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The Mystery of Property Rights: A U.S. Perspective

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Economic development requires both secure property rights and the ability to reallocate property in response to technological and other changes. Significant reallocations have occurred repeatedly throughout U.S. history and have often been involuntary. This essay considers the question of how property rights can be subject to frequent involuntary reallocation and still be considered secure.

> "Upon the sacredness of property civilization itself depends—the right of the laborer to his hundred dollars in the savings bank, and equally the legal right of the millionaire to his millions."[1]
>
> Andrew Carnegie

It is an article of faith among both economic historians and business tycoons that secure property rights are critical for economic development. I have no intention of quarreling with this idea; the logic that underpins it is incontrovertible, and the evidence that supports it compelling.[2] I would like to point out, however, that there are a number of important facts that, at least at first glance, seem inconsistent with this point of view. These facts are "anomalies," in T. S. Kuhn's sense

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[1] Andrew Carnegie, "Wealth," *North American Review* (June 1889), p. 656.

[2] For a clear statement of this logic, see North and Weingast, "Constitutions." There is a large literature on the theory of property rights, but see especially Barzel, *Economic Analysis*; and Libecap, *Contracting*. For an early review of the evidence, see De Alessi, "Economics." For some striking new evidence, see Libecap and Lueck, "Demarcation."

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of the term; that is, they have the potential to undermine key aspects of the "paradigm."[3] In my opinion, these anomalies are not sufficiently serious to call the property rights paradigm itself into question, but they do require us to rethink some significant aspects of it, including the mechanisms that bolster the security of property rights.

In this article, I will focus on one important group of anomalies—a set of facts suggesting that under some circumstances secure property rights may themselves be inconsistent with economic development. As Jean-Laurent Rosenthal has shown, for example, important irrigation projects were not undertaken in Old Regime France because the collective action problem of obtaining agreement among the many affected property owners was too difficult to resolve. Only after the Revolution, when the central government acquired the power of eminent domain, were these projects built.[4] Divided but secure property rights also inhibited economic activity in early modern England. Dan Bogart and Gary Richardson have documented the difficulties that landowners had to overcome in order to sell land or exploit mineral or timber resources because all the parties with an ownership stake, including potential heirs, could not commit credibly to a deal. These problems were easier to resolve after the Glorious Revolution, when a supreme Parliament could pass "estate acts" that legitimated the desired action—that is, when there was a governmental body with the power to reallocate property rights.[5] The early modern configuration of property rights also made it difficult to use land as collateral for debts. As Claire Priest has shown, the problem was particularly vexing in the British North American colonies where settlers had little else to borrow against. At the behest of (mainly English) creditors, Parliament passed legislation restructuring property rights in the colonies so that land could be seized in payment of debts, even if it had not been specifically pledged as collateral.[6]

Scholars have incorporated these anomalies into the property rights paradigm by treating them as phenomena of the Age of Revolutions—as once and for all developments that substituted for the fragmented property rights of the Old Regime, a modern system that significantly reduced transaction costs by aligning ownership with control.[7] The problem, however, was that reducing transaction costs in this way required the

[3] Kuhn, *Structure*.
[4] Rosenthal, "Development."
[5] Bogart and Richardson, "Making Property."
[6] Priest, "Creating."
[7] On this point, see especially, Bogart and Richardson, "Making Property."

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creation of an entity—a stronger government—with the power to reallocate property rights. What would insure that this government did not abuse its power?

The United States is generally held up to the world as a country with exemplary protections for property rights, but even here, as I will show, governments have continually reallocated property against the wishes of owners in order to promote economic development or to further other goals. Sometimes these reallocations have had minimal distributional consequences. Landowners were largely unaffected, for example, by the government's expropriation of the airspace above their property for commercial aviation because it was of little or no economic value to them.[8] In other cases, as in the removal of the Cherokees from Georgia, the reallocations mainly impacted groups that were generally considered to be outside the scope of the property rights system anyway and so provoked no general concern.[9] But there were many other cases in which the government's reallocation of property rights had distributional consequences that could not be ignored so easily. In the most dramatic instance, the threat that the federal government might abrogate property rights in enslaved human beings eventually led to civil war. For the most part, however, the government's tamperings with property rights have had much less disruptive consequences. Nor did they undermine Americans' basic faith that they were secure in the enjoyment of their property.

If economic development required the repeated reallocation of property in the face of opposition from those who owned it, how could property rights be considered secure? The aim of this article is to ponder this "mystery of property rights" through an exploration of various examples drawn from U.S. history.[10] My justification for focusing on the United States is that policymakers have repeatedly held it up as an example that developing countries should follow in order to achieve economic success. Those who tout the United States as a model

[8] Banner, *Who Owns the Sky?*

[9] For an overview, see Wallace, *Long, Bitter Trail*.

[10] The title of this article is an obvious reference to Hernando de Soto's bestselling book, *The Mystery of Capital.* De Soto argued that western societies had gone through a revolution in property rights that substituted popular, extralegal conceptions of ownership for traditional ones and recognized the possessory rights of the men and women who actually occupied the land against the landlords who held formal title to it. By thus making ordinary people secure in the ownership of the land they farmed and the dwellings in which they resided, Western societies gave them the ability to borrow against their assets and pursue entrepreneurial ambitions, fueling economic growth. But if putting assets in service of economic development meant reallocating the rights to them, sometimes through violence means, how could property rights be considered secure? Behind the mystery of capitalism, in other words, lay another mystery of property rights.

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typically focus on formal institutions—the balance of powers imbedded in the Constitution, the court system's power to enforce the rule of law—that they believe other countries would do well to adopt. When push came to shove, however, these institutions generally did not pose significant obstacles to involuntary redistributions of property rights. Instead, Americans' security in their property owed to circumstances that made these institutions largely self-enforcing—in particular, to the widespread ownership of property that was already well established during the colonial era.[11]

CHANGING PROPERTY RIGHTS IN THEORY AND PRACTICE

> "If I were asked to answer the following question: WHAT IS SLAVERY? And I should answer in one word, IT IS MURDER, my meaning would be understood at once. . . . Why, then, to this other question: WHAT IS PROPERTY! May I not likewise answer, IT IS ROBBERY, without the certainty of being misunderstood; the second proposition being no other than a transformation of the first?"[12]
>
> Pierre-Joseph Proudhon

> "The tendency of universal suffrage is to jeopardize the rights of property, and the principles of liberty. There is a constant tendency in human society, and the history of every age proves it; there is a tendency in the poor to covet and to share the plunder of the rich; in the debtor to relax or avoid the obligation of contracts; in the majority to tyrannize over the minority, and trample down their rights; in the indolent and the profligate, to cast the whole burthens of society upon the industrious and the virtuous; and *there is a tendency in ambitious and wicked men to inflame these combustible materials*."[13]
>
> Chancellor James Kent

To understand how property rights can be both secure and subject to reallocation by government, it is useful to start with some simple theory about how property rights change. In his often cited article, "Toward a Theory of Property Rights," Harold Demsetz postulated that societies create new property rights when there are important shifts in the benefits to be derived from them relative to enforcement costs. His main example was the effect of the growth of the fur trade on the hunting practices of Native Americans. The rise in the value of furs had encouraged more hunting, threatening the depletion of animals prized for their skins.

[11] For the idea that institutions must be self-enforcing, see Mittal and Weingast, "Self-Enforcing Constitutions." On the United States' heritage of widespread land ownership, see Engerman and Solokoff, *Economic Development* and "Factor Endowments."

[12] Proudhon, *What is Property?* p. 38.

[13] New York, *Report*, p. 221.

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Previously, these societies had not found it worth their while to regulate hunting practices, but they now responded to this threat to their livelihood by creating new systems of property rights that allocated territories to specific families. In places where this rise in values did not occur or where the animals' migratory patterns undermined the utility of enforcing territorial boundaries, hunting grounds remained common property.[14]

In Demsetz's theory, the driver of change could be a shift in either the benefits to be derived from creating a property right or in enforcement costs. Demsetz did not attempt to analyze how such a change actually occurred—the mechanisms by which a society revised its institutions in response to a shift in benefits or costs. Contemplating the "gradual changes in social mores and in common law precedents" that created the modern system of private property in Western societies, he acknowledged that it was "unlikely that externalities per se were consciously related to the issue being resolved." Nonetheless, he hypothesized, in societies like those of the West, where relative success is highly dependent on efficiency, "viability in the long run" depends on the ability to adjust property rights systems to changes in technology and market valuations.[15] Of course, as Demsetz would be the first to admit, societies may not in fact evolve in a direction that improves their economic viability. If they did, policymakers would not find it necessary to lobby developing nations to improve the security of their property rights. Unlike biological species, countries do not always disappear when they are maladapted. More commonly, their populations just suffer seemingly endless cycles of poverty and violence.

In thinking about how property rights change, there are two separate issues to consider. First, countries are sometimes unable to make changes that are welfare enhancing (like the French irrigation projects) because of collective action problems or other sources of market failure. As already suggested, solving those problems requires the creation of a government with the power to coerce property holders. But the mere existence of such a government is no guarantee that it will act to maximize social welfare. Inevitably, there is the second issue of who gets to exercise power in this government and to what end. Once one raises this issue, moreover, one must entertain the possibility that the relevant cost-benefit calculation may not be broadly societal, as it is in Demsetz' model. If a powerful interest stands to gain from a change in property rights and the benefits to this group exceed the political costs of securing the change, then the change may occur even if the costs to

[14] Demsetz, "Toward a Theory."
[15] Ibid., p. 350. See also Demsetz, "Frishmann's View."

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society as a whole exceed the benefits. In democratic societies like the United States, changes in property rights that are efficiency enhancing may garner widespread support because they make everyone better off. But it is also possible that powerful interests have enough political influence to secure changes that benefit themselves at the expense of less powerful members of society (acts Proudhon would have regarded as theft). Alternatively, the mass of voters may use the power of the ballot box to redistribute property in their favor (fulfilling Kent's worry about the tyranny of the majority). As a practical matter, it is often difficult to gauge whether a given change is in the interests of a particular group or is genuinely welfare enhancing because both those who support and oppose it typically justify their positions in terms of the value—or harm—to society as a whole.[16]

A good example is the celebrated *Charles River Bridge* case. In 1785 the Massachusetts General Court passed legislation granting a charter of incorporation to a group of private investors who proposed to build a bridge across the Charles River at Charlestown.[17] At the time of the grant, it was not at all certain that the venture would succeed—that the bridge could be built at all or that it could be built and maintained at a reasonable cost. To compensate the investors for their risk, the legislature granted them the right to collect tolls for forty years (later extended to seventy). The company succeeded in building the bridge, which earned handsome profits for its financial backers. By demonstrating the bridge's feasibility, however, they encouraged others to undertake similar projects, and in 1828 the General Court granted a charter of incorporation to a company that proposed to build a second bridge right alongside the first. This company would only collect tolls for six years (less if it recouped its investment sooner), and then the state would take over maintenance of the bridge and allow toll-free passage. The proprietors of the original Charles River Bridge realized that once the new span became free, they would no longer be able to collect tolls, and they sued to prevent it from being constructed. After losing in state court, they pursued their case in the U.S. Supreme Court and lost there as well.

Both sides in the dispute had important interests at stake. On the one hand, the proprietors of the old bridge wanted to protect the profits they were earning from charging tolls. On the other, proponents of the new bridge, who included local merchants, farmers, and producers, wanted

[16] See Levmore, "Two Stories."
[17] The account in this paragraph and the next is based on Kutler, *Privilege*.

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to lower their transportation costs by securing free passage across the river. Both sides, however, posed their arguments in terms of the general welfare.

Defenders of the old bridge claimed that the legislature had entered into what was in effect a contract with the original proprietors "that no bridge should be built over Charles River during the charter, without indemnity to the latter for the loss of income thereby sustained."[18] That concession had been necessary to elicit the investment and was by no means unreasonable "considering the novelty of the enterprise, its importance, the hazard of great loss attending it."[19] To renege on such a contract would be an uncompensated taking, "a breach of public faith" that would "diminish the confidence in and lessen the security of the rights of property."[20] As Justice Joseph Story, a supporter of the old proprietors, asked rhetorically in his dissenting U.S. Supreme Court opinion, "Is there a man living of ordinary discretion or prudence, who would have accepted" a charter on terms that effectively allowed the legislature to "destroy [his] profits, and annihilate [his] tolls, without annihilating [his] burthens." To Story, the answer was obvious. No man would "hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success." If the government wanted its citizens to invest in improvements beneficial to the public, "there must be some pledge, that the property will be safe." The popular agitation for a new bridge was a threat to property rights "sufficient to alarm every stockholder in every public enterprise. . . throughout the whole country."[21]

By contrast, the new bridge's supporters saw the effort to block construction as an example of corrupt practices that had been carried over from monarchical England—of a "spirit of monopoly" that enabled "the few" to pursue their "narrow and selfish" policies at the expense of the "interests of the many, and the prosperity of the state." As one pamphleteer opined in a related dispute, the burdensome tolls imposed by the old bridge's proprietors were "retard[ing] the growth . . . of the city." Erect a free bridge and in a short time the whole area "will be covered with habitations and buildings—the value of the land would be greatly increased." The legislature's grant of a charter for a new bridge did not pose any threat to property rights. Every investor in a transportation project had to be aware of the potential for competition from any superior

[18] Shaw, *Reasons*, p. 10.
[19] Idem.
[20] *Review*, pp. 94–95.
[21] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) at 608, 615.

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alternative that might arise in the future. To the contrary, the real threat to progress and the prosperity of the community was the "monstrous" idea that special interests could, with the connivance of government, use the rhetoric of property rights to protect themselves against such competition.[22]

Although he had been aligned in his earlier political career with the new bridge's supporters, Chief Justice Roger Taney did not embrace their arguments directly in his opinion for the Supreme Court.[23] Instead, he rendered his decision on narrow legal grounds, mustering precedents from the Marshall court in opposition to Story and other disciples of Marshall. Corporate charters were indeed contracts which the states were obligated by the Constitution to honor, but such contracts had to be construed strictly. The charter for the original bridge did not explicitly grant the corporation a monopoly over this particular transportation route, so the Massachusetts legislature did not violate its contract with the corporation by chartering a second bridge. Despite his restraint, in the course of his opinion Taney conjured up a nightmarish vision of the potential consequences of a finding in favor of the old bridge. The proprietors of old turnpike corporations, "awakening from their sleep," might claim similar rights, putting in jeopardy "the millions of property which have been invested in railroads and canals" along adjacent routes. "We shall be thrown back to the improvements of the last century," he warned, held hostage to the claims of these obsolete companies that would prevent states from benefiting from "the lights of modern science" and from partaking "of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."[24]

Each side thus claimed that dire consequences for economic development would follow unless the court decided the case in its favor. It is far from clear, however, that either claim was correct. If the new bridge was really as economically valuable as its proponents alleged, private interests could have compensated the proprietors of the old one for their foregone tolls, or the government could have used its powers of eminent domain to fix a payment.[25] Nor does it seem that the old bridge's loss of its monopoly privilege scared investors away from transportation projects. Although construction ground to a halt during the depression that followed the Panic of 1837, investment in railroads soared when the

[22] Citizen, *Appeal*.

[23] On Taney's background and decision, see especially Kutler, *Privilege*.

[24] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) at 552–53.

[25] The power of eminent domain was in fact used in a similar New Hampshire case around the same time and in other subsequent instances. See Kutler, *Privilege*, p. 145.

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economy revived in the 1840s.[26] Property rights had been reallocated in a way that seemingly violated their security, but without the dire long-term consequences that Story forecast.[27]

ONGOING REVISIONS TO PROPERTY RIGHTS

> "Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's, or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use."[28]
>
> Justice John Fitzgerald

The proprietors of the old Charles River Bridge claimed that their property had been expropriated without compensation. Supporters of the new bridge claimed that the old proprietors had in fact had no property rights at all, so there was no need to compensate them for their loss. In many other cases in which governments reallocated property to further economic development or other social goals, the existence of a prior right was clear. Sometimes these reallocations favored politically powerful interests; sometimes they occurred at the behest of a majority of the voting public. Regardless, in only some cases did the original holders receive adequate compensation. Many owners complained that their payments were not sufficient, and many received no compensation at all.

Take water rights, for example. Around the time of the American Revolution, the prevailing common-law doctrine gave landowners the right to use water from streams that flowed through or were adjacent to their property so long as they did not obstruct or divert the water to the detriment of other landowners with whom they shared "riparian" rights. Landowners who built water-powered mills on their property were subject to damages if their mills adversely affected the water rights of other landowners, even those who acquired their property subsequent to a mill's construction. Since water was a critical power source for early manufacturing, strict adherence to this principle threatened to inhibit economic development.[29]

[26] Taylor, *Transportation Revolution*.

[27] Some transportation companies, for example the Boston and Worcester Railroad, would demand explicit guarantees of monopoly privileges in their charters (see Kutler, *Privilege*, pp. 156–57), but the practice did not become common. Moreover, the explicit language was of dubious value because legislatures routinely imbedded clauses in charters that allowed them to alter the terms unilaterally at a later date.

[28] The quotation is from Justice Fitzgerald's dissenting opinion in Supreme Court of Michigan, *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981) at 644–45.

[29] Horwitz, *Transformation*.

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The earliest disputes over watermills generally pitted manufacturers against farmers, but as time passed, they increasingly involved manufacturers on the same river whose expanding operations interfered with each other's water sources. Governments responded to these conflicts by reallocating property rights in two major ways. First, legislatures enacted (and the courts enforced) statutes known as mill acts that transferred powers of eminent domain to manufacturers, setting up procedures for compensating landowners adversely affected by a mill's use of water. Farmers' widespread complaints suggest that the legislation enabled manufacturers to ride roughshod over existing property owners, and scholars have generally agreed that the acts did not provide riparian users with adequate compensation.[30] Second, the courts gradually felt their way toward a new set of rules that struck a balance between the efficiency gains from technological innovation and the need to provide mill owners with greater security for their investments. In effect, they instituted a version of what came to be known as the doctrine of prior appropriation, granting to the proprietor of the first water power facility erected on a stream the "right to maintain it, as against the proprietors above and below." This first facility's use of water might make it impossible for other landowners on the same stream subsequently to build and operate their own mills, thus preventing them from fully exploiting their own property. Nevertheless, provided that the mill was "profitable, beneficial, and reasonable," its proprietor did not owe the others any damages.[31] The general thrust of this line of case law was to limit the compensation that owners of watermills might have to pay to other riparian landholders.[32]

In the West, especially in California, property rights to water were periodically subject to even more radical revision. At the time of statehood, the California legislature voted to accept the existing body of common law and with it the principle of riparian water rights. However, the courts initially adjudicated conflicts (mainly among miners) primarily on the basis of prior appropriation, and the legislature enacted this principle into statute in 1872. Whereas in the East, courts had used prior appropriation as a tool for resolving conflicts *among* riparian owners, in California the two legal doctrines often were in conflict because owners of appropriation rights diverted water to mines

[30] See ibid., pp. 47–53; Hart, "Maryland Mill Act" and "Property Rights"; and Scheiber, "Property Law."

[31] The quotations are from Massachusetts Chief Justice Lemuel Shaw's opinion in *Cary v. Daniels*, 49 Mass. 466 (1844) at 477. In Delaware, the legislature wrote this idea into statute by granting absolute property rights to existing mill owners in 1859. See Hart, "Property Rights."

[32] See Horwitz, *Transformation*, pp. 40–42; Scheiber and McCurdy, "Eminent Domain Law"; Pisani, "Enterprise"; and Rose, "Energy."

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or desert lands to the detriment of riparian owners.[33] What is most striking about the history of water rights in California is the extent to which the balance the courts attempted to strike between the riparian and prior appropriation doctrines was periodically disrupted—and property rights consequently thrown into turmoil—by changing pressures on resources and the emergence of new interest groups. After the 1870s, for example, the courts' initial bias in favor of appropriative rights shifted as commercial agriculture began to challenge mining's dominance of the state's economy and developers built large-scale irrigation projects that transferred water to farmers who were not located along the source. In 1886 the California Supreme Court upheld the riparian rights of a large cattle rancher who had sued to prevent an irrigation company from diverting water from the Kern River to supply farms in a nearby desert.[34] The decision touched off a wave of litigation as riparian landowners rushed to protect their water rights from diversion, leaving farmers on irrigated land without either water or compensation because they were found to have no rights to the flow in the first place. As in the East, moreover, riparian owners began suing each other as demand for water soared. The result of all this litigation was a gradual move in the early twentieth century back toward prior appropriation and the imposition of a reasonableness test for riparian uses that was formally embodied in the state's constitution in 1928.[35]

As environmental concerns moved to center stage during the mid-twentieth century, however, water rights were reallocated again. Courts in California revived yet another legal doctrine—the idea that waterways are a public trust that must be protected and husbanded by the government for the public good—in order to roll back grants of water previously made to cities and for agricultural purposes.[36] The result was to throw water rights once more into turmoil. In a recent law review article, one scholar used the device of an imaginary conversation between a government lawyer and a California farmer to mock the notion that property rights to water were secure. As the lawyer admonished the farmer, "your water right may not, as Sam Goldwyn once reputedly said about an oral agreement, be worth the paper it's written on."[37]

[33] Miller, "Shaping California Water Law"; Miller, "Riparian Rights"; Pisani, "Enterprise"; and Kanazawa, "Efficiency."

[34] *Lux v. Haggin*, 69 Cal. 255 (1886). See Miller, "Riparian Rights"; Kanazawa, "Efficiency."

[35] Miller, "Shaping California Water Law"; and Miller, "Riparian Rights." For a similar history of groundwater rights in California, see Kanazawa, "Origins."

[36] Libecap, *Owens Valley*, chaps. 7 and 8; and Sax, "Some Thoughts."

[37] Leshy, "Conversation," p. 1990.

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According to this fictional attorney, the "fundamentally public character of water" distinguished it from land, to which property rights were more secure.[38] But property rights to land have also been subject to significant revision throughout American history. Much of the literature has focused on the development of policy toward public lands and on squatters' persistent and ultimately successful efforts to force the federal government to give them title to lands that they could not afford to purchase under existing rules.[39] What is less often recognized is that private purchasers of frontier lands also had difficulty maintaining their property rights.[40] When confronted with the question of who should gain title to a plot of land, the squatter in possession of it or the owner who held formal title, the courts generally sided with the formal owner, but they also upheld a variety of statutes enacted by legislatures favorable to squatter interests.[41] For example, some legislatures passed adverse possession laws that decreased the time period that a settler had to occupy property unchallenged in order to gain formal title.[42] Many also reduced landowners' triumphs to largely pyrrhic victories by requiring them to reimburse evicted settlers for improvements. In addition, squatters in some states were able to gain advantages through the tax law. In Kentucky, for example, squatters who paid taxes obtained a lien on the land and a right of possession until the rightful owner reimbursed them for back taxes.[43]

There were plenty of other instances in which legislatures tampered with property rights to land to benefit politically powerful interests. In support of its mining industry, for example, California passed an act in 1852 that allowed prospectors to invade farmers' land to search for and

[38] Ibid., p. 1992.

[39] Tatter, "Preferential Treatment"; Robbins, "Preemption" and *Our Landed Heritage*; Gates, *History*; Atack and Passell, *New Economic View*, pp. 254–60; and Van Atta, "Lawless Rabble."

[40] On this point, see especially de Soto, *Mystery*, chap. 5.

[41] In some times and places, such as Kentucky in the late eighteenth century or California in the quarter century following statehood, there was a great deal of uncertainty about land titles and it could take years to obtain a decision. See Aron, "Pioneers"; Van Atta, "Lawless Rabble;" and Clay, "Property Rights." Moreover, landowners could not always enforce their titles in the face of threats of violence or other extralegal action. For example, a squatters' uprising in Sacramento in 1850 resulted in several deaths, including government officials, and there were a number of similar revolts elsewhere in the region over the next few years. In the Midwest, settlers banded together in claim clubs to defend their holdings, forcibly if necessary, against railroads and other nonresident owners who asserted formal title to the land. In Kansas, resistance to a secret purchase of Cherokee land by a railroad led to a string of violence against both property and persons. See Pisani, "Squatter Law"; Bogue, "Iowa Claim Clubs"; and Gates, *History*, pp. 371–72. See also McCurdy, *Anti-Rent Era*, for a detailed treatment of the tenants' revolt in upstate New York.

[42] For example, the time period was reduced to seven years in late-eighteenth-century Kentucky and to five years in mid-nineteenth-century California.

[43] Gates, *History* and "Tenants"; and Pisani, "Squatter Law."

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exploit ore resources. Although the law was amended in 1855 to require miners to post bond against any damage they might inflict on farmers' property, the cost of enforcing their property rights weighed heavily on farmers (especially poor ones) who were located near mining areas.[44] Western legislatures also commonly granted mining companies powers of eminent domain. Nevada's 1875 Act "to encourage the mining, milling, smelting, or other reduction of ores," which was upheld by the state's supreme court in 1876, declared that as "the production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."[45]

In addition to the water mills and mines already discussed, states delegated powers of eminent domain to a variety of private companies. Some of these concerns served the public by constructing roads, bridges, canals, or railroads that reduced the costs of transportation, but others were purely private entities: lumber companies, factories that needed a spur line to a railroad, or individual irrigation projects that (like mines and mills) could be said to benefit the public only to the extent that they contributed to economic growth. Courts rarely posed objections to these uses. Nor did they block compensation rules that provoked general outrage, such as those that subtracted from the payment granted landowners who lost only part of their property to a transportation improvement, a value equivalent to any benefits they would realize on their remaining land.[46] Indeed, the delegation of eminent-domain powers to private businesses that the courts were willing to countenance was so liberal that the legal historian Harry Scheiber has posited that "expropriation of private property by government" was an important tool of economic development in the United States.[47]

As the U.S. population became increasingly urban in the late nineteenth century, battles over property rights gravitated from the countryside to the cities. Beginning in the early twentieth century, for example, states began to use their powers of eminent domain to promote

[44] Scheiber and McCurdy, "Eminent Domain Law." See also Nichols, "Meaning."

[45] *Dayton Gold and Silver Mining Co. v. Seawell*, 11 Nev. 394 (1876). For additional examples, see Scheiber, "Property Law."

[46] The courts did attempt to distinguish between benefits that were general to the community, which should not be not deducted, and those that were particular to the landowner, which should, but the line was difficult to draw. See McCormick, "Measure," pp. 487–94.

[47] Scheiber, "Property Law." I do not mean to suggest that the courts never scrutinized the public purposes of takings that transferred property to private parties, but only that their dominant stance was one of deference. For some contrary cases, see Nichols, "Meaning."

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private urban revitalization projects. This activity accelerated after 1937, when Congress approved federal subsidies to states that cleared slums for the purpose of building low-income housing. These projects were controversial because they effectively transferred land from one set of urban dwellers to another, but by 1949 courts in 22 states had upheld the constitutionality of these takings.[48] Courts also upheld takings that benefited private business corporations on the grounds that they would create or save jobs. The most notorious such case, *Poletown Neighborhood Council v. City of Detroit*, decided by the Michigan Supreme Court in 1981, sanctioned the destruction of most of the homes in a working-class neighborhood to make way for a General Motors factory that the company otherwise threatened to locate in another state.[49] *Poletown* was subsequently cited as precedent by courts in at least nine other states.[50]

During the twentieth century, urban officials sometimes pushed out the envelope when it came to eminent-domain practices. For example, they instituted policies that enabled them to condemn more land for projects than was actually needed, selling off the surplus to help finance their undertakings. Occasionally, these practices ran afoul of the courts, but in a number of states cities were able to secure statutes or even constitutional amendments that permitted excess condemnations.[51] Cities also secured expedited condemnation procedures that reduced landowners' bargaining power. Perhaps the most extreme example was legislation drafted by Robert Moses and passed by the New York legislature in 1924 that enabled the Long Island State Park Commission to expropriate land by a simple administration declaration, taking possession of it immediately and leaving landowners to seek compensation after the fact from the appropriate agencies.[52]

It is difficult to know how common it was for landholders to lose their property to other private interests through eminent domain proceedings. It is also difficult to know whether owners who lost their property received fair compensation. Policymakers who wish to curb such proceedings point to numbers of condemnations they consider abusively large—by one count, 10,000 properties in 41 states seized or threatened for the

[48] Nichols, "Meaning"; and Note, "Public Use Limitation."

[49] Supreme Court of Michigan, *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981). The Michigan Supreme Court backtracked a quarter century later in *County of Wayne v. Hathcock*, 471 Mich. 445 (2004).

[50] Bell and Parchomovsky, "Uselessness."

[51] See Note, "Eminent Domain"; Nichols, "Meaning"; and Cushman, *Excess Condemnation*.

[52] Caro, *Power Broker*, p. 174.

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benefit of private interests between 1998 and 2002.[53] Others, however, make the case that the numbers are overstated, and that property holders in fact often receive above-market valuations.[54] Still others argue that, because property owners do receive compensation, eminent domain proceedings are the most benign of the many ways in which governments can reallocate property rights.[55]

Certainly governments can and do use their taxation and regulatory powers in ways that dramatically affect property rights.[56] Zoning laws, for example, constrain what landholders can and cannot do with their property and hence the stream of income they can earn from it. When zoning laws are changed, landowners may discover that the manner in which they have been using their property is no longer legal, and that the next best use of it is less remunerative. Such experiences cannot have been uncommon over the course of the last century as the number and scope of such laws increased dramatically.[57] Moreover, property owners who adhere to all the normal zoning and building codes can suddenly find themselves subject to additional constraints if their neighborhood is designated a historic district or becomes subject to other location-specific laws.[58] These kinds of regulations, which reallocate property rights without compensating those who are harmed by them, have been routinely upheld as legitimate exercises of the government's police powers since the early twentieth century, when the U.S. Supreme Court ruled that zoning regulation was constitutional in *Village of Euclid v. Ambler Realty Co*.[59] By the late twentieth century there were signals from the courts that owners should be compensated in the most extreme cases—when the value of the owner's property is reduced to nothing, for example—but the general rule is still that losses resulting from regulatory changes are not compensable.[60]

[53] Cited by Joshua Kurlantzick, "Condemnation Nation," *Harper's Magazine* (Oct. 2005), pp. 72–75. Kurlantzick thinks the numbers are underestimates, claiming that in the same years there were 1,237 such cases in Maryland alone.

[54] See, for example, Garnett, "Neglected Political Economy." Patricia Munch, however, has presented evidence that excess compensation mainly benefits owners of high-value properties, whereas the compensation offered for low-value properties tends to be too low. See Munch, "Economic Analysis."

[55] Bell and Parchomovsky, "Uselessness."

[56] Epstein, *Takings*; and Bell and Parchomovsky, "Uselessness."

[57] Ellickson, "Alternatives," p. 692.

[58] Sax, "Some Thoughts." Other examples include coastal areas and business improvement districts.

[59] 272 U.S. 365 (1926). See Toll, *Zoned American*; and Wolf, *Zoning*.

[60] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See Epstein, "*Lucas*"; and Sax, "Property Rights."

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KELO V. CITY OF NEW LONDON

> "Today the court abandons [its] long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded . . . ."[61]
>
> Justice Sandra Day O'Connor

The practice of seizing property from one private owner and transferring it to another for the purpose of economic development was a source of increasing controversy by the late twentieth century. This controversy came to a head in 2005 when the U.S. Supreme Court upheld one such transfer in *Kelo v. City of New London*.[62] The case and its immediate precedents are worth examining in detail because they highlight the extent to which the Supreme Court has deferred to state and local governments in determining whether takings meet the Fifth Amendment's test of "public use." Moreover, the response to the decision provides insight into the mechanisms that have allowed Americans to maintain faith in the security of their property rights even when constitutional mechanisms seemingly offered little protection.

The case had its origins in an effort to revitalize New London's downtown waterfront. The pharmaceutical giant Pfizer had decided to build a research facility in the area, and the Connecticut city sought to leverage the effect of this facility on the local economy by promoting the development on adjacent land of a mixed-use complex of residences, hotels, restaurants, stores, office space, and a marina. The city used its power of eminent domain to acquire property for the complex and quickly managed to secure most of the land. Nine residents refused to sell, however, and instead took their case to court. After losing in New London Superior Court and again in the Connecticut Supreme Court, they appealed to the U.S. Supreme Court on the grounds that the takings violated their rights under the Fifth Amendment to the Constitution. In a five-to-four decision, the Supreme Court found against them.

The key issue in *Kelo* was whether the city could legitimately use its power of eminent domain to secure land that would then be transferred to a private entity. Everyone involved in the case agreed that the government could transfer property from one private party to

[61] From Justice O'Connor's dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005) at 494.

[62] 545 U.S. 469 (2005). The literature on this case is already voluminous, but see Lopez, "Revisiting *Kelo*"; Sax, "*Kelo*"; Zuck, "*Kelo*"; and Brooks et al., *Supreme Court*.

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another as long as the transfer achieved a public goal. The question before the court, therefore, was whether a transfer that aimed to revivify the city's economy served a public goal. Justice John Paul Stevens, who wrote the majority opinion, cited precedents showing that the court's practice in such cases was to defer to the judgment of state and local officials about what constituted a valid public purpose. Although the court was required to hold officials to a standard of reasonableness, Stevens had no doubt that the New London project met that test. The city, after all, was in a "distressed" condition. It had suffered "decades of economic decline" by the time the federal government closed the Naval Undersea Warfare Center, located along the waterfront near the downtown. The center had been a large employer, and its closing helped worsen the city's unemployment rate to twice the state average. It was understandable that government officials would want to take advantage of Pfizer's intention to build a research lab in the area to put together a comprehensive redevelopment plan to create jobs and revitalize the downtown.[63]

Justice Sandra Day O'Connor wrote the main dissent.[64] As the quotation cited at the beginning of this section indicates, she portrayed the decision as a major break with precedent that would disastrously "wash out any distinction between private and public use of property—and thereby effectively delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[65] But was this decision really the significant break with legal tradition that O'Connor claimed it was?

Stevens cited two main precedents in his opinion. The first was *Berman v. Parker* (1954), in which the court had unanimously upheld an urban renewal plan in Washington, DC.[66] As in the New London case, the plan involved condemning land in private hands and transferring it to private parties for purposes of redevelopment. In the Washington, DC case, however, the area at issue was a slum. Even the appellant, the owner of a department store, acknowledged the government's authority to condemn slum dwellings, but he argued that since his own property was not "blighted," appropriating it and transferring it to someone else violated his constitutional rights under the takings clause. Writing for the court, Justice William O. Douglas declared that the taking of this unblighted piece of property was constitutional because the project in question had to be treated as a whole. If individual owners "were

[63] *Kelo v. City of New London*, 545 U.S. 469 (2005) at 473.

[64] All four dissenting justices signed O'Connor's opinion. Justice Clarence Thomas also wrote a dissent that was signed only by him.

[65] *Kelo v. City of New London*, 545 U.S. 469 (2005) at 494.

[66] *Berman v. Parker*, 348 U.S. 26 (1954).

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permitted to resist these redevelopment programs" on such grounds, the projects would not be feasible. Determination of the actual properties to be acquired, Douglas insisted, was a matter for local government to settle: "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[67]

Up to this point there was nothing particularly controversial about the ruling, but Douglas went on to use the case as an opportunity for making a broader statement about the need to defer to legislatures in matters within the scope of the "police power": "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[68] The subtext for this strong language was, of course, the court's rejection of the doctrine of "substantive due process"—that is, its rejection of the set of legal principles used earlier in the century to overturn state legislation regulating hours and conditions of labor.[69] The Court had previously held many such laws to be unreasonable uses of the states' police powers because they infringed on the right to contract and other similar rights that, though not specifically enumerated in the Constitution, were protected by the due process clause of the Fourteenth Amendment. To emphasize the court's shift away from this doctrine, Douglas insisted that it was "the legislature, not the judiciary" that was "the main guardian of the public needs to be served by social legislation." "This principle admits of no exception," he went on, "merely because the power of eminent domain is involved."[70] Douglas's language made it seem as if *Berman* deviated from past eminent domain decisions, when in reality it did not. As already discussed, state courts had traditionally deferred to legislatures in determining whether a particular taking of private property was for the general good. Federal courts adopted a similar posture when they began to hear appeals on eminent domain cases in the late nineteenth century.[71]

[67] Ibid., at 35.
[68] Ibid., at 32.
[69] For an excellent overview of this history, see Kens, *Lochner*.
[70] *Berman v. Parker*, 348 U.S. 26 (1954) at 32.
[71] Like the other amendments that constitute the Bill of Rights, the Fifth Amendment was interpreted initially as constraining the federal government and not the states, though most states adopted similar takings provisions in the early nineteenth century. After the ratification of the Fourteenth Amendment, the federal courts gradually extended the reach of the Bill of Rights to the states, with the Supreme Court deciding the first cases involving states' use of eminent domain at the end of the nineteenth century. For examples of the court deferring to legislative judgment, see *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and *Strickley v.*

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O'Conner did not repudiate *Berman* in her dissent in *Kelo*, but rather sought to reign in its implications. At issue was Douglas's "errant language" linking "the police power and 'public use,'" a conflation that I have suggested crept into his decision as a result of his eagerness to mark the court's rejection of substantive due process.[72] O'Connor proposed instead a new criterion for determining whether a transfer of private property met the Fifth Amendment's standard: whether the pre-taking use of the property inflicted harm on society. *Berman* passed that test—the "blight resulting from extreme poverty" justified the taking. The current case, however, did not, and as a result the court's decision threatened the security of property rights.[73] As a practical matter, it is difficult to understand how judges could easily draw a distinction between the harm caused by urban blight (*Berman*) and the problems caused by urban decay (*Kelo*). O'Connor attempted to differentiate between the two by noting that "New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm."[74] But, as Stevens caustically noted in dismissing O'Connor's "novel" argument, "there was nothing 'harmful' about the nonblighted department store at issue in *Berman*" either.[75]

The second of the main precedents for *Kelo*—a Supreme Court decision handed down in 1984 in the case of *Hawaii Housing Authority v. Midkiff*—upheld the Hawaii Land Reform Act of 1967, a statute that used the state's power of eminent domain to redistribute land from haves to have-nots.[76] At the time of the legislation, a mere 72 landowners owned 91 percent of all privately held land in the state, and almost all residents leased rather than owned their homes.[77] The act gave the Hawaii Housing Authority power to condemn tracts larger than five acres, compensate the owners, and then sell the houses to the lessees who lived in them. Over the next decade and a half the authority took control of 30 tracts (amounting to about 5,000 house lots). In 1979, however, one of the largest landowners sued in federal court to have the act declared unconstitutional on the grounds that it violated the Fifth

Highland Boy Gold Mining Co., 200 U.S. 527 (1906). See also Lopez, "Revisiting *Kelo*"; Sax, "*Kelo*"; and Bell and Parchomovsky, "Uselessness."

[72] *Kelo v. City of New London*, 545 U.S. 469 (2005) at 501.

[73] Ibid., at 500–2.

[74] Ibid., at 500.

[75] Ibid., at 486.

[76] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[77] Public domain lands accounted for 48.5 percent of the land in Hawaii. Cincone, "Land Reform," p. 1243. For discussions of the history of the act and its effect on Hawaii's housing market, see La Croix, Mak, and Rose, "Political Economy"; and La Croix and Rose, "Public Use."

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Amendment's takings clause. Although a federal district judge upheld the law, it was struck down by the Court of Appeals for the Ninth Circuit. In his opinion for the court, Judge Arthur Alarcon cited James Madison's fear that property rights would lack security whenever the majority was without property. Just as Madison might have anticipated, "the Hawaii legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land." The Hawaii Land Reform Act was "a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit."[78]

The Supreme Court did not buy this Madisonian view of the case and unanimously reversed the appeals court's decision.[79] Ironically, it was Justice O'Connor who wrote the opinion for the court, relying heavily on the *Berman* precedent in finding that "the 'public use' requirement [was] coterminous with the scope of a sovereign's police powers"—and therefore a legislative rather than a judicial matter. Although "one person's property may not be taken for the benefit of another private person without a justifying public purpose, . . .where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause." The case at hand easily met that standard. Consequently, the court had "no trouble concluding that the Hawaii Act is constitutional."[80]

Although this ruling might appear to sanction a radical extension of the power of eminent domain, there was precedent for it in *People of Puerto Rico v. Eastern Sugar Associates*, decided by the First Circuit of the U.S. Court of Appeals in 1946. That decision, which the Supreme Court declined to review, upheld an agrarian land reform act passed in 1941 by Puerto Rico's legislature. The act aimed, among other things, "to put an end to the existing corporate latifundia in this island, block its reappearance in the future, insure to individuals the conservation of their land, assist in the creation of new landowners," and "provide the means for the agregados [squatters] and slum dwellers to acquire parcels of land on which to build their homes." Counsel for Eastern Sugar Associates, which had filed suit to prevent its land from being taken, charged that the act amounted to "state socialism." The court admitted that the program of land reform might be considered "radical," but declared that "concrete cases are not to be decided by calling

[78] *Midkiff v Tom*, 702 F.2d 788 (1983) at 793, 798
[79] Justice Thurgood Marshall did not participate in the case.
[80] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) at 241.

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names." Listing a long line of eminent-domain cases in which judges had deferred to legislatures' determination of public purpose, the court acknowledged that it was nonetheless "required to make some inquiry" into the reasonableness of the legislature's rationalization for land reform. Data pertaining to the island's economy and social structure convinced the justices that the legislators had been motivated by a desire to cure real "evils," and they held the act constitutional.[81]

Citing the Puerto Rican case, O'Connor used a similar logic to uphold the Hawaii Land Reform Act as a reasonable exercise of the state's police powers. She first laid out the extent of the concentration of landholdings in the state and then traced this "evil" back to the "feudal land tenure system" imposed on the islands by their Polynesian chiefs. This history enabled her to draw a parallel between the actions of the Hawaii legislature and those of the founders of the United States. "The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did" when they abolished entail and other feudal incidents, "to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." Of course, land reform might not "accomplish its objectives," but that was beside the point. "Empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." What mattered was that the legislature's purpose was legitimate. "Regulating oligopoly and the evils associated with it is a classic exercise of a state's police powers." Taking land from A and giving it to B ("redistribution of fees simple") was constitutional if its purpose was "to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly."[82]

O'Connor's language seems surprising in retrospect, but it does not seem to have shocked many people at the time. None of the other justices on the court—not even conservatives such as Warren Burger, William Rehnquist, and Lewis Powell—dissented from O'Connor's declaration that the Hawaii legislature's attack on the "evils of concentrated property ownership" had as "legitimate" a public purpose as the railroads, irrigation canals, and urban redevelopment projects for which the court had previously upheld the use of eminent domain.[83] Nor was there a general public outcry over the decision. The *Wall Street Journal* opined that "eminent domain may be the most devastating of government powers" and worried that "a well-intentioned court has

[81] *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1946) at 318, 324–25.
[82] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) at 232, 241–43.
[83] Ibid., at 245.

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just opened" the private sphere of the home "to a host of unforeseeable harassments."[84] But most newspapers that covered the decision did not editorialize about it. Instead, they reported on the case in remarkably neutral language, invariably burying any comments from the aggrieved plaintiffs regarding the decision's potential effect on property rights in the remoter paragraphs of the story.[85] Writing about two months after the decision, conservative columnist James J. Kilpatrick expressed astonishment "that so little attention has been paid to the Hawaii case" given its "ominous implications for the sanctity of private property," but he was unable to awaken any interest in the case and coverage soon petered out.[86]

The urban redevelopment project at issue in the New London case would seem a routine matter by comparison. Yet, whereas the court had unanimously upheld land redistribution in the Hawaii case, it split five to four in *Kelo*. Moreover, the *Kelo* decision provoked widespread outrage. Newspapers and other news media broadcast O'Connor's dire warnings (quoted at the beginning of this section) across the country, supplementing their news coverage with incendiary editorials.[87] "A bare majority of the court recklessly rewrote two centuries of eminent domain practice," wrote one journalist, putting "private property, people's homes no less," at risk of seizure.[88] Another proclaimed that the *Kelo* decision "threaten[ed] more homes, small businesses, and churches with destruction . . . than all the nuclear-tipped missiles the Soviet Union could have launched in a preemptive first strike at the height of the Cold War."[89]

As national opinion polls revealed that voters were passionately and virtually unanimously opposed to the use of eminent domain for economic-development projects, politicians hastened to jump on the band wagon.[90] President George W. Bush issued an executive order under the banner, "Protecting the Property Rights of the American People," promising that the federal government would not take private property

[84] "Lords of the Manor," *Wall Street Journal*, 1 June 1984, 24.

[85] See, for examples, Linda Greenhouse, "Justices Uphold Hawaii's Statute on Land Reform," *New York Times*, 31 May 1984, A1; Philip Hager, "Estate Breakup Law Upheld," *Los Angeles Times*, 31 May 1984, 1; "Court Upholds Hawaiian Land Redistribution," *Hartford Courant*, 31 May 1984, A7A; Lyle Denniston, "Hawaii Upheld on Land Splits," *Baltimore Sun*, 31 May 1984, A1; and Fred Barbash, "Court Sustains Hawaiian Law Dividing Large Land Holdings," *Washington Post*, 31 May 1984, A2.

[86] James J. Kilpatrick, "Sunset of Hawaii's Private Property Rights," *Hartford Courant* (21 July 1984), D8.

[87] On the "intense" reaction, see Sax, "*Kelo*"; Zuck, "*Kelo*"; and Lopez, "Revisiting *Kelo*."

[88] Robert J. Caldwell in the *San Diego Union Tribune*, quoted in Zuck, "*Kelo*," p. 188.

[89] Bob Marshall in the *Richmond Times-Dispatch*, quoted in Lopez, "Revisiting *Kelo*," p. 562.

[90] An MSNBC survey found, for example, that fully 97 percent of those polled opposed the use of eminent domain for economic development. See Lopez, "Revisiting *Kelo*."

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except "for public use, with just compensation, and for the purpose of benefiting the general public."[91] Committees in both houses of Congress held hearings to demonstrate their concern, and the House passed the "Property Rights Protection Act of 2005," a bill that would deny federal funds to any governmental entity that used eminent domain to take property for economic development.[92] Most of the action, however, was at the state level. By the beginning of 2007, 34 states had enacted legislation or constitutional amendments that required governments to meet higher standards of public use in order to take private property or that banned altogether takings for the purpose of economic development.[93]

Defenders of property rights have criticized many of these measures on the grounds that the standards written into them were too vague to have much bite.[94] But this objection is somewhat beside the point. In order to be effective, even the toughest statutes must be largely self-enforcing, to borrow Sonia Mittal and Barry Weingast's phrase.[95] That is, government officials must perceive it to be in their interests to uphold them. Presumably, the strong public reaction to the *Kelo* decision sent a signal to local officials everywhere that their tenure in office might depend on the exercise of greater caution in matters involving eminent domain. Significantly, several members of the New London city council lost their seats in the wake of the case.[96]

RESOLVING THE MYSTERY

> "The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state."[97]
>
> Thomas Jefferson

[91] Quoted in ibid.

[92] The bill died in the Senate. See Utt, "States"; and Bell and Parchomovsky, "Uselessness."

[93] Zuck, "*Kelo*," p. 221. See also Utt, "States"; Lopez, "Revisiting *Kelo*"; and Bell and Parchomovsky, "Uselessness."

[94] There is, however, evidence from the recent case law that these changes have made it easier for property owners facing condemnation actions to win in court. See Lopez, "Revisiting *Kelo*"; and Jacobs and Bassett, "All Sound."

[95] See, for example, Mittal and Weingast, "Self-Enforcing Constitutions."

[96] Lopez, "Revisiting *Kelo*."

[97] Letter from Jefferson to the Reverend James Madison, 28 Oct. 1785, in Boyd et al., ed., *Papers*, vol. 8, pp. 681–82.

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Kelo was not the first time that a government's use of eminent domain (or other powers to reallocate property rights) had provoked popular outrage. Many of the other examples I have described led to widespread protests and to actions by voters to curb governmental authority.[98] At the beginning of the nineteenth century, for example, most state constitutions lacked provisions regulating the use of eminent domain. By mid-century, however, growing opposition to the mill acts and to other takings for economic development had spurred the passage in many states of constitutional amendments to protect the interests of property owners.[99] In New York, for instance, the only provision regarding eminent domain in the state's 1821 constitution was a verbatim transcription of the takings clause of the U.S. Constitution.[100] Anger over the condemnation of land to build private roads and other transportation projects led delegates to the state's 1846 constitutional convention to add a provision mandating that in all such cases compensation "shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record." In addition, the 1846 constitution specified that a privately owned road could not even be embarked upon until a jury of freeholders determined that it was necessary.[101] Outraged voters also used constitutional conventions to prohibit practices that reduced landowners' compensation for takings by subtracting the benefits that accrued to their remaining properties. Ohio changed its constitution in 1851 to specify that compensation for a taking "shall be assessed by a jury, without deduction for benefits to any property of the owner."[102] Similarly, by the early twentieth century, growing political opposition in the West to takings by the mining industry induced many states to improve procedures for compensating landowners and even in some cases to roll back policies delegating powers of eminent domain to private companies.[103]

In all of these cases, the opposition succeeded because large numbers of voters perceived the takings to be a direct personal threat, though few of them were in any actual danger of losing their property. In the New

[98] For an overview of many of these protests, see Fleck and Hansen, "Repeated Adjustment." The "revulsion" against internal improvements that occurred during the 1840s should be viewed in a similar light. See Wallis, "Constitutions."

[99] Scheiber, "Property Law."

[100] Article VII, Section 7, New York State Constitution of 1821. All quotations from state constitutions come from The NBER/Maryland State Constitutions Project, available at http://www.stateconstitutions.umd.edu/index.aspx.

[101] Article I, Section. 7, New York State Constitution of 1846.

[102] Article I, Section 19, Ohio State Constitution of 1851. For a list of such amendments and also statutes that accomplished the same purpose, see Fleck and Hanssen, "Repeated Adjustment," p. 109. See also Scheiber, "Property Law."

[103] Fleck and Hanssen, "Repeated Adjustment"; and Scheiber, "Property Law."

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London case, for example, property owners across the country identified with Kelo and her "little pink house."[104] If the government could seize Kelo's well-maintained home and transfer the property to influential businesses, it could also take theirs! Something must be done! Bill Von Winkle, one of the other plaintiffs in the case, gave voice to this sentiment when he told a reporter for the *New York Times*, "It's desperately hard to believe that in this country you can lose your home to private developers. . . . It's basically corporate theft."[105] Government, many people believed, was in league with big business, and as a result the property of ordinary citizens was no longer safe. Joshua Kurlantzick asserted in *Harper's Magazine* that the number of takings was exploding under "a concerted campaign by city governments, on the one hand, and large real estate developers and 'big-box' retailers, on the other, to exploit eminent domain for their own gain."[106]

Of course, voters were likely to respond en masse to these kinds of threats to property rights only to the extent that they themselves had property to protect. This seems like an obvious enough point, but it is the key, I think, to resolving the mystery of property rights at the heart of this article. Because most voters owned property, they could safely grant government the authority to rearrange property rights for the common good. That is, they could allow property rights to be flexible. But they could also protect themselves against potential abuse because, if powerful interests and politicians conspired to reallocate property for their own benefit, voters could put a stop to the practice by taking back some of the authority they had given up.[107] Because property was so widely held, moreover, redistribution in favor of the bottom would be kept in check. Any significant reallocation to benefit the propertyless would adversely impact too many voters.

[104] Kelo's little pink house became a powerful symbol of the dangers of an overweening government in league with powerful business interests. See, for example, Benedict, *Little Pink House*. Opponents of eminent domain purchased the house and moved it to a different location in New London so it would "stand as a testament to the bravery of Susette Kelo and her neighbors, and to the thousands of others who have battled and are battling government's abuse of eminent domain across the country." From the website of the Institute for Justice, http://www.ij.org/index.php?option=com_content&task=view&id=2065&Itemid=245, accessed on 15 Jan. 2011.

[105] Avi Salzman and Laura Mansnerus, "For Homeowners, Frustration and Anger at Court Ruling," *New York Times*, 24 June 2005, A20.

[106] Kurlantzick, "Condemnation Nation."

[107] For an intriguing attempt to model a very similar idea, see Fleck and Hanssen, "Repeated Adjustment." I am abstracting in this discussion from the nature of the political system. Property owners can, of course, express their will more easily in democratic polities. It is difficult, however, to envision a society where property rights are widespread yet political institutions are not democratic. By contrast, there are many societies where people vote but property ownership is not widespread.

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Where voters did not have a stake in a particular kind of property, they were generally indifferent to protecting it or, worse yet, eager to redistribute it in their own best interests. Southern slaveowners understood this danger very well and worked assiduously to limit the power of non-slaveholding whites (in the South as well as the North) to tamper with their property in human beings.[108] When they thought they had failed, they seceded from the Union. Less dramatic examples include the chartering of a free bridge alongside the original Charles River toll bridge and the redistributions of land that occurred in Puerto Rico and Hawaii. In these instances, the protections to property imbedded in the Constitution amounted to naught, as the federal courts refused to find these actions unconstitutional. True, in the case of settlers squatting on frontier lands, the courts generally upheld landowners' formal titles, but as already discussed, they also allowed the value of those titles to be undermined by legislation favorable to the squatters. What ultimately mattered in all of these examples, in other words, was the will of the majority of voters.

Redistribution in favor of those at the top—that is, in favor of politically powerful interests—has been a more persistent problem throughout American history, and I do not mean to imply that the protection offered by widespread property ownership is either automatic or foolproof. In the first place, voters are often slow to respond or difficult to mobilize. Some property-rights defenders, for example, had been sounding the alarm about urban redevelopment projects for years to little avail. After the 1981 *Poletown* decision, the issue received more attention, but it was not until *Kelo* that the outrage was widespread enough to produce a political response. Second, many kinds of reallocations are unlikely to stir up voters. One example is takings that affect narrow business interests. It was eminently predictable, for example, that Americans would react much more viscerally to Kelo's loss of her home than to the taking of a local department store, as in the *Berman* case. Takings that affect mainly the poor or members of minority groups are particularly likely to go unchallenged. Voters did not protest the removal of the Cherokees from their lands in Georgia; to the contrary, they generally applauded the action. Nor did they rush to the defense of the poor displaced from their homes in city after city in the name of urban renewal.

The U.S. model, therefore, is by no means a panacea. Security of property rights in the United States depends on the mass of voters and

[108] For a particularly nice example that illustrates slaveowners' fears of redistribution within the South, see Einhorn, "Species."

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so does not offer the same degree of protection to those at the bottom or top of the wealth distribution as it does to those in the middle. Moreover, though widespread property ownership makes it possible to delegate to government the authority to redistribute property in order to facilitate economic development or other broad social goals, it also places potential limits on that flexibility that can make it difficult to solve important social problems. U.S. voters, for example, have not been eager to tax themselves to provide public goods that they generally agree are badly needed; nor do they seem willing to support measures that are necessary to confront the serious environmental problems the country faces.

These imperfections notwithstanding, the U.S. economy has racked up an enviable record of two centuries of sustained economic growth —an achievement, it has often been asserted, that was predicated on the establishment of institutions guaranteeing the security of property rights. My aim in this article has been to qualify this assertion by reminding scholars that economic development also requires that societies be able flexibly to reallocate property rights in response to new technological and other developments. If such reallocations could always occur smoothly—either through market transactions or a consensus effort on the part of society to capture the resulting gains in efficiency—there would be nothing mysterious about this qualification. As I have shown, however, reallocations in the United States have often been involuntary, and losers have not always received adequate (or any) compensation. Owners whose property has been taken from them have routinely charged that property rights are in fact not secure, but aside from some relatively brief episodes when broader protest movements have taken up their cause, these kinds of complaints have never become general. Hence the mystery. Despite the many involuntary reallocations of property that have occurred repeatedly since the formation of the republic, Americans still strongly believe that their property rights are secure and they act in their economic lives accordingly.

I have suggested that the key to resolving this mystery is the widespread ownership of property, which makes redistribution in favor of the bottom unlikely and prompts voters to mobilize whenever they think redistribution in favor of the top is getting out of hand. Although I have focused exclusively on examples from the United States, my motive has been only to provide a clearer sense of what the U.S. model actually is —not to make an updated case for American exceptionalism. Most advanced industrial nations, after all, have rates of homeownership today

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that are comparable to that of the United States.[109] Moreover, the economic miracles of Japan, Taiwan, and South Korea followed hard upon the successful land redistributions enacted after World War II.[110] Whether widespread property ownership has functioned in these other countries in a way that allows property rights to be both flexible and secure is a subject for further research. Of course, there have been other cases where land reform has led to social and political turmoil that set economic development back. Nevertheless, my analysis suggests that, if redistribution is done right, the payoff on just this one dimension of property rights is potentially huge.[111]

[109] "Home ownership (most recent) by country," available at Nationmaster.com, http://www.nationmaster.com/graph/peo_hom_own-people-home-ownership, accessed 24 Jan. 2011. See also, van Ewijk and van Leuvensteijn, eds., *Homeownership*.

[110] See, for example, Williamson, "Land Reform"; Koo, "Economic Consequences"; and Jeon and Kim, "Land Reform."

[111] Of course, redistribution has other benefits as well. See de Soto, *Mystery*. Currently, many African countries have land distribution plants in the works or under discussion. For a discussion of these plans and worries about the possible political fallout, see Boone, "Property."

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