ and sometimes referred to as law and social norms (or just law and norms) scholarship.¹³⁹ Many of these legal scholars are fascinated with private communities—from cattle ranchers¹⁴⁰ to cotton merchants¹⁴¹ to diamond traders¹⁴²—that have been able to develop highly successful and efficient cooperative institutions that operate

¹³⁷ See, e.g., OSTROM ET AL., *supra* note 19, at 225–316 (reciting field studies on irrigation systems, coastal fisheries, groundwater systems, and other organized CPRs); THE QUESTION OF THE COMMONS, *supra* note 42 (collecting studies of communities located in such diverse places as the Canadian subarctic, lowland Amazonia, Papua New Guinea, Botswana, southeastern Borneo, northern Spain, Ireland, and Iceland). Professor Ostrom draws conclusions from the many empirical findings reported by numerous political scientists studying different communities. See, e.g., OSTROM, GOVERNING THE COMMONS, *supra* note 19, at 58 (finding that long-enduring CPRs designed basic operational rules, created organizations for operational management, and modified rules over time); Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1910 fig.3 (2003) (identifying the requirements of adaptive governance in complex systems and the general principles of governance of governmental resources that satisfy them); Elinor Ostrom, *Reformulating the Commons*, in PROTECTING THE COMMONS: A FRAMEWORK FOR RESOURCE MANAGEMENT IN THE AMERICAS 17, 29 box 1.1 (Burger et al. eds., 2001) (identifying design principles present in long-enduring CPRs).

¹³⁸ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661, 663 (1998) (describing how the New Chicago School aims to understand structures of regulation outside of the law); see also, e.g., Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 613 (2004).

¹³⁹ See, e.g., Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1781 (2000) (“[T]he relationship between law and social norms, between legal and nonlegal sanctions, is flourishing . . .”).

¹⁴⁰ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52–64 (1991) (describing the effectiveness of private social norms in influencing the behavior of Shasta County cattle ranchers).

¹⁴¹ Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745 (2001) (describing the efficiency of the cotton industry’s private arbitration system).

¹⁴² Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing the efficiency of the diamond industry’s private arbitration system); Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 409–13 (2006) (describing how Jewish family and community institutions allow for effective extralegal enforcement of diamond credit sales in different settings).

extralegally. Using game theory and other theoretical frameworks, this scholarship examines the cooperative behavior employed by these groups and contrasts such self-regulation with traditional legal forms of regulation.

A. *Extralegal Group Management of the Commons*

Unlike the “tragedy of the commons” depicted in Garrett Hardin’s classic account,¹⁴³ contemporary commons scholarship concludes that, under the right circumstances, individuals dependent upon a CPR can, even if “left to themselves[,] . . . work out a system that achieves regulation over the commons.”¹⁴⁴ Such cooperative self-regulation is depicted as a viable, and in many instances superior, alternative to the traditional all-or-nothing choice between full private ownership of, or full governmental authority over, CPRs.¹⁴⁵ Studies of successful communal self-regulation “provide strong evidence against the assumption that there is only one institutional way to solve all problems related to common-pool resource systems.”¹⁴⁶

Certain local communities and small groups are more likely than others to achieve a system of successful self-regulation.¹⁴⁷ Ostrom has produced a comprehensive list of factors that affect a group’s ability to cooperate and produce rules to manage the CPRs it collectively controls.¹⁴⁸ Of the fifteen

¹⁴³ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (arguing that multiple individuals, each acting in her rational self-interest, will ultimately deplete a resource, and thus concluding that “[f]reedom in a commons brings ruin to all”).

¹⁴⁴ Elinor Ostrom, *Institutional Arrangements for Resolving the Commons Dilemma: Some Contending Approaches*, in *THE QUESTION OF THE COMMONS*, *supra* note 42, at 250, 251.

¹⁴⁵ *Id.* at 251–52. Professor Ostrom notes that “[a]dvocates of both positions share the assumption that a particular form of institutional arrangement is necessary” for every common-pool situation. *Id.* at 251. By contrast, her approach “acknowledges that communal ownership rather than private ownership or central control, can be an optimal institutional arrangement for some types of common-resource problems.” *Id.* at 251–52.

¹⁴⁶ *Id.* at 262.

¹⁴⁷ *ACHESON*, *supra* note 9, at 1 (“There are a number of cases where local-level communities and governments have been able to generate rules to effectively manage resources at sustainable levels. However, at this point it is not at all clear why some communities have succeeded in conserving the resources on which their livelihood depends when the vast majority have failed.” (citations omitted)).

¹⁴⁸ Professor Ostrom’s complete list includes:

[T]he type of production and allocation functions; the predictability of resource flows; the relative scarcity of the good; the size of the group involved; the heterogeneity of the group; the dependence of the group on the good; common understanding of the group; the size of the total collective benefit; the marginal contribution by one person to the collective good; the size of the temptation to free ride; the loss to cooperators when others do not cooperate; having a choice of participating or not; the presence of leadership; past experience and level of social capital; the

factors she names, many may explain the relative successes (and nonsuccesses) of different lobster gangs.¹⁴⁹ For example, Ostrom concludes that a small, homogenous group that is highly dependent on the resource in question and has the autonomy to make binding rules will be more likely to develop informal rules than groups that do not share those qualities, or which share them to a lesser extent.¹⁵⁰ And, at least in some instances, other land use models fail to preserve the ecological environment as efficiently as those already established by local communities.¹⁵¹

In establishing rules and norms, and maintaining them once created, a strong sense of community may be crucial.¹⁵² In communities that are

autonomy to make binding rules; and a wide diversity of rules that are used to change the structure of the situation.

Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, J. ECON. PERSP., Summer 2000, at 137, 148. *But see* Arun Agrawal, *Common Property Institutions and Sustainable Governance of Resources*, 29 WORLD DEV. 1649, 1651 (2001) (“Given the large number of factors . . . that have been highlighted as being critical to the organization, adaptability, and sustainability of common property, it is fair to suggest that existing work has yet to develop fully a theory of what makes for sustainable common-pool resource management.”).

¹⁴⁹ ACHESON, *supra* note 9, at 208.

¹⁵⁰ Ostrom, *supra* note 148, at 151 (arguing that the ability of local users to create their own rules and enforce effective sanctions facilitates the resolution of collective action and monitoring programs); *accord* ACHESON, *supra* note 9, at 224 (“[P]eople in small social units are more able to provide themselves with rules in the common good than those in large units where people are less able to come to consensus and monitor each other’s behavior.”); OSTROM, GOVERNING THE COMMONS, *supra* note 19, at 185 (describing how small groups, unlike their larger counterparts, were able to establish organized and effective systems); Ostrom, *supra* note 137, at 34 (identifying dependency, trust, and autonomy as factors leading to the maintenance of rules). *But see* Arun Agrawal, *Small Is Beautiful, but Is Larger Better? Forest-Management Institutions in the Kumaon Himalaya, India*, in PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE 57, 73–74 (Clark C. Gibson et al. eds., 2000) (challenging the notion that collective action always becomes easier as a group gets smaller based on his finding that, in the context of village forest councils in the Himalayas, “councils with a larger membership find it easier to organize successfully for collective action, and the smaller councils face difficulties in organizing successfully,” and postulating that this result suggests that, at least in certain circumstances, there is a minimum aggregate group surplus necessary to enable the group to protect its collective property interest vis-à-vis outsiders). *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 36–45 (1990) (discussing the emergence and persistence of informal constraints in institutional structures).

¹⁵¹ *See, e.g.*, Brian Houseal et al., *Indigenous Cultures and Protected Areas in Central America*, CULTURAL SURVIVAL Q., Feb. 1985, at 10, 10 (“There are no other land use models for the tropical rain forest that preserve ecological stability or biological diversity as efficiently as those of the indigenous groups presently encountered there.”); David Western et al., *The Status of Wildlife in Protected Areas Compared to Non-Protected Areas of Kenya*, 4 PLOS ONE e6140 (2009), <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006140> (“[W]ildlife on private and community sanctuaries is stable or increasing, in contrast to the declines in [state] protected areas . . .” (footnote omitted)).

¹⁵² ACHESON, *supra* note 9, at 71 (“Recently, a number of scholars have argued that one of the most important factors allowing some groups to develop rules to solve collective action dilemmas is a sense of community and the social capital that is found in communities.” (citing SARA SINGLETON, CONSTRUCTING

dependent on a resource, this sense of community will tend to foster a strong conservation ethic.¹⁵³ In economic terms, there is “little to distinguish . . . a conservation ethic from a low discount rate. The first stresses a culture of conservation; the second places value on future rewards. The essence of both is the willingness to sacrifice present gains for future rewards.”¹⁵⁴

Such studies, and the conclusions drawn from them, have been used by these same scholars and others to design and advocate for new types of institutions to manage common resources.¹⁵⁵ The comanagement zone system adopted in Maine is a prime example. Professor Acheson was both one of the leading advocates for, and architects of, this system.¹⁵⁶ This comanagement system was deliberately designed to promote group-level efficiency by giving rule-making authority to the lobstermen, and to facilitate cooperation among

COOPERATION: THE EVOLUTION OF INSTITUTIONS OF COMANAGEMENT (1998), and Sara Singleton & Michael Taylor, *Common Property, Collective Action and Community*, 3 J. THEORETICAL POL. 309–24 (1992)); OSTROM, GOVERNING THE COMMONS, *supra* note 19, at 183–84.

¹⁵³ See, e.g., ACHESON, *supra* note 9, at 78 (finding that a strong sense of community has led to the maintenance of rules in some harbors); Houseal et al., *supra* note 151, at 10 (describing how native peoples in Central America have devised sustainable long-term land use practices, which maintain cultural traditions of individual communities); Western et al., *supra* note 151, at 5 (finding that community initiatives are necessary to sustain free-ranging herbivore populations in Kenya). *But see* Terra Lawson-Remer, *Do Stronger Collective Property Rights Increase Household Income? Evidence from a Field Study in Fiji* 9 (May 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628234 (“The wide range of studies regarding the environmental outcomes associated with collective ownership have reached conflicting conclusions.”).

¹⁵⁴ ACHESON, *supra* note 9, at 221. In fact,

the higher the probability that people will be able to harvest all or most of a resource in the future, the more willing they will be to devise rules to conserve those resources. This means that people will be more willing to invest in rules when . . . the area exploited by a group is reserved for that group and there are limits on entering that group . . . [and] there is the ability to enforce rules, which, in turn, depends on group size and heterogeneity.

Id.; see also Adler, *supra* note 16, at 20 (“Whether the owner of a given resource is an individual, a corporation, or a community, the security of the property right enables the owner to plan the present and future use of the resource so as to maximize the resource’s present value, which includes the discounted value of future harvests.”); Elinor Ostrom & Harini Nagendra, *Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory*, 103 PROC. NAT’L ACAD. SCI. 19224, 19230 (2006) (“When users are genuinely engaged in decisions regarding rules that affect their use, the likelihood of users following the rules and monitoring others is much greater than when an authority simply imposes rules on users.”).

¹⁵⁵ ACHESON, *supra* note 9, at 100. CPR research has had only a modest impact domestically, with Maine’s comanaged zone licensing system, see *supra* notes 96–97 and accompanying text, and comanagement of Pacific salmon fisheries in the state of Washington, OSTROM, INSTITUTIONAL DIVERSITY, *supra* note 19, at 285, the most notable cases in which it has had a direct impact.

¹⁵⁶ See ACHESON, *supra* note 9, at 99, 103.

the relatively small number of individuals who fish within the same zone.¹⁵⁷ The same research that helped propel the movement to enact the Maine comanagement law¹⁵⁸ could be used to create legal protections of other existing communities, as has already occurred in other countries. For example, as discussed in detail in Part III below, communities in Brazil,¹⁵⁹ Sumatra,¹⁶⁰ and Scotland¹⁶¹ (among others¹⁶²) are already the beneficiaries of legally vested interests in resources they communally manage.¹⁶³

B. *Effective Self-Regulation by “Close-Knit” Groups*

Legal scholars too are increasingly interested in the ability of certain groups to successfully self-regulate. The now-enormous field of legal scholarship dealing with effective, extralegal social norms can be traced to Professor Robert Ellickson’s groundbreaking study of Shasta County ranchers

¹⁵⁷ *Id.* at 97–98; see also Rieser, *supra* note 43, at 825 (discussing “the concept of ‘co-management’” as a deliberate attempt to replicate a “common ownership regime”).

¹⁵⁸ ACHESON, *supra* note 9, at 99 (noting that CPR literature “documenting the local-level conservation rules found in a large number of fishing communities” was a factor positively influencing the push for the comanagement system in Maine).

¹⁵⁹ See, e.g., Lee P. Breckenridge, *Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 TENN. L. REV. 735, 779 (1992) (describing how, in Brazil, the government has vested specific local communities with usufructuary rights in designated areas of state-owned forests “to harvest rubber and other non-timber products, and it agrees to protect these communities from incompatible exploitation of resources by others”).

¹⁶⁰ Koen Kusters et al., *Towards Solutions for State vs. Local Community Conflicts over Forestland: The Impact of Formal Recognition of User Rights in Krui, Sumatra, Indonesia*, 35 HUM. ECOLOGY 427, 435 (2007) (describing the impact of a 1998 decree issued by the Indonesian government enabling certain communities to register for concession (use) rights over areas of state forests).

¹⁶¹ A. Fiona D. Mackenzie, *A Common Claim: Community Land Ownership in the Outer Hebrides, Scotland*, 4 INT’L J. COMMONS 319, 320 (2010) (describing community purchases of large tracts of land in the Scottish Highlands and Islands, placing “Scotland at the ‘cusp’, globally, of . . . ‘community-centric’ land reform”).

¹⁶² See, e.g., Fikret Berkes, *Common-Property Resource Management and Cree Indian Fisheries in Subarctic Canada*, in THE QUESTION OF THE COMMONS, *supra* note 42, at 66–68 (discussing treaty granting fishing rights to Cree in Canada); Lawson-Remer, *supra* note 153 (discussing ownership by family sub-groups of inshore reef-fishing territories in Fiji); Tracy Yandle, *Sharing Natural Resource Management Responsibility: Examining the New Zealand Rock Lobster Co-Management Experience*, 39 POL’Y SCI. 249, 274 (2006) (noting the creation in New Zealand “of mataitai reserves which define geographic areas where commercial fishing is prohibited, and noncommercial fishing is managed by traditional Maori methods”).

¹⁶³ In the United States, the recognition of exclusive “conservation-oriented” fishing zones around Monhegan and Swan’s Islands arguably constitutes an example of such legal protection. And, as discussed below in Part III, international environmentalists have identified the global protection of local communities and indigenous groups that sustainably manage CPRs as an important principle. See Breckenridge, *supra* note 159, at 776 (describing how UNCED documents incorporate notions of local rights into the development of international environmental law).

who resolve their disputes beyond “the shadow of the law.”¹⁶⁴ After this work and the many others it inspired, it is well accepted that small, close-knit groups may sometimes use social norms to self-regulate and resolve disputes privately.

The basic principle derived from these studies is the notion that small groups can and do work effectively without legal intervention or supervision because the ongoing and close relationships among members cause them to avoid conflict and cooperate with one another through informal norms.¹⁶⁵ Even in market settings with significant amounts of money at stake, groups may rely on extralegal norms of conflict resolution and thereby avoid the high transaction costs associated with bringing formal legal claims.¹⁶⁶

This legal scholarship often contrasts effective community norms and rules with legal rules and sanctions that may prove less effective.¹⁶⁷ For example, where a Pennsylvania coal company depends upon maintaining good relationships with community members who constitute its workforce, it has an incentive not to conduct its operations in a manner that will cause the destruction of community members’ homes.¹⁶⁸ This incentive exists whether or not the company has a legal obligation to avoid this result.¹⁶⁹ “So long as

¹⁶⁴ ELLICKSON, *supra* note 140, at 52 (internal quotation marks omitted).

¹⁶⁵ See *e.g.*, *id.* (describing how a conscious commitment to cooperation among ranchers creates trespass norms independent of formal legal entitlements); OSTROM, *GOVERNING THE COMMONS*, *supra* note 19, at 88–89 (noting that successful group managers of CPRs include members who “have shared a past and expect to share a future” but not “participants who vary greatly in regard to ownership of assets, skills, knowledge, ethnicity, race, or other variables that could strongly divide a group of individuals”); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 85 (1999) (“[A]s a general matter, successful CPR management was dependent on small numbers and a similarity of interests.”).

¹⁶⁶ See, *e.g.*, Bernstein, *supra* note 141. Most obviously these include time and money, which are wasted when one brings a legal claim rather than invoking or utilizing a less formal process. *Id.* at 1740. It can also be inefficient in other ways. For example, a private dispute resolution system for a small group that is composed of members of the group may have expert information that makes them superior judges. See, *e.g.*, *id.* at 1741 (“[I]ndustry-expert arbitrators . . . can make many factual determinations more accurately and less expensively than a judge or jury can . . .”).

¹⁶⁷ Richard A. Epstein, *Enforcing Norms: When the Law Gets in the Way*, 7 RESPONSIVE COMMUNITY, Fall 1997, at 4, 11.

¹⁶⁸ *Id.* at 12 (discussing the effect of the decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

¹⁶⁹ *Id.* Arguably the coal miners were positioned equally well before enactment of the state law regulating subsurface rights of the coal companies and after the Supreme Court concluded the regulation was an unconstitutional taking. *Id.* In neither case did the coal company want to incur the social costs associated with taking an action that would result in the destruction of a house, despite its legal ability to do so. *Id.* The coal miners were in a slightly better position after passage of the law and during pendency of the coal company’s

there are repeat transactions between parties, there is good reason to believe that social norms will be respected even if not backed by the force of law.”¹⁷⁰ Thus, social norms may be preferable to formal rules in cases where they operate effectively.¹⁷¹

This academic literature has explained norm effectiveness mostly in terms of the social sanctions and rewards triggered by individual conformity (or nonconformity) with the relevant group’s rules and norms. In the classic treatment, reputational consequences of behavior are considered the primary (or, sometimes, only) factor motivating behavior.¹⁷² This is true even when cooperation is observed in settings where social sanctions or rewards are unlikely to explain the behavior, such as when subway riders choose, against self-interest, to stand in more crowded sections of a subway car to give personal space to a couple standing in a less crowded section.¹⁷³

lawsuit, when uncertainty regarding such action’s legal consequences would have increased the coal miner’s bargaining position in marginal cases. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1815–20 (1996) (concluding that a private system enforced by social norms within the feed and grain industry is more efficient than the UCC’s use of inherent business norms); Bernstein, *supra* note 141, at 1761 (“In sum, the cotton industry has succeeded in creating a private legal system and a social and informational infrastructure of trade that improves on the substantive rules and adjudicative procedures in the public system and is well-designed to maximize the value of transactors’ legally enforceable and legally unenforceable commitments.”); Richman, *supra* note 142, at 384 (noting that the informal system utilized by diamond traders is “less costly, more reliable, and thus superior” to legal regulation); Randall W. Stone & Stephen E. Gent, *Formalizing Informal Cooperation: Norm-Based Cooperation and the European Stability and Growth Pact 16* (Feb. 1, 2006) (unpublished manuscript), available at http://users.polisci.wisc.edu/pec/papers/Stone_Gent_06.pdf (“[N]orm-based cooperation is not simply a best available substitute when rigorous enforcement is impractical, but rather is generally optimal.”); cf. Epstein, *supra* note 167, at 15 (“The excesses of big government today often stem from a systematic misvaluation of the relative value of social and legal norms.”).

¹⁷² See, e.g., ELLICKSON, *supra* note 140, at 180–81 (reputation in ranching communities); Bernstein, *supra* note 141, at 1745 (reputation-based rationing in the cotton industry); Richman, *supra* note 142, at 401 (reputation as a mechanism for multilateral exchange in the diamond industry).

¹⁷³ Strahilevitz, *supra* note 23, at 363. One commentator notes this example, among others, and further observes that

individuals in a group setting “reciprocate the behavior of others: if they perceive that other group members are restraining themselves in the face of temptations to behave contrary to a group’s collective interests, most individuals display similar self-restraint; if, in contrast, they become convinced that those around [them] are putting their own interests ahead of the group’s, most individuals again respond in kind, availing themselves of any available opportunities to advance their own interests at the expense of collective ones.”

Id. at 364 (quoting Dan M. Kahan, *The Logic of Reciprocity: A Theory of Collective Action and Law* (unpublished manuscript) (on file with author)); accord Peter H. Huang, *Herd Behavior in Designer Genes*, 34

Recently, economists have demonstrated that incorporating identity into the economic equation can explain behavior that otherwise appears to be economically irrational.¹⁷⁴ Such identity-based motivations may help explain altruistic behavior in situations where neither the threat of social sanctions nor the potential reward of social approbation likely accounts for all observed norm compliance, as for example, when one tips a city taxi driver.¹⁷⁵

Intrinsically, membership in a small, close-knit community is likely to be fundamental to an individual's self-identity or self-concept.¹⁷⁶ This identity

WAKE FOREST L. REV. 639, 646–47 (1999) (positing that mimicry may occur based on the usually incorrect assumption that other people possess valuable private information).

¹⁷⁴ See, e.g., George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 745–48 (2000) (describing how identity influences economic outcomes). See generally *id.* at 716 n.2 (distinguishing identity theory from economic literature on norms in which “a norm is obeyed because failure to do so results in punishment” and instead arguing that “agents follow prescriptions, for the most part, to maintain their self-concepts”). It is possible that a biological instinct toward altruism and cooperation has evolved and that such an instinct may derive from the benefits inherent in such cooperation at the small-group level. See Nicholas Wade, *We May Be Born with an Urge to Help*, N.Y. TIMES, Dec. 1, 2009, at D1 (“[T]he human capacity for cooperation ‘seems to have evolved mainly for interactions within the local group’” (quoting Dr. Tomasello, a developmental psychologist who is co-director of the Max Planck Institute for Evolutionary Anthropology in Leipzig, Germany)). An individual's identity may be constructed through a variety of factors and circumstances, including through rituals and other “socialization techniques.” See Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1183 & n.7 (2005) (“For ritual, the coercive force is exercised, not chiefly through *ex post* sanctions, but rather through the *ex ante* technique of assigning social roles to individuals and inducing them and others to accept the roles thus assigned as natural and appropriate.”); *id.* at 1183 n.7 (“All sorts of socialization techniques (parenting, schools, religious instruction, etc.) serve a similar function [to ritual], as do broader social institutions in which people function in their daily lives, such as popular culture and even language itself.”).

¹⁷⁵ See Geisinger, *supra* note 138, at 614 (arguing that “rational choice does not explain all norm origin and development” and developing a “theory of norm formation and development based on the notion that individuals conceive of themselves not just as individuals, but also as members of groups. This ‘group identity theory’ provides a much different picture of norm formation and development than that of rational choice.”); cf. Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1102 (2005) (“At the core, these situations force us to confront whether the law can induce us to act because we *believe we should*, rather than because we *fear legal or social sanctions*.” (emphasis added)).

¹⁷⁶ See, e.g., Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 81 (2004) (“That communities are valuable to people should come as no surprise. It is a key finding of a vast ethnographic literature and resonates well with common experience.” (footnote omitted)). Even a less significant (or virtually insignificant) group identity created by the formation of groups based on “random assignment of subjects to labels” can have substantial effects on an individual's behavior. Akerlof & Kranton, *supra* note 174, at 720 (“[E]ven arbitrary social categorizations affect behavior.”). And, “because identity is fundamental to behavior, choice of identity may be the most important ‘economic’ decision people make. Individuals may—more or less consciously—choose who they want to be. Limits on this choice may also be the most important determinant of an individual's economic well-being.” *Id.* at 717; cf. Bernstein, *supra* note 141, at 1787 (“[T]he stability of . . . cooperative-based commercial systems may also be due, in whole or in part, to the fact that social norms of honor, particularly

effect has significant behavioral consequences for which traditional economic models have not fully accounted. Better monitoring, repeat transactions, and more opportunities to control behavior through social rewards and sanctions are not the only factors affecting a community's success. Its success may be based, at least in part, on the fact that a member of a close-knit community esteems himself as such and chooses, in most instances, to validate this identity through compliance with its rules.¹⁷⁷ This "identity-motivator" will impact an individual's behavior even in situations where only self-monitoring occurs.¹⁷⁸

As a general matter, law and norms scholarship has often focused on the *extralegal* nature of group self-regulation, concluding that establishment of private groups may be a better alternative to legal regulation.¹⁷⁹ Another strand has focused on how law itself may be utilized to create norms and operate to change behavior.¹⁸⁰ But such scholarship generally does not grapple

when reinforced through . . . a basic human desire to think of one's self as trustworthy, are more powerful motivators of transactional behavior than economic models of behavior typically assume." (footnote omitted).

¹⁷⁷ See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 356 (1997). Professor McAdams has suggested an explanation for such behavior in line with the external motivation, which he calls an "esteem" model of behavior. *Id.* at 377. This view suggests that compliance with social norms in situations where there is no obvious sanction for misbehavior can be explained as motivated by the desire to earn the esteem of others in the community. *Id.* at 358. But even in this esteem model, which ostensibly looks for external motivation to explain altruism, McAdams recognizes that "social norms" may be followed because an individual "feel[s] obligated to follow [them] because of an internalized sense of duty." *Id.* at 340. This appears to be in line with the internal, identity-based motivation described by Akerlof and Kranton and others. See *supra* note 174.

¹⁷⁸ See McAdams, *supra* note 177, at 381 ("The individual feels psychological discomfort whether or not others detect her violation."). In the context of lobster fishing, for example, because individual lobstermen spend so much of their time fishing alone (or with a single partner), group monitoring of the individual behavior of community members may not always be possible to the same extent as in other close-knit groups that have been studied. Yet, it is not clear whether there would be a markedly lower rate of rule compliance in the absence of such monitoring by the larger group. Cf. Richman, *supra* note 142, at 404–08 (describing the opportunities for diamond cutters who are members of ultra-Orthodox Jewish communities to cheat and how their values may be a substantial factor in the rule-compliance rate); Vandenbergh, *supra* note 175, at 1102 (recognizing that in some cases people can be "induce[d] . . . to act because [they] believe [they] should, rather than because [they] fear legal or social sanctions").

¹⁷⁹ See, e.g., Bernstein, *supra* note 141, at 1788 ("[P]rivate commercial law systems can offer transactors . . . benefits that are either unavailable or only available at great cost through the public legal system."); Epstein, *supra* note 167, at 15 ("Social norms without legal enforcement do an enormous good.").

¹⁸⁰ See Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 367–68 (2002) (characterizing "law and social norms" scholarship as arguing that "[l]aw might have a constructive role to play in fostering these behavioral mechanisms, but otherwise it should simply get out of the way of their natural evolution"). To the extent that norms scholars view law as desirable, it is usually only as a tool to create or bolster norms, which will then serve to affect private behavior through the same system of social sanctions and rewards. Geisinger, *supra* note 138, at 650 ("Expressive theorists argue that the state, through lawmaking or other means, can alter the normative meaning of particular acts as a means of more efficiently constraining behavior."); Kahan, *supra*, at 367–68.

with how law might be employed to protect the private groups themselves. For the first strand, this strategy would be the antithesis of the project of moving away from legal protection. And for the second, the focus is on expanding “good” norms to impact larger communities, or on changing “bad” norms, but not on protecting smaller communities that are already utilizing norms in a socially productive way.

Furthermore, in addition to the externalities created by legal intervention, legalizing norms has at least the potential to fundamentally alter group identity and relationships among group members, thereby unraveling the group’s self-regulatory effectiveness.¹⁸¹ Likewise, while the zone licensing system consciously tracked some of the boundaries of existing customary territories, its other features—expressly permitting fishing over the existing boundary lines and declining to recognize territorial boundaries that fell within the zones—encouraged the dissipation of norms protecting these boundaries

¹⁸¹ For example, the imposition of a formal trap limit on the Maine lobster industry forced certain lobstermen to fish fewer traps but may have undermined an informal norm that favored even lower trap use. Thus, the unforeseen effect of the trap limit was to increase the number of traps being fished, as some fishermen increased their numbers upwards to the new legal limit. See ACHESON, *supra* note 9, at 131 (“There was money to be earned in the lobster fishery, and people responded by putting more traps in the water to get higher catches and returns.”). Furthermore, to the extent that part of a group identity is built on a group self-concept as self-sufficient or hostile to government intervention, the very act of endorsement or intervention by the state could be shattering for the group. See Akerlof & Kranton, *supra* note 174, at 739–40 (discussing that some groups excluded from the dominant culture choose an “oppositional” identity characterized by rule or law breaking); cf. Mackenzie, *supra* note 161, at 322 (using theories of norm-disruption designed by Michel Foucault and Judith Butler to hypothesize that collective ownership by a community serves to disrupt norms surrounding private ownership and thereby “opens up the meanings of the land to new possibilities”).

In addition, the existence of “legal” status may have meaning for an individual and for that individual in relation to other members of his small group or culture. See Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 362 (2008) (“We might well agree, then, to acknowledge that marriage equality is in part an argument about the expression of identity.”). Indeed, the “identity” effect of proposed legislation may be a central motivating factor for groups lobbying for and against it. See *id.* at 351 (“[Marriage] confers a status, an identity, and a kinship network, above and beyond its tangible benefits.”). In the context of the gay marriage debate, some people may insist that there should be legal recognition of gay marriage rather than civil unions to demonstrate that the identity of a couple as “married” does not connote sexual orientation. See *id.* at 359 (“Advocates of marriage equality typically seek to appropriate the legitimacy, status, and identity [that it provides] . . .”). Likewise, a group favoring civil unions may also have identity motivations, desiring to grant equivalent rights to all people, but retaining the idea that something is fundamentally “different” about heterosexual and homosexual couples. See *id.* at 351 (noting “the recurring rhetoric of pollution and desecration” in the marriage debate). One recent article proposes that the challenge to same-sex marriage is essentially a cultural property claim to the institution by straight couples. See *id.* at 343–44 (“This Article will argue that the traditionalist claim that same-sex couples should be excluded from marriage is the same kind of claim as is often made by Native American, indigenous, and other culturally-subordinated groups to certain cultural resources—a right to exclude others in order to protect sacred objects, places, and rituals, so as to preserve and perpetuate group identity over time.” (footnote omitted)).

against incursions. Thus, “legalizing” rules and norms is not always—or perhaps even often—desirable.¹⁸²

Yet, without some legal mechanism for preserving institutions and groups that rely solely upon extralegal norms, some or all of the very communities generating scholarly interest because of their success and efficiency may be regulated out of existence and replaced with something less desirable. Thus, for those policymakers interested in preserving the positive aspects of these communities, some form of legal protection may need to be considered.

III. LEGAL RECOGNITION OF PROPERTY RIGHTS IN GROUPS

Although the academic interest in small groups discussed in Part II is generally focused on the extralegal nature of small group self-regulation, and not on legal protection of these groups, group-level legal rights have been recognized since before the emergence of American property law. Historically, courts have sometimes recognized, and have even given substantial weight to, the right or authority of groups to control or govern common property. More recently, formal recognition of a similar kind of group property right—a right to property of special significance to a group’s cultural heritage—has been the subject of a growing number of international treaties and federal statutes. Finally, outside of the United States, some communities enjoy formal legal property rights in fisheries and other communal resources.

A. *Common Law Recognition of Community-Level Rights*

As Professor Rose has thoroughly documented, the concept of communal property rights has historical roots. Under English common law, into the nineteenth century, communities had a recognized right to the exclusive use of certain common property.¹⁸³ Under this system, “those communities (but not outsiders) enjoyed rights to such various economic and recreational uses of land, and they were expected to govern their own behavior through reasonable community norms.”¹⁸⁴

¹⁸² See, e.g., Bernstein, note 141, at 1787 (“[The] benefits . . . created through the use of private institutions . . . cannot be fully replicated through private contracts and the use of public institutions.”).

¹⁸³ Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 739–44 (1986); Rose, *supra* note 16, at 179.

¹⁸⁴ Rose, *supra* note 16, at 179.

As a general rule, early American courts did not recognize a similar right.¹⁸⁵ Yet, nineteenth-century American courts did recognize other rights that had the effect of recognizing or vesting authority in certain communities. Certain riparian rights, for example, “effectively turned river-bank landowners into participants in common property regimes for particular rivers, from which outsiders were excluded.”¹⁸⁶

Other early American judges also formalized or took into account extralegal community norms.¹⁸⁷ For example, in *Ghen v. Rich*, a nineteenth-century court not only embraced a claim based on local custom in the whaling industry, but went so far as to say that, “although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection [does] not apply to a custom which embraced an entire business, and ha[s] been concurred in for a long time by every one engaged in the trade.”¹⁸⁸ The practical effect of decisions such as this one was legal recognition of group-level rights—at least on occasion—and deference to local governing authorities.

¹⁸⁵ Professor Rose posits that this is likely owing to the tension between then-contemporary views of constitutional government and the de facto governance role enjoyed by communities with communal rights in England at the time. Rose, *supra* note 183, at 741 (noting the view that recognition of customary rights was “uncongenial with the genius of our government and with the spirit of independence” of our farmers” (quoting *Van Rensselaer v. Radcliff*, 10 Wend. 639, 649 (N.Y. Sup. Ct. 1833))); Rose, *supra* note 16, at 179 n.163 (“Courts in the United States were more hostile to customary claims, partly because of the feudal origin of such claims and partly because their informal governance role seemed contrary to constitution-based government.”). Some examples of community uses that were recognized formally through public easements include for annual festivals, *see, e.g.*, *Hall v. Nottingham*, [1876] 33 Ir. L.T.R. 697 (Exch. Div.) (maypole dancing), and sporting events, *see, e.g.*, *Mounsey v. Ismay*, [1863] 158 Eng. Rep. 1077 (Q.B.) (horseracing); *Fitch v. Rawling*, [1795] 126 Eng. Rep. 614 (K.B.) (cricket).

¹⁸⁶ Rose, *supra* note 16, at 179.

¹⁸⁷ Even decisions whose outcomes failed to defer to local custom were at least viewed as controversial. In *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805), for example, the court ruled against a hunter who had argued that his “hot pursuit” of a fox vested him with a property interest in the animal that was superior to that of the defendant who had intercepted and killed it. The court rejected the hunter’s claim—despite the fact that “all hunters in the region regarded hot pursuit as giving rights to take an unimpeded first possession.” Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1231 (1979). The result was a vehement protest by a dissenting judge, who decried the majority’s interference with “usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana*.” *Pierson*, 3 Cai. 175 (Livingston, J., dissenting).

¹⁸⁸ 8 F. 159, 161 (D. Mass. 1881). The dispute giving rise to the action arose over the ownership of a whale carcass. *Id.* at 160. The whale had been killed by the plaintiff, but then purchased at auction by the defendant from a man who had found it but had failed to “send[] word to Princeton, as is customary.” *Id.* The court noted that “[t]he usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case.” *Id.*

The common law of nuisance can also be viewed as incorporation of, and respect for, community norms in property law.¹⁸⁹ While nuisance cases formally pit one property owner against another (or others), the standards, or norms, of the locality often drive their outcomes.

Thus, a community that has gentrified and overwhelmingly attained a residential character can stop a brickwork installation on nuisance grounds.¹⁹⁰ By contrast, the old common law “coming to the nuisance” principle allowed “noxious” communities to preserve their character against unwanted, new residential intruders.¹⁹¹ Like many other areas of law, common law nuisance

¹⁸⁹ See Rose, *supra* note 16, at 179 (“Nuisance law, using precepts very like those of riparian law, effectively created common property regimes among the neighbors for the reasonable preservation of their common enjoyment of quiet, clean air, and water; again, the participants were expected to act according to ‘reasonable’ norms of mutual forbearance. It has only been a failure of our own imagination that has kept us from seeing these judicially-created regimes [such as nuisance law] for what they are—common property regimes involving emergent resource uses, including only imprecisely specified participants.” (footnote omitted)).

¹⁹⁰ See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding the constitutionality of an ordinance prohibiting the manufacture of bricks within specified limits of Los Angeles). A contemporary example is the proposal in Arizona to enact new legislation that would hold cattle owners liable for damage caused by their livestock. Marc Lacey, *Uneasy Neighbors on the Open Range*, N.Y. TIMES, Oct. 12, 2010, at A14. The current statute places the burden on the potential victims to fence their property or bear any consequences. ARIZ. REV. STAT. ANN. § 3-1427 (2011). Opponents of the proposed legislation, including the Arizona Cattlemen’s Association, claim that putting “the liability on the ranchers if an animal gets out would be devastating to [the] industry.” Lacey, *supra*.

¹⁹¹ See, e.g., *Mahlstadt v. City of Indianola*, 100 N.W.2d 189 (Iowa 1959) (overturning an injunction against a dump in a residential neighborhood, where the dump had preexisted residential usage); *Jerry Harmon Motors v. Farmers Union Grain Terminal Ass’n*, 337 N.W.2d 427, 432 (N.D. 1983) (“We therefore conclude that any individual or corporation or partnership that comes to an alleged nuisance has a heavy burden to establish liability.” (footnote omitted)); see also 2 WILLIAM BLACKSTONE, COMMENTARIES *400, *402–03 (“If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue.”). But cf. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 701 (Ariz. 1972) (concluding that, because of the number of individuals affected, the health hazards caused by a cattle feedlot constituted a public nuisance that could be enjoined, but also providing that the residential developer was required to pay damages to compensate the feedlot owner). The majority contemporary view considers as a factor whether a plaintiff “came to the nuisance,” but it is not dispositive of whether he has an actionable claim. See RESTATEMENT (SECOND) OF TORTS § 840D (1977) (“The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable.”).

There are other tort law examples of courts taking legal cognizance of groups, as such. In *Ybarra v. Spangard*, for example, the California Supreme Court allowed a plaintiff’s *res ipsa loquitur* case to proceed against a group of medical professionals despite the fact that no inference of wrongdoing could be drawn against any individual defendant. 154 P.2d 687 (Cal. 1944). In effect, the decision can be viewed as a way of legally encouraging the group to monitor one another and ensure proper behavior by each individual member.

has been largely superseded by statute. Common law recognition of custom and other community standards has given way to statutory regulation of most property interests.¹⁹²

B. Protections of Cultures and Communities Under International Law

Similar transformation has occurred in the international arena. Certain collectively held cultural heritage rights have long been recognized as customary international law. For example, restitution of cultural property looted by conquering armies has long been recognized as a legal obligation.¹⁹³ The concept that such looting is wrongful can be traced back to ancient Egypt.¹⁹⁴

Less tangible cultural heritage rights also have been recognized as part of customary international law since at least the end of World War I. In 1921, the

See Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85, 89, 105 n.61 (1995).

¹⁹² Many of the statutes codify common law principles, and in some cases, they serve to protect certain interests in the same way that the old “coming to the nuisance” standard did. For example, “right to farm” statutes protect against nuisance claims by residential communities that might complain about noxious owners. *See, e.g.*, Elizabeth R. Springsteen, *States’ Right-to-Farm Statutes*, NAT’L AGRIC. LAW CTR., <http://www.nationalaglawcenter.org/assets/righttofarm/index.html> (last visited May 17, 2011) (“All fifty states have enacted right-to-farm laws that seek to protect qualifying farmers and ranchers from nuisance lawsuits filed by individuals who move into a rural area where normal farming operations exist, and who later use nuisance actions to attempt to stop those ongoing operations. While the overall statutory schemes might be similar, each state has noticeably different content in the specific details of the laws.”). One such example is N.C. GEN. STAT. § 106-701 (2011), which provides in part that

[n]o agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or its appurtenances.

Id. § 106-701(a). Other types of statutes serve similar purposes. For example, Arizona maintains laws that put the burden on property owners to fence and protect their individual parcels against damage by free-range cattle. *See, e.g.*, ARIZ. REV. STAT. ANN. § 3-1427 (“An owner or occupant of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence . . .”).

¹⁹³ C. Franklin Sayre, Comment, *Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 857 n.25 (1986); Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 FORDHAM INT’L L.J. 1033, 1049 & n.49 (1993) (citing Sayre, *supra*).

¹⁹⁴ *See The Illicit Traffic of Cultural Property Throughout the World*, INT’L COUNCIL OF MUSEUMS, <http://archives.icom.museum/traffic.html> (last updated July 11, 2005) (citing Véronique Pierron, *L’UNESCO et la Trafic des Biens Culturels*, ARCHÉOLOGIA, Nov. 1992, at 38, 40, and JEAN VERCOUTTER, À LA RECHERCHE DE L’ÉGYPTE OUBLIÉE (1986)) (“It was denounced in one of the oldest legal documents in Egypt at the time of the pharaohs, in the Amherst Papyrus dating from 1134 BC.”).

League of Nations' Commission of Rapporteurs considered whether the small island archipelago of the Aaland Islands, situated between southern Sweden and southern Finland, could choose to break away from Finland and reunify with Sweden.¹⁹⁵ The Commission noted its appreciation of “the ardent desire, the resolute wish of the Aaland population . . . to preserve intact the Swedish language and culture—their heritage from their ancestors.”¹⁹⁶ The Commission was able to reconcile this appreciation with its ultimate conclusion that the Aaland Islands should remain a part of Finland—but only because “[t]he Finnish State [wa]s ready to grant the [Aalanders] satisfactory guarantees” that they would have autonomy regarding their schools and language.¹⁹⁷ Absent these assurances, the Commission warned, it would then be “force[d] . . . to advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite.”¹⁹⁸

A fishing community's interest in economic survival has also been recognized as relevant to discerning the contours of a customary international law claim. In the *Fisheries Case (United Kingdom v. Norway)*, the United Kingdom objected to Norway's traditional fishing zone border, which was formally enacted into Norwegian law through a royal decree in 1935.¹⁹⁹ The International Court of Justice (ICJ) ruled in favor of Norway on the basis that “the peculiar geography of the Norwegian coast” permitted the method it used to draw its fishing zone boundary, consistent with customary international law.²⁰⁰ Yet, before proceeding through its analysis of the customary international law standards, the ICJ found relevant that “the inhabitants of the [Norwegian] coastal zone derive their livelihood essentially from fishing” and that this reality, among others, “must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian

¹⁹⁵ *Report Presented to the Council of the League by the Comm. of Rapporteurs*, League of Nations Doc. B.7.21.68.106 1921 VII (1921) [hereinafter *League of Nations Report*]. The Aaland Islands were originally part of Sweden, which ceded them to Russia, along with Finland (a Swedish province), following various wars between Sweden and Russia. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 118 (3d ed. 2010). Finland declared its independence from Russia following the outbreak of the Russian Revolution, at which point the Aalanders, nearly all of whom spoke and identified as Swedish, insisted on a plebiscite, which Finland refused to authorize. *Id.* At that point, Finland and Sweden approached the League of Nations, which constituted first a committee and then a commission to determine the legal rights of the Aalanders. *Id.* at 118, 120.

¹⁹⁶ *League of Nations Report*, *supra* note 195, at 28.

¹⁹⁷ *Id.* at 29.

¹⁹⁸ *Id.* at 34.

¹⁹⁹ 1951 I.C.J. 116, 118 (Dec. 18).

²⁰⁰ *Id.* at 139.

fisheries zone laid down in the 1935 Decree are contrary to international law.”²⁰¹ Though arguably dicta, this explicit recognition of the importance of fishing to the inhabitants of the disputed area suggests that a community’s survival interest may at least bolster a customary international law claim, if not give rise to one.²⁰²

Because customary international law offered weak protection of cultural claims to historical artifacts,²⁰³ stronger protections were eventually demanded and achieved through the adoption of several multilateral conventions, beginning during the post-World War II movement to formalize many customary rights in treaty law. Three of these conventions are generally considered the major sources of most international cultural property rights worldwide.²⁰⁴ Each one, in addition to establishing definitions for cultural property, affirmed the growing sentiment in the twentieth century in favor of protecting cultural property.²⁰⁵

²⁰¹ *Id.* at 128.

²⁰² At the time of the *Fisheries Case*, Norway derived 3% of its national income from fisheries. DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 40 (1965). Furthermore, a few years later, the ICJ ruled that the United Kingdom and Iceland had an obligation to negotiate in good faith to reach agreement regarding fishing boundaries and that such negotiations would have to take into account, *inter alia*, Iceland’s “special dependence” on the fisheries—as well as resource conservation concerns. *See Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3, 3, 14 (July 25).

²⁰³ For example, customary international law does not require restitution for cultural property “removed by economic or colonial conquest.” Mastalir, *supra* note 193, at 1049. “The products of so-called ‘Elginism,’ after the man who brought the Parthenon Marbles to England, have often remained in the acquisitive nation.” *Id.* at 1049 & n.50 (citing Sayre, *supra* note 193, at 855).

²⁰⁴ *See* Unidroit Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, 1330 [hereinafter 1995 Convention]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 232–34 [hereinafter 1970 Convention]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, 240 [hereinafter 1954 Convention]; *cf.* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279–80, 1 Bevans 631. Nations also may have additional or separate treaty obligations pursuant to bilateral treaties to which they are a party. *See* Jonathan Drimmer, *Hate Property: A Substantive Limitation for America’s Cultural Property Laws*, 65 TENN. L. REV. 691, 745 n.374 (1998) (listing bilateral treaties that the United States has entered into “with numerous individual nations that render covered cultural properties fully inalienable and carry criminal as well as civil penalties for trafficking within the United States”).

²⁰⁵ The principle favoring the protection of cultural artifacts from wartime expropriation and destruction existed well before implementation of the 1954 Convention. The United States, for example, has generally followed such a policy, at least since World War II. *See* REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC MONUMENTS IN WAR AREAS 48–49, 61 (1946) (“We are bound to respect . . . monuments so far as war allows.”); *see also* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 232 (2005) (noting extraordinary measures taken by U.S. forces during World War II to protect culturally significant sites in Europe). This policy continued in effect after World War II. *see* Mastalir, *supra* note 193, at 1048 & n.45 (citing Letter from Ronald J. Bettauer, Attorney, Office of the Legal Adviser, Dep’t of State, to Anne Coffin Hanson, President,

The central purposes of all three conventions reflect the notion that an individual's cultural identity should be protected because such protections benefit not only the individual and his culture, but also the entire global community through the preservation of a rich, multicultural heritage.²⁰⁶ For example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (the 1954 Convention) contains a broad purpose statement reflecting the core principle that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."²⁰⁷ The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 Convention) reiterates and expands on this sentiment, announcing "that the interchange of cultural property among nations . . . increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations" and "that . . . it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations."²⁰⁸ Likewise, the Convention on Stolen or Illegally Exported Cultural Objects (the 1995 Convention) recognizes the "importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilization . . . with the objective of improving the preservation and protection of the cultural heritage in the interest of all."²⁰⁹

As these conventions are agreements between nations, the rights they extend do not attach to the specific group with a cultural interest in the relevant property.²¹⁰ Instead, the cultural property must be claimed by a signatory

Coll. Art Ass'n of Am., *reprinted in* 31 ART J. 488 (1972) (presenting the official State Department position in response to a letter urging U.S. ratification of the 1954 Convention), even though the United States did not ratify the 1954 Convention until 2009, *see United States of America Ratified Conventions*, UNESCO, http://portal.unesco.org/la/conventions_by_country.asp?language=E&typeconv=1&contr=US (last visited May 17, 2011).

²⁰⁶ Drimmer, *supra* note 204, at 696–97, 725–27.

²⁰⁷ 1954 Convention, *supra* note 204, at 240 ("Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.").

²⁰⁸ 1970 Convention, *supra* note 204, at 232–34.

²⁰⁹ 1995 Convention, *supra* note 204, at 1330.

²¹⁰ While vesting the right in the signatory state is consistent with conventional principles of international law, modern treaties in other contexts do vest rights to bring claims in individuals or other entities. *See, e.g.,* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 41–43 (1995). For

nation-state, which is deemed the “owner” of the property.²¹¹ The potential numbers of groups and types of property that could be claimed by a particular nation-state are, however, quite expansive.²¹²

example, human rights treaties often allow individual victims to file complaints with tribunals, which can investigate and determine whether to hear the claim. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221, 234 (creating the European Commission of Human Rights (the Commission) in order “[t]o ensure the observance of the engagements undertaken by the [parties to the Convention]”); *id.* art. 25, at 237 (expressly vesting the Commission with the authority to “receive petitions . . . from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation [committed] by one of the [party-states to the Convention]”). In the context of foreign direct investment, bilateral investment treaties (BITs) vest individuals and corporations who are directly impacted by alleged breaches by party-states to bring claims directly on their own behalf in binding arbitration. *See Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 11 ICSID Rep. 295, ¶ 37 (Aug. 2, 2004) (“[T]he greatest innovation of ICSID and other systems directed at the protection of foreign investments is precisely that the rights of investors are not any longer subject to the political and other considerations by their governments, as was the case under the old system of diplomatic protection Investors may today claim independently from the view of their governments.”). Thus, it is possible to imagine regimes that vest more direct rights in the cultural groups themselves than do currently existing cultural property conventions. *See Jordan J. Paust, Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977, 978 (2011) (describing the essay’s intent to debunk “a false and inhibiting myth regarding nonstate actors [including groups] and a related pretense of exclusion by identifying a large number of such actors . . . and a number of specific forms of formal participation [by such nonstate actors]” in international law).

²¹¹ As one commentator has noted, a potential flaw in the definition of cultural property under UNESCO is that only nation-states have the authority to designate what property is culturally significant; the group to which the objects hold personal cultural significance has no formal voice. *See Mastalir, supra* note 193, at 1037 (“[T]he question regarding what cultural property should be protected by domestic and international efforts remains unanswered.”). Another commentator argues that this is at least similar to group rights, as compared to “internationalism,” an alternative view sometimes advocated, in which allowing “international circulation of cultural properties can help to foster greater world cultural understanding.” Drimmer, *supra* note 204, at 744 n.370.

²¹² For example, the 1970 Convention defines “cultural property” as:

[P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j)

Finally, one United Nations document explicitly recognizes a link between cultural property rights and environmental sustainability. Notably, this recognition extends to all local communities, not just to indigenous groups. Principle 22 of the 1992 Rio Declaration on Environment and Development declares that “[i]ndigenous people and their communities, and other local communities, have a vital role in environmental management and development” and calls upon all nations to “recognize and duly support [these communities’] identity, culture and interests and enable their effective participation in the achievement of sustainable development.”²¹³

C. Domestic Legal Protection of Local Communities and Cultures

1. Domestic Legal Protection of Local Communities Outside of the United States

While still a rarity, a growing number of nations provide to communities legal entitlements to resources or other ownership of property. The types of legal protections on which these communities may rely are also varied.

Certain local communities in Brazil may be the best-known examples of communal rights in CPRs. These communities hold exclusive-use rights to certain areas of state-owned forests.²¹⁴ While the Brazilian government retains ownership of the forests, it granted the local communities the exclusive right to harvest and sell the renewable resources found there, such as rubber and Brazil

archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

1970 Convention, *supra* note 204, at 234–36. An implementing country is expressly permitted to choose, as has the United States, to enact a more restrictive definition. *See infra* note 233 and accompanying text (discussing CPIA).

²¹³ Rio Declaration of Environment and Development, adopted June 14, 1992, U.N. Doc. A/CONF.151/26/Rev. 1 (1992). The Rio Declaration, adopted by the United Nations Conference on Environment and Development, is a collection of non-legally binding, authoritative statements of global consensus on environmental policies, reflected in twenty-seven “principles.” *See* Breckenridge, *supra* note 159, at 735–36.

²¹⁴ Breckenridge, *supra* note 159, at 779 (citing Stephan Schwartzman, *Extractive Reserves: The Rubber Tappers’ Strategy for Sustainable Use of the Amazon Rainforest*, in *FRAGILE LANDS OF LATIN AMERICA: STRATEGIES FOR SUSTAINABLE DEVELOPMENT* (John O. Browder ed., 1989), and Stephan Schwartzman, *Land Distribution and the Social Costs of Frontier Development in Brazil: Social and Historical Context of Extractive Reserves*, in *ADVANCES IN ECONOMIC BOTANY* (Daniel C. Nepstad & Stephan Schwartzman eds., 1992)).

nuts.²¹⁵ The rights to these renewable resources are held subject to the requirement that the communities' harvest practices remain "sustainable."²¹⁶

Some local communities in Indonesia also have been granted a similar right to extract "cat eye resin" (used in incense, varnish, paint, and cosmetics) in the forests of Sumatra.²¹⁷ The legal status of this right has waxed and waned over the years.²¹⁸ While subject to Dutch colonial rule in the 1930s, local community leaders negotiated the boundaries of a forest reserve that was designated for customary local regulation.²¹⁹ In 1991, however, the reserve became a national park and large areas were reclassified as "State Production Forest," a designation that "implies that local use is strongly restricted (de facto prohibited) and that the government may issue logging concessions."²²⁰ Following lobbying efforts by a consortium of nongovernmental organizations, Indonesia's Minister of Forestry signed a decree in 1998 that "acknowledged local people as the only beneficiaries of the management of" designated forest areas.²²¹ According to the decree, communities within the designated zone were required to make a formal application to register their concession rights.²²² In fact, communities have not registered these rights.²²³ Even so, the decree has resulted in governmental acceptance of arguably illegal local community farming within the designated areas and extinguished the threat posed by several planned commercial forestry enterprises.²²⁴

In Fiji, kinship groups hold collective rights to inshore reef-fishing territories called *qoliqolis*, each of which consists of multiple family subgroups.²²⁵ While customary law in Fiji vests local chiefs with the ultimate authority to create rules governing the use of communal resources, "[a]ll

²¹⁵ *Id.* at 779–80.

²¹⁶ *Id.* at 780 (internal quotation marks omitted). The impetus for the Brazilian government to create this legal regime originated, at least in part, with environmental groups in the United States lobbying Congress to put pressure on Brazil by reducing its World Bank funding. *Id.*

²¹⁷ See generally Kusters, *supra* note 160, at 428–29 (describing a process whereby local communities negotiated for concession rights to harvest *damar* resin).

²¹⁸ *Id.* at 428–29.

²¹⁹ See *id.* at 429.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 435.

²²⁵ Lawson-Remer, *supra* note 153, at 10 ("Depending on the *qoliqoli*, the rights-holding unit is either the *yavusa* (composed of 2-5 family sub-groups, called *matanqalis*) or the *vanua*, which is generally comprised of between 5 and 14 *yavusas*.").

villagers participate in [the] monitoring and enforcement” of these rules.²²⁶ The collective property rights are formally recorded in a register maintained by the Native Fisheries Commission. No individual—nor even the *qoliqoli* as a collective—has the right to alienate any fishing rights; “individual use rights accrue as part and parcel of clan group membership, which is transmitted patrilineally.”²²⁷ Current efforts to strengthen this collective ownership regime are supported by environmental groups who see it as the most attractive strategy for regulating the fisheries, in light of the practical inability of the Fisheries Department to effectively patrol the vast Fiji coastline, which stretches more than 1.3 million square kilometers.²²⁸

Community ownership initiatives in Scotland have taken a different approach entirely. There, a growing number of communities have formed trusts to purchase crofting estates from private or government owners.²²⁹ “This move to collective [private] ownership [by communities] places Scotland at the ‘cusp’, globally, of . . . ‘community-centric’ land reform.”²³⁰

2. *Legal Protection of Cultural Property in the United States*

The United States has been modestly supportive of the broader international effort to protect cultural property. It has ratified both the 1954 and 1970 Conventions, discussed in Part III.B,²³¹ and has also entered into several bilateral agreements that protect cultural property.²³² The United States

²²⁶ *Id.*

²²⁷ *Id.* at 10–11.

²²⁸ *Id.* at 13–14.

²²⁹ Mackenzie, *supra* note 161, at 320. “Crofting, as a form of land tenure, dates from *circa* 1800. A crofter, as tenant, rents a small piece of land . . . for individual use from the landowner, and holds use rights in common to, frequently, large areas of common grazing.” *Id.* at 320 n.1.

²³⁰ *Id.* at 320 (citing John Bryden & Charles Geisler, *Community-Based Land Reform: Lessons from Scotland*, 24 LAND USE POL’Y 24 (2007)).

²³¹ See *United States of America Ratified Conventions*, *supra* note 205; see also *Treaties & Legislation, SAVING ANTIQUITIES FOR EVERYONE*, <http://www.savingantiquities.org/heritagetreaties.php#Unidroit> (last visited May 17, 2011) (“[O]nly a handful of countries have joined the [1995] Convention.”).

²³² For example, the United States has enacted specific trafficking statutes to implement obligations it has toward certain countries. See, e.g., Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091–2095 (2006)) (making illegal the importation and trafficking of cultural properties from Central and South America and the Caribbean without approval of the country of origin’s government); *id.* § 2093(b) (providing for repatriation of items seized pursuant to the Act).

implemented the 1970 Convention by enacting federal legislation—the Convention on Cultural Property Implementation Act (CPIA)—in 1983.²³³

Within its own borders, the United States also has a great number of domestic laws protecting cultural property. Early efforts were mainly aimed at protecting “national treasures,” such as national historic buildings and sites.²³⁴ More recently, federal legislation has also been enacted to protect cultural and archaeological artifacts located on federal land.²³⁵ A number of federal laws also specifically aim to preserve the cultures of Native American tribes and native Hawaiians.²³⁶

The most comprehensive examples of domestic cultural property protection can be found in statutes enacted in the last few decades, such as the Archeological Resources Protection Act of 1979 (ARPA)²³⁷ and the Native American Graves Protection and Repatriation Act (NAGPRA),²³⁸ enacted in

²³³ Pub. L. No. 97-446, 96 Stat. 2329 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2006)). As expressly permitted by the 1970 Convention, CPIA restricts the definition of protected cultural property. *Id.* § 2601(6).

²³⁴ *See, e.g.*, Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (2006)) (providing legal protection against destruction of “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” located on federally owned land); Historic Sites, Buildings, and Antiquities Act, ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461–467 (2006)) (setting forth the purpose to “preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States”); National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470 (2006)) (providing for the establishment of the National Register of Historic Places).

²³⁵ *See, e.g.*, Archeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa–mm (2006)) (establishing criminal penalties for, *inter alia*, the destruction or unauthorized removal of archeological resources on federal land); Native American Graves Protection and Repatriation Act, Pub. Law No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006)) (creating a requirement that Native American tribes be consulted before the federal government undertakes to excavate Native American human remains or cultural items on federal land and establishing criminal penalties for the trafficking in such items).

²³⁶ *See, e.g.*, 42 U.S.C. § 11701(2) (2006) (“The Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.”). While this Article focuses on the statutes that protect cultural property, other federal statutes aim to protect and preserve these cultures outside of the tangible property context. *See, e.g.*, Native American Languages Act, 25 U.S.C. §§ 2901–2906 (2006) (protecting the right of Native Americans to speak and teach their native languages). Others are a hybrid and vest some property-type rights (such as access to sites) with other types of protections. *See, e.g.*, American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006) (recognizing an “inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites”).

²³⁷ Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa–mm (2006)).

²³⁸ Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. §§ 3001–3013 (2006)).

1990. Both seek to protect and preserve archeological resources. ARPA does this by prohibiting any excavation and removal of such resources from federal or tribal land unless done in accordance with a permit issued for that purpose.²³⁹ All materials recovered by a permit-holder remain the property of the government.²⁴⁰ NAGPRA, on the other hand, actually vests ownership of ancestral remains and related funerary objects in lineal descendants, if they can be identified.²⁴¹ If identification is not possible, an item becomes the collective property of either the indigenous tribe on whose land the item is found or the tribe having the closest relationship to it.²⁴² Ownership of “sacred objects” and “objects of cultural patrimony” are always vested in the tribe with the closest relationship to the objects.²⁴³

IV. THE COMMONS AS CULTURAL PROPERTY

As discussed in Part II, research by social scientists concludes that, under the right conditions, groups can cooperate and self-regulate to sustainably manage CPRs under their control.²⁴⁴ Furthermore, CPRs can sometimes be the most effective form of resource management.²⁴⁵ This conclusion stands in contrast to the traditional assumption, which still permeates U.S. property law, that resources can be managed only by private ownership or central governmental control.²⁴⁶

Formal recognition of group rights to, or authority over, CPRs remains rare,²⁴⁷ despite the fact that *de facto* group ownership and control—including among Maine lobstermen, particularly before the advent of the new zone

²³⁹ 16 U.S.C. § 470ee(a). “Archaeological resources” are defined by the statute as “any material remains of past human life or activities which are of archeological interest” that are at least 100 years old. *Id.* § 470bb. Tribes are exempt from the permit requirement, as are individual tribe members if the tribe has enacted “tribal law regulating the excavation or removal of archeological resources.” *Id.* § 470cc(g)(1).

²⁴⁰ *Id.* § 470cc(b)(3).

²⁴¹ 25 U.S.C. § 3002(a)(1).

²⁴² *Id.* § 3002(a)(2)(A)–(B).

²⁴³ *Id.* “Because of the communal ownership rights in these cultural properties, and the inability of any individual to dispossess the group of its ownership interests, NAGPRA prohibits any individual from alienating covered items.” Drimmer, *supra* note 204, at 740 (footnote omitted).

²⁴⁴ Ostrom, *supra* note 144, at 251–52.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ A few exceptions are recounted above in Part III. The ocean waters that contain all Maine lobster territories are legally “public property. . . held in trust by the state for all citizens. . . . [A]ll citizens have legal access to them.” ACHESON, *supra* note 9, at 24.

licensing system—have been documented.²⁴⁸ In the United States, the traditional options, private ownership or central governmental regulation, continue to dominate the discussion at the policy-making level. Even in the legal academic literature, private group cooperation and effectiveness are studied and lauded as *alternatives* to legal paradigms, not as goods in and of themselves that should be incorporated into, or protected by, existing legal systems.²⁴⁹

As groundbreaking as it was for Ostrom's work to disrupt the then-prevailing sole paradigm of natural resource management policy, entrenched legal presumptions and norms are harder to displace. Perhaps in part for this reason, deliberate institutional design has attempted to tinker with regulation rather than more extensively overhaul or displace it—even in situations where continued small-group management might be superior.²⁵⁰ Thus, in Maine, co-regulation was introduced to vest lobstermen with formal rule-making authority, but their authority is not absolute. Instead, it is highly circumscribed and subject to being overridden by governmental authorities.²⁵¹ Nor does comanagement protect, or even recognize, the existence of customary fishing territories.²⁵²

To the contrary, while incorporating successful cooperative management techniques into existing regulatory regimes might be superior to traditional top-down central resource management, these new institutions appear not to encourage or preserve successful cooperative regimes that are already in place.²⁵³ On the surface, traditional property regimes, predicated on the notion of individual ownership, seem ill equipped to assimilate group-level rights and management practices. As Professors Daniel Cole and Elinor Ostrom have recently noted, “Property theory has not kept pace with the growth of empirical

²⁴⁸ See, e.g., *id.* (describing the local-level tradition of “‘harbor gang[s]’ that maintain[lobster] fishing territor[ies] for the use of [their] members”); Acheson & Brewer, *supra* note 31, at 40–41.

²⁴⁹ See *supra* Part II.B.

²⁵⁰ ACHESON, *supra* note 9, at 143; Acheson & Brewer, *supra* note 30, at 55.

²⁵¹ ACHESON, *supra* note 9, at 97.

²⁵² The zone boundaries were deliberately drawn to track customary territorial boundaries. See *id.* at 113. However, there is no formal incentive for lobstermen to stay within these boundaries, as the zones do not recognize any of the smaller territories located therein and the regulations associated with them expressly permit a licensed lobsterman to do as much as 49% of his fishing outside of the zone in which he is licensed. *Id.* at 112–13.

²⁵³ To the contrary, expressly legalizing behavior that is contrary to the customary system may directly serve to undermine it. See *supra* note 181.

and historical data on property systems.”²⁵⁴ In particular, legal scholars, among others, “continue to rely on simplistic, outmoded and incomplete models” that fail to account for contemporary commons research.²⁵⁵ If legal scholars are resistant to incorporating new theories of property, lawmakers and judges who rely on existing precedents are likely even more so.

Yet, American legal systems, particularly American property law systems, do recognize rights belonging to pairs, groups, and collectives.²⁵⁶ There are

²⁵⁴ Daniel H. Cole & Elinor Ostrom, *The Variety of Property Systems and Rights in Natural Resources*, in PROPERTY IN LAND AND OTHER RESOURCES (Daniel H. Cole & Elinor Ostrom eds., forthcoming 2011) (manuscript at 1), available at <http://ssrn.com/abstract=1656418>.

²⁵⁵ *Id.*

²⁵⁶ Some obvious examples include: common rights to property held by spouses, see James R. Ratner, *Community Property, Right of Survivorship, and Separate Property Contributions to Marital Assets: An Interplay*, 41 ARIZ. L. REV. 993, 998 (1999) (distinguishing between joint property and community property, both of which are jointly owned by spouses but are treated differently upon a spouse’s death, with joint property automatically reverting solely to the surviving spouse while the dead spouse’s half-share of community property must be devised by will or by intestate succession); common rights to real property or associated rights, such as mineral rights, held jointly by multiple individuals, see James M. Acheson & Julianna Acheson, *Maine Land: Private Property and Hunting Commons*, 4 INT’L J. COMMONS 552, 563 (2010) (describing various arrangements wherein multiple owners have different property interests in the same parcel, such as owners of forestland selling development rights to conservation organizations, thereby creating conservation easements, as well as forest landowners who sell recreational and hunting rights to individuals or groups); Dorothy J. Glancy, *Breaking Up Can Be Hard to Do: Partitioning Jointly Owned Oil and Gas and Other Mineral Interests in Texas*, 33 TULSA L.J. 705, 706 (1998) (describing potential difficulties of separating joint ownership of multiple individuals through partition action); as well as common ownership of certain property in condominiums, see Rose, *supra* note 16, at 139 (describing condominiums as a form of “[l]imited common property”); Michael H. Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 277 (2007) (“The condominium owner owns his or her unit in fee simple absolute and shares an undivided interest in the common elements . . . as a tenant in common with the other condominium owners.”). The same effect is also achieved through corporate structures, such as in housing cooperatives. See *id.* (“[While] the owner of the building in a housing cooperative is the cooperative corporation[, e]ach shareholder of the cooperative corporation is entitled to a proprietary lease granting him or her the right to occupy a unit within the building for a significant period of time Thus, the owner of a cooperative apartment is technically both the owner of shares in the cooperative corporation and a tenant of that corporation.”). Dealing with collective rights has also been the subject of legislative and other rule-making action, where special procedural mechanisms, most notably class actions, have been designed to facilitate collective legal action. See, e.g., FED. R. CIV. P. 23 (governing the procedure of class action suits brought in United States federal courts); Warth v. Seldin, 422 U.S. 490, 515 (1975) (noting that an association may have standing to bring a claim based on injury of its members even when there is no injury to the association as such).

On Matinicus Island itself there is a long tradition of “common” (private) ownership. The shorefront was originally owned by a single settler, who deeded it to his heirs as undivided land. See ROGERS, *supra* note 1, at 16.

Today the shorefront is owned by many, the shares having been divided, sold and divided again and again, each time making the shares smaller, until it is possible to own a share as small as 1/400th. That share allows the owner to build a house or shop . . . , but without clear title to that particular piece. In essence, he owns 1/400th of everyone else’s land.

even some examples of legislatures that will consider and enact fairly novel strategies—with Maine among them, in adopting the comanagement system for regulating the lobster industry—though admittedly they are far more likely to implement new laws that are based on established legal models.²⁵⁷

Cultural property rights provide an excellent model that could be tailored and adapted to recognize group management of CPRs. Casting the argument in cultural property terms may be the best way for the collective management structure of “commons” to achieve formal legal recognition. While cultural property laws have been slow to expand, they have been treated with great deference once enacted.²⁵⁸ Notably, this is so “even when those efforts have conflicted with private property rights of a previously well established and traditional nature.”²⁵⁹

Furthermore, while a community’s claim of a right to exclude rival fishermen from a local fishing ground is not identical to the more commonly recognized cultural property interest in “tangible, movable objects,”²⁶⁰ neither does it take much imagination to consider it in the same terms. As it has been broadly defined, *cultural property* can be any property, tangible or intangible, having special significance to a defined group of people, whether or not the group is vested with a traditional property interest.²⁶¹ As shown in the examples discussed in Part III, cultural property rights are perhaps best characterized as a concept that has been legally recognized through a wide variety of different domestic and international initiatives. Despite the myriad ways of recognizing these claims,

[t]he idea that unifies all . . . [cultural property rights] initiatives is that defined groups of people—such as the residents of a town, the citizens of a state, the members of a tribe, or the citizens of a nation—have identifiable interests in particular kinds of tangible or intangible property which are legally cognizable and which should be protected for the benefit of those groups.²⁶²

Id. This system, “for over two hundred years[,] . . . has worked just fine on Matinicus.” *Id.*

²⁵⁷ In addition to conservatism and the “failure of imagination,” other pragmatic and political reasons may underlie this phenomenon.

²⁵⁸ UNDERKUFFLER, *supra* note 20, at 112 (“The courts have exhibited remarkable receptiveness to public efforts to protect cultural property . . .”).

²⁵⁹ *Id.*

²⁶⁰ Mastalir, *supra* note 193, at 1037.

²⁶¹ UNDERKUFFLER, *supra* note 20, at 110.

²⁶² *Id.*

So conceived, the concept of cultural property rights, even as currently understood, is broad enough to encompass community rights initiatives.²⁶³ The identification of group members with the community, and their desire to pass this identity to their children as a cultural heritage, not only encourages cooperation and rule-following behavior by group members, but also gives rise to a unique community culture. The CPR on which the group relies is crucial to its group identity and its continued cultural existence. For these communities, like the Matinicus Island lobstermen, “[b]iological resources . . . have special meaning . . . , differentiated from their value to the public in general.”²⁶⁴ Such resources therefore can be conceived as the “cultural property” of that community in much the same way that a tangible sacred object is the cultural property of another group.²⁶⁵

Yet, concluding that the definition of cultural property is broad enough to encompass community-level claims is not the end of the inquiry. The notion that groups serving as de facto managers of CPRs could be vested with rights modeled on existing cultural property rights initiatives only hints at when such rights should be recognized and what form this recognition should take. I attempt to analyze these questions below, both generally and with specific reference to the lobbying effort now being advanced by the Matinicus Island lobstermen.

²⁶³ Consciously extending this model would work well for such groups for several reasons. First, many of these groups are precisely the same indigenous groups that are already the subjects of existing cultural property rights. See, e.g., Berkes, *supra* note 162, at 66. The Canadian government signed a treaty with the Cree that “specified and consolidated their land and resource use rights, [and] made provisions for regional self-government” including self-regulation of many CPRs. *Id.* at 68. Some of these groups may already have implicit recognition of their exclusive rights to manage resources to the extent that these resources are found on reservations over which tribal sovereignty is expressly recognized. Second, by vesting rights at the group level, cultural property rights expressly recognize, and potentially strengthen through that recognition, the unique identity that many groups have developed based on their stewardship role. Third, a model of group rights based on the special relationship between the group and the property interest provides a solid theoretical framework for explaining why certain groups should prevail at the “expense” of other individuals, which has been the basis for efforts opposing extending recognition of island subzones in Maine.

²⁶⁴ Breckenridge, *supra* note 159, at 776.

²⁶⁵ See, e.g., Graceann Hall, *Oregon Natives Seek Return of Rare Meteorite*, ALBION MONITOR (Apr. 3, 2000), <http://www.albionmonitor.com/0004a/copyright/willamette.html> (reporting that an Oregon tribe brought a claim under NAGPRA, attempting to utilize the statute to regain possession of a meteorite that the tribe has revered as a religious object since it first fell to Earth on Native land).

A. *When Cultural Property Rights in CPRs Should Be Recognized*

Communities grow and shrink and even, with relative frequency, entirely cease to exist.²⁶⁶ While often viewed as lamentable,²⁶⁷ this reality is generally not legally actionable.

Certain small, insular communities, however, have a distinct culture that may be of historical significance. In the case of communities that sustainably manage CPRs, their continued existence will often be in the public interest. Yet, this cannot be the only fact relevant to deciding whether to create a “cultural” property interest. Just as other preservation efforts have been criticized for impeding more desirable new alternatives, an overly broad conception of community-level rights would have negative potential as well. Some of the same factors that make small, close-knit communities efficient—their insularity and homogeneity—could work against efforts to promote the inclusive multicultural society that constitutes both a core value of the cultural property rights movement and a normative value broadly woven through the fabric of contemporary American law. Ideally, a framework for vesting cultural property rights in nonindigenous communities should prevent the extinction of unique communities that are lauded for their conservation ethic and—at the same time—establish a standard for other collective efforts (thereby helping to maintain a diverse collection of subcultures). Yet, any framework should also guard against entrenchment of community values that are antagonistic to tolerance and diversity.

One can imagine such an issue arising with some frequency in the context of claims brought by small communities. While communities may be effective at enforcing norms, the norms they enforce may or may not confer a net benefit on the broader society.²⁶⁸ Whether it is in the public interest to favor

²⁶⁶ See Parchomovsky & Siegelman, *supra* note 176, at 91 (describing how all but six property owners agreed to sell to their polluting corporate neighbor, but noting that “residents voted overwhelmingly not to dissolve the town government, so technically Cheshire still exists and will be governed by its roughly fifteen remaining residents”); see also ROGERS, *supra* note 1, at 4–5, 15–16 (describing the growth and decline in population over two centuries and how neighboring Criehaven Island, which for many years “enjoyed a vital growing population,” ceased to have any year-round inhabitants in the 1960s).

²⁶⁷ See Parchomovsky & Siegelman, *supra* note 176, at 144 (“[A] sense of community is obviously something of great importance to many residents of small towns and urban neighborhoods.”).

²⁶⁸ Rai, *supra* note 165, at 85 (“[E]ven if a norm that is efficient for a particular group emerges, it may create negative externalities. For example, the exclusionary behavior of a particular social group may be efficient for that group, but it is not likely to be efficient for society as a whole.”); see also Samuel Bowles & Herbert Gintis, *Social Capital and Community Governance*, 112 *ECON. J.* F419, F428 (2002) (“Communities work because they are good at enforcing norms, and *whether this is a good thing depends on what the norms*

recognition of a particular community's preservation claim must begin by taking account of the norms that would be perpetuated thereby. If the community culture is one based on hegemonic exclusion, the community rights claim may not be compatible with broader public policy—or constitutional—principles. “When insider–outsider distinctions are made on divisive and morally repugnant bases such as race, religion, nationality or sex, community governance may contribute more to fostering parochial narrow-mindedness and ethnic hostility than to addressing the failures of markets and states.”²⁶⁹

As a preliminary matter, then, a plausible community rights claim should not have qualities that are inconsistent with core constitutional values²⁷⁰ or be antithetical to the multicultural foundations of most cultural property efforts to date.²⁷¹ Preserving and recognizing the value of individual groups with distinct cultures will not serve the broader interest in diversity and multicultural pluralism when the culture of a group is inconsistent with that interest.²⁷²

A related way of evaluating whether a group's preservation claim should be granted is to ask whether groups that are effective because they are homogenous, and can thus preserve a common group interest based on that

are.” (emphasis added)); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 225–26 (1994) (discussing as economically inefficient the norm of racial discrimination); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044–63 (1995) (discussing group norm enforcement of racist values); Parchomovsky & Siegelman, *supra* note 176, at 81 n.16 (“The downside [of communities] is that [they] may also enforce ‘bad’ norms such as racial segregation.”). *But see* ROSE, *supra* note 7, at 88 (“Yet another . . . safeguard on local government . . . [is] ‘exit’—the ability to abandon something when dissatisfied—and it exists most distinctively at the local level. . . . [P]eople have a *choice* about the community in which they live . . .”).

²⁶⁹ Bowles & Gintis, *supra* note 268, at F428.

²⁷⁰ *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (gender discrimination); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (racial discrimination).

²⁷¹ *See, e.g.*, Drimmer, *supra* note 204, at 696–97, 725–27 (describing the general multiculturalist rationale for international cultural property rights initiatives); *id.* at 740 (“NAGPRA’s purpose is fundamentally multiculturalist; it was created to reverse the historical attitude that indigenous minority cultures, particularly Native American tribes and native Hawaiian organizations, were not worth preserving.”); Mastalir, *supra* note 193, at 1063 (“In the case of NAGPRA, the arguments used to support the request for repatriation of cultural property to Native Americans were founded on human rights principles. Recognition of human rights was the basis offered for enactment of the law during public hearings and upon introduction of the bill on the floor of the House and Senate.”).

²⁷² *See* Drimmer, *supra* note 204, at 749 (“To best achieve the multiculturalist goals of cultural property laws, it seems axiomatic that boundaries must be drawn to discourage—or at least to not encourage—the perpetuation of violent cultures or cultural practices that threaten the existence of other cultures or human collectivities.”).

homogeneity, on balance have something significant to contribute to the larger community or the public interest generally. When the community culture and values are not inconsistent with the public interest in multiculturalism, pluralism, and diversity, general principles favoring multiculturalism would tend to support its preservation. When the values of the community culture contribute to the broader public good, there is a doubly strong public interest in preservation. But when the cultural hostility to outsiders has no purpose other than exclusion for its own sake, preservation of the community may be neither a good policy goal nor constitutionally permissible.

The Matinicus Island fishing community is homogeneous from an economic point of view based on its single-minded focus on, and interest in, lobster fishing.²⁷³ This makes it a strong candidate for preservation: “fisheries and marine environments are extremely complex, and . . . at least in some instances, community-level management is likely to deal with these complexities more efficiently, and more ecologically soundly, than can individuals”²⁷⁴ or the state.²⁷⁵ As different lobster communities demonstrate, a firm boundary that excludes outsiders may be more effective at limiting resource extraction than one that is not able to deter encroachment by outsiders.²⁷⁶ Furthermore, the smaller and more close-knit the group, the more likely it is to “agree on more nuanced and intricate sets of rights and responsibilities,” which may also lead to more effective conservation of the resource.²⁷⁷

²⁷³ It is also true as a factual matter that Matinicus Island is racially homogenous (white) and excludes those who are not considered “kin.” However, the racial composition is better understood as a historical byproduct of Maine’s generally homogenous and white population, than as an aspect of the community culture. Indeed, “kin” is understood by Islanders to include those who may marry in from “outside.” There is no evidence that an individual of another race who married in could not be recognized as a kinsman and become a fully accepted member of the community. Nor is the community generally organized around a principle of racial discrimination. Its exclusion is not based on race but on factors that may correlate to race. See generally ROGERS, *supra* note 1.

²⁷⁴ Rose, *supra* note 16, at 176 & n.157 (citing Rieser, *supra* note 43, at 824); see also, e.g., *supra* notes 147–153.

²⁷⁵ See, e.g., Houseal et al., *supra* note 151; Western et al., *supra* note 151, at 5, 6 n.46.

²⁷⁶ See, e.g., ACHESON, *supra* note 9, at 78–79, 143; see also Rose, *supra* note 16, at 177 n.158 (citing Acheson to make this same point).

²⁷⁷ Rose, *supra* note 16, at 177 & n.159 (citing Rieser, *supra* note 43, at 826–27) (“[C]ommunity management [is] more nuanced than government regulation, including ITQs.”); see also *id.* at 177 & n.160 (citing Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L.Q.* 631, 640–41, 652–55 (1996)) (“Another environmental law scholar . . . makes the case that at the landscape level, we might also get more environmental mileage out of community efforts than individual ones, for many of the same reasons: purely individual actions may overlap and interact poorly, whereas individuals within communities can work out quite intricate sets of internal rights, responsibilities, and overarching norms of expected give and take.”).

The isolated nature of the Island fishery and its strong connection with the community, and vice versa, explains the conservation ethic of the Matinicus lobstermen. In general, some form of this ethic can be found throughout many communities in the fishing industry, as it directly correlates to the economic incentive to preserve and enhance an income stream over the long term.²⁷⁸ But the motivation of a single individual to preserve his own income stream cannot be compared to a group's motivation to preserve a way of life for the next generation. The interest shared by the Islanders in a future income stream is instrumental to achieving the goal of community preservation, which cannot be quantified or understood in purely economic terms, even if its achievement is almost entirely economically dependent.

Channeling this survival instinct and the strong conservation impulse that accompanies it may be the most effective way to solve conservation conundrums like the one inherent in the Maine lobster fishery. One more or less intractable conservation issue that has plagued Maine regulators is the successful imposition and enforcement of trap limits.²⁷⁹ As lobstermen themselves recognize, per-person trap limits have no real impact if the number of license holders continues to increase.²⁸⁰ There must be a limit on the total number of traps set. Small island communities sometimes will be better situated both to formulate trap limits and to enforce them effectively.²⁸¹

In general, the historical existence of self-governing, extralegal, close-knit communities in the Maine lobster fishing industry may account for its success, in conservation terms, over the years. Scientific knowledge is not always incorporated quickly into law. In Maine, most of the lobster regulations enacted during the last century were the product of scientific research and recommendations.²⁸² But in each instance, it took years, if not decades, before legislation was enacted.²⁸³ Yet, in certain instances, lobstermen voluntarily began adopting the measures advocated by scientists and other lobbyists long

²⁷⁸ ACHESON, *supra* note 9, at 212.

²⁷⁹ *Id.* at 98; *see also supra* note 107 and accompanying text (describing the increase in the total number of traps in the wake of the enactment of a per-person trap limit into law).

²⁸⁰ ACHESON, *supra* note 9, at 98.

²⁸¹ In theory, such communities may attempt to expand their borders as the size of the group grows and thus increase trap numbers through this growth. However, there is a limit on how large such communities can grow and still maintain the other features that cause them to remain viable as efficient close-knit communities; if they grow too large to monitor themselves and work collectively in an effective way, they simultaneously become worse at managing the resource. If their current borders are recognized and "fixed," this will incentivize the group to formulate norms discouraging overgrowth.

²⁸² *Id.* at 91–93.

²⁸³ *Id.* at 93.

before their enactment into law.²⁸⁴ They did so in cases where the predicted conservation outcomes benefitted them. In this way, the lobstermen furthered their communities' interests by preserving a way of life for their posterity, while simultaneously benefitting the larger society by conserving the resource that made that way of life possible. This public interest should weigh strongly against competing claims to the resource by encroaching groups that are not as conservation-oriented or conservation-motivated.²⁸⁵

Recognizing rights in conservation-oriented groups could also incentivize other groups to create or promote a more well-defined conservation ethic. The creation of a secure property right would give such communities, as owners, a further incentive to conserve resources and use them efficiently, while at the same time eliminating encroachment by outsiders.²⁸⁶ Depending on how such

²⁸⁴ See, e.g., *supra* note 33 and accompanying text.

²⁸⁵ Of course, whether environmental concerns justify restricting the use of particular property may itself be a first-order question. In some situations, it is possible to imagine that the community claim, even if conservation oriented, might conflict with another use of the property that is deemed to be a higher and better use. Cf. Stephen Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 URB. LAW. 113, 115–16 (1989) (“[The] highest and best use often involves complex juggling of aesthetic, economic, environmental, legal, practical, and social forces.”). With respect to the particular claim being advanced by Matinicus Islanders, of course, the only two uses that are incompatible with the exclusive use desired by Matinicus lobstermen are (1) lobster fishing by others, and (2) no lobster fishing at all. (Other uses, such as boating through the area or other types of fishing, presumably would not be impacted by vesting exclusive lobster fishing rights in Matinicus Islanders.) While other lobstermen may be able to prove a claim that they will suffer some financial impact from being excluded from the Island fishery, that will be true whenever more restrictive policies are imposed. With limited resources, the public interest in conservation will often outweigh the economic harm suffered by a small number of individuals in the short-term based on new use limitations. As for an outright ban on lobster fishing, which would visit economic harm on Matinicus lobstermen as well as their competitors, it could be argued that this is an even better way to conserve the resource. On the other hand, this might result in the loss of certain local knowledge that might be valuable for long-term conservation. Regardless, it is hard to imagine Maine public policymakers adopting this type of policy because of the likely substantial economic impact such a moratorium or ban would have on an industry that, for many, defines the state. In any case, a fishing moratorium is certainly not the current policy, which seeks to balance the competing interests of various groups of lobstermen with the environmental impact concerns, albeit in a manner that is arguably less effective than a comprehensive scheme that incorporates recognition of more subzones in perimeter-defended areas.

In addition, while Maine might consider other more classic regulatory measures—such as a broad lobster fishing moratorium or severe trap limits—history demonstrates that enforcement would be difficult. Indeed, perhaps for this reason, Maine has demonstrated its commitment to local resource management (and local self-enforcement in addition to marine patrol enforcement) by enacting the comanagement zone system. If local resource management—rather than some other type of top-down regulatory system—is indeed preferable, then the interests of the less cooperative lobstermen in nucleated gangs should yield to the public interest in resource conservation.

²⁸⁶ ACHESON, *supra* note 9, at 9 (“Since it is not in the rational best interest of an owner to damage his own property, most renewable resources owned privately are used efficiently and conserved.”) (citing James M. Acheson, *Management of Common-Property Resources*, in *ECONOMIC ANTHROPOLOGY* 351 (Stuart Plattner

a right was structured, and on what basis it was granted, the potential to obtain a property interest in a CPR might motivate groups to form or to reorganize in ways that would result in broad public benefits.

Finally, in terms of determining whether to recognize such a right, the potential loss of conservation-oriented practices should be taken into account. If the legal right to exclusive lobster fishing is not vested in the Matinicus Island fishing community, or protected on its behalf, the entire Island community, along with its local knowledge (perhaps including unique conservation-oriented fishing practices), may cease to exist.²⁸⁷ This is not only true in the esoteric sense that the culture of Matinicus Island will be radically altered if its residents no longer define themselves as “lobstermen” as they have for generations. In the case of Matinicus Island, unlike some other towns that have lost a longstanding industry, it is likely also literally true.²⁸⁸ The offshore Island, currently isolated to the point where it has only monthly contact with the mainland during the winter, cannot sustain a community without a full-time fishing industry upon which its residents can depend. Without an exclusive fishing boundary, the community may be forced to disband, with many or most residents dispersing to other places where they are able to earn a living.²⁸⁹ Their fishing territory would then be utilized by

ed., 1989); Bonnie J. McCay, *Everyone's Concern, Whose Responsibility? The Problem of the Commons*, in UNDERSTANDING ECONOMIC PROCESS 189 (Sutti Ortiz & Susan Lees eds., 1992)); Kusters, *supra* note 160, at 435 (noting that, in a particular instance, government support of local community rights discouraged corporate expansion and strengthened local communities' sense of security). *But see* Acheson & Acheson, *supra* note 256, at 556 (noting that the local Maine community understanding of “traditional [extralegal] rights” may lead to significant backlash against an individual exercising a “legal” property right, suggesting that the actual impact of legal recognition will likely depend on public perception (internal quotation marks omitted from first quotation)).

²⁸⁷ Such an “all or nothing” claim can be framed in a manner analogous to the cultural protection of Native American languages, which will be lost forever if not preserved. *See supra* note 236 (citing Native American Languages Act of 1990, 25 U.S.C. §§ 2901–2906 (2006)).

²⁸⁸ *Cf.* Parchomovsky & Siegelman, *supra* note 176 (describing the destruction of a small community by its polluting corporate neighbor).

²⁸⁹ While the community is currently very small—and likely will have to remain so to be sustainable—nothing suggests it will cease to exist so long as lobster fishing remains a viable occupation. Indeed, for those committed to lobster fishing as an occupation, it is a good location, and would be even more so if the Island were to gain exclusive rights to fish within the traditional territory. Moreover, the community conservation ethic can be passed on to new members, some of whom might move from outside the community. Indeed, the conservation-oriented ethic might attract certain like-minded individuals from outside, as it did with current resident Nat Hussey, who now combines his environmental law practice with lobster fishing. *See Zero-Carbon Lobsters*, NAT HUSSEY, <http://nathussey.com/zclobsters.html> (last visited May 17, 2011) (describing his “zero-carbon” lobster fishing business, “[h]arvesting lobsters by hand in a traditional rowboat”); *Law*, NAT HUSSEY, <http://nathussey.com/law.html> (last visited May 17, 2011) (describing his law “practice in marine resources and fisheries issues, and land use matters of concern to working waterfronts and our small island

coastal fishermen from nucleated territories that are likely to have a less imperative conservation ethic. Sustainable practices and knowledge vested in the community of fisherman might well be lost forever.

These criteria, which make for a fairly strong community conservation claim by Matinicus Island lobstermen, will not be present in the claims of every group. Indeed, even most groups of Maine lobstermen are likely to have weak claims when viewed under these criteria. As discussed in Part I, the Matinicus Islanders are one of only a few remaining island communities of lobstermen. Most lobstermen fish out of mainland harbors with nucleated territories whose borders are fuzzy and which overlap many others. The members of these gangs still identify themselves as members of groups. Some of these individuals may even experience this sense of group identity very strongly. But, in many cases, members of these lobster gangs do not even know all of the other members well, much less have a defined community that transcends working hours and encompasses dependents.²⁹⁰

On the other hand, the dire nature of the situation currently faced by the Matinicus lobster fishing community may indicate that Matinicus Island is likely to be less conservation oriented than other small island fishing communities. For example, the two Maine islands that have already achieved subzone recognition have been able to make stronger claims as conservation-focused communities. These subzones were expressly created as resource conservation zones and did not need to rely on “community” as a proxy for conservation.²⁹¹ Matinicus Islanders, by contrast, do not want to accept the same trap limits that the other two islands have accepted because they fear they will be unable to make a sufficient living at those levels.²⁹²

Monhegan Island is able to sustain itself with less income from its lobster fishery because it also has a significant summer tourist industry. Because it requires less income from the fishery, it has less incentive to sacrifice long-

community” and noting recent cases he has worked on, including a case “to fight the shutdown of Matinicus lobstering grounds in 2009”).

²⁹⁰ See *ACHESON*, *supra* note 9, at 74–75 (noting that in the mainland harbors he studied, “the amount of interaction among fisherman is far less than it is on the islands” and that “many fishermen in these harbors do not know each other well”). This reality probably makes it less likely that these lobster gangs would even bring a community-conservation claim. The same factors that make a community efficient may also give it an advantage in terms of mobilizing to protect its interests.

²⁹¹ *ACHESON*, *supra* note 9, at 50–51, 60–61, 67–68.

²⁹² Goodnough, *supra* note 1 (noting that Matinicus Island lobstermen do not think they should have to accept trap limits as low as those of Monhegan Island because, unlike Monhegan Island, Matinicus Island has no tourist industry on which it can fall back).

term sustainability for short-term income.²⁹³ But, even so, it appears that on balance Monhegan, not Matinicus, is likely better positioned than most communities to conserve effectively. Despite only fishing about half the year, its members are close-knit and the community is tightly integrated because its members also work together in the Island's summer tourist industry.

Still, despite the unflattering comparison with Monhegan's (already-successful) claim, Matinicus Island's claim is fairly compelling. Matinicus Islanders are much more conservation- and community-oriented than nearly every other existing lobster gang, almost all of whom have nucleated territories and a weak sense of community, with limited interaction outside of work, no group cohesion, and no potential for monitoring if the licensing system continues to erode the customary boundaries. Moreover, finding a novel conservation strategy may be imperative if the Matinicus Island community is to survive. At some point, the public benefits of saving a particular community will be marginal and not worth the effort of recognizing that group's territorial claim.²⁹⁴ Matinicus Island arguably is not such a community. Its continued success would provide some benefit to the public, even if only as a living example of sustainable resource management practices and techniques.

Undertaking an analysis of the costs and benefits of a novel conservation strategy should be a prerequisite for any formal determination of whether to validate a community conservation claim. If applied systematically, the analysis should assist in assessing the strength of these efforts to be vested with rights akin to cultural property rights. Conscious consideration of these criteria would also deepen lawmakers' understanding of the public policy interests inherent in such claims and allow them to see beyond the "special interest" label that often accompanies them.²⁹⁵ For example, Matinicus Islanders are most likely to succeed in their effort to gain recognition of their community interest if they can demonstrate that this interest also serves the public, and the broader community of lobstermen, through the conservation benefits that could

²⁹³ See generally ACHESON, *supra* note 9, at 58–61 (discussing and analyzing the Monhegan Island lobster fishing community).

²⁹⁴ Arguably this may be the dividing line between nucleated and perimeter-defended territories, since the monitoring ability (and associated ability to enforce group norms) is weak. Island communities also have not experienced the same levels of trap escalation as a result of stricter entry requirements. See *id.* at 46 ("[I]slanders do not feel the same pressure to increase the area they fish.").

²⁹⁵ See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48 (2011) ("As the number of groups in the public limelight has increased, so has anxiety about the group-based identity politics on which civil rights have historically been based. Many Americans view civil rights as an endless parade of groups clamoring for state and social solicitude.").

be expected to result. Analyzing a community-level claim like a cultural property claim, particularly with a sophisticated understanding of the economic incentives for conservation at play in small, close-knit, and isolated communities, allows for a fuller understanding of the principles at stake than does viewing the claim only as a zero-sum distribution of “benefits” to certain lobstermen at the economic expense of others.

B. Possible Methods of Recognizing a Community-Level Right

Assuming that some sort of community-level right should be recognized, such a right could be structured in various ways. Each possibility has both advantages and drawbacks. For example, as a general matter, any “right” that is granted could either permit the state to maintain its ownership, and therefore its ultimate control over the community’s “property,” or it could actually vest the community directly with an ownership stake.²⁹⁶ The former has the advantage of allowing the state to reverse itself, or revise the conditions associated with recognizing a community’s interest, without the financial, political, and legal obstacles associated with unraveling a property interest once created.²⁹⁷ On the other hand, the stronger and more secure the property interest granted, the greater the incentive for resource conservation by the communal owners.²⁹⁸

1. Zoning or Similar Initiatives

The most obvious way the Matinicus Islanders could gain state-sanctioned authority to exclusively use their traditional territory is by successfully obtaining a formal designation as a subzone. This is the method they are currently pursuing, at least as a preliminary strategy.²⁹⁹

²⁹⁶ Compare, e.g., Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–mm (2006) (ownership interest in property retained by federal government), with Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006) (collective property interest held by tribes).

²⁹⁷ See, e.g., *Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997) (“[P]ublic employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process”); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (holding that civil service employees have a property right to continued employment); *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982) (“[I]ntangible assets [including those created by contract or statute] are subject to condemnation [proceedings].”).

²⁹⁸ See *supra* note 286.

²⁹⁹ Auciello, *supra* note 1 (quoting Matinicus sternman Nat Hussey as predicting that the subzone proposal will likely “go to the Legislature,” although “DMR could conceivably do this under their regulatory authority” (internal quotation marks omitted)).

Not only is subzone designation the easiest way for the group to achieve its goal, both in terms of effort and political capital, there is also some precedent for it. The subzones already created around Monhegan Island and Swan's Island effectively recognize those Island communities' traditional perimeter-defended boundaries. Unfortunately for Matinicus Islanders, they will have to overcome the more recent recommendation by the subzone committee task force not to approve the creation of any future subzones.³⁰⁰

Were the Matinicus Island lobstermen able to achieve the exclusive right to fish their territory via subzone designation, this method of recognizing the community's traditional boundaries would have a number of advantages. To begin with, the community might be able to achieve subzone recognition relatively quickly, giving it the best chance for economic sustainability. Because subzones already exist and are part of the current zone system, the Marine Patrol would be able to adjust almost immediately to policing the borders on the same basis and pursuant to the same authorities that are already in place. If enforcement were to continue on the same terms, this would give the Islanders considerable autonomy.³⁰¹ While the traditional extralegal boundaries have been threatened by the Marine Patrol's failure to enforce them, the Marine Patrol has not, to date, directly interfered with any group norms that are not illegal.³⁰² Thus, to the extent that a subzone was created on the same basis as the existing larger zone, the only change for Island lobstermen would be formal recognition and policing by the Marine Patrol of their borders. All other norms would presumably be unaffected by that change.

The negative aspects of subzone recognition relate primarily to the unknown variable of subzone-specific requirements, which have been imposed in the other two subzones.³⁰³ If Matinicus Islanders were given the opportunity to obtain subzone recognition only if they also accepted, for example, more severe trap limits or special apprenticeship rules, a downward spiral could

³⁰⁰ See *supra* notes 130–32 and accompanying text.

³⁰¹ The enforcement costs to the state of Maine should also decrease. In general, one benefit of collective ownership rights is the need for minimal state regulation and enforcement. See Lawson-Remer, *supra* note 153, at 13 (“Pursuing marine resource conservation by strengthening collective ownership rights is an attractive strategy for environmental [groups in Fiji] in light of the limited capacity of the state to effectively enforce fishing regulations.”).

³⁰² To the contrary, “[a]mong state fishery officials, there has been a tacit acceptance of the traditional territorial system. . . . [I]t has generally been accepted as long as violence and destruction of property are kept to a minimum and do not come to public attention.” Acheson & Brewer, *supra* note 30, at 38.

³⁰³ ACHESON, *supra* note 9, at 61, 67–68, 224–25.

result. If the community members were divided in opinion regarding the feasibility of economic survival with such restrictions, their cohesiveness might unravel, rendering them unable to agree on the best strategy to pursue. They might, for example, be unable either to rally around a proposed subzone or to present a strong front to lobby the legislature for an alternate strategy. This could undermine or destroy the community more quickly than its own inaction.

Similarly, even if Islanders accepted a subzone with restrictions as a means of saving the community, the subzone restrictions might still be accepted only grudgingly by most, or over the strong dissent of a significant minority of the community. The result could be internal discord, with factions forming over the status of these restrictions and their enforceability as community norms. Enough discord could fracture the group's sense of community, undermining its ability to work efficiently in general, including with respect to other norms that previously were well accepted.³⁰⁴

While a subzone appears to be the most straightforward way to obtain the type of formal territorial recognition they are seeking, some Islanders have already recognized that the current subzone taskforce recommendation creates a potentially insurmountable obstacle to subzone recognition, at least by the Maine Department of Marine Resources. It may be that directly lobbying the Maine legislature would provide a better chance of success, both for the community and in general.

2. *Statutory Possibilities*

As illustrated by the examples in Part III, cultural rights initiatives have taken various forms. Likewise, there are many different approaches that a legislature could take in creating a statutory scheme that recognizes community-level rights. While these approaches might also be subdivided into many different types of schemes, they can broadly be generalized either as (a) community-specific statutes or as (b) statutory schemes vesting rights in any and all communities or groups that meet specified criteria.

³⁰⁴ Cf. *id.* at 63 (noting that, on Criehaven Island, "the sense of community appears to be waning rapidly," which "has resulted in an increased willingness to deviate from the rules").

a. *Community-Specific Approach*

The first broad category of legislation includes any statutes vesting specific communities with unique rights to specified property. In the case of Matinicus Island, such a statutory initiative would presumably resemble the statute establishing the conservation zone around Swan's Island, which was enacted before the zone licensing system was established. Most likely, such legislation would be passed as an amendment to the zone management law, with the Matinicus Island fishing territory designated as an official zone or subzone.

To protect the Island lobstermen's exclusive right to their traditional territory, at a minimum, such legislation would have to bar anyone not in possession of a subzone license from fishing in the subzone.³⁰⁵ It would also need to impose a restriction against issuing subzone licenses to applicants who are not Island residents. In light of the recent shooting, which arose in connection with a feud between different factions over this very issue, imposing a membership requirement consistent with Island norms might prove somewhat tricky.

Many issues of legal interference with community norms would be averted if the statute restricted the territory to use by the community and formally vested the community with the right to determine fishing eligibility. Another alternative would be to establish a set number of subzone licenses for the Island and permit the entire community (or an Island zone council) to determine how to distribute them. This alternative would vest the Islanders with less autonomy and encroach upon their ability to self-regulate, but would help mitigate the risk of eventual overfishing.³⁰⁶

Indeed, one of the primary issues with which policymakers would have to grapple is whether such a statute should recognize a community-level property right, similar to NAGPRA,³⁰⁷ or, alternatively, vest governing authority over the fishing territory at the community level. The two existing Island subzones do neither, but instead, in a manner similar to ARPA, protect the resource

³⁰⁵ This would be unlike the current system in which a license holder from one zone is permitted to set traps in another zone, so long as he sets no more than 49% of his traps outside of his home zone. *See id.* at 112.

³⁰⁶ Another possibility would be a formal apprenticeship program or a requirement that the community or subzone committee establish a program under the comanagement rules. There might be benefits to allowing the group to make such determinations. In light of the concerns expressed about community conservation and establishing a business for the next generation, the Islanders' community would likely develop a system that worked best for it in terms of training its next generation of lobstermen.

³⁰⁷ *See supra* notes 238, 271, and accompanying text (discussing NAGPRA).

against exploitation by continuing to vest the ultimate property interest in those resources—and the territory containing them—in the state government.³⁰⁸

b. Broad Scheme Setting Forth Specified Criteria

The other possibility, which would be a more radical departure from any existing law in the United States, would be for a legislature to pass a statute that vests any group meeting specified criteria with a legal property interest (or, alternatively, with broader authority to self-govern and self-regulate the designated property, which they might be deemed to hold in trust).³⁰⁹ From a purely political perspective, this seems to be an unlikely possibility; it is difficult to imagine the political will required to undertake such a radical shift. Further, in the case of lobster fishing, it would effectively overhaul the current zone system, which takes no cognizance of any community rights in customary boundaries. If it were feasible, however, clear precedent for this type of scheme exists in the various international conventions discussed in Part III.

Like those conventions, this scheme could define property that may be claimed as cultural property. The international conventions define categories of property quite broadly but permit state parties to draft their own domestic implementing legislation with narrower definitions. In the context of a community-conservation statute, the designated categories of property, such as fishing rights, could first be defined more narrowly and expanded over time, if warranted. This path would be more difficult to navigate than a community-targeted scheme, as it would no doubt be challenging to craft a statutory definition that is neither over- nor under-inclusive and which could precisely target the characteristics of small groups or communities that cause them to contribute significantly to the public interest.

On the other hand, general statutory recognition of a small group's right to stake property or property-like claims (such as legally enforceable usufructuary claims) would eliminate the type of politics that led to the controversial recommendation of the subzone task force committee. Similar political obstacles might impede the efforts of future groups forced to lobby separately every time a situation arose where legal recognition might be warranted. Indeed, even one or two successful efforts would not guarantee success for later groups, just as the successful Monhegan Island and Swan's Island

³⁰⁸ See *supra* note 237 and accompanying text (discussing ARPA).

³⁰⁹ See Breckenridge, *supra* note 159, at 777–78.

precedents did not stop the subzone task force from recommending against further subzone recognition.

3. *Other Methods of Recognizing Group-Level Rights*

Because wildlife and fisheries are publicly owned in Maine,³¹⁰ some sort of public law solution, such as the possibilities outlined above, is likely the only viable solution for lobstermen seeking rights to their traditional fishing territories. In the case of other CPRs, however, quasi-private ownership solutions may be available, like those recently undertaken by several local communities in Scotland.³¹¹

Local communities or groups could adopt a similar strategy in the context of a private resource (such as Maine forestland, which is nearly all privately owned³¹²). Hybrid ownership schemes are also possible. A private entity or organization, such as a conservation group, might purchase a property and retain the right to alienate but grant exclusive-use rights to small groups that can sustainably manage and benefit from them. Any of these “private” structures could be encouraged by legislation offering benefits, such as tax breaks or other incentives, for property whose resources are managed by small groups using sustainable practices.³¹³

CONCLUSION

In the decade since Professor Rose proposed that recognition of communal property rights should occur in the next generation of property law, little indicates that such a movement is truly afoot. Instead, this Article has noted that the customary territorial system of the Maine lobstermen—one of the institutions lauded by Professor Rose and others for its superior communal management of natural resources—is now threatened by a new wave of government regulation, among other things. We hardly appear closer to recognition of a community-level property right that could be used to save

³¹⁰ Acheson & Acheson, *supra* note 256, at 553.

³¹¹ See *supra* notes 161, 229, and accompanying text.

³¹² Acheson & Acheson, *supra* note 256, at 554.

³¹³ Likewise, use rights could be granted on private property, as in certain places in Europe where “owners of estates may have the rights to timber and agricultural products, but peasants have the *de facto* right to gather mushrooms, nuts, and firewood, and to use the land for grazing.” *Id.* at 565. Courts in the United States have also sometimes recognized customary use rights of private property. See, e.g., *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244 (1818) (concluding that hunters have the right to hunt on unenclosed private property).

communities whose conservation values make them excellent stewards of a resource they know better than anyone else. This Article has suggested that such a right, which would enable certain communities to retain their resource-conservation values, should be considered as a tool by anyone interested in conservation, including legislators and lobbyists.

A study of the growing literature on CPRs both demonstrates the need for such a right and reveals why these communities are worthy of preservation. But the “community” as an institution and potentially important repository of property rights in the next generation requires further study. In particular, the identity aspects inherent in community—and which may account for the efficiency of many close-knit groups—should be more overtly integrated into institutional design analysis.

In the immediate aftermath of the shooting of Chris Young, the instinctive response of Maine authorities to view Matinicus Island lobstermen as a single legal entity based on their status as a lobster fishing collective may have been correct (even if the manifestation of that instinct—punishing the entire community for the criminal misconduct of a few—may not have been).³¹⁴ In appropriate instances, collective property rights should be recognized in communities. Property law—constantly evolving in response to ever-changing political realities—is up to the challenge.³¹⁵

³¹⁴ The Islanders’ lawsuit against the commissioner was quickly settled, and no judgment on the merits was reached. See Walter Griffin, *Court Allows Lobstermen Back to Work*, MORNING SENTINEL (Waterville, Me.), July 24, 2009, at A2. The State’s prompt agreement to lift its ban might (but, of course, might not) indicate that it believed it was on weak legal ground and that its actions would be deemed illegal.

³¹⁵ The contemporary focus on resource conservation is the best example of a complete reversal in policy manifesting itself as a legal change. For example, property doctrines in different types of systems generally favored use, rather than conservation. Common law systems, for example, permitted adverse possession to occur only when the possessor used and improved the property. In usufructuary systems, absolute ownership can never occur, but usufructuary rights are lost if they are not exercised through continuous use of the property by the holder.

The ability (or more frequently, inability) of courts and legislatures to adapt to changing norms and needs is perhaps not more critical in any other legal arena than the one regulating the physical environment, which has a mortal impact on every citizen.