

## Yellow Stripes & Dead Armadillos

A safe place for moderates in a polarized world

# This Land is Whose Land? (Part 2)

“Today’s version of private property *is* a moderate position,” asserts Prof. Harvey Jacobs. Americans are not free to do whatever they want with their land, but the question of exactly what they can do is never settled. Climate change may be the latest disruption that redefines our relationship to land.

<https://yellowstripsdeadarmadillos.org/2021/03/23/this-land-is-whose-land-part-2/>

By Harvey M. Jacobs

*This is the fourth in an occasional series on environmental issues from Harvey Jacobs. Professor and Visiting Professor Emeritus, University of Wisconsin and Radboud University Nijmegen, The Netherlands. The first is titled Searching for a Responsible Localism, and posted on February 2nd; the second is titled Is There Too Much Regulation? and posted on February 15th ; the third is titled This Land is Whose Land (part 1) and posted on March 5th. This post concludes the discussion on land ownership and property rights.*

I ended part 1 of this series with the following assertion and question:

*Conservatives and liberals now stare at each other across an abyss. For conservatives, private property is just that – private, and with limited exceptions they believe you should be able to do what you want to with it. If the public chooses to regulate land then they believe they are often entitled to compensation. For liberals*

*private property is a stewardship, and it involves a delicate balance of private and public interests, and the cases for compensation are few and far between.*

*Are these differences irreconcilable? Is there even a space for a moderate position?*

## **Section 1 – The Continuous Controversy**

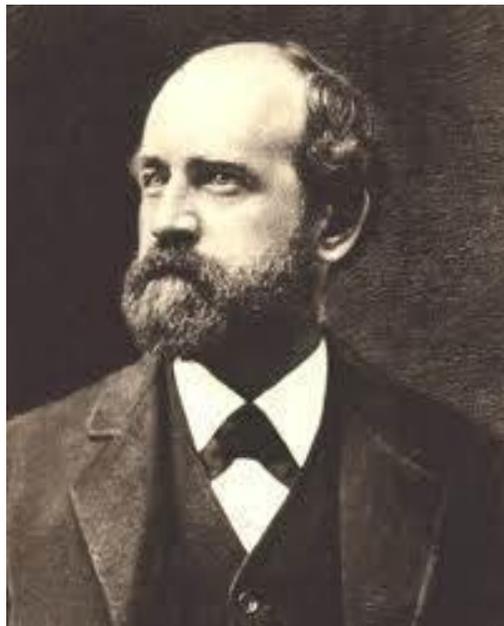
Private property is of central importance to the growth of western economic and political systems. Some argue that it is *the* important element for a market economy, which itself is central to the growth of the middle class, modern technological innovation, and the overall rising standard of living during the past few centuries.

But as a social and legal institution private property has been subject to a wide variety of critiques from a wide variety of social and

political reformers since at least the middle of the 1800s, not even a century after the American and French revolutions.

In the United States the controversy took a particular shape. In the late 1800s social reformer Henry George posed a question that is as relevant today as it was then – why does so much progress and so much poverty co-exist? For George, the answer centered on who owned land. The few had a lot, and the right to unlimited accumulation. At the

same time the many had very little (if any) land, and little prospect of getting any. A committed capitalist, George nonetheless proposed a radical program for land distribution. So he was not anti private property, but he was against a property system which kept the benefits of land ownership from being widely available. His analysis and advocacy was wildly popular in its time. And today there are those who continue his fight.



Henry George recognized private property, but wanted more people to have a chance to own it.

In the early 1900s matters of land and property were taken up anew by a group of economists at the University of Wisconsin. Richard Ely, John R. Commons and others laid out a systematic argument that land was in fact a social creation reinforced by law, and private property had no substance except what we all agreed it

had. Their work, their school of thought, and those of their students, led to some of the major innovations in public regulation of private land and resources in this period, including the foundation for the thinking that validated policies such as zoning in 1916.

The University of Wisconsin was also the home of Aldo Leopold, the country's first professor of wildlife management. In the post World War II period his essay *A Land Ethic* was published posthumously. He drew on decades of field work to decry then contemporary land management approaches rooted to private ownership which he found inevitably led to land degradation. He called for a new approach in which humans do not so much own land as exist within it as part of an integrated ecological community. His vision has inspired generations of environmental scientists and activists.

Twenty years later, in the aftermath of the first Earth Day, the Wisconsin Supreme Court decided a case which seemed to implement Leopold's land ethic. According to the Court "*(a)n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state . . .*"

Throughout the remainder of the 20<sup>th</sup> century and into the 21<sup>st</sup> scholars and activists globally have argued a version of the point made by the early 20<sup>th</sup> Wisconsin economists (and by Benjamin Franklin in the colonial period) – property is a social creation, bendable to society's needs, and

only is what society says it is. And many of these same scholars and activists seek ways to bring Leopold's vision into practice.

## **Section 2 – A Moderate Position on Private Property?**

So is there a space for a moderate position on private property? No, and yes.

No, from the perspective of the most doctrinaire conservative. For those on this radical end of the spectrum they will not allow themselves to think about private property in any way except to say that it is mine, and I should be able to do what I want with it. And if government wants to restrict my right to do what I want, then the government should compensate me for that restriction.

But for most others, the answer is grudging yes. Why grudging? Why yes?

Most of us acknowledge the importance of private property, and want the benefits traditionally associated with ownership and its control. We want security, we want legacy, we want equity.



Aldo Leopold emphasized land stewardship over exploiting only its short term economic values.

But many of us also recognize the essential truth in the assertion and argument of Benjamin Franklin and the early 20<sup>th</sup> century Wisconsin economists. Private property in land and other 'objects' in 2021 are not what they were in 1921 or 1821. For example, children are no longer owned by their parents in a way that allows them to be sent to the mines or the mills. And domestic animals can no longer be abused at will just because they are owned. Children and domestic animals now have rights of their own, separate from their owner. And so it is with land. For example, in many places you cannot cut old growth trees or fill a wetland just because it is your land; the land has its own rights.

Today's version of private property is a moderate position. It has been continually

renegotiated as social attitudes and technology have evolved. The invention of the airplane took away my right to own 'to the heavens above'. But we all gave up this right for a greater good (air highways). The civil rights movement took away the right to deny commercial service based on race, ethnicity, religion, and gender. Again, it was a right given up (though not without substantial struggle, some of which continues) for a greater good.

So while my great-grandchildren may not have the version of private property my great-grandparents had (if they even had private property), in the future my great-grandchildren will still have private property, and it will be recognizable as such. However, private property of the future will be different in the way property

in 2021 is not what property was in 1921 or 1821. Exactly how it will be different is a crystal ball question. A decade ago I speculated that, for example, nature – landscapes, resources, animals – will have rights analogous to children and domestic animals; rights separate from the owner of land. If this comes about would this change be considered moderate?

And what about the impacts of climate change – rising sea levels, warmer temperatures, wildfires, tornados, and hurricanes? If they continue these will impact property also, likely forcing a redefinition of property with stronger public rights vis-a-vis private rights.

Ultimately, the form of private property at any time in history comes out of social struggle. Usually the solution that is settled upon is conservative in nature – it builds on the past and only cautiously engages the present and future. When it isn't conservative is when there are disjunctures – wars, natural disasters, radical new technologies or social conceptions – that suddenly force new definitions. To the extent the present status of private property is dissatisfactory (and I believe it is), it is incumbent upon those who are dissatisfied to force upon us all renewed social dialogue about a new form of this ever evolving social and legal institution.

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