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# Towards an understanding of public property

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## Towards an Understanding of Public Property

### I. Introduction

Public property in land is remarkable for its unremarked ubiquity, obvious to identification, yet oblivious<sup>1</sup> to coherent understanding. While richly embroidering human landscapes, we remain pauperised by public property's theoretical under-development. As American scholars Sally Fairfax and Jon Souder observe, '[t]he flourishing literature concerning property...is little reflected in the debate surrounding U.S. public resources. Discussions of public lands - our national parks, forests, wildlife refuges, and grazing districts - has been surprisingly unconcerned with theories of property, access and ownership.'<sup>2</sup> Leigh Raymond concurs, noting the surprising absence of property rights from the public lands 'conversation'.<sup>3</sup> Such lack of concern for 'property' in public land is one that resonates beyond America.<sup>4</sup> This paper seeks to redress this imbalance, to canvass 'theories of [public] property, access, and ownership', and the contributions of jurists to its putative jurisprudence. From an antipodean vantage, it explores the public estate in comparative common law jurisdictions, with an emphasis on three 'settler' societies.<sup>5</sup>

Part II commences with a brief definition of public property in land. Part III then reviews the spectrum of public property type, from corporeal to incorporeal, and beyond to custom and illusion. Part IV aims to identify public property's vexed proprietorship. Part V scrutinises *inclusion*, its elusive, unconsummated relationship with access, analogies to use and enjoyment, and how it facilitates property as propriety. Part VI concludes with a call for greater sophistry in public property discourse.

As Fairfax and Raymond intimate, scrutiny of public property in land is overdue. To myopically overlook the public estate is to consign its values and meanings to the periphery. Conversely, to better 'see'<sup>6</sup> the public estate is to dispel the corrosive implication that it is at one extreme, an oxymoron,<sup>7</sup> or at the other, a perverse variant of private ownership.<sup>8</sup> Its better understanding makes clearer sense of what is ours.

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<sup>1</sup> CM Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems', (1998-1999) 83 *Minnesota Law Review* 129, 132.

<sup>2</sup> 'Our understanding of publicly owned property is largely restricted to principles of scientific management and multiple use.' Jon Souder and Sally Fairfax, 'In Lands We Trusted: State Trust Lands as an Alternative Theory of Public Ownership', in C Geisler and G Daneker (eds.) *Property and Values: Alternatives to Public and Private Ownership*, (Island Press, Washington DC, 2000) 89.

<sup>3</sup> LS Raymond, 'Sovereignty Without Property? Recent Books in Public Lands' (2003) 43 *Natural Resources Journal* 313, 315.

<sup>4</sup> 'There is little written about public property...except in contradistinction to private property.' JW Hamilton & N Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in A McHarg et al (eds) *Property and the Law in Energy and Natural Resources* (Oxford, Oxford University Press, 2010) 19-20.

<sup>5</sup> Australia, New Zealand, and the United States.

<sup>6</sup> CM Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, Westview Press, 1994).

<sup>7</sup> 'CM Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property' (1986) 53 *University of Chicago Law Review* 711.

<sup>8</sup> 'In the strict common law tradition even government-owned property is regarded, technically, as... subject to private ownership.' K Gray and SF Gray, 'Private Property and Public Propriety' in J McLean (ed) *Property and the Constitution*, (Oxford, Hart Publishing, 1999) 13.

## II. Defining Public Property

Public property in land is typically defined by what it is not, property that is *not* private property. Common property is arguably better understood.<sup>9</sup> The public estate suffers the paradoxical risk of being perceived as non-property, a passive *res* awaiting capture. As Margaret Davies argues, 'the private nature of property is naturalised and universalised, as though other forms are somehow less ethically defensible.'<sup>10</sup> Centuries of marginalisation of non-private property dating from the enclosure period<sup>11</sup> have obscured public property; it's seeing dispersed and drowned out by private rhetoric.

To define public property is to jettison the familiar paradigms of exclusion and alienability, and embrace an expansive conception of property that is 'not a monolithic notion of standard content... [but] the most comprehensive of all the terms which can be used... indicative and descriptive ...of all or any of the very many different kinds of relationship between a person and a subject matter.'<sup>12</sup> Such a perspective accommodates the idea of public property in land as those 'interests in which the individual concerned has no greater claim than any other member of the public,'<sup>13</sup> collective rights, enjoyed by individuals in common with others, and measured by their public sum.

This paper expands on this preliminary definition by next identifying three indicators of public property in land: the diversity of its type; the conundrum of its ownership; and its right of inclusion. Each attribute amplifies further comprehension of the public estate; type expands recognition; ownership exposes the fault line between property's collective and individual values; while inclusion represents the hope of a nascent touchstone right, presently ill formed and amorphous.

## III. The Spectrum of Type

Public property in land takes a plethora of form. This part seeks taxonomic order by adopting a blunt divide familiar to property lawyers, corporeal versus incorporeal. Corporeal public property refers to tangible, identifiable lands. Incorporeal public property comprises non-possessory, intangible, less than fee interests in land. Type then diverges to examining the sources of public property beyond statute and the common law, those of custom, even illusion.

Traditionally seen as government-owned land, the spectral breadth of public property type demonstrates both a surprising diversity, and a refutation of any distinct public/private divide in property. Rather public property occupies

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<sup>9</sup> E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York, Cambridge University Press, 1990).

<sup>10</sup> M Davies, *Property meanings histories theories* (Abingdon, Routledge, 2007) 13.

<sup>11</sup> CM Rose, 'Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age' (2003) 66 *Law & Contemporary Problems* 89, 91.

<sup>12</sup> *Yanner v Eaton* (1999) 201 CLR 351 (HC).

<sup>13</sup> *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672, 679 (HC).

space across a broad continuum, where degrees of 'public-ness' are relative, not absolute, questions.

## A. Corporeal Public Property

Public property is most recognisable in its corporeal form, typically alienated land held by the State or Crown, state agencies, or public lands leased to long-term private right-holders.<sup>14</sup> Public land held by government agencies is primarily land dedicated<sup>15</sup> or reserved for public purposes. Its usage depends on its public function: conservation; resource exploitation; education; transport; health; defence; public administration; recreation; and so on. Then there are public lands with no present use; unalienated Crown lands or non-allocated public domain lands that have not been dedicated, reserved, or otherwise dealt with. Interspersed is an inchoate miscellany, the like of permissive occupancies, travelling stock routes, or 'paper' roads, *ad hoc* interests that reflected periodic policy imperatives.

The physical footprint of corporeal public property is impressive. In the United States, one-third of the continental landmass comprises federally owned public lands.<sup>16</sup> In three of the 11 western states, the percentage exceeds 50 percent.<sup>17</sup> In Australia, Crown land amounts to 50 percent of the landmass of the populous state of New South Wales. In more sparsely settled Western Australia, it is 93 percent. State-owned conservation land alone constitutes one-third of New Zealand's area. Yet despite its superlative acreage, public property lacks the legitimacy or normalcy of private property, a consequence of a binary liberal worldview that naturalises the primacy of the private rights holder, and views the state with deep suspicion.<sup>18</sup> Hence public boundaries, physical and metaphorical, are perpetually tested, while collective values are perceived as inferior to the individual values of the private estate. In the western United States, 'sagebrush rebellions'<sup>19</sup> or 'storms over the rangelands'<sup>20</sup> are well-documented episodic revolts against the public property estate. Elsewhere, the unidirectional propensity of private rights to encroach into public space has been observed.<sup>21</sup>

The sheer size of the corporeal public estate seemingly fails to address such existential or normative shortcomings. That it may take incorporeal form unlocks potentialities for new, non-reactive ways to 'see' and understand public property in land.

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<sup>14</sup> For example, lands leased or licensed to pastoral right holders under Land Acts in Australian states or New Zealand, or Taylor Grazing Act permittees in the US.

<sup>15</sup> *Randwick Municipal Council v Rutledge* (1959) 33 ALJR 367, 372-3 (HC).

<sup>16</sup> 'One Third of the Nation's Land', A report to the President and to the Congress by the Public Land Law Review Commission, (1970).

<sup>17</sup> Nevada 82%, Utah 64% and California 61%. S Lehmann, *Privatizing Public Lands* 4, 22-23 (New York, Oxford University Press, 1995).

<sup>18</sup> GE Frug, 'The City as a Legal Concept' (1980) 93 *Harvard Law Review* 1057; N Blomley, *Law, Space, and the Geographies of Power* (New York, Guilford Press, 1994).

<sup>19</sup> RH Nelson, *Public Lands and Private Rights: The Failure of Scientific Management* (Lanham, Rowman & Littlefield, 1995)

<sup>20</sup> W Hage, *Storms Over Rangelands Private Rights in Federal Lands* (Bellevue, Free Enterprise Press, 1989)

<sup>21</sup> A Brower et al, 'The Cowboy, the Southern Man, and the Man from Snowy River' (2009) 21 *Georgetown International Environmental Law Review* 455.

## B. Incorporeal Public property

Less recognisable is public property's manifestation as an array of incorporeal property rights. As less than fee interests; they comprise a panoply of covenants, easements, servitudes and *sui generis* statutory rights, held by the state, state agencies, the public at large, even private entities that act in the public interest. Incorporeal rights subsist over both private lands, as public rights encumbering private title, and corporeal public land.<sup>22</sup>

Conceptualised as abstract, non-possessory sticks within the bundle metaphor; incorporeal public rights are separate and divisible from the physical land itself. For example, the right of recreational access to private property is a use and enjoyment 'stick' held by the general public. When enacted in England by the *Countryside and Rights of Way Act 2000*, the statutory right was described in bundle terms as a transfer or re-allocation of 'a valuable property right from private landowners to the public.'<sup>23</sup>

Despite its inherently abstract nature, incorporeal public property plays a (surprisingly) key role in contextualising property right to place<sup>24</sup>, and connecting otherwise fragmented land parcels. Examples include scenic easements that preserve natural vistas<sup>25</sup>, public footpaths that link villages across privately owned farmland<sup>26</sup>, or conservation covenants that form wildlife corridors across private habitat. Re-inserting links between disparate property ownerships militates against Eric Freyfogle's 'tragedy of fragmentation', the private rights-dominated landscape where property holdings are island enclaves 'with no mechanisms to achieve landscape-scale goals'. Freyfogle prescribes as a remedy the reconceptualisation of private property, and a need to 'reassert the public's varied interests in private lands.'<sup>27</sup>

The conservation easement exemplifies the connectivity potential of incorporeal public property. Ostensibly modeled on the common law easement<sup>28</sup>,

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<sup>22</sup> Restrictions and positive covenants are imposed on Crown land under ss 77A, 77B *Crown Lands Act 1989* (NSW).

<sup>23</sup> J Anderson, 'Countryside Access and Environmental Protection: An American View of Britain's Right to Roam', (2007) 9 *Environmental Law* 241, 246.

<sup>24</sup> It is surprising because of the historical tendency of private property since enclosure to de-couple property right from context. The end result is what Nicole Graham calls 'lawscapes', landscapes where 'standardised, universal and measurable space was grafted over place so that physicality and particularity of places became irrelevant.' N Graham, *Lawscape Property Environment Law* (Abingdon, Routledge, 2010), 66.

<sup>25</sup> W Hutton, 'Conservation Easements in the Ninth Federal Circuit' in JA Gustanski and RH Squires (eds) *Protecting the Land: Conservation Easements Past, Present and Future*, (Washington DC, Island Press, 2000) 381; R Cunningham, 'Scenic Easements in the Highway Beautification Program' (1968) 45 *Denver Law Journal* 167.

<sup>26</sup> A Sydenham, 'The Countryside and Rights of Way Act 2000: Balancing public access and environmental protection?' (2002) 4 *Environmental Law* 87, 95-96.

<sup>27</sup> ET Freyfogle, *The Land We Share: Private Property and the Common Good* (Washington DC, Island Press, 2003) 177, 203.

<sup>28</sup> 'The conservation easement statute purposefully creates and defines a specific right or interest in property having...its own set of rules.' TD Mayo, *A Holistic Examination of the Law of Conservation Easements*, in Gustanski & Squires (n 25). Statutorily defined in § 1(1) *Uniform Conservation Easement Act*.

conservation easements first appeared in the 1930s<sup>29</sup>, but their use did not become widespread until 50 years later, when taxation incentives encouraged the donation or sale of perpetual conservation easements to public agencies or land trusts.<sup>30</sup> By the beginning of the 21<sup>st</sup> century, conservation easements were 'the fastest-growing method for protecting land' in the United States preserving 1.2 million acres from development, at growth rates over the preceding decade of 377%.<sup>31</sup> Many conservation easements vest in, or benefit land trusts, 'non-profit organizations that preserve or enhance environmental amenities...on private land.'<sup>32</sup> Landscape resources protected by conservation easements include open space, wetlands, forests, scenic views, recreation and trails, greenways, and coastlines.<sup>33</sup> The legal justification for conservation easements is said to be 'significant public benefit.'<sup>34</sup> Often the public benefit is indirect, the provision of 'ecosystem services...a nice view...habitat for wildlife or protected farmland.'<sup>35</sup> Direct public goods manifest as walking trails linking national parks, or trails using disused railway corridors.<sup>36</sup>

In Australia, conservation agreements<sup>37</sup>, or positive covenants protecting environmental, cultural, heritage, or natural resource values<sup>38</sup>, are analogous incorporeal public rights, the benefit vesting in the relevant land conservation agency. The American land trust is replicated by not for profit organisations such as the Nature Conservation Trust,<sup>39</sup> where voluntary landowner agreements and revolving fund arrangements protect natural and cultural heritage<sup>40</sup> and run with the land through registration.<sup>41</sup> In New Zealand, conservation<sup>42</sup> or open space<sup>43</sup> covenants fulfill similar functions to protect ecological or landscape values.<sup>44</sup>

The significance of incorporeal public rights is threefold. First, they broaden our understanding of public property to encompass a diversity of rights beyond fee simple state ownership. Second, they highlight the anachronism of any distinct public/private divide. Conservation easements exemplify that public rights subsist on private lands, and condemn by their existence the notion of a distinct

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<sup>29</sup> Cunningham (n 25) 181-183; SK Fairfax et al, *Buying Nature* (Cambridge, MIT Press, 2005) 122.

<sup>30</sup> R Brewer, *Conservancy: The Land Trust Movement in the United States* (Hanover, Dartmouth College Press, 2003) 148, 155.

<sup>31</sup> JA Gustanski, 'Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands' in Gustanski & Squires (n 25).

<sup>32</sup> D Parker, 'Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements' (2004) 44 *Natural Resources Journal* 483.

<sup>33</sup> JA Gustanski, 'Protecting the Land: Conservation Easements, Voluntary Actions and Private Lands' in Gustanski & Squires (n 25) 21.

<sup>34</sup> Brewer (n 30) 116.

<sup>35</sup> *ibid.*

<sup>36</sup> JA Gustanski, 'Protecting the Land: Conservation Easements, Voluntary Actions and Private Lands' in Gustanski & Squires (n 25) 22.

<sup>37</sup> s 69C(1)(a) *National Parks and Wildlife Act 1974* (NSW).

<sup>38</sup> s 77A *Crown Lands Act 1989* (NSW); ss 88D & 88E *Conveyancing Act 1919* (NSW).

<sup>39</sup> *Nature Conservation Trust Act 2001* (NSW)

<sup>40</sup> s 30(1) *Nature Conservation Trust Act 2001* (NSW).

<sup>41</sup> s 37 *Nature Conservation Trust Act 2001* (NSW).

<sup>42</sup> *Conservation Act 1987* (NZ), or *Reserves Act 1977* (NZ)

<sup>43</sup> *Queen Elizabeth the Second National Trust Act 1977* (NZ)

<sup>44</sup> D Donohue, 'The Law and Practice of Open Space Covenants' (2003) 7 *New Zealand Journal Environmental Law* 119.

property duality as 'confusion elevated to principle.'<sup>45</sup> Third, they demonstrate public property's potential to invigorate connections across human landscapes, to link property with place and context, and obviate the risks of countless 'tragedies of fragmentation.'

### C. Customary public property

The sources of public property type are not restricted to the mainstream. Property's commodification has masked an ancient alter ego, one with meaning for personhood, identity, and community.<sup>46</sup> Customary public property evidences faint but 'surprising connections between informal usages and understandings' about public property, and their binding effect amongst 'those who practice and share them.'<sup>47</sup>

Custom<sup>48</sup> is an awkward, anachronistic source of modern property law, particularly in settler societies lacking the social history from which customary rules arose. Nonetheless customary norms find ways to percolate into the margins of property discourse. Robert Ellickson's 'order without law' in Shasta County, California, observes the powerful, all-pervasive effect of custom in generating rights, including property rights, amongst tightly knit communities of ranchers.<sup>49</sup> Ellickson concludes that such informal rules arise 'through decentralized social processes, rather than from the law.'<sup>50</sup> Similarly, Gregory Duhl studies food cart owners at Temple University, and surmises that 'the ordering of lunch trucks and carts ... illustrates how, in the absence of private property ownership, communities adopt and follow customs and norms to create and order property rights.'<sup>51</sup>

Carol Rose escapes territorial constraints to explore the wider relationship between custom and public property, noting that 'custom provides powerful insights into the nature of "inherently public property".'<sup>52</sup> Rose posits that the effective management of public property arises 'through the medium of the customs and habits of a civilized citizenry.'<sup>53</sup> Efficient albeit informal governance of public resources by the customary public averts a tragedy of the commons, and instead enhances a 'comedy of the commons', where the greater

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<sup>45</sup> C Geisler, 'Property Pluralism' in Geisler & Daneke (n 2) 79.

<sup>46</sup> GS Alexander & EM Penalver (eds), *Property and Community* (New York, Oxford University Press, 2010); GS Alexander, *Commodity & Propriety: Competing Visions of Property in American Thought 1776- 1970* (Chicago, University of Chicago Press, 1997)

<sup>47</sup> D Bederman, 'The Curious Resurrection of Custom: Beach Access and Judicial Takings', (1996) 96 *Columbia Law Review* 1375.

<sup>48</sup> Custom's traditional definition is 'ancient customs practiced by a definite community in a distinct geographical locale...recognized...to constitute a local common law.' A Loux, 'The Persistence of the Ancient Regime: Custom, Utility and the Common Law in the Nineteenth Century' (1993) 79 *Cornell Law Review* 183. A wider definition embraces informal practices that have community adherence.

<sup>49</sup> RC Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Harvard University Press, 1991)

<sup>50</sup> *ibid*, 139.

<sup>51</sup> GM Duhl, 'Property and Custom: Allocating Space in Public Spaces', (2006) 79 *Temple Law Review* 199, 207.

<sup>52</sup> Rose (n 7) 722.

<sup>53</sup> *ibid*, 774.

the use of public property, the greater the resource's social value is maximised, and the 'solidarity and fellow-feeling of the whole community' is reinforced.<sup>54</sup>

The paradox of custom<sup>55</sup> and property is the normative strength of the former. Or as Leigh Raymond describes when the contest is determined informally, 'what is most striking about th[e] incongruity between law and custom, is how often custom wins.'<sup>56</sup> Even in the courts, custom as the basis of a public right occasionally prevails.<sup>57</sup> In Oregon, the celebrated case of *State ex rel. Thornton v Hay*<sup>58</sup> established a statewide public easement over private dry sands on the basis of customary practice.<sup>59</sup>

#### **D. Illusory public property:**

Type concludes with a foray into illusory public property. Carol Rose posits that people 'see' property in a variety of ways, even as false claims, 'the imaginative construction of property... where the law recognizes none.'<sup>60</sup> Much of Rose's discussion centres on people claiming transient entitlements to public spaces as their imagined own, such as lunchtime 'rights' to park benches. Kevin Gray's study of the property norms of spatial order in queues is an analogous example.<sup>61</sup> Arguably, the modern shopping mall best typifies illusory public property, 'private space masquerading as a public space.'<sup>62</sup> As 'open-access private properties'<sup>63</sup> or privately owned 'quasi-public property'<sup>64</sup>, these hybrids foster illusory expectations of public rights of inclusion. The illusion is shattered when private owners enforce behaviour or dress codes, or restrain public assembly or political protest. In such circumstances, 'private proprietorial power [the right to exclude] intrudes into the public sphere.'<sup>65</sup> According to James Kunstler, 'the mall commercialized the public realm.'<sup>66</sup>

#### **E. Type and Property Plurality**

The diverse range of public property type is a reminder that public property is capable of being 'seen' in the most likely and unlikely of places. Incorporeal property in particular underscores that there is no bright line,<sup>67</sup> no distinct

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<sup>54</sup> *ibid*, 759.

<sup>55</sup> Custom in the US is based on 'communitarian norms...a norm shared by all of the constituent groups within a community.' Duhl (n 51) 238.

<sup>56</sup> LS Raymond, *Viewpoint: 'Are grazing rights on public lands a form of private property?'* 50(4) *Journal of Range Management* 431 (1997). The migration of customary norm into law in the American West is studied in TL Anderson & PJ Hill, *The Not So Wild, Wild West* (Stanford, Stanford University Press, 2004).

<sup>57</sup> N Ubhi and B Denyer-Green, *Law of Commons and Town and Village Greens* (Bristol, Jordans, 2004) 135. In a US context, the judicial application of custom is discussed in S Eagle, 'Unitary Law of State Takings', 69-2 *Planning & Environmental Law* (2010) 6.

<sup>58</sup> 462 P.2d 671 (1969).

<sup>59</sup> S Bender, 'Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon Beaches', (1998) 77 *Oregon Law Review*. 913, 917.

<sup>60</sup> Rose, (n 6) 274.

<sup>61</sup> K Gray, *Property in a Queue*, in Alexander & Penalver (n 46) 165-195.

<sup>62</sup> JH Kunstler, *The Geography of Nowhere* (New York, Simon & Schuster, 1993) 119-120.

<sup>63</sup> C Geisler, 'Property and Pluralism' in Geisler & Daneker (n 2) 75.

<sup>64</sup> K & SF Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) *European Human Rights Law Review* 46.

<sup>65</sup> Davies (n 10) 11.

<sup>66</sup> Kunstler (n 62) 119-120.

<sup>67</sup> Davies (n 10) 11.



public/private divide. Rather public property can be found across a continuum, where 'notions of "public" and "private" operate, not dichotomously, but continuously ... in which adjacent connotations shade easily into one another,'<sup>68</sup> and 'finely intercalated distinctions or gradations'<sup>69</sup> segue from state-owned public lands through to customary public rights. In seeking to understand public property through the spectrum of type, it is the differing degrees of 'public-ness' in land, rather than the formal technicality of individual type, that may prove the most instructive.

Importantly, a wider 'seeing' of public property in land enlivens a pluralistic mosaic<sup>70</sup> of property rights and uses across human landscapes. Public property contributes to the mosaic by adding different tiles, corporeal and incorporeal, to the private monotony. The more we 'see' a variety (and greater quantity) of different property types<sup>71</sup>, the less conditioned we become to a self-imposed straitjacket where property and private property are synonymous.<sup>72</sup> Also by diluting the dominance of the abstract private right, the propensity for property to become relational to, rather than divorced from its physical context is enhanced. The Hohfieldian analysis of (essentially private) property as relations between person and person, 'where land is not property, but the subject of property',<sup>73</sup> has narrowed and hardened how we see land.<sup>74</sup> Optimistically, property plurality has the potential for human landscapes to become less like a universalised 'Blackacre'<sup>75</sup>, and more representative of 'where we live.'<sup>76</sup>

Legal geographers such as Nicholas Blomley emphasise that property is best understood by context, 'by reference to its place in and relationship to social, economic, political and ecological systems...'<sup>77</sup> In so doing, they reject an idealised paradigm where the 'law's separateness... [is] deaf to material, physical, spatial and cultural influences.'<sup>78</sup> Edward Relph argues 'an authentic attitude to context is important...because from such a relation, authentic places emerge, places which ... sustain the earth and those dwelling on it.' Relph believes the ability to make 'authentic relations with place' is rare, which he attributes to 'weakening symbolic qualities of modern places.'<sup>79</sup> Property

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<sup>68</sup> K & SF Gray, 'Private Property and Public Propriety' in McLean (n 8) 11.

<sup>69</sup> *ibid*, 18

<sup>70</sup> Fairfax (n 29) 34.

<sup>71</sup> A Brower & J Page, 'Property rights across sustainable landscapes' in D Grinlinton & P Taylor (eds) *Property Rights and Sustainability* (Leiden, Martinus Nijhoff, 2011) 305.

<sup>72</sup> "It is a genuine misconception, which affects the whole theoretical handling of the concept of property by many modern writers." CB Macpherson, 'The Meaning of Property', in *Property: Mainstream and Critical Positions*, 5-6 (Toronto, University of Toronto Press, 1999).

<sup>73</sup> W Hohfield, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', (1913) 23 *Yale Law Journal* 16, 22.

<sup>74</sup> Hohfield's lasting legacy was not 'hocus-pocus' terminology, but his emphasis on property as relations between people, S Banner, *American Property* (Cambridge, Harvard University Press, 2011).

<sup>75</sup> 'Blackacre' is a hypothetical parcel of land invoked in property law classes. Freyfogle charts the rise of Blackacre to a trend at Harvard Law School in 1870 to instill abstract scientific principles into the teaching of law. Freyfogle, (n 27) 107-125.

<sup>76</sup> R Garbutt, *The Locals* 29-30 (Bern, Peter Lang, 2011).

<sup>77</sup> J Holder & C Harrison, 'Connecting Law and Geography' in J Holder & C Harrison (eds) *Law and Geography* (2003) 3.

<sup>78</sup> *ibid*.

<sup>79</sup> E Relph, cited in Garbutt, (n 76) 54-55.

matters in the pursuit of authenticity, 'both symbolically and literally.'<sup>80</sup> Eric Freyfogle's bleak description of Champaign County, Illinois, where the public owns less than 1% of the county 'setting aside roadways and the remnants of a now-abandoned [and contaminated] air force base'<sup>81</sup> is a depressing symbolic and literal vision of property uniformity. To Freyfogle, public lands are the 'remedy for private irresponsibility'.<sup>82</sup> James Kunstler's *The Geography of Nowhere* is an equally grim visage of the decline of the American public realm, the 'landscape tissue that ties together the thousands of pieces of private property that make up a town, a suburb, a state.'<sup>83</sup>

While largely a descriptive exercise, the spectrum of type subverts the inevitability of Kunstler's thesis, or the unremitting bleakness of Freyfogle's imagery. Its opportunities lie in expanding the definitional parameters of public property, a weakening of private ubiquity, and the optimistic consequences this may pose for re-physicalising property rights to place. Its risk is to complicate a coherent account of public property, where type and form necessarily vary according to particular context. On balance, its overarching worth is to demonstrate that we are not prospectively fated by Eduardo Penalver's 'land memory', 'the consequence of countless decisions made decades, even generations, ago'<sup>84</sup> about singular property patterns, that there are alternatives to Champaign County-like uniformity. Seeing a wide diversity of public type may alter such restrictive path dependencies for the better.

#### IV. The Conundrum of Ownership

Ownership is premised on the vesting of property rights in a recognisable entity in its capacity as owner<sup>85</sup>, a 'right to have and to dispose of possession and enjoyment of the subject matter.'<sup>86</sup> In the case of public property, the ownership entity is assumedly public: the state, or an agency of the state<sup>87</sup>. But this assumption poses further questions; does the state or state agency own the land absolutely, or pursuant to some trust for and on behalf of its citizens? And what of private organisations such as land trusts that hold stick rights in property that benefit the public? These questions suggest that the issue of ownership is likewise not a 'bright line.'<sup>88</sup>

Putative ownership by the public at large is a further muddying of the ownership waters. Carol Rose argues that rights in 'inherently public property' are

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<sup>80</sup> H Jacobs, 'Is an Answer Blowin' in the Wind?' (2010) 62-9 *Planning & Environmental Law* 8.

<sup>81</sup> ET Freyfogle, 'Private Rights in Nature: Two Paradigms' in P Burdon (ed) *Wild Law The Philosophy of Earth Jurisprudence* (Adelaide, Wakefield Press, 2011) 271.

<sup>82</sup> Freyfogle, (n 31) 96.

<sup>83</sup> Kunstler (n 62)

<sup>84</sup> EM Penalver, 'Land Virtues' (2009) 94 *Cornell Law Review*. 822, 830. The 'collective interdependence of individual land uses reinforces their inertial power. Once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others. The interplay of these physical, psychological and social components of land's memory yields a pervasive path-dependence in land use....' 830-1.

<sup>85</sup> Waldron defines property type by owner. J Waldron, *The Right to Private Property* (New York, Oxford University Press, 1988) 47.

<sup>86</sup> *Yanner v Eaton* (1999) 201 CLR 351.

<sup>87</sup> Rose (n 7) 719.

<sup>88</sup> Davies (n 10) 10.

controlled neither by government agencies nor private entities, but by society at large.<sup>89</sup> Rose calls this owner the 'unorganized public'.<sup>90</sup> In the United States, ownership of inherently public property by the unorganized public is given effect to by the doctrine of public trust. Originally concerned with core areas such as navigable waterways, 'inherently public property' has proven a 'resurgent concept'<sup>91</sup>, bringing within its ambit new forms of contestable public property that recognize community or public values in diffuse resources.<sup>92</sup> This in turn expands the types of property capable of ownership by an amorphous public.

Joseph Sax frames ownership from a values perspective, in the process identifying a fault line common to the cultural divide between property as a private commodity, and property's ancient social or personhood meanings.<sup>93</sup> Sax states that '[t]he debate over ownership of the public lands is basically part of a much larger controversy over the legitimacy of collective versus individualistic values.'<sup>94</sup> Courts tend to prefer individualistic values, '[t]he common law tradition is not entirely friendly to group rights.'<sup>95</sup> In Australia, the High Court held that members of the public generally do not acquire a proprietary interest in public land.<sup>96</sup> But its judgment was framed from the perspective of the private paradigm, where 'right ...does not in its context mean a public right; it means an individual right of a proprietary nature', and 'interest' mean 'interests held by persons in their individual capacity.'<sup>97</sup> Yet the court did touch on what public ownership may entail.

It [the statute] does not embrace interests in which the individual concerned has no greater claim than any other member of the public. All members of the public have a right to pass freely along and across public highways but none have in their capacity as members of the public any estate or interest in such land. Likewise members of the public may be entitled pursuant to particular statutes to use specified areas of Crown lands for the purpose of recreation... All members of the public may have the right to go upon such land [to] freely walk thereon...and may resist attempts by the Crown or anyone else to eject them from such land.

Ownership of public property demands context, informed through the lens of property's collective values rather than its sense of individual entitlement.

### **A. Entity or no entity?**

Unlike private property<sup>98</sup>, the involvement of a distinct ownership entity may not be a theoretical necessity for public property. Rose's 'unorganized public'

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<sup>89</sup> Rose (n 7) 720.

<sup>90</sup> Rose (n 7) 722.

<sup>91</sup> JL Sax, 'Some Thoughts on the Decline of Private Property', (1982) 58 *Washington Law Review* 481, 482.

<sup>92</sup> CM Rose, 'Joseph Sax and the Idea of the Public Trust', (1998) 25 *Ecology Law Quarterly* 351, 355.

<sup>93</sup> Alexander (n 46).

<sup>94</sup> JL Sax, 'The Claim for Retention of the Public Lands', in S Brubacker (ed) *Rethinking the Federal Lands*, 130 (1984). "Property may be better understood, both historically and legally, as the result of a balance struck between competing individual and collective goals, the private and the public interest." K & SF Gray, 'Private Property and Public Propriety' in McLean (n 8) 15.

<sup>95</sup> CM Rose, 'Property and Language, or the Ghost of the Fifth Panel' (2006) 18 *Yale Journal of Law and the Humanities* 1, 13.

<sup>96</sup> *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672

<sup>97</sup> *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672, 679.

<sup>98</sup> Jeremy Waldron, *What is Private Property?* (1985) 5 *OJLS* 313, 327.

exemplifies that 'inherently public property' may be owned by the collective public at large.<sup>99</sup> The *prima facie* answer to this question suggests there is no limitation on who owns public property. The state, a state agency, the public at large, even (in the case of conservation easements) private owners, may 'own' public interests in land.

Direct ownership by the state or a state agency is a paradigm framed within (private) property's individualistic values and rhetoric of exclusion.<sup>100</sup> It also has perverse consequences. Richard Barnes observes that ownership of collective property by the 'individual' state is a variation of private ownership that precludes it generating 'a specific normative meaning.'<sup>101</sup> Margaret Davies agrees in part. In articulating a 'taxonomy of owners', Davies lists five possible classes of owner: private individuals, companies, governments, a limited community, or the public at large. Davies argues that individual and corporate ownerships are 'private', while 'government ownership of resources such as office buildings [is also] essentially private.'<sup>102</sup> On the other hand, ownership by limited communities or the public at large are 'dispersed'. But government ownership of 'public infrastructure, and environmental resources such as parks and beaches on trust for the public'<sup>103</sup> are neither private nor public, an unsatisfactory hiatus. Crawford Macpherson describes 'state property' as 'corporate private property', where a 'smaller body of persons authorized to command its citizens' exercise a corporate right to exclude<sup>104</sup>. It is as if explicit state ownership taints public property's *public-ness*, and relegates the ownership of key public places (such as Davies' parks and beaches) to an uncertain no-man's land.

By contrast, 'public domain goods' are in Davies' terms 'fundamental to a flourishing community; they provide us with the basic ability to move about, to undertake trade and commerce, to engage in recreation, to situate ourselves historically, culturally, or even spiritually, to communicate and express ourselves.'<sup>105</sup> As Rose argues, they vest in an unorganized public. Macpherson also writes of an 'unorganized public', a mass of individuals with individual rights in analogous 'common property.'<sup>106</sup> He argues that rights in such property are 'the most unadulterated kind of property, a right of each natural person not to be excluded from the property's use and benefit.'<sup>107</sup>

Thus ownership by the public at large, whether Rose's amorphous mass, or Macpherson's mass of individuals, may be preferable since it avoids unfavourable analogy with private ownership and sidesteps the implications of

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<sup>99</sup> Rose (n 7).

<sup>100</sup> T Merrill, 'Property and the Right to Exclude', (1998)77 *Nebraska Law Review* 730; S Balganes, 'Demystifying the Right to Exclude' (2008) 31 *Harvard Journal of Law & Public Policy* 593.

<sup>101</sup> R Barnes, *Property Rights and Natural Resources* (Portland, Hart Publishing, 2009) 154.

<sup>102</sup> Davies (n 10) 63-4.

<sup>103</sup> *ibid*, 64

<sup>104</sup> Macpherson, n 73, 5-6. 'In the strict common law tradition, even government-owned property is regarded, technically, as ... subject to private ownership.' K & SF Gray, 'Private Property and Public Propriety' in McLean (n 8) 13.

<sup>105</sup> Davies (n 10) 65-6

<sup>106</sup> Macpherson cites 'public parks, city streets, highways' as 'common use' property, Macpherson (n 73) 4.

<sup>107</sup> Macpherson, (n 72) 6.

exclusion. And by invoking property's collective values, it may prove the sanguine catalyst for greater normative meaning for public property in land.

## **B. In trust for the public?**

References to public property in land regularly invoke the concept of trust. To borrow trust terminology, the trust may be express (such as charitable trusts<sup>108</sup>), or implied or resulting (where the term is used in a non-technical sense). Private land trusts also conform; signifying that the public stick they hold over private land is impressed by obligations in favour of local communities, the wider public, or the public interest.

Fairfax and Souder use the educational state land trust as a platform for arguing, 'trust principles ought to occupy a more prominent place in our understanding of publicly owned land than they do.'<sup>109</sup> As 'arguably the oldest of all federal programs and ... the most durable national approach to public resource ownership'<sup>110</sup>, the state land trust provides an existing template. Raising its profile presents an opportunity for a 'new but not untested route to thinking about public ownership.'<sup>111</sup>

By contrast, the public trust doctrine enjoys a high profile and is the subject of a rich literature. Its contemporary resurrection since the 1970s is attributed to Joseph Sax<sup>112</sup>, although its history can be traced to the *jus publicum* of Roman law, and the English common law before its reception in the United States.<sup>113</sup> Its origins lie in the nature of property in rivers, lakes, submerged lands, and foreshores adjoining water bodies as inherently public property, or 'at least subject to a kind of inherent easement for certain public purposes.'<sup>114</sup> While private ownership of foreshores was possible, the incorporeal public property inherent to those lands (such as rights to navigable waters) was itself inalienable.<sup>115</sup>

The doctrine was neglected until growing environmental awareness in the late 1960s re-awakened its potential, 'liberating it from its historical shackles',<sup>116</sup> to protect public rights in a diverse range of public resources<sup>117</sup>. These include access rights over the dry sands of beaches, limits on the appropriation of water

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<sup>108</sup> A Bradbrook et al, *Australian Real Property Law* (Sydney, Lawbook Co, 5th ed., 2011) 357.

<sup>109</sup> Souder & Fairfax, (n 2) 87, 89.

<sup>110</sup> Souder & Fairfax (n 2).

<sup>111</sup> *ibid.*

<sup>112</sup> JL. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', (1969-70) 68 *Michigan Law Review* 471.

<sup>113</sup> M Higgins, 'Public access to the shore: public rights and private property', in DM Whitelaw and GR Visgilio (eds) *America's Changing Coasts: Private Rights and Public Trust* (Cheltenham, Edward Elgar, 2005) 183-4.

<sup>114</sup> Rose (n 92) 355.

<sup>115</sup> HC. Dunning, 'The Public Trust: A Fundamental Doctrine of American Property Law', (1988-89) 19 *Environmental Law* 515, 516.

<sup>116</sup> JL Sax, 'Liberating the Public Trust Doctrine from its Historical Shackles', (1980) 14 *UC Davis Law Review* 185.

<sup>117</sup> C Rechtschaffen & D Antolini, *Creative Common Law Strategies for Protecting the Environment* (Washington DC, Environmental Law Institute, 2007)

to serve public trust values,<sup>118</sup> even 'property' in surfing waves<sup>119</sup>. This expansion has relied on a lateral interpretation of its founding shackles, a creative linking of new public resources with the common denominators of navigable waters or foreshores below the high water mark.<sup>120</sup> These newer forms of public trust property have been described as possessing a 'natural suitability for common use' and tendency towards 'scarcity',<sup>121</sup> or qualities essential for communication, travel and sociability.<sup>122</sup> Despite its critics<sup>123</sup>, the public trust is 'a recognition of important public property rights'<sup>124</sup> premised on the fragmentation of ownership between bare legal title and beneficial property subject to public trust. In the case of private lands, the grantee holds a naked fee subject to public trust rights.<sup>125</sup> In the case of public lands, there is no merger that extinguishes the public trust.

Trust relationships in public property also arise through the gift or transfer of private land to public authorities for specified purposes<sup>126</sup>, as conditions of planning consent<sup>127</sup>, or by operation of statute. For example, in New South Wales, the Crown reserve trust is a statutory creature under the Crown Lands Act 1989 (NSW).<sup>128</sup> The New Zealand Reserves Act 1977 establishes a similar regime. That Act applies to Crown land classified according to its primary purpose, including recreation,<sup>129</sup> historic,<sup>130</sup> or scenic<sup>131</sup> reserves. Title is vested under sections 26 and 26A, such that 'all land so vested shall be held in trust for the purpose or purposes for which the reserve is classified.' In a High Court judgment dealing with conflicting private uses on Crown land<sup>132</sup>, section 26A was scrutinised, the court concluding that 'the general public of New Zealand must be regarded as its beneficiaries.'<sup>133</sup> The Reserves Act 'confer[s] legal ownership ... in the Crown while making it clear that the land is held on trust for all New Zealanders.'<sup>134</sup>

Nor is the language of trust necessarily restrained by a lack of an equitable or statutory basis for the beneficial relationship claimed. Narratives surrounding the public estate often describe lands being held 'in trust for', or 'on behalf of' citizens. This beneficial claim is substantiated by broad-brush references to the nature of democratic governance, or the people's common legacy in important

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<sup>118</sup> *National Audubon Society v Superior Court* 33 Cal. 3d 419, 658 P.2d 3

<sup>119</sup> D Nazer, 'The Tragicomedy of the Surfers' Commons' (2004) 9 *Deakin Law Review* 655, 677.

<sup>120</sup> In Mono Lake the link was the navigability of waters in the lake.

<sup>121</sup> Dunning, (n 115) 523.

<sup>122</sup> Rose, (n 7).

<sup>123</sup> S Jawetz, 'The Public Trust Totem in Public Land Law: Ineffective- And Undesirable- Judicial Intervention, (1982) 10 *Ecology Law Quarterly* 455.

<sup>124</sup> Dunning, (n 115) 516.

<sup>125</sup> J Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 *U C Davis Law Review* 195, 215-6 (1980).

<sup>126</sup> *Brisbane City Council v Attorney-General (Qld)* [1978] 3 Qd. R 299.

<sup>127</sup> Bradbrook et al (n 108) 357.

<sup>128</sup> Crown reserve trusts are 'legal bod[ies] which cares for a Crown reserve on behalf of the people of NSW.' <http://www.lpma.nsw.gov.au/trusts/trusts2>

<sup>129</sup> s 17 *Reserves Act 1977* (NZ).

<sup>130</sup> s 18 *Reserves Act 1977* (NZ).

<sup>131</sup> s 19 *Reserves Act 1977* (NZ).

<sup>132</sup> *Gibbs v The New Plymouth District Council* [2006] NZHC 231

<sup>133</sup> *ibid* [16]-[17]

<sup>134</sup> *ibid* [14]

natural resources. On the 50<sup>th</sup> anniversary of the U.S National Park Act in 1966, National Geographic magazine quoted first director Stephen Mather claiming that the park system belonged 'to everyone-now and always.'<sup>135</sup> The landmark Report of the Public Land Law Review Commission in 1970, repeated this common legacy view, '[t]hese lands are a natural heritage and national asset that belong to us all.'<sup>136</sup>

An implied trust seemingly results from state ownership, accentuated where the lands are iconic, or under threat of loss.<sup>137</sup> While the nominal owner may be the state, its title is a threadbare one. The true beneficial owner, illusory or otherwise, is the people. Margaret Davies' description of 'parks and beaches being held in trust for the public'<sup>138</sup> is a previously traversed exemplar of this narrative. Carol Rose speaks similarly of 'the public... as a kind of beneficial owner of diffuse resource rights...'<sup>139</sup>

The concept of trust permeates public property, its doctrines, statutes, and rhetoric. Its redolence suggests an inclination for public property to vest in the collective 'sum of us'. But where does that leave the individualistic state?

### C. Ownership or management rights?

Eric Freyfogle believes that the 'biggest difference between public and private lands has to do with management power over the land.'<sup>140</sup> Yet again there is no bright line. 'Decisions about public lands are mostly made by public decision-makers, but not completely so. Public decision-makers are often influenced by private parties who want to use the lands.'<sup>141</sup>

Freyfogle's emphasis on state management rather than ownership may be apt if one adopts the concept of underlying beneficial ownership by the public at large. Where the state is a bare trustee, its role is reduced to management of trust assets for the exclusive benefit of the true beneficial owners, who retain the bulk of the key bundle rights. The state's residual right is essentially a right to manage constrained by trust obligations. Shorn of most of the hallmark property rights, it may be unrealistic to describe the state's dearth of bundle rights in public property as proprietorial.<sup>142</sup>

Indeed from the state's perspective, is ownership *per se* the prime objective? As Sally Fairfax and her colleagues observe

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<sup>135</sup> *National Geographic*, July 1966, Vol. 130(1), 2.

<sup>136</sup> 'One Third of the Nation's Land' (n 16) 20.

<sup>137</sup> 'The loss of New Zealander's "birthrights" to access public lands', M Philp, 'The No-Go Zones', *North & South*, August, 2008, 44.

<sup>138</sup> Davies, (n 10) 64.

<sup>139</sup> CM Rose, 'A Dozen Propositions', (1996) 53 *Washington & Lee Law Review* 265, 276; H Scheiber, 'Public Rights and the Rule of Law in American Legal History', (1984) 72 *California Law Review* 217, 223.

<sup>140</sup> Freyfogle, (n 27) 93.

<sup>141</sup> *ibid.*

<sup>142</sup> '[P]roperty rights may contain so few traditional sticks in the bundle as to defy continued description by the term *property*.' LS Raymond, *Private Rights in Public Resources* (Washington DC, Resources for the Future, 2003) 18.

Ownership does not ensure control. The relevant myth here suggests that if you own land, you can protect it. The reality... is that formal ownership frequently provides little control or resource protection at all.<sup>143</sup>

The state as bare owner may be better employed devoting its energies to the effective control of the public land it manages on behalf of its citizens. Good state management may reinforce the integrity of public property, and silence its critics.<sup>144</sup>

Ownership of public property is a vexed issue. Its inexactitude suggests that it is not the defining characteristic of public property that it should be. Who owns public property, and in what capacity, are complex questions lacking ready answers. Part of this struggle may be attributed to a values paradigm of dominant individualism. Its end result leaves us less equipped to meaningfully understand the ownership of public property in land.

#### **D. Ownership and Diffusion**

One clearer way to explain the conundrum of ownership is the idea of diffusion, Rose's 'the more the merrier'.<sup>145</sup> Simply, the more dispersed a sense of 'ownership' by individual members of the public of the vast public estate, the more self-interested we become in its management, use and welfare. Diffusion rests on an instinctive imperative that citizens should conceive of public property as their own, no matter how thin the 'ownership'.

Such a disaggregation of property ownership amongst the public at large decentralises property 'rights' and spreads relative degrees of 'ownership' amongst a wide class of persons.<sup>146</sup> Joseph Singer describes similar ideas of dispersal as inherent to his 'nuisance model' of property. 'The effect is to identify multiple persons who have legally protected interests in the same piece of property and therefore have something to say about how it is used.'<sup>147</sup> That the law will act to protect public property rights<sup>148</sup>, sometimes at the behest of the state, but often at the instigation of informal community or representative groups, the spontaneous 'friends of public space' movements, is a tangible manifestation of the diffusion of public ownership of land.

Diffusion is deeply conceptual and practically problematic. How can scattered public 'ownership' rights be regulated and enforced? What can prevent a motivated, self-interested few capturing the public estate to the detriment of an apathetic many? The American experience of the public trust suggests a role for the judiciary as guardians of the public interest in public property. This paper does not purport to provide ready answers to such prosaic matters. Yet

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<sup>143</sup> Fairfax (n 29) 257.

<sup>144</sup> Brower et al (n 34).

<sup>145</sup> Rose, (n 7).

<sup>146</sup> J Page, 'Towards a Sustainable Paradigm for Property' (2011) 1 *Property Law Journal* 86.

<sup>147</sup> JW Singer, *Entitlement: The Paradoxes of Property* (2000) 88. His 'environmental or good neighbor' model is a later refinement. JW Singer, 'Property Norms Construct the Externalities of Ownership' in Alexander & Penalver (n 46) 57, 60.

<sup>148</sup> 'Legal institutions protect property rights, both public and private', Rose, (n 7).



fundamentally, developing a sense of public propriety requires paradigmatic change. Articulating what a right of inclusion may encompass is one step in beginning such an incremental shift.

## V. The Right to Include

If exclusion is the hallmark right of modern private property<sup>149</sup>, logically inclusion should be public property's inverse gatekeeper.<sup>150</sup> As a guiding principle, what is meant by a right to include? Does its foil define it, such that it is a right *not* to exclude? Or does it have an independent, positive meaning?

Carol Rose warns that

It is a serious mistake to think of property only in metaphors of exclusion, boundaries, and disengagement. These are metaphors drawn chiefly from land, but human[s] have devised ways to allocate property in many other things ... We have created not only individual property, but also partnership property, common property and public property. Human interactions make property into a thoroughly malleable institution, and one that adjusts to a vast variety of subjects.<sup>151</sup>

Rose's advice intimates that exclusion is a flawed place to start. Nor is Rose alone in observing that property is a 'thoroughly malleable institution' that moulds to context.<sup>152</sup> To define inclusion by what it is not is counter-contextual, and affirms that exclusion is the *sine qua non* of property.<sup>153</sup> Inclusion merits a stand-alone definition.

Language is one starting point. Roget's Thesaurus lists numerous synonyms for 'inclusion': participation; membership; affiliation; eligibility; admission – terms that embody shared or common use of space.<sup>154</sup> The links between language and property are intimate and powerful; Carol Rose calls them 'a central project of her legal scholarship.'<sup>155</sup> Language is not only words in a thesaurus, but in a broader sense, a means of persuasive communication. In the case of property, it is its symbols, visual cues, or collective narratives.<sup>156</sup> Rose proffers a number of images as the 'expressive endeavor' or 'symbolic presentation'<sup>157</sup> of public property- streetscapes, parks, highways, and most evocatively, a fresco of a medieval street scene, a 'good life' where 'people stop to chat with one another and with the street vendors, ... laugh at a pet monkey's antics, drop into a shop and buy something, or have a seat and watch the other passers-by.'<sup>158</sup> The democratic sharing of a public space is an uncomplicated way to 'see' public

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<sup>149</sup> Merrill (n 100).

<sup>150</sup> Hamilton & Bankes (n 4) 19, 26.

<sup>151</sup> CM Rose, 'Rhetoric and Romance: A Comment on Spouses and Strangers', (1992-93) 82 *Georgetown Law Journal* 2409, 2420.

<sup>152</sup> See for example Singer, (n 147); JL Sax, *Property Rights and the Economy of Nature*, 45 *Stanford Law Review* (1992) 1433, 1446.

<sup>153</sup> Merrill (n 100).

<sup>154</sup> *Roget's Thesaurus of English Words and Phrases* 755 (Hammondsworth, Penguin Books, 1962).

<sup>155</sup> Rose (n 95) 2.

<sup>156</sup> CM Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, (1990) 2 *Yale Journal of Law & the Humanities* 37.

<sup>157</sup> *ibid.*

<sup>158</sup> Rose (n 95) 18.

property in land, an image that captures the diverse language of inclusion. It is the antithesis of private property's 'expressive endeavor', the fence, gate, and keep-out sign.

## A. Inclusion and Access

Access ought to be the epitome of inclusion. It lies at the heart of Rose's street scene. Yet the right of access is far from clear-cut. Some public lands are openly accessible, others have conditions attached to their intrusion (such as the payment of entrance fees in popular national parks), while in other cases, there is no access at all (military land, or dedicated wilderness, or wildlife preservation areas<sup>159</sup>). In other cases, legislation may give an occupier of prescribed public lands the discretion to eject intruders provided a prior demand to leave is made, deeming the recalcitrant intruder a trespasser.<sup>160</sup> Such legislation places the emphasis on the right to exclude, at times confusing Barnes' 'needs of society as a whole' with the 'self-serving interest' of the particular occupier.<sup>161</sup> In sum, access as a proposition is a *mélange* of unqualified, qualified, or denied entitlement.

Even where access appears unfettered, externalities may practically restrict freedom of entry. A surrounding landholder may effectively capture the public lands by impeding the most feasible points of access. A consequence of effective capture is their *de facto* privatisation. Private capture of public lands in New Zealand's iconic high country is the subject of separate academic scrutiny.<sup>162</sup> Equally, contested access through private land to beach and coastal foreshore attracts vocal, high profile attention.<sup>163</sup> In June 2010, *Stop the Beach Renourishment v Florida Department of Environmental Protection*<sup>164</sup> was 'the [US Supreme Court's] case of the year for planners and land use practitioners'<sup>165</sup>, a curious dispute about property rights, accretion and littoral access. Beaches are much-loved public places.<sup>166</sup> Access to them engages the *many* as well as the *few*<sup>167</sup> in both practice and idea. Yet despite their revered status, access to wet sands can be perplexing.<sup>168</sup> In the United States piecemeal<sup>169</sup> public rights depend on the vagaries of jurisdiction, limited by the low tide in some states, extending to the mean high tide mark in others, and in Texas protected by public

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<sup>159</sup> Public access is denied to Codfish Island in New Zealand, home to a Department of Conservation breeding programme for the endangered flightless kakapo parrot.

<sup>160</sup> See for example *Inclosed Lands Protection Land Act 1901* (NSW) or *Trespass Act 1980* (NZ).

<sup>161</sup> Proceedings of the Federated Mountain Clubs Backcountry Recreation 2000 Conference, *Ruling and Regulating or Freedom of the Hills*, St. Arnaud, Nelson Lakes, September 27-29, 1991.

<sup>162</sup> A Brower, *Who Owns the High Country?* (Nelson, Craig Potton, 2008); J Page and A Brower, *Property Law in the South Island High Country – Statutory Not Common Law Leases*, (2007) 15 *Waikato Law Review* 48.

<sup>163</sup> At the Sea Ranch in northern California, 'developers and other private littoral owners have either unknowingly or intentionally, blocked existing means of public access.' D Dyer, 'California Beach Access: The Mexican Law and the Public Trust', (1972) 2 *Ecology Law Quarterly* 571, 573.

<sup>164</sup> 130 S.Ct. 2592, June 17, 2010.

<sup>165</sup> L Lucero, 'Stop the Beach Renourishment – Six Perspectives', *Planning & Environmental Law* (2010) 62-9, 3.

<sup>166</sup> Bederman (n 47).

<sup>167</sup> M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Harvard University Press, 1968).

<sup>168</sup> Stevens (n 125) 230.

<sup>169</sup> Bender (n 59) 914.

rolling easements to the first vegetation line.<sup>170</sup> Access is an underdeveloped discourse in the common law,<sup>171</sup> too often dependent on agency whim rather than espoused as a universal right qualified only on principle.<sup>172</sup> Its uncertainties deny it default status as a benchmark for public property rights in land.

## B. Inclusion and Use and Enjoyment

It is imperative therefore that inclusion embraces wider meanings than ingress and egress. Can public property be *used and enjoyed* without physical access? As previously traversed, the incorporeal conservation easement serves a multitude of uses and purposes. These include the provision of ecosystem services,<sup>173</sup> 'viewsheds',<sup>174</sup> open space,<sup>175</sup> or wildlife corridors.<sup>176</sup> Inherent to each is an intangible and indirect public *enjoyment* absent access.

The right of use and enjoyment is described as hierarchically lower, 'less compelling'<sup>177</sup> than other significant property rights, in particular the right to exclude. While the private right is dominated by the descriptor of active *use*, its public equivalent may have a different conjunctive emphasis, one where physical use is ancillary to a primary enjoyment. Where physical access is permitted, the public right may encompass both limbs - use and enjoyment - but where other indirect public benefits ensue minus access, the right falls away to one of enjoyment *simpliciter*. The umbrella right of inclusion is analogous to a diffuse public enjoyment of land, in which individuals derive a public good, but where individual enjoyment of that good is no greater than any other member's enjoyment. Pointedly, access is a non-essential component.

The public good however is a malleable, circumstantial concept. Eric Freyfogle advocates the need for private property to serve the 'public good'.<sup>178</sup> Jeremy Waldron observes the primacy of a 'collective social interest' in defining collective property.<sup>179</sup> Richard Barnes agrees, '[t]he organizing idea of collective property is that the needs of society as a whole take precedence over those of individuals.'<sup>180</sup> What overarching societal need explains public enjoyment, why should the public enjoy a general right to be included? *Propriety* offers the beginnings of at least one answer to this question.

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<sup>170</sup> T Eichenberg et al, 'Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay', (2010) 3 *Golden Gate U. Environmental Law Journal* 243, 248-9; M Peloso & M Caldwell, 'Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate', (2011) 30 *Stanford Environmental Law Journal*. 51, 57-85.

<sup>171</sup> cf Scandinavia's allemansrätten, Anderson (n 23) 404

<sup>172</sup> R Boast, *Foreshore and Seabed* (Auckland, Lexis Nexis, 2005) 6.

<sup>173</sup> Examples include lands set aside for carbon sequestration.

<sup>174</sup> S McKee, 'Conservation Easements to Protect Historic Viewsheds' in Gustanski & Squires (n 25).

<sup>175</sup> Brewer (n 30) 155; Donohue (n 44) 119; S Silverstone, 'Open Space Preservation through Conservation Easements', (1974) 12 *Osgoode Hall Law Journal*. 105.

<sup>176</sup> K Ewing, 'Conservation Covenants and Community Conservation Groups' (2009) *New Zealand Journal Environmental Law* 316.

<sup>177</sup> L Underkuffler *The Idea of Property: Its Meaning and Power* (Oxford, Oxford University Press, 2003) 25.

<sup>178</sup> ET Freyfogle, *On Private Property Finding Common Ground on the Ownership of Land* (Boston, Beacon Press, 2007).

<sup>179</sup> Waldron (n 85) 328.

<sup>180</sup> *ibid*, 154.

### C. Inclusion and Propriety

To Gregory Alexander, the commodity view of property is only one-half of the dialectic of modern property. The missing half, 'property as propriety', provides the 'material foundation for creating and maintaining the proper social order', a civic conception of a 'properly ordered society'.<sup>181</sup> Propriety enables the 'well-lived life'<sup>182</sup>, in which individual interaction and reciprocity of social obligation within community constitutes 'human flourishing in a very deep sense'.<sup>183</sup> Human flourishing speaks to property's marginalised communitarian values.

Flourishing is an unavoidably cooperative endeavor rather than an individual pursuit or purely personal project. Our ability to flourish requires certain basic material goods and a communal infrastructure... However much we value our personal independence, it is quite literally impossible for a person to flourish without others.<sup>184</sup>

Public property in land is an important component in the propitious, well-ordered community. It is the 'communal infrastructure', the physical and metaphorical common ground, where shared activities 'socialize, democratize and educate society'.<sup>185</sup> In its corporeal form, it provides space for egalitarian recreation.<sup>186</sup> In its incorporeal form, it may minimise the tragic risk of fragmentation,<sup>187</sup> or engender what Kevin Gray terms 'pedestrian democracy', a 'flourishing of the civil and ecological communities of which we humans are a part'<sup>188</sup> that heightens 'civic responsibility and...participation in an integrative society of equals'.<sup>189</sup> By contrast, modern private property marginalises propriety. Its commoditisation leaves scant scope for alternative paradigms, the likes of stewardship<sup>190</sup> or economies of nature,<sup>191</sup> to take root. Its abstraction de-couples property right from place, preferring anonymous cartographic space to the lived sociable experience of community.<sup>192</sup>

James Kunstler's study of the decline of America's cities highlights the importance of public property to properly ordered communities. Kunstler writes of growing up in a soulless suburbia whose 'motive force [was] the exaltation of privacy and the elimination of the public realm'.<sup>193</sup> By contrast,

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<sup>181</sup> Alexander, (n 46) 2-3; Barnes (n 101) 112.

<sup>182</sup> GS Alexander, 'The Social-Obligation Norm in North American Property Law', (2009) 94 *Cornell Law Review* 745, 763.

<sup>183</sup> *ibid*, 761.

<sup>184</sup> GS Alexander & EM Penalver, *An Introduction to Property Theory*, (New York, Cambridge University Press, 2012) 87.

<sup>185</sup> Rose (n 7) 779, 781.

<sup>186</sup> J Laitos & T Carr, 'The Transformation on Public Lands', (1999) *Ecology Law Quarterly* 178.

<sup>187</sup> ET Freyfogle, *Agrarianism and the Good Society* (Lexington, University Press of Kentucky, 2007) 9-24.

<sup>188</sup> K Gray, 'Pedestrian democracy and the geography of hope' (2010) 1 *Journal of Human Rights and the Environment* 45, 52, writing of the right to roam.

<sup>189</sup> *ibid*, 54.

<sup>190</sup> W Lucy & C Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55(3) *CLJ* 566

<sup>191</sup> JL Sax, *Ownership, Property and Sustainability*, (Salt Lake City, University of Utah Press, 2011) 14; Sax (n 153) 1446.

<sup>192</sup> C Meine, *Correction Lines Essays on Land, Leopold, and Conservation* (Washington DC, Island Press, 2004); N Blomley, *Unsettling the City: Urban Land and the Politics of Property* 91 (New York, Routledge, 2004).

<sup>193</sup>*ibid*, 189.

summer camp visits to Lebanon, New Hampshire, with its 'town square, band shells, elm street trees, and various civic buildings'<sup>194</sup> highlighted the lost dignity and substance of public space. Nicholas Blomley likewise draws the link between property diversity and community, arguing that the private-centric 'ownership model'<sup>195</sup> is inadequate to describe a 'diversity of property on the ground.'<sup>196</sup> Modern global cities are 'intensely propertied places', *terra populi*, where communities are given form and normative meaning by their collective claims to public space.

Public property is critical to the social and communal fabric. It fills the void vacated by a commoditised private property, such that Alexander's theory is optimally *public* property as propriety. Rather than a false dawn for access, the right to include may be better understood as a universal entitlement to flourish in well-ordered communities, places symbolised by Rose's deeply expressive streetscape. Public property enables well-lived lives by acting as an 'entrance to community',<sup>197</sup> the vehicle through which public inclusion imposes and legitimises the idea of public property rights in land.

## VI. Conclusion

It has been an explicit objective of this paper to highlight the 'property' in the public property equation. In so doing, diverse interests in public land have been explored, vexed issues of ownership canvassed, and aspects of inclusion laid open to initial scrutiny.

In the common law, modern public property remains a work in progress, an under-developed institution deficient in the ways identified in this paper's introduction. But immaturity need not be its evolutionary end.<sup>198</sup> Structure, sophistry and coherence should be our ambitions for public property in land. At the heart of any resurgent public property lies the right to include. Inclusion speaks to property's collective values, representing what we can peaceably enjoy in common beyond individual allocation and exploitation. Properly formed and defined, inclusion is the perfect foil to exclusion. It renders a harmonious balance between property's social and communitarian traditions on the one hand, and its private and individualistic instincts on the other.

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<sup>194</sup> *ibid*, 13.

<sup>195</sup> Singer (n 147).

<sup>196</sup> Blomley (n 190) 15.

<sup>197</sup> EM Penalver, 'Property as Entrance' (2005) 91 *Virginia Law Review* 1889.

<sup>198</sup> cf public property in Roman or Spanish American law, D Coquillette, 'Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment' (1979) 64 *Cornell Law Review* 761, 802-803; Dyer (n 164) 573.