

Legispedia

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Is drafting legislation sort of like Wikipedia? The first time I thought of this question, it seemed silly, and perhaps it is. However, the silliness of the question began to fade as I recognized the relevance of their shared characteristics. This article argues that, like Wikipedia, open source software, and patent pools, legislation could properly be characterized as a cultural commons, albeit an unusual one. The article applies the cultural commons framework put forward by Madison, Frischmann, and Strandburg to Congress creating legislation. The relatively new cultural commons literature was founded by intellectual property scholars and, up to this point, mainly employed to explain intellectual property-focused communities. By examining legislation, something that seems to fit within the concept of the framework but is far from the intellectual property context, this article hopes to provide us with a unique vantage point within a familiar institutional setting to reexamine the cultural commons framework and test the robustness of the theoretical lens.

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I. Introduction

A few years ago, Professors Michael Madison, Brett Frischmann, and Katherine Strandburg became smitten with communities that had banded together to create intellectual and cultural resources traditionally developed by individuals and companies. They were not alone in their fascination. Many watched with piqued interest as the world of cooperative, open source software pushed its way into markets dominated by mega companies. However, others were too distracted by participating in online communities facilitated by email listservs, writing research papers based off of Wikipedia entries, or hunting for bargains on Craigslist to notice that a cooperative model of enterprise and ingenuity was quickly transforming many aspects of everyday life. While there is much about these communities that could have captured the imagination of scholars like Madison, Frischmann, and Strandburg, they focused on the question of how this sort of cooperation came to be and how it could be sustained, perhaps even encouraged. Out of this initial inquiry, these scholars created a systematic way to conceptualize and study such problems. They called their newfound theory and research agenda the *cultural commons*.¹

As the name suggests, the cultural commons plays off of the now familiar riff of the commons. Of course, a very different set of scholars—although still dominated by those interested in property rights—had been discussing the commons for more than forty years. One could imagine that in 1968, when Garrett Hardin wrote *The Tragedy of the Commons*², the idea of the commons must have seemed clever and even useful.³ Yet, it is hard to imagine that even those in the most ivory of ivory towers would have guessed that a few scattered kernels of ideas would grow into such an impressive body of literature. Indeed, while the most celebrated commons scholar, Elinor Ostrom, has already received the honor of a Nobel Prize, in significant part due to her contribution to the commons literature,⁴ it seems likely that the field will only increase in its importance. The reason for this is two-fold. First, as time passes, more resources

¹ Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659 (2010).

² Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

³ Of course, Hardin was not the only scholar to ever conceive of a commons. Perhaps the best illustration of this point is that Ostrom has traced the idea of the commons as far back as Aristotle. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION ___(1990). He certainly deserves credit for coining the term that is now associated with the commons concept. Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 242 (2000) (“Hardin gave the problem a vivid and visceral name that quickly captures our attention and tells us much of what we need to know.”). He was also the first person to my knowledge to clearly articulate that the concept applied to a myriad of resources. In *The Tragedy of the Commons* he draws on common knowledge of how the phenomenon plays out in grazing, fishing, advertising, and parking meters. Hardin, *supra* note 2.

⁴ THE PRIZE IN ECONOMIC SCIENCES 2009 (2009), http://www.nobelprize.org/nobel_prizes/economics/laureates/2009/press.pdf.

will be identified as commons resources, expanding the breadth of the literature to currently untouched vistas. Second, time will provide greater opportunity to synthesize the lessons of the commons literature. While there are no panaceas, the value of these lessons is tremendous: studying commons resources allows for the possibility that what we learn about managing one commons resource, like a fishery, might actually allow us to learn something about managing something quite different, like a crowded court docket, giving insight that otherwise may continue to elude us.

Given the impressive size and growth potential of the commons literature, it might seem tempting just to treat the nascent field of the cultural commons as a subcategory of the commons literature. That, however, would be a mistake.

While the concept of a cultural commons is certainly related to the commons literature, it is also distinct from the commons—perhaps making it a not-too-distant cousin, or something of the like.⁵ But how are the two different? As described below, scholars have proffered a number of differences between the commons and the cultural commons.⁶ However, I would argue that the most relevant difference has not really percolated to the top yet. It is simply this: in the commons literature the resource is the dependent variable, whereas in the cultural commons the cooperative community is the dependent variable. Put another way, the commons literature focuses on how *resources* fare in light of various institutional and community characteristics, whereas the cultural commons literature focuses on how the *community* establishes cooperative arrangements to produce resources. In the commons literature, we see the risk of the tragedy of the commons always looming in the background and celebrate those instances when commons appropriators manage to build long-enduring institutions that allow for sustainable yields of the resource. In contrast, the idea of the cultural commons asks us to primarily focus on how communities interact as they work to create intellectual or cultural resources and is determined to find ways to prevent these communities from unraveling or losing their interest in jointly creating intellectual or cultural goods.

While it makes sense to treat the cultural commons as a distinct category from the commons, the similarities are still great enough that the commons literature provides a useful roadmap to guide new lines of academic inquiry in the cultural commons. The commons literature began with—and is still primarily dominated by—case studies documenting how different commons resources fared over time and analysis as to why. It is therefore not surprising that Madison, Frischmann, and Strandburg are eager to encourage analysis of “a far larger and richer set of commons cases in the cultural context.”⁷ Wisely, these same scholars have advocated the use of a modified version of Ostrom’s Institutional Analysis and

⁵ Those of us who demand exactness in language may find it frustrating that we call the cultural commons “the cultural commons.” However, reverting to calling the cultural commons “the cultural commons-ish” is not likely to win over the truly pedantic either.

⁶ Madison, Frischmann & Strandburg, *supra* note 1, at 672.

⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 665.

Development (IAD) framework⁸ so that cultural commons case studies can develop in a uniform way.⁹

Moreover, while the commons literature began and has continued to draw the attention of those interested in management of natural resources like forests,¹⁰ rivers,¹¹ and fisheries,¹² the commons lens is increasingly being applied in surprising places, including governance of urban landscapes¹³ and the timing of presidential primary contests.¹⁴ Within the commons literature, the line of thinking that identifies commons in unexpected or novel places is often referred to as “new commons.”¹⁵ Similarly, even though the cultural commons scholarship grew out of a community of intellectual property scholars, the originators of the cultural commons anticipated that this lens would be employed in multiple and diverse contexts.¹⁶ Legislating is precisely such a context, adaptable for study through this lens despite being far afield from intellectual property. Perhaps, this may be one of the first articles in a longer line of thinking that may become known as “new cultural commons.” Time will tell.

It is important to point out that while case studies should be, and often are, interesting in their own right, the call for case study analysis is not simply for the sake of amassing more case studies. Rather, the thought is that these case studies might later be distilled for lessons that could be applied across the field of study.¹⁷ This is the same basis upon which Ostrom structured her highly regarded principles of long-enduring institutions within the commons

⁸ OSTROM, *supra* note 3 at ____.

⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 678.

¹⁰ See, e.g., Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992); ARUN AGRAWAL, COMMON RESOURCES AND INSTITUTIONAL STABILITY, IN THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds. 2002).

¹¹ See, e.g., OSTROM, *supra* note 3 at ____.

¹² See, e.g., JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988).

¹³ See, e.g., SHEILA R. FOSTER, PRIVATIZING THE CITY?: THE ENABLING FUNCTION OF LOCAL GOVERNMENT (2009). [I believe that this is a law review article.]

¹⁴ See Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, ____ (2007).

¹⁵ See Charlotte Hess. Mapping the New Commons (June 19, 2008), presented at “Governing Shared Resources: Connecting Local Experience to Global Challenges;” the 12th Biennial Conference of the International Association for the Study of the Commons, University of Gloucestershire, Cheltenham, England, July 14-18, 2008. See also, UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 15 (Charlotte Hess & Elinor Ostrom eds., 2007) (discussing knowledge commons).

¹⁶ Madison, Frischmann & Strandburg, *supra* note 1, at 665 (“The framework for collecting and analyzing case studies of constructed cultural commons across a wide range of domains that we describe below offers a method for assessing the validity of this property- focused narrative. We suspect that over time the constructed cultural commons framework will yield a far larger and richer set of commons cases in the cultural context than one might discover by focusing only on patent law or scientific research or software development.”).

¹⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 660 (“We do not claim that all cultural commons work in exactly the same way or that they all solve exactly the same problems or that they all produce exactly the same benefits (or costs). Our claim is precisely the opposite: by aligning case studies of related but distinct commons phenomena, over time we will be able to identify those features of commons that are more and less significant to the success and failure of a commons enterprise.”).

literature.¹⁸ It is easy to imagine and hope that the similarities of the commons and cultural commons might also extend to the ability to tease out design principles that help facilitate cultural commons communities, including the factors that make these communities sustainable and productive.¹⁹ Each case study is a valuable data point in future scholarship geared toward gaining a better understanding of what makes the cultural commons tick.

This paper will use the cultural commons lens to examine how Congress makes legislation, what I will refer to below as the legislation-making cultural commons. While there should be little objection to the notion that legislation is the collaborative work product of a group, one might ask, how exactly is legislation an intellectual or cultural resource? The simple answer to this question is that law plays an important role in reflecting, ordering, and inspiring culture. I will explain each of these roles in turn.

Laws reflect culture and are important cultural resources in and of themselves. They illustrate a society's values,²⁰ a society's nobler ambitions,²¹ and reinforce cultural norms.²² Not surprisingly, many legal scholars have argued that law reflects culture.²³ This connection is quite important in legal academia: in addition to the very active national Law and Society Association,²⁴ many law schools have established centers and societies devoted to the link between law and culture.²⁵ Furthermore, many in the social sciences who study cultural norms characterize law as formal norms.²⁶ I do not believe that controversy should accompany the claim that we can learn quite a bit about a society's culture by the sort of things it deems a crime, the rights it promises its citizens, and the preferences it manifests through the things it regulates, subsidizes, and taxes.

Additionally, laws order society in a way that can facilitate or stifle the creation and distribution of other intellectual and cultural resources.²⁷ Whether laws are designed to incentivize the creation of intellectual or cultural resources or do so through direct government investment, we see that law plays an important role in guiding culture.²⁸ Certainly, the First Amendment has become a world renowned trademark of American culture. Speaking of trademark, we should not forget that the Constitution also gives Congress power "[t]o promote

¹⁸ OSTROM, *supra* note 3 at 58.

¹⁹ James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 108-12 (1997).

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²³ See, e.g., Lawrence Freidman, *Borders: On Emerging Sociology of Transnational Law* 32 Stan. J. Int'l L. 65, 72 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 915-917 (1996).

²⁴ The Law and Society Association, <http://www.lawandsociety.org>.

²⁵ For example, consider a sampling of programs in New York schools alone: NYU's Law and Society program; Columbia's Center for the Study of Law and Culture; Syracuse's Association for the Study of Law, Culture and the Humanities; an undergraduate minor in Law and Society at Cornell University; and, the Forum on Law, Culture and Society at Fordham Law.

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²⁷ Discuss that the cultural commons framework even looks to law as a major pivot point.

²⁸ Madison, Frischmann & Strandburg, *supra* at 683.

the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²⁹ Thomas Jefferson, a Founder and inventor whose thinking on this aspect of the Constitution proved quite influential, first resisted the notion of giving inventors an exclusive right to their inventions.³⁰ Ultimately, however, he accepted the idea of protecting intellectual property in the hopes that “ingenuity should receive a liberal encouragement.”³¹ While many would argue that intellectual property law is too protective,³² considering the remarkable progress of ingenuity within the United States and the extensive use of federal intellectual property law as a haven for inventors, it seems that Jefferson’s ideal has been in good measure realized.

Lastly, cultural and intellectual resources quite distinct from the law often incorporate the law, legislation making, and lawmakers into their fabric. A brief reflection on the many cultural landmarks integrating the law reveals the breadth and depth of its reach, ranging from Socrates’ *Apology*³³ to Harper Lee’s *To Kill a Mockingbird*³⁴ to *Legally Blonde*³⁵ and *People’s Court*,³⁶ evidencing the importance of law in the cultural landscape.

Even though the legislation-making process seems far afield from the cooperative arrangements used to create the intellectual property on which the nascent cultural commons literature has primarily focused up to this point, legislation making still fits within the contours of the cultural commons. Similar to an open source software community, Congress is an “environment for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way.”³⁷

While I believe that legislation making fits nicely within the theory and framework used in the cultural commons literature, let me be clear that my aim in this article is not to unlock some great secret about the inner workings of Congress or to resolve complexities related to legislation. Rather, I believe that examining legislation making will prove helpful for two reasons. First, because of our familiarity with Congress and how it makes legislation, I believe that looking at this example will highlight whether the cultural commons lens has identified the most relevant aspects of the process and those involved with it. Second, because legislation making is far afield from the types of things the cultural commons literature has typically explored up to this point, it provides an ideal opportunity to test the robustness and flexibility of this line of inquiry.

²⁹ U.S. CONST. art. I, § 2, cl. 2, U.S. CONST. art. I, § 8, cl. 8.

³⁰ *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 7-8 (1966).

³¹ *Id.* at 8 (citing *Letter to Oliver Evans* (May 1807), V WRITINGS OF THOMAS JEFFERSON, at 75-76 (Washington ed.)). Jefferson’s influence and evolution of thinking on the protection of intellectual property is summed up nicely in *Graham v. John Deere Co.*, 383 U.S. at 7-10.

³² See, e.g., Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. Econ. Persp. 57-58-62 (2005).

³³ PLATO, *APOLOGY, CRITO, AND PHAEDO OF SOCRATES* (2008).

³⁴ HARPER LEE, *TO KILL A MOCKINGBIRD* (2010).

³⁵ *LEGALLY BLONDE* (MGM 2001).

³⁶ *PEOPLE’S COURT* (Legal TV 2007).

³⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 659.

Before turning my attention to the legislation-making cultural commons, in Part II, I first describe the concepts of the cultural commons and the commons and how they differ from each other in greater detail. With this background in place, in Part III, I apply the cultural commons framework to Congress's most important work product. In Part IV, I conclude the paper.

II. The Cultural Commons and the Commons, Similarities and Differences

When Madison, Frischmann, and Strandburg introduced the concept of the *constructed cultural commons*, they defined it as an “environment[] for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way.”³⁸ The idea primarily grew out of the authors' interest in the ways that various social arrangements and communities had increasingly emerged to jointly create and share intellectual property.³⁹

While pooling and sharing knowledge and culture is by no means a new thing and is certainly not limited to instances of sharing intellectual property, it is not surprising that the idea caught the imaginations of these intellectual property scholars. After all, the interrelated trends of globalization and technological advancement have exponentially multiplied examples of shared and pooled cultural and scientific knowledge.⁴⁰ These examples include forums as diverse as Wikipedia, microblogging diversions like Twitter and Facebook, e-mail listservs, open-source software, and the proliferation of digital associations ranging from the most technical and scholarly to online Justin Bieber fan clubs. The literature on the cultural commons largely examines the institutional arrangements that come about in order to facilitate communities hoping to pool, create, and share knowledge and culture.

As Madison, Frischmann, and Strandburg began to develop this project, they recognized that the study of cooperative efforts was by no means a new one.⁴¹ While much has been written on cooperation, these authors found that the scholarship on commons that had been developed over the course of decades provided a useful template and direction in building an academic agenda to study institutional pooling and sharing.⁴² This connection probably explains the genesis of their label, *the cultural commons*. By taking this step, the authors recognized that the cultural commons and the commons were similar enough that the research model employed by the commons would provide insight into how scholars might build research agendas to explore the cultural commons.⁴³ At the same time, these authors argued that the cultural commons and the commons were different enough that it would be

³⁸ Madison, Frischmann & Strandburg, *supra* note 1, at 659.

³⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 660-64.

⁴⁰ Madison, Frischmann & Strandburg, *supra* note 1, at 669.

⁴¹ Madison, Frischmann & Strandburg, *supra* note 1, at 670.

⁴² Madison, Frischmann & Strandburg, *supra* note 1, at 670.

⁴³ Madison, Frischmann & Strandburg, *supra* note 1, at 670-71.

inappropriate to use the exact system of analysis used in the commons, though they held out hope that a modified version of the commons approach might adequately account for those differences.⁴⁴

This Part addresses the related but distinct concepts of the commons and the cultural commons. To do this, I first quickly lay out the essential features that make up a commons and a cultural commons and then highlight their most important differences, including the most important differentiating factor: the dependent variable—the commons focuses on sustaining *resources* and the cultural commons focuses on sustaining *communities*. I also discuss other ways that the literature frames the differences between the commons and the cultural commons. To this end, I will discuss rivalry, cooperation, the creation of resources, and anticcommons.

A. Essential Features of the Commons and Cultural Commons

Due to its familiarity, it makes sense to start this discussion with the commons. The first characteristic of a commons is that consumption of the commons means fewer opportunities for others to consume, which is sometimes referred to as rivalry or subtractability.⁴⁵ I discuss rivalry in some detail below.⁴⁶ The second characteristic of a commons is that it is difficult to exclude others from using the resource at issue, which is sometimes referred to as nonexcludability.⁴⁷ For those who care about the commons, these two traits often collide in a very unfortunate way: rational users of the commons consume as much as they want, setting up a free-for-all that Garrett Hardin famously coined *the tragedy of the commons*.⁴⁸

Although the literature on the commons primarily consists of a myriad of case studies,⁴⁹ it also includes, among other things, some important attempts to synthesize the lessons from

⁴⁴ Madison, Frischmann & Strandburg, *supra* note 1, at 670.

⁴⁵ See Richard Cornes & Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* 6–7 (1986); Robert O. Keohane & Elinor Ostrom, *Introduction*, in *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS* 13–15 (Robert O. Keohane & Elinor Ostrom eds., 1995); C. Ford Runge, *Common Property and Collective Action in Economic Development*, in *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY*, *supra* note ___, at 17, 26.

⁴⁶ See Richard Cornes & Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* 6–7 (1986); Robert O. Keohane & Elinor Ostrom, *Introduction*, in *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS* 13–15 (Robert O. Keohane & Elinor Ostrom eds., 1995); C. Ford Runge, *Common Property and Collective Action in Economic Development*, in *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY*, *supra* note ___, at 17, 26. See *infra* Part II.B.2.a.

⁴⁷ See OSTROM, *supra* note 3, at 30; TOM TIETENBERG, *ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS* 598 (5th ed. 2000); Elinor Ostrom, *Reformulating the Commons*, in *PROTECTING THE COMMONS: A FRAMEWORK FOR RESOURCE MANAGEMENT IN THE AMERICA*, at 17-18 (Joanna Burger et al. eds., 2001); ORAN YOUNG, *THE INSTITUTION DIMENSIONS OF ENVIRONMENTAL CHANGE* 140 (2002).

⁴⁸ See Hardin, *supra* note 2.

⁴⁹ See, e.g., *PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS AND GOVERNANCE* (Clark C. Gibson et al. eds., 2000); *MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY* (Daniel W. Bromley ed., 1992); *COMMON PROPERTY RESOURCES: ECOLOGY AND COMMUNITY-BASED SUSTAINABLE DEVELOPMENT* (Fikret Berkes ed., 1989); *THE DRAMA OF THE COMMONS* (Elinor Ostrom et al. eds., 2002).

those case studies.⁵⁰ Hardin's article on the commons includes the observation that property rights and regulation are the two mechanisms that can be used to overcome the tragedy of the commons.⁵¹ In making his argument, Hardin included the assumption that users of the commons by themselves are incapable of finding or manufacturing solutions to the tragedy of the commons. This assumption has been emphatically rejected by much of the subsequent literature on the commons, including—and perhaps particularly—the work of Ostrom.⁵² In large part, the commons literature examines the extent to which institutions created by and for users of the commons are able to help those users overcome challenges presented by the tragedy of the commons—particularly the “temptations to free-ride and shirk”⁵³—and thereby avoid having the defining characteristics of the commons to “tragically” collapse in upon themselves.

Scholarship on the cultural commons takes another tack. Rather than focusing on the tragedy of the commons, scholars of the cultural commons focus on how cultural communities sustain themselves in pursuit of creating, pooling, and sharing intellectual and cultural resources. When Madison, Frischmann, and Strandburg attempted to start the cultural commons literature, they did so with the hope that a body of scholarship would grow out of it and that thereby they could come “to identify those features of the [cultural] commons that are more and less significant to the success and failure of a commons enterprise.”⁵⁴ While the moniker cultural commons is certainly catchy, the term *commons* is used in the cultural commons literature in a loose and even a metaphorical sense.⁵⁵

⁵⁰ See OSTROM, *supra* note ____; Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. C47 (1992); JEAN-MARIE BALAND & JEAN PILLIPPE PLATTEAU, HALT DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RULE COMMUNITIES (1996); ARUN AGRAWA AND CLARKE C. GIBSON, COMMUNITIES AND THE ENVIRONMENT (2001); Arun Agrawal, *Common Resources and Institutional Stability*, in THE DRAMA OF THE COMMONS, *supra* note ____, at 41–85; ROBERT WADE, VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA (1988).

⁵¹ Hardin, *supra* note 2, at 314.

⁵² OSTROM, *supra* note 3, at 2-18. (Emphatically rejecting Hardin's notion that the only pathways open to the commons summed up by Leviathan, property, and tragedy and calling the widely accepted view that this was correct “uncritical”). For a brief introduction to this aspect of the commons literature see Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 519-520 (2007).

⁵³ OSTROM, *supra* note 3 at 12.

⁵⁴ Madison, Frischmann & Strandburg, *supra* note 1, at 660.

⁵⁵ Madison, Frischmann & Strandburg, *supra* note 1, at 674 (“We draw on narrative and metaphorical approaches to legal and sociological questions, specifically by examining the metaphorical dimensions of the information ‘environment’ and the knowledge ‘commons.’). For those who study the commons, this looseness of language and use of the commons as a metaphor may initially cause some frustration. The commons literature has struggled with people saying commons and meaning different things and significant efforts within the commons literature have been made to make sure that when somebody is talking about the commons, they mean a particular sort of resource and not something else, like a property right, community, or a governance mechanism. Margaret A. McKean, *Common Property*, in PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS AND GOVERNANCE, *supra* note ____, at 27, 30. In fact, it seems that it was for this reasons that many within the commons literature have migrated away from the term commons and instead tried to use the term common-pool resource in its place. *Id.*

As an interesting and perhaps promising side note, it is my suspicion that these two related lines of thinking have not yet been integrated fully. Of course, the cultural commons literature has already recognized the need for and the promise of integrating lessons from the commons literature.⁵⁶ However, we should not forget that before the cultural commons literature came into being, much of what is studied in the cultural commons had already made a home in the commons literature. Charlotte Hess labeled these “knowledge commons,” which include studies that have obvious cultural commons dimensions to them, covering universities, intellectual property, libraries, and open source software, just to name a few.⁵⁷ Given this, it seems likely that as the cultural commons literature begins to take hold that commons scholarship—including areas beyond the knowledge commons—may benefit from the cultural commons literature as well.

B. Noteworthy Differences between the Commons and the Cultural Commons

I now highlight the most important differences between the commons and the cultural commons, including what I consider the most important differentiating factor—the dependent variable—followed by a discussion of several other differences highlighted in the cultural commons literature.

1. Dependent Variables Constitute the Most Important Difference

While the literature on the cultural commons has not yet focused on this point, I believe the most important difference between the commons and the cultural commons literatures is that from the outset scholars have in mind two very different dependent variables. In the commons literature, the dependent variable is the commons *resource*. The major thrust of the literature examines the health of a resource in light of a large number of factors related to institutions governing the commons, the characteristics of resource itself, and the characteristics of appropriators.⁵⁸

In contrast, the cultural commons literature focuses on how the *community* establishes cooperative arrangements to produce and distribute intellectual and cultural resources. This is

⁵⁶ See Madison, Frischmann & Strandburg, *supra* note 1.

⁵⁷ Charlotte Hess. Mapping the New Commons ____ (June 19, 2008), presented at “Governing Shared Resources: Connecting Local Experience to Global Challenges;” the 12th Biennial Conference of the International Association for the Study of the Commons, University of Gloucestershire, Cheltenham, England, July 14-18, 2008. See also, UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 15 (Charlotte Hess & Elinor Ostrom eds., 2007).

⁵⁸ See OSTROM, *supra* note ____, at 88-102; Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. C47 (1992); JEAN-MARIE BALAND & JEAN PILLIPPE PLATTEAU, HALT DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RULE COMMUNITIES 284-345 (1996); Arun Agrawal, *Common Resources and Institutional Stability*, in THE DRAMA OF THE COMMONS, *supra* note ____, at 41-85; ROBERT WADE, VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA 179-198 (2007).

not to say that cultural commons resources are not important. It is one piece of evidence—and often highly valuable evidence—of a cultural commons’ benefits or costs.⁵⁹ It should be weighed against other costs and benefits associated with a cultural commons community in our assessment of it.⁶⁰ Among these other factors, patterns of interactions within cultural commons communities have particular import because in them are the seeds of “constantly refreshed commons outcomes.”⁶¹

Because of the different dependent variables, in the commons we screen out cases where we do not have the right sort of resource, just as we screen out cases where we do have the right sort of communities in the cultural commons. When thinking about the commons, the way we know we are dealing with a commons situation is that we find a particular sort of resource, specifically one where rivalry and difficulties excluding others is present. This means, for example, a private forest that does not present challenges in excluding other users does not qualify as a commons even though forests are typically going to qualify as commons resources. Similarly, we can only know that we have found a cultural commons situation if we can determine the right sort of community associates with it. In the cultural commons everything turns on cultural commons communities: cultural commons are “environments for developing and distributing cultural and scientific knowledge”⁶² and cultural commons communities are the very *environments* where these cultural resources develop. For example, Wikipedia is a cultural commons because of its community of volunteer Wikipedians; the same resource would not count as a cultural commons if it had been built through the proceeds of market transactions grounded in traditional intellectual property rights.⁶³ We are looking for “institutionalized sharing of resource among members of a community.”⁶⁴

The dependent variable also dictates the sorts of problems we are trying solve. The overarching problem in the commons is finding ways to skirt the tragedy of the commons—the looming death knell of a commons resource.⁶⁵ While the sorts of problems the cultural commons sets out to solve are more varied, they tend to focus on problems related to helping

⁵⁹ See Madison, Frischmann & Strandburg, *supra* note 1, at 704-05.

⁶⁰ See Madison, Frischmann & Strandburg, *supra* note 1, at 704-05.

⁶¹ Madison, Frischmann & Strandburg, *supra* note 1, at 705.

⁶² Madison, Frischmann & Strandburg, *supra* note 1, at 659.

⁶³ See Madison, Frischmann & Strandburg, *supra* note 1, at 659 (discussing “environments” at issue within the definition of the cultural commons as “environments ... designed and managed with limitations tailored to the character of those [cultural] resources and the communities” and contrasting these environments with those “left to evolve via market transactions grounded solely in traditional proprietary rights.”).

⁶⁴ Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Reply: The Complexity of Commons*, 95 CORNELL L. REV. 839, 841 (2010).

⁶⁵ See, e.g., Madison, Frischmann & Strandburg, *supra* note 1, at 691 (stating “common-pool resources are defined by the problem of subtractability or rivalrousness (e.g., removing lobsters from the pool results in fewer lobsters for everyone else) and the risk that a common-pool resource will be exhausted by uncoordinated self-interested activity (e.g., unmanaged harvesting may jeopardize the sustainability of the lobster population.”).

cultural commons communities interact: “collective action, coordination, [t]ransaction cost problems”⁶⁶ or “mediat[ing] among communities with different default norms.”⁶⁷

Again, while the importance of differences in dependent variables has not been a major focus in the literature up to this point, it seems to be *the* major difference between the commons and cultural commons literatures, and one that must be accounted for in the interaction of these two literatures.

2. Role of Rivalry

There is a simple discussion and a more nuanced discussion to be had about the role of rivalry in the commons and in the cultural commons. I begin with the simple and then move on to the more nuanced. While I revisit this issue several times in Part III, I also note, the cultural commons framework seems to incorporate both of these views in different aspects of the framework.

Before presenting either of these, however, we must discuss what it means for a resource to be rivalrous or nonrivalrous. As discussed above, rivalry (sometimes called subtractability) means that one person’s use of a resource actually consumes some of the resource and thereby leaves less of it for others to enjoy.⁶⁸ In contrast, use of a nonrivalrous resource does not consume the resource and does not reduce opportunities for others to enjoy it.⁶⁹

By definition, commons resources are rivalrous.⁷⁰ In the simple discussion, we would treat cultural commons as a nonrivalrous resource.⁷¹ This is, in fact, where Madison, Frischmann, and Strandburg come down on the issue, at least as far as outputs of the cultural commons are concerned:

Despite considerable variation and nuance, these activities all can be understood to present a simple core problem: as public goods, the “output” from these activities – whether described as information, expression, invention, innovation, research, ideas, or otherwise – is naturally nonrivalrous, meaning that consumption of the resource does not deplete the amount available to other

⁶⁶ See Madison, Frischmann & Strandburg, *supra* note 1, at 691.

⁶⁷ See Madison, Frischmann & Strandburg, *supra* note 1, at 692.

⁶⁸ See *supra* note ____ .

⁶⁹ Taking these characteristics on their face, the cultural commons seems more like a public good than a commons resource. Madison, Frischmann & Strandburg, *supra* note 1, at 666. Other intellectual property scholars, such as Lawrence Lessig, have also characterized intellectual resources in this way. LAWRENCE LESSIG, *The Future of Ideas: The Fate of the Commons in a Connected World* ____ (2002).

⁷⁰ Madison, Frischmann & Strandburg, *supra* note 1, at 666.

⁷¹ Taking these characteristics on their face, the cultural commons seems more like a public good than a commons resource. Madison, Frischmann & Strandburg, *supra* note 1, at 666. Other intellectual property scholars, such as Lawrence Lessig, have also characterized intellectual resources in this way. LAWRENCE LESSIG, *The Future of Ideas: The Fate of the Commons in a Connected World* ____ (2002).

users, and nonexcludable, meaning that knowledge resources are not naturally defined by boundaries that permit exclusion of users.⁷²

Before taking issue with that framing of cultural commons resources, I want to emphasize that I am not arguing that this simple story is reflective of simplistic thinking. To the contrary, this position is perfectly consistent with the position taken by, among others, many respected intellectual property scholars⁷³ and Supreme Court Justices.⁷⁴ The idea can even be traced back to the writings of Thomas Jefferson.⁷⁵

In this version of the story, we would not expect to see a tragedy of the commons associated with use of cultural commons resources. In fact, we are left to expect quite the opposite. As people access the cultural commons, the gut reaction is “the more, the merrier.” Under these assumptions, we would expect to see what Carol Rose, the most renowned legal commons scholar, famously described as the comedy of the commons.⁷⁶

I will now move on to the more nuanced argument. The gist of this line of argument is that rivalry plays an important role in cultural commons resources as well, either because they are in fact rivalrous or, at the very least, inextricably tied to and impacted by other resources that are rivalrous.

⁷² Madison, Frischmann & Strandburg, *supra* note 1, at 666.

⁷³ See, e.g., Henry E. Smith, Intellectual Property As Property: Delineating Entitlements in Information, 116 Yale L.J. 1742, 1747, 1751-52 (2007) (“information is nonrival and other resources are rival”); Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. Pa. L. Rev. 635, 645-46, 654 (2007) (“Copyrightable works are generally considered to be nonrival in [that]...consumption by one person does not reduce the supply available for consumption by others.”); Mark A. Lemley & David W. O’Brien, Encouraging Software Reuse, 49 Stan. L. Rev. 255, 268-69 (1997) (“[S]oftware products in general, whether distributed in object-code (computer readable) or source-code (human readable) format, raise substantial public goods issues.... The public goods problem is not unique to the software industry; all developers of intellectual property face the same problem.”) (citation omitted).

⁷⁴ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

⁷⁵ Thirteen Writings of Thomas Jefferson 333-34 (Lipscomb ed., 1904) (Letter to I. McPherson, Aug. 13, 1813) quoted in Ralph Brown & Robert Denicola, *Copyright* 9 (6th ed. 1995) (“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, that no one possess the less, because every other possess the whole of it. He who receives an idea from me, receives instructions himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation.”).

⁷⁶ Carol M. Rose, *The Comedy of the Commons: Commerce, Custom and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

First, consider the argument that cultural commons resources are rivalrous. As mentioned above, a few years ago, Hess and Ostrom took a close look at a category of resources that they called knowledge commons.⁷⁷ Not surprisingly, much of what they considered knowledge commons would probably meet Madison, Frischmann, and Strandburg's definition of cultural commons.⁷⁸ However, when Hess and Ostrom discussed knowledge commons, they were not talking about cultural commons but rather commons resources subject to rivalry. According to Hess and Ostrom,

The introduction of new technologies can play a huge role in the robustness or vulnerability of a commons. New technologies can enable the capture of what were once free and open public goods. This has been the case with the development of most "global commons," such as the deep seas, the atmosphere, the electromagnetic spectrum, and space, for example. The ability to capture the resource, with the resource being converted from a nonrivalrous, non-exclusionary public good into a common-pool resource that needs to be managed, monitored, and protected, to ensure sustainability and preservation.⁷⁹

Hess and Ostrom talk about technology transforming public goods into commons resources. I would frame it a bit differently: such resources have always been commons resources, it just took technology changing before we recognized it. Hess and Ostrom's examples of journal publications with world-wide distribution in print were later published only in an online form, allowing the publisher to disband the journal and allowed it to vanish altogether; similarly, online publications created by the government that provided a wide array of useful data and information vanished after 9/11.⁸⁰ In these cases, and others like them, we did not recognize that knowledge could be corralled so effectively and taken out of the hands of so many; we did not recognize that it was a commons.⁸¹

Additionally, even if one were unwilling to recognize this sort of rivalry, competition over a resource can arise through other ways as well. In previous work, I have discussed competition among users and competition among uses in the context of the commons.⁸² This sort of competition happens all the time in the cultural commons. Hess and Ostrom recognize this as well:

⁷⁷ Charlotte Hess & Elinor Ostrom, *Introduction*, in UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 3-25 (Charlotte Hess & Elinor Ostrom eds., 2007).

⁷⁸ Madison, Frischmann & Strandburg, *supra* note 1, at 659.

⁷⁹ Charlotte Hess & Elinor Ostrom, *Introduction*, in UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 10 (Charlotte Hess & Elinor Ostrom eds., 2007).

⁸⁰ Charlotte Hess & Elinor Ostrom, *Introduction*, in UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 14-15 (Charlotte Hess & Elinor Ostrom eds., 2007).

⁸¹ See Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 536 (2007) (discussing the range of ways that crowding can occur).

⁸² See Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 536-37 (2007).

There are clearly multiple uses and competing interests in these commons. Corporations have supported increased patents and copyright terms, while many scientists, scholars, and practitioners take actions to ensure free access to information.⁸³

To understand how different viewpoints clash in the world of the cultural commons, consider a fictional story about a tasty lobster bisque recipe. Some may argue that sharing the recipe with another does not diminish the recipe owner's ability to use the recipe. This still holds even if it is shared widely. Through this lens, it is easy to claim, "The more the recipe is shared, the better." On the other hand, harvesting lobsters is a classic example of a rivalrous commons. On further inspection, however, the lobster bisque recipe might have more in common with lobster harvesting than it might appear at first blush. When it comes to harvesting lobsters, each lobster that finds its way into a trap means one less lobster in the sea to catch. Like most intellectual resources, recipes derive their value in part because they are not freely available. It is easy to argue that the benefits associated with having the lobster recipe are diminished each time the recipe is shared. A good recipe can be much more valuable to the recipe owner if it is not common knowledge.

The value of a particularly good recipe is gist of the memorable speech explaining the success of Kentucky Fried Chicken's founder Colonel Sanders delivered by Mike Myers' Scottish father character in *So I Married an Axe Murderer*. He could hardly contain his scorn as he explained the Colonel "puts addictive chemicals in his chicken making you crave it fortnightly."⁸⁴ Had the Colonel blabbed the recipe far and wide, when the craving kicked in, getting out the fryer would be an alternative to paying a visit to the Colonel. In reality of course, Kentucky Fried Chicken goes to great lengths to protect its recipe, keeping a single handwritten recipe in a corporate headquarters vault protected by various motion detectors and surrounded in concrete.⁸⁵

The fight about what purposes the various resources identified as cultural commons should serve is a fight about interests as much as it is one about vision. It is a controversy that sits at the heart of intellectual property law: how the world would look with and without giving some the power to exclude others from cultural commons resources.⁸⁶

⁸³ Charlotte Hess & Elinor Ostrom, *Introduction*, in UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 10 (Charlotte Hess & Elinor Ostrom eds., 2007).

⁸⁴ SO I MARRIED AN AXE MURDERER (TriStar Pictures 1993). Another amusing example along these lines comes from the *Seinfeld* "Soup Nazi" episode. The gist of the Soup Nazi storyline is that an iron-fisted restaurateur prepares delicious soup but does so only the way he wants to prepare it—no exceptions and no protests, or else, "No soup for you!" Elaine knows this but flaunts his rules. The Soup Nazi ends up banning Elaine from his restaurant for a year. Due to serendipity rarely seen in life but frequently seen on *Seinfeld*, Elaine ends up receiving the Soup Nazi's armoire, which of course includes his soup recipes in a drawer. She then proceeds to blissfully expose the Soup Nazi's recipes, forcing him to close his business.

⁸⁵ Bruce Schreiner, *KFC Stores Colonel's Secret Recipe in New, Safer Vault*, Feb. 2, 2009, http://www.huffingtonpost.com/2009/02/10/kfc-stores-colonels-secre_n_165630.html. Also, one is left to wonder what would become of Mr. Crab would be if Plankton got hold of his recipe for Crabby Patty.

⁸⁶ See e.g., Madison, Frischmann & Strandburg, *supra* note 1, at 667 ("At the core of IP law, as traditionally conceived, is the right to exclude, without which it is assumed that some producers would abandon their efforts for fear of free

Furthermore, it is hard to deny that however one characterizes rivalry among the cultural or intellectual output of a cultural commons, the cultural commons is often inextricably linked to other resources that are commons resources. As highlighted in the literature on semicommons, these interactions can be complex.⁸⁷ Take the example of intellectual property law. By allowing for exclusion, the law links the cultural commons resources with money, which is of course a scarce resource.⁸⁸ Money is not the only commons linked to the cultural commons: the time Wikipedians can spend updating the wiki is not unlimited; neither is the server capacity hosting an open source software program; nor are the items to be sold on Craigslist.⁸⁹ While it may be hard to imagine that crowding would slow the server of something like Wikipedia, the fact that it is even plausible to imagine such crowding suggests rivalry is lurking in the background of most of the cultural commons.

Finally, cultural commons often reverberate in the rivalry-constrained world. Sometimes, these can be positive and create what Brett Frischmann and Mark Lemley call spillovers⁹⁰ and what economists might term positive externalities. The cultural commons can also result in negative externalities.⁹¹ To illustrate these points, think about the mountains of information Wikipedia has put at our fingertips. One could imagine that many useful and destructive things have happened and will happen when people put that information to use.⁹²

riding (unlicensed sharing) by competitors.”); Thomas B. Nachbar, *The Comedy of the Market*, 30 Colum. J.L. & Arts 453, 455 (2007) (“The whole purpose of intellectual property laws is to artificially increase the excludability of intellectual works so that the proprietor of an intellectual work can credibly charge for access to it.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’”) (citations omitted).

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⁸⁸ Thomas B. Nachbar, *The Comedy of the Market*, 30 Colum. J.L. & Arts 453, 455 (2007) (“The whole purpose of intellectual property laws is to artificially increase the excludability of intellectual works so that the proprietor of an intellectual work can credibly charge for access to it. In so doing, intellectual property laws allow the conversion of some of the non-rival benefits of using intellectual works into the kinds of rival resources (read: money) necessary to create and distribute them, and channels those rival resources into the hands of those who do the creating and distributing.”). The old adage goes that money does not grow on trees. Interestingly enough, even if it did, however, it would still be a commons.

⁸⁹ A word to the wise, if one were to believe the ads posted on the website many of these goods “are going to go fast, so don’t wait.”

⁹⁰ Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

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⁹² For an example of a destructive consequence of Wikipedia, consider the controversial decision to put the Rorschach test on Wikipedia. Psychologists feared that it would enable people to become familiar with them and cheat, thereby

The communities building open source software and various hacktivist communities, for better or for worse, arise out of the cultural commons. In the cultural commons, we see both some of the most promising growth in science and other intellectual pursuits, as well as examples of people being sucked into what many would consider useless endeavors.

In sum, the more nuanced view of rivalry in the intellectual commons suggests that there are good reasons to view the cultural commons as actual commons resources, albeit extremely robust ones. We often see rivalry when it comes to competing visions about what shape the cultural commons should take. Even if some important dimensions of the cultural commons arguably are truly nonrivalrous, these dimensions are likely to be inextricably tied to rivalrous resources, such as money and time. Lastly, due to externalities and spillovers we should expect to see the cultural commons continue to reverberate in the rivalry-constrained world.

As shown below, some of the aspects of the more nuanced view of rivalry in the cultural commons have been incorporated into the cultural commons framework. Others, up to this point, have not.

3. Other Differences Highlighted in the Literature

Madison, Frischmann, and Strandburg point to other differences between rivalrous and nonrivalrous resources too, each with varying degrees of significance. I consider three of them below.

a. Facilitating Collective Action

To start with, according to Madison, Frischmann, and Strandburg, one difference between the commons and the cultural commons is that a major role of cultural commons institutions is to remove hurdles preventing collective action.⁹³ They point to examples of how cultural commons institutions have successfully reduced the costs of collective action, including pooled media coverage employed by the Associated Press, Wikipedia, and even the Grateful Dead.⁹⁴ In the context of this article, it is no small achievement that Congress can pass legislation and allow a nation of more than 300 million people come to decision on a wide range of issues.

While it is true that cultural commons institutions can work to reduce collective action costs, does this really reflect a major difference between cultural commons and commons institutions? Promoting cooperation and reducing the costs relating to collective action are quite familiar to those interested in the commons. In fact, it is quite easy to argue that reducing the costs of collective action is a major thread that runs through the fabric of the commons

ruining a helpful psychological profiling tool.

<http://www.nytimes.com/2009/07/29/technology/internet/29inkblot.html?pagewanted=all>

⁹³ Madison, Frischmann & Strandburg, *supra* note 1, at 672.

⁹⁴ Madison, Frischmann & Strandburg, *supra* note 1, at 662-63.

literature.⁹⁵ The commons literature builds on important insights made by Mancur Olson⁹⁶ and others⁹⁷ that illustrate how institutions can help us overcome the challenges of coordinating collectively. It is telling that some of the factors that Ostrom attributes to long-enduring commons institutions⁹⁸ also work toward reducing transaction costs. For example, one could easily point to provisions of commons institutions that allow commons users the right to organize themselves⁹⁹ and that allow the use of nested enterprises within large and complex commons resources to facilitate local control among a smaller group of resource users.¹⁰⁰ Other noninstitutional factors highlighted by other commons scholars that have a bearing on the longevity of commons management schemes also seem to directly relate to the costs of collective action. For example, collective action costs seem to be significant reasons that the following factors are relevant to long-enduring institutions: the size of the resource,¹⁰¹ the extent to which users of the commons live near the resource,¹⁰² and the degree to which users of a commons belong to a shared community or at least have a shared set of values.¹⁰³

However, there is a significant difference between the reasons that cooperation matters in the commons and the reasons it matters in the cultural commons. Cooperation in the commons is important mainly because it allows the users of the commons to regulate who gets what and how much. The commons literature often highlights the role of cooperation in providing resource users in the commons with a credible commitment that restraint and investment today will result in benefits to those making these efforts.¹⁰⁴ In the cultural commons, reducing collective costs plays a different role, particularly along nonrivalrous dimensions of the cultural commons. In such circumstances, the purpose of cooperation is to

⁹⁵ See OSTROM, *supra* note 3, at 36; Armin Falk, Ernst Fehr & Urs Fischbacher, *Appropriating the Commons – A Theoretical Explanation*, in THE DRAMA OF THE COMMONS 157, 159-61 (Elinor Ostrom et al. eds., 2002) (noting “[a] large body of evidence indicate fairness and reciprocity are powerful determinants of human behavior”); Ronald Oakerson, *Analyzing the Commons*, in MAKING THE COMMONS WORK: THEORY PRACTICE, AND POLICY 41, 49-51 (Daniel W. Bromley ed., 1992) (arguing “[f]ree-riding behavior erodes reciprocity”); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 576-77 (2001) (noting parties may be motivated by “[n]ot wanting to be suckers”).

⁹⁶ See generally, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 1-2 (1965).

⁹⁷ OSTROM, *supra* note 3 at ____.

⁹⁸ OSTROM, *supra* note 3 at ____.

⁹⁹ OSTROM, *supra* note 3 at ____.

¹⁰⁰ See OSTROM, *supra* note ____ 3 at ____..____.____.____. Of course there might be a number of other benefits of these attributes as well.

¹⁰¹ Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992); ARUN AGRAWAL, COMMON RESOURCES AND INSTITUTIONAL STABILITY, in THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds. 2002). [others]

¹⁰² Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992); ARUN AGRAWAL, COMMON RESOURCES AND INSTITUTIONAL STABILITY, in THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds. 2002). [others]

¹⁰³ Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992); ARUN AGRAWAL, COMMON RESOURCES AND INSTITUTIONAL STABILITY, in THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds. 2002). [others]

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draw more people into the commons and to get them to contribute in useful ways. Clearly, the differences in incentives matter and are likely to present different challenges. However, while these differences are likely to prove significant, the data and lessons learned in the commons about reducing the costs of collective action have potentially potent applications for those interested in the cultural commons.

b. Necessity of Creating Resources

According to Madison, Frischmann, and Strandburg, another major difference between the commons and the cultural commons is that within the cultural commons, resources must be created before they can be shared, whereas within the commons, particularly traditional natural resource commons, resources exist without any human effort.¹⁰⁵ On the surface, this difference seems to ring true. Hardin's fictional herdsmen did not have to build the pasture: the field was just there for the taking. The same could be said of other classic commons like forests, rivers, and fisheries. Yet, some commons that have attracted the attention of scholars are human inventions: one does not just come upon cityscapes,¹⁰⁶ court dockets,¹⁰⁷ or subway systems¹⁰⁸ in nature. Additionally, in most commons, in order to govern or in some cases even have access to the commons, some sort of human infrastructure or investment is necessary. Irrigation requires ditches, oil fields require wells and pipelines, and most modern pastures require fences. In many instances, building and maintaining this infrastructure is also a joint venture. This cooperation we see in the commons does not occur without conscious human effort. So, while there is a difference here, it seems more of a difference in scale rather than kind. It also seems that the documentation of how this sort of cooperation has occurred in the commons contains many lessons for those interested in studying cultural commons.

c. Anticommons Problems

Some of what has been uncovered regarding the cultural commons is quite different from what one ordinarily runs across in the traditional commons literature. Take, for example, what Madison, Frischmann, and Strandburg say about the Manufacturer's Aircraft Association patent pool¹⁰⁹ and how it relates to the idea that Michael Heller has labeled the tragedy of the anticommons, the unfortunate result that arises when so many individual property rights are at play that no one can really access their potential benefits.¹¹⁰ The U.S. government created this patent pool during World War I to help facilitate airplane manufacturing. A major challenge

¹⁰⁵ See, e.g., Madison, Frischmann & Strandburg, *supra* note 1, at 672.

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¹⁰⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 660-61.

¹¹⁰ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

facing airplane manufacturers at the time was that they often found it difficult to get access to all of the necessary patents.¹¹¹ This hurdle to manufacturing had major consequences with regard to the country's attempts to meet the demands of the war effort. Quite simply, the Association provided a one-stop shop for manufacturers: those in the pool would be able to access the required intellectual property without having to negotiate each and every license.¹¹²

While the story of the Manufacturer's Aircraft Association does have some elements of promoting cooperation and reducing collective actions costs, it also illustrates how interactions within the cultural commons may help in overcoming anticommons problems. There may be some examples of this sort of benefit in the commons, such as an association getting water rights for irrigation as a group rather than each member obtaining his or her own permit, but this has not proven a major focus of the more traditional commons literature up to this point.¹¹³ So, while solutions to anticommons problems are usually the domain of cultural commons, it is foreseeable that commons communities may deal with them as well.

With this discussion as a backdrop, I will now focus on legislation making as a cultural commons. To do this, the remainder of the article will employ Madison, Frischmann, and Strandburg's cultural commons framework to look at Congress. In doing so, the hope is that looking at a community effort to create a cultural resource that is quite distant from the sorts of situations Madison, Frischmann, and Strandburg envisioned will provide a unique vantage point to examine the cultural commons framework.

III. Examining Legislation Making with the Cultural Commons Framework

When Madison, Frischmann, and Strandburg put forward the concept of the cultural commons, a significant part of their analysis included a proposed framework for examining cultural commons. The framework that they settled upon was a modified version of Ostrom's IAD framework, which has been used extensively in the commons literature.¹¹⁴ This cultural commons framework systematically thinks through a number of factors. Below, I march through these factors to examine legislation making.

A. Background Environment

Given the nuanced weave of culture's tapestry, it is not surprising that the task of identifying the natural cultural background of a cultural commons is a difficult one, perhaps particularly in the context of congressional legislation making. Following an attempt to subject legislation making to the cultural commons framework, I provide some suggestions about how

¹¹¹ Madison, Frischmann & Strandburg, *supra* note 1, at 660.

¹¹² Madison, Frischmann & Strandburg, *supra* note 1, at 660.

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the cultural commons framework could be modified to improve identifying background environments.

The cultural commons framework first asks researchers to identify the background environment from which the cultural commons emerges.¹¹⁵ It should come as no surprise that when discussing culture it is difficult to draw lines as to when one aspect of culture ends and another begins.¹¹⁶ It seems equally challenging to meaningfully separate the different building blocks that make up a culture. In many ways, it is these interrelationships and complexities that make culture interesting and worth creating. Analyzing this complex environment is difficult because “[t]here is no clean way to separate a particular cultural commons from the ‘natural’ cultural background, because cultural activity is always grounded in human social interaction, the material environment, laws, and norms.”¹¹⁷ In trying to provide cultural commons researchers some clarity in this area, the framework separates cultural commons into two groups: one that relates to subjects typically governed by patent and copyright law and one that relates to subjects that are not.¹¹⁸ It seems obvious that the end product of congressional attempts to write legislation would fall into the latter category. As such, the authors suggest that “the most appropriate choice for the ‘natural environment’ is a cultural environment unmediated by rights of exclusion or other regulation.”¹¹⁹

So, what is the natural environment for legislation making? What is law making unmediated by rights of exclusion or other regulation? To me, these questions are very abstract and not all that helpful. The notion of looking for “unmediated by rights of exclusion or other regulation” suggests that the cultural commons represent a departure from the natural world. Yet, we have had the legislation-making cultural commons for centuries. I find it difficult to determine where to draw the line in the sand and what to do once a line is drawn given that the lines that make sense date back decades, if not centuries. Should we try to project a world without the Magna Carta, a Constitutional Convention, the Civil War, or the New Deal? Even more frustrating, as I pondered how this could be done, I realized that doing so might run afoul of the framework which also incorporates Julie Cohen’s argument that the concept of natural cultural environment “encompasses all that we inherit and experience.”¹²⁰ Haven’t all living citizens in the United State inherited a world with the Congress? In short, I found it very difficult to identify the background environment that harmonized with the cultural commons framework.

In hopes of finding further guidance, I returned to Ostrom’s commons IAD framework, which Madison, Frischmann and Strandburg used as an instructive template.¹²¹ The corollary in IAD framework asks us to identify how traits of the biophysical and material world influence

¹¹⁵ Madison, Frischmann & Strandburg, *supra* note 1, at 683-84.

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¹¹⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 683.

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¹¹⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 684.

¹²⁰ Madison, Frischmann & Strandburg, *supra* note 1, at 685; cite Cohen cites they rely upon too.

¹²¹ ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 22-24 (2005). See also Madison, Frischmann, & Strandburg, *supra* note 1, at ____ .

the resource at issue.¹²² While the cultural commons framework could have taken a number of routes in incorporating and refitting Ostrom's framework, I would recommend revamping this portion of the framework to recapture the gist of the analysis called for in Ostrom's IAD framework. I would ask, what aspects of culture are beyond the control of the cultural commons community and yet shape participation in that community? Instead of trying to figure out what the world would be like absent a patent pool, an open source community, or a legislature, researchers instead would try to sort out the barriers and incentives that drive people to participate in a patent pool, open source community, or legislature. Given that this is not the analysis called for by the cultural commons framework, note that this line of thinking would point researchers in a very different direction than the background environment sought in the current cultural commons framework. Instead of focusing on the end product of collaboration that occurs within a cultural commons, we would focus instead on barriers and incentives to collaboration on the front end. A patent pool, for example, might give access to various licenses to use intellectual property without having to wade through excessive bureaucracy. For an open source software community, this might highlight the roles of networking, résumé building, and socializing opportunities. For legislation making, this might be advancing one's political agenda, building political coalitions, facilitating fundraising, or rent seeking. My suggested change would allow us to understand how factors largely outside of the control of those participating in a cultural commons might impact the dependent variable of the robustness of the cultural commons community.

B. Basic Characteristics of the Legislation Making Commons

The modified IAD framework next asks researchers to identify characteristics of the cultural commons relevant to creating, managing, and disseminating intellectual and cultural goods.¹²³ The framework calls for discussion of cultural commons resources and communities, the goals and objectives associated with a cultural commons, the extent to which the resource and the community are open to users, and the rules that govern the cultural commons.¹²⁴ Below, I discuss each of these in turn.

1. Resources and Community in the Legislation-Making Cultural Commons

a. Resources

When it comes to resources, the cultural commons framework focuses on the resource created by the community.¹²⁵ Examples include "patents in a patent pool, news items for a news service, recordings for a music database, or recipes shared within a community of French

¹²² ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 22 (2005).

¹²³ Madison, Frischmann & Strandburg, *supra* note 1, at 688.

¹²⁴ Madison, Frischmann & Strandburg, *supra* note 1, at 689.

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chefs.”¹²⁶ Painted with a broad brush, the resource created within the congressional commons is legislation. In explaining the cultural commons framework, Madison, Frischmann and Strandburg note, “it may take some consideration to identify the most salient description of the relevant resources.”¹²⁷ The authors go on to ask, “What resources are pooled and shared in an open source software community? Ideas? Code? Coding expertise? Debugging opportunities?”¹²⁸ They further warn that often “multiple types of resources are being shared within the community.”¹²⁹ Understandably, the cultural commons framework pushes for more sophisticated and nuanced understandings of cultural commons resources. Before expanding upon my one word response “legislation,” I must admit at the outset that a detailed examination of legislation could fill – and in fact in many cases already has filled – many volumes. While the answers I will give below are perhaps a bit trite, I will stay true to the cultural commons framework by at least identifying categories of resources encapsulated within legislation. Once I have done that, I will provide some thoughts about this aspect of the framework and particularly its assumption that cultural commons resources are nonrivalrous.

Instead of rattling off a list of things that make up legislation, however, it seems worthwhile to break down this line of questioning a bit more systematically. Playing off the open source community suggestions provided by Madison, Frischmann, and Strandburg, the concepts of ideas and code both seem to prompt researchers to think about the multiple dimensions of the final output of the open source software end product. What is the category of things that make up the dimensions of the output of legislation? Embedded in most legislation we probably find a number of things, including but not limited to a collection of ideas, language, and analysis relating to policy, budgeting, and law.

Moving on, what about Madison, Frischmann, and Strandburg’s example of coding expertise? In this example, the focus shifts from the cultural commons’ output to the attributes of the cultural commons’ community drawn upon in the creation of the end product.¹³⁰ Thinking along these lines, there are a large number of community attributes of the legislation-making cultural commons that are drawn upon regularly. Congress often draws upon experts within a particular field when drafting legislation for policy expertise. In determining what tack to take, members of Congress may rely on political expertise to formulate their strategies. One could add a long list of similar community traits that are pooled in the legislation-making cultural commons, including creativity, the ability to negotiate, effort, the ability to inspire and shame others, and the ability to filter large amounts of information.

The key word in the example of debugging opportunities is *opportunities*. What opportunities are pooled in the creation and dissemination of the legislation-making cultural commons? Again, though certainly overly simplistic, there are a number of stereotypical narratives about the opportunities provided to those with influence over the legislation-making cultural commons. For example, such a conversation could begin with the rose-tinted impression often left about candidates by their own media campaigns that highlight such things

¹²⁶ Madison, Frischmann & Strandburg, *supra* note 1, at 689.

¹²⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 689.

¹²⁸ Madison, Frischmann & Strandburg, *supra* note 1, at 689.

¹²⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 689.

¹³⁰ Madison, Frischmann & Strandburg, *supra* note 1, at 690.

as a candidate's desire to have the opportunity to make a difference, express her patriotism, and serve the community. It could end with the more cynical and yet widely-held view that what happens in Congress is due to politicians trying to increase their odds of reelection, to gain power and to indulge in other forms self-interested behavior.

While this discussion of resources barely skims the surface, there is enough here to revisit the worthwhile discussion regarding the view of rivalry in the cultural commons discussed above.¹³¹ Madison, Frischmann, and Strandburg take the position that "the 'output' of ... information, expression, invention, innovation, research, ideas, or otherwise ... is naturally nonrivalrous."¹³² I believe a key word that reverberates in this discussion of cultural commons resources is that of output. As illustrated in the examples above, output is only one of three categories of resources pooled in the cultural commons. When it comes to pooled community attributes and opportunities, rivalry would apply. These categories of cultural commons resources, community attributes and opportunities, relate directly to the discussion above about cultural commons being inextricably linked to rivalrous resources.¹³³

Again, this point plays out similarly in the legislation-making cultural commons and the cultural commons more generally. To illustrate the point, take the example of coding expertise. Ask any expert if she can give expertise unlimitedly or if her time and energies are endless, and the answer will of course be no. As for debugging opportunities, if these were truly nonrivalrous, it would strange to call them opportunities.

The legislation-making cultural commons also provides an entry to challenge the assumption that cultural commons resources are nonrivalrous, something also discussed and challenged above in the context of the cultural commons more generally.¹³⁴ Uses of a cultural resource like law are many, and rivalry may exist depending on how one uses the cultural commons output. Take an enactment, the legality of which is litigated in several courts.¹³⁵ While it is difficult to argue that simply understanding what the law is has limits, what about other uses of the law? Isn't using the law as a basis for litigation a use of the legislation? Assume that one challenges the law for any reason. If successful, given the value of precedent, one person's use of the legislation may very well preclude others from using the legislation in the way they had desired. While the words on the page may still be accessible, the use of a law to create change has eroded.

I revisit this topic again below in addressing the goals and objectives of the legislation-making cultural commons.¹³⁶ In that context, I will provide some musings about how rivalry plays into the legislation-making cultural commons specifically. Of course the story of the resources at issue, particularly those related to attributes and motivations of the community, largely turns on who one counts as a member of the community. With that in mind, consider the various parties who might be included in the legislation-making community.

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¹³² Madison, Frischmann & Strandburg, *supra* note 1, at 666. I have mentioned that there is some disagreement as to whether this is indeed the case. See discussion *supra* ____.

¹³³ See *supra* at ____.

¹³⁴ See *supra* at ____.

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b. Community

When identifying the community associated with a cultural commons, we should begin by “asking who is part of a particular constructed cultural community sharpens the inquiry and helps pave the way for [other] inquiries.”¹³⁷ Below, I quickly identify relevant members of the legislation-making cultural commons. I do so, however, with some reticence because this is where the mountain of literature on Congress is bound to make my musing seem obvious, if not trite. I begin by discussing members of Congress and then briefly address congressional staffers and outside constituencies that often influence the legislation-making cultural commons.

As far as legislation making goes, the most obvious place to start is with the members of Congress themselves. After all, it is the collective vote of these members of Congress that creates legislation. With the signature of the president, or two-thirds vote after a presidential veto, mere proposals transform into law.

Because of the political stakes involved, it is not surprising that membership in Congress is highly sought after. It is stunning to realize, particularly given caps placed on donations by campaign finance legislation,¹³⁸ that literally billions of dollars are spent in aggregate on congressional campaigns every election cycle.¹³⁹ Along similar lines, we could consider the amount of time candidates spend running for office, the efforts political parties and interest groups go to recruit and assist candidates, and the attention that the media pays to such races as additional evidence of its import.

Because those in Congress have it in their power to move the country in one direction or another, it is noteworthy, and yet not surprising, that some of the most contentious controversies in American political history had to do with the composition of Congress. Consider a few examples. In what is known as the Constitutional Convention’s Great Compromise, the esteemed delegates of the Convention struck a balance between the interests of small states and the interests of large states that had to do with state claims to representation in the Senate and the House of Representatives. Similarly, the Missouri Compromise was a deal brokered between pro-slavery and anti-slavery factions, and in large part had to do with preserving the political balance of slave and non-slave states in Congress, particularly within the Senate. Moreover, one of the reasons that efforts to extend voting rights were so heated was because of the impact they could have on political races, including congressional elections. For the past several decades, the political fight over campaign finance laws has been a fight about access to congressional membership. Additionally, at the root of this fight is an assertion and a concern that the funding of campaigns can turn an election. Along with these massive political decisions, elected leaders at the state level have long participated in the redistricting process, which determines the constituency of House seats within a state. This process, which is often described as allowing politicians to choose their voters, almost unavoidably ends up serving one political interest or another.

Other communities have influence over the legislation-making cultural commons as well. I will briefly mention two of them. First, I will begin with congressional staff. While

¹³⁷ Madison, Frischmann & Strandburg, *supra* note 1, at 690.

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crafting legislation is not the only role played by congressional staff, it is a major one. Within each congressional office, we would expect to see staff members with titles like Legislative Director, Senior Legislative Assistant, and Legislative Coordinator. In addition, even staff members who work in district offices and nonpaid interns often have a role in drafting and sifting through legislative language. In addition, Congress employs staff members to assist committees and subcommittees in evaluating and drafting legislation, not to mention those employed by the Congressional Research Service, Congressional Budget Office, and the General Accounting Office.

Additionally, Congress often relies on outside constituencies for their expertise and input. Even if Congress does not seek input, many will clamor for Congress's attention.¹⁴⁰ Obviously, interest groups, political parties, political action committees, lobbyists, and activists are often found within the halls of Congress and congressional offices. These entities go to great lengths to influence legislation, sometimes in broad and visible ways and sometimes in narrow and largely undetectable ways. These groups not only seek to influence members of Congress directly, but also seek to influence other players on Capitol Hill, including congressional staffers. Due to concerns about how outside interests influence politicians and their staffs, laws that prohibit gifts to those in congressional staffs and elsewhere in government have been adopted over the years.¹⁴¹

There are probably other constituencies that could be addressed as well. The American public, the press, and those outside of Congress's employ but still within the federal government are some examples. While a story could be told that made each of these active contributors to the process of creating and disseminating legislation, the ties to these other constituencies are not as direct as the several constituencies I focused upon.

2. Identifying goals and objectives in the legislation-making cultural commons

The cultural commons framework asks researchers "to identify the particular problem or problems that a given commons is constructed to address."¹⁴² In this aspect of their framework, Madison, Frischmann and Strandburg contrast what is going on within the cultural commons with that of other commons resources. They argue that within the commons, the overarching goal generally boils down to managing "the risk that a common-pool resource will be exhausted by uncoordinated self-interested activity."¹⁴³ This is necessary because of the rivalrous nature of commons resources. On the other hand, they see cultural commons resources as "public goods" and "not rivalrously consumed."¹⁴⁴ Because of this

¹⁴⁰ Congress in its active role is sometimes referred to as police patrol oversight and its passive role is sometimes referred to as fire alarm oversight. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, ___ Am. J. of Pol. Sci. 165 (1984).

¹⁴¹ See, e.g., Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735.

¹⁴² Madison, Frischmann & Strandburg, *supra* note 1, at 691.

¹⁴³ Madison, Frischmann & Strandburg, *supra* note 1, at 691.

¹⁴⁴ Madison, Frischmann & Strandburg, *supra* note 1, at 691.

[t]he various problems that cultural commons institutions solve are not merely, or even primarily, problems of overuse. The problems addressed by cultural commons include the production of intellectual goods to be shared, the overcoming of transaction costs leading to bargaining breakdown among different actors interested in exploiting intellectual resource, the production of commonly useful platforms for further creativity, and so forth.¹⁴⁵

I begin this section by addressing the goals and objectives of the cultural commons in the way that the cultural commons framework suggests. Following this, I briefly highlight the value of focusing on the goals of particular communities within a larger cultural commons community as well as the importance of rivalry within this particular facet of the cultural commons framework.

Again, at the risk of seeming simplistic and by way of brief overview, there seem to be several goals in creating Congress as a legislation-making cultural commons that one might attribute to the Founders of the Constitution. The most fundamental purpose of Congress is to formulate, debate, write, and pass bills; the Constitution explicitly vests Congress with “all legislative powers”¹⁴⁶ and the power to “make all laws which shall be necessary and proper.”¹⁴⁷

There are some other additional themes that might be attributed to the Founders. Without trying to make an exhaustive list, consider three other goals that might be associated with the creation of a Congress. First, at least to some extent, the Founders empowered Congress in order to create some uniformity of law among the states.

For example, the desire to have uniformity, is the genesis of the commerce clause. As noted by Justice Cardozo,

Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was ‘the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.’¹⁴⁸

This view of the commerce clause echoes the pleas of Alexander Hamilton, in his Federalist Paper #22: “It is indeed evident, on the most superficial view, that there is no object, either as it

¹⁴⁵ Madison, Frischmann & Strandburg, *supra* note 1, at 691.

¹⁴⁶ U.S. CONST. art. I, § 1.

¹⁴⁷ U.S. CONST. art. I, § 8.

¹⁴⁸ Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

respects the interests of trade or finance, that more strongly demands a federal superintendence.”¹⁴⁹

Second, it seems fair to say that the Founders made Congress accountable to the various states in order to create a sophisticated governing body that provides citizens a conduit to the federal government. James Madison explains benefits of this sort of government by comparing it to a direct democracy in Federalist #10:

The effect of the first difference [between republics and direct democracy] is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.¹⁵⁰

Third, the legislative branch was seen as a check against the sorts of problems the colonies had experienced under English rule, particularly problems that might arise from a powerful Executive Branch of government. Because of this, it gave Congress a number of ways to safeguard the country from the executive branch, such as vesting with Congress the power to write the law, declare war, and tax, to name a few.

a. Adding an Examination of Goals Relevant to Subgroups Involved in Reinventing the Cultural Commons to the Cultural Commons Framework

The Founders’ motivations, while both relevant and interesting, leaves out a lot of what is driving the law-making cultural commons today and are quite distant from the political life of Congress in the twenty-first century. This observation caused me to wonder whether the cultural commons framework is probing the goals and objectives of those within a cultural commons community deeply enough. Based on this thinking, I concluded that it might make sense to pay attention to more than the broad goals the creators of a cultural commons had at its inception. I offer two additions to the cultural commons framework.

When thinking about what is fueling participation in a cultural commons, it would be helpful to address those things that drive people to participate in the cultural commons on an ongoing basis. Goals change with time, and because a cultural commons must not only be invented but also be sustained, these changes are worth noting. Cultural commons are not just constructed; they are invented; more importantly, they are reconstructed and reinvented as the interests and shape of cultural commons communities change.

Second, it is important to remember – and central to the concept of the cultural commons – that when we are talking about a cultural commons community, it is a group of people made up of individuals. As many have noted, Congress is a they and not an it.¹⁵¹ It

¹⁴⁹ Cite Federalist #22.

¹⁵⁰ Cite Federalist #10.

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seems that drawing out the various motivations of subgroups (and perhaps individuals) within a cultural commons community is worthwhile.

To do this, I would suggest that the cultural commons framework should ask researchers to note the broad motivations of each of the subgroups that the researcher has identified as part of the cultural commons community.

As an illustrative example, I will briefly address each of the subgroups identified above in discussing the law-making cultural commons. This discussion is not meant to provide a fine-grained analysis. Rather, it is meant to illustrate some of the motivations a rational actor might have for participating in the cultural commons at issue. (This level of analysis is not unlike the assertion that ends up playing the driving force behind the tragedy of the commons: that a rational appropriator would want to appropriate as much of a scarce commons resource as possible.)

I will begin by starting with the goals associated with members of Congress. What are their goals? We might begin thinking about this by again remembering rosy campaign media ads where candidates explain their love of country, desire to make a difference, or aspirations to serve a community they love. Contrast this with the last lines of the caricature of a congressional candidate portrayed by Robert Redford's character Bill McKay in the movie *The Candidate*. The movie, which employed the tagline "Nothing matters more than winning. Not even what you believe in."¹⁵² shows a candidate that had lost his bearings through the electoral process and only after winning wonders "What do we do now?"¹⁵³ Of course, the truth of the matter almost certainly falls between the poles of these scripted media productions, differs among candidates, and even changes over time for any particular politician.

The discussions of what motivates members of Congress are as old as the Union itself and arise out of multiple schools of thought. Some of the themes that arise from the literature discussing motivations of members of Congress include the notion that members of Congress attempt to mirror the majority of their electorate,¹⁵⁴ to promote their own best judgment,¹⁵⁵ to act as agents to political principals such as voters or interest groups,¹⁵⁶ to maximize personal benefit,¹⁵⁷ or to balance a variety of these interests, among many others.¹⁵⁸

It is easy to imagine a number of factors motivating the goals and objectives of congressional staff. Like any other job, it is the basis of a person's livelihood, and one would imagine that salary, job security, and promotion would matter to congressional staff. As any

¹⁵² THE CANDIDATE (Redford-Ritchie Productions 1972).

¹⁵³ THE CANDIDATE (Redford-Ritchie Productions 1972).

¹⁵⁴ John Adams.

¹⁵⁵ THE FEDERALIST NO. 10 (James Madison) (describing political coalitions as people "who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of community"); Edmund Burke

¹⁵⁶ Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON 371, 373-74 (1983); Theodore Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677, 688 (1964).

¹⁵⁷ FRED MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 2-3 (1997).

¹⁵⁸ ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 24 (1967) ("Because constant negotiations among different centers of power are necessary in order to make decisions, citizens and leaders will perfect the precious art of dealing peacefully with their conflicts, and not merely to the benefit of one partisan but to the mutual benefit of all the parties to a conflict.").

employer would hope, it is probably the case that members of Congress hope that their staff attempt to maximize the goals and motivations of their member of Congress. Of course, a staff member may have her own preferences that will sometimes conflict with or even overshadow those of the Congressman, at least, from the staff member's perspective.

Interest groups, political parties, lobbyists, political action committees, and activists might have a number of interests. It seems that the overriding objective of these entities is to achieve certain policy ends through the legislative process. This can be done in diverse ways, including gaining access to and reasoning with members of Congress and staffers. Influence may be won by other methods like campaign donations – as the bumper sticker wisdom suggests, “Invest in America, Buy a Congressman.” Or, it may come as a result of orchestrating events to generate publicity or by mobilizing constituents in order to increase pressure on politicians. Admittedly, each of these players is likely to be vastly more complex than such a simple results-oriented view would suggest. The motivations driving their method may range from a desire to satisfy a particularly strong policy preference to the desire to gain political power and/or money.

b. Importance of Recognizing Rivalry in Discussing Goals and Objectives Associated with a Cultural Commons

Quickly reviewing the goals and objectives mentioned above, it is clear that rivalry plays an important role in the law-making cultural commons. While it is at least a defensible – though I think losing – argument that access to law is nonrivalrous, the same cannot be said of most of what drives people to the cultural commons community.

Members of Congress quickly experience what it feels like to win and lose roll-call votes. The reason that the Speaker of the House or the President pro tem in the Senate says, “The ayes appear to have it . . . the ayes do have it” is because if the ayes have it, then the nays do not, and the same goes for each of the community members with a preference regarding the legislation. That is rivalry. A job or a promotion of a congressional staffer or a federal bureaucrat precludes somebody else filling that same job. Once again, it is rivalry. One interest group's access to a member of Congress leaves others scavenging the halls of Congress.

This discussion about goals and objectives is an important one to have if one is to understand the law-making cultural commons. First, it often helps us understand why people participate in the cultural commons community and what sustains their attention. This understanding is clearly imperative for those hoping to sustain cultural commons endeavors.

Second, such an understanding may help us better predict what a cultural commons end product will look like. Understanding, for example, that Wall Street generally opposes a piece of legislation might help us predict how particular members of Congress might also view that legislation.

Lastly, understanding the things that motivate members of the cultural commons might help us identify areas where institutional reform would be helpful. In fact, Madison, Frischmann and Strandburg hit upon this topic in discussing goals and objectives associated with cultural commons, even though they do not associate it with rivalry. They write,

Pooling arrangements also may exist for less socially salutary reasons. Most obvious is the case of members colluding to restrict competition, and it is

certainly within the purview of our approach that commons should be evaluated in part by reference to the possibility of anticompetitive behavior and other possible costs.¹⁵⁹

Ultimately, the authors opt to distinguish this situation from their interest in the cultural commons because cartels are entities that “operate by sharing price and output information and which pose significant and obvious risks of anticompetitive behavior without offsetting welfare benefits.”¹⁶⁰ This attempt to distinguish, however, does not preclude the possibility of anticompetitive behavior in the context of a cultural commons enterprise that has welfare benefits associated with it as well. An analysis that explicitly tries to expose where rivalry does exist may be the first step in limiting aspects of a cultural commons that are problematic. It is not surprising that many of the reform efforts aimed at the legislation-making cultural commons have occurred in places where those associated with the cultural commons community experience rivalry. Examples include voter fraud laws,¹⁶¹ campaign finance laws,¹⁶² political protection of federal employees,¹⁶³ and ethics rules associated with gift giving to members of Congress and their staff.¹⁶⁴

It is important to stress that this sort discussion could be had across the cultural commons. To illustrate the point, answer the question, what is it that brings Wikipedians back to edit and tend the wiki? Certainly, some Wikipedians have stayed true to what one might assume was the motives of the creators of Wikipedia, however, what should be made of the controversy regarding Wikipedia’s decision to block the Church of Scientology from making self-promoting edits?¹⁶⁵ What about the Wikipedians who began changing the story of Paul Revere after Sarah Palin flubbed it?¹⁶⁶ While the creators of Wikipedia may not have self-promotion and public relations in mind when they founded the wiki, doesn’t understanding this provide important information about how to manage the community and its output resource?

What about open source software? What should we make of coders that are employed private businesses? Is the way they are shaping the software only related to their employers’ business interests or is it more complicated than this? Does it depend on the employer? Does coding help give volunteer coders credibility on the job market?¹⁶⁷ While Linux may not have been created to provide job security for some and job opportunities for others, understanding the answers to these questions might be important in shaping and sustaining the community.

It seems that if we are ever going to get to *Governing the Cultural Common*, we need to have a more fine grained understanding of what brings people to the cultural commons and

¹⁵⁹ Madison, Frischmann & Strandburg, *supra* note 1, at 693.

¹⁶⁰ Madison, Frischmann & Strandburg, *supra* note 1, at 693.

¹⁶¹ See, e.g., Help America Vote Act, Pub. L. 107-252 (2002).

¹⁶² See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81.

¹⁶³ See, e.g., Hatch Act of 1939, 52 Stat. 1147.

¹⁶⁴ See, e.g., Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735.

¹⁶⁵ http://www.theregister.co.uk/2009/05/29/wikipedia_bans_scientology/

¹⁶⁶ http://hosted2.ap.org/APDefault/*Article_2011-06-06-US-Palin-Wikipedia/id-a95cf3e4eaf646749ad740cc518e0a2b

¹⁶⁷ <http://www.hbs.edu/research/pdf/07-028.pdf>

whether to promote or discourage particular users from using the cultural commons in particular ways.

3. Degree of openness and the character of control in the legislation-making cultural commons

The cultural commons framework identifies two sorts of openness, one that relates to openness as applied to cultural commons resources and a second that focuses on it as applied to cultural commons communities. I will take each in turn.

a. Openness as applied to law as a resource

The openness of the law as a resource varies depending on how one intends to use it. On the spectrum of open and closed resources, access to reading the law and knowing what the law says is extremely open (although what the law *means* is often more difficult to grasp). The government has made the entirety of the U.S. Code available online and free of charge.¹⁶⁸ In addition, the government has created more than 1,000 Federal Depository Libraries where the general public can access the U.S. Code and other federal materials.¹⁶⁹ It does not appear that the government is attempting to exercise any intellectual property rights over the U.S. Code, and it can be found in full on several websites,¹⁷⁰ and in part on many others. Public access to what the law is only seems limited by the public's ability to grasp legislative language.

The law can be used in other ways as well, and some of these are not as open. For example, if one wants to use the law as the basis of a lawsuit, one might be limited by whether a statute creates a cause of action or whether an individual has standing to bring a claim. And, whereas reading a statute is virtually free, even when a cause of action is available, bringing lawsuits is in many instances will prove cost prohibitive.

b. Openness as applied to the legislation-making cultural commons community

How open is the legislation-making cultural commons? While all of the communities within this cultural commons at first glance appear quite open, in practice this is not the case.

To begin this discussion, consider membership in Congress. In theory, membership is open to any US citizen who meets the age requirements set forth in the Constitution.¹⁷¹ This obviously is a very low threshold. In fact, if one were to review voting guides that allow candidates to present themselves and their views to potential voters, one would realize that a

¹⁶⁸ See U.S. Government Printing Office, Federal Digital System, <http://www.gpo.gov/fdsys/>.

¹⁶⁹ See U.S. Government Printing Office, Welcome to the Federal Depository Library Directory, <http://catalog.gpo.gov/fdlpdir/FDLPdir.jsp>.

¹⁷⁰ See Legal Information Institute, U.S. Code Main Page, <http://www.law.cornell.edu/uscode/>; Wikipedia, United States Code, http://en.wikipedia.org/wiki/United_States_Code.

¹⁷¹ One must be more than 25 years old to run for House seat and more than 30 years old to run for the Senate. U.S. CONST. art. I, § 2, cl. 2, U.S. CONST. art. I, § 3, cl. 3.

substantial number of people who get their names on the ballot are eccentric or crazy, or sometimes both.

However, getting one's name on the ballot is much different from winning an election. The difficulty of winning a race for the House or the Senate is further complicated by the fact that it is often extremely difficult to beat an incumbent. Add to this fact the reality that the career span of members of the House and Senate often last decades, and one gets a picture of how difficult it would be to win a House or Senate seat. Even when the chances of victory are small, the two major parties in the United States tend to field impressive candidates, almost all of which are elites in society. They well connected and often wealthy. In practice, membership in Congress is very exclusive and closed to all but the small number of elites who rise to the top, with a lot of help and some luck.

However, participation in other communities within the legislation-making cultural commons is much more accessible. While getting the job as a congressional staffer is certainly not easy, particularly when we are talking about a leadership role in an office, many college students are allowed to play minor roles in these offices as interns. The higher one gets within a congressional office, however, the more difficult it becomes to secure these positions.

The same is true of the many interests that descend upon Washington, D.C. to lobby Congress. If one is looking for a relatively short-term experience, the people that lobby Congress are not so much unlike average people in American life. High school students, senior citizens, people involved in different trades, and political activists of different stripes commonly find their way to Washington, D.C. to lobby congressional offices for a day. In fact it does not even take traveling to Washington, D.C. to participate. Anyone who cares enough to spend a few minutes writing a letter or an e-mail can send it to a member of Congress, and usually receive some sort of response.

While attempting to get the ear of a member of Congress or a congressional staffer is an opportunity open to the public at large, there is very little doubt that some people are much more capable of influencing the legislative process than others. There is a major barrier to obtaining access to the powerful, particularly if one believes the conventional wisdom that much of the most influential lobbying opportunities occur in places most people cannot go: in back rooms, at parties with Washington socialites, or within the offices of members of Congress.

There is no doubt that one could dredge up many exceptions to the rule, but the rule seems to be that those with influence in American society are by and large those who have the most of it within the Congress. While all of these communities are at least in theory wide open, the practical reality of the matter is that Congress is dominated by quite an exclusive and impenetrable club.

4. Governance or “Rules in Use” within the Legislation-making Cultural Commons [Omitted]

[Omitted]

a. history and narrative [Omitted]

[Omitted]

- b. entitlement structures and resource provisions
[Omitted]

[Omitted]

- c. institutional setting [Omitted]

[Omitted]

- d. legal structures that affect the pool itself [Omitted]

[Omitted]

- e. governance mechanisms [Omitted]

[Omitted]

C. *Patterns and Outcomes Emanating from the Legislation-Making Cultural Commons [Omitted]*

[Omitted]

- 1. Solutions and benefits [Omitted]

[Omitted]

- 2. Costs and risks [Omitted]

[Omitted]

IV. Conclusion [Omitted]

[Omitted]