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Eve Darian-Smith “Who Owns the World? Landscapes of Property, Sovereignty, Dispossession”

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Who Owns the World? Landscapes of Sovereignty, Property, Dispossession

by Eve Darian-Smith[\[1\]](#)

Abstract

This essay engages with the concept of the global commons in the context of politics surrounding climate change and environmental degradation. Global commons rhetoric is becoming increasingly evident in a wide range of social movements that seek to protect the oceans, atmosphere and biodiversity. There is a growing sense that these resources are collectively shared and owned by everyone. At the same time, and working in the opposite direction, elite companies and countries are buying up land and resources on a massive scale. In what ways is the concentration of land possession in the hands of a few shifting debates about national sovereignty, individual rights to property, and the constitution of a global commons? Reflecting on the politics of resistance to the Keystone XL Pipeline, this essay picks up a question that has ever increasing urgency in our contemporary era – who owns the world and, relatedly, who has the capacity and authority to determine, defend, modify and resist the western-based legal concepts of ‘property’ and ‘possession’?

The question ‘who owns the world?’ presents contradictory responses about the nature of ownership itself. On the one hand, how can ownership at the scale of the planet be anything but absurd in its imposition of an entirely anthropocentric concept on something that cannot be governed or controlled? On the other hand, maybe everyone does or should own some elements of the world (e.g. the atmosphere). But how would that form of possession be defined and imagined? More pragmatically, how could the Anglo-American legal system deal with the concept of collective ownership of the atmosphere and translate it into some sort of regulatory framework? In this essay I play with the contradictory responses to ownership of the global commons as they emerge in the context of the politics surrounding climate change and environmental degradation.[\[2\]](#) As the shared property of humankind, the concept of the global commons forces us to reflect upon our rather limited state-based property laws. In my view, it is this very limitation of conventional western legal frameworks and concepts of ownership that makes the idea of a global commons so timely, interesting and provocative.

With rising awareness of environmental impact on human behaviors and available resources such as water and food, there is a gathering sense that perhaps some elements such as the atmosphere and oceans should really belong in some fundamental way to a collective humanity. The concept of global commons suggests that every person, irrespective of class or status or nationality, has access to and enjoys a common resource. The global commons builds upon a more familiar concept of the open commons which generally refers to such things as public lands, national parks and beaches, and the open access public domain that includes language, internet, unformed ideas, opinions and so on. In theory, these properties and things are open to the public who cannot be excluded from use and access.[\[3\]](#) In practice, however, there are many instances in which certain lands are cordoned off to select sub-sets of people, or access denied on particular grounds of justice, morality or risk (e.g. child pornography on the internet). In short, open access commons are not static or fixed and are constantly being both expanded and diminished according to the political will of national governments and the respective values of their populations.

Open commons are typically owned by governments representing the public at large, and are primarily regulated by national laws of property and intellectual property. National laws are supplemented by international treaties precluding the appropriation of such things as the deep-sea bed and outer-space, and international agencies such as UNESCO which designates certain sites part of a World Heritage. However, it is becoming increasingly evident that inter/national property laws and treaties are of limited application when it comes to thinking about the global commons and ensuring protection and access for the world's population to resources that may not be limited to any one country or reflect the geopolitical borders of nations. As state and non-state actors increasingly encroach upon some open commons (through fishing, mining, polluting and so on), managing the global commons becomes enormously complicated. One only has to think of Japan's Fukushima Daiichi nuclear disaster in 2011, and the global impact of radioactive waste in the oceans and atmosphere, to appreciate the scale of the problem and our current legal and political inadequacies.

In the first part of this essay I explore the emergence of global commons rhetoric in the United States. I then contrast this rhetoric about global ownership with a counter phenomenon occurring around the world which is the concentration of land, resources and possessory rights into the hands of a very few. This concentration of rights points to what some scholars have called the 'second enclosure' movement.^[4] I then explore public resistance to the Keystone XL Pipeline as a site in which global commons rhetoric was actually performed, in turn animating the concept of the global commons in North American political discourse. Finally, in interrogating the 'global' I suggest that thinking about what constitutes the global commons underscores the limits of our modernist liberal paradigm and western worldview. I argue that taking seriously the concept of the global commons suggests new sets of social relations, new ways of looking at ourselves in the world, and new configurations of a public/private sphere that decenter our dominant state-centered legal orders and offer up new spaces of legality and norm-making.^[5]

Emerging global commons rhetoric

While the idea of an open commons may be familiar in some societies and cultures, it is exceptionally rare in US market-led politics that has been entrenched for over four decades in the ideology of neoliberalism, privatization, individual gain, and exclusive property rights – all antithetical to the idea of a shared public good. In recent years, three notable events have occurred of great significance to people living in the United States. Together these events have introduced the concept of the global commons into mainstream media, underscoring the idea of common pool resources to be shared by everyone irrespective of race, class, gender or religion.

The first of these events occurred in November 2014. This was the announcement of an historic China/US agreement between Presidents Xi Jinping and Barack Obama setting limits and reductions on carbon emissions in an attempt to protect a shared global resource, the earth's atmosphere. The departing European Union climate commissioner, Connie Hedegaard, said that halting the growth in Chinese carbon dioxide emissions would 'be a very important gift from China to the whole world'.^[6] The second of these events occurred a year later on 6 November 2015. This was the declaration by Obama that the final phase of the Keystone XL Pipeline would not be approved. After six years of review the TransCanada Corporation was blocked from running pipes from Alberta into Montana and South Dakota and through to Steele City in Nebraska which were

planned to transfer up to 830,000 barrels of crude oil a day. The third of these events occurred approximately a month later in December 2015 and was the culmination of two tense weeks at the UN Climate Change conference in Paris. The conference negotiated a global agreement to reduce greenhouse gas emissions and make every effort to prevent temperatures from rising more than 1.5 degree Celsius over the coming decades. The Paris Treaty represented a consensus by the 196 countries attending, and was endorsed in April 2016 with the signatures of 175 of those countries.

President Obama's pronouncements to protect the earth's atmosphere, to defend the lands and water tables running across the American heartland, and to pledge the country's support to reduce climate change have been met with both enormous pleasure and a great deal of outrage. Obama's introduction of the concept of global commons into mainstream media has been loudly praised by environmentalists and those on the political left, while on the political right it has been condemned by a range of corporations, big energy producers, and Republican leaders who claim Obama's actions will stifle innovation and growth, reduce jobs and ultimately hurt the economy.^[7]

Whether Obama's actions will be adequate to help cut global carbon emissions and reduce environmental degradation is anyone's guess. What I wish to focus on in this essay is how the President's actions have surprisingly, and I think very excitingly, revitalized the concept of the commons – and specifically a global commons – in everyday conversations. This emergence of an open commons rhetoric is surprising because over the past four decades the concept of the commons, the idea that there are things owned by no one and shared by everyone, has been virtually eviscerated in the United States. But as more and more people have come to accept that climate change and rising seas implicate in very alarming ways the stability of wealthy industrialized states, there has emerged a low-key yet perceptible shift in political conversations, especially amongst younger people.^[8] Obama's pronouncements since 2014 have brought these peripheral conversations about the value of protecting common pool resources front and center. As one of the world's major superpowers where the free-market private sector reigns supreme, these pronouncements are really quite remarkable and open up a range of new questions in the US media: What exactly are the commons? How have the commons been historically managed? Does animating the idea of the commons reinforce liberal notions of property, individualism and the divide between private and public? Or does the idea of common pool resources in the 21st century challenge these modernist ideals and present new relations between people that are not contained and constrained by nation-states? Finally, when thinking about the management of global commons, what are the implications for countries in terms of power-sharing, cooperative sovereignty, democracy, or even what count as authorized regulatory processes? What about non-state communities and their different ways of managing resources beyond those envisaged by dominant western societies?

Pluralizing legal spaces and subjectivities

This essay is not meant to provide solutions or a programmatic way forward, but rather intended as a provocation to thinking about law in the 21st century under conditions of legal plurality that involves, amongst other things, elements of postnationalism, postcolonialism, posthumanism, and postsovereignty.^[9] Thinking about the global commons provides an opportunity to reflect upon new spaces of legality and correspondingly new modes of collective political and social activity that may not be bound by the horizons and logics of nation-states. These new modes of activity

may also highlight the inadequacies of a dominant western legal framework that has enabled our current era of growing global inequities, oppressive finance capitalism, and explicit dispossession and displacement of the majority of the world's population.

With respect to reflecting about new forms of politics I take a cue from the work of Ernesto Laclau and Chantal Mouffe and specifically the last chapter in their influential yet controversial book *Hegemony and Socialist Strategy*. It should be remembered that this book was written in 1985, just as Ronald Reagan and Margaret Thatcher had been re-elected for a second term, but before the fall of the Wall, before the internet, before climate change was identified, before unending wars on terror, and well before conversations about globalization and its impacts. In this book Laclau and Mouffe wrote about new democratic struggles in what they called 'a plurality of political spaces'. In explaining this term, Laclau and Mouffe argue that original forms of democratic thought were always linked to the state. And within the state was 'constituted a public space linked to the idea of citizenship'.^[10] In contrast, they identified more radical forms of politics that would transcend Marxist class analysis and 'broaden the domain of the exercise of democratic rights beyond the limited traditional field of 'citizenship''.^[11] In a remarkable passage Laclau and Mouffe wrote – and remember this is 1985:

What we are witnessing is a politicization far more radical than any we have known in the past, because it tends to dissolve the distinction between the public and the private, not in terms of the encroachment on the private by a unified public space, but in terms of a proliferation of radically new and different political spaces. We are confronted with the emergence of a plurality of subjects, whose forms of constitution and diversity it is only possible to think if we relinquish the category of 'subject' as [citizen].^[12]

Today in much scholarship there is increasing attention given to the plural spaces of political engagement – and here I am thinking of the works of human geographers such as Doreen Massey and David Harvey who have in turn inspired a generation of spatially-oriented critical sociolegal thinkers such as Lauren Benton, Nick Blomley and David Delaney. Together these scholars highlight the need for all sociolegal scholarship to take seriously the spatial challenges – be these physical, metaphorical, or symbolic – to prevailing normative understandings of law and justice.^[13] It is in the context of these emerging conversations about law and space that the concept of the global commons presents one way of thinking about how a 'plurality of subjects' and 'proliferation of radically new and different political spaces' – including those conventionally designated public and private – are being reconfigured in our contemporary historical moment.

Expulsions and dispossessions

Emerging conversations about the global commons and resource sharing are rising in prominence in tandem with another phenomenon that appears to be working in exactly the opposite direction. This second phenomenon is the enormous rush to grab lands in Africa, the Americas and around the world by rich countries and elite corporations anxious to secure food production and exclusive rights to natural resources and biodiversity. This land rush involves what some are arguing is an unprecedented enclosure of the commons, and involves the mass dispossession of peoples of their lands in a literal sense, as well as spiritually and psychologically displacing people from their sense of place.

Saskia Sassen in her book *Expulsions: Brutality and Complexity in the Global Economy* (2014) writes that we have entered a new era of capitalism in the 21st century. The post WWII era, she argues, was ‘driven by a logic of inclusion, by concerted efforts to bring the poor and marginalized into the political and economic mainstream’. But, she goes on, the ‘nation-based assumptions underlying this project of building the just society began to crumble toward the century’s end’.[\[14\]](#) Today, Sassen argues, the costs for maintaining functioning societies are antithetical to the economic logics driving financial markets. And as a result, today’s pervasive economic system is creating disposable populations expelled from civil and political life outside the protections of law and state.[\[15\]](#)

It is hard not to take Sassen’s argument very seriously. For what we are currently experiencing is the undoing of the liberal welfare state system and the dismantling of the middle classes that includes the crushing of failed states (such as Greece and others in the global south through IMF and World Bank structural adjustment schemes), the promotion of unending regional wars and remote drone warfare, the incarceration of millions in for-profit jails, the abandonment of asylum seekers on boats in the Mediterranean sea, the escalation of massive permanent refugee camps around the world, and the slow violence of environmental degradation and climate change.[\[16\]](#) As noted by the Office of the United Nation’s High Commissioner for Refugees in a 17 June 2015 report, there are now more on the run from oppression and more refugees in the world than at any time since the staggering figures of post-WWII. The report notes that nearly 14 million people were newly displaced in 2014 alone, and this figure includes 11 million people who are scattered within the borders of their own countries, the highest recorded in the UN agency’s 50 year history.

What this cumulative vision underscores is that in all of these instances people are being expelled – literally and figuratively – from public life. Many of these people have been abandoned by their countries, have no recourse to national or international laws, and will probably live their lives expelled from state protections and capacities to access laws of any sort. This horrific reality is driven by the new logics of finance capitalism that sees more value in land and natural resources than in people’s value as workers and consumers which were the hallmarks of an older form of market capitalism.[\[17\]](#)

While some commentators see the mass dispossession of peoples from lands, cultures and opportunities as reflecting the new logics of finance capitalism, other scholars see this recent form of dispossession as the latest iteration of colonial forms of oppression that emerged primarily in the 18th century. In an important special journal issue, *Reflections on Dispossession*, Brenna Bhandar and Davina Bhandar explore the dialectical relationship between capital accumulation and the logics of dispossession on which capitalism is ontologically and epistemologically founded.[\[18\]](#) They interrogate the constitutive interrelations of self-possession and dispossession, and embedded notions of freedom and slavery, that are historically encapsulated in the idea of a self-determining individual capable of owning their body and mind as property. They write:

To be dispossessed of one’s home, land, territory, means of subsistence, history, language, and sense of self has been a defining experience of much of the world’s population in the modern era. The global reaches of imperialism have not been relegated to a distant past, but are a networked legacy instrumental to shaping contemporary forms of modernity. Yet the acceleration of dispossession, and the extension of its grasp in contemporary late capitalism have produced its


own cultural logics, affects and ways of being, which we refer to here as ‘cultures of dispossession’.[\[19\]](#)

Bhandar and Bhandar argue that ‘cultures of dispossession have become an intrinsic part of living in capitalist societies’.[\[20\]](#) If that is correct – and I think that it is – then how is it possible to reconcile historical and contemporary practices of exclusion and displacement (of migrants, refugees, indigenous communities, marginalized poor and racialized and criminalized minorities) with the idea of the global commons and collective sharing of air, water, natural resources, biodiversity, outer space, knowledge, experience etc.? Doesn’t the very idea of global commons contradict the historically embedded capitalist logics of dispossession? How can the ‘propertyless’, ‘homeless’ and ‘stateless’ make a claim to owning anything? Moreover, doesn’t a claim to global ownership transgress the normative private/public divide that crystallized around the legal concept of exclusive ownership rights to private property?[\[21\]](#) As suggested at the outset of this essay, President Obama has introduced these questions, perhaps inadvertently, to the general American public in a cluster of acts defending the earth’s lands, waters, atmosphere and biodiversity. Significantly, these questions fly in the face of a society that has built its nationalist identity on an ideology of ‘manifest destiny’ that involved conquering ‘nature’ and possessing and exploiting land, slaves and indigenous peoples.[\[22\]](#)

INDIAN LAND FOR SALE

GET A HOME
OF
YOUR OWN

EASY PAYMENTS



PERFECT TITLE

POSSESSION
WITHIN
THIRTY DAYS

FINE LANDS IN THE WEST

IRRIGATED GRAZING AGRICULTURAL
IRRIGABLE DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SEALED BIDS ALLOTTED INDIAN LAND AS FOLLOWS:

| Location. | Acres. | Average Price per Acre. | Location. | Acres. | Average Price per Acre. |
|--------------------|-----------|----------------------------|--------------------|------------|----------------------------|
| Colorado | 5,211.21 | \$7.27 | Oklahoma | 34,664.00 | \$19.14 |
| Idaho | 17,013.00 | 24.85 | Oregon | 1,020.00 | 15.43 |
| Kansas | 1,684.50 | 33.45 | South Dakota | 120,445.00 | 16.53 |
| Montana | 11,034.00 | 9.86 | Washington | 4,879.00 | 41.37 |
| Nebraska | 5,641.00 | 36.65 | Wisconsin | 1,069.00 | 17.00 |
| North Dakota | 22,610.70 | 9.93 | Wyoming | 865.00 | 20.64 |

FOR THE YEAR 1911 IT IS ESTIMATED THAT 350,000 ACRES WILL BE OFFERED FOR SALE

For information as to the character of the land write for booklet, "INDIAN LANDS FOR SALE," to the Superintendent U. S. Indian School at any one of the following places:

| | | | | | |
|---|---|--|---|---|---|
| CALIFORNIA: Hoopa. COLORADO: Igouah. IDAHO: Laywal. KANSAS: Sallis. Nadana. | MINNESOTA: Onigum. MONTANA: Crow Agency. NEBRASKA: Macy. Sallis. Winnebago. | NORTH DAKOTA: Fort Totten. Fort Yates. OKLAHOMA: Anadarko. Cantonment. Calumet. Darlington. Muskogee, W. & A. Pawnee. | OKLAHOMA—Con. See and Fox Agency. Shawnee. Wendotte. OREGON: Emaneth Agency. Pendleton. Roseburg. Stietz. | SOUTH DAKOTA: Chayenne Agency. Crow Creek. Grosswood. Lower Brule. Pine Ridge. Reserved. Siaston. | WASHINGTON: Fort Simcoe. Fort Spokane. Tolma. Tulalip. WISCONSIN: Ossida. |
|---|---|--|---|---|---|

WALTER L. FISHER,
Secretary of the Interior.

ROBERT G. VALENTINE,
Commissioner of Indian Affairs.

Figure 1: United States Department of the Interior advertisement offering 'Indian Land for Sale'. The man pictured is a Yankton Sioux named Not Afraid Of Pawnee. 1911.

Carving up the commons today

The idea of the global commons includes elements that are arguably held by all humankind such as biodiversity, genes, peace, cultural assets, the earth's atmosphere and so on. [\[23\]](#) Against this inclusive conceptualization, we are concurrently experiencing the privatization and enclosure of common pool resources all over the world – in the massive land grabs that have taken place across the global south in the name of development, in the privatization of water, the corporatization of food, the commodification of public space, fisheries and oceans, as well as the commodification of a range of cultural assets and intellectual properties.

As the concept of the commons is stretched beyond tangible resources such as land and water, so too are the mechanisms used to enclose them. We can see this in the commodification and economizing of almost everything: in the privatization of creative works, information, and

knowledge, in the corporatizing of universities, the monopolizing of indigenous knowledge and experience, and the patenting of ‘bacteria, genes, living tissue and both natural and bioengineered life-forms’.[24] Together these forms of enclosure are creating a pervasive cordoning off of public goods that amount to what David Bollier has described as ‘the silent theft and private plunder of our common wealth’.[25] Legal scholar James Boyle calls the enclosing of the public domain the ‘second enclosure movement’ of late modernity which may, like the first enclosure movement, have detrimental consequence.[26] Boyle laments, ‘We rush to enclose ever-larger stretches of the commons of the mind without convincing economic evidence that it will help processes of innovation and with very good reason to believe it will actually hurt them’.[27] Yet as the property law scholar Margaret Davies notes:

The scholarship on new enclosures and the public domain can give the impression that an ever-increasing slice of the finite pie which is the world’s tangible and intellectual resources is being reduced to property. In some contexts this is undoubtedly true, but a broad historical perspective presents a more complicated picture of shifting demarcations between objects and subjects of property, between public, common and private domains, and between things which are regarded as available for human exploitation and those which are not.[28]

In conjunction with the complexities associated with the so-called second enclosure movement is the shifting role of the nation-state. Historically, governments would hold some common resources on behalf of the populations. The state was seen as the protector or trustee of common goods such as water, national parks and beaches. Today, however, the state is typically regarded as working with corporations in exploiting the commons at the expense of ordinary people. National governments all around the world have allowed the privatization of what was formerly thought of as publically-owned resources. This has resulted in the conflation of public (i.e. state) with private (i.e. private market sector), creating in turn a deliberately ambiguous economic sphere that is both decentralized and largely unaccountable. In this context Wendy Brown notes, ‘The economization of everything and every sphere, including political life, desensitizes us to the bold contradiction between an allegedly free-market economy and a state now wholly in service to and controlled by it’.[29]

The conflation between state and market, public and private, is most evident in huge extractive industries and land grabs in Africa and Latin America that are enabled by countries such as the US, China, Russia and Australia.[30] Importantly, the dominant Anglo-American international legal system facilitates the appropriations and exploitation of the global commons. Nicole Graham in her book *Landscape: Property, Environment, Law* (2011) talks about the ‘dephysicalisation’ of property in modern Anglo-American law which treats property as an abstract right rather than a material thing and place. As an abstracted property right, disconnected from people and places, property law can be applied across space and time and was essential in earlier processes of European colonization and appropriation of foreign territories. Today, the dephysicalisation of property law enables companies to purchase land around the world and win legal actions against local communities fighting the takeover of their territories, resources and embedded cultural and social identities. As Graham argues, the dominant legal conceptualization of property leaves little room to recognize people-place relations, which are involved in many conflicts about land and ecosystems currently unfolding around the world. She writes: ‘The strangeness and crises of people-place relations prescribed by modern law are increasingly evident from disputes over

property rights where what has been lost has not been the right, but the place'.^[31] In some cases places are literally wiped from the face of the earth with the building of mega dams, the mining of mountain tops, and the deforestation of rainforests. As places disappear, the embedded social economies and culturally based people-place relationships are also obliterated. People are physically, psychologically, and symbolically dispossessed from their way of life and being in the world.

Surrounding the politics of climate change, it seems that on the one hand we have calls across a spectrum of social movements and non-state actors to imagine a new kind of global commons. This global commons would be truly open, and in belonging to humankind would work in the best interests of an interconnected and interdependent global population. But on the other hand we have an overwhelming global market system that through the abstraction of property law is implementing a 'second enclosure movement', resulting in turn in the physical and psychological dispossession of millions of ordinary people. This suggests that emerging demands to protect the global commons and the pressing realities of global dispossession are mutually constitutive and historically interlocking processes that are finding themselves in increasing tension under 21st century late capitalism. This returns us to the earlier discussion on 'cultures of dispossession' whereby the global displacement of millions is the result of today's capitalist system grounded in colonial histories of dispossession, racialization and violence.^[32] This highlights a profound dilemma. Proposing the protection of the global commons as a response to halting climate change and environmental degradation critiques, but does not displace, the capitalist system and its logics of dispossession that make such a solution necessary in the first place.

For this reason, some indigenous communities will not support the idea of a global commons since it means embracing the logics of capitalist accumulation and affirming colonial histories of indigenous dispossession on which capitalism advanced.^[33] For these indigenous communities, there is nothing to be held in common with former colonizers and there is no desire for any form of collective ownership or stewardship. Rather, for these communities the objective is to refuse liberal recognition and reclaim their ability for self-governance through the returning of lands, places, resources, histories, laws, languages, memories, legacies and knowledge that was taken away from them in the first place. In other words, their historical loss is not a common loss to be recognized and 'restored' by liberal states through international law for the benefit of all of humanity, but a particular loss implemented on them through policies of explicit racism and genocide that structurally endure into the 21st century.^[34]

The 'politics of refusal' held by some indigenous communities stands in stark contrast to other indigenous communities that may be in favor of, or see little alternative to, pursuing reconciliation and collaboration with former colonizers. As discussed below with respect to resistance to the Keystone XL Pipeline, the indigenous communities involved in this case fell into the latter group and regarded the rhetoric of the global commons as a political and legal platform through which to effect social change. How to reconcile these differences amongst and across various indigenous communities in settler states and elsewhere is beyond the scope of this essay. But these differences are important to keep in mind when discussing the concept of the global commons since they temper the argument that protecting global commons is in the best interests of the world's population. We should not forget that what one person may think of as a restored 'global commons'

may for another be a stolen ‘local particularity’ on which their identity, culture, livelihood and future depends.

These debates also highlight the slippage between truly open global commons and limited commons whereby some people are excluded from access. We can see this slippage in the establishment of world heritage sites which are typically considered to be open commons, protected and preserved for a global humanity. But as was the case of the Yosemite National Park (established in 1890 and designated a World Heritage site in 1984), the Ahwahneechee tribe of the Yosemite Valley was run off the land in order to create a pristine natural landscape for mostly non-indigenous visitors to enjoy.[\[35\]](#)

Performing the global commons – Keystone XL Pipeline

The Keystone XL Pipeline controversy presents a moment in which a range of non-state actors resisted a powerful transnational corporation and in the process affirmed the value of what Nicole Graham calls ‘people-place’ relations.[\[36\]](#) Putting it another way, the Keystone XL Pipeline controversy played a powerful political and symbolic role in shifting the popular imagination in North America around notions of common lands and intertwined common futures. What was at stake was not just the lands upon which the pipeline was to run, but a new understanding of how the pipeline would impact a range of global commons including the atmosphere, ground water, and biodiversity.

The Keystone XL Pipeline was the fourth and final phase of a project commissioned by the TransCanada Corporation to run a pipeline from Alberta (Canada) to refineries in Illinois and Texas (United States). The Keystone XL Pipeline was proposed to run through Montana and South Dakota to Steele City in Nebraska and was planned to transfer up to 830,000 barrels of crude oil a day. For various reasons, including TransCanada’s poor record of project management and pipeline ruptures, the project met with considerable opposition in the United States (and Canada) by Democrats, environmental activists, farmers, tribal communities, and the general public. Of particular concern was that the route travelled over the Sand Hills in Nebraska which is a wild and fragile prairie and was designated a National Natural Landmark in 1984 for being the largest wetland ecosystem in the United States. Environmental concerns were also a great worry to the many Native American tribes whose reservations are crossed by proposed pipeline routes. Indigenous peoples cannot forget centuries of colonialism, and specifically remember dispossessing land grabs by white farmers in the 19th centuries as well as decades of non-compensation for the dumping of toxins on reservation land that has polluted water and created genetic disorders among their children across generations.[\[37\]](#)



Figure 2: An estimated crowd of 35-50,000 gathers near the Washington Monument on Feb 17, 2013 to protest the Keystone XL Pipeline and support action on climate change. 17 February 2013. https://commons.wikimedia.org/wiki/File:13feb17_nokxl_dc.jpg

Public demonstrations and opposition to Keystone persisted for five years and involved groups from Canada, across the United States, and many international organizations (Figure 2). During this time activists of many stripes and affiliations organized marches and demonstrations and mobilized global media to bring worldwide attention to the negative potentials in terms of oil spills and greenhouse gas emissions of the Keystone project. These groups did not agree on every issue but they all agreed that the pipeline would cause damage now and in the future and should be stopped. Perhaps one of the most unlikely of these coalitions was the [Reject and Protect](#) march, a five-day gathering of the Cowboy/Indian Alliance in Washington DC in April 2014 (Figure 3). This alliance brought together indigenous and non-indigenous peoples – those who had historically taken land and those who were historically dispossessed of it – in ‘truly unprecedented ways’. As noted by one native participant at the demonstration, ‘It’s no surprise to me that mother earth is what’s bringing us together – literally on common ground.’ [\[38\]](#)

In a passionate plea to President Obama, Wiowey Najin Win, Director of Owe Aku, a grassroots organization of the Lakota people, urged Obama to be visionary:

The KXL can contaminate the ground water and surface waters with not only its vile tarsands oil but the many lethal and deadly chemicals mixed with it... Common sense tells an intelligent person that the KXL tarsands pipeline is a black snake with deadly venom that must be kept away from our lodges and our environment. Would you make the decision to allow a rattlesnake to live in your living room or the bedroom of your daughters and sons? ...Do not open the door to this

beautiful land and water to the black snake so that it can enter our lodges. It will not care or discern that it is a Lakota standing there or a white man standing there. The white farmers and ranchers are just as much at risk as we Lakota are...I urge you to see beyond the desire to be part of the backslapping good ole boy network of Fat Taker pleasing the appetite of insatiable greed...I urge you to be brave and visionary and not only stand apart from, but stand against, Fat Taker. [39]



Figure 3: Reject and Protect Demonstration, Cowboy Indian Alliance to stop Keystone XL Pipeline. Washington D.C., April 22, 2014. Photo taken by Mary Anne Andrei. https://picasaweb.google.com/lh/photo/uGB7Cu_S_0CXqJF9vJ0v_dMTjNZETYmyPJy0liipFm0

With mounting public resistance and legal challenges, President Obama ultimately rejected the Keystone XL Pipeline on 6 November 2015. This was seen by many across the US and Canada and around the world as a major political and symbolic victory. Anti-Keystone activists had been effective in evoking a range of common interests in their united stand against the mining corporation's attempt to enclose lands and exploit natural resources, transforming 'perceptions of self-interest, making possible coalitions where none existed before'. [40] These coalitions had also been successful in subverting the paradigm of modern property law and its 'dephysicalisation' by presenting alternative people-place relations that prioritized local communities and their various interactions and connections with land. [41] Obama's siding with the activists and calling for the need to protect a collective global future affirmed a set of values at odds with finance capitalism and the maximizing of economic profit. By standing in alliance with a range of non-state actors in the form of environmental activists, social justice organizations, and anti-globalization social movements, Obama affirmed that another future is possible outside the free-market quick-profit logic that runs so deeply in American political discourse. [42]

Resistance to the Keystone XL Pipeline also marks another feature emerging around the world in the context of rising global dispossession, inequality, and precarious existence. This is what Judith Butler and Athena Athanasiou call the ‘performative in the political’ in which disenfranchised communities come together, often in desperation, to assert their collective stance against exploitation, discrimination and erasure. In their book *Dispossession: The Performative in the Political* (2013), Butler and Athanasiou are concerned with how groups of people perform their dispossession, concurrently calling for new ways of belonging and being that do not necessarily hinge on the premise of property ownership and self-interested individualism.^[43] While Butler and Athanasiou don’t explicitly refer to the concept of global commons, their theorizing suggests that we can think of resistance to the Keystone XL Pipeline as the performing or enacting of the global commons. In this context, Athanasiou’s concluding words from the book seem most appropriate:

If there is a crowd, there is also a media event that forms across space and time, calling for the demonstrations, so some set of global connections is being articulated, a different sense of the global from the ‘globalized market’. And some set of values is being enacted in the form of collective resistance: a defense of our collective precarity and persistence in the making of equality and the many-voiced and unvoiced ways of refusing to be disposable.^[44]

Protecting the global commons

While there may be a rising consciousness about the global commons amongst ordinary people, protecting common pool resources presents distinct challenges in international law. Despite attempts, international law has not yet been able to provide an effective institutional framework to govern global common goods such as biodiversity, water, and the atmosphere, and other less obvious common resources such as global justice or a global public sphere. This is in large part because international law developed historically ‘as a system of norms regulating reciprocal relations between sovereign states’, hence locking out of most conversations non-state actors without claims to national sovereignty and who do not ground their claims within the liberal framework of self-possessing individuals.^[45]

Kathryn Milun explores this problem in her book *The Political Uncommons* (2010). She highlights the problems faced by an international legal system in attempting to govern global commons because, she argues, the very cultural logic inherent in international law is bound to state systems of governance that were built on the dispossession of indigenous peoples. Milun’s argument brings us back to the earlier discussion around Brenna Bhandar and Davina Bhandar’s ‘cultures of dispossession’ and the historically embedded capitalist logics of removal in contemporary societies. These cultural and capitalist logics seemingly preclude notions of collective relations to land outside a western property regime. Yet Milun is ultimately optimistic, arguing that we can learn from cross-cultural engagements with different forms of land tenure that are increasingly finding accommodation within mainstream law courts.^[46] This optimism is also evident in the very gradual accommodations being made to indigenous worldviews such as occurred in the drafting of the Universal Declaration on the Rights of Indigenous Peoples.^[47] The opening up of the Westphalian system is forcing new notions of global governance and shifts in how to understand geographical and intellectual property as a collective resource that does not necessarily demand exclusive access or control. As Francesco Francioni has written in the context of how best

to govern global common resources, this shift ‘compels a rethinking of sovereignty not only in terms of [it being the] ultimate locus of authority, but also as the indispensable source of power to effectively achieve the goal of respecting and protecting these ‘common goods’ in the general interest of humanity’.[\[48\]](#)

Rethinking of conventional legal concepts and legal relations is occurring as grassroots organizations around the world, and particularly in the global south, are increasingly demanding a say in the management of resources. These grassroots organizations champion what the Nobel-winning economist Elinor Ostrom argues in her book *Governing the Commons* (1990), namely that local communities may be the better solution in the managing of the global commons.[\[49\]](#) Admittedly, Ostrom’s argument is primarily about limited commons where a specific group or village has access to a particular resource. So Ostrom’s argument is not about truly open commons and over the years there have been critiques made of her work that suggest her use of community case studies have limited global application.[\[50\]](#) In other words, Ostrom’s argument does not easily translate to the concept of the global commons or to the expansion of the commons to include such things as genetic materials and knowledge that are not subject to exclusive use or scarcity reasoning. That being said, Ostrom’s contributions are significant in that she shows a range of alternative non-state solutions to resource management, arguing against the western presumption that only markets or centralized states are capable of managing common resources.[\[51\]](#)

In 2009 the World Social Forum issued a manifesto titled ‘Reclaim the Commons’, and many environmental, pan-indigenous, and new labor movements took up the theme of local self-determination. The World Social Forum and other international NGOs and organizations have been essential in nurturing a worldwide push-back against neoliberal market logics and the privatization of global commons. Sometimes these efforts have been successful, if only symbolically, such as the \$19 billion ruling against Chevron by an Ecuadorian court for polluting the region’s rainforest and its globally significant biodiversity. In other cases there is slow but real change, as with the adoption in a number of Latin American countries of the global guidelines on land tenure published in 2012 by the Committee on World Food Security. These guidelines include such things as respect for human dignity and gender equality.[\[52\]](#) These moments of pushback and resistance by non-state actors, while perhaps fleeting and unenforceable in the immediate sense are – I would argue – still immensely important in that they present alternative ways of being in the world. To put it in Butler and Athanasiou’s terminology of performativity, these moments provide opportunities for different enactments of political, economic, social, and cultural practice.[\[53\]](#) Implicit in the global commons rhetoric are different epistemologies and ontologies than those ‘implied by the neoliberal marketplace and state’.[\[54\]](#) These include different constructions of property, resources, possession, control, individualism and self-interest, as well as different spaces for alternative legal framings and social organization. Hence, argues Bollier, ‘The law of the commons represents something of a threat to formal law because its substance and legitimacy derive from the always-shifting social practices of the community’.[\[55\]](#)

Concluding comments

I like to think of struggles around the world against the enclosure of global commons not as Christopher Hill described resistance to the first enclosure movement – a *World Turned Upside Down* – but rather as a *World Turned Inside Out*. What we are increasingly experiencing – in both the global south and global north – is a new phenomenon whereby people who have historically been corralled and contained by nation-states as domesticated citizens are now being expelled from that framework and forced to challenge from an ‘outsider’ position the very western legal system and capitalist logic that sought to manage them in the first place. These outsiders – indigenous peoples and LGBTQ communities, as well as racially, ethnically and religiously marginalized groups – are ‘returning’ to demand a place at the decision-making table.[\[56\]](#)

Yet there is something new to the current moment with the numbers of the displaced and disenfranchised rapidly swelling as concentrations of power and possession settle in the hands of the very few. As the hollowing out of the middle classes continues, and the populations of the marginalized rise to include those who were historically the oppressors, opportunities are emerging for new coalitions such as the Cowboy/Indian alliance protesting the Keystone XL Pipeline. These new coalitions speak to what Laclau and Mouffe noted back in 1985, and which I referred to at the beginning of this essay, of the ‘proliferation of radically new and different political spaces’ and a ‘plurality of subjects’ that exist alongside the cultural logics of modern state-building and dispossession. These new spaces and subjectivities are opening up across a global/local spatial continuum and include actors that range from elite climate scientists to impoverished environmental refugees. Peasants, laborers, immigrants, indigenous peoples, and millions of the world’s poor are increasingly talking to each other through new media and organizing across space and time, cultures and languages, laws and religions.

However, it is important not to romanticize collective efforts that champion the global commons and resist environmental degradation and processes of dispossession. It is important to remember that the late capitalist system through which these collective efforts are being forged has not been dislodged, nor have western ‘cultures of dispossession’ been transcended.[\[57\]](#) What collective efforts and new coalitions do remind us of is that we now live in a postnational and postcolonial world and that our destiny may not be one of inevitable tragedy.[\[58\]](#) They also remind us that we need to include in any understanding of the global commons plural legal norms and non-state legal actors, as well as inclusive and dynamic concepts of sovereignty, property and collective forms of legal ownership. And somewhat counter-intuitively, since the global commons is a concept intertwined with deep histories of exploitative capitalism, embracing its promise also reminds us to give back to indigenous peoples who want it control over lands and resources that have been stolen. Perhaps most importantly, these moments of collective resistance to market logics and environmental degradation underscore new possibilities of being and relating in the world that question the taken-for-granted relationship between state and citizen, and the public/private, insider/outsider, lawful/lawless, propertied/propertyless distinctions that relation engenders.

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[2] Jeremy Davies, *The Birth of the Anthropocene* (Univ of California Press 2016).

[3] Margaret Davies, *Property: Meanings, histories, theories* (Routledge 2007) 64-6.

[4] James Boyle, 'The second enclosure movement and the construction of the public domain' (2003) 66 *Law and contemporary problems* 33; James Boyle, *The public domain: Enclosing the commons of the mind* (Yale University Press 2008).

[5] Boaventura de Sousa Santos, *Toward a new common sense: law, science and politics in the paradigmatic transition* (Routledge London 1995).

[6] Edward Wong, 'China's Climate Change Plan Raises Questions' (*New York Times*, 12 November 2014) <http://www.nytimes.com/2014/11/13/world/asia/climate-change-china-xi-jinping-obama-apec.html?_r=0>; accessed 30 May 2016.

[7] William Maudlin and Amy Harder, 'Obama Faces Obstacles to Emissions Deal with China' (*Wall Street Journal*, 12 November 2014) <<http://www.wsj.com/articles/u-s-china-agree-to-curb-greenhouse-gas-emissions-1415763692>>; accessed 30 May 2016.

[8] This has been particularly evident in the success of Bernie Sanders in his bid for the Democratic nomination in the 2016 campaign for president of the United States.

[9] Eve Darian-Smith, 'The Constitution of Identity: New Modalities of Nationality, Citizenship, Belonging and Being' in Austin Sarat and Patricia Ewick (eds), *Handbook of Law and Society* (Handbook of Law and Society, Wiley Blackwell 2015) 351-66.

[10] Ernesto Laclau and Chantal Mouffe, *Hegemony and socialist strategy: Towards a radical democratic politics* (Verso 2001) 185.

[11] Ibid 185.

[12] Ibid 181.

[13] See Eve Darian-Smith, *Laws and societies in global contexts: Contemporary approaches* (Cambridge University Press 2013) 167-83.

[14] Saskia Sassen, *Expulsions* (Harvard University Press 2014) 212.

[15] See Judith Butler, *Precarious life: The powers of mourning and violence* (Verso 2006).

[16] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011).

[17] Sassen, *Expulsions* (n 14) 10.

[18] Brenna Bhandar and Davina Bhandar, 'Cultures of Dispossession: Critical Reflections on Rights, Status and Identities' (2016) 14 *darkmatter Journal* .

[19] *Ibid* 2.

[20] *Ibid* 10. See also: David Harvey, *The new imperialism* (Oxford University Press, USA 2003); David Harvey, *Rebel cities: from the right to the city to the urban revolution* (Verso Books 2012); Judith Butler and Athena Athanasiou, *Dispossession: The performative in the political* (John Wiley & Sons 2013). With respect to settler colonial contexts see: David Lloyd and Patrick Wolfe, 'Settler colonial logics and the neoliberal regime' (2016) 6 *Settler Colonial Studies* 109; Lisa Ford, *Settler sovereignty: Jurisdiction and indigenous people in America and Australia, 1788-1836* (Harvard University Press 2010); Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge 2012).

[21] Joseph William Singer, *Entitlement: the paradoxes of property* (Yale University Press 2008).

[22] Amy S. Greenberg, *Manifest manhood and the antebellum American empire* (Cambridge University Press 2005); Figure 1.

[23] See Jane B. Holder and Tatiana Flessas, 'Emerging commons' (2008) 17 *Social & Legal Studies* 299.

[24] David Bollier, *Think like a commoner: A short introduction to the life of the commons* (New Society Publishers 2014) 74.

[25] David Bollier, *Silent theft: The private plunder of our common wealth* (Routledge 2013); Davies, *Property: Meanings, histories, theories* (n 3) 71.

[26] Boyle, 'The second enclosure movement and the construction of the public domain' (n 4); Boyle, *The public domain: Enclosing the commons of the mind* (n 4).

[27] Boyle, 'The second enclosure movement and the construction of the public domain' (n 4) 49-50.

[28] Davies, *Property: Meanings, histories, theories* (n 3) 76.

[29] Wendy Brown, *Undoing the demos: Neoliberalism's stealth revolution* (MIT Press 2015) 4.

[30] Charles Geisler, 'New Terra Nullius Narratives and the Gentrification of Africa's "Empty Lands"' (2015) 18 *Journal of World-Systems Research* 15; Ruth Hall, 'Land grabbing in Southern Africa: the many faces of the investor rush' (2011) 38 *Review of African Political Economy* 193.

[31] Nicole Graham, *Landscape: property, environment, law* (Routledge 2010) 185-6.

[32] Bhandar and Bhandar, 'Cultures of Dispossession: Critical Reflections on Rights, Status and Identities' (n 18).

[33] See Glen Sean Coulthard, *Red skin, White masks* (University of Minnesota Press Minneapolis, MN 2014).

[34] Audra Simpson, *Mohawk interruptus: Political life across the borders of settler states* (Duke University Press 2014); Coulthard, *Red skin, White masks*; Aileen Moreton-Robinson, *The White Possessive* (University of Minnesota Press 2015).

[35] Lafayette Houghton Bunnell, *Discovery of the Yosemite, and the Indian War of 1851: Which Led to that Event* (FH Revell Company 1892).

[36] Graham, *Landscape: property, environment, law* (n 31).

[37] See for instance the report filed by Zumila Wobaga, spokesperson for the Sioux Nation Treaty Council, on the uranium contamination of the Northern Great Plains of the United States, in November 2015 (United Nations General Assembly, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, Baskut Tuncak (Human Rights Council, A/HRC/27/54, 2014).

[38] See 'Cowboys and Indians Stand Together Against Keystone XL' (*National Geographic*, 14 May 2014) <<http://voices.nationalgeographic.com/2014/05/14/cowboys-and-indians-stand-together-against-keystone-xl/>> accessed 15 May 2016.

[39] Wiowey Najin Win, 'Testimony before the South Dakota Public Utilities Commission' 2015) <www.oweakuinternational.org> accessed 24 August 2016.

[40] Also: '...it is not enough merely to offer criticisms of the logic of enclosure. What is needed is deeper. We need a change in the way these issues are understood, a change that transforms even our perceptions of self-interest, making possible coalitions where none existed before' (Boyle, 'The second enclosure movement and the construction of the public domain' (n 4) 52).

[41] Graham, *Landscape: property, environment, law* (n 31).

[42] Boaventura de Sousa Santos, 'Another knowledge is possible: Beyond northern epistemologies' (2007) .

[43] Butler and Athanasiou, *Dispossession: The performative in the political* (n 20). See also: Davina Cooper, *Everyday utopias: The conceptual life of promising spaces* (Duke University Press 2013).

[44] Butler and Athanasiou, *Dispossession: The performative in the political* (n 20) 197.

[45] Francesco Francioni, 'International common goods: an epilogue' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International law for common goods : normative perspectives on human rights, culture and nature* (International law for common goods : normative perspectives on human rights, culture and nature, Hart Publishing 2014) 443, 444.

[46] Kathryn Milun, *The political uncommons: the cross-cultural logic of the global commons* (Ashgate Publishing, Ltd. 2011). See also: Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge 2014); Joshua Kleinfeld, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755.

[47] See however Moreton-Robinson, *The White Possessive* (n 34).

[48] Francioni, 'International common goods: an epilogue' (n 45) 447-8.

[49] Elinor Ostrom and others, 'Revisiting the commons: local lessons, global challenges' (1999) 284 *science* 278.

[50] David Harvey, 'The future of the commons' (2011) 2011 *Radical history review* 101, 103.

[51] Ostrom and others, 'Revisiting the commons: local lessons, global challenges' (n 49).

[52] For more information on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security see: <<http://www.fao.org/nr/tenure/voluntary-guidelines/en/>>;

[53] Butler and Athanasiou, *Dispossession: The performative in the political* (n 20).

[54] David Bollier, *The Future of the Commons: Notes from a retreat exploring the potential of the commons to fight enclosures and build commons-based alternatives* (2009) <<http://commonstrust.global-negotiations.org/resources/Bollier.%20Crottorf%20retreat.pdf>> accessed 24 August 2016.

[55] Bollier, *Think like a commoner: A short introduction to the life of the commons* (n 24) 85.

[56] James Clifford, *Returns* (Harvard University Press 2013).

[57] Bhandar and Bhandar, 'Cultures of Dispossession: Critical Reflections on Rights, Status and Identities' (n 18).

[58] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

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