Between Racially Restrictive Covenants and Indian Beaver Hunting: The Metatheory of Property Rights

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Abstract

Scholarly writings about collective actions for the production of non-excludable goods, especially in the field of law and economics, look at coordination of class members as a potential failure—a collective-action problem. Economics professor Harold Demsetz's famous article *Toward a Theory of Property Rights* belongs to this tradition of writing. Emphasizing the negative externalities associated with communal ownership, Demsetz describes as an efficient solution to overhunting of beaver pelts the historical transition of Indians' communal-property system to a private-property system.

The historic evolution of racially restrictive covenants—a property system which sought to place racial limitations on the sales rentals, use or occupancy of private property—challenges the public/private dichotomy in property law and, consequently, Demsetz's basic assumptions leading to the conclusion of efficiency. Contrary to the scarce anthropological data on Indians' property regimes, Demsetz had abundant evidence, experience, and knowledge on the emergence of racially restrictive covenants that were part of a developing property regime that largely dominated the landscape of America and in particular Chicago, the birthplace of Demsetz. Nevertheless, neither Demstz's scholarship, nor the rich scholarship that followed his, thoroughly examined the implications of the historic emergence of racially restrictive covenants for underlying theories of property law.

Despite their professional appearance, theories themselves are non-excludable collective goods and their production should suffer from the same collective-action failure as free riding and the problem of "blinded riding." One should stop and ponder on Demsetz's decision to use the

relatively unknown experience of Indians' beaver hunting, contrary to the more familiar subject of racially restrictive covenants, as the primary illustration through which he demonstrated his theory. The fact that the scholarship that followed Demsetz's research, and Demsetz himself, did not question his use of this relatively unknown experience and did not confront his theory with the perplexing implications of racially restrictive covenants is an intriguing and even illuminating dilemma.

Employing Demsetz' own building blocks while comparing the field of racially restrictive covenants to Indian beaver hunting, this article reveals and unravels the preliminary political stage in which competing collective problems are being prioritized for attention, along with similarly competing solutions. This prioritization exposes the challenge of an open and inclusive collective-decisionmaking process and the inevitable intertwinement of private and public interests in the formation of property regimes and property theories. It also exposes the advantages and risks of blinding strategies in the collective process, one risk of which is the ability for leaders to hide—deliberately or inadvertently—the preliminary political stage by using the collective process to promote cooperation through its mostly objective and professional appearance. Leaders in this hidden stage may push for a specific preordained collective good without an open and serious examination of competing options. These strategies may lead community members and—in the case of legal theorists—future scholars and students to becoming "blinded riders" who are oblivious to the full range of competing problems and solutions.

I. INTRODUCTION

Though it never presumed to offer a complete normative theory of the evolution of property regimes,[1] economics professor Harold Demsetz's 1967 article *Toward a Theory of Property Rights*[2] quickly came to dominate the theoretical landscape of property law.[3] Demsetz presented his research as a set of neat, authorial arguments—which eloquently connected the ideas of cost and benefit analysis, free riding, and negative externalization—regarding the conception of gradual progression of property systems towards efficiency and privatization that in turn achieved internalization of property's overall benefits and costs.[4] Demsetz's theory, despite its overwhelming influence, was heavily criticized by scholars who questioned the theory's socioeconomic foundations as well as the actual scope of its legal implications.[5] This

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[1] *See, e.g.*, Harold Demsetz, *Frischmann's View of "Toward a Theory of Property Rights"*, 4 REV. L. & ECON. 127, 128 (2008) [hereinafter *Frischmann's View*] ("This [article] was an exercise in positive economics, but it does rest on the presumption that people, and specifically Native Americans, positively value efficiency."). Nevertheless, the preferability of efficiency, as a socioeconomic value, along with the determination or indifference to the process in which efficiency is measured, are inevitably normative decisions in economics analysis.

[2] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967) [hereinafter *Toward a Theory*].

[3] Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 119 (2005) ("Almost forty years after it first was published, a short article by economist Harold Demsetz remains the touchstone for explaining why private property develops.").

[4] Demsetz, *Toward a Theory*, *supra* note 2; *see also* Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16 (1973) (utilizing a similar cost benefit analysis).

[5] *See, e.g.*, Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. 359, 359 (2002) [hereinafter *Transitions*] (explaining that "the Demsetz account fails to specify any mechanism by which the transition can actually occur, and the existence of such a mechanism is not obvious"); *see also, e.g.*, Wyman, *supra* note 3, at 117 (arguing "that Demsetzian-inspired accounts of the evolution of property tend to neglect the role of the state in property rights formation"); Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 183 (2003) ("Property rights change over time either because the alterations maximize wealth, as the modern law and economics version would suggest, or, more skeptically, because an interest group has successfully brought about a new regime."); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. 421, 429 (2002) [hereinafter *Two Stories*] ("The Demsetz-style

article herein chooses a metatheory approach. Instead of deconstructing Demsetz's arguments and reasoning, it accepts his cost-benefit analysis and focuses instead on the blind spots in his preliminary decisionmaking process and those essential components he perhaps deliberately left out of his analysis.

By exposing hidden aspects of Demsetz's decisionmaking process, as well as the scholarship that followed his writing, this article offers a metatheory to assist in the understanding of how theories can be formed. This article also offers a complementary critical insight into the evolution of property regimes and collective actions in general.[6] This metatheory maintains that free riding is a dilemma that advances over time, and that the collective agreement—which determines and defines the common problems which need addressing, their order of priority, and the proper remedies that ought and can be implemented—is drafted and executed in a preliminary political stage which precedes free riding.[7] The most common strategies utilized in this preliminary political stage are blinding strategies—strategies of concealment of competing collective goods and their accompanying distribution patterns.[8] These turn the collective members into what this article refers to as "blinded riders"—oblivious to the full range of problems and possibilities that the collective process accommodates.[9]

The article begins in Part I by describing Demsetz's contribution to the theory and scholarship of property law.[10] It then in Part II presents an analysis of the main inconsistencies and common critiques of his work.[11] Part III of the article is concerned with the characters missing from consideration in Demsetz's work—namely blinded riders—and the role blinding strategies play in collective actions for the production of public goods.[12] Part III concludes by examining the well-known property phenomenon of racially restrictive covenants as a counter example to the theoretically clear historical transition in property regimes and through this examination challenges Demsetz's theory of the evolution of property rights.[13]

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story about transaction costs, as well as the related depictions of technological advances and price changes leading to closed access and private investment, is at root quite optimistic."); Richard A. Epstein, *The Allocation of Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 543–44 (2002) ("The choices in question often result in odd distributional patterns that are better explained if Demsetz's basic efficiency story is tempered with a healthy dose of public choice theory.").

6 *See infra* Part II.C.1.

7 *See infra* Part IV.

8 *See infra* Part III.A.

9 *Id.*

10 *See infra* Part I.

11 *See infra* Part II.

12 *See infra* Part III.

13 *See infra* Part III.D.

II. DEMSETZ'S LEGAL CONTRIBUTION

A. Toward a Theory

Demsetz's classical and, at the time, novel article *Toward A Theory of Property Rights* presents an economic theory of the evolution of property law.[14] From an economic perspective, property rules are a social instrument designed to increase the efficient usage of property. The exercise of a person's property rights produces both costs and benefits. The aim of property law is to promote the efficient use of property rights through the internalization of both costs and benefits.[15] Otherwise put, property law should prevent externalization, since it distorts the owner's assessment of property's true value and their incentive to maximize its efficient use.[16] In a world based on social interdependence, internalizing all externalities, or at least most of them, is essential for an efficient utilization of services and assets.[17]

The internalization mechanism itself, however, may incur certain costs that could possibly outweigh the costs associated with negative externalities.[18] It would therefore make no sense to demand that property law promote individuals' internalization of certain externalities, when the costs of that internalization exceed the costs of said externalities.[19] In reality though, values and costs are unstable and through rapid shifts in market values, technology, knowledge, and human aspirations, the costs of both internalization mechanisms and possible externalities may change considerably. Taking all this into account, Demsetz developed a descriptive theoretical framework regarding the evolution of property law; he argued that property law evolved by way of introducing new benefit-cost possibilities.[20] When changes in market values or commercial practices caused the costs of externalities to outweigh those

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[14] *See generally* Demsetz, *Toward a Theory*, *supra* note 2.

[15] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 347 ("[P]roperty rights specify how persons may be benefited and harmed, and therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities.").

[16] *See id.*

[17] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 347 ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. Every cost and benefit associated with social interdependence is a potential externality.").

[18] *See* Demsetz, *Frischmann's View*, *supra* note 1, at 131 (explaining that "it costs something to internalize externalities, so internalization is not always efficient").

[19] *See id.*

[20] *See* Demsetz, *Toward a Theory*, *supra* note 2 at 350 ("If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects.").

of internalization, property law offered new patterns of internalization.[21]

But Demsetz did more than just present a thorough and lucid framework regarding the evolution of property regimes. He also demonstrated the applicability of his theory using historical information about the development of a system of private land ownership among the Montagnais Indian tribes of the Canadian Labrador Peninsula.[22] As missionary Paul Le Jeune and father Gabriel Druilletes observed in the middle of the seventeenth century from their time among these tribes, the property system employed by these Indians in their hunting operations was not founded on a system of private land ownership, but rather on the tradition of communal ownership.[23] Relying on Eleanor Leacock's research regarding the connection between European fur trade and the hunting practices of the Montagnais,[24] Demsetz concluded that the evolution of private land ownership among Indians in the beginning of the eighteenth century was primarily motivated by the need to internalize the cost of externalities, which rose sharply due to the advent of European commercial fur trade.[25]

B. Free Riding, The Tragedy of The Commons, and The Evolution of Private Property

Demsetz, using the example of the Montagnais Indian tribe, formulates a classic economic account of the transition of property rights and property forms, based on an internalization of external costs.[26] Through internalization, property law increases the concentration of benefits and costs that the exercise of property rights produces.[27] The major externality which communal property creates and, therefore, the main focus of Demsetz's economic account, is the tragedy of the commons.[28] Demsetz explained, a year before Garret Hardin's famous

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[21] *Id.* at 350 (observing that "property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization").

[22] *Id.* at 352 ("The geographical or distributional evidence collected by Leacock indicates an unmistakable correlation between early center of fur trade and the oldest and most complete development of the private hunting territory.").

[23] *Id.* at 352 ("Both accounts indicate a socioeconomic organization in which private rights to land are not well developed.").

[24] *Id.* at 351–52 ("The property right system began to change, and it changed specifically in the direction required to take account of the economic effects made important by the fur trade.").

[25] *Id.*

[26] *See generally id.* at 351 ("[I]t prompted Leacock's study of the Montagnais who inhabited large regions around Quebec. Leacock clearly established the fact that a close relationship existed, both historically and geographically, between the development of private rights in land and the development of the commercial fur trade.").

[27] *Id.* at 350 ("The thesis can be restated in a slightly different fashion: property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization. Increased internalities, in the main, results from changes in economic values, changes which stem from the development of new technology and the opening of new markets, changes to which old property rights are poorly attuned.").

[28] *See generally id.* at 351 ("Because of the lack of control over hunting by other, it is in no

article,[29] and more than a decade after H. Scott Gordon and Anthony Scott's analyses of overuse in communal fisheries,[30] that communal property suffered from overexploitation because everyone freely enjoyed the exercise of their communal rights without bearing the full costs of their use.[31] Individuals lacked the necessary incentive to restrict their usage from depleting the communal property.[32] Moreover, acknowledging that others were likely to overexploit the common resource, and that the common resource was soon to be depleted, caused people to further increase their own overexploitation externalities.[33]

The externalities associated with the tragedy of the commons are just another version of the familiar free-rider problem and the prisoner's dilemma.[34] When people exercise their rights in communal-property systems they are aware that, taking into account the property's condition, they should contribute to the conservation of the common pool by abridging their own usage of the common property.[35] If the common property is a lake full of fish, people need to make sure that the pool is not depleted and that there are enough fish in the lake to support their ongoing reproduction.[36] This kind of common property is, of course, a non-excludable public good that everybody enjoys, and as a non-excludable good it faces the problem of free riding.[37] The rational choice

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person's interest to invest in increasing or maintaining the stock of the game. Overly intensive hunting takes place. Thus a successful hunt is viewed as imposing external costs on subsequent hunters—costs that are not taken into account fully in the determination of the extent of hunting and animal husbandry.").

[29] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.").

[30] *See* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 124 (1954) ("Although the theory presented in the following pages is worked out in terms of the fishing industry, it is, I believe, applicable generally to all cases where natural resources are owned in common and exploited under conditions of individualistic competition."); Anthony D. Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116, 117 (1955) ("In this section he sets out to suggest the nature of the equilibrium of this common-property industry as it occurs in the state of uncontrolled or unmanaged exploitation.").

[31] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 351 ("Because of a lack of control over hunting by others, it is in no person's interest to invest in increasing or maintaining the stock of the game. Overly intensive hunting takes place. Thus a successful hunt is viewed as imposing external costs on subsequent hunters—costs that are not taken into account fully in the determination of the extent of hunting and of animal husbandry.").

[32] *Id.* at 351–52 ("Hunting could be practiced freely and was carried on without assessing its impact on other hunters. But these external effects were of such small significance that it did not pay for anyone to take them into account.").

[33] *See generally id.* at 351 ("Second, as a result, the scale of hunting activity rose sharply. Both consequences must have increased considerably the importance of externalities associated with free hunting.").

[34] *See* RUSSELL HARDIN, COLLECTIVE ACTION 25-27 (Resources for the Future, 1982) (1982) ("It will be useful to perform a game theory analysis of collective action to demonstrate that the logic underlying it is the same as that of Prisoner's Dilemma.").

[35] *Id.* at 25 ("There are two possible results if one member of the group declines to pay a share: either the total benefit will be proportionately reduced, or the cost to the members of the group will be proportionately increased.").

[36] *See id.*

[37] Collective actions for public goods suffer from free riding due the characteristics of public goods as products and services that are relatively non-rival and non-excludable. In other words,

of all people, or at least most, would be to let others take care of the conservation of the communal property while not spending the necessary personal resources to examine the lake's condition nor curtailing their own fishing.[38]

Demsetz's analytical argument begins with an implicit unraveling of the free-rider problem as it appears in the traditional hunting practices of Indians.[39] Before the arrival of the European fur trade, communal ownership of lands incentivized overhunting.[40] Every member of the community could hunt freely without bearing or externalizing in effect the potential harm of her actions.[41] In such a scenario, every person thinks mainly of her own immediate interests and not of those of the public or of future generations.[42] This means that everybody would expect others to curtail their hunting rates and take care of the conservation of the stock while no one would actually do it.[43] In a different version of the same scenario, no one would invest in the conservation of the stock knowing that everybody else would free ride on their efforts.[44] Thus, this free-rider problem leads to the eradication of public natural resources.[45] However, before the arrival of the European commercial fur trade, hunting rates were limited due to their low value and modest purposes.[46] Before the Indians encountered the Europeans' demand for fur, externalities' costs were kept low and did not justify the costs associated with their internalization.[47]

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individuals can enjoy their use even without contributing their share to the collective action. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 27–28 (1965) ("It follows from the very definition of a collective good that an individual cannot exclude the others in the group from the benefits of that amount of the public good that he provides for himself. This means that no one in the group will have an incentive independently to provide any of the collective good once the amount that would be purchased by the individual in the group with the largest F_i was available.").

[38] *Id.* ("This suggests that just as there is a tendency for large groups to fail to provide themselves with any collective good at all, so there is a tendency in small groups towards a suboptimal provision of collective goods. The suboptimality will be the more serious the smaller the F_i of the 'largest' individual in the group." (emphasis omitted)).

[39] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 351 ("Before the fur trade became established, hunting was carried on primarily for purposes of food and the relatively few furs that were required for the hunter's family.").

[40] *Id.* ("Hunting could be practiced freely and was carried on without assessing its impact on other hunters. But these external effects were of such small significance that it did not pay for anyone to take them into account.").

[41] *Id.* ("Because of the lack of control over hunting by others, it is in no person's interest to invest in increasing or maintaining the stock of game. Overly intensive hunting takes place.").

[42] *Id.*

[43] *Id.*

[44] *See* Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L. J. 377, 396 n.53 (1998) ("In the absence of similar contributions by other people, she may prefer not to contribute at all.").

[45] *See id.*

[46] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 351 ("Before the fur trade became established, hunting was carried on primarily for purposes of food and the relatively few furs that were required for the hunter's family.").

[47] *See id.* at 351–52 ("The externality was clearly present. Hunting could be practiced freely and was carried on without assessing its impact on other hunters. But these external effects were of such small significance that it did not pay for anyone to take them into account.").

With the advent of European commercial trade, and as a result of the sharp increase in the demand for fur and the rise of its market value, extensive overhunting followed, and the costs of externalities grew substantially.[48] This shift in individual needs and market values created a cost-benefit analysis that demanded changing the property system into one that would allow for the internalization of externalities' costs associated with the overexploitation of communal resources.[49] The Demsetzian analysis maintains that the proper response to this overexploitation is the concentration of all the costs and benefits that the exercise of property rights produces through private land ownership.[50] Correspondingly, in order for an individual to bear all costs and benefits associated with the relevant property, the main characteristic of private property must be the right to exclude all others from the exercise of a person's private rights.[51] In more general terms, the free-rider problem of communal property leads to the establishment of a property system based on private property and the preponderance of the right to exclude.[52]

III. LOGICAL INCONSISTENCIES AND CRITICAL VIEWS REGARDING TOWARD A THEORY

A. Between Random Hit And Miss And The Collective Establishment of Legal Institutions

The right to exclude all others from a person's exercise of property rights allows the property owner to economize the use of her property and enjoy the full benefits her investment in it produces, knowing that no one can free ride on her conservation efforts.[53] Despite the advantages of the right to exclude as it exists in a private property system, the conduct of adjacent land owners frequently affects owners of private lands.[54]

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[48] *Id.* at 352 ("[T]he advent of the fur trade had two immediate consequences. First, the value of furs to the Indians was increased considerably. Second, and as a result, the scale of hunting activity rose sharply. Both consequences must have increased considerably the importance of the externalities associated with free hunting.").

[49] *See id.* ("The property right system began to change, and it changed specifically in the direction required to take account of the economic effects made important by the fur trade.").

[50] *Id.* at 356 ("[A]n owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.").

[51] *Id.* (explaining the necessity of the right to exclude in order to achieve an efficient internalization of overhunting externalities).

[52] *Id.* ("The development of private rights permits the owner to economize on the use of those resources from which he has the right to exclude others.").

[53] *Id.*

[54] *Id.* at 357 ("[A]n increase in the number of owners is an increase in the communality of

Their use of their property may be hindered by the noise, smells, sounds and even behavior and cultural practices of adjacent property owners. And yet, it may appear that in a communal-property system, the transaction costs of reaching a unanimous agreement among all communal-rights holders regarding limiting potential externalities would be considerably higher than a private-property system and would therefore prevent efficient agreements.[55] On the other hand, in close-knit communities,[56] or within a private property system, the Demsetzian view would maintain that these costs would be significantly lower because individuals would only have to negotiate with those few land owners who directly affected their property.[57]

This inverse relationship, however, exposes a fundamental flaw in Demsetz's economic account of the evolution of property law. If the negotiation costs of reaching a resolution between communal-land owners are too high, and therefore prevent an efficient agreement,[58] how can the same land owners agree in the first place, according to Demsetz's analysis, on the allocation and enforcement of private-property rights? Private property cannot be justified by the collective failure of producing non-excludable goods when the establishment and maintenance of a private-property system is based on a collective action aimed at producing non-excludable goods.[59] The logical inconsistency in Demsetz's analysis, more so than his basic claim, ignited scholarly imagination and research.[60] Richard Posner argues that Demsetz's theory

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property and leads, generally, an increase in the cost of internalizing.").

[55] *Id.* at 357 (comparing the negotiation costs of private land owners and condemned property owners, Demsetz explains that "[w]hat would be a simple negotiation between two persons under a private property arrangement turns out to be a rather complex negotiation between the farmer and everyone else. . . . The soot from smoke affects many homeowners. . . . All homeowners together might be willing to pay enough, but the cost of their getting together may be enough to discourage effective market bargaining.").

[56] *See* Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1320 (1993) ("[P]eople on the ground recognize that property in land is a positive-sum game and play it cooperatively. . . . [C]ontrary to Garrett Hardin's analysis in the Tragedy of the Commons[,]a traditional village's grazing commons is unlikely to be tragic".)

[57] *Cf.* Demsetz, *Toward a Theory*, *supra* note 2, at 357 ("Indeed, an increase in the number of owners is an increase in the communality of property and leads, generally, to an increase in the cost of internalizing.").

[58] *Id.* at 356 ("[T]he owner of a communal right cannot exclude others from enjoying the fruits of his efforts and because negotiation costs are too high for all to agree jointly on optimal behavior.").

[59] James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J. L. & PUB. POL'Y 325, 336 (1992) [hereinafter *Tragedy, Part Two*] (explaining that the establishment and maintenance of a private property system is a non-excludable collective good, and therefore suffer from same negative externalities as the ones in common ownership).

[60] *See, e.g.*, Elinor Ostrom and Charlotte Hess, *Ideas, Artifacts, and Facilities*, 66 LAW & CONTEMP. PROBS. 111, 117–18 (2003) (claiming that "the possibility that the appropriators would find ways to organize themselves was not considered seriously in the political-economy literature until recently. Organizing to create rules that specify rights and duties of participants creates a public good for those involved. Anyone who is included in the community of users benefits from this public good, whether they contribute or not. Thus, getting 'out of the trap' of the free-rider problem is itself a second-level dilemma. . . . Since much of the initial problem exists because individuals are stuck in a setting where they generate negative externalities on one another, it is not consistent with the conventional theory that they solve a second- and third-level dilemma to address the first-level dilemma).

of the emergence of private property rights was based on a hasty and inexplicable leap—Demsetz assumes that individuals have an interest in maximizing efficiency, and draws from that the unfounded conclusion that society at large is incentivized by similar interests.[61] Law professor James Krier highlights the public nature of private property, showing that the collective decisions regarding its definition, boundaries, permissible methods of protection, and the criteria according to which it is distributed fall under the purview of public agencies.[62] Criticizing Demsetz's analysis, Krier argues that private property cannot be explained as a remedy for society's inability to cooperate, when private property itself was founded on a collective agreement about its definition, distribution, and protection.[63]

There is however a way to make sense of Demsetz's logical leap, and that is by reading the leap not as a fundamental flaw but as an alternative interpretation of collective actions.[64] In this case, Demsetz's theory becomes even more troubling as it maintains that he did not neglect the necessary attributes of the collective process, which when used to agree on the contours of a private-property system includes, as noted above, both defining and distributing private-property rights.[65] He instead assumed that private-property rights should be primarily grounded on the right to exclude and that a collective process—in which their boundaries, enforcement, and distribution are set—was not necessary for property regimes' transformation.[66]

According to this reading, the existence of collective failures illustrates that public participation and collective agreement are not

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[61] Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 289 (1979) (critiquing "Demsetz's early discussion of the emergence of individual property rights in primitive legal systems under the pressure of increasing resource scarcity").

[62] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 46 n.18 (2d ed. 1988) ("What trouble? A move from common ownership to private property is hardly costless. Some sort of agency—some sort of government—has to be established to run the system. Even in its simplest conception, a relatively elaborate mechanism is necessary. Elaborate mechanisms are expensive to realize. If, once realized, a mechanism works to *common* advantage, then it is not obvious—at least under the assumptions of Demsetz's argument—why anyone would contribute to production of the mechanism in the first place." (emphasis in original) (internal citations omitted)).

[63] Krier, *Tragedy, Part Two*, *supra* note 59, at 336; *see also* Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37, 40–43 (1990) (raising concerns about the cost of implementing a new system of common ownership and critiquing the concept of individuals as self-interested as creating inconsistencies in property theory).

[64] Demsetz, *Toward a Theory*, *supra* note 2, at 350 ("[I]n a society that weights the achievement of efficiency heavily, [the] viability [of legal and moral experiments] in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values.").

[65] *Id.* ("[I]n a society that weights the achievement of efficiency heavily, [the] viability [of legal and moral experiments] in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values.").

[66] *Cf. id.* (instead stating that "in a society that weights the achievement of efficiency heavily, [the] viability [of legal and moral experiments] in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values").

necessary to the efficient establishment of private-property rights. The transition to a private-property system can therefore be described as a new market equilibrium, justified by a perspective of efficiency maximization, rather than one of a collective agreement.[67] Consequently, the mechanism utilized for the establishment of the private-property system may be one of random violence and coercion by small groups, major forces,[68] or even a tyrant.[69] This means that private property can be based on coercion and that the making of the rules governing its distribution, definition, and protection can lack public participation.[70]

It would probably be an exaggeration to claim that, due to the increasing demand for furs, all Indians through a democratic process reached a collective agreement to change their property system. Demsetz did not say so either.[71] But even if the property system can be forcefully imposed on the Indian public without its consent, through random violence as well as through conflicts within and outside Indian communities, one question remains: why did private property and the right to exclude survive the random hit-and-miss phases of property formation? In other words, the maintenance and protection of private-property rights, especially when they are executed by private parties,[72] produce high transaction costs which may outweigh those of communal-property rights. Once one understands that collective failures exist in private- and communal-property systems alike, another explanation of the success of private property systems is needed.

It is therefore widely accepted that the process of establishing and maintaining a legal system based on private property cannot be described as a simple reply to the tragedy of the commons. Even in a private-property system, people must comply with the rules governing private-property rights and must bear the burden of their geographic and material limitations. They must agree on the establishment of collective institutions governing private-property law and on the ways in which the

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[67] *See* THRAINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 28 (1990) (explaining that "an optimizing individual reacts to a change in one or more constraints and how such reactions by many individuals lead to new equilibrium outcomes"). Scholars like Eggertsson view the transition to better wealth-maximizing institutions as the product of a competitive markets equilibrium. *See id.*

[68] In this case, the major force may have been the Europeans themselves. *See Demsetz, Toward a Theory, supra* note 2, at 351–52.

[69] *See id.* at 350. Demsetz's main claim is not that a conscious collective agreement was reached because of certain externalities. Rather, he describes the process as a random hit and miss, which in the long run brings about maximized efficiency. *Id.* ("I do not mean to assert . . . that the adjustments in property rights . . . need by the result of a conscious endeavor to cope with new externality problems. . . . This legal and moral experiments may be hit-and-miss procedures . . . but in a society that weights the achievement of efficiency heavily, their viability in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values.").

[70] *Id.* at 357 (describing negotiations between private property owners consistently with this interpretation of Demsetz's normative claim). This interpretation of Demsetz's normative claim fits his description of private property owners' negotiations. *Id.*

[71] *See generally id.* at 351–53.

[72] *Id.* at 353. This is probably Demsetz's main assumption. *Id.*

legal system protects private-property rights, and so on.[73]

Despite its validity, this criticism does not present an alternative vision or a competing explanation for the development of private property, or what many describe as its essential feature—the right to exclude.[74] It does, however, call for the development of a new theory, which could explain the preference, under certain conditions, for a system of private-property rights over a system of communal ownership.[75]

1. The Distributional Concern: A Motivating Force in the Formation of Property Regimes

The evolution of property regimes, as so eloquently portrayed by Saul Levmore, can be analyzed in two conflicting fashions.[76] The first is the Demsetzian cost-benefit analysis, which highlights a shift towards greater efficiency.[77] The second is that of public-choice analysis and analysis regarding the incentives of small interest groups in the distribution effects of different property regimes.[78] For Demsetz, the movement towards efficiency is as an ongoing product of scientific innovations, and a collective good that all can enjoy.[79] When new cost-

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[73] *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125–27 (1972) (discussing the consequences of protection of property rights based on liability rules or property rules and inalienability).

[74] *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997) (explaining that "at a theoretical level we understand the right to property equally as a right of exclusion or a right of use, since they are opposite sides of the same coin"); Thomas W. Merrill, *Property and The Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) [hereinafter *Property and The Right*] ("The Supreme Court is fond of saying that 'the right to exclude others' is one of the most essential sticks in the bundle of rights that are commonly characterized as property.").

[75] *See* Merrill, *Property and The Right*, *supra* note 74, at 733 ("Finally, there is a consensus that the concept of property is not limited to private property, but includes also what may be called common property and public property.").

[76] See Saul Levmore, *Two Stories*, *supra* note 5, at 423 ("One is about transaction costs and is normally optimistic; the other is about interest groups and is potentially pessimistic or at least suspicious.").

[77] *See id.* ("Transaction costs can play an important role in explaining privatization, by which I mean the evolution from open access to property rights that include the right to restrict access. Transaction costs can also play a critical role in understanding any reversal, or reemergence, of open access. The simplest stories build around exogenous changes in relative prices, perhaps because of technological change.").

[78] *See id.* at 426 ("For expositional purposes, we can think of coordinating owners or beneficiaries of this kind as interest groups. And because they often secure government action or form an important constituency for political actors who serve their needs, the label is appropriate. One starting point is the idea that even if transaction costs and prices and technologies are frozen, it is possible that commons will close and reopen because of the influence of different interest groups—which may in turn depend not on other transaction costs.").

[79] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 350 ("Changes in knowledge result in changes in production functions, market values, and aspirations. New techniques, new ways of doing the same things, and doing new things-all invoke harmful and beneficial effects to which society has not been accustomed. It is my thesis in this part of the paper that the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost

benefit opportunities arise, the incentives of individuals to improve their property regime sharply increase, and with it the chances for efficient cooperation in the making of a better property system.[80] This image of the evolution of property regimes emphasizes a non-excludable good which advances both the interests of the collective and individual.[81] Based on extensive empirical work, however, there is a contrary public-choice image that presents the darker side of the formation of a distributive property regime. That public-choice image depicts the effects of distribution as playing a prominent role in overcoming the collective-action problem, but doing so in a way that produces clear winners and losers.[82]

The establishment of such a property regime is primarily a political phenomenon and, much like the legislative and political sphere, it is dominated by small interest groups whose purpose is to each get a bigger slice of the collective pie.[83] This public-choice perspective provides an alternative explanation to that of the canonical depiction of exogenous changes, which stands at the heart of Demsetz's cost-benefit analysis of the formation of property rights.[84] While the basic economic account of property formation therein failed to present the mechanism by which those seeking to establish private-property rights were able to overcome the collective-action problem, the contrary explanation elaborated on below—which focuses on strong distributional consequences and therefore conflicting interests among the individuals in the collective—actually raised compelling reasons for the cooperation of individuals.

In fact, as law professor Stuart Banner empirically showed, transitions between property regimes that successfully overcame the collective action problem did not distribute efficiency gains equally and were based on and motivated by the ability of active participants to

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possibilities.").

[80] *See id.* ("If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects.").

[81] *See id.* ("The thesis can be restated in a slightly different fashion: property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.").

[82] See Banner, *Transitions*, *supra* note 5, at 368 ("These programs all had significant distributional consequences. There were clear winners and losers in the change from functional to spatial property rights. The expected payoffs to the winners were large enough to provide them with an incentive to bear a disproportionate share of the administrative costs of reorganization.").

[83] *See id.* ("The winners in each transition were the rich and powerful . . . . The big winners from reorganization were the same people who ran the governments that decided whether reorganization would take place. By skewing the payoffs in favor of the powerful, these programs facilitated the reallocation of property rights.").

[84] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 348 ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. Every cost and benefit associated with social interdependencies is a potential externality."); *see also* Levmore, *Two Stories*, *supra* note 5, at 427 ("The prevailing arrangement of property rights may be the product of politics and interest group activity, as opposed to changes in technology or exogenously determined prices, it becomes apparent that most movements along the access spectrum can be the product of either kind of force.").

acquire disproportional gains.[85] Exploring the transition from a functional property regime in which rights to use particular resources are scattered in various places[86] to a spatial property regime in which an individual's property rights are located in a single geographic space,[87] Banner found that the distributional aspects of property ownership during the transition played a vital role in inducing individuals to participate.[88]

The reorganization of property rights in Europe and its colonies from the sixteenth century onwards demanded complicated and expensive administrative procedures.[89] The previous regime's property rights owners had to be compensated for their proportional share in the old property system.[90] In order to achieve this goal, information about existing property rights and their unique characteristics needed to be gathered, market value of these property rights had to be ascertained despite the absence of a marketplace, and corresponding rights in the new property regime had to be located.[91] And even then, assessing the value of those rights in objective monetary terms was distortive; it could only ever capture a fraction of what it meant for a person to have communal access to a lake, to the forest where she played as a child, or to the land where she was raised. Even overlooking the subjective,

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[85] *See* Stuart Banner, *Transitions*, *supra* note 5, at 369 (relying on empirical evidence, stressing that "[a] relatively small number of people who anticipate disproportionately large gains from a transition will have a greater incentive to cooperate . . . . Here, then, is empirical evidence of a mechanism that permits a transition between property regimes to overcome the obstacles of collective action and administrative costs . . . . facilitated some of the major transitions of modern times.").

[86] Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 810–11 (1999) ("That is, a person would not own a zone of space; he would instead own the right to use a particular resource in a particular way. . .Possession of such a right did not imply the possession of other rights in the same geographic space.").

[87] *Id.* at 833. ("The English normally accomplished this by uniting ownership of all the land in a single person, who was then understood to have the power to direct the activities of everyone else present on the land.").

[88] The distribution was not random, but was based mainly on the collective action process and its leading participants. *See* Stuart Banner, *Transitions*, *supra* note 5, at 368 ("A wealth-enhancing transition between property systems sometimes requires some roughness in assigning and valuing rights if it is to occur at all. In a hierarchical political structure, that roughness will cause the gains and losses from the transition to be distributed unequally, in ways that favor the people managing the transition.").

[89] *Id.* ("[T]he presence of high administrative costs meant that the managers of the transitions had to cut some corners. They had to adopt some rules of thumb that would drive the costs of valuation and assignment low enough to make the transition feasible.").

[90] *See, e.g.*, *id.* at 368–69 (noting that "[i]n New Zealand, Native Land Court judges fell into the habit of registering blocks of land to a maximum of 10 Maori, regardless of the true number of people with rights to resources within the block. This . . . served its twin purposes of curbing the cost of ascertaining the owners and facilitating land sales to British settlers by reducing the number of Maori with standing to object").

[91] *See id.* at 364–65 ("A second kind of obstacle blocking a transition between property regimes can arise from the administrative costs of ascertaining the value of everyone's rights under the old system and locating equivalent rights under the new one. . . . Suppose I have the right to gather berries from a particular tree. What is that worth? There is not a well-developed market for my right to gather berries (at least there was not among many groups of indigenous people), so we cannot look to the market price. The value of my property right depends on the value of the berries, the yield of the tree, the location of the tree, and soon. Once we obtain all that information, we can calculate the value of what I will lose when my right to gather berries is reassigned to the person who will get the zone of land where the tree grows.").

psychological, and emotional aspects of property rights, it is still complicated from an economical point of view to translate the value of a variety of property rights scattered across geographic spaces into relatively similar property rights part of a new spatial property regime.[92]

Because of these difficulties, certain "corners" had to be cut in the process of transition between property regimes.[93] Performing a meticulous calculation in the new regime of each person's property rights, their values, and their equal substitutes was impractical as well as inefficient.[94] Instead, the transition had to rely on seemingly objective "rules of thumb."[95] The selection and design of these rules was an inevitably political process, with significant distribution consequences that worked in favor of small interest groups.[96]

Banner provides two compelling examples of how these rules of thumb have produced significant inequalities in the distribution of wealth. The first deals with use rights in Britain—originally, there was a right to collect leftover grains.[97] It was of great importance to the poor, due to the decreasing marginal utility of money, but during the transition between property regimes, the right was valued at zero and was lost.[98] The second example examines communal rights to land in New Zealand.[99] The New Zealand Native Land Courts limited the recognition of communal ownership rights in a parcel of land to no more than ten individuals.[100] Their purpose was to significantly reduce transaction costs, and facilitate the sale of lands to rich British settlers.[101]

In the political phase of moving toward a new property regime, those who manage the collective action process also influence its rules

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[92] *See id.* ("The costs of valuation and allocation are likely to be even higher in the transition from one already existing property system to another.").

[93] *Id.* at 364. ("But the presence of high administrative costs meant that the managers of the transitions had to cut some corners.").

[94] *Id.* at 367. ("All would have been extraordinarily expensive—perhaps too expensive to have occurred—had they been scrupulously conducted.").

[95] *Id.* at 368. ("They had to adopt some rules of thumb that would drive the costs of valuation and assignment low enough to make the transition feasible.").

[96] *See* Levmore, *Two Stories*, *supra* note 5, at 421, 427 (noting that "[t]he prevailing arrangement of property rights may be the product of politics and interest group activity, as opposed to changes in technology or exogenously determined prices, it becomes apparent that most movements along the access spectrum can be the product of either kind of force"). Stuart Banner also explains that "the political economy of the transition . . . tended to pit an oligarchy against a larger number of relatively powerless farmers. . . . By skewing the payoffs in favor of the powerful, these programs facilitated the reallocation of property rights." Banner, *Transitions*, *supra* note 5, at 368.

[97] *See* Banner, *Transitions*, *supra* note 5, at 368 ("When the property right in question was as meager as that of picking up leftover bits of grain after the harvest, it might have cost more to price the right than the right itself was worth.").

[98] *Id.* at 368 (referring to the work of E. P. THOMPSON, CUSTOMS IN COMMON 128–35 (1993)) ("In Britain, for example, the poorest commoners often had their use rights valued at zero.").

[99] *Id.* at 368 ("In New Zealand, Native Land Court judges fell into the habit of registering blocks of land to a maximum of 10 Maori, regardless of the true number of people with rights to resources within the block.").

[100] *Id.*

[101] *Id.* at 368–69 ("This kind of corner cutting no doubt served its twin purposes of cutting the cost of ascertaining the owners and facilitating land sales to British settlers by reducing the number of Maori with standing to object.").

and distributive consequences. Thus, despite high participation costs—such as court fees, lawyer fees, and the investment of time and resources in proving one's property rights—transition programs enjoyed a high rate of participation, which helped to both overcome the collective action problem and legitimize the process.[102] Banner adds that individuals were threatened not only by distributional concerns, but also by outright exclusion from the transition's proceeds if they did not participate.[103] Thus, on the grounds of efficiency and models of collective action failures, individuals were pressured to enter into a process which favored some and was to the detriment of others.

2. *The Distributional Concern: Linear Progress Toward Efficiency or Hold-Ups and Setbacks*

The distributional account of the formation of new property regimes presents allocation concerns as a factor that encourages cooperation.[104] However, it does not take into serious account the increased transaction costs that distributional effects produce or their negative impact on potential cooperation. Analyzing the role of distributional concerns, Banner maintains that in egalitarian societies collective actions meant to form a new property regime would fail because individuals would not agree to participate in a process that provides some with disproportionate large shares and others with marginal benefits.[105] But as noted above, even in a non-egalitarian society, distributional consequences may cause great discomfort to those who get the short end of the stick.[106] How, then, can the managers of collective actions face the resentment of those Banner calls the "losers" of the collective action? Moreover, how can various and conflicting interest groups reach a collective agreement when they are aware that every other group is a strategic player trying to skew the collective process in her own favor?

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[102] *Id.* at 367.

[103] *Id.* at 363.

[104] *See id.* ("The ability to deny nonparticipants enforceable rights in a new property system is itself a decision that requires some coordination, so it is a decision subject to the very same collective action problem."); *id.* at 368 ("These programs all had significant distributional consequences. There were clear winners and losers in the change from functional to spatial property rights.").

[105] *Id.* at 369–70 ("In their distributional effects, enclosure and the parallel colonial schemes were a bit like free trade today, with diffuse gains for most and concentrated gains for some coming at the expense of concentrated losses for others. . . . This account suggests the general (and testable) proposition that transitions between property regimes are more likely in less egalitarian societies. Further evidence in support of this proposition may be found in the fact that so many indigenous societies, with political structures more egalitarian than the pattern of settler-native relations that replaced them, did not reorganize their traditional property systems themselves.").

[106] *See id.* at 369 ("In a hierarchical political structure, that roughness will cause the gains and losses from the transition to be distributed unequally, in ways that favor people managing the transition.").

Tackling the questions another way, law professor Katrina Wyman tried to ascertain why tradable rights "have been slow to develop in U.S. coastal fisheries in federal waters since national jurisdiction over fisheries was extended to 200 miles from the shore in 1976."[107] In her work, she presented distributional considerations among fishing interest groups as the main cause for the slow transition to individual transferable quotas.[108] For Wyman, distribution concerns play a prominent role in the transition from one property regime to another, especially when they provide small groups with veto power,[109] and may impede the political decisionmaking process, which lies at the heart of the collective-action problem.[110] And this is precisely what happened in the case of U.S. coastal fisheries: small interest groups tried to obtain a larger share of the property rights that were initially distributed for free by interfering with the political process and delaying it for several years.[111]

By concentrating on the political decisionmaking process, Wyman raised serious and inevitable doubts regarding the purported efficiency of the collective product—that is, the new property regime. Small interest groups, which operated strategically to maximize their private gains, got in the way of an efficient public good. Moreover, these groups would have promoted a property regime over a better practical alternative, or simply would have promoted an inefficient property regime, as long as it allowed them to obtain larger shares of the collective pie.[112] Though Demsetz described the evolution of property rights as a linear function,[113]

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[107] Wyman, *supra* note 3, at 117.

[108] *Id.* at 225 ("[D]isputes about how tradable rights should be allocated when they first are implemented would seem to be the main reason that many of the veto points in the highly inclusive decision-making process have been exercised. Conflicts between interest groups in Alaska and Washington State about the initial allocation of rights provided an important initial impetus for the six-year moratorium on introducing individual transferable quotas through the council process. In addition, councils have taken a long time to develop proposals for individual transferable quotas, often because of disagreements among fishing interests seeking to maximize their share of the rights initially distributed for free.").

[109] *Id.* at 224 ("[T]he political institutions through which tradable rights typically must be established provide multiple veto points for interest groups to delay the pace of change. While these institutions certainly are subject to economic and social forces, the institutions collectively generate a decisionmaking process which arguably has had an important independent impact on the timing of the introduction of tradable rights.").

[110] *Id.* at 118 ("She argues in turn that filling this gap requires the development of a more robust positive theory of the evolution of private property that takes into account the political process through which private property often is formed, and more systematic empirical research into the development of property rights."). According to Wyman, the political decision-making process is essential to the evolution of private property regimes. *Id.*

[111] This was achieved due to political veto powers. *Id.* at 224 ("[I]nterested parties who disagree with council decisions on matters such as the initial allocation of rights may be able to block change by appealing to NMFS, the federal courts, and especially to the small group of coastal-state senators who have proven themselves willing to veto the introduction of individual transferable quotas.").

[112] *Id.* at 137 ("An overall loss to a society still might take place if the change would benefit a small group of politically influential persons. If each member of the small group stands to make large gains, the group members might lobby for the change even though it would not generate sizeable gains for society as a whole[;]the effect of the distribution of expected rents among influential groups has been recognized only slowly in the scholarship about the origins of property rights formation.").

[113] Banner, *Transitions*, *supra* note 5, at 360 ("[O]ver the long run, property rights will be reallocated in the direction of efficiency.").

once the political process is taken into consideration, this depiction appears to lose credence, and distributional effects seem to produce social gaps or crises, which may in the long run reduce productivity.[114]

C. Between An Individualistic and a Collective Paradigm: Examining Demsetz's Assumptions

As noted above, the main criticism of the efficiency approach to the evolution of property systems is that it overlooks the fairly obvious fact that the establishment of a property system is itself a collective action.[115] In order to institute a property system, people need to spend time, money, and labor, formulating its rules, its distribution effects, and its enforcement mechanisms.[116] The system itself is necessarily a non-excludable collective good, and its establishment will therefore suffer from the common free-rider problem.[117] This means that Demsetz cannot theorize a move from a system of communal-property rights to a private one without giving this problem some serious attention.

Yet the most striking thing about Demsetz's work is his depiction of a binary world, where only two alternatives exist. One is a communal-property system, in which all enjoy and suffer the results of the work of other people. The other is a private-property system, in which strict exclusion governs socioeconomic lives. In this analysis, there is only one problem that the community needs to address, rather than several problems with conflicting solutions. Moreover, Demsetz does not explore the social mechanism that makes individuals value the costs and benefits of a certain property usage, just as he does not explore the impact of the collective action on the initial wants and needs of those individuals.

1. Between Market Equilibriums and Efficiency

Although the common criticism of Demsetz's ideas about the evolution of property rights is convincing,[118] the heart of his analysis

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[114] *Id.* at 369 ("The more concentrated political power is, and the more unevenly the gains from the transition will be distributed, the smaller the number of people that will be necessary to make that credible threat.").

[115] *See* Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 3, 31 (J. Roland Pennock & John W. Chapman eds. 1982) ("Since cooperation is—has to be—both possible and existent without and prior to property, the domain of property cannot be coextensive with that of the commons.").

[116] *Id.* ("Property is a scheme of social cooperation whose utility is always a question for judgment and varying choice, dependent on multiple considerations varying with the circumstances, rather than impelled by some universal and inexorable grim logical of welfare.").

[117] *See* Krier, *Tragedy, Part Two*, *supra* note 59, at 336.

[118] *See, e.g.*, Krier, *Tragedy Part Two*, *supra* note 59, at 338; Rose, *supra* note 63, at 37.

does not necessarily lie in the collective process through which modern property rights come to be formed and maintained. A careful reading reveals that his portrayal of Indian hunting lands relies heavily on the role of families and individuals in the establishment of the property system.[119] Furthermore, while the enforcement of law in general, and property law in particular, is a prominent feature of the collective aspect of private property—which is why it is usually thought of as part of the public sphere—it is important to remember that the protection of private-property rights in Demsetz's portrayal of the Montagnais Indians was enforced by private players.[120] In other words, employing a collective perspective stands at odds with the Montagnais using private retaliation as their main enforcement mechanism for private land ownership.

In truth, Demsetz's argument speaks less of a collective process, and more of a gradual hit-and-miss process of system formations, which eventually reaches a stabilization at a system of private-property rights.[121] It is therefore more accurate to describe Demsetz's evolution model as based on shifts in the market's Nash equilibriums—which when reached indicates that no market participant has an incentive to deviate—rather than based on a unanimous or majority decisionmaking process.[122] In the Montagnais Indians example, some people assumed control over certain parcels of land, while other people, either instead of fighting that assumption or after a period of struggle, assumed control over different parcels of land.[123] Before the commercial fur trade with European settlers, the benefits of exclusion did not justify their costs.[124] However, with the increase of fur value, individuals and families probably found private ownership over land sufficiently rewarding.[125]

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[119] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 353 ("Among the Indians of the Northwest, highly developed private family rights to hunting lands had also emerged- rights which went so far as to include inheritance.").

[120] *Id.* (explaining that "family proprietorship among the Indians of the Peninsula included retaliation against trespass").

[121] *Id.* at 350 ("These legal and moral experiments may be hit-and-miss procedures to some extent but in a society that weights the achievement of efficiency heavily, their viability in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values.").

[122] *See* DOUGLAS G. BAIRD, ET AL., GAME THEORY AND LAW 21 (1994) ("The combination of strategies that players are likely to choose is one in which no player could do better by choosing a different strategy given the strategy the other chooses. The strategy of each player must be a best response to the strategies of the other.").

[123] Demsetz, *Toward a Theory*, *supra* note 2, at 352 ("An anonymous account written in 1723 states that the 'principle of the Indians is to mark off the hunting ground selected by them by blazing the trees with their crests so that they may never encroach on each other . . . . By the middle of the century these allotted territories were relatively stabilized.").

[124] *Id.* ("The principle that associates property right changes with the emergence of new and reevaluation of old harmful and beneficial effects suggests in this instance that the fur trade made it economic to encourage the husbanding of fur-bearing animals. Husbanding requires the ability to prevent poaching and this, in turn, suggests that socioeconomic changes in property in hunting land will take place.").

[125] *See id.* ("We may safely surmise that the advent of the fur trade had two immediate consequences. First, the value of furs to the Indians was increased considerably . . . The geographical or distributional evidence collected by Leacock indicates an unmistakable correlation between early centers of fur trade and the oldest and most complete development of the private hunting territory.").

That is, at least, the Demsetzian take on formation of a private-property system.[126]

Still, even if we accept that by assuming control over lands market participants have reached a new Nash equilibrium, that does not necessarily mean that their strategic behavior aligns with social efficiency. Market equilibriums can at times be inefficient, an example of this being the strategic behavior of a small number of firms choosing not to compete in an oligopolistic market.[127] When two or three firms produce competing products in a specific market, and by so doing influence one another's decisions on what and how much to produce, they may well reach an equilibrium in which no firm has an incentive to lower prices. This occurs because each firm knows that the other firms will do the same, thereby preserving each firm's market size by not competing. This represents an inefficient equilibrium.

Going back to Demsetz's portrayal of the hunting lands of the Montagnais tribes, we might find his claim that a transition toward private ownership is efficient[128] to be somewhat ungrounded. Even if we accept that the property regime of the Montagnais suffered from overexploitation due to the commercial fur trade with European settlers,[129] one must still ask just how advantageous the private allocation of their communal lands has been for the Indian tribes. According to conventional economic theory, the fragmentation of communal Indian lands into private parcels would necessarily increase competition within the Montagnais group, which would substantially lower the market price of beaver furs.[130] If we assume a perfect competition model, the market price of beaver fur would equal its marginal cost of production, thereby improving the bargaining power of European settlers.[131] The bargaining

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[126] *Id.* at 351 ("The factual material uncovered by Speck and Leacock fits the thesis of this paper well, and in doing so, it reveals clearly the role played by property right adjustments in taking account of what economists have often cited as an example of an externality—the overhunting of game.").

[127] On the oligopolistic market structure, see generally DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 157–99 (4th ed. 2005) (noting that "[t]his chapter presents the best-known noncooperative oligopoly models" and making certain economic assumptions for purposes of discussion)

[128] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 349 ("The output mix that results when the exchange of property rights is allowed is efficient and the mix is independent of who is assigned ownership (except that different wealth distributions may result in different demands.").

[129] *Id.* at 351 ("Because of a lack of control over hunting by others, it is in no person's interest to invest in increasing or maintaining the stock of the game. Overly intensive hunting takes place. Thus a successful hunt is viewed as imposing external costs on subsequent hunters costs that are not taken into account fully in the determination of the extent of hunting and of animal husbandry.").

[130] In other words, the privatization of Montagnais hunting territories, resulting in handing specific lands to individual owners, reduces these owners' ability to coordinate their efforts as fur traders. *See generally* MICHAL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES xvi (2008) (discussing the negative effects of the fragmentation of property rights).

[131] *See* Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. Legal Stud. 653, 654 (2002) [hereinafter *Toward a Theory II*] ("The calculus of maximization had been applied to utility and profit, the meaning of cost had been made clear, supply and demand became formal analytical tools, and decentralization had been conceptualized and modeled through the perfect-competition model.").

inferiority of Indians would ultimately increase beaver hunting, which is the very problem that the fragmentation of property rights has sought to resolve.[132] In fact, John McManus stresses that, contrary to conventional economic models, as fur trade grew there was a sharp decline in beaver population despite the existence of exclusive rights.[133]

If Indian tribes as a collective wanted to increase their monetary profits, why would they choose a path that improved the market conditions of European settlers? Moreover, the private allocation of their lands inevitably led to the fragmentation of their collective power, to a decrease in the value of their assets, including—most importantly—their lands.[134] One could even claim that overexploitation of beaver hunting was replaced by overexploitation of lands, since in the new property regime European settlers could purchase land more easily from a single owner without taking into consideration the collective value of this land in terms of Indian heritage, tradition, and culture.[135]

2. *The Collective Attributes of Private Property*

As Demsetz shows, a property system based on private-property rights advances the individual's internalization of the negative or positive effects that the exercise of her property rights produces.[136] As his historical account demonstrates, in a communal property system the negative repercussions of overhunting are shared by all, including those who did not enjoy the gains of the fur trade with Europeans. This leads to inefficient usage of the community's communal resources. By contrast, in a system of private parcels of land, individuals bear the full costs of

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[132] *See generally* HELLER, *supra* note 130.

[133] *See* John C. McManus, *An Economic Analysis of Indian Behavior in the North American Fur Trade*, 32 J. ECON. HIST. 36, 39 (1972) ("Almost all of the historians of the fur trade to whom I have referred remark that beaver populations were sharply reduced after the introduction of the fur trade into an area[.] . . . [T]here appears to be no doubt that in some areas, including parts of Eastern Canada, for some periods of time, beaver populations were sharply reduced due to the rate at which they had been harvested by Indian hunters."); *see generally* H. A. INNIS, THE FUR TRADE IN CANADA (Toronto University Press, 1956).

[134] *See* Banner, *Transitions*, *supra* note 5 at 368–69 (discussing the limit of 10 owners for each parcel and noting that "[a] relatively small number of people who anticipate disproportionately large gains from a transition will have a greater incentive to cooperate in in organizing the transition than would a larger number of people anticipating gains more equally distributed.").

[135] *Id.* at 367 (noting that ultimately, "[a]llotment caused a very large quantity of land to move from Indian to white owners, who presumably valued the land more highly (or at least could pay more for it) and had been unable to purchase it before.").

[136] Harold Demsetz, *Some Aspects of Property Rights*, 9 J. L. & ECON. 61, 62 (1966) ("There are three important implications of a private property system that are valid in a world in which all property rights are assigned and in which the cost of exchanging and of policing property rights are zero. A private property system under such conditions, implies that (1) the value of all harmful and beneficial effects of alternative uses of property rights will be brought to bear on their owners, (2) to the extent that owners of property rights are utility maximizers, property rights will be used efficiently, and (3) the mix of output that is produced will be independent of the distribution of property rights among persons except infosar as changes in the distribution of wealth affect demand patters.").

their conduct and are therefore motivated to act in a way that uses their private resources most efficiently.

This individualistic paradigm of property, however, conceals its collective aspects, and therefore it conceals the need for a collective decisionmaking process. Thriving wildlife, including a healthy population of beavers, was probably an important part of the value Indians attributed to their land. But there are also other animals, such as species of birds, bears, deer, moose, caribou, [137] and bison,[138] which, unlike beavers, do not necessarily stay in one location. The preservation of these other animals thus may demand a concentrated collective effort. A property system based on private land ownership would induce Indians to hunt these animals as they pass through their private territory, so as to catch them before other hunters do. This urgency would lead to a race to the bottom, in which private owners of land compete against one another, hunting as much as they can to increase private gains and limit those of their competitors. In other words, focusing on beavers, without thoroughly examining the birds and migratory animals in the Montagnais lands,[139] as well as the different species of animals which they used to hunt,[140] conceals the collective aspects of private property rights, as opposed to the private aspects of common-pool resources.[141]

Moreover, despite Demsetz's account of the Montagnais common-pool problem, exclusive rights did not prevent the overhunting of beavers.[142] In fact, in contrast to the individualistic vision of property rights, the effort to conserve the beaver population was actually initiated

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[137] *See* McManus, *supra* note 133, at 45 (differentiating beavers and caribou by stating that "[t]he caribou is migratory and, therefore a risky source of food supplies. Deer and moose had to be tracked down").

[138] *See* Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. 609, 642–43 (2002) (noting that "bison are nasty and strong . . . and like to move constantly"). For further studies on the Bison, see JOEL ASAPH ALLEN, THE AMERICAN BISONS: LIVING AND EXTINCT (1876) and FRANK GILBERT ROE, THE NORTH AMERICAN BUFFALO: A CRITICAL STUDY OF THE SPECIES IN ITS WILD STATE (1951).

[139] *See* Demsetz, *Toward a Theory II*, *supra* note 131, at 656. In a posterior article Demsetz simply assumes that "land rights confer effective control of an area's animal stock if this stock contains mainly forest animals, since forest animals stay close to "home." *See id.*

[140] *See* Demsetz, *Toward a Theory*, *supra note* 2, at 353 (which such examination does not exist in Demsetz's paper, he assumes that "there were no plains animals of commercial importance comparable to the fur-bearing animals of the forest" and does not base this assumption. By relying on it he skips the political stage in which a comparison between different attributes of property, commercial, cultural or personal, is made).

[141] *See* Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. 609, 648 (2002) (analyzing the economic history of the Bison and its overhunting despite land privatization by stating that "[o]pen access prevailed because white encroachment broke down tribal territories and because wild bison stocks were extremely costly to own . . . had the bison been less nomadic, the hide market might have generated a 'reindeer equilibrium' with private or group ownership of bison herds. By 1890, only those few, small, and scattered bison herds that were too far removed from white settlement remained").

[142] *See* Jonathan D. Greenberg, *The Arctic in World Environmental History*, 42 VAND. J. TRANSNAT'L L. 1307, 1342 (2009) ("Having driven the Siberian sable population to extinction, Russian traders shifted the fur trade toward the production of pelts from other species of Siberian animals . . . further distorting, if not destroying, traditional subsistence economies of Siberian indigenous peoples.").

by a monopoly.[143] The Hudson's Bay Company, incorporated by a British Royal Charter in 1670, had a monopoly over the Arctic Canadian fur trade.[144] Facing a major decline in beaver population, the Hudson's Bay Company discouraged beaver hunting in 1842 by placing quotas for individual posts and in the 1930s by establishing on the north shore of Rupert River a 7,000 square mile beaver preserve.[145] Instead of relying on private exclusive rights and individual internalization of gains and costs, it turned to regulatory intervention.[146] This monopolistic conservation effort challenges Demsetz's individualistic model.[147]

The aforementioned example of migratory animals is just one of many. A significant portion of the value individuals attribute to their land derives from collective characteristics which preservation accordingly demands a concentrated collective effort. Similarly, the market value of the private home—which, for many, is their most valuable asset—is influenced by the quality of the community in which it resides. Thus, if a person's home is located in an educated, law-abiding community, its value increases, while if it is located in a poor neighborhood, the opposite is true. This means that collective characteristics, such as the manners and characters of the neighbors, as well as the quality of the education system, police department, and health facilities, are intrinsic to the value of private property. In many cases, these characteristics demand a collective internalization effort by most, and a few bad apples are enough to spoil the barrel. Put differently, while in some cases private ownership effectively internalizes the effects of the conduct of property owners, in others the collective characteristics of private property demand collective internalization and the supervision of many.

Taking all this into account, we find that the collective and private aspects of property usage are deeply intertwined, and so a richer and fuller economic account must address the advantages of both private and collective control over the community's vital assets. In fact, in many cases, the value of the collective aspects of a person's house can equal that of the private aspects. Since the conduct of the few can lower the

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[143] *See id.* ("The Hudson's Bay Company (incorporated in 1670 by a British Royal charter granting a monopoly over the entire Arctic Canadian fur trade for 'the Governor and Company of Adventurers of England trading into Hudson Bay' dominated the trade for three centuries and remains in operation today." (internal citation omitted)).

[144] *See id.*

[145] McManus, *supra* note 133, at 46.

[146] Hudson's Bay Company was not a typical commercial corporation, as we know it today. It had a monopoly over fur trade, for "the Governor and Company of Adventurers of England trading into Hudson Bay." *See* Hudson's Bay Company, Our History, *available at* http://www.hbc.com/en/history.html [https://perma.cc/Q9NQ-CVLZ] (last visited Oct. 4, 2009) (cited by Jonathan D. Greenberg, *Exploring The Legal and Political Future of the Arctic: The Arctic in World Environmental History*, 42 VAND. J. TRANSNAT'L L. 1307, 1342 (2009)).

[147] *See* McManus, *supra* note 133, at 46 ("The evidence that the Hudson's Bay Company incurred costs to conserve the beaver population is inconsistent with the existence of exclusive and transferable rights in beaver resources within the Indian economy. If the Indians had expected to exclusively appropriate the returns to investment in beaver, there would have been no incentive for the Company to raise beaver population at their own expense. Certainly, the Company could not have enforced constrains on depletion as cheaply as the Indians themselves.").

value of the private property of many, preventing such harmful behavior cannot be achieved by isolated transactions between individuals, like in the case of hunting beavers, and it demands a concentrated effort. This effort is usually managed and monitored by governmental authorities, which levy compulsory taxes to fund their activity, but another possible method of management and monitoring this effect is by using social and cultural norms, as well as the existence of close-knit communities.

IV. THE MISSING CHARACTER

A. Blinding Strategies

Though it is less neat and linear than the efficacy-based analysis, one can study the evolution of property regimes without making efficiency the be-all and end-all. Presenting a counter narrative to that of Demsetz, Banner suggested an explanation for the transition to private ownership, an explanation which despite the fact that very little is actually known about them was again based on their historical example of the Montagnais.[148] Banner's explanation addressed distributive effects.[149] According to his version of the story, conflicts within the Montagnais motivated small Indian groups, interested in increasing their own power, to form an alliance with European settlers. These alliances allowed these small Indian groups to seize control of large parts of the tribe's hunting territory,[150] but at the same time lowered the costs European settlers had to pay for the Indians' commodities and lands as it was much easier to negotiate with the sole owner of a parcel of land than with 100 owners of a communal property.[151]

From a game-theory perspective, it can be argued that the alliance with European settlers shifted the market equilibrium from communal-property rights to private-property rights. Due to this alliance, the costs of exclusion were significantly reduced when the Indians took control over large hunting territories.[152] Moreover, taking a larger share of the

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[148] *See* Banner, *Transitions*, *supra* note 5, at 360 (noting that "noticing this difficulty leads to an alternative way of thinking about transitions between property regimes").

[149] *See id.* at 368 ("The answer resides in yet another pair of common features. These programs all had significant distributional consequences.").

[150] *See id.* at 360 (describing that "colonial settlement altered power relations within the tribe . . . by conferring more power to tribe members who had closer contact with the settlers").

[151] *Id.* at 368 (explaining how the balance of power was tipped in favor of the powerful colonizers).

[152] *See* McManus, *supra* note 133, at 39. From an anthropological and historical perspective, Indian hunting lands were neither communal nor private, and had strong familial aspects to them. Thus:

[A]nthropological studies. . .have found that most of the bands. . .have established exclusive hunting

collective hunting territory sharply increased these allied Indians' interest in a system of private land ownership. Surprisingly, the externalization, which took the shape of excessive use of communal property, and, in turn, justified developing a system of private-property rights, created a new collective-action problem as community members overexploited the collective pie by grabbing a disproportionate share.

In the case of open-access resources, Nash equilibrium is reached through overexploitation.[153] But when communities face the risk of losing disproportionate chunks of their collective lands, Nash equilibrium is reached by privatizing everything. In essence, overexploitation of communal resources became overexploitation of the collective process. Hastily assigning private ownership rights in lands was therefore a rational attempt to limit the overexploitation of the collective process in which communal property was disproportionally distributed.

Accordingly, distributive consequences can motivate interest groups to transform property regimes based on communal use into regimes based on private property rights.[154] The process of moving property into private hands as part of a regime change has considerable costs, and during this process interest groups can squeeze a disproportionate share from the collective wealth, thereby justifying their initial contribution to the collective process.[155] Basing his analysis on the incentive of these interest groups, Banner argues that changes in property regimes are more likely to occur in non-egalitarian societies than in egalitarian ones.[156] His work relies on the reasonable assumption that an inequitable distribution of public wealth would not be tolerated by an egalitarian society.[157]

One of the most important and wide-scale property-system transitions in history took place between the fifteenth and nineteenth centuries, in the stratified society of medieval England.[158] What is today

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territories which are held by individual families and have been passed on through successive generation of the same family. These territories are delineated clearly enough to be mapped and their establishment either precedes or was roughly coincident with the beginnings of the trade.
Id. See also Avner Greif, *Family Structure, Institutions, and Growth: The Origin and Implications of Western Corporatism*, 96 (2) AM. ECON. REV. (2006) (discussing similar observations on the role of family in commercial settings).

[153] *See* Lewinsohn-Zamir, *supra* note 44, at 386 (explaining free riding as the source of the prisoner dilemma and the tragedy of the commons).

[154] *See* Banner, *Transitions*, *supra* note 5, at 368 ("These programs all had distributional consequences.").

[155] *See id.* ("The expected payoffs to the winners were large enough to provide them with an incentive to bear a disproportionate share of the administrative costs of reorganization.").

[156] *Id.* at 369-70 ("This account suggests the general (and testable) proposition that transitions between property regimes are more likely in less egalitarian societies.").

[157] *See generally* Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. LAW & ECON. 393, 410 (1995) (noting, *inter alia*, that legal rules of first possession were crafted with the purpose of mitigating exploitive use of resources "the law recognizes the potential for dissipation under first possession . . . and is crafted to mitigate it").

[158] *See generally* JAMES BOYLE, THE PUBLIC DOMAIN, ENCLOSING THE COMMONS OF THE MINDS 43 (Yale University Press, 2008) ("It fits and starts from the fifteenth to the nineteenth century[.]").

famously known as the first enclosure movement refers to the conversion of English open fields—available for common use by inhabitants, copyholders, and freeholders in a feudal society—into private property belonging to a single owner, usually the lord of the manor.[159] The assignment of private property rights, by way of internalizing the costs and benefits of property usage through centralized management,[160] may have ultimately increased efficiency and facilitated England's transition from a rural economy to a money-based market economy.[161] However, it also gave rise to distribution consequences that had a meaningful impact on the socioeconomic balance of medieval England.[162] In the English feudal system, which was based on the lord-vassal relations and the dichotomy between lords and peasants, these distributional inequalities, as Banner assumed,[163] could not be challenged nor could they interfere with the collective process of transforming the property system.[164]

While the first enclosure movement fits perfectly with Banner's analysis, transitions of property regimes still did occur in egalitarian societies.[165] One major example is the second enclosure movement, a term which signifies the expansion of intellectual property rights.[166] This expansion is expressed in the Sonny Bono Copyright Term Extension Act,[167] which extended copyright duration significantly.[168] Intellectual products, like copyrights and patents, are characterized by non-rivalry—

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[159] *See generally* J. A. YELLING, COMMON FIELD AND ENCLOSURE IN ENGLAND, 1450-1850 (Hamden, Conn.: Archon Books, 1977).

[160] *See* Demsetz, *Toward a Theory*, *supra* note 2, at 356 (describing the basic Demsetzian view regarding the efficiency of private property rights). "The resulting private ownership of land will internalize many of the external costs . . . [t]his concentration of benefits and costs on owners creates incentives to utilize resources more efficiently." *Id.*

[161] *See* Donald N. McCloskey, *The Enclosure of Open Fields: Preface to a Study of Its Impact on the Efficiency of English Agriculture in the Eighteenth Century*, Journal of Economics History 15, 30–32 (1972) (providing an efficiency-based analysis of the first enclosure movement and noting that "[a]n explanation of the timing of enclosure is necessary for measuring its impact on efficiency").

[162] For a criticism of the social aspects of the enclosure movement, see THOMAS MORE, UTOPIA (New York: W. J. Black, 1947); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Boston: Beacon Press, 1957) ("But it is also here that the weak underbelly of the doctrines of the selfregulating markets are exposed (at least to those who pay no attention to the social consequences of the doctrines)!").

[163] *See* Banner, *Transitions*, *supra* note 5, at 369.

[164] *See* THOMAS ROBERT C. ALLEN, ENCLOSURE AND THE YEOMAN (New York: Oxford University Press, 1992) (providing a critical analysis of the enclosure movement).

[165] *See generally* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES, TRANSFORMATION THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME. (Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, eds., Oxford University Press 2010).

[166] James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 6666 LAW & CONTEMP. PROBS. 33, 37 (2003) ("We are in the middle of a second enclosure movement. It sounds grandiloquent to call it 'the enclosure of the intangible commons of the mind,' but in a very real sense that is just what it is. True, the new state-created property rights may be 'intellectual' rather than 'real,' but once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights.").

[167] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

[168] *See* Boyle, *supra* note 166, at 42 (identifying the Sonny Bono Copyright Term Extension Act as satisfying the implied need to strengthen intellectual property rights, which is triggered by "the lowering of copying and transmission costs").

that is, their consumption by one does not prevent or interfere with their consumption by others—and virtual non-excludability, which is the result of them being easy to replicate.[169] This thwarts their pricing by market mechanisms.[170] Consequently, intellectual products, much like public goods and open-access resources, suffer from the free-rider problem[171]—this means that people would not invest in producing them, if they knew that everybody could enjoy their creation freely and that they would not be fully reimbursed.[172]

Changes in the property regime of intellectual products can be partially explained by a Demsetzian cost-benefit analysis, according to which new regimes could lower the externalities generated by the use of intellectual property.[173] A contrary paradigm would stress the distribution

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[169] *Compare with* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 10 (1969) [hereinafter *Information and Efficiency*]. Demsetz argues that high penalties would prevent illegal replication and violation of private property rights in intellectual property. *Id.* ("The degree to which knowledge is privately appropriable can be increased by raising the penalties for patent violations and by increasing resources for policing patent violations. . .It is true that all "theft" of information cannot be eliminated at reasonable cost. But knowledge is not unique. . .since the same can be said of any valuable asset. The equilibrium price that is paid to producers of automobiles will in part reflect the fact that there is a positive probability that the purchaser will have his automobile stolen.").

[170] *See* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616–17 (Nat'l Bureau Comm. for Econ. Res., Comm. on Econ. Growth of the Soc. Sci. Res. Council ed., 1962) (noting that where the production of information is for *invention*, the risk of information misallocation is significant because "[a]ny information obtained, say a new method of production, should, from the welfare point of view, be available free of charge (apart from the cost of transmitting information). This insures optimal utilization of the information but of course provides no incentive for investment in research. In an ideal socialist economy, the reward for invention would be completely separated from any charge to the users of the information. In a free enterprise economy, inventive activity is supported by using the invention to create property rights; precisely to the extent that it is successful, there is an underutilization of the information. The property rights may be in the information itself, through patents and similar legal devices."). Demsetz offers a counter argument, according to which the pricing of the market is needed, since it signals market's needs and evaluation: without it we would not know the true value (in regards with desirability and quality), of relevant assets. Demsetz, *Information and Efficiency*, *supra* note 169, at 11 ("[O]ne of the main functions of paying a positive price is to encourage others to invest the resources needed to sustain a continuing flow of production, the efficiency with which the existing stock of goods or information is used cannot be judged without examining the effects on production . . . . If, somehow, we knew how much and what types of information it would be desirable to produce, then we could administer production independently of the distribution of any given stock of information. But we do not know these things."

[171] Demsetz acknowledges the free-rider problem raised in the production of intellectual property. Demsetz, *Information and Efficiency*, *supra* note 169, at 13 ("If freeloading is allowed, that is, if users of knowledge are given the right to knowledge without paying for it, some prospective users will be inclined to stay out of any cooperative agreement between users . . . they stand to benefit from research paid for by other users. This may lead to an underinvestment . . . in research."). Demsetz handles this failure by assigning private property rights, which exclude all others. *Id.* ("If the legal system is changed so that producers of research have property rights in their research output, they will be able to transfer legal title to purchasers who can then exclude non-purchasers from the use of the research.").

[172] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 10 (1st ed. 2004) ("A person can enjoy the full benefit of the statute, regulation, or other policy in question without having contributed a dime to the collective effort necessary to get it promulgated.").

[173] *Id.* at 21 (maintaining that the historical progress of intellectual property can be easily "explained by reference to material and social changes that increased the social value of such rights. When copying is expensive relative to the cost of expression . . . the value of intellectual property

consequences that a regime of intellectual property rights produces. Here one would focus on the role interest groups like copyright holders played in the enactment of the Sonny Bono Act,[174] while emphasizing the fact that the general public remained passive.[175] In other words, despite Banner's "general proposition," [176] even in egalitarian societies, or at least liberal democracies, distribution consequences can play a central role in overcoming collective-action failures. As will be explained in detail later, however, these transitions are frequently influenced and navigated by complicated strategies that camouflage their distributional aspect. These are blinding strategies, which mask the true incentives behind the transition, as well as the full scope of socioeconomic distributional consequences.

There are various blinding strategies for hiding private interests in the collective decisionmaking process. One such strategy is overburdening the process with redundant and unprocessed information, which increases the costs of an "informed" collective decisionmaking process where only being informed can enable analysis of distribution effects. Another strategy is using a "squeezed timetable," which limits the possibility of meaningful assessment of possible alternatives and distributive effects.[177] These and other blinding strategies turn the public and process members into blinded riders, who are oblivious to the real reasons behind the collective process and its distribution repercussions. In fact, since at their core these strategies aim to raise transaction costs in an already complex process, they may result in inefficient resource allocation.[178]

Another far subtler blinding strategy centers on constructing a framework of thought, limiting its scope and utilizing distorted

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rights is limited; authors and inventors do not need them in order to be protected from copying that is so fast and cheap that it prevents them from recovering their fixed costs of expression or invention.").

[174] *Id.* at 16 ("Copyright owners were generous contributors to House and Senate sponsors and supporters of the Sonny Bono Act[.] . . . [I]n 1996, motion picture and music interest donated $1,419717 to six of the act's eight sponsors and cosponsor[.] . . .Disney, MCA, Viacom, Paramount Pictures, and Time Warner all donated conspicuously large amounts.").

[175] *See id.* at 14 (explaining that interest groups control the legislative process of laws, having to do with intellectual property, by noting that "[t]he enforcement of an exclusive right to intellectual property can shower economic rents on the holder of that right, but copiers can hope to obtain only a competitive return. This should make it easier to organize a collective effort of copyright and patent owners to expand intellectual property rights than it would be to organize a copiers' interest group to oppose such an expansion.").

[176] *See* Banner, *Transitions*, *supra* note 5, at 369–70 ("This account suggests the general (and testable) proposition that transitions between property regimes are more likely in less egalitarian societies.")

[177] *See id.* at 367 ("All would have been extraordinarily expensive—perhaps too expensive to have occurred—had they been scrupulously conducted."); *see also id.* at 370 ("Any transition, whether efficient or inefficient, has to be accomplished through some political mechanism. Why does this kind of political decision seem to have a bias in the direction of efficiency?").

[178] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 16 (1960) (claiming that when transaction costs are high, "the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates"). However, the players' aim, as suggested in the article, is to increase transaction costs in collective bargaining processes, as part of a blinding strategy. Without this strategy, the likelihood of reaching an agreement would go down. *Id.*

perceptions of objectivity and proficiency.[179] This strategy is based on guiding individuals to concentrate on a limited set of two or three options and neglect to examine or even acknowledge the existence of countless other possibilities, some of which may well be superior to the ones proposed.[180] A great deal of research has been dedicated to the study of human rationality and its psychological limitations. An important work on cognitive biases, by psychologists Daniel Kahneman and Amos Tversky, shows that questions can be framed in different ways and that the way in which a question is phrased can psychologically tilt an individual to decide in a desired manner.[181]

Writing about collective actions, political science professor Russell Hardin suggested that formulating a limited framework of thought, based on the conflict between personal and collective interests, could increase cooperation between individuals while maintaining the illusion of choice.[182] That is to say, when we accept our bounded rationality and earthly limitations it becomes clear that framework of thought is of vital importance to individuals' ability to form an opinion and choose rationally between competing alternatives.[183]

Another successful blinding strategy, which prevents public awareness and oversight, is based on the existence, or merely the false perception, of emergencies.[184] Strategic players can use crises as part of a blinding strategy in two ways. The first is using a time of crisis for passing collective resolutions and dressing them as proper responses to immediate collective challenges, while in truth any correlation between the resolutions and the crisis is purely circumstantial.[185] Such proposals

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[179] Barak Atiram, *The Wretched of Eminent Domain: Holdouts, Free-Riding and the Overshadowed Problem of Blinded-Riders*, 18 BERKELEY J. OF AFR.-AM. L & POL'Y 52, 81 (2016) ("By building on the misleading presumptions of objectivity and proficiency, planners can frame the collective question in a way that fits only one or a minimal set of solutions while maintaining the illusion of choice.").

[180] *Id.*

[181] *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981) ("The frame that a decision-maker adopts is controlled partly by the formulation of the problem and partly by the norms, habits, and personal characteristics of the decision-maker.").

[182] *See* HARDIN, *supra* note 34, at 114 (examining studies of influence of individual ignorance and misunderstanding on collective actions). Hardin points out that: "It may also be that having to make a choice in the presence of others tends to lead people to act morally, especially when the choice is carefully defined as a conflict between personal and group interests." *Id.*

[183] James G. March, *Bounded Rationality, Ambiguity and the Engineering of Choice*, 9 BELL J. OF ECON. 587, 598 (1978) ("The answer, I believe, lies in several things, some related to the ideas of bounded rationality, other more familiar to human understanding as it is portrayed in literature and philosophy than to our theories of choice.").

[184] David H. Clark & William Reed, *The Strategic Sources of Foreign Policy Substitution*, 49 AM. J. POL. SCI. 609, 610 (2005) ("W]hen democratic leaders make public threats, they constrain themselves from backing down because to do so would incur punishment by the domestic audience.").

[185] *See* James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 580 (1994) ("If state leaders are sometimes impatient for a deal, it seems more often due to domestic political pressures (e.g., American elections or Gorbachev or Yeltsin's need for cash) than to a pure preference by the leader for "territory today rather than next month.'").

are expected to pass without serious scrutiny of their consequences, due to public pressure and a demand for quick action.[186] The problem is that the public cannot truly appreciate the value of this chosen path.[187] The second strategy is more active. Rather than wait for market crashes to occur, the second strategy builds up the public's sense of an emergency, even when in reality there is no real crisis. This is possible because public opinion can often be shaped and manipulated by trends. Public frenzy and fear allow strategic players to stay under the radar and increase their share without real scrutiny of the distribution effects of their proposals.

Demsetz may have employed two types of blinding strategies in his own article: one is utilizing the sense of an economic crisis, and the other is constructing a limited framework of thought. A legal scholar enjoys wide discretion in defining the problem he is studying and formulating a set of possible solutions to that specific problem. It does not matter whether the writer intentionally chose to emphasize certain facts, or whether the writer's identity as well as political socioeconomic tendencies *de facto* influenced that choice. What does matter is that Demsetz's drive to convince the reader of the advantages of a private property system led him to construct a framework of thought which blinded his readers. It is therefore important to understand how blinding strategies can be employed by legal scholars or collective-action leaders as persuasive mechanisms.

The first option which Demsetz offers in order to illustrate the problem of overexploitation in open-access resources is that of the Montagnais hunting practices in common lands. Though there is little evidence regarding Indian hunting practices, he ties this problem with the transition to a property system based on private ownership.[188] A careful reading of the article reveals that there is really no logical link between the two, and that the connection is made through an elaborate framework constructed by Demsetz.[189] He presents only two options: one which we know little about, and another which his analysis teaches us is the cure to the first. With scant information about the Montagnais it seems that the readers have few options. If they only know what Demsetz tells them, they can either accept his analysis or reject it, but that is about it. They would have to go through the trouble of digging up more information about other common-land examples and about these tribes and their customs and hunting practices before they could begin to ascertain if

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[186] *Id.* at 577 ("Crises are frequently characterized as 'wars of nerves.' Measures such as troop deployments and public threats make crises public events in which domestic audiences observe and assess the performance of the leadership.").

[187] The central feature of blinding strategies is raising the transaction costs of anyone who tries to unravel the benefits, costs, and motivations underlying the collective action.

[188] Ronald H. Coase, *The Lighthouse in Economics*, J. L. & ECON. 357, 374–75 (1974). Criticizing unsubstantiated illustrations, Coase explains that an illustration can be: "simply plucked out of the air . . . to provide 'corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.'" *Id.*

[189] *See generally* Demsetz, *Toward a Theory*, *supra* note 2.

there were other possible questions to ask and different solutions to examine.

Banner rightfully pointed out that we know very little about the Montagnais.[190] Still, we can try to put aside the framework constructed by Demsetz and formulate different questions than the ones he did. One way to do this is to imagine how common use of land really works. If open-access resources suffer from overexploitation, are there not better and worse places to overexploit? Are there certain parts of the land where a hunter can get away from winds or the sun? Are there certain areas of the Montagnais land which are better for placing traps? How did the Montagnais make their traps? Did they place them on the ground or between trees? How did they prevent others from unintentionally damaging their traps? How did they prevent others from taking their spoils once an animal was caught in a trap? Did they all overexploit the common lands in the same way? Were some groups better than others in overexploitation? Did these groups compete with one another? Did older Indians compete with younger ones? Were there struggles over food, spoils, and desired hunting grounds? How did the Montagnais settle such disagreements? These and other questions—the answers to which answers can certainly be relevant for the Montagnais in a possible transition to a new property-rights regime—can provide the foundation for a different framework of tackling the whole subject. And this "other" framework can yield very different conclusions than that of Demsetz.[191]

Of course, working within the Demsetzian framework has profound advantages. It sets out a clear cost-benefit analysis, which provides a foundation and a language which people can use to formulate their arguments, philosophies, and critiques.[192] More to the point, Demsetz offers this as a simple model which can explain property-system transitions—especially transitions from common-land to private ownership.[193] It is therefore important to note that despite the canonical status that Demsetz's analysis of transitions between property regimes enjoys in the legal discourse, his work does not help us understand what common property really is.[194] It is also not clear whether private property is really the only solution to the problems of common ownership and, if there are other possible solutions, it is not clear why private property was

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[190] *See* Banner, *Transitions*, *supra* note 5, at 360 ("One could tell this kind of story about the Montagnais as well, given how little we know about them.")

[191] *See generally* Demsetz, *Toward a Theory*, *supra* note 2.

[192] *Id.* at 348.

[193] *See* Coase, *supra* note 188, at 374–75. The lighthouse example is not supported by much evidence or research: "Despite the extensive use of the lighthouse example in the literature, no economist, to my knowledge, has ever made a comprehensive study of lighthouse finance and administration. The lighthouse is simply plucked out of the air to serve as an illustration." *Id.*

[194] *See id.* at 376 ("We may conclude that economists should not use the lighthouse as an example of a service which could only be provided by the government. But this paper is not intended to settle the question of how lighthouse service ought to be organised and financed. This must wait more detailed studies. In the meantime, economists wishing to point to a service which is best provided by the government should use an example which has more solid backing.").

chosen instead of other solutions.[195] Demsetz's analysis simply does not provide us with necessary information in these regards, and without realizing it, this leads us to a binary mode of thinking.[196]

It is then not surprising that most scholars worked within Demsetz's framework, and conveyed their objections or approval using Demsetz's own terms.[197] One of the main criticisms against Demsetz's work, raised by scholars like law professors James Krier and Carole Rose, concentrated on the fact that a system of private ownership was a collective good and therefore establishing such a system required overcoming the collective action problem, which arose in open-access resources.[198] Despite its appeal, this criticism cannot shake the foundations of Demsetz's analysis since it still operates within the binary framework of either private- or common-property systems.[199] In other words, it is very difficult not to accept Demsetz's assumptions considering the little we know—the little he tells us—about the Montagnais,[200] and once we do accept those assumptions, it limits the scope of our critique.[201]

B. Blinded Riders & The Production of Public Goods

A shortsighted vision of the process of producing public goods concentrates on the end product: for example, a specific lighthouse or highway. But the thesis promoted here looks closely at a more preliminary stage. Before dealing with overhunting, the community must examine and acknowledge the various problems it faces beyond just

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[195] *Id.*

[196] There are of course dozens of articles dealing with property regimes, with different takes on Demsetz's analysis. Nevertheless, some scholars, most students, and even judges, rely on only a small part of them. Thus, Demsetz's article, as is, has become central to property theory.

[197] *See* Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S333 (2002) (noting that "Demsetz . . . offered a sophisticated account of the benefits of property, and included one compelling illustration of his thesis. But the article said nothing about the factors that determine the costs of a property regime. It said virtually nothing about the precise mechanism by which a society determines that the benefits of property exceed the costs[.] . . . And it said virtually nothing about the form that emergent property rights are likely to take[.]").

[198] *See* Krier, *Tragedy, Part Two*, *supra* note 59, at 338 ("Even if Hardin had discovered Demsetz he would only have been misled, because the same mistake appears in *Toward a Theory of Property Rights*; Demsetz ends up begging the same question, assuming the same problem away, implicitly arguing that a community plagued by noncooperation can improve its condition by cooperating."); Rose, *supra* note 63, at 52 ("The existence of a property regime is not predictable from a starting point of rational self-interest; and consequently, from that perspective, property needs a tale, a story, a post-hoc explanation. That, I think, is one reason Locke and Blackstone, and their modern day successors [like Demsetz], are so fond of telling stories when they talk about the origin of property.").

[199] *See* Krier, *Tragedy, Part Two*, *supra* note 59, at 338; Rose, *supra* note 63, at 52.

[200] See Banner, *Transitions*, *supra* note 5, at 360 ("One could tell this kind of story about the Montagnais as well, given how little we know about them.").

[201] One can therefore wonder whether Demsetz's choice to focus on the Montagnais was also strategic.

overhunting, prioritize these problems based on its culture and traditions, and propose different ways to deal with these collective problems. In other words, one of the important functions of the collective process which produces public goods is to examine and choose between competing collective goods. An example of this examination or choice is the review of competing routes for a highway, or competing possible locales for building a lighthouse. Moving away from a narrow vision of the collective process—which centers around the idea of a preordained outcome—toward a richer depiction of collective goods reveals the intricate web of strategies and incentives that are part and parcel of the preliminary stages of the collective process, as well as the essential role that distributive concerns play in the strategies of individuals and interest groups.

This article puts emphasis on the incentive of small interest groups, or as law professor Marc Galanter calls them, "repeat players,"[202] to hide their disproportionate gains under the guise of promoting cooperation, which this article refers to as a blinding strategy. When such blinding strategies are not implemented, the general public becomes aware that small groups are expected to receive the bulk of the collective gains—as a result, members of the public may choose not to take part in the collective action.[203] This would lead to a cooperation breakdown, and to underproduction of collective goods.[204] Therefore, small interest groups have a strong incentive to keep the public in the dark regarding their disproportionate private gains.[205] This incentive is amplified in liberal societies, where egalitarian values play a central role in shaping the socioeconomic culture.[206]

In the short term, blinding strategies may hide disproportionate gains and be mistakenly perceived as promoting cooperation.[207] However, over time, the existence of private interests is likely to become

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[202] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) ("We might divide our actors into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time.").

[203] *Id.* at 150 ("Reformers will have limited resources to deploy and they will always be faced with the necessity of choosing which uses of those resources are most productive of equalizing change.").

[204] *Id.* at 151 ("Rule changes which relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the costs of opponents-for instance authorization of class action suits, award of attorneys fees and costs, award of provisional remedies-these are the most powerful fulcrum for change.").

[205] *Id.* ("[F]or instance authorization of class action suits, award of attorney's fees and costs, award of provisional remedies-these are the most powerful fulcrum for change. The intensity of the opposition class action legislation and autonomous reform-oriented legal services such as California Rural Legal Assistance indicates the 'haves' own estimation of the relative strategic impact of the several levels.").

[206] *Id.* at 147 ("There is, for example, in American law (that is, in the higher reaches of the system where the learned tradition is propounded) an unrelenting stress on the virtues of uniformity and universality and a pervasive distaste for particularism, compromise and discretion.").

[207] *See* Galanter, *supra* note 202, at 104–24 (arguing that the strategic advantages of repeat players in the legal system are strengthened by the presence of lawyers, basic features of the court, and administrative, judicial, and legislative rules).

apparent and cause diminished public trust in collective actions.[208] When it is clear that a collective action would favor small groups at the expense of the general public, individuals may "choose" not to contribute such collective action, even when the action has non-excludability or non-rivalry features.[209] However, there would be no free-riding concerns in such a case, and therefore no place for legal coercion.[210] The decision of individuals not to take part in the collective action may result from their disapproval of the collective-action structure, and their passive role in it as blinded riders.[211] In such circumstances, conceptualizing individuals as rational free riders limits our ability to understand and tackle distribution concerns in the production of public goods.

Facing competing collective goods with competing distributive outcomes, people have to choose between "having lunch"—sitting at the negotiation table, learning about relevant options, and promoting their interests and preferences—and "being lunch"—finding that the distributive result of the collective bargain favors others.[212] In many cases, different people hold different positions and therefore cannot automatically free ride on the work of another.[213] In other words, collective goods are non-rivalrous, but they are usually also non-homogenous in their distribution effects.[214] This means that avoiding the negotiation table has its costs, and so-called "free riding" is in no way free.[215] As a result, the collective production of non-excludable goods can be at least partially excludable.[216]

It is probably true that the outcome reached at the end of the negotiation process is a non-excludable collective good.[217] However, the preliminary bargaining process, in which competing problems and solutions are examined, may bring about adverse distributive effects and material inequalities.[218] Today, the focus in legal scholarship is on the end result of the collective action and on anticipated cooperation failures, such as free riding. But taking all of the above into account, it is not clear whether this focus is justified or if the focus of legal socioeconomic attention should not fall on the collective process itself, as well as its nature and implications.

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[208] *See* OLSON, *supra* note 37, at 7 (arguing that collective actions serve no purpose where individual action can better serve one's interests).

[209] *See id.* at 48 (explaining that the more inadequate the reward to the individual is for participating in collective action, the less likely larger groups will be to contribute to the pursuit of collective goods).

[210] *See id.* at 27–28 (outlining the free-rider problem in the context of collective goods to which the individual must contribute in order to maintain the supply).

[211] *See* Galanter, *supra* note 202, at 124–25 (noting that claimants often decide not to take action when they know that the cost of litigation will outweigh its benefits).

[212] *See* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 131 (2004).

[213] *See* Atiram, *supra* note 179, at 72.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at 78.

[218] *Id.*

Law professor Meir Dan-Cohen's distinction between decision making rules and rules of conduct in criminal law, which he calls "acoustic separation," can serve as an illustration of the strategic need to hide certain information from individuals in order to maintain the legal framework.[219] In collective bargaining, a reduction in cooperation costs can be reached through a similar pattern of separation—a separation between the information regarding distributive aspects of competing alternatives held by blinded riders, and that held by collective-action planners.[220] Using deliberate blinding strategies as a mechanism for increasing cooperation was also examined by law professor Henry Smith in his analysis of semicommon property regimes.[221]

The characters missing from Demsetz's account then are those individuals who have dominated the preliminary process, in which the importance of the problem of overhunting as well as its solution were discussed and decided—all without raising competing problems, or blinding the public to their existence, and the existence of different alternatives to overcoming overhunting. While blinding strategies can be used for a good cause, by increasing cooperation in the preliminary stage—the stage in which problems and corresponding solutions are formulated—they can also be used for less noble purposes, such as hiding the exploitation of the collective action by leaders.[222] Accordingly, and in contrast with economist John Harsanyi's demand for complete ignorance of one's relative position,[223] as well as philosopher John Rawls' famous veil of ignorance in his *Theory of Justice*,[224] strategies to achieve collective ignorance can be used to blind and distract individuals from the role private interests play in shaping collective goods and the collective process.[225]

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[219] *See generally*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) ("The general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public. Imagine further that each of the two groups occupies a different, acoustically sealed chamber . . . acoustic separation.").

[220] Atiram, *supra* note 179, at 78–79 (discussing how in collective bargaining cooperation costs can be reduced when there is informative separation of the "data held by blinded riders and the data held by leaders").

[221] *See* Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL. STUD. 131, 137–40 (2000).

[222] Atiram, *supra* note 179, at 55 ("[B]linding strategies can also be employed for the less than noble purpose of covering up the continuous disregard of those who are not represented in the collective process.").

[223] *See generally* John C. Harsanyl, *Cardinal Utility in Welfare Economics and In The Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953) ("[T]he person who made this judgment had to choose a particular income distribution in complete ignorance of what his own relative position . . . would be within the system chosen.").

[224] *See* JOHN RAWLS, A THEORY OF JUSTICE, 304–09 (1971) ("I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles . . . .").

[225] Atiram, *supra* note 179, at 55 ("The usage of blinding strategies can produce a misleading appearance of public purpose and overall efficiency even though the extent of the harm inflicted on the less fortunate was purposely or indifferently ignored.").

C. Blinded Rider vs Conscious Collaboration

Criticizing the work of Demsetz,[226] legal commentators such as Krier and Rose maintained that property law is a product of collective action.[227] This view contradicts the common depiction of private property as based on the inability of individuals to cooperate.[228] Descriptively, Rose and Krier's claim is convincing, even though the property regime which Demsetz presented in his famous article was based on private retaliation.[229] The true strength of their claim, however, is normative rather than descriptive. In an egalitarian and liberal society, the collective action which shapes legal rules and institutions should not be based on market equilibriums or the struggles of interest groups.[230] Normatively, the law should direct individuals to take part in collective actions, from which they and the general public could benefit and in which they could express democratically, their thoughts, experiences, and even their feelings.

Focusing on free-riding and collective-action problems is misleading, since it causes us to define the problem in terms of negative externalizations and look at individuals as free riders who advance their own interests at the expense of others.[231] The emphasis is on the end-result, and not on the preliminary political stage in which people form opinions and aspirations regarding their community, individual identity, and moral, social, and cultural belongings.[232] Others emphasized the

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[226] *See* Demsetz, *Toward a Theory*, *supra* note 5, at 348 (explaining the transition between property regimes through a cost-benefit analysis, while neglecting the collective action problem of forming a new property regime).

[227] *See generally* Rose, *supra* note 63; Krier, *Tragedy, Part Two*, *supra* note 59.

[228] Krier, *Tragedy, Part Two*, *supra* note 59, at 338 ("Yet an inability to organize, or coordinate, is the problem to begin with."); Rose, *supra* note 63, at 37 (raising the same concern, as part of her overall criticism of the inconsistencies in the idea of individuals as self-interested, wealth maximizers).

[229] *See* Demsetz, *Toward a Theory*, supra note 2, at 353.

[230] *See* Banner, *Transitions*, *supra* note 5, at 369–70 ("This account suggests the general (and testable) proposition that transitions between property regimes are more likely in less egalitarian societies.").

[231] *See id.* at 362 ("Everyone faces the incentive to free ride on the organizational efforts of others. The problem is starkest with respect to the original transition between property systems, the one that took place with the very first human efforts to create property rights.").

[232] Existing scholarship has already placed various limitations on the collective action problem. Olson analyzed the unique circumstances in the case of several small groups of different sized small groups. *See* OLSON, *supra* note 37, at 33–34 ("[C]ertain small groups can provide themselves with collective goods without relying on coercion or any positive inducements apart from the collective good itself. This is because in some small groups each of the members, or at least one of them, will find that his personal gain from having the collective good exceeds the total cost of providing some amount of that collective good.") The role of *byproduct* activities performed by existing organizations pursing collective goods. *Id.* at 132–34. *See* Pamela Oliver, *If You Don't Do It, Nobody Else Will: Active and Token Contributors to Local Collective Action*, 49 AM. SOC. REV. 601, 602 (1984) ("[W]e expect that larger contributions will come from people who value neighborhood collective goods more or who experience lower costs from their contributions. A third factor, social ties among group members, is stressed by sociologist[.]"); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, And Law*, 102 MICH. L. REV. 71,76 (2003) ("The reciprocity theory suggests an alternative policy, namely, the promotion of trust. If individuals can be made to believe

communitarian approach to property institutions that centered around a cooperative depiction of individuals, rather than one which describes them as merely self-interested and rational.[233] Following this line of thought, the preliminary stage—which precedes the fulfilment of a specific public good—can provide individuals with the opportunity to form social bonds, take part in the process which shapes their socioeconomic surroundings, gather valuable knowledge regarding the concerns of other members of society, and so forth.[234]

As Demsetz's efficiency perspective is individual and self-centered, it marginalizes these collective features of private property rights, and overstresses the role of private property in the production of collective goods. On the other hand, by portraying the transition to private ownership as a collective action, and therefore proof of the ability of individuals to cooperate,[235] the communitarian theory links market

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that others are inclined to contribute to public goods, then they can be induced to contribute in turn, even without recourse to incentives."); ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION 10-11 (New York: Basic Books, 1984) ("The reasoning does not apply if the players will interact an indefinite number of times . . . with an indefinite number of interactions, cooperation can emerge."); Anne E. Sartori, *The Might of the Pen: A Reputational Theory of Communication in International Disputes*, 56 INT. L. ORG. 121, 122 (2002) ("[T]he model I present here has a theoretical implication about when bluffs will succeed: Diplomacy, whether it be honest or a bluff, is most likely to succeed when a state is most likely to be honest. A state is most likely to be honest when it has an honest reputation to lose, a reputation gained either by its having used diplomacy consistently in recent disputes or having successfully bluffed without others realizing its dishonesty."); *see also* MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 104 (CAMBRIDGE UNIVERSITY PRESS, 1987) ("We have seen that if Cooperation is to occur at all, then at least some of the players must be *conditional* Cooperators[.] . . . Cooperation may still be rational for the rest—provided that there are some players who Cooperate conditionally on the Cooperation of *all* the other Cooperators, both conditional and unconditional, and that all the Cooperator' discount rates are not too great."); Joaquim Silvestre, *Wicksell, Lindahl and the Theory of Public Goods*, 105 SCAND. J. ECON. 527, 542 (2003) ("He first discusses the case where "everyone agrees on the nature of the public services to be produced, leaving only the question of their extent and the distribution of the cost."). Silvestre assumes that "collective goods do not have the same order of priority for all," in which case, "each party must undertake to pay a greater share than the other toward the cost of those services which each finds most useful.").

[233] *See* Rose, *supra* note 63, at 51 ("[P]eople have to cooperate to set up the system—they have to get themselves organized, go to meetings, discuss the options, figure out who gets what and how the entitlements will be protected. Even if the property regime is just a matter of customary practices that develop over time, the participants have to cooperate to the extent of recognizing and abiding by the indicia of ownership that their customs set out . . . Thus a property system depends on people not stealing, cheating and so forth, even when they have the chance—that is, all the participants, or at least a substantial number of them, have to cooperate to make a property regime work."). This kind of focus presents a wider range of the individual's order of preferences than that of the self-interested, rational individual. This account suggests placing exogenous interests alongside private ones, and can therefore facilitate cooperation in the creation of public goods.

[234] *Id.* ("[P]roperty regimes generally, taken as an entire system, has the same feature as a common property. This is most notable at the formative stage. At the outset of private property, people have to cooperate to set up the system—they have to get themselves organized, go to meetings, discuss the options, figure out who gets what and how the entitlements will be protected.").

[235] Krier, *Tragedy, Part Two*, *supra* note 59, at 338; Rose, *supra* note 63, at 51 ("[P]eople have to cooperate to set up the system—they have to get themselves organized, go to meetings, discuss the options, figure out who gets what and how the entitlements will be protected. Even if the property regime is just a matter of customary practices that develop over time, the participants have to cooperate to the extent of recognizing and abiding by the indicia of ownership that their customs set out[.] . . . Thus a property system depends on people not stealing, cheating and so forth, even when they have the chance—that is, all the participants, or at least a substantial number of them, have to cooperate to make a property regime work.").

equilibriums to the collective decisionmaking process.[236] And yet, it is vital to draw a clear normative line between market equilibriums and the strategic behavior of individuals on one side, and the decisionmaking process—which shapes property institution and rules—on the other.[237] This normative connection is meant to show us that property rights and property systems are the product of a collective, conscious collaboration, and not merely one of market pressures and interest groups.[238]

D. Racially Restrictive Covenants: The Hidden Aspect of Property's Utilitarian Theories

Racially restrictive covenants that "ran with the land" were common in the early twentieth century and were administrated through a concentrated effort which included getting them adopted, signed, and filed with the recorder of deeds.[239] Following the First World War and the possibility for employment in the developing automobile industry or even civil service, racially restrictive covenants came as a response to the great migration of African Americans from the oppression of the rural American south to the cities of the north and west—among them, Chicago.[240] At their core, racially restrictive covenants are the embodiment of the collapse of the private/public dichotomy,[241] since they represent individuals' essential interest in the identity and character of their public sphere. That is why, aside from such legal means as restrictive covenants and the passage of racial zoning ordinances, informal means were employed by the community members themselves to preserve racial segregation ranging from disapproval, threats, arson, riot, and even homicide.[242]

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[236] Rose, *supra* note 63, at 51 ("Even if the property regime is just a matter of customary practices that develop over time, the participants have to cooperate to the extent of recognizing and abiding by the indicia of ownership that their customs set. And indeed, even after a property regime is in place, people have to respect each others' individual entitlements out of cooperative impulses, because it is impossible to have a continuous system of policing and/or retaliation for cheating. Thus a property system depends on people not stealing, cheating and so forth, even when they have the chance—that is, all the participants, or at least a substantial number of them, have to cooperate to make a property regime work.").

[237] *Id.* ("A property regime, in short, presupposes a kind of character who is *not* predicted in the standard story about property.").

[238] Conscious collaboration is presented here as the opposite of the hit-and-miss, random market equilibriums, or private forces and retaliation that can lead to the establishment of a new property system.

[239] *See* Allen R. Kamp, *The History Behind Hansberry v. Lee*, 20 U.C. DAVIS L. REV. 481, 484 (1987) ("Organizing a neighborhood to adopt a covenant was a massive task. Legal descriptions and signatures had to be obtained, and then the covenants had to be filed with the Recorder of Deeds.").

[240] RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD, RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 23–24 (2013) ("The later history of racially restrictive covenants in the urban areas would show some similar patterns: the turn to legal norms to supplement informal enforcement of neighborhood segregation[.]").

[241] *Id.* at 7. ("Through covenants . . . white neighbors attempted to establish a form of collective ownership, asserting that they informally 'owned' the neighborhood as a whole[.]").

[242] *Id.* at 19 ("[V]iolence, real or threatened, has played a significant role in the segregation of

The law could not control individuals' interests in the racial character of their neighborhood and when the judicial enforcement of racial covenants was prohibited in *Shelley v. Kramer*[243] and the award of damages for the breach of racial covenants was banned in *Barrows v. Jackson*,[244] new ownership devices were formed to control neighborhoods' racial identity. Among them were voluntary adherence through demands for cash deposit with provisions for forfeiture in case of breach, or a "club membership" plan, in which the title to all property would be held by the "club," which excluded membership to objectionable members of certain races.[245] Racial covenants were based on real individuals' racial tendencies and the understanding that the private and public spheres are inseparable. As law professor Richard Brooks elucidated, the effectiveness of racially restrictive covenants was not exclusively based on their legal enforceability.[246] They were rather a form of social norms, corresponding with real social tendencies and coordinating the behavior of various private and institutional actors surrounding racial segregation.[247] Accordingly, Brooks explains that even after 1948, racially restrictive covenants were still used by insurers, banks and even the Federal Housing Administration.[248]

More than mere legal devices, racial covenants were the product of coordinated social pressures, customs, and conventions that controlled the housing market.[249] Some time before the late 1940s, it was estimated that up to eighty-five percent of Chicago's housing market was

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American residential areas[.]"); *id.* at 30 ("Violence could and did range from petty harassment to threats, and then to arson, riot, and homicide—all serving as escalating signals of exclusionary social norms.").

[243] Shelley v. Kraemer, 334 U.S 1, 20 (1948) ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

[244] Barrows v. Jackson, 346 U.S 249, 254 (1953) ("The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action.").

[245] Cuba Y. Holloway, *Damages in Lieu of Specific Performance in Restrictive Covenant Cases*, 7 WYO. L. J. 204, 206 (1953) ("One of these plans is to require each party to the covenant to make a cash deposit, or give a bond, to assure his voluntary adherence to the agreement, with provision for forfeiture to the other signers in case of breach . . . . Another device is the 'club membership' the exclusion of the objectionable class of persons from membership in the club.").

[246] Richard R. W. Brooks, *Response to Robert Ahdeih's Beyond Individualism in Law and Economics [comments]*, 91 B. U. L. REV. 379, 382 (2011) ("The effectiveness of covenants did not exclusively hinge on their legal enforceability; rather, covenants were signals that coordinated the behavior of a variety of private individual and institutional actors – signals that remained effective despite their later legal unenforceability.").

[247] *See id.* at 381 ("A richer model that incorporates important elements of social identity may be more descriptively accurate, and might even suggest new insights, but the better model still does not tell us the appropriate normative emphasis to place choice and consent.").

[248] *Id.* at 381–82.

[249] *See* Richard R. W. Brooks, *The Banality of Racial Inequality*, 124 Yale L.J. 2626, 2639 (2015) ("Hirsch no doubt understated the impact of covenants with this logic, since much of their effect was social, rather than legal, and didn't depend on court enforcement. Still, the covenants imposed by neighborhood associations were often less effective than the members sought."). While many understand racial covenants as legal commitments, Richard Brooks maintains that in a society abounding with discrimination preferences, racial covenants did "not simply establish[] legal tools used by racist cartels to achieve their limited and foul objectives. Racial covenants were both more corrosive (generating, promoting, disseminating, and legitimating racial ideologies through policy and practice) and more constitutive of communities, including integrated ones[.]" *Id.* at 2640.

controlled by racial covenants, which protected the racial character of white neighborhoods, and limited the expansion of the African-American housing area.[250] The dominant evolution of racially restrictive covenants and its vast impact on American lives stand at odds with the undertheorized implications of racially restrictive covenants on property law.

Instead of focusing on the individualistic paradigm of the Montagnais overhunting a specific species—which is based on very little actual information and therefore hard to examine and criticize[251]—one could and should focus on a more familiar, dominant, theoretically challenging and extensively researched transition in property systems—such as *racially* restrictive covenants. While most of the collective aspects of private property, such as police enforcement, the existence of employment opportunities, and the quality of the education system, are for the most part, shaped by state authorities, racial covenants were based on the racial preferences of individuals, and only indirectly shaped by the state's legal system.[252] The role of the state and the law in the development of racially restrictive covenants can be perceived as a normative legal supervision of market equilibriums in the shaping of property forms.[253] And, despite Demsetz's analysis, not every market equilibrium should amount to a collective process that can normatively be described as a transition in property law.

Leaving the individualistic perspective for the benefit of a collective one, which is actually quite common in property forms,[254] demands a normative assessment of the collective process, its ability to protect the constituencies involved in it, and the place it gives to their voices and interests. Racially restrictive covenants are, by their definition, based on strong conflicts within the class of property owners.[255] They limit individuals' opportunity to form social, educational, and cultural relationships with those outside their ethnic group, and while for some ethnic segregation is a public good, for many

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[250] *See* Groner & Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426, 430 & n.21 (1948) (noting that "[i]n Chicago, estimates of land coverage by covenants have gone as high as 85%" and arguing that "in seeking to buy or build a home of his own, the Negro is faced with the restrictive covenant, apparently the most widely used technique for enforcing discrimination in private housing. In large cities as Chicago and Los Angeles racial covenants have almost completely cut off any possibility of expanding the Negro housing area").

[251] *See* Banner, *Transitions*, *supra* note 5, at 360 (noting that "one could tell this kind of story about the Montagnais as well, given how little we know about them").

[252] *See* Richard R. W. Brooks, *Response to Robert Ahdeih's Beyond Individualism in Law and Economics*, 91 B. U. L. REV. 379, 381–382 (2011) (explaining that racially restrictive convents were therefore a collective effort based on and managed through customs and conventions).

[253] *Id.* (noting that "effectiveness of covenants did not exclusively hinge on their legal enforceability; rather, covenants were signals that coordinated the behavior of a variety of private individual and institutional actors").

[254] *See* Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 455 (2002) [hereinafter *Exclusion*] ("Exclusion rights are used when the audience (of duty holders) is large," and the simplicity associated with exclusion rights "reduces processing costs . . . for such a large and anonymous audience.").

[255] The Supreme Court could not reasonably assume that the interest in racial separation was shared by all class members.

others it is a public evil.[256] Acknowledging the distribution effects which an ethnographic property system produces (and the possible conflicts between different groups within the class), the Supreme Court of the United States preferred a conscious, collective decisionmaking process to a class action which marginalizes the role of most class members—that is, community members—and advances a clientless representation mode of litigation.[257]

Despite the interpretation of the dismissal of *Corrigan v. Buckley*[258] as declaring racially restrictive covenants legal,[259] the enforcement of these racially restrictive covenants against subsequent purchasers could not be managed efficiently by individual homeowners.[260] A collective effort was required to achieve that goal.[261] This effort took the shape of a class-action suit in *Burke v. Kleiman*[262] and an attempt to bind subsequent purchasers to its resolution in *Hansberry v. Lee*.[263] These cases began with a successful suit filed by Olive Ida Burke to enforce a racial restrictive covenant in the Washington Park Subdivision after an apartment there was leased to an African American man, James L. Hall.[264] A few years later her husband, Mr. Burke, set up a dummy transaction in order to convey his property in the subdivision to another African American man, Carl Augustus Hansberry.[265]

Examining the claims against the validity of the racially restrictive covenant in *Hansberry v. Lee*, raised by the NAACP and Mr. Hansberry, the Supreme Court of Illinois concluded that *Burke v. Kleiman* was a "representative suit," which decree bound subsequent challenges against the validity of the covenant.[266] Though factual findings in the earlier suit

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[256] ALBERT O. HIRSCHMAN, EXIT VOICE, AND LOYALTY, RESPONSES TO DECLINE IN FIRMS ORGANIZATIONS, AND STATES 101 (1970).

[257] In other words, most class members would reasonably be unaware of the suit and its social repercussions.

[258] Corrigan v. Buckley, 271 U.S. 323 (1926).

[259] *See, e.g.*, Richard R. W. Brooks & Carol M. Rose, *Racial Covenants and Segregation, Yesterday and Today* 6–7 (Strauss Institute Working Paper 08/10, 2018), *available at* http://www.law.nyu.edu/sites/default/files/siwp/Rose.pdf [https://perma.cc/LZJ3-NAHD] (noting that "from all appearances" it "gave a definitive constitutional ruling in favor of racial covenants").

[260] *See id.* at 7.

[261] *See id.* at 8.

[262] *See* Burke v. Kleiman, 277 Ill. App. 519, 519 (1934) ("Appellee filed her bill setting out that her predecessor in title, in common with nearly 500 white persons, in the locality described in the bill, who were either owners of or predecessors in title to the premises owned by appellee and those owned by appellants, entered into a restrictive agreement as to the use of the property described therein, including the property of appellee and of appellants.").

[263] *See* Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("[T]he decree to which was entered did not purport to bind others."). Interestingly, the white neighborhood association defending the racial covenants received in Hansberry was supported by Chicago University. *See* Richard R. W. Brooks, *The Banality of Racial Inequality* 124 YALE L.J. 2626, 2639 (2015) ("Respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the landowners.").

[264] *Burke*, 277 Ill. App. at 520–21.

[265] *See* Kamp, *supra* note 239, at 487 ("In order to sell to the Hansberrys, Burke set up a dummy transaction in which Jan D. Crook bought the property to convey to the Hansberrys.").

[266] *See Hansberry*, 311 U.S. at 39–40 ("[T]hat petitioners in the present suit were members of the

showed that the condition of the restrictive covenant, requiring signatures of ninety-five percent of the owners, was not met, the Illinois Supreme Court upheld the covenant due to the binding effects of the class action suit in *Burke v. Kleiman*.[267] Since racially restrictive covenants can be challenged by *every person in the relevant area*, the class-action device overcame collective action failures in the enforcement of the covenants, and substantially reduced litigation costs.[268] The enforcement of racially restrictive covenants therefore left the realm of an *in personam* legal dispute, based on inefficiency, and entered that of an *in rem* legal procedure of class actions.[269]

In *Hansberry v. Lee,* eight years before the prohibition on state courts' enforcement of racially restrictive covenants in *Shelley v. Kraemer*,[270] the Supreme Court of the United States, reversing the Supreme Court of Illinois, eliminated the employment of class-action suits to enforce racially restrictive covenants.[271] Ignoring the social repercussions of racially restrictive covenants, the Supreme Court held that a class-action suit could bind absent parties when the interests of the class were the same as those of their representatives.[272] The Supreme Court also held that racially restrictive covenants could never produce common liability or interests, and therefore could not be enforced in a class-action suit.[273] The Supreme Court reached this conclusion by challenging the binding effect of *Burke v. Kleiman* in a subsequent suit.[274]

Hansberry v. Lee is rooted in a unique social context—a property

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class represented by the plaintiffs in the earlier suit and consequently were bound by its decre[.]").

[267] *Id.* at 40 ("The court thought that the circumstance that the stipulation in the earlier suit that owners of 95 per cent of the frontage has signed the agreement was contrary to the fact, as found in the present suit, did not militate against this conclusion[.]").

[268] *Id.* at 41 ("The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical.").

[269] *Id.* at 40–41 ([T]o an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those who represented who were not made parties to it.").

[270] *See Shelley*, 334 U.S at 20 (1948) ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

[271] *See Hansberry*, 311 U.S. at 46 ("For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, n view of their dual interests it does not appear that they could right discharge.").

[272] *Id.* at 42–43. ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present[.]").

[273] *Id.* at 44 (noting a decision that "[t]he restrictive agreement did not purport to create a joint obligation or liability. . . . Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance").

[274] *See* Kamp, *supra* note 239, at 482; *see also Hansberry*, 311 U.S. at 40 ("But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.").

system directed by racial biases and preferences.[275] But it is not limited to the specifics of the case and the fraudulent stipulation it discusses.[276] It is relevant to every racially restrictive covenant whatsoever.[277] Taking into consideration the characteristics of such covenants, the Supreme Court maintained that there would always be conflicting interests in their performance.[278] The Supreme Court did not explain the source of these inevitable conflicts and one could have mistakenly assumed that all class actions were prohibited.[279] At any rate, the Supreme Court's resolution can be explained as a normative evaluation of racially restrictive covenants as a property form. By prohibiting the employment of class-action suits for racially restrictive covenants, the Supreme Court limited these covenants to the *in personam* portion of the adjudication process.[280] In doing so, it challenged racially restrictive covenants and made their collective implementation that much harder.[281]

To put it another way, the Supreme Court rejected property rights determined by a suit purporting to represent passive, voiceless, unaware individuals. What is the worth of a baseless assertion that the utility of one group outweighs the suffering of the other? Who can promise us that the costs of beaver hunting outweigh the loss associated with the move to private property? The Court maintained that when such a fundamental conflict existed between members of the group, the sociolegal status quo

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[275] *See* Richard R. W. Brooks, *Covenants & Conventions* 4 (Northwestern Univ. Sch. of L., L. & Econ. Res. Paper Series No. 02-8, 2002) (*available at* https://www.ipr.northwestern.edu/publications/docs/workingpapers/2002/IPR-WP-02-03.pdf) [https://perma.cc/J4YX-4XK8] ("Northern residential segregation, I will argue, was maintained and perpetuated in large part through racial restrictive covenants."); Brooks & Rose, *supra* note 259, at 3 ("It is no doubt a good thing that racially restrictive covenants have receded into a set of increasingly vague memories. But they are the past of housing segregation in the United States, and their role as legal instruments undoubtedly helped to shape both physical patterns and social attitudes about segregation and integration—attitudes that to some degree persist today. They are widely used from the beginning of the nineteenth century up to and beyond *Shelley v. Kramer*, and the 1948 Supreme Court case that rather abruptly made then unenforceable in court.").

[276] *See* Kamp, *supra* note 239, at 499 ("It follows that in enforcing the covenants the judiciary was not just upholding a consensus as to the rightness of segregation, a view shared by blacks and whites, but was rather preventing citizens, on the basis of race, from doing what they wanted to do, buying and selling houses wherever they wanted to. A state's deprivation of that right because a person is black must then violate the fourteenth amendment.").

[277] *See, e.g.*, *id.* ("A state's deprivation of that right because a person is black must then violate the fourteenth amendment.").

[278] *Hansberry*, 311 U.S. at 44–45 ("Because of the dual and potential conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say . . . that any two of them are of the same class. . . . Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far.").

[279] *See* Kamp, *supra* note 239, at 496 ("Hansberry ignores all of this. This repression of reality must occur for a reason. The Court must not have wanted to deal with the racial and constitutional issues involved.").

[280] *Hansberry*, 311 U.S. at 40 ("[O]ne is not bound by a judgement in personam in a litigation in which he is not designated as a party or two which he has not been made a party by service of process.").

[281] *Id.* at 44 ("The course of litigation sustained here by the plea of res judicata do not satisfy these requirements. The restrictive covenant did not purport to create a joint obligation or liability.").

and the market equilibrium of racial separation did not suffice. After all, those could have been reached by private retaliations, social pressures, and acts of intimidation. What this article suggests then is that under such circumstances, conscious collaboration between individuals is normatively necessary for the formation of both collective goods and individual preferences.[282] Paternalist efforts should therefore be directed to furthering knowledgeable collaboration—in which there are no blinding strategies utilized—instead of a process of deciding the content of collective goods behind a veil of ignorance. As there was no such collaboration in *Hansberry*, the Court decided there was no place for a class action.

By participating in an accessible collective-bargaining experience, individuals can increase their knowledge, understand the complexities involved, and possibly change their *ex ante* preferences.[283] The value, utility, or costs cannot and should not be measured in the absence of a substantive collaboration. Moreover, favoring conscious participation over blinded riding exposes the unbreakable link between distributive justice and collectivized rights and incentives.[284] Welfare or utility cannot be described in absolute terms. Knowing a person has a salary of a thousand dollars tells us nothing about the individual or his capabilities. For that purpose, we need to know how that salary compares to the average salary in that profession. Similarly, wealth is a hollow term if we do not know how it is distributed.[285] Blinding strategies, however, conceal these conflicts and in turn conceal the most important questions faced by communities.[286] This inattentiveness to distributive questions also deprives society of the opportunity to conduct informed deliberations regarding its basic values and aspirations.

In the absence of a meaningful collective process, the common static description of individual preferences cannot be challenged. In this setting, strategic behavior and high transaction costs are not dealt with appropriately, and thus they prevent conscious collaboration.[287] There are circumstances, however, in which blindness to conflicting interests can be used to promote cooperation.[288] Since the costs of free riding and

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[282] *See supra* Section III.C.

[283] Hardin explains that the problems of ignorance and misunderstanding are intertwined. For example, he argues that "[i]f I have a clear grasp of the causal relations over some realm, I may be more likely to know the facts just because I am better able to put them into usable order." HARDIN, *supra* note 34, at 112.

[284] *See* Atiram, *supra* note 179, at 81 ("It is therefore more economically efficient and morally desirable to deal openly with distribution concerns than leaving them festering in the shadows.").

[285] *See id.* at 80 (discussing the use of more sophisticated blinding strategies, especially "the conventional separation between distributive concerns and overall wealth maximization").

[286] *See id.* at 76 ("However, in the cases where the collective action can lead to radical distributive effects and considerable losses, this blindness leads to alienation and not cooperation.").

[287] Coining the term "semicommons," Smith explains semicommons is "a situation in which common property and private property regimes both interact[.]" Smith, *Exclusion*, *supra* note 254, at 480.

[288] Due to the strategic behavior employed in semicommon property regimes, Smith presents "scattering," a mechanism used to blind participants to their private gain, as part of an efficient strategy to promote cooperation. *Id.* at 480–81.

blinded riding should be contextually analyzed, it would be a mistake to present the model of conscious collaboration as a general bargaining model. When the distributive aspect of a collective action is meaningful, and can therefore justify the costs of public participation, the free-rider logic should take a minimal role in shaping the collective process, and planners in both the private and public spheres should make a sincere effort to increase participation. In much the same way, when there are significant distributive effects, the existence of non-participating actors should be seen as an opportunity to expose the profound costs involved in the collective process for non-excludable goods, and lead to a meaningful and empowering bargaining structure, coined here as conscious collaboration.[289]

V. SUMMARY AND CONCLUSIONS

When individuals enter a collective process, they are confronted with conflicting thoughts, expectations, and strategies, none of which align neatly. Imagine a meeting between Montagnais tribes regarding their property system or between American neighbors in the early nineteenth century regarding the racial identity of their neighborhood.[290] Demsetz described fur trade as the dominant component of their property system and some neighbors within the facts of *Hansberry* decided that race was the essential component in their neighborhood.[291] But moving to a normative perspective of the collective process may lead us to different avenues of thought. Who should decide and define what the group's most valuable goods are, and how should their decision be reached?[292] Returning to that imaginary meeting, some would probably mention the group's history and the dynamic sociocultural changes, and others would argue that permanent changes should not be based on temporary commercial practices or even racial tendencies.

To get a better understanding of the normative value of this

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[289] This article does not present the best "conscious collaboration" structure, since there may be several different structures of that sort, shaped according to a particular context and set of circumstances.

[290] It is a hypothetical scenario, since no federation of Indian bands existed, "the band acted as a community only for a few weeks in the summer[.] . . . The population of these bands varied from about six hundred to as few as fifty individuals. During the summer, and throughout the year, the band was subject to virtually no formal organization[.] . . . No federation of bands exists; they do not regularly meet together, nor do their chiefs. Whatever institutional constraints existed on the behavior of these Indians will have been established within the band itself." McManus, *supra* note 133, at 47–48.

[291] It was important enough to bring the Montagnais to change their property system.

[292] This question must be answered before another one is: how can we assess the costs and benefits derived from the use of these goods? *See* Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331, 333 (2002) ("But [Demsetz's] article said nothing about the factors that determine the costs of a property regime. It said virtually nothing about the precise mechanism by which a society determines that the benefits of property exceed the costs[.]").

collective decisionmaking process, a deeper account of the role that blinding strategies and blinded riders play in collective cooperation is needed. Instead of dwelling on the unknown and unresearched, and relying only on factual bases which no one can examine, one should confront the challenges of our times and increase the accessibility of the process that determines our collective goods or theories. Property regimes are based, among other things, on community perceptions of solidarity and on socioeconomic ties between community members. The regime chosen influences family structure, parent-children relationships, racial tendencies, and socioeconomic bonds between different generations. A regime can celebrate sociocultural diversity or reject it, recognize religious aspirations and a group's culture and heritage, or ignore them.

When people seek to shape the property regime, they may wish to do more than just influence the world they live in—they may very well seek to get a disproportionate share of the collective pie or to preserve existing inequalities in the allocation of public resources. In a complicated collective process with countless possibilities, influenced by interests and preferences which are very difficult to discern clearly,[293] individuals can easily find themselves on the wrong path—one which favors the few at the expense of the many.[294] The main challenge of a collective action is, therefore, to create a common and accessible language that is not limited to a preordained outcome and can question basic decisions and assumptions. A collective action such as this promotes comprehensibility in the face of incoherent and even conflicting messages.

By examining the missing pieces in Demsetz's *Toward a Theory of Property Rights* and confronting it with the development of racial restrictive covenants in the early nineteenth century, this article proposes an analytical framework for understanding the relations between private and collective ends, in the ongoing process of property rights formation, the construction of legal institutions, and more generally, the production of public goods and even theories. Focusing on a normative account of property formation, this article analyzes the distributive effects of the collective decisionmaking process, which leads to the establishment of property institutions. In doing so, it maintains that the collective action process is a political arena in which small interest groups can try to take advantage of the process and secure more than their share, at the expense of the general public.[295]

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[293] Instead of providing the necessary information for a conscious decision-making process, presenting people with too much information in an inaccessible way, blinds individuals to what is relevant and important.

[294] *See* Amos Tverrsky, Shmuiel Sattah. & Paul Slovic, *Contingent Weighting in Judgment and Choice*, *in* CHOICES, VALUES, AND FRAMES 504 (Daniel Kahneman & Amos Tversy eds., 2000) (explaining that individual preferences and choices are shaped by the decisionmaking process, and that they therefore depend "on the different methods of elicitation").

[295] See Levmore, *Two Stories*, *supra* note 5, at 421, 427.

These interest groups, keen on hiding their distributive agenda, employ blinding strategies to achieve this goal and promote the exclusion of the public from the collective process.[296] This process and these blinding strategies can bring about the establishment of property law and institutions.[297] However, in a modern liberal and egalitarian society—in which property rights are vital—such a collective action *should not* receive normative legitimacy. The normative account of the production of public goods, presented in this article, concentrates on the decisionmaking process, which shapes property institutions. This account maintains that in the face of strong distribution concerns, conscious collaboration—the desired collective action—should reject the blinding strategies of interest groups and challenge existing market equilibriums. Furthermore, it emphasizes the essential components of the decisionmaking process, including public trust, transparency, awareness of its distributive effects, and the possibility of active public participation and contribution to the process.

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[296] *See* Krier, *Tragedy, Part Two*, *supra* note 59, at 336 (explaining that the concept of private property was founded on a collective agreement about its definition, distribution, and protection).

[297] *See* Levmore, *Two Stories*, *supra* note 5, at 426–27 (noting that politicians may develop and enable collective action by interest groups that seek to secure rights to public and private land).