

American Exceptionalism

Due Principally to Secure
Private Property Rights

GARY LIBECAP

The United States has been unusual in its protection of property, especially in the realm of physical resources like land but also with regard to intellectual property and encouraging innovation.

This is not surprising given that most early immigrants, at least, came from places where individuals had few rights to land or other resources: these were all held by the state through the king or other authority, and so those rights came to be enshrined in the US Constitution with protections against the taking of property without just compensation. In terms of threats to property rights and American exceptionalism, this “takings” issue is distinctive, not least in terms of natural resources.

Take environmental regulation. Don’t get me wrong: I do like the environment, and I am concerned about the environment, but the environment can become a very convenient tool to undermine property rights and all of the benefits that they provide. We have this protection

in the Bill of Rights and also in the delegation of powers clause. The idea is to restrict the power of the state vis-à-vis individual assent in a private society and a market economy.

Why are private property rights so critical? For one thing, they assign authority over resources to individuals, not the state. It is individuals who make decisions about production, investment, and reallocation. Markets and individuals become the primary drivers of economic activity, reallocation, and decisions about resource use. This is absolutely essential for a free society. If the state were the primary decision maker, or the property right were very subservient to the state, then we would live in a very different society and a very different kind of economy.

The longer the time period during which the property right naturally exists, the more durable the decision making can be. In the longer term, people can consider decisions about investment and other economic activities. The more secure the property right, the more risk people will be willing to take in their investment and economic activities. Uncertainty with regard to the property right regime only exacerbates the other natural uncertainties that may exist through market or other external conditions. The more secure and longer term the right is, the greater the ability to trade and the higher the expected returns from private economic activity are. This is what leads to a dynamic, growing economy and encourages long-term economic growth. This pattern is attributable to an American exceptionalism based on the historical security of property rights.

What are the threats to all of this good news? A primary one is environmental regulation—an expansive regulatory overreach, or broadening interpretation of important environmental laws, to restrict private decision making. The Clean Air Act; the Clean Water Act; the Endangered Species Act; NEPA (the National Environmental Policy Act)—these are the four pillars, and every state has its comparable environmental legislation. So long as these laws adhere to the original intent in drafting them—under which private property rights are protected—there is little

to be concerned about in terms of requiring cleaner air or water. But when agencies broaden their interpretation of the law, they become part of the problem.

Where does this occur, for example, in the Clean Water Act, and why is this so difficult for a landowner? One area is in the definition of a navigable stream. Initially, federal law was restricted to navigable waterways, but over time that definition has been stretched so that almost any waterway can be defined or designated as navigable. That means that the federal agencies, under the Clean Water Act, actually might claim authority over them. It is very costly for a landowner to challenge an agency if it makes a ruling to restrict activity in agricultural or urban development, or manufacturing, or any matter, because it is within agencies, and within the administrative process, that rulings are reconsidered. The decks are stacked against landowners, and it becomes prohibitively expensive to challenge rulings.

We also see this overreach in the Clean Air Act, in defining what is a pollutant and what activities constitute significant contributions to air pollution. But perhaps the most egregious is the Endangered Species Act. Nobody wants to see a species become extinct, but there has to be some sort of rational balance. Unfortunately, the Endangered Species Act specifically prohibits cost-benefit analysis. Essentially, the species are assigned infinite value, and costs associated with their protection are not regarded. We have about 1,600 species listed, and only thirty-three out of those have been successfully de-listed. It's very politicized to put a species on a list, and equally politicized to take it off, because all sorts of groups benefit from these measures. The act puts many restrictions on land use in order to protect habitat. This can be counterproductive to protecting a species because landowners know this, so it sometimes is in their interest, frankly, to destroy the creatures. And should they observe this potentially endangered species threatening their own interests, they may be motivated to destroy it before somebody else finds out that it's there, which certainly runs counter to the objective and spirit of the law.

In this and other matters, what is gradually happening, as compared to the early period of American history, is that the state is becoming increasingly important in terms of monitoring and determining which areas of private decision making are acceptable, a trend that is weakening property rights. This comes from a broader definition of the public's role, or of the public good, in deciding whether private decisions are commensurate with public interest. That is the open door for regulatory "mission creep."

Over time, the American position with regard to the security of property rights has declined. In the early part of this century, the United States was always ranked first; but recently, in some indexes, we're down to forty-first. Today, there are other places, such as Finland and New Zealand, that provide more definite property rights.

Fracking provides an illustration of the problem. It's a very emotional issue where I teach, at the University of California–Santa Barbara, but it sheds light on the role of secure property rights and innovation and on how regulatory restrictions can inhibit beneficial activities.

Fracking is the hydraulic fracturing of subsurface material followed by directional drilling, which allows for a single well to reach a wide area in order to access hydrocarbons. The process propelled the United States from a country that was thought to have been at peak supply—which was going to be a national security problem—to one that is in a far more secure position in terms of the energy it needs to drive prosperity. Fracking reduced greenhouse gas emissions by allowing for cheaper natural gas. In energy production, the lower costs owed to fracking have encouraged the relocation and reinvigoration of manufacturing. Indeed, it has been beneficial on almost every level, not least by adding about \$1,200 in disposable income to the average American pocket and accounting for much of the reduction in carbon dioxide emissions in the United States.

This innovation was exclusively a US activity: the exploration and innovation applied, in new ways, techniques that had been around for a while. Why did that happen in the United States and not elsewhere?

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It's not because we have the largest reserves but because we have had the most beneficial property rights regime.

Americans, for the most part, own their mineral rights. But if you're a surface landowner in some other nation, the state owns them. That is the standard situation in most countries. And if the government undertook or considered fracking or some similar activity on your land, you would bear all the costs, and the benefits would be broadly spread. You would have very little incentive to agree to that. In the United States that's not likely to happen. You have mineral rights to oil and gas below your surface property, and you can share it and any of the benefits. This provides incentives for individual landowners to be part of a wider energy progress.

Notably, most fracking in the United States takes place on private, not federal, lands, where the federal government has to decide where this will take place for most of the recoverable reserve slot. This is a good empirical test of the importance of property rights relative to natural endowments. In many countries, especially in Europe, fracking has been so politicized that it's been banned.

Today, the United States is where the action is in terms of fracking: 95 percent of all wells involved in fracking are drilled in the United States, even though most of the reserves lie on federal lands. It's the property rights regime that explains this. It's very hard to get the Bureau of Land Management, for example, to approve any new wells, and the Obama administration added numerous restrictions on fracking on federal lands.

Fracking is a concrete example of an activity that involved American ingenuity and American innovation. It's had positive benefits, and yet it takes place almost solely where private property rights are secure—that is, where American exceptionalism has been in force.

