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Property and the politics of belonging

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Abstract

Property is often associated with exclusion when, in fact, property relations deal
with exclusion and inclusion. The politics of belonging comprise social, political,
and legal discourses which deliberate and negotiate a socially acceptable mix of
exclusion and inclusion. The Working Paper examines monorational approaches
to theories of private and common property (among others, Locke, Blackstone,
Marx, Demsetz, Hardin, Ostrom, de Soto). Although monorational approaches can
be very convincing, they often do not work in the presence of many voices, many
rationalities. The theory of polyrationality—based upon the work of Mary Doug-
las—helps understand why property theories are more valuable for public policy
(e.g., planning and land use policy) if they consider plural rationalities. As exam-
pies of polyrational approaches to property, the Working Paper considers theories
by John Stuart Mill, Johann Heinrich Gottlob von Justi, and Thomas Humphrey

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‘We wants it, we needs it. Must have the precious. They stole it from us. Sneaky little hobbitses. Wicked, tricksy, false!’

Gollum (a.k.a. Smeagol)

Negotiating the politics of belonging

Belonging and rights

Inclusion and exclusion distinguish the self from the other and define belonging (B. Davy 2004). Unsurprisingly, belonging means different things to different people. Mary Douglas’ grid/group theory helps contextualize plural notions of inclusion and exclusion (Douglas 1982 and 1992; Douglas & Ney 1998). Hierarchists define belonging as obedience to the government or another established authority. An individualist hardly feels to belong unless she is free to choose her own actions and memberships; individualists belong by entering the competition of their choice. Egalitarians include each other through like-mindedness, but they also assert their community membership by excluding ‘the other.’ Applying grid/group theory to inclusion and exclusion does not seek to classify, for example, real estate corporations as hierarchical, rural villagers as egalitarian, or the owners of detached single-family houses as individualist. Grid/group theory rather examines how plural rationalities affect social situations: How does land management work if a real estate corporation, women in a rural village, or families in a suburban neighborhood negotiate inclusion and exclusion by emphasizing or neglecting certain aspects? Rarely, and perhaps just temporarily, are the politics of belonging only hierarchical, individualist, egalitarian, or fatalistic. This chapter reviews literature examples on land policy and property to find out how plural rationalities negotiate the politics of belonging.

Two meanings of land and belonging

In general, the politics of belonging comprise all institutions and practices determining who fits into a group, a local community, a society, a country—and who does not. The means of inclusion and exclusion are extremely diverse and encompass, among other things, international boundaries and passports, imagined communities and collective memory, sports clubs and cuisine. Creating many opportunities of fitting in, the politics of belonging can establish multiple inclusion (a
person belongs in many ways), yet also multiple exclusion (a person belongs in no way). Frowning upon a customer, who asks for gasoline instead of petrol, is a harmless expression of the politics of belonging. Equality standards of human rights or constitutional law often list criteria unacceptable to the politics of belonging, such as gender, origin, race, class, language, religion, political beliefs, or disabilities. Such equality standards often respond to widely reproached politics of belonging, for example, the anti-Semitic Nuremberg Laws in Nazi Germany, the ‘separate but equal’-doctrine in the United States, South African Apartheid, or the Indian caste system.

Land and belonging evokes at least two meanings. If a person or a use community own land, the land belongs to the owner as private or common property (Ellickson 1992). In this sense, land and belonging often evokes Western private property, succinctly captured by Honoré’s characterization of ‘the “liberal” concept of “full” individual ownership’ (Honoré 1961: 107). But with ownership in land, it also can be the other way round. We belong to the land because our inclusion into society depends on our access to desirable or, at least, vital land uses. In medieval Europe, unfree people were constrained to the land. Feudal law considered the serfs as glebae adscripti—bounded to the soil. Some countries grant citizenship to every-
body born within their territory, the so-called *ius soli*—literally, the right of land (Barbalet 2007: 497). Citizenship and property have much in common, and the allocation of nationality resembles the intergenerational transfer of property (Shachar & Hirschl 2007). Belonging to a country—may it be rich or poor—greatly influences what any individual can achieve in life. Displaced and expelled persons, who have lost their property in land, often not only grieve for an economic loss, but also the loss of their places of identity and memory (Barahona de Brito et al. 2001). The sense of belonging associated with being at home actually is a very significant aspect of inclusion, territoriality, and identity.

The two meanings of land and belonging diverge in conflicts between territorial sovereignty and indigenous land rights. Indigenous land rights often assume that a tribe or indigenous groups belong to the land (with the consequence that land cannot be alienated or seized by colonial powers). The idea has been emphasized as political argument in the land rights struggle of Aboriginal people in Australia:

> As land was not merely a source of sustenance but also a living spiritual entity, an inextricable part of the life of the tribe, the question of transfer or barter could never arise, for this would have implied the bartering of the very soul sustenance, the Dreaming, which would have been tantamount to suicide for the tribe. Not only did the land belong to them, but they belonged to it—now and for ever. (Gilbert 1973: 3)

The notion of a two-way relationship of belonging, tying together the land and its proprietors, can be legally significant. It is recognized in international law, for example, in the Western Sahara case (1975) by the Vice-President of the International Court of Justice, Judge Fouad Ammoun. In his dissenting opinion, he quotes Mr. Bayona-Ba-Meya, Senior President of the Supreme Court of Zaire, as saying that

> the ancestral tie between the land, or ‘mother nature’, and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. (International Court of Justice, 16 October 1975, Western Sahara, Advisory Opinion, I.C.J. Reports 1975: 12 [Judge Ammoun dissenting at 85–86])

Regarding land, the politics of belonging affect belonging as exclusion (‘This land is my land!’) as well as belonging as inclusion (‘I belong to this land!’). Stakeholders, who negotiate the politics of belonging, pursue plural goals—most prominently: political, civil, economic, social, and cultural—and they make assumptions about how to achieve their goals effectively, efficiently, and in a fair manner. The plural goals and assumptions sometimes find their way into land policy and property theory. This does not imply that a consensus emerges easily from plural rationalities. Neither Hardin (1968) nor Demsetz (1967) would conceive of property as an ‘ancestral tie between the land… and the man who was born therefrom’ (I.C.J. Reports 1975: 85). But Barnes (2006) and other egalitarian authors find the notion of common property as a natural right more convincing. The comparison of hierarchical, individualist, and egalitarian approaches to property suggests that no consensus can be produced by insisting on monorationality or that only one representation of property is correct. The accounts of Hardin, Demsetz, or Barnes (and many other authors in property theory) may be incompatible, yet are neither irrational nor obviously false.
The politics of belonging, as applied to property in land, involve rights: The right of the private landowner to exclude others from trespassing, the right to enjoy private property without unreasonable interferences from the government, the right not to be excluded from using a spatial commons, the right to minimal property. Since domestic property law varies between jurisdictions, land policy profits from values and meanings emerging from international law and other global discourses on property in land. Universal human rights are a suitable framework for analyzing the politics of belonging in land policy. Human rights are not always binding law or provide legal remedies for each person, but universal human rights are a global consensus on inclusion and exclusion which requires that stakeholders with plural rationalities constantly negotiate its meaning in specific cases. In this sense, ‘human rights are social constructions, not eternal verities’ (Dean 2007: 9).

What are the implications of universal human rights for land policy and the politics of inclusion and exclusion? Most importantly, the Universal Declaration of Human Rights covers belonging both as exclusion and inclusion (Simpson 2001: 757). Everybody has the right to own land (Article 17 UDHR) and, absent a legitimate reason for public use, the government must respect private property in land. Article 17 UDHR not only tolerates, but directly endorses property relations restricted to private owners and excluding everybody else from using private land without the owner’s permission. Although the right to property has been written into neither of the two international covenants (ICCPR, ICESCR), subsequent human rights treaties confirm the protection of property of racial minorities (Article 5 CERD), women (Articles 15 and 16 CEDAW), migrant workers (Article 15 CRAM), and people with disabilities (Article 12 CRPD). Some regional human rights laws protect private property (Article 1 ECHR_P1). International law also promotes the idea of minimal property. The distribution of land rights never must amount to the total exclusion of anybody from vital land uses. Minimal property is a legal claim against States Parties under Article 11 ICESCR, but still a moral claim based on the Universal Declaration: If persons are deprived from access to vital land uses, the government must fulfill their right to an adequate standard of living (Article 25 UDHR; Eide & Eide 1999). The access rights to vital land uses, promoted by human rights law, confer minimal property on every human (B. Davy 2009).

Owning land, even if only in the form of minimal property, facilitates social inclusion. The politics of belonging control when to open up or close the access to land uses: Land policy and property law then assign land use rights to certain individuals or groups (inclusion) and, simultaneously, determine who has no access to land (exclusion).

- Private property includes the landowner (proprietor) and every person, who the landowner admits to her land. Family members and friends are often informally admitted. Business partners, tenants, and other persons, who derive their right of access to land from the landowner’s private property right, often enjoy inclusion through a pre-contractual relationship or as party to a contract with the owner.
• Common property includes the members of a use community composed of everybody, who is entitled to the shared use of spatial commons. In some instances, for example, in the case of public streets, the federal, state, or municipal government are holders of a private property title to the land (in Germany; in the United Kingdom, the title of the private landowners survives: Gray & Gray 2005: 16). As long as the land is designated for public use, the private property title remains dormant and is surpassed by common use rights in public streets and other spatial commons. The members of the use community can be included in a broad fashion (‘Everybody is admitted!’), but some spatial commons are limited to certain users only (‘Parking for residents only!’).

• Private property excludes everybody apart from the landowner, and persons admitted by the landowner, from using the private land. Common property excludes everybody, who is not a member of the use community, from using the commons and, moreover, excludes any private appropriation of common land. In both cases, excluded persons, who unlawfully enter upon or use the private or common land, are trespassers.

The politics of belonging shape inclusion and exclusion through a wide variety of access rights to land uses. However, property theory mostly thinks about one as-
pect of property—exclusion. The Western ownership tradition is often traced back to Blackstone’s concept of property as ‘that sole and despotic dominion’ (Blackstone 1766: 2 [Book II, Chapter 1]). Indeed, a simple reading of Blackstone reduces private property to exclusion, but property is inclusive, too: It fastens the landowner to the ownership society and helps avoid the ‘road to serfdom:’

What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. (von Hayek 1944: 136)

Social scientists, particularly sociologists, rarely believe the libertarian’s assertion and associate property rights mostly with exclusion and inequality (Carruthers & Ariovich 2004: 31–32; Turner 1993: 429–495 and 499). Such associations, perhaps bolstered by Weltanschauung, hamper the examination of inclusion and exclusion as tools. After all, von Hayek delivers a powerful argument against all forms of concentration of ownership—also against corporate property in land and other assets. Common property relations also depend on a viable balance between inclusion and exclusion. Some authors consider common property to be all-inclusive (Hardin 1968) or, in some cases, as permitting open access (Bromley 1991: 21–31; Needham 2006: 42). But common property relations, although open to many, often grant access only to the members of a use community. The clear definition of such a community is important to successful resource management (Ostrom 1990: 91–92).

Belonging and land typically circle around questions such as: Is it a problem if only few people own most of the land while others are entirely excluded from vital land uses? Do property relations permit land uses that are harmful to others? Should legal persons have the same kind of property rights as natural persons? Can everyone, who does not own private property, still enjoy full citizenship? Each of these questions can be (and, at some point in history, has been) subject of a passionate debate on belonging. The politics of belonging respond to these questions with a mix of inclusion and exclusion. This mix is a tool of the social construction of belonging, and neither inclusion nor exclusion is a virtue by itself. Property relations of inclusion and exclusion define ‘yours’ and ‘mine.’ Naturally, I would be unhappy if everything belonged to you (as you would be unhappy if everything belonged to me). Regarding inclusion and exclusion by private and common property, the politics of belonging need to achieve a satisfying mix of inclusion and exclusion. How does land policy achieve this mix?

**Property relations, boundary making, and liminal functionality**

Property relations of inclusion and exclusion are arranged through borders (Ellickson 1992: 1328–1334; Ostrom 1990: 91–92; Webster & Lai 2003: 70–75). The politics of belonging controls for everyone on which side of the border they are. Lord Curzon’s allusion to frontiers and a ‘razor’s edge’ invokes the idea of surgical pre-
cision. A certain mix of inclusion and exclusion often emerges not from informed
deliberation, but from struggle, power play, and subjugation. The concept of li-
minal functionality (B. Davy 2004 and 2008) explains the prerequisites of a success-
ful mix between inclusion and exclusion, it does not deny that boundary processes
can be very painful and unsatisfying to some.

The liminality of property emerges from different types of boundary making.
Physical barriers, such as a fence or a wall, and colorful signs to put off trespassers
are popular symbols of such borders. The exclusion of persons with disabilities
from land uses sometimes occur because a physical barrier, like a steep board-
walk, prevents access. Persons without disabilities may not even recognize the
steep boardwalk as a border, even if someone in a wheelchair is unable to over-
come the obstacle. Physical barriers are just one kind of border. Inclusion and ex-
clusion employ a much larger variety of boundary making tools including, among
others, the drawing of property lines on a cadastral map, the designation of per-
mitted land uses in a zoning ordinance, the enforcement of legal rules, the unequal
rendering of public services, or practices of social discrimination or community
building. Stakeholders use borders to communicate their claims, governments use
borders to stake out the spaces of their territorial sovereignty, but also to control
land uses. Yet, even if citizens or governments use physical objects for the dema-
cration of their claims (e.g., a fence, a wall, a river), borders are—according to
Georg Simmel—a social construction:

The border is not a spatial fact with sociological consequences, but a sociological fact
which shapes space. (Simmel 1908: 697; author’s translation)

Borders are mind maps of difference and belonging. Borders address other people,
because ‘boundaries have no significance except in relation to human beings’
(Boggs 1940: 28). The drafters of universal human rights treaties have been fully
aware that property relations often result in discrimination and unacceptable in-
equality. All over the world, people of color, women, or persons with disabilities
experience the borders of imagined otherness. The international community be-
lieves that neither race nor gender or disabilities should exclude individuals from
property relations protected by universal human rights (Article 2, para. 1, UDHR;
Article 3 ICCPR; Article 2, para. 2, ICESCR).

The liminal functionality of property relations of inclusion and exclusion de-
pends on a satisfying level of division, separation, and connection. If, for example,
only the elite owns property in land and exploits the landless, the calls for land
reform grow louder (Ankersen & Ruppert 2006; Chigara 2004; El-Ghonemy 1990;
Ghimire 2001; Shiva 2005). If, on the other hand, a country has very effective rent
control and statutory protection against evictions, its property system is liminally
functional although the homeownership rate is low (Voigtländer 2009). In both
cases, many individuals have no private property rights in land, yet the liminal
functionality of property relations is not the result of a simple equation. The limin-
al functionality of property relations depends on

- **division**: a clear definition of common or private property relations for plural
  land uses, particularly the degree of commodification and usability;
• *separation*: the distribution of land rights and the security of titles to land in terms of property formalization and enforcement of common or private property rights;

• *connection*: the quality of uncommodified spatial goods (territorial qualities, infrastructure, environment) and the availability of access rights to all, who need to use land they do not own.

Division defines which kind of land uses are subject to which kind of property relations. Separation defines who has the right to use land in a certain way and how this right is protected and enforced. Connection defines how property relations of inclusion and exclusion provide for external qualities and avoid multiple exclusion.

Property relations are rarely viable if one or several of these factors are pushed too far. A popular interpretation of the Coase theorem demands that land rights be defined as clearly as possible to lower transaction costs and improve the efficiency of land uses (Demsetz 1967 and 2002; Posner 2007: 31–34). Regarding liminal rationality, the clear definition of property rights is an act of division: What can be owned and how? The debate on the Coase theorem, however, often avoids to address the distribution of property and the social consequences of exclusion. The clear definition of property rights, however, is only one of several land policy goals. Or, as Ronald Dworkin criticizes economics and law scholarship:

A society is … not a better society just because it specifies that certain people are entitled to certain things. (Dworkin 1980: 207)

The most prominent recent example of a discourse on the liminal functionality of property in land is the controversy spawned by Hernando de Soto’s *Mystery of Capital* (2000). In developing countries, unclear property titles sometimes hamper development and exacerbate poverty and inequality. In order to make real estate visible to the formal economy and the finance industry, de Soto demands vigorous property formalization (de Soto 2000):

Property is the realm where we identify and explore assets, combine them, and link them into other assets. The formal property system … is the place where capital is born. Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market. (de Soto 2000: 47)

De Soto uses the example of the United States—the development from land-grabbing and squatting during the frontier era to a well-protected system of private property—to demonstrate the social and economic power of formal property relations (de Soto 2000: 105–151). The formalization of the assets and use rights of poor people can enhance the economic impact of small property holdings. Formal property rights are important for the legal empowerment of the poor as a whole (Ingram & Yu-Hung 2009: 14–16; Robbins 2008) and can be used to change property cultures in favor of women (Chiweza 2008; Razavi 2003). As libertarians point out, private property strengthens individual liberty and lessens the dependency on government assistance.

Land rights are not merely legal or economic rights, but have a high symbolic, emotional, and territorial value for each landowner. De Soto’s approach mirrors
market-based property theories which accentuate the liberating effect of private property (Hayek 1944 and 1976; Coase 1988; Cooter & Ulen 2004). De Soto emphasizes the significance of the individualist rationality for development, poverty reduction, and land rights. Egalitarian and hierarchical rationality often dominate such discourses—only to deliver fatalistic results. In this sense, de Soto adds a polyrational flavor to the emergence of socio-ecological land policy (B. Davy 2009: 249–251). The World Bank also emphasizes the relevance of tenure security for poverty reduction (Bruce et al. 2006; Deininger 2003; Deininger at al. 2010), and so does the Commission on Legal Empowerment of the Poor, co-chaired by Madeleine K. Albright and Hernando de Soto (CLEP & UNDP 2008: 64–68). However, some authors criticize privatization and private property formalization as ineffective (Bromley 2008; Lesorogol 2003; Sjaastad & Cousins 2008). If titling programs go too far, the formal clearness of property rights turns into a disadvantage. A fair degree of imprecision of land rights as well as some skepticism towards wealth maximization can lead to beneficial flexibility of land policy.

Figure 3: Good fences make good neighbors?
(Stellenbosch, South Africa © 2011 B. Davy)

The ambiguity of land policy instruments such as title formalization is easier to explain, if we construe inclusion and exclusion in the light of liminal functionality. A border is not just a border, but a border must fit the purposes of everybody,
who is affected by the border. Robert Frost, in his famous poem *Mending Wall* (Frost 1914: 87–88), demonstrates the ambiguity of borders quite succinctly. Property literature (Epstein 1988: 907; von Hayek 1973: 107) is fond of quoting the most famous line of this poem: ‘Good fences make good neighbors.’ The phrase is meant to say that a clear border helps build good relationships between the self and the other. Yet, the popular quote just states the preference of the narrator’s rather ominous neighbor. The narrator actually has an entirely different opinion on borders:

[…]
Before I build a wall I’d ask to know
What I was walling in or walling out,
And to whom I was like to give offence.
Something there is that doesn’t love a wall,
That wants it down. I could say ‘Elves’ to him,
But it’s not elves exactly, and I’d rather
He said it for himself. I see him there
Bringing a stone grasped firmly by the top
In each hand, like an old-stone savage armed.
He moves in darkness as it seems to me,
Not of woods only and the shade of trees.
He will not go behind his father’s saying,
And he likes having thought of it so well
He says again, ‘Good fences make good neighbors.’

*Mending Wall* confronts two monorational views on borders (B. Davy 2004: 52–55). One is all for exclusion and walls and good fences. The other view emphasizes that walls are expendable and offend those who are excluded. But both views are, in fact, untenable. Neither can viable land policies promote the enclosure of every piece of land, nor can land policy abandon all fences (literally and metaphorically speaking). Rather, land policy must balance boundaries, needs, and opportunities to establish property relations with a view to liminal functionality.

**Inclusion and exclusion as convenience**

Quite often, inclusion and exclusion conveniently avoid land use disputes, establish legal security, and keep transaction cost low. In the world of John Locke, government has the purpose to establish ‘Guards and Fences to the Properties of all the Members of the Society, to limit the Power and moderate the Dominion of every Part and Member of the Society’ (Locke 1698: 412 [Book II, § 222]). The protection of property relations through a viable arrangement of inclusion and exclusion are the ultimate goal of government in Locke’s world. Yet, even if the protection of property were not the ultimate purpose of government, such an arrangement can be quite handy.

Property relations of inclusion and exclusion define the scope and rules of access to land. One expedient consequence of the definition is that transactions
cost are kept low for entering and defending a property relation. Assume a neighborhood of owner-occupied houses. As a potential buyer, I once chose between several houses in this neighborhood and was most likely indifferent to some of the available options. I found it difficult to choose between houses A, B, or C, because A was better located, B was cheaper, but C came with a larger garden. Throughout the period of indifference, I was not particularly attached to any of these houses. My expenses for identifying a suitable object, negotiating with the seller, and the fees of lawyers and the land register are the ‘cost of using the price mechanism’ (Coase 1937: 389). The technical term for such cost is transaction cost. If we want to buy land, we expect the transaction to involve costs apart from the market price (Williamson 1981; Cooter & Ulen 2004: 91). Clearly defined property rights decrease the costs of buyers and sellers to find out what they are buying or selling. The users of common property also need to know the scope of their use rights. Transaction cost in common property relations are, for example, the information costs of a new user, who wants to clarify under what circumstances she is admitted to the commons or which uses are acceptable. Also, the cost of building trust and accumulating social capital are transaction cost of property relations, particularly associated with egalitarian land uses. A ‘transaction’ in this sense is the exchange of owners or the entry of new members to the use community.

But a transaction also takes place if the owner actively resists an exchange of ownership (presumably because the price is not right, but perhaps for other reasons), or if the members of a use community prevent their peers from inflicting a tragedy upon the commons. Once I have chosen house A, I shall insist on my right to use the house as I see fit and that my property be protected from intrusion. My transformation from potential buyer to actual owner—and the fact, of course, that I had to pay the seller—also transforms my interests from curious indifference to passionate resolve. The exclusion of others from the use of my property is a matter of practicality. My neighbors and I do not need to negotiate each evening, who will sleep with their family in which house. Our property rights—or our rights as tenants which we derive by rental contract from the landowner—save us from wasting time on renegotiating the spatial distribution of households and redecorating our homes on a daily basis. The same principle applies to apartments and farmland, but also to parking spaces on the street or public beaches: As long as everybody has reasonable access to such land uses, nobody minds for very long which other options are or would have been available. But once we have moved into our apartment, have started to cultivate our field, have occupied our parking space, or have set up the barbecue in our favorite spot on the beach, we seriously care that nobody else occupies the same space. The parties to property relations, who have expenses for not changing their positions, also incur transaction cost. Cost required to avoid a transaction may be as low as getting rid of a tiresome real estate agent by hanging up the phone or by spreading a picnic blanket or performing other territorial gestures on the beach. Transaction cost also could involve warfare between street gangs or barbed wire fences and armed patrols along the property boundary. Such transaction costs are sometimes called exclusion costs (Webster & Lai 2003: 41–42) or institutional costs (Buitelaar 2007: 49).
Our private and common property rights protect us from having to spend, without good reason, too many resources on establishing, maintaining, or abandoning property relations. A clear arrangement of inclusion and exclusion in property relations, if it helps control transaction cost, is a matter of convenience. Putting up the proverbial fence, locking the door, or installing a security system are costs that landowners incur while preventing an unwanted transaction. The means of exclusion help organize land uses by lowering the owner’s transaction cost. In a similar vein, robust management rules for common pool resources curb the transaction costs for members of a use community (Ostrom 1990: 190–191). The more effective the rules are, the less cost do these members incur by protecting their common property against selfish peers, free riders, and trespassers from outside. As long as their common property arranges inclusion and exclusion effectively, the members of the use community do not need to defend, clean up, or free from congestion their spatial commons by themselves.

While the enforcement of property rights lowers the transaction cost of landowners or members of a use community, it also increases transaction cost for trespassers. With respect to property relations of inclusion and exclusion, trespassers are actors, who are excluded from private or common property, but still use the land as if they were included in these relations. Weak property relations render the border between inclusion and exclusion vulnerable. It is relatively cheap for trespassers to exploit the commons or appropriate the use of land that belongs to someone else. The tragedy of the commons or the illegal use of unguarded private land often result from weak property relations. Strong property relations increase the effort required to trespass on the land of others. As the border between inclusion and exclusion becomes less permeable, it keeps transaction cost high for everybody, who is excluded from the use of common or private land. It is misleading to say that ‘land-use planning should be directed to reducing transaction costs’ (Needham 2006: 60). Planning has to manage transaction cost, but with a view to whose transaction cost are managed. With respect to trespassers, land use planning presumably should maintain high transaction cost in order to deter incursions into private property or free riders in common property relations.

Property rights help manage transaction cost (Coase 1960). Property rights facilitate clear expectations of the parties to an exchange contract, but also prevent unwarranted changes in the present user and uses of land. After all, society would be no better off if our apartment, farmland, parking space, or spot on the beach remained contested land forever. In this sense, inclusion and exclusion through property rights are a matter of convenience. Obviously, the same property arrangement of inclusion and exclusion is not suitable for all spatial goods or land uses. Compare, for example, the arrangement for my apartment and a public beach. If my apartment were accessible to the general public as if it was a public beach, the arrangement became highly dysfunctional. Yet, if all public beaches were privatized like my apartment, nobody but the immediate landowners could enjoy a barbecue there. Identifying a suitable mixture of private and common property must account for the types of spatial goods and land uses, but also for scarcity, public welfare, or the distribution of costs of production and transaction.
Liminal dysfunctionality of inclusion and exclusion

Although sometimes a matter of convenience, inclusion and exclusion are troublesome if they cause unacceptable inequality. Property relations of inclusion and exclusion cease to be a matter of convenience as soon as the quantity or quality of inclusion or exclusion are ‘wrong’ (Carruthers & Ariovich 2004). Take, for example, the private ownership of an apartment as discussed in the previous section. If I do not merely own one apartment, but 100,000 apartment houses, my ownership turns into social power (Marx & Engels 1888: 236). As soon as I can exercise my ‘sole and despotic dominion’ over vast real estate assets, unfettered private property rights not only protect my wealth, but empower me to control—and even destroy—the happiness of 100,000 families. Whatever reasons may justify my power as large property holder, mere practicality or convenience are not among them.

The landlord, who has thousands of tenants quiver at his mercy, is just one example of inadequate inclusion and exclusion. Basically, inclusion or exclusion is inadequate, if too many are denied access to vital land uses (over-exclusion) or have rights to access and use the same land (over-inclusion).

• Over-exclusion in private property occurs when only a tiny elite of possessors holds title to the land. Over-exclusion occurs in a common property relation when a common pool resource remains unused due to an excessively restrictive use regulation. Typical examples of over-exclusion are unused public spaces (unattractive due to the banning of leisure activities) or growing masses of landless people without minimal access to land uses.

• Over-inclusion occurs in a common or private property relations if too many users or too intense land uses are admitted. Typical examples of over-inclusion are congested streets, harmful emissions from an industrial property, or a too extensive rent control system.

Some of the most prominent property theories deal with issues of over-exclusion or over-inclusion. Such theories deal with the politics of belonging, or their outcome, and the search for liminal functionality.

Over-exclusion

Property relations of inclusion and exclusion hardly ever are liminally functional because policymakers chose either ‘inclusion’ or ‘exclusion.’ Responsive land policy combines inclusion and exclusion in order to make property relations work well. Nevertheless, many authors blame the exclusionary side of property for its malfunctions.

Over-exclusion and primitive accumulation

A good example of such an accusation is Jean-Jacques Rousseau’s condemnation of private property and enclosures as the main reasons for social inequality:
Le premier qui ayant enclos un terrain, s'avisa de dire, ceci est à moi, et trouva des gens assez simples pour le croire, fut le vrai fondateur de la société civile. Que de crimes, de guerres, de meurtres, que de misères et d’horreurs n’eût point épargnés au genre-humain celui qui arrachant les pieux ou comblant le fossé, eût crié à ses semblables. Gardez-vous d’écouter cet imposteur; Vous êtes perdus, si vous oubliez que le fruits sont à tous, et que la terre n’est à personne. (Rousseau 1997: 172)

The first man who, having enclosed a piece of land, thought of saying ‘This is mine’ and found people simple enough to believe him, was the true founder of civil society. How many crimes, wars, murders; how much misery and horror the human race would have been spared if someone had pulled up the stakes and filled in the ditch and cried out to his fellow men: ‘Beware of listening to this impostor. You are lost if you forget that the fruits of the earth belong to everyone and the earth itself belongs to no one!’ (Rousseau 1755: 109)

Rousseau has Locke’s appropriation theory of private property in mind when he accuses—literally the first—stakeholders of inflicting misery and horror upon the human race. Rousseau complains about over-exclusion in private property relations. Karl Marx and Friedrich Engels offer the most prominent version of this complaint when they sum up the theory of communism ‘in the single sentence: Abolition of private property’ (Marx & Engels 1888: 235):

Property, in its present form, is based on the antagonism of capital and wage labour. … To be a capitalist is to have not only a purely personal but a social status in production. Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion. Capital is, therefore, not a personal, it is a social power. When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class character. (Marx & Engels 1888: 236)

The Manifesto demands the abolition of all property relations serving the oppressors in the ‘antagonism of oppressing and oppressed classes.’ Karl Marx examines the prerequisites of ‘bourgeois property’—property relations based on the exploitation of the labor class—in the first volume of Capital. He criticizes the accounts by John Locke, Adam Smith, and other property narratives as ‘nursery tale.’ Such narratives would romanticize the previous or primitive accumulation of capital and the expropriation of land from rural people (Expropriation des Landvolks von Grund und Boden).

With regard to the appropriation of land and other means of production, ‘it is a notorious fact that conquest, enslavement, robbery, murder, in short, force, play the greatest part’ (Marx 1867: 874):

So-called primitive accumulation (ursprüngliche Akkumulation), therefore, is nothing else than the historical process of divorcing the producer from the means of production. (Marx 1867: 874–875)

Marx describes the evolution of property relations as a constant rearrangement of exclusion that finally leads up to the emergence of bourgeois property:

The spoliation of the Church’s property, the fraudulent alienation of the state domains, the theft of the common lands, the usurpation of feudal and clan property
and its transformation into modern private property under circumstances of ruthless terrorism, all these things were just so many idyllic methods of primitive accumulation. They conquered the field for capitalist agriculture, incorporated the soil into capital, and created for the urban industries the necessary supplies of free and rightless proletarians. (Marx 1867: 895)

Karl Marx describes a stream of land policies that modify property relations in the interest of an elite. This elite—the oppressing class—benefits from a design of property which allows the appropriation of the surplus value of land use, the land rent, and of capital. Over-exclusion in this sense is the progressing exclusion of vast parts of the population from meaningful property relations. Marx understands very well why the enclosure of the commons and the clearing of estates is essential for providing factories with cheap labor. The property relations which replaced tribal and feudal property with private (or bourgeois) property had an important impact on economic and social development. His analysis is important evidence that the social construction of property relations greatly influences the use of land and other natural resources as well as the economic system. Property is loaded with social and political values and never just a neutral arbiter (Renner 1929: 112). Marx assumes that the purpose of property is exclusion, not only with
respect to just one landowner and one single piece of land, but with respect to a whole economy.

The analysis of primitive accumulation, as a sequence of violence and occupation, positions the proletarians as egalitarian victims. True to the egalitarian spirit, Marx romanticizes the life of agrarian laborers in England in the 14th century as enjoying ‘the right to exploit common land, which gave pastures to their cattle, and furnished them with timber, fire-wood, turf, etc.’ (Marx 1867: 877). His analysis does not account, however, for individualist or hierarchist achievements among proletarians. Social movements like consumer cooperatives or trade unions led to an economic and political empowerment of the working class that Marx did not anticipate. Also, the process of one-sided exclusion became less significant as soon as ‘the steady increase in small savings blurred the class distinction between the capitalist and the propertyless proletarian’ (Marshall 1950: 46). Social class loses its potential to create conflict, the more the lower classes embrace the advantages of private property:

The wage-earner with savings finds that his social level urges him to defend the rights of property while interests as a wage-earner prompt him to invade them. (Marshall 1950: 119–120)

Nevertheless, over-exclusion is a very pertinent problem for spatial planning and land policy. A typical example of this problem is a planning practice that in the United States has been labeled ‘exclusionary zoning.’

**Over-exclusion and Exclusionary Zoning**

Land use planning that monorationally emphasizes the interests of wealthy landowners can lead to over-exclusion. Most notably, zoning in the United States raises the issue of the planners’ responsibility for the unfair exclusion of minorities and poor people (a variation of NIMBY and LULU):

The benign view of zoning is that it is a system with everything in its place and a place for everything. Indeed, early proponents analogized zoning to good housekeeping: keep the piano in the parlor, not the bedroom and the stove in the kitchen, not the pantry. The dark side, however, [is that] zoning has played a significant role in establishing housing patterns that exclude, among others, persons of low and moderate income, racial minorities, and the disabled. (Juergensmeyer & Roberts 2007: 214–215)

The case of exclusionary zoning achieved attention when the Southern Burlington County NAACP (National Association for the Advancement of Colored People) sued the Township of Mount Laurel, New Jersey, for its exclusionary zoning practices. Most of the land designated for building purposes in Mount Laurel was zoned for low density single-family housing. The zoning ordinance did not say: ‘Mount Laurel hereby orders poor people and people of color be excluded from dwelling within the township’s boundaries!’ Zoning for low density housing, however, has the effect of excluding everybody, who cannot afford a single-family on a relatively large parcel of land. In its 1975 Mount Laurel I decision, the New Jersey Supreme Court examines the legal question whether a municipality may
validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality. The court finds that such an exclusionary land use regulation must be held invalid:

We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefore. (New Jersey Supreme Court, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 [1975] 174 [Mt. Laurel I])

The court assumes that land use regulation is encompassed within the state’s police power and that the police power must be employed for the general welfare. With regard to responsive land policy, the court takes issue with the over-exclusion resulting from planning. It exhorts the Township of Mount Laurel not to use its police power only with a monorational view to its affluent white population:

This brings us to the relation of housing to the concept of general welfare just discussed and the result in terms of land use regulation which that relationship mandates. There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. … It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity. (New Jersey Supreme Court, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 [1975] 178–180 [Mt. Laurel I])

Mount Laurel I, although limited in its legal effects, was a victory for the civil rights movement and is an important land policy document. The court understands that property relations not only concern landowners, but also municipal planning authorities and other land policy makers, the general public, and individuals looking for suitable land use opportunities. The court considers a wealth-based land policy, not a property-based land policy.

Exclusionary zoning is not limited to the United States. All planners, who designate permissible land uses or prevent undesirable land uses, operate property relations of inclusion and exclusion. The planning systems in Germany and other OECD countries provide for local plans that, similar to zoning in the United States, designate permitted or prohibited land uses. Use classes, density requirements, or
building lines determine the usability and the economic value of potential sites. Consider the land market for single family houses in the City of Dortmund. Depending on location, the average land value ranges from 175 to 350 €/m² (Gutachtenausschuß Dortmund 2011: 25). If the binding land use plan demands plot sizes of 400 m² or more, a family must pay between 70,000 and 140,000 € just for the land and before they can start buying bricks, mortar, and labor. If the local plan is enforced strictly, there is no space for informal settlement or slums. This means that everybody, who cannot afford to buy at the market price, is excluded from private property in land in Dortmund and similar municipalities. Homelessness can be a property problem (Baron 2004).

<table>
<thead>
<tr>
<th>Meaning of acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>LULU</td>
<td>locally unwanted land use</td>
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<tr>
<td>NIMBY</td>
<td>Not in my backyard!</td>
</tr>
<tr>
<td></td>
<td>Next, it might be you!</td>
</tr>
<tr>
<td></td>
<td>Not in my bone yard! (referring to ancient burial grounds)</td>
</tr>
<tr>
<td>NAMBY</td>
<td>Not all in my backyard!</td>
</tr>
<tr>
<td>NIABY</td>
<td>Not in anybody’s backyard!</td>
</tr>
<tr>
<td>BANANA</td>
<td>Build absolutely nothing anywhere near anyone!</td>
</tr>
<tr>
<td>NOPE</td>
<td>Not on planet Earth!</td>
</tr>
<tr>
<td>NIMTOO</td>
<td>Not in my terms of office!</td>
</tr>
<tr>
<td>YIMBY</td>
<td>Yes in my backyard!</td>
</tr>
<tr>
<td>YIMBY-FAP</td>
<td>Yes in my backyard—for a price!</td>
</tr>
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Table 1: Acronyms of exclusion

Planners, who wish to avoid over-exclusion, need to pay special attention to fair share requirements and the exclusionary effects of minimum lot size, minimum floor space, and low density (Juergensmeyer & Roberts 2007: 217–228). As the exclusionary zoning of LULUs, NIMBYs, and other unwanted land uses (Table 1) is typical of spatial planning, planners need to stay away from too much exclusion. Germany and other OECD countries counteract some of the dire consequences of spatial planning with rent control, social housing projects, and housing subsidies. The fact still stands, however, that minimal plot sizes and similar planning tools exclude a portion of the population from ever owning a house. If carried out monorationally (in a NIMBY and LULU fashion), exclusionary zoning amounts to intolerable inequality because it denies the right to existence to the poor. Perhaps land ownership is not necessary for a person’s existence, but the planners then would have to demonstrate how anybody, who cannot afford land in a municipality with exclusionary zoning, still can obtain an adequate standard of living.
Over-inclusion

Inappropriate levels of inclusion also create liminal dysfunctionality in property relations. If too many users are included in the use of the land or other spatial goods, or if users are permitted to use their land too intensely, over-inclusion may result in the depletion of the resource and the loss of valuable property rights.

Over-inclusion and the Tragedy of the Commons

Shared land uses, if profitable to the users, can result in congestion and harmful exploitation of the land. Many authors refer to Garrett Hardin’s seminal article (Hardin 1968) as irrefutable evidence that common property in a resource, if not replaced by some other management scheme, will inevitably result in the destruction of this resource. Hardin’s solution to the ‘tragedy of the commons’ demands that some users—or uses—be excluded. The instruments of exclusion are either private property or regulatory coercion.

Hardin is interested in demography, not the environment. He is skeptical of Adam Smith and contends that no ‘invisible hand’ prevents population growth from causing a global tragedy of the commons. The welfare state would exacerbate the ‘misery of overpopulation’ because social security encourages unsuitable parents to breed. The tragedy could be avoided by ‘abandoning the commons in breeding’ (Hardin 1968: 1248). The overgrazed pasture serves as an illustration:

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy. (Hardin 1968: 1244)

Hardin presents the ‘inherent logic of the commons’ as a path to annihilation. Individualist rationality would lead to collective demise:

[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another; … But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all. (Hardin 1968: 1244)

The tragedy of the commons with regard to pastoral land can be resolved through enclosure and private property rights (Hardin 1968: 1245). This solution would not be available, however, with regard to other natural resources such as air and water. If the natural environment would be used as a commons, as cesspool for noxious emissions, another tragedy of the commons would be inevitable:

In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting
something in—sewage, or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air; and distracting and unpleasant advertising signs into the line of sight. The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of ‘fouling our own nest,’ so long as we behave only as independent, rational, free-enterprisers. (Hardin 1968: 1245)

Hardin correctly identifies property relations as a cause for liminally dysfunctional resource use. His suggests a two-step solution. All common resources that can be enclosed should be privatized. The use of other natural resources should be regulated through coercion:

The tragedy of the commons as a food basket is averted by private property, or something formally like it. But the air and waters surrounding us cannot readily be fenced, and so the tragedy of the commons as a cesspool must be prevented by different means, by coercive laws or taxing devices that make it cheaper for the polluter to treat his pollutants than to discharge them untreated. We have not progressed as far with the solution of this problem as we have with the first. Indeed, our particular concept of private property, which deters us from exhausting the positive resources of the earth, favors pollution. (Hardin 1968: 1245)

The enclosure of the commons and the assignment of private property rights are a prerequisite for environmental pollution. Factories can only exist because the legal system enables factory owners to develop their private land—previously the commons—for commercial purposes. Yet, Hardin denies that pollution could be controlled by the owners’ self-regulation and the privatization of environmental resources. In the world of Hardin, a strong force pushes society toward over-regulation: Private property replaces common property, and then coercion replaces private property.

Coercion is a dirty word to most liberals now, but it need not forever be so. As with the four-letter words, its dirtiness can be cleansed away by exposure to the light, by saying it over and over without apology or embarrassment. To many, the word coercion implies arbitrary decisions of distant and irresponsible bureaucrats; but this is not a necessary part of its meaning. The only kind of coercion I recommend is mutual coercion, mutually agreed upon by the majority of the people affected. … Who enjoys taxes? … We institute and (grumblingly) support taxes and other coercive devices to escape the horror of the commons. (Hardin 1968: 1247)

The mutual agreement to exercise coercion is reminiscent of Thomas Hobbes’ Leviathan. Perhaps majority decisions do not sound as totalitarian as a large-than-life ruler, but the abandonment of the commons—the escape from the ‘horror of the commons’—obviously justifies all consequences. Hardin does not explore the self-defeating argument because, after all, he is interested in the ‘misery of over-population’, not in property in land or environmental pollution. The tragedy of the commons may be the consequence of over-inclusion in common property relations, but Hardin’s suggestions lead to over-regulation and the loss of freedom.

According to Google Scholar, more than 14,000 articles quote Hardin (1968), and the phrase ‘tragedy of the commons’ googles more than two and a half million
Articles pertaining to land policy and the tragedy of the commons examine international common property (Ross 1971), the management of land and other natural resources (Dasgupta 2005; Feeny et al. 1990; Giordano 2003; Kreuter et al. 2006; Lesorogol 2003; Ostrom 2009; Sandler & Arce M. 2003), rights to biodiversity (Çoban 2004; Gepts 2004), and public policy (Connelly 2006; Cooley 2008).

**OVER-INCLUSION AND LAND USE CONTROL**

Private property, restricting land uses to one owner or group of owners, gives a powerful right to the proprietor and their contract partners. If the owners may exercise their right without moderation, property quickly becomes over-inclusive because it confers more power to the owners than society can tolerate. But over-inclusion works both ways. Land use regulation encumbers the owner of land with restrictions that are inclusive to the needs of other landowners, tenants, environmental interest groups, or the general public. Such restrictions, if they leave no space for profitable land uses, go too far and cause over-inclusion. The politics of belonging need to establish a moderating force that controls the intensity of private property relations without annihilating its essence.

John Locke already recommends that property be moderated by the government. If a conflict between individual interests (comprised in the broad concept of ‘property’ which includes ‘Lives, Liberties and Estates’) arises, the government has to define and arrange a conflict resolution that accounts for mutual cooperation (B. Davy 2009: 239). Locke insists on ‘Guards and Fences to the Properties of all the Members of the Society, to limit the Power and moderate the Dominion of every Part and Member of the Society’ (Locke 1698: 412). Moderation of private property, of course, can be built into the rules of property relations. In this vein, William Blackstone confirms the traditional land use maxim *sic utere tuo ut alienum non laedas* (use your property not harmful to others) as common law principle:

> Nusance, nocuumentum, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. [... ] If one’s neighbour sets up and exercises any offensive trade; as a tanner’s, a tallowchandler’s, or the like: for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, ut alienum non laedas:* this therefore is actionable nuisance. (Blackstone 1768: 216–217)

Blackstone’s rule of considerate land use is monorational. It defines good neighborhood between insular uses. It is insofar polyrational as it considers the perspectives of each of the affected landowners, but in fact *sic utere tuo* is an interest-based conflict resolution. Insular uses must not rely on private property as an authorization to create a nuisance for adjacent properties or the rest of world. Planners and other policymakers should remember occasionally that land use control not always requires a regulatory approach. Sometimes, common law or statutory private law can very well resolve land use conflicts. In Rylands v. Fletcher, Lord Blackburn rules on the landowner’s liability for anything she brings on her property ‘which was not naturally there:’

> We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it
escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. ... The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth of his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damned without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. (Rylands v. Fletcher, LR 3 HL 330 [1868]).

Figure 5: Property law prevents conflicts between adjacent landowners
(Everywhere © 2004 B. Davy)

The rule from Rylands v. Fletcher underpins many land policy systems, but is not generally accepted in United States case law. In the Boomer case, most notably, the Court of Appeals of New York denies an injunction against pollution from a large cement plant near Albany and limits the adjacent landowners to damages.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. ...
Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable. ... It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls. (Boomer v. Atlantic Cement Co., 257 N.E.2d 870 [N.Y. 1970] 871)

Boomer precedes the rise of environmental and land use regulation associated with the government’s effort to curb the social cost of environmental pollution. Private litigation over property in land, the court assumes, cannot resolve environmental conflicts:

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley. (Boomer v. Atlantic Cement Co., 257 N.E.2d 870 [N.Y. 1970] 871)

In permitting the nuisance from the cement plant to continue, the court promotes wealth accumulation, yet makes the plant owner’s property too inclusive. The court does not limit the over-inclusion, albeit openly dysfunctional, because it fears the economic consequences of stopping environmental pollution from profitable sources. A legal perspective reveals Boomer as unconvincing (Singer 2006: 280), but the theory of polyrationality can explain the inconsistency. The Court of Appeals of New York tries to make the case look like a conflict between insular land uses (landowners versus one ‘single cement plant’) when, in fact, it considers the conflict between insular and corporate land uses. Moreover, the court yields to the Leviathan’s approach to environmental pollution, namely the ‘growing sense of responsibility in State and Federal Governments to control it.’

Perhaps unwittingly, Boomer promotes government regulation and state interventions into market-driven property relations. Hardin (1968: 1247) anticipates this second prong of moderating private property through coercion. Certainly, Blackstone’s sic utere tuo rule not only applies to tort cases, it also guides land use planning. Planning—in the sense of zoning—helps ‘lawful and necessary trades’ to identify suitable locations. Planners, who designate sites for ‘offensive trades ... in remote places,’ apply the doctrine of sic utere tuo, not as agents of common law, but by exercising government powers. Or, in the words of the United States Supreme Court: ‘A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard’ (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 [1926] 388). The ‘pig’ in question was industrial land use, and the ‘parlor’ a suburb of the City of Cleveland, Ohio (Wolf 2008). The village council had adopted a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, and single-family houses. The appel-
lee owned a tract of land and claimed that, due to the plan, the property value had been reduced. The Euclid decision affirms the planning powers of local communities, but also mandates that zoning restrictions demonstrate a ‘substantial relation to the public health, safety, morals, or general welfare.’ The politics of belonging sometimes demands differences between similar plots of land that are difficult to explain—why there and not here? Inclusion and exclusion receive astonishing authority from zoning, however, because zoning controls land uses through the police power (Ellickson & Been 2005: 74–94; Juergensmeyer & Roberts 2007: 42–125; Singer 2006: 915–941).

Locke’s ‘Guards and Fences,’ Blackstone’s doctrine of sic utere tuo, the Rylands v. Fletcher doctrine, and even Euclidean zoning are monorational because they moderate private property only with regard to conflicts between landowners or other property holders. In many planning and property systems, individual interests are only protected if they are proprietary interests. Planning is supposed to control nuisances caused by inconvenient land uses, not to redress the wrongs of the market distribution of wealth and income. This approach has inherent limits (as the Boomer case shows) and it also neglects anybody, who does not own private property. Planners, who merely resolve disputes between landowners, can neither reach out to the entire community nor address the needs of the poor. The moderation of private property may indirectly serve the public interest of the whole community, including the poor. If a land use plan preserves open spaces and makes room for public parks and affordable housing, it exceeds what could be achieved by private law. Ultimately, a limitation of planning to moderating the exclusionary effects of property results in over-inclusion: It pays too much attention and gives too much rights to private landowners.

But over-inclusion works the other way round, too. Monorational land use control, as Justice Oliver Wendell Holmes points out, can easily go ‘too far’ (Pennsylvania Coal v. Mahon, 260 U.S. 393 [1922] 415). If land use control goes ‘too far,’ it is over-inclusive to the general public or other stakeholders than the landowner. Consider, for example, the situation of transformation economies. On the one hand, former communist countries fully embrace the concept of private property and economic freedom. On the other hand, a country in transformation from a communist to a capitalist system still has to cater to the needs of its population. Poland is a typical example of the pressure created by plural expectations. In particular, Poland acceded to the European Convention on Human Rights, but tried to retain a system of rent control imposing on landlords restrictions in respect of rent increases and the termination of leases. The European Court of Human Rights, in principle, accepts government interventions into landlord and tenant relationships as long as the government has ‘regard to the need to strike a fair balance between the general interests of the community and the right of property of landlords in general and of the applicants in particular’ (ECtHR, 19 December 1989, Mellacher v. Austria, para. 57). Rental laws, after all, redistribute certain ‘sticks’ in the bundle of property from the landowner to the tenant. But how many ‘sticks’ are too many? Ms. Maria Hutten-Czapska, a French national of Polish origins, owns a plot of land and a house in Gdynia, Poland, that she has inherited
from her parents. She complains about a violation of her right to property because she is permitted neither to evict the current tenants nor raise the rent. In effect, the owner is locked into rental agreements that deny her even to recover the maintenance costs. The Grand Chamber of the European Court of Human Rights agrees:

In the first place, the applicant had never entered into any freely negotiated lease agreement with her tenants; rather, her house had been let to them by the State. … In … the instant case Polish legislation attached a number of conditions to the termination of leases, thus seriously limiting the landlords’ rights in that respect. Finally, … the Polish scheme … does not, provide for any procedure for maintenance contributions or State subsidies, thereby causing the inevitable deterioration of the property for lack of adequate investment and modernisation[]. (ECtHR [Grand Chamber], 19 June 2006, Hutten-Czapska v. Poland, para. 224)

The court criticizes the ‘combined effect’ of restrictions imposed upon the landowner. Although the court acknowledges the difficulties of governing a transformation economy, it rules that the right to property under Article 1 ECHR_P1 is violated:

It is true that … the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. … Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country’s housing supply. This burden cannot … be placed on one particular social group, however important the interests of the other group or the community as a whole. (ECtHR [Grand Chamber], 19 June 2006, Hutten-Czapska v. Poland, para. 224)

Poland pursued a land and housing policy based on egalitarian rationality, but embraced the legal concept of private property, based upon individualist rationality. Without accounting for polyrationality, the ambiguous approach failed.

Landlord and tenant agreements under Polish law are the opposite of the property relations between Oscar Boomer and the Atlantic Cement Corporation. The Boomer case renders the corporation’s property rights as over-inclusive, urging the regulatory branch of government to intervene. In the Hutten-Czapska case, the social rights of tenants are over-inclusive and the Polish government takes the blame for entirely ignoring the rights of landowners. In both cases, monorational land policy fails to accomplish liminally functional property relations.

**Liminal functionality of inclusion and exclusion**

*From the politics of belonging to polyrational policymaking*

Marx emphasizes the social power of private property and exclusion, and demands that property be abandoned. The discourse on exclusionary zoning also criticizes over-exclusion, yet the New Jersey Supreme Court is less revolutionary and settles for a more inclusive land use control. Hardin emphasizes the disadvantages of unregulated common property and calls for strict government regulation.
Such regulation, however, sometimes goes too far and encumbers the landowner with too much inclusion of other interested parties (ranging from the general public to an over-protected tenant). Land use control, if applied monorationally, benefits or harms landowners by bestowing too much or too little of 'belonging' to them. Each example of over-exclusion or over-inclusion presents, of course, also a case of monorational land policy that uses a certain view on property relations as 'condom' (B. Davy 2008), as justification to ignore plural land use rationalities.

Planners and other policymakers, who design property relations with regard to plural land use rationalities, expect to avoid the liminal dysfunctionality caused by over-exclusion or over-inclusion. Such expectations are based on experiences with polyrational property relations which accommodate individualist, egalitarian, hierarchical, and fatalistic rationalities in the social construction of property and land uses. With respect to the eight types of restricted and shared uses, inclusion and exclusion serve a whole host of social functions. Planners and other policymakers determine through their choices and actions as to which of these social functions are promoted or suppressed. In some instances, applying unsuitable design principles results in obviously defunct property relations. If planners apply the rules for opportunistic uses (e.g., a bench in a public park) to insular uses (e.g., an apartment), the users will feel disturbed. An apartment is not a park bench, and not everybody is welcome to enter the insular use space at will. In other instances, possible disturbances are less obvious. In many legal systems, the rules of private property relations apply to insular uses as well as corporate uses. Yet, the social functions of property vary greatly between insular uses (e.g., a home) and corporate uses (e.g., a multinational retail chain). Individual liberty is a good reason to protect the proprietary interests of homeowners. If the government invades their homes, the homeowners’ freedom suffers. If the government fails to provide the poor with an adequate standard of living—with, among others, the access to vital land uses—the government denies poor people their right to a dignified existence. Such reasons do not apply to companies. Corporate land users do not ‘naturally’ enjoy the same level of inclusion like insular land users. Whether private or common property are exclusive to some or inclusive to others, is for policymakers to choose. Maybe land use planners not always have the power to make this choice themselves because a decision involves the prerogative of legislators, courts, or other major decision makers. It is still a choice, however, that flows from the politics of belonging.

Considering property relations of inclusion and exclusion from a polyrational perspective means to recognize other rationalities. Taking policy advice from strong polyrationality, policymakers would design property relations with regard to the four rationalities described by Mary Douglas' cultural theory. Inclusion and exclusion imply different things to hierarchists, individualists, egalitarians, and fatalists. Assume, for example, the proverbial fences that allegedly make good neighbors (p. 10). Hierarchists use fences to engineer social interaction; the government encourages enclosure because small and well-defined units of land are easier to control. An individualist perceives a fence around her parcel of private land as important to keep away the rest of the world: 'My home is my castle!' Ega-
litarians need fences to protect their community from hostile or, at least, suspicious outsiders. Each of the three active rationalities perceives fences in a different fashion. A polyrational imagination of inclusion and exclusion accounts for these differences:

The simple but profound message is that cultural pluralism is essential. The three active rationalities—the hierarchical, the individualistic and the egalitarian—structure the world in different and (in the right circumstances) complementary ways. Diversity, contradiction, contention and criticism … are the best tools we have for understanding the inchoate. We must learn to husband them and make the most of them. Divided we stand; united we fall. (Schwarz & Thompson 1990: 12–13)

The theory of polyrationality suggests that cultural pluralism be taken seriously, yet in a playful manner. I call this playfulness—the essence of planning and policymaking without a condom (B. Davy 2008)—weak polyrationality.

Weak polyrationality neither limits the consideration of other rationalities to a certain number nor to Mary Douglas’ cultural theory. Regarding fences and walls, Robert Frost expresses a weak polyrational notion by claiming: ‘Before I build a wall I’d ask to know, what I was walling in or walling out’ (Frost 1914). Due process always includes to listen to all parties, in particular to the other party: audiatur
et altera pars. Polyrational listening is not eager to identify the party, who is wrong, but a fresh perception that yet has to be contemplated. Plural rationalities, although they contradict each other, are hardly ‘wrong.’ Weak polyrationality demands that policymakers acknowledge plural rationalities as a sign of vitality, maybe joie de vivre, not disorder. Polyrational land policy improves the liminal functionality of property relations.

Garrett Hardin never asks ‘to know, what I was walling in or walling out,’ when he demands that the commons be parcelled out into private property or put under regulatory control. But Elinor Ostrom, who emphasizes the institutional aptitude and high social value of common property relations, also rarely asks what she is ‘walling in or walling out.’ Common pool resource management requires a high level of exclusion (Ostrom 1990: 91) to avoid the pitfalls of open access. Effectively, CPR management removes land and other natural resources from private and corporate appropriation. Yet, Ostrom admits that conflicting views in politics or policy theory must not be dealt with monorationally:

We are much stronger if we learn to respect the multiple approaches proposed, both for how we do our science as well as how diverse policies can lead to better outcomes when learning and adaptation are enhanced. As a discipline, we can move forward when we embrace learning from multiple approaches. As citizens of the world, we must learn there are no blueprints that fit all the puzzling policy questions we face. (Ostrom 2006: 9)

Polyrational policymaking does not mean that everybody gets what they want. Polyrational policymaking avoids institutions that are monorational, abominable for any rationality, or merely a weak compromise (B. Davy 1997: 352–353). Polyrational policymaking favors institutions that foster a sense for opportunities and turbulent boundaries and help produce explicit and unusual solutions based on a consensus between stakeholders (B. Davy 2008: 316).

Considering other rationalities, not only conflicting interests, allows policymakers to choose from different toolboxes, may there be four (Douglas 1992: 263; Douglas & Ney 1998: 122–123; Schwarz & Thompson 1990: 7), five (Thompson et al. 1990: 5), or nine (B. Davy 2004 and 2008). Responsive land policy does not depend on numbers; it hardly matters whether we consider ‘four, or five or fifty’ rationalities (Douglas 1982: 185). Spatial planning and land policy are responsive as long as planners and other policymakers contemplate plural rationalities without Simmel’s condom (B. Davy 2008). Even weak polyrationality can support policymaking greatly. Weak polyrationality is not a new invention of policymaking. In fact, the consideration of other stakeholders’ perspectives has a longstanding tradition in property and land policy. Three examples, selected from the perspective of individualist, hierarchical, and egalitarian rationality, may serve as examples: Liberal political philosophy, pro-government Policy, and social citizenship.

**Polyrationality and liberalism**

Libertarian authors often present private ownership as a right that a government with respect for individual liberty and economic efficiency may limit only under
exceptional circumstances (Epstein 1985; Fischel 1985; von Hayek 1973: 107; Posner 2007: 31–92; Webster & Lai 2003). However, the Western doctrine of liberal ownership does not condone unfettered property rights. Liberal thought understands the shortcomings of a land policy that addresses only the established landowners.

John Stuart Mill’s critique of Lockean property identifies polyrational principles of inclusion and exclusion. Mill does not refute private property in its entirety, but searches for a viable mix of inclusion and exclusion. He starts with the statement that private property in land, because of its sweepingly exclusionary effects, imposes hardship on each new generation:

No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced … But it is some hardship to be born into the world and to find all nature’s gifts previously engrossed, and no place left for the new-comer. (Mill 1848: 233)

Distinguishing eight monorational types of restricted and shared land uses helps understand the problem Mill has in mind. Large landholdings are not insular, but container uses. If the rules designed for insular uses are applied to inadequately large container uses, too many users are dissatisfied. They do not wish to pursue their happiness in an environment that condemns them to fatalism. Mill, however, assails private property as far as it applies to land without regard to the types of land use. He claims that ‘landed property’ would be felt ‘to be a different thing from other property’.

Mill does not think that the problem of private property in land can be resolved through land use control by the government. The government’s power to control landowners would only add to dispossession. Exploring the consequences of his critique, Mill suggests that the exclusionary powers of private property be curbed:

For instance, the exclusive right to the land for purposes of cultivation does not imply an exclusive right to it for purposes of access; and no such right ought to be recognised, except for the extent necessary to protect the produce against damage, and the owner’s privacy against invasion. (Mill 1848: 235)

Modern planning is making good use of Mill’s idea of property strata, for example, in the case of privately owned public land (Kayden 2000). Combining insular with opportunistic or collaborative uses allows to satisfy the needs of several land users. The proprietor may use her property more intensely (or receives other benefits from planning) in exchange for making land accessible to the general public.

Mill also demands that uncultivated land be removed from the group of objects that can be owned privately. As an economist, Mill obviously saw the dilemma of deterring private investments in land that could not be owned securely. But as a philosopher, he felt that at least uncultivated land should not be subjected to restricted use:

When land is not intended to be cultivated, no good reason can in general be given for its being private property at all; and if any one is permitted to call it his, he ought to know that he holds it by sufferance of the community, and on an implied
condition that his ownership, since it cannot possibly do them any good, at least shall not deprive them of any, which they could have derived from the land if it had been unappropriated. (Mill 1848: 235)

Uncultivated land, in many instances, is ecologically valuable land. Restricting private property rights in rangeland, or the wilderness, is important to environmental policy (Kreuter et al. 2006). Wetland protection would be much easier if the biosphere, apart from cultivated land, was excepted from private property (Adger & Luttrell 2000). Implicitly, Mill distinguishes between (restricted) insular uses and (shared) environmental use of land.

Mill’s reservations about private property are the more remarkable as he represents liberalism and liberal thought. He does not conceive of private property as a natural right, but as a right derived from the ‘sufferance of the community.’ Mill does not suggest that private property be abandoned entirely. But private landowners should not feel free from social obligations:

Even in the case of cultivated land, a man whom, though only one among millions, the law permits to hold thousands of acres as his single share, is not entitled to think that all this is given to him to use and abuse, and deal with it as if it concerned nobody but himself. The rents or profits which he can obtain from it are at his sole disposal; but with regard to the land, in everything which he does with it, and in everything which he abstains from doing, he is morally bound, and should whenever the case admits be legally compelled, to make his interest and pleasure consistent with the public good. (Mill 1848: 235)

Through moral and legal obligations, each landowner should be bound to the public good. Landowners, who cultivate their land, should not be compelled to sacrifice their individual interest. Rather, they should use their land in a way that serves their pleasure and is ‘consistent with the public good.’ Private property relations become dysfunctional if the boundaries of property result in over-exclusion. Mills’ concept of property relations accounts for the rationalities of hierarchists, individualists, and egalitarians. John Stuart Mill balances individual and collective interests in property relations by mixing inclusion and exclusion. Article 14, para. 2, GG, demanding from landowner to use their land in a way that is also beneficial to the public interest, proves that Mill’s idea can be put into practice.

Polyrationality and Policey-Wissenschaft

Almost hundred years earlier than John Stuart Mill, a representative of the German Policey-Wissenschaft presented a concept of property and governance that anticipated many subsequent doctrines. Johann Heinrich Gottlob von Justi, one of the less popular founders of political economy (Backhaus 2009), presents a surprisingly polyrational view on land policy and property relations. In the 17th and 18th century, European governments assumed that common property got in the way of modern agrarian land uses (Dahlman 1980; Radkau 2000; Stevenson 1991). The Policey-Wissenschaft, recommending to the emperor a good governance through good land policy, was particularly eager to replace the commons with private property (Dahlman 1980: 29–64). Von Justi contends that
all areas of surface land, presently owned by municipalities or many individuals in common, always remain much less used than parcels of land that are owned by a private landowner. (von Justi 1760: 122; author’s translation)

Von Justi explains the use deficit as a result of over-inclusion. If too many users share land as common property, they are unwilling to take proper care of their shared resource:

Nobody makes an attempt to improve or cultivate a thing that may be used by so many; and while everybody rushes to gain a little benefit from the common property, the users prevent each other from receiving proper benefits. (von Justi 1760: 122; author’s translation)

As soon as the snow starts melting in spring, von Justi contends, each herdsman hurries his flock to the common pasture. The herdsmen’s anxiety to surrender even a single blade of grass to their competitors would lead to the demise of the pastoral community. Von Justi’s solution of the tragedy of the commons differs strongly from Garret Hardin’s monorational precepts. He starts out like Hardin (1968), however, by demanding that as much land as possible be transformed from common property to private property:

The good judgment of the government (Landespolicey) must result in a suitable division of property in the country’s surface, an indispensable condition for the successful cultivation of land. I consider this rule one of the most noble principles of Polizeywissenschaft: As much property in land as possible must be put into the hands of private individuals and, with the exception of outstanding needs, no land must remain with the municipalities and ownership communities. (von Justi 1760: 122; author’s translation)

Von Justi’s recommendation to turn unsatisfying collaborative uses into profitable insular uses anticipates a core element of market-oriented land policy and literature on law and economics (Demsetz 1967 and 2002; Posner 2007: 31–34; Veljanovski 2007: 68–70). The dispossession of the shared use community (e.g., a rural village) through regulatory control surely is a hierarchical notion. But von Justi does not propose an appropriation of land by the government. Rather, the government must transfer the land to private stakeholders. The German Polizeywissenschaft develops a land policy that achieves efficiency through a modification of property relations. The over-inclusion caused by common property would lead to inefficient land uses, but inefficiency can be avoided by changing property relations. Contrary to neoliberal privatization, however, Von Justi relies not only on market forces. The government still controls the land use of private landowners. Individual proprietors should enjoy as much liberty in using their property as possible, yet the government must interfere in cases of neglect:

Above all, the government never must permit that landowners leave their farms or other fecund land idle, even if the owners pay all of their taxes. Although each landowner enjoys the most extensive freedom to use his property as he deems fit, this liberty never comprises his right not to cultivate and use his land. Each private property simultaneously belongs to the public domain (allgemeines Vermögen des Staats) because it is located within the state’s territory. (von Justi 1760: 128; author’s translation)
A well-established government should enact a law directing that private property, if the land remains idle for four to six years, be taken from the present landowner and sold to the highest bidder. The sales price, upon deduction of costs and taxes, should go as compensation to the previous owner. Only if nobody wants to buy the idle land, it should be transferred for free to anybody, who promises a suitable use of the land in the future. Von Justi’s concept combines the invisible hand of the market with the visible hand of the state or—in terms of the theory of polyrationality—individualist and hierarchical rationality. Mitigating the inefficiency of common property through privatization, this concept expects private landowners to be faithful to the inherent use values of their land. Von Justi restores the liminal functionality of private property relations and, theoretically, solves the problem of unbecoming uses of private land. According to his solution, the government must protect the land from unsuitable owners. In this early version of land use planning, land should be used for farming, grazing, logging, or mining, but the idea can be easily applied to other land uses, too. Industrial brownfields or derelict urban properties are also land owned by ‘unfaithful’ proprietors (B. Davy 2006; Bowman & Pagano 2004). The redistribution of these properties to more suitable users helps secure the best, or at least, better use of the land.

Von Justi (1760) takes weak polyrationality even further by introducing a land policy for structural land uses. He requests that certain types of common property be created by the government. Public works and facilities should beautify the whole country for the benefit of all. Public works and facilities (öffentliche Werke und Anstalten) are accessible for everybody to use and a consequence of civilization and good governance (von Justi 1760: 367). The absence, low quality, or disrepair of public works and facilities would be a clear sign of ‘barbarism’ (einer großen Barbarie) and a corrupt government. Von Justi distinguishes between public works and facilities that serve the interests of everybody or extol the power of the government. The latter need no encouragement. The generally useful public works and facilities, however, need to be planned and developed carefully (von Justi 1760: 368–369).

One of the examples of such spatial commons are highways (von Justi 1760: 372–380). Remarkably, von Justi expects no tragedy of the commons with highways designated to the shared use by the members of an open use community. Although highways are open to the general public, they will not be ruined by everybody’s freedom to use them for travelling and other purposes. As the highways would be planned and constructed with great diligence and the best available engineering, the maintenance costs will be low. Also, a network of modern highways would allow an intensity of traffic so useful to commerce that businesses and travelers would be glad to pay the taxes necessary for sustaining the common property (von Justi 1760: 378). The observation contradicts a frequent assumption in contemporary property theories, i.e., that spatial commons are especially beneficial to the poor. Although spatial commons often are the only access to land for poor people, many commons are more beneficial to the wealthy because they have the means to exploit them more intensely (Dasgupta 2005: 1618). The greater advan-
tage that a network of public streets has for rich people probably explains why von Justi expects no tax avoidance. Spatial commons, of course, require effective management. In von Justi’s world, no individual has the right to harm the public best: Public traffic is subject to regulation, and the government will control damage or abuse of its highways.

Figure 7: Re-defining the commons—the notorious A40 and the European Capital of Culture 2010
(Dortmund, Germany © 2010 B. Davy)

The German Policy-Wissenschaft treats the entirety of property relations as a flexible system of inclusion and exclusion. Its considerations are not limited by international law or constitutional and civil rights. Still, individual rights and private property are essential for good governance. The Leviathan does not resign, but its hierarchical rationality is developed towards a more individualist approach. Also, it becomes quite clear that property relations must accommodate different types of restricted and shared uses of land. Von Justi predominantly has insular and structural uses in mind. Different types of land uses and polyrational property relations not merely coexist, but are typical of a well-balanced society. Being able to actively participate in such a society and ‘to live the life of a civilised being according to the standards prevailing in the society’ (Marshall 1950: 11) is, at least from the perspective of social welfare capitalism, the essence of citizenship (Turner 1990).
Polyrationality and citizenship

In his seminal essay Citizenship and Social Class, Thomas Humphrey Marshall presents a sociological concept of citizenship that starts from an egalitarian position to progress into a theory of differentiated inclusion and exclusion (Marshall 1950). Marshall’s concept of citizenship contains elements of polyrationality that have inspired—and perhaps confused—a vast discourse on citizenship (Bulmer & Rees 1996; Isin & Turner 2002; Turner 2009). Citizenship often is associated with nationality or passport holding (Barbalet 2007: 407), but Marshall (1950) perhaps is better understood as discussing a standard of rights that every person must be able to enjoy in a good society. Citizenship guarantees to everybody certain rights, yet also permits a fair degree of inequality. Citizenship means to belong to a ‘society in which class differences are legitimate in terms of social justice, and in which, therefore, the classes cooperate more closely than at present to the common benefit of all’ (Marshall 1950: 62). How can class differences be legitimate in terms of social justice and encourage social cooperation? Marshall’s answer is simple: Class differences are legitimate, if social rights ensure that nobody is left behind.

T. H. Marshall’s concept of citizenship

T. H. Marshall emphasizes the relevance of rights. Nobody is really included unless they have an individual right to belong; nobody really is excluded unless they are denied even the right to claim some space for themselves. Marshall (1950: 10–27) specifies three elements of citizenship—civil, political, and social—which derive from individual rights:

The civil element is composed of the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. … By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. … By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. (Marshall 1950: 10–11)

Marshall examines the long-term development of the three elements in England as institutionally divorced components of citizenship. Moreover, he considers the relationship between citizenship (traditionally, a standard of equality) and social class (a standard of inequality):

Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. … Social class, on the other hand, is a system of inequality. And it too, like citizenship, can be based on a set of ideals, beliefs and values. It is therefore reasonable to expect that the impact of citizenship on social class should take the form of a conflict between opposing principles. (Marshall 1950: 28–29)

What would the conflict between equality (citizenship) and inequality (social class) look like? In a society only based on social class, policymakers may think that poverty is evidence of a failure by the poor:
In such circumstances it is natural that the more unpleasant features of inequality should be treated, rather irresponsibly, as a nuisance, like black smoke that used to pour unchecked from our factory chimneys. (Marshall 1950: 32)

Poverty as nuisance to wealthy people would justify the removal of the poor to ‘remote places’ (Blackstone 1768: 217). ‘Class-abatement’ works like ‘smoke-abatement’ (Marshall 1950: 32). If ‘class-abatement’ became a goal of land policy, spatial planners would regard the poor as a type of locally unwanted land use (or LULU), just like a waste management facility. If planners consider the poor and the land in this fashion, the poor are going to be treated like the proverbial Euclidean ‘pig in the parlor’ (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 [1926] 388). Since they never are ‘a right thing,’ however, the poor always are ‘in the wrong place.’ Consequences of constantly being in the wrong place are the criminalization of homeless people, bylaws against loitering, the tolerated abuse of street children, or mass evictions of slums (Charles 2009; Davis 2007; Ewelukwa 2006; Foscarinis et al. 1999; Gustafson 2009; Leipold 2001). How can social citizenship mitigate the predicament? Presumably, the spatial dimension of poverty connects citizenship to spatial planning and land policy.

T. H. Marshall, writing about welfare states and social rights, uses town planning as an example of how policymakers may overcome the divide between citizenship and social class. He claims that ‘town-planning is total planning’: Town-planning not only treats ‘the community as a whole, but it affects and must take account of all social activities, customs and interests’ (Marshall 1950: 61). Marshall understands the planners’ dilemma of wishing to create new spaces for ‘new human societies,’ but also cater to the needs of present residents. Ultimately, planners ‘try to provide for all the major diversities’ contained in a society. Spatial plans designate certain areas as suitable for certain land uses and, by doing so, augment social inequality:

Town-planners are fond of talking about a ‘balanced community’ as their objective. This means a society that contains a proper mixture of all social classes, as well as of age and sex groups, occupations and so forth. They do not want to build working-class neighbourhoods and middle-class neighbourhoods, but they do propose to build working-class houses and middle-class houses. Their aim is not a classless society, but a society in which class differences are legitimate in terms of social justice, and in which, therefore, the classes cooperate more closely than at present to the common benefit of all. (Marshall 1950: 61–62)

In emphasizing the relationship between social rights and belonging, T. H. Marshall develops a theory of inclusion and exclusion based on citizenship. Traditionally, citizenship has been associated with civil and political rights. T. H. Marshall adds a ‘social element’ to citizenship that comprises ‘the right … to live the life of a civilised being according to the standards prevailing in the society’ (Marshall 1950: 11). He doubts that society, even in the face of abundant natural resources, could ‘enable every man to be a gentleman’ (Marshall 1950: 6). Although in favor of social rights, he claims that ‘citizenship has itself become, in certain respects, the architect of legitimate social inequality’ (Marshall 1950: 6 and 9). The conclusion is based on his interpretation of social class as ‘by-product of other institutions:’
Class differences are not established and defined by the laws and customs of the society (in the medieval sense of that phrase), but emerge from the interplay of a variety of factors related to the institutions of property and education and the structure of the national economy. (Marshall 1950: 31)

Planning, not only property, is among the institutions establishing inequality (a conclusion that many planners find hard to swallow). By accepting the need for ‘middle-class houses,’ planners create the social spaces of ‘middle-class neighbourhoods,’ thus excluding the poor from certain urban areas:

When a planning authority decides that it needs a larger middle-class element in its town (as it very often does) and makes designs to meet its needs and fit its standards, it is not, like a speculative builder, merely responding to a commercial demand. It must re-interpret the demand in harmony with its total plan and then give it the sanction of its authority as the responsible organ of a community of citizens. … This is one example of the way in which citizenship is itself becoming the architect of social inequality. (Marshall 1950: 62)

The fragmentation of cities—with spaces on the right and the wrong side of the tracks—allows ‘all the major diversities’ to find places for themselves. Spatial inequality, if seasoned by the social right ‘to live the life of a civilised being,’ adds to citizenship that speaks to plural rationalities. T. H. Marshall does not advocate a
concept of citizenship ‘aiming at absolute equality’ (Marshall 1950: 77). Rather, he
turns our attention to ‘the impact of a rapidly developing concept of the rights of

CITIZENSHIP AND THE POLITICS OF BELONGING

Citizenship is a salient, yet oscillating way to capture the politics of belonging. The
Handbook of Citizenship Studies (Isin & Turner 2002) and Citizenship Studies, a jour-
nal published by Routledge since 1997, demonstrate a wide range of topics and
views. Probably because Marshall’s essay is ‘evolutionary, analytically vague and
ethnocentric’ (Turner 1990: 212), it has attracted attention, critique, opposition, and
praise. Drawing upon Marshall (1950), many authors construe citizenship as an
overarching concept of inclusion and exclusion based upon rights (Barbalet 2007;
Bulmer & Rees 1996; Isin & Turner 2007; Keating 2009; Kymlicka 1995; Mann 1987;
has functioned as a substitute for a sociology of rights (Turner 1993: 496) perhaps
explains the widespread popularity of citizenship theories. The idea of citizenship
as differentiated inequality challenges gender studies (Fallon 2003; Korpi 2010;
Lister 1998; Orloff 1993; Vasan 2007; Walby 1994). The citizenship concept is fun-
damental to poverty research and social policy (Alcock 2006: 253–254). In particu-
lar, the ‘assets agenda’ of social policy examines well-being based on ownership
(Prabhakar 2009). Corporate citizenship examines the social responsibilities of
companies, especially with respect to economic globalization (Abrahamson 2007;
does not confine citizenship to the nation-state, but eventually leads to supra-
national citizenship (Deacon et al. 1997: 16–19) or global citizenship (Carter 2001;

Citizenship has grown into a popular concept in social sciences even among
those, who pay no attention to T. H. Marshall’s theory. With regard to land policy,
recent examples comprise citizenship and planning (Lo Piccolo 2010; Yiftachel
2009: 97–98), citizenship and climate change (Harris 2008), citizenship and political
geography (Staeheli 2010), or citizenship and the post-Apartheid property disci-
course in South Africa (Everingham & Jannecke 2006; van der Walt 2008). Being a
citizen, and not just a human, sounds inclusive and promises a right to belong. How-
ever, examining citizenship within the context of planning, land policy, re-
source management, and property requires more than just a label.

T. H. Marshall conceives of citizenship as the rights-based outcome of the poli-
tics of belonging. In particular, social citizenship strikes a balance between inclu-
sion and exclusion. Social citizenship means that the wealthy and the poor are
treated as full members of society, not as ‘the other’ (Isin & Turner 2007: 7). How-
ever, social citizenship also means that the wealthy have the right to be unequal—
to possess more and better functionalities than others—as long as the poor receive
their right to a civic minimum in exchange for equality. In other words, inequality
is acceptable if no one is left behind. Gated communities, luxurious real estate de-
velopments, or exclusionary zoning do not contradict social citizenship as long as
everybody receives all goods and services required for an adequate standard of living. Inequalities are generated by rights because the increasing equality of opportunities leads to conflicts over resources (Runciman 1996: 61). Of course, a deterioration of formal state structures—for example, through privatization, deregulation, or decentralization—can also result in the inequality of ‘differential citizenship’ (Lake & Newman 2002).

T. H. Marshall assumes that citizenship entails rights and duties, yet he seems to think that every society is free to determine what the rights and duties of citizenship are:

There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed. (Marshall 1950: 28–29)

Depending on what ‘universal principle’ means, T. H. Marshall is perhaps wrong. Indeed, no natural right or preordained order determines property relations everywhere, and the politics of belonging combines inclusion and exclusion in a wide variety of ‘image[s] of an ideal citizenship.’ However, universal human rights actually set a standard for the citizenship quality of different property systems. In this sense, a universal principle of citizenship exists.

Citizenship and human rights are overlapping, yet incongruent concepts. Citizenship and human rights cannot be divorced because human rights would remain unprotected without the existence of states. State protection hinges on belonging, however, and citizenship—as membership or as minimal standard of individual rights—remains highly significant (Isin & Turner 2007: 12–13). Social theory, particularly sociology, is suspicious of human rights which are ‘covertly but inevitably tied to the idea of (private) property’ (Turner 1993: 499). The suspicion perhaps derives from misunderstanding, maybe ignorance. The internationally proclaimed right to private property (Article 17 UDHR) has never been transformed into universal human rights law. Neither ICCPR nor ICESCR contain a property clause akin Article 17 UDHR. Some of the international conventions protect property with respect to vulnerable individuals and minorities (e.g., Article 5 CERD, Articles 15 and 16 CEDAW, Article 15 CRAM, Article 12 CRPD). Also, some regional human rights protect proprietary interests. But certainly, universal human rights do not unambiguously protect private property. In fact, human rights and property in land are a multi-layered subject with liquid boundaries from which, in the light of T. H. Marshall’s citizenship theory, polyrational property relations emerge.

CITIZENSHIP, HUMAN RIGHTS, AND PROPERTY

Universal human rights help communicate values shared by many. Some authors consider human rights from a moral perspective ‘as pronouncements in social ethics, sustainable by open public reasoning’ (Sen 2004: 355–356). Others insist that rights be treated as expressions of binding law, not just affection (Waldron 1988). The legal analysis of human rights, particularly of those granted by ICESCR, sug-
gests that human rights can be considered in several ways: as duties of every States Party, either enforced by other States Parties or an individual whose rights have been violated, or as ‘affirmative independent values’ (Henkin 1979: 439–442). From the perspective of land policy, it is important whether universal human rights are legally binding, but is even more relevant to understand the substance matter of internationally shared values. What are these values with respect to property in land?

Universal human rights know no second-class citizens and demand that property relations accommodate both the landowner and the landless, the real estate tycoon and the street Sweeper. The politics of belonging and property relations comply with human rights, if no one is held in slavery or servitude (Article 4 UDHR), marriage is entered into only with the free and full consent of the intending spouses (Article 15, para. 15, UDHR), and the government respects everyone’s right to own private property (Article 17 UDHR) and also fulfills everyone’s right to an adequate standard of living (Article 25 UDHR, Article 11 ICESCR). Human rights treat neither the landowner nor the landless as ‘the other,’ but consider everyone worthy of the government’s respect, protection, and care ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (Article 2, para. 1, UDHR). This demands a fair degree of polyrationality, of listening to other voices, other rationalities. During the translation of the Universal Declaration of Human Rights into international treaties, the UDHR rights were split into two groups and five subgroups. Some rights were written into ICCPR, others into ICESCR. The five subgroups, mentioned in the names of both covenants, are civil, political, economic, social, and cultural rights.

The five subgroups of rights, guaranteed under ICCPR and ICESCR, are reminiscent of T. H. Marshall’s civil, political, and social citizenship. With regard to Article 17 UDHR, the principal comment suggests property be ranked with other ‘social, economic, and cultural rights’ (Morsink 1999: 233). Neither covenant mentions the right to own private property (and, insofar, the scale is tipped in favor of the landless and the street Sweeper). Some authors consider property an economic right (Eide 2001: 18) or a right with social elements (Krause 2001: 197). But perhaps property also is a cultural right, considering ‘the ancestral tie between the land, or “mother nature”, and the man who was born therefrom’ (International Court of Justice, 16 October 1975, Western Sahara, Advisory Opinion, I.C.J. Reports 1975: 12 [Judge Ammoun dissenting at 85]). In his essay on Citizenship and Social Class, T. H. Marshall characterizes private property rights as civil rights which confer the legal capacity to strive for the things one would like to possess but do not guarantee the possession of any of them. A property right is not a right to possess property, but a right to acquire it, if you can, and to protect it, if you can get it. (Marshall 1950: 34–35)

He even makes a joke that implies that property is not a social right:

But, if you use these arguments to explain to a pauper that his property rights are the same as those of a millionaire, he will probably accuse you of quibbling. (Marshall 1950: 35)
Marshall’s ‘joke’ draws from a paradox of the Western ownership tradition. In this tradition, property is the right that the poor are having while they have nothing:

Abstractly, persons who are homeless have the same property rights as anyone else, with respect to whatever they might own. But it is unlikely, if a person is homeless, that she owns much. (Baron 2006: 1427)

Marshall is well aware of the cruelty of his ‘joke’ and insists that civil rights be accompanied by social rights:

Similarly, the right to freedom of speech has little real substance if, from lack of education, you have nothing to say that is worth saying, and no means of making yourself heard if you say it. But these blatant inequalities are not due to defects in civil rights, but to lack of social rights[]. (Marshall 1950: 35)

The opposition between property (as a civil right) and social rights does not represent the full range of property relations. Resource rights, riparian rights, the right to draw your next breath, the right to maintain an ancient burial ground, use rights in streets and other public spaces, or corporate property not really fit the definition of a civil right. Why is property not (also) a political, economic, social, or cultural right? After all, among Marshall’s social rights are the ‘right to a modicum of economic welfare and security’ and the right ‘to live the life of a civilised being according to the standards prevailing in the society’ (Marshall 1950: 11). Social rights, as far as they demand ‘a modicum of economic welfare’ be transferred by the government to the beneficiaries, guarantee the possession of this modicum (may it consist of a social cash transfer, in kind services, or minimal property rights in land and other natural resources). Also, some legal systems protect social rights as property (Krause 2001: 203–208; Reich 1964; Singer & Beermann 1993).

T. H. Marshall himself admits the economic and political character of property relations when he closes The Nature of Class Conflict by saying that property ‘makes governments appear as servants, not as masters:’

Capitalists, in the sense of owners of property, do show common features when examined in terms of social class, but these are not derived from the fact that capital gives power over labour, nor primarily from the fact that capital yields an income, but rather from the fact that property, however small, gives security and insurance against misfortune and liberty for new adventure, thus cultivating a sense of proprietorship in a civilisation, of independence of status, which makes governments appear as servants, not as masters, and institutions as the means to freedom, not to servitude. (Marshall 1950: 112–113)

Property relations combine the hierarchical, individualist, egalitarian, and fatalist rationality. Of course, the pioneer from Locke’s account of appropriation through labor is a typical individualist, but already the social contract and property theories by Hobbes or Rousseau add descriptions of other rationalities. The vulnerability of women and men in Rousseau’s natural position leads to a social contract and property system based on egalitarian rationality. Moreover, Hobbesian property fully depends on the willingness and good judgment of the Leviathan to grant and control property rights in the public interest. The concept of a multi-faceted citizenship (Marshall 1950), in combination with universal human rights, helps understand how property relations, if viable; avoid over-exclusion as well as over-inclusion through a polyrational mix of inclusion and exclusion.
Polyrational property relations

With respect to inclusion and exclusion, John Stuart Mill resolves the problem of over-exclusion and the tension between private and public interests in land (p. 28). Von Justi recombines property relations of inclusion and exclusion in order to achieve the best land use (p. 30). T. H. Marshall employs the egalitarian notion of citizenship to introduce differentiated inequality caused by spheres of rights (p. 34). Each author starts with a monorational idea: Mill with individualist rationality, von Justi with hierarchist rationality, Marshall with egalitarian rationality. And then each author develops this idea by introducing other voices, other rationalities. Mill picks up on egalitarian and hierarchical rationality, von Justi combines hierarchist with individualist and egalitarian rationality, Marshall mitigates citizenship with social class, based on individualist and hierarchical rationality. The results of these encounters are quite productive and create a framework for land policy in the face of polyrational property relations.

If planners and other policymakers wish to control or promote the land uses of owners or use communities, they certainly need to know what ‘property’ means. The review of property in land (Chapter 6—hopefully, whoever has read so far, will want to read more) delivers a much more complex picture than monorational accounts of property let us expect and confirms Blackstone’s dictum: There is ‘nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property’ (Blackstone 1766: 2 [Book II, Chapter 1]). The law rising from these imaginations and affections, however, has considerably departed from Blackstone’s concept of property as ‘that sole and despotic dominion.’ The most prominent conclusions from the review of property in land are:

• Property relations are concerned with belonging—a balance between inclusion and exclusion—not only with ‘total exclusion.’ Plural use rationalities are standard elements of land rights: The property relations between the owner of a piece of land and everybody else change with the conversion from farmland to housing, shopping mall, or waste treatment facility.

• Property relations hardly ever represent clear-cut private or common use rights, but rather combine restricted and shared access to land uses in order to achieve satisfying results for individuals as well as the general public. Homes and streets—the typical combination of insular and structural land uses, each controlled by its own set of property rules—illustrate the viability of polyrational property relations.

• Property law involves the government actively in all property relations, not merely as provider of crime prevention and a court system. Governments have the obligation to respect, protect, and fulfill property relations, including the human right to an adequate standard of living (Article 25 UDHR and Article 11 ICESCR).

• Property relations require that public and private purposes, or collective and individual interests, be evaluated constantly for mutual gain, not only for poss-
ible interferences. Kinship uses and collaborative uses are examples of how the creative tension between collective and individual interests can be resolved through property relations.

- Property relations, drifting between high and low levels of property, address issues of wealth and poverty. The use of large property holdings requires land policies different from the access to minimal land uses. Although formally the same laws apply, the social and spatial functions of property vary with the capabilities of its owners and users.

Property speaks with many voices, responds to plural rationalities. In particular, private and common property organize restricted and shared land uses within the dynamics of individualist, egalitarian, hierarchical, and fatalistic rationalities.

Monorational statements about property can be helpful if they emphasize certain aspects that require the policymakers’ attention. However, statements like ‘property means X’ oversimplify the plural rationalities involved in property relations. The concept of polyrational property relations denies that anybody can capture the meaning of property monrationally. For example, ascertaining the superiority of private property in a ‘competition between private and collective ownership’ (Demsetz 2002) makes little sense in cities with great interdependencies between restricted and shared land uses. If private landowners are allowed to compete for restricted uses of streets, i.e., the transformation of structural uses into insular or corporate uses, city life ceases (because we would have to negotiate a fee for crossing the street). A theory of land policy must not simplify property relations to make them fit preconceived ideas. A theory of land policy has to accommodate the forensic and cultural knowledge embodied in property discourses on the global, regional, and domestic level. Unimpressed by monorational contentions, these discourses have moved beyond the traditional dichotomies of freedom or security, capitalism or communism, inclusion or exclusion, private or common property. A theory of property relations which neglects these discourses certainly misrepresents the complexity of contemporary thought on property. In fact, a theory of property relations profits from the richness of experiences with polyrational property, as Amnon Lehavi points out with regard to public parks and other public spaces:

Richness does not mean nihilism. The construction of various property configurations, each with its unique bundle of entitlements and responsibilities, can be made in a way that both better meets the changing needs of society and provides the platform for the possibility of future change, and at the same time maintains a sufficient level of coherence and certainty that validates property law as a meaningful mechanism that stands firmly on its own feet. (Lehavi 2008: 212)

Land policy contemplates not so much the details of property law than the dynamics of property relations as liquid, yet vital ingredient in a polyrational theory of planning and property. I call this ingredient ‘polyrational property relations’ to emphasize that viable property emerges from the politics of belonging and plural land uses as a turbulent mix of inclusion and exclusion, private and common uses, individual and collective interests, and wealth and poverty considerations. Polyra-
Polyrational property is not at all like a master plan, blueprint, cornerstone, or building block. There is nothing simple about polyrationality. However, polyrational property is responsive, and a prerequisite of performing spatial planning and land policy without a condom. What does polyrational property relations mean?

Polyrational property relations account for plural rationalities in restricted and shared uses of land. Property relations depend on the land use context which monorational representations of ‘one property’ disregard. Yet, only from a very generalizing perspective, insular uses or corporate uses, kinship uses or opportunistic uses, environmental uses and structural uses would be manifestations of ‘one property.’ In practice and everyday life, they are not.

Figure 9: Defiance of land markets and the joy of the commons
(Central Park, New York City, N.Y. © 2008 B. Davy)

Polyrational property also recognizes that policymakers and stakeholders appreciate land as valuable from various perspectives which include the exchange value, the use value, the territorial value, and the existence value of land (Chapter 5). Polyrational property acknowledges that property theory offers a wide range of explanations of property as things, hierarchy of norms, constraint on parliamentary and regulatory powers, a bundle of rights, a number of conceptions, a regime, or, property relations (Chapter 6). Polyrational property considers that the legal

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