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## Our Global Commons

*Brigham Daniels\* and James Salzman\*\**

In January 2014, the *BYU Law Review*, in partnership with The Nature Conservancy, hosted a symposium focused on the global commons. First popularized by Garrett Hardin in 1969,<sup>1</sup> environmental, natural resources, and land use scholars quickly realized that the dynamic of the commons drives many policy challenges.<sup>2</sup> At their root, commons problems arise when the unrestricted, collective consumption or use of a limited resource leads to depletion or even destruction of the resource. In simple terms, actions that seem to make individuals better off in the short term ultimately create a mess for everyone.

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1. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

2. See, e.g., William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515 (2007); Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183 (2005); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011); Nicole Stelle Garnett, *Managing the Urban Commons*, 160 U. PA. L. REV. 1995 (2012); Blake Hudson, *Commerce in the Commons: A Unified Theory of Natural Capital Regulation Under the Commerce Clause*, 35 HARV. ENVTL. L. REV. 375 (2011); Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L.J. 1273, 1283 (2013); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB.POL'Y 325, 325 n.3 (1992); David E. Pierce, *Carol Rose Comes to the Oil Patch: Modern Property Analysis Applied to Modern Reservoir Problems*, 19 PENN ST. ENVTL. L. REV. 241 (2011); Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & POL'Y 913 (2011); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, 5 INT'L. J. COMMONS 28 (2011); Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36 HARV. ENVTL. L. REV. 445 (2012); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533 (2007); Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 475 (2008); Barton H. Thompson, *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241 (2000); Jacqueline Lang Weaver, *The Tragedy of the Commons from Spindletop to Enron*, 24 J. LAND RESOURCES & ENVTL. L. 187 (2004).

For example, people throughout the United States routinely make the decision to drive even when they have the option of walking, biking, carpooling, or taking mass transit. While this may make sense for those opting to drive, it also contributes to traffic jams and poor air quality. To an impressive degree, a host of environmental problems occur because they present similar commons dilemmas such as crashing wildlife populations decimated by aggressive hunting and fishing; pollution problems in our rivers, lakes, and oceans; climate change; overgrazing our rangelands; and overharvesting our forests and water resources. Indeed, the problem of the commons plays out in one form or another in many of our natural world's important features—ranging from deserts and the atmosphere to oceans and forests.

It is not just the pervasiveness of commons problems that explains why the global commons deserve our attention. Understanding the commons problem is important because what we learn about one commons resource (e.g., a forest) often provides us lessons to help manage others (e.g., the global atmosphere). In a complex world, this pathway to potential solutions is extremely valuable.

While environmental law scholarship has explored the commons for decades, the genesis for this symposium can be traced back to June 12, 2012, when the best-known commons scholar—Elinor Ostrom—passed away. The symposium was designed to reflect on her seminal work on the commons, which often grew out of insights from applying political economy to a broad array of environmental and resource challenges. Her most renowned work, *Governing the Commons*, includes case studies of rivers in Spain and the Philippines, landscapes in Switzerland, forests in Japan, groundwater aquifers in California, and fisheries in Turkey, Nova Scotia, and Sri Lanka, among others.<sup>3</sup> This work led her on a path that ultimately made her the first female recipient of the Nobel Memorial Prize in Economic Sciences, awarded in 2009.

The symposium had two goals. The first was to honor Dr. Ostrom and her work. The second was to carry her work—and the work of many others—forward by furthering our understanding of the global commons.

An engaged and impressive group of scholars helped the symposium accomplish both goals. Participants included Zachary Bray, Marcilynn Burke, Daniel Cole, Brigham Daniels, Lee Anne Fennell, Eric Freyfogle,

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3. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

Blake Hudson, Marco Janssen, James Rasband, Carol Rose, Jonathan Rosenbloom, James Salzman, Barton Thompson, and Hannah Wiseman.

Carol Rose provided the keynote address for the symposium, which was based on her article *Surprising Commons*.<sup>4</sup> Rose argues that in the commons, surprises are to be expected. Some surprises arise because of the nature of the commons and the people consuming it; for example, we do not anticipate the impacts of many consumers each consuming the commons in small bites.<sup>5</sup> Surprises are not always negative; in fact, as the set of things recognized as commons has grown, we have found unanticipated applications of lessons about one commons to another that seemed completely unrelated.<sup>6</sup> Rose also suggests strategies to avoid unpleasant surprises without forgoing pleasant surprises.<sup>7</sup> In many ways, *Surprising Commons* builds on her work in *The Comedy of the Commons*,<sup>8</sup> a landmark in legal scholarship. *The Comedy of the Commons*, while focused on the physical environment, has increasingly become as important to intellectual property scholars as it already was to environmental policy scholars.<sup>9</sup> This is just the sort of surprise that Rose's latest article tells us to anticipate.<sup>10</sup>

Seven other participants also contributed articles to this symposium issue of the *BYU Law Review*. Zachary Bray examines the evolution of Texas groundwater law in his article *Texas Groundwater and Tragically*

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4. Carol Rose, *Surprising Commons*, 2014 BYU L. REV. 1257 (2014).

5. *Id.* at 1262–70.

6. *Id.* at 1270–73.

7. *Id.* at 1274–1279.

8. Rose, *supra* note 4.

9. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1, 26, 70 (2004); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1333 (2004); James Ming Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 MICH. ST. L. REV. 51, 68 (2005); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 492 (1998); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 147 (2009); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 281 (2007); Michal A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Daphne Keller, *A Gaudier Future That Almost Blinds the Eye*, 52 DUKE L.J. 273, 301–02 (2002); Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 456, 461, 484 (2001); Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 628 (2002); Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 665 (2010); Henry E. Smith, *Intellectual Property As Property: Delineating Entitlements in Information*, 116 YALE L.J. Pocket Part 87 (2007).

10. Rose, *supra* note 4, at 1270.

*Stable “Crossovers.”*<sup>11</sup> In the article, he traces the way in which the Texas Supreme Court has adopted oil and gas law in the water law context, sometimes with disastrous results. Bray shows how the rigidity found in Texas oil and gas law has created a new source of challenges for Texas water law.<sup>12</sup> This discussion of rigidity in one area infecting another body of law provides a new insight in the commons literature.<sup>13</sup>

In *The Tragicomedy of the Commons*,<sup>14</sup> Brigham Daniels reconciles the different stories told about the commons, which range from comedy to tragedy. In doing so, he highlights reasons beyond the tragedy of the commons to expect challenges in managing commons resources, even when things seemingly are on the right track. His examples range from interrelated commons (e.g., a river and a riparian area or a parking lot and an adjacent road) to tragic institutions that bias the use of a particular commons over time (e.g., a field used exclusively for grazing even though it could be ideal for wildlife habitat or recreation).

Lee Anne Fennell considers the role of commons in her article, *Agglomerama*.<sup>15</sup> Urban interaction space, where people and institutions come together to produce, consume, and live, can either be synergistic and increase social welfare or, conversely, create negative externalities. Treating urban interaction spaces as a commons, Fennell explores what she calls the “participant assembly problem”—how to maximize the benefits from bringing together different and potentially competing uses within urban areas.

Eric Freyfogle, in his article *Naming the Tragedy*, looks back to Hardin’s seminal article<sup>16</sup> and questions whether Hardin’s original framing of the problem has lulled us into overlooking the real dynamic at play in ecological decline. After exploring many of the assumptions made in Hardin’s essay, Freyfogle highlights culprits other than Hardin’s rational-self interest. Among other likely suspects, Freyfogle suggests that externalities of the market-based system,<sup>17</sup> fragmentation

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11. Zachary Bray, *Texas Groundwater and Tragically Stable “Crossovers,”* 2014 BYU L. REV. 1283 (2014).

12. *Id.* at 1318–26.

13. *Id.* at 1326–28.

14. Brigham Daniels, *The Tragicomedy of the Commons*, 2014 BYU L. REV. 1347 (2014).

15. Lee Anne Fennell, *Agglomerama*, 2014 BYU L. REV. 1373 (2014).

16. Eric Freyfogle, *Naming the Tragedy*, 2014 BYU L. REV. 1415 (2014).

17. *Id.* at 1423.

of property rights,<sup>18</sup> and weak communities can serve as important drivers of commons mismanagement.<sup>19</sup>

Blake Hudson and Mike Hardig apply commons analysis to constitutional jurisprudence. In *Isolated Wetland Commons and the Constitution*,<sup>20</sup> they use the example of isolated wetlands and the case study of Ebenezer Swamp in Alabama to argue that the concept of the commons can provide a basis for extending federal regulation under the Clean Water Act. They contend that treating isolated wetlands as privatized commons resources will satisfy the “substantial effects” test relied on by courts for Commerce Clause analysis.

In *Local Governments and Global Commons*,<sup>21</sup> Jonathan Rosenbloom explores the dynamic between local governments and global commons. Treating local governments as individual actors, similar to the shepherds in Hardin’s classic article, he explains the incentives for local governments to act rationally to increase their short-term economic benefit by increasing atmospheric pollution. He goes further, though, and shows why many local governments act “irrationally” to reduce their environmental impacts. Ironically, Rosenbloom demonstrates how national and international laws often prevent local governments from reducing their environmental impacts.

In *Coordinating the Oil and Gas Commons*,<sup>22</sup> Hannah Wiseman applies insights found in the commons to a wide range of problems that permeate oil and gas law. The article goes well beyond the typical discussions of coordination in this context—i.e., when property owners overlying an oil and gas field end up pooling these resources. Specifically, her article applies insights from the commons to help us understand challenges ranging from conflicts between surface and mineral rights holders<sup>23</sup> to the many externalities associated with hydraulic fracturing.<sup>24</sup>

The breadth of commons issues addressed in the workshop made clear just how powerful a method of analysis Elinor Ostrom and other

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18. *Id.* at 1420–22.

19. *Id.* at 1440.

20. Blake Hudson & Mike Hardig, *Isolated Wetland Commons and the Constitution*, 2014 BYU L. REV. 1443 (2014).

21. Jonathan Rosenbloom, *Local Governments and Global Commons*, 2014 BYU L. REV. 1489 (2014).

22. Hannah Wiseman, *Coordinating the Oil and Gas Commons*, 2014 BYU L. REV. 1543 (2014).

23. *Id.*

24. *Id.* at 1546–1549.

scholars have developed. Participants not only left with a greater appreciation of the complexities and the stakes at issue in the commons, but also with a resolve to move the work forward. This felt right. After all, the work on the commons—particularly the work of Elinor Ostrom—is suffused with optimism: that people are clever and capable; that people can put their selfishness aside; and that ordinary people can come together and solve extraordinary problems.