

**The “Taking” of Europe:
Globalizing the American Ideal of Private Property?**

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Abstract

This paper examines Western European efforts in an area which has received limited attention to date – the balance between private property rights and the power of the state to manage those rights.

Through theoretical, legal, historical, institutional and case study research a set of questions are examined. These include: is a transition in the institution of private property taking place? If so, how aware are Europeans of the concerns and criticisms about the U.S. model of private property? To what extent does it appear that Europe will learn from the United States' lessons with the management of private property?

Findings include:

- Across Europe existing national constitutional provisions are close in content and intent to the U.S. Taking Clause. While some of these constitutions contain language stressing the social obligation inherent in private property, the major differences over the legal management of property appear to be not instrumentally legal at all, but cultural, embodying social attitudes and reflective of administrative practices.
- The proposed property provision of the European Constitution seemed to flow logically from many of the national constitutional provisions, to reflect the content and intent of the U.S. Taking Clause and Right 17 of the Declaration of the Rights of Man, and to not draw much controversy or commentary on English-accessible websites.
- There is strong interest in a set of property rights related policy initiatives throughout Europe. This is reflected in the work of scholars, researchers, and practitioners who seek to utilize new land use and environmental management tools such as transfer of development rights.
- There are a set of sophisticated, well-connected advocacy groups and think tanks in Europe working to change policy and public attitudes toward private property rights.
- As a result of administrative directives from the European Union and the spread of classical liberal ideas in political discourse, owners are acting more assertively regarding their rights in property. Owners are less willing to accept public plans and rules regarding their property, and more demanding of plan and rule outcomes which allow them economically productive use of their property rights. The practical outcome of this social change appears to be the beginning of significant urban-fringe and rural development, more urban sprawl.
- There is a “taking” of Europe underway, when “taking” is understood to mean a restructuring of the relationship between the individual and the state over private property rights, whereby the individual's rights are getting stronger vis-a-vis the power of the state.

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The Taking of Europe: Globalizing the American Ideal of Private Property?

Introduction

Private property is a foundational social institution for democratic and market-based societies. In the 18th century, drawing inspiration from the work of John Locke and Jean-Jacques Rousseau, the framers of American democracy argued that it was specifically the ability to hold and control private property – land – that provided the conditions for political liberty (Ely 1992, Siegan 2001). During this exact period Adam Smith (1776) penned the foundational document of capitalist theory, The Wealth of Nations. Smith recognized that the secure right to hold and control land was key to a market economy; land is a basic resource and commodity, and when you have clear title to it, you have something to which you can invest labor and extract products, and against which you can borrow, raising capital for investment.

This present period of history is one in which property is again dominant on the world stage (e.g., Bethell 1998, DeSoto 2000). With the fall of the Berlin Wall in 1989, and the subsequent dissolution of the Soviet Union and its political-economic block, the western countries have been actively promoting democracy and capitalism throughout the transition and developing countries (see, for example, Lemel 2000, Strong et al. 1996, Chaskalson 1995). Often the first step in this process is assistance in the creation of private property, property registration and transfer institutions, and property markets by international aid organizations such as the United States Agency for International Development (USAID) and the World Bank for precisely the reasons articulated by the American founders and Adam Smith over two hundred years ago (e.g. Deininger 2003).

At the same time, property in the developed world is a subject of renewed attention. The rise of the modern environmental movement over the last 30 years has resulted in focused attention on property's very definition, especially the balance between private and public property rights. The base argument of the movement is that it is the individual's right to use property, regardless of its social and intergenerational consequences, which is the root of most environmental problems (e.g. Freyfogle 2003). The environmental movement has sought to circumscribe the property rights of individuals (whether they be, for example, owners of farmland, wetlands, endangered species habitat, or urban historic sites and structures), shrinking the private bundle of rights and expanding the public bundle through land use and environmental policy and regulation. Their goal is to achieve what they see as a more reasonable balance between individual decisions and the social good.

But since the 1980s, a counter movement has arisen throughout the developed world to assert the necessary primacy of private property – in all democratic and market-based

societies, developing and developed – and thus to dampen the effect of governmental-based regulatory land use and environmental action (e.g. Yandle 1995).

During the period of these two sets of social changes – the fall of socialism/communism, and the rise and subsequent challenge to environmentalism – Western Europe (hereinafter referred to as Europe) has been undergoing significant self-examination and institutional realignment. As part of this reassessment, Europe as a whole and individual European governments have been instituting changes in a wide variety of areas – e.g. internal migration (elimination of border controls), currency (common vs. individual), and integrated higher education structural reform.

This paper examines European efforts in an area which has received limited attention to date – the balance between private property rights and the power of the state to manage those rights in the public interest.

Specifically, this paper was prompted by preliminary evidence that there was substantial interest at the governmental and professional levels in the reform of the long-standing, centralized command and control approach to land use planning and environmental planning and management, and as part of this that there was shifting public attitudes and institutional relations toward the institution of private property. If this is true, it is partly because of the European perspective of how Europe should and needs to reform these institutions to remain a competitive economic and political player on the global scene.

Therefore the questions which frame this research include: is a transition in the institution of private property taking place; if so, what are its likely implications for land use and environmental planning policy? How aware are Europeans of the concerns and criticisms about the U.S. model of private property among planners, government officials and environmental and property rights activists? To what extent does it appear that Europe will learn from the United States' lessons with the political, policy, legal and administrative management of private property? Finally, if Europe is moving towards a U.S. style model of private property, how will this be reconciled with other, competing, public policies for spatial management?

Takings: Narrowly or Broadly Understood?

As is detailed below, the concept of takings has a very specific meaning in the U.S. historical, administrative and legal context. Takings has to do with the rights of the individual relative to a) compensation when privately owned land is expropriated for public purposes, and b) compensation when government regulation is deemed to be too onerous. The 20th century and current debate about takings largely focuses on the latter

issue.¹ Specifically, the idea of takings has to do with the rights of the individual when the government initiates regulation, most specifically with whether the individual owner of property is entitled to compensation for the “burden” imposed by regulation upon the individual in the name of “public use,” or more broadly the public interest. That is, when government undertakes regulation of privately owned land – for any of a number of purposes, including for example the prevention of urban sprawl, the protection of environmental resources, the protection of historic and/or cultural resources – should the government have to provide some degree of monetary compensation to the individual for the social imposition on that person’s rights?

As discussed below, the answer to this question has varied through U.S. history and varies between the U.S. and Europe. In the U.S., before 1922, the answer to the question was generally “no.” Government was not required to compensate an owner as a result of government regulation, no matter how onerous and injurious that regulation might be. Regulation was understood to be a necessary social activity. And it was understood that the composition and guarantee of individual property rights only came about through social action and guarantee, therefore society was “free” to modify those rights as society saw necessary. But post 1922 the legal framework for the relationship between the individual and the state changed. Following the U.S. Supreme Court decision in Pennsylvania Coal v. Mahon, the Court said that there was now a distinction between reasonable and unreasonable regulation, and when government crossed the line into unreasonable regulation it was required to compensate the owner for the burden this regulation created or to modify the regulation so that it didn’t create a burden (that is to modify it so that it went from unreasonable to reasonable).

In Europe the situation is quite different. Generally speaking, the countries of Western Europe operate in a legal and administrative world like the U.S. world pre-1922. Governments are free to regulate privately owned land, often in a highly burdensome way. Individuals have limited claim against government for compensation, and government has essentially no concern about crossing some un- or poorly defined line that distinguishes compensable from non-compensable regulatory action.

So, when I talk about “the ‘taking’ of Europe” do I mean the importation of the U.S. idea and method of providing regulatory compensation for regulation that “goes too far” (to use the phrase of the 1922 decision; see the discussion below)? Yes and no.

Yes, in the sense that I am interested in the extent to which this idea and method is becoming established in Europe, since there are indications that there are those who want it to take hold (e.g. many of the participants at the 2006 bi-annual conference of the

¹ Recently, as a function of the so-called Kelo decision (discussed at the end of the section on “The 20th Century Legal Framework”) there has also been renewed debate about the appropriate definition of the public purpose when there is so-called complete physical takings, or expropriation. However, this research focuses on the so-called regulatory takings issue.

International Center for Research on Environmental Issues – “Property Rights, Economics and Environment: Land Resources,” see <http://www.environnement-proprete.org/english/index.htm> for the conference program).

No, in that this investigation is not limited to the narrow use of the term and what it means in the U.S. Instead, I am using the term and phrase “taking” as a proxy for a situation where the rights of private landowners have a relatively strong position vis-a-vis the power and authority of government. This may get most explicitly expressed in the form of and requirement for compensatory regulations. But this need not be the only way this gets expressed. So when I say “the ‘taking’ of Europe” I mean to explore the ways in which the social institution and legal form of property is changing in Europe, and to ask, in the broadest sense, whether this institution is undergoing a change whereby the state is either losing or choosing to give up some of its traditionally strong role relative to that of the individual landowner, and conversely whether the landowner is gaining strength relative to the traditional power of the state. And if this relationship is changing, what is driving this change – is it social action, is it administrative and legal actions following from European integration, is it 21st century globalization of a set of ideas about the relationship of the individual and state, ideas which enshrine a strong individual and a strong market, and a limited state?

If this change is occurring, it should be evident in discourse, official policy documents and legal decisions that often serve as the meeting ground for conflicting views about these matters – issues such as urbanization, the management of urban sprawl, landscape protection and management, ecological protection, etc. If in Europe today the 20th century relationship between the individual and the state is changing, then a “takings” perspective should emerge in these issues, as it does in the U.S.

Democracy, Property Rights and Land

There is a second issue underlying this work that requires a brief discussion. Much of the literature on land and property rights assumes a causal relationship between private property as a social institution and legal form and the existence of democratic governance.² As is discussed below in the next section of this paper much of the literature informing this assertion originated in the 17th and 18th centuries. It is embodied most prominently in the work of John Locke and Jean-Jacques Rousseau, and then the writings of key American founders who were strongly influenced by these political philosophers.

² For this immediate discussion I leave aside the issue of the causal relationship between private property and markets.

At the time Locke and Rousseau were writing and the American founders were fomenting revolution, much of the population in the American colonies and throughout Western Europe lived an agrarian existence. In a world where most people sustained their existence and earned their livelihoods directly from the land, political philosophy which concentrated on the ownership of land and integrity of property rights made sense. It was reasonable, even logical, to draw economic, political and social connections between different states of ownership and control and the well-being of owners and the viability of certain political systems (for example, on two extremes, feudalism and democracy).

A question that nags at this and related research on property rights in the 21st century in developed countries is the actual – as opposed to the rhetorical – relevancy of this causal relationship. That is, at a time and in a world when fewer than 3% of the population in most developed countries are actively engaged in agriculture, and when more than 50% of the population globally, and 80+% of the population in developed countries, live in urban areas, how important is the causal relationship between property rights and democracy?

In developed countries owners own, at best, a small suburban tract with a single family home, and many owners own only a slice of airspace in a dense urban area. At the same time there has been a spatial transformation in the developed world, there have also been social and political transformations. Since the late 1700s there has been a revolution of human and political rights. Rights that used to be directly tied to land ownership have now been freed from that relationship. So, for example, while it was not uncommon in the 18th and 19th centuries to restrict voting to landowners, now voting is available to all legitimate citizens of a place, regardless of whether they are owners or not.

It is not the central purpose of this research to examine the question of the relevancy of the causal relationship, and it is certainly not the purpose of this research to offer a conclusion to this query. Instead, this research proceeds from the assumption that the causal relationship is still meaningful, while acknowledging that there may be those who are skeptical about this assumption.

However, as one way to get perspective on the relevancy of property in current debates in Europe, I offer the following observations from a legal scholar writing about the issue of property and European integration, specifically the way property rights and were addressed under the then proposed European Constitution (see the subsection below on the European Constitution in the section on “The Status of Takings in Europe;” also see Appendix II).

Property’s exceptionalism in the Constitutional Treaty is due to the fact that the generation of current decision-makers still sees private property as pivotal. It is a generation intellectually fed by the political debates preceding the fall of the

Berlin Wall and characterised by a sharp emphasis on the political symbolism of private property. Property law *is* exceptionally meaningful . . . because it *is* loaded with governance implications, but also because it is *perceived* as such in political discourse (Caruso 2004: 763; emphasis in original).

Caruso (2004) is one among many contemporary scholars from a variety of disciplines who argue that even though the world has changed significantly since the 18th century, property rights and what they represent are still fundamentally important (see, for example, Blomley 2005, a geographer writing to geographers, and Carruthers and Ariovich 2004, sociologists writing to sociologists). These new property scholars want to argue that scholars, policy analysts and decision makers need to awaken and re-awaken to property's real and symbolic place for individuals and communities.

Takings in the U.S.

In order to understand how the takings issue is being “exported” to Europe, it is necessary to understand how it developed and where it stands in the U.S. This section provides a context for understanding the takings issue through an examination of its colonial emergence and original Constitutional context, its place in the twentieth century legal jurisprudence of the U.S. Supreme Court, and the rise and impact of the so-called private property rights movement.

The Colonial Era

In the U.S. governmental management of private property rights is as old as the country itself (e.g. Bosselman et al. 1973, Ely 1992, Treanor 1995). Even before the U.S. emerged as a new country, colonial governments passed local laws which seem to be clear antecedents to modern land use and environmental regulations. For example, colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent overplanting, and colonial Boston, New York City and Charlestown all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from existing within city limits (Treanor 1995).

The role and place of private property rights was a subject of intense interest and debate among the founders. For a variety of reasons – philosophical, historical and contemporary – there was a clear sense that the right to own and control land was an important element of a democratic governmental structure.

First there was the reality of the settlement process. Colonial America was settled by Europeans searching for religious and political freedom (the rights guaranteed in the First Amendment), and for access to land (Ely 1992). In America's early years European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain freehold (obligation free)

ownership was nil. America offered an alternative. America was a place where any white male immigrant could get ownership of land, and with that land as capital make a future for themselves. America was, quite literally, the land of opportunity.

In America's colonial past, the existence of land converged nicely with the new political theories of the period. In particular, drawing from the work of John Locke and Jean-Jacques Rousseau, ideas circulated about notions of ownership and democracy. One came to own land through using it (which provided the justification for taking land from America's native inhabitants, who were not using it in the European sense of active agricultural and forest management), and freely constituted governments (i.e. democracies) existed for the protection of individual liberties, including the liberty to own and use land.³

The country's founders configured these ideas into a particular and specific relationship. Democracy required liberty (and vice versa), and both in turn required freehold property. Drawing from the writings of John Locke, some of America's founders saw that one of the principal functions of forming a government was protection of property. In the debate over the ratification of the proposed U.S. Constitution, James Madison wrote in Federalist No. 54 in 1788, "government is instituted no less for the protection of property than of the persons of individuals" (Hamilton, Madison and Jay 1961: 339). Others, including Alexander Hamilton and John Adams concurred. Adams (1851 [1790]: 280) 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 it was perhaps Thomas Jefferson who left modern Americans with their most enduring image of this perspective – that of the yeoman farmer. For Jefferson the idea of the yeoman farmer linked the individual's right to own and control property with the very existence and viability of democracy. According to Jefferson, because the yeoman farmer owned his own farm, and could produce food and fuel for himself and his family, he was obligated to no one – he was literally free to exercise his political views as a democrat. For Jefferson it was the very act of ownership that created the conditions that allowed democracy to exist.

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. As John Locke himself wrote (1952 [1690]: 68-69):

³ Cronon (1983) is commonly cited as a pioneering study documenting the attitudes of Puritans towards the Native Americans use of their land in the colonial settlement period, an attitude which, either sincerely or cynically, understand Indians to not own property because they were not engaged in what Europeans saw as active agriculture and forestry practices.

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 society, should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is subject.

Echoing these sentiments were Thomas Jefferson (a founder whose opinions can be cited by all sides to this debate), Benjamin Franklin and others. Benjamin Franklin is perhaps the most articulate proponent of a counter-position to that of Madison, Adams, Hamilton and others. For example, in the debate over the ratification of the Pennsylvania state constitution, Franklin (1907 [1789]: 59) said: “Private property is a creature of society, and is subject to the calls of the society whenever its necessities require it, even to the last farthing.” In other words, Franklin did not see property rights as sacrosanct.⁴ Instead he viewed as legitimate the public’s right to create, re-create, take away and regulate property as it best served public purposes.

Land – private property – was thus a confusing issue for the founders. How were these disparate positions resolved? With ambiguity. In 1776 the Declaration of Independence promised each (free, white, male) American “life, liberty and the pursuit of happiness.” What is telling about this phrase is that Thomas Jefferson, the Declaration’s author, borrowed it from Locke. Locke’s phrase was life, liberty and property. This is what Jefferson wanted the Declaration to say, as a way of furthering his vision of a nation of yeoman farmers. Jefferson’s ideas, however, did not hold sway.

Eleven years later, in 1787, the U.S. Constitution was adopted as a replacement for the Articles of Confederation. What did it say about land-based private property? Nothing! It was not until 1791 with the adoption of the Bill of Rights that the now infamous and contentious so-called “takings” phrase appeared as the closing clause to the Fifth Amendment to the Constitution: “. . . nor shall private property be taken for public use, without just compensation.”

With the adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity which is public use, and a form of payment specified as just compensation. The interrelation of

⁴ These sentiments by Franklin were not isolated. As noted in a recent biography “Franklin took a striking socialistic view of property” (Brands 2000: 623). Brands (2000: 623) provides these examples of Franklin’s opinions: “All property . . . seem to me to be the creature of public convention.” “All the property that is necessary to a man for the conservation of the individual and propagation of the species is his natural right, . . . but all property superfluous to such purposes is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it whenever the welfare of the public shall demand such disposition.”

these concepts is such that where private property exists, it may be taken (i.e. seized by the government over the landowner's objections) but only for a denoted public use, and when just compensation is provided. If any of these conditions are not met, then a takings may not occur. But the clause does not say and colonial commentary does not clarify what constitutes private property, exactly when a taking has occurred, what is a public use, and what makes up just compensation.

In the colonial period and for a century afterwards disagreements about the place of private property in a democracy and the exact meaning of the takings clause were largely theoretical. When government determined that it needed to take property, the public use was generally clear – land for a school, a road, or other public facility – and the owner was compensated. And for much of the 18th and 19th centuries taking of private land was not much of a public policy issue. The new country had land in abundance, and it was the disposition of public land, not the acquisition of private land, that dominated the public agenda (Gates 1968). It was not until the twentieth century that this changed.

The 20th Century Legal Framework

The twentieth century ushered in an entirely different period in American land use policy history. The “frontier” was settled (Turner 1893, Gates 1968). Public policy focus shifted from the disposition of America's public lands to the management of its land resources. With this shift, America experienced a significant re-configuration of its demographic and spatial make-up. The 1920 U.S. Census officially recorded the shift from a rural to an urban nation (Scott 1969). The turn of the century (1880-1920) was a period of intensive immigration, industrialization and urbanization. It was in response to these conditions that modern land use and environmental planning and policy and the modern relationship of the state to the individual via private property rights was born. Cities and states began to pass regulations to manage public health and safety conditions. The impact of these regulations was to burden individual landowners – both private landowners and corporate landowners. Out of these new spatial and economic conditions arose a concern about whether there were appropriate limits to government regulation.

In this context, and throughout the century, the U.S. Supreme Court has found itself called upon to interpret the meaning of the takings clause in conditions very different than those in which it had been written. There is a huge body of scholarship about how to understand and approach the jurisprudence of the court (two examples written for the non-specialist audience include Bosselman et al. 1973 and Meltz et al. 1999). For the purposes of this discussion, I rely heavily on the analysis and interpretation of Kayden (2004), and I summarize and synthesize this discussion for my purposes.

At first, the Supreme Court's answer to the question of whether there were limits to government regulation was simply and strongly no. As the century began, the Court affirmed the right of government to regulate absent any obligation for compensation. In

language that now seems quite sweeping, the Court in 1915 examined the matter of government regulation and its impact on the individual. Its conclusion:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

But the conditions of the period were to keep the issues before the courts for another decade-plus. Within less than a decade, the Court, examining the issue again, seemed to completely change its mind about the reach of government regulation.

The key case in this regard is that of Pennsylvania Coal v. Mahon in 1922 (260 U.S. 393 (1922); subsequently referred to as Penn Coal). It was here that the Court issued its famous dictum, defining the 20th century concept of regulatory taking. In this case the Court was asked to determine the validity of a state-based regulation that impacted the usability and integrity of mining-based private property rights. As noted above, they were operating in a context in which they themselves had validated a wide range of government regulations, some quite onerous, as long as the landowner was left with some property rights. In a decision that has echoed down through the years, the Court said in Penn Coal: “The general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking” (260 U.S. 393 (1922): 415; emphasis added). In other words, a regulation can be equivalent to a takings under the Fifth Amendment. If it is, however, then compensation is required. But what the Court did not say is exactly where the line is that distinguishes regulation that “goes too far” from regulation that does not.

The second case of importance from this period was the Court’s ruling on the validity of zoning. New York City is credited with inventing zoning in 1916. Within a few years zoning had spread across the country as a way for cities to manage growing populations, industrialization, and property values (Scott 1969). In 1926 the Court examined whether the idea of allowing a local government to regulate land use by designating land use zones, which provided for different levels of development opportunities, was acceptable. By a one vote margin, the Court decided yes, such an approach to the management of private property rights was acceptable.

So, as the Depression loomed, the Court said: regulation that “goes too far” is unacceptable, but that regulation of private property rights through zoning is acceptable. So where was “too far?” The Court was not to define this in advance.

In practice, this was not a problem, as most governmental bodies did not use their authority to impose onerous requirements upon landowners.

After Euclid, the Court largely left the property rights arena for fifty years. During this quiescent period, however, there was one important case to take note of. In 1954 the Court took up the meaning of the “public use” phrase in the Taking Clause in the case of Berman v. Parker (348 US 26 (1954)). The Court’s decision ushered in the era of urban renewal. The question before the Court was the right of government to take private property, paying compensation, when the goal was to consolidate property for redevelopment often by another profit-making owner, all under the justification of “blight.” The Court upheld government’s right to do this.

In 1978 the Court re-entered the property rights arena with renewed vigor, by seeking to establish boundaries to governmental authority. In the ensuing nearly twenty-five years since Berman many things had changed – the composition of the Court, and America’s attention to and involvement with private property rights. Since about 1970 the U.S. had experienced a literal explosion of laws, policies and regulations at the national, state and local levels that affected private property. The Clean Air Act, Clean Water Act, Coastal Zone Management Act, National Environmental Policy Act, were all examples at the national level (Moss 1977 provides one then-contemporary chronicling of these). Among state governments, a so-called “quiet revolution in land use control” had occurred where nearly a dozen states re-asserted their Constitutional authority to regulate private land use activities at the state level (Bosselman and Callies 1971). And local governments across the country were beginning what has become decades-long experiments in public policy approaches to protect and manage farmlands, wetlands, open spaces, watersheds, threatened habitats, urban sprawl, etc.⁵

Between 1978 and 1994 the Court heard a series of cases in which they began to redefine the rules of interaction between government and private property owners.⁶ While the Court did not eviscerate the right of government to regulate private property, the Court did begin to more clearly say when the line of “too far” articulated in Penn Coal had been crossed. Of the cases decided in this period, one that received a great deal of attention was Lucas. Here the Court ruled that when all economically viable use has been taken by

⁵ Daniels and Bowers (1997) is an example of these approaches applied to farmland protection; Nelson and Dawkins (2004) is an example of these approaches applied to urban containment.

⁶ Some of the most prominent and discussed examples include the decisions of the Court in the cases of Penn Central Transport. Co. v. New York City 438 US 104 (1978); First English Evangelical Lutheran Church v. County of Los Angeles 482 U.S. 304 (1987); Nollan v. California Coastal Commission 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Dolan v. City of Tigard 512 U.S. 374 (1994).

regulation, this was a case of regulation going “too far” and compensation was owed the landowner. The outcome of these cases was ambiguous however. As commonly understood by private property owner-advocates and government officials, regulation was still acceptable, but a regulating body needed to be precise in the formulation and administration of regulations.

The twenty-first century began (and the twentieth century ended) with two major cases being decided by the Court, both of which seem to take a step back from the boundary setting tone of the immediate prior period. In the 2002 case of Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (535 U.S. 302 (2002)), the Court took up the matter of a nearly three year moratoria on development in light of some of its prior boundary setting decisions. In a decision strongly in favor of government, the Court found that planning and regulation are normal and expected governmental functions and that the Court had no reason to interfere with regular planning activity (Kayden 2002). In other words, planning and government regulatory action received a strong “green light.”

Then, in June 2005, the Court issued its closely watched decision in the case of Kelo v. City of New London (125 S. Ct. 2655 (2005)). Pressed by property rights advocates (see the section that follows), the Court agreed to clarify its thinking about the “public use” phrase in the Takings Clause, revisiting what was for some its controversial 1954 decision in Berman v. Parker. In the Kelo case, there was not even an assertion of “blight” by the city. Instead, the city asserted its right to take private property, with compensation, for a public use, when the public use was defined to be consolidation of the land for distribution to another private owner in order to facilitate and further economic development in the city, through new jobs and increased property tax revenues from the land. By a one vote margin the Court affirmed the public’s right to do this.

In summary, the U.S. twentieth legal history of the relationship of government to private property owners can be characterized as a story that goes like this:

- 1915 – there is no limit to government regulation; the individual’s property rights must yield to the needs of the community;
- 1922 – government regulation can go “too far” and if it does, owners are entitled to compensation or the regulation must be revoked;
- 1926 – zoning – local government’s division of land into districts and the listing of acceptable uses for that land – is an acceptable form of regulation that does not go too far;
- 1954 – government can take private property land from one private party and then transfer it to another private party to further the public interest, when the original property is classified as “blighted;”
- 1978-1994 – there are limits to overzealous government regulation; government needs to be careful and precise in what it does. But it is not clear how much these

limits really challenged the way government practiced its management of private property;

- 2002 – land regulation is a normal and expected function of government;
- 2005 – government can take private property land from one private party and then transfer it to another private party to further the public interest in the name of economic development, regardless of whether the original property is classified as “blighted.”

The Property Rights Movement

The themes and issues presented in the two prior sections come together in the formation and subsequent activism of the so-called property rights movement.

From the perspective of the property rights movement, the intent of key American founders and the principles embodied in the founding documents of the U.S. make the protection of private property rights a key element of the American political and social contract (Jacobs 1995, 1998b; Marzulla 1996). One of the factors that make the U.S. so unique is how the right to own property and the protection of that property provide a buffer from the power of the state (Ely 1992). Through the ownership and control of property – land – the owner has the material conditions which allow him to be literally free. Following from Jefferson’s idea of the yeoman farmer, ownership provides the conditions upon which liberty and the exercise of democratic citizenship are based. Without the availability of property, liberty and democracy – in the American configuration – are not feasible. Thus, what is needed is a national state strongly committed to the ideal and the reality of private property, the protection of this property, and the integrity of this property. Why? Because the state understands that if there is a serious erosion in property and property rights, then there is a consequent erosion in the very viability of liberty and democracy.

This framing of American history comes together with an alarmist view of 20th century public policy and law. From the perspective of the property rights movement, the last 100 years presents a story that appears to move away from a view of property rights as integral and central to liberty and democracy. Instead, what appears is a story in which government is allowed ever increasing authority to intrude upon, reshape and take away property without respecting the protections afforded property by the Constitution (for public use and just compensation). Despite the promise contained in Penn Coal (1922) that regulation that “goes too far” will be recognized as a takings, in practice legislatures and the Court seems to continuously affirm the right of government over the rights of individuals with regard to property (Bosselman et al. 1973, Salkin 2001). Even the Court’s decisions of the late 1980s and early 1990s that appeared to hold promise for reigning in governmental practices seem to have had little real impact on those practices at the local, regional and national levels (Roddewig and Duerksen 1989). With the 2002 decision in Tahoe-Sierra and the 2005 decision in Kelo, those activists concerned with

the integrity of private property rights find little promise and solace in the arena of the Court.

It is in part because of this that the political-social movement for private property rights protection was born (Gottlieb 1989, Minter 1994). The movement was formally born in 1988 with a focus on western U.S. land resources, and labeled itself as the wise use movement (Gottlieb 1989).⁷ However its intellectual and geographic antecedents originate at least with the rise of the modern environmental movement (e.g. McClaughry 1975, 1976). What exists today is a national coalition targeting national, state, and local land use and environmental laws, policies and programs, such as the those for endangered species protection, smart growth, farmland and wetland protection, etc. (Jacobs 1995; an early listing appears in Deal 1993). This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective.

The property rights movement has pursued a multi-level strategy to achieve their objectives – judicial, legislative, policy and public relations (Jacobs 1999b). While they approach the judicial strategy skeptically (and the outcome of the Tahoe-Sierra and Kelo cases suggests their skepticism to be well founded), they will not forego this option since they see the property rights issue as fundamentally Constitutional. However, in conceptualizing an approach for engaging this issue they decided early on to not rely on legal decisions alone. They supplemented a legal strategy with a policy and legislative strategy. In their early years, this strategy was focused at the national level, exploring what could be accomplished via Executive Orders issued by the President, and through legislation proposed in the U.S. Congress (Folsom 1993, Pollot 1989). But much to their frustration, there was little outcome for this activity. Quickly therefore the movement's strategy shifted towards state legislatures. And here they found fertile ground for their arguments and their ideas.

Since 1991 every state in the U.S. has considered state-based legislation in support of the policy position of the property rights movement, and 27 states have passed such legislation (Emerson and Wise 1997, Jacobs 1998a, 1999b). These states are on both sides of the Mississippi, they are “red” and “blue” states, and extend from Maine to Washington, the Dakotas to Texas, with eleven of these states east of the Mississippi River. The property rights movement has offered up three basic types of state-based laws to address what they believe to be the necessary corrective for law and policy.⁸

Compensation laws grow out of frustration with what courts have not delivered in terms of “justice” to owners. They are designed and intended to by-pass courts and give

⁷ Since then it has gone through a variety of labels – wise use movement, land rights movement, property rights movement – settling on the latter as the most generic (Brick and Cawley 1996, Yandle 1995).

⁸ The following paragraphs draw heavily from Jacobs 1998a, 1999b. See White (2000) for one updating of this research.

owners a precise cause of action against government for laws, regulations and policies that impact upon private property. What these laws do is establish by legislation the precise percentage at which an individual property owner is entitled to compensation (rather than leaving it up to a court to decide if any compensation is due at all, and forcing the landowner to initiate an action). These laws, adopted in six states, establish percentages that range from 10 to 50 percent; that is, if a state or local law reduces property values by the amount set in the state-based law, the landowner has a legislative basis for claiming compensation, or having the burden of the legislation removed.

Takings impacts assessment (TIAs) laws require a unit of state government to prepare a report on the likely impact of a proposed law, policy, or program on private property rights. Conceptually this approach is modeled on the requirement for environmental impact assessments required under the National Environmental Policy Act (NEPA). These laws are put forth as “look before you leap” laws. They are intended to make the public sector do the research that the property rights movement can then use to fight proposed private property rights “impinging” proposals. TIA requirements have been adopted in 17 states, and follow the model first promulgated as an Executive Order under President Reagan (Folsom 1993).

These two legislative approaches – compensation and taking impact assessment – represented the first wave of state-based laws, and the majority of these laws. Most were passed in the period 1991-1995. However, much to the surprise and frustration of the property rights movement, these laws did not yield the results that the movement had expected.

In the mid-1990s, the property rights movement adopted a second-wave approach to state-based laws: conflict resolution laws. These were presented as “let’s sit down and talk about it reasonably” laws. They were framed within the new language of conflict resolution and alternative dispute resolution. However, given that they were intended to further the policy strategy of the property rights movement they were written in such a way as to grant the landowner a strong cause of action against government, to precisely prescribe the terms of under which dispute resolution would occur, and to pre-determine the basis (favorable to the landowner) under which resolution of asserted conflicts could be achieved. Two states adopted this approach.

In addition to a state-based strategy, the property rights movement also pursued a more local strategy, focused at the county level, primarily in the American west. Based on an obtuse interpretation of language in NEPA, the movement promoted what they deemed as “culture and custom” ordinances (Hungerford 1995, Budd-Falen 1996, Reed 1996). These ordinances were so-called land use plans. What they did was assert the primacy of the county as the lead governmental agency for all aspects of land use and environmental planning and policy, even when county-based policy conflicted with state or federal planning and policy. Even though this approach has been found to be blatantly illegal – a

violation of the supremacy clause of the U.S. Constitution – it was actively promoted in over 300 counties, adopted by scores of counties as far east as Michigan, and actions based on it became prominent in national media coverage of the movement in the mid-1990s.⁹

By the late 1990s the property rights movement had come to a policy standstill. They had been effective in passing state-based laws, they had been effective in promoting county-based laws, they had been effective in garnering significant media attention to their cause, but they had been ineffective in changing the fundamental way government – at the national, state and local levels – acted towards and upon property.

With the dawn of the 21st century, the movement had an opportunity to revise their strategy. Largely this came about because of the election of George W. Bush to the White House (Jacobs 2003). With a sympathizer occupying the president's office, the movement decided to try again for nationally based action, through the President's office and through Congress. Initially it appeared that they were going to have a great deal of influence. Patterns of appointments and non-appointments in the administration suggested this (Jacobs 2003). However, several factors – principally the systemic impact of 9/11 on Administration priorities and Congressional realignments, forced the movement back to a state-based strategy. The outcome of this move may yield more than they anticipated.

In November 2004 the property rights movement sponsored an initiative in the state of Oregon directly intended to undercut the influence and impact of Oregon's 30 year old and model approach to land use and environmental planning and urban sprawl management (Oliver 2004, Rohse 2004). The initiative was a form of compensation law. It was closely watched nationally, because of Oregon's role as a leading state in the area of land use and environmental planning (Ozawa 2004). The initiative was similar to one put before the voters in November 2000 (Abbott et al. 2003). The 2000 initiative passed but it was subsequently found to not meet procedural requirements spelled out in Oregon's constitution. The November 2004 initiative – Measure 37 – passed by a 61% majority. The measure forces the state of Oregon and local governments to either remove the requirements of their 30 year-old land use law on properties owned by people who owned them prior to the adoption of the law and have owned them continuously since then, or to provide compensation to these owners for the burden of the law. In early 2006 the Oregon State Supreme Court upheld the legality of the initiative, after it had been challenged by the environmental community on state constitutional grounds, and found to be unconstitutional by lower state court (Macpherson et al. v. Department of Administrative Services et al. 340 Ore. 117 (2006)).

⁹ Boundary Backpackers, et al. v. Boundary County, et al. 913 P. 2d 1141 (1996) is the legal case; the county movement was profiled on the front cover of *Time* magazine on October 23, 1995, under the title "Don't Tread on Me: An Inside Look at the West's Growing Rebellion," focusing on the resistance and defiance activities of a group of residents in Nye County, Nevada.

The adoption of Measure 37 by such a strong majority in Oregon has emboldened the property rights movement. Their thinking – if they can shape citizen attention and grab citizen support in Oregon, they can do this anywhere. Parallel efforts are already bubbling in Colorado, Florida, South Carolina, Washington, Wisconsin and Wyoming, and are likely to spread to even more states (states with either the initiative option or sympathetic legislators) (Harden 2005). In addition, the U.S. Supreme Court decision in Kelo has also engendered a spate of state-based reactions, reactions intended to blunt the potential impact of Kelo in implementation (Egan 2005). Together these two actions – the success of the property rights movement in Oregon and the opportunity for state-based laws in reaction to Kelo – has, I believe, launched a third-wave approach for state-based action.

The Globalization of Property Rights

With the fall of the Berlin Wall in 1989 and near-total collapse of communism globally in the early 1990s, issues surrounding land, its ownership, and markets for it and its place within markets have moved front and center into global policy debates (DeSoto 2000, Huntington 1996, Fukuyama 1989). The fall of communism in Eastern Europe and the former Soviet Union caused a rush towards the creation of private land ownership systems (private property) and land markets (Bromley 2000, DeSoto 2000, Singer 2000). As the new and newly liberated countries of this region moved to invent themselves – establishing democratic and market systems – one of their first acts had to do with land – creating it, and allowing for its free ownership and exchange. This was the case in countries as disparate as Albania, Krygyzstan, Mongolia, Poland and Russia.

To some extent this trend grew out of historical forces and focused, in part, on the restitution of property to those from whom land was taken by the post World War II regimes. But this movement was also a part of the broad push for privatization of former state assets (Barnes 1998, Strong et al. 1996). These assets include former state industries, state cooperatives, state farms, and urban flats. Privatization was and is pursued both for goals of equity to those who worked within these enterprises, but more prominently to facilitate a process of modernization and economic development. It was expected that by moving these assets into private hands they would be used more efficiently and contribute to the economic and political transition of the country, and thus contribute to a social and economic state of security and sustainability (see for example, Havrylyshyn 1999).

The rationale for this focus draws directly from the classic political and economic literature that informed the creation of the United States (as discussed in the section above, The Colonial Era, and subsequently in Property Theory). That is, there was a recognition and a belief that private ownership and control of land was foundational to

the creation of democratic political systems, and that it was equally foundational for the creation of market-based economic systems.

While the re-invigoration of global focus on property was most prominently prompted by the events in central Europe and the former Soviet Union, it was not restricted to them. Two countries from two very different regions demonstrate this. In the early 1990s, South Africa made a peaceful transition away from apartheid. One of the new parliament's first legislative acts had to do with the access to and ownership of land. Discussions on land, property rights and land restitution played a significant part in the country's political transition and reformulation (e.g. Chaskalson 1995, Klug 1996, Roth et al. 2004). During the 1990s China has been forced to continually revisit the issue of private property (deLisle 2004, Ding and Song 2005, Ho 2001, Kahn 2003, Lai 1995 are among many examples of works that pay attention to the phenomenon). The changing economic structure of China, moving more towards a market structure, and the desire to attract foreign investment, means that the Chinese government has had to engage discussions which appear to violate a central tenet of Community Party ideology.

In response to all this activity, many of the multi-lateral and bi-lateral international development aid organizations have shifted their agendas to focus on property rights issues. Governmental organizations such as the U.S. Agency for International Development, the parallel organization in Germany, GTZ, and the World Bank all have invested substantially in programs for land and property rights reform because of their understanding of how key such programs are to democratic and market reforms.

There is another interesting, and for many unanticipated, trans-national dimension to the reinvigoration of property rights. Over the course of the last few decades, indigenous peoples in developed, transition, and developing countries have been asserting their traditional claims to and rights in land. After several centuries of colonialism, native peoples are asserting treaty rights, or their equivalent, in countries around the world (Perry 1996). In most cases, the point of this reassertion is to achieve the dual purposes of security through land ownership through a form of private property, and to foster sustainability of resource management (Howitt et al. 1996, Wolfe-Keddi 1995). Throughout the U.S. and Latin America, and in Canada, Australia and New Zealand, the issue of restitution of land to native peoples, and/or the renegotiation of traditional treaties about land, has led, for example, to creation of new provinces (Canada), uncertainty about non-native rights to land (U.S.), and new bases for thinking about access to exploitable natural resources (Fleras and Elliot 1992, Bourassa and Strong 1998). Quite literally, native peoples globally are re-inventing property, using the western model of private property to establish claims to their traditional lands as a first

step in re-establishment and re-assertion of tribal identity, security, and sustainability (Rangan and Lane 2001, Howitt et al. 1996).¹⁰

While the policy debate about property rights, private property, land markets, and land has been most prominent in transition and developing countries in the 1990s, and secondarily with regard to the rights of indigenous people, it is in no way confined to these regions or people. As noted in the subsection above on The Property Rights Movement, in the U.S. the issue appears different but is very much the same – what should private property be, and what should be the bounds of private and public rights in property? The social debate between the so-called property rights movement and environmental movement is centrally about this topic.

As property rights issues have risen as a policy topic and as this rise has both been driven by and contributed to a parallel theoretical literature to support it (see the subsequent section), other developed countries and regions are finding themselves engaging the property rights topic. So, for example, Canada, England and France all have think-tanks parallel in purpose to their cousins in the U.S., whose goals are to promote property rights as a basis for lowered governmental regulations and increased market activity.

Significant debates have emerged about land use-based regulatory reform in most western democratic developed countries. The structure of twentieth-century institutions for planning and land use management are being reexamined with an interest in moving away from a reliance on command and control and towards more market-based approaches (transfer of development rights (TDRs), for example). And throughout the 1990s and into this decade countries across Europe – from Spain to France, Italy, and north across Scandinavia – have been engaged in two significant and parallel activities: an effort to re-write their national planning laws, and an effort to create a European Constitution and parallel implementing institutions (such as a European Court of Human Rights). European governments appear to want to self-consciously move away from their 20th century structure of a strong state and a weak(er) set of rights in the relationship over private property (at least as compared to the U.S. model).

Since 1996 many of the intellectuals and activists associated with these European reforms have come together in a series of every other year meetings on the way the property rights concept can be utilized in various sub-sectors of resource and environmental management (e.g. Falque and Massenet 1997, 2000, Falque et al. 2002).

In summary, land – its ownership, the very nature of private property and its contribution to social and economic progress and poverty, and local, regional, and global security and environmental sustainability – is once again dominant on the global stage, as efforts are

¹⁰ Nadasdy (2002: 253, citation omitted) summarizes this argument well: “If in the context of the modern nation-state, aboriginal people wish to claim some form of control over their lands, and they wish those claims to be seen as legitimate by others, the must . . . speak ‘in a language that power understands.’ And that language is, and has long been, the language of property.”

mounted to reform societies in the directions of markets and democracies, to address issues of social justice to indigenous peoples, and to loosen the long-standing (20th century) structures for managing the state-individual and state-market relationships. A key assumption in all these activities is that the establishment and/or strengthening of private property rights in land and land markets will lead to positive results for all concerned – within a place, within a region, and thus globally.

Property Theory

The theory which informs this research is both old and newly emerging and is known as “property theory.” In its new form it is an interdisciplinary body of material drawing from anthropology, economics, history, law, planning, political science, and sociology (the fields are listed alphabetically, not by order of importance). What ties the scholarship together is an interest in the institution of property – private, public and common – and the various claims made about it: how it came to be; the roles it serves for the individual, group, and society; the problems and issues that its very existence generates; and the appropriate boundedness of it, given other social institutions and goals.¹¹

In introduction, there are several things that should be said about this area of property theory. First, the fact that it even exists is surprising. In classical economic formulations, the major factors of productions are identified as land, labor and capital. And for much of the history of economics and political economy there were significant bodies of scholarship on each of these factors. Depending on the moment of history, one or the other was considered more important, but there was continuous development of theoretical and empirical understanding about all of the factors. In post-WWII period this changed. Suddenly land was treated as no longer a constraint that required much attention. Whereas in the pre-war period some of the brightest minds had been drawn to land economics as a field of study, by the 1960s the discipline was being relegated to a backwater.¹²

What changed this situation? One explanation is tied to the rise of the modern environmental movement in developed countries. Here was a social movement centrally interested in protection and management of natural and environmental resources. In order to address this point, the movement found itself engaging questions about ownership and control. Who owned environmental resources? What rights did ownership actually entail and thus what did ownership mean? How did social

¹¹ One sampling of key literature in this area focused on private property is included as Appendix I.

¹² For example, in the 1930s then young scholars, such as the future Harvard University economist John Kenneth Galbraith and Cornell University historian Paul W. Gates were drawn to the field, specifically through the work of the National Resources Planning Board, where they worked on the Board’s pioneering national study of land use activities and land planning (United States National Resources Board, Land Planning Committee 1935-1938).

relationships over ownership change to reflect new social ideas and new scientific analyses?

A key contributor to the renewal of property theory came from outside the field. In 1968 Garrett Hardin – a population biologist – published a landmark essay in Science: “The Tragedy of the Commons.” For Hardin the central subject of his essay was population growth, and especially the need and methods for population control. However to engage this subject he chose as a metaphor to discuss a form of property which received little attention at that time – what is now referred to as an open access commons. Interestingly, it was his metaphor, not his central subject, which became the legacy of his work.

Hardin was concerned about the tension between the logic of personal decision making and its mismatch with the logic of social decision making. He argued that when each individual pursues their own self interest with regard to environmental and natural resource use, the net result for social and ecological systems is a “tragedy.” This is not because any one individual is making a bad decision; just the opposite. With regard to common resources, each user is making a decision that is logical and reasonable to him or her within their decision calculus. The problem is the cumulation of these decisions; a summation of individual logic does not cumulate into social logic. In fact, just the opposite occurs. The cumulation of individual rational decisions is an irrational outcome from the social perspective.

It was Hardin’s solution which was so provocative. According to him “the tragedy of the commons . . . is averted by private property” (Hardin 1968: 1245).¹³ Why was this true? Because when you owned something, you had an incentive to manage it properly. Whereas in open-access commons it was the lack of ownership which provided the institutional incentive for resource exploitation, and ultimately and inevitably, eco-system collapse. Hardin then went further in his thoughts about private property by acknowledging that “an alternative to the commons need not be perfectly just to be preferable. With real estate . . . the alternative we have chosen is the institution of private property coupled with legal inheritance. . . . We must admit that our legal system of private property plus inheritance is unjust – but we put up with it because we are not convinced, at the moment, that anyone has invented a better system” (ibid: 1247). Conceptually, Hardin had laid out the fundamental logic of one major branch of the renewed field of property theory.

But Hardin also laid out the seeds of the counter position to his principal position. In his argument for managing commons resources, he argued that one feasible alternative for averting the tragedy of the commons was “mutual coercion, mutually agreed upon” (ibid: 1247).

¹³ Hardin was also very clear about what the solution was not: “it is a mistake to think that we can control . . . in the long run by an appeal to conscience” (ibid: 1246).

Property theory, while longstanding in the social sciences, blossomed after 1970. And in so doing it took two very distinct directions. Below I use a limited but illustrative body of literature from this broad and integrative literature to illustrate these directions. The discussion focuses on the literature that most specifically touches on private property, rather than the many other types of property (e.g. public, tribal, common).

Conservative Property Theory

Conservative scholars in the area of property theory draw together three strands of thinking to make their case: property as a foundation of democracy – often as embodied in the arguments of one group of American founders (discussed above), Adam Smith’s (1776) arguments about property in The Wealth of Nations, and Garrett Hardin’s arguments (which can be understood as a modern day updating of Adam Smith’s arguments).

Currently, one of the most influential of these new property theorists is Hernando DeSoto (2000). His focus is captured in the subtitle of his book: “why capitalism triumphs in the west and fails everywhere else.” For DeSoto the “west” is the U.S. and everywhere else is primarily the developing world. His answer to his query is unambiguous. Capitalism triumphs in the west because of the right to hold and control private property.

“The poor inhabitants of these nations . . . do have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds; . . . It is the unavailability of these essential representations that explains why people who have adapted every other Western invention . . . have not been able to produce sufficient capital to make domestic capitalism work. This is the mystery of capital” (DeSoto 2000: 6-7).

Drawing from Smith, DeSoto argues that the problem in the developing world is not poverty per se, but what he terms “dead” property. This is property with the potential to be of benefit to an owner, but which is not beneficial because users are not owners. Because users lack ownership they cannot release the value buried within property, through investment, mortgage, etc. even though they have the capacity and the desire to do so.

“Property . . . is . . . a mediating device that captures and stores most of the stuff required to make a market economy run. Property seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for monetary and banking system to work and for investment to function. The

connection between capital and modern money runs through property”
(ibid: 63).

For DeSoto property is the central social institution, and what is necessary is legal and institutional reform to allow for the freehold ownership of property and the market exchange of property. If this can be achieved, he is convinced that countries and people now mired in poverty will be able to replicate the experience of the west (the U.S.). DeSoto’s ideas are at the center of major programs sponsored by international aid organizations, such as the World Bank and the United States Agency for International Development.

While DeSoto (2000) is the most policy-popular of conservative theorists, he joins a long list of others making similar arguments about the centrality of property to market economies and democratic political structures (e.g. Bethell 1998, Deininger 2003, Epstein 1985, Pipes 2000). For example, Bethell (1998) examines property in a broader historical sweep. Like DeSoto (2000) his central question is an examination of what distinguishes prosperous from non-prosperous societies. His conclusion – it is the ability of individuals to own and control property, absent arbitrary interference from government.

If DeSoto is the principal influence on contemporary international public policy, Epstein (1985) is the principal legal theorist of this perspective. Epstein task is to examine the legitimacy of government to restrict the right of the individual to use their property through regulation and absent compensation. This is, Epstein examines property from a perspective that presumes a strong private bundle of rights. Epstein argues that there is no justification for this action. Instead he insists that the legitimacy of democratic, American-based law draws from a tradition that is wary of government, and specifically is meant to keep government at bay, allowing its intrusion upon individual property rights only under the most dire of circumstances. Epstein’s arguments are joined by a broad array of scholars, who bolster both his historical and legal approach (e.g. Siegan 2001).

Liberal Property Theory

A counterpoint to the conservative perspective is presented by a range of scholars who view property liberally (e.g. Bosselman et al. 1973, Bromley 2006, Freyfogle 2003, Geisler and Daneker 2000, Large 1973, Logan and Molotch 1987, Rose 1994, Steinberg 1995). For these scholars a liberal perspective on property means that, centrally, property is a social creation. That is, property has no *prima facie*, fixed character. Related to this first key concept is the related concept that the very nature of property changes as society itself changes; society determines how property needs to change.

In very broad terms, these scholars are the inheritors of Benjamin Franklin’s position on property. Like Benjamin Franklin they argue that individuals only have property because of social institutions – social norms, cultural values, legal frameworks – that create it,

recognize it, and protect it. Therefore, no particular bundling of property rights or definition of “private” property has any more legitimacy than any other. And in particular, since it is society that creates, recognizes and protects property, society, through government, can re-shuffle the rights in the property bundle as best fits society’s needs at any given time, largely absent compensation to the individual for the act of re-shuffling.

Bromley’s work is one of many examples of this. To illustrate it in some detail I use his exposition in Bromley (1993). Drawing from Kant, Bromley (1993: 653) argues that 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-state relationships, 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 understands it, property is a completely moldable social construct, established by society to fulfill social needs, and thus changeable as social circumstances require it.

As his example of this, Bromley notes the widespread acceptance of public action that prevents a landowner from cultivating marijuana or (in the United States) of running a house of prostitution. He ponders why this is socially acceptable, and regulatory action to protect wetlands or farmlands is not. More precisely, Bromley wonders why one action is not considered a violation of private property rights requiring compensation under the doctrine of regulatory taking and the other is.

As with many scholars in this area Bromley (1993: 682) acknowledges that “land use and environmental policy is contentious precisely because it joins claims of individual freedom and private property rights.” However, he speaks directly to what calls the “myth of the overarching sanctity of private property,” and argues that “the public cannot continue to be held hostage to the extortion that emanates from this view.” He concludes that from his analysis this myth and view has “no basis . . . in economics, in philosophy, or in the law.”

In terms of Hardin’s formulation, Bromley and the other scholars noted argue that the solution to property problems is not privatization of property. To them it is not clear that the benign “selfishness” of ownership will result in sustainable management. Instead, from a liberal perspective, the preferred solution is Hardin’s notion of “mutual coercion, mutually agreed upon.” Public policy which re-forms property through regulation is just such an action.

Like the conservative scholars, liberal scholars come from a variety of disciplines: law (Freyfogle 2003), economics (Bromley 2006) and sociology (Logan and Molotch 1987) among them.

Others – The Straddlers

There are a set of scholars who, quite literally, provided ammunition to both sides in this otherwise polarized debate. These scholars recognize the centrality of property to American democracy and the American process of economic development and growth, and at the same time recognize how flexible and fluid property has been over time. That is, these scholars affirm the positions of both conservative and liberal theorists.

For my purposes, the most prominent of these scholars is Ely (1992). As he notes in the introduction to his monograph, “historically (in the U.S.), property ownership was viewed as establishing the economic basis for freedom from government coercion and the enjoyment of liberty” (Ely 1992: 3). From his perspective as an historian, he argues that “to the colonial mind, property and liberty were inseparable,” and “by failing to respect the high value of property rights in the colonial mind, English imperial policy after 1763 precipitated the revolutionary crisis. Significantly, the cry of ‘Liberty and Property’ became the motto of the revolutionary movement” (ibid: 17, 25). Therefore “colonial leaders viewed the security of property as the principal function of government. It followed that any government that rendered property rights insecure violated the very purpose of its existence. Such a government would forfeit the allegiance of its citizens and would be open to rebellion” (ibid: 28).

Yet, Ely says, “it is important to realize that property is a dynamic concept . . . [and] once-common types of property may cease to have legal recognition” (ibid: 6). This is because “thinking about property rights is not fixed but has evolved over time in response to changed conditions (ibid: 8). A prominent example that Ely offers is the way slave owners rights were treated in the wake of the Emancipation Proclamation (1863), and ratification of the Thirteenth Amendment (outlawing slavery, 1865). Slaves are the one form of property actually explicitly mentioned in the U.S. Constitution. Yet, with changing social conditions and values, “the property interests of slave owners were eliminated without compensation, an instance of massive government interference with existing economic relationships to achieve societal goals” (ibid: 83).

Ultimately, Ely (1992) concludes that there is a strong basis for the role of property in U.S. law, society and culture: property rights “remain important for both utilitarian and libertarian purposes,” partly because “property . . . arrangements constitute the legal foundations of the free-market system. An economic system resting on private property ownership tends to diffuse political power and to strengthen individual autonomy from government control” (ibid: 155). And at the same time there is also a long tradition of challenging and re-shaping those rights through expropriation, reallocation, regulation, because “in the last analysis, the viability of property rights . . . rests on broad popular acceptance” (ibid: 156).

While she may not self-identify as a “straddler” (and I have identified earlier in this section as a liberal theorist), Prof. Carol M. Rose of Yale University through her body of work largely agrees with this assessment (see for example Rose 1994). In a recent essay, she specifically addresses the political theory justification of property, and expands upon some of Ely’s observations.

“... there is a long string of venerable arguments precisely about the political importance of property: that property gives owners the independence necessary for participation in the political order; that property acts as a concrete symbol for thinking about rights more generally; that property and commerce diffuse power; that experience with property and trade soften manners and make people attentive to one another’s needs, as of course they must be in a democracy; that the pursuit of property distracts people and disarms them from cruel and divisive ruptures over religion and ethnicity; and finally, that democratic government is in some ways a luxury good – that is, that free speech and press and voting only are meaningful values to people after they have built up some modicum of wealth – which they can only have through the security of property” (Rose 2000: 4, citing Rose 1996).

The State of Property Rights in Europe

Introduction

There has been a spillover from the U.S. to Europe of all this theoretical attention and policy activity relative to property rights. But in examining precisely how this spillover has taken shape, it is necessary to set the issue of property rights into a broader European context – a context of history, law, and contemporary global-political realignments.

History

Historically, the relationship around property rights in general and private property rights in particular – the relationship between the individual and the national state – has been much different in Europe than in the U.S. Some of this goes back to colonial times.

The historical experience of the U.S. is that of a frontier nation. Immigrants arrived to a land that seemed limitless, and a land that was treated, for all extensive purposes, as if it was “empty” (that is, the land and property rights of the native peoples were afforded little respect) (Cronon 1983; see also Gates 1996). As settlement occurred, an ethos evolved (drawing from the ideas of Locke) that individual effort applied to land gave one rights to that land (labor mixed with land). And that one’s rights to land were paramount. The role of government was ambiguous. During pre-revolutionary colonial times, the English government was distant and its actions perceived as intrusive and disruptive. The American Revolution was premised, in part, on the need to throw off government

intrusion on the rights of the individual to use land as they best saw fit (see the discussion by Ely (1992) in the previous section). That is, individuals already had land, they were using it productively, and they saw opportunities for further productive use. Government in the form of the English sovereign and Parliament was seen as a force that stood in the way of this realization. With the revolution, Americans threw off the English government and sought to create a government that would not repeat the mistakes of the prior ruler, and would instead facilitate their rights for and with land. Thus the American experience is one in which the rights of government over land are viewed suspiciously, while the rights of the individual with regard to land is seen as the appropriate starting point for the property rights relationship (Ely 1992).

The experience of Europe is essentially opposite to that of the U.S. During the 1700s land in Europe was still largely owned by an aristocracy. There was little opportunity for the ordinary person, the emergent middle-class, to get access to land. And yet, there was a strong desire for this access. How was this access achieved? Through popular action such as the French Revolution. That is, it was by people banding together and demanding their rights for access to land that it was possible to wrench land from the aristocracy and to guarantee the rights of land users desiring to become new landowners. In this instance, new, non-aristocratic government came to be seen as a force of good. That is, it was the very existence of government that allowed for and guaranteed the existence of widespread access to property. Therefore, the legacy of this experience is that, on the whole, government and what government represents – the interests of the whole – has been viewed much more benignly throughout Europe.

Law

These differences in historical experience find their expressions in the way the formal legal system treats private property. In the legal, public administrative, policy and political science literatures it is usual to point out the distinctions between the legal systems of continental Europe and those of the UK and its former colonies, including the U.S.

Civil law, the system which predominates on continental Europe and is in fact the most common form of law globally, is usually understood to have several, general distinguishing characteristics.¹⁴

First, civil law is based strongly on codes, or parliament-based statutes and laws. That is, in contrast to the common law system civil law draws much less from judge made law, specifically precedent, in understanding what social rules are and what they are meant to

¹⁴ Civil law is also often referred to as the Napoleonic Code; the Code was created in 1804.

be. Instead it is supposed to be based on laws that are “clearly written and accessible” (Wikipedia 2006b).

Then this leads to a second distinguishing characteristic – judges and judge made law have a much less prominent role in civil law systems. Whereas in common law systems, legislatures pass laws which are understood as generalities, and which are then specified by administrative agencies and through judicial interpretation via law suits, in civil law systems judges apply the law as passed by legislatures. Legislation itself serves as the primary source of law.

In civil law countries, legislation is seen as the primary source of law. By default, courts thus base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to be derived. Courts thus have to reason extensively on the basis of general rules and principles of the code, often drawing analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in the common law system, cases are the primary source of law, while statutes are only seen as incursions into the common law and thus interpreted narrowly (Wikipedia 2006a).

A third distinction is that “[T]he underlying principle of separation of powers is seen somewhat differently in civil law and common law countries. In some common law countries, especially the United States, judges are seen as balancing the power of the other branches of government.” Whereas in civil law systems there is a designed-in skepticism about the independence and role of judges, that goes back to the conservative role played by judges during the French Revolution (Wikipedia 2006b).

For both legal systems, concepts of property are central to their very foundation and functioning. Through constitutions, civil law systems provide a clear right to property. However, this right is tempered by a parallel right of the state to act upon property. So, as noted by Booth (2002: 155): “the theoretical understanding of property ownership as it developed in continental Europe, [is] imbued with the traditions of Roman law. Roman law posited two fundamental concepts in relation to land. The first was that of *dominium*, which represented the exclusive right of the owner to the current beneficial use of his or her property and its future development. The second concept was . . . *imperium* . . . [which stressed that] those [individual] rights nevertheless resided within an overall right of the state to govern, and by implication to intervene in the landowner’s right to property for the greater good of the state.”

These two principles are articulated in a set of European constitutions where the right to property is counter-posed to the social obligation of property owners. Specifically, this provides the basis for state intervention upon property rights. More specifically, though, it provides the justification for state intervention absent compensation.

Within both common law and civil law systems a distinction exists between areas of public and private law. But within civil law systems this distinction appears more clear and to raise a number of issues for this study. Public law encompasses those areas of law having to do with the relationship between the state and its citizens. So this encompasses constitutions and constitutional law (how rules will be established by the state), administrative law (the functioning of government bureaucracy) and criminal law (the consequences for individuals violating established social standards). In contrast, private law encompasses those areas of law having to do with relationships between individuals in which, in theory, the state has a limited role – that is, interactions between private individuals.

In Europe the clarity of this distinction comes out in a variety of ways. On law faculty, individuals have appointments as professors of public or private law. They identify themselves this way, and clearly see the distinction as significant.¹⁵ The legal literature is likewise organized into separate bodies having to do with public and private law. So while there are general law journals for all types of law (e.g. European Law Journal), there are also distinct journals (e.g. European Review of Private Law). In general, property as a subject matter is understood as an arena of private law (more on this below).

But perhaps most strikingly – how this distinction most strongly evidences itself – has to do with the literature around environmental management. In the U.S., the environmental literature, for example in journals such as the Environmental Law Review, will commonly address topics having to do with regulation's impact on private property, property rights, and relevant U.S. and state Supreme Court decisions (see, for example, the recent article by Echeverria (2005)). Yet, in a comprehensive review of the table of contents of Europe's parallel journal, European Environmental Law Review, (a review that encompassed over 14 years of the journal's publication) there was not a *single* article on the topic of property or property rights. Instead there were articles on aspects of environmental management that are understood as appropriately within the purview of public law – biodiversity, coastal zone management, energy, forests, habitat conservation, pollution, waste, water, etc. This lack of attention to property in general and private property and private property rights was confirmed by examining other sources having to do with environmental law – e.g. the table of contents of The Yearbook of European Environmental Law for the period 2000-2005, volumes 1-5 (Somsen 2000-2003, Etty and Somsen 2004-2005), and the work of Seerden et al. (2002) and Macrory (2006).

¹⁵ For example, upon meeting the law librarian at the European University Institute in Fiesole, Italy (herself trained as a lawyer), then meeting Prof. (of Public Law) Klaus Vallender, Universität St. Gallen, Switzerland at EUI in February 2006, and upon following up European law faculty contacts providing to me by Prof. Daniela Caruso of Boston University's Law School, all are clearly identified as working within the field of public or private law.

So property is understood as a matter of private law in civil law systems. That is, most aspects of ownership and management are understood as private matters, matters which the state per se has limited business within (sale, leasing, inheritance), and not matters for the “grander” and “broader” consideration of public law and its scholars. However, also as noted, this distinction is tempered by the right of the state under *imperium*, whereby the state can “intervene in the landowner’s right to property for the greater good of the state” (Booth 2002: 155).

Superficially, it appears that property has the same social value and serves the same social role in Europe as it does in the U.S. For example, the French Revolution occurred only 13 years after the American Revolution (in 1789), and access to and protection of rights in property was a central theme of this mass social movement. And as in the American Revolution, the French revolutionaries were strongly influenced by political philosophers such as John Locke and Jean-Jacques Rousseau. When the Revolutionaries sat to articulate their ideas about the social and political rights of citizens in the new France, one of the rights that emerged is directly parallel to the Taking Clause of the Fifth Amendment of the U.S. Bill of Rights.

In the Declaration of the Rights of Man and Citizen of August 1789 the final of the seventeen rights states: “[P]roperty being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.” All the structural elements of the Taking Clause in the Fifth Amendment to the U.S. Constitution discussed above are here. The right to private property is recognized. The right of government to expropriate that property is also recognized. However, the right of government to advance against a citizen’s right noted as “inviolable and sacred” is only under the conditions of a “public necessity” which “obviously requires it” and when such action is “certified by law.” When these conditions are met, then the citizen is entitled to “the condition of a just compensation in advance.” In fact, in many ways, as articulated as a purely constitutional-legal statement, the protection of private property under Right 17 seems stronger than that offered by the Taking Clause in the Fifth Amendment (e.g. just compensation is to be paid “in advance”).

However, as with the Taking Clause, the right of property protection in the Declaration is understood as a right guaranteed against unreasonable expropriation. It does not establish a right against government regulation. So, in France, as in much of Europe, government has had and continues to have the right to regulate property, often onerously from a U.S. perspective, under its presumed right of *imperium*. And as is discussed below in the next major section, some European constitutions further reinforce this tension by expressly noting the social obligations or social rights inherent in property. For much of the 20th century in Europe there has been a broad understanding of a hard line existing between the concept of physical taking – an act of expropriation – and the financial obligations of the state to the individual under the state’s rights of regulation.

Global-Political Realignment

Europe has been undergoing significant changes in the last several decades, changes which are accelerating in the recent years. Broadly, Europe is re-examining its geo-political place as a set of formerly globally dominant colonial countries, and actively experimenting with a move towards an integrated Europe.

At least to Europeans the reason for this is clear. At the current time, the U.S. is the dominant military, political and economic power on the globe. But to many analysts it seems clear that this is not likely to last. Analysts of many persuasions predict that the 21st century will be a time when, for example, China emerges to challenge the U.S. on all facets of its current dominance (e.g. Goldstein 2005). Europeans pose the following questions to themselves – will there be two or three power poles in the future of the globe? And what will Europe's place be within a new geo-political configuration? One answer to these questions is a conceptualization of an integrated Europe – a united states of Europe – as a third pole (Reid 2004).¹⁶ It is clear that a fragmented Europe – “old” Europe of Spain, France, Germany, Italy, etc. – cannot be a significant player against two giants. But it seems possible that an integrated Europe can be a significant player, a player that offers forth an alternative perspective, a European point of view.

As this idea has taken shape in Europe, Europe has begun to actively re-form itself to function as an integrated whole. In the last decade alone, for example, European countries have eliminated border controls allowing freer movement across the continent, introduced a common currency allowing for clearer price signals and market efficiencies, established uniform food safety and health regulations, and are currently engaging in efforts to unify their higher education systems along a common structure, which together with new labor rules will allow European citizens to work anywhere in Europe their skills (and language) qualify them (Reid 2004).

Following decades of important, but often less than visible to the lay citizen, institutional changes directed at a unified Europe – such as a common market, a set of cross-European legal institutions (e.g. the European Court of Human Rights), a European Parliament, and a cross-European bureaucracy (the European Union) – the most conspicuous step in this process was the proposal for a European Constitution. In many ways, the proposed Constitution represented a culmination of prior activities. It was a proposal for further unification of the member countries formal legal and statutory structures into a common, binding structure (Reid 2004).

¹⁶ Reid's (2004) use of this phrase is not without precedent. In modern times it is a concept that goes back to a 1946 speech by Winston Churchill, a book by Herriot (1930), a long-standing member of the French cabinet, and known to have been used by Victor Hugo as early as 1849 (see the entry for “The United State of Europe” in Wikipedia, especially, the sub-section on “Origin of the Name”; http://en.wikipedia.org/wiki/United_States_of_Europe ; accessed on 23 March 2006).

The idea represented by the Constitution was that with its ratification, combined with prior changes in currency, and rules governing labor, education, agriculture and environment, Europe would be able to present itself as a unified unit in geo-political discourse, and offer itself as a competitive market for the global production and consumption of goods.

The Place of Property Rights in European Unification

The question at the center of this research is the place and role of property rights in the re-forming of Europe.

From the perspective of the property theory literature, private property serves two functions – to insure the viability of democratic political structures and to facilitate the functioning of market-based economic structures. Europe already serves as a model of one type of democratic political structure – multi-party parliamentary democracies which generally generate high level of voting and civic engagement. The debate in Europe about property rights is thus centered more on the economic function of property.

Europe did not have an economic boom parallel to the one that existed in the U.S. in the 1990s. Why not? One answer from property's advocates is that Europe's existing command-and-control, top-down, bureaucratic approach to economic and land management stifles the ability of individuals to "exploit" (in the best sense of the word) the potential contained in their property. Thus as Europe examines many facets of reforming itself, property presents itself as part of the equation and discussion. Theory would suggest that in order for Europe to achieve its goal of moving into a position of a third pole in the global geo-political system, with a robust economy, property reform will have to occur. And this reform will have to be in a direction which imbues individuals with stronger rights, and less "fear" (i.e. concern) of undue interference from state authorities, especially via restrictive and uncompensated regulation.

Status of Takings in Europe

The macro-context for understanding takings and private property is discussed in the previous section. It is shaped by both the existing status of takings in the law of individual European countries and in pan-European agreements. In addition, how the law is understood and implemented affects professionals, activists, and individual perceptions of the status of property rights. In this section, these issues, as well as anecdotal data on property rights in Europe are presented. Finally, as one vehicle for understanding property rights in Europe a set of case studies conducted in the first half of 2006 in France, Italy, and Norway is presented.

Existing Constitutional Provisions¹⁷

The proposed European Constitution was preceded by a series of pan-European agreements stretching back over fifty years. So, for example, the European Convention on Human Rights, First Supplementary Protocol, adopted March 20, 1952, in Article 1 provides for a provision that seems to be very similar in intent to that of the Takings Clause and follows from Rights 17 of the Declaration of the Rights of Man:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The sentiment and precedent of these provisions were reinforced in by the European Parliament's Declaration of Fundamental Rights and Freedoms, Art. 9, adopted April 12, 1989:

The right of ownership shall be guaranteed. No one shall be deprived of their possessions except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to fair compensation.

Both of these provisions recognize the right of the individual to hold property, and appear to restrain the state from arbitrary action against the individual, except as noted above when it is "deemed necessary in the public interest" and then such action must be "subject to fair compensation."

While these pan-European agreements established a basic takings framework in Europe, the European Economic Community Treaty of March 25, 1957, The Treaty of Rome, Art. 222, reserved to the member states the right to specify their own ideas about what these general provisions actually mean: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." So, what did member states do and say? A sampling gives a flavor for this.

¹⁷ Constitutional information was obtained from <http://www.oefre.unibe.ch/law/icl/index.html>

The Scandinavian countries all contain provisions of their constitutions similar in content and intent to that of the U.S. Takings Clause and Right 17. So, for example, Articles 104 and 105 of the Norwegian Constitution of 1814 state: “Land goods may in no case be made subject to forfeiture. If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.” Section 15 of the Finnish Constitution of 1999 is briefer but similar: “(1) The property of everyone is protected; (2) Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.”

Throughout Europe there is similar constitutional language. In Spain, Article 33 of the Constitution (1978) provides that “(1) The right to private property and inheritance is recognized,” and “(3) No one may be deprived of his property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law.” In this way, the Spanish Constitution appears fully in line with the pan-European agreements. But, provision two of Article 33 shows the power of individual country specification provided for in the Treaty of Rome: “(2) The *social function of these rights* shall determine the limits of their content in accordance with the law” (emphasis added).

The Italian Constitution of 1947, Articles 42, 43 and 44 contain similar language to that of the Spanish Constitution. Under Article 42, the Constitution recognizes the existence of private property: “(1) Property is public or private. Economic goods may belong to the state, to public bodies, or to private persons,” and the limits to the state to take land absent public purpose and compensation is also provided for: “(3) Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.” Yet, like in Spain, section 2 of this article notes the social function of private ownership: “(2) Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment and its limits, in order to *ensure its social function* and to make it accessible to all” (emphasis added). Article 43 further specifies the conditions of takings:

To the end of the general good, the law may reserve establishment or transfer, by expropriation with compensation, to the state, public bodies, or workers or consumer communities, specific enterprises or categories of enterprises of primary common interest for essential public services or energy sources, or act as monopolies in the preeminate public interest.

Finally, Article 44 further specifies the idea of social obligation contained in section two of Article 42:

For the purpose of ensuring rational utilization of land and establishing

equitable social relations, the law imposes obligations on and limitations to private ownership of land, defines its limits depending on the regions and the various agricultural areas, encourages and imposes land cultivation, transformation of large estates, and the reorganization of productive units; it assists small and medium sized farms (emphasis added).

The constitutions of Netherlands and Sweden are interesting, in that they appear to contain language which provides for the type of regulatory taking guarantee that came about in the U.S. through the 1922 U.S. Supreme Court case of Penn Coal. In the 1983 Dutch Constitution it is stated that “(1) Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament,” and “(3) In the cases laid down by or pursuant to Act of Parliament there shall be a right to full *or partial compensation* if in the public interest the competent authority destroys property or *renders it unusable or restricts the exercise of the owner’s rights to it* (emphasis added; Article 14). The 1994 Swedish Constitution states in Chapter 2, Article 18 that

The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests.

A person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss. *Such compensation shall also be guaranteed to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property.* Compensation shall be determined according to principles laid down in law (emphasis added).

Interestingly, in line with the above discussion about the social function (Spain) or obligation (Italy) of private land ownership, the Swedish Constitution concludes this discussion of property by stating “There shall be access for all to the natural environment in accordance with the right of public access, notwithstanding the above provisions.”

The Proposed European Constitution

How did all of this pre-existing treaty and country-specific constitutional language and provisions become articulated into the proposed European Constitution? With great simplicity and clarity. Article II-77 of the proposed European Constitution is titled

“Right to property.” It has two parts, addressing respectively land and intellectual property. Section one states:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

So the proposed takings provision of the European Constitution follows strongly from the content and intent of the Takings Clause and Right 17 – it acknowledges a right to property, it protects against an unlawful taking (deprivation) of property, and it provides for “fair compensation” for any deprivation that does occur.

In line with many of the examples, the provision explicitly reserves the right of regulatory-based legislative action – “the property may be regulated by law insofar as is necessary for the general interest.” Unlike the Dutch and Swedish cases it does not provide for an assertion of regulatory taking. Instead, Article II-77 says that deprivation of property *may* occur “in the public interest and in the cases and under the conditions provided for by law.” And counter to Spanish and Italian examples, there is no explicit mention of the social function or obligation of property.

One of the things that proved surprising in this research was the lack of the explicit commentary about Article II-77. Repeated searches on the worldwide web over the period January - June 2005 yielded little in the way of discussions, concerns, or focused assessments of its provisions (in English).

Anecdotal Data

Despite what appears to be a lack of formal data on takings in Europe, anecdotal data suggests that intellectual, policy and citizen attitudes on land, property and private property are undergoing significant changes.

So, for example, in my various travels through Europe in the last decade-plus, I have had discussions with planning academics and practitioners in Spain, France, Italy and Norway, initiated by them, about the movement in their respective countries to reform their national planning laws.¹⁸ These discussions all went along similar lines – that the current structure of planning and planning control was heavily premised on strong central

¹⁸ A preliminary review of the literature reinforces these personal experiences. See, for example, Booth (1998), Booth (2003), Cladera and Burns (2000), Needham (2006), Priemus and Louw (2003) and Røsnes (2005) for discussions, respectively of France, Spain, the Netherlands and Norway.

control, that there was disillusionment with the outcome of this control, and that there was interest in moving towards a more market-based system of land use management, including a system which imbued the individual property owner with stronger property rights.

To reinforce this trend, European academics and policy activists have begun to explore the utility of policy approaches which are themselves based on the presumption of strong individual property rights. One example is interest in transfer of development rights (TDRs).

In 1993 and 1997 I participated in programs in Italy in which I was asked to present papers on the U.S. experience with TDRs. These presentations resulted in publications for the Italian planning community, including in Italy's leading planning journal (Jacobs 1994, 1997, 1999a). This exploration continues. So, for example, earlier this summer I was contacted by a German economics scholar beginning a sabbatical program at UW-Madison. The focus of his research – what he refers to in print as tradeable land dedication contingents, which he discusses as transferable zoning permits, and what is functionally TDRs (Walz and Küpfer 2005). Discussions with another visiting German scholar, a landscape economist, reinforces the German interest in this topic. In an informal interview he suggested a strong level of interest in Germany in particular, but throughout Europe, in various types of transfer programs – for water and air pollution management, through the mechanism of transferable discharge permits, and cap and trade (Klaphake 2005).

It was during an extended visit to Norway in late spring 2003 that the idea for this research took its current form. In discussions with researchers at NIBR – the Norwegian Institute for Urban and Regional Research – they discussed two phenomena which seemed to them to indicate seismic shifts in attitudes and expectations about private property (Falleth 2003). One reflected survey data on rural landowners attitudes about what is referred to as the social function or obligation of land. The traditional attitude in Norway is that rural private property, while private, should be used for national public purposes – productive agriculture, forestry, etc. The most recent survey, however, evidenced a shift where landowners were now more interested in their ability to capture private gain from increasing land values for rural land, gain coming about as a demand for land has emerged for its use as second home property, by Norwegians and continental Europeans. The second phenomenon they spoke of was stories they were hearing relative to actions taken by the European Court of Human Rights in terms of landowners rights vis-a-vis government rights in the area of regulation. The case that was discussed had to do with a property owner in Stockholm who was prevented from use and development of their property due to zoning and historic preservation regulations. The landowner, after extended attempts to obtain permission for property use, shifted their area of appeal to the Court of Human Rights, arguing that the denial of use and the denial of compensation for the denial of use was a violation of fundamental human rights guaranteed under European

law. The city disagreed. It asserted that its regulation were a reasonable exercise of normal regulatory activities, and in line with reasonable social obligations of landowners. The Court, however, found in favor of the landowner.

Activism

An additional piece of data that suggests the anecdotal data might represent the leading edge of activity around and about property rights is the extent and form of citizen activism focused on this topic in Europe.

Since 1996 the International Center for Research on Environmental Issues, a French think-tank associated with the Faculty of Applied Economics of the Université Paul Cézanne - Aix en Provence, has sponsored an every other year set of meetings focused on some aspects of property rights (see <http://www.environnement-propriete.org/index.htm>). The meetings take as their charge a perspective that is specifically critical of traditional European approaches to resource management, and specifically supportive of a more property rights imbued alternative. The meetings, sponsored every two years from 1996 to 2006 have been aimed primarily at a European audience. The subject of the meetings is property rights plus. So, for example, the initial meeting was on the general idea of property rights and environment, focusing on broad concepts and exploring issues in theory and ethics.. The subsequent meetings have been on a sectoral component of the environment – water (1998), marine resources (2000), the coastal zone (2002), and wastes (2004) – and have resulted in publications from reputable publishers in France and the U.S. (Falque and Massenet 1997, 2000, Falque et al. 2002). The 2006 meeting, the largest and most international planned to date, focused on property rights and land use. Sponsorship for the meetings come from governmental and non-governmental sources including, for example, the French Minister of Planning and Urban Development, the Secretary General of the Council of Europe, and the European Landowners Organization. In past meetings, attendees have been concentrated from across Europe, though the presenters include those from the U.S. and Canada, and especially those who can extol the virtues and success of a property rights perspective.

Other organizations concerned and active in the area include the European Landowners' Organization (www.elo.org). The ELO has existed since 1972, and is focused on promoting the interests of rural property owners in the formulation and implementation of European policy in areas such as agriculture and rural development, forestry, renewable energy and the status of private property.

The Friends of the Countryside is another group specifically concerned about rural property rights issues, and works to support the activities of the ELO. According to their website “the right of land ownership has been eroded to a very limited definition. As a consequence of land-use limitations, restrictions and constraints, owners may retain their right to possess, but not the freedom on how to use the land. The rights to manage, to

exploit or freely make use of their assets is being progressively removed by the State in the name of the general, or public good” (<http://www.friendsofthecountryside.net/intro.html>). Drawing from the theory literature discussed above in the section titled Property Theory, Friends of the Countryside argues:

The degree of State interference in private property rights . . . has become so commonplace that it often happens without consultation, resistance, or compensation for the loss of private assets. Successful economies have always depended on efficient free enterprise and the right to private property. All others have severe limitations – the failure of the planned economies in Central and Eastern Europe bare testimony to this folly. . . . Where there is a loss of a private asset for a public good, then surely there must be an appropriate compensation.

Yet, interestingly, this final demand, for compensation, follows an acknowledgment of the public nature of private property: “Of course, rights and duties go hand in hand, and there is no question of avoiding the obligations, which environmental or public considerations may require to be imposed on private property. But the important point is that this must follow adequate consultation and not as a result of unilateral imposition.”

A third group is the International Union of Property Owners (<http://www.uipi.com>). According to their website they are a “paneuropean body, representing internationally millions of property owners of all kinds of real estate property, all over Europe.” They have worked “for more than 80 years,” to ensure “the solidarity of the property owners organizations of Europe, the cooperation and the continuous flow of information among them.” Their current goals are directed at the activities of European Union and the European Parliament. What they are seeking is “to influence authorities and public opinion of Europe . . . towards the deregulation and reprivatization of property.” At another point they state, quite simply, that they are directed at “the expansion, the increase and the protection of private real estate property.”

The question that these points raise together – existing constitutional provisions, the proposed European constitution, anecdotal data, and activism – is whether as they add up to anything that is a whole. The cases that follow add further insight to this query.

National Case Studies

During the first six months of 2006 a set of case studies were conducted for the purpose of grounding the theory of property rights change to the experiences of practitioners and policy analysts. Cases were undertaken in southern France, Italy and Norway. The principal approach to the cases was to undertake guided interviews. All interviews were conducted by me. Subjects for the interviews were identified through the recommendation of local contacts, all of whom are themselves scholars in the area of

land use and environmental planning, and all of whom have decades of experience in their respective countries. The identities, dates of interviews and positions held by interviewees is provided in the section titled “Case Interviewees” that follows the Bibliography; all other material cited in the cases is included in the Bibliography.

As is evident upon reading the cases, they vary in the breadth and depth of material that informs them. Thus, none of these cases should not be considered final, but rather works in progress. It is planned that during 2007 additional material will be added to each case – additional interviews and additional primary and secondary literature – and additional cases will be conducted.

However, even with this caveat, I present these cases confidently. Based on the recommendations provided to me as to who to interview, my research and the positions held by interviewees I am convinced that the “stories” presented in the cases accurately reflects conditions in the respective countries.

A (southern) France mini-case

France presents an interesting and perplexing case with regard to the status and future of private property rights. At least on paper – by statute and under the *Code Civil* – owners enjoy a robust set of rights. Ownership entails “. . . a virtual ‘monopoly’ over the property. It grants the right to own, occupy and dispose of the land and any buildings on the land . . . Absolute ownership carries with it the right to the soil below and the air space above, (though) . . . there are exceptions imposed in the public interest . . .” (Dubois 1998: 179).

This right of ownership is set within a legal-administrative structure where there is a tradition of both a strong central state, with significant direct presence in the regions, and a highly fragmented and strong system of local government (Booth 2003). The historical role of local government and local control is so important – as a symbolic representation of democracy in France, post Revolution: “the commune has always been seen as the essential core of democratic France” – that it appears near impossible to engage in any substantive administrative reform to directly take power away from the local governments (Booth 2003: 952).¹⁹

Yet, this situation is dissonant with a period from the 1980s onward of strong, even raging, urban growth (especially in the secondary, provincial cities), where the local governments – “tiny in population and poor in resources” – lack the skill and resources to

¹⁹ Booth (2003: 952) notes that at the time of the French Revolution there were approximately “. . . 40,000 parishes in metropolitan France; that number has decreased but only to 36,565.” He continues: “. . . attempts at amalgamation have all failed.” As for why, he offers the following: “the one thoroughgoing attempt to establish a new pattern of local authorities was proposed by the Vichy government [during World War II], and in this way abolition of the communes became identified with a hated regime” (ibid).

respond to this growth (Booth 2003: 952, 955). One of the reasons they have difficulty responding is the ‘real politic’ of local governance – “mayors feel reluctant to offend local landowners, to whom by virtue of the small size of most communities they would inevitably be very close” (Booth 2003: 954).

This view of the situation in local government was reinforced by interviews conducted in the Montpellier and Nimes regions of southern France. All interviewees noted the pressures brought by landowners upon local officials to designate their land for development permission. This was especially true of agricultural land owners, who are caught in a squeeze between the greater public interest in retaining their land in agriculture, European Union policies which are pushing for a reduction in agricultural production, and the wide disparity (a scale of ten times or more) between land prices for land use in agriculture and its use for development. Thus, in its own way, the traditional politics of growth in local government in France play out a form of Molotch’s (1976) growth machine.²⁰

In late 2000 France adopted “a radical change to (its system of) land-use planning” (Booth 2003: 949). This change introduced a major revision to the administrative structure for the preparation of land-use plans and their implementation (Booth 2003, Girault 2006, Robieu 2006). The major feature of this change is the introduction of the requirement for a new type of urban-regional spatial development plan, the “*schéma de cohérence territoriale* (SCOT) which larger urban areas are now obliged to create” (Booth 2003: 950). These SCOTs are different from prior procedures and requirements in several ways – they require comprehensive analysis prior to the preparation of a plan, integration of land use planning with transportation, housing, economic development and environmental issues, and an explicit commitment to sustainable development. Also,

²⁰ This is true even without all the pre-conditions that Molotch (1976) notes as driving the machine in U.S. local governments. According to Molotch, local governments are compelled to grow, and thus be receptive to requests for intensification of land use, because of the continuing need to generate more property tax revenue. They need this revenue because even the same bundle of municipal services costs more each year, and adding new services adds further costs. The two choices to pay for these costs are to raise taxes on existing property owners or to generate new property value. Because of the resistance to paying more taxes by most landowners, local officials (in Molotch’s term “the city”) turn to land intensification, and thus enter a process where “the city” becomes “a growth machine.” This is reinforced by the fact that individual landowners in the city, especially landowners of greenfields, have the opportunity to capture significant profit from land conversion. Thus, a coalition forms between landowners who want land conversion because of the personal gain to be captured and local officials who want land conversion as a vehicle to capture tax revenue for the ever increasing cost of local services.

In France land taxation and payment of services is not as localized as it is in the U.S., and so these do not become the type of driving forces that they are in the U.S. But landowner behavior to capture potential gains, and local governments response to this behavior, does appear to be parallel.

once adopted no development permission can be granted unless the proposed development is consonant with the SCOT (Booth 2003: 958).²¹

What is especially interesting is that the requirement for SCOTs is linked to the introduction in the French public administration system of *communauté d'agglomération* in 1999. These are a form of regional government. One of the responsibilities of the *agglomération* is to prepare and implement these new spatial plans (the SCOTs) (Booth 2003).

Added to this (the requirement for the SCOT and the introduction of regional government with substantive powers), there is the fact that French law allows planners to (a) designate land for non-development and the owner of that land has no claim for regulatory compensation following from this designation, and (b) utilize a long-standing power of the public sector to intervene in proposed individual land sales via the power of pre-emption (Alterman 1997, Dubois 1998).

Relative to the pre-emption authority, France's public sector power may be as strong as any in Europe. This puts local landowners in a very difficult situation. To the extent land exists within an area designated as subject to the pre-emption power of local government (and all the land in SCOTs is), local landowners may not engage in market-based sales prior to a declaration filed with the government. Failure to make this declaration voids all proposed sales. Once a declaration is made, however, the eventual outcome of the land transaction is very much controlled by the public sector. That is, assuming the public sector wants to pre-empt (intervene, exercise a right of first refusal) on the land, landowners have several choices: to accept the offer of sale to the public sector *at a price determined by the public*, or to not accept the offer from the public but to then to continue to hold on to the ownership of the land. That is, the landowner does not have the right to exercise a market sale solely on the basis of not liking the price offered by the public sector.

So the French case is perplexing. On the one hand the public sector has *strong* powers – the power to designate land for non-development without any concern about regulatory compensation obligations being imposed on the public sector; the power to intervene in and pre-empt individual market-based land sales, at a price determined by the public sector; a new regional governance structure, with the power to make plans and enforce those plans for the region; and a new planning process, to be executed by the new regional government structure, which requires the development of sustainable development plans integrating spatial elements with environmental, economic development and transport elements.

²¹ In many ways, the requirements for SCOTs, as prepared and administered by *communauté d'agglomération*, appear to parallel the recent activity in the U.S. for smart growth; see for example the discussions in Burchell et al. (2000), Ohm (2000) and Knapp (2006).

Yet, all of the changes in France's administrative and planning structure build upon a legacy of strong local governments, with high levels of popular support. Traditionally (until the recent change in late 2000) it was these local governments that controlled the planning process. At least since the 1980s these local governments and landowners within them have found themselves on the receiving end of a tidal wave of land use change. Strong demand for land for development throughout southern France over the course of the last two decades-plus in combination with factors which make peri-urban and rural land ever-less valuable in agriculture (especially for viticulture, the most dominant agricultural use) leads landowners to want to, quite literally, "cash in" their valued assets. Thus, landowners, especially rural and peri-urban landowners, who have found themselves aggrieved of administrative rules and procedures preventing land use change appeal to mayors who are their friends and neighbors to have these rules changed. Interviews and scholarship suggest these appeals are often successful.

What does all this mean about the status and future of property rights? It is not clear. Despite the apparent strength of the French public sector, interviewees asserted the apparent rise of landowners' position vis-a-vis the state. So, for example, Jean-Paul Gambier (2006), the director of the land service for the Montpellier Agglomeration argued that overall "the rights of owners are getting stronger." Why? He argued that it was because of the rhetoric coming out of Brussels (the EU). That is, it was not policy per se that was strengthening the rights of landowners but a social attitude that they are tuning in to, an attitude that is reflective of new liberal (i.e. conservative) ideas; in his words "the liberal way of thinking." Specifically, Gambier notes that in his area of expertise – the exercise of the preemption rights by the public sector – "judges are (increasingly) backing the private (owner) against the public."

Isabel Girault (2006), director of the urbanism agency for metropolitan Nîmes, followed in this line of thinking. With regard to the use of the pre-emption right, she argued that if a proposed pre-emption is challenged by an owner, the "court would back the owner, unless it is a 'real' project" (i.e. a road, a school, etc.). However, she attributed the "rise" of a property rights attitude less to EU activities (in fact she specifically discounted the impact of EU policies in southern France) and more to the culture and traditional attitude toward land and environmental resources. She said that sociologists say that people in southern France do not have the same relationship to the environment and environmental resources as those in Anglo-Saxon areas.²² In southern France the history and heritage is more about active use of the environment – e.g. hunting, fishing, etc. So, "local people here are fed up with protection" because of all the rules that exist, often EU rules. "People don't want to be imposed (upon); they are more liberal (conservative)."

²² Girault noted that she found it particularly striking having moved to Nîmes from northern France.

The big unknown for the future is what will follow from the actual adoption and implementation of the SCOTs – the Montpellier SCOT is due to be formally adopted in spring 2006, the Nimes SCOT before the end of 2006. Gambier (2006) argued that “as power shifts to the region (the Agglomeration) it should become harder for owners to assert power,” as they have under a system of local control. But Girault (2006) wonders if one implication of the new system will be “that judges and courts will have a stronger role.” And if this is the case, it is unclear what will happen to property rights, because it may have more to do with the juridical philosophy and political leanings of the jurist.

What is clear, though, is what a difficult and complex area of policy this is. Urban and peri-urban growth pressures are continuing, if not increasing. The analyses informing the SCOTs in Montpellier and Nimes do not provide for adequate land to accommodate this growth *at the densities that have existed for the last several decades*. And given the crisis in French agriculture, especially viticulture (a wine glut and an EU policy requiring a constriction of wine grape production), landowners have strong motivations to seek options for their land outside of agriculture. As Eva Bourdat (2006) noted, “a lot of vineyards are disappearing;” as a result “owners put lots of pressure on local communities so that their land can be developed. It is difficult not to listen to them,” especially because “we don’t have easy solutions for them.”

An Italian micro-case

In many ways Italy presents a very different situation than does France with regard to private property rights and their management by the state.

Superficially, the definition of these rights are very similar. Ago (1998: 287) notes that “Property rights are real rights and therefore give absolute ownership.” Under Italy’s Civil Code, the “. . . Code provides for a number of different types of tenure . . . the most important of which is absolute ownership (*diritto di proprietà*).” Here “. . . the owner has the right to use, enjoy and dispose of his property as he wishes, subject to a few legislative exceptions” (ibid). These exceptions are like those in France. They include “. . . planning regulations, rights of reasonable and necessary access from adjoining land and protection of areas of natural beauty. . . . restrictions which aim to protect private interests . . . include the laws of nuisance protecting neighbouring lands . . .” (Ago 1998: 289).

Rights of pre-emption, however, are much more restricted than in France, and only apply in tightly defined circumstances. These include the rights of tenant farmers, if agricultural land is made available for sale, and the right of the state to acquire by pre-emption “. . . property of recognised artistic or historic value” (Ago 1998: 289).

Administratively, the management of land and property rights is through a system of regional and local planning and planning implementation. Ago (1998: 304) notes that

“(T)he Republican Constitution in the 1970s granted the regional authorities the power to pass their own statutes regarding planning and building regulation. Gradually, more and more powers have been transferred to the individual regions. . . .” Now, “(T)here is a planning authority in each region . . . The town council lays down the general town plan . . . It is then left to the regions to implement further detailed regulations” (ibid). “Once the general town plan has been created, the town council is then responsible for creating further ‘implementation plans’” (Ago 1998: 305).

What does all this really mean? According to one commentator, not much and a great deal.

Mazza (2006) has been a leading scholar on, critic of and practitioner within the Italian planning system for 40 years, with a special focus on the procedures and systems for land use planning. In a wide-ranging discussion about the status Italian land use planning and its relationship to the private property rights of individuals under the system, he made several points.

First, that Italians have at best an ambivalent attitude and at worst a skeptical and negative toward the public sector and the exercise of public authority. In his words: “we don’t worry about the state; there is always a way to negotiate around the state; we are never too frightened of the state.” More specifically, the rights of landowners – their relative strength or weakness – is not necessarily a function of the formal structure of Italian law but rather the informal networks that pervade Italian society – “Nothing has really changed (in Italy); you have to have a friend in government (to get things done). The substance (of planning processes since the mid-1980s) has not changed.”

What has changed, however, according to Mazza (2006), is a function of EU initiatives in the areas of subsidiarity. Subsidiarity – the idea of decentralization and devolution – has, according to Mazza, “. . . weakened the idea of the state and state intervention.” Together with the ever-stronger presence of ‘liberal’ (i.e. conservative) groups in Italian life – specifically radical Catholics and La Lega Nord (the Northern League) – what has risen is the idea of anti-government-ism. So it is increasingly difficult for the Italian state to assert a notion of the public interest and public action in such interest. To the extent an assertion of stronger private property rights is part of a broader anti-government policy and political agenda, then *perhaps* private property rights are assuming a stronger position. But, from Mazza’s perspective, when viewed directly, the property rights of individuals are no stronger (or weaker) today (in 2006) than they have been in the past several decades.

Fausto Curti (2006), Mazza’s colleague at Milan Polytechnic both agrees and disagrees with him. He agrees that a lot of what happens in Italian planning is a function of informal and semi-formal networks. And he agrees that subsidiarity has weakened the idea of state intervention. But he disagrees about the status of property rights. Curti

believes that the property rights positions of owners are stronger now than in the recent past. As his evidence he notes the increasing interest in property rights based land use management tools such as transfer of development rights among Italian municipalities, and the explicit concern of local government officials to not engage in land planning activities that impose too strongly upon owner's property rights.

A Norwegian mini-case

In certain ways, Norway presents a paradoxical and unusual case with regard to the question of property rights in Europe. The status of the formal and narrow issue of regulatory taking is clear. Under Norwegian law and administrative practice there is only a very constricted basis for a regulatory taking claims. Generally speaking, "as a law matter it is settled" (Rogstad 2006). What is it that is settled? "The principle is: you don't get it!" (Horgen 2006). What this means is that an individual has little basis and for making such a claim, and likewise if a claim is made there is little expectation that such a claim would be sustained.²³

This perspective and sentiment was put forth in all the interviews conducted (e.g. Aasen 2006, Rommen 2006 – "Norwegians have not accepted such mechanisms," Krogstad 2006, Jensen 2006). While interviewees used different words to express this idea, the idea communicated was that while the concept of property includes a full bundle of rights ("in principle you can do what you want," Aasen 2006), under Norwegian law and administrative practice what is also true is that "the state can always control what is going on" (Rommen 2006; see also the general description in Askheim and Rødsæther 1998).

Further nuances of this situation are explored below. However, if the subject of regulatory taking was not a matter of much current social debate (though whether it will be in the future was a matter of some disagreement among the interviewees), the more general topic of the relationship of the state to the individual over the subject of property rights was of intense interest to the interviewees. They had a lot to say about the subject, and a surprising degree of consensus among them about the issue as it currently exists in Norwegian policy discourse.

A second way in which Norway presents an unusual case for this research has to do with the extent to which it is actually "European." According to Rolf Jensen (2006), a former academician and now private planning consultant on urban development matters, "we're a strange country; part of Europe, but not part of Europe." In a literal sense this is true. Norway is part of the Schengen treaty group. This is a group of 13 European Union

²³ The one exception to this are limited provisions under the Nature Conservation Act which allow for compensation to an owner when newly protected activities requires the curtailing of long-standing land management practices. The Nature Conservation Act is Act No. 63 of June 1970, as amended most recently by Act No.59 of August 1995; the relevant section is Chapter VII – "Compensation and Redemption."

countries plus Norway and Iceland which operate under a “virtual border” whereby they agree to use of a passport-free and harmonized visa arrangement (Handelman 2006). This agreement, in place since 1985, provides for freer movement of people throughout the European economic area, in line with one of the major goals of European integration. In addition, Norway adheres to many of the initiatives emanating from the European Union, which are designed to foster European integration, such as the Bologna declaration for the reform of higher education along the so-called 3+2 model for bachelor’s and master’s degrees.²⁴ However, Norway is not a formal member of the European Union, and the most visible symbol of this is the fact that it has not adopted the euro as its monetary unit, preferring (for a number of reasons) to retain the Norwegian krona.

So is Norway “European”? It is clearly Scandinavian, as it is also clearly Nordic (the term encompassing Finland, Sweden, Norway and Denmark, and sometimes Iceland). For the purpose of this research it is also European. Why? Norwegian scholars and practitioners are fully aware of and engaged with contemporary European debates and investigations about natural resources, agriculture, urban, rural and regional form, and processes of urban, regional and landscape planning. As such, Norway is a representative and useful example of a northern, Nordic country grappling with the issues attendant to the changing nature of individual property rights and the relationship of the individual to the state over these rights. And it becomes especially useful for this research as it is both informally within and formally outside the European Union itself.

Private property has a long and strong place within Norwegian society. Interviewees noted that while a substantial amount of the land area of the country is owned in tenure forms that are not private property per se (public property, state-commons property, common property, etc.), the idea of a Norwegian having title to their own land is an idea that dates at least to the Viking era. According to Knut Rasmussen (2006) “back to the Vikings free land ownership [was] a pillar of Norwegian society.” In modern times, in the 20th century, the Norwegian Labor Party formally adopted the idea of private property ownership by all working Norwegians as a key component of their party platform. “The Labor Party has a long-standing principle that labor should own land and housing. Ownership was the dream of the labor movement” (Jensen 2006). And at least in rural Norway, this idea of ownership was very much tied to the individual’s and the family’s direct use of the land, not the idea of land as a market commodity. According to officials in the Ministry of the Environment, this traditional attitude is such that “many Norwegians . . . think land should yield them a zero percent profit” (Rommen 2006).

Another part of the Viking legacy has to do with common (societal) rights to property. Drawing from Viking times, the Norwegians have a national law – the Outdoor

²⁴ Frijdal (2005) provides a good, brief overview of the Bologna declaration and its implications for higher education in Europe, though his focus is specifically on doctoral education.

Recreation Act – which guarantees individuals the right of free passage on private land (analogous to the British right to roam). Specifically it allows Norwegians the right to ramble, boat and ski and gather natural materials (berries and mushrooms) in the open country. Because Norwegians strongly construct their self identities on access to and activity in the natural outdoors, this commons right is important as a way of actualizing their outdoor activities. But, as noted “the right to free access is one of the hot potatoes in policy and political discourse” (Falleth 2006). Why this would be true gets to the core of the contemporary property debate in Norway.

Finally, Norway, like France, has strong public controls over land and especially the process of rural land subdivision and sale. While “[i]n principle land is freely disposable . . . ,” in reality “[m]ost acquisitions of property in Norway are subject to the Concession Act [of] 1974 . . . Under the 1974 Act, all property acquisitions require prior approval from the authorities . . .”²⁵ “If a transaction requires approval . . . the government and, more rarely, the local municipality, will have a right of pre-emption”(Askheim and Rødsæther 1998: 425). According to Ingrid Aasen (2006) with the Ministry of Agriculture, with regard to agricultural land in particular, there is strong power for the government to say ‘no’ to proposed development (subdivision). It is difficult to get permission for the conversion of agricultural land, in part because it requires permission under three separate laws.

But despite this context – strong private property, set within strong common rights of public access, and strong state control over rural (agricultural) land subdivision and sale – all of the interviewees spoke of a set of tumultuous changes in Norwegian attitudes and policy toward private property, and as a result changes in the relationships between the individual and state over property.

Most prominently this new attitude is tied to Norwegian economic affluence. For most of its history Norway has been a relatively poor country, where people worked hard to realize a marginal existence, largely tied to resource extraction, primarily in commercial fishing and subsistence farming. The discovery of North Sea oil a generation-plus ago has changed all this. Norway now finds itself with substantial resources which it has used to invest in the country’s physical and social infrastructure. A consequence of this is that the ordinary person now has personal economic resources undreamed of by their parents, and especially their grandparents. According to Karl Rommen (2006) of the Ministry of the Environment, “Thirty years ago Norway was not so wealthy. Norwegians have the capacity now to buy land and buildings. Land is like stocks. The business element of land before was very limited. Conflict has increased with more people being

²⁵ “The main exceptions include the acquisition of small residential property . . . land and buildings not exceeding 5,000 square meters; and transactions between members of the same family” (Askheim and Rødsæther 1998: 425).

involved.” His colleague Bjørn Casper Horgen (2006) noted “It is a very political question. I agree with you.”

Tom Johnstad (2006) of the Norwegian Institute for Urban and Regional Research sees the expression of this in the availability and form of second homes. “There is a big change with regard to second homes. Around the 1994 Olympics a new type of second home evolved, one with electricity and other urban amenities. There is now a new wave – a tsunami – of second homes, all with urban-style infrastructure – road access, electricity, sewage disposal, cable access, etc.²⁶ After the Olympics, the ones that were developed for the event were sold for next to nothing in 1995.”

The result of all this is a change in public attitudes. “Public opinion is moving . . . towards me, not us” (Aasen 2006). Or as Knut Rasmussen of the Ministry of Local Government said “There are no problems to solve at the moment [in Norwegian society].” “Now I can think of myself and not be ashamed of myself.” With regard to environmental matters, for example, Aasen (2006) notes that while “there is support for the environment, [there is] . . . less support for behaving within the law,” and that this represents a very big change in how Norwegians view themselves and their relationship toward their community.

The area of land and environment where this was most strongly expressed, and which drew the most commentary from interviewees had to do with the use of agricultural land, and the use options available to agricultural land owners. As noted above, Norway has a strong set of laws that establish a public presence on agricultural land use and proposed subdivision. The law is purposely designed to make it difficult to get permission to subdivide agricultural land. This institutional form actually goes back to the time when Norway was ruled by Sweden; it was designed to keep land from becoming owned by the “wrong persons.”

Now however there is a problem. The laws are designed to keep agricultural land in agriculture, but the state of agriculture is undergoing tremendous change. Eva Falleth of the Norwegian Institute for Urban and Regional Research says that the biggest problem in rural Norway today is that “environmental policy has not changed, but agriculture has changed!” “Farmers want to build infrastructure (to accommodate opportunities) for tourism, with amenities. So there is a conflict between agriculture and (proposed) urban (style) uses.”

The Norwegian Mountain Touring Organisation (Den Norske Turistforeningen) is especially aware of and concerned about this. This is an organization built on taking

²⁶ This is in contrast to the traditional Norwegian mountain hut, which was without running water, electricity and other urban amenities, and most often required the owner to hike in a substantial distance from a road.

advantage of the traditional public right of common access to provide opportunities for rural trekking and skiing. Towards this end they have a membership that represents nearly 5% of the Norwegian population and a system of 420 cabins maintained through 55 volunteer chapters that provide stopovers for hikers and skiers. Anne Mari Aamelfot Hjelle, the Assistant General Secretary of DNT, notes that “There are two different pressures on land: 1) a lot of Norwegian people want their own cabin in the mountains; rural landowners can earn money from sale of their land for this purpose. 2) the current state of Norwegian agriculture, especially the support from the state; this support is declining. We believe this support will continue to decline.” This sets up a conflict. “Landowners say: how will we earn money? The government says – tourism. The question becomes what kind of tourism; how to use nature. A lot of these conflicts with farmers and landowners wanting to earn money come from the government saying you have to earn money from tourism” (Hjelle 2006).

As in many other industrialized, developed countries, the farmer’s advocacy organization, in Norway the Farmer’s Union, becomes one focus for this conflict. Interviewees noted that the Union seemed confused about the roles and interests it should serve. “The Farmers Union is very conflicted . . . who are they – farmers or developers?” (Tesli 2006). “Traditionally, in rural areas owners were interested in different things – primarily owning and farming. Now the focus is on second homes, golf courses, fishing rights; it all has a money focus”(Rasmussen 2006). Rasmussen goes to say that “there is now a program being pushed by the Ministry of Agriculture called ‘agriculture, plus.’ The Ministry of Agriculture is putting pressure on the Ministry of Local Government to define nature-tourism as a form of agriculture.”

Two broad trends support these particular changes in agricultural and rural land – a process of devolution and the introduction of classical liberal ideas into political and policy discourse.

Since 2004 there has been a formal policy of devolving competency toward local governments (e.g. Aasen 2006). This is a big change for modern Norway. Until this recent period Norwegians have been content to live with a high degree of central government control over many aspects of social and economic life. But now, for a variety of reasons, this is changing. “Decentralization is a positive social value for politicians; there is no real criticism of it” (Tesli 2006). One reason is that “municipalities are very strong. . . municipalities are very influential with ministries and parliament and want more power” (ibid). But, because of Norway’s history of strong central control this change is not without conflict. Tesli (2006) notes that “the issue of devolution is a ‘hot potato’ in policy and politics”; his comment drew agreement from Falleth (2006) and Johnstad (2006).

Why this would come about has to do with the introduction of classical liberal ideas into political and policy discourse. Rolf Jensen, the former academic and current planning

consultant reflects on the changes in Norwegian society: “Everything was opened to the market in the 1985-1989 period; this was a major shift in Norwegian society. As liberal thinking has come up those in charge of the public interest are more like businessmen.” Jensen sees several consequences of these changes: “a loss of trust in society taking care of you and being fair, and (the fact that) you want choices (like in a supermarket). So, as an example, until the 1960s in the housing sector you took what was available and were happy. Now with the same amount of money you expect choice of location, housing type, etc.” (Jensen 2006). Others who have long been active in policy analysis and advocacy appear to agree. “This is a completely different country than it used to be since the late 1980s with the introduction of neo-liberal ideology” (Tesli 2006). One consequence of these changes has to do with the perceived legitimacy of the state to manage property. According to Hans Sevetdal, a senior professor in the Department of Landscape Architecture and Spatial Planning at the Norwegian University of Life Sciences, “the justification of strong regulation by government is losing [lessening] to the interests of property, all kinds of property – public, semi-public and private.” (Sevetdal 2006). Or as a younger, state bureaucrat said, today, “. . . individual rights have a much stronger focus in Norway . . . than they have in earlier modern times” (Rasmussen 2006).

Norway, like France, presents a perplexing case. At the surface, based on formal law and administrative practice, it would appear it is a country where the state holds a strong position vis-a-vis the individual with regard to property rights. While the individual is said to have a full bundle of rights, and there is a long-standing (millennial) respect for private property and tradition, history, and law are all construed to put the central state in a strong position. Especially with regard to rural, agricultural land, a relatively scarce land resource, the state has the authority to intervene and prevent land subdivisions and sales that would take land out of agricultural use. And this configuration is, traditionally, one that Norwegians have been comfortable with. In general they have been pleased to yield some individual freedoms and rights to a central state committed to a set of social goals which provide for the welfare of all Norwegians.

But now, at least in the area of property rights, land use and environmental management, this long-standing configuration appears to be changing. Interviewees attributed this change to a number of separate but overlapping factors. One important factor had to do with the state of Norwegian agriculture and especially the decline (and expected continued decline) of government support for agriculture. As the central government is reducing its support system for Norwegian farmers – for its own reasons and in line with European Union policies – landowners are seeking alternative ways to make money from the land. One of the most viable of these appears to be second-home and tourism related land development. Why? This relates to a second factor.

A second major factor is the wealth of Norwegian families. In the last generation, with the discovery of North Sea oil, Norway has become an affluent country with a high quality of life. With this affluence individual Norwegian families want to acquire

country properties – cabins with urban style amenities in the mountains, cabins by the sea.

So at the same time that there is a change in state policy towards agriculture there is an increasing demand for rural land from Norwegians and others for the use of this land for recreational purposes. One of the ways that Norwegian landowners can make money from their land resource is to sell it to urban Norwegians (and continental Europeans) who want it and have the resources to acquire it.

One outcome of this configuration of circumstances – a centralized state system that regulates and manages rural land subdivision opportunities, declining support for traditional agriculture, and increasing household resources by Norwegians and others – is an ever louder call by landowners to respect their rights in land and to allow them to do with their land what makes economic sense.

This outcome is then itself married to broader changes in Norwegian society. These include a general turn towards a more market-based economy and society and as part of this increasing influence of classical liberal ideas in public policy discourse, drawing from their general rise across Europe.

What does all this mean? That one has to understand the status of private property rights in Norway by examining it at two levels. At the formal level, the state still has strong authority over property rights and there is essentially no (or very limited) access to a claim for regulatory taking as it is understood in the U.S. The concept does not exist in Norwegian law, and except in extremely narrow circumstances the Norwegian government and courts do not appear inclined to provide for it. However, at the informal level, bureaucrats, specialists, activists and academics believe there is a fundamental change underway in Norway. While it has not yet expressed itself in the Norwegian system of law and administration, those interviewed shared a sentiment that the property rights of individual owners were getting stronger relative to the position such rights had held in the past. What direction this trend might take and how much this change would evolve was unclear. Some interviewees – Jensen and Rogstad in particular – suggested that they would not be surprised to even see the introduction of a form of U.S.-style regulatory takings in the not-too-distant future.

So, is there a “taking” of Norway? No, not there is not. Is the situation private property significantly changing in Norway? Yes, it appears that it is. And the forces that are pushing and facilitating this change seem to be the same ones that are causing change in other parts of Europe, most especially France.

The “Taking” of Europe?

In Summary

Three phenomena frame this research. One, a global reinvigoration of a body of theory broadly labeled as property theory. The premise of this interdisciplinary body of theory is the foundational importance of property rights to democratic-political and market-economic systems. Two, contemporary political events flowing most ostensibly from the fall of the Berlin Wall and the demise of the Soviet Union in the late 1980s and early 1990s. With “the end of history” advocates have been actively promoting the establishment of democracies and market-based economies in countries around the world, especially those in the former Soviet bloc and the developing world (Fukuyama 1989). To further this goal these advocates, drawing from theory and history, are promoting a particular type of property regime – private property – as specifically foundational to achieving these goals (Deininger 2003). Three, a debate in Europe about how best to position Europe to be a major player, a third pole, in an emergent global geo-political reconfiguration.

In 2006, more than 15 years after the fall of the Berlin Wall, and even while there is debate about the success of property-based policy initiatives in developing and transition countries, the active promotion of these initiatives in these places continues. And there is also a robust property rights movement in the U.S., which argues that contemporary land use and environmental laws and regulatory schemas are ineffective and un-American. However, little parallel attention has been paid to the impact of the theory and the global policy environment on another part of the developed world – Western Europe. It is this gap that this research is designed to address.

The questions this research was designed to address include: is there parallel attention to and transition in private property in Europe? If there is, how is this transition in private property taking shape; what are its likely implications for land use and environmental planning policy? As Europeans engage a discussion about private property, are they aware of the concerns and criticisms about the U.S. model among planners, government officials and environmental and property rights activists? To what extent does it appear that Europe will learn from the United States’ lessons with the political, policy, legal and administrative management of private property? Finally, if Europe is transitioning towards a stronger private property model, how will the move be reconciled with other, competing, long-standing social values about spatial management?

Several comments can be made and conclusions drawn about the questions that frame the research.

- There is a strong theoretical case for a stronger private property culture – legally and economically – in Europe. To the extent Europe seeks to establish itself as a third

pole in geo-political discourse and economic strength, it appears (from a theoretical perspective) that this requires a loosening of central state controls, a revision of command-and-control approaches to public sector management, and as part of this a strengthening of individual private property rights.

- Across Europe existing national constitutional provisions are close in content and intent to the U.S. Taking Clause and draw directly from the Declaration of the Rights of Man. While some of these constitutions contain language stressing the social function or obligation inherent in private property, it seems that the major differences over the legal management of property are, in fact, not instrumentally legal at all, but cultural, embodying social attitudes and reflective of administrative practices.
- The proposed property provision of the European Constitution, an effort now stalled because of the national votes in France and the Netherlands in late May and early June 2005, itself seemed to flow logically from many of the national constitutional provisions, to reflect the content and intent of the U.S. Taking Clause and Right 17, and to not draw much controversy or commentary on English-accessible websites.
- There is interest in a set of property rights related policy initiatives throughout Europe. This is reflected most strongly in the interest of scholars, researchers, and practitioners in, for example, Germany, Italy and Spain, in new land use and environmental management tools such as transfer of development rights. TDRs are premised on the very idea that the individual holds property rights, to which they are entitled to a form of regulatory compensation, and which are not subject to regulatory expropriation.
- Based on informal, preliminary discussion with selected researchers, this interest in policy alternatives is reinforced and buttressed by changing social attitudes toward land ownership. At least in selected countries, social attitudes seem to be moving towards a more classic U.S. concept, and away from a concept rooted in an attitude of which encompasses the social function and obligation of private property.
- There are a set of sophisticated, well-connected advocacy groups and think tanks in Europe concerned about the property rights issue. Some of them draw their inspiration and self conceptualization directly from parallel U.S. groups. Substantively, they are focused on the sectoral issues of rural, natural and environmental resources, and the property rights of the owners of these resources.
- Case studies, especially those in southern France and Norway, suggest that the state of property rights is undergoing significant change. This change is *not* fundamentally legal in nature. Rather, as a result of (i) administrative directives from the European Union, primarily regarding directives to reduce agricultural production, and (ii) the spread of classical liberal ideas in political discourse, owners are acting more

assertively regarding their rights in property. Specifically, case interviewees report a mood whereby owners are less willing to accept public plans and rules regarding their property, and more demanding of plan and rule outcomes which allow them to make economically productive use of their property rights, which in practice means allows them to sell once-restricted land for development.

Answering the Research Questions

Is there parallel attention to and transition in private property in Europe? This is the base question for this research effort. The evidence from the research suggests that the answer is an unqualified and strong yes! This attention is at a different stage than it is in the U.S., and it is likely to take a significantly different form. But planners, elected officials, bureaucrats, scholars, and advocates sense a sea-change in public attention to and attitudes about the appropriate balance in the relationship between the individual and the state over property.

If there is, how is this transition in private property taking shape; what are its likely implications for land use and environmental planning policy? Evidence from case study research suggests that it is taking shape through an empowered citizenry more willing to challenge public planning and regulation procedures, and more intent on demanding an outcome that contains equity for the individual and their rights in land. The practical outcome of this social change seems to be establishing the conditions for even more urban-fringe and rural development, more urban sprawl.

As Europeans engage a discussion about private property, are they aware of the concerns and criticisms about the U.S. model among planners, government officials and environmental and property rights activists? Among academics, professionals and advocates there appears to be good exposure to the theoretical literature that informs the property rights issues, especially in its critique of command and control approaches and the utility of a property rights approach. At the same time, among academics and professionals there appears to be little exposure to the politicized property rights debate in the U.S., specifically the criticisms of the property rights movement and its policy agenda from planning, environmental and legal perspectives.

To what extent does it appear that Europe will learn from the United States' lessons with the political, policy, legal and administrative management of private property? I cannot answer this question at this time.

Finally, if Europe is transitioning towards a stronger private property model, how will the move be reconciled with other, competing, long-standing social values of spatial management? Individual European nations and the continent as a whole, under European Union directives, have long given attention to issues of spatial management – the integrity of city form and rural areas, the relationship of city form and the countryside to

each other, regionality, etc. The question is posed because of an assumption that a change in how property rights are conceptualized and managed will (or is likely to) have an impact on these issues. However, I can not answer this question at this time.

The Globalization of an American Ideal?

The title of this final subsection ends with a question mark. But the section heading has imbedded within it a set of assertions. It presumes that private property strongly held is an American ideal. It presumes that globalization of private property has been occurring, in some form, for the recent period. The body of this paper has sought to demonstrate the verity of these two presumptions, even though the former is open to challenge (i.e. there are competing visions of property in American history and law) and the latter to interpretation (i.e. there is an attempt at globalization; the success of this effort is not yet clear).

The title of this section is presented as a question – the “taking” of Europe? Is Europe about to adopt an American version of private property and with it an American version of public policy (law) and public administration that follows from this? If “taking” is understood in the narrow sense of an individual’s right to compensation for onerous regulation, regulation that goes “too far” according to the standard established in Penn Coal, then the answer seems to be no. There is not a taking of Europe underway. However, if “taking” is understood in the broader sense of a realignment of the relationship between the individual and the state, where the individual’s position is strengthening and the state’s is weakening, then the answer seems to be yes.

The status of private property and takings *is* changing in Europe. Activities of scholars and policy analysts and case studies suggest a stronger focus on the rights of the individual, and less assertiveness by government in managing private property under the banner of the greater public interest than has been true in Europe through the 20th century. The drivers of this change seem to be a combination of formal European Union policy (especially as it affects agriculture), changing attitudes about the relationship of the individual to the state reflective of classical liberal ideas, and a sense that the century-long tradition of command-and-control may no longer be viable as Europe restructures itself as a global economic and political force in the 21st century.

While there seems to be an emergent consensus about the need to change the traditional European perspective on property, *exactly* what this change and consensus will yield is not yet determined. That is, the status of property is changing but what it is becoming is not yet clear. The transformation of private property is a phenomenon underway, but its final form is as yet undetermined.

I believe it is fair to say that the beginning of the 21st century is a period when mid-18th century ideas – Thomas Jefferson’s (John Locke’s) about property and its relation to

democracy, and Adam Smith's about property and markets – rule the global policy discourse. This is a period of history where significant effort is being expended to globalize an American ideal of private property. What is still unclear, though, is precisely how this discourse is assuming shape in the countries and on the continent where Jefferson's (Locke's) and Smith's ideas were born.

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France

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Gambier, Jean-Paul. 2006 (31 January). Personal Interview. Gambier is Chef du Service Foncier, Montpellier Agglomération.

Girault, Isabel. 2006 (03 February). Personal Interview. Girault is Directeur, Agence d'Urbanisme et de Développement de la Région Nîmoise.

Roubieu, Nicolas. 2006 (31 January). Personal Interview. Roubieu is Urbaniste - Chef du project SCOT, Montpellier Agglomération.

Italy

Curti, Fausto. 2006 (May 11). Personal Interview. Curti is a professor in Il Dipartimento di Architettura e Pianificazione (DiAP), Milano (Italy) Politecnico.

Mazza, Luigi. 2006 (February 15). Personal Interview. Mazza is a professor in Il Dipartimento di Architettura e Pianificazione (DiAP) and Coordinatore, Dottorato in Progetti e Politiche Urbane, Milano (Italy) Politecnico.

Norway

Aasen, Ingrid. 2006 (30 May). Personal Interview. Aasen is Senior Adviser in the Department of Forest and Natural Resource Policy, Ministry of Agriculture and Food (Landbruks- og matdepartementet).

Bergsholm, Einar. 2006 (02 June). Personal Interview. Bergsholm is a lecturer in the Department of Landscape Architecture and Spatial Planning (ILP), Norwegian University of Life Sciences (UMB).

Falleth, Eva. 2006 (30 May). Personal Interview. Falleth is a member of the Environmental Planning Research Group of the Norwegian Institute for Urban and Regional Research (NIBR).

Hjelle, Anne Mari Aamelfot. 2006 (31 May). Personal Interview. Hjelle is Assistant General Secretary of the Norwegian Mountain Touring Organisation (Den Norske Turistforeningen).

Hoff, Per Trygve. 2006 (01 June). Hoff is a member of the City Council, City of Oslo, representing the Conservative Party, with responsibilities for the areas of environment and transportation and former responsibility for urban development.

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Jensen, Dr. Rolf H. 2006 (01 June). Personal Interview. Jensen is a private planning consultant and former academician.

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Molnes, Ole. 2006. (01 June). Personal Interview. Molnes is Head of Section of the Housing and Building Department, Ministry of Local Government and Regional Development (Kommunal- og regionaldepartementet).

Raknes, Rune. 2006 (01 June). Personal Interview. Raknes is Senior Adviser in the Department of Urban Development, City of Oslo

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Rogstad, Daniel M. 2006 (02 June). Personal Interview. Rogstad is a professor in the Department of Landscape Architecture and Spatial Planning (ILP), Norwegian University of Life Sciences (UMB).

Rommen, Karl Inge. 2006 (31 May). Personal Interview. Rommen is Senior Adviser in the Department for Regional Planning, Land-use and Geomatic Policy, Ministry of the Environment (Miljøverndepartementet).

Røsnes, August E. 2006 (02 June). Personal Interview. Røsnes is a professor in the Department of Landscape Architecture and Spatial Planning (ILP), Norwegian University of Life Sciences (UMB).

Sevatdal, Hans. 2006 (02 June). Personal Interview. Sevatdal is a professor in the Department of Landscape Architecture and Spatial Planning (ILP), Norwegian University of Life Sciences (UMB).

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Appendix I – A Property Theory Sampler

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Appendix II

The Future of the Regulatory Taking Issue in the U.S. and Europe: Divergence or Convergence?

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The Future of the Regulatory Taking Issue in the U.S. and Europe: Divergence or Convergence?

England and the U.S. have, famously, been described as “two countries separated by the same language”.¹ In a similar way, the U.S. and Europe have been thought of as two “nations” in which property holds a similar historical place, and yet its treatment seems remarkably divergent.²

The purpose of this paper is to explore the future of property in the U.S. and Europe from the perspective of “regulatory takings.” I do several things in this exploration. First, I engage the myth that the treatment of property in the U.S. and Europe is, in fact, divergent. Instead, I argue that until the early part of the 20th century, less than 100 years ago, property and its treatment were essentially similar in the U.S. and Europe; that is, the American treatment of property under regulatory takings was, in fact, very European. It was the U.S. that changed its perspective not the Europe. Second, I explore the likely future of regulatory takings in the U.S., especially in the context of the 2002 and 2005 U.S. Supreme Court decisions, and the rise and impact of the so-called private property rights movement. Third, I speculate on the European future of regulatory takings in specific but private property more broadly, especially as a function of European integration. Finally, I speculate on whether the 21st century will bring Europe and the U.S. into convergence or divergence over regulatory takings. Will Europe and the U.S. continue to be separated by the same language?

To begin I first provide some definitions and contextual material.

Regulatory taking in the U.S. – a definition, its development, evolution and status.

Regulatory takings is a U.S. concept that speaks to the limits placed on government to engage in regulation of private property absent compensation to the landowner for regulation that is deemed to be too onerous. Put another way, regulatory takings is the idea that government regulation that is deemed to demand too much from the individual property owner in the pursuit of a public purpose entitles that property owner to some form of compensation from the public.

Legally, the concept of regulatory taking originates in the so-called taking clause of Fifth Amendment of the Bill of Rights of the U.S. Constitution – “nor shall private property be

¹ A quote attributed to George Bernard Shaw, though without attribution as to source.

² I use the term “nation” to describe Europe. While this may be a generous description, it is not unprecedented, and draws most recently from Reid (2004). In modern times it is a concept that goes back to a 1946 speech by Winston Churchill, a book by Herriot (1930), a long-standing member of the French cabinet, and known to have been used by Victor Hugo as early as 1849 (see the entry for “The United State of Europe” in Wikipedia, especially, the sub-section on “Origin of the Name”; http://en.wikipedia.org/wiki/United_States_of_Europe ; accessed on 23 March 2006).

taken for public use, without just compensation” (1791). The origin and role of this clause in the U.S.’s founding documents is itself interesting.

What we know is that key American founders conceived that the very purpose of government was for the protection of an individual’s right to property (Ely 1992; see also Jacobs 1999a and 2006). And yet the debates that led to the Declaration of Independence in 1776 and the U.S. Constitution in 1787 yielded no clear positions or statements about the relationship of government to an individual’s private (real) property. Instead, and tellingly, when Thomas Jefferson drafted the Declaration and in his draft borrowed from John Locke and premised that the purpose of government was to guarantee “life, liberty and property,” this became transformed into the now famous phrase (for Americans) “life, liberty and the pursuit of happiness.” Eleven years later when America’s founders met to revise the Articles of Confederation and drafted the U.S. Constitution they again (purposely) left out any explicit mention of the individual’s rights to real property, and the relationship between the government and the individual over this property.

This lack of any explicit statement about property was “rectified” in the Bill of Rights. Here the taking clause stated some things clearly. An individual’s right to property was acknowledged. And government’s right to take (i.e. expropriate) this property was also acknowledged. What was important, however, was how this relationship was conditioned. According to the phrase, government has the right to expropriate private property but only under two conditions, which must both be present at the same time – i.e. the taking must be for a public use, and the individual landowner must be provided with just compensation.

What we know is that this formulation arose out of both the political philosophy of the period and particular historical circumstances. American colonists were angry at their treatment during the Revolutionary War, especially how their property was often expropriated absent compensation, for dubious public purposes. Given the feelings about property prevalent at the time, it was incumbent on the new government to acknowledge reasonable limits to public action when it might occur (Bosselman et al. 1973, Ely 1992, Treanor 1995).

But the scope of the taking clause was bounded. That is, it had (and has) to do with physical taking. Taking was about government expropriating privately owned land for public purposes – to build a road, a dam, a school, etc. Takings *was not* about government regulation and its impacts. It was not designed to be about this, and it did not function in this way (Bosselman et al. 1973, Jacobs 1999a).

In fact, during colonial times, both pre-Revolution and during the Revolutionary period, it was quite common for government to regulate privately owned land for various public health, public safety and what we would deem to be ecological purposes (Treanor 1995). These actions by government were seen as normal and appropriate. But regulation of

private land was not something that was very present in the American political or legal consciousness in the 18th and 19th century. Instead, the focus was on continental settlement – America’s “manifest destiny.” So it was the conquering of land, not its management, that drew the attention of the political and legal spheres.

As a consequence, from the time of the founding of the American colonies through the whole of the 19th century, regulatory takings was not a concept that existed in American jurisprudence or American policy practice. Where government regulated land, it was free to do so for various reasons, and the individual, while they might be aggrieved and seriously burdened by the regulation, had little recourse. This changed in the early part of the 20th century. This is when American ideas about property and takings diverged from those of Europe.

The early part of the 20th century was a time of great change in the U.S. There was both substantial immigration (to America’s eastern coastal cities) and internal migration (from rural to urban areas). There was in addition substantial industrialization, much of it clustered in the same cities as were experiencing migration and immigration. The net result was a situation where the physical landscape of America’s urban areas was changing rapidly, and the conditions within these cities was often deteriorating seriously, especially in those areas where migrants, immigrants and industry clumped together. The response of some of these cities was to pass regulations to manage public health and safety conditions. The impact of these regulations was to burden individual landowners – both private landowners and corporate landowners (Scott 1969). Out of these new spatial and economic conditions arose a concern about whether there were appropriate limits to government regulation.

At first, the answer was simply and strongly no. Early in the 20th century, the U.S. Supreme Court affirmed the right of government to regulate absent any obligation for compensation. In language that now seems quite sweeping, the Court in 1915 examined the matter of government regulation and its impact on the individual. Its conclusion:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

But the conditions of the period were to keep the issues before the courts for another decade-plus. And as they did, the U.S. Supreme Court would define the issue of regulatory taking.

The key case in this regard is that of Pennsylvania Coal v. Mahon in 1922 (subsequently referred to as Penn Coal). It was here that the Court issued its famous dictum, defining the 20th century concept of regulatory taking. Interestingly, the specifics of the case are no longer important. What is important is the decision. In examining the power of government to issue regulations which affect private property the Court said: “[T]he general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking” (260 U.S. 393 (1922): 415; emphasis added). In other words, a regulation can be equivalent to a taking (physical expropriation) under the Fifth Amendment.

But given the construction and logic of the Fifth Amendment, if a regulation is found to be equivalent to a physical takings (and assuming *prima facie* that the regulation is being developed for a “public use”) then under Fifth Amendment’s structure government is obligated to provide the landowner with compensation. But what the Court did not say in 1922 (and has never specified since then) is exactly where the line is that distinguishes regulation that “goes too far” from regulation that does not. And this is important. Because regulation that “goes too far” entitles the landowner to compensation under the doctrine of regulatory taking; regulation that does not go “too far” requires the landowner to accept the regulation’s structure (and burden) as a reasonable exercise of governmental authority.

The Court, however, was not quite done with its investigations and reviews in this area. In 1926, following its 1922 decision, the Court took up the matter of whether the new idea of zoning by local government was itself a reasonable exercise of governmental authority, or did it go “too far.” After much internal discussion, the Court found in the case of Euclid v. Ambler Realty (272 U.S. 365 (1926)), that, in fact, zoning was a reasonable exercise of public authority; zoning did not violate the protections of the taking clause, or other related protections in the U.S. Constitution.

Thus, as the Depression and then World War II loomed landowners and government officials were left with an ambiguous set of messages. In theory government regulation could go “too far,” and when it did a landowner might claim a taking; when this claim was affirmed government was obligated to provide compensation (or remove or lessen the regulation). But zoning – the preparation of a plan for land use where areas are pre-designated as to density and development standards – was not an instance of government going “too far.” Zoning was within the realm of acceptable regulatory behavior.

However, not unlike the experience of the taking clause itself during the 18th and 19th centuries, the new regulatory takings dictum established by the Penn Coal case proved to be more theory than practice in the first two-thirds of the 20th century. That is, for the first two-thirds of the 20th century, there were few instances of government going “too far.” Broadly speaking, economic and social conditions were about development, not its

restriction. When this changed was with the first Earth Day. For a number of reasons (which will not be explored here), beginning around 1970, government at the federal, state and local levels in the U.S., began to engage in more regulation and this regulation imposed itself more strongly upon individuals and their property rights. It was because of this that the limitations established by Penn Coal – the doctrine of regulatory taking – emerged as an important part of the legal, policy and administrative discourse of the final third of the 20th century and this first decade of the 21st century in the U.S.

What was the *legal* status of the 20th century discourse? Between 1978 and 1992 the U.S. Supreme Court agreed to review a number of cases in which it had the opportunity to revisit and refine its own, government's and the individual's understanding of the appropriate balance point between acceptable and unacceptable regulation.³ While the Court did not eviscerate the right of government to regulate private property, the Court did begin to more clearly say when the line of "too far" articulated in Penn Coal had been crossed. Of the cases decided in this period, one that received a great deal of attention was Lucas. Here the Court ruled that when all economically viable use has been taken by regulation, this was a case of regulation going "too far" and compensation was owed the landowner.

The outcome of these cases was ambiguous however. As commonly understood by private property owner, their advocates and government officials, regulation was still acceptable, but a regulating body needed to be careful and precise in the formulation and administration of regulations.

The Court then largely left this arena for another decade. What happened when it took up the matter again in the early part of this decade is discussed below in the section on the likely future of regulatory takings in the U.S.

Regulatory taking in Europe – its development and status. Superficially, it appears that property has the same social value and serves the same social role in Europe as it does in the U.S. For example, the French Revolution occurred only 13 years after the American Revolution (in 1789), and access to and protection of rights in property was a central theme of this mass social movement. And as in the American Revolution, the French revolutionaries were strongly influenced by political philosophers such as John Locke and Jean-Jacques Rousseau. When the Revolutionaries sat to articulate their ideas about the social and political rights of citizens in the new France, one of the rights that emerge

³ Some of the most prominent and discussed examples include the decisions of the Court in the cases of Penn Central Transport. Co. v. New York City 438 US 104 (1978); First English Evangelical Lutheran Church v. County of Los Angeles 482 U.S. 304 (1987); Nollan v. California Coastal Commission 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council 505 U.S. 1003 (1992); and Dolan v. City of Tigard 512 U.S. 374 (1994).

is directly parallel to the Taking Clause of the Fifth Amendment of the U.S. Bill of Rights.

In the Declaration of the Rights of Man and Citizen of August 1789 the final of the seventeen rights states: “[P]roperty being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.” All the structural elements of the Taking Clause in the Fifth Amendment to the U.S. Constitution discussed above are here. The right to private property is recognized. The right of government to expropriate that property is also recognized. However, the right of government to advance against a citizen’s right noted as “inviolable and sacred” is only under the conditions of a “public necessity” which “obviously requires it” and when such action is “certified by law.” When these conditions are met, then the citizen is entitled to “the condition of a just compensation in advance.” In fact, in many ways, as articulated as a purely constitutional-legal statement, the protection of private property in the Declaration of the Rights of Man seems stronger than that offered by the Taking Clause in the Fifth Amendment (e.g. just compensation is to be paid “in advance”).

But as in the U.S. this broadly written constitutional guarantee requires specification. In France, as in the U.S., it comes through the legal system. But the legal system in France is different than that of the U.S. Whereas the U.S., as a former British colony, is based on a common law system, continental Europe, like most of the rest of the world except the former British colonies, operates under a civil law system. And much of the continent uses a civil law system derived from the Napoleonic Code of 1804.

In theory a civil law system operates in such a way as to emphasize the centrality of codes, or parliament-based statutes and laws over judge-made decisions. Judicial decisions, specifically precedent as established by prior decisions, do not serve the role that they do in common law systems. And in fact, drawing from the experience of the French Revolution, civil law systems have built into them a specific skepticism about the role of judges and the social and class interests they serve.

The Code draws strongly from its interpretation of Roman law. Accordingly it recognizes two sets of authority with regard to property – that of *dominium* and *imperium*. *Dominium* represents “. . . the exclusive right of the owner to the current beneficial use of his or her property and its future development.” Yet *imperium* stresses that “. . . those [individual] rights nevertheless reside[d] within an overall right of the state to govern, and by implication to intervene in the landowner’s right to property for the greater good of the state” (Booth 2002a: 155).

The practical implication of the balancing of these rights is similar to the legal experience of the U.S. pre-1922. That is, the right of property protection in the Declaration is understood as a right guaranteed against unreasonable expropriation. It does not,

however, establish a right against government regulation. So, in France, as in much of Europe, government has had and continues to have the right to regulate property, often onerously from a U.S. perspective, under its presumed right of *imperium*. And some European constitutions further reinforce this tension by expressly noting the social obligations or social rights inherent in property (and thus the need for the individual to curb their individualistic expectations) (see Jacobs 2006, the section on “The Status of Takings in Europe”). What has not happened in Europe is something parallel to the 1922 Penn Coal decision. Neither on a country or European basis has a legal, legislative or policy decision been forthcoming that articulates a concept of regulatory taking. At least in Europe today, there is still a hard line between the concept of taking – an action of physical expropriation – and the concept of regulation.

The questions taken up below, are whether this hard line is likely to continue, and why?⁴

The Future of Regulatory Takings in the U.S. As discussed above, the concept of regulatory taking was articulated in 1922. For most of 50 years, however, it lay dormant. As a significant component of contemporary policy discourse it emerged in the context of regulatory activities by government in the wake of Earth Day in 1970. Actions by federal, state and local governments to, for example, protect air and water resources, manage urban sprawl, and preserve biological diversity and endangered species, spawned a plethora of regulations with impacts upon privately held land. Landowners reacted. These reactions took two distinct forms – policy-political and legal.

The legal reactions through the early 1990s are discussed above. Here let me continue the story through 2005, and then proceed to predicting the future.

In 2002 the U.S. Supreme Court returned its attention to the takings issue. In the case of Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (535 U.S. 302 (2002)), the Court took up the matter of a nearly three year moratoria on development in light of some of its prior decisions. Specifically, the question before the Court was whether this action by government went “too far.” In a decision strongly in favor of government, the Court found that planning and regulation are normal and expected governmental functions and that the Court had no reason to interfere with regular planning activity (Kayden 2002). In other words, planning and government regulatory action received a strong “green light.” As Kayden (2004: 44) notes, the Court’s analysis and opinion “. . . exhibits a genuine appreciation for land-use planning. . . . Land-use regulations, says the Court, are ‘ubiquitous,’ usually ‘impact property values in some tangential way,’ and would become ‘a luxury few governments could afford’ if automatic regulatory takings rules were widely applied. *Tahoe-Sierra* is a rude awakening for anyone who thought that the Court’s pendulum swung only in one direction.”

⁴ What is not discussed below, however, is whether this hard line *should or should not* continue.

Then, in June 2005, the Court issued its closely watched decision in the case of Kelo v. City of New London (125 S. Ct. 2655 (2005)). Pressed by property rights advocates (see the sub-section that immediately follows), the Court agreed to clarify its thinking-guidance about the “public use” phrase in the Takings Clause, revisiting what was for some its controversial 1954 decision in Berman v. Parker (348 US 26 (1954)). In the Kelo case, the city asserted its right to take private property, with compensation, for a public use, when the public use was defined to be consolidation of the land for distribution to another private owner in order to facilitate and further economic development in the city, through new jobs and increased property tax revenues from the land. Unlike the earlier Berman case, the city did not even bring forth a pretense of classifying the property slated for takings as “blighted.” By a one vote margin the Court affirmed the City’s right to engage in this form of taking.

The Kelo case has set off a firestorm of popular protest and state-based legislative reactions (Egan 2005). Nonetheless what is interesting for my purposes is what it says about the *legal* state of regulatory takings in the U.S. In 1922 with Penn Coal the Court established the concept of regulatory taking. Yet despite this, the place of regulatory taking in U.S. law has been limited. The Penn Coal decision says that regulation can be equivalent to a physical taking when it “. . . goes too far.” But in practice, it seems that little in the way of actual governmental practice crosses this magically undefined line. While in the 1980s and 1990s the Court began to try and specify what this might mean in practice, their recent decisions suggest that they are giving up. “Too far” is a strong idea in theory, but like the Court’s decisions on pornography (one knows it when one sees it) it seems too difficult to specify in advance.

So, for all practical purposes, I assert that the U.S. has a legal framework for regulatory taking, but that its practical consequences are minimal.

However, this conclusion does not speak to the rhetorical and policy consequences and implications of regulatory takings.

Despite what might be a weak legal situation for regulatory taking, its rhetorical and policy situation is quite different, or at least appear to be. In the late 1980s a social movement arose whose explicit purpose was to advocate on behalf of the rights of landowners under the banner of regulatory taking. Variouslly labeled, the private property rights movement is a national coalition targeting national, state, and local land use and environmental laws, policies and programs, such as the those for endangered species protection, smart growth, farmland and wetland protection, etc. (Jacobs 1995; an early listing of these groups appears in Deal 1993). This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective. Why? Because, drawing from classical political theory, the coalition sees that through public policy and law that diminishes private property the state

is actually encouraging a situation that diminishes the very viability of liberty and democracy it is designed to protect.

This movement has pursued a multi-level strategy to achieve their objectives – judicial, legislative, policy and public relations – at all levels of government (Jacobs 1999b).⁵ Their most prominent success has been at the level of the American states. For example, since 1991 every state in the U.S. has considered state-based legislation in support of the policy position of the property rights movement, and 28 states have passed such legislation (Emerson and Wise 1997, Jacobs 1998a, 1999b). These states are on both sides of the Mississippi River, they are “red” and “blue” states, and extend from Maine to Washington, the Dakotas to Texas, with eleven of these states east of the Mississippi River.

In November 2004 the property rights movement sponsored an initiative in the state of Oregon directly intended to undercut the influence and impact of Oregon’s 30 year old model approach to land use and environmental planning and urban sprawl management (Oliver 2004, Rohse 2004). It was closely watched nationally, because of Oregon’s role as a leading state in the area of land use and environmental planning (Ozawa 2004). The November 2004 initiative – Measure 37 – passed by a 61% majority, and after several rounds of legal appeals was recently upheld by the Oregon State Supreme Court (Macpherson v. Dep’t of Admin. Servs. 340 Ore. 117 (2006)). The adoption of the measure by such a strong majority in Oregon (and its judicial affirmation) has emboldened the property rights movement. Their thinking – if they can shape citizen attention and grab citizen support in Oregon, they can do this anywhere. Parallel efforts are already bubbling throughout the U.S. (Harden 2005). This has been joined to the popular, negative reaction to the U.S. Supreme Court decision in Kelo to form the basis of what I have characterized as the property rights movement’s third-wave approach for state-based action (Jacobs 2006).

So what is the likely future of and for regulatory taking in the U.S.? I believe regulatory taking will have a two track future.

On the one track – the formally legal track – the Courts will continue to be wary about expressly defining the bright line that delineates regulation that “goes too far” from regulation that does not. While Penn Coal gave the Court the opportunity to do this, in the area of property rights and the balancing of the rights of the individual with those of the community at large, the Court has shown a continuing preference for an ad-hoc, case-by-case approach. Despite its rhetorical appeal, I do not believe that the U.S. Supreme

⁵ While they approach the judicial strategy skeptically (and the outcome of the Tahoe-Sierra and Kelo cases suggests their skepticism to be well founded), they do not forego this option since they see the property rights issue as fundamentally Constitutional. However, in conceptualizing an approach for engaging this issue they decided early on to not rely on legal decisions alone. They supplemented a legal strategy with a policy and legislative strategy.

Court will expressly and clearly determine the arena of regulatory taking (from non-regulatory taking).

On the other track – the political, policy and social movement track – advocates, such as the property rights movement, will continue to pursue a multi-level strategy (including a legal strategy) for a clear delineation. They are highly motivated, able to base their advocacy on powerful history and theory, and strongly funded. They will continue to work to actualize their vision of a limited state on the one hand and strong property rights on the other. How successful will they be? That is harder to say. As measured by the number of state laws passed their success in the 1990s has been impressive. As measured by how those state laws have changed actual administrative practice, their success seems more pyrrhic – a lot of effort expended for little actual change (Jacobs 1998a, 1999a). The unknown is what their recent success in Oregon and the outcry over Kelo will mean for their ability to mobilize public opinion and realize substantive change.

My own analysis and conclusion is that these issues are never finally settled (Jacobs 1999a). Instead they are in constant motion, reflective of changing social and technological circumstances. That is, we Americans renegotiate the boundary line of acceptable from unacceptable regulation and the very nature of what it means to hold and control property as the world we live in changes and we in turn adjust to it. And I believe that this is what we will continue to do, as we have for over 200 years.

The Future of Regulatory Takings in Europe. Drawing from its civil law tradition (discussed above) and the particulars of intra-European treaty language, the status of regulatory taking in Europe is both different and more hazy than it is in the U.S.

The current European Union draws from the 1992 Treaty of Maastricht. This treaty itself updates provisions of the 1957 Treaty of Rome which formerly established the European economic community. Within the Treaty of Rome the key provision is Article 222, which states quite simply “[T]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”

In recent scholarship Caruso (2004: 752) points out that “[P]roperty is strangely singled out and portrayed as immune from Europeanisation [and] . . . this seems somewhat at odds with the growing impact of supranational adjudication upon States’ property regimes.” Likewise Gambaro (1997: 497) notes that “. . . article 222 of the EEC Treaty raises a complete bar to the disciplining of real property at the European level . . .” When he ponders why this is the case, Gambaro makes an argument that property law, by its very nature, reflects the individual circumstances – the history, the culture and the language – of individual countries. So, for example, with regard to language, he points out how difficult if not impossible it is to appropriately and precisely translate property-based legal terms from one language to another; his example being the mismatch between French and English. And further, because of history and culture “. . . different legal

traditions have not organized their property law schemes around the same group of problems” (Gambaro 1997: 501). So ultimately, he believes that “. . . it is in any case extremely doubtful whether real property law could be explicated more effectively or usefully through the application of a European-wide code, as opposed to the nuanced approaches offered by the various national codes already covering the subject” (Gambaro 1997: 497).

But Caruso, Gambaro and a few others were writing about the status and future of private property in the context of what was then the proposed European Constitution. They were trying to understand how property would be treated by this proposed unification instrument. Would it become something to be managed centrally, would it be left to individual states, what would be the balance of individual and public rights?

Article II-77 of the proposed European Constitution is titled “Right to property.” It has two parts, addressing respectively land and intellectual property. Section one states:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

So this provision of the proposed European Constitution appears to copy the content and intent of the U.S. Takings Clause and the parallel statement in the Declaration of the Rights of Man – it acknowledges a right to property, it protects against an unlawful taking (deprivation) of property, and it provides for “fair compensation” for any deprivation that does occur. The provision explicitly reserves the right of regulatory-based legislative action – “the property may be regulated by law insofar as is necessary for the general interest” – and says that deprivation of property *may* occur “in the public interest and in the cases and under the conditions provided for by law.” Yet what is interesting, is that Art. III-425 of the proposed Constitution also says that “[T]he Constitution shall in no way prejudice the rules in Member States governing the system of property ownership.”

Overall, Caruso finds herself surprised and perplexed. As she says, “. . . a quick look at the Constitutional Treaty reveals a rather striking detail. The drafters, while making it clear that *intellectual* property becomes a subject for legitimate legislative action at EU level, have restated the promise of non-interference with property in general: “The Constitution shall in no way prejudice the rules in Member States governing the system of property ownership”” (emphasis in original). So, “. . . in the draft [European] Constitutional Treaty, property remains segregated and portrayed as something essentially different, somehow severable from the project of integration” (Caruso 2004:

753). Will this endure? Gambaro thinks so; Caruso is not so sure but ultimately agrees with Gambaro's assessment. After parsing the matter, she concludes that property will remain a national, rather than European matter.

But Griffiths (2003), who Caruso draws upon for her analysis, is not so sure. He sees an irreconcilable conflict between the exceptionalism of property under the Treaty of Rome and the proposed European Constitution, the longer-term process of European integration and specifically the other broader legal principles guiding the integration project. That is, as Griffiths sees it, the commitment by the EU to implement the so-called "four freedoms" (unhindered movement of goods, persons, services and capital) will at some point come into conflict with a national structure for the management of private property. At this point it will be necessary to both re-think and re-invent these structures – to Europeanize them.

So for the time being property is a matter of national concern, not European concern. What is its status within nations? More specifically, is there a place for regulatory taking in Europe?

The answer appears to be a strong and simple no. In civil law systems there is a strong tradition of *imperium*, and this tradition insulates the state from the need to broach regulatory taking. So far, legal decisions at the national and European level have not established a basis for this right.

But when one goes from the level of legal and political theory to the level of policy practice, the answer to the question of whether there is a place for regulatory taking (or something like it) is more ambiguous. In winter 2006 I conducted interviews with public officials in southern France (Montpellier and Nimes) about the status of property and its management.⁶ The results are fascinating. Under French law, public authorities have both a broad and a strong set of authorities to manage privately owned land. Owners have no basis to claim regulatory taking, and the public may pre-empt proposed private land sales. But according to public officials the mood of landowners and the judicial system is undergoing a seismic shift. Landowners are more willing to challenge local authorities, and courts are more likely to back landowner challenges against local authorities. Why? It appears that Griffiths (2003) may be correct. According to interviewees, challenges and successes are not a function of formal changes to the law, but instead reflect a local sense of a European mood in favor of markets and property rights and away from the central state.

⁶ Interviewees included: Jean-Paul Gambier, 31 January, 2006, Gambier is Chef du Service Foncier, Montpellier Agglomération; Nicolas Roubieu, 31 January 2006, Roubieu is Urbaniste - Chef du project SCOT, Montpellier Agglomération; Eva Bourdat, 01 February, 2006, Bourdat is Chargée de Mission, Mission Interministérielle d'Aménagement du Littoral, Préfecture de région du Languedoc-Roussillon; and Isabel Girault, 03 February 2006, Girault is Directeur, Agence d'Urbanisme et de Développement de la Région Nîmoise.

How will this evolve? It is not clear. As in the U.S. there are groups advocating a property rights perspective. However unlike in the U.S. there are neither as many of these groups nor are they as focused on property rights issues per se. Groups like the Centre for the New Europe have an environmental section but it focuses on issues such as energy supply and air pollution; more broadly the Centre seeks to influence policy related to health policy, competition and especially intellectual property (see <http://www.cne.org/index.htm>, accessed on 13 March 2006).

The difficulty and the challenge in Europe is the “weight” of tradition with regard to this issue. There seems little reason to expect the state, whether it is national or supranational, to forego its authority. This would appear to be a major “stepping back” from decades of tradition and experience. And experience in Europe suggests the danger of stepping back. For example, Booth (2002b: 136) chronicles how in Britain “[I]n the first half of the 20th century town planning was essentially hamstrung by the perceived need to compensate landowners for loss of development value. In theory empowered to take radical action to direct the pattern of development, local authorities all too often did not do so for fear of being liable to make large payments.” In many ways, this is reminiscent of the current controversy in the U.S.⁷

But while this assessment provides both the easiest and safest answer to the question of whether the situation is likely to change, it doesn’t seem that it is necessarily the only or clear answer. Why not? As in the U.S. the debate about the role of property and the rights of landowners vis-a-vis the state is an active one. At the level of theory and activism there are many who are advancing a position that suggests that the pendulum has swung too strongly to the side of the state and to the disadvantage of the landowner, and that the result of this is simply unfair and unreasonable. In an increasing number of instances, the individual is being asked to bear a very large burden on behalf of the public.

As my interviews in France evidenced, these matters happen in real time and space, under real market conditions, with real owners, jockeying for advantage in real political systems. So one of the questions becomes the extent to which changing market conditions (in part pushed by changing policies at the EU level) will create the circumstances in which the existing policy structures have to change, because they are just untenable in their old and continuing form. Then, at this moment, the question will become what will be the impact of new ideas and social activism? This is what we do not know.

⁷ Scholars such as Epstein (1985) suggest that it is precisely through the need to have to be concerned about compensation that the state will weigh carefully whether the imposition of its rules are, in fact, “worth it.”

A 21st century Convergence? This paper opened with George Bernard Shaw's famous comment about England and the U.S. – “two countries separated by the same language” – and suggest that in the common understanding something similar is believed to be true for the U.S. and Europe with regard to property and regulatory takings. However, in this paper I suggest that this is an overly simplistic characterization. At least until the early years of the 20th century, the U.S. and Europe were joined by the same language when it came to the way the state related to the individual over private property.

Both the U.S. and Europe share a common heritage in the Enlightenment, specifically the ideas of John Locke and Jean-Jacques Rousseau as they influenced the American and French Revolutions respectively. For both of these revolutions, occurring as they did within a span of less than a generation, lack of access to and security of property for the common person (the common man) was a central theme. And thus each, upon their success, sought to enshrine a right to property, and as importantly a right to private property's protection from the arbitrary and capricious power of the state.

The literal form of these protections is similar – the Takings Clause of the Fifth Amendment to the U.S. Constitution (1791) and Right 17 of the Declaration of the Rights of Man (1789). And for the remainder of the 18th century and the duration of the 19th centuries the way these protections were understood and implemented was likewise similar. These respective clauses referred to the way the individual was protected from the state *when the state sought to engage in physical expropriation*. Neither of these clauses was understood to apply to the right of the state to engage in regulation. There was no concept of regulatory taking; there was no right of protection from regulation. As late as 1915, the U.S. Supreme Court could assert that “. . . we are dealing with one of the most essential powers of government, one that is the least limitable. . . . the imperative necessity for its existence precludes any limitation upon it . . . if . . . private interests are in the way they must yield to the good of the community” (Hadacheck v. Sebastian 239 US 394 (1915): 410). This statement is parallel to the continental, civil law understanding of the power of *imperium*, the right of the state to manage private property in the public interest.

When divergence occurred it was from the U.S. In 1922 the U.S. Supreme Court invented the concept of regulatory takings through its now famous phrase that “[T]he general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking” (260 U.S. 393 (1922): 415; emphasis added). For nearly 85 years (though actually most pointedly for the last 30+ years) the Court, the legislatures and the American people have been grappling with specifying what this concept means. To many it make sense; but where is the line of “too far”?

And it is in the difficulty of specification that convergence may reemerge. As much as has been written about the idea of regulatory taking, my assessment is that it has more rhetorical and political power than actual legal authority. When the U.S. courts have

engaged the matter of whether a regulatory action in fact “goes too far,” more often than not they find themselves returning to the framework of Hadacheck – that in theory there is a limit to regulatory action, but in practice the particular regulation they are examining does not cross the line, and does justify public action towards and imposition upon private property rights. This certainly seems to be the lesson from their 2002 and 2005 decisions. Where the concept of regulatory taking has agency is in the political arena. Its very existence allows policy advocates to argue for a regulatory approach more sensitive to landowners rights and less expansive of public rights.

In Europe the situation is different. Without the 20th century introduction of a broad concept of regulatory taking the legal and political concept of *imperium* has largely continued on unabated. The result has been and can be regulatory structures that impose themselves heavily upon individual landowners. Will this change? And if so, how? There are property rights advocates in Europe parallel to those in the U.S., but their voices do not appear particularly loud, coordinated or effective. So it is not clear that they will have much impact on the policy or political form of any regulatory takings debate. If there is a venue for change, however, it will be legal. Drawing from the imperatives embedded in the Treaties of Rome and Maastricht and guarantees in the European Convention on Human Rights landowners may have a cause to argue that the state must lessen the extent of its regulatory actions.⁸ And related to this may be a legal and political debate about the extent to which the “four freedoms” require the shifting of land and environmental regulation from the nation-state to the European level.

Divergence or convergence? My best guess – convergence. How? We will see a detailing of regulatory taking in the U.S. that is, in practice, relatively mild (at least compared to the hopes and expectations of property rights advocates), and thus does not really restrain the state from much of what it wants to do relative to private property. In Europe, we will see the introduction of this idea, through one venue or another, but drawing from centuries of unabated practice of *imperium* it too will be mild.

So, with the 21st century I expect to see a return to the pre-1922 era when the practices in the U.S. and Europe, notwithstanding their being based on different legal systems, return to a mode where their outcomes are essentially the same – an acknowledgment of the idea of regulatory taking, but a very limited impact of the idea on the actual mechanisms of governmental decision making, at the supranational, national and sub-national levels.

⁸ See Çoban (2004) for a recent discussion of the property rights issue with the context of the European Convention on Human Rights.

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