

What Kind of Property? Landownership for the Urban Century

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An issue central to urban and environmental management is the institution of property rights – the extent of the ability to own and control a piece of land.

The contemporary form of private property rights in the western world came into being in the 18th century, post the American and French revolutions. It reflected the influence of the political philosophers John Locke and Jean-Jacques Rousseau, and the political economist Adam Smith (see [Jacobs 2015](#) and [2010](#) for a more specific discussion of this history). Together they argued that democratic governance structures and market economies required a strong and enforceable set of privately owned property. [Ely \(1992\)](#) argues that contrary to popular understandings, it was in fact conflict over property that was the central matter of

contention in the American revolutionary war.

The contemporary form of property notions the natural world as a bundle of rights – where what is in actuality a whole can be treated as fragmentable. An owner owns the soil, trees, air, water, minerals, as well as the right to control access and use, and transfer land through gift (inheritance), lease or sale. The rights to use or transfer apply to land as whole as well as individual rights within the bundle. This is the basis of the idea that there are water rights, air rights, mineral rights, etc., and that these rights can be separated from the bundle. This is what gives rise to our ability to create conservation easements, carbon trading markets, water pollution control markets, payments for ecological services, and so on.



Image Credit: Harvey Jacobs

The idea of the natural world and the urban world as property is widely understood as contributing to the economic, social, political and technological transformation – the progress – of the west from the 18th century to the world of the 21st century ([Bethell 1998](#)). Yet, the world of today is not the world of the 18th century – it is a world which is predominately urban, and expected to become ever more so in the next decades, and where two billion people are expected to live in slums in these cities by 2030.

A question that needs to be posed is whether the form of property invented in the 18th century is appropriate as it is in the 21st century or whether it needs to change.

Beginning in the late 20th century a variety of perspectives emerged around this question.

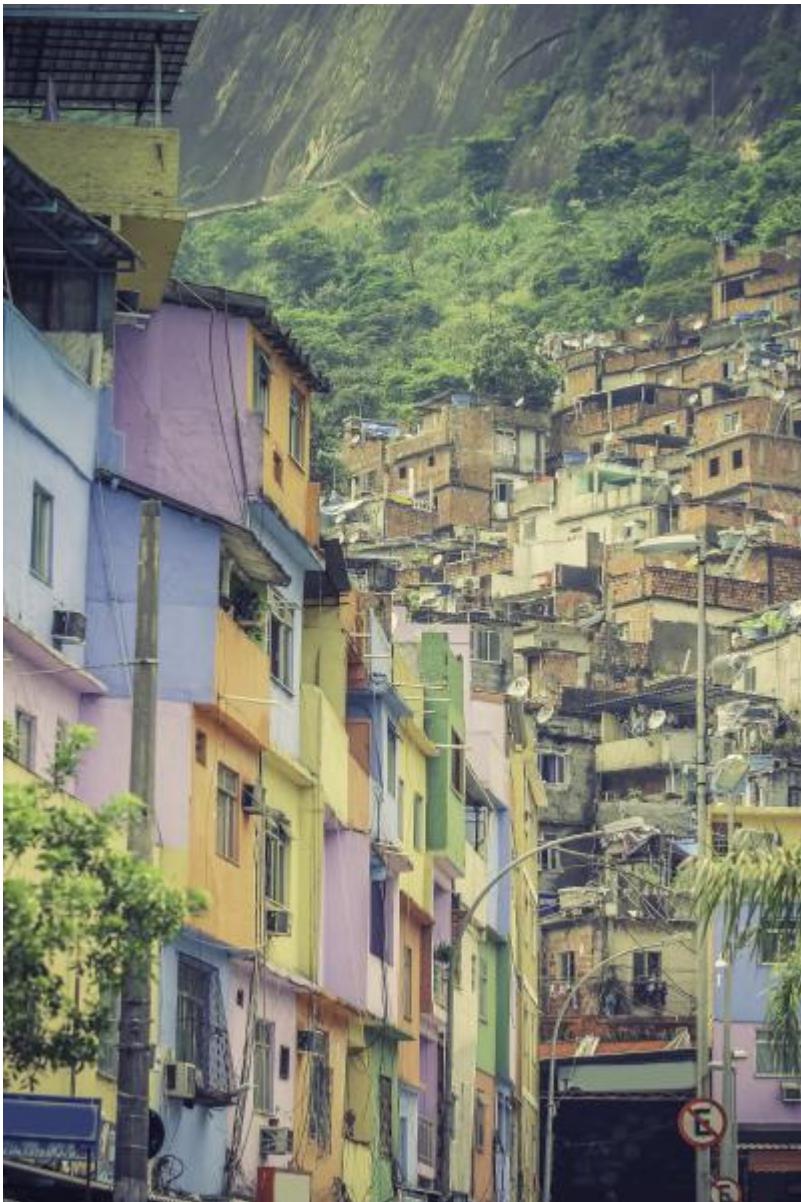
In his famous article “[The Tragedy of the Commons](#)” (1968) Garrett Hardin, a population biologist, brought the issue of

property rights back into academic and policy discourse. In his case he examined so-called commons, property resources owned by none by used by all; examples are the atmosphere and the oceans. Hardin argued that open access (a lack of property rights) was what resulted in what he deemed a tragedy. Why was this true? Because – and this was his insight – individual rational decision making relative to environmental and natural resources use did not result in socially rational outcomes. Hardin’s solution was a further extension of the 18th century concept. Privatize commons resources and they will be better – i.e., more sustainability – managed.

In 2000 this ‘rediscovery’ of property rights was extended to the rapidly growing megacities of the developing world. [Hernando De Soto](#) examined the problem of poverty in urban slums in these cities and argued that the slums, but more importantly the poverty of the people living in these slums, was solvable through the creation and distribution of the 18th century form of property rights. In his words,

The poor inhabitants of these nations . . . do have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds. It is the unavailability of these essential representations that explains why people who have adapted every other Western invention . . . have not been able to produce sufficient capital to make domestic capitalism work. This is the mystery of capital.

Property . . . is . . . a mediating device that captures and stores most of the stuff required to make a market economy run. Property seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for monetary and banking system to work and for investment to function. The connection between capital and modern money runs through property.



A favela in Rio de Janeiro, Brazil. Image Credit: [Shutterstock.com](#)

De Soto (and Hardin's) ideas have been particular influential with institutions like the World Bank, and serve as the bases for proposals for property rights reform in developing and transition countries globally. But whether De Soto and Hardin are actually correct is hotly debated (see e.g., [Ostrom 1990](#) vis-a-vis Hardin, and [Gilbert 2002](#) vis-a-vis [De Soto](#)). In the last decade-plus another strand has been added to these arguments: a suggestion that private

property is part of a core realization of human rights in the 21st century ([Jacobs 2013](#)).

In the same period a counter narrative emerged. Partially drawing from Hardin, and his insight about the mismatch between the rationality of individual decision making and the social outcomes of these decisions, a set of environmental ethicists, legal scholars,

policy analysts, planners and others, began to wonder if the 18th century property rights scheme was truly functional for long-term environmental and urban sustainability. Multiple proposals have been offered forth in this counter-narrative.

In the early 1970s the state of Wisconsin in the U.S. imposed regulations for any proposed changes to privately owned wetlands. A landowner who believed these regulations to be inappropriate proceeded to drain a wetland they owned and build without permission. The issue ended up before the Wisconsin Supreme Court which ultimately decided in favor of the government requiring a permit for land use change. But it was less that that the Court found in favor of the government than their rationale for doing so that grabbed the attention of so many. In a ringing opinion

the Court argued that landownership was only of land in its natural state:

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.

In other words – ‘you bought a wetland, you own a wetland’. Any changes had to be asked for and given (see [Large 1973](#) for a discussion of this case). At the time the environmental community hoped to get the U.S. Supreme Court to review and affirm this finding. It did not. If the Court had, it would have resulted in a fundamental change to the core notion of private property rights in the United States.



A wetland in the University of Wisconsin Arboretum, Madison, WI. Image Credit: Mark Watkins

At about the same time another conflict raised the question – to use Dr. Seuss’s phrase from *The Lorax* – who speaks for the trees? In a famous article Christopher Stone asked why nature only had rights as filtered through its ownership by humans (Stone 1974). Should nature – landscapes, forests, etc. – have rights in and of themselves? Asked this way the question may seem silly, even outrageous. But 100 years ago parents owned their children, husbands their wives, people their animals. And in all cases owners could do as they wished with their possessions (send their children to the mills, beat their wives, abuse their animals). This changed. The Society for the Prevention of Cruelty to Animals pioneered the idea that animals had rights. Children came to have rights (to go to school, to be well cared for), women to expect human dignity. All of these changes were with significant social struggle, but all came to be. Stone asked: is it time for a similar change for nature?

As urbanization has accelerated and environmental conditions have raised more concerns these original ideas have been revisited, revised and further elaborated. Recently one scholar ponders whether society should add “green wood to the bundle of sticks” (Goldstein 2004). And others look for ways to reform private property, to create a new form of property or to view (and thus treat) property through a multi-faceted lens (see respectively

Freyfogle 2003, 2007, Geisler and Daneker 2000, Davy 2012).

What set of ideas are correct? What form of property is the right form for cities, for sustainability, for the 21st century? An answer is not clear. Advocates on all sides of this debate are passionate, and it can often seem that it is ideology more than anything else that drives discourse.

If the 18th century form of property needs to change, is such a change even possible? Yes! As noted, the form of property rights in 2015 is not what it was in 1915. In the early 20th century I “owned” my children, my wife, my animals and could (ab)use them as I saw fit. With regard to urban land since the early 20th century forms of public regulation which re-frame and re-direct private ownership for use and control – via zoning, via environmental rules – have greatly expanded and in general been largely accepted, though they always came into being with significant social contention (see Wolf 2008 for a detailed discussion of the emergence of zoning in the U.S., see Jacobs 2010 for a discussion of the contemporary social conflict over proposals to shape individual decision making over privately owned land).



Above: Hikers in Richmond Park, London. Below: A hiker utilizing Right of Way in rural UK. Image Credit: [Shutterstock.com](#)



Globally, we have multiple examples of how urban and environmental resources can be owned, controlled and managed differently than the classic 18th century model would suggest, and perhaps more in line with the proposals of Earth Day-era reformers. And this is true even in the developed world. In the U.K. in the mid-20th century the right to change the use of land – especially urban land – was taken away from all individual land owners and vested with the public to provide a broader perspective on what is in the best interests of the community as a whole ([Haar 1951](#)). Today, proposed land use changes are negotiated between an owner and a public authority, and if the authority denies a proposed change, such a decision is largely accepted. Similarly the Netherlands has a multi-decade tradition and

experience with the idea that property rights are shared between the private and public spheres, and the public interest must be afforded a significant voice in land use decisions ([Needham 2014](#)). So alternate notions exist and can be feasibly implemented.

What kind of property is right for this period of rapid urbanization, an emergent world of global mega-cities with an exploding population living in marginal conditions, accompanied by a rising demand on environmental resources such as water, air and land for food production? Should there be continuity or disruption in the 18th century property form which created the modern world? There is no clear answer to

this question. But there is no doubt that this is a question which is central to our



successfully creating a sustainable future.
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