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“The Taco Truck Rush: Regulating the Commons in Boom Times”

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THE TACO TRUCK RUSH: REGULATING THE COMMONS IN BOOM TIMES

“Sir, this is a case in which the law giver must go with the current; and then he may regulate it: if he goes against the current, his law will be nugatory, and his authority will be despised.” Senator Thomas Hart Benton, MO, January 15, 1849¹

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¹ CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1859). Sen. Benton was a colorful character with close ties to California; his daughter married John C. Fremont, who figured prominently in California’s nascent statehood. Sen. Benton championed manifest destiny and Jeffersonian democracy. He was also a staunch proponent of “hard currency.” He once proposed a law requiring payment for federal land in gold, which was defeated in Congress but later enshrined in an executive order, the Specie Circular, by Jackson in 1836. His position on currency earned him the nickname “Old Bullion.” DAVID S. HEIDLER & JEANNE T. HEIDLER, *HENRY CLAY: THE ESSENTIAL AMERICAN* 144-47 (Random House, 2010).

INTRODUCTION

This paper will explore the legacy of California Gold Rush mining codes and its relevance to Los Angeles “taco trucks.” Granted, there are clearly stark differences between Gold Rush mining claims and today’s taco truck claims. However, this paper will compare the two and from that premise study the issues that arise when private commercial activity flourishes on publicly held land. Despite a reliance on the undergirding philosophies of American property jurisprudence, this paper is not a study of the philosophy of property rights. Rather, this paper uses the philosophy of property, private enterprise, and public ownership within the facts of the Gold Rush and the Los Angeles taco truck bonanza to explore government response to private enterprise on open-access public land.

Part I traces California Gold Rush miners’ ad hoc development of property rights and the government’s response. Part II discusses the history and resurgence of street vending in Los Angeles, as well as local government attempts to regulate it. Part III compares the factual similarities of miners’ codes and the Los Angeles mobile food community, and it also compares the different government response to these two endeavors. Part IV summarizes where the comparison breaks down and where it is valid.

The paper concludes that the government and legal response to private enterprise on publicly held land has dramatically changed in the last hundred and sixty years. The Los Angeles City Council could learn something from the lessons of the past and allow the mobile food vendors to regulate themselves in property and traffic issues; the State of California promotes this approach and has laws that preempt most municipal attempts to regulate taco trucks. Public health concerns should remain a government concern, but

local legislatures must be careful not to use public health as a pretext for preferential treatment of brick and mortar restaurants.

I. GOLD RUSH MINERS AND EARLY UNITED STATES MINERAL LAW

When James Marshall discovered gold at Sutter's Mill in January of 1848, California was still a Mexican province under the occupation of the American military and de facto control of Colonel Richard Mason.² Within a few weeks California became United States territory, but it still lacked any coherent or enforceable legal system. This general anarchy, coupled with the rumors—later substantiated—of vast amounts of gold, set the stage for a massive onslaught of California-bound fortune hunters. Gold miners flocked to the open access land to make their fortunes. As people streamed in to the state, miners, the California government, and the federal government all began to deal with how to regulate and control access to California's gold.³ Miners developed their own informal property system. Without much means to enforce rules, the military authorities in California merely acquiesced to the miners' informal rules. The federal government debated whether it should itself derive some financial benefit from potentially lucrative mineral extraction on public lands, but ultimately did not enact a national mining policy until more than fifteen years later, in the mid-1860s.⁴

A. *Mining in an Open-Access Commons and Miners' Codes*

When gold was first discovered California was still under Mexican law, despite being under American military control. Mexican laws and customs addressed mineral

² Martin Ridge, *Disorder, Crime, and Punishment in the California Gold Rush*, MONTANA: THE MAGAZINE OF WESTERN HISTORY, Autumn 1999, at 12, 12.

³ *Id.*

⁴ Michelle Albert, *The Fight to Save Red Lady: Does the 1872 Mining Law Impliedly Preclude Review of Patent Protest Determinations?*, 79 U. COLO. L. REV. 929, 940 (2008); see also Ridge, *supra* note 2, at 12-13.

mining and required miners to make a formal claim.⁵ However, before the signing of the Treaty of Guadalupe Hidalgo and the formal end to the Mexican-American War, then military governor, Colonel Richard Barnes Mason,⁶ had abolished Mexican laws relating to the private acquisition of land and mineral rights.⁷ He directed that “Mexican laws and customs now prevailing in California, relative to the denouncement [i.e. the making of formal claims] of mines” be discontinued.⁸

Contrary to Colonel Mason’s selective dismissal of Mexican law, the Treaty of Guadalupe Hidalgo guaranteed that Mexican laws and land grants would be recognized under American law. The American legislators at California’s first Constitutional Convention opined that the Treaty of Guadalupe Hidalgo contained an implied contractual provision that provided that the Mexicans (now Californians) in California would retain the same privileges and immunities under American law that they enjoyed under Mexican law.⁹ This principle took hold in some aspects of American

⁵ John C. Lacy, *Going with the Current: The Genesis of the Mineral Laws of the United States*, 41 ROCKY MOUNTAIN MINERAL L. INST. 10, § 10.01[1] (1995).

⁶ Col. Mason was Military Governor of California during the tumultuous time when gold was discovered at Sutter’s Mill. He wrote numerous reports to Washington, D.C., chronicling the discoveries and the ensuing gold rush. His papers are held at the Bancroft, UC Berkeley. See Virtual Museum of the City of San Francisco, *San Francisco Street Names*, <http://www.sfmuseum.org/street/stnames4.html> (Last visited Dec. 14, 2010).

⁷ Ridge, *supra* note 2, at 12.

⁸ Lacy, *supra* note 5.

⁹ See e.g., Debate over English-Only Amendment to Cal. Const. Art. IV, in 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 1878-1879 (Sacramento, 1880-1881) 801-2 (explaining that “in the Treaty of Guadalupe Hidalgo there was an assurance that the natives should continue to enjoy the rights and privileges they did under their former Government, and there was an implied contract that they should be governed as they were before”).

jurisprudence in California.¹⁰ But the Mexican mineral rights laws—already discarded by Colonel Mason—were not honored by the new California. This left California ill-equipped to cope with the accelerating Gold Rush: American law had not yet developed any mineral rights jurisprudence and California’s nascent statehood limited the ability of the government to effectively control its citizens.

At the beginning, California’s goldfields represented “a vast commons” open to anyone bold enough to exploit it.¹¹ There seemed wealth enough for everyone and the rules of the game rewarded the diligent. As one historian opined, “Conflict among them was rare as long as resources were abundant.”¹² Soon, however, the easy pickings were exhausted, but there was still a huge influx of people flocking to the region. This led the men, by necessity, to band together in efforts to protect their interests. In the absence of government rules, groups of miners began to organize together and grant themselves informal property rights in the public land.¹³ The miners gravitated away from property rights in fee and toward a claims system.¹⁴ Under a claims system, a miner staked his

¹⁰ See e.g., Cal. Const. of 1849, art. XI, § 21, *reprinted in* THE ORIGINAL CONSTITUTION OF THE STATE OF CALIFORNIA 1849, at 12, 43 (Telefact Foundation 1965) (reproducing handwritten section of Spanish version of California’s first constitution); see also Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 316-19 (1992) (providing a history of language development in California, beginning with the Native American language, the imperialism of Spanish, the language conflicts after the Mexican-American War, and California’s early use of Spanish in official government documents).

¹¹ Ridge, *supra* note 2, at 14; see also Andrea G. McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J.L. & HUMAN. 1, 11 (2002) (explaining that before the introduction of claims, the mining region was treated as a commons from which anyone could help themselves to gold).

¹² Ridge, *supra* note 2, at 14.

¹³ McDowell, *supra* note 11, at 3; see also Ridge, *supra* note 2, at 14.

¹⁴ McDowell, *supra* note 11, at 3 (explaining that the miners saw themselves as laborers not property holders, because they associated property holders with the aristocratic landholding class).

right to mine a certain area of land until he either abandoned or exhausted it. These became known as “mining codes.” Thus, by restricting access to certain plots of land the miners began to form what could be called a limited-access or group-access commons.¹⁵

The earliest mining codes on record are from 1848.¹⁶ Historians believe they were fairly common by 1849.¹⁷ Despite group variations, most of the codes followed a similar structure based on the principles of discovery, notice, and continuous use:

[T]he right of property in mines is made to depend on discovery and development; that is, discovery is made the source of title, and development, or working, the conditions of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights.¹⁸

Discovered claims were generally limited to one per person. The miners called this the one-claim rule.¹⁹ This rule sought to prevent monopolies but also to encourage miners to work individual claims. Miners also limited the dimensions of a mining claim pursuant to the richness of the diggings, the ease of extracting gold, and the local traditions.²⁰ The size varied according to the diggings. “Local custom was a strong stabilizing factor in reaching a consensus about claim size and other conditions of holding a mining claim.

When new diggings were discovered, many of the first miners on the scene came from

¹⁵ See e.g., MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 34 (Perseus Books Group, 2008); Michael Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1182-85 (1999); Lee Anne Fennel, *Common Interest Tragedies*, 98 *NW. U. L. REV.* 907, 913 (2004) (distinguishing a “‘limited-access’ commons to which a limited number of people have access, from an ‘open-access’ regime that is open to ‘everyone’”).

¹⁶ McDowell, *supra* note 11, at 13.

¹⁷ *Id.*

¹⁸ J.H.N. de Fooz, *Fundamental Principles of the Law of Mines* at vii § 5 (Henry W. Halleck trans., 1860) (quoting Halleck, a California attorney, who was the adjutant on Colonel Mason's staff and was the first contemporary commentator who was also a practicing lawyer) *found in Lacy, supra* note 5, at note 105.

¹⁹ McDowell, *supra* note 11, at 34-36 (explaining the intricacies of the one-claim rule).

²⁰ *Id.* at 36-39 (explaining the intricacies of the one-claim rule).

camps nearby, bringing with them the usages and expectations of the spot where they had just been working.”²¹ Once a miner “discovered” a claim, he had to keep working it to retain possession.²² Regulations quantified the time, extent, and character of work that must be done to hold the claim. If a miner did not comply, he would likely be displaced by a third party and forfeit his right to challenge the new ownership.²³

B. *Government Response to Private Property Rights on Public Land*

1. The State Response

At the beginning of the Gold Rush, California was under the control of the United States Army and in between legal systems. The state lacked a cohesive mining policy and could not even look to a federal policy because the U.S. government lacked one as well. In addition, “the army in California lacked both the power and the authority to prosecute or control gold hunters.”²⁴ This is not to say, however, that Colonel Mason and other state leaders did not consider trying to promulgate and enforce a mining policy, for this option was certainly debated.²⁵

The first state discussions about regulating mining focused on how the public might obtain some pecuniary gain from these private citizens who were getting rich on public land. Colonel Mason reported:

It was a matter of serious reflection with me how I could secure to the Government certain rents or fees for the privilege of procuring this gold; but upon considering the large extent of the country, the character of the people engaged,

²¹ *Id.* at 37.

²² Lacy, *supra* note 5, at § 10.04[2].

²³ Lacy, *supra* note 5, at § 10.04[2].

²⁴ Ridge, *supra* note 2, at 13.

²⁵ Albert, *supra* note 4, at 940 (“When gold was discovered . . . a general federal ‘mining law or policy simply did not exist.’”).

and the small scattered force at my command I resolved not to interfere, but to permit all to work freely.²⁶

Thus Colonel Mason concluded that simply staying out of the miners' way was the best policy. This view typified California's response to the Gold Rush: "simply ratify what the miners [did] and otherwise stay out of their way."²⁷ The state legislature commonly accepted that "miners were the primary legislators as regards mineral rights."²⁸ Many years later, U.S. Senator William Stewart of Nevada celebrated California's approach to mining and recommended that the federal government adopt the same deferential policy. He summarized the California approach as follows: "[The] rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State or of the United States should govern the decision of the action."²⁹ In hindsight, some commentators have observed that California's passive acceptance of mining codes may also have been "tempered with the knowledge that the federal government would eventually act."³⁰

2. The Federal Response

Similar to California's approach, the Federal Government's initial response to gold mining on government land was acquiescence.³¹ The United States government lacked a developed mineral rights jurisprudence.³² However, under common law there

²⁶ Gregory Yale, *Legal Titles to Mining Claims & Water Rights in California Under the Mining Law of Congress of July 1866*, at 17 (1867).

²⁷ Lacy, *supra* note 5, at § 10.04[2].

²⁸ *Id.*

²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 3226 (1866).

³⁰ Lacy, *supra* note 5, at § 10.04[2].

³¹ Ridge, *supra* note 2, at 13; *see also* CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1849); Lacy, *supra* note 5, at § 10.04[2].

³² Albert, *supra* note 4, at 940 ("When gold was discovered . . . a general federal 'mining law or policy simply did not exist.'").

was always the possibility that the government could bring a trespass action against a prospector on federal land.³³ The news of the Gold Rush and the incredible promise of its riches spurred almost immediate Congressional debate over the government's right to a financial benefit from the potential gold lodes in California.³⁴ They also debated the broader issue of a structure of laws that would eventually provide for mineral development in the United States.³⁵ In the debates for a federal mining law, Congress considered the nature of property rights that should be granted to miners, a permit system akin to that for hunting or fishing, and finally the general idea of leaving the mines to a laissez-faire capitalism.³⁶

The Treasury Department first proposed selling mineral lands to miners in two-acre parcels.³⁷ Clearly this land in California had mineral wealth, and the Treasury Department believed that the federal government should see a return on its value.³⁸ Senator Benton blasted this idea on two grounds.³⁹ First, he viewed the gold rush as a transitory event in that there is only a finite amount of gold in each deposit. Second, Senator Benton believed that the miners did not want a fee simple title to any land. What they wanted was the right to hunt and the protection of the discovery for the time required

³³ See Albert, *supra* note 4, at 945 (“This [codification of miners’ codes] change in legal status at last put to rest the threat of a trespass action brought by the United States against a prospector on the public lands.”).

³⁴ See CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1849) (recording Congressional discussions about nature of California’s gold discoveries and the structure of laws that would eventually be needed to govern mineral development in the United States).

³⁵ See *id.*

³⁶ See *id.*

³⁷ Lacy, *supra* note 5, at § 10.04[1].

³⁸ See Albert, *supra* note 4, at 940 (“Distracted by the Civil War and divided by pragmatic concerns (especially the question of whether the federal government should derive some financial benefits from mineral extraction on public lands), the legislature instead engaged in a policy of ‘tacit acquiescence’ to the status quo.”).

³⁹ Lacy, *supra* note 5, at § 10.04[1].

to exhaust the deposit.⁴⁰ He recommended that “[i]nstead of hoarding, and holding them up, and selling in driblets” that the government leave them open to industry and enterprise. “Lay them open to natural capital—to labor—to the man that has stout arms and a willing heart.”⁴¹ Senator Benton saw no need to tax mineral extractions. “No matter who [dug] up the gold,” the wealth generated by mining would return to the stream of commerce in the form of currency.⁴² He also recommended granting permits, akin to government hunting or fishing permits. The permits would reflect a miner’s limited and transitory property interest and were, in Senator Benton’s opinion, a better option than selling fee simple title to the land.⁴³

Perhaps Senator Benton’s most influential observation was that legislation requiring sales and the hoarding of federal land would only put miners in opposition to the law and cause them to disregard it. Such a move would not cause them to reform their mining habits. He concluded:

*“Sir, this is a case in which the lawgiver must go with the current; and then he may regulate; if he goes against the current, his law will be nugatory, and his authority will be despised. The current is for hunting, and finding, and digging; permits follow this current, and by granting them, the legislator may control and regulate the current.”*⁴⁴

Senator Benton’s words turned out to be the precise approach taken by the federal government, except that Congress fully embraced a laissez-faire approach and did not

⁴⁰ CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1849); *see also* Lacy, *supra* note 5, at § 10.04[1] (interpreting Senator Benton’s remarks to Congress).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1849) (emphasis added).

even require the miners to secure permits.⁴⁵ Miners were allowed to continue improvising their own laws for the time being.⁴⁶

Eventually Congress adopted a national mining policy with the passage of the Lode Law in 1866.⁴⁷ The Lode Law recognized and codified the miners' informal laws, and officially sanctioned mining activities on public lands. The Lode Act was limited to vein-type deposits, but the 1870 Placer Act soon filled this gap.⁴⁸ Therefore, within two decades of the California Gold Rush, Congress had enacted a fairly comprehensive federal policy on mineral rights that heavily relied on the informal miners' codes.

Today, the primary federal statute governing mining is the 1872 Mining Law.⁴⁹ The 1872 Mining Law drew heavily on the Lode and Placer Acts. As previously explained, the Lode and Placer Acts in turn drew heavily on the miners' self-regulated codes. Therefore, the government appears still to follow the wisdom of Senator Benton. Indeed, the 1872 Mining Law states this conciliatory approach: "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase."⁵⁰ The laissez-faire and conciliatory

⁴⁵ See Lacy, *supra* note 5, at § 10.04[2].

⁴⁶ Albert, *supra* note 4, at 940.

⁴⁷ An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, 14 Stat. 251 (1866) (currently codified at 30 U.S.C. §§ 43, 46, 51 (2000)).

⁴⁸ Albert, *supra* note 4, at 945.

⁴⁹ See General Mining Act of 1872, 17 Stat. 91 (1872) (current version at 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-35, 37, 39-43, 47 (2000)); Albert, *supra* note 4, at 939 ("The primary federal statute governing hard rock mining today is the 1872 Mining Law.").

⁵⁰ 30 U.S.C. § 22 (2000). The law then outlines the process of prospecting for minerals, staking a claim to them, working the claim, and protecting it against others. For a complete overview of the development of U.S. mineral laws, see John C. Lacy, *Going With the Current: The Genesis of the Mineral Laws of the United States*, 41 ROCKY MTN. MINERAL L. INST. 10 (1995) and Michelle Albert, *The Fight to Save Red Lady: Does the 1872 Mining Law Impliedly Preclude Review of Patent Protest Determinations?*, 79 U. COLO. L. REV. 929 (2008).

approach to private gain on public land would change as local California governments of the twenty-first century were confronted with a new industry flourishing in public space—the taco truck.⁵¹

II. TACO TRUCKS AND THE MOBILE FOOD CRAZE

A. *Resurgence of Street Vending in Los Angeles*

“Historically public markets and street vendors dominated food distribution in the U.S. into the early 20th Century.”⁵² Mobile vendors even occupied their own census category until 1940.⁵³ However, the advent of motor vehicles changed the nature of street markets by changing the street from a place of multi-use to one of single-use: transportation. Consequently, for the past half-century most Angelenos have neglected the street vendor in favor of the grocery store.⁵⁴ As a result, our view of streets became one-dimensional.⁵⁵ This one-dimensional view is at odds with the reality that in the past few decades, street vending has once again become common in Los Angeles. Traditional taco trucks always had local followings, but recently they gained renewed notoriety with

⁵¹ In keeping with common parlance of Angelenos and for the purposes of this paper, “taco truck” will be interchangeable with mobile food trucks, food trucks, and mobile food vendors. Where it is necessary to delineate the traditional taco trucks that cater to mainly Latino customers and serve traditional Mexican and El Salvadorian lunch fare, this paper will use the term “loncheros.” Loncheros is commonly accepted in the mobile food community to define traditional taco trucks that serve lunch to workers throughout the city. *See e.g.* Asociación de Loncheros L.A. Familia Unida de California, <http://www.loncheros.com> (last visited Nov. 11, 2010).

⁵² Alfonso Morales & Gregg Kettles, *Healthy Food Outside: Farmers’ Markets, Taco Trucks, and Sidewalk Fruit Vendors*, 26 J. CONTEMP. HEALTH L. & POL’Y 20, 27 (2009).

⁵³ Alfonso Morales, *Peddling Policy: Street Vending in Historical and Contemporary Context*, 20 J. SOC. & SOC. POL’Y 76, 79-84 (2000).

⁵⁴ *Id.*

⁵⁵ Morales & Kettles, *supra* note 52, at 21.

L.A.'s young nightlife crowd and ironic hipster culture.⁵⁶ Sensing the emerging trend and potential market, entrepreneurs and foodies jumped on the taco truck wagon. Thus, they ushered in a new wave of the modern food trucks. They may dispense gourmet takes on traditional cuisine, fancy French fries, or fusion food, but above all, they are trendy.⁵⁷ The surge in mobile food gained notoriety not only in Los Angeles, but also across the country.⁵⁸ All this private enterprise flourishing on public property clearly has ramifications for property law. Taco trucks may compete with brick and mortar businesses by luring customers away. Moreover, taco trucks do not have the overhead of a traditional restaurant, which may allow them to undercut prices in the restaurants. Taco trucks may also clog streets and sidewalks with traffic from the throngs of people waiting in lines. As of yet the government has not found an effective or equitable means of regulating the potential problems created by the surge in Los Angeles taco trucks. In the meantime, loncheros, taco trucks, and other gourmet food trucks continue to attract an increasing number of customers and headlines.

⁵⁶ On October 11, 2010, an eight-person panel at UCLA, "Look at This F*ing Panel: A Sociological Investigation of the Hipster," debated the defining characteristics of the term "hipster." They were unable to come to a consensus on the definition of a hipster, but they did arrive at common characteristics. As the *L.A. Times* summarized, "it did leave the audience with this overview: A hipster is, by definition, someone 18 to 25 years old with an interest in music, fashion and fornication; with progressive ideology (there are no 'tea party' hipsters); with a weakness for criticism and apathy; and with the desire to be creative and connected." Carolyn Kellog, *What Do Hipsters and Pornography Have in Common?*, JACKET COPY, Oct. 12, 2010, at <http://latimesblogs.latimes.com/jacketcopy/2010/10/hipster-pornography.html>.

⁵⁷ See e.g. Fry Smith, <http://www.eatfrysmith.com/> (last visited Dec. 11, 2010); Green Truck, <http://www.greentruckonthego.com/> (last visited Dec. 11, 2010); Nom Nom Truck, <http://nomnomtruck.com/> (last visited Dec. 11, 2010).

⁵⁸ Katy McLaughlin, *The King of the Streets Moves Indoors*, WALL ST. J., Jan. 15, 2010, at W5.

B. *Sidewalks and Streets as a Public Good and an Open Access Commons*

1. Public Space

A discussion about street and sidewalk vending calls for a preliminary definition of public space. Public space is where people engage with those outside their private circles.⁵⁹ Public spaces serve as venues to articulate public concerns, socialize, communicate information, and even engage in commercial exchange,⁶⁰ the latter use being specifically relevant to this paper. Competing activities occupying public spaces can generate conflict over the limited resource of open space. Some activities necessarily infringe on others. For example, a taco truck may clog the sidewalk with customers or block or slow vehicular traffic, thereby impeding the flow of transportation. Negotiating access to these spaces is often the mechanism by which citizens and governments seek to control the activities within the public space.⁶¹ Struggles over the right to use public spaces can be grouped into two forms: (1) the right to access space for its defined use, and (2) the right to define the scope of the use or access.⁶² Because streets and sidewalks are essentially an open-access commons,⁶³ it would seem that controlling access is not as efficient or realistic as trying to define the scope of usage.

⁵⁹ Renia Ehrenfeucht & Anatasia Loukaitou-Sideris, *Constructing the Sidewalks: Municipal Government and the Production of Public Space in Los Angeles, 1880-1920*, 33 J. HIST. GEOGRAPHY 104, 106 (2007); see also J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, 1989) (providing a cogent explanation of the public sphere and public spaces).

⁶⁰ See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1173 (1996) (“To socialize its members, any society, and especially one as diverse as the United States, requires venues where people of all backgrounds can rub elbows.”).

⁶¹ Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 107.

⁶² *Id.*

⁶³ “Commons property refers to shared resources for which there can be no single decision maker.” Heller, *supra* note 15, at 34.

2. Open Access Commons

Michael Heller proposes that the commons can be divided into two distinct categories.⁶⁴ First is “open-access” which he defines as “a regime in which no one at all can be excluded, like anarchy in the parking lot or on the high seas.”⁶⁵ The second type of commons has many different terms, but this paper will follow Heller’s term of “group access.”⁶⁶ Group access is a regime in which a limited number of commoners can exclude outsiders but not each other.⁶⁷ The Gold Rush miners and their miners’ codes align with the concept of group access. They sought to limit *access* to the public land for the purpose of mining through their informal codes and vigilante justice. By contrast, various government and private actors in Los Angeles have tried to control the public streets and sidewalks by *defining* which appropriate activities may occur there. In Heller’s terms, streets and sidewalks have developed into open-access commons limited by the scope of use or access.⁶⁸

⁶⁴ Michael Heller is a real estate law professor at Columbia and “one of America’s leading authorities on property. . . . Heller’s scholarship explores ownership puzzles in a wide range of settings. For example, in “Land Assembly Districts,” *Harvard Law Review* (April 2008) (with Rick Hills), Heller proposes a simple, workable solution to the problem of eminent domain abuse. His book, *Corporate Governance Lessons from Transition Economy Reforms* (Princeton University Press, 2006, paperback 2008), co-edited with Columbia Law School professor Merritt Fox, collects essays that use the post-socialist economic experience to illuminate the fundamentals of corporate governance. Heller’s work on “The Tragedy of the Anticommons,” in the *Harvard Law Review* and in *Science*, draws on post-socialist transition and biomedical research to show how the creation of too many private property rights can be as costly as creating too few.” COLUMBIA LAW SCHOOL, http://www.law.columbia.edu/fac/Michael_Heller (last visited Dec. 13, 2010).

⁶⁵ Heller, *supra* note 15, at 34.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Gregg Kettles, *Formal Versus Informal Allocation of Land in a Commons: The Case of the MacArthur Park Sidewalk Vendors*, 16 S. CAL. INTERDISC. L.J. 49, 49 (2006) [hereinafter Kettles, *Allocation of Land in a Commons*] (construing the streets and

Economists, historians, sociologists, and other academics have studied the development of public streets and sidewalks in modern Western culture and have tried to address the following question: Why do we have public streets and sidewalks at all? One reason offered by economists is that public sidewalks and streets are “public goods.”⁶⁹ They are articles and objects freely accessible to most people. They are “public” because it is not practical to exclude people who have not paid for access. Private actors would not be willing to build streets and sidewalks if they had to erect tollbooths at every corner, or pay employees to collect a fee from transient users just passing through. This theory of public goods may help explain why streets and sidewalks are public insofar as we view them as transportation corridors.⁷⁰ However, this view ignores the renascent use of these public goods; sidewalks and streets have reemerged as multi-use public spaces.⁷¹ In Los Angeles this shift has been highly visible and spawned a potentially lucrative business venture, the trendy mobile food truck. The law is struggling to catch up and to deal with the conflicts that arise out of this renewed commercial use of public property.

C. *Social and Legal History of Los Angeles Sidewalks and Streets*

In the nineteenth century, streets and sidewalks served many important social functions. In Los Angeles, streets and sidewalks “were the center of urban life.”⁷² Vendors sold tamales, fruit, meat, and household wares. Advertisers shouted from

sidewalks of MacArthur Park in Los Angeles as “essentially an open access commons” with respect to mobile vendors).

⁶⁹ Morales & Kettles, *supra* note 52, at 23.

⁷⁰ Morales & Kettles, *supra* note 52, at 23-24.

⁷¹ See e.g., Morales & Kettles, *supra* note 52 (tackling this issue in *Healthy Food Outside: Farmers’ Markets, Taco Trucks, and Sidewalk Fruit Vendors*).

⁷² Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 110.

soapboxes. Indigent workers sought and procured day jobs. On the street, people and activities overlapped. Near the end of the nineteenth century, Los Angeles residents and city government were rapidly constructing public thoroughfares to aid the expansion of the city. In 1850 the city had about 1610 people and few graded streets and sidewalks. By 1900 the population had reached 103,479 and countless new roads and sidewalks had been erected in response to this rapid growth.⁷³

As the streets in Los Angeles grew more and more crowded, the competing uses of the public space began to generate conflict.⁷⁴ The conflicts that arose during this time—conflicts that have resurfaced during the late twentieth century—can be grouped in three main categories. First was the conflict between the use of streets and sidewalks as corridors of transportation versus the use by mobile food vendors as a place of semi-transient commerce. Second, brick and mortar restaurants resented the competition of mobile vendors who did not have to pay even a fraction of the overhead of a typical restaurant. Finally, there was an element of class conflict. These categories frequently overlapped and municipal ordinances have often been an attempt to address all three of the previously mentioned concerns.

Technology in the form of advanced motor vehicles and political progressivism swept through Los Angeles in the early twentieth century.⁷⁵ Soon the multi-purpose

⁷³ B.L. Hunter, *The Evolution of Municipal Organization and Administrative Practice in the City of Los Angeles*, Los Angeles, 1933.

⁷⁴ See generally Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 107-12 (tracing the development of public sidewalks and streets in Los Angeles and the ensuing conflicts as they became places of limited use rather than spaces for a broad range of public activities).

⁷⁵ Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 110.

street, teeming with vending activity, was no longer desirable.⁷⁶ The smooth flow of vehicular traffic and middle-class ideals of sterilized bourgeois public spaces took precedence over the open-access commons of nineteenth-century streets. Illustrating this contemporary desire, a Los Angeles Times reporter lamented the impassibility of sidewalks for the middle-class woman:

[A visitor] leaves the Cosmopolitan; possible she may get up to Main Street opposite the Pico House and not find her progress impeded by anything more than a carriage or two arranged for display on the sidewalk. There she crosses the street, comes down the other side, threads her way through a collection of second hand furniture, crosses Arcadia street, raises her eyes to admire the magnificent proportions of Baker Block, and tumbles into a pile of oranges stacked up four deep on the curb! Recovering her equilibrium she continues her course down Main street, picks her way carefully among some empty dry goods boxes and is soon compelled to turn out into the middle of the street and become sandwiched between a passing street car and sundry piles of lumber, a bed of mortar and a wall of bricks. She turns up Main again at the corner of First Street, hoping to get to the hotel, three blocks away, during the hour that still remains before dinnertime.⁷⁷

The former public space activities became incompatible with the new public goal of “efficient and safe circulation and middle class ideals for orderly space.”⁷⁸

Los Angeles responded to these new goals with local ordinances and regulations restricting sidewalk and street vending, as well as loitering, littering, and obstructing traffic. Municipal governments in U.S. cities had already started to exercise substantial control over street activities by the end of the nineteenth century.⁷⁹ In 1885, the California Supreme Court validated municipal regulation of sidewalks and streets when it upheld a nuisance ordinance, saying, “[S]idewalks of the public streets of a city are parts of the street. Any obstruction of the sidewalk is therefore an obstruction of the street and

⁷⁶ See e.g., Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 110-11.

⁷⁷ Reporter, *A Perambulator Sees the Sights About the City*, L.A. TIMES, May 6, 1882.

⁷⁸ Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 110.

⁷⁹ See Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 107.

a nuisance.”⁸⁰ The California Supreme Court’s seeming willingness to support the city’s regulation of streets and sidewalks as public spaces enabled a proliferation of city ordinances aimed at discouraging street vending so as to promote transportation and protect brick and mortar businesses.⁸¹ Now, however, the right to promote transportation is considered a state concern, rather than a municipal concern.⁸² This becomes relevant in the 2008 legal battle over Los Angeles’ regulation of taco trucks.⁸³

Most often, conflicts arose between brick and mortar merchants and the mobile food vendors who directly competed with their business. As early as 1890, shopkeepers who sold fruit in downtown Los Angeles were petitioning the city to curtail the operations of mobile fruit peddlers who sold cheaper fruit out of their wagons. In support of the merchants, the city council enacted an ordinance that imposed a strict time limit on the fruit wagons: The wagons could not stand on streets within the downtown district for more than three minutes at a time.⁸⁴ The vendors had a three-minute window to make a sale and move on.⁸⁵ Similar ordinances targeted mobile meat vendors, flower vendors, lunch wagons, and snack vendors.⁸⁶

⁸⁰ *Marini v. Graham*, 7 P. 442, 443 (Cal. 1885).

⁸¹ *See Ehrenfeucht & Loukaitou-Sideris, supra note 59, at 115; see Marini v. Graham*, 7 P. 442, 443 (Cal. 1885).

⁸² *See Johnson v. Bradley*, 4 Cal. 4th 389, 399 (1992); *infra* Part II.D.1.

⁸³ *See infra* Part II.D.1.

⁸⁴ *See Ehrenfeucht & Loukaitou-Sideris, supra note 59, at 115.*

⁸⁵ This is very similar to a Los Angeles ordinance that was struck down in 2008, which forbade taco trucks from stopping for more than sixty minutes. Vendors complained that this was hardly enough time to make all the food. *See e.g., Jeff Gottlieb, Taco Trucks are Feeling the Crunch Across the U.S., L.A. TIMES*, May 20, 2009 at A11 (reporting that vendors complained that half an hour was “barely enough time to set up and prepare a meal or two before having to break down and drive away again”).

⁸⁶ *See e.g., Ehrenfeucht & Loukaitou-Sideris, supra note 59, at 111.*

Some academics theorize that the impulses opposing street vending in the late nineteenth to early twentieth century were, at times, not even primarily about vending itself but rather what vending represented; an activity aimed at a lower socio-political class.⁸⁷ Street vending, especially “lunch wagons and snack vendors” received little support from middle class consumers. To the contrary, it was associated with lower class customers. As restaurant owner J. Clyde Legg explained in a 1917 petition to the city council, the lunch and tamale cart outside his restaurant should be removed because it blocked the sidewalk and “degraded” his establishment with mess and odor.⁸⁸ Tamale carts were also associated with unruly crowds, but this association could have something to do with the fact that the city restricted their operation to the evening hours between 6:30 PM and 2:00 AM.⁸⁹ Therefore, the tamale carts were catering to the late night crowds when bars closed, much like the modern late night taco trucks parked outside Los Angeles bars.

Moreover, street vending was, and continues to be, a common occupation for immigrants. During the period of the Chinese Exclusion Act, Chinese street vendors were “highly visible” in Los Angeles.⁹⁰ In response to escalating anti-Chinese sentiment by Angelenos, the city council dramatically increased the annual licensing fee for

⁸⁷ See e.g., Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 117 (discussing the xenophobic and classist undertones of the lobbies pushing for municipal ordinances aimed at street vendors); *Obnoxious Class Legislation*, L.A. TIMES, Feb. 17, 1897.

⁸⁸ See e.g., Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 119 (citing to a 1917 Los Angeles petition, Petition 3018).

⁸⁹ See e.g., Ehrenfeucht & Loukaitou-Sideris, *supra* note 59, at 119.

⁹⁰ See e.g., *id.* at 111.

vegetable vendors from \$3 to \$20.⁹¹ This was an overt attempt to cleanse the public space of Chinese Americans. The public streets could be used as a means of social control where the government or concerned middle class citizens could limit the scope of street activity in an attempt to exclude certain perceived deviant or undesirable people.

D. *Modern Los Angeles and the Attempt to Regulate Taco Trucks*

Los Angeles regulates mobile food vendors within two different categories: sidewalk vendors and street vendors. Sidewalk vending is prohibited altogether,⁹² though all one needs to do is visit MacArthur Park, the Westlake District, or Echo Park to see that enforcement of this prohibition is lax.⁹³ Taco trucks and other mobile food vendors that sell from the road, rather than from the sidewalk, are likewise subject to regulation. There are, however, significant limits on the ability of local governments to regulate these trucks because they fall under the purview of California state statutes, which preempt municipal ordinances.⁹⁴ Regardless, such limits have not stopped Los Angeles and surrounding municipalities from repeatedly trying to curtail the operations of the popular taco truck.

⁹¹ Robert Lou, *The Anti-Chinese Movement in Los Angeles, 1870-1890*, in LABOR DIVIDED: RACE AND ETHNICITY IN UNITED STATES LABOR STRUGGLES, 1835-1960, 51 (Robert Asher & Charles Stephenson, Eds., 1990).

⁹² Selling from the sidewalk is a misdemeanor punishable by up to six months in jail and a \$1000 fine. L.A., CAL. MUN. CODE § 42(b) (2004). Los Angeles experimented with legalizing sidewalk vending but the regulation scheme failed and was ultimately abandoned. See Kettles, *Allocation of Land in a Commons*, *supra* note 68, at 49.

⁹³ Sidewalk vending is beyond the scope of this paper, which focuses on taco truck vending. For an in-depth legal, economic, and historical analysis of sidewalk vending, see Gregg Kettles, *Formal Versus Informal Allocation of Land in a Commons: The Case of the Macarthur Park Sidewalk Vendors*, 16 S. CAL. INTERDISC. L.J. 49, 49 (2006).

⁹⁴ See CAL. VEH. CODE § 21 (2009); *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808 (1993) (holding that the California Vehicle Code preempts an ordinance enacted by a charter city to ban vending from vehicles parked on public streets in residential areas).

1. State Regulation; California Vehicle Code, State Preemption, and the Doctrine of Statewide Concern

At the state level, California has not been overly concerned with regulating mobile food trucks. Taco trucks and other mobile food trucks are classified as “mobile catering.”⁹⁵ As such, they are regulated under the California Vehicle Code and California Retail Food Code.⁹⁶ The Vehicle Code expressly allows street vending, leaving little room for local control.⁹⁷

The California Vehicle Code contains numerous provisions that pertain to the use of streets.⁹⁸ These apply uniformly statewide.⁹⁹ The “home rule doctrine” under the California Constitution reserves to cities the right to adopt or enforce ordinances that conflict with state law provided that the subject of the regulation is a “municipal affair” rather than one of statewide concern.¹⁰⁰ However, California Vehicle Code Section 21 obviates the “home rule” doctrine by expressing the legislature’s intent that matters regulated by the Vehicle Code are matters of statewide concern and apply uniformly statewide.¹⁰¹ Section 21 declares, “Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and *no local authority shall enact or enforce any ordinance on*

⁹⁵ CAL. VEH. CODE § 21, et seq. (2009).

⁹⁶ *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808 (1993) (holding that the California Vehicle Code preempts an ordinance enacted by a charter city to ban vending from vehicles parked on public streets in residential areas).

⁹⁷ *Id.*

⁹⁸ See CAL. VEH. CODE §21.

⁹⁹ See CAL. VEH. CODE §21.

¹⁰⁰ *Johnson v. Bradley*, 4 Cal. 4th 389, 399 (1992); see also CAL. CONST. art. XI, §5.

¹⁰¹ See CAL. CONST. art. XI, § 2, 3, 5; *Cobb v. O’Connell*, 134 Cal. App. 4th 91, 96 (2005) (construing the home rule doctrine to “reserve[. . .] to charter cities the right to adopt and enforce ordinances, provided the subject of the regulation is a municipal affair rather than a subject of statewide concern”).

the matters covered by this code unless expressly authorized herein.”¹⁰² Thus, the state government expressly preempts cities from enacting legislation that would limit or ban mobile food vending in contravention of the California Vehicle Code.¹⁰³

California Vehicle Code Section 22455 applies specifically to mobile food vendors. It states:

(a) The driver of any commercial vehicle engaged in vending upon a street may vend products on a street in a residence district only after bringing the vehicle to a complete stop and lawfully parking adjacent to the curb. . . . [A] local authority may, by ordinance or resolution, adopt additional requirements *for the public safety* regulating the type of vending and the time, place, and manner of vending from vehicles upon any street.¹⁰⁴

California courts have consistently acknowledged the plenary power of the state as expressed in Section 21. Recently, a California Court of Appeal construed Section 22455 to preempt an ordinance enacted by Anaheim to ban vending from vehicles parked on public streets in residential areas.¹⁰⁵ This precedent continues to stymie regulatory advances by Los Angeles.¹⁰⁶

2. Municipal Regulations

Largely in response to the clout of business owners, Santa Monica heavily regulates food trucks. Kathleen Rawson, CEO of Bayside District Corporation, the company that manages Third Street Promenade, explained, “While we understand that these mobile food vendors can be a very good thing for Downtown and any area, we are concerned that if we have a proliferation of those trucks they could have a negative

¹⁰² CAL. VEH. CODE § 21 (emphasis added).

¹⁰³ See e.g., Barajas at 1813-17.

¹⁰⁴ CAL. VEH. CODE § 22455 (emphasis added).

¹⁰⁵ Barajas at 1819-20.

¹⁰⁶ See Morales & Kettles, *supra* note 52, at 35-36; see e.g., SaveOurTacoTrucks, *Viva!!!*, <http://saveourtacotrucks.org/2008/08/27/viva/> (last visited Nov. 8, 2010); Phil Willon, *L.A. Taco Trucks Can Stay Parked For Business*, L.A. TIMES, June 11, 2009 at C12.

impact on businesses.”¹⁰⁷ Therefore, food trucks in Santa Monica must obtain a vendor permit through the Santa Monica Police Department and a business license through City Hall.¹⁰⁸ Taco trucks are limited to thirty-minute parking, after which they must move at least one hundred feet away. In addition, the trucks must be at least ten feet away from the entrance of doors, vestibules, driveways, and outdoor dining areas of any business.¹⁰⁹

Residents of Palos Verdes Estates, alarmed by the growth of the loncheros catering to construction crews, gardeners, and nannies, complained of traffic and litter. City Manager Joseph Hoefgren called the trucks’ presence “just disruptive to the neighborhood.”¹¹⁰ In reaction to this perceived disruption, Palos Verdes Estates limited the trucks to thirty-minute stops at locations where a bathroom would be available to patrons. They also required all lonchero employees to get a background check.¹¹¹

In 2008, Los Angeles attempted to legislate mobile food trucks out of business. In the face of these new laws, taco truck owners organized and formed trade associations to protect their livelihoods and battle illegal regulations. Traditional taco trucks, or loncheros, have formed the Asociación de Loncheros. The new trucks formed the

¹⁰⁷ Posting by Cyrus Farivar, *Santa Monica’s Bayside District Corporation Calls for Tighter Food Truck Rules*, to CaliforniaTacoTrucks.com (Nov. 30, 2009) available at <http://californiatacotrucks.com/blog/2009/11/30/santa-monicas-bayside-district-corporation-calls-for-tighter-food-truck-rules/>.

¹⁰⁸ Melanie Hanatani, *Putting the Food Truck Craze on a Diet*, SANTA MONICA DAILY PRESS, Nov. 28, 2009, available at <http://californiatacotrucks.com/blog/2009/11/30/santa-monicas-bayside-district-corporation-calls-for-tighter-food-truck-rules/> (last visited Nov. 28, 2010).

¹⁰⁹ *Id.*

¹¹⁰ Gottlieb, *supra* note 85.

¹¹¹ *Id.*

Southern California Mobile Food Vendors Association. Both of these are registered as 501(c)(6) organizations, enabling them to engage in political speech.¹¹²

Mobile food vendors in Los Angeles have had reasonable success challenging the city's ordinances against them. In 2009, Los Angeles Superior Court Commissioner Barry D. Kohn struck down a 2006 city ordinance that prohibited trucks from parking in a commercial area for more than an hour and in a residential area for more than thirty minutes. Commissioner Kohn ruled that mobile trucks are regulated by the state and that the city had overstepped its authority. In August of 2009, a judge overturned the ordinance that made it a misdemeanor to park a taco truck in unincorporated parts of Los Angeles County for more than an hour. On July 10, 2009, the Ninth Circuit held that Los Angeles Municipal Code Section 80.73 was "inconsistent" with the California Vehicle Code and therefore beyond the scope of municipal authority.¹¹³ The Muni Code provided for the towing of vehicles parked in an otherwise legal public spot "for more than 72 hours *in the aggregate* during any period of 73 consecutive hours."¹¹⁴ This code has since been amended to be consistent with the California Vehicle Code.

Despite the continued invalidation of local restrictions by California courts, Los Angeles City and County continue to propose ordinances aimed at restricting and regulating taco trucks.¹¹⁵ On November 8, 2010, the Los Angeles City Council once

¹¹² see IRS.gov, *Lobbying Activities-Business Leagues*, <http://www.irs.gov/charities/nonprofits/article/0,,id=163921,00.html>; see also posting by Cyrus Farivar to <http://californiatacotrucks.com/blog/category/legal> (Jun. 4, 2010) (announcing that SCMFVA formally endorsed Betsy Butler (D) for the 53rd Assembly District in the California State Assembly).

¹¹³ Lone Star Security & Video v. Los Angeles, No. 07-56521 (9th Cir. 2009).

¹¹⁴ L.A., CAL., MUN. CODE § 80.73.2 (1987).

¹¹⁵ See Ernesto Hernandez-Lopez, *Don't Discourage Food Trucks*, O.C. REGISTER, Sept. 22, 2010 at E13.

again announced plans to regulate the food truck industry. The proposed regulations include instituting a permit process for taco trucks and restricting parking to “prevent [the trucks] from affecting regular traffic and pedestrians.”¹¹⁶ Moreover, on October 12, 2010, the County of Los Angeles Public Health Department approved an ordinance requiring trucks to submit to the same health grading as brick and mortar restaurants. The ordinance also requires the owners of the trucks to provide the Board of Supervisors with a route sheet “which details the arrival, departure, and exact location of each transient Mobile Food Facility.”¹¹⁷ It remains to be seen whether this last provision is even feasible, given the spontaneity of food truck routes and likelihood of finding parking.

The plan requires taco trucks to submit “details of the complete address as well as arrival and departure times for each location where the retail food business is being conducted” in order to facilitate random inspections.¹¹⁸ As drafted, this requirement is nearly impossible for a mobile food truck to meet. Mobile food trucks have rough schedules and rarely know exactly where they will be from lunchtime to midnight. Traditional loncheros often revise their schedules in order to congregate at current construction sites.¹¹⁹ Moreover, how can they know the exact and complete address

¹¹⁶ Posting by Ching-Ching Ni, *L.A. To Consider Regulating Food Trucks*, to <http://latimesblogs.latimes.com/lanow/2010/11/la-to-consider-regulating-food-trucks.html> (Nov. 19, 2010, 3:29 PST).

¹¹⁷ Ordinance to Amend Los Angeles County Code Title 8, Consumer Protection and Business Regulations, to Establish Letter Grading for Mobile Food Facilities and Mobile Support Units, County of Los Angeles Public Health (October 12, 2010).

¹¹⁸ *Id.*

¹¹⁹ This is based on years of personal observation and experience. Some East Los Angeles construction crews have the phone number of a lonchero and will notify the driver of their current construction site. The truck will then drive to the work site during lunchtime to serve the crews.

where they will be parked, when it all depends on where they can find open street parking? Sure, Silver Lake residents know that Taco Zone *usually* parks north of Sunset on Alvarado, and Mid-Wilshire residents know that during lunchtime various food trucks park *around* the museum area. However, these trucks have flexible schedules and inexact locations. The only way patrons truly know where to find a mobile food truck at any given time is to check the truck's recent "tweets" on twitter.com.¹²⁰ By drafting such an unreasonable requirement, the ordinance sets up taco trucks for failure and revocation of their permit. The ordinance states that "[f]ailure to provide an accurate Mobile Food Facility Route Sheet may result in suspension or revocation of the Public Health Operating Permit."¹²¹ Therefore, although the ordinance is a prima facie health regulation, it is drafted in such a way as to be unfair towards the mobile food vendors. The health concerns belie the true motivation, which is to promote legislatively brick and mortar restaurants over mobile food units.¹²²

III. THEMATIC ANALYSIS

A. *Factual Comparison*

There are some surprising factual similarities between the two activities of mining during the California Gold Rush and of mobile food vending. Both the miners and taco

¹²⁰ See e.g., Fry Smith, <http://www.eatfrysmith.com/> (last visited Dec. 14, 2010) (posting a rough schedule on the truck's website, but explaining that "[e]xact locations and times are approximate and subject to change depending on traffic, parking, flat tires and other truck-specific challenges!" and directing patrons to "[p]lease check twitter.com/frysmith for updates").

¹²¹ Ordinance to Amend Los Angeles County Code Title 8, Consumer Protection and Business Regulations, to Establish Letter Grading for Mobile Food Facilities and Mobile Support Units, County of Los Angeles Public Health (October 12, 2010).

¹²² See also *supra* notes 107-11 and accompanying text (showing the power of brick and mortar restaurant interests and Los Angeles City Council's willingness to defend their interests over those of mobile food vendors).

truck drivers are trying to cash in on a lucrative craze. Clearly gold was lucrative, but food trends are not something to discount in America's popular consumer culture.¹²³ For instance, Roy Choi, the creator of the Kogi Truck, is now a food legend. He has been featured in television shows, news stories, and various blogs. The Wall Street Journal even profiled him in January of 2010, reporting, "Today Kogi, with four trucks and one outlet in an L.A.-area nightclub, has nearly 52,000 Twitter followers. Scion, a division of Toyota, recently paid \$90,000 to custom-build Kogi a car outfitted with a grill, sink and refrigerator."¹²⁴ Moreover, Choi's success with the Kogi fleet has enabled him to save money for a brick and mortar restaurant. Mr. Choi says that in its first year of operation, "Kogi grossed about \$2 million from check averages of roughly \$13 a person. Mr. Choi earns a \$90,000 salary; a manager on each truck earns about \$38,000. Profit margins are around 20%, which has enabled Mr. Choi . . . to put money aside for a restaurant."¹²⁵

Not every taco truck owner will reach Choi's level of success; there is still an element of risk to the business. However, the risks of operating a taco truck business may not be as high as the risks miners faced.

Miners left their homes to sojourn to California in search of gold. There was no guarantee they would find any. "One might dig for days and come up empty handed, while another in the same amount of time would earn thousands of dollars."¹²⁶ Popular opinion in Los Angeles is capricious, but perhaps not to that extreme.

¹²³ *But c.f. Kettles, Allocation of Land in a Commons, supra* note 68, at 87 (opining that sidewalk vending in MacArthur Park was of limited value, whereas gold mining was potentially worth a fortune). This paper, however, deals not with sidewalk vendors in MacArthur Park, but with the explosion of the taco truck trend.

¹²⁴ McLaughlin, *supra* note 58.

¹²⁵ McLaughlin, *supra* note 58.

¹²⁶ Kettles, *Allocation of Land in a Commons, supra* note 68, at 87.

Just as the miners were self-organized, so too are the Los Angeles taco trucks. Miners banded together in groups to form informal rules at their local diggings partly in efforts to protect their rights in the gold from outsiders and government interference.¹²⁷ Likewise, in the face of legislative zealotry in 2008, Los Angeles taco truck owners formed two organizations, The Asociación de Loncheros and the Southern California Mobile Food Vendors Association (SoCalMFVA). Both of these groups are registered as 501(c)(6) organizations, allowing them to participate in the political process. The SoCalMFVA even endorsed a candidate for the 53rd Assembly District in the California State Assembly.¹²⁸

In addition to providing a platform for mobile vendors to speak their voice and a support group to help enforce their rights, these organizations also promote an informal self-governed code of conduct. The SoCalMFVA purports to “create a code of behavior for our industry to ensure that we are good neighbors and a benefit to our communities” and “develop a system of mentoring new operators so they can become positive additions to this new culinary movement.”¹²⁹ The SoCalMFVA also apportions claims for parking spots at various mobile food lots around Los Angeles. In order for a vendor to reserve a place for her truck at the organized food lot, she need only email lots@socalmfva.com.¹³⁰ This informal self-regulation and control over resources harkens back to the development of the miners’ codes. Immediately following the discovery of gold in California, mining

¹²⁷ See McDowell, *supra* note 11, at 5-13.

¹²⁸ Posting by Cyrus Farivar to <http://californiatacotrucks.com/blog/category/legal> (Jun. 4, 2010) (announcing that SoCalMFVA formally endorsed Betsy Butler (D) for the 53rd Assembly District in the California State Assembly).

¹²⁹ SoCalMFVA, About Us, available at <http://socalmfva.com/about-2/> (last visited Dec. 10, 2010).

¹³⁰ SoCalMFVA, Truck Lots, available at <http://socalmfva.com/truck-lots/> (last visited Dec. 14, 2010).

was a free-for-all, much like the mobile food trend. Soon, however, mining became more sophisticated and the miners responded with rudimentary rules and regulations to govern their claims. Likewise, the mobile food trend continues to evolve and become a complex business, rather than a fad. Mobile food vendors are also creating ways to stake claims to certain parking spots, regulate the resource, and avoid a tragedy of the commons.

Mining claims and taco truck claims also share similar limited property rights. Neither miners nor taco truck vendors own or lease the real property from which they generate their income.¹³¹ They own or rent the tools—the mining equipment or vehicle and cooking equipment—but they do not operate on private land. In addition, both types of claims operate on a discovery principle.¹³² Taco trucks, like miners, must physically stake a claim to a space and continue to occupy it. The vendor has a limited interest in that space, both as to time and size. A taco truck is limited to the space it can physically occupy with its truck and its customers. In addition, the vendors can only claim that street and sidewalk space while the truck is parked there. Like the miners, once they stop “working” the space and move on, another vendor may move in and sell from that spot. Finally, absent a fleet of vehicles, there is no evidence that a mobile food vendor may hold more than one spot at a time. This also conforms to the general rule of the mines, that a miner was limited to one claim at a time under the discovery principle.¹³³

¹³¹ See Kettles, *Allocation of Land in a Commons*, *supra* note 68, at 87.

¹³² See Richard O. Zerbe & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114, 135 (2001) (“The first come procedure . . . recognizes that the earliest miners would develop special knowledge about particular claim sites.”).

¹³³ A miner could hold more than one claim in certain instances or if he purchased the claim from another man rather than discover it. See McDowell, *supra* note 11, at 35-36.

B. *Property Theory*

The Gold Rush miners and their miners' codes align with the concept of group access. They sought to limit *access* to the public land for the purpose of mining through their informal codes and vigilante justice. The miners were a group of common occupants who sought to exclude others through informal exclusionary rules promulgated by the miners themselves rather than by the government. They operated with sanction of the state and U.S. governments, but without direct interference from the government. By contrast, the Los Angeles City and County governments are the acting force behind taco truck legislation. In addition, the government seeks to control public streets and sidewalks by *defining* which appropriate activities may occur there. In Heller's terms, streets and sidewalks have developed into open-access commons limited by the scope of use.¹³⁴

C. *The Difference in Government Responses*

The factual similarities that may exist between mining claims and taco truck claims do not extend to the government response. When miners were making a fortune extracting gold from publicly held lands, neither the state nor federal government challenged them.¹³⁵ Both governments debated enacting a permit system, but ultimately decided to honor the miners' informal self-regulation. They "[did] their level best to simply ratify what the miners had done and otherwise stay out of their way."¹³⁶ Decades later, of course, mining laws are far more extensive, but they still retain the premise that

¹³⁴ See Kettles, *Allocation of Land in a Commons*, *supra* note 68, at 49 (construing the streets and sidewalks of MacArthur Park in Los Angeles as "essentially an open access commons" with respect to mobile vendors).

¹³⁵ See *supra* Part II.B-C.

¹³⁶ Lacy, *supra* note 5, § 10.04[2].

“[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase.”¹³⁷

Far from simply “stay[ing] out of their way,”¹³⁸ Los Angeles tried to regulate taco trucks out of existence in 2008. The state government takes a more moderate position, allowing street vending through the vehicle code but otherwise leaving the trucks alone. The supremacy of state law over local ordinance trumped the hotly debated regulations and ordinances challenged in 2008, yet Los Angeles continues to try to enact regulations. Taking up the permit concept, which was rejected by California and the federal government with respect to mining claims, Los Angeles has recently proposed requiring taco trucks to get a permit. Santa Monica and Palos Verdes Estates already require permits for mobile food trucks.

Perhaps a reason for this discrepancy is that taco trucks are competing with more immediately visible public interests than the miners were. When taco trucks park in a metropolitan area of town, they arguably take business away from the local brick and mortar restaurants.¹³⁹ Unfair competition is the most common charge levied at the trucks by local restaurant owners.¹⁴⁰ Indeed, owners of Mexican restaurants in Los Angeles are

¹³⁷ 30 U.S.C. § 22 (2000).

¹³⁸ Lacy, *supra* note 5, § 10.04[2].

¹³⁹ Tom LaBonge, Los Angeles City Councilman representing the 4th district, and Matt Geller, CEO, SoCal Mobile Food Vendors Association (SCMVA), debated Councilman LaBonge’s call for restrictions on taco trucks. Councilman LaBonge represents the mid-Wilshire district and was voicing the concerns of local restaurants. He also proposed creating designated mobile food zones for the trucks. *Airtalk for June 18, 2010: Food Trucks Gear up for Fight with L.A. City Council*, (89.3 KUOR, Southern California Public Radio broadcast June 18, 2010) available at <http://www.scpr.org/programs/airtalk/2010/06/18/food-trucks-gear-up-for-fight-with-la-city-council/> (last visited Dec. 13, 2010).

¹⁴⁰ See e.g., Ann M. Simmons, *Mobile Food Vendors Told to Leave Miracle Mile*, L.A. TIMES, Aug. 24, 2009, at D3.

often behind efforts to rid the streets of taco trucks, arguing “they’re unfair competition because they don’t have overhead.”¹⁴¹ In August of 2009, police descended upon mid-Wilshire, citing trucks for minimal violations such as parking too close to the curb or parking too far away from the curb.¹⁴² Some trucks were simply ordered to pack up and leave.¹⁴³ Lieutenant Dan Hudson of the Los Angeles Police Department Wilshire Division cited complaints from local brick and mortar restaurants as a reason for the department’s one-day operation to clear mid-Wilshire of illegal vendors.¹⁴⁴ However, it was unclear which restaurants complained of unfair competition. Moreover, there was evidence that the trucks had little or no impact on local brick and mortar restaurants. Patricio Palacios, manager of a mid-Wilshire Baja Fresh, had no complaints and claimed that his business was thriving. He told reporters, “If you come here now, you will see there’s no free table.”¹⁴⁵

In addition to the unfair competition claims, sidewalks and streets are now regulated as corridors of transportation. They are no longer considered mixed-use public spaces in which people may congregate and trade their wares. There are also public health interests to consider.¹⁴⁶ When miners first came to California, there were few residents and many open acres of land. The prospectors were not disturbing the public with their mining. They were not disrupting flows of traffic in a sprawling metropolis

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* Ordinance to Amend Los Angeles County Code Title 8, Consumer Protection and Business Regulations, to Establish Letter Grading for Mobile Food Facilities and Mobile Support Units, County of Los Angeles Public Health (October 12, 2010) (explaining the necessity of inspecting taco trucks in order “to ensure that food handling and storage practices and facility hygiene are in compliance with state codes and regulations”).

devoted to its cars. Finally, the miners converged on California when it had no real government and when the federal government was occupied with trying to avoid a brewing civil war.

IV. CONCLUSION

Taco trucks and the forty-niners sought to capitalize on a potentially lucrative craze. Both groups of entrepreneurs soon developed informal self-governance and ways to limit access to claims in order to avoid a tragedy of the commons. Miners and mobile food vendors based their claim to a mining or vending area on an informal claim system whereby discovery principles governed. Just as the miners sought to control access to the diggings, so too have the mobile food vendors sought to control access to parking spots. The SoCalMFVA is even experimenting with a self-regulatory body through which vendors register for certain parking spots maintained by the SoCalMFVA.

However, the comparison breaks down when you compare the realities of the historical context in which these movements developed and the ensuing government response. Both the state and federal government allowed the miners to regulate themselves. They let the free market and self-governance rule the day. By stark contrast, Los Angeles City Council relentlessly attempts to regulate taco trucks out of existence. City council members continue to propose rules and regulations aimed at taco trucks. Even the recent food-grading plan proposed in order to promote public health contains requirements that would regulate mobile food trucks out of existence. The professed health concerns over the food trucks belie the true motivation, to promote legislatively the brick and mortar restaurants over mobile food units.

If Los Angeles is truly concerned with providing for spontaneous health inspections—which seems a reasonable furtherance of public health—they should not draft the ordinance so as to set the vendors up for failure. Los Angeles County Public Health inspectors would not arrive for a random health check after a restaurant had closed, and then accuse the restaurant owner of violating the Public Health Code. Therefore, they should extend the same courtesy to mobile food vendors and try to understand the nature of the mobile food industry—check Twitter! A health inspector need only spend sixty seconds on the Internet in order to know where she can surprise a food truck for inspection.

Other than the public health inspections, which should be handled by a public health agency, food trucks do an admirable job of monitoring and regulating themselves. They have their own standards of business and continue to work together with communities to reach compromises. Los Angeles could take a page out of the Gold Rush experience and watch how the mobile food vendors regulate themselves. Vendors know the unique nature of their business better than a Los Angeles City Councilman could know it. Like the miners, they will come up with solutions and self-regulations that can then be adopted by the legislature.