This thesis tracks the development of common right concerning livestock grazing, from legal codification in England, through the colonization of America and into the creation of the vast grazing commons administered by the Bureau of Land Management (BLM) in the western United States. By following landmark legal decisions and legislation, the development from manorial legacy in England, to natural law infused legislation in the early United States, it is demonstrated that the current BLM grazing programs are not only a grazing common, with a distinctly unique form of common right, but also result of the post-colonial evolution of commons in the United States.
# Table of Contents

Chapter 1: Introduction .............................................................................................................. 2
  The Legal Framework .............................................................................................................. 4

Chapter 2. The Historical Development of Commons: England ............................................. 8

Chapter 3: Historical Divergence of Common Right in the United States .............................. 13
  American Enclosure: ............................................................................................................. 16

Chapter 3: Western Rangelands & the Bureau of Land Management ...................................... 19

Chapter 4: American Rangelands; Commons by Another name? ............................................. 27

Chapter 5: Conclusion .............................................................................................................. 35
Chapter 1: Introduction.

“The rise of capitalist practice and morality brought with it a radical revision of how the commons are treated, and also of how they are conceived.” - Noam Chomsky

On April 12th, 2014, a group of armed protesters converged on Bureau of Land Management (BLM) lands in Clark County in the state of Nevada. This group came to support a rancher by the name of Cliven Bundy in his political quarrel with the Bureau of Land Management, which was attempting to round up and impound his livestock grazing on public lands. Through powerful armed posturing, the protesters forced the police working with the Bureau of Land Management to stand down, and Cliven Bundy’s livestock continues to roam and graze freely on BLM lands to this day. While this sounds like a heroic show of populist power, it actually reveals a flash of the longstanding tensions concerning the management of rangelands throughout the Western States. Cliven Bundy was one of the 18,000 permitted grazers on the over 155 million acres of rangeland held by the federal government under the Taylor Grazing Act for the control and regulation of grazing on the vast western ranges. Bundy who had been a permitted grazer since 1954, stopped paying his permit fees in 1994, and by 2014 had accumulated almost one million dollars in unpaid fees and court order fines. The obvious question arises, why did he stop paying? Bundy’s legal claim (United States v. Bundy) was that he possessed a right to graze, inherited from his family’s grazing of similar lands in the 19th century.¹ When this claim was defeated, he repositioned himself under a much grander political claim that the BLM lands should be constitutionally relegated to the control of the states.² Whether Bundy knew it or not, both of these claims, while legally ruled defunct, did strike at the heart of the political debate and legal evolution that shaped the lands he had been grazing for 40 years, and elicits a greater examination of exactly how this situation arose.

Bundy’s general claims in both of these cases can be simplified to two legal concepts: common rights, or the use rights over another’s property based on tradition, and states’ rights. While the purview of states’ rights within the federalist structure of the United States is hotly debated, a lesser discussed topic is what constitutes common rights, and how, if at all, do they fit within the United States national historical

¹ Martinez, Michael (April 12, 2014). "Showdown on the range: Nevada rancher, feds face off over
development. Interestingly enough, the discussion about common rights, sometimes stated as rights of common, originates all the way from the legal traditions of the United States’ colonizing metropole, England. Going back almost a millennium, we can trace the legal evolution of commons and common right to reveal that not only did commons of one kind or another once exist throughout the United States, but they had a critical role in shaping the management of western rangelands, as we now know them.

In 1776, the United States and the England severed their colonial bond irrevocably. Although the bond was broken, the colonial legacy of that connection still remains engrained, albeit altered, in institutions that continue to this day. One significant lasting effect is the legacy of English common law, which when the United States was still in its infancy, was used to guide the early legal decisions and help build legal structures for the new nation. Through this tumultuous beginning, the legal institutions adapted to the newfound geography, and in the process, evolved into something distinctly different than its paternal endowment. One distinct realm of change concerned the concept of private property, as the paradigm shifted from one dominated by natural law, which justified the colonization, and English common law, which reigned in the country’s naissance, to one of a more mature centralized constitutional framework.

The right to private property in the United States is one of its most fundamental values, being protected implicitly and explicitly throughout the U.S. Constitution and its accompanying Bill of Rights.

Although the right to private property is firmly asserted in these founding documents, what is not specifically expressed is what constitutes private property and what legal implications do private property rights entail. In fact, the examination of these two questions reveals a distinct development and divergence from the inherited English common law, specifically with regards to the concept of “common right” as a form of property ownership.


4 English common law became fundamental in the creation of the legal structure in the United States. That was not always obvious, as early on natural law had predominance over certain property rights issues, as will be addressed later one and some practices in pure civil law were attempted. See: Eric T. Freyfogle, The Enclosure of America (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 07-10 October 26, 2007 pg 45

5 U.S. Constitution, Fifth Amendment
The concepts of “the common” and “common right” in regards to land use, would most likely not inhabit a significant place in the either the legal or practical thoughts of the average modern day American. The lack of familiarity with these ideas is not because they have never existed, but today, “common right” or simplistically the right to utilize or access resources on another’s property from custom and tradition, and “common land”, or land communally or openly utilized, only earnestly exist in the margins, archives, and subtext of the legal code or relating to obscure traditionally held protections for things such as water for irrigation in the western states.\(^6\)

This stands in contrast with England, where “common land” still openly occupies almost 372,941 hectares of land, equal to approximately 3% of the entire country. This common land has evolved from its feudalistic agricultural conception to also serve recreational and civic functions. Still an institution within the English legal framework, laws and legal decisions regulating their existence and exercise has been ingrained into England’s legal development since the first statute in the 13\(^{th}\) century.\(^7\)

**The Legal Framework**

To understand the extent of this divergence, a more in depth understanding of the legal concept of “common land” and how that creates what is called “common right” is required. Common land, at least how it conceptualized in England, is privately held land, over which others, often referred to as “commoners”, possess use rights, or rights of common, giving legally recognized access to specific resources.

The English legal system created an extensive classification of rights held by its commoners describing who would be entitled to such rights as well as the extent and purpose. Most established common rights were attached to a landholding as a subsidiary right also known as an “appurtenant” rights, although it was also possible to hold rights “in gross”, which could be transferred and inherited regardless of landholding. There also existed “common pour cause de vininage” which were common grazing rights held by those in neighboring settlements, although this concerned settlements where commons were contiguous, and did not actually allow

---


\(^8\) The Commons Act 2006 (c 26)
the one settlement’s commoner to graze on the contiguous commons but was more of a legal protection from the trespass of straying animals.9

These common rights historically came in many forms and varied based on the local arrangements made, but also on the terrain involved, usually designated into two types: “arable land” used for agriculture, and “waste”. “Arable land” was related to communal agriculture arrangements such as open field or strip farming, which was usually the first to be enclosed, or fenced and privatized.

“Waste”, unlike arable land, included undeveloped land, pasture, fen, and otherwise farm deficient land. This type of common provided a more significant common value, as it served an integral part of the rural economy providing grazing, fuel, and a wide variety of other resources.10 11 12 Waste common most directly relates to the development of common right as it contains the greatest variety of periphery rights and is not directly related to simple cultivation.

The common law of England recognized six non-exclusive categories of common rights over wastes, although many rights do not neatly fit within these categories. The first and most commonly used right was the right to pasture, which is still exercised in England and Wales and is centrally important to the rural economy of upland England and Wales.13 In practice, these commons were often regulated by two practices that reappear into the modern day, first was the practice of “couchancy and levancy”, also known as “wintering”, which controlled the amount of livestock grazed on common lands in relation to the capacity of attached land to feed the livestock in the winter months.14 The second principle is called “stinting”, which is the permitting of a fixed number of grazing animals on the common.15

Besides grazing, a vast array of other common rights also existed such as piscary or the right to take fish from waterways, turbary or the right to collect sod or peat for

---

12 “Waste” in England would also include wooded areas, but this was not universal and in continental Europe there was often a distinction for common woodland. (Moor, M. D., Shaw-Taylor, L., & Warde, P. (2002). *The management of common land in North West Europe, c. 1500-1850*. Turnhout, Belgium: Brepols. pg 19)
14 ibid.
15 ibid.
fuel, and estover, or the right to collect wood. One right existing rarely in England but emerging heavily in the colonial America is the right to take wild animals or Ferae Naturae. Using this framework we can study the divergence in the practices of common land use in both England and the United States, and develop a better understanding of its current practice.

The study of commons is convoluted, as the subject can be studied through a variety of academic lenses, and socio-economic, historical and political issues such as collective action, liberalism, and colonialism, all of which have influenced its development. This particular study will concentrate on the institutional development of the law and legal structure in the United States and England as it relates to the concept of common lands.

The argument presented in this thesis will demonstrate that the legal divergence in the institutionalization of common right seen between the United States and England can be traced to the segmented colonial development of the United States, its industrialization, the influence of natural law, and the late 19th century push for legal centralization. Nevertheless, the United States did develop an analogous form of commons in the grazing commons of the BLM western grazing lands.

Through examination of the historical origins and legal development of common right in England, and its adaptation and combination with natural law in the colonization of America, we can track a definite devolution of the U.S. common right into the 20th century as it struggles to adapt to increasing enclosure, industrialization, and legal codification. In comparison, in England, we see the emergence of common right from open field agricultural manorialism, followed by the crucible of enclosure from the 15th century until the early 20th, and an increasing inclusion of the public interest from the late 19th century until the present day. In the United States the inability to establish codified commons institutions during the late 19th century centralization of jurisprudence virtually eliminates landuse rights not held in full ownership by the 20th century.

With the historical context established, I will take a closer examination of how the historical development of the modern western rangelands represented a unique development of American common rights. Avoiding privatization and enclosure, U.S. western rangelands are to be held in perpetuity by the federal government to act as the

landowner, and as ranching interests were established on the open land, grazing regulations, entitlements, and political interests institutionalized themselves to create the largest regulated grazing commons in United States.

Finally, with an understanding of the origin and function of these governance plans, a comparison between the management of the western rangelands in the United States, and the management structure of modern day grazing commons in England reveals that not only should the western rangelands be seen as an outcome of divergence in common right institutions, but also can be easily improved to be more sustainable and effective according to Elinor Ostrom’s Eight Principles of Common Pool Resource (CPR) management.
Chapter 2. The Historical Development of Commons: England

The history of commons and common right in England can be traced back to manorial feudalism and the implementation of “open field” agriculture. In the “open field” system, communal farmers would procure long-term leases or exercise their common right to farm on large open “arable fields” as well as graze and harvest from nearby “common lands”. These lands that had common rights attached to them included the fertile agricultural “arable field” which was often jointly organized by the commoners into assigned strips of land, called selions, and farmed for the church, the lord of the manor, as well as the individual farmer. The selions were distributed across the open fields to reduce the harm of a bad harvest to an individual farmer. The management of individual commons was different from common to common, although accounts of their organization reveal that communities of commoners and manor lords would regularly meet to assign selions and determine limits to commons usage.17

The manorial agricultural system has been practiced since at least the 6th century Rome, where the “open field” system provided independence and employment for families who would lease, own, or work a share of the land in exchange for common right benefits and agricultural land access.18 In the manorial system the people who exercised these common rights were called commoners.19 The commoner had, as a matter of tradition or explicit agreement with the manorial lord, common rights to the reasonable sustainable exploitation of varying degrees of the “common land” or “wastes”.20 While the open field system was capable of supporting the agricultural needs of the yeomen, the church and the landowning class, the “common land” and “waste” would sometime provide the auxiliary benefits of livestock grazing and fuel gathering as well as support minor “cottage trades”.21

As these rights were locally organized through manorial courts and informal arrangements the codification concerning rights of common didn’t really occur at the

20 Paraphrase: of Roberts, A. "Rich Dirt; Dirt Poor: The decline of the commoner & Common Right in the English Agricultural Revolution" (2016)
parliamentary statute level in England until 1235 with the Statute of Merton, which dictated that while manorial landowners could enclose their property, in this case expand their agricultural fields into common lands and wastes, they had to secure their tenants continued ability to excise their rights of common to do so, otherwise it would constitute an act of unlawful dispossession of common land. While this statute in effect increased enclosure and reduced the rights of common that tenant yeomen had, it was the first legal codification of their rights at a statute level.

The legal formation of these rights at the time was not always obvious or directly derived from manorialism, in Christopher Rogers, Elenor Straughton, and Margarita Pieraccini’s collaborative work Contest Commons: Environmental Governance Past and Present, they parse out the development of commons in terms of property rights, identifying, among other things, the overlapping and fluidity of common rights in English development. They point to the “the opposing forces of private rights… and public ‘ownership’…” as a theme that runs through codification of common right and recognize that a “shifting boundary” existed in what constituted a common land.

While land could for “all practical purposes” be identical to manorial waste commons with “…areas of semi-natural vegetation over which grazing rights were shared…” these commons sometimes originated from licensed use making it not technically derived from simple common right, and only receiving classification as such in the 20th century. Another quasi-common that emerged to be later legally classified as common was through the use of enclosed communal pastures, where individuals often with sole rights, or exclusive rights, communally grazed without manorial involvement at all.

From the 13th century onward we see the continued struggle of the commoner against the enclosure of common lands producing a multitude of legal dictates, political debates, and events such violent uprisings. In the 15th and 16th centuries, England experienced the first surge of enclosure as a massive population decline caused by the Black Plague drove up the cost of labor, drove down the cost of rent, and made sheep farming significantly more lucrative to land owners. As a result open field farming began its general decline and landowners, often unilaterally,
transformed arable land, for which they could neither find enough tenants or labor to work as farmland.26 These enclosures had drastic effects on the commoners’ rights, as they caused unemployment, displacement, and sometimes the disappearance of whole villages that could no longer sustain themselves without access to the open field and commons.27 In response, some ineffective and overly broad anti-enclosure legislation were passed in 1489, 1516, and into the 16th century but the movement towards greater enclosure steadily continued.28 As enclosure continued and legislation easing the plight of unemployed and dispossessed yeomen failed to achieve any relief, many notable anti-enclosure rebellions and riots occurred in the country over the next century including Ketts’s Rebellion (1549), the 1607 Midland Revolt, and the resulting Newton Rebellion.29 At this point in the 17th century, the process of enclosure began its transition from landlords unilaterally enclosing the common fields to a process of Parliamentary enclosure, where landlords sought the use of the local parliament and governmental procedure to enclose their lands. These enclosures were structurally different than the unilateral enclosures by landlords because they also incorporated the input from freeholders and common right holders of the period.30 Starting in 1604, containing over 5,200 acts and continuing until 1914, parliamentary enclosure enclosed over 27,000 km² of common land in England.31 Moving forward into the late 19th century, we see the majority of the parliamentary enclosures having been completed, with over 80% occurring between 1750-1819.32 In the late 19th century and continuing into the 21st we see increasing appreciation of the commons of England, not just as agricultural spaces, but also as public and recreational spaces. For example, in 1879 we see the first of many formalized commons acts, which registers and regulates the functioning of over 30 commons in

England and Wales and also makes provisions protecting the public use of urban greens and commons by inflicting penalties on those that would develop them stating:

“An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty.”

This section marks the first piece in a series that introduces the broader public into the dynamic relationship of common rights, no longer simply between the landowner and the commoner. After this legislation was passed, further expansion of this legal movement occurred with other legislation such as the Commons Act of 1899, which relegates management of primarily recreational commons or commons without known ownership, to district councils and national park authorities, as well as, the Law of Property Act in 1925, which designated approximately one fifth of all commons, those in metropolitan districts, as having a right to public use for “air and exercise”.

Into the 20th and 21st century, the public integration into the rights of common, as well as the solidification of the existing commons, becomes finalized with the Commons Registration Act of 1965, the Countryside and Rights of Way Act (2000), and the Commons Act of 2006, which for the first time extended public access and attempted to register all remaining commons, commons ownership, and rights of common throughout the UK. The Commons Act of 2006, along with greater registration and protection of English commons, also formulated a new management structure called the “Commons Council”.

These three pieces of legislation finalize the movement, and can be argued to mark the end of enclosure, as they provide protections and sustainable management structures for the remaining commons, but they also mark a definitive transformation in the nature of that commons agreement. No longer are rights of common a traditional manorial-based agreement between a landowner and attached tenants, they have now been incorporated into the public sphere as a part of history and civil development. This development from feudal arrangement, through the crucible of

33 Commons Act 1876, section 29 line 3
34 Law of Property Act 1925 15 Geo 5 c 20
enclosure, and finally public integration creates a distinct evolutionary path that, as we will see, was not to be successfully emulated in United States for many reasons.
Chapter 3: Historical Divergence of Common Right in the United States

“...in the beginning, all the world was America.” – John Locke

In the growth of the United States, the discussion of the development of common rights might seem strange, primarily because of the modern day exaltation and protection of private property being sometimes seen as crucial to the nations “exceptional” status.36

Some accounts of early colonial settlement by some historians of the colonies assert that communal property was unfit for American practice on a cultural level, citing accounts of colonial leaders such as William Bradford in Allan Kulikoff’s book From British Peasants to Colonial American Farmers:

“...abandoned common property and common cultivation in 1623. William Bradford, the colony’s leader, explained that the communal system had bred “much confusion and discontent and retarded much employment.” Communal ownership and work had led “young men, that were most able and fit for labour and service,” to "repine that they should spend their time and strength to work for other men’s wives and children without recompense." Their wives, for their part, deemed being "commanded to do service for other men, as dressing their meat, washing their clothes, etc.,” as “a kind of slavery” and neither could many hands brook it.” In contrast, the division of land made all hands very industrious.37

Allan Kulikoff may happily cite William Bradford’s distaste for communal living, but the fact is throughout the colonial settlement common land, in a more general form, had its distinct place in America’s development. Admittedly, the American colonies did fail to implement extensive lasting manorial agricultural schemes, however this was mostly due to availability of land grants and competition of land tenure schemes throughout the colonies rather than a uniform cultural distaste for this form of land management. In New England, attempts at establishing manorial style open field agriculture had to compete with other colonies offering opportunities for freehold land ownership, as well as attract immigrants from Europe, which increasingly saw feudal agricultural schemes as outmoded.38 That said, the creation of waste commons were significantly more prevalent than open field arable commons,

and their establishment can be seen in land distribution plans from New England to South Carolina. These designated commons developed their own local informal or formal requirements for access, usually requiring acceptance by the freemen of the town and participation in the local church.

The colonial diversity of the land distribution schemes, immigrated cultural practices, and approaches to communing leave behind relics that can be witnessed today. One such example of this is the famous Boston Common in the state of Massachusetts, which served as a grazing common, a public meeting ground, and sustainably regulated cattle grazing for over two centuries. Another and significantly more peculiar example is that of New Haven Green in Connecticut, which was designed to hold the exact number of people that were believed to be saved in the second coming of Christ, approximately 144,000, and the common space has served civic functions as well as a site for animal grazing since the early 17th century.

While private property regimes were predominant and important to the founding political theorists of the United States, as can be seen in the many protections for property owners in the Constitution and the accompanying Bill of Rights, it cannot be said that commons and common right had no place in the colonial and developing United States. The laws of the metropole adapted to the unique conditions that existed across the Atlantic, as well as through the process of colonization, and the varied semi-autonomous colonial governments that were developing in diverse geographic localities.

Common land and common rights significantly diverged from English practice throughout colonial America largely due to the mixing of common and natural laws concerning ownership and property. One significant factor in early United States legal theory was the labor theory of ownership, a principle in natural law that stated that a prerequisite of ownership was the working or cultivation of the land. This notion, made popular by the influence of John Locke and his book Second Treatise of Civil Government, was used to justify the taking of indigenous land in the colonies, by
framing the “new world” as a “Universal Common” unlike the commons of England which were “common by compact, i.e. the law of the land…” according to this theory, the “universal common” in America required no voluntary agreement or compensation to enclose or privatize because it existed outside the realm of governance and law. Although implicit in this interpretation of ownership is that the colonization of the Americas was fundamentally oriented towards enclosing and privatizing the land. As we look to the implementation of this concept in the legal record we find that it had the effect of creating huge ‘free-access’ commons on the land that remained unenclosed throughout the early United States into the late 19th century. As the United States developed its own system of commons, it often found it at odds with the old common laws of England.

This paradigm of thought, of property being constituted by enclosure or cultivation can be seen throughout the 19th century in the United States, but most clearly in southern cases concerning grazing commons and the trespass of livestock. The 1854 case of Nashville & Chattanooga Railroad Co. v. Peacock reveals this principle in action. In Nashville & Chattanooga Railroad Co. v. Peacock the supreme court of Alabama had to rule on whether compensation was required for the death of a cow that wandered onto railroad tracks. In Alabama at that time railroads were held liable for the death of all livestock unless the railroad could prove that “the killing was the result of accident, which could not have been controlled by the company by the exercise of the greatest degree of diligence and care.” The defense the railroad employed in these not-unusual cases would be that the cow was trespassing under English common law and thus the railroad should not be held liable. The Alabama supreme court was quick to remind the railroad company that the state of Alabama never adopted that portion of common law and that its property regime was profoundly different and, both in the precedent and the statutory law, the entire state was “common pasture for the cattle and stock of every citizen,” except for those lands that had been fenced or cultivated. This statute, which could be found in similar forms throughout the southern states of the U.S., embodied both the divergence from

44 Locke, John. Two Treatises on Government. London: Printed for R. Butler, etc., 1821; Chapter 5, pg. 137
English law that had occurred, and the American conception of commons. This also reveals that the American interpretation of common diverges strongly from what was found in England as well as what typically is considered common in the modern day which is not simple open access, but rather communally regulated and used land.\textsuperscript{47}

While the states differed in their development of land and property laws, the traditional use of unenclosed lands as commons with varying common rights is evidenced throughout the United States during the mid-19\textsuperscript{th} century. For example, cases defending the open grazing on unenclosed land can be seen in California, South Carolina, Illinois, Mississippi, and Georgia, as well as rights to hunting on unenclosed lands in Vermont, South Carolina, Georgia, and Kentucky, and throughout New England the right to forage was heavily exercised.\textsuperscript{48} These common lands weren’t marginal either but differed widely. In many states in 1850 the amount of fenced or cultivated land was low, with just under 10\% in the Southern states, and ranging from over 20\% in Kentucky, Virginia, Maryland and Delaware, to less than 1\% in Texas and Florida.\textsuperscript{49}

\textbf{American Enclosure:}

These open access common rights that dominated much of the understandings about property in the early 19\textsuperscript{th} century United States are almost all gone from legislation and public consciousness because of a distinct evolution in the framework of property rights away from one that acknowledges a “right to roam” of the citizenry to one that asserts the “right to exclude” of the property owner. The causes for this shift in thought are amorphous, multifaceted and include many economic, cultural, political, and legal reasons. This legal development named the American Enclosure by legal historians such as Eric T. Freyfogle, lacks the extensive study and analysis that its English analogue had, although the reason for this may be due to the causes of the enclosure itself, one of which being the inability to formulate a definitive rights structure. Theorists like Freyfogle posit that the American Enclosure consisted of a multitude of causal trends that I have organized into two parts. The first part consisted of a bottom up movement away from the necessity of access to the commons, as subsistence agriculture diminished, affordability of fencing increased, and a need for

\textsuperscript{48} Eric T. Freyfogle, \textit{The Enclosure of America} (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 07-10 October 26, 2007 p. 4
\textsuperscript{49} Ibid. Pg. 4
the proletarianization of freed slaves emerged after the American Civil War. The second part consisted of a simultaneous top down movement through the centralization of common law as legal decisions increasingly abstracted interpretations of property rights without regard for traditional practice and custom.

The legal centralization concerning American land use and jurisprudence itself coincided with three major changes that were occurring in American legal culture and politics. These changes were the decline of natural law, the rise of individualism, and the political effects of industrialization.

The centralization and abstraction was the product of a growing library of precedent accumulating from North Eastern urban courts who were the first to start publishing their rulings in 1789. As American precedent started to accumulate, judges increasingly looked towards the common law to decide their rulings, instead of natural law or the extra-legal considerations of custom. The open range common structure neither successfully created its own legal framework nor could conform to the legal framework that existed, such as the structure of commons in English common law. This lack of legal structure put the deciding justices in the position of deciding whether to follow the established configuration of the common law or to establish new precedent that would significantly undermine property rights without a structured limit.

The period also saw the rise of industrialization, which produced a powerful industrial class as well as greater availability of goods causing a reduction in the dependence on subsistence agriculture and the need for commons lands. The emergence of powerful industrial lobbying groups at this time contributed to the general centralization of legislation regarding land use as industrial interest groups pushed to promote the interpretation that land ownership was exclusive to solidify their control and exploitation of their land holdings. As statues created at county and state levels increasingly eliminated land use arrangements on the local level, the decline in subsistence agriculture reduced resistance to these disposessions.

One trend that Freyfogle is apt to point out is the emergence of the individualism and the public – private dichotomy that occurs in legal interpretations of the period. Looking at the concept of liberty during this period, the late 19th

50 Ibid. Pg. 19
51 Ibid. Pg. 26
52 Ibid. Pg. 43
53 Ibid. Pg 38
century, we see the evolution from one that identifies liberty as the freedom to exercise collective action for communal self-governance to a more Jacksonian interpretation that promoted individual liberty from interference in the pursuit of economic opportunity.\textsuperscript{54} This inversion would have the effect of reframing the private and private property as outside of the public sphere and cementing the notion of property as exclusive.

Throughout the late 19\textsuperscript{th} century these factors slowly deteriorated the utilization and legitimacy of common rights within the accepted American legal framework. Finally in 1922, Supreme Court Justice Oliver Wendell Holmes seemingly codifies the exclusivity of all private property and a rejection of common right in the decision of *McKee vs. Gatz* stating:

\begin{quote}
“The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.”\textsuperscript{55}
\end{quote}

This interpretation not only acknowledged the customary commons practices that occurred throughout the country, but also codified the actions into a preexisting legal category that secured the rights of the property and access onto the landowner of the unenclosed land. This represents a final rejection of that natural law paradigm that supported the creation of these commons, and did so with federal precedent, overruling the interpretations of lower state courts. While it didn’t immediately enclose all the lands, enclosure now became an issue of property owners applying their rights, which Justice Holmes now asserted they always had.

While this may seem like the end of commons in America, emerging in the West at a similar time we start to see the codification of a completely new form of common rights in the grazing programs of the Bureau of Land Management. What is also important to note is that into the late 1970s we see this paradigm of complete property control tested with the emergence of the environmental movement, which puts a fissure in the conceptualization of property rights as completely exclusive in ownership and usage, to one which it is increasingly accountable for its indirect benefits and harms.

\textsuperscript{54} Ibid. pg 35
\textsuperscript{55} *McKee v. Gratz*, 260 U.S. 127, 136 (1892)
Chapter 3: Western Rangelands & the Bureau of Land Management.

The United States geography is vast and diverse, creating unique challenges to land management and property rights, especially in the western states. Large swaths of grazing lands, sometimes referred to as rangelands, in this multi-state region were initially held by the federal government for distribution to settlers. Some of these settlers developed a heavy reliance on the vast and available unenclosed grazing common, producing the institutional codification of common rights that failed to appear broadly elsewhere in the United States.

The history of the western grazing lands in the United States has its roots in the unique histories of the American West, specifically of Mexico, Texas, the American railroad, the ‘Indian Wars’, and the American Civil War. To avoid overindulging in these interesting but tangential stories, we should focus on the political, economic, and legal factors that facilitated the creation of the land agency that is the U.S. Bureau of Land Management (BLM) and its current commons regulatory scheme. Using these factors as identified by Karen Merrill in her book *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them*, we can piece together the formative political economic and legislative events that led to its creation. While the BLM was only founded in 1946, the origins of the agency’s responsibilities extends back to the mid-19th century when the dramatic expansion of the American western frontier created one of the largest grazing commons in North America in the form of public domain. This explosive expansion was due in part to some of the core themes of the western epic: removal and reservation of the numerous indigenous tribes, land purchases from Spain and France, and the annexation of land from Mexico and Texas.56

These events massively increased the amount of inhabitable land in the control of the United States federal government, and it is this federal control that set the stage for the legal development of a common right in the form of modern day BLM Grazing districts. These lands referred to at the time as public domain, were placed under the control of the federal agency, the General Land Office, with the stated purpose “to handle the business associated with the sale of public lands for private ownership, transforming wilderness to agricultural use, and generating income for the Federal

government.” This organization set out to survey, distribute and sell the newly acquired lands, and it did so with the assistance of the homestead acts, a series of legislative acts that served to give or sell portions of land throughout the public domain.

The U.S. land policy of the 19th century at the time had its basis in two pieces of legislation, the Land Ordinance of 1785, and the Northwest Ordinance of 1787, which stipulated that when the indigenous peoples had given up their land, government would survey and divide the public domain into townships of six square miles each, with increasing divisions down to 160 acres. Even before the land could be surveyed and distributed western settlers had already begun staking out the western frontier, creating an obstacle of present and politically active squatters, which proved to be formative in the creation of later policy.

The Homestead Act of 1862, passed in the midst of the American Civil War, allowed a citizen or prospective citizens, heads of households or person above the age of 21, the settlement of up to 160 acres of public domain under the condition that they reside there for 5 years and improve and cultivate the land. This act, requiring cultivation to acquire ownership, was another example of the effect of natural law, and resulted in the settlement of 1.6 million homesteads and privatization of 270,000,000 acres or 10% of all the United States lands at the time. While these figures are impressive, the act set the groundwork for lasting property issues throughout the west, as not all property was capable of sustaining cultivation, and neighboring unenclosed public domain land provide fertile opportunity for cattle ranchers to exceed the carrying capacity of the lands they did possess. Ranchers that did homestead in dry regions primarily did so around water sources effectively


60 Act of May 20, 1862 (Homestead Act), Public Law 37-64, 05/20/1862; Record Group 11; General Records of the United States Government; National Archives.

denying others necessary access to this essential resource and maintaining greater control of the usage of neighboring public domain.\textsuperscript{62}

Throughout the west at this time we see the emergence of what is colloquially called the “Cattle Kingdom”. As the Civil War came to a close in 1865, the opening up of eastern markets to Texas beef gave birth to the great northern cattle drives and a boom of ranching throughout the West. For example, in the period between 1870 to 1880 the amount of cattle being grazed in Wyoming jumped from 11,130 to 278,073, a 2,398\% increase, while in Colorado that number went from 70,736 to 346,839 a still impressive ~300\% increase.\textsuperscript{63} This boom period of the 1870s created massive personal wealth and political power for the cattle industry as profits reached up to 30 – 40 \%.\textsuperscript{64} In 1872, one of the first ranching political advocacy groups to establish themselves was the Wyoming Stock Growers Association (WSGA), which quickly consolidated other livestock associations to include 363 members with ownership of over two million head of livestock by 1883.\textsuperscript{65} This group and similar ones provided centralization for political advocacy, aide in maintenance of the grazing lands, and created an informal barrier to entry for new ranchers.

As the cattle boom flourished in the 1870s and 1880s, overgrazing and property protection became increasingly pressing issues and informal and formal policing was widespread and frequently violent. Since public domain at this time had no formal barrier to use, few formal measures could be implemented besides the issuing of brands through local committees, and a resulting push for federal legislation made illegal branding a felony in 1879.- The vast majority of control over the open range was done through informal and often illegal measures. The stock growers associations played a major part in these controls as associations like the WSGA would divide the range into districts to organize and oversee cattle roundups, and decide who could and could not enter the cattle industry through the creation of blacklists of suspected rustlers, and the harassment of smaller cattle ranchers. As the range became overgrazed and the market for beef dipped in the late 1880s outbreaks of violence occurred in what was called the “range wars”. During this period, violence such as the Johnson County War in Wyoming broke out when the WSGA hired

\textsuperscript{63} Ibid. p. 19
\textsuperscript{64} Ibid. p. 20
\textsuperscript{65} Ibid. p. 24
gunmen, named “the regulators,” to find suspected rustlers eventually resulting in the death of two people. This particular outbreak of violence outraged nearby farmers and small livestock owners producing a mob that required the intervention of federal troops. In other parts of the western rangelands, illegal regulating was attempted through the fencing of the public domain land, the creation of “dead lines” where cattlemen would kill livestock of the competing grazers and demarcate the ranges they used with the bodies, and the targeted overgrazing of lands both on the public domain and on the property of homesteads. The federal response to these outbreaks of conflict and violence was mixed, primarily because congress intended to dispose of the land, and rarely exerted any governmental control over its use. The silence of Congress on the matter was interpreted as an important policy statement indicating a permission to use, as seen in the 1890 Supreme Court case Buford v. Houtz. A Justice in that case, Samuel Freeman Miller argued that:

“There is an implied license, growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed and no act of the government forbids their use… The government of the United States in all its branches has known of this use, has never forbidden it nor taken any steps to arrest it.”67

The Justice even went on to point out the divergence that had occurred between American Common law and the English practice:

“The owner of a piece of land who had built a house or enclosed twenty or forty acres of it had the benefit of this universal custom as well as the party who owned no land. Everybody used the open, unenclosed country which produced nutritious grasses as a public common on which their horses, cattle, hogs, and sheep could run and graze. It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbors… Owing to the scarcity of means for enclosing lands and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country…”68

This judgement in 1890 not only verbalized the divergence that occurred in American legal development regarding commons, but also identified the current access to the plains as an “implied license” of “great value.” The extent of this

66 Ibid p. 26
67 Buford v. Houtz 133 U.S. 320, (1890)
68 Ibid. 133 U.S. 328
“license” was also unclear, as it didn’t indicate a vested property right, and ranchers continued to try in many ways to control grazing lands for their exclusive use.

The first bureaucratic attempt at the regulation of the public domain took place in the executive creation of forest reserves, containing significant common domain grazing land. Starting in the 1890s, these reserved expanded to 194 million acres by 1909.69 This created a divisive battle concerning grazing right, which reached a compromise with grazing interests group such as the newly founded National Livestock Association (NLSA) with creation of a grazing permit system to regulate use. This permit system created a three-tiered classification of grazers:

- Class A: Permittees would be those ranchers with “adjacent property” to the reserves
- Class B: Permittees would consist of ranchers who owned property that was not adjacent to the reserves, but who have utilized the public domain ranges in the past
- Class C: Permittees would include those “transient herders” who were not owners of property.

The classification system was hierarchical and offered priority to ranchers from A to C. As demands were so high on reserve land, this effectively eliminated transient herders. Also included in this system was a rule of “commensurate property” which gave greatest priority to ranchers who owned enough private land to support their animals when they were on not on forestlands.70

These two principles for regulation of grazing set the foundation for the regulation and debate regarding grazing rights on public lands into the modern day. The concept of commensurability represented the first clash between regulators and the lobbying interests as they debated how to constitute it. Tying the ranchers grazing allotments to their private property created huge ramifications on the operations of livestock owners who utilized the public domain as a primary part of their grazing operations, and the grazing permits themselves had a contributing property value that quickly ingrained itself into appraised values for loans.

70 Ibid. pg 60
Still the lasting legacy of American Common right reemerged to test the new rules in the court case of *Light v. United States*, that questioned and clarified the nature of the federal ownership of the land. *Light v. United States* concerned a cattle owner name Fred Light who released cattle on unenclosed public domain resulting in them straying onto the unenclosed reserve land and the forestry service charging him with trespass. Light argued that since federal government held the title to the land *as proprietor only*, the federal lands were subject to the state policing powers, which allowed for access to unenclosed lands.  

The court decided that the nature of the reserves as public property was not of rightful ownership by all American people, but rather the governments right to hold the land in “public trust”. The “public” essentially meant the federal government, which acted both a *proprietor* (or land owner) and *sovereign* (or autonomous state). This distinction, was actually a distinct alteration of the classic liberal and natural law view of the state, which held the “role of the government is largely to protect private property and not encroach upon private property rights.”

By far one of the most formative and significant pieces of legislation concerning the organization of western lands in the 20th century was the 1934 Taylor Grazing Act. This act, which extended the federal governments regulatory capacity to include the public domain lands and organized defined grazing areas called districts, represented the end of homesteading, public domain, and establishment of a controlled common of over 80 million acres. The Taylor Grazing Act implemented a regulatory scheme very similar to those that were created for the forest reserves two decades earlier, with additional provisions and protections.

Three major and somewhat conflicting provisions were included to protect the established interests of ranchers and have proved to be the source of debate to this day.

Primarily, much like the permit system in the forest reserves, the Taylor Grazing Bill gave preference to

---

71 U.S. Supreme Court Light v. United States, 220 U.S. 523 (1911)
73 Ibid. 65
“those within or near a [grazing] district who are landowners engaged in the livestock business, bona-fide occupants or settlers, or owners of water or waterrights as may be necessary to permit the proper use of lands…” with an additional assurance saying that “Nothing in this…shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands.”74

In addition to this provision we also see the firm assertion that “the creation of the grazing district or the issuance of a permit…shall not create any right, title, interest in or to the lands.” Although this seemingly conflicts McCarran amendment which stated:

“no permittee complying with the rules and regulations laid down by the secretary of the interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit to the permittee, which such unit is pledged as security for any bona-fide loan.”75

These provisions, which both include lasting protections and the firm denial of property rights, obfuscate the intent at the crux of the debate regarding grazing “rights”. This act and the political campaigning required to pass it, further complicate its interpretation, as the first director of the Grazing Bureau, (the forerunner agency of the BLM) Farrington Carpenter routinely campaigned to ranch lobbying organizations using the terms of “range rights”, and Harold Ickes, the head of the department of the interior, often used terms of “home rule” and “self-governance”.76

Implementing the Taylor Grazing Act expanded on the regulatory structure used in the forest reserves in two ways. Firstly, the creation and regulation of “grazing allotments” within established “grazing districts” incorporated significantly more cooperation with local associations of stockmen as well as state officials, effectively decentralizing the bureaucracy to include public and private interests. Secondly, the establishment of grazing regulations such as requirements for “commensurability”, and maximum allowed grazing animals uniquely catered to the environmental capacity of the district with input from the local ranging interests.77

This regulatory structure, which was brought under the control of the Bureau of Land Management in 1946, remained relatively unchanged until the 1970s, when environmental legislation emphasizing ecosystem protection and recreational use of

75 ibid. p. 156
77 ibid
all public lands emerged. Through these laws, such as the National Environmental Protection Act, and the Federal Land Policy and Management Act, environmentalists unseated the relationship between the government, the ranchers and the people, by identifying indirect effects and services provided by the ecosystems on the lands.\textsuperscript{78} The current state of the management of the western rangelands hasn’t significantly changed since, but as can be seen with Cliven Bundy case; the conflict over the “rights” of grazers is far from settled.

\textsuperscript{78} Ibid. p. 206
Chapter 4: American Rangelands; Commons by Another name?

In the context of the development of common right in the United States, the BLM grazing lands represent a thought-provoking case study. While the initial conditions of American colonization prevented the U.S. from forming identical land arrangements as England, the dominance of natural law, and the resulting widespread practice of grazing on unenclosed lands did produce a codified, regulated, and entitled common on the western rangelands.

As common right was increasingly being removed from the common jurisprudence, primarily because the legal structure to support it wasn’t in existence, the management of the western rangelands through debate and conflict formulated a legal structure for the protection and continued functioning of its grazing commons.

To effectively compare the development of the western rangeland commons with that of the English commons as a legitimate common with, at least a form of common right, and an effective form of commons, I will first define more strictly the concept of common land, and common right. Then comparing legal structure of BLM grazing lands to early American open access commons regulation, and the governance structure currently in England, I will demonstrate that the development of the codified common governance structure in the United States is at least practically similar to that in England.

Determining the legitimacy of the conceptualization of the BLM grazing lands as “common land” requires some caveats, since common land itself has no firm legal definition, and can be described as:

"...land over which rights of common are exercised. A right of common is the legal right of one or more persons to take some part of, the produce of, or the wild animals on the land of another person."\(^{79}\)

In this definition for English commons found in G. Gadson’s Law of Commons, the crux of the issue is whether or not grazing permits can be argued to constitute a “legal right” on BLM lands. While cases like the United States v. Bundy have shown that traditional grazing practice does not in itself provide a unrestricted right, it has been argued that the non-revocability of successfully exercised permits do

\(^{79}\) Gadsden, G., The Law of Commons (London: Sweet & Maxwell, 1988) page 1
create a legally enforceable entitlement.\textsuperscript{80} It is important to remember that commons in England themselves do not have the unfettered use rights like the ones that Cliven Bundy seeks to assert his right to, and the successful traditional exercise of commons in England came with a wide variety of communally enforced regulations. These regulations included mechanisms such as stinting, or setting maximum amounts of grazing animals, and wintering, or requiring grazers to have enough feed for their animals in the wintertime.\textsuperscript{81} Both of these practices are present in the arrangements of BLM managed grazing lands.\textsuperscript{82} Also, while the presence of grazing fees might be argued to undermine the proposition of a common right relationship between the BLM lands and the prioritized permitted ranchers, in a comparison to the current management system of English commons, which under the Commons Act of 2004 includes fees for participation in and registration of commons, shows it is not irreconcilable with the concept of common right.\textsuperscript{83}

Another question arises whether the land could be considered the property of “another person”. In regards to BLM lands, the law has shown in cases such as \textit{Light v. United States}, that the government is in fact the proprietor or owner, of the land while simultaneously sovereign. Whether this qualifies as another person is up to debate, but ownership by non-individuals can be seen in the exercise of modern day commons in England by corporate charities such as Natural Trust in Shropshire, which maintains land ownership of a large grazing commons on Long Mynd in the Shropshire hills.\textsuperscript{84} Also, historically it wasn't unprecedented for lords with juridical powers tantamount to the state to own and directly allow exercise of common right on their land.\textsuperscript{85}

Using this broad legal definition of common, we can see that at least theoretically the BLM practice represents a common with a form of legally exercised common right, although an examination of the more practical exercise of this common right can give us a clearer picture. In a comparison between the exercise of

\begin{itemize}
\item Commons Act 2006 (c 26) section 32
\item Roberts, A., \textit{Case Study: Long Mynd Common}, International Association for the Study of the Commons, (2016)
\end{itemize}
commons in modern day England and the United States, and the 19th century England and United States, the convergence of the institutionalized modern day common practices becomes evident.

Table 1.

<table>
<thead>
<tr>
<th>Practice:</th>
<th>England 86 87 88</th>
<th>19th century England 89</th>
<th>19th century USA 90 91</th>
<th>USA BLM Lands 92</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defined Boundaries</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Restricted Use</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Legally Authorized</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Management</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legally Respected Use</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Custom Based Use</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Localized Regulations</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Participant led Management</td>
<td>X</td>
<td>X</td>
<td></td>
<td>*</td>
</tr>
<tr>
<td>Authorized Sanctions for</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>rule violation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In this comparison of practices between England and the United States, we see the formation of an analogous institutionalized common on BLM grazing lands compared to those in England, as well as seeing the progression in the two locations over a period of almost 200 years. This comparative matrix is made using practical characteristics derived from Commons Councils, the English commons governance structure proposed in the Commons Act of 2006. Commons Councils come in different models, requires voluntary adoption by commoners, and are therefore not instituted fully across all English commons, but it offers a governmentally authorized decision making structure for governance of registered commons. The councils are assembled from representatives from the commons they are overseeing as well as

86 Commons Act 2006 (c 26) part 2
89 Ibid. p. 25
91 More research concerning the implementation localized regulations of American unenclosed land use is needed, but legal interpretations from state supreme courts would indicate a legal block to the implementation of regulations on unenclosed land use.
owners, and any relevant government authorities. The establishment of these Commons Councils include setting defined boundaries to the common, identifying and registering active and inactive common users, and the authority to make legally binding regulations about the use of their legally recognized common rights. The Commons Councils have oversight from environmental authorities to curtail environmentally damaging common use and enforce council regulations. The Commons Councils model proves to be a good metric of commons comparison because it represents extensive codification of the operations and governance of a common in a country with extensive tradition and protection for common land use. In the comparison between the BLM management structure and that of the Commons Councils we see that they share every criteria listed except participant led management. While the Bureau of Land Management does establish Regional Grazing Advisory Boards of local ranchers and is legally required to receive recommendations from them and state officials, there is no statutory requirement to incorporate that advice. What is also revealed in this comparison is the failure of early U.S. unenclosed commons to create any of the institutionalized governance systems to organize its common right. While some early formal commons in the U.S. did develop regulation of use and users, such as the Boston common in Massachusetts, it seems, as far as this researcher can tell, that these examples represent an anomalous occurrence compared to the more widespread exercise of unenclosed commoning. Also important to note that while jurists of the early United States have referred to this right to common on unenclosed land with the vernacular of common and common right, the modern day understanding of commons as institutions emphasize the informal and formal community controls over the use. What is shown in the early American unenclosed common arrangement seems to be a right to use, codified in early legislation, which without the framework of regulation, would presumably retard regulation implementation as enclosure was required by law before such controls could be put on

93 Commons Act 2006, part 2
95 ibid. Merrill pg 180
the land. Greater research into attempts to regulate unenclosed land need to be done to fully clarify this relationship.

Having identified the apparent similarities between the governance of English commons governance and that of the BLM grazing lands, a more qualitative analysis of the systems as effective and sustainable governance structures can occur. In Elinor Ostrom’s Nobel Prize winning book, Governing the Commons, she formulates eight design principles for the successful management of a common pool resource (CPR), or resources like unenclosed grazing lands, that are rivalrous but non-excludable.97 Her design principles are guidelines for self-governing, self-organized, and long-enduring commons, and can be adapted to gauge, at least conceptually, the sustainability and effectiveness of western grazing land management.98 While Elinor Ostrom’s principles were not intended for use as a strict criteria in evaluating the sustainability of a commons structure, much less a centrally regulated one, they do give us an indication of what aspects of the management design align with the many examples of successful and robust common practices in places like Switzerland, Japan, and Spain.99

Elinor Ostrom’s eight design principles for self-governing, self-organized, and long-enduring commons include:

1. Clearly defined boundaries and group membership,
2. Matching rules governing use of common goods to local needs and conditions,
3. Ensuring that those affected by the rules can participate in modifying the rules
4. Developing a system, carried out by community members or those accountable to community members, for monitoring the observance of the rules,
5. Using graduated sanctions for rule violators,
6. Providing accessible, low-cost means for dispute resolution,
7. Making sure the rule-making decisions of community members are respected by outside authorities.
8. Building in responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system.100

---

98 Ibid pg 61 - 71
99 Ibid.
100 Ibid. Pg 90
These principles are presented in Table 2, below, for easy comparison between England and USA in current management practices.

### Table 2.

<table>
<thead>
<tr>
<th>Design Principles</th>
<th>UK Grazing Commons</th>
<th>USA Grazing Lands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Clear Membership &amp; Land Boundaries</td>
<td>Yes, registered boundaries; membership inherited or purchased</td>
<td>Yes, defined districts; permits prioritized for adjoining property &amp; past use.</td>
</tr>
<tr>
<td>2. Localized Regulations</td>
<td>Yes, regulations determined by local council</td>
<td>Yes, localized regulations established for individual grazing districts &amp; local needs.</td>
</tr>
<tr>
<td>3. Member participation in rulemaking</td>
<td>Yes, collective choice arrangements</td>
<td>* Somewhat, state &amp; Grazing Advisory Board participation</td>
</tr>
<tr>
<td>4. Monitoring: appropriators or working for appropriators (users of the common)</td>
<td>Yes, Commons Councils with legally binding decisions</td>
<td>*All monitoring is through federal authorities</td>
</tr>
<tr>
<td>5. Graduated sanctions for regulation violations</td>
<td>Yes, graduated sanctions applied through criminal law.</td>
<td>*Discretion of BLM federal authorities.</td>
</tr>
<tr>
<td>6. Low cost dispute resolution</td>
<td>*Commons Councils legally sanctioned decisions.</td>
<td>No</td>
</tr>
<tr>
<td>7. External recognition of the rights to self-organize.</td>
<td>Common councils are voluntary, come in many forms &amp; are legally authorized</td>
<td>*No, with the exception of Grazing Advisory Boards</td>
</tr>
<tr>
<td>8. Shared responsibility for successful governance on every level</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

As demonstrated in Table 2, a significantly higher proportion of the principles in the governance structure offered by the English Commons Councils are satisfied in comparison to those managed by the Bureau of Land Management. Although this comparison is not without caveat, as many of the criteria are at least partially structurally satisfied or should not be considered applicable. One partially

---

4. Severity of sanction is dictated by BLM officers but can include a revocation of full or part of permit, or fees based on severity of violation, e.g. “be required to pay twice the value of forage consumed as determined by the average monthly rate per AUM for pasturing livestock on privately owned land (excluding irrigated land) in each State as supplied annually by the National Agricultural Statistics Service, and all reasonable expenses incurred by the United States in detecting, investigating, and resolving violations. If the dollar equivalent value is not received by the authorized officer within 30 days of receipt of the final decision, the grazing permit or lease shall be cancelled. Such payment shall be in addition to any other penalties the authorized officer may impose under paragraph (a) of this section.” Found in the Code of Federal Regulations (CFR) section 4170.1-1 - Penalty for violations.
achieved principle is principle three, which concerns member participation in rule making. The Bureau of Land Management does not give any formal legal rulemaking capacity to the Grazing Advisory Boards or state officials, and while their input may incorporated, their power to influence decisions concerning rules is primarily political.\textsuperscript{105} Also, while principle four is partly structurally satisfied, in that much like the Commons Councils rules, BLM regulations are enforced by government authorities, the nature of the property arrangement is different so regulations are not enforced for the “appropriators”, in this case the grazers. In regards to principle five, graduated sanctions for BLM grazing lands are not inherent in the Code of Federal Regulations, although there does seem to be a spectrum of severity. Another factor that casts doubt on the satisfaction of principle five is also witnessed by the federal government’s inability to successfully enforce sanctions, given Cliven Bundy’s continued grazing after having both his grazing permit revoked and receiving a legal injunction, being the primary example.\textsuperscript{106} Finally, principle seven for BLM land management is not realized although we should recognize the advisory capacity of Grazing Advisory Boards.

With these shortcomings in mind, this presents the opportunity for the BLM management to implement small and smart policy changes to align better with Ostrom’s eight design principles. One definite way to improve rule adherence, is through the incentivization of grazers to monitor each other. This would increase the competition between grazers, and produce healthier rangelands as rule violators would receive reduced grazing permits thereby reducing overall grazing and its harmful impacts. In this line of thought, small structural reforms could be done to satisfy principle eight in the BLM management of grazing lands. Principle eight, specifically intended for CPRs that are part of a larger system, requires “appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities” to be organized in multiple levels of the nested enterprise. The extent to which BLM land management is truly a “nested enterprise” is questionable, as creation of regulations, management, oversight and enforcement is statutorily in the hands of the BLM, but empowering and incentivizing ranchers and livestock associations could increase sustainability and importantly reduce expenditures of

\textsuperscript{105} Ibid. P. 141
management. While there is current subsidization of ranchers implementing their own land improvements, empowering ranchers and livestock associations to monitor, enforce, and arbitrate disputes could create progress towards the satisfaction of principle eight.\textsuperscript{107} Also worth noting is that the U.S. federal government currently spends approximately 36.2 million dollars of its 79 million dollar budget for the BLM on the administration of its grazing program, while the commons councils program itself does not have a discernable cost to the public, with the exception of enforcement and oversight through public body institutions like Natural England. \textsuperscript{108}


\textsuperscript{108} Ibid.
Chapter 5: Conclusion

Cliven Bundy’s stand may have been a protest over a claim to rights that was proven to be legally defunct, however the dispute over these rights was not without cause. In fact, the silent struggle over the existence of common right in the United States has been with the nation since its founding and is intertwined with core legal debates such as those over rights of property, the proprietary role of the government, and the dynamic struggle between central and regional control inherent in the practice of federalism. The development of the western rangelands proved to be a perfect arena for this struggle to play out.

In conclusion, by exploring the divergence in the development of a legal framework in regards to common right between the United States and England. I have sought to add to the overall study of the commons at large, while identifying the limitations of this paper and areas for further study and exploration.

By comparing the developments in England and America we’ve been able to get a sense of why the divergence occurred and how the two systems manifested common right differently. In England, common right progressed from the formal and informal manorial arrangements of lords with their tenants, through the legal crucible of enclosure to create the modern Commons Councils we see being implemented today. In the United States, the presence of a different colonial form of common land is widespread from its founding and into the 19th century. However, the incongruence with English commons and the inability to establish codified commons during the late 19th century centralization of jurisprudence virtually eliminated land rights not held in full ownership by the early 20th century. Nevertheless the US has developed its own legal framework of common right in the public domain lands of the western United States. Finally, with the comparison of the modern day commons practices of both nations we can see striking similarities in the practical aspects of the regulation schemes indicative of a modern day convergence. While it is important to recognize the profound differences that still exist in the practice of American commons and English commons, specifically concerning explicit identification of rights, and the distinct influence of the manorial legacy in England, the practical management of the commons in both countries still represent similar goals of protecting controlled entitled use.
Also, from this comparison arose two key policy prescriptions on how to manage the common most sustainably and efficiently in line with Elinor Ostrom’s eight principles of long enduring common pool resource institutions.

I believe that this thesis contributes to the study of English and American commons by expanding the scope of the study across a millennium and connecting the origin of common right in the metropole, through its colonial divergence and evolution, and finally to its modern day codification, in which we can see divergent but common threads that shape common rights in different societies.

Limitations and problems were encountered in this study, most specifically concerning the gathering of resources about the implementation and decline of manorialism in early colonial United States, and developing a neutral framework for comparison of commons regulatory practices.

To further this study of American commons development beyond the scope of this paper, greater research needs to be done on the United States common enclosures including the lasting effects of the New England manorialism and other colonial demarcated commons, as well as the multicultural reactions to commons practice by European immigrants. It would also be worthwhile to undertake more intensive legal research regarding conflict between state provisions for unenclosed land usage and established regulated commons as we can see happening in the western lands with Light vs. United States. Research into conflicts of these sorts as well as early attempts at unenclosed land use regulation could shed valuable light on the inability to codify the early American commons arrangement. Further investigation into the comparison between English commons and BLM grazing lands, is also warranted to support efforts to increase legislation that could improve environmental sustainability and economic efficiency, especially in light of the effects of climate change. While studies have already been pursued on the environmental impacts of BLM grazing management, placing the environmental sustainability in a comparative framework could produce better policy prescriptions for the future. For such a study to occur greater auditing and research of the variety of commons practices and effects throughout England would be needed.

From an historical perspective, because so many exogenous factors are interconnected in the management of common land, greater research concerning the cultural exchange that occurred in the development of law and conceptions of property rights in England and the United States would be of great help in
understanding the relationships between post-colonial countries and their colonizing metropole.
Bibliography:

Concerning United States:


5) Bureau of Land Management: Public Land Statistics, 2014


**Concerning England:**


21) The Commons Act 2006

22) Commons Registration Act 1965


