The Commons, Capitalism, and the Constitution

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1. The history and law of the commons summary

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Thesis Summary: the erosion of the Commons in the United States has contributed to the deterioration of community and uprooting of people in order to meet the dynamic demands of capitalism. This article suggests countervailing measures to help remedy the situation.

1. The History and Law of the Commons Summary

The unfolding of land use policies in the United States has contributed to the erosion of the common good and community. The push towards individualization, markets, and unrestricted property rights has produced a society of individualists adrift in a wasteland of strip malls, suburbs, and other islands of isolation. The property clauses of the American Constitution have not been sufficient in controlling the profiteers from turning America into a wasteland. The tools that can be found in the Constitution for controlling unrestricted and un-managed property growth are of a minimal nature. Hence, there is a need for a major overhaul of the current Constitution. Once the public good is subordinated to the private good, we have a society of individualists, which is a contradiction of terms. In the United States there has emerged a general opinion over the centuries that the private good should trump the public good. This has been especially evident with regard to property issues. This trend needs to be reversed if America is to be a place where all citizens have a right to exist and to earn a place at the table and enjoy the fruits of the earth.

How is the word “Commons” being used here? The idea of the Commons has a long history. We are defining the word “Commons” as referring to a piece of property that belongs to the surrounding community as a whole. That is, the Commons is a piece of property that is open to all in the community rather than privately held. It is not equivalent to public property in the sense
of being open to the whole world, but a piece of property enveloping a given community that can be put to use by the community for its needs. We may take the English model as our historical takeoff point in our efforts to locate historical and traditional starting points for a Commons restoration under capitalism and post-capitalism. This paper will only in passing touch upon the issues relating to the much concerned and much analyzed use and distribution issues involving common-pool resources.\(^1\) However, what can be said about common resource issues is that the bourgeois and capitalist model of study and analysis of such issues is a non-starter and highly skewed towards property owners and property accumulation philosophies, and the “justice” systems for such common-pool properties is based on the capitalist model--- that is, based on capital accumulation and other power systems that leave out the majority of the people.

The long history of the Commons has been slowly eclipsed with the arrival of markets and capitalism where the privatization of communities (or the commodification of communities) has eroded the last vestiges of the Commons by the close of the 18\(^{th}\) and early 19\(^{th}\) century England and America. The English enclosure movements in the 18\(^{th}\) century reached their climax in the mid-19\(^{th}\) century in destroying the last vestiges of the Commons.

The unbounded frontier in the United States had rendered the Commons as unnecessary due to the abundance of land. In the United States the idea of a Commons was not fully entrenched as in the United Kingdom. Hence, America never fully developed a legal system that duly respected the rights to a Commons. Although the American Constitution does not give absolute rights to property owners, it gives them sufficient rights and minimal obligations with regard to property. The unbounded frontier of America provided the space to make the obligation on property holders as minimal as possible, since any serious obligation could provoke them to pick up stakes and move elsewhere. But, since the American Frontier\(^2\) has long been closed, there needs to be tighter regulation of land use and national policies be developed to give maximum latitude to lawmakers and regulators in the policing of the public domain to be sure that private interests, private holdings, and private property does not impinge upon public space and public sphere, even though the history of the United States is a history of

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\(^1\) This paper will focus on bringing back the Commons rather than directly engage the issues that deal with common-pool resources; therefore, by extending the community Commons as a first step in cutting into the domain of corporate space and corporate containment; the common-pool resources would also be extended on similar principles that the distribution of these resources be fairly distributed to the community and not monopolized by a few corporations or a few individuals at the expenses and endangerment of the many.

\(^2\) Turner, Frederick Jackson, The Frontier in American History (The University of Michigan Press, 2006)
treating public space with hostility or as secondary to private space. The public property/public space has been rendered as second class property under capitalism in comparison to importance with regard to private property. This has led to the disparagement and neglect of public property/space. So, all those that lack private property have been rendered as second class citizens under bourgeois/capitalist conditions.

The modern study of issues surrounding the Commons and common-pool resources has served as an impediment for further developing options to bring the Commons back to life and to halt any unjustified suburbanization of America. The philosophy, economics, and mathematization of Commons issues has served to stall or reverse any push to further developing Commons ideas and stopping mindless sprawl. This is evident in the methodologies being used to study the issues---the use of scientific methods to the study of a non-scientific problem. "In his classic account of social dilemma situations, Hardin (1968) develops his pessimistic view of the “tragedy of the commons.” Given the incentive structure of social dilemmas, he predicted inefficient excess appropriation of common-pool resources. Hardin’s view has been challenged by the insights of numerous field studies reported in the seminal book by Ostrom (1990). In this book the metaphor of a tragedy is replaced by the emphasis that people are able to govern the commons. Ostrom shows that in many situations people are able to cooperate and improve their joint outcomes.”3 The problem of the Commons is not a science problem but a social and humanitarian problem. The ideology and philosophy of transforming social and humanistic issues and problems into science problems has been to neutralize, sterilize, and de-vitalize the problems so that they can properly be treated in a scientific way. The problems of land use cannot be treated nor studied in the laboratory.4

There is a need for a Commons regardless of whether it makes good economic sense or meets efficiency goals. That is to say, principles of modern economics based on efficiency standards are tied in to an economic theology that elevated bourgeois existence over and above any other non-efficiency system of Being. Therefore, regardless of the monetary value, costs, disruptions, and dislocations of developing a Commons for every community, it needs to be undertaken one way or another for non-utilitarian


4 The emergence of positivism philosophy in the 19th and 20th centuries has been to circumscribe what counts as “real” knowledge from the “impressions” of knowledge; see, A. J. Ayer, Language, Truth, and Logic (London: Penguin 2001, orig. pub. 1936); Vienna Circle, Vienna University 1922 (Moritz Schlick, Gustav Bergmann, Rudolf Carnap, Phillip Frank, Hans Hahn, etc.); Comte, A., A General View of Positivism [Discours sur l’esprit positif 1844], Bridge, J. H. (tr.),(Trubner & Co., 1865, reissued by Cambridge University Press, 2009)
reasons. That is the destruction of any sense of community, which has turned America into a land of strangers, the Other, and non-market Being has collapsed under the weight of markets, and market seeking behavior as the totality and final being of human existence; that is, non-commercial existence has been destroyed by capitalism and hopefully some sort of community and communitarianism can be saved or reestablished in America as it attempts to hold back some portion of human existence to the commodification forces at play in America today. Some sense of communitarianism that can provide an alternative to capitalistic Being. It is one thing to have an efficiency standard as a safety net that insures that all have the minimum wherewithal for existence. It is another thing when the efficiency standard becomes the be all and end all for existence.

The establishment or re-establishment of a Commons can serve as a first line of defense to the commodification of all forms of existence under capitalism. Since property owners do not hold their property absolutely, (a principle handed down over the generation through the Common law and so interpreted by Courts throughout the United States) but conditionally, it is not a State intrusion that the property owners make certain concessions to the State, in its maintenance, upkeep, etc. There is nothing controversial here. The State requiring privateers (profitiers) to meet certain social obligations in the use and management of their properties.

It is clear that property owners have an interest in the land use of adjacent and surrounding properties as it will affect the value of their property---incompatible uses of property or dangerous uses of surrounding properties places land owners in the thick of it---to be sure land holders have an interest that land use policies in their local communities does not damage or destroy the value of their land holdings. That is clear enough and acknowledged in land use policy via the Takings Clause of the Constitution and use of Eminent Domain of the American Constitution law in compensating property owners if the State has taken or devalued their property holdings. However, there has emerged a powerful push by land holders to exclude and push out of their communities those interests that they consider dangerous or obnoxious. For example, the building of rental housing in areas that are mostly privately owned housing under the premise that rental housing will devalue the owners’ property. However, the government cannot abdicate its responsibility and allow the most powerful and wealthy land and property interests dictate the land use policies of local communities. “What exactly are gated communities? Setha Low, one of the first theorists on the subject states that they are “residential development(s) surrounded by walls, fences” with a “structured entrance” that is usually

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5 George Skouras, Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State’s Acquisition, Use and Control of Private Property (New York, NY: Peter Lang Publisher, 1998, 2000 paperback)
accompanied by surveillance technologies, e.g. security guards and CCTV. Therefore, there is a conscious process of privatization as the residents control and restrict access to what was formally public space. It is within this restricted space particular social groups, usually the middle class can appropriate a shared identity or community that is defined in opposition to the ‘outside’.”

What is clear about the history of the Commons is that it has succumbed to capitalist forces. The process of privatization has rendered the function and role of common property as non-economic/non-efficient in the bourgeois model of existence. “Portrayals of most famous example, the English Commons and their enclosure suggested, if only by implication, that common property is a curious holdover from the past that was destined to disappear in the face of trends toward modernization. To many observers, placing common property in the historical past seemed so obvious as to be natural.”

2. The philosophical, mathematical, and economic paradox of the Commons

Let us take a brief look at the philosophy that underlies the Commons and its problems. The Commons is a problem because limited resources are insufficient to provide for all the material needs of people. So the question needs to be asked as to the fairness and justice of any material resources that has its origin in nature. There are problems with using the markets as judges of fair land holdings or other common-pool resources. Markets distribute and value commodities based comparative values. A commodity has value as long as there are customers to value and buy it. If no markets exist for the commodity, it lacks value----it is valueless.

The use of markets to distribute commodities is to value those commodities contingently, not absolutely, based on the need or want of a buyer. Therefore what is fair or proper to do is based on the indiscriminate valuation of what the market values at a given point in history. But “some things” might have value or non-utilitarian values not measurable by markets beyond that historical point. Natural resources for example might have a market value x at t(1) and a value y at t(2). So the use of markets is ahistorical, with respect to valuations that are market discounted at the present time. This ahistoricity has a serious consequence in how common-pool resources are turned into commodities from natural resources. This has led to serious waste and mal-distribution because valuations may have taken

7 Agrawal, Arun,”Common Resources and Institutional Sustainability,” in The Drama of the Commons, p. 42
a sudden dip and property abandoned, discounted, or marked as a loss on the balance sheet because profits could not be made from this commodity.

The bourgeois scholars, like John Rawls, have attempted to come up with a “fair” distribution system free of solely utilitarian conditions. John Rawls’ *Theory of Justice* is a major effort to attempt to humanize market conditions and market distribution systems. It follows a long line of liberalism philosophy and attempts to expand on John Stuart Mill and the utilitarian tradition. Even though Rawls wants to avoid the pitfalls of utilitarian philosophy, his bourgeois political philosophy cannot help but model itself on markets and the commodity philosophy as the groundwork for his legal and social philosophy.

All analysis hitherto has been an analysis that takes bourgeois existence as axiomatic and foundational. All concepts that do not meet efficiency or scientific protocols are condemned in the name of progress or simply seen as a reversion to medievalism and Pre-Enlightenment existence. It assumes that a society under capitalism is synonymous with progress. And all things not comporting to these bourgeois categories and standards of investigation are to be condemned as unenlightened, backwards, utopian, and romantic. That is, the capitalist blade cuts away the fat of inefficiency and yields the best results for people and society. With the problem of distribution, if we stop to think a moment how the resources of planet earth are being chopped up and distributed, we will notice that the vast majority of humanity have been dispossessed from the fruits of the earth and therefore the Commons offers them greater participation in the community and can serve as an alternative to the bourgeois and capitalism system, as to forms of existence. The Commons is not a system of efficiency but a social system serving humanistic concerns rather than commodity or market concerns.

Also there is the assumption under capitalism/bourgeois society derived from the Enlightenment and modern scientific procedure that the human animal is a rational animal. Post-Modernism/Post-Structuralism and Freudianism seriously dispute the capacity of the human animal towards rationality. It considers the rational animal as the weaker and less prevalent animal in the condition of actual existence where the passions and instincts

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predominate the characteristics of the human animal. Therefore, the Paradox of the Commons might contradict principles of rationality but be perfectly proper under the full range of qualities that mark the human animal besides rationality in the natural world.

And then there is the issue of distributional justice and community membership. The problem is a difficult one because of the set assumptions that exist and have existed regarding who owns the land and natural resources. So there is an ownership issue. The notion of ownership can only make sense within a materialist set of propositions and historical facts. For example the idea that humans can own the land is considered by tribal native-Americans and other tribal peoples of the world as absurd. It is one thing to own the fruits of the land that have mixed with human labor as above and beyond the common property pool, but another to lay claim to a land simply because the claimant was the first to set foot on that land and can bar anybody else from setting foot on that land. “Taken together, therefore, we have the following puzzle: In a sparse institutional environment, people tend to overharvest common-pool resources. In this sense the pessimistic predictions by Gordon and Hardin, which are based on the assumption of selfish preferences, are supported. At the same time, however, we find the efficiency-enhancing effect of informal sanctions and communication. This is in clear contradiction to the standard rational choice view, because why should a rational and selfish individual sacrifice money in order to sanction the behavior of another subject? And why should a money-maximizing subject reduce his or her appropriation level following some cheap talk? The question is more general: Why is the rational choice conception correct in one setting and wrong in another?”

Armin Falk et al. paper attempts to challenge the standard rationalistic model. In that they extend the rational model to cover non-efficient and cooperative behaviors that are referenced in the Hardin model:

In this paper we suggest an integrated theoretical framework that is capable of explaining this puzzle. We argue that the reported regularities are compatible with a model of human behavior that extends the standard rational choice approach and incorporates preferences for reciprocity and equity. The basic behavioral principle that is formalized in our model is that a substantial fraction of the subjects act conditionally on what other subjects do. If others are nice or cooperative, they act cooperatively as well, but if others are hostile, they retaliate. Our model also accounts for the fact that there are selfish subjects who behave in the way predicted by standard rational choice theory. We formally show that the interaction of these two diverse motivations (reciprocity and selfishness) and the institutional setup is responsible for the observed experimental outcomes. In the absence of an institution that externally enforces efficient appropriation levels, the selfish players are pivotal for aggregate outcome. However, if there is an institutional setup that enables people to impose informal sanctions or allows for communication, the reciprocal subjects discipline selfish players and thus shape the aggregate outcome. Moreover, our model shows that when the members of a group have preference for reciprocity and equity, the common-pool resource problem is transformed into a coordination game with efficient and

12 Falk, Armin, et al, p. 158. The Drama of the Commons; see also, Hardin, R., Collective Actions (MD: Johns Hopkins University Press, 1982)
inefficient equilibria. If subjects are given the opportunity to communicate, they can, therefore, ensure that the equilibrium with the efficient appropriation level is reached.\textsuperscript{13}

The philosophy that undergirds the Commons is a philosophy that attempts to bring back into the community all those that have been dispossessed by capitalism. It is a first step in reclaiming the social and humanizing element in the human animal. It is in the interest of any given community and greater society in general that all members of the community have the opportunity and material necessary to be able to live, flourish, and maximize their talents. It is no accident that Aristotle said that the human animal is a social animal, but capitalism is antithetical to sociability; capitalism and modern economics operates under principles of individualism which is antithetical to community existence.

Capitalism has served to break the ties that bind human animals. The modern human animal, under capitalism finds itself under Hobbesian conditions that reduces the totality of the animal’s range of capabilities and is reducible into a “practical” animal, a utilitarian animal, and an efficient animal---that can be turned into an efficient agent during peace and a killing machine during war. However, the human animal might not be susceptible to living a good and full life under principles of market efficiency. That is to say, human animals should not serve as cogs in large scale enterprises, corporations, bureaucracies in the name of efficiency. This Anglo-American tradition is now being pushed to all corners of the globe and assumes that all peoples of the globe want to be turned into efficient consumer and killing machines.

Capitalism has monopolized the word “ownership” to mean private ownership. What is it to own “something” that was not created by the human animal? The Marxist tradition distinguishes between “use value” and “exchange value.” John Locke also made the distinction between resources that are in nature or natural and those resources that require the incorporation of human labor to either acquire value or to increase in value.\textsuperscript{14} Locke and Marx have considered whether land is a natural resource or private property. They seem to have arrived at the same conclusion despite coming from different philosophical perspectives. That is, land is a natural resource, a common-pool resource, until a worker mixes his labor with the land. Open land is a natural resource until the laborer plants on that land. The land remains private property as long as the worker has incorporated his labor into that land. Once the worker has removed the fruits of the land, the land itself reverts back into public space and a public, common-pool, resource. Usually referred to the “labor theory” of value, in

\textsuperscript{13} Falk, Armin et al, p. 158 in The Drama of the Commons

making the distinction as to what one deserves and what belongs to nature and the Commons. Due to the particular trajectory of our civilizational development, it has left behind a trail of plunder, war, hunger, pestilence at all the points of intersection in carving up natural space for personal use and community use. That history based on conditions found on earth along with our animal desires, needs, fears, hopes, etc. has pushed each successive generation to “occupy” the planet and delimit opportunities for the many as the few monopolize the land and natural resources; making problems of feeding, housing, clothing, and other aspects of human existence an individual concern and matter.

Whether the earth is carved up as it is presently, “market-nation”, or a more primitive tribal arrangement each attempt has been a battle on how to live on planet earth. This abstract sketch of humans on earth will continue to present challenges as to how the vast majority of peoples of the earth can exist on it with dignity. Currently, we have no room for utopias, maybe a thousand years from now with technological breakthroughs, the people occupying the planet, might be afforded different opportunities. Our current best hope is to attempt to increase the Commons for as much of humanity as possible---the Commons being the carving up of sufficient natural space to allow for the betterment of the material and social well-being of all members of a given location and community. In other words any attempt at the monopolization of this natural space and resource is to be resisted at all costs since it means the affording of a dignified existence for all people (not just the select few).

3. Normative deductions and policy prescriptions based on history and social organization

The concepts of the Commons and community have suffered under capitalism if not eliminated altogether. If the concept of public space is to be well regarded, from its low regard in American history, it is imperative that public institutions be respected and strengthened to serve as countervailing forces or powers to privateers and profiteers such as the modern corporations. John Kenneth Galbraith has made the case, in his 1952 book, American Capitalism, that a capitalist system, left unchecked by countervailing forces, will tend towards the monopolization of resources.15 “There can be very good reason for attacking positions of original market

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power in the economy if these are not effectively offset by countervailing power.”

Galbraith has argued for a number of forces that can serve as countervailing powers in the capitalist system. He, however, has left out of his analysis the role of the Commons as serving as a potential countervailing force in the capitalist system. By communities reclaiming the Commons space, they are acting as a countervailing force to the market system. Since they have been deprived of a Commons with the emergence and domination of the capitalist system, communities have been neglected and forced to exist by markets alone. Therefore, should community residents petition their local authorities for the establishment of a Commons to be used as open space, parks, public recreation, gardening, etc., the local authorities cannot deny the residents their request for an alternative medium to commodity existence. All those residing within the community are entitled their slice/share/participation in the Commons, but whether a Commons is used as open space, gardening, etc. by the locals, it must be decided as to what type of Commons is feasible for any given community. What function the locals want to put the Commons is entirely a local matter. However, the establishment of a working Commons is a critical matter and cannot be contracted, sold, or bargained away by the locals. If no type of Commons is suitable for a given community, due to modernization, the rights of the locals do not disappear simply because capitalism has rendered the establishment of a Commons impossible for that community. No, even though a Commons could not be established there, a Commons substitute will need to be found just the same. A community can decide what type of Commons it wants, but it could not evade the duty and responsibility of a Commons.

The right to the Commons is a matter of necessity and not an option if there is to be a counter-balance to the private economic system. Should the locals wish to make use of the Commons for gardening or planting purposes, rather than as open space, park, etc., they have a right and an obligation to so petition their local government. “As the ultimate guarantor of property rights arrangements, the role of the state and overarching structures of administration have been decisive under many historical circumstances in governing common-pool resources. It is true that many communities and local user groups have the right to craft and implement new institutional arrangements. But unspecified rights and the settlement of major disputes often cannot be addressed without state intervention.”

16 Gailbraith, American Capitalism, p. 144.
17 Agrawall, Arun, “Resource Users, Resource Systems, and Behavior in the Drama of the Commons,” in The Drama of the Commons, p. 58
Arun Agrawall’s historical observation should be rephrased as follows: It is the community and locals that decide the nature of the Commons for their situation, but it is a state responsibility to see to it that all members of the community have a fair access, distribution, and use of the Commons. In other words, how the Commons is used is entirely a local matter, but how each member of the community uses the Commons is a state obligation and responsibility. The only principle involved is that ALL members of the community have a fair stake in the Commons, whatever the nature of a given commons might be. Of course, any vegetables they grow from their efforts of the Commons is to be for their own table or if they wish to sell to other locals. They should be free to do so, with the following proviso: since the vegetables were grown on the Commons, rather than on private property, the grower may keep the fruits of his labor for his own table or sell to other locals; but the fruits and vegetables are to stay within the community and not for national or international export. It is not to be understood as a market enterprise issue; these public space slices cannot be sold on the market but can only be used by locals as a part of the community and serving the local community. Once a citizen leaves the community, his/her slice does not leave with him/her.

The slow erosion of the Commons has dispossessed and deprived the public of their right to have available the use of community space. Although this is a medieval practice of a day where kings, nobles, warriors, and the praying classes ruled the day, it was recognized that the workers of the land required certain basic necessities before working the land, namely the ability to take off the Commons those resources that would allow that peasant/worker the ability to exist or to supplement their meager earnings during the year. It is no longer possible or desirable to return to this medieval world that capitalism has terminated. But it should be possible to borrow from that world the ideas and precedents that prevented all the natural resources going to a few hands, the peoples of the Manor. The capitalist system has terminated the possibility of the Commons under modern conditions that operate on efficient market systems. Well, regardless of whether this is true or not, there is a need for an re-opening of space for the Commons. Under modern capitalist conditions vast swaths of peoples have been displaced from planet earth and exist only at the sufferance of their nations throwing them somewhere/anywhere at the sufferance of the modern Manor, the Corporation.¹⁸

As indicated earlier, although previous uses of the Commons may not be appropriate within modern cities, the concept of the Commons cannot be negated simply because the previous land use of the Commons can no longer serve heavily concentrated city and large town spaces. Clearly, the ability to use the Commons for "pasture, piscary, turbary, common of marl, mast or pannage, and estovers" is limited by the location of the given community, town, and city; however, there is no law that says that other functions (or substitute functions cannot take the place of traditional functions based on the evolution of communities) cannot be performed on the commons in recognition and accommodation of the growth of towns and cities. There is no reason why a garden or planting function cannot be performed on the Commons by the local residents of that community. As long as someone lives in that community that individual has a slice/share in the Commons of that community, recognizing that that slice cannot be bought or sold, but is there for the convenience of the resident and the locals of that community. Should that individual leave the community, the slice of use of the Commons does not follow the individual.

Let us summarize what this article has attempted to do: it has attempted to claim the Commons from the profiteers for the people. It has found a historical precedent that allowed for the Commons in the Anglo-American tradition before it was eclipsed by capitalism. It has put forward the normative claim that ALL members of a given community have a stake in the Commons; this is not a privilege offered by the profiteers or the government but a right based on their existence and their existence that cannot be taken away from them either by the private sector or the governmental sector; and that the Commons automatically attached upon the formation of any community. The distributional model is unjust and unfair to all those that cannot command commodities under modern capitalism. That is to say, that modern capitalist conditions benefits a small section of society and is not broadly fair to the vast majority of peoples of the earth. It generates a non-personal existence based on the non-personal commodity transaction. This yields a poor harvest as to the quality and nature of the human animal. It does not elevate the human animal but tries to extract its labor power and time on planet earth in exchange for wages. It is destructive to communities as it is the broader society in general. There is currently nothing on the horizon that will eliminate capitalism. However, by taking small steps to providing alternative means of existence to capitalism, we hopefully are firing the first shots towards its ultimate destruction and elimination. If it cannot be done with one felt swoop of revolution, then we'll take small size bites out of it until the day comes that other ways of Being can come into existence that is not based on the cash-nexus and alternatives to the capitalist/bourgeois ways of Being can be seen on the horizon.
The article attempts to offer a way of life or revive ways of life that have been destroyed by markets and capitalism. It is an effort to give an equal opportunity to dispossessed people; by checking capitalism to only a portion of the life-cycle demands of the individual and not the totality-of-human existence and Being; that there be reserved to Being a portion of existence that is non-commercial, non-marketable, or on the selling block of capitalism, that some physical space remain available for the locals rather than gobbled up in large turbines of capitalist industrialization. That is, that some natural resources and spaces be off-the-market, not for sale. And the need for countervailing forces to the monopolization of all resources by Giant Industry---and further that natural resources not be monopolized by the few under the legal theory that they took possession of the land first---first in time first in right.

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