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From *Terra Nullius* to *Terra Communis*: Reconsidering Wild Land in an Era of Conservation and Indigenous Rights

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Abstract: This article argues that understanding "wild" land as *terra nullius* ("land belonging to no one") emerged during historical colonialism, entered international law, and became entrenched in national constitutions and cultural mores around the world. This has perpetuated an unsustainable and unjust human relationship to land no longer tenable in the post-Lockean era of land scarcity and ecological degradation. Environmental conservation, by valuing wild lands, challenges the *terra nullius* assumption of the vulnerability of unused lands to encroachment, while indigenous groups reasserting their rights to communal territories likewise contest individual property rights. South American case studies illustrate routinized *terra nullius* prejudices.

INTRODUCTION

The colonial justification known as *terra nullius* states that wild[1] or "insufficiently" used land constitutes vacant land available to the first settler. A number of recent popular monographs (Mann 2005; Dowie 2009; Humes 2009), as well as scholarly volumes (Cronon 1995; Banner 2005a; Milun 2011; Tomlins 2011), have grappled variously with the inconsistencies of the *terra nullius* construct (whether named or described) as it collides with contemporary conservation and indigenous rights. Yet, with few exceptions (Milun 2011), no systematic treatment detailing how the *terra nullius* convention continues

1. The term "wild" itself, as discussed later, is a highly problematic but useful shorthand designating non-industrialized landscapes.

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to permeate contemporary discourses of land, commons, and ownership has been set forth. This article interrogates the outcomes and mechanisms through which the legacy of the *terra nullius* norm impedes and colors environmental conservation and historically contextualizes the contemporary contradictions of conservation investment.

On an unprecedented scale, contemporary conservation efforts place financial and cultural value on maintaining undeveloped ecologically-rich land. While prima facie such valuation would seem to defy the *terra nullius* notion that discredits the property status of wild or "unused" land, recent critical literature documenting patterns of neoliberal governance call attention to the inconsistencies and impediments of environmental conservation against this backdrop (Liverman and Vilas 2006; Holmes 2007; Igoe and Brockington 2007; Tecklin et al. 2011). Neoliberal governance describes the current system of economic markets based on limited government intervention and the privatization of public resources according to a conception of individual property rights. Prior to institutionalized privatization qua natural resources, common lands or undeveloped wilderness remain vulnerable to usurpation as they fall outside the ambit of neoliberal governance. Such a political, legal, and cultural model treats land without a specific accountable rights-holder as lacking valuation on its own, and instead as a resource to exploit. As examined below, concepts of visibility and legibility play a major role in how land outside the *terra nullius*-cum-neoliberal reference are treated (Scott 1998), where land without a visible owner becomes subject to usurpation, occupation, squatting, farming, and other *use*, resulting in ownership by first taker (Swift et al. 2004). Yet overall, common land is not wasted or unused; it is subsistence for individuals without private property rights and fulfills myriad (im)perceptible ecosystemic purposes.[2] In effect, neoliberal conservation efforts sequester lands to private individuals and firms, excluding non-property owners from use of former commons (Heynen and Robbins 2005). Private conservation investment mirrors in important ways colonial acts of dispossession (Harvey 2005).

Neoliberal conservation simultaneously also reduces complex ecosystems and their many uses, human and natural, to resources to be bought and sold through markets. The development of global carbon exchanges, within states, regions, and international markets such as the United Nations' Reducing Emissions from Deforestation and Forest Degradation (REDD+) scheme is case in point, relying on private conservation investment entities to securitize carbon. Circumventing valuing wild lands intrinsically, these conservation models base value on tradable surplus commodities. Even for land conserved

2. The World Bank (2003) estimates that over a billion people subsist from directly foraged forest resources.

purely for environmental reasons, the *terra nullius* framework remains present: only through inscribing wild land in economic exchange is it safe from development.

Despite this trend of reinscribing conservation in *terra nullius* patterns of exclusionary privatization and (carbon) use even to preserve wild land, countervailing processes reviving communal land ownership and inclusive human-conservation environments are on the horizon. Resurgence of communal ownership of semi-wild lands, or *terra communis*, stems from the victories and assertions of indigenous and local peoples demanding recognition for their traditional ways of life and complex ecological-social milieus. The reterritorialization of indigenous lands worldwide places disposed land through legal means and political movements back into common ownership. Simultaneously, community-based approaches to conservation in the form of natural resource management bridges the human-nature dichotomy by integrating local inhabitants as stewards of conservation. Both phenomena constitute resistance against a *terra nullius*-derived land ethic, fundamentally altering the trajectory of how land is conceived and valued (Pinkerton et al. 2008; Milun 2011; McCarthy 2005). Such movements have fertilely led to reconsidering the internationalized *terra nullius* norm. For various reasons outlined below, the routinized *terra nullius* status quo increasingly faces challenges by superseding indigenous rights and conservation land valuation.

This article proceeds initially by disentangling the historical origins of *terra nullius* as a political concept, exposing its performative dimensions employed as a legitimizing justification for dispossessing indigenous peoples in the Americas of their land. In doing so, it becomes apparent that the *terra nullius* discourse continues to unduly influence land use laws, policies, and mores. The second main section deconstructs the concept of the wild as central to the *terra nullius* discourse to review the ways in which conservation, indigenous rights, and neoliberal critiques challenge the *terra nullius* norm yet simultaneously function within it. The oscillations between *terra nullius*- and *terra communis*-based policies are next illustrated with examples from the Latin American context, tracking how the *terra communis* discourse of territorial rights and global commons present alternative land ownership regimes. Finally, a discussion explores the ramifications of the political and cultural assumptions of *terra nullius* for developing markets like REDD+ that value unexploited ecosystems, elaborating basic principles to avoid the recognized ecological and social pitfalls.

A NOTE ON TERMS

Scholars have variously defined *terra nullius* as a "principle" (Tully 1993), a "doctrine" (Lesaffer 2005), a "policy" (Banner 2005b) and a "fiction" (Connor

2005; Pateman 2007). The precise term—though not the concept—is of relatively recent coinage. A lively debate has developed since the celebrated 1992 *Mabo v Queensland* case brought *terra nullius* to international visibility, ruling that Australia in fact was not *terra nullius* at the time of the state's founding, opening the door for significant land concessions to Australian aboriginals (Mabo 1992; Pateman 2007). Particularly in Australian scholarly debates, disagreement over the origins of the term *terra nullius* and its usage have led to various interpretations (Fitzmaurice 2007; Borch 2008; Connor 2005); questions as to whether in fact colonists invoked *terra nullius* explicitly as a justificatory principle (Reynolds 1992; Borch 2008); and controversy over the validity of the term's contemporary assignment to historical circumstances (Fitzmaurice 2007).

Outside the Australian context, historians have documented various cases of the concept and practice of *terra nullius* instantiated through the *law of nations* (*ius gentium*), rather than focusing on the exact phrase itself (Tully 1993; Seed 2001; Boucher 2010). The associated concepts *res nullius* and Locke's agriculturalist argument were more routinely mentioned before the twentieth century than the phrase *terra nullius* itself (Tomlins 2011; Lesaffer 2005). As Lesaffer indicates, *occupatio* served as a category in Roman law during the classical period (50 BCE to 250 CE) for acquiring things (*res*) and land belonging to no one—be they *res nullius* (e.g., a wild animal) or *res derelictae* (e.g., abandoned lands) (2005, 40–41). Additional Roman law and English Common Law practices that would become part of the law of nations contributed to the codification of the *terra nullius* principle during the sixteenth and seventeenth centuries. The cognate *territorium nullius* emerged briefly during the 1860's culminating in the 1884–1885 Berlin Conference (Tomlins 2011), where a conference member remarked, "All regions are considered to be *territorium nullius* which do not find themselves effectively under sovereignty . . . no matter whether the region is inhabited or not" (Fitzmaurice 2012, 131).

While these debates are important in articulating the history of the word itself, they have often obscured the history of the *concept* as it was theorized and practiced; the manners of application and justification of the principle of *terra nullius* by empire; and the diffusion of its assumptions throughout international law, which have been written into many national constitutions, laws, and mores in hybridized and opportunistic forms (Swift et al. 2004; Maybury-Lewis et al. 2009). These are the movements articulated here.

Following Lesaffer (2005), Reynolds (1992), Banner (2005b) and Milun (2011), this article employs the linguistic convention of the term *terra nullius*—albeit *avant la lettre* referring to the natural law doctrine that contained its principle—to track dispossession of land from indigenous peoples and the bias against the value of unimproved lands. *Res nullius*, *territorium nullius*, and

the right of husbandry all are adequate but less precise terms to refer to the associated and overlapping phenomena discussed.

THE ORIGINS OF *TERRA NULLIUS*

From the sixteenth through the eighteenth centuries it was common practice for aspiring European empires to treat the lands they encountered in the Americas and elsewhere as *terra nullius*. Invoking *terra nullius* enabled colonial powers to "cut through all the problems of justification" European nations encountered as they competed with each other for sovereignty of new lands during the overseas expansions (Pateman 2007, 46). England and Holland (and later, the United States) relied on variants of the *terra nullius* claim to justify their titles, as they lacked the papal bulls Spain and Portugal enjoyed as the basis for their title to acquiring land (Pagden 1998, 91; Seed 1995). Consumed with challenging these claims of other imperial powers, the English and the Dutch "paid little heed to grappling with the rights of native peoples" in their initial interactions with non-Europeans (Maybury-Lewis et al. 2009, 180).

Terra nullius formed part of the law of nations, which applied to those (European) nations demonstrating sovereignty through their political and civil organization. Boucher reminds us that in early modern Europe "the law of nations, or *ius gentium*, was not a law enacted by an international legislature nor was it enforced in international courts," rather it consisted of the acceptable practices of self-regarding European states performing agreed-upon customs of civility and sociability (2010, 70). Many "laws" of this epoch derived from customs, heavily influenced through assertions by theologians, philosophers and jurists of the era.

The conventions of property and international law held today are greatly indebted to their English common law origins, their Roman law precedents, and the historical expedients of empire. Early modern writers, especially English and Dutch authors, "created a general principle of natural law" that cobbled together the Roman *occupatio* with cannon law's endowment of title to occupation of property (Lesaffer 2005, 45). The English scholars from Gentili and Grotius through Locke conceived of possession and land title as requiring cultivation. The "distinctively English definition of *wild* as uncultivated" can according to Seed be traced to the eighth century CE, and was further developed in the eleventh century concurrent with the origin of the enclosure movement that culminated in the seventeenth and eighteenth centuries (Seed 1995, 186, emphasis in the original).

The English (and Dutch) were successful in mounting arguments for colonization through *terra nullius* land-use claims without having to rely on religious distinctions between themselves and the Amerindians for justification. Hugo Grotius's (1583–1645) humanist re-definition of private property

as pertaining to only that which the owner could consume or transform individually (or through extension) gave the concept of *terra nullius* purchase and anticipated Locke's agriculturalist argument. Personal property would only be recognized as performed and demonstrated through personally interested actions in specifically extractive forms. Such a conception allowed Grotius to argue in *Mare Liberum* that God gave nature to humanity in common, and the triumph of civilization entailed converting things through use and seizure into owned property (Grotius 2004, 20–21). Tomlins (2011) places the first instance of the concept of *terra nullius* in Grotius's *De Juri Belli ac Pacis* as granting title to settlers of untended land through extending what one can acquire freely from the seas as Grotius previously expounded in *Mare Liberum*.

This notion of wild land as uncultivated and thus bereft of ownership was popularized by Alberico Gentili (1552–1608). The practical need for justificatory claims for land titles in the New World spawned the uptake of Gentili's *terra nullius* variation of *res nullius* as a legal justification. Quoting Tacitus's refrain that "God did not create the world to be empty," Gentili concludes that "the seizure of vacant places is regarded as a law of nature . . . because of that law of nature which abhors a vacuum, they will fall to the lot of those who take them, though the sovereign will retrain jurisdiction over them" (quoted in Tuck 1999, 48). Gentili's naturalistic rendering of Tacitus's principle of *vacuum domicilium*—that nature "abhors a vacuum"—deplores wilderness as a threatening sign of regression from civilization to "primeval times" (ibid.). Explicitly mentioning America as a place where the overabundance of wilderness necessitates appropriation and use, Gentili plants the conviction that "whatever remains uncultivated, is not to be esteemed a Property" (ibid., 105). Equating uncultivated land with wild land gained international utility for the Dutch and English in overturning Spanish, French and Portuguese claims to discovery based on declaring ownership over vast territories these colonists had neither seen nor trod upon, let alone tilled, built up or fenced in. Armed with this more visible, physical, and (hence) defendable definition of occupation, the English and the Dutch sought to contest or usurp the land claims of other European powers as insufficient.

John Locke (1632–1704) justified dispossession of non-European lands similarly on the basis of lack of cultivation, understanding uncultivated land to be a *tabula rasa*. Because of Locke's unique biographical involvement in the New World, he is "a crucial link in the historical chain joining liberalism with colonialism" (Armitage 2004, 603). In addition to his role as a philosopher, Locke has been described as an apologist and active "agent of British colonialism" due to his authoring the Constitution of the Carolinas and his property stakes there, although Locke never set foot in America (Farr 2008, 495).

Locke's theory of labor in Chapter V of the Second *Treatise* is different than the right of *terra nullius*, yet notable overlap exists, especially pertaining to the influence his agriculturist theory has had on contemporary cases of conservation. According to Locke's logic, people not cultivating the land according to European standards do not own it; hence they do not have property rights. Only property-owning societies are "civil," and only these societies can exercise sovereignty. Locke questions the status of indigenous Americans he perceives as living in a pre-civil state of nature:

> whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life, as ten acres of equally fertile land do in Devonshire, where they are well cultivated. (1988, 83)

Locke's logic of efficiency is later echoed in de Tocqueville's melancholic observation that "reason indicated that wherever civilized men could establish themselves, the savages would have to move away," as U.S. pioneers could extract from the same parcel of land "ten times" the resources compared to the native peoples (Pierson 1938, 596).

These claims to land ownership based on the ability to extract greater surplus than required for subsistence led Milun (2011) to designate surplus extraction as the hallmark of the *terra nullius* justification. The idea that wild or minimally altered land constitutes waste and abnegates one's claim to the land assumes, according to *terra nullius*, a particular esteem for cultivation and settlement and a devaluation of other forms of land (dis)use. For Locke and his contemporaries, "the planning, coordination, skills, and activities involved in native hunting, gathering, trapping, fishing, and non-sedentary agriculture, which took thousands of years to develop and take a lifetime for each generation to acquire and pass on," Tully notes, "are not counted as labor at all, except for the very last individual step (such as picking or killing), but are glossed as 'unassisted nature' and 'spontaneous provisions'" (1993, 156). The worth of land and its designation as private property for Locke follow solely from human effort, predicating land "title" on "labor" (Locke 1988, §34). Tilling the soil, clearing brush, mining the land, building a house, making a fence, forestry, or otherwise visibly transforming the natural landscape demonstrates ownership; people minimally (invisibly) impacting the land they resided on could not be determined under this model as the actual owners. Such people were deemed to live in a "state of nature."

Thomas Hobbes (1588–1679) takes the *terra nullius* argument in a different direction, differentiating societies from peoples in a pre-civil state of nature by predicating the ability to hold sovereignty on performances of civility based on subduing the land. Hobbes's concept of the state of nature plays a prominent

role in framing the right of possession; for in the state of nature, as he believes American natives to be, Europeans are to "constrain them to inhabit closer together," and "snatch what [land] they find" (Hobbes 1991, 239). Just because land was deemed vacant did not mean that it was uninhabited; instead, *terra nullius* came to mean lands under-used, under-cultivated or lands lacking a proper sovereign government.

This idea of underutilization as asocial was a tenet of the law of nations' reliance on sociability. Sociability, believed to be a unique cultural emergence essential to the Enlightenment, was honed in the practice of European property-based colonial dispossession. To create society required labor and work, subduing nature and in the process becoming civilized. For these natural law thinkers, "civil, and thus truly human, society was solely the creation of an act of will" (Pagden 2003, 180). Samuel Pufendorf (1632–1694) viewed the creation of property as a socializing force, as he believed private property promoted sociability and fought idleness, as neighbors wrested goods from the land. Pufendorf supported the catholically accepted understanding of *Genesis* that nature consisted of resources "intended, by God, for human use and consumption" (Carr and Seidler 1996, 373). To this end, Emeric de Vattel (1714–1767) stipulated "cultivation of the soil" as "an obligation imposed upon man by nature," echoing the same *Genesis*-inspired trope (Pagden 2003,183). Vattel criticized those shirking their agricultural charge for demonstrating unsociable behavior "injuring their neighbors" and vehemently attacked non-cultivators, who he believed "deserve[d] to be exterminated like wild beasts of prey" (ibid.). Vattel's pronouncement has unfortunately countless times since befallen indigenous people not cultivating lands in the Americas according to European standards.

As colonial powers in the Americas and elsewhere achieved their independence, instead of casting off the ideological prejudices of their former sovereign powers, these new nation-states instead cloaked themselves in similar legitimating discourses following the behavior of hegemony, as they yearned to prove their mettle as states deserving of membership in the international community (Maybury-Lewis et al. 2009). Inheriting these biases against fallow land and against indigenous peoples who did not work the land according to the visible European signifiers of ownership excluded many traditional native cultures from recognition and citizenship in these new polities.

Dispossession and its rhetoric have played a powerful and enduring role from the sixteenth century to the present. Private property rights predicated on customs and constructions of European sociability legitimated discourses of dispossession co-constitutive of European identity. Doolittle's insight that "property rights are relationships between people with respect to things, not between people and things" underscores the designation of native land as devoid

of sovereignty as justification for writing non-assimilated non-Europeans out of the law of nations (2005, 23).

Enacting Property

Land ownership is performed according to prevailing hegemonic land practices (Rose 1994). Modern performances of private property ownership make plain how the blinders of *terra nullius* misinterpret wild lands as empty and belonging to no one. In what Pateman (2007) calls the "settler contract," the rights regime of private property requires use of land in a particular, socially-prescribed manner to qualify as legitimate. The prescribed performance of ownership in settling newly acquired lands excluded indigenous peoples who "did not play that role" (Maybury-Lewis et al. 2009, 6).

During early colonization, performative demonstrations of possession and empire were enacted by each colonizing nation according to their particular construct as rightful heirs to the legacy of the Roman Empire (Seed 1995). These nations' ritualized performances concretized claims to new land. These included the Spanish reading of the *requerimiento*, the Portuguese planting of stone pillars or wooden crosses displaying their royal coat of arms, and French public spectacles celebrating their new subjects' loyalty. The English envisaged their connection to Rome through their laws, and it was the English performances of establishing claims to land that persisted (Lissitzyn and Mann 1938; Seed 1995, 183–184).[3]

The performative aspect of *terra nullius* as an original right to possession is crucial in understanding why today "many conservation-minded landowners believe that they need to make some kind of economic use of the land, such as ecotourism or scientific activities, or even perform some grazing or ranching, in order to protect their land within the cultural context of Latin America" (Swift et al. 2004, 100). The compulsion to make productive use of one's land or else face the threat of usurpation suggests the norm of *terra nullius* has been routinized in colonial and postcolonial culture and law.[4]

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3. One reason for the endurance of *terra nullius* type claims rather than these other demonstrations of sovereignty may rest in the Hobbesian conclusion that only by physically occupying land could a nation actually defend it should the territories be threatened by competing claims.

4. Grove (1995) rightly points out that even in considering land as merely a resource containing local inhabitants, imperial colonialism was not entirely devoid of environmental concern. In fact, many colonial officers felt deep obligations to conserve and replant areas significantly degraded by colonial resource extraction. As part of their self-understanding as overseers of their conquered territories, tree planting campaigns, concerns about soil erosion, and even worry of changing the climate through deforestation were present in colonies since the eighteenth century. Unfortunately, such practices neither valued (wild) land as such, nor esteemed native inhabitants as stewards or owners of such territories, failing to escape human-nature dualism.

CONTEXTUALIZING *TERRA NULLIUS* IN LATIN AMERICA

To reflect the current post-Lockean ecological situation of scarce land and degraded environments requires refiguring obsolete colonial definitions of wild land as vacant land available to the first taker, the place of (indigenous) people in wild lands, and concepts of territorial sovereignty inherited through the *terra nullius* discourse. Around the world, but crucially in Latin America, contemporary conservation investment is the literal and figurative frontier where the legal, political, but especially cultural internalizations of the *terra nullius* convention are currently being played out.

Following the initial imperial colonialism of the sixteenth and seventeenth centuries, a second era of "internal colonialism" in the Americas took place in the nineteenth century and again in the twentieth as recently independent colonial states sought to concretize their imagined territorial claims (Maybury-Lewis et al. 2009). According to Maybury-Lewis et al., in "Chile, Argentina, [the] western United States and Canada, and non-coastal Brazil—new national stories served largely to justify and settle outline maps. They filled in the blank 'unoccupied' spaces with 'nationals' or at least demonstrated possession in some visible way" (2009, 6). Unknown territories illegible to removed planners and decision-makers required repopulating "dark" areas on maps with nationals committed to the general mindset of cultivation and accumulation (Perruci 2008; also compare Scott 1998). Such action secured possession in a visible way to would-be encroachers, insuring that in the race to define territorial limits vis-à-vis other "states," the vying state could expand its land claims to the maximum potential.

The Argentinean nation-making project after colonial independence sought to flex its sovereignty through the 1879–1883 Conquest of the Desert, a military campaign aiming at bringing frontier lands under settlement. That the European-Argentine national narrative required purging the desert of its "foreign" indigenous people before being able to claim the Pampa and Patagonia as part of the national territory is telling. Whereas typically for *terra nullius*, it was enough to prove that the land was being underutilized, the Argentine national narrative under General Roca fabricated a story that the indigenous populations were in fact foreign immigrants from Chile from which they could "reclaim" their national territory (Maybury-Lewis et al. 2009, 58). Argentina's 1871 Civil Rights Code classified the native Mapuche as "wild" and "handicapped," dehumanizing them to justify Euro-Argentine dispossession of their lands (Díaz and Falaschi 2002, 20–21).

In Brazil, a well-documented campaign by the Brazilian military government (1964–1985) to occupy the Brazilian Amazon sought to allay territorial anxieties over the sovereignty-deflating possibilities of wild lands and spurred a forceful project of Amazon resource development based on extraction,

ranching, and roads (Perruci 2008; Zhouri 2010). The undeveloped Amazon was perceived as a threat to Brazilian sovereignty both vis-à-vis peasant encroachers from neighboring countries and global commons-intent environmentalists. In response to the perceived "conspiracy" by the international community to "take over the Brazilian Amazon," the Brazilian government worked to strengthen in the region "cultural dominance by Portuguese-speaking Brazilians as a way of ensuring loyalty among the local population towards the Brazilian state" (Perruci 2008, 169, 167). A linguistically-bound definition of national identity precluded Amazonian indigenous peoples from fulfilling the role of *occupatio*. In effect, the Brazilian government rejected the indigenous population's non-exploitative way of living as indicating sovereignty. Failing to use Amazonian resources in a visible manner performing land ownership potentially jeopardized the Brazilian government's claim that the land was in fact occupied, leaving it vulnerable to potential control by an international community perceiving the territory as *terra nullius*.

THE LAND-USE BIAS AGAINST CONSERVATION

In the last few decades, the unprecedented resource development deployed in Latin America and other developing countries has inaugurated a crisis for many indigenous groups of the world, whose "unused" lands, through government subsidies and permission, become de facto if not de jure *terrae nullius* developed by enterprising logging, mining, cattle, agribusiness interests, or poor urban migrants. Incidences of violence have been quite high, both during the process of removing indigenous and local peoples from land to be developed, and against those decrying usurpations and negative impacts (Peluso and Watts 2001; Holmes 2007).

While north-south investment on the basis of resource extraction has on the whole been welcome by governments, north-south conservation investment has met an unequal level of institutional and popular resistance. This resistance cannot be explained through economic advantage alone, as the impetus behind payments for ecosystem services is predicated on such payments being competitive in a market system. Adherents to free market principles wager that "if a private resource owner believes that grizzly bear habitat is more valuable and can capitalize on that value, then politics will not matter" (Anderson and Leal 2001, 11). This argument that only economic considerations matter and that politics, culture, and ideology are immaterial is discussed below against observations of embedded biases against certain types of (communal) ownership and certain types of (conservation) land use.

To advance the economics-only argument, Anderson and Leal point out that "there is an opportunity cost associated with the allocation" of land as wilderness that may make conservation more expensive than the immediate

returns and taxable production of extractive industry (2001, 14). If environmentalists and the global conservation investment market cannot pay fair price for the land *and* its resources—which, should a biota-rich piece of land happen to lie on a vein of precious metal, mineral, gas or oil, they likely could or would not—then what reason does a developing country or a private landowner have to forgo development and higher returns? The problems Ecuador has encountered convincing a reticent international community to defray the $8 billion in lost revenue for forgoing exploitation of the Ishpingo-Tambochocha-Tiputini oil concessions discovered under the Yasuntí national park reserve is case in point (Finer et al. 2010). Asking developing countries to sacrifice economic gains at the altar of the global public good because they happen to have industrialized later than developed countries disproportionately distributes the economic benefits of industrialization to already-developed states and the costs of conservation to developing countries. Some environmentalists lament that "if economics rules, tropical forests are worth more dead than alive" (Terborgh 1999, 18). If this is the case, then *terra nullius* as an underpinning discourse is secondary to financial demands, and the incentive for extractive rather than conservation investment can be reduced to simple financial trade-offs.

Recent payment for ecosystem services schemes intend to defray the immediate opportunity costs of conservation. The above assessments are predicated on short-term rather than medium- or long-term economic benefits of resource development versus conservation, and as REDD+ carbon credits normally carry 30-year securitization, renewed future contracts fetch additional capital for lands that otherwise would likely significantly depreciate post-extraction value (Corbera et al. 2011; Simula 2010). Although in many instances conservation investment schemes like REDD+ cannot compete with the immediate economic yields of extractive investment, the cases where conservation investment preemptively buys up lands that have no immediate resource accessibility or financially viable extractive potential are the exceptions that prove the *terra nullius* rule.

In Chile in the 1990's, for example, American entrepreneur-turned-deep ecologist Douglas Tompkins purchased one and a half million acres of Patagonian rainforest and turned over the vast majority of it to the Chilean state for perpetual ecological protection to create *Parque Pumalín* as a National Sanctuary. His purchases were challenged by nationalists and government officials anxious that his holdings compromised national security, constituted sovereignty breaches, and handicapped Chile's economic development by taking those lands out of extractive industrial use.[5] Chile's Minister of National

5. Meanwhile, Canada's Barrick Gold operations at the Pascua-Lama mine, was welcomed to buy this land and extracted 500,000 kilograms of gold, although the mine straddles the Chile-Argentina border—potentially raising a national security issue (Barlow

Resources from 1994–1999, Adriana Delpiano, summed up the opinion of many Chileans: "Chile already has 2.5 million acres of National Parks, and we don't need any more. . . . Tompkins owns 50% of Palena Province, land that could be used for development" (Langman 1997). Tompkins failed initially to adequately engage the involvement and support of Chilean environmental NGOs, industry, and politicians, suffering substantial public backlash against his purchases. However, Tompkins's purchases were certainly no less transparent than other foreign investors buying similarly sized tracts of land for energy resources, mining, or for-export agribusiness. The difference was, Tompkins's lands were to remain undeveloped. While the public pushback might be explained by Tompkins's denunciations of the pollution streaming from Chile's prized Salmon farms and his awkward handling of the press, compared with the lack of controversy surrounding major foreign extractive investment in Chile and elsewhere in Latin America, such resistance seems prima facie disproportionate.

Privately owned conservation areas receive increased scrutiny, not only because they preclude economic development; to the contrary, conservation investors, after all, can only buy land from willing sellers. Instead, increased scrutiny transpires because many governments, corporations, and citizens continue to view conservation through the jaundiced *terra nullius* lens as converting resource-rich areas into "inefficient" land use or wasted opportunities, contributing little to, or even detracting from, the strength of the state and economy.

Because of their agricultural use of land, major land purchases for foreign food security also enjoy routine approval without public discussion or protest. As a result of the February 22, 2012 agreement between Argentina's Chaco province and a Saudi Arabian firm, 500,000 acres of dense forest nicknamed "El Impenetrable" will be converted to for-export agricultural production bolstering Saudi Arabia's domestic food supply. The 60,000-member Wichi indigenous group living in El Impenetrable will be removed from the land (MercoPress 2012). That such dispossessions continue to be condoned in an era of putative inclusivity and respect for indigenous rights evinces the obduracy of the *terra nullius* pathology to disregard indigenous territories and lands judged unproductive.

The *Movimento dos Trabalhadores Rurais Sem Terra* (MST) (Landless Peoples' Movement) in Brazil that began in the 1970s and overran, with government support, the land of indigenous communities living traditionally and sustainably in the Amazon, illustrates enduring *terra nullius* logic. During this period, Brazil's "effective use law," which meant "use it or lose it," had the aim of

2007, 109). Cross-border resource development raises less suspicion or concern than domestically contained or cross-border conservation, in this case.

"encourag[ing] settlement [by poor and politically-threatening Brazilians] and had come to be systematically manipulated by influential landowners in order to wrest land from the less powerful" (Perfecto et al. 2009, 110). MST's famous but "quite inaccurate description" of the Amazon by Brazilian President Medici as "the land without people for the people without land," has become the rallying cry for landless people the world over, unknowingly declaring virtual war on the indigenous communities calling the forest home (ibid., 111).[6] By 2005, through promises of land grants, schools, and jobs, sixty million hectares of so-called *terra nullius* (better known in Brazil as *terra devoluta*) were allotted to 667,000 families, comprising 16 percent of Brazil's total farmland (ibid.). The current 1988 Brazilian Constitution has been interpreted by enterprising landless people as a free pass to occupy and make use of "vacant" lands. According to Article 5, Sections 184 and 186, land may be expropriated if it is not fulfilling its "social function" (República Federativa do Brasil 1988; see also Swift et al., above). This movement epitomizes Locke's agriculturalist argument and the sociability of the performance of land use, exhibiting first taker's right to disregard wild land and indigenous peoples.

Private foreign conservation investment's flaw of often overlooking the need to cooperate with local inhabitants and its checkered reputation in (not) working with other (indigenous) groups with a legacy of sustainable living is glaring. Yet, because of its reliance on international cooperation, donors, and public image to a greater extent than the predominant utilitarian calculations of profit often driving resource extraction investors, conservation investment must at least gesture towards social justice concerns in its assertions of power.

Field studies have repeatedly tracked a pattern in land grabs indicative of the *terra nullius* assumption (Branford and Glock 1985; Perruci 2008; Peluso and Watts 2001), discriminating against conservation investment and also against territories inhabited by *campesinos* or indigenous people. In this sense of not using up land according to prevailing norms, conservation investment and indigenous land stewards occupy the same oppositional role of valuing "wild" land. The process of *terra nullius* in Latin America's recent history is aptly summarized in this observation:

> In Latin America, a forest that provides income to several thousand local families can quickly become the weed-choked pasture of a cattleman with political connections and a government subsidy. Loggers may gain rights to move onto supposedly 'unused' forest land for their own benefit. And finally, landless colonists from other regions of the country may move in and colonize the forest for farming. Having no experience in sustained-

6. To be fair, in recent years the MST has sought to work with indigenous groups and respect their territories.

> yield forest extraction, they end up destroying the economic future for three or four years of corn production. (Nations 1992, 216)

This disposability of land is precisely that adversarial relationship indicative of *terra nullius* ideology.

TERRA NULLIUS UNDONE: THE WILD?

Terra nullius is conceptually predicated on unmodified lands actually existing. Yet, the very notion of virgin land, untouched or unaffected by human intervention does not hold up to scrutiny. Recent scientific findings reveal that much land previously perceived as "wild" is in fact deeply contingent on human involvement. The *terra preta* of the Amazon rainforest, for example, is evidence that for hundreds if not thousands of years, humans have engaged in intensive (agri)cultural practices to intentionally enrich the capacity of soils to retain nutrients responsible for the apparent fecundity of the region (Hecht 2003; Glaser and Woods 2004). *Terra preta*, literally "black earth," consists of taking the refuse of forest use—leftover biomass from eating, making clothing and equipment, and other silvaculture—and placing it in compost pile-like heaps to be burned at super low-heat, producing a nutrient-dense form of biochar. Amazon areas where *terra preta* is practiced exhibit noticeably more fertile, nutrient rich, and black or brown-colored soils. *Terra preta* complicates the myth of the natural fecundity of the Amazon, as this fecundity is at least partially humanly created through the deliberate actions of native indigenous peoples. "The persistent idea of . . . the Amazon as exuberantly fertile has continued to propel large-scale colonization schemes," incongruously betraying the source of this fertility as devoid of human intervention (Slater 1995, 115; also see Morton 2007).

As Tully (1993) noted (above) regarding the invisibility of work carried out in the socio-economies of indigenous peoples to western eyes, *terra preta* pinpoints culturally contingent definitions of work and cultivation, and the utter inappropriateness of applying European standards of cultivation and thus civil society to other regions with more hospitable natural environments. *Terra preta* further complicates the *terra nullius* assumption that anthropogenic changes in the environment signal civilization and thus the ability to hold and exercise property rights, as the changes in the landscape wrought by indigenous people have often been invisible to (European) outsiders only accustomed to recognizing blatant forms of landscape adaptation. Such findings erase the fantasy of pristine landscapes untouched by human hands, a fantasy negatively impacting the reconciliation of conservation objectives with territorial tenures of indigenous peoples.

Conservationists whom mistakenly ascribe to the mutually exclusive human-nature dualism and attempt to conserve land free of human intervention actually uphold a romantic notion of a moment in ecological time,

captured and frozen, rather than the processes of the landscape and the eco-engineering of the people that made it that way (Marris 2011). This antinomy, enshrined in the 1964 U.S. Wilderness Act defining a national park as "an area where man himself is a visitor who does not remain" (United States Congress 1964), has also been taken up by the International Union for the Conservation of Nature (IUCN), the head international coordinating body for conservation work, defining national parks as areas "where ecosystems are not materially altered by human exploitation and occupation" (Dowie 2009, 12). Both unwittingly pit conservation ahistorically against the indigenous communities often living in these ecosystems.

Human-nature and civilization-wild dualism is at the heart of the *terra nullius* doctrine. Shiva points out that "the colonial category of land as *terra nullius*, served two purposes: it denied the existence and prior rights of original inhabitants and it obscured the regenerative capacity and processes of the earth" (1997, 46). Land, like all natural things through this lens, becomes passive; and as Locke maintained, human intervention is the lone activity that renders value. While the literature on the valuation of ecological services has begun to recast the passive-active dichotomy (Costanza 2003),[7] in practice unused or underused nature retains its vulnerability as unclaimed and unproductive.

Wild People: Indigenous People as "Part of the Fauna"

The *terra nullius* discourse problematically essentializes the naturalism of indigenous cultures. On multiple continents, colonists viewed indigenous people as wild as the land they inhabited—"as part of the fauna" (Markus 1994, 50; Shiva 1997, 46; Dowie 2009, 300). In devaluing the land as empty of sovereignty and systematically overlooking indigenous forms of agriculture, the *terra nullius* perspective of colonialism through to the twentieth century dehumanized the native inhabitants encountered. *Terra nullius* served as a powerful discourse to legitimate European exclusion of indigenous peoples from the category of equal human status which would have required fair treatment and respect for their sovereignty under the law of nations.

The European conception of the autonomous individual undergirding modern property rights is predicated on a notion of personhood constructed during the modern period through interactions with non-Europeans (Comaroff

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7. Clearly the ecosystem services literature and practices are varied and problematic for a host of related reasons, even as ecosystem services begins to "value" natural processes independent from nonhuman intervention. Constanza makes clear the conundrum: "while ecosystem valuation is certainly difficult, one choice we do *not* have is whether or not to do it. Rather, the decisions we make, as a society, about ecosystems *imply* valuations. We can choose to make these valuations explicit or not" (2003, 23, emphasis in the original).

and Comaroff 2012),[8] creating the dualities of civilized and savage, human and nature that rely on a "certain kind of denied dependency on a subordinated other" (Plumwood 1993, 41). Dehumanized natives viewed as living in a pre-political state of nature conveyed a lack of sovereignty and property rights colonists (mis)employed to justify subsuming such territories as *terrae nullius*.

The danger of essentializing indigenous people, regardless of their history of sustainability, is that pigeonholing indigenous peoples as ontologically ecological has dire consequences for their relationship with environmental conservation as well as their status as owners of their territories. The choice given to indigenous peoples, to either remain in the forests living according to an "'enforced primitivism'—requiring people who wished to stay in protected areas to remain 'native,' to not adopt modern practices or technologies" or else be "relocated" outside protected areas is unsatisfying and unjust (Dowie 2009, 269). Conservationists fear traditional people will—through exposure with dominant culture and the ensuing process of acculturation to dominant national culture—begin negatively impacting their environment in unintended but sometimes catastrophic ways. Terborgh for example, considers indigenous people a "threat from within" conservation parks (1999, 40). And as revealed in a leaked memorandum, Conservation International shuddered at the idea of a tribe living in lands slated for conservation "ever coming into possession of shotguns and chainsaws" (Dowie 2009, 268). Without proper education, or becoming what Igoe and Brockington critique as "eco-rational subjects" (2007, 444), conservationists argue indigenous people would unwittingly use industrial technologies to deplete their game, deforest their land, and could be duped into selling their surplus to predatory entrepreneurs.

CONSERVATION AS THE LIMIT CASE FOR *TERRA NULLIUS*

Conservation in many ways tests the limits of inherited *terra nullius* assumptions, as it values—highly—precisely those lands that are fallow, unused, and wild. As it relates to indigenous territories, conservation investment also is beginning to acknowledge the sovereignty of indigenous peoples, even indigenous peoples choosing to continue living outside of the money economy. Indigenous peoples living thusly are increasingly regarded as having developed their own complex forms of social relations, sciences, arts, and cosmologies, as well as labor practices that have enabled their survival, living sustainably with their environments. These people have degrees of political organization internal to their group, and externally in the form of activists, NGOs, and Indian Bureaus (or their equivalent) tasked with looking out for their welfare.

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8. One could compare this to the Greek concept of the citizen as defined over and against their slaves—acquiring independence in one realm through enforced dependence in (and on) another.

While until recently many indigenous groups were still considered wards of the state, paternalistic relationships are no longer acceptable as the norm and are increasingly scrutinized by many NGOs. All of these movements indicate that the *terra nullius* discourse is losing ground to another paradigm, that of *terra communis*.

Terra communis

Parallel to the political and legal shift from land as only a resource to be exploited toward viewing land as nature which humans can live amongst more-or-less sustainably has been an accompanying conceptual shift in academic debates. While Garret Hardin cemented in 1968 the bias against communal ownership by decrying the "tragedy of the commons," in 1990 Elinor Ostrom (to name but the most influential torchbearer of this trend) documented empirical cases of *Governing the Commons* collectively that were ecologically and economically sustainable.

In a tragedy of the commons situation, each herder attempts to overgraze the commons (deplete the ecological stock) as there is no incentive to show restraint; self-restraint only leads to more feed for the other herders' animals. Hardin's widely accepted solution to this was to instead break apart common property into smaller units of property, each privately managed. Yet, such a strategy does not disengage the drive to overgraze; it instead transposes it from mainly affecting other herders to affecting even more intensely the earth itself (e.g., the "Green Revolution"). Without changing the cultural practices of overgrazing and the ideology of land use as land exhaustion, private property merely perpetuates a race-to-the-bottom game, only now played against the land rather than another rancher. Ostrom identifies the consequence of land privatization to ward off tragedies of the commons as "*playing a game against nature*" (1990, 12, emphasis in the original). Ostrom's work on *common pooled resources* (CPR) in communities jointly managing ecological commons to ensure the flow of resources they extract does not deplete their resource stock helped set a new model depicting sustainable outcomes rather than competition-driven tragedy when lands are commonly managed according to traditional practices. Legitimizing CPR valorizes the economic and ecological benefits of commonly shared land, influences public perceptions of indigenous territories as well as community-based conservation management, and incorporates local peoples with traditional forest use into conservation regimes.

Because the negative externalities from pollution exceed private property rights and boundaries (Speth 2004), the global commons approach is a logical discourse to negotiate these issues. Much like *terra nullius* was employed to move land out of the commons and into private hands, *terra communis* works through international law to subsume negative externalities accountable to private parties for protecting global fluid commons from atmospheric, oceanic

and other pollutants. Negative externalities cannot be confined—although polluters can be held responsible for their effects on others. Global carbon accounting schemes, currently exemplified in the REDD+ framework, aim to strengthen international law to override point-source pollution from continuing to degrade global commons. While the sovereignty of nations remains resolutely guarded (by the United States as much as any other country), the friction of international law is that theoretically it supersedes national interests. To tackle cross-border issues like climate change, international "rules and norms" must be created and enforced to grapple with globalized environmental degradation. And in order for "global standards [to be] meaningful, nations must cede some of their sovereignty" (Barry and Sims 1994, 97).

Cosmopolitan arguments consider all humanity the beneficiaries of protecting ecosystems as world commons. What were once considered wastelands are now often considered global patrimony. These same spaces, thought of as belonging to no one and belonging to everyone, nonetheless continue to share the conceptual feature of emptiness, lands that are a *tabula rasa* for social projections of value. Milun perceives a curious "oscillation" between discourses of *terra nullius* and *terra communis* alive in contemporary practices espousing global commons rhetoric (2011, 40). She notes "the cultural as well as juristic tendency to create *res nullius* while ostensibly professing *res communis*" (ibid., 26). This is a forceful claim. REDD+ and other private conservation schemes aim to reassert ownership and control over lands that, if recognized as sovereign territories of indigenous peoples, enable indigenous peoples to have an unprecedented position of power in global decision-making and determining global environmental and economic futures. If these global commons, however, aim to consolidate the ownership of indigenous lands and conservation lands into the control of a global elite group of absentee owners, as some have argued (Peluso and Lund 2011), then the global commons discourse problematically perpetrates a contemporary form of green colonialism.

GLOBAL COMMONS FOR WHOM?

Conservation investment schemes relying on markets necessarily make use of individual private property rights for property holdings to gain international certification. While historically conservation mainly consisted of state-based national parks and public-private partnerships, in the last thirty years private conservation has experienced a dramatic upswing in securing conservation lands, both in developed and developing countries (Igoe and Brockington 2007). Chief Executive of the Wildlife Conservation Society Steve Sanderson blames the mixed results of conservation on "national governments and the intergovernmental system," claiming that for more complete conservation and better enforcement, "conservationists must embrace a new agenda, led

by a coalition of actors in civil society, including leaders from the global corporate community" (2002, 166). While local and indigenous people are to be consulted and included, the agenda itself is clearly top-down.

This asymmetrical relationship between those who live on lands valued as global commons to be protected through conservation investment, and those investing in such lands, omits from the discussion those very people directly impacted by such accords, creating serious questions for earth governance democratic participation (Farrell 2012). In part because developed countries have already deforested their lands and now have entrenched populations where their forests used to be, Western countries interested in conservation have turned to mostly tropical regions that have not yet undergone total deforestation. Yet, because of this very history of deforestation on the European continent over the past millennia, the global effects of current deforestation in the developing countries have an even greater impact on climate change due to the preexisting historical "carbon debt" of developed countries (Hughes 2011; Martinez-Alier 2002). Rather than focusing on greening global industry and market practices which account for the majority of emissions, instead REDD+ has attracted attention for its mechanisms to export climate change mitigation. This reflects a perspective shared by many decision-makers in developed countries that "paying for greenhouse reductions elsewhere is easier, cheaper, and faster than domestic reductions" (Bumpus and Liverman 2008, 128).

While its original authors made clear that their intention was not to reduce ecosystems and the natural world to yet another stratum of products and resources (Costanza et al. 1997; Costanza 2003; Norgaard 2010), the nascent science of ecological economics has nonetheless played a role in converting ecosystems into a type of reductionist value recognizable by markets. Recent developments in earth systems governance stem from the payment of ecosystems service paradigm, which aims to instate a sense of value for conserving lands (MEA [Millenium Ecosystem Assessment] 2005). This value, however, rather than intrinsic or local, springs from the emergence of new markets for carbon credits in the wake of REDD+ and other carbon sink mechanisms (FAO et al. 2008).

While on the one hand this translation process has been a boon for conservation, putting conservation by hook or by crook on the large-scale investment map through emerging carbon markets and other REDD+ mechanisms of investment, on the other hand, putting price tags on ecosystem services has contributed to removing indigenous and local peoples from conservation lands for the sake of legibility, bolstering a neoliberal model of "fortress conservation" (Gómez-Baggethun and Ruiz-Pérez 2011). Such denial of access to forest services for the sake of securing other market-traded ecosystem services has often pitted private conservation investment against indigenous land rights (Dowie 2009). The battle between the ability of people on the ground to continue their subsistence interactions with wild lands

and the neoliberal property regime of conservation investment focused on securing the integrity of the lands to buy and sell ecosystem services with confidence that the ecosystems are conserved as advertised, has its source in competing *access*- versus *rights*-based models of property (Ribot and Peluso 2003). These opposing narratives of viewing land as common pooled resource or private property can find their precedents in the historical *terra communis* versus *terra nullius* debates and dispossessions.

Thinking about conservation parks as "islands under siege" by pollution and local forest users is indicative of the problems facing the piecemeal treatment of conservation amidst a host of possible options necessary to adequately address climate change (Freemuth 1994). When taken to the extreme, these islands of conservation become "fortresses" with literal and figurative walls keeping humans out and nature in (Brockington 2002). This type of conservation reinforces *terra nullius* exclusionary human/nature and civilization/nature categories. Matrix ecology critiques of the adequacy of conservation parks as islands of nature amongst used-up industrialized lands repeatedly show how ecosystem biodiversity and resiliency are predicated not on dichotomous developed-wild areas, but instead rely on interwoven spaces—cultivated, paved, and wild—to achieve networks of life (Perfecto et al. 2009; Marris 2011). While this is not meant to undermine the importance of major ecosystem conservation projects, such projects are insufficient alone to effect the environmental remediation and global norm change necessary without developed countries addressing their own unsustainable economies.

In order to maintain the market-defined ecosystemic integrity of the protected lands, neoliberal conservationists often cut off local peoples from traditional sustainable use of the parks (Brockington 2002; Brockington and Schmidt-Soltau 2004). These social costs to conservation perpetuate the idea that the fate of ecosystems is separate from their human counterparts. Only, the difference now versus during colonialism is that indigenous people and local forest-dependent peoples often engage in activities clearly visible to contemporary conservationists as labor; chopping down trees with steel axes (or chainsaws), shooting animals with guns, and using other technologies that clearly mark them as (industrializing) humans rather than just another harmless part of the fauna. When conservation areas are conceived as enclosures, keeping nature in and humans out, they exclude essential human components that may have traditionally maintained forested areas in a more biodiverse relationship (Glaser and Woods 2004). These local people are dispossessed of their lands just as conservation land is accumulated into the hands of a small fraction at the economic top of the cosmopolitan citizenry (Harvey 2005).

The real threat to conservation is not from the forest practices of indigenous or local forest-dependent peoples, but instead from business-as-usual global consumption and the industries that supply this demand. Gómez-

Baggethun and Ruiz-Pérez acknowledge the gains that have been made in recent years in conserving ecosystems, but are critical that "traditional conservation approaches have been powerless to reverse or stabilize the metabolic patterns of the global economy, characterized by ever-increasing demands on natural capital stocks, ecosystem services, and biodiversity" (2011, 615). Conservation of select areas in a desert of environmental inconsideration serves to legitimate the out-of-control unsustainable metabolism of the global economy. The surplus value of conservation is that it exculpates serious overhaul to global economic environmental unsustainability.[9]

The fungibility of nature *qua* resource continues to play out in conservation investment. Many large conservation NGOs buy and sell conservation lands as environmental commodities, sometimes buying lands of less ecological value but potentially increased future exchange value for the purpose of trading up the lands to grow their conservation goals (Luke 1997). What this means, however, is that no individual conservation plot is necessarily permanent or secure. As long as so-called commons remain in private hands—however wise and beneficent those hands might be—the trust of the local communities that border or inhabit these lands is fundamentally compromised. Understanding conservation lands as real-estate, and the land conservation endeavor as a type of "green real-estate investment trust" poses serious limits to actually confronting global ecological degradation in anything but financial terms (Luke 1997, 58). Instead of shaking off the mantle of *terra nullius*, private conservation, which composes REDD+ to a significant degree, invokes the legal authority of private property ownership to sequester lands from human incursion.[10]

A critique of conservation is precisely this: as long as undeveloped lands remain enclosed as graveyards for nature, this fosters a tacit acceptance of (1) the status quo relationship of capital as the measure of the worth of land and specific ecosystems, (2) the existence and division of separate realms of human civilization and wild nature, and (3) continuing unmitigated business-as-usual extractive land use on all tracts of land not explicitly reserved for conservation. The result of environmental conservation assimilating into the *terra nullius* land ownership regime is that in many areas outside the immediate (over)sight of the state, even conservation lands remain de facto *terrae nullius* unless guarded and/or fenced.[11]

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9. Or, as Blühdorn (2007) puts it, conservation-as-environmental-panacea serves further in "sustaining the unsustainable."

10. Even such exclusionary regimes are not entirely effective, depending on the exigencies of local peoples and the ability or not of property owners to enforce the protection of lands with the threat of violence.

11. Which of course, underscores the primary cultural and ideological problem of in-

INDIGENOUS RIGHTS AND TERRITORIAL RIGHTS

It is precisely the indigenous peoples living sustainably according with their traditions who are most likely to have their long-standing territories become candidates for conservation parks—and most at risk of being evicted of their homeland due to their very history of responsible stewardship (Colchester 1994). While indigenous people are often praised as "stewards" of the lands they inhabit, and rightfully so, conservation plans have often targeted their lands to protect, as if the inhabitants were not doing a sufficient job protecting the lands themselves; or, in order to legitimate the lands of people written out of the legal-political order through infusions of capital and corporate power. This is evident in the fact that "about half of the land selected for protection by the global conservation establishment over the past century was either occupied or regularly used by indigenous peoples," with this figure soaring to eighty percent in the Americas (Dowie 2009, xxi). Survival International, an NGO representing Amazon indigenous peoples, criticizes private foreign conservation investment for providing armchair activists disarmingly simple carbon credit mechanisms because "their popularity 'diverts attention' from the more urgent need to return rainforest to indigenous people" (Jowit 2007).

Carbon markets so far have a tendency to treat *terra communis* as *terra nullius*. Celestial Green Ventures, a well-funded start-up in the voluntary carbon credit business, announced in early 2012 their acquisition of 20 million hectares of securitized Brazilian forest. Two million of these hectares to be "protected" for carbon credits were signed with the Yanomami tribe in Brazil, later to be nullified when the Brazilian government's National Indian Foundation (FUNAI) learned of this transaction (Lang 2012). These were lands the Yanomami had no immediate plans for developing *anyway*. This redundancy of carbon-credits isn't really preserving new or threatened lands, but instead is a for-profit financial scheme ostensibly giving carbon-emitting industries, companies, and individuals further rights to pollute without actually changing the on-the-ground situation.

Quoting from a 1991 New York Times article, Slater compares the dichotomous standing of two indigenous groups: "Whereas the 'Stone Age Yanomami' conjure up a primordial past, the Kayapó have eaten from the Tree of Capitalism occupying the jungle's verdant heart" (1995, 119). The Yanomami are counted as part of the fauna, barely human, and certainly not Brazilian citizens vested with the same rights as those who might wish to buy their land, while the Kayapó tribe is regarded as formidable and powerful, respected because of its savvy in becoming a *cause célèbre* for international NGOs.

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centive to take whatever one can and use up whatever is not nailed down. To combat the nature-as-resource one-dimensionality of the *terra nullius* worldview, CPR communities must be fostered.

In fact, in a country that has a history of marginalizing and treating its indigenous people as orphans of the state without rights, the Kayapó people of Brazil are an exceptional success story demonstrating the possibility for conservation from within rather than imposed externally. In the 1980s and early 90s the Kayapó faced "encroaching soy farmers, cattle ranchers, and gold miners" acting illegally to grab land regarded as *terra nullius* (Dowie 2009, 203). But working with Brazil's Service for the Protection of Indians (SPI) and representatives of the World Wildlife Fund (WWF) to scrap the Altamira-Xigu River Complex dam, a $10.6 billion World Bank project planned for their territory, the Kayapó won the land rights to the 28.8 million acre Area Indígena Kayapó, a "green island in [the Brazilian state of] Para" that "is the one of the largest single expanses of closed-canopy rainforest in the world, a territory as large as Austria" (ibid., 201).

In the Brazilian context, an important May 2009 ruling by the Brazilian Federal Supreme Court demarcated the Raposa Serra do Sol reserve in the Brazilian providence of Roraima solely for indigenous peoples and began removing non-indigenous settlers (whom the government would compensate). The Chief Justice dismissed the enduring fear of loss of sovereignty over wild indigenous territories in an age of global commons as a "'sophism fed by politicians and farmers'" (Sheps 2010, 292). By granting this four-and-a-half million acre reserve exclusively to the native Macuxi, Wapixanas, Ingaricós, Taurepangs, and Patamonas and forcibly removing settlers, this case heralds a renewed possibility in Brazil to uphold communal lands against those who opportunistically view the land as merely *terra nullius*. This landmark case came after the State of Roraima unsuccessfully petitioned the Brazilian federal government to reduce the size of the native territory to allow for more economic use for the state and local prospectors, and rice farmers bitter about "excessive" indigenous land ownership had lashed out with violence at the indigenous population. "In response to conservative politicians' complaints that there is 'too much land for too few Indians,' previous supporters of indigenous rights have exposed the fact that one percent of Brazilian landowners control almost half of the country's surface" (Slater 1995, 123).

The success of the Kayapó and Raposa Serra do Sol in Brazil resurrects the *indigenato* designation of land, granting indigenous people in Brazil natural ownership of the land (*senhores naturais da terra*) that "cannot be understood as a mere occupation or possession" of land but is legitimacy "*per se*, not requiring any further acts to legitimize" ownership (Ackerman Sheps 2010, 288). While *terra nullius* and *terra derelicta* require active work invested in the land in order to gain ownership over it, the primary *indigenato* right makes no such requisite demands.[12]

12. Although the *indigenato* right is enshrined in the Brazilian Constitution under ar-

DISCUSSION

Max Weber observed that the liberties of modernity were exacted through the price of colonialism, the product of a unique set of geopolitical circumstances never to repeat. He asks, "how are freedom and democracy in the long run at all possible under the domination of highly developed capitalism" based on "overseas expansions?" (Weber 1948, 71–72).[13] Because of the distinct colonial context in which capitalism developed, the model of maintaining a continuous influx of resources beyond the carrying capacity of a given area breaks down when this model is no longer restricted to Europe but applied globally. The status quo of depleting ecological stock and then moving on to greener "available" pastures ceases to work when carried on over time and across greater areas. The problem, as Weber already encountered it in 1906, not only for capitalism but also for a freedom and democracy predicated on continuous economic growth, is simply that "there is no new continent at our disposal" (ibid.). Without a new *terra nullius* periphery from which to extract resources and funnel them back to centers of power, the very model must either evolve or self-cannibalize.

In a world subscribing to *terra nullius* norms, minimal impact and sustainability was and in many cases continues to be a liability rather than an asset in terms of retaining use and rights to one's territory. That is why programs such as REDD+ are so interesting as challenges to this received tradition, and may also explain why in part they have such trouble actually getting off the ground. Conservation regimes need the support and engagement of local people, whether indigenous people or peasants with customary land rights. The scale of conservation for REDD+ that the UN imagines, trillions of dollars of investment by the end of the decade, requires on-the-ground maintenance with buy-in from local people to support integrated community management.

Customary rights of people living in and around parks must be dealt with rather than simply revoked when a new tract of land comes up on the conservation block. Holmes's (2007) thorough treatment of the various forms of local resistance to conservation reserves excluding people enjoying a preexisting relationship with the land found many acts of explicit and implicit resistance and sabotage, including the wonton killing of animals and many cases of

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ticle 231, section 2o., some Brazilian scholars believe extensions of this right to be exaggerated maneuvers by the international community jockeying for international control over the Brazilian Amazon (Sheps 2010, 289n25). On the other hand, the International Labor Organization's Convention No. 169 dealing with the rights of indigenous and tribal peoples has made great strides in the so-far twenty ratifying countries. This Convention has effectively acted as a lever around the world to return land to indigenous peoples, free from stipulations of guided or necessary development.

13. For a similar point, cf. Ophuls (1995) and Dobson (2013).

arson where locals burned forests in protest of their denied access to them. Local resistance to conservation occurs when people who have traditionally or recently lived there are stripped of their hunting, farming, gathering, or other customary use rights without consultation.

Rather than repeating the violent process of deterritorializing and reterritorializing peoples according to market exigencies (Harris 2004), conservation presents the opportunity to defy outgrown ideas of mastery over nature and instead understand that a quality future depends on mutual interdependence rather than mutual exclusivity. Berkes tracks three conceptual shifts in ecological thinking that support the emergence of a *terra communis* ethic: "a shift from reductionism to a systems view of the world, a shift to include humans in ecosystems, and a shift from an expert-based to participatory conservation and management" (2004, 622). These approaches all work to deflate hubris and update the *terra nullius* view of lands and people.

CONCLUSION

Because of the powerful opportunistic incentive for those benefiting from its construction, "once *terra nullius* had been implemented, it could not be stopped" (Banner 2005b, 131). Be that as it may, in the context of conservation and indigenous rights, the recent oscillations between *terra nullius* and *terra communis* have disrupted status quo definitions of wild land, even if neoliberal policies and practices are remarkably resilient in reinscribing them.

While it is too early to identify the current changes as a decisive turn away from *terra nullius* conceptualizations, it is evident that valuation of ecosystems, wild land conservation, and indigenous land rights pose significant departures from previously held conceptions of the human-nature relationship, and wild land value and ownership. Ultimately, just as *terra nullius* operates through norms and laws, so too *terra communis* transformations are galvanized through networks and legal solidarity comprised of legal and political professionals, NGOs, local and indigenous peoples, scholars, and environmentalists committed to both sustainability and social justice.

Many issues have been touched upon here salient to the competing *terra nullius*-*terra communis* worldviews currently playing out in international environmental politics. And an attempt to elucidate some basic conceptual/ideological difficulties for an equitable and sustainable land regime to manifest has also been mounted. Nevertheless, many points demand further explanation elsewhere. Above all, rigorously proving the theory proposed here requires further research detailing the process of Dutch and Anglo-Saxon conceptions and practices of *terra nullius* integrating into the law of nations (*ius gentium*) and thus becoming the standard legitimizing discourse for land among competing European colonial powers, as well as delineating how this ideology

persisted in law and custom during the transition from colonial to post-colonial governments in Latin America. Further systematic assessments are also needed concerning the actual sustainability (or lack) and desires for industrialization of diverse indigenous groups. More analysis would also be required to extricate drivers of *terra nullius* outcomes: i.e., disentangling the obvious political and economic dimensions of competing sovereignties and short-term economic gain from bona fide *terra nullius*-based ideology and assumptions.[14] Nonetheless, in preliminarily tracing present land-use bias to legitimizing colonial discourses, my intention is to have piqued curiosity about how our inherited historically-contingent assumptions color current notions of nature, culture, and domination.

The *terra nullius* discourse continues to influence how we use and conceptualize categories such as property rights, performances of ownership, designations of political sovereignty and personhood, and land value. At the same time, the reassertion of indigenous peoples' rights and traditional land practices recognized by states, serious consideration of common pooled resource arrangements, and community-based conservation nurtures a *terra communis* countertrend serving as a compelling sustainable option for people and the environment.[15]

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14. An adequate treatment of this relationship would also investigate how social movements, economic and political demands, and juridical concepts interact.

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