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Property rights, taxpayer rights, and the multiscalar attack on the State: Consequences for regionalism in the United States

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**Property Rights,
Taxpayer Rights,
and the Multiscalar
Attack on the State:
Consequences for
Regionalism in the
United States**

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April 2007

UNIVERSITY OF CALIFORNIA

**“Property rights, taxpayer rights, and the multiscalar attack on the state:
Consequences for regionalism in the United States”**

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“Property rights, taxpayer rights, and the multiscalar attack on the state: Consequences for regionalism in the United States.”

Abstract:

Studies of “new regionalism” often focus on the new actors or goals characteristic of contemporary regional coalitions, at the cost of recognizing how competing social movements may constrain regional policy. This paper considers the recent evolution of the property rights and taxpayer movements in the U.S., and how their attacks on state regulatory and tax capacity have affected regional governance. The development and strategic use of “scalar repertoires” and framing strategies has enabled these movements to take advantage of political opportunities at different scales. Regionalists have been slow to build the versatile scalar repertoires needed to respond to these challenges.

Keywords: Social movements, regionalism, property rights, tax limitations, regulatory takings, *Kelo* case

JEL classifications: H71, O21, P14, R52

Over the past decade and a half, a diverse set of interests has converged around regionalism as a way to address a host of problems that fragmented local governments have long failed to attack in the metropolitan United States. Focusing on the region, which includes the cities and suburbs that comprise the broader metropolitan area, has allowed public and private actors to propose innovative approaches to growth control, economic development, and

redistribution. But as these variegated “new regionalisms” have gained attention and popularity, the property rights and anti-tax movements have concurrently advanced a very different agenda aimed at reducing the regulatory and tax capacity of the state. In this article, we argue that even though the property rights and anti-tax movements seldom attack regionalism directly, their recent successes at the federal, state, and local scales threaten to place significant limits on what regional governance can accomplish. By restricting the state’s power to regulate land use and to tax, these movements undermine possibilities for effective collaboration on regional growth plans, obstruct efforts to enhance regional infrastructure and preserve open space, and hinder attempts to make affordable housing available throughout metropolitan areas. These movements thus circumscribe not only the equity- and environment-oriented regional strategies that rely heavily on state action, but also the growth-oriented regionalism that is more commonly initiated by public-private coalitions.

We begin by using the insights of social movement theory and critical geography to examine how property rights and anti-tax activists strategically adapted to changing political opportunities by drawing on the scalar repertoires of various actors within their coalitions. Two case studies – regulatory takings laws in Oregon and national property rights activism – demonstrate how these activists have squeezed state capacity, often by mobilizing at one scale to shape decision-making at others (*e.g.*, using state legislation to affect local government capacity). Although these movements have not experienced uniform success, they exhibit a striking ability to regroup after defeats and to press their claims in multiple arenas. Regionalists, we show, have barely begun to respond with similarly versatile scalar strategies.

Scale and strategy in the property rights and anti-tax movements

Contemporary studies of regionalism in the United States typically situate their analyses in relationship to two earlier waves of regionalism (DREIER *et al.*, 2001). In the 1920s, and again in the 1950s and 60s, arguments about the benefits of consolidating governments in metropolitan areas led to a variety of proposed reforms, which yielded little in the way of results. The most recent set of regionalist ideas and strategies, which emerged in the 1990s, are commonly compared and contrasted to these earlier efforts as a way to assess their prospects for success.

The new regionalists who began pressing for more coordination and connection across metropolitan areas in the 1990s are a diverse lot. They include those whose primary goal is promoting equity across the region, those who emphasize environmental concerns, and those whose main interest is economic competitiveness. Despite their differences, proponents of regionalism share a strong focus on governance as the chief way to promote their goals. Instead of proposing new general purpose metropolitan governments, as did earlier generations of regionalists, the new regionalists emphasize the benefits of greater cooperation across local governments and highlight the need to construct new linkages between the public and private sector. All three groups recognize the need to build alliances that cross geographic lines and unite interests that have historically been at odds with one another. All three also acknowledge that government action may be needed to achieve their goals, although they typically emphasize distinct priorities for public action. Business-oriented regionalists highlight the importance of public spending on infrastructure and education, while equity and environmental regionalists are more likely to press for government regulations to support the construction of affordable housing or restrict development.

A growing literature highlights the many regions where advocates have initiated new conversations about metropolitan development, the instances in which they have pressed for more inclusive regional development by striking deals with private sector actors, and the rarer cases in which they have altered public policy (RUSK, 2001; ORFIELD, 1997, and PASTOR, MATSUOKA, and BENNER, FORTHCOMING) But this attention to the collaborative conversations and mobilizing strategies deployed by regional advocates has come at the expense of situating these advocates in the context of contemporary competing social movements, whose activities have enormous implications for the potential success of all types of regionalism. Especially when it comes to enacting new public policies to support their vision, regionalists find a political field already occupied by formidable opponents.

In this paper, we show that the interlinked property rights and anti-tax movements have been particularly influential in constricting the prospects for regionalism.¹ Both movements took shape well before renewed interest in regionalism, but their successes in restricting the capacity of government have had a profound effect on the political context that regionalism's advocates confront. One of the most striking features of these movements has been their ability to operate at multiple scales – what we call their “scalar capacities” – which depend on their mastery of the specific tools needed to be effective at diverse scales – their “scalar repertoires”.

Here we build upon research in social movement theory and critical geography that provides complementary frameworks for understanding how, despite a series of obstacles and setbacks, property rights and anti-tax activists have successfully adapted to changing political circumstances. Social movement theory has historically focused on understanding how movements arise in the first place. A large literature places political opportunities, framing processes, and mobilizing structures at the center of its analysis for explaining the rise of social

movements (MCADAM *et al.*, 1996). More recently, however, social movement theory has turned to examine how social movements become effective. Answering this question requires examining the capacities of social movements to influence the political settings in which they are embedded. For example, sociologist Marshall Ganz has argued that the ability to take advantage of political opportunities depends on a movement's "strategic capacity" (GANZ, 2000). One key element of strategic capacity is what sociologist Elisabeth Clemens calls "organizational repertoires" (1993:763) – the tactics, mobilizing tools, and organizational forms upon which movements rely. Theorists have posited that an appropriate "fit" between organizational form and the political context in which movements operate is especially important for movement success. Theda Skocpol, for example touched upon the scalar dimension of organizational capacities and repertoires, in highlighting the distinctive strengths of federated movements (movements with linked national and state chapters) in the American political system. But overall, few studies have explained how social movements develop repertoires appropriate to different scales.

Geographers have emphasized the importance of this scalar dimension in their analysis of social movement efficacy. In his influential studies of the anti-gentrification protests centering on New York's Tompkins Square, Neil Smith (1992) concludes that the incipient movement lost momentum because it failed to "jump scales," to build the scalar capacity necessary to operate beyond the scale of the neighborhood.² Other geographers have observed that movements can also build their scalar capacities through cross-scalar networks and deliberately decentralized action, suggesting that jumping scales is less imperative than the ability to act strategically at different scales (LEITNER *et al.*, 2002; STAEHELI, 1994; in political science, see KECK and SIKKINK, 1998). Some geographers have drawn from social movement theory's treatment of

political opportunities and framing to explain this strategic aspect. Byron Miller (1994) describes the Cambridge Peace Movement's shifts from local to national activism and back in the early 1980s as strategic responses to changing political opportunity structures; Hilda Kurtz (2002) examines how careful framing allowed a Louisiana environmental justice group to press claims at multiple scales of governance. But mirroring the gap in social movement theory, critical geography has not addressed the scalar dimension of movement repertoires.

We define a scalar repertoire as the range of tactics, mobilizing tools, and organizational forms that a movement is able to use strategically at different scales. The tools and forms employed by the property rights and anti-tax movements vary widely and have included legal efforts in the state and federal courts; rallies targeted at state and national politicians; coalition-building activities (including conferences, etc.) at multiple scales; and information-sharing networks that do not map neatly into any scale of state governance. Such repertoires also, importantly, include the movements' understanding of relationships *among* scales and the effects of activism at one scale on another. For example, Colorado voters passed the Taxpayers' Bill of Rights in a state referendum and capped the growth in state expenditures, but TABOR also specified formulae for growth at county and local levels. Tax and regulatory capacity was thereby limited across multiple scales of government. These scalar strategies partly explain how taxpayer and property rights initiatives, while seldom attacking regional governance directly, can circumscribe opportunities for regionally coordinated action.

How did the property rights movement and the anti-tax movements become so adept at the strategic use of scale? We argue that three features of these movements have bolstered their capacity to be effective at multiple scales. First, they emerged as counter movements seeking to undermine the past gains of environmentalists, pro-spending liberals, and entrepreneurial urban

regimes; this led movement elites to develop their repertoires at various other scales, particularly at the state scale. Second, their connections to a larger well-resourced conservative movement provided information and resources needed for developing these repertoires – *i.e.*, by promoting organizational innovation, disseminating policy strategies, and sustaining the movement's presence in multiple venues. Finally, these movements paired flexible scalar repertoires with framing strategies that were supple enough to attract a diverse array of allies, thus creating the possibility for assembling distinct coalitions at different scales.

The literature on social movements has recognized counter movements as a distinctive form of mobilization. Counter movements are likely to emerge and endure in the context of federal systems which provide challengers with “political allies to aid mobilization and venues in which to press claims” (MEYER and STAGGENBORG, 1996:1637). The availability of alternative venues allows movements that have been solidly defeated in one arena to regroup and publicly press their claims in an alternative venue. Because the western property rights and anti-tax movements emerged as counter movements to environmentalists and pro-spending liberals, they had an appreciation of scale from the start. Liberal successes in national politics meant that these counter movements initially sought a foothold in state and local venues. They later took advantage of new opportunities at the federal level during the Reagan Administration. But their limited success in rolling back environmental protections and limiting taxation at the national level meant that these movements were always active at multiple scales. The eastern property rights movement, as we shall see, had a somewhat different trajectory, but it too eventually became active at multiple scales.

All three movements also relied upon connections to a larger conservative movement to provide resources and foster the development of scalar repertoires. At times, “general-purpose”

conservative organizations have led activism across the country, paralleling the hierarchy of state scales in which Supreme Court decisions, for example, may circumscribe the actions of local government. But more often these organizations have made resources available through networks organized across “fuzzy and noncontiguous spaces” (SHEPPARD, 2002) and between organizations pursuing policy agendas at the national, state, and local scales. In other words, even though activists are clearly conscious of existing scalar hierarchies, they have tended not to replicate the power relations organizationally (the groups may be arrayed “vertically” but not “hierarchically”; see LEITNER and MILLER, 2007). Thus, general-purpose conservative organizations have built scalar repertoires and capacities among property rights and anti-tax activists by reaching out to local groups, supplying research, disseminating policy models, pressuring state and local politicians, and offering legal support. Key organizations have included the American Legislative Exchange Council (ALEC), a multi-issue free-market oriented group, which for 25 years has sought to influence state politics by developing model legislation and convening like-minded state legislators into issue forums (STANKIEWICZ, 2005 225-57). Other organizations, notably Defenders of Property Rights, have specialized in legal support; whereas Americans for Tax Reform has focused on pressuring state and local politicians.

Activists complemented these scalar repertoires with versatile framing strategies, a third common feature. Both movements adopted broad, culturally-resonant frames, invoking a Lockean vision of property – in which the individual possession and use of land is fundamental to liberty – and Jeffersonian ideals of small government and individual freedom. Such frames were not only supple enough to serve as a common banner for diverse sets of interests, they also allowed the movements to attach specific grievances to a sweeping anti-government agenda.

Rather than serving as the impetus for redistributive reform, concerns about the abuse of eminent domain in African-American communities or the pressure of rising property taxes on elderly homeowners have served as entry points for building broad coalitions to endorse policies that primarily protect the well-to-do from public claims. Moreover, these broad coalitions have enabled property rights and anti-tax activists to mobilize at multiple scales – against local, state, and federal government.

Over time, then, the property rights and anti-tax movements have demonstrated a considerable capacity for taking advantage of political opportunities by skillfully framing issues and drawing upon activists' diverse and multiscalar organizational repertoires. The movements' leading intellectuals and lawyers have assembled coalitions of elite and grassroots activists to advance their agenda through various channels – the courts, the legislature, the executive, the media. They have also adapted to obstacles by changing their scale of mobilization, with the center of eastern property rights activism, for example, shifting from the Reagan administration to the state legislatures in the early 1990s, and then to a primarily legal strategy at multiple scales. Finally, activism shifted back to the state legislatures in the wake of *Kelo*, a unpopular U.S. Supreme Court decision that affirmed the local government's eminent domain power to seize private land for a broad range of "public uses" including, most controversially, for economic development by private parties (on public response to *Kelo*, see RICHEY, 2005).

The Counter Movements in Action

Property rights groups and anti-tax activists have recently backed three types of legislation that restrict state capacity and limit the prospects for regional governance: state regulatory takings laws requiring government to compensate owners for any reduction in

property value resulting from regulation; post-*Kelo* statutory redefinitions of blight and public use that prevent government takings for economic development; and state taxpayer bills of rights (TABORs) that cap the growth of governmental expenditures. New regulatory takings laws and TABORs are far more stringent than their antecedents – the regulatory takings laws and the tax and expenditure limitations of the 1970s, 1980s, and 1990s. The recent anti-regulatory and anti-tax measures are also complementary: regulatory takings require the extensive compensation of property owners, while TABORs restrict the expenditure needed to compensate them.

Government can be thus “squeezed” towards abdicating its regulatory function. Several libertarian organizations and donors have accordingly backed both TABORs and takings legislation across the country, though no state has yet passed both TABOR and a stringent compensation law. Nevertheless, each type of legislation has been adopted in at least one state: TABOR passed in Colorado, regulatory takings in Arizona and Oregon, and *Kelo* legislation in a majority of U.S. states.

Our studies of the political struggles surrounding adoption and implementation illustrate the development of scalar repertoires in property rights movements, the successful employment of these repertoires in particular campaigns, and the impact on governing capabilities at various scales, including the region. First, we consider regulatory takings legislation in Oregon, which has forced the state and local government to waive most of its land-use regulations, thus undermining the most advanced system of regional governance in the country. Oregon’s unique efforts to blend environmental, growth, and equity regionalism are all threatened by these legal changes. We then turn to the national and state-level campaigns for new restrictions on eminent domain powers – usually through the redefinition of “blight” and “public use” – that have gathered momentum in the wake of the Supreme Court’s controversial *Kelo* decision (2005).

Although eminent domain has a flagrant history of abuse in metropolitan areas, efforts to shape regional growth patterns are severely handicapped without some tool to claim land for public purposes.

Due to space constraints, we do not describe the antitax campaigns in detail, although we do consider their impact on regionalism. Antitax activists have passed tax and expenditure limitations across the U.S. (in 30 states by 2005), but their largest victory so far has been Colorado's Taxpayer Bill of Rights. Colorado's TABOR sharply limited the annual growth of spending and revenue raising capabilities at the state, county, and local scales. Because TABOR restrictions peg annual expenditure increases to the previous year's expenditures, spending can not bounce back after a recession. TABOR also requires a legislative supermajority for all tax increases, and mandates an additional voter approval for those that are permanent. The state's spending limits placed such severe pressures on education, infrastructure, and social services that the business community recently led a successful campaign to suspend the statewide law for five years.

All three property rights and antitax reforms directly or indirectly limit the tools available for the varied forms of regional governance. This includes not just those efforts such as "equity" or "environmental" regionalism that rely heavily upon direct state action, but also "growth" regionalism approaches that emphasize public-private partnerships and private-sector voluntarism. The broad attack on activist government may result in a movement away from both regional government and regional governance and a move toward a region whose trajectory is determined by the interests and decisions of private actors.

Regulatory takings laws in Oregon

There have been several branches of property rights activism in the US during the last thirty years.³ The “western” branch that focused on rural primary producers gained considerable attention for successfully organizing the Wise Use movement of the 1980s and 1990s, a movement whose diverse repertoires enabled it to win victories at the federal, state, and local scales. This wave of activism would set the stage for important regulatory takings measures that Oregon’s voters approved in the 2000s, and that nearly unraveled Oregon’s regional planning regulations, the most far-reaching and well-institutionalized form of regionalism in the country.

Though protests over federal control have a long history in the U.S. West, the Wise Use movement can trace its origins to the mid-1960s, when the increasingly restrictive environmental regulation of private lands and the preservationist turn in the management of federal public lands fomented widespread resentment in primary production-dependent communities. Nevertheless, the first organized response to these new conditions — the Sagebrush Rebellion of the 1970s and 1980s — was led by a narrow group of think tanks and industry trade groups, and the “rebellion” was attacked as a bald-faced corporate maneuver. When Ron Arnold and Alan Gottlieb organized the Wise Use movement around similar issues in the 1980s, they went to great lengths to legitimate its grassroots credibility. Anxious to project a more populist image, they built ties to small producers through state and local property rights activists while drawing on the resources of elite national-level groups. The diversity of the movement’s activists – from individual producers to regional trade associations to libertarian intellectuals – broadened the movement’s scalar repertoires and contributed to its success (MCCARTHY, 1999; SWITZER, 1997). Environmentalists cast doubt upon the Wise Use’s supposedly grassroots character by tracing the funding of its various organizations to industry associations and conservative foundations. But

as McCarthy (1999) has shown, the movement was in fact quite strong among small producers, even if local activism depended upon the strategic assistance of regional and national groups.

Particularly important at the local level was a "county supremacy" strategy entailing legal claims that local land use planning (based on the "local custom and culture" of resource use) superseded federal environment regulation (MCCARTHY, 1999). Regional and national organizations such as the National Federal Lands Council were instrumental in devising and popularizing this county-scale approach, and it quickly came to dominate Wise Use politics across the West. Local Wise Use activism also had an impact on national land management policy, successfully discouraging Bill Clinton's Interior Secretary Bruce Babbitt from raising grazing fees, preventing Clinton from elevating the EPA to a cabinet-level post, and deterring federal authorities from enforcing federal law on the ground (JACOBS, 1998: 34; MCCARTHY, 2001).

These successes drove a growing convergence with an "eastern" branch of the property rights movement, which had been pressing to expand the government's liability for regulatory takings – reductions in current or potential property value resulting from government regulations. Composed primarily of activist libertarian lawyers (and discussed at greater length in the next section), this branch of the movement had met with mixed success at the national level since coalescing in the early 1980s. On the one hand, William Rehnquist's elevation to Chief Justice and Antonin Scalia's appointment had allowed its legal experts to move an anti-regulatory agenda through the Supreme Court in the late 1980s and early 1990s, expanding the range of categorical takings and limiting government demands on property. But leading activists lost the access they had briefly gained as appointees in Reagan's Departments of Interior and Justice, where they had most notably authored Executive Order 12,630, directing government agencies to

assess the possible takings costs of all proposed new federal laws, and regulations. The administration of George H. W. Bush proved far less receptive to property rights advocacy, and the Clinton administration was still less so. Federal agencies, moreover, found it so difficult to implement Order 12,630 that it remained a dead letter (EMERSON and WISE, 1997; JACOBS, 2003). Nor could activists look to Congress; during the 1994 campaign, Republican congressional leaders vowed to deliver greater property protections in their Contract with America, but failed to pass new legislation once in power (JACOBS, 2003; OLIVETTI and WORSHAM, 2003).

Western Wise Use groups, however, were concurrently expanding their agenda to include state-level regulatory takings legislation (DAVIS, 1997; OLIVETTI and WORSHAM, 2003; SWITZER, 1997). Existing Wise Use groups were well-positioned to access state legislatures and find sponsors for legislation; environmental groups had not developed the organizational capacity to monitor state legislation and mobilize opposition in state political arenas (JACOBS, 1998:40; JACOBS, 2003; LUND, 1995; MARZULLA, 1995). Property rights groups successfully organized support for a variety of regulatory takings bills in the states between 1992 and 1996, ranging from largely procedural measures to those requiring the extensive compensation of property owners (EMERSON and WISE, 1997; PENDALL, 2002). In the West, these state campaigns drew grassroots legitimacy from local-scale Wise Use activism, while the legislation itself was shaped by national-scale models and organizations: model compensation bills, for example, were drafted by the American Legislative Exchange Council and Defenders of Property Rights (EMERSON and WISE, 1997; LUND, 1995). Wise Use began to decline in the mid-1990s, after the Idaho Supreme Court rejected the county supremacy strategy; the Oklahoma City

bombing made the movement's violent tactics a liability; and a sizable segment of the movement turned its attention to international trade issues (MCCARTHY, 1999:195-8; 2001).

Wise Use activism in many states, however, did develop enduring linkages between state activists, national organizations, and corporate interests that paved the way for renewed regulatory takings activism in the 2000s. This was particularly the case in Oregon, which has long been the target of sustained, industry-backed, anti-environmentalist community organizing. (RAMOS, 1995; RAMPTON, 2004). Begun as a local property rights group in 1981, Oregonians in Action (OIA) flourished during the heyday of Wise Use, opening an education center and a legal center (MARZULLA, 1995). In 1989, OIA decided to focus exclusively on land use issues, deliberately acting as a counterweight to 1000 Friends of Oregon, an organization that built grassroots support for Oregon's planning system in general, and its regional elements in particular (ABBOTT *et al.*, 2003; WEIR, 2000). Timber interests financially supported OIA, while national and state Wise Use organizations such as the Alliance for America filed *amicus* briefs supporting OIA client Florence Dolan in the landmark *Dolan v. City of Tigard* property rights case.⁴

Since 2000, OIA has spearheaded the first of the recent regulatory takings campaigns: Measure 7, which passed in 2000 but was invalidated on a technicality, and Measure 37, which passed in 2004 and withstood legal challenges. These measures, however, represent the birth of a somewhat different counter movement, focused on Oregon's exceptionally stringent land-use laws rather than federal environmental restrictions. Measure 37 enabled landowners to file claims against the state for any reduction in property value caused by a regulation that has been put in place since they acquired their property; the state also had the option of waiving the regulation, and in fact, the language of the initiative provides incentives for the state to waive

rather than pay. The political base of Oregon's Wise Use movement had centered on timber companies and workers aggrieved by national environmental regulations, and indeed, timber companies were among Measure 37's key backers (DEMOCRACY REFORM OREGON, 2007). But Measure 37 expanded the property rights constituency to landowners and would-be small developers who had been prevented from improving their property by Oregon's mandatory local growth boundaries and limits on forest and farmland conversion (FLINT, 2006; SABATH, 2004; WHITMAN, 2006).

New framing processes have enabled the movement to shift from contesting federal to state regulation. The rhetoric of Oregon's Wise Use movement had repeatedly warned that federal environmental protections would lead directly to job loss. Ten years later, Measure 37's proponents instead fused an attack on overreaching bureaucrats and a defense of free enterprise with broadly-appealing arguments for fairness. They told stories of landowners who had invested their life savings in property, hoping to develop it, only to be financially ruined when local planners drew urban growth boundaries (UGBs) that marked their land for preservation. Many credit Measure 37's victory to TV spots featuring 93-year-old Dorothy English, who was unable to subdivide land to build houses for her children due to its location outside of Portland's UGB. Frustration with regionalist land-use regulations, particularly state-mandated urban growth boundaries (often lauded in the regionalist literature) also contributed to grassroots rural and suburban support. Finally, proponents insisted that Measure 37 would not strip away existing zoning, although it held the potential to do just that for property owners who had acquired property before the introduction of zoning codes. In the end, Measure 37 won with a landslide 61 percent of the vote.

Victorious OIA activists traveled the country, inspiring similar campaigns elsewhere, though the support of the broader libertarian and conservative movements was both an asset and a liability (FLINT, 2006; SABATH, 2004). After Measure 37's survived legal challenges, the libertarian Reason Foundation produced a guide for "exporting" regulatory takings to other states; the booklet included detailed instructions for crafting initiatives and amendments, and recommended strategic alliances with taxpayer advocacy groups, "which share a common goal of protecting individual and political freedoms and reducing the size and scope of government [and] also tend to have large donor bases, extensive grassroots networks, and well-established clout in media and political circles" (GILROY, 2006:33). During the 2006 election cycle, Howard Rich, a wealthy and reclusive New York City real estate investor, bankrolled regulatory takings legislation and TABORs in a number of states through his Americans for Limited Government group. Opponents seized on Rich's involvement, attacking the initiatives as out-of-state interference. Regulatory takings measures appeared on state ballots in Arizona, California, Idaho, and Washington, though only Arizona's passed. Property rights activists were also chastened the following year, when Oregon voters – after a major mobilization on the part of the well-established organizations supporting Oregon's land use laws -- passed Measure 49. The new measure invalidated many of the large landowner claims filed under Measure 37.

Nevertheless, the Oregon case demonstrates the power of property rights advocates: before being modified, regulatory takings claims generated an administrative burden sizable enough to halt most other planning activities at multiple scales. In this regard, Measure 37 echoed the multiscalar design of ALEC's Wise Use-era model regulatory takings legislation, which required government compensation if the interaction of government regulations at various scales resulted in a 50 percent reduction of property value (EMERSON AND WISE, 1997).

Measure 37 was more extreme, as there was no minimum threshold; states and local governments were potentially liable for any reduction of property value. But since local governments enforce both their own zoning and state planning mandates, landowner claims had effects at both the local and state scales.

The effects on environmental regionalism – conceived of broadly to include forest preservation, watershed protection, and so on – are readily apparent in the Oregon case. Measure 37 hamstrung local land-use management practices as state and local governments chose to waive regulations rather than compensate property owners. The scale of Measure 37 claims against state and local governments – over \$19 billion in claims had been filed as of May 2007 – effectively precluded compensation, especially in a state where previous rounds of tax and expenditure limitations had reduced the tax capacity of state and local governments (THOMPSON and GREEN, 2004; WHITMAN, 2006; DORIG, 2007). Had Oregon voters approved the 2006 TABOR referendum – which would have instituted spending limits similar to those in Colorado – state and local capacity to compensate property owners would have been further diminished.

The same interface of expenditure restrictions and regulatory taking restrictions could also prevent efforts to pursue equity goals at the regional scale. Affordable housing advocates in Oregon had recommended repealing a 1999 state law that prohibits mandatory inclusionary zoning ordinances. But since Measure 37 did not exempt affordable housing from its “pay-or-waive” requirement, inclusionary zoning ordinances could have entailed the extensive compensation of developers.

Post-Kelo activism and the Castle Coalition

In 2005, the property rights movement launched a major mobilizing campaign in response to the Supreme Court's decision in the *Kelo* case, which upheld the right of localities to use eminent domain in pursuit of private development. Playing on widespread popular fears about eminent domain abuse, activists in several states attached regulatory takings restrictions to the eminent domain reform that they placed before the electorate. The speed with which these “*Kelo-plus*” initiatives appeared on state ballots and in state legislatures highlighted the multiscalar capacities of the property rights movement.

The activism that followed the Court's decision traced its roots to the elite eastern branch of the property rights movement. Whereas Wise Use's strategists focused on primary producers, federal lands, and environmental regulation in the West, this second branch of the property rights movement has concentrated on the property rights of developers, homeowners, and businessowners. During the 1980s and 1990s, property owners won a series of cases before the Supreme Court, expanding the types of government action that could be considered “takings” (including regulations that only partially diminished property value) and preventing governments from imposing permit fees unrelated or disproportionate to the impacts of proposed development (see for example, FLINT, 2006; MARZULLA, 2005; AND OLIVETTI AND WORSHAM, 2003). They converged with Western property rights organizations in campaigns for regulatory takings laws discussed in the previous section. But it was not until the 2000s that this branch of the movement began to organize grassroots support among individual urban and suburban homeowners in the Northeast and Upper Midwest. What has developed since 2000 has been a counter movement to local economic entrepreneurialism, a counter movement that the Supreme

Court's *Kelo* decision catapulted to national prominence (on entrepreneurialism generally, see HARVEY, 1989; also see FRIEDEN and SAGALYN, 1989).

Kelo affirmed that economic development could be considered a “public use” under the Fifth Amendment’s Takings Clause, which forbids government seizure of property for public use without just compensation. The details of the case were widely reported in the local and national media: the City of New London, Connecticut, having long suffered from job loss and deindustrialization, devised a plan whereby its development corporation would acquire and demolish a number of residences and businesses in the Fort Trumbull neighborhood; the city’s development corporation would then work with developers and Pfizer to construct new waterfront development, including a state park, office and retail space, a hotel, a marina, and upscale housing (GARNETT, 2006). Homeowner Suzette Kelo and several others refused to sell their parcels and challenged the city’s eminent domain proceedings in court. The Connecticut Supreme Court found against the plaintiffs, who then successfully appealed the case to the U.S. Supreme Court.

The arguments largely hinged on whether the Supreme Court should modify the expansive definition of “public use” and the principle of deference to state legislatures established in *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984) (ECKHOFF and MERRIAM, 2006:31-3). Representing the plaintiffs, the libertarian Institute for Justice argued that the court should adopt a narrower definition of “public use” – one that did not include the “public benefits” such as jobs and tax revenue that flow from redevelopment by private parties – and strengthen judicial oversight. Other *amici* emphasized that such restrictions were justified by broad patterns of eminent domain abuse, including seizure for “speculative” development and, importantly, the historical targeting of poor and minority communities.

The respondents – including *amici* such as the American Planning Association and the cities of Baltimore and New York – countered that eminent domain was an indispensable planning tool for the revitalization of older cities and the provision of infrastructure, and that judicial deference to the legislature should be maintained. The majority accepted this argument and emphasized the role of planning in preventing eminent domain abuse, with Justice Kennedy going so far as to suggest that the execution of a participatory and comprehensive planning process might be used to distinguish eminent domain’s valid use from its abuse (BARRON, 2006; GARNETT, 2006; SALKIN *et al.*, 2006).

Although *Kelo* was not the successful challenge to state power that property rights advocates had hoped for, they could console themselves that their efforts to frame eminent domain as a civil rights issue had borne fruit: the novel diversity of *amici* for the petitioners during the case held the promise of a much broader property rights coalition. This emerging alliance had been assembled by the Institute for Justice, a libertarian non-profit co-founded in 1991 by Chip Mellor and Clint Bolick. The organization’s earliest work included a brief on behalf of the beachfront homeowner in *Lucas vs. South Carolina Coastal Council* (an important regulatory takings case), but IJ had become known for lawsuits on behalf of clients in working-class communities and communities of color that had broad deregulatory effects (WILAYTO, 2000).⁵

In 2002, while the *Kelo* case was *en route* to the Supreme Court, the Institute for Justice launched the “Castle Coalition,” an effort to educate homeowners and businessowners about the dangers of eminent domain and provide them with the legal resources needed to fight takings in their community (MCFEATTERS, 2002; Castle Coalition website, www.castlecoalition.org). IJ simultaneously began to cultivate relationships with civil rights groups at the local, state, and

national scales. Hence, the briefs in the *Kelo* case included not just the usual coterie of libertarian think tanks and homeowners' groups, but a number of civil rights and anti-gentrification organizations – the National Association for the Advancement of Colored People (NAACP), the American Association of Retired Persons, the Hispanic Alliance of Atlantic County (New Jersey), and Develop Don't Destroy Brooklyn – who emphasized the discriminatory past and present application of eminent domain power. The NAACP *et al.*'s brief predicted that, “elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged” (*amicus* in *Kelo*, 4). The NAACP has since joined coalitions pushing for post-*Kelo* legislative reforms in Pennsylvania and Minnesota, and judicial remedies in Ohio (BURTKA, 2006; CASTLE COALITION, 2007), though it remained neutral on the Property Protection Acts, because the legislation provided no protections for renters (SHELTON, 2008). The support of these civil rights groups marked a failure, among progressives and planners, to articulate a compelling distinction between eminent domain's abuse and its progressive possibilities (*i.e.*, a distinction based upon community benefits, distributional or environmental impacts, etc.).

Since the *Kelo* defeat, IJ has shifted back to a legislative strategy, drawing on its network of homeowners, businessowners, and civil rights groups to support its “Hands Off My Home” campaign. At the national scale, IJ has led the drive for the Property Protection Acts of 2005 and 2006 in Congress, both of which would have denied federal economic development funding to state and local governments that use eminent domain for private commercial development (INSTITUTE FOR JUSTICE, 2005). Though these federal efforts have thus far been unsuccessful, the IJ has successfully supported state-level legislation to limit the definition of blight, bar takings for economic development, or both; by September 2006, thirty state legislatures had

approved these (anti-) *Kelo* bills, and that November, eight states placed constitutional amendments or measures limiting the use of eminent domain before voters, all of which passed without encountering significant organized opposition (BALLOT INITIATIVE STRATEGY CENTER, 2006; INSTITUTE FOR JUSTICE, 2006). Many have observed that these new restrictions have more “bark than bite,” although the IJ continues to press for stronger restrictions in states that have passed weak legislation (BARRON, 2006; ECHEVERRIA, 2006; INSTITUTE FOR JUSTICE, 2006).

IJ’s property rights campaigns – and its non-property rights activism on issues like school choice – have kept it connected to well-funded libertarian and conservative groups at the national level. The proponents of new regulatory takings laws (including the Reason Foundation, Howard Rich, and others) have done their best to ride the wave of popular discontent that has followed *Kelo*, often by pairing regulatory takings laws with eminent domain restrictions in “*Kelo-plus*” initiatives. *Kelo*’s potential as a wedge issue that could introduce a still larger section of the U.S. electorate to the broader property rights agenda led Grover Norquist – better known, not incidentally, as an anti-tax activist – to proclaim the ruling “manna from heaven” for the property rights movement (BRADLEY, 2006). Thus far, the *Kelo-plus* strategy has only been successful in Arizona, though California narrowly rejected its Proposition 90 after opponents outspent supporters by a 3-1 margin (PRISTIN, 2006). The Castle Coalition’s website indicates that further efforts to place *Kelo-plus* referenda on the 2007 ballot in other states are currently underway.

The activism surrounding *Kelo* is directly antagonistic to regionalism. By stripping away most public control of land, the most extreme of these initiatives make the very notion of regional planning moot. Even the least government-oriented and business-driven regional growth coalitions would have little room to maneuver in a context where property owners had

absolute control over their land. Post-*Kelo* legislation, for example, threatened to obstruct the City of Philadelphia's recent efforts to acquire and demolish residential units – many in neighborhoods that were more than 90% vacant – and re-build them with substantial affordable set-asides. For this reason, regional groups worked to exempt several Pennsylvania cities from state legislation that would have tightened requirements on the conveyance of land acquired by eminent domain to private parties (WETZEL, 2007).

Regionalism and Resistance to taxpayer and property rights activism

Proponents of regionalism do not have an organizational infrastructure that can match the multiscalar organization of the taxpayer and property rights movements. Several national groups including Smart Growth America, Congress for a New Urbanism, and PolicyLink, are dedicated to regionalist ideas. But these organizations rely mainly on educating state and local officials, business groups, and community organizations; they do not have the sharp advocacy orientation of Norquist's anti-tax group, nor do they promote model legislation in the way that ALEC does. Moreover, the regionalist organizations are considerably newer and lack the strong horizontal networks that conservative organizations developed over a period of decades.

Yet, property rights and anti-tax activists are less organized at the regional scale than are various regional groups, particularly the private-public partnerships that are the institutional backbone of growth regionalism. This fact has ambiguous consequences for anti-tax and property rights initiatives. On the one hand, business groups have sometimes joined regional coalitions that support neoliberal policy, including property rights and anti-tax legislation. Feldman and Jonas (2000), for example, describe how in Riverside County, California, large landowners, farmers, and businesses joined forces to weaken enforcement of the Endangered

Species Act. In the process, the coalition effectively formed “western Riverside County’s pro-growth urban regime” (273).

But regional business interests have not consistently arrayed themselves behind anti-tax and anti-regulatory measures, and they have just as often judged these initiatives as a threat to growth and become critical members of the opposition. While regional growth coalitions across the country often press for tax breaks, they also advocate (and facilitate) increased spending on infrastructure and workforce development (OLBERDING, 2002). Concerned that draconian cuts to higher education and infrastructure would comprised economic competitiveness, Colorado’s business community came all out in favor of a 2005 measure that allowed the state to retain revenue even if it exceeded the TABOR formula. Denver’s business leaders have been among a handful of regional groups attempting to respond to threats to regionalism with the same scalar and organizational flexibility as property rights and anti-tax activists. With the backing of a broadly united business community, the Denver metropolitan area approved regional sales tax increases for public transit and stadium construction (LEIB, 2004; PARR, 2007). When anti-tax activists in Maine successfully placed a TABOR on the state ballot in 2006, the Metropolitan Denver Chamber of Commerce sent letters to Maine business leaders, warning them of TABOR’s damaging effects on infrastructure and higher education. This active lobbying by Colorado business leaders contributed to the defeat of TABOR in other states (SHANLEY, 2006).

During the same year, regionalists in California organized against Proposition 90, a *Kelo*-plus regulatory takings measure. The California Center for Regional Leadership, a non-profit organization focused on conducting regional dialogues with a variety of public and private stakeholders, included presentations to inform its member organizations about Prop 90’s likely effects on regional planning. Organizers for the No on 90 campaign were also careful to

foreground the adverse effects of the regulatory takings component, not only for Californians' quality of life, but also for local and state budgets and taxpayers. This points to a weakness in the "pay or waive" approach of regulatory takings measure like 37: that opponents might win the votes of (even pro-property rights taxpayers) who fear that state will choose to pay out claims.

There has been little opposition, regional or otherwise, to post-*Kelo* legislation and referenda that have not included a regulatory takings provision. In 2006, eight referenda made state ballots across the country, and all of them passed (most by large margins). Given the popular backlash in the immediate aftermath of the *Kelo* decision, those who supported the judicious use of eminent domain may have been understandably hesitant to organize campaigns against the new restrictions. Moreover, few regional groups are *directly* involved in redevelopment activities that would be obstructed by new limits to eminent domain powers. Post-*Kelo* backlash, however, has provided the opportunity to spirit the regulatory takings measures planted in *Kelo*-plus referenda into law, a strategy with one early success in Arizona and a near-success in California. If property rights activists continue to employ this strategy in the coming years, any effective regionalist response to regulatory takings legislation must take the popular response to *Kelo* into account. Regionalists might find some inspiration in the work of groups who employ community benefits models (such as the Partnership for Working Families) and have begun to articulate an alternate model for the proper use of eminent domain, one that focuses on the distributional impacts of eminent domain rather than categorically rejecting its use.

Conclusion

Public-private collaboration has become central to the most recent wave of regionalism and it is important to understand the novelty, opportunities, and limitations of this form of regional governance. But over the past three decades, property rights and anti-tax activists have affected the context within which regional efforts take place. Property rights and anti-tax activists seek to constrain the tax and regulatory capacity of government and, directly or indirectly, to curtail the public sector's support for regionalism. When successful, their activism undermines regional initiatives through its effects upon state and local regulations, available public resources, and the willingness of regional actors to participate. The ability of these groups to influence so many aspects of policy related to regional development suggests that they are critical – if unacknowledged – contenders in the effort to shape regions. Regionalists have only begun to build similarly vital networks at other scales of government.

We have argued that drawing from social movement and scale theories – and filling the lacuna of the “scalar repertoire” – can help explain the recent trajectory of the property rights and anti-tax movements. The growth of both movements has been facilitated by the development of their scalar capacities. Anti-tax and property rights activists have long had an appreciation for the strategic use of scale since their earliest days as counter movements; have drawn upon the resources of conservative networks to develop their scalar repertoires, and have adopted broad frames that enabled them to mobilize a variety of actors at several scales. These movements have thus able to concentrate their efforts in the most politically favorable venues, while remaining well-poised to take advantage of new opportunities when they emerge (such as the backlash against the *Kelo* decision).

Many other social movements, of course, also employ scalar repertoires and attempt to develop their spatial capacities. A synthesis of social movement and scale theories can enrich our analysis of their strategies far beyond what sociology and geography can provide independently. In both fields, a desire to understand the relationship between context and collective action has raised questions about the agency of groups as they attempt to act within (structured and structuring) political/institutional environments and scaled spaces. Examining the relationships between scale, political opportunities, organizational repertoires, and frames allows to grasp why particular movements succeed or fail, and perhaps more importantly, to identify opportunities for social and political transformation.

¹ We draw our data from our review of news sources, electoral results, and secondary literature, along with interviews conducted with government officials, regionalists, and civil rights advocates.

² Smith's broader theoretical point that scales were both pre-given and socially (re-)constructed anticipated long-running debates between those who emphasize structural constraints and those who emphasize the creative power of individuals and groups in re-making scales (see, *e.g.*, BRENNER, 2001; HEROD, 2001; MARSTON, 2000). This paper places greater emphasis on the "pre-given" scales of state governance; the social movements concerned most often direct their demands to the state, and the movements, broadly speaking, have been less concerned with changing the relationship between scales than with limiting the power of government at every scale.

³ Our distinction between the branches is taken from prior work by McCarthy (1999) and Davis (1997), among others. "Western" and "eastern" here refer to where the movement's corresponding organizations were based and where they initially focused their activism; growing overlap and collaboration from the early 1990s onward has made this distinction murkier.

⁴ *Dolan* set limits upon local land-use regulation, particularly upon the power of local governments to demand exactions (*e.g.*, land set-asides for public use) from landowners who apply for building permits.

⁵ For example, the Institute attempted to have the Davis-Bacon Act declared unconstitutional, on the grounds that it was originally designed to protect the interests of unionized white workers, and that its requirements burden small construction companies. Such a decision would have effectively released all construction companies from the "prevailing wage" provision requiring that contractors on federally-funded projects pay the local union wage.

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