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PROPERTY RIGHTS
AND LAND POLICIES

Edited by Gregory K. Ingram and Yu-Hung Hong

Property Rights and Land Policies

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Gregory K. Ingram and Yu-Hung Hong

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U.S. Private Property Rights in International Perspective

Harvey M. Jacobs

This is a period of history in which there is intense focus upon and interest in private property rights and in the U.S. experience with these rights. This chapter first discusses briefly the nature of and reasons for this global interest, after which it turns to the U.S. experience with private property rights. In this discussion, both how and why the particular legal and social configurations of private property rights emerged in the United States are examined as well as the historical and contemporary tensions about these configurations. Finally, the chapter concludes with some thoughts on the transferability of the U.S. experience both to other developed countries (most particularly Western Europe) and to transition and developing countries.

The Global Interest in Private Property Rights —————

Private property is a social and legal institution with a long history (Schlatter 1951). It has come into contemporary focus because of the changing nature of the global political economy.

With the fall of the Berlin Wall in the late 1980s and the dissolution of the Soviet Union in the early 1990s, some commentators believed that the grand social debates of the twentieth century were finished (Fukuyama 1989). Throughout the century, the debates had been structured by the relative merits of conflicting political economies: socialism versus capitalism and communism versus democracy. In the new era, it seemed that only one set of ideas would prevail: capitalism and

democracy.¹ The new countries of Central and Eastern Europe and the former Soviet Union, which had had dependent relationships with the former Soviet Union, as well as other countries that were undergoing their own independent political changes (such as South Africa) began asking themselves and others how to become more integral to the global community. How does a country acquire the economic standing of the advanced developed countries? How does a country acquire the political legitimacy of the advanced developed countries? How does a country acquire capitalism and democracy? These became among the most pressing sets of questions of the late twentieth century.

An answer seemed to center on private property. Private property was the literal key to a market-based capitalist economy; likewise, private property was central to democratic political structures.

Over the last two decades, developing and transition countries around the world have, with the counsel of the multilateral and bilateral international aid agencies, moved to introduce the social and legal institutions of private property (Deiningner 2003). This tendency has been further aided by advocacy suggesting that the creation of private property is the central variable to alleviation of poverty in developing countries (de Soto 2000).

In the last few years, the extent and substance of this trend has become clear. Two of the few remaining communist-led countries in the world have moved to embrace private property. In spring 2007 China made international news through its revision of national laws that established limited conditions for the ownership of private property in housing, and this spring Cuba introduced laws that would also allow the private ownership of houses (*New York Times* 2008).

All told, this has led to a global discussion of private property rights. Legal scholars are noting a “global debate over constitutional property” (Alexander 2006). Some suggest that the extent of private property rights serves as a reliable indicator of both economic strength and political freedom, leading to global rankings of private property rights robustness (Bethell 1998; Thallam 2008).

The U.S. Experience with Private Property Rights —————

As the global discussion about private property rights has accelerated, one focus has been the U.S. experience. The United States is commonly and broadly understood to be a strong private property nation and to have lengthy experience with private property rights as the bases for both its economic system and its political system (de Soto 2000; Thallam 2008).

1. Huntington's (1997) notion of a “clash of civilizations” is an alternate concept to the one advanced by Fukuyama (1989).

THE COLONIAL ERA

The role and place of private property rights was a subject of intense interest and debate among the country's founders. For a variety of reasons—philosophical, historical, and contemporary—there was a clear sense that the right to hold and control property rights was an important element of a democratic governmental structure (Ely 1992).

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 of the Bill of Rights of the U.S. Constitution) 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 were small. America offered an alternative. It was a place where any white male immigrant could get ownership of land and, with that land as capital, make a future for himself. America was, quite literally, the land of opportunity (Schleuning 1997; Scott 1977).

In America's colonial past, the existence of land converged nicely with the then-new political theories. In particular, drawing from the work of John Locke, ideas circulated about ownership and democracy. A person came to possess property 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 (democracies) existed for the protection of individual liberties, including the liberty to hold and control property.

The country's founders configured these ideas into a particular and specific relationship. Some argued 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 54* in 1788 that "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 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" (1851 [1790], 280).

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 the very act of ownership created the conditions that allowed democracy to exist (Scott 1977).

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, "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" (1952 [1690], 68–69).

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 was perhaps the most articulate proponent of a counter-position to the camp of Madison, Adams, Hamilton, and others. For example, in the debate over the ratification of the Pennsylvania state constitution, Franklin 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" (1907 [1789], 59). In other words, Franklin did not see property rights as sacrosanct.² Instead he appeared to view as legitimate the public's right to create, re-create, take away, and regulate property as it best served public purposes.

Property—private property—was thus a confusing issue for the founders. How were these disparate positions resolved? With ambiguity. Even before the United States emerged as a new country, colonial governments had passed local laws that seem to be clear antecedents of 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 Charleston 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).

Thus 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." That 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 (Scott 1977).

Eleven year 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

2. These sentiments by Franklin were not isolated. As noted by Brands, "Franklin took a striking socialistic view of property." Brands 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" (2000, 623).

property? Nothing. It was not until 1791 and the adoption of the Bill of Rights that the now contentious “takings” (expropriation) 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 that is public use, and a form of payment specified as just compensation. The interrelation of these concepts is that where private property exists, it may be taken (seized by the government over the landowner’s objections), but only for a denoted public use and with the provision of just compensation. If any of these conditions is not met, a taking 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 a public use is, and what makes up just compensation.

In the colonial period and for a century afterward, disagreements about the place of private property in a democracy and the exact meaning of the takings clause were largely theoretical. There was little public infringement on private property rights. The new country had land in abundance, and the disposition of public land, not the acquisition or regulation of private land, dominated the public agenda (Gates 1968). Not until the twentieth century did this change.

THE TWENTIETH-CENTURY LEGAL FRAMEWORK

The twentieth century ushered in an entirely different period in the American experience relative to private property rights. The American frontier was settled: western acquisition and expansion had been completed (Gates 1968; Turner 1893). 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 reconfiguration of its demographic and spatial makeup. The 1920 U.S. Census officially recorded the shift from a rural to an urban nation (Scott 1969). The years 1880 to 1920 were a period of intensive immigration, industrialization, and urbanization. In response to these conditions, modern land policy and the modern relationship of the state to the individual via private property rights were born. Cities and states began to pass regulations to manage public health and safety. The impact of these regulations was to burden individual landowners, both private and corporate. Out of these new spatial and economic conditions arose a concern about the appropriate limits to government regulation.

In this context and throughout the century, the U.S. Supreme Court 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 (examples written for the nonspecialist audience include Bosselman, Callies, and Banta [1973] and Meltz, Merriam, and Frank [1999]). This discussion relies heavily on the analysis and interpretation of Kayden (2004).

A key case is *Pennsylvania Coal v. Mahon*, 260 U.S. 393 in 1922, in which the Court issued its famous dictum defining the twentieth-century concept of regulatory taking. 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. The justices had earlier 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 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” (415; emphasis added). In other words, a regulation can be equivalent to physical expropriation under the Fifth Amendment. If it is, however, compensation is required. But the Court did not exactly identify the location of the line that distinguishes a regulation that goes too far from a regulation that does not.

The second case of importance 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 that provided for different levels of development opportunities was acceptable (*Euclid v. Ambler Realty*, 272 U.S. 365). The Court decided that such an approach to the management of private property rights was acceptable.

As the Great Depression of the 1930s loomed, the Court said that 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 did not 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’ private property rights.

After *Euclid*, the Court largely left the property rights arena for fifty years. During this quiescent period, however, there was one important case. In 1954, in the case of *Berman v. Parker* (348 U.S. 26), the Court took up the meaning of the “public use” phrase in the takings clause, ushering 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 again entered the property rights arena with renewed vigor by seeking to establish boundaries to governmental authority. In the nearly twenty-five years since *Berman*, things had changed: the composition of the Court, and America’s attention to and involvement with private property rights. Since about 1970, the United States 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, and National Environmental Policy Act were all examples at the national level (see Moss [1977] for a contemporaneous chronicling of these). Among state governments, a so-called quiet revolution in land use control had occurred in which nearly a dozen states reasserted their constitutional authority to regulate private land use activities at the state level (Bosselman and Callies 1971). Local governments across the country were beginning what has become a decades-long experiment in public policy approaches to protecting and managing farmlands, wetlands, open spaces, watersheds, threatened habitats, urban sprawl, and so on.³

Between 1978 and 1994, the Court heard a series of cases in which it began to redefine the rules of interaction between government and private property owners.⁴ While the Court did not eviscerate the right of government to regulate private property, it 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, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), received a great deal of attention. Here the Court ruled that, when regulation had taken all economically viable use, it had gone too far, and compensation was owed the landowner. The outcome of these cases was ambiguous, however. As commonly understood by private property owners and their advocates and by government officials, regulation was still acceptable, but a regulating body needed to be precise in the formulation and administration of regulations.

The twentieth century ended and the twenty-first century began with two major cases decided by the Court, both of which seem to take a step back from the boundary-setting tone of the prior period. In the 2002 case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 U.S. 302), the Court took up the matter of a nearly three-year moratorium 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).

Then, in June 2005, the Court issued its closely watched decision in the case of *Kelo v. City of New London*, 545 U.S. 469. Pressed by property rights advocates, 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

3. 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.

4. Some of the most prominent and discussed examples include *Penn Central Transport Co. v. New York City*, 438 U.S. 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).

by the city. Instead, the city asserted its right to take private property, with compensation, 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. By a one-vote margin, the Court affirmed the city's right to do this.

THE PROPERTY RIGHTS MOVEMENT

These historical and legal themes come together in the formation and subsequent activism of the so-called private property rights movement. From the perspective of this movement, the intent of key American founders and the principles embodied in the founding documents make the protection of private property rights an essential element of the American political and social contract (Jacobs 1995, 1998b; Marzulla 1996). According to this view, one of the factors that makes the United States unique is the way the right to own property and the protection of that property provide a buffer to the power of the state (Ely 1992). Through ownership and control of property, the owner has material conditions that 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.⁵

This framing of American history comes together with an alarmist view of twentieth-century public policy and law. From the position of the property rights movement, in the last 100 years the United States has appeared to move away from a view of property rights as integral and central to liberty and democracy. Instead, it appears that government has been allowed ever-increasing authority to intrude upon, reshape, and take away property without respecting the protections afforded by the Constitution. Despite the promise contained in *Penn Coal* that regulation that goes too far will be recognized as a taking, in practice legislatures and the Court seem to continuously affirm the right of government over the property rights of individuals (Bosselman, Callies, and Banta 1973; Salkin 2001). Even the Court's decisions of the late 1980s and early 1990s that appeared to hold promise for reining in governmental practices seem to have had little real impact on those practices at the local, regional, and national levels (Roddewig and Duerksen 1989). In the 2002 decision in *Tahoe-Sierra* and the 2005 decision in *Kelo*, activists concerned with the integrity of private property rights have found little promise and solace from the Court.

It was in part because of this that the political and social movement for private property rights protection was born (Gottlieb 1989; Miniter 1994). Although

5. Brick and Cawley (1996) and Yandle (1995) provide overviews of the property rights movement; Epstein (1985) is a foundational legal argument for their position.

the movement formally came into being in 1988, its intellectual and geographic antecedents originated at least with the rise of the modern environmental movement (for example, 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 those on endangered species protection, smart growth, and farmland and wetland protection (Jacobs 1995; an early listing appears in Deal 1993). This coalition argues that such attempts at the management and restriction of private property are un-American, inefficient, and ultimately ineffective.

The property rights movement has pursued a multilevel strategy to achieve its objectives—judicial, legislative, policy, and public relations (Jacobs 1999b). While its proponents 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 forgo this option because they see the property rights issue as fundamentally constitutional. However, in conceptualizing an approach for engaging the issue, they decided early to not rely on legal decisions alone, supplementing a legal strategy with a policy and legislative strategy. In the 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 proponents' frustration, there was little outcome from this activity. Quickly, therefore, the movement's strategy shifted toward state legislatures, where they found fertile ground for their arguments and ideas.

Since 1991 every U.S. state 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). They include both "red" and "blue" states extending from Maine to Washington and the Dakotas to Texas, and 11 of them are east of the Mississippi River. But by the late 1990s, the property rights movement had come to a policy standstill. Its proponents had been effective in passing state-based laws and in promoting county-based laws, and they had garnered significant media attention, but they had been ineffective in changing the fundamental way government at the national, state, and local levels acted toward and upon property.

Why was there dissonance between legal change, public attention, and institutional behavior? Among the reasons are the fact that some of the laws adopted in states (such as Mississippi) and counties were purely symbolic; government activity has never required nor was ever expected to require invoking their provisions. In other states (such as Kansas) and counties, these laws were adopted over the objection of the executive branches, which had the responsibility of implementing them. Therefore, the executive branches developed implementation procedures that in effect diluted the intent and impact of the laws.⁶ In addition,

6. These two state examples draw from research detailed in Jacobs (1999b).

while the property rights argument is initially appealing, individual landowners (including property rights advocates themselves) can be wary of a regulation-free land use environment. In effect, people trust themselves to be good land managers, but few trust their neighbors.

With the dawn of the twenty-first century, the movement had an opportunity to revise its strategy, largely as a result of the election of George W. Bush (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 the movement was going to have a great deal of influence. However, several factors—principally the systemic impact of the terrorist attacks of September 11 on administration priorities and congressional realignments—forced the movement back to a state-based strategy.

RECENT ACTIVITY

In fall 2006 the property rights movement had an opportunity to demonstrate the strength of its support among the American people. In 2004 it had achieved a substantial victory in Oregon with passage of a state law, Measure 37, intended to overturn a 30-year process of centralized state planning and regulation of private property rights (Jacobs 2007, 2008a). Another factor was the significant public outcry over the U.S. Supreme Court's 2005 decision in *Kelo*.⁷

So in 2006 the movement promoted a set of votes on property rights issues in six states. Using a provision of state law that exists in some, mostly western U.S. states, citizens petitioned to have a law passed. If such a petition is adopted by a majority of those voting in the election, the petition becomes law; legislators may not interfere with its implementation. Much to the surprise of the property rights movement—and to the delight of planning's supporters—the measure failed in five of the six states in which it was proposed, including some states with long-standing, well-known, strong property rights traditions (Hannah Jacobs 2007). The reasons for the failures were varied, reflecting the nuances of state politics and particular elections. But one theme that seems to tie the failures together was the way the initiatives were promoted. In several of the states, they appeared to be funded and coordinated by a single nonlocal, nonregional, antigovernmental think tank largely funded by one person, rather than by grassroots citizens' initiatives (Ring 2006). Opponents of the initiatives (environmental and planning supporters) thus described them as efforts “by outsiders to try and tell us what to do with our communities and our land.” This fact was well publicized and was believed to be part of the backlash to the proposals.

Then in 2007 the citizens of Oregon, where the measure had passed, had the opportunity, under the same voting procedure described above, to reconsider their

7. Measure 37, the lawsuit leading to the *Kelo* decision, and the public outcry resulting from it had been engineered by the property rights movement, a fact proudly acknowledged by its proponents.

2004 vote. Again, much to the delight of planning's advocates, voters approved Measure 49, which was touted as turning back many of the more antiplanning, pro-property rights components of 2004's Measure 37, by a margin of nearly two-thirds.

Oregon's Measure 37 had been promoted as a law that would bring justice to small landowners relative to the oppressive nature of the original (and subsequently modified) 1973 statewide planning law. The 1973 law required, among other elements, the preparation of plans by all communities in the state, the coordination of that planning effort among adjoining communities, the designation of urban growth boundaries for urban areas, and explicit programs for the protection of farmland and infill of existing urban areas. It provided a cause of action for property owners who had continuously owned land since the time of its passage. Under Measure 37 government was required either to compensate owners for the impact of rules and regulations that restricted growth and land use or to revoke the impact of those rules and regulations upon affected owners. According to the media presentation by Measure 37's proponents, a few small landowners would benefit from Measure 37. But by fall 2007, over 7,700 claims had been filed, affecting nearly 800,000 acres and totaling over \$19 billion.

Measure 49 sought to address this situation of extensive claims on large amounts of acreage for astronomical sums by denying claims for commercial or industrial development and providing three pathways for people who want to build homes. It allows landowners subject to the law to (1) develop as many as three homesites under a streamlined process; (2) build as many as ten homesites after proof by appraisal that regulations had devalued property; or (3) possibly proceed with even larger subdivisions if they can establish pre-Measure 49 vested rights.

What does all this mean? How does an observer make sense of what appears to be a pendulum swing of voter actions and opinions? Votes in 2006 and 2007 do not appear to mean that social conflict over private property rights is settled in the United States. Conflicting concepts about the rights of the individual and the right of government (as representative of the community) vis-à-vis property rights is a multi-century issue, the character of which changes with the social conditions of the times (Jacobs 1999a).

In the short term, the property rights movement has shown itself to be adept at learning from its experiences in the courts, in the legislatures, and with the media. Yet, it is a long-term project. While its proponents may be frustrated by short-term setbacks, they are impassioned by their perspective on property rights and their perceived need to restrain government power and reframe public discourse (Jacobs 2007).

Will there be an ultimate or final outcome of this debate? As I have argued elsewhere, I do not believe it will ever be settled (Jacobs 1999a). It may be that fighting over conflicting concepts of property rights is both central to and necessary for the American experience.

The Transferability of the U.S. Experience _____

The transferability of the U.S. experience has to be divided between the lessons for other developed countries and the lessons for developing and transition countries. With regard to the former, I concentrate my remarks on the transferability of the U.S. experiences to Europe, the current focus of my research (Jacobs 2006, 2008a, 2008b). While global attention has been focused largely on the efforts in transition and developing countries to invent and implement private property, a parallel effort has been occurring in Western Europe. Countries across Europe have been engaged in two significant and parallel activities: an effort to rewrite their national planning laws, and an effort to create a European constitution and parallel implementing institutions (Jacobs 2006). These efforts fit into a decades-long pattern of planning and implementation to create the structures for an integrated Europe. While the particular effort to create a European constitution stalled in summer 2005, the broader trend of European integration continues (Reid 2004).

In the area of land policy, Europeans (or at least European governments) appear to want to self-consciously move away from their twentieth-century structure of a strong state and a weaker set of rights in the relationship over private property (at least as compared to the U.S. model), and to move explicitly toward a U.S. model of strong private rights and a relatively weaker state (Jacobs 2006). Europeans are aware of and involved in both the contemporary debate about property's role in creating and re-creating democracies and market economies, and the American experience with trying to balance the rights of the individual and of the public in relation to individually owned environmental and land resources. As part of broader trans-European dialogue and policy initiatives, professionals, activists, and policy makers are actively reconstructing a half-century-old planning, management, and regulatory system strongly based on command and control into one more individual- and market-based.

Despite what is commonly depicted as essentially differing legal systems, I see a furtherance of what has become a global project (van Erp 2006). My research suggests a convergence of perspective with regard to the legal and social status of private property rights between the United States and Europe (Jacobs 2008a).

Examples are the situations in southern France and in Norway.⁸ Under French law, government has authority to designate land in the peri-urban area for permanent nongrowth status. Once the land is designated, owners have little basis to claim compensation for the designation, even when there are significant impacts on the value of the land. In addition, French law gives government the right of first refusal for purchase. This right is so strong that if owners want to sell and

8. Both are discussed in Jacobs 2006; the French case is discussed in more depth in Jacobs 2008b.

government offers them a reasonable price (based on the land's designated status) but owners choose to refuse the price, the owners do not have the option of then selling the land in the open market. This authority has been extensively used with regard to productive agricultural land. It would appear to give French planners a strong set of tools to manage urban growth. Yet the situation in southern France (Montpellier, Nîmes) suggests that in practice this is not the case. For a complex set of reasons, owners of peri-urban agricultural land appear to be behaving analogously to American landowners in the same situation. They are pressuring political authorities to change land designations and increasingly asserting the primacy of their property rights over a regionally defined public good in order to capture potential nonagricultural land value.

The situation in Norway is similar. While Norway, like France, has a strong tradition of private property rights, it also has a strong tradition of governmental planning of land and natural resources, as well as a well-established set of social institutions for common access to rural and natural land. Yet, in 2006 interviewees spoke of tumultuous changes in Norwegian attitudes and policy toward private property and resulting changes in the relationship between the individual and the state over property. These changes are being pushed by the decline (and expected continued decline) of government support for agriculture and the relatively newly found wealth of Norwegian families. At the same time that there is a change in state policy toward agriculture, there is an increasing demand for rural land for recreational purposes by Norwegians and others. One way a Norwegian landowner can make money from a land resource is to sell it to urban Norwegians (and continental Europeans) who have the resources to acquire it.

The status of private property rights in Norway thus has to be understood on 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-based compensation as it is understood in the United States. However, at the informal level, bureaucrats, specialists, activists, and academics believe that a fundamental change is under way in Norway. While the change 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 their position in the past. What direction this trend might take and how much the change would evolve is unclear. Some interviewees suggested that they would not be surprised to see the introduction of a form of U.S.-style regulatory takings in the not-too-distant future.

Will these social transformations lead to revision of European law to become more American in form? There is a great deal of debate about this. I believe the answer is that it will (Jacobs 2008a, 2009). The way European law functions and the social pressures that are being brought upon it will create a situation analogous to the way American law functions, despite the fact that the two legal systems are rooted in two different legal traditions (Jacobs 2008a). In addition, the way the European Court of Human Rights is beginning to engage Article 1, Protocol 1 of the European Convention on Human Rights (analogous to the tak-

ings clause of the U.S. Constitution) is providing individuals, such as in France and Norway, with a vehicle to challenge the provisions of national law and administration (Jacobs 2009). The net result is likely to be essentially the same functioning of both legal systems in terms of the rights of the individual, the rights of government, and the relationship between the two.

The U.S. experience is more complex for developing and transition countries, and the situation seems far removed from many of them. For example, the United States is a country with, *inter alia*, high levels of private land ownership; low levels of communal, tribal, and common land tenure; a system of law and law enforcement that is well developed and generally well respected by its citizens; relatively high levels of public sector administrative transparency; a robust private sector market system; high levels of income; a relatively high standard of living; and little explicit tribal or ethnic strife.

Yet, several key elements of the U.S. experience are worth noting, including the following:

- The role of government as an active manager of private property rights comes about because of increasing urbanization, increasing market activity, and increasing threats to public health, safety, and welfare. These conditions are now global in scope and partially explain why countries around the world look to the United States for lessons from its experience.
- The appropriate balance of private property rights and public activity (through, for example, regulation) is never fixed or settled; it is continually renegotiated as a function of changing social, economic, and technological conditions.
- Social conflict over private property rights is never over; it is a continuous process precisely because of the proxy role of private property rights in social dialogue.

I have been privileged to work in several transition and developing countries in the last two decades, among them Poland (1991), Albania (1994–1996, 2001), Kenya (1996), Zimbabwe (2001–2003), and South Africa (2001–2002), and of participating in ongoing training programs for mid-career, mid-level professionals and appointed and elected officials from transition and developing countries through the Land Tenure Center of the University of Wisconsin–Madison (1991–present), the International Center for Land Policy Studies and Training of Taiwan (1994–2008), and the Institute for Housing and Urban Development Studies, Erasmus University Rotterdam, The Netherlands (2006–2008). What seems clear to me from these experiences is the misunderstanding of the U.S. situation from the perspective of transition and developing countries.

First, there is often a belief that creation of social and legal institutions for private property rights will, by themselves, create conditions for functioning markets, robust economic development, and responsible and transparent democratic governance. Conversely, there is often limited understanding of how property

rights are shaped by the particular historical and cultural experiences of the United States and how current conditions have evolved over more than two centuries. So, for example, in Albania it became clear to those of us associated with the Land Tenure Center that the creation of private property rights was woefully insufficient absent a parallel legal system in which lawyers and jurists had a shared understanding of the legal and social role of private property rights. Without this, property rights creation, transfer, and transformation could seem as arbitrary as it had under the prior communist regime.

Also, there is an often naive misunderstanding that private property is about rights but not about responsibilities. Throughout Central and Eastern Europe soon after the political transition of the early 1990s, new owners were clear about what they wanted to have, and equally clear about not wanting to have to think or function within a social and collective context (often as a reaction to the forced collective behavior of the prior decades). The advantages of private property were clear to all; the need to constrain their behavior with regard to that property was not at all evident. Similarly, reformers in South Africa expected a widespread distribution of property post-apartheid to address a wide range of social justice and economic development problems. But they have not appeared to have anticipated the push back from existing (white) owners of private property and the legacy of ethnic and tribal conflict that would make the distribution of property contentious. All in all, the experience of the post-Berlin Wall, post-Soviet Union world in this last decade and a half is that private property is not necessarily the singularly magical key that some thought it could be.

The developed, transition, or developing countries should not see the United States as a cowboy country with strong, unregulated private property, or as a country with strong social consensus about the balance of individual and social rights in property, or as a country with clearly resolved principles for how to manage this balance of rights. It is important to keep in mind that the United States has a strong cultural and historical tradition that promotes and respects private property, a relatively weak legacy of government intervention with private property rights, and a system of governmental planning and policy implementation oriented toward devolution and action by local government. While there is much to learn from the U.S. experience, the international community needs to understand the United States as a place where the social value of private property rights blunts public action and fuels substantial social conflict and public and administrative behavior (Fischel 2001; Molotch 1976), and that there is every reason to expect private property rights to continue to be influenced by these factors in the immediate future.

REFERENCES

- Adams, John. 1851 (1790). Discourses on Davilia, A series of papers on political history. In *The works of John Adams*, vol. 6, ed. Charles Francis Adams. Boston: Little, Brown.

- Alexander, Gregory S. 2006. *The global debate over constitutional property*. Chicago: University of Chicago Press.
- Bethell, Tom. 1998. *The noblest triumph: Property and prosperity through the ages*. New York: St. Martin's Press.
- Bosselman, Fred P., and David Callies. 1971. *The quiet revolution in land use control*. Washington, DC: U.S. Government Printing Office.
- Bosselman, Fred, David Callies, and John Banta. 1973. *The taking issue: An analysis of the constitutional limits of land use control*. Washington, DC: U.S. Government Printing Office.
- Brands, H. W. 2000. *The first American: The life and times of Benjamin Franklin*. New York: Anchor Books.
- Brick, Philip D., and R. McGreggor Cawley, eds. 1996. *A wolf in the garden: The land rights movement and the new environmental debate*. Lanham, MD: Rowman and Littlefield.
- Daniels, Tom, and Deborah Bowers. 1997. *Holding our ground: Protecting America's farms and farmland*. Covelo, CA: Island Press.
- Deal, Carl. 1993. *The Greenpeace guide to anti-environmental organizations*. Berkeley, CA: Odonian Press.
- Deininger, Klaus. 2003. *Land policies for growth and poverty reduction*. A World Bank Policy Research Report. Washington, DC: The World Bank and New York: Oxford University Press.
- de Soto, Hernando. 2000. *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*. New York: Basic Books.
- Ely, James W., Jr. 1992. *The guardian of every other right: A constitutional history of property rights*. New York: Oxford University Press.
- Emerson, Kirk, and Charles R. Wise. 1997. Statutory approaches to regulatory takings: State property rights legislation issues and implications for public administration. *Public Administration Review* 57(5):411–422.
- Epstein, Richard A. 1985. *Takings: Private property and the power of eminent domain*. Cambridge, MA: Harvard University Press.
- Erp, Sjeff van. 2006. European and national law: Osmosis or growing antagonism? Sixth Walter van Gerven Lecture. Leuven, Belgium: Leuven Centre for a Common Law of Europe. <http://ssrn.com/abstract=995979>.
- Fischel, William A. 2001. *The homevoter hypothesis: How home values influence local government taxation, school finance, and land-use policies*. Cambridge, MA: Harvard University Press.
- Folsom, Robin E. 1993. Executive order 12,630: A president's manipulation of the Fifth Amendment's just compensation clause to achieve control over executive agency regulatory decisionmaking. *Boston College Environmental Affairs Law Review* 20(4):639–697.
- Franklin, Benjamin. 1907 (1789). Queries and remarks respecting alterations in the Constitution of Pennsylvania. In *The writings of Benjamin Franklin*, vol. 10, ed. Albert H. Smith. London: Macmillan.
- Fukuyama, Francis. 1989. The end of history? *The National Interest* 16 (Summer):3–18.
- Gates, Paul W. 1968. *History of public land law development*. Washington, DC: U.S. Government Printing Office.
- Gottlieb, Alan M., ed. 1989. *The wise use agenda*. Bellevue, WA: The Free Enterprise Press.

- Hamilton, Alexander, James Madison, and John Jay. 1961 (1788). *The Federalist papers*. New York: Mentor Books.
- Huntington, Samuel P. 1997. *The clash of civilizations and the remaking of world order*. New York: Touchstone.
- Jacobs, Hannah. 2007. Searching for balance in the aftermath of the 2006 takings initiatives. *Yale Law Journal* 116(7):1518–1566.
- Jacobs, Harvey M. 1995. The anti-environmental, “wise use” movement in America. *Land Use Law and Zoning Digest* 47(2):3–8.
- . 1998a. The impact of state property rights laws: Those laws and my land. *Land Use Law and Zoning Digest* 50(3):3–8.
- . 1998b. The “wisdom,” but uncertain future, of the wise use movement. In *Who owns America? Social conflict over property rights*, ed. Harvey M. Jacobs, 29–44. Madison: University of Wisconsin Press.
- . 1999a. Fighting over land: America’s legacy . . . America’s future? *Journal of the American Planning Association* 65(2):141–149.
- . 1999b. *State property rights laws: The impacts of those laws on my land*. Policy Focus Report. Cambridge, MA: Lincoln Institute for Land Policy.
- . 2003. The politics of property rights at the national level: Signals and trends. *Journal of the American Planning Association* 69(2):181–189.
- . 2006. The “taking” of Europe: Globalizing the American ideal of private property? Working paper, Lincoln Institute of Land Policy, Cambridge, MA.
- . 2007. New actions or new arguments over regulatory takings? *Yale Law Journal Pocket* 117:65–70. <http://yalelawjournal.org/2007/09/16/jacobs.html>.
- . 2008a. The future of the regulatory taking issue in the U.S. and Europe: Divergence or convergence? *Urban Lawyer* 40(1):51–72.
- . 2008b. L’engrenage de la croissance urbaine: La place de la propriété dans la planification urbaine (The machinery of urban growth: The role of property in the planning process). *Études Foncières* 132:12–16.
- . 2009. An alternative perspective on U.S.-European property rights and land use planning: Differences without any substance. *Planning and Environmental Law* 61(3):3–12.
- Kayden, Jerold S. 2002. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*: About more than moratoria. *Land Use Law and Zoning Digest* 54(10):3–5.
- . 2004. Charting the constitutional course of private property: Learning from the 20th century. In *Private property in the 21st century*, ed. Harvey M. Jacobs, 31–49. Northampton, MA: Edward Elgar.
- Locke, John. 1952 (1690). *The second treatise of government*, ed. T. P. Peardon. Indianapolis, IN: Bobbs-Merrill Educational Publishers.
- Marzulla, Nancie G. 1996. Property rights movement: How it began and where it is headed. In *A wolf in the garden: The land rights movement and the new environmental debate*, ed. P. D. Brick and R. McGreggor Cawley, 39–58. Lanham, MD: Rowman and Littlefield.
- McCloughry, John. 1975. The new feudalism. *Environmental Law* 5(3):675–702.
- . 1976. Farmers, freedom, and feudalism: How to avoid the coming serfdom. *South Dakota Law Review* 21(3):486–541.
- Meltz, Robert, Dwight H. Merriam, and Richard M. Frank. 1999. *The takings issue: Constitutional limits on land-use controls and environmental regulation*. Washington, DC: Island Press.

- Minitzer, Richard. 1994. You just can't take it anymore: America's property rights revolt. *Policy Review* 70:40–46.
- Molotch, Harvey. 1976. The city as a growth machine: Toward a political economy of place. *American Journal of Sociology* 82(2):309–322.
- Moss, Elaine, ed. 1977. *Land use controls in the United States: A handbook on the legal rights of citizens by the Natural Resources Defense Council, Inc.* New York: Dial Press/James Wade.
- Nelson, Arthur C., and Casey J. Dawkins. 2004. *Urban containment in the U.S.: History, models, and techniques for regional and metropolitan growth management.* Planning Advisory Service Report 520. Chicago: Planners Press.
- New York Times*. 2008. Cuba to allow thousands to own homes. April 12 (national edition):A9.
- Pollot, Mark L. 1989. The effect of the federal takings executive order. *Land Use Law and Zoning Digest* 41(5):3–7.
- Reid, T. R. 2004. *The United States of Europe: The new superpower and the end of American supremacy.* New York: Penguin.
- Ring, Ray. 2006. Taking liberties. *High Country News*, July 24. http://www.hcn.org/servlets/hcn.Article?article_id=16409.
- Roddewig, Richard J., and Christopher J. Duerksen. 1989. *Responding to the takings challenge: A guide for officials and planners.* Planning Advisory Service Report 416. Chicago: American Planning Association.
- Salkin, Patricia E. 2001. *Trends in land use law from A to Z: Adult uses to zoning.* Chicago: American Bar Association.
- Schlatter, Richard. 1951. *Private property: The history of an idea.* New Brunswick, NJ: Rutgers University Press.
- Schleuning, Neala. 1997. *To have and to hold: The meaning of ownership in the United States.* Westport, CT: Praeger.
- Scott, Mel. 1969. *American city planning since 1890.* Berkeley: University of California Press.
- Scott, William B. 1977. *In pursuit of happiness: American conceptions of property from the seventeenth to the twentieth century.* Bloomington: Indiana University Press.
- Thallam, Satya. 2008. 2008 report—International property rights index. Washington, DC: Property Rights Alliance. [http://www.internationalpropertyrightsindex.org/UserFiles/File/022508ot-report%20\(2\).pdf](http://www.internationalpropertyrightsindex.org/UserFiles/File/022508ot-report%20(2).pdf).
- Treanor, William Michael. 1995. The original understanding of the takings clause and the political process. *Columbia Law Review* 95(4):782–887.
- Turner, Frederick Jackson. 1893. The significance of the frontier in American history. *Report of the American Historical Association*, 199–227.
- Yandle, Bruce, ed. 1995. *Land rights: The 1990's property rights rebellion.* Lanham, MD: Rowman and Littlefield.