

The Future of the Regulatory Takings Issue in the United States and Europe: Divergence or Convergence?

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ENGLAND AND THE UNITED STATES HAVE FAMOUSLY been described as “two countries separated by the same language.”¹ In a similar way, the United States 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 stated purpose of this article is to explore the future of property in the United States 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 United States and Europe is, in fact, divergent. Instead, I argue that until the early part of the twentieth century, less than 100 years ago, property and its treatment were essentially similar in the United States and Europe; that is, the American treatment of property under regulatory takings was, in fact, very European. It was the United States that changed its perspective—not the Europeans. Second, I explore the likely future of

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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 T.R. REID, *THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY 1* (Penguin Books 2004). In modern times it is a concept that goes back to a 1946 speech by Winston Churchill at the University of Zurich, a book by EDOUARD HERRIOT, *THE UNITED STATES OF EUROPE* (The Viking Press 1930) (translated by Reginald J. Dingle), a long-standing member of the French cabinet, and known to have been used by Victor Hugo as early as 1849. See Wikipedia, *The United States of Europe*, http://en.wikipedia.org/wiki/United_States_of_Europe (last visited Dec. 15, 2007) (sub-section on “Origin of the Name”).

regulatory takings in the United States, especially in the context of the 2002 and 2005 United States 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 twenty-first century will bring Europe and the United States into convergence or divergence over regulatory takings. Will Europe and the United States continue to be separated by the same language?

However, to begin I first provide some definitions and contextual material.

I. Regulatory Takings in the United States—

A Definition, Its Development, Evolution, and Status

Regulatory takings is a United States 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.³ 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 takings originates in the so-called Takings Clause of the Fifth Amendment of the Bill of Rights of the United States Constitution—“nor shall private property be taken for public use, without just compensation.”⁴ The origin and role of this clause in the United States’ 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.⁵ And yet, the debates that led to the Declaration of Independence

3. There is a large amount of diverse and divisive literature on the doctrine of regulatory takings. The concept emerges from the United States Supreme Court’s decision in *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922). See, e.g., Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction*, 17 VT. L. REV. 647 (1993); WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (Harvard University Press 1995); STEVEN J. EAGLE, *REGULATORY TAKINGS* (LexisNexis 2005) (1996).

4. U.S. CONST. amend. V.

5. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 42 (Oxford University Press 1992); see also Harvey M. Jacobs, *Fighting over Land: America’s Legacy . . . America’s Future?*, 65 J. AM. PLANNING ASS’N 2, 141–43 (1999) [hereinafter Jacobs 1999a]; Harvey M. Jacobs, *The “Taking” of Europe: Globalizing the American Ideal of Private Property?*, 6–9 (Lincoln Institute of Land Policy, Working Paper No. 06HJ1, 2006) [hereinafter Jacobs 2006].

in 1776 and the United States 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 of Independence 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 (for Americans) now famous phrase: life, liberty, and the pursuit of happiness. Eleven years later, when America's founders met to revise the Articles of Confederation and draft the United States 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.⁶

This lack of any explicit statement about property was "rectified" in the Bill of Rights. Here, the Takings 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.⁷

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 at how their property was often expropriated absent compensation for dubious public purposes.⁸ 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.⁹

But the scope of the Takings 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. Taking was not about government regulation and its

6. See U.S. CONST. amend. V.

7. See *id.*

8. See ELY, JR., *supra* note 5, at 112–15.

9. See FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* 102–04 (Government Printing Office 1973); ELY, JR., *supra* note 5, at 43; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 788–91 (1995).

impacts. It was not designed to be about this, and it did not function in this way.¹⁰

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.¹¹ These actions by government were seen as normal and appropriate.¹² But regulation of private land was not something that was very present in the American political or legal consciousness in the eighteenth and nineteenth centuries. Instead, the focus was on continental settlement—America’s “manifest destiny.”¹³ 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 nineteenth century, regulatory takings was not a concept that existed in American jurisprudence or American policy practice.¹⁴ Where government regulated land, it was free to do so for various reasons, and the individual, while he might be aggrieved and seriously burdened by the regulation, had little recourse.¹⁵ This changed in the early part of the twentieth century, when American ideas about property and takings diverged from those of our European cousins.

The early part of the twentieth century was a time of great change in the United States. There was both substantial immigration (to America’s eastern coastal cities) and internal migration (from rural to urban areas).¹⁶ In addition, there was substantial industrialization, much of it clustered in the same cities that were experiencing migration and immigration.¹⁷ The net result was a situation where the physical landscapes of America’s urban areas were changing rapidly, and the conditions within these cities often were deteriorating seriously, especially in those areas where migrants, immigrants, and industry clumped together.¹⁸ The response of some of these cities was to pass regulations to manage

10. See BOSSELMAN, CALLIES & BANTA, *supra* note 9, at 141–42; Jacobs 1999a, *supra* note 5, at 142–43.

11. See Treanor, *supra* note 9, at 789–90.

12. See *id.* at 791.

13. *Id.* at 791–93.

14. See BOSSELMAN, CALLIES & BANTA, *supra* note 9, at 105–06; Treanor, *supra* note 9, at 788.

15. See *Hadacheck v. Sebastian*, 239 U.S. 394, 411–12 (1915).

16. See MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890* 8–9 (University of California Press 1969).

17. See *id.* at 27–32.

18. See *id.* at 6–7.

public health and safety conditions.¹⁹ 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.

At first, the answer was simply and strongly no. Early in the twentieth century, the United States Supreme Court affirmed the right of government to regulate absent any obligation for compensation.²⁰ 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.²¹

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

The key case in this regard is that of *Pennsylvania Coal Co. v. Mahon*²² in 1922. It was here that the Court issued its famous dictum defining the twentieth century concept of regulatory takings. 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 that affect private property, the Court said: “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.”²³ 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 taking (and assuming *prima facie* that the regulation is being developed for a public use) then under the 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

19. *See id.* at 7.

20. *Hadacheck*, 239 U.S. at 410.

21. *Id.*

22. 260 U.S. 393 (1922).

23. *Id.* at 415.

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 takings; 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 whether it went too far.²⁴ After much internal discussion, the Court found in *Euclid* that, in fact, zoning was a reasonable exercise of the police power; zoning did not violate the protections of the Takings Clause or other related protections in the United States Constitution.²⁵

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 Takings Clause itself during the 18th and 19th centuries, the new regulatory takings dictum established in *Pennsylvania Coal* 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.²⁶ Broadly speaking, economic and social conditions were about development, not its restriction.²⁷ This changed with the first Earth Day. For a number of reasons (which will not be explored here),

24. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

25. *See id.* at 396.

26. *See* Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning From the 20th Century*, in PRIVATE PROPERTY IN THE 21ST CENTURY 31 (Harvey M. Jacobs ed., 2004).

27. There are many discussions of the national, state, and local focus on growth and development during the first two-thirds of the 20th century. *See, e.g.*, ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (Basic Books 1987); Margaret Weir, *Planning, Environmentalism, and Urban Poverty: The Political Failure of National Land-Use Planning Legislation*, in THE AMERICAN PLANNING TRADITION: CULTURE AND POLICY 193 (Robert Fishman ed., Woodrow Wilson Center Press 2000).

beginning around 1970, government at the federal, state, and local levels in the United States began to engage in more regulation, and this regulation imposed itself more strongly upon individuals and their property rights.²⁸ It was because of this that the limitations established in *Pennsylvania Coal*—the doctrine of regulatory taking—emerged as an important part of the legal, policy, and administrative discourse of the final third of the twentieth century and this first decade of the twenty-first century in the United States.

What was the legal status of the twentieth century discourse? Between 1978 and 1992 the United States 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.²⁹ 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 articulated in *Pennsylvania Coal* had been crossed. Of the cases decided in this period, one that received a great deal of attention was *Lucas v. South Carolina Coastal Council*.³⁰ 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 where compensation was owed the landowner.³¹

The outcome of these cases was ambiguous, however. As commonly understood by the 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.³²

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 United States.

28. See LAND USE CONTROLS IN THE UNITED STATES: A HANDBOOK ON THE LEGAL RIGHTS OF CITIZENS BY NATURAL RESOURCES DEFENSE COUNCIL, INC. 2 (Elaine Moss ed., The Dial Press/James Wade 1977) [hereinafter LAND USE CONTROLS IN THE UNITED STATES].

29. Some of the most prominent and discussed examples include the following: *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

30. 505 U.S. 1003 (1992).

31. *Id.* at 1019.

32. See, e.g., Richard J. Roddewig & Christopher J. Duerksen, *Responding to the Takings Challenge: A Guide for Officials and Planners*, 416 AM. PLAN. ASS'N PLAN. ADVISORY SERVICE REP. 39 (1989) (discussing the impact on planning practice of some of the then-new cases cited *supra* note 29).

II. Regulatory Takings 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 United States. For example, the French Revolution occurred only thirteen years after the American Revolution (in 1789), and access to and protection of rights in property were central themes of this mass social movement.³³ As in the American Revolution, the French revolutionaries were strongly influenced by political philosophers such as John Locke and Jean-Jacques Rousseau.³⁴ 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 was directly parallel to the Takings Clause of the Fifth Amendment of the United States Bill of Rights.

In the Declaration of the Rights of Man and Citizen of August 1789, the final of the seventeen rights states: “Property 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.”³⁵ All the structural elements of the Takings Clause in the Fifth Amendment to the United States 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.”³⁶ When these conditions are met, then the citizen is entitled to “the condition of a just compensation in advance.”³⁷ 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 and Citizen seems stronger than that offered by the Takings Clause in the Fifth Amendment.³⁸

But, as in the United States, this broadly written constitutional guarantee requires specification. In France, as in the United States, it comes

33. See Philip Booth, *Promoting Radical Change: The Loi Relative à la Solidarité et au Renouveau Urbains in France*, 11 EUR. PLAN. STUD. 949, 951 (2003).

34. See Stanford University, <http://plato.stanford.edu/entries/locke> (last visited Dec. 20, 2007).

35. THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY 77–79 (Lynn Hunt trans., ed., 1996) [hereinafter Hunt].

36. *Id.*

37. *Id.*

38. This is because just compensation is to be paid “in advance.”

through the legal system. But the legal system in France is different than that of the United States. Whereas the United States, 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.³⁹ And much of the continent uses a civil law system derived from the Napoleonic Code of 1804.⁴⁰

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.⁴¹ Judicial decisions, specifically precedent as established by prior decisions, do not serve the role that they do in common law systems.⁴² 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.⁴³

The Napoleonic Code draws strongly from its interpretation of Roman law.⁴⁴ 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.”⁴⁵ 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.”⁴⁶

The practical implication of the balancing of these rights is similar to the legal experience of the United States pre-1922. That is, the right of property protection in the Declaration of the Rights of Man and Citizen is understood as a right guaranteed against unreasonable expropriation.⁴⁷ It does not, however, establish a right against government regulation.⁴⁸ So, in France, as in much of Europe, government has had and continues

39. See Sjeff van Erp, *European and National Property Law: Osmosis or Growing Antagonism?* 3–4 (Dec. 21, 2006) (Working Paper presented at the Sixth Walter van Gerven Lecture organized by the Centre for a Common Law of Europe of the University of Leuven), available at <http://ssrn.com/abstract=995979>.

40. See 7 WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005), at 162–63.

41. See 2 WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005), at 342–43.

42. See *id.*

43. See II LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL AND CULTURAL ENCYCLOPEDIA (2002), at 551. See also JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968), reviewed in 13 AM. J. LEG. HIST. No. 2., 166, 167 (Apr. 1969).

44. See 7 WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005), at 162–63.

45. Philip Booth, *From Property Rights to Public Control: The Quest for Public Interest in the Control of Urban Development*, 73 TOWN PLAN. REV. 153, 155 (2002).

46. *Id.* at 155.

47. See Hunt, *supra* note 35, at 77–79.

48. See *id.*

to have the right to regulate property, often onerously from a United States perspective, under its presumed right of imperium.⁴⁹ 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 individuals to curb their individualistic expectations).⁵⁰ What has not happened in Europe is something parallel to the 1922 *Pennsylvania Coal* decision. Neither on a country nor European basis has a legal, legislative, or policy decision been forthcoming that articulates a concept of regulatory takings. 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.⁵¹

III. The Future of Regulatory Takings in the United States

As discussed above, the concept of regulatory takings was articulated in 1922. For most of fifty 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 1970.⁵² 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.⁵³ 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 United States Supreme Court returned its attention to the takings issue. In the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,⁵⁴ 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

49. See Rachele Alterman, *The Challenge of Farmland Preservation: Lessons from a Six-Nation Comparison*, 63 J. AM. PLAN. ASS'N 220, 232–33 (1997); Maître Philippe Dubois, *France*, in PROPERTY IN EUROPE: LAW AND PRACTICE 179 (A. Hurndall ed., 1998).

50. See Jacobs 2006, *supra* note 5, at 33–35.

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

52. See LAND USE CONTROLS IN THE UNITED STATES, *supra* note 28, at 40–43.

53. See *id.*

54. 535 U.S. 302 (2002).

action by government went too far.⁵⁵ 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.⁵⁶ In other words, planning and government regulatory action received a strong green light. As Kayden notes, the Court's analysis and opinion

exhibits a genuine appreciation for land-use planning. . . . [L]and-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.⁵⁷

Then, in June 2005, the Court issued its closely watched decision in the case of *Kelo v. City of New London*.⁵⁸ Pressed by property rights advocates,⁵⁹ 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*.⁶⁰ 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.⁶¹ Unlike the earlier *Berman* case, the city did not even bring forth a pretense of classifying the property slated for takings as blighted.⁶² By a one-vote margin, the Court affirmed the city's right to engage in this form of taking.⁶³

The *Kelo* case set off a firestorm of popular protest and state-based legislative reactions.⁶⁴ Nonetheless, what is interesting for my purposes is what it says about the legal state of regulatory takings in the United States. In 1922 with *Pennsylvania Coal*, the Court established the concept of regulatory takings. Yet despite this, the place of regulatory takings

55. *Id.* at 325–26.

56. *See id.* at 337–38; *see also* Jerold S. Kayden, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency: About More Than Moratoria*, 54 *LAND USE L. & ZONING DIG.* 1, 3–5 (2002).

57. Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th Century*, in *PRIVATE PROPERTY IN THE 21ST CENTURY* 31, 43–44 (Harvey M. Jacobs ed., 2004).

58. 545 U.S. 469, 480–81 (2005).

59. *See* the sub-section that immediately follows.

60. 348 U.S. 26 (1954).

61. *Kelo*, 545 U.S. at 474–75.

62. *Id.* at 475.

63. *Id.* at 490.

64. *See* Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, *N.Y. TIMES*, July 30, 2005, at A1, A10.

in United States law has been limited. The *Pennsylvania Coal* decision says that regulation can be equivalent to a physical taking when it goes too far.⁶⁵ 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, its recent decisions suggest that it is giving up.⁶⁶ Too far is a strong idea in theory, but like the Court's decisions on pornography,⁶⁷ it seems too difficult to specify in advance.

So, for all practical purposes, I assert that the United States has a legal framework for regulatory takings 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 takings, its rhetorical and policy situation is quite different, or at least appears 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 takings.⁶⁸ Various labels, the private property rights movement is a national coalition targeting national, state, and local land use and environmental laws, policies, and programs, such as those for endangered species protection, smart growth, farmland, and wetland protection, etc.⁶⁹ This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective.⁷⁰ 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.⁷¹

65. *Pennsylvania Coal*, 260 U.S. at 415.

66. See *Kelo v. City of New London*, 545 U.S. 469 (2005); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

67. See *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Powell, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

68. See Harvey M. Jacobs, *The Anti-Environmental, "Wise Use" Movement in America*, 47 LAND USE L. & ZONING DIG. 3, 3 (1995) [hereinafter Jacobs 1995]. An early listing of these groups appears in CARL DEAL, *THE GREENPEACE GUIDE TO ANTI-ENVIRONMENTAL ORGANIZATIONS* 23 (Odonian Press 1993).

69. See Jacobs 1995, *supra* note 68, at 3-4.

70. See *id.* at 5.

71. See *id.*

This movement has pursued a multi-level strategy to achieve its objectives—judicial, legislative, policy, and public relations—at all levels of government.⁷² Its most prominent success has been at the level of the American states. For example, since 1991, every state in the United States has considered state-based legislation in support of the policy position of the property rights movement, and twenty-eight states have passed such legislation.⁷³ These states are on both sides of the Mississippi River, they are red and blue states, they extend from Maine to Washington, the Dakotas to Texas, and eleven of these states are 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 thirty-year-old model approach to land use and environmental planning and urban sprawl management.⁷⁴ It was closely watched nationally because of Oregon's role as a leading state in the area of land use and environmental planning.⁷⁵ The November 2004 initiative—Measure 37—passed by a sixty-one percent majority and after several rounds of legal appeals was recently upheld by the Oregon State Supreme Court.⁷⁶ The adoption of the measure by such a strong majority in Oregon (and its judicial affirmation) has emboldened the property rights movement. Its thinking—if it can shape citizen attention and grab citizen support in Oregon, it can do this anywhere.⁷⁷ Parallel efforts are already bubbling throughout the United States.⁷⁸ This has been joined to the popular negative reaction to the United States

72. See Harvey M. Jacobs, *State Property Rights Laws: The Impacts of Those Laws on My Land* (Policy Focus Report, Lincoln Institute of Land Policy) 3, 3–8 (1999) [hereinafter Jacobs 1999b].

73. See Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412 (1997); Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land*, 50 LAND USE L. AND ZONING DIG. 3, 3–8 (1998) [hereinafter Jacobs 1998a]; Jacobs 1999b, *supra* note 72, at 3.

74. See Gordon Oliver, *Oregon on the Cusp: If Oregon's Modern Era Had a Birthday, It Would Be May 29, 1973—The Day the Late Governor Tom McCall Signed Senate Bill 100 Into Law*, PLANNING, Oct. 2004, at 4–9; CONNIE OZAWA, *THE PORTLAND EDGE: CHALLENGES AND SUCCESSES IN GROWING COMMUNITIES* (Island Press 2004); Mitch Rohse, *Oregon's Measure 37: Just or Unjust Compensation*, PLANNING, Oct. 2004, at 6.

75. See OZAWA, *supra* note 74.

76. See *MacPherson v. Dep't of Admin. Serv.*, 130 P.3d 308, 322 (Or. 2006).

77. See Oregonians in Action, <http://www.oia.org> (last visited Nov. 9, 2007) (the website of the advocacy group that put forward Measure 37 in Oregon); see also American Land Foundation, <http://www.amland.us/> (last visited Nov. 9, 2007); PropertyRights.Org, <http://www.propertyrights.org/> (last visited Nov. 9, 2007).

78. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide In Oregon*, WASH. POST, Feb. 28, 2005, at A1.

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.⁷⁹

So what is the likely future of and for regulatory takings in the United States? I believe regulatory takings 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 *Pennsylvania 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.⁸⁰ Despite its rhetorical appeal, I do not believe that the United States Supreme Court will expressly and clearly determine the arena of regulatory takings (from nonregulatory takings).

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.⁸¹ 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.⁸² 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.⁸³ 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.⁸⁴ Instead they are in constant motion, reflective of changing

79. See Jacobs 2006, *supra* note 5, at 6–9.

80. See *Tahoe-Sierra Pres. Council*, 535 U.S. at 335; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

81. For a partial restatement of their perspective on history and theory, see Jacobs 1999a, *supra* note 5, at 142–43. For a widely cited article on the funding basis for the property rights movements' 2006 initiative campaigns run largely in the American West, see Ray Ring, *Taking Liberties*, HIGH COUNTRY NEWS, July 24, 2006, available at http://www.hcn.org/servlets/hcn.Article?article_id=16409.

82. See Emerson & Wise, *supra* note 73, at 413; Jacobs 1999b, *supra* note 72, at 11.

83. Jacobs 1998a, *supra* note 73, at 4; Jacobs 1999a, *supra* note 5, at 145–46.

84. Jacobs 1999a, *supra* note 5, at 146–47.

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.

IV. 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 takings in Europe is both different and more hazy than it is in the United States.

The current European Union draws from the 1992 Treaty of Maastricht.⁸⁵ This treaty itself updates provisions of the 1957 Treaty of Rome, which formerly established the European economic community.⁸⁶ Within the Treaty of Rome, the key provision is Article 222, which states quite simply: “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”⁸⁷

In recent scholarship, Caruso 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.”⁸⁸ Likewise, Gambaro notes that “Article 222 of the EEC Treaty raises a complete bar to the disciplining of real property at the European level. . . .”⁸⁹ 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.⁹⁰ 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.⁹¹ And further, because of history

85. See van Erp, *supra* note 39, at 3–7 (citing the Treaty on European Union (Treaty of Maastricht), Feb. 7, 1992, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001>).

86. See *id.* (citing the Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, available at <http://www.hri.org/docs/Rome57/>).

87. See *id.*

88. Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751, 752 (2004).

89. Antonio Gambaro, *Perspectives on the Codification of the Law of Property: An Overview*, 5 EUR. REV. OF PRIVATE L. 497, 497 (1997).

90. See *id.*

91. See *id.* at 500–01.

and culture, “different legal traditions have not organized their property law schemes around the same group of problems.”⁹² 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.”⁹³

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.⁹⁴ 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.”⁹⁵ It has two parts, addressing land and intellectual property, respectively. 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.⁹⁶

So this provision of the proposed European Constitution appears to copy the content and intent of the United States Takings Clause and the parallel statement in the Declaration of the Rights of Man and Citizen—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”⁹⁷—and says that deprivation of property may occur “in the public interest and in the cases and under the conditions provided for by law.”⁹⁸ Yet what is interesting is that Art. III-425 of the proposed Constitution also says

92. *Id.* at 501.

93. *Id.* at 497.

94. *See* Caruso, *supra* note 88, at 755–58; Gambaro, *supra* note 89, at 498–500.

95. EUR. CONST. art. II-77 (2000), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_01_05_constitution.pdf.

96. *Id.*

97. *Id.*

98. *Id.*

that “[t]he Constitution shall in no way prejudice the rules in Member States governing the system of property ownership.”⁹⁹

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 [European Union] 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.”¹⁰⁰

So, “in the draft [European] Constitutional Treaty, property remains segregated and portrayed as something essentially different, somehow severable from the project of integration.”¹⁰¹ Will this endure? Gambaro thinks so;¹⁰² Caruso is not so sure but ultimately agrees with Gambaro’s assessment.¹⁰³ After parsing the matter, she concludes that property will remain a national, rather than European, matter.¹⁰⁴

But Griffiths, who Caruso draws upon for her analysis, is not so sure.¹⁰⁵ 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.¹⁰⁶ That is, as Griffiths sees it, the commitment by the European Union 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.¹⁰⁷ 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 takings 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 takings. So far, legal decisions

99. EUR. CONST. art. III-425 (2000), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_01_05_constitution.pdf.

100. Caruso, *supra* note 88, at 756 (emphasis in original).

101. *Id.* at 753–54.

102. See Gambaro, *supra* note 89.

103. See Caruso, *supra* note 88, at 756.

104. See *id.* at 758.

105. See Gerwyn Griffiths, *The Bastion Falls? The European Union and the Law of Property*, 8 CONVEYANCING & PROP. L. J. 39 (2003).

106. See *id.* at 39.

107. See *id.* at 41–42.

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 takings (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.¹⁰⁸ The results are fascinating. Under French law, public authorities have both a broad and a strong set of authorities to manage privately owned land.¹⁰⁹ Owners have no basis to claim a regulatory taking, and the public may preempt proposed private land sales.¹¹⁰ But according to public officials, the mood of landowners and the judicial system is undergoing a seismic shift.¹¹¹ Landowners are more willing to challenge local authorities, and courts are more likely to back landowner challenges against local authorities.¹¹² Why? It appears that Griffiths 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.¹¹³

How will this evolve? It is not clear. As in the United States, there are groups advocating a property rights perspective.¹¹⁴ However, unlike in

108. Interview with Jean-Paul Gambier, Chef du Service Foncier, in Montpellier Agglomération (Jan. 31, 2006); Interview with Nicolas Roubieu, Urbaniste—Chef du project SCOT, in Montpellier Agglomération (Jan. 31, 2006); Interview with Eva Bourdat, Chargée de Mission, in Mission Interministérielle d'Aménagement du Littoral, Préfecture de région du Languedoc-Roussillon (Feb. 1, 2006); Interview with Isabel Girault, Directeur, Agence d'Urbanisme et de Développement de la Région Nîmoise, in Nîmes (Feb. 3, 2006).

109. See Maître Philippe Dubois, *France*, in PROPERTY IN EUROPE: LAW AND PRACTICE 181, 198 (1998); Roubieu, *supra* note 108.

110. See Dubois, *supra* note 109, at 198; Roubieu, *supra* note 108; see also Rachele Alterman, *The Challenge of Farmland Preservation: Lessons from a Six-Nation Comparison*, 63 J. AM. PLAN. ASS'N 220, 233 (1997).

111. See Gambier, *supra* note 108; Girault, *supra* note 108.

112. See *id.*

113. See Gambier, *supra* note 108.

114. See Property Rights, Economics and Environment, <http://www.environnement-propriete.org/english/index.htm> (last visited Nov. 11, 2007) (The International Center for Research on Environmental Issues (I.C.R.E.I) has held international (largely European attended) conferences on property rights issues since 1996 and the proceedings are published on this webpage. The following proceedings are of note: DROITS DE PROPRIÉTÉ ÉCONOMIE ET ENVIRONNEMENT, PROPERTY RIGHTS, ECONOMICS & ENVIRONNEMENT (Max Falque & Michel Massenet eds., 1997); DROITS DE PROPRIÉTÉ, ÉCONOMIE ET ENVIRONNEMENT: LES RESSOURCES EN EAU SOUS LA DIR PROPERTY RIGHTS, ECONOMY AND ENVIRONMENT: WATER RESOURCES AND THE SEA (Max Falque & Michel Massenet eds., 2000); MARINE RESOURCES: PROPERTY RIGHTS, ECONOMICS AND ENVIRONMENT (Max Falque, Michael de Alessi & Henri LaMotte eds., 2000); DROITS DE

the United States, 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 for the New Europe seeks to influence policy related to health policy, competition, and especially intellectual property.¹¹⁵

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 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.”¹¹⁶ In many ways, this is reminiscent of the current controversy in the United States.¹¹⁷

But while this assessment provides both the easiest and safest answer to the question of whether the situation is likely to change, it does not seem to me that it is necessarily the only or clear answer. Why not? As in the United States, the debate about the role of property and the rights of landowners vis-à-vis the state is an active one. At the level of theory and activism, there are many who are advancing a position that suggests 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.¹¹⁸ In an increasing number of instances, the individual is being asked to bear a very large burden on behalf of the public.

PROPRIÉTÉ, ECONOMIE ET ENVIRONNEMENT: LES RESSOURCES FONCIERES (PROPERTY RIGHTS, ECONOMICS AND ENVIRONMENT: LAND RESOURCES) (Max Falque ed., 2007) (forthcoming).

115. See Centre for the New Europe, <http://www.cne.org/index.htm> (last visited Nov. 1, 2007).

116. Philip Booth, *Nationalizing Development Rights: The Feudal Origins of British Development Control*, 29 ENV'T & PLANNING B: PLANNING & DESIGN 129, 136 (2002).

117. Scholars such as RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263–273 (Harvard University Press 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.

118. See Property Rights, Economics and Environment, <http://www.environnement-propreite.org/english/index.htm> (last visited Nov. 11, 2007).

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.¹¹⁹ So one of the questions becomes the extent to which changing market conditions (in part pushed by changing policies at the European Union 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.

V. A 21st Century Convergence?

I opened this article with George Bernard Shaw's famous comment about England and the United States—"two countries separated by the same language"—and suggested that in the common understanding something similar is believed to be true for the United States and Europe with regard to property and regulatory takings. However, in this article I suggest that this is an overly simplistic characterization. At least until the early years of the twentieth century, the United States and Europe were joined by the same language when it came to the way the state related to the individual with regard to private property.

Both the United States 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 revolution, upon its success, sought to enshrine a right to property, and as important, a right to private property's protection from the arbitrary and capricious power of the state.

The literal form of these protections is similar in both the Takings Clause of the Fifth Amendment to the United States Constitution and Right 17 of the Declaration of the Rights of Man and Citizen. And for the remainder of the 18th century and the duration of the 19th century, 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

119. See Gambier, *supra* note 108.

regulatory takings; there was no right of protection from regulation. As late as 1915, the United States Supreme Court could assert that “we are dealing with one of the most essential powers of government, one that is the least limitable. . . . [t]he imperative necessity for its existence precludes any limitation upon it. . . . [I]f . . . private interests are in the way, they must yield to the good of the community.”¹²⁰ 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 United States. In 1922, the United States Supreme Court invented the concept of regulatory takings through its now famous phrase: “[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.”¹²¹ For nearly eighty-five years (though actually most pointedly for the last thirty-plus 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 takings, my assessment is that it has more rhetorical and political power than actual legal authority. When United States 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 toward and imposition upon private property rights. This certainly seems to be the lesson from 2002 and 2005 decisions.¹²² Where the concept of regulatory takings 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 twentieth century introduction of a concept of regulatory takings, the legal and political concept of imperium has 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

120. *Hadacheck*, 239 U.S. at 410.

121. *Pennsylvania Coal*, 260 U.S. at 415.

122. See *Tahoe-Sierra Pres. Council*, 535 U.S. 302; *Kelo*, 545 U.S. 469.

property rights advocates in Europe parallel to those in the United States, but their voices do not appear particularly loud, coordinated, or effective.¹²³ 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 statements about basic human rights, landowners may have a cause to argue that the state must lessen the extent of its regulatory actions. 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 is convergence. How? We will see a detailing of regulatory takings in the United States 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 United States 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 takings, but a very limited impact of the idea on the actual mechanisms of governmental decision making, at the supranational, national, and sub-national levels.

123. See Property Rights, Economics and Environment, <http://www.environnement-propreite.org/english/index.htm> (last visited Nov. 11, 2007).