CAPITALISM, THE COMMONS AND DIVINE RIGHT

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INTRODUCTION

I first encountered EF Schumacher in 1973, when 'Small Is Beautiful' was published in the United States. I was then a reporter for *The New Republic* magazine, and a friend told me I *had* to read this book. I did - and, as we put it in those days, I was 'blown away.' Never before had I read a book by an economist that was so impassioned, so literary, so unafraid to challenge prevailing orthodoxy.

I reviewed 'Small Is Beautiful' for *The New Republic,* and wrote: "I had never heard of EF Schumacher before reading this book. After reading it I am ready to nominate him for the Nobel Prize in economics." I still am.

Schumacher wrote eloquently about many things. For some people, his most important contributions had to do with scale and appropriate technology. For me, re-reading him 30 years later, what stands out is his focus on permanence.

"From an economic point of view," he wrote, "the central concept of wisdom is permanence. Nothing makes economic sense unless its continuance for a long time can be projected without running into absurdities."

The market, Schumacher noted, "utterly disregards things which cannot be, or have not been, privately appropriated, but are nonetheless an essential precondition of all human activity, such as air, water, the soil, and in fact the whole framework of living nature." The result is that we humans are destroying our own nest. And not only *our* nest, but the nest of all other creatures who share our planet.

There's another large problem with capitalism: inequality. Schumacher didn't dwell on this, but another of my favorite writers, Tom Paine, did. I'll come back to inequality and Tom Paine later.

Today I want to look at these twin problems of capitalism — impermanence and inequality — through a new lens. That lens is the commons.

Why this particular lens? Let me back up and say that, even before I read Schumacher, I had been struggling to understand the capitalist system in which we live. First, as a boy crunching numbers for my father's book on the stock market, then as a student of economics in college, then as a journalist, a political activist, and lastly, for 20 years, as a business person.

I think I have a pretty good handle on capitalism now — both its virtues and its flaws. And I should say that I *like* many things about capitalism. I like the freedom, the dynamism, the creativity it unleashes. I would never, ever, want to do away with the market as the primary engine of productivity.

But while I appreciate the market's virtues, and know the problems it *can* solve, I also know the problems it *can't* solve, and the problems it inexorably makes worse. In this latter category are the two very big problems I mentioned earlier - tragedies, really, of major proportions: the destruction of age-old natural systems, and the exacerbation of inequality among humans.

These are fundamental systemic flaws. Not things that can be fixed by patches here and there, by stopping this or saving that, by spending more on education or adding a few government regulations. Such reforms may make us feel better, and even be beneficial, but they don't fundamentally change a system that disregards permanence and exacerbates inequality because of its very nature.

Let's be clear about this. Any economic system whose core mathematical calculus is to maximize short-term profit for a few, is bound to create these results. It's no accident – no accident at all - that, despite more than a century of non-systemic reforms, the great profit-maximizing, nature-destroying, wealth-concentrating juggernaut that modern capitalism is, marches on.

The problem is the economic system itself – and by that I mean not just the market, but also everything that surrounds and interacts with the market. It's the economic system *as a whole* that must be re-programmed – 'upgraded,' if you will, like a computer operating system.

But how? What's wrong with the current operating system? What's missing? As I've thought about this question from various perspectives, the answer I've come to is this: the missing piece - the piece without which the market will never function properly - is the commons. It's that part of the whole system I want to draw your attention to today.

In many ways the commons is like the dark matter of the universe. It's everywhere, but we don't see it. The only economic matter we see is the kind which glistens with dollar signs.

In my mind, the great challenge for the 21st century is, first of all, to make the commons visible; secondly, to give it proper reverence; and thirdly, to translate that reverence into property rights and legal institutions that are on a par with those we give to private property. If this is done, I think we *can* solve the problems of permanence and inequality, and retain what is best about capitalism.

WHAT IS THE COMMONS?

First, it's important to distinguish between 'a' commons and 'the' commons. 'A' commons is a specific thing or place — the playground down the street, the Housatonic River, the Boston Common. 'The' commons is an abstract concept similar to 'the' market or 'the' state. It is the sum of thousands, perhaps millions, of individual commons. Today I will talk mostly about 'the' commons as a concept representing the sum of many smaller commons.

What, then, is 'the' commons? There's no simple or obvious answer, so let me wander around a bit before I offer a modern and I hope useful definition.

First of all, the commons consists of stuff we share. That is to say, whether it's a street or a river or the air or the vast store of human knowledge - none of these things belong to you or me or private corporations. These are things we share in one way or another.

Secondly, the commons consists of stuff we inherit. That is, it's not made up of stuff you or I or some corporation makes. One can make a very good case that if you make or invent something, it should be your private property – at least for a while. This is an entirely appropriate way of rewarding people and businesses for value they create and risks they take. But air and water and ecosystems and DNA and language and legal and political institutions are not things that any individual or corporation makes. They're gifts we inherit, either from nature or from the collective efforts of millions of humans.

Thirdly, the commons consists of stuff we must pass on to future generations. Just as we receive the commons as a gift, so we have a moral obligation to pass this gift on to our children in at least the same condition as we received it. If we can add to it, improve it, so much the better; but at a minimum we must not degrade it, and we certainly have no right to destroy it.

Fourthly, the *kinds* of things that tend to be commons are not small things. Rather, they tend to be large, and they tend to be spaces or systems — natural systems or social systems. Within these spaces and systems there can be private parts — for example, many pieces of the Internet, or of a watershed, may be privately owned. But the Internet and the watershed as whole systems are things we share, and the systems, if not all the pieces, are parts of the commons.

And fifthly, let me dispell two myths that have obstructed clear thinking about the commons for many years. First is the myth that all commons are inherently self-destructive. This myth is largely the result of a 1968 essay by the late biologist Garrett Hardin, called 'The Tragedy of the Commons.'

Hardin assumed there's only one kind of commons, the unfenced pasture or waste dump with no management system. In such a situation, individuals can add animals or wastes to the commons without limit, and destruction *can* result. But what Hardin overlooked is that there are many kinds of commons and many ways to run them. For example, you can put a fence around a waste dump and charge a dumping fee. You can have fishing and hunting limits and sell licenses. There's no tragedy in these and many other ways to run a commons.

Another myth is that a commons must always be free and open to anyone who wants to use it. In an uncrowded world, this *would* be the rule. But in a crowded world, such as the one we now inhabit, this frequently *can't* be the case. We can't allow unlimited dumping into the air, the water and the soil. We must put limits on the noises we allow into the shared spaces around us. We can limit hunting and fishing, the cutting of trees, the posting of billboards. We can charge tolls for parking on city streets, using congested highways and driving into the center of cities such as London. All these are legitimate management tools to protect and preserve different kinds of commons.

Now let me say a few words about the importance of the commons. We all know why the market is important – it produces and distributes the vast array of goods and services that characterize our high-consumption society. What the commons does for all of us is less obvious – in part, I should note, because the commons never advertises.

First, it's important to remember that for most of human existence, the commons supplied everyone's food, water, fuel and medicines. People hunted, fished, gathered wild fruits and herbs, collected firewood and building materials, grazed their animals in common pastures and farmed on common lands. In other words, the commons was the source of basic sustenance. This is still true today in many parts of the world, and even in the city where I live - San Francisco - there are people who fish in the Bay not for sport but for food.

Second, the commons is the source of all natural resources and nature's many replenishing services. Water, air, DNA, seeds, topsoil, fire, electricity, minerals, wild animals, domesticable animals, edible plants, healing plants, solar energy, wind energy, water power, forests, rivers, ultra-violet protection, climate regulation, biodiversity and much more – these are all parts of the commons.

Third, the commons is our ultimate waste sink. It recycles water, oxygen, carbon and everything else we excrete, exhale and throw away. It's the place we store, or try to store, the toxic residues of our modern industrial system.

Fourth, the commons holds and disseminates humanity's vast accumulation of science, art, customs and laws. And it is the seedbed of all human creativity. As Isaac Newton said, "If I have seen further it is by standing on the shoulders of giants." Without the open sharing of ideas, there'd be no religion, science, mathematics, philosophy, children's games, musical instruments, dances, jazz, hip-hop, fashion, sports, democracy, universities, libraries - the list goes on and on.

Fifth, the commons is essential to human communication. We talk to each other with shared symbols and languages that are living products of many generations. Most of the spaces we communicate through – the air which carries sound, the visual environment we use for traffic signs and billboards, the electromagnetic waves we use for radio, TV and cell phones, the vast global web of wires and switches we call the Internet – are parts of the commons.

Sixth, we use the commons whenever we travel from place to place, whether by land, water or air. If we couldn't use the commons in this way, we'd be prisoners in our private homes.

Seventh, we rely on the commons for our sense of community. The commons is the village tree, the public square, Main Street, the neighborhood and the playground. Outside of families, it's the glue that holds us together.

Now, let me speak a little about the history of the commons.

The commons itself is as old as the earth, and as I said a moment ago, for most of human existence it was - and for many humans still is - the source of basic sustenance.

From a conceptual standpoint, the *idea* of the commons goes back hundreds of years.

The Romans distinguished between three types of property: *res privatæ, res publicæ* and *res communes*. The first consisted of things capable of being possessed by an individual or family. The second consisted of things built and set aside for public use by the state, such as public buildings and roads. The third consisted of natural things used by all, such as air, water and wild animals. This was codified in the Institutes of Justinian, the grand summation of Roman law, which said: "By the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shore of the sea."

In the United Kingdom during the Middle Ages, the commons were shared lands used by villagers for foraging, hunting, planting crops and harvesting wood. In 1215, the Magna Carta established forests and fisheries as *res communes,* resources available to all.

In America, four early states - Massachusetts, Pennsylvania, Virginia and Kentucky - called themselves 'commonwealths'. Several states declared in their constitutions that natural resources belong to the people and that the government acts as the people's trustee.

Here's an excerpt from the Pennsylvania Constitution:

> "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

That, in a nutshell, is the good side of the history of the commons. Unfortunately, there's a bad side – a tragic side – as well. That is the long history of enclosure of the commons, which began in 18th century England and continues to this day, in America and almost everywhere in the world. As Andrew Kimbell said in his Schumacher Lecture a few years ago, "It's no longer just the enclosure of the lands. It's the enclosure of our genes, it's the enclosure of the seas; it's the corporate enclosure of virtually the entire living commons."

Enclosure is an old-fashioned word for privatization. At first it meant privatization by the landed gentry. Today it means privatization by corporations. Either way, it means that what once belonged to many now belongs to a few.

Enclosure is usually justified in the name of 'efficiency.' And sometimes, though not always, it *does* result in efficiency gains. But what also results from enclosure is the impoverishment of those who lose access to the commons, and the enrichment of those who take title to it. In other words, enclosure widens the gap between those with income-producing property and those without.

At this point, having wandered around a bit, I am ready to offer a modern definition of the commons. I say 'modern' because I want to erase from our minds the antiquated notion of the commons as a pasture or a plot of land.

The most useful way to understand the commons today is as *the sum of all we inherit together and must pass on, undiminished and more or less equally, to our heirs.* (And here I include non-human as well as human heirs.)

Another way of saying this is that the commons consists of stuff we share – which is to say, stuff that nobody owns or that we all own together. This is in contrast to the market, which consists of stuff we own privately.

In either way of viewing things, the economy as a whole system is divided between the market and the commons. Within the market part of the system are the things we mostly manage for the short-term monetary gain of a property-owning class. Within the commons part of the system are the things we manage, or *should* manage, for the long-term enhancement of all living beings.

Economists, politicians and the media have tended to focus almost exclusively on the market side of the economy, even though the commons is just as important. (In fact, the commons happens to be worth more, even in crude dollar terms, than the market, but I don't want to get into bean-counting here.)

Whatever their relative values, the commons precedes the market, is the source of most that enters the market, and the sink for all that leaves. To put this in visual terms, we might say that the commons surrounds the market. Or, more dynamically, that the commons is the pond in which the fish of private property swim.

Actually, I like the fish/pond image for a couple of reasons. First, it conveys the notion that both the market and the commons are living systems, with constantly moving and interacting parts. The pond is a soup of water, air, light, heat, currents, nutrients and life forms. The fish are active competitive creatures, constantly on the move, taking what they need from the pond, growing, excreting, reproducing and dying. This is pretty much how corporations operate.

Secondly, the pond/fish image points to a rather remarkable aspect of corporations. Unlike real fish, or any other life form, the corporation has no optimum or maximum size. It can grow, or presumes it can grow, *ad infinitum*, without damaging the pond. Of course, if we think about it, this is an impossibility.

In any case, the economic system as a whole has these two distinct sectors, the commons and the market. And the boundaries between these sectors shift over time. For the past 300 years, that shift has been in one direction only: the market has steadily expanded into the commons.

What I am proposing is that, from this moment forward, we reverse that direction. I believe this is not only absolutely necessary, but eminently doable if we put our minds to it. In the rest of this lecture I would like to show how. First, though, I need to say a bit more about the market and the state.

THE MARKET AND THE STATE

In the minds of most economists, the market floats in an unbounded universe. It takes resources from this universe, transforms them into products that can be profitably sold, and returns all wastes into unlimited sinks. If any particular resource runs out, the market can - thanks to human ingenuity – replace it with another. Because both sinks and resources, with substitutions, are unlimited, this game can go on forever.

Of course, as Schumacher and many others have pointed out, this view is a delusion. It’s a delusion not so much because we’ll run out of resources, but because we’ll run out of sinks.

This exhaustion of sinks is most imminent, somewhat surprisingly, in the sky. In the 1970s Schumacher warned that we would shortly run out of oil. In fact, there’s still a fair amount of oil left in the ground – and a great deal of gas and coal as well. But long before we run out of fossil fuels, we’ll use up the atmosphere’s capacity to safely absorb the wastes of burning them.

This is not the place to go into the details of climate change – if you're interested you can read my book 'Who Owns The Sky?'. My point here is that the atmosphere is not infinite. It's a scarce – and hence valuable - economic resource. It's also a commons that's being used by polluters for free, and as a result it's being turned into a sewer.

To put this in Schumacher's words, because the market 'utterly disregards' the air, we are well on our way to melting the polar ice caps, redirecting the Gulf Stream, and radically altering life on earth as we know it. This is the problem of permanence that the market, by itself, cannot solve.

Let me now offer another way of thinking about the market.

I'm sure many of you have seen the classic Disney movie 'Fantasia.' In it there's a wonderful segment starring Mickey Mouse as the Sorcerer's Apprentice. Mickey is charged with cleaning up the workshop. He thinks he can make his job easier by getting the broom to carry a bucket of water for him. He gleefully directs the broom with a wave of his arms.

Then the broom goes out of control. In a panic, Mickey takes an axe and chops the broom into hundreds of pieces. But each piece turns into a new broom carrying a new bucket, and soon the entire workshop is by engulfed by a raging flood. Only when the wise old Sorcerer returns is the watery chaos brought under control.

In many ways the market is like those out-of-control brooms. It is populated by an army of corporations which are programmed, like robots, to maximize short-term profit for the few. No matter how you shout at them or chop them up, they keep doing what they're programmed to do. The Sorcerer who knows how to stop them is nowhere to be found.

Of course, corporations *do* create useful products and jobs. But the robotic calculus that drives them inexorably compels them to pay as little as possible for the resources they use, and to shift as many costs as possible to others – be it workers, taxpayers, future generations or nature. This happens daily, automatically, and on a massive scale, with nobody able to stop it.

Now, the fact that corporations act like profit-maximizing robots, and shift as many costs as possible to others, is not a shocking revelation. It has been pointed out repeatedly for at least 100 years. What *is* new is that the accumulation of these externalized costs has reached the point where the biological integrity of our planet is in grave danger.

I don't need to list all the indicators – the extinction of species, the alteration of the climate, the accumulation of toxic chemicals, the degradation of forests, oceans, aquifers and wetlands – because you know them well. My point is that this cannot go on much longer. The problem we need to solve – and quickly – is how to stop – and indeed reverse - this systematic carnage.

Let's now look at this problem through the lens of the commons. We've talked about enclosure – how for 300 years the market has been privatizing everything it can get its hands on. And we've talked about externalization – how for roughly the same period of time the market has been dumping wastes and unpaid costs into the commons. In effect what's been going on is a relentless, two-pronged assault by the market on the commons. With one hand the market takes good stuff *from* the commons; with the other hand it dumps bad stuff *into* the commons. If someone were keeping a balance sheet of our common wealth, it would not look good.

Of course, no one is keeping such a balance sheet, and that is part of the problem. It's also quite odd, given that double-entry bookkeeping was invented in the 16th century. Every economist and business person knows that one person's income is another person's expense, and that liabilities for the most part offset assets. Yet when it comes to keeping double-entry books for the market and the commons as a whole, we simply don't do that.

But the bigger part of the problem is that the contest between the market and the commons has not been an even one. It's been like a World Series between the New York Yankees and the Portland Sea Dogs. One side has all the money, the top hitters and the best pitchers. It also, I might add, pays the umpires.

Sports metaphors aside, it's extremely important to understand *why* the market is so much stronger than the commons. There are multiple reasons, to be sure, but there are two that I want to highlight today. One has to do with law, or more precisely, with property rights; and the second has to do with institutions.

DIVINE RIGHT

Let's look first at property rights. Marjorie Kelly has written a brilliant book called 'The Divine Right of Capital.' By 'divine,' of course, she doesn't mean God-given – although there are indeed some apologists for capitalism who attribute the current design of our economy to the Almighty. What she means is that, under the current laws of our land, the rights of capital trump everything else. The rights of employees, the rights of communities, the rights of nature and the rights of future generations, are all subordinate to the right of capital to maximize short-term profit for the few.

This primacy of capital is embedded not only in state and federal law, but also in international treaties such as GATT and NAFTA. Thus, a California company, Sun Belt Water, recently sued Canada under NAFTA, claiming billions of dollars in damages because Canada won't let it export fresh water in supertankers. The company is arguing that its right under NAFTA to make a profit from selling Canadian water trumps Canada's right to protect its natural resources.

Now, the question of who gets the 'divine' right in any society is always an interesting one. Because I have a 15-year-old son who is learning to drive, I happened to read the California Drivers Manual the other day, and came across the following rule: "At an intersection, yield to the car which arrives first *or* to the car on your right if it reaches the intersection at the same time you do."

Why does the car on the right 'trump' the car on the left? It's unclear. Quite possibly the rule is entirely arbitrary. But *someone* has to have the right of way or cars will collide. The same is true for boats at sea, and for moving objects in any complex system. Someone has to be 'king of the road.'

So, too, in a market economy. When two property rights come to the same intersection, one has to 'trump' the other. Either capital can trump labor, or labor can trump capital. Either my right to pollute trumps your right not to be polluted, or vice versa. One of the conflicting property rights, you might say, has to be the 'divine' right.

But which one? Invariably, those who hold the divine right in any era say there's *no choice*: *they* are the only conceivable top dogs. Kings said it 300 years ago; capital owners say it today. They hire priests and economists to add moral or 'scientific' credence to these claims. The truth is, though, that we *do* have a choice. *Society* chooses the divine right holder, and its choice can change over time.

Bear in mind that, even if we aren't talking literally about divinity, we *are* talking about reverence. Reverence doesn't come from 'up there;' it comes from 'in here.' Today, despite all our speechifying about family values, God and nature, we in the West revere capital above all. That's why we give it trumping rights in our economy – indeed, that's why we call our economic system 'capitalism.' If we were to revere the commons as fervently as we currently revere capital, our divine right would shift.

Let me now bring our discussion back to the problems of permanence and inequality. It seems to me that, if anything is divine, it should be those things we inherit together and must pass on, undiminished and more or less equally, to future generations. Permanence should trump transience. Broad benefit should trump narrow benefit. The commons should trump capital.

Let me add an historical perspective here. The explosion of the market over the last 300 years has been a logical response to the problem of scarce goods and services; it makes perfect sense that, during this time, capital held the divine right. But now we humans, as a single imperial species, are approaching what Schumacher called 'the tolerance limits of nature.' Today our problem – at least in the West

- isn't the scarcity of goods and services. It's the scarcity of nature and equity, time and quiet. So it makes historic sense that the divine right in modern, post-industrial economies should shift to the commons.

Of course this is easier said than done. I can think of only one American law – the Endangered Species Act – that gives precedence to permanence over transience, to the commons over capital. The Endangered Species Act says that a species' right to survive trumps capital's right to short-term profit.

The trouble is that the law comes into play only *in extremis* – when a species has been so devastated that it is on the brink of extinction. The more general situation is not just that capital trumps the commons, but that the commons has no rights at all. Protections for private property are enshrined in our Constitution, while the notion that there even *is* such a thing as the commons is still in its infancy.

I want to add two more thoughts about legal rights here. The first is that there's a difference between human rights and property rights. Human rights include the rights to life, liberty, speech and so on. Property rights involve the power to own, control and sell things, to limit other people's use of things and to charge prices for using things. There may also be a third class of non-human rights, such as those proposed by Thomas Berry. I want to be clear that what I'm talking about today are property rights, though these property rights have significant implications for human and non-human rights.

The other thing I want to say about property rights involves one of the more original economists of the 20th century - Ronald Coase. Coase worked with Milton Friedman at the University of Chicago and is considered a conservative. Unlike Schumacher, he did win a Nobel Prize.

Coase is most recognized for his theorem that pollution can be reduced more efficiently through property rights than through government regulation. One version of his argument is that if pollutees are given the right *not* to be polluted, they can bargain in the market with polluters, and the end results will be (a) less pollution, and (b) that polluters will pay pollutees a price based on how much pollution the pollutees are willing to accept and how badly the polluters want to pollute.

Coase also argued that the property rights approach would work just as well if polluters are given the right to pollute and pollutees pay them *not* to pollute. He was strangely indifferent to the question of who should get the initial property rights and who should pay whom.

Coase's theorem became the basis for so-called 'cap-and-trade' programs, such as the sulfur dioxide trading program that was created in the 1990s to reduce acid rain. These programs are generally supported by business because they allow polluters to figure out the cheapest ways to reduce pollution.

Unfortunately, they have been thus far been set up with the initial property rights given free to polluters, with the economic result that billions of dollars have been paid by pollutees to polluters.

How does this work? Well, economists have a concept called 'scarcity rent.' Scarcity rent is what owners of highly demanded things collect from other people just because of scarcity. The *Mona Lisa,* for example, has a high scarcity rent because there's big demand for it and only one original. In general, the scarcer things such as buildable land, Barry Bonds home run balls and New York taxi medallions are, the higher their scarcity rents. As OPEC or any cartel knows, when you restrict supply you can raise prices and profits, sometimes by huge amounts. That's because, in economic terms, you can collect more scarcity rent.

So what happens when we set up a cap-and-trade system and give the initial property rights to polluters? Well, first of all, we reduce pollution – which is good. Secondly, we raise the price of polluting, which is currently zero. This is also good. And thirdly, we raise the prices of all goods and services made with now more expensive polluting processes. This too is appropriate.

But think about who gets to keep the extra money we pay for these goods. If polluters are given scarce pollution rights for free, then we – the ultimate consumers and pollutees –wind up paying scarcity rent to them forever. Imagine that: because a corporation polluted in the past, it gets free money forever. Over the long haul, this would be an enormous transfer of wealth to shareholders of historically polluting corporations.

I'll come back to this question of who gets initial property rights – polluters or pollutees – in a minute.

The second reason the commons is much weaker than the market is the institutional imbalance. As I noted earlier, the market is populated by aggressive, profit-maximizing robots, armed with property rights, money, lawyers and lobbyists. The commons, by contrast, is institutionally threadbare.

There's no institution that 'owns' the sky or the Housatonic River watershed and can say to a corporation, 'Stop! This is common property. You can't trespass here for free.' There are just a handful of institutions whose mission is to preserve common assets for the future, and who have the property rights needed to carry out that mission. This institutional imbalance means that the commons is essentially defenseless against the ceaseless aggression of the market.

This brings us to the subject of the role of the state in defending the commons.

The first point we need to be clear on is that *the state is not the commons.* The state is the state and the commons is the commons. The state may act as *trustee* of a commons, but the commons *belongs* to the people. If the state does *not* act as a trustee should, the people have the right to hire another trustee.

Americans often get confused about this because so much land in our country is state-owned. In theory these public lands are *part* of the commons, but at best they are a small part, and the mere fact that the state *owns* them in no way guarantees that they will be managed as the commons should be managed. Quite to the contrary, the state more often than not has been a co-conspirator with private industry in managing public lands for short-term profit rather than long-term preservation.

The US Forest Service, for example, has spent billions of tax dollars building logging roads in national forests; it then sells logging rights to private companies for less than private landowners do. Similarly, grazing and mineral rights on federal lands are sold for a song. And the public airwaves that carry radio and TV signals are given free to giant media conglomerates owned by Disney, General Electric and Rupert Murdoch.

There's a legal principle called the Public Trust Doctrine which I should mention here. This principle arose from common law, though it is embodied in several state constitutions, such as Pennsylvania's. The Public Trust Doctrine holds that natural resources belong to the people rather than the state, and that the state's job is to act as trustee of these resources for the people and future generations.

The principle of 'trusteeship' is very important, and I'll come back to it shortly. Suffice it to say here that a private trustee who gave away entrusted assets would be sued, fired and probably sent to jail. But this rarely happens when the state is trustee.

As for the Public Trust Doctrine itself, the difficulty with it is similar to the difficulty with the Endangered Species Act: it only comes into play *in extremis, after* a state has failed to protect a resource. In such cases, citizens can sue the state and a court can order the state to remedy its breech of the public trust. But it costs millions of dollars to bring such suits, and needless to say, they are rare. For this reason, despite its sound philosophy, the Public Trust Doctrine is an inadequate tool for defending the commons against the everyday assaults of the market.

Of course, if the state were acting as a proper trustee of the commons in the first place, lawsuits under the Public Trust Doctrine would be unnecessary. Which brings us to three critical questions:

1) What is the role of a commons trustee?
2) Why has the state NOT been a good commons trustee?
3) If the state isn't a good commons trustee, who CAN be?

THE ROLE OF TRUSTS

When we think of capitalist institutions, the one that immediately comes to mind is the corporation. But there's another institution that's as old and as firmly established as the corporation, and that is the trust.

The essence of a trust is a fiduciary relationship. A trustee holds and manages property for another person or for many other people. A simple example is a trust established by a grandparent so that her grandchildren will have money to go to college. A trustee manages the property to assure that the trust purpose is achieved. Other trusts include pension funds, charitable foundations and university endowments.

The rules of trust management are defined by state statutes and by centuries of case law. These rules include:

- Managers must act with undivided loyalty to beneficiaries. If a manager fails this obligation, s/he can be removed and penalized.

- In most cases, managers must preserve the principal. It's okay to spend income, but it's not okay to invade the corpus.

- If the beneficiaries of a trust span many generations, the trustee cannot favor one generation over another.

- Managers must assure transparency. Information about money flows must be readily available to beneficiaries.

These rules are enforceable by the courts. The basic mechanism is that an aggrieved beneficiary can bring suit against a trustee, and the trustee must then prove that she acted prudently to carry out the mandate of the trust.

If we were to design an institution to protect pieces of the commons, we couldn't do much better than a trust. The goal of commons management, after all, is to preserve assets and deliver benefits to broad classes of beneficiaries. That's what trusts do, and managing a trust isn't rocket science.

What, then, can we say about the state's capacity to serve as a commons trustee? In theory, the state represents all citizens equally, and should be able to protect our common assets. But in reality, the track record of the state as trustee of the commons has been far from exemplary. There are at least five reasons for this:

1) The elected officials who run the state have a short-term, not a long-term, perspective. Just as corporate leaders are focused on the next quarterly statement, political leaders are focused on the next election. They like to please constituents here and now, not worry about future generations.

2) Elected officials, alas, need money to get re-elected. It is tempting to trade common assets for private campaign contributions.

3) Elected officials aren't accountable to beneficiaries in the same way private trustees are. They can give assets away with virtual impunity, whereas private trustees, because of their fiduciary responsibility, cannot.

4) The state and its leaders have many other things to do besides manage common assets. It's easy for this task to get neglected.

5) The state's finances are huge and complex. All sorts of funds are co-mingled. It's extremely difficult for the public to track money from common assets or to ascertain whether these assets are being well managed.

Many of my liberal friends get nervous when I make these arguments. They think I'm aiding and abetting conservatives who believe the state is always incompetent and the market is always right. So let me be clear that this is *not* what I'm saying.

At heart I am an old New Deal liberal. I believe in limiting corporate power and in achieving a fairer distribution of income and property. But I'm a pragmatist when it comes to the *means* to achieve these ends. I think the state is good at some things and not so good at others.

When it comes to defending the commons, the state *does* have a critical role to play. That role is not to own and manage the commons directly, but to assign common property rights, to nurture the commons with as much vigor as it nurtures the market, and to maintain a healthy balance between the commons and the market. The problem today is that the state has abandoned this balancing role and become a single-minded champion of the market. This is what we must change.

REBUILDING THE COMMONS

As I see it, the great task of the 21st century is to build a new and vital common sector that can resist enclosure and externalization by the market, protect the planet, and share the fruits of our common inheritances more equitably than is now the case.

Just as the market is populated by profit-maximizing corporations, so we require a common sector that is populated by commons-preserving trusts. These trusts should be endowed with property rights that are equal to those of corporations. Their beneficiaries should be all citizens equally, as well as future generations and, at times, the larger biotic community. Their trustees and managers should be legally accountable to these beneficiaries, and their finances should be completely transparent.

There are many models for such trusts, including Community Land Trusts which were pioneered by Bob Swann and others in this audience. But before I talk about these models I need to lay out a few general principles for commons management.

Commons managers must, first and foremost, protect shared assets for the long term. They must also assure that the benefits flowing from the assets are widely shared.

Beyond these basic principles, specific rules for commons management will vary from one commons to another. Broadly speaking, they depend on the *level of use* society wishes to allow or encourage. And here there are three distinct categories. These are roughly comparable to situations where we want no parking, free parking, or paid parking.

If we want a commons to be off limits to all but the most non-invasive use — a wilderness area, for example — the guiding rule is, 'No parking' or 'No trespassing.' This is pretty straightforward.

If a commons has no physical limits on use — such as the Internet or the cultural commons — the guiding rule is, 'Free parking' or 'The more the merrier.' Use should be as free as possible, and management's main job should be to minimize private toll booths. This too is relatively straightforward, at least conceptually if not politically.

The third category is the most complex, and also the most prevalent. This is the category of commons that can be used up to a point, but not infinitely. Fisheries, rivers, aquifers, forests, the atmosphere, congested highways and crowded streets are examples. Management's job is to encourage efficient use and prevent overuse. In economic terms, its challenge is to live off income without diminishing capital.

Interestingly, there's an old common law principle that's relevant here. It's called the 'riparian principle,' and it used to apply to rivers and streams in England and early America.

The riparian principle says that water can be used, but not owned, by those adjacent to it, so long as the users don't diminish the resource for others. In other words, you can take from the commons as long as you don't deplete or pollute it.

Unfortunately, the riparian principle was displaced in America by the 'prior appropriation' rule – that is, perpetual property rights belong to whoever takes water first, and there's no limit to what an appropriator can take. With this kind of property regime, it's no surprise that America is the most profligate water-using nation in the world by far.

In managing commons where some use is okay but unlimited use is not, it's often desirable to set a limit on total use and charge users a fee. Such usage limits and prices assure preservation, let markets sort out competing uses and generate revenue for many possible good purposes. What's crucial is that a trust representing the commons – not private polluters – collect the scarcity rent that arises from setting usage limits.

Setting usage limits can be controversial. If the physical threshold is uncertain, as it usually is, a critical question is "Which side should we err on?" Under the precautionary principle, if the potential harm from overuse is substantial (for example, the polar ice caps could melt), the usage limit should be set with safety as the primary guide. As Carolyn Raffensperger has stated, "The precautionary principle's fundamental idea is that we prevent problems rather than clean them up afterward."

The process of protecting and sustaining a commons involves several steps. The commons must first be identified, given legal standing and an institutional infrastructure. In some cases, usage limits and new kinds of property rights may be necessary. It may also be necessary to appoint trustees and acquire pre-existing property rights.

Once a commons is identified, given property rights and a proper management regime, markets can come into play. Profit-maximizing corporations which, in the past, could freely take from or dump into the commons, will then have to deal with property managers who can limit their use and make them pay for previously externalized costs.

There's one last principle I should mention, and that's the 'polluter pays' principle. This principle has been endorsed by virtually every economist in the world, and in theory, it's a no-brainer.

It would make a huge difference if this principle were actually built into the economy's operating system. The costs of fossil fuel burning, chlorine bleaching, pesticide spraying, long distance transport and many other commons-diminishing processes would instantly rise, making clean energy, recycling, local organic food production and other commons-sustaining processes immediately more competitive.

Yes, prices for many things we buy would also rise, but if the money polluters pay is recycled back to commons owners – that is, to all of us – consumers would, on average, be held harmless.

What's more, if the dividends are equal, consumers who switch to less polluting products will come out ahead – that is, their dividends will exceed what they pay in higher prices. By contrast, those who use the most polluting products (and consequently make the most use of scarce common sinks) will pay for that privilege – that is, their higher costs will exceed their dividends. In short, total pollution will decrease, the right kind of individual behavior will be rewarded, and money will flow from over-users of the commons to under-users (which usually translates into 'from rich to poor'). All this through just a slight tweaking of property rights. No new taxes or government bureaucracy required.

The chart below summarizes this discussion of commons regimes and rules.

MODERN COMMONS REGIMES			
	OPEN ACCESS *(Free parking)*	**ZERO ACCESS** *(No parking)*	**LIMITED ACCESS** *(Parking: $5)*
GUIDING PRINCIPLES ***ALL TYPES*** Future generations, non-humans have stakes Precautionary principle (err on safe side)	The more the merrier	No use (or harmlessly minimal use)	Riparian principle (use but don't diminish) Polluters pay for use Put income in trust Use income for common purposes, dividends, inheritances One person, one share
MANAGEMENT RULES AND TOOLS	Free access to all Shared rules and protocols Short copyrights/patents with public funding	Anti-trespassing laws No dumping of toxics or system disruptors	Licenses or permits sold Fees or tolls charged Cap-and-trade with property rights to a trust Conservation easements
CAPITALIST VARIANT	Long copyrights/patents		Cap-and-trade with property rights to polluters
EXAMPLES	The Internet Uncrowded streets, roads Culture Science Airwaves (potentially)	Wilderness areas Ecosystems as sinks	Atmosphere Water Crowded streets, roads Fisheries Airwaves (at present)

REAL-WORLD MODELS

It's time to shift now from what has been a fairly abstract argument to concrete examples. Many of these are mentioned in the report I co-authored, 'The State of the Commons,' which is available at **www.friendsofthecommons.org.**

These models are examples of existing institutions – trusts in one form or another – that preserve and manage property on behalf of broad classes of beneficiaries.

State land trusts have been around since 1787, when Congress required western territories to set aside land for 'common schools.' Today over 150 million acres are held in trust by states. Much of this land is leased for timber, grazing or oil production, with revenues going to public schools.

The Texas Permanent School Fund owns submerged lands along the Gulf Coast. Proceeds from offshore oil and gas leases launched the Fund in 1954. Earnings from investments go to local schools.

The Alaska Permanent Fund, launched in the 1970s, is like a communal savings account for Alaskans. Initial capital came from oil leases on state land. Today a $23 billion diversified portfolio pays every Alaskan a yearly dividend. Last year's was $1,540.

The Marin Agricultural Land Trust buys conservation easements from farmers using private and public funds. Farmers continue to own and operate their farms, while MALT's easements preserve the shared landscape and the farm economy.

The Pacific Forest Trust buys conservation easements from private forest owners. The owners can continue to harvest trees sustainably, but they can't over-cut and they can't develop.

The Oregon Water Trust acquires previously allocated water rights and uses them to augment flows of rivers and streams.

The Edwards Aquifer Authority, which manages the aquifer from which San Antonio, Texas, gets its water, limits withdrawals of underground water and sells tradable withdrawal permits.

The Music Performance Trust Fund was formed in 1948 by the recording industry and the musicians' union. A small percentage of record sales goes into a fund that pays for free concerts in schools, parks and hospitals. Sales of corporate products thus support living culture.

The U.S. Sky Trust doesn't exist yet, but I fervently hope it comes into being during my lifetime. It's the model I describe in my book, 'Who Owns The Sky?'

The Sky Trust is based on the premise that the sky belongs to everyone and must be held in trust for future generations. It requires polluters to purchase emission permits from a trust representing all citizens. The trust's income can be used for public purposes and/or rebated to citizens through equal dividends, in the manner of the Alaska Permanent Fund.

A study by the Congressional Budget Office found that, of all cap-and-trade systems that might be used to reduce carbon emissions, the Sky Trust would be the easiest to implement, have the most positive effect on household incomes, and result in the lowest overall cost to society.

A key point here involves the assignment of initial pollution rights. This is not just an abstract philosophical question. Because carbon is so pervasive in our economy, literally trillions of dollars are at stake. This money could flow from pollutees to polluters, or vice-versa. It's a case where 'divine right' is worth really big bucks.

Some of the Sky Trust's principles are embodied in the McCain-Lieberman bill, called the Climate Stewardship Act, which is coming to a vote next week. Our President will surely veto the bill if it should pass, but I consider its reaching the Senate floor a significant step toward a rational and equitable climate policy. It will be interesting to see how many votes it gets. [Note: It got 43.]

I mention these models for two reasons: first, to show that it's possible to design modern institutions that can preserve and share a valuable commons, and second, to paint a picture of what the 21st century could look like.

In the 21st century I envision, there'd be a large common sector populated by thousands of trusts like these. These trusts would be as powerful as *those* corporations. They'd act as protectors for various commons – or, to put it slightly differently, as proxies for externalities that markets currently ignore. They'd have property rights, management, money and beneficiaries – in short, as much power as the corporations that populate the market.

The primary engine of productivity would still be profit-maximizing corporations and the market, but this engine would now be tempered by automatic balancing mechanisms, like the governors in James Watt's steam engines.

There'd also be a kind of common property that disperses income equally - as well as private property that disperses income unequally.

The key features of the two types of property would be as below.

KEY FEATURES OF PRIVATE AND COMMON PROPERTY

	Private	Common
Transferable:	Yes	No
Universal birthright:	No	Yes
Expires at death:	No	Yes
Beneficial ownership:	1 dollar, 1 share	1 person, 1 share
Voting rights:	1 dollar, 1 vote	1 person, 1 vote
Future generations:	No stake	Legal stake
Non-humans:	No stake	Legal stake
#1 management goal:	Maximize short-term profit	Preserve assets
Basic management entity:	Corporation	Trust
Main income source:	Corporate profits	Commons rents & fees
Pays dividends*:	Yes	Yes

*Per share payments that vary from year to year depending on performance. Some, but not all, commons trusts would pay dividends.

The benefits of this enlargement of property rights would include great advances in permanence, in democracy, in popular as opposed to corporate culture, and in economic equality.

The state's main job in all this is to redraw the boundaries between the commons and the market – to create new common property rights, shift the 'divine right' from private property to common property, and make it nearly as routine to form and empower commons-preserving trusts as it is to form and empower profit-maximizing corporations.

In addition, some of the new commons trusts might be quasi-public, like the Social Security Trust Fund and the Alaska Permanent Fund, where elected officials appoint some or all of the trustees.

Finally, let me talk about Tom Paine and the problem of inequality.

INEQUALITY

The perpetuation of inequality is built into the current design of capitalism. Because of the skewed distribution of private wealth, a small self-perpetuating minority receives a disproportionate share of America's non-labor income. If the inheritance tax is completely repealed, as George Bush and most Republicans want, we will truly have recreated a permanent aristocracy of wealth – one of the feudal privileges the American Revolution sought to end.

Tom Paine was an amazing man who lived an amazing life. He was born in England when the commons was being enclosed, came to America and participated in the revolution here, then moved to France in time to join the revolution there.

Let me read from one of his greatest essays, 'Agrarian Justice,' written in 1790. In it he argued that, because enclosure of the commons had separated so many people from their primary source of sustenance, it was necessary to create a functional equivalent of the commons in the form of a National Fund. Here is how he put it:

> "There are two kinds of property. Firstly, natural property, or that which comes to us from the Creator of the universe — such as the earth, air, water. Secondly, artificial or acquired property — the invention of men.
>
> "In the latter, equality is impossible; for to distribute it equally, it would be necessary that all should have contributed in the same proportion, which can never be the case... Equality of natural property is different. Every individual in the world is born with legitimate claims on this property, *or its equivalent*." [Emphasis added.]

Enclosure of the commons, he went on, was necessary to improve the efficiency of cultivation. But:

> "The landed monopoly that began with [enclosure] has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, an indemnification for that loss, and has thereby created a species of poverty and wretchedness that did not exist before."

The remedy he proposed was a fund remarkably similar to the Alaska Permanent Fund, except it was financed not with oil revenue but with ground rents paid by land owners. Out of this fund there would be paid to every person reaching 21 years of age the sum of 15 pounds sterling, "as a compensation in part, for the loss of his or her natural inheritance." An additional sum of ten pounds per year would be paid to every person over age 50 – an idea that foreshadowed Social Security.

This essay, written 213 years ago, could not be more timely today. Surely from our vast common inheritance – not just the land, but the atmosphere, the broadcast spectrum, our mineral resources, our threatened habitats and water supplies – enough rent can be collected to pay every American over 21 a modest annual dividend, and every person reaching 21 a small start-up inheritance.

If this sounds dangerously communistic, consider the familiar board game *Monopoly*. *Monopoly* is the capitalist game *par excellence,* with players buying and selling property and trying to build monopolies. But there are two rules of *Monopoly* that make it very different from capitalism as we know it today. First, all players receive an equal amount of start-up capital. Nobody starts off penniless - or by inheriting Boardwalk and Park Place. And second, all players receive an equal dividend every time they complete a trip around the board.

Or consider professional sports - the profit-seeking leagues of baseball, football and basketball. Each has a set of rules designed to shift money from the richest teams to the poorest, and to give losing teams first crack at the best new players. These businesses have learned that too much inequality hurts everyone.

The rules of *Monopoly* and professional sports in no way inhibit the vigor of the market. Indeed, they make the market stronger by making it fairer and more competitive.

In a post-modern, over-productive economy like America's, there's absolutely no reason why every baby shouldn't be a trust fund baby. Commons-funded inheritances and commons-funded dividends would strengthen our market economy.

In addition, they'd correct the two systemic flaws I spoke of at the beginning. On the one hand, by limiting commons usage, they'd diminish pollution and the destruction of nature. On the other hand, by distributing common property income to everyone, they'd partially offset the maldistribution of private property income.

The commons would again be a source of sustenance for all, as it was in pre-enclosure days.

Now, if there are any economists in the audience, I'd like to engage you in a thought experiment. I want you to think about incentives.

Right now, there's a huge incentive to pollute because (a) it's free, and (b) no one profits if you *reduce* pollution. But imagine a system where pollution sinks are commonly owned through trusts. These trusts sell a finite number of pollution permits for whatever the market will bear. And every American gets a dividend from these trusts – one person, one share.

The trustees have the power to decide how many permits to sell. Leaving aside all ecological and legal issues – such as the trustees' fiduciary responsibility to future beneficiaries – my economic question is: under what circumstances should the trustees sell *more* permits? And under what circumstances should the trustees sell *fewer* permits? Please see me after class with your answers.

Just so no one feels left out, here's another thought experiment for anyone with a little business sense. No PhDs or MBAs are required.

Imagine that all the critical ecosystems in the world – the oceans, the atmosphere, forests, rivers, watersheds and so on – are owned by one large holding company – call it Gaia, Inc. This company itself is owned by shareholders on a one person, one share basis. Each ecosystem is managed by a separate company, but all are coordinated by the global holding company.

Each ecosystem manager has the legal rights necessary to charge scarcity rent for limited human or corporate use of its ecosystem. The business question is: If Gaia, Inc., wants to maximize dividends to its shareholders, what strategy should it pursue?

Hint: Think of Gaia, Inc. as a cartel like OPEC whose asset isn't oil but vital eco-systems. Again, see me after class with your answers.

It's important to be clear what I'm *not* suggesting. I'm not suggesting that we abolish the market or change its fundamental calculus. Quite the contrary. I strongly believe we *need* a sector of the economy that's driven by short-term profit maximization for the few. We need it for productivity, for creativity, for vitality, and for freedom.

What I *am* saying is that we shouldn't confuse the calculus of the market with the calculus of our entire society. As a society we have values that differ from those embodied in the market. So the calculus of the market needs to be balanced by other calculi, other property rights and boundaries. Limits of nature need to be respected, as do the interests of future generations, those without private property, and non-human species. Within this framework – and, I would argue, *only* within this framework - the market can flourish indefinitely.

It's important to note that, under this sort of economic operating system, the rules of the market will still be as they are today. CEOs will not have to change their consciousness; businesses will not have to learn new tricks. They'll still be driven by profit-maximization. The bottom line will still be the bottom line.

The big difference from a business point of view is that costs that are routinely externalized today will, instead, be routinely be internalized. Nature and future generations will be represented in real-time transactions, and money from these transactions will flow to a broad set of 'owners' whose added purchasing power will spur economic activity.

Of course it will be claimed that this new operating system, in which the market and the commons are on a roughly equal footing, will reduce GDP, depress the stock market and cost millions of jobs. Washington think tanks will busily grind out studies 'proving' this.

My response would be to look at the city of Washington itself. There's a height limit there – no building can be taller than the Capitol. This limit enhances the city's beauty without in any way impoverishing its economy. The same will be true when we put limits on other kinds of economic activity – especially if we recycle the commons scarcity rents equitably. Markets and businesses and workers will do just fine. More importantly, humans as a whole will do much better.

CONCLUSION

My generation – the generation born in the mid-20th century - has had a grand party. We've consumed more resources, and created more environmental destruction, than all previous generations combined. We are leaving behind one hell of a mess for our children.

But we haven't departed quite yet. We still have time to leave a legacy. The question I often ponder is, 'What can my generation's legacy be?'

The species we've exterminated can never be revived. The harmful chemicals we've deposited in the biosphere can't be removed in our lifetime. The forests and wetlands we've destroyed will take a long time to heal. I wish we could summon a Sorcerer who, with a wave of her hand, could put an instant end to the chaos we've unleashed. But that's not going to happen. So the best legacy we can leave, it seems to me, is a road map – a blueprint for incorporating permanence and greater equality into our runaway economic system.

I think this can be done. My remarks today are a first stab at this. I think we have the ingenuity and the tools to do it. The basic tools are familiar: property rights, trusts, limits, prices and dividends.

We also have some time-tested principles to guide us: the riparian principle, the polluter pays principle, the precautionary principle, and the centuries-old notion of the commons. We can extend the principle of one person, one vote, to one person, one share. We can redraw the boundaries between the commons and the market, and we can shift the divine right, in whole or in part, from private to common property.

It will, of course, take decades to build a strong common sector. But at least we can see where we are going and how we can get there from here - one step toward reverence for the commons, one legal precedent, one institution, at a time. I propose that we start now.

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