

FACULTY PROFILE

Harvey M. Jacobs

Harvey M. Jacobs is on the faculty of the University of Wisconsin-Madison, where he holds a joint appointment as professor in the Department of Urban and Regional Planning and the Institute for Environmental Studies and serves as director of the Land Tenure Center. His research and teaching investigate public policy, theory and philosophy for land use and environmental management. During the last decade he has focused his domestic work on the impact of the private property rights movement. He wrote the book *Who Owns America? Social Conflict over Property Rights* and the Lincoln Institute policy focus report *State Property Rights Laws: The Impacts of Those Laws on My Land*; and his work has been published in academic and professional journals in the U.S. and Western Europe. Jacobs also has investigated international issues of land use policy formation in Eastern Europe and southern Africa, with a specific focus on peri-urban (urban fringe) land management and the definition of private property rights. He is particularly interested in how societies define property and the policy structures they develop to manage the public-private property relationship.



Jacobs is a faculty associate of the Lincoln Institute, where he teaches courses for policy makers and practitioners in land use planning and management. He developed a Lincoln course titled "Land Use in America," originally designed for staff of the Environmental Protection Agency and now available through open enrollment. As part of his current education and research project with the Institute, he will lead a seminar in Cambridge in May on the future of private property rights in America, and he is working on another book to be titled *Private Property in the 21st Century*. This essay outlines his views on the uncertain future of the American ideal of private property rights. *Contact: hmjacobs@facstaff.wisc.edu.*

Property Rights and Environmental Planning

Social conflict over property rights is at the center of all U.S. land and environmental planning and policy. One key source of this conflict is the differing interpretations of the so-called Takings Clause of the Fifth Amendment in the Constitution's Bill of Rights: "...nor shall private property be taken for public use, without just compensation."

Those who support the integrity of private property rights and stand against land use and environmental regulation by state and local governments can be understood as participants in one of the most significant U.S. land use and environmental movements of recent times. This movement is referred to by a variety of labels, including the private property rights movement, the land rights movement, the wise use movement and, by the environmental community, the anti-environmental movement. This movement's leaders have succeeded in keeping their agenda before the U.S. Congress since the early 1990s, though as yet no action has resulted from their efforts. More significantly, they have

succeeded in having bills reflecting their agenda introduced in all 50 states, and they have secured the passage of significant legislation in over half of the states. In addition, they have promoted significant parallel activity in over 300 counties. Perhaps most important, they have reshaped public debate on how the media communicates to the American public about issues of land and environmental management, and the balancing of the public good with individual property rights.

The potential power of the property rights movement became even more important after the 2000 elections. While governor of Texas, George W. Bush exhibited strong sympathies to the arguments of the property rights movement and supported state-based legislation in accordance with the movement's goals. Among his most prominent initial appointments as president were the selection of a secretary of the interior and a solicitor general with explicit ties to the property rights movement and commitments to the property rights issue. These developments, together with renewed activity at the state level, indicate that the property rights move-

ment seems to be alive and well in America. The passage of Measure 7 in the state of Oregon in the fall of 2000 is of particular interest, since this measure is one of the most stringent state property rights laws in what is considered one of the most progressive states in its land use and environmental management policies. The measure, passed by initiative, requires landowners to be compensated if the value of their property is reduced by a state or local law or regulation. It is under state constitutional challenge by land use and environmental groups, and its implementation is being held back until this challenge is settled by the Oregon courts.

Historical Context

Underlying the policy agenda of the property rights movement and the conflict with the land use and environmental movements is a fundamental debate about U.S. history, the cultural myths that inform our understanding of ourselves as a nation, and the intended meanings of selected provisions of the Bill of Rights. From the perspective of the property rights movement, strong individual private property rights are an

integral component of our democratic society. Drawing from the writings of the nation's founders such as John Adams, James Madison and Thomas Jefferson, these proponents argue that liberty, equality and citizenship in a democracy, in fact democracy itself, can not be secured and sustained without a robust set of property rights essentially unassailable by the power of the state. From this perspective, land use and environmental laws become a threat to the very nature of democratic way of life. Richard Epstein, one of the leading legal scholars articulating this view, has suggested that “the [entire] system of land use planning is a form of socialism in microcosm” (Epstein 1992, 202).

In opposition, the land use and environmental movements also draw from the writings of the founders, including Benjamin Franklin and Thomas Jefferson, to argue that property rights are created by the public sector to serve social ends, and that citizens' rights in property have to bend and flex with society's changing needs over time. Land use and environmental proponents tend to make arguments about rights *and* responsibilities in property, rather than to see individual rights as preexisting or standing before the rights of society, as expressed through the actions of government.

The historical challenge for this debate is the that private property has been subject to substantial local regulation even since colonial times, and it has been fundamentally reshaped at several times in American history, to reflect changing social values and changing technology. For example, in the 1860s the property ownership rights of slave-owning plantation farmers in the South and in the 1960s the commercial trespass rights of lunch-counter owners were significantly reshuffled to reflect changing social values about race relations. In the early part of the twentieth century it was necessary to reconceptualize the property rights bundle as a function of the invention of the airplane and the seeming nonsense of allowing individual owners to claim trespass for air travel above their property.

Changing Conditions

Social reformulation of private property to reflect changing conditions continues. During the 1990s resistance by male-only membership clubs and male-only colleges to the admission of women was prominent in the media and the courts. Like the prior slavery and civil rights situations, here, too, individuals lost their rights in property, absent compensation, to reflect changing social values.

Thus, we know that private property is not a static concept or entity. In America it has changed since its creation during colonial times, and there is every reason to believe it will continue changing in the future. In fact, for over fifty years some ecologists and land ethicists—most prominently and enduringly Aldo Leopold (1949)—have called for a fundamental reinvention of property, based on new scientific knowledge that is less individual-rights oriented and more oriented toward social and ecological responsibilities.

It is reasonable to say that both sides to this debate have legitimate concerns and perspectives on the issue. Some property rights reforms through land use and environmental planning and policy, when taken too far, do seem to violate fundamental American understandings about the social contract that underlies national life. On the other hand, unassailable bundles of private property rights seem to leave society in a place that does not allow for change through the integration of new technologies, new social values, or new concepts of ourselves and the land on which we live.

Social conflict over property rights is at the center of all U.S. land and environmental planning and policy. However, much of the current scholarly inquiry and legislative and judicial debate that occurs now is formalized posturing, with little real communication around an issue that is one of the most central to our democratic society. Too often, the well-known players trot out their already settled analyses and opinions and wave them at one another. Little real progress occurs, either in intellectual understanding of these matters or in policy innovation.

The goal of my current work is to get key actors to put aside their rancor and agree to talk *with* one another instead of *at* one another. Is it possible to move beyond the broad rhetoric in this debate to a determination of clear, specific areas of agreement and disagreement about the place and role of the property rights bundle and the concept of property rights in our American democratic-legal schema?

The challenge is twofold: accepting that private property is fundamental to the American character and the design of American democracy, and acknowledging that private property has changed significantly through the centuries and thus will continue to change. The issue is not if private property will evolve, but how it will evolve.

As we seek to address this issue, many questions present themselves. How much will new ecological knowledge and social values transform our sense of what is mine to use (and misuse and abuse) as I please? Is the evolutionary transformation of private property a slippery slope that eventually undermines the viability of contemporary democratic forms of governance? Are the ideals and principles of the founding fathers about the relationship of land ownership to liberty and democracy irrelevant in a world of urban wage earners, in contrast to the world of farmers, foresters and ranchers for which they were formulated? These are among the challenges we face in trying to untangle a puzzle that is the key to the future of American (and increasingly global) land use and environmental planning. **L**

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