

Whose Rights, Whose Regulations? Land Theory, Land Policy, and the Ambiguous Future of the New Private Property Rights Movement in the U.S.

HARVEY M. JACOBS

The promotion of private property rights is the most significant land-use policy movement in the U.S. today. This is despite the widespread support for growth management and environmental protection among the American people, as reflected in public opinion polls. This movement has succeeded in passage of significant legislation in 18 states, 13 new laws in 1995 alone, plus parallel activity in the U.S. Congress and in over 200 counties.

The private property rights movement raises a set of issues about the role of private property in the American social contract which have been debated since the country's founding. The movement seems to capture one set of sentiments about the bureaucratization of land policy. Their success in the legislative arena suggests that they are likely to exert substantive future pressure on the form and direction of land policy.

This paper uses Aldo Leopold's "Land Ethic" essay to frame the paradoxical rise of private property rights movement. The validity of the legal-historical claims made by private property rights advocates are examined in light of debate among the U.S.'s founders, and of legal and political decisions made in subsequent centuries regarding the inviolability of private property rights relative to social needs. I argue that the private property rights movement's influence will likely grow in the short term, because backers are well organized for political action. However, in the long term they are likely to fail because they misunderstand how much of today's regulatory activities are actually conservative and designed to protect private property rights.

Land Theory and Land Policy

Nearly fifty years ago Aldo Leopold, a University of Wisconsin ecologist, penned what has become a modern classic of land use literature—*A Sand County Almanac* (Leopold 1968 [1949]). In "The Land Ethic," the most well known and often cited essay in that book, Leopold bemoaned the state of people-land relations.

There is as yet no ethic dealing with man's relation to land and the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land relation is still strictly economic, entailing privileges but not obligations (Leopold 1968: 203).

Leopold then laid out the need for an alternative relationship, an ethical relationship.

The land ethic... enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. A land ethic... affirms... [the] right [of resources] to continued existence, and, at least in spots, their continued existence in a natural state. ...a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it (Leopold 1968: 204).

Writing in the late 1940s, Leopold's ideas of an ethical relationship between land resources and people seemed nothing but a philosopher's dream. Here he was contemplating an alternative relationship as America stood at the edge of its post-war expansion. With regard to land, the baby boom, the building of the U.S. interstate highway system, and the suburbanization of America characterized the country in the 1950s and 1960s, not an ethical relationship to land. If anything, the American relationship to land in this period was even more exploitative than it had been in the decades before the war. Economic and spatial growth equalled a social sense of progress, and the needs of America's urban areas took precedent over its rural and ecological zones (see, for example, Jacobs 1989). A cultural predilection towards land exploitation combined with both the technological means (widespread ownership of automobiles and an inexpensive way to build single-family housing) and fiscal tools (widespread access to housing credit and steadily growing household income) to realize this phenomenon.

But if in the late 1940s Leopold's ideas seemed to stand in opposition to the mainstream of American thought and action, within a generation it appeared that his dream was about to become reality. In 1969, 20 years after the publication of *A Sand County Almanac*, Wisconsin's former governor and then U.S. Senator, Gaylord Nelson, helped design a watershed event—Earth Day 1970. Earth Day is broadly recognized as launching the contemporary environmental movement (Shabecoff 1993). Here seemed evidence that people cared deeply about land and environmental resources and were willing to demand individual and social action that reflected a new land ethic.

A few years after the first Earth Day, again in Wisconsin, the state supreme court issued a landmark ruling in the case of *Just v. Marinette County* (201 N.W.2d 761 [Wis. 1972]) that turned traditional American notions of land and private property upside down. The court held that a landowner has no reason to presume use rights to land other than to keep land in its natural state (Large 1973). This ruling embodied a Leopoldian land ethic, and became a holy grail to the emerging environmental movement (Stone 1974). Combined with an avalanche of land-use and environmental legislation of the same period it seemed as if Leopold's land ethic was coming to be (see Popper 1988 for one discussion of this legislative action).

Even now, one of the social values which seems to most characterize the American people is widespread support for sound land-use and environmental protection. Public opinion polls consistently show that a significant proportion of the U.S. public identifies with these values, and, importantly, backs public policy action to restrict private property rights and protect the land and environmental resources (Dunlap 1991). Almost all politicians, regardless of political party, find it necessary to identify themselves as "environmentalists" of some stripe in order to have the necessary public credibility to run for office. The Republican Party, which won national power in 1994 in part on a strong anti-environmental platform, found it necessary to use the occasion of the most recent Earth Day to emphasize its sympathies for environmental values and its commitment to expunge anti-environmental action for its current legislative agenda.

But this does not mean that this move towards Leopold's "Land Ethic" has been without critics or backlash. There has been a consistent stream of criticism emanating from the political right about these new laws, policies, and programs. During the first generation of the so-called "quiet revolution in land-use control" in the 1970s, conservative critics blasted the new state and federal laws as fundamental threats to foundational American values (Bosselman and Callies 1971 on the "quiet revolution;" McClaughry 1975, 1976, for an articulate, libertarian response). More recently we have the emergence of the so-called wise use movement (Jacobs 1995, Echeverria and Eby 1995, Brick and Cawley 1996).

Leopold seemed to have provided warning of this phenomenon and of the serious threat it could pose. In the closing section of "The Land Ethic," Leopold notes that "conservation (i.e., sound land-use management) is paved with good intentions which prove to be futile, or even dangerous, because they are devoid of critical understanding either of the land, or of economic land use" (Leopold 1968: 225). To Leopold's list needs to be added the cultural meaning of land, and of its political power in the U.S. context.

The early political history of the U.S. is as much a settlement movement for access to freehold land unavailable

in Europe as it was a search for religious and political freedom (Ely 1992). The cultural myth of freehold private property—the open spaces of the American West, the attitude of "it's my land and I can do what I want with it!"—define the American character as much any characteristic. To be an American is to own and control private property. So, while public opinion polls show that environmental protection is supported by most Americans, many of these same citizens can be deeply disturbed by the public regulatory, private property right impinging programs developed to achieve this goal.

At least initially the conservative critics of late-modern land-use policy had little impact. While they wrote about their sense of the danger to American values and democracy, the legislation, programs, and support for land-use and environmental organizations continued unabated. Recently, though, a real change has occurred. Beginning in the late 1980s, a coordinated and concerted effort began to undo the land-use and environmental policy success of the last two decades (Minter 1994, Lund 1994, Marzulla 1995, Yandle 1995). Its success has been formidable. For example, private property advocates who argued that federal efforts were really intended to "take" private land (Stapleton 1993)¹ successfully derailed what would have been one of the most innovative efforts at integrated ecosystem management to coordinate management of public holdings in the greater Yellowstone ecosystem.

Private property advocates are also the intellectual leadership behind President Reagan's Executive Order 12,630 in 1988 (Pollot 1989, Folsom 1993). This order, titled "Government Actions and Interferences with Constitutionally Protected Property Rights," required, in essence, preparation of a private property rights impact statement on all federal regulatory action. Bills put forth in the U.S. Senate and sponsored by former President Bush's administration sought to codify this order (Jacobs 1995). These legislative proposals have continued unabated, and the 1996 presidential race between Bob Dole and Bill Clinton echoes the debates over them (Freilich and Doyle 1994, Jacobs and Ohm 1995, Kriz 1996).

Even under the Clinton-Democratic administration, and before the Republican victory in November 1994, the private property rights movement had significant influence. Efforts to float grazing fees on federal lands to market levels have been hampered by their lobbying, as have efforts to close federal lands to off-road vehicle use. Most dramatically, efforts to elevate the Environmental Protection Agency to a cabinet department, a key promise of the 1992 Clinton campaign, were aborted by private property advocates (Cushman 1994).

In 1994 the 103rd Congress took up 22 separate pieces of legislation that were introduced to offer some level of protection to private property rights (Meltz 1994). Perhaps more significantly, the movement has been associated with efforts to get similar pieces of legislation passed by states

(Lund 1994, Marzulla 1995). In 1995, 101 "takings" bills were offered up in 39 states; in 13 states these bills became law. This brings the number of state bills which have been passed in 18 states since 1991 to 23 (Murray 1995, Jacobs 1995, Jacobs and Ohm 1995).

But the private property rights movement is not just focused on federal and state level policy issues. This is a broad-based movement. One component of it is known as the county movement. Drawing upon a local experiment in New Mexico, its members are promulgating land-use plans for adoption in rural counties throughout the U.S. These plans assert the private property rights of individual landowners as part of the normal culture and custom of the area. The plans, then, direct local officials, such as the county sheriff, to undertake official action against any party, including federal officials, who seek to commence action in violation of these county plans. These plans are promoted in part on provisions of federal environmental laws which direct federal agencies to take local plans into account in their own planning (Arrandale 1994, Jacobs and Ohm 1995). At least 40 counties have adopted these plans, and upwards of 300 (ten percent of U.S. counties) have shown interest in doing so, and in spite of an explicit, well-publicized legal decision against the legitimacy of these plans (*Boundary Backpackers, et al., v. Boundary County, et al., 913 P. 2d 1141*).

Whose Rights, Whose Regulations?

The private property rights movement raises a set of genuine and important issues, both activist and theoretical. Private property advocates are having an impact upon policy formation, and they are not wholly wrong when they suggest that the theoretical basis for contemporary land-use and environmental policy rests on a diminution of private property rights and a growth of public property rights.

One way to understand the contemporary (post-1970) environmental movement is to see it as a movement which has argued for the social dysfunctionality of private property rights. From the point of view of its members, land-use and environmental problems arise precisely because of private property rights. Private individuals make land-use management decisions which do not take into account the broader public interest, and a more expansive economic calculus. A litany of common land-use and environmental issues—farmland depletion at the urban fringe, wetland loss, suburban sprawl, downtown deterioration, etc.—have all been depicted as issues that arise from a version of "the tragedy of the commons" (Hardin 1968). In these instances, the tragedy is that individual landowners make decisions that are economically and socially sensible to them, but are not judged to be as sensible to the broader public.

The solution to this situation, in the last quarter century, is to take property rights from the private bundle and shift them to the public bundle—to "public-ize"

previously held private property rights. The rationale is that by doing this, better land-use and environmental decisions will result.

That there is disagreement over the private and public content of property rights is, in and of itself, not surprising. Given the historical role of private property in U.S. social history and cultural myths, actions to establish a strong public regulatory presence are bound to meet resistance (Ely 1992). But from a legal-historical point of view there is a strong basis to suggest that the private property rights movement is on shaky ground. Much of their public policy thrust attempts to enshrine a particular concept of private property. It is a concept that sees private property as foundational to American democracy, and where the individual's bundle of rights should be as intact as feasible, absent a compelling public need. This perspective is not without historical and theoretical support (McCloughry 1975, 1976).

There were intensive debates among the country's founders about the relationship of private property to citizenship and democratic structure (Ely 1992). Drawing from the writings of John Locke the founders saw that one of the principle functions of forming a government was protection of property. As James Madison wrote in the *Federalist No. 54* "government is instituted no less for the protection of property than of the persons of individuals." Others, including Alexander Hamilton and John Adams concurred. Adams noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not monolithic. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. As Locke noted:

For it would be a direct contradiction for any one to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government to which he himself, the proprietor of the land, is a subject.

Echoing these sentiments were Thomas Jefferson, Benjamin Franklin, and others. As Franklin noted with force "private property... is a creature of society, and is subject to the calls of that society whenever its necessities shall require it, even to its last farthing."

The history of public imposition on private property rights seems, ultimately, to come down in favor of the position taken by those who see private property as necessarily secondary to social needs. In multiple instances,

society has re-formed the concept of private property to reflect new social relations and new technology. So, for example, southern slave owners were not compensated when their "property" (the slaves) was taken through emancipation, even though some sued for just such compensation after the Civil War. During the 1960s, owners of commercial establishments lost their private property right to choose who they would serve, or not serve, again reflecting changing social attitudes on race and human relations; again they were not compensated (Hecht 1964). And early in the century when the airplane was invented, landowners lost their airspace for the greater public good of creating a navigable airway (Jacobs 1995).

According to Bromley (1993: 653), drawing from Kant, the reality of private property is that "...what I own is a function of what the members of the polity say I own—not what I say I own." When society's actions appear to represent a departure from a prior set of rules governing individual-social interaction, society is just articulating new rules, reflective of new social circumstances and necessities. Society is never obligated to any *a priori* rule structure. As Bromley presents it, property is a completely moldable social construct, established by society to fulfill social needs, and thus changeable as social circumstances require it.

So, ultimately, the private property rights movement presents a paradox. It is decidedly out of step with legislative and judicial trends throughout this century (Bosselman et al. 1973). These trends have, in general, allowed for increasingly broad governmental reshaping of private property rights so as to achieve an ever evolving and expanding definition of the public interest—a Leopoldian land ethic (Jacobs and Ohm 1995, Freilich and Doyle 1994). Legal and philosophical analyses support these trends. These analyses emphasize the social basis and construction of private property.

But the "truth" of a legal/philosophical/political-economic analysis doesn't take away from the emotional power of private property in the U.S. as a cultural symbol. And it is this cultural symbol which is the driving force behind the private property rights movement at all levels.

The Ambiguous Future of the New Private Property Rights Movement in the U.S.

So a question presents itself: what is the likely future of the new property rights movement?

Informed speculation on this matter can be drawn from several sources. One arises out of the object of the movement's activism. At the federal level the movement has targeted the national laws which protect endangered species and wetlands. Often the basis for these attacks are stories showing the burden these laws can cause to ordinary citizens. But this effort has proved much less successful than anticipated. While the American public does not like

unfair burden, polling data continues to show that in considerable numbers the American public support these policies and programs.

Thus the thrust of the movement seems to have shifted to state legislatures. Here the movement has a different problem. To assail the legitimacy of government regulation is to assault the very fabric of state and local governmental activity. The object of the movement's ire often becomes zoning regulations—that simplest but most widespread and longstanding of tools used by state and local governments to manage conflicting land-use relationships. The problem with property rights proponents attacking zoning is that zoning itself was an invention of conservative private property rights forces in the early part of the century (Babcock 1966, Haar and Kayden 1989). Zoning was developed to protect threats to private property rights and property values from competing, non-regulated market forces. First found constitutional in 1926, zoning was defended before the U.S. Supreme Court as a reasonable exercise of governmental authority because it served the private property rights interests of landowners.

It is in this vein that land-use/growth management/environmental proponents dub property rights bills as "the pornography shop owners bill of rights." Their point being that without government regulation of property, land-use relationships will be subject only to market forces, and those forces will select land uses based on their highest and best use, from a solely economic point of view. So, in those two instances where property rights bills have been put to public referendum, in Arizona in 1994 and Washington State in 1995, voters soundly defeated them by 60 percent to 40 percent margins (Kriz 1996).

Finally, there is the spillover impact of the militia-linked terrorist bombing of the federal building in Oklahoma City in spring 1995. This tragic event brought the phenomenon of the citizen-militia to the eyes of the American people. Soon afterwards stories appeared in the national news weeklies about the network of radical anti-governmental forces in the U.S. The wise use/property rights movement was listed as one of the affiliated activities. Now clearly this is painting the movement with too broad a brush. There are many dedicated activists within the movement with very legitimate concerns, grounded in sound theory, history, and abusive administrative practice. But it is also true that there are elements of the movement that ally itself with the agenda of the radical and racist right in the U.S. (O'Keefe and Daly 1993, Helvarg 1994, Dees and Corcoran 1996). This cannot help in building support for its core issues.

Conclusions

There can be no foregone conclusions about the future of the new property rights movement in the U.S. Regardless of their affiliations, the corporate influence on its agenda, and even the forthright cynicism of one of its co-

founders, the movement exists and has influence precisely because its message strikes a chord with the American citizenry (Jacobs 1995).

Private property rights advocacy in the U.S. is not a question of law or philosophy, it is a question of cultural myth and politics. Private property advocates are tapping into and exploiting a cultural myth about private property that runs deep with the American people. Logic and precedent will not turn them or potential supporters aside. With the formation of this movement, the politics of land policy in the U.S. has become more sharpened, more contentious, and more dimensional. The new property rights movement offers a serious challenge to the realization of Leopold's land ethic. At least for the near future, their influence is likely to grow not weaken.

The prognosis for the long-term future is different, however. Long-term trend analysis suggests that while the movement is giving voice to an important component of Americans' myth about themselves as freehold property owners, ultimately that element of American culture that requires private property to be subjugated to social needs will prevail. Perhaps never completely (nor should it), but substantially. While it is not clear when and if Americans will ever fully embrace Leopold's land ethic, in its fragmented, incremental way, the U.S. public sphere, at the local, state and national levels, with the support of the American people, is likely to keep asserting socially-based concerns over private property.

Harvey M. Jacobs is Professor and Chair of the Department of Urban and Regional Planning and Professor, Institute for Environmental Studies at University of Wisconsin-Madison. This paper was presented to the Joint International Congress of the Association of Collegiate Schools of Planning and the Association of European Schools of Planning in Toronto, Canada, July 25-28, 1996.

NOTES

1. To "take" or more commonly "takings" refers to the so-called takings clause of the fifth amendment to the U.S. Constitution: "...nor shall private property be taken for public use without just compensation." This clause recognizes the existence of private property, establishes an action called takings, though such an action is conditioned upon the land being put to a public use and the requirement that the landowner be justly compensated (Jacobs and Ohm 1995). The specific social debate around takings has to do with the extent of regulatory action that may occur absent compensation. The more general social debate centers around the necessary integrity of land ownership to the existence of a democratic society (Ely 1992).

BIBLIOGRAPHY

- Arrandale, Tom (1994). "The Sagebrush Gang Rides Again," *Governing* (March): 38-42.
- Babcock, Richard F. (1966). *The Zoning Game*, Madison, WI: University of Wisconsin Press.
- Bosselman Fred P. and David Callies (1971). *The Quiet Revolution in Land Use Control*, Washington, DC: United States Government Printing Office.
- Bosselman, Fred, David Callies, and John Banta (1973). *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control*, Washington, D.C.: United States Government Printing Office.
- Brick, Phillip D. and R. McGreggor Cawley, eds. (1996). *A Wolf in the Garden: The Land Rights Movement and the New Environmental Debate*, Lanham, MD: Rowman and Littlefield.
- Bromley, Daniel W. (1993). "Regulatory Takings: Coherent Concept or Logical Contradiction," *Vermont Law Review*, 17, 3: 647-682.
- Cushman, John H., Jr. (1994). "E.P.A. Critics Get Boost in Congress," *The New York Times* (February 7): A1, A15.
- Dees, Morris with James Corcoran (1996). *Gathering Storm: America's Militia Threat*, New York, NY: Harper Collins
- Dunlap, Riley E. (1991). "Trends in Public Opinion Toward Environmental Issues: 1965-1990," *Society and Natural Resources*, 4, 3: 285-312.
- Echeverria, John and Raymond Booth Eby, eds. (1995). *Let the People Judge: A Reader on the Wise Use Movement*, Washington, D.C.: Island Press.
- Ely, James W., Jr. (1992). *The Guardian of Every Other Right: A Constitutional History of Property Rights*, New York, NY: Oxford University Press.
- Folsom, Robin E. (1993). "Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decisionmaking," *Boston College Environmental Affairs Law Review*, 20, 4: 639-697.
- Freilich, Robert H. and Roxanne Doyle (1994). "Takings Legislation: Misguided and Dangerous," *Land Use Law*, 46, 11: 3-6.
- Haar, Charles M. and Jerold S. Kayden, eds. (1989). *Zoning and the American Dream: Promises Still to Keep*, Chicago, IL: Planners Press.
- Hardin, Garrett (1968). "The Tragedy of the Commons," *Science*, 162 (December): 1243-1248.
- Hecht, Neil (1964). "From Seisin to Sit-In: Evolving Property Concepts," *Boston University Law Review*, 44, 4: 435-466.
- Helvarg, David (1994). *The War Against the Greens: The "Wise Use" Movement, The New Right and Anti-Environmental Violence*, San Francisco, CA: Sierra Club Books.
- Jacobs, Harvey M. (1989). "Debates in Rural Land Planning Policy: A Twentieth Century History from New York State," *Journal of Rural Studies*, 5, 2: 137-148.
- Jacobs, Harvey M. (1995). "The Anti-Environmental, 'Wise Use' Movement in America," *Land Use Law*, 47, 2: 3-8.
- Jacobs, Harvey M. and Brian W. Ohm (1995). "Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals," *Wisconsin Environmental Law Journal*, 2, 2: 173-223.
- Kriz, Margaret (1996). "Taking Issue," *National Journal* 28, 22: 1200-1204.

- Large, Donald W (1973). "This Land is Whose Land? Changing Concepts of Land as Property," *Wisconsin Law Review*, 4: 1041-1083.
- Leopold, Aldo (1968 [1949]). *A Sand County Almanac*, London and New York: Oxford University Press.
- Lund, Hertha L (1994). *Property Rights Legislation in the States: A Review*, Bozeman, MT: Political Economy Research Center.
- Marzulla, Nancie G. (1995). "State Private Property Rights Initiatives as a Response to 'Environmental Takings'," *South Carolina Law Review*, 46, 4: 613-640.
- McCloughry, John (1976). "Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom," *South Dakota Law Review*, 21, 3: 486-541.
- McCloughry, John (1975). "The New Feudalism," *Environmental Law* 5, 3: 675-702.
- Meltz, Robert. (July 22, 1994). "Property Rights Legislation in the 103rd Congress" *CRS Report for Congress*, No. 94-588 A.
- Minter, Richard (1994). "You Just Can't Take It Anymore: America's Property Rights Revolt," *Policy Review* No. 70: 40-46.
- Murray, Susan A. (1995). "Memorandum to Interested Persons Regarding State 'Takings' Bills," (August 1995). Washington, D.C.: National Audubon Society.
- O'Keefe, Michael and Kevin Daley (1993). "Checking the Right: (Conservative Backlash Against the Environmental Movement)," *Buzzworm*, 5, 3 (May/June): 38-44.
- Pollot, Mark L. (1989). "The Effect of the Federal Takings Executive Order," *Land Use Law* 41, 5: 3-7.
- Popper, Frank J. (1988). "Understanding American Land Use Planning Since 1970: A Revisionist Interpretation," *Journal of the American Planning Association*, 54, 3: 291-301.
- Shabecoff, Philip (1993). *A Fierce Green Fire: The American Environmental Movement*, New York, NY: Hill and Wang.
- Stapleton, Richard M. (1993). "On the Western Front," *National Parks*, 67 (January/February): 32-36.
- Stone, Christopher D. (1974). *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Los Altos, CA: William Kaufman.
- Yandle, Bruce, ed. (1995). *Land Rights: The 1990s Property Rights Rebellion*, Lanham, Maryland: Rowman and Littlefield.



Professional
Development for
Planners
Now
Available

Teaching Ethics: An Introduction to American and Canadian Ethics

Do you think planning ethics is only about conflicts of interest? Then tune into this video and see how the boundaries of the planning field are being expanded through ethical inquiry. The video compares the development of Canadian and American codes of ethics—and discusses how planning ethics can best be taught. Package contains an original workbook with detailed exercises on ethical reasoning. Presenters include Elizabeth Howe, Professor, University of Wisconsin, Madison and Sue Hendler, Associate Professor, Queen's University, Kingston, Ontario.

- 1 hour of video education and workbook. 1995. \$94.95; APA members \$89.95.
- 3.0 CPDP credits available to AICP members.

Call Planners Book Service at 312-786-6344 to order today.



Planners Book Service
122 S. Michigan Ave., #1600
Chicago, IL 60603
312-786-6344; 312-431-9985 (fax)

APA Video Education Series