

Introduction to the Hoover Classics Edition

“The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

—Justice Sandra Day O’Connor

It has long been understood that secure property rights provide the foundation for a free society. Protecting property was of utmost importance to the people of England who penned the Magna Carta and to our Founding Fathers who drafted the Declaration of Independence and Constitution. In the colonies, the Revolutionary War was fought in part because of the Crown’s abuse of property rights, evidenced in the original slogan of the Revolution: “Liberty, property, and no stamps!” (Bowen 1966).

Since the Revolution, the United States has seen its economy and its individual freedoms increase to a level unsurpassed in world history. Per capita incomes have doubled with every generation; slavery—the most inequitable distribution of human rights and property rights—was eliminated, and geographic, social, and economic mobility are virtually unlimited.

Despite these triumphs, all of which depend on the sanctity of private property rights, state, national, and international forces continue to threaten them. On June 23, 2005, for example, the U.S. Supreme Court handed

down a landmark decision in the case of *Kelo v. City of New London* [545 U.S. 469] that allowed the city of New London, Connecticut, to take Susette Kelo's and her neighbors' houses (with compensation) to build a private development that included a hotel, office building, and condos—all in the name of community development and increased tax revenues. As the New London residents discovered, the government's power of eminent domain to take private property for "public use" is practically limitless. In Ms. Kelo's words, "This battle against eminent domain abuse may have started as a way for me to save my little pink cottage, but it has rightfully grown into something much larger—the fight to restore the American Dream and the sacredness and security of each one of our homes."

A month after the *Kelo* decision, the *New York Times* (July 28, 2005) reported that towns, cities, and counties that had development projects on hold pending the *Kelo* decision, moved quickly to condemn homes and businesses and replace them with stadiums, shopping centers, and condos. Arlington, Texas, for example, sought to remove homes for a new Dallas Cowboy football stadium by filing "condemnation lawsuits" against holdout property owners. In Santa Cruz, California, the city began a legal action to seize a parcel of family-owned land that holds a popular restaurant, other businesses, and a "conspicuous hole in the ground" to force a sale to a developer planning to build fifty-four condominiums. The owner of the so-called hole in the ground claims he is being penalized for trying to build a unique house on his property. The city states that its

condemnation is advancing because “the Supreme Court gave us reassurance of our ability to proceed.”

During the year following *Kelo*, local governments threatened or used eminent domain to transfer ownership of nearly 6,000 homes or businesses to private parties favored by political decision makers (Berliner 2006). At the same time, *Kelo* imprinted the fragile nature of private property rights on the American public’s conscience and inspired legislators in 47 states to introduce, consider, or pass legislation limiting local governments’ power to use eminent domain for private development (Mehren 2006). Property owners rallied behind the claim by Justice Sandra Day O’Connor, in a dissenting opinion, that the Court had abandoned a “long-held, basic limitation on government power” and that “all private property is now vulnerable to being taken and transferred to another private owner,” but the takings continue.

In addition to eminent domain proceedings, property is also being confiscated by regulatory takings. The government’s police power allows it to regulate the use of property in the name of “health and safety,” even if such regulation diminishes the value of the property. Such regulatory diminution of property values begs the question of how much must the value be reduced before a taking occurs. In Lake Tahoe, years of construction around the lake has led to extensive runoff of organic material, increasing the growth of algae and decreasing the clarity of the lake, arguably threatening human health. Although existing development was clearly to blame for the problem, a series of rolling moratoria

against new home construction forced owners of undeveloped lots to swallow the entire cost of preserving Lake Tahoe's beauty.

In the case of *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, [535 U.S. 040] (2002), the U.S. Supreme Court upheld the moratoria and ruled that it did not constitute a taking because of the temporary status of the moratoria, meaning that the property owners were not entitled to compensation for losses in property value resulting from regulatory restrictions. *Tahoe-Sierra* gave legislatures the option of depriving property owners of the value of their property for an unlimited amount of time as long as each successive deprivation is "temporary" in nature (Levy and Mellor 2008). The Court assures the owners that a temporary prohibition on economic use is not a taking because the property will recover value as soon as the prohibition is lifted. As Justice Clarence Thomas pointed out in his dissent: "The 'logical' assurance that a 'temporary restriction . . . merely causes a diminution in value,' . . . is cold comfort to the property owners in this case or any other. After all, in the long run we are all dead" (*Tahoe-Sierra* 2002, 356).

Whether through eminent domain or through regulation, the value of private property has been reduced by the government's police power. Although some gains have resulted from the use of the power, the question is, who pays and who gains. Should only those unlucky few who used their savings to buy development lots pay for the public benefit of a pristine lake? Should Susette Kelo and her neighbors who lost their homes pay for

urban development and increased tax revenues? Justice Holmes answered this question some eighty years ago in *Pennsylvania Coal Co. v. Mahon* [260 U.S. 393] (1922), when he explained that “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Turning to the international front, consider investing in land in a country such as Zimbabwe, where secure property rights no longer exist. Robert Mugabe, the country’s ruler, has dominated the political system since Zimbabwe’s independence in 1987. His chaotic land redistribution campaign, which began in 2000 by taking land from people who thought they had secure title and giving it to others, caused an exodus of white farmers, crippled the economy, and ushered in widespread shortages of basic commodities. A nation that once fed itself and exported corn and wheat to its neighbors has witnessed a government invasion of commercial farms—leading to a 70 percent reduction in agriculture productivity (Rothberg 2002).

As a result, a tyrannical government, rather than resource constraints, has destabilized economic and political institutions, causing a state of near collapse. By neglecting the rule of law, which underpins secure property rights, Zimbabwe’s economy has rapidly transformed from one of Africa’s strongest to the world’s worst, with the lowest real GDP growth rate in an independent country, an 85 percent unemployment rate, and spiraling hyperinflation of approximately 80 sextillion (10^{21}) percent a year (CIA 2008). Although Zim-

babwe is an extreme example, it emphasizes the importance of secure property rights.

This book argues that property rights are central to freedom and prosperity. This is clear in Zimbabwe, once a prosperous country and now a nation faced with starvation. The decision to take Susette Kelo's house seems pale in comparison, but it illustrates even governments as stable as that of the United States can use their eminent domain powers to advantage special interests rather than protect the rights of citizens. And as we see in *Tahoe-Sierra*, regulatory takings also set a dangerous precedent for the erosion of property rights and therefore future investment.

People tend to think of property rights in terms of land, but the connection of secure property, freedom, and prosperity holds for all property rights. Be it property rights to oneself (human capital), one's investments (physical capital), or one's ideas (intellectual capital), secure claims to assets give people the ability to make their own decisions, reaping the benefits of good choices and bearing the costs of bad ones.

The link between freedom and prosperity is perhaps best illustrated by slavery, which eliminates the possibility of freedom for those in bondage. If individuals do not own themselves, they cannot be free. The same point applies to all assets. When individuals invest in goods, and when those investments are threatened by takings, freedom is diminished and prosperity will decline.

The crucial connection among secure property rights, freedom, and prosperity is elucidated in this vol-

ume. We describe what property rights are (chapter 1), what they do (chapter 2), how they evolve (chapter 3), how they can be protected (chapter 4), and what their future might be (chapter 5). This brief treatment of a vast and complex subject studied by scholars from many disciplines is not intended to cover all of the intricacies of the subject but rather to provide a blueprint for how societies can encourage or discourage freedom and prosperity through their property rights institutions.

Much of the literature on property rights—and this book is no exception—relies on lessons from history. We have used many examples from the U.S. frontier, where new resources, expanding populations, emerging technologies, and a lack of formal government afforded a crucible for property rights evolution and institutional innovation. Although we have drawn examples from history, the lessons they teach are applicable to the study of property rights today. From the genetic structure of living organisms to the open access of the oceans to the far reaches of outer space, new frontiers where property rights are undefined offer new opportunities for their evolution.

How we have dealt with the evolution and protection of property rights in the past and how we deal with them in the future will determine how free and prosperous we will be. The United States began with a Constitution that limited government power and protected property rights. Those initial limits are eroding, making property rights more tenuous and individual freedom less secure. The question is, what can be done to restore the founding vision of a free and prosperous nation?

If individuals are allowed more autonomy in the use of their physical, human, and intellectual property, they will have an incentive to invest in assets and to use them productively. These incentives result if people are, as the Nobel laureate Milton Friedman titled one of his books, “free to choose.” We hope this book helps readers better understand what property rights are and how important they are to freedom, an asset that is all too precious and scarce.

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Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 040 (2002).