

# Private Property in Historical and Global Contexts and Its Lessons for Planning

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We live in a time of intense global focus on and interest in private property. This focus is present in developed, transitional, and developing countries. Why is there such an intense focus? Private property is believed to have the potential to address a broad range of social and economic problems. In this chapter, I explore the historical and global contexts of the current interest in private property, the rationale(s) for private property as a solution to a set of social and economic problems, the renaissance in attention to private property, and why it is likely to have a tumultuous future. What emerges is an understanding that the tensions between private property and planning are part of this larger global trend. Thus, the discussion in this volume on property and planning in Canada reflects a larger movement internationally. I conclude the chapter by offering some thoughts on the ways in which planning's advocates in Canada, as elsewhere, might engage with the global debate on private property to further a planning agenda that both shows respect for private property rights and attains the public interest goals inherent in the process of land-use planning.

## Private Property in a Global Context

Private property is a social and legal institution that has a long history across many cultures and legal systems.<sup>1</sup> It has come into contemporary focus because of the changing nature of the global political economy.

# Public Interest, Private Property

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Locke's ideas had a substantial influence on the ideas of French philosopher Jean-Jacques Rousseau.<sup>15</sup> Together, Locke and Rousseau strongly influenced contemporary thinking about what became the American and French Revolutions. As well documented, the American Revolution was as much about grievances over access to and control of property as about more commonly spoken-of issues such as freedom of speech, freedom of religion, freedom of the press, and freedom of assembly.<sup>16</sup>

In the nascent United States, the country's founders drew from Locke's ideas to argue that one of the principal functions of forming a government is protection of property. In the debate over ratification of the proposed US Constitution, James Madison (who would go on to be the fourth American president) wrote that the "government is instituted no less for the protection of property than of the persons of individuals."<sup>17</sup> Other key contemporaries agreed. John Adams (who became the second American president) noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."<sup>18</sup>

And Thomas Jefferson (the author of the Declaration of Independence and the third American president) linked the individual's right to own and control property to the very existence and viability of democracy. According to Jefferson, ownership of land by farmers created the very conditions that allowed democracy to exist.<sup>19</sup> When a farmer owned his own farm, he could produce food, fuel, and building materials for himself and his family. In so doing, he was obligated to no one – he was literally free to exercise his political views as a democrat.

But this view of the relationship of property to democracy, and the fact of asserting property's centrality, did not go unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. Among American founders, these sentiments were argued most strongly by Benjamin Franklin (the colonies' revolutionary-era ambassador to France and the Netherlands). For example, in the debate over ratification of the Constitution for the state of Pennsylvania (his home state), Franklin said that "[p]rivate 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."<sup>20</sup> In other words, Franklin viewed as legitimate the public's right to create, recreate, take away, and regulate property as doing so best served public purposes.<sup>21</sup>

Private property was thus a confusing issue for America's founders. How were these disparate positions resolved? With ambiguity. In 1776, the

Declaration of Independence (authored by Jefferson) promised each (free, white, male) American "life, liberty and the pursuit of happiness." Telling here is that Jefferson adapted the phrase directly from Locke, but Locke's phrase was "life, liberty and property." This is what Jefferson wanted the declaration to say, but his (and Locke's) ideas did not prevail in the final debate and ratification of the document.

Eleven years later, in 1787, the US Constitution was adopted. What did it say about land-based private property? Nothing. It was not until 1791, with adoption of the *Bill of Rights*, that the so-called takings (expropriation) clause appeared as the closing phrase to the Fifth Amendment to the Constitution: "[N]or shall private property be taken for public use, without just compensation."<sup>22</sup>

With adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as a taking, a realm of activity that is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that, where private property exists, it can be taken (i.e., seized by the government without the landowner's permission) but only for a denoted public use and only when just compensation is provided. If either of these two conditions is not met, then a taking cannot occur.

The French Revolution occurred only thirteen years after the American Revolution, in 1789, and access to and protection of rights in property were likewise central themes. When the revolutionaries sat to articulate their ideas about the social and political rights of citizens in the new France, one right that emerged was directly parallel to the takings clause of the Fifth Amendment of the US *Bill of Rights*. In the *Declaration of the Rights of Man and of the Citizen* of August 1789, the final right of the seventeen rights states that "[p]roperty being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance."

All the structural elements of the takings clause of the Fifth Amendment to the US Constitution discussed above are in Right 17. The right to private property is recognized. The right of the government to expropriate that property is also recognized. However, the right of the government to act upon a citizen's right noted as "inviolable and sacred" is only under the condition of a "public necessity" that "obviously requires it" and when such action is "certified by law." When these conditions are met, the citizen is entitled to "the condition of a just compensation in advance."<sup>23</sup>

### Economic Arguments

At the same time as these political arguments were being developed and adopted as key components of the emerging American and French Revolutions, a parallel economic argument was being developed. In *An Inquiry into the Nature and Causes of the Wealth of Nations*,<sup>24</sup> Adam Smith advanced the foundational argument for a market economy; he argued for an economic structure based on labour specialization and free-market exchange of goods and services.

Smith argued that private property is central to a market economy. When someone owns land, he or she has something that can return value. The owner has reasons to care for the land and to invest in it (e.g., to make it more productive). Individual actions can provide direct returns to the owner. In addition, individual ownership of property becomes key to a modern banking system. Ownership gives the owner something of value that can be invested in and borrowed against. Finally, Smith argued that the social institution of property provides one of the strongest justifications for a civil government.

Both sets of arguments for the centrality of private property – the political (for democracy) and the economic (for market economies) – have continued into the present day. Political scientists and legal scholars continue to make arguments drawing from Locke and Rousseau and analogous to those of Jefferson.<sup>25</sup> Economists continue to make arguments that draw directly from Smith.

Among contemporary economists, probably the most influential (and among the most controversial) is Hernando de Soto, a Peruvian whose work has had significant impact at the World Bank.<sup>26</sup> De Soto provides a twenty-first-century updating of Smith's arguments but focuses on urban poverty in developing countries. As he asks, why are the poor poor? In answering this question, he makes this observation:

The poor ... have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds ... It is the unavailability of these essential representations that explains why people who have adapted every other Western invention ... have not been able to produce sufficient capital to make domestic capitalism work. This is the mystery of capital.<sup>27</sup>

For de Soto, the solution involves creating private property:

Property ... is ... a mediating device that captures and stores most of the stuff required to make a market economy run. Property seeds the system by

making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for [the] monetary and banking system to work and for investment to function. The connection between capital and modern money runs through property.<sup>28</sup>

Thus, traditional rationales for private property have included both the political and the economic.<sup>29</sup> Drawing from political theory, the argument is that ownership insulates the owner from the arbitrary power of the state and provides the owner with the literal material conditions to exercise his or her rights as a citizen in a democracy. That is, as Jefferson argued (drawing from Locke and Rousseau), (agrarian) land ownership frees one to exercise political judgment without coercion. This is so because it allows the owner to provide food, fuel, and building materials for self and family. Drawing from economic theory, the argument is that private property, to use de Soto's words, "seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for [the] monetary and banking system to work and for investment to function."<sup>30</sup> Intertwined, these two arguments provided much of the rationale for programs of land reform in the post-Second World War period as developed countries sought to foster private property (as an alternative to tribal, communal, group, and state property) in developing and then transitional countries.

### Private Property's Renaissance

Yet, as Franklin argued, the social or legal institution of private property is also subject to critique. A way to understand one broadly accepted critique is through the lens of what is perhaps the most cited paper in the field of environmental studies and natural resource management. In 1968, Garrett Hardin, a population biologist, popularized the phrase "the tragedy of the commons."<sup>31</sup> For him, the concept offered a key lesson about property rights.

The tragedy of the commons refers to a situation in which individual property owners-users act rationally with regard to their property rights to maximize the value of those rights. That is, owners-users act exactly as economic theory says they should act. But a problem arises: the sum of the individual rational decisions is not socially rational. Rather, it is the opposite. So individuals acting rationally result in a situation that is irrational from a social perspective.

Hardin uses a story of peasant cattle grazers using commons land in medieval England to illustrate this point. His story is based on the premise

that each grazer has unlimited and unregulated access to a commons grazing field. In this situation, he argues, there is an incentive for each grazer to increase the size of his herd to reap benefit from his action (more cattle yield more value at the market). However, each grazer acting rationally quickly leads to a degraded commons because it cannot sustain the ever-increasing grazing activity. Overgrazing leaves all grazers without grazing land, a situation that none of them desires. But Hardin's key point is that the tragedy of the commons occurs not because of irrational behaviour by owners-users but because of rational behaviour. According to Hardin, "[e]ach man is locked into a system that compels him to increase the herd without limit," so "[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons."<sup>32</sup>

The core message of this story has been extrapolated to many types of natural resource management situations, even ones in which land is privately owned (in contrast to the commons that Hardin describes).<sup>33</sup> One example is privately owned farmland in the peri-urban areas of growing cities. When agricultural land is owned privately and there is an opportunity for market-based exchange for the land, each owner must decide whether to keep the land in agricultural use or accept a competing (often higher-price) offer for urban use. The obviously rational decision for the owner is to sell the land for urban use. However, too many such decisions by individual owners of agricultural lands result in the disappearance of these lands in peri-urban areas, which might be judged by many (including the individual owners of agricultural lands) not to be in either the short-term or the long-term public interest.<sup>34</sup>

Hardin's article brought the matter of property rights fully into academic and policy conversations about land-use and environmental management and planning. What is the solution to the tragedy of the commons? Two solutions are offered. The first solution is to change the scale of decision making so that the strength of the individual owner and the scope of individual property rights are diminished. The most common way to accomplish this is through proposals for region-wide public management of land and natural resources.<sup>35</sup> The second solution is fundamentally to rethink what it means to own land and natural resources. Starting in the 1970s, scholars in the developed countries began exploring radical ideas about ownership of the natural world.<sup>36</sup> New public programs for environmental and natural protection and management that began developing in the 1970s – for farmlands, water resources as discussed by Jane Matthews Glenn in her chapter, wetlands, species habitat, and so on – were designed, in part, to embody

these two solutions.<sup>37</sup> Relatedly, property theorists have taken up this challenge in recent works that recraft theories of private property ownership to allow an understanding of private property as a collection not only of rights but also of obligations; some of these works are mentioned in the introduction to this volume.

In summary, despite the benefits of private property in fostering democracy and markets, it can be a problematic social and legal institution. Private property becomes problematic when owners seek to maximize benefits of and returns from their ownership of a piece of the natural world. The potential problem is that a rational decision for the individual in resource use and management might not be a rational decision for the social group (the neighbourhood, the community, the city, the region) as a whole. As Marcia Valiente and Anneke Smit argue in the introduction, this is where public planning becomes critical.

### Private Property's Tumultuous Present and Future

Inasmuch as the preceding discussion established the political and economic theoretical foundations of private property, its eighteenth-century emergence as part of the American and French revolutionary movements, and its mid-twentieth-century policy resurgence, the more pressing question is its future as a global institution. I opened this chapter by asserting that private property is a significant part of global policy discourse. I revisit this assertion here by examining its re-emergence in the context of land-use planning in the United States vis-à-vis the *Kelo* decision of the US Supreme Court (also mentioned in the introduction and revisited by Stephen Waqué and Ian Mathany, and Smit, in their chapters), in western Europe as a result of both legal and social changes, and in China and Cuba as part of economic liberalization.

#### The *Kelo* Decision

In June 2005, the US Supreme Court issued its closely watched decision in the case of *Kelo v City of New London*.<sup>38</sup> In this case, the city asserted its right to take private property, with compensation, for public use, defined as consolidation of land for distribution to another private owner in order to facilitate economic development of the city. Of a total of 115 property owners, 15 challenged the legitimacy of the proposed taking, arguing that expropriation for economic development purposes violated the intent of the takings clause. They further argued that, if the city prevailed in this case, the

government could always assert that a proposed new use is in the greater public interest.<sup>39</sup>

By a one-vote margin, the Court sided with the city and against Susette Kelo. The decision was one of the Court's most controversial of the first decade of this century. The Court itself was aware that it would be. According to the Court, the decision was only about whether New London's action was acceptable under the US Constitution. The members of the Court then went out of their way to invite state-based action in response to the decision: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."<sup>40</sup>

The *Kelo* case became a vehicle for those who oppose government land-use regulation to invigorate their particular agenda and spur public discourse. These opponents (broadly known as the "property rights movement") want US citizens to discuss when it is reasonable and legitimate for the government to take property under 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. Since the early 1990s, these opponents have worked systematically to push an agenda focused on the supremacy of private property rights.<sup>41</sup> As noted in the introduction, this movement has been gaining traction in Canada as well, if with less intensity.

The success of the property rights movement in using *Kelo* to bring this conversation into the public realm has been breathtaking. The movement has managed to put the issue into mainstream media and, following up on the Supreme Court's invitation for state-based action, orchestrate adoption of anti-*Kelo* laws in forty-three of the fifty US states.<sup>42</sup> Globally, there is broad awareness of the decision and the issues that it raises.<sup>43</sup> The explicit intent of most of the state-based laws is to prohibit eminent domain actions for the sole purpose of economic development and those in which privately owned land is taken from one owner and given to another owner. Notwithstanding the actual impact of the state laws adopted (it does not appear that the laws are seriously affecting government practices), the most significant outcome of this activism is the broad public discourse that it has engendered, both nationally and internationally.<sup>44</sup>

#### Property Rights in Western Europe

Recent legal decisions and case study research suggest that private property is ascendant in western Europe, perhaps as part of a diminishing of the traditionally strong role of the state. The *European Convention for the Protection*

of *Human Rights and Fundamental Freedoms* was adopted in November 1950. A European Court of Human Rights was created to supervise compliance with the *Convention*. Article 1, Protocol 1, of the *Convention*, adopted in March 1952, states in part that "[e]very 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."

Several recent analyses examine Article 1, Protocol 1, from the perspective of decisions issued by the European Court of Human Rights.<sup>45</sup> Both Allen and Ploeger and Groetelaers note that there has been a sharp increase in the number of cases brought before the Court since 2000 and that "the right to property is one of the most frequently litigated Convention rights."<sup>46</sup> This increase alone is one indication of the shift in attention to property rights and the substantive shift in perspective on them.

Tom Allen and Hendrik Ploeger and Daniëlle Groetelaers focus on cases that articulate the Court's thoughts on how Article 1, Protocol 1, should be understood.<sup>47</sup> Both identify the 1982 case of *Sporrong and Lönnroth v Sweden* as especially significant. According to Allen, *Sporrong* represents a radical shift in the Court's thinking: "The *Sporrong* judgment ... 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."<sup>48</sup> Ploeger and Groetelaers likewise conclude that "[t]he use of land development tools and planning tools will find a boundary in the protection of [the] 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."<sup>49</sup>

Case study research reinforces this legal shift. Interviews conducted in France and Norway, for example, show a heightened awareness among owners of their property rights and an increased willingness to challenge formal planning and regulatory processes.<sup>50</sup> This is especially striking because of the long-standing and strong formal power of the government in France regarding privately owned land and the long-standing tradition of the social nature of land in Norway.

According to public officials in both countries, the mood of landowners is undergoing a seismic transformation. Landowners are more willing to challenge local authorities, and in the process a new balance is emerging between the relative rights of the individual and those of society (as embodied by the government). 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 the spreading sense of a changed European mood, one more favourable to markets and property rights and less trusting of centralized government authority. This change in mood is striking and can be detected in various ways throughout Europe. For example, the Netherlands has a long and globally admired tradition of public planning, one in which property rights are generally subjugated to the public interest.<sup>51</sup> Yet there is a crisis in the structure of planning that is affecting how planning occurs and thus the perception of property rights and their place in the planning process.<sup>52</sup> Therein lie important challenges for planning and other regulations of land in the public interest.

#### Private Property in China and Cuba

As noted in the introduction to this chapter, a significant event of the past decade was the introduction of private property as a social and legal institution in China and Cuba, two countries whose formal political philosophies eschew it. For multiple reasons, these two countries, like others around the world, are drawing from foundational economic (though in their cases not political) theory and inventing a form of private property in which land and housing are no longer solely centrally owned and in which individuals can claim a form of legal title. With this it is hoped that a form of market-based economic development will evolve.<sup>53</sup>

Equally significant is the social contestation over the invention of private property. It is estimated that daily in China there are hundreds of protests (“mass incidents”) about the right to property; one estimate by a Chinese sociologist is that there were 180,000 such incidents in 2010.<sup>54</sup> Most of them are analogous, in a form, to the US *Kelo* situation. That is, they are about government expropriation of land for economic development. What is different is that in China, technically, all land is centrally owned. Yet this does not remove the sense of ownership by farmers at urban edges forcibly removed from their lands for urban expansion or of more well-to-do residents in suburban enclaves.<sup>55</sup>

In 2010 and 2011, I participated in a set of training programs organized by the Lincoln Institute of Land Policy in Cambridge, Massachusetts. Each year these programs were developed for two dozen provincial and national officials of the Ministry of Land and Resources of the People's Republic of China. Being at the operational forefront of land policy in China, these officials were acutely aware of the rapidly changing nature of property and property rights. Each year their overriding concern was expropriation and

compensation. How much did the government have to pay to land “owners” when expropriation occurred? How was value to be determined when “owners” did not own the land? How could value be determined if there was no comparable market price?

In China, the actual outcome of this process is indeterminate and complex, reflecting tensions among the central state, the local state, the private development sector, and groups of local “owners.”<sup>56</sup> But what is significant is that property in general and private property in particular comprise a locus of attention and an active part of national policy discourse.

There is every reason to believe that a situation similar to that of China will evolve in Cuba as it moves forward with its own reforms. In November 2011, Cuba announced the most far-reaching reforms with regard to property that had been made in decades of socialist rule. For the first time since the early period of the revolution, Cubans are now allowed to own housing. Buyers and sellers can set house prices, individuals can make choices about when they want to move, and transactions are not subject to government approval.<sup>57</sup> These changes in Cuban law were expected to lead to a significant shift in the structure of Cuban real estate, and early indications are that this is exactly what occurred. By March 2012, prices in Havana, Cuba's capital, were \$250 per square metre, more than twelve times the average monthly salary of \$20. Yet there seemed to be a strong market of buyers available.<sup>58</sup> Although many Cubans are excited by these changes, others express caution. There are concerns about an exacerbation of class conflict, an emergence of homelessness, and an influx of foreign buyers (though technically this is not allowed under the new law).<sup>59</sup> As in China, the actual outcome of this process is indeterminate and complex, but as in China it is significant that private property is an active part of national policy discourse.

#### Private Property's Future

In pondering private property's future, it is safe to make several assertions. Private property as a social and legal institution will continue to evolve globally. Since its modern invention in the eighteenth century, private property has never stood still, and it will not stand still in the future: what one claims now as a possessor of private property is different from what one would have claimed 200 or even 100 years ago.<sup>60</sup> As it evolves, it will be in response to changing technology and changing social values, as has been demonstrated by its transformation over the past century. Again, this is a subject taken up by a range of modern property law theorists (among them

Jeremy Waldron, Carole Rose, and Larissa Katz), referenced in the introduction to this volume.

In addition, private property as a social and legal institution has to make sense and adapt in a global environment in which human settlement is being fundamentally transformed. Private property was invented in a world in which most people lived an agrarian existence. Now, for the first time in global history, more people live in cities than in the countryside. And predictions are for this trend to continue throughout this century. What this means is unknown; the phenomenon of an urban world is unprecedented. Whether and how the theories of Locke, Rousseau, and Smith remain valid in a world so fundamentally different from the one in which these theories were articulated remains a live question.

What is clear is that private property will continue to be a prominent part of the global discussion in the coming decades. It is in Western, market-based democracies such as the United States, Canada, and the countries of western Europe; it is in long-standing centralized, socialist countries such as China and Cuba; it is throughout the developing world via contemporary debates about land grabbing (large-scale economic land concessions) and formalization of property; and it is in the way that indigenous peoples press forward with historical land claims.<sup>61</sup> Matters of long-standing tension involving private property – the appropriate balance between public and private rights in property, the appropriate scope of government regulatory authority, the bases for government expropriation of private property – occupy scholars, activists, policy analysts, and legislators globally.

### **The Future Relation of Private Property to Public Planning**

Finally, and of particular importance for this volume, the focus on, and debate about, property rights and private property hold special places for those focused on urban and regional planning. Planning as it was invented at the beginning of the twentieth century – in Europe, the United States, and Canada – was justified with a tragedy of the commons argument: individuals acting from self-interest were not realizing the greater social interest. Comprehensive plans, zoning, and all the other tools of urban and regional planning were developed to seek a balance between property rights and the larger public interest, as discussed in the introduction.<sup>62</sup> So what might this mean at the beginning of the twenty-first century? What should be planners' and planners' position with regard to private property and private property rights? A colleague and I have argued that, at a minimum, three

strategies should be pursued.<sup>63</sup> These strategies are as applicable in Canada as elsewhere.

First, advocates of planning must learn to tell a compelling story about property rights that reflects a planning perspective. The perspective of those who see strong property rights as only "good" and government planning as always "bad" is strongly one-sided. Yet in the United States, western Europe, and perhaps globally, this rhetoric seems to capture a public mood. As mentioned in the introduction, this public mood might be less apparent in Canada but is nevertheless present. Rather than avoiding a public conversation about property rights, advocates of planning need to stress how planning, regulation, and even taking land for economic development purposes are essential, even long-standing, though never without controversy. To move this conversation along, storytelling is essential.<sup>64</sup>

Second, advocates of planning need to work on developing a new language to discuss property, especially private property. Advocates must develop a way of talking about property that highlights rights and duties of private owners as well as the community. At least since the 1970s, there have been repeated calls to rethink what property means, what ownership means, and how to balance private and public rights and duties in property.<sup>65</sup> Indeed, this is the theme of this volume. Advocates can and should take a lead in helping to articulate and refine these ideas and this language.

Third, advocates of planning should consider preparing something like a property rights impact statement (analogous to an environmental impact statement) as part of the planning process. A planning-based approach would highlight both the costs and the benefits along with both the short-term and the long-term consequences of both action and inaction of proposed plans or policies. Such an exercise can clarify public discussion in the best tradition of applied planning research. How will planning proposals modify or create property rights? How will the effects of these modifications be distributed? Who will gain, and who will lose? How will future generations and the environment be affected? Although the answers to these questions are not obvious, if such questions are not asked and answered, then advocates of planning remain unaware of the real consequences of what they propose, and their proposals might seed the very social conflict that they hope to avoid.

As private property globalizes, continually talking about, even fighting over, conflicting concepts of property rights will characterize this period of history. Advocates of planning need to be more active in this discussion. The more active they are, the more likely it is that they will effect an outcome in

line with a planning and public interest perspective. This can be as true in Canada as anywhere else.

#### Notes

- 1 Richard Schlatter, *Private Property: The History of an Idea* (New Brunswick, NJ: Rutgers University Press, 1951).
- 2 See, e.g., Francis Fukuyama, "The End of History?" (1989) 16 *National Interest* 3.
- 3 Huntington's notion of a "clash of civilizations" is an alternative concept to the one advanced by Fukuyama, *ibid.* See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1997).
- 4 K. Deininger, *Land Policies for Growth and Poverty Reduction*, a World Bank Policy Research Report (Washington, DC: World Bank; New York: Oxford University Press, 2003), is one of the many examples of this work by the multilateral and bilateral aid agencies.
- 5 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) [de Soto, *Mystery of Capital*].
- 6 Harvey M. Jacobs, "The 'Wisdom,' but Uncertain Future, of the Wise Use Movement," in Harvey M. Jacobs, ed., *Who Owns America? Social Conflict over Property Rights* (Madison: University of Wisconsin Press, 1998) 29 [Jacobs, "Wisdom"]; Harvey M. Jacobs, "Fighting over Land: America's Legacy ... America's Future?" (1999) 65(2) *Journal of the American Planning Association* 141; Harvey M. Jacobs, "Social Conflict over Property Rights: The End, a New Beginning, or a Continuing Conversation?" (2010) 20(3) *Housing Policy Debate* 329.
- 7 My own work includes Harvey M. Jacobs, "The Future of the Regulatory Taking Issue in the US and Europe: Divergence or Convergence?" (2008) 40(1) *Urban Lawyer* 51 [Jacobs, "Regulatory Takings"]; Harvey M. Jacobs, "L'engrenage de la croissance urbaine: La place de la propriété dans la planification urbaine" (2008) 133 *études foncières* 12 [Jacobs, "L'engrenage"]; and Harvey M. Jacobs, "An Alternative Perspective on U.S.-European Property Rights and Land Use Planning: Differences without Any Substance" (2009) 61(3) *Planning and Envtl L* 3 [Jacobs, "European Property Rights"]. The work of others is discussed later in this chapter.
- 8 "Cuba to Allow Thousands to Own Homes," *New York Times* (12 April 2008), online: [New York Times \(4 November 2011\), online: \[http://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html?pagewanted=all&\\\_r=0\]\(http://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html?pagewanted=all&\_r=0\). The action by Cuba received broad international coverage. For example, in addition to coverage in the \*New York Times\*, it was covered by the \*Wall Street Journal\*, the \*Guardian\*, the \*Daily Mail\*, the Canadian Broadcasting Corporation, and the British Broadcasting Corporation, among others. A simple Internet search of "Cuba private property" brings up these and other articles and stories from mid-November 2011.](http://www.nytimes.com/2008/04/12/world/americas/12cuba.html?_r=1&sq=cuba%20to%20allow%20thousands&st=cse&_r=1&_; Damien Cave, )

China's efforts to create private property made the front cover of the *Economist* on 10 March 2007. The illustration showed a happy Chinese peasant atop a tractor, à la Maoist-era realist art posters, holding up a little red book (an allusion to Mao's Little Red Book). The words on the book were "property deed."

- 9 Gregory S. Alexander, *The Global Debate over Constitutional Property* (Chicago: University of Chicago Press, 2006).
- 10 Tom Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin's Press, 1998); Francesco di Lorenzo, "2013 Report – International Property Rights Index," *Property Rights Alliance* (2013) online: [Property Rights Alliance <http://www.internationalpropertyrightsindex.org/methodology>](http://www.internationalpropertyrightsindex.org/methodology).
- 11 On the idea of democracy, see, e.g., John Dunn, ed., *Democracy: The Unfinished Journey, 508 BC to AD 1993* (Oxford: Oxford University Press, 1992); on the idea of the early emergence of market economies, see Peter Temin, "A Market Economy in the Early Roman Empire" (2001) 91 *Journal of Roman Studies* 169.
- 12 This discussion on the emergence of democracy and markets draws strongly from the exposition by Ophuls. See William Ophuls, *Ecology and the Politics of Scarcity: Prologue to a Political Theory of the Steady State* (New York: WH Freeman, 1977).
- 13 John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill Educational Publishers, 1952).
- 14 It was this argument that provided the justification for taking land from native inhabitants of the Americas and Africa, who were not understood to be using it in the European sense of active agricultural and forest management. This argument also justified proposals for breaking up large landed estates of the wealthy and redistributing lands to the labouring class and newly emerging middle class. Cronon is commonly cited as a pioneer who documented the attitudes of Puritans toward how Native Americans used their lands in the American colonial settlement period. See William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983). Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill: University of North Carolina Press, 2001), chronicles the movement that led to the breakup of the Dutch-originated, feudal-style land estates in New York's Hudson River Valley.
- 15 Jean-Jacques Rousseau, *Discourse on the Origin of Inequality* (1754), translated by Franklin Philip, edited with an introduction by Patrick Coleman (Oxford: Oxford University Press, 1994); Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (1762), translated and edited by Victor Gourevitch (Cambridge: Cambridge University Press, 1997); Daniel W. Bromley, "Rousseau's Revenge: The Demise of the Freehold Estate," in Harvey M. Jacobs, ed., *Who Owns America? Social Conflict over Property Rights* (Madison: University of Wisconsin Press, 1998) 19.
- 16 James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992).
- 17 Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (1788) (New York: Mentor Books, 1961) at 339.



- 18 John Adams, "Discourses on Davila, a Series of Papers on Political History" (1790), in Charles Francis Adams, ed, *The Works of John Adams, Vol 6* (Boston: Little Brown, 1851) at 280.
- 19 For an interesting and thorough exposition of Jefferson's position, see Luigi Marco Bassani, "Life, Liberty, and ... : Jefferson on Property Rights" (2004) 18(1) *Journal of Libertarian Studies* 31.
- 20 Benjamin Franklin, "Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania" (1789), in Albert H Smith, ed, *The Writings of Benjamin Franklin, Vol 10* (London: Macmillan, 1907) at 59.
- 21 These sentiments by Franklin were not isolated. As noted by Brands, "Franklin took a striking socialistic view of property." Brands provides these other examples of Franklin's opinions: "All property ... seem[s] to me to be the creature of public convention," and "[a]ll 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." HW Brands, *The First American: The Life and Times of Benjamin Franklin* (New York: Anchor Books, 2000) at 623.
- 22 The US Constitution does speak to private property, just not land-based private property. What the Constitution recognized was the ownership of slaves as property under s 2 of art IV, where it establishes the right of owners to have escaped slaves returned to them. Also under s 2 of art III, the Constitution establishes a procedure for how conflicting claims to state-based land grants by individuals would be resolved. It is also worth noting that in the Fifth Amendment the phrase preceding the takings clause states that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law," making explicit the Locke-inspired link between liberty and property.
- 23 A discussion on the property provision in the *Rights of Man* is contained in Jacobs, "Regulatory Takings," *supra* note 7.
- 24 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) (New York: Random House, 1937).
- 25 See, e.g., Jedidiah S Purdy, "A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates" (2005) 72(4) *U Chicago L Rev* 1237.
- 26 De Soto, *supra* note 5. De Soto's work is subject to substantial academic and popular critique. For only a sample, consider on the academic side Alan Gilbert, "On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?" (2002) 24(1) *International Development Planning Review* 1; in the popular media, an example is John Gravois, "The de Soto Delusion" (2005) online: Slate, <[http://www.slate.com/articles/news\\_and\\_politics/hey\\_wait\\_a\\_minute/2005/01/the\\_de\\_soto\\_delusion.single.html](http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2005/01/the_de_soto_delusion.single.html)>.
- 27 De Soto, *ibid* at 6-7.
- 28 *Ibid* at 63.
- 29 Other theories abound. For example, Jeremy Bentham and others articulated a "utilitarian" justification for property: that is, protection of private property rights provides the greatest happiness to the greatest number of persons; see, e.g., Jeremy

Bentham, *Principles of the Civil Code: The Works of Jeremy Bentham, Vol 1* (Edinburgh: W. Tait, 1843). More modern justificatory theories of property are discussed in the introduction to this volume.

- 30 Although dominant, political and economic arguments are not the only ones made for the focus on private property and private property rights. Garber provides an insightful (and humorous) examination of why property in American society becomes imbued with emotional power and comes to represent many aspects of self in society. See Marjorie B Garber, *Sex and Real Estate: Why We Love Houses* (New York: Pantheon, 2000).
- 31 Garrett Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243.
- 32 *Ibid* at 1244.
- 33 See, generally, Amy Sinden, "The Tragedy of the Commons and the Myth of a Private Property Solution" (2007) 78(2) *U Colo L Rev* 533. She notes that "it is a particularly powerful parable, because ... this particular iteration of the externality problem forms the root of virtually all environmental problems, from the over-exploitation of forests and fisheries to the pollution of air and water" (at 546). Sinden then notes the work of Carol M Rose, "Rethinking Environmental Controls" (1991) 1 *Duke LJ* 1, for its characterization of all environmental problems as commons problems. This perspective has been taken up in an active way by the International Center for Research on Environmental Issues, online: <<http://www.icrei.org>>, which, since 1996, has sponsored an international biennial conference on the broad theme of "Property Rights, Economics, and Environment." Conference themes have included water (1998), waste (2004), land resources (2006), biodiversity (2010), and most recently agriculture and forestry (2012).
- 34 There is a broad range of critiques of Hardin and his discussion of the tragedy of the commons. He is writing about a particular land-use arrangement (the open-access commons), and even among commons this is only one of many types. And his scenario is premised on a set of assumptions that when revealed is highly questionable (e.g., that people will always act in short-sighted, greedy, self-interested, and non-communicative ways with members of their communities). Finally, the particular historical example that Hardin uses – the English commons that existed from medieval times to the beginning of the industrial era – did not disappear through any misuse or tragedy. The English commons was a sustainable and enduring land-use and social institution that came to an end only through an act of the British Parliament designed to create a labour pool for the then-emerging factories (if the landless could not graze their animals on "free" or common land, then they were forced to work in factories to earn a living). See Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990); and my more limited discussion in Jacobs, "European Property Rights," *supra* note 7. Yet, despite the limitations of Hardin's article and the story at its centre, the article (really the title) has become a central metaphor for the environmental movement globally. When there is a natural resource management problem, someone sometime will identify it as "a tragedy of the commons," drawing from one of Hardin's key points (the point that I stress above): that individual rationality does not equal social rationality.

- 35 For a pioneering study of this issue in the United States, see Fred P Bosselman and David L Callies, *The Quiet Revolution in Land Use Control* (Washington, DC: USGPO, 1971).
- 36 See Donald W Large, "This Land Is Whose Land? Changing Concepts of Land as Property" (1973) 4 *Wis L Rev* 1041; and Christopher D Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (Los Altos, CA: William Kaufman, 1974). For more recent explorations, see Eric T Freyfogle, *The Land We Share: Private Property and the Common Good* (Washington, DC: Island Press, 2003); Eric T Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Boston: Beacon Press, 2007); and Robert J Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks* (Burlington, VT: Ashgate, 2004). An exploration of these themes was published in the special issue of *Cornell Law Review* (2009) 94(4) focused on *Property and Obligation*.
- 37 Hardin himself provides a third solution to the problem that he identifies. His solution is to increase the extent of private property: "The tragedy of the commons ... is averted by private property." Hardin, *supra* note 31 at 1245. Since Hardin is examining the problem of unlimited and unregulated access to commons land, he believes that a solution to non-sustainable management lies in privatization.
- 38 545 US 469 (2005).
- 39 Harvey M Jacobs and Ellen M Bassett, "All Sound, No Fury? The Impacts of State-Based Kelo Laws" (2011) 63(2) *Planning and Envtl L J*.
- 40 *Supra* note 38 at 489.
- 41 Jacobs, "Wisdom," *supra* note 6.
- 42 Harvey M Jacobs and Ellen M Bassett, "After 'Kelo': Political Rhetoric and Policy Responses" (2010) 22(2) *Land Lines* 14; Jacobs and Bassett, *supra* note 39.
- 43 Since the date of the decision, I have not travelled anywhere globally where I am not asked about it and often asked to lecture on it.
- 44 For discussions of the impacts of these state laws, see Jacobs and Bassett, "After 'Kelo,'" *supra* note 42, and "Fury," *supra* note 39; Edward J López et al, "Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash" (2009) 5(1) *Review of Law and Economics* 101; Andrew P Morriss, "Symbol or Substance? An Empirical Assessment of State Responses to Kelo" (2009) 17 *Supreme Court Economic Review* 237; and Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo" (2009) 93(6) *Minn L Rev* 2100. For discussions of the media coverage and impact of the decision, see James W Ely Jr, "Post-Kelo Reform: Is the Glass Half Full or Half Empty?" (2009) 17 *Supreme Court Economic Review* 127; Janice Nadler, Shari Seidman Diamond, and Matthew M Patton, "Government Takings of Private Property: Kelo and the Perfect Storm," in Nathaniel Persily et al, eds, *Public Opinion and Constitutional Controversy* (New York: Oxford University Press, 2008) 287; and Lynne B Sagalyn, "Positioning Politics: Kelo, Eminent Domain, and the Press," in Timothy N Castano, ed, *Land and Power: The Impact of Eminent Domain in Urban Communities* (Princeton, NJ: Policy Research Institute for the Region, Woodrow Wilson School of Public and International Affairs, Princeton University, 2008) 49.
- 45 See, e.g., Hendrik D Ploeger and Danielle A Groetelaers, "The Importance of the Fundamental Right to Property for the Practice of Planning: An Introduction to

- the Case Law of the European Court of Human Rights on Article 1, Protocol 1" (2007) 15(10) *European Planning Studies* 1423; Tom Allen, "Compensation for Property under the *European Convention on Human Rights*" (2007) 28(2) *Mich J Int'l L* 287; and Tom Allen, "Liberalism, Social Democracy, and the Value of Property under the *European Convention on Human Rights*" (2010) 59(4) *ICLQ* 1055 [Allen, "Liberalism, Social Democracy"].
- 46 Allen, "Liberalism, Social Democracy," *ibid* at 1078.
- 47 See also Aida Grgić et al, *The Right to Property under the European Convention on Human Rights*, Human Rights Handbooks No 10 (Strasbourg, Belgium: Directorate General on Human Rights and Legal Affairs, Council of Europe, 2007).
- 48 Allen, "Liberalism, Social Democracy," *supra* note 45 at 1065.
- 49 Ploeger and Groetelaers, *supra* note 45 at 1436.
- 50 Jacobs, "L'engrenage," *supra* note 7.
- 51 Hans van der Cammen et al, *The Self-Made Land: Culture and Evolution of Urban and Regional Planning in the Netherlands* (Houten-Antwerpen: Spectrum, 2012).
- 52 See, e.g., Erwin van der Krabben and Harvey M Jacobs, "Public Land Development as a Strategic Tool for Redevelopment: Reflections on the Dutch Experience" (2013) 30(1) *Land Use Policy* 774.
- 53 See, e.g., Cave, *supra* note 8.
- 54 Andrew Jacobs, "Harassment and Evictions Bedevil Even China's Well-Off," *New York Times* (28 October 2011), online: <http://www.nytimes.com/2011/10/28/world/asia/harassment-and-house-evictions-bedevil-even-chinas-well-off.html?pagewanted=all>.
- 55 *Ibid*.
- 56 For recent discussions, see, e.g., Daniel Abramson, "Transitional Property Rights and Local Developmental History in China" (2011) 48(3) *Urban Studies* 553; and Susan Whiting, "Values in Land: Fiscal Pressures, Land Disputes, and Justice Claims in Rural and Peri-Urban China" (2011) 48(3) *Urban Studies* 569.
- 57 See, e.g., Cave, *supra* note 8.
- 58 Suzannah Hills, "Cuban Property Market Booms after House Buying Allowed for the First Time since the 1959 Revolution," *Daily Mail* (30 March 2012), online: <http://www.dailymail.co.uk/news/article-2122601/Cuban-property-market-booms-house-buying-allowed-time-1959-Revolution.html>.
- 59 Cave, *supra* note 8.
- 60 Harvey M Jacobs, ed, *Private Property in the 21st Century: The Future of an American Ideal* (Northampton, MA: Edward Elgar Publishing, 2004).
- 61 On land grabbing, see, e.g., "Forum on Land Grabbing" (2011) 38(2) *Journal of Peasant Studies* 206; see also Ann Varley, "Postcolonialising Informality?" (2013) 31(1) *Environment and Planning: Society and Space* 4, on formalizing property rights in the developing world; and Paul Nadasdy, "Property and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations" (2002) 104(1) *American Anthropologist* 247, on Indigenous peoples' claims.
- 62 I draw here from Harvey M Jacobs and Kurt Paulsen, "Property Rights: The Neglected Theme of 20th Century American Planning" (2009) 75(2) *Journal of the American Planning Association* 135.

63 *Ibid.*64 The Dutch, well known for a strong planning system, have recently begun discussing among themselves the critical role of storytelling as part of the planning process. See, e.g., Maarten Hajer et al, eds, *Strong Stories: How the Dutch Are Reinventing Spatial Planning* (Rotterdam: 010 Publishers, 2010).

65 See the discussion above related to note 33.

## 2

## Bumble Bees Cannot Fly, and Restrictive Covenants Cannot Run

BRUCE ZIFF

Some eighty years ago, an urban myth with remarkable longevity was born. It was claimed that it was aerodynamically impossible for bumble bees to fly, and that any suggestion to the contrary runs afoul of the laws of physics. This assertion was first advanced in the 1930s by a Swiss aerodynamicist during a dinner with an eminent German biologist. The wings of this insect, it was shown on a napkin, simply cannot produce sufficient lift to enable flight to occur.

It turns out, though, that bumble bees *can* fly, which explains why we see them doing so all summer long. However, I would like to use this chapter to introduce a new urban myth. It is that the juridically recognized restrictive covenant is a legal, social, economic, and moral impossibility. Despite appearances, it seems to have no basis for sustained life. It is the law's bumble bee. I propose to advance this claim by showing that the recognition of such interests in land defies the circumstances of legal history, entrenched property law doctrine, economic analysis, and social policy. I will present to you my napkin calculations that prove that restrictive covenants are not possible.

Before beginning, some basics should be addressed. A restrictive covenant is designed to control the uses to which a parcel of land is put. In that way, it resembles a land use by-law. The difference, of course, is that such covenants are imposed by private owners against other private owners, and not by some governmental authority such as a municipality. Indeed, prior