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### 3 Eighteenth-century property rights for twenty-first-century environmental conditions?

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#### **Introduction**

As noted in this book's Introduction, the social and legal form of property and property rights is central to the ways that environmental resources are managed. The way property is configured establishes realms of what comes to be considered private action, and thus solely within the purview of the resource "owner" (whether that owner is an individual, a family, a tribe, a community, or some other unit which can claim an exclusive right to a resource), and public action, where the state may set rules and standards which shape private decision-making over resources.

Much of the time in law, planning and resource management property systems seem to function as stage settings – the focus of the viewer is on the more immediate play which is occurring on the stage, the words and movements of the actors. But, in fact, just as in theatre or film, the setting is immensely influential to the perception of the actors; so it is with property systems and resource management. It is only quite recently that scholars have begun systemic investigations of the relationship of property systems to climate change in particular (e.g. Adler 2009; Klass and Wilson 2010; Doremus 2011). As a contribution to this volume, this chapter adds to this investigation by examining the existing western property system and both long-standing and very contemporary arguments for and against the functionality of this system for a new era of resource management (note: this chapter expands on a blog essay, Jacobs 2015).

#### **An eighteenth-century and classical view**

The theory which gives rise to the contemporary form of property in the western world – and especially the idea of private property rights – came into being in the eighteenth century, post the American and French Revolutions. It reflected the influence of the political philosophers John Locke (most prominently influential on American founders) and Jean-Jacques Rousseau (most prominently influential on the French founders), and the political economist Adam Smith (see Jacobs 2010, 2016, for a more specific discussion of this history). These

three intellectuals were writing in a world quite different from the world of today. Most people lived rurally; at the time of the American Revolution (1776) Philadelphia, Pennsylvania was the country's largest city and its population was only about 20,000. Yet the world of today was beginning to emerge, a world of urbanization and industrialization.

Questions which link these thinkers together had to do with what today we refer to as human rights, and whether the political and economic system then current was appropriate for the emerging world. Relative to property, the European world of the 1700s was one where most land was still owned and controlled by the aristocracy. These thinkers, among others, brought forth an argument about how to create and realize democratic governance structures and market economies. Central to their thinking was the need for a strong and enforceable set of privately owned property. It was land ownership which would allow people to have political freedom and it was land ownership which would allow people to make innovative and creative (and individually and socially beneficial) decisions about land use. In fact, Ely (1992) argues that, contrary to widespread popular understanding, it was in fact conflict over property that was the central matter of contention in the American revolutionary war (not matters related to religious freedom, freedom of speech, etc.).

What was the form of property that was coming into being? It was one in which the natural world is conceptualized 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 the ability to create conservation easements, carbon trading markets, water quantity markets, payments for ecological services, and so on.

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 eighteenth century to the world of the twenty-first century (see, e.g. Bethell 1998). Yet, the world of today is not the world of the eighteenth 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. And in this world the evidence of climate change and its consequences are evermore apparent. Melting glaciers in Greenland, island nations in the Pacific literally disappearing, evermore severe storms impacting major coastal cities, and vanishing species are but some of the phenomena which challenge long-standing social, economic, political, cultural systems. A question that needs to be posed is whether the form of property invented in the eighteenth century, a social and legal invention which facilitated the creation of the modern world, remains appropriate for the twenty-first century, or whether it needs to change.

While the remainder of this chapter largely focuses on the intellectual, legal and policy discourse of the twentieth century, it is worth noting that scepticism about eighteenth-century property arose within a century of its invention. In the mid to late nineteenth century, during the periods of rapidly evolving social ferment, leading thinkers, primarily on the left, questioned the social and legal institution of property. So, for example, in 1840, Pierre-Joseph Proudhon, the French anarchist, famously declared "property is theft!" in his book *What Is Property? Or, an Inquiry into the Principle of Right and Government* (1994 [1840]). A few years later, in 1840, Karl Marx published *Zur Judenfrage* [On the Jewish Question] (1919 [1840]), and in it began what became a series of comments about private property central to his theory of social construction and change: "The right of property, is, ... the right to enjoy one's fortunes ... without regard for other men and independently of society ... It leads every man to see in other men ... the limitation of his own liberty." Several decades later, in 1880, Pyotry (Peter) Kropotkin, the Russian prince, anarchist and geographer, argued in *The Spirit of Revolt* "Society ... clamors loudly for a complete remodeling of the system of property ownership." All of these social commentators, who could also be referred to as social critics and social reformers, saw limitations with the system of private property.

In the same period as Kropotkin, but from a very different perspective, Henry George, the American tax reformer, published his book *Progress and Poverty* (1929 [1879]). His question – indicated in the book's title – poses the quandary of how there can be so much progress and yet so much poverty co-existing. George's answer – it is about who owns the land! So while George was a committed capitalist, in contrast to Proudhon, Marx and Kropotkin, with regard to land, he held a view consonant with these radical-left theorists: "We must make land common property."

The impact of these ideas has been significant. During the twentieth century, Marx's ideas in particular formed a component of the rationale for the Russian Revolution and the rise of the Soviet Union and its member states, the Chinese Revolution, the Cuban Revolution and other socialist-communist states globally. In all these places private property in land was, to a greater or lesser extent, reduced, if not eliminated altogether. Likewise, though quite differently, George's ideas for a differential tax system directed at breaking up large land holdings had significant influence throughout the British colonies and limited influence in the USA.

But these ideas about land and private property also became entangled in a century-plus debate about fundamental political ideology – an east-west debate – about capitalism versus communism, about democracy versus socialism, about the rights of the individual versus the rights of the community (the state). And so for much of the last century-plus, notions of non-private property seemed too many to suggest a rejection of capitalism, democracy and individual human rights.

Beginning in the late twentieth century, a new set 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 from a different perspective. The article examines the case of what he refers to as the commons, property resources owned by none but used by all. Examples of the commons include the atmosphere and the oceans. Hardin argued that in the case of open access commons, where there are no assignable property rights, what resulted was 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. Individuals had a motivation to exploit the resource for their benefit without considering the cumulative effect of their own and others' actions. In order to solve this problem, Hardin's solution was a further extension of the eighteenth-century concept of property. If commons resources were privatized, they would be better – i.e. more sustainably managed: "The tragedy of the commons ... is averted by private property" (*ibid.*: 1245).

As noted by Sinden (2007) and others, Hardin's metaphor has become ubiquitous. There is perhaps no environmental issue or problem that has come to attention since 1968 which has not been described by someone somewhere as a tragedy of the commons. This is true even when the issue or problem does not strictly meet Hardin's description of a commons, and in fact can even be resources which are owned. The key lesson many take from Hardin's article is not about the commons per se, but about the mis-match of individual logic and social outcomes. And even though the veracity of Hardin's central story and his logic has been subject to wide-ranging and widely legitimated criticism (see, for example, Ostrom 1990, and related works), his metaphor still holds, as does his proposed solution. This is especially true as it fits in with and is supported by a broader economic literature drawing on the work of Coase (1960), and which has come to be known as free market environmentalism (e.g. Anderson and Leal 1991; Anderson and Libecap 2014).

In 2000, this rediscovery of property rights was extended to the rapidly growing mega-cities 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 eighteenth-century form of property rights. In his words:

The poor ... have things, but they lack the process to represent their property and create capital ... 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.

(2000: 6–7)

He also wrote: "Property ... is ... a mediating device that captures and stores most of the stuff required to make a market economy run ... The connection between capital and modern money runs through property" (*ibid.*: 63).

For Garrett Hardin and Hernando De Soto (and others), eighteenth-century property is relevant, appropriate and necessary. For these analysts, in this century of climate change and urbanization, the solution to our environmental and urban problems is more private property! They see problems such as climate change through a lens akin to classical economics. For them, climate change is a problem of scarcity and management. When they pose the question about what to do, privatization of natural resources offers itself as a reasonable and even logical solution. Why? Privatization – a robust set of private property rights – over a diverse set of natural resources should, they believe, lead the owners of the resources to manage them for long-term sustainability, including wanting to avoid instances of liability for misuse or abuse of the resource. In addition, a robust set of private property rights allows a set of owners to bargain over the composition and use of a set of resources, which should lead to a situation of positive outcomes for both individuals and society. So even a set of radical environmental conditions – e.g. rising sea levels which threaten the very existence of Pacific island nations or the functionality of major coastal cities globally – does not, *prima facie*, negate the utility of property rights as a potential solution.

Hardin's and De Soto's ideas have been particularly influential with institutions like the World Bank, and serve as the basis for proposals for property rights reform in developing and transition countries globally. But whether Hardin and De Soto are actually correct is hotly debated (as noted, Ostrom 1990 *vis-à-vis* Hardin, and Gilbert 2002 *vis-à-vis* De Soto). And yet the idea of private property as a solution continues, and in the last decade-plus another strand has been added to these arguments: a suggestion that private property may be (should be?) part of a core realization of human rights in the twenty-first century (Jacobs 2013).

### **An alternate twentieth-century view**

Yet throughout the twentieth century a very different, counter-radical narrative emerged. Eventually 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 institutional economists, ecologists, environmental ethicists, legal scholars, policy analysts, planners and others, began to wonder if the eighteenth-century property rights scheme was truly functional for long-term environmental and urban sustainability. Multiple proposals have been offered in this counter-narrative; space allows for only a limited treatment of this literature.

As noted, a pointed critique of private property emerged by the mid-nineteenth century, largely, though not solely from those on the political left. By the late nineteenth and early twentieth centuries, another strand got woven into this critique, though this time a decidedly non-political one. Also as noted, Henry George, an American tax reformer, took up the issue of property from a non-left perspective, and his work was extremely influential in its time.

By the early twentieth century, new economic thought – institutional economics – emerged, drawing from the pioneering work of Thorsten Veblen, Richard T. Ely, John R. Commons and others. Their emphasis, like those of Locke and Rousseau, was the centrality of land ownership to citizenship, and like George they were concerned with land concentration. But as scholars (and scholar-activists) they emphasized the social construction of property, how what property is what it is because of social agreement, and how property can, does and should change to reflect changing social and technological circumstances. Using this perspective they engaged in wide-ranging explorations of land use, and also developed some of the intellectual foundations for the emergence of public sector land policy (land use regulations) in this period.

But it was in the middle of the twentieth century that the current form of counter-narrative really began to take form in a way that broadly resonated with scholars and activists. Aldo Leopold was a University of Wisconsin Professor of Wildlife Management (the country's first such professor) and a pre-eminent twentieth-century environmentalist. His most famous work is *A Sand County Almanac* (1968 [1949]), which continues to inspire students and environmentalists. In this book (published posthumously after an untimely death) his most famous essay is entitled "The Land Ethic." Here he argues:

There is as yet no ethic dealing with man's relation to land and the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land relation is still strictly economic, entailing privileges but not obligations.

(Ibid.: 203)

What is his proposed alternative?

The land ethic ... enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.

A land ethic ... affirms ... [the] right [of resources] to continued existence, and, at least in spots, their continued existence in a natural state.

... a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it.

(Ibid.: 204)

Leopold came to writing about land use and land ethics after decades of working on land management, initially in the American West. There he came to a conclusion that would later be drawn upon by Hardin, that what is logical to the individual is not always logical for society. In Leopold's case, he concluded that private ownership of land (private property) was a problem, because the owner did not understand what should be done to properly manage land and the economic system sent out signals relative to land use which encouraged an owner to use land to the point of over-use. The problem was clear, but what was the answer? For Leopold, at least in his formal writings, this was not so obvious.

However, Freyfogle (2003) has spent considerable effort working with Leopold's many works to derive what he believes to be a way to formally and legally realize the land ethic.

Decades later Leopold's concerns and his sense of a new direction appeared to be ready to take form. In 1970, Americans celebrated the first Earth Day. A new environmental consciousness had appeared and it seemed to be growing rapidly and with its growth there seemed new possibilities for re-thinking the very nature of private property. A seminal legal case provided one basis for these new ideas.

In the 1960s, the State of Wisconsin developed environmental rules which were also implemented by local governments for the use of shoreland property. Marinette County in northern Wisconsin adopted such a regulation, including rules 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 favour of the government requiring a permit for land use change. But the real significance of the case was in the rationale the Court articulated in legitimizing governmental action. 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.

(Large 1973: 1081)

In other words, as it came to be characterized as – “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 and its apparent implications). Here was Leopold's land ethic in operation. At the time the environmental community hoped that those who opposed the decision of the Wisconsin Supreme Court would appeal the decision and that the US Supreme Court would review and affirm the State Court's finding. The US Supreme Court chose not to take up the case. If the nation's highest court had reviewed and affirmed the State's decision, it would have resulted in a fundamental change to the core notion of private property rights in the United States.

In this same period, Dr. Seuss, the children's author, published *The Lorax*, a fable about environmental management and destruction with the themed message “Who speaks for the trees?” Christopher Stone, a law professor and environmental ethicist, posed the same question but in a slightly different way. Stone asked why nature only had rights as filtered through its ownership by humans (1972). Should nature and aspects of nature – landscapes, forests, etc. – have rights in and of itself? Asked this way, the question may seem silly, even outrageous. But Stone pointed out that the very concept of ownership has evolved significantly (the point made by the institutional economists). In the

early twentieth century parents owned their children, husbands their wives, people their animals. And in all cases owners could do as they wished with their possessions (husbands could beat their wives, parents could send their children to the mines or the mills, people could abuse their animals). And the law expressly recognized this. Property was defined in law as one's land, spouse, children and animals. This changed. The Society for the Prevention of Cruelty to Animals pioneered the idea that animals had rights. Children came to have rights independent of their parents (to go to school, to be well cared for), women to expect full human dignity. All of these changes were not without significant social struggle, but all came to be. Stone's work asks: isn't it time for a similar change with regard to nature?

As the rate of environmental change and urbanization has accelerated the ideas put forward by Leopold and Stone, and articulated in the *Just* case, have been revisited, revised and further elaborated. Drawing from the core conception of western property – land as a bundle of sticks (rights) – and both preserving it but also seeking a modification in line with a perception of necessary change sympathetic to environmental concerns, one scholar has pondered how society might add “green wood to the bundle of sticks” (Goldstein 2004). Others note that the long-standing frame for property in the West (private versus public) is too narrow and does not capture the reality of property ownership and management forms. Geisler and Daneker (2000), for example, wonder if there are alternate, more nuanced property forms. Still others emphasize that all forms of property have always been and continue to be “polyrational” and that management structures for it need to understand this and incorporate a necessarily messy reality (e.g. Davy 2012). And there are others who vigorously join in this debate, offering a range of theoretical and strategic ideas (e.g. Gray 1991; Christman 1994; Frazier 1995; Krueckeberg 1995; Steinberg 1995; Meyer 2009). Regardless of their particular position, though, together they share a perspective – eighteenth-century property is a problem, alternate property systems must be developed, property can (and should) be designed (and be re-designed) to serve current needs, social and political systems have in the past and can in the future re-create private property ownership systems.

### **Private property for the future?**

So the facts are largely not in dispute – the planet is undergoing rapid environmental and urban change. Exactly how resources are owned and managed is an important element of the possibility of successfully managing through this period. But what this means exactly is in great dispute. Broadly there are two positions, and within those positions important nuances of difference. Drawing from Hardin, De Soto and the free market environmentalists is an argument that success will be a function of further embracing eighteenth-century property. From their perspective, the fundamental arguments of Locke, Rousseau and Smith are correct and governance, markets and sustainability will best come about through clearly defined and widely distributed private property. Drawing



from the radical-left critics of the mid-nineteenth century, the institutional economists of the early twentieth century, and the mid and late twentieth-century work of Leopold, Hardin, Stone and others is an argument that the form of property created in the eighteenth century was functional for many aspects of social and cultural development, but altered conditions require changed property.

Which set of ideas is correct? What form of property is the right form for sustainability, for the twenty-first century? An answer is not obvious or 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.

So one question to pose is: if the eighteenth-century form of property needs to change in line with the critiques of environmentalists, is such a change even possible? Yes, it is. The institutional economists are correct. The form of property rights in the early twenty-first century is not what it was in the early twentieth century. In the early twentieth century, an owner "owned" (possessed) his (and it was largely men who owned) children, his wife, his animals and his land and could (ab)use them as he saw fit. With regard to ownership, many changes ensued. With regard to urban land, since the early twentieth 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 USA, see Jacobs 2010, for a discussion of the contemporary social conflict over proposals to shape individual decision-making over privately owned land).

Globally, we have multiple examples of how urban and environmental resources can be owned, controlled and managed differently than the classic eighteenth-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 UK in the mid-twentieth century (after the Second World War), 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 has, for decades, been 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). And throughout the globe, though originating in the developed world, there are active experiments with alternate property systems, many of which share ownership between a private and public owner with the express purpose of maximizing the benefits of each form of ownership (see, for example, Davis 2010; Moore and McKee 2012). So alternate ("greener"?) notions exist and can be feasibly implemented.

What kind of property is right for this century with rising demands on environmental resources such as water, air and land for food production, where climate change is changing the very contours of land and water globally, and where rapid urbanization has created an emergent world of global mega-cities with an exploding population living in marginal conditions? Should there be continuity or disruption in the eighteenth-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 creating a sustainable future.

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