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

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England and the U.S. have, famously, been described as "two countries separated by the same language." In a similar way, the U.S. and Europe are commonly thought of as two "nations" in which property holds a similar historical place, and yet its treatment seems remarkably divergent (see Reid (2004) and Herriot (1930) for the use of this term in reference to Europe).

In this paper I argue that until the early part of the 20th century property and its treatment were essentially similar in the U.S. and Europe. It was the U.S. that changed not Europe. The likely future of regulatory takings in the U.S., especially in the context of the 2002 and 2005 U.S. Supreme Court decisions, and the rise and impact of the so-called private property rights movement is also explored. And I offer speculation on the European future of regulatory takings in specific but private property more broadly, especially as a function of European integration. I end by answering the question: in the 21st century will Europe and the U.S. continue to be separated by the same language?

To begin, some definitions and contextual material.

Regulatory taking in the U.S. Regulatory takings is a U.S. concept that addresses the limits placed on government to engage in regulation of private property absent compensation to the landowner for regulation that is deemed too onerous. Legally the concept of regulatory taking originates in the so-called taking clause of Fifth Amendment of the Bill of Rights of the U.S. Constitution – "nor shall private property be taken for public use, without just compensation." The origin and role of this clause in the U.S.'s founding documents is itself interesting.

Key American founders conceived that the very purpose of government was for the protection of an individual's right to property (Ely 1992; see also Jacobs 1999a and 2006). And

yet the debates that led to the Declaration of Independence in 1776 and the U.S. Constitution in 1787 yielded no clear positions or statements about the relationship of government to an individual's private (real) property.

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

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

In fact, during colonial times, it was quite common for government to regulate privately owned land for various public health, public safety and what we would deem to be ecological purposes (Treanor 1995). These actions were seen as normal and appropriate. But regulation of private land was not something that was very present in the American political or legal consciousness in the 18th and 19th century.

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

The early part of the 20th century was a time of great demographic, spatial and economic change in the U.S. There was both substantial immigration and internal migration (from rural to urban areas). There was also substantial industrialization, much of it clustered in the same cities experiencing immigration and migration. The response of these cities was to pass regulations to manage public health and safety conditions. The impact of these regulations was to burden individual landowners – both private and corporate (Scott 1969). Out of these new spatial and economic conditions arose a concern about whether there were appropriate limits to government regulation.

At first, the answer was simply and strongly no. Early in the century, the U.S. Supreme Court affirmed the right of government to regulate absent any obligation for compensation. In language that now seems quite sweeping, the Court in 1915 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. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

But the conditions of the period were to keep the issues before the Court for another decade-plus. As they did, the Court would define the issue of regulatory taking.

The key case is that of Pennsylvania Coal v. Mahon in 1922 (subsequently referred to as Penn Coal). It was here that the Court defined the 20th century concept of regulatory taking. In examining the power of government to issue regulations which affect private property the Court said: "[T]he general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking" (260 U.S. 393 (1922): 415; emphasis added). In other words, a regulation can be equivalent to a taking (physical expropriation) under the Fifth Amendment.

But what the Court did not say in 1922 is exactly where the line is that distinguishes regulation that "goes too far" from regulation that does not. And this is important. Because regulation that "goes too far" entitles the landowner to compensation; regulation that does not go "too far" requires the landowner to accept the regulation's burden as a reasonable exercise of governmental authority.

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

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

However, the new regulatory takings dictum established by the Penn Coal case proved to be more theory than practice in the first two-thirds of the 20th century; there were few instances of government going "too far." This changed with the first Earth Day. For a number of reasons (which are not explored here), beginning around 1970, government at the federal, state and local levels in the U.S. began to engage in more regulation and this regulation imposed itself more strongly upon individuals and their property rights. It was because of this that the limitations established by Penn Coal – the doctrine of regulatory taking – emerged as an important part of the legal, policy and administrative discourse of the final third of the 20th century and this first decade of the 21st century in the U.S.

What was the *legal* status of the 20th century discourse? Between 1978 and 1994 the U.S. Supreme Court agreed to review a number of cases in which it had the opportunity to refine its own, government's and the individual's understanding of the appropriate balance point between acceptable and unacceptable regulation (see for example Penn Central Transport. Co. v. New York City 438 US 104 (1978); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Dolan v. City of Tigard, 512 U.S. 374 (1994)). The Court began to more clearly say when the line of "too far" had been crossed. Of the cases decided in this period, one that received a great deal of attention was Lucas. Here the Court ruled that when all economically viable use has been taken by regulation,

this was a case of regulation going "too far" and compensation was owed the landowner.

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

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

Regulatory taking in Europe. It appears that property has the same social value and serves the same social role in Europe as it does in the U.S. The French Revolution occurred only 13 years after the American Revolution and access to and protection of rights in property was a central theme of the Revolution. One of the rights that emerged is directly parallel to the U.S. Taking Clause.

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

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

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

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

The practical implication of the balancing of these rights is similar to the legal experience of the U.S. pre-1922. That is, the right of property protection in the Declaration is understood as

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

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

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

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

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

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

The Kelo case has set off a firestorm of popular protest and state-based legislative reactions (Egan 2005). What is interesting is what it says about the *legal* state of regulatory

takings in the U.S. In 1922 with Penn Coal the Court established the concept of regulatory taking. Yet despite this, the place of regulatory taking in U.S. law has been limited. While in the 1980s and 1990s the Court began to try and specify what it might mean in practice, their recent decisions suggest that they are giving up. "Too far" is a strong idea in theory, but like the Court's decisions on pornography (one knows it when one sees it) it seems too difficult to specify in advance.

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

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

Despite what might be a weak legal situation for regulatory taking, its rhetorical and policy situation is quite different, or at least appear to be. In the late 1980s a social movement arose whose explicit purpose was to advocate on behalf of the rights of landowners under the banner of regulatory taking. The private property rights movement is a national coalition targeting national, state, and local land use and environmental laws, policies and programs (Jacobs 1995). This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective. Drawing from classical political theory, the coalition argues that through public policy and law that diminishes private property the state is actually encouraging a situation that diminishes the very viability of the liberty and democracy it is designed to protect.

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

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

What is the likely future of regulatory taking in the U.S.? I believe regulatory taking will have a two track future.

On the formally legal track, the Court will continue to be wary about expressly defining the bright line that delineates regulation that "goes too far" from regulation that does not. While Penn Coal gave the Court the opportunity to do this, in the area of property rights and the balancing of the rights of the individual with those of the community at large, the Court has

shown a continuing preference for an ad-hoc, case-by-case approach. Despite its rhetorical appeal, I do not believe that the U.S. Supreme Court will expressly and clearly determine the arena of regulatory taking.

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

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

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

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

Caruso (2004: 752) points out that "[P]roperty is strangely singled out and portrayed as immune from Europeanisation [and] . . . this seems somewhat at odds with the growing impact of supranational adjudication upon States' property regimes." Likewise Gambaro (1997: 497) notes that ". . . article 222 of the EEC Treaty raises a complete bar to the disciplining of real property at the European level . . .". Ultimately, he believes that ". . . it is in any case extremely doubtful whether real property law could be explicated more effectively or usefully through the application of a European-wide code, as opposed to the nuanced approaches offered by the various national codes already covering the subject" (Gambaro 1997: 497).

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

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

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law,

subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

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

Caruso finds herself surprised and perplexed. As she says, ". . . a quick look at the Constitutional Treaty reveals a rather striking detail. The drafters, while making it clear that *intellectual* property becomes a subject for legitimate legislative action at EU level, have restated the promise of non-interference with property in general" (emphasis in original). So, ". . . in the draft [European] Constitutional Treaty, property remains segregated and portrayed as something essentially different, somehow severable from the project of integration" (Caruso 2004: 753). Will this endure? Gambaro thinks so; Caruso is less sure but ultimately agrees with Gambaro's assessment. After parsing the matter, she concludes that property will remain a national, rather than European matter.

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

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

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

But when one goes from the level of legal and political theory to the level of policy practice, the answer to the question of whether there is a place for regulatory taking (or something like it) is more ambiguous. In winter 2006 I conducted interviews with public officials in southern France about the status of property and its management. Under French law, public authorities have both a broad and a strong set of authorities to manage privately owned land. Owners have no basis to claim regulatory taking, and the public may pre-empt proposed private land sales. But according to public officials the mood of landowners and the judicial system is undergoing a seismic shift. Landowners are more willing to challenge local authorities, and courts are more likely to back landowner challenges against local authorities. Why? It appears that Griffiths (2003) may be correct. According to interviewees, challenges

and successes are not a function of formal changes to the law, but instead reflect a local sense of a European mood in favor of markets and property rights and away from the central state.

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

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

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

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

Both the U.S. and Europe share a common heritage in the Enlightenment. Both the American and French revolutions, occurring as they did within a span of less than a generation, were about lack of access to and security of property for the common person. And each sought to enshrine a right to property, and as importantly a right to private property's protection from the arbitrary and capricious power of the state.

The literal form of these protections is similar – the Takings Clause of the Fifth Amendment to the U.S. Constitution (1791) and Right 17 of the Declaration of the Rights of Man (1789). And for the remainder of the 18th century and the duration of the 19th centuries the way these protections were understood and implemented was likewise similar. These respective clauses referred to the way the individual was protected from the state *when the state sought to engage in physical expropriation*. Neither of these clauses was understood to apply to the right of the state to engage in regulation. There was no concept of regulatory taking; there was no

right of protection from regulation.

When divergence occurred it was from the U.S. In 1922 the U.S. Supreme Court invented the concept of regulatory takings. For nearly 85 years (though actually most pointedly for the last 30+ years) the Court, the legislatures and the American people have been grappling with specifying what this concept means. To many it make sense; but where is the line of "too far"?

It is in the difficulty of specification that convergence may reemerge. As much as has been written about the idea of regulatory taking, my assessment is that it has more rhetorical and political power than actual legal authority. When the U.S. courts have engaged the matter of whether a regulatory action in fact "goes too far," more often than not they find themselves returning to their 1915 framework – that in theory there is a limit to regulatory action, but in practice the particular regulation they are examining does not cross the line. This certainly seems to be the lesson from their 2002 and 2005 decisions. Where the concept of regulatory taking has agency is in the political arena. Its very existence allows policy advocates to argue for a regulatory approach more sensitive to landowners rights and less expansive of public rights.

In Europe the situation is different. Without the 20th century introduction of a broad concept of regulatory taking the legal and political concept of *imperium* has largely continued on unabated. The result has been regulatory structures that impose themselves heavily upon individual landowners. Will this change? And if so, how? There are property rights advocates in Europe parallel to those in the U.S. It is not clear that they will have much impact on the policy or political form of any regulatory takings debate. If there is a venue for change, however, it will be legal. Drawing from the imperatives embedded in the Treaties of Rome and Maastricht and guarantees in the European Convention on Human Rights landowners may have a cause to argue that the state must lessen the extent of its regulatory actions (see Çoban (2004) for a recent discussion of the property rights issue with the context of the European Convention on Human Rights). And related to this may be a legal and political debate about the extent to which the "four freedoms" require the shifting of land and environmental regulation from the nation-state to the European level.

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

So, with the 21st century I predict a return to the pre-1922 era when the practices in the U.S. and Europe, not withstanding their being based on different legal systems, return to a mode where their outcomes are essentially the same – an acknowledgment of the idea of regulatory taking, but a very limited impact of the idea on the actual mechanisms of governmental decision making.

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