

Planning By Law and Property Rights Reconsidered

Chapter 4 Talking about Property Rights over Tea: Discourse and Policy in the US and Europe

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A radical right has emerged in both the US and in Western Europe. In both regions their discourses and policy agendas are largely the same: smaller government, less regulation, lower taxes, flexible labour markets, job creation, strong borders and anti-immigration. This rhetoric appears to appeal to an increasingly large segment of voters. In the US it has led to the so-called Tea Party Movement and in Europe to the election of right-wing candidates and parties in traditionally social democratic countries such as Sweden and Finland.

A key component of traditional rightist rhetoric is about the foundational basis of land-based property rights to assure political freedoms and the functionality of markets. This argument is rooted in classic political-economy texts from the seventeenth and eighteenth centuries. This rhetoric has the potential to constrain public sector spatial planning – land use, environmental and redevelopment planning and regulatory activities.

This chapter examines the way in which property rights is a part of contemporary rightist discourse in the US and Europe and why similarities and differences exist. Speculation is then offered about what role property rights will play in the future, and how this is likely to affect the opportunity and ability to engage in public sector spatial planning.

A Global Context for Talking about 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:

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capitalism and democracy.¹ The new countries of Central and Eastern Europe and 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 integrated into 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 centred on private property. Private property was offered as 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 (for example Alexander 2006). 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). 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 (Jackson 2011).

As the global discussion about private property rights has accelerated, one focus has become the status of property rights in the developed countries themselves. My purpose here is to understand the changing discourse about property rights and its likely impact on spatial planning. Prior research suggests that such advocacy has been influential, in both the US and Europe (for example Jacobs 2003, 2008a, 2009).

The American Tea Party (and its European Counterparts)

The American Tea Party movement burst into politics in 2009. They are broadly recognized as a conservative movement that promotes an agenda focused on reduced government spending, opposition to taxation, reducing the federal deficit and adhering to an originalist interpretation of the US Constitution (Wikipedia 2011b).

In a recent essay about the implications of the Tea Party for American foreign policy, Mead (2011: 32) notes that while 'there are reasons to doubt the movement's long-term ability to dominate politics across the rest of the country ... the Tea Party movement has clearly struck a nerve in American politics'. Mead (2011) presents the Tea Party as the latest manifestation of a form of American populism called Jacksonianism (after the 1830s American president, Andrew Jackson).

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

Philosophically he ties them to the Scottish Enlightenment – the idea that the average person (in contrast to elites) can discern the truth in public, religious and scientific affairs.

Who are the adherents of this movement? A 2010 national poll found them to be older, more likely to be men, better educated and with higher incomes than the average American. They describe themselves as politically conservative and they attend religious services more regularly than the average American; more than half of them keep a gun in their home. Overall they are both more pessimistic about America's future and angrier than the average American about the current state of public policy, the economy and social affairs. A very large majority of Tea Party supporters believe that their views reflect the views of most Americans, though this does not appear to be the case (Montopoli 2010).

While the Tea Party is largely focused on economic issues, they do pay attention to some of the social issues long associated with the American political right: illegal immigration, abortion, same-sex marriage and gun control. In addition, they are strongly opposed to the healthcare law adopted under President Obama's leadership. Two other prominent issues for them are global warming and cap and trade. Tea Party adherents doubt the existence of global warming and oppose the implementation of an emission trading system to manage air pollution (Montopoli 2010; Wikipedia 2011b).

Mead notes that the populist tendency represented by the Tea Party has always had a land-based element associated with it

[T]he demand of Jacksonian America for cheap or, better, free land in the nineteenth century led to the Homestead Act, which allowed millions of immigrants and urban workers to start family farms. It also led to the systematic and sometimes genocidal removal of Native Americans from their traditional hunting grounds and a massively subsidized 'farm bubble' that helped bring about the Great Depression. Populist hunger for land in the twentieth century paved the way for an era of federally subsidized home mortgages and the devastating burst of the housing bubble. (2011: 33)

While Mead begins his examination wondering about 'the movement's long-term ability to dominate politics across the rest of the country' (2011: 32), he ends on a more sombre note. 'If the Tea Party movement fades away, other voices of populist protest will take its place. American policymakers ... cannot do their jobs well without a deep understanding of what is one of the principal forces in American political life' (Mead 2011: 44).

The situation in Europe is similar in that there has been a parallel rise of conservative political forces, and these forces are described and understood as having a populist basis. The National Front in France, Lega Nord in Italy, the FPÖ (Freiheitliche Partei Österreichs – Freedom Party of Austria) and Jörg Haider in Austria are examples that have been studied and broadly discussed in the academic and popular literature (see, respectively, Mavet 2003; Woods 2009

and Höbelt 2003; and more generally Schain et al. 2002 and Ignazi 2003). Added to this are the more recent success of nationalistic conservatives in Sweden and Finland in the 2010 and 2011 elections, the rebirth of the National Front in France under Marine Le Pen, and the expected success of other, similar parties throughout northern Europe (Wikipedia 2011a; *The Economist* 2011b, 2011a; Shorto 2011). In all these cases, some combination of the substantive issues parallel to those fuelling the American Tea Party have been at the root of the conservative turn – a mix of social and fiscal concerns, for example about immigration, citizenship, government spending and debt.²

Discourse and Policy in the US

Discourse about property rights is long-standing in the US. The role and place of property rights was of intense interest and debate among the founders. For a variety of reasons – philosophical, historical and contemporary – there was a strong sense that the right to hold and control property was an important element of a democratic governmental structure.

First there was the reality of the settlement process. Colonial America was settled by Europeans searching for religious and political freedom (the rights guaranteed in the First Amendment of the Constitution's Bill of Rights) and for access to land (Ely 1992). In Europe in this period an elite owned most of the land, and the prospects for the ordinary person to obtain freehold ownership was small. America offered an alternative. America was a place where any white male immigrant could, in theory, get ownership of land, and with that land as capital make a future for themselves. America was, quite literally, the land of opportunity.

During America's colonial era John Locke influenced the founders' ideas about ownership and democracy. One 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 (for example 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. In the debate over the ratification of the proposed US Constitution, James Madison wrote in *Federalist* No. 54 in 1788, 'government is instituted no less for the protection of property than of the persons of individuals' (Hamilton, Madison and Jay 1961: 339). Others, including Alexander Hamilton and John Adams concurred. Adams (1851 [1790]: 280) noted that 'property must be secured or liberty cannot exist. The moment the idea is admitted into society that property

² Depending on the country and the situation particular issues have more or less prominent.

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'.

Thomas Jefferson left modern Americans with an enduring image of this perspective – that of the yeoman farmer. According to Jefferson, because the yeoman farmer owned his own farm, and could produce food and fuel for himself and his family, he was obligated to no one – he was literally free to exercise his political views as a democrat. For Jefferson it was the very act of ownership that created the conditions that allowed democracy to exist.

But this view of the relationship of property to democracy was not unchallenged. Also drawing from Locke, other founders saw the need for private property ownership to bow to social needs. Benjamin Franklin was perhaps the most articulate proponent of a counter-position to that of Madison, Adams, Hamilton and others. For example, in the debate over the ratification of the Pennsylvania state constitution, Franklin (1907 [1789]: 59) said: 'Private property is a creature of society, and is subject to the calls of the society whenever its necessities require it, even to the last farthing'. Franklin did not see property rights as sacrosanct.³ He viewed as legitimate the public's right to create, re-create, take away and regulate property as it best served public purposes.

Private property was thus a confusing issue for the founders. How were these disparate positions resolved? With ambiguity. In 1776 the Declaration of Independence promised each (free, white, male) American 'life, liberty and the pursuit of happiness'. What is striking about this phrase is that Thomas Jefferson, the Declaration's author, borrowed it from Locke. Locke's phrase was life, liberty and property. This is what Jefferson wanted the Declaration to say, but he did not hold sway.

In 1787 the US Constitution was adopted. What did it say about land-based private property? Nothing!⁴ It was not until 1791 with the adoption of the Bill of Rights that the now infamous and contentious so-called 'takings' phrase appeared as the closing clause to the Fifth Amendment to the Constitution: 'nor shall private property be taken for public use, without just compensation'.

³ These sentiments by Franklin were not isolated. As noted by Brands (2000: 623) 'Franklin took a striking socialistic view of property.' Brands (2000: 623) provides these other 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.'

⁴ The US Constitution does speak to private property, but just not about land-based private property. What the Constitution recognizes are slaves as property under Section 2 of Article IV, where it establishes the right of owners to have escaped slaves returned to them. Also under Section 2 of Article III, the Constitution establishes a procedure for how conflicting claims to state-based land grants by individuals would be resolved

With the adoption of this phrase, the Constitution formally recognized the existence of private property, an action denoted as taken (commonly denoted as takings), a realm of activity which is public use, and a form of payment specified as just compensation. Where private property exists, it may be taken (for example seized by the government without the landowner's permission) but only for a denoted public use, and when just compensation is provided. If any of these conditions are not met, then 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 is a public use, and what makes up just compensation.

For over 100 years the place of private property in American democracy and the exact meaning of the takings clause were largely theoretical. There was little regulation of land as we currently understand it. And when government determined that it needed to take property, the public use was generally clear – land for a school, a road, or other public facility – and the owner was compensated. For much of the eighteenth and nineteenth centuries there was little public discourse or social conflict over private property. The US had land in abundance, and it was the disposition of public land, not the status of private land, that dominated the policy agenda (Gates 1968).

The twentieth century ushered in a new period for American land policy, and thus discourses over property rights. The frontier was settled (Turner 1893). Public policy shifted from the disposition of America's public lands to the management of its land resources. The turn of the century (1880–1920) was a period of intensive immigration, industrialization and urbanization. The 1920 US Census officially recorded the shift from a rural to an urban nation. In response to these changes, modern spatial planning and policy and the modern relationship of the state to the individual was born. Cities and states began to pass varied regulations to manage public health and safety conditions, and out of these new conditions arose a concern about the appropriate limits to government regulation.

The US Supreme Court found itself called upon to clarify the place of private property in modern America.⁵ The Court was asked whether there were limits to public regulation of private property. Their initial answer – no. In 1915 the Court concluded:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable ... the imperative necessity for its existence precludes any limitation upon it. ... There must be progress and if in its march private interests are in the way they must yield to the good of the community. (*Hadacheck v. Sebastian* 239 US 394 (1915): 410)

⁵ There is a huge body of scholarship about how to understand and approach the jurisprudence of the court. For the purposes of this discussion, I rely heavily on the analysis and interpretation of Kayden (2004).

But conditions of the period kept the issue before the Court. In *Pennsylvania Coal v. Mahon* in 1922 (260 US 393), the Court appears to completely change its mind about the reach of governmental power. It was here that the Court issued its famous dictum defining the twentieth century concept of regulatory taking: 'The general rule ... is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking' (260 US 393 (1922): 415; emphasis added). A regulation could be equivalent to a takings under the Fifth Amendment, and if it was then compensation was required. This 'warning' has echoed down through the century. Its impact has been to make planners, but even more so the locally elected officials who hold authority for formally adopting and implementing spatial plans, cautious in the planning process. If a spatial plan can be equivalent to a physical expropriation, government might find itself liable for compensation. Given the decentralized structure of US governance, this would put the burden on the most local of governmental units that are given the authority to develop and implement spatial plans.

The final case of importance from this period was the Court's ruling on the validity of zoning. New York City is credited with inventing zoning in 1916. Within a few years zoning had spread across the country as a way for cities to manage growing populations, industrialization, and property values (Revell 1999; Wolf 2008). In 1926 the Court examined whether the idea of allowing a local government to regulate land use by designating land-use zones, which provided for different levels of development opportunities, was acceptable (*Euclid v. Ambler Realty* 272 US 365). The Court decided yes, such an approach to the management of private property rights was acceptable.

So as the Depression loomed, the Court had said: there are no limits on public regulation; yes there are limits, regulation that 'goes too far' is unacceptable; but regulation of private property through zoning is not going too far. So where was 'too far'? The Court would 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.

After *Euclid*, the Court largely left the property rights arena for fifty years. In the late 1970s they re-entered it with vigour, seeking to establish boundaries to governmental authority. Many things had changed, including America's attention to private property. Starting around 1970 the US experienced an explosion of laws, policies and regulations at the national, state and local levels that affected private property. The Clean Air Act, Clean Water Act, Coastal Zone Management Act, National Environmental Policy Act are all examples at the national level (Moss 1977 provides one then-contemporary chronicling of these). Among state governments, a so-called 'quiet revolution in land-use control' had occurred where nearly a dozen states re-asserted their Constitutional authority to regulate private land-use activities at the state level (Bosselman and Callies 1971). And local governments across the country were beginning what have become decades-

long experiments in public policy approaches to protect and manage farmlands, wetlands, open spaces, watersheds, threatened habitats, urban sprawl, etc.⁶

Between 1978 and 1994 the Court heard a series of cases in which they worked to more precisely define the rules of interaction between government and private property owners.⁷ While the Court did not eviscerate the right of government to regulate private property, the Court did begin to more clearly say when the line of 'too far' articulated in *Penn Coal* had been crossed. Of these cases one that received a great deal of attention was *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992). Here the Court ruled that when all economically viable use has been taken by regulation, this was an instance of regulation going 'too far' and compensation was owed the landowner.⁸ In general, regulation and spatial planning were still acceptable, but a regulating body needed to be careful in its formulation and administration.

The twenty-first century began with two major cases being decided by the Court, both of which seem to take a step back from the boundary-setting tone of the immediate prior period. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 US 302 (2002)), the Court took up the matter of a nearly three year moratoria on development. In a decision strongly in favour of government, the Court found that local planning and regulation are normal and expected governmental functions and that the Court had no reason to interfere with them (Kayden 2002).

Then, in June 2005, the Court issued its closely watched decision in the case of *Kelo v. City of New London* (545 US 469 (2005)). 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 land for distribution to another private owner in order to facilitate economic development in the city. Of a total of 115 properties, fifteen property owners challenged the legitimacy of the proposed taking, arguing that expropriation for economic development purposes violated the intent of the takings clause. It was further argued that if the city prevailed, government could always assert that a proposed new use was in the greater public purpose (Jacobs and Bassett 2011).

6 Daniels and Bowers (1997) is an example of these approaches applied to farmland protection.

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

8 However, even in *Lucas* the Court provided government with an 'out'. That is, the Court noted that its ruling was made with the proviso that the individual's use of land could not violate state-based background principles of nuisance which governed property use (505 US 1003 (1992): 1029).

By a one vote margin the Court sided with the city and against *Kelo*. The decision was one of the Court's most controversial of the first decade of this century. And the Court itself was aware that it would be. According to the Court, their decision was only about whether New London's action was acceptable under the national Constitution. They then went out of their way to invite state-based action in response to the decision by saying 'We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power' (545 US 469 (2005) at 489).

Parallel to the rise of post 1970 land use and environmental regulation came the formation of the so-called property rights movement (Gottlieb 1989; Minter 1994). From their perspective the intent of the key American founders and of the principles embodied in the founding documents are clear – the protection of private property rights is to be a key element of the American political and social contract (Jacobs 1995, 1998b; Marzulla 1996). They hold an alarmist view of twentieth century public policy and law. The century presents a story that moves away from a view of property rights as central to liberty and democracy. Instead, what appears is a story in which government is allowed ever increasing authority to reshape property without respecting the protections afforded to property by the Constitution. Despite the promise contained in *Penn Coal* (1922), the right of government over the rights of individuals seems to be continually affirmed (Bosselman et al. 1973; Salkin 2001). Even the Court's decisions of the late 1980s and early 1990s appeared to have had little impact on governmental practices (Roddewig and Duerksen 1989).

The property rights movement has pursued a multi-level strategy to achieve their objectives (Jacobs 1999).⁹ For many reasons they have focused their efforts at the state level, and here they have found fertile ground for their arguments and ideas.¹⁰ Since 1991 every state in the US has considered state-based legislation in support of the policy position of the property rights movement, and by the decade's end 27 states have passed such legislation (Emerson and Wise 1997, Jacobs 1998a, 1999b). These states are on both sides of the Mississippi, they are 'red' and 'blue' states, and extend from Maine to Washington, the Dakotas to Texas, with eleven of these states east of the Mississippi River.¹¹

9 There have been and are a wide range of advocacy groups pursuing aspects of this strategy. These include, for example, the American Land Rights Association, the Competitive Enterprise Institute, the Castle Coalition. These groups can be searched on the web, and they in turn have links to related organizations.

10 The states have always been central players in the land-use drama. It is they who have residual authority under Article X of the Bill of Rights for land use, which in turn leads them to adopt enabling legislation passing this authority along to sub-state governments.

11 The use of these color designations came into being after the Bush-Gore presidential election of 2000. The media depicted states where a majority had voted for Bush as red states and where a majority had voted for Gore as blue states. Subsequently, this designation came to be used as shorthand in American political discourse for areas of the

From 2005 forward the *Kelo* case has been used by the property rights movement to invigorate their agenda and spur public discourse. The property rights movement wants citizens to talk about the issues of when it is reasonable and legitimate for government to take property under the authority of the takings clause, and whether there are limits to reasonable government regulation, beyond which the individual property owner is entitled to a degree of compensation (à la *Penn Coal*).

The property right movement's success in bringing this conversation into the public realm has been breath-taking. They have managed to put the issue into the most mainstream of media fora, and following on the Court's invitation for state-based action, they have orchestrated adoption of anti-*Kelo* laws in 43 of the 50 US states (Jacobs and Bassett 2010, 2011). The explicit intent of most of these laws is to prohibit eminent domain actions for the sole purpose of economic development, and where privately owned land is taken from one owner to be redistributed to another owner. *Kelo* has allowed the property rights movement to give their issue and perspective public visibility, to make it a national issue, and, importantly, to establish the issue as one of oppressive government and vulturous big corporations versus the common person.

Notwithstanding the actual impact of the state laws adopted, the most significant outcome of the property rights movement's activism has been in the area of public discourse (see Jacobs and Bassett 2010 and 2011; Lopez et al. 2009; Morris 2009; and Somin 2009 for discussions of the impact of these state laws). According to Ely

the most significant impact of *Kelo* may well be heightened public awareness of the need to guard property rights ... [a] welcome if unintended consequence of *Kelo* has been to restore the rights of property owners to public dialogue. (2009: 150)

Nadler et al. agree:

the *Kelo* decision seems to have tapped into existing concerns about the sanctity of the home, government overreaching, and tensions between protecting public goods (like the environment) and protecting private rights. In some sense, *Kelo* was a "perfect storm" because all these issues were directly implicated in the decision. (2008: 306)

Thus in the United States there is a paradox about property rights. Legally the courts largely affirm the right of government to manage (regulate) these rights to achieve public purposes. Administratively, most governmental units do not act to impose upon those rights in a particularly stringent way. Yet there is renewed

country which appear to express more conservative (red state) or liberal (blue state) social and political values: see, for example, Brooks (2001).

interest in property rights law and policy as a conscious part of a multi-decade strategy, from the political right. Over the last thirty years the so-called private property rights movement has grown substantially. There are now a wide range of advocacy groups pursuing aspects of an integrated policy agenda, as well as a supporting network of legal advocacy firms available to bring action on behalf of landowners (such as Susette Kelo) and against elected officials (Teles 2008). By some measures, including media attention and state laws passed, these groups have been wildly successful (Sagalyn 2008 for one discussion of the media impact).

This paradox directly impacts the domain of spatial planning. In theory there are few practical limits to the spatial plans that planners can propose and governments can adopt and implement. But in practice the rhetorical focus on property rights, the media success of the property rights movement, and the concern about crossing the largely undefined line of what *Penn Coal* identified as 'too far' means that spatial planners are cautious in what they propose, and elected officials are even more cautious in what they choose to adopt. So spatial planning exists in a realm where its opponent has little formal legal basis for challenging any planning, but the discourse about property rights has created a climate which impedes the scope of the spatial planning that occurs.

Discourse and Policy in (Western) Europe

The situation in Europe is similar and different. As in the United States, throughout Europe there is a network of politically conservative, policy advocacy organizations. Broadly speaking they advocate less government regulation, stronger markets, and stronger individual liberties – a liberal position in the European sense of the term. But their focus on the discourse about property rights seems to be much less than their US counterparts.

The Stockholm Network functions as a coordinating and networking body for over 120 of such groups throughout Europe (<http://www.stockholm-network.org/>). Their website groups activities into three broad areas: health and welfare reform, energy and environment (with further focus on climate change and cap and trade proposals), and intellectual property and property rights. Noticeably absent is the type of land-based property rights advocacy common in the US. The Centre for a New Europe, formerly headquartered in Brussels, was similar in focus (the Centre appears to have closed in 2008 or 2009). When functioning, it acknowledged on its 'about CNE' page the key role of property rights: 'Private property ensures the freedom of the individual in his private sphere' (<http://www.cne.org/about2.htm>). Many of these groups come together for a networking conference known as the European Resource Bank (<http://www.resourcebank.eu/european-resource-bank-meeting-2011/about.html>). According to its website the bank is 'modelled after the resource bank organized every year by the Heritage Foundation in the United States ... [and is] the largest annual congress of free market think-tanks in Europe'. They have been meeting annually since 2004. As is true with the

Stockholm Network, the 2011 conference showed little evidence of interest in land-based property rights per se (<http://www.resourcebank.eu/european-resource-bank-meeting-2011/agenda.html>).

A notable exception is the International Centre for Research on Environmental Issues in France (<http://www.icrei.org/>). ICREI was founded in 1992 with an explicit mission to undertake research and education promoting 'property rights and market transactions, assessing the net impact of social regulations, using the principle of responsibility and promoting institutional arrangements for a free society'. Since 1996 they have organized a biennial international conference with a single environmental resource focus – theory and ethics (1996), water (1998), marine resources (2000), coastal zone (2002), waste (2004), land resources (2006), air pollution and climate change (2008), biodiversity (2010) and forthcoming in 2012, agriculture and forestry – from 'the perspective of non-regulatory tools, for example property rights and markets'.

Even in those areas where they actively seek influence, it is unclear how much impact liberal advocacy organizations have had (though the 2010 and 2011 elections in Sweden and Finland and forthcoming elections in France give pause to this assertion). Regardless, it does not appear that, with the exception of ICREI, the European groups have chosen to focus on the property rights debate in the way the sub-set of American groups have. But this is not the end of the story. There are two other elements to be explored that give a fuller picture of public discourse in Europe – public attitudes and legal decisions.

In 2006 I undertook case study research in Europe (France, Italy, Netherlands and Norway) about the status of property rights. Interviews with local and regional officials and advocacy group representatives suggest a significantly changed mood. Here I examine two of these cases – southern France and Norway.

France presents a perplexing case with regard to the status and future of private property rights and land development. Formally – by statute and under the *Code Civil* – owners enjoy a robust set of rights (Dubois 1998). The right of ownership is set within a legal-administrative structure where there is a tradition of both a strong central state, with significant direct presence in the regions, and a highly fragmented and strong system of local government. As part of this structure, French law allows public sector planners to designate land for non-development, the owner of that land has no claim for regulatory compensation following from this designation, and public sector planners may utilize the power of pre-emption to intervene in proposed individual land sales (Alterman 1997; Dubois 1998).

France's pre-emption power may be as strong as any in Europe. This puts local landowners in a very difficult situation. To the extent land exists within an area designated as subject to pre-emption, local landowners may not engage in market-based sales prior to a declaration filed with the government. Failure to make this declaration voids all proposed sales. Once a declaration is made, however, the eventual outcome of the land transaction is very much controlled by the public sector. Assuming the public sector wants to pre-empt land, landowners have several choices: to accept the offer of sale to the public sector at a price determined

by the public, or to not accept the offer from the public but to then to continue to hold on to the ownership of the land. The landowner does not have the right to exercise a market sale solely on the basis of not liking the price offered by the public sector.

This situation is dissonant with a period from the 1980s onward of strong, even raging, urban growth (especially in the secondary, provincial cities), where the local governments often lack the skill and resources to respond to this growth. One of the reasons they have difficulty responding is the 'real politic' of local governance – 'mayors feel reluctant to offend local landowners, to whom by virtue of the small size of most communities they would inevitably be very close' (Booth 2003: 954).

In the Montpellier and Nîmes regions all interviewees noted the pressures brought by landowners upon local officials to designate their land for development permission. This was especially true of peri-urban agricultural land owners, who are caught in a squeeze between the greater public interest in retaining their land in agriculture, European Union (EU) policies which are pushing for a reduction in agricultural production, and the wide disparity (a scale of ten times or more) between land prices for land use in agriculture and its use for development.

What does all this mean for the status of property rights? It is not clear. Despite the apparent strength of the French public sector, interviewees asserted the apparent rise of landowners' position vis-à-vis the state. So Gambier (2006) argued that overall 'the rights of owners are getting stronger'. Why? He argued that it was because of the rhetoric coming out of Brussels (the EU). That is, it was not policy per se that was strengthening the rights of landowners but a social attitude that they are tuning in to, an attitude that is reflective of new ideas: in his words 'the liberal way of thinking'. Specifically, Gambier noted that in his area of expertise – the exercise of the pre-emption rights by the public sector – 'judges are (increasingly) backing the private (owner) against the public'. Girault (2006) followed in this line of thinking. With regard to the use of the pre-emption right, she argued that if a proposed pre-emption is challenged by an owner, the 'court would back the owner, unless it is a "real" project' (for example a road, a school, etc.). She attributed the rise of a property rights attitude to the culture and traditional attitude toward land and environmental resources. So, 'local people here are fed up with protection' because of all the rules that exist, often EU rules. 'People don't want to be imposed (upon); they are more liberal.'

In France urban and peri-urban growth pressures have been increasing for decades. Landowners have strong motivations to seek options for their land outside of agriculture. As Bourdat (2006) noted, 'a lot of vineyards are disappearing'; as a result 'owners put lots of pressure on local communities so that their land can be developed. It is difficult not to listen to them', especially because 'we don't have easy solutions for them'.

In Norway private property has a long and strong place; interviewees noted that it is an idea that dates at least to the Viking era (Rasmussen 2006). In the 20th century, the Norwegian Labour Party formally adopted the idea of private property

ownership by all working Norwegians as a key component of their party platform (Jensen 2006).

Norway, like France, has strong public controls over land and especially over the process of rural land subdivision and sale. While '[i]n principle land is freely disposable', in reality '[m]ost acquisitions of property in Norway are subject to the Concession Act [of] 1974 ... Under the 1974 Act, all property acquisitions require prior approval from the authorities.'¹² If a transaction requires approval ... the government and, more rarely, the local municipality, will have a right of pre-emption' (Askheim and Rødsether 1998: 425). According to Aasen (2006) there is strong power for the government to say 'no' to proposed agricultural land development (subdivision).

But interviewees spoke of a set of tumultuous changes in Norwegian attitudes toward private property, and as a result changes in the relationships between the individual and state over property. As in many countries, use options available to agricultural land owners were among the most controversial of issues. Falseth (2006) says that the biggest problem in rural Norway today is that 'farmers want to build infrastructure (to accommodate opportunities) for tourism, with amenities. So there is a conflict between agriculture and (proposed) urban (style) uses.' The Norwegian Mountain Touring Organisation is especially concerned about this.

There are two different pressures on land: 1) a lot of Norwegian people want their own cabin in the mountains; rural landowners can earn money from sale of their land for this purpose; 2) the current state of Norwegian agriculture, especially the support from the state; this support is declining. We believe this support will continue to decline. (Hjelle 2006)

This sets up a conflict.

Landowners say: how will we earn money? The government says – tourism. The question becomes what kind of tourism; how to use nature. A lot of these conflicts with farmers and landowners wanting to earn money come from the government saying you have to earn money from tourism. (Hjelle 2006)

'Now [in rural areas] the focus is on second homes, golf courses, fishing rights; it all has a money focus' (Rasmussen 2006). Rasmussen went on to note that 'the Ministry of Agriculture is putting pressure on the Ministry of Local Government to define nature-tourism as a form of agriculture'.

Part of the reason for this new area of conflict is the introduction of classical liberal ideas into political and policy discourse. Jensen (2006) notes that 'everything was opened to the market in the 1985–1989 period; this was a major

¹² 'The main exceptions include the acquisition of small residential property ... land and buildings not exceeding 5,000 square meters; and transactions between members of the same family' (Askheim and Rødsether 1998: 425).

shift in Norwegian society. As liberal thinking has come up, those in charge of the public interest are more like businessmen.' Jensen sees several consequences of these changes: 'a loss of trust in society taking care of you and being fair, and (the fact that) you want choices (like in a supermarket)'. Others agree. 'This is a completely different country than it used to be since the late 1980s with the introduction of neo-liberal ideology' (Tesli 2006). One consequence of these changes has to do with the perceived legitimacy of the state to manage property. According to Sevetdal (2006) 'the justification of strong regulation by government is losing to the interests of property, all kinds of property – public, semi-public and private'. Or as a younger, state bureaucrat said, today 'individual rights have a much stronger focus in Norway ... than they have in earlier modern times' (Rasmussen 2006).

Thus Norway, like France, presents a perplexing case. At the surface, based on formal law and administrative practice, it is a country where the state holds a strong position vis-à-vis the individual with regard to property rights. While the individual is said to have a full bundle of rights, and there is a millennial-long respect for private property, tradition, history, and law are all construed to put the central state in a strong position. But there is reported to be an ever louder call by landowners to respect their rights in land and to allow them to do with their land what makes individual economic sense. Bureaucrats, specialists, activists and academics believe there is a fundamental change underway in Norway. Those interviewed shared a sentiment that the property rights of individual owners were getting stronger relative to the position which such rights had held in the past. The forces that are pushing these changes seem to be the same ones that are facilitating change in southern France.

Parallel to and reinforcing these social changes are legal changes.¹³ The European Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) was signed in Rome and adopted in November 1950. Its signatories included the ten countries of the Council of Europe. A European Court of Human Rights was created to supervise compliance with the Convention. Since its adoption,

¹³ The US and most of continental Europe function under two different legal systems. The United States, as a former British colony, is based on a common law system, whereas continental Europe, operates under a civil law system, and this system is strongly derived from the Napoleonic Code of 1804 (Booth (2005) discusses these two systems for Britain and France). (There are other ways of organizing European legal and administrative systems; Newman and Thornley (1996) present a five part taxonomy.) In theory, a civil law system operates in such a way as to emphasize the centrality of parliament-based statutes and laws over judge-made decisions. Judicial decisions, specifically precedent as established by prior decisions, do not have the strong role that they do in common law systems. And in fact, drawing from the experience of the French Revolution, civil law systems have built into them a specific skepticism about the role of judges and the social and class interests they serve.

the Convention has been adopted by all member states of the Council of Europe, which includes all 27 members of the European Union.

Article 1, Protocol 1 of the Convention, adopted subsequently in March 1952, addresses the issue of property and its use. It states:

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

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

Several recent analyses have been published which analyse Article 1, Protocol 1 from the perspective of the case law of the European Court of Human Rights (for example Ploeger and Groetelaers 2007; Allen 2007, 2010).¹⁴ Both Allen (2010) and Ploeger and Groetelaers (2007) note that there has been a sharp increase in the number of cases brought before the Court since the 2000, and that '(T)he right to property is one of the most frequently litigated Convention rights' (Allen 2010: 1078).

Ploeger and Groetelaers note that

[i]n general, the Court leaves the national authorities a wide 'margin of appreciation' to implement social and economic policies. Therefore, it will respect the judgment of the national legislature that the measure is in the general interest, unless that is manifestly without reasonable foundation. (2007: 1431)

At the same time, the Court has developed a trans-European concept of property that is not solely dependent on national laws or definitions; it has 'an autonomous meaning' (Ploeger and Groetelaers 2007: 1427).

What concerns Allen (2010: 1055) is that in its original construction Article 1, Protocol 1 'represented a compromise between liberal and social democrat visions of property ... [h]owever, the Court has not been entirely comfortable with that compromise, and it has steadily moved to a liberal construction' of the clause. What does he mean by this? According to Allen

14 There is other, though limited, English language literature on this subject, some of it focused on very particular subjects. Take note of, for example, Coban (2004), Fabri (2002) and Schwebel (1964), as well as two guides prepared for jurists by The Council of Europe – Carss-Frisk (2001) and Grgić et al. (2007). For the purposes of this chapter, I rely heavily on to the analysis in Ploeger and Groetelaers (2007) and Allen (2010).

[t]he liberal view of human rights and democracy concentrates on the protection of individual liberty from the State. It regards expropriation and regulation as interferences in a natural or normal state of affairs ... as a general principle, liberal governments would leave decisions regarding the use and disposition of property to the owners ... this view ... sees the relationship between owners of private property and the State as one of opposition. (2010: 1056)

In contrast,

[t]he social democratic vision [sees] the ... regulation of property in a fundamentally different light ... the regulation of property is therefore not a primary threat to human rights: it is the failure to regulate that is the greater threat. For social democrats ... regulation is the normal state of affairs. (Allen 2010: 1058, emphasis in original)

Ploeger and Groetelaers (2007: 1436) argue that their analysis suggests that 'any involvement with the use of land, so any planning instrument, will constitute an "interference" in the sense of Article 1'. So it is not *if* planning instruments interfere, but rather *how* that interference impacts 'the peaceful enjoyment of the property' and whether it strikes 'a fair balance' of public and private needs and goals in the context of the protections offered by Article 1, Protocol 1.

The notion of 'fair balance' emerges from the Court's decisions. Both Allen (2010) and Ploeger and Groetelaers (2007) focus on a key set of cases that articulate the Court's thoughts on how Article 1, Protocol 1 should be implemented (see also Grgić et al. 2007). Both identify the 1982 case of *Sporrong and Lönnroth v. Sweden* as a watershed shift. For Allen (2010) the case is particularly troubling. As he notes, *Sporrong* 'represents a radical shift in thinking: from reviewing only the lawfulness and the purpose of legislation, the Court would now review the fairness of the legislation' (Allen 2010: 1065). But more importantly, *Sporrong*

re-aligned the liberal-social democrat balance ... The adoption of the fair balance test favoured the liberal model of the right to property ... The judgment therefore casts doubt on the social democrat views of property and value in the regulatory State. (Allen 2010: 1066)

As he concludes, Allen emphasizes this point:

[t]he *Sporrong* judgment therefore subjected regulatory policies to closer human rights scrutiny, especially as it shifted ... to the liberal view that an unregulated market is the normal state of affairs, from which all departures require justification. (2010: 1073)

Ploeger and Groetelaers conclude that '[t]he use of land development tools and planning tools will find a boundary in the protection of fundamental right

to property' and that 'any involvement with the use of land, so any planning instrument, will constitute an "interference" in the sense of Article 1' (2007: 1436).

Allen (2010: 1067) agrees that the Court extended Article 1, Protocol 1 'to protect property from both direct and indirect interference with rights of property'.¹⁵

Neo-liberal organizations exist in Europe and advocate a range of policies similar to those advocated by their American counterparts – smaller government, less regulation, lower taxes, flexible labour markets, job creation, strong borders and anti-immigration. But unlike their American counterparts, Europeans seem less focused on land and property rights per se.¹⁶ But still there is significant discourse about property in Europe. According to public officials the mood of landowners is undergoing a seismic shift. Landowners are more willing to challenge local authorities, and in the process a very new relationship is emerging about the balance of the relative rights of the individual and that of society (as embodied by government). And as landowners undertake these challenges, it seems as if the legal system – particularly the decisions of the European Court of Human Rights under the European Convention on Human Rights – is more likely to back them. These changes reflect a spreading sense of a changed European mood, a mood more favourable to markets and property rights and away from the long-standing authority of the central state.¹⁷

Conclusion

Discourse about property rights is present and strong in both the US and Europe. And in both nations this discourse is shaped by similar liberal (that is, conservative) political ideas.¹⁸ What is different, though, is how the discourse is emerging and the form that it is taking.

¹⁵ Does this mean that the legal systems and the legal guidelines for spatial planning in the US and Europe are functionally converging? Has *Sporrong* and other key cases litigated before the European Court of Human Rights created a situation similar to that created by the 1922 Penn Coal decision in the US? I believe so. See my detailed discussions about this matter in Jacobs (2008b, 2009).

¹⁶ For one exploration of why this might be so, see the discussion in Jacobs 2008b.

¹⁷ While I use case studies in France and Norway to make my point, my experience in other parts of Europe (for example Spain), and the breadth of legal cases heard before the European Court of Human Rights, suggest that phenomenon I reference is broader, even if it is not present to the same extent in all western European countries; see Allen (2010) and Ploeger and Groetelaers (2007) for a discussion of these other cases.

¹⁸ There is a debate about using the term 'nation' to refer to the European Union, but the term has a both a long history and contemporary usage. For example, since the mid-1800s advocates have urged for the creation of a 'United States of Europe.' Victor Hugo used the phrase in 1849; Herriot, a long-standing member of the French cabinet in the early twentieth century, used the phrase as the title of his 1930 book; Winston Churchill used the term in a speech in 1946. and in 2004 it was the title of a popular book by Reid.

In the US the discourse is very much being pushed by selected advocacy organizations who see property rights as central to their interpretation of the foundational social contract that is the United States. They are the ones who actively work to keep the issue in the media, before legislative bodies, and as a component of formal litigation. In (western) Europe the discourse seems to be present less because of the activism of specific advocacy organizations and instead a result of changing economic conditions for individual landowners and a mood of economic liberalism they are tapping into which are causing them to rethink what it means to own land and what should be their relationship vis-à-vis government. Some of these landowners are in turn litigating the nature of their rights under Article 1, Protocol 1 of the European Convention on Human Rights and they are finding a sympathetic forum in the European Court of Human Rights.

For many reasons I believe that social debate about property rights – specifically the appropriate balance of individual and social (governmental) rights in land – will continue in the US and Europe, as well as globally.¹⁹

In the US, it is not clear that state-based property rights laws, either 1990s first generation laws or the more recent anti-*Kelo* laws are having much impact on spatial planning. But this is unlikely to dampen the activism of US property rights advocates. Just as they have, for over two decades, sought to continuously advance their agenda and to learn from their policy experiments, they will, again, learn from their successes and failures with state-based *Kelo* legislation. State-based *Kelo* laws represent the latest, not the final, wave of policy activism on property rights issues by these advocates.

In Europe the situation will be somewhat different. For the most part, advocacy organizations will ignore the types of land and property issues engaged by their US counterparts. But their general levels of activism together with the momentous changes occurring within Europe and relative to Europe's position to the world, will keep a liberal perspective an active part of public and policy discourse. As it does, it is likely to influence broader public and policy discussions and legal decisions about the rights and responsibilities of the individual and the state.

What does all this mean for spatial planning? Spatial planning is premised on the fact that individual decisions over land will not, when cumulated, result in the greater social interest. Therefore there is a need for public action over land. But the discourse over property rights is a powerful one. The idea that there should be strong private property rights minimally subjugated to the state fits with contemporary rhetoric about markets and democracy. To the extent that this discourse prevails it would appear to be difficult to advance spatial planning schemes in the public interest. One challenge for spatial planners is to develop and advance a discourse

See Wikipedia http://en.wikipedia.org/wiki/United_states_of_europe, accessed on 19 June 2011, especially the History sub-section, and the citations noted.

¹⁹ See Jacobs (2010) for my most recent general analysis about why this is likely to be true in the US.

about property rights (and spatial planning) that is as compelling as that advanced by liberals. While this may seem difficult, it is essential for planning's future.

Globally, public policy discussion is focused on the economic fiscal crisis, the 'Great Recession', and its systemic impacts at the national and local levels. Countries and communities are having to have unexpected and uncomfortable discussions about the provision of public services as the tax base which supports those services has softened and declined (sometimes significantly and precipitously). It is in this context that it is necessary to project upon the likely future of spatial planning and the way the discourse over property rights will shape it. Ironically I believe it is likely that spatial planning may be reinvigorated as a result of the crisis. Why? Places severely affected by the fiscal crisis will be forced to re-examine any and all tools at their disposal as ways to address oversupply in the housing sector and to facilitate economic and social redevelopment. As communities do this, it is not at all clear what, if any, resistance their citizens will want them to experience, including resistance from their neighbours professing the integrity and strength of their property rights. What is needed now are real solutions to evermore complex problems. And if an assertion of property rights stands in the way of those solutions, it is not clear that it will heeded. So, despite the rhetoric of liberals, spatial planners and others who advocate for the planning process may not need to be defensive about what they do. Spatial planners have the opportunity to mount arguments for planning solutions to contemporary problems. The current dearth of ideas for how to move forward may allow for the serious engagement of these arguments, including arguments about the appropriate role of property rights in modern, democratic, market societies.

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