

CHAPTER FOUR

How Secure Are Property Rights?

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions.

James Madison, *Federalist Papers*

SUPPOSE A child is playing with a prized possession and a bully takes it. Most would consider this theft because the bully has no right to take the toy. But suppose that a babysitter, hired by the parents to watch the children and settle disputes, plays favorites and takes a toy that clearly belongs to one child and gives it to another. Because the babysitter is strong and has been granted authority, he or she can transfer the rights, and the child will have to acquiesce, at least until the parents come home. Upon the parents' return, the child can appeal to their high authority to reverse the decision. To prevent future transfers, the child might

ask the parents to find a different babysitter and to make it clear to all future babysitters that their actions must be fair.

Such is the problem with the coercive power of government. To enforce property rights and adjudicate disputes, citizens band together to form governments with enough coercive power to implement the rule of law. As discussed in chapter 3, individuals can defend property rights by joining private associations or by exercising their own enforcement activity (locks, fences, alarms). But private definition and enforcement has limitations, providing a rationale for granting government the power to enforce property rights against theft from other citizens and from other nations. The problem then becomes how to prevent the coercive power granted to government from being abused to effect transfers of property.

As the architects of a free society, the United States' Founding Fathers recognized this problem (Siegan 2001). James Madison was particularly concerned about a centralized abuse of power and the security of individual rights. In his speech on December 1, 1829, at the Virginia State Constitutional Convention, he stated, "The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse." Madison frequently expressed his trepidation about the "tyranny of the majority," fearing that majority coalitions in a democracy might vote to take from minorities.

In this chapter, we explore Madison's concerns and how they might be allayed. In order to determine how secure property rights actually are, we look to the structures and outcomes of private enforcement of property rights and compare them with centralized enforcement. After discovering that there can be high costs associated with government's enforcing and defining property rights, we focus on the fundamental dilemma of political economy—how to harness government's coercive power to protect

property rights without that power's being used to reallocate rights from one individual or group to another.

Private Versus Governmental Enforcement

Although individuals can enforce their own property rights, there clearly are limits to this approach. The most obvious problem with private enforcement is that if might makes rights, fighting could prevail, consuming valuable resources and destroying the potential for economic progress.

The second problem with individual enforcement is that scale economies can make collective action cheaper and more effective. Just as specialization and scale economies can reduce the cost of producing cars, so can they reduce the costs of enforcement. Up to a point, larger armies can beat smaller armies, which helps explain why we have nation states.

A third drawback to private enforcement is that it can be subject to free rider problems, which arise when those who benefit from certain actions cannot be compelled to pay. When there are scale economies in protecting larger groups, it is difficult to defend only those who pay for protection without securing others in the vicinity. A lock on the door of a house protects just that house and therefore does not provide a free ride for others, but a neighborhood watch program has a deterrent effect for all houses despite the fact that many neighbors do not participate in the program. Even more prone to the free rider problem is protection of a country's borders, which guards all people within those boundaries regardless of whether they have contributed to payment of the cost of such services.

Because private efforts to enforce property rights can be costly and ineffective, individuals form governments, in part, to lower these costs, discourage free riding, and more effectively define and protect rights. To do this, citizens sanction government to be

the only legitimate agency with the authority to use coercion for enforcing property rights. David Friedman writes:

Government is an agency of legitimized coercion. The special characteristic that distinguishes government from other agencies of coercion (such as ordinary criminal gangs) is that most people accept government coercion as normal and proper. The same act that is regarded as coercive when done by a private individual seems legitimate if done by an agent of the government. (1973, 152–154)

In other words, individuals agree to a framework whereby they give government—whether local, state, or national—the authority to coerce themselves or others to provide the public good of law and order. Citizens authorize government to use force legitimately as long as it is used to enhance social welfare.

With its legal monopoly on the legitimate use of force, government can potentially overcome the problems that arise with private definition and enforcement. First, through supplanting the use of force by multiple private parties trying to keep others from violating their property rights, a government can potentially maintain peace among the citizens. Competition among enforcement groups, such as with the Mafia, can lead to a Hobbesian jungle. Similarly, countries torn by civil strife, such as Northern Ireland and Somalia, illustrate what can happen if rules are formed by the might of competing individuals and groups. All sides in these disputes are armed and spend large amounts of time and energy fighting over rights. A single, collectively sanctioned enforcement unit can eliminate this warring competition and replace it with law and order. And when citizens can rely on government for protection, they can focus on productive activity rather than on combat.

Second, government can choose the optimal size police or military force and can take advantage of scale economies where

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they are available. For local jurisdictions, a smaller unit can patrol and enforce rights against theft. Where jurisdictions overlap, larger units can resolve disputes. For example, county governments can resolve disputes between neighboring towns, state government can resolve disputes between counties, and at the national level, even larger military action can protect citizens from outside threats.

Finally, governments can prevent the free rider problem inherent in the enforcement of property rights. The taxing power allows the government to force would-be free riders to contribute to enforcement and defense, thus overcoming the potential for underprovision by voluntary enforcement groups.

The Trouble with Government

Though there are gains from involving government in the definition and enforcement of property rights, those gains come with costs. One particular problem facing a government trying to give valuable property rights to citizens is that people will find ways of competing to get the property rights. (In New Zealand, this type of competition is called a lolly scramble, referring to a children's party game in which candies are scattered on the floor and children scramble to get their share.)

Consider, for example, land rushes and homesteading. When the federal government made lands on the western frontier of the United States available to those willing to occupy on a first come, first served basis, people could not wait until it was actually profitable to farm the land and market the products; if they waited, someone would be there first. Hence, people competed to get title to the land by racing and enduring a starving time. This explains why failure rates were so high for homesteaders.

The Oklahoma Land Rush in 1893 provides a quintessential example of what can happen when government tries to give away

property rights to land. On the morning of September 16, when the Cherokee Strip was to be opened for claiming, between 100,000 and 150,000 people stood ready to race for land. Soldiers with rifles were stationed every 600 yards along the line to prevent “sooners” from starting before the signal. When they did start, bedlam ensued, with horses breaking legs and wagons overturning, the contents strewn across the prairie. People who tried to race on foot were trampled by horses and run over by wagons.

Races still occur if governments try to give away valuable property rights. When public lands are opened for oil or mineral exploration, companies race to establish their claims by exploring. When the U.S. government tried to distribute radio frequencies in the 1930s, people raced to be the first to broadcast on the frequencies and thereby claim a license for that frequency. The racing occurred because frequency assignments were for indefinite periods and based on the principle of first come, first served. Moreover, only a minor background investigation was conducted to establish the need for the frequency (Coase 1962, 40). In Alaska, where overfishing is regulated by limiting the season to a few days, fishers purchase big, powerful boats, race to the best fishing grounds, and catch as many as they can in the short time allowed them.

Moreover, if competition to claim valuable resources being given away by government does not actually cause racing, it still encourages efforts to influence the government’s assignment of property rights. The technical term used by economists to describe competition for political property rights is *rent seeking*, where rent is the value of the asset that is up for grabs in the political arena. When a federal agency tries to allocate uses of public lands, for example, the rents from those lands are put up for grabs and competing interest groups try to influence the allocation. The question of whether snowmobiles will be allowed in Yellowstone National Park in the winter months is a case in point. Obviously

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snowmobilers want to retain the right to ride their machines in the park, and snowmobile manufacturers are more than willing to join in the fight. On the other side are environmentalists who want to preserve the peace and quiet of the park for their enjoyment. Each side spends time and money trying to convince the relevant agencies and Congress that its claim is more meritorious.

Zoning and building regulations are other examples of how the political process can put property rights up for the taking. The property owner who is restricted in the use of his or her property, by, say, the disallowing of commercial development, will see a resulting diminution in the property's value and will fight to prevent such zoning. But a neighboring property owner who will see higher property values because of the restriction will try to get the zoning limitation imposed. The competition is little different from sooners racing to acquire property; parties in the zoning dispute compete by racing to the zoning meeting to make their case.

Astute politicians will attempt to turn these rent-seeking efforts to their favor. Though not common in the United States, corruption would be one way to do this. Campaign contributions, however, offer a legitimate alternative. People who want to get a larger share of the politically allocated pie or prevent their existing share of the pie from being taken away have a substantial incentive to influence politicians through campaign contributions. Thought of this way, politicians are able to get "money for nothing" (McChesney 1997). As long as property rights are allocated and reallocated in the political process, campaign finance reform is unlikely to find much real success.

The Power to Take

Perhaps the biggest problem with governmental enforcement of property rights is that it creates the potential for government to take property rights. Consequently, the fundamental dilemma in

establishing government is how to harness coercive power to protect property rights without that power's being used to reallocate rights from one individual or group to another.

Military Takings

The transfer of Indian lands to whites throughout the nineteenth century illustrates how the brute force of government was used to transfer rights (Anderson and McChesney 1994). Despite common perceptions, most of the early history of Indian-white land transactions involved trading rather than taking. In the eastern third of the United States, Indians had relatively well-defined territories within which families and clans had secure property rights to the land they farmed. Combine this with a balance of power and the use of force, and the conditions were right for exchange.

When settlement moved to the West around the middle of the nineteenth century, however, conditions encouraged takings. In the first place, nomadic tribes of the plains had less secure territorial rights and relatively few individual or family rights to land. Given that they depended mostly on migrating buffalo herds for their sustenance, individual land rights made little sense. Secondly, in 1848, because of the Mexican-American War, the United States established a standing army, which dramatically changed the calculus of taking. Especially after the Civil War there were large numbers of troops in the army with little to do. In this setting, the cost of taking fell, and the number of battles over land rights increased dramatically as America's Indian policy shifted from trading to taking.

In the contemporary world, the potential for such takings still disrupts property rights. This problem is obvious in Zimbabwe, where the government of President Robert Mugabe began a program of land reform aimed at redistributing property rights to

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black citizens in the late 1990s. Black citizens were allowed to squat on private property, thus claiming the land for themselves. Mugabe has been able to use his military to force whites off their land, and by stacking the country's supreme court with his own supporters, he has been able to circumvent constitutional limitations on takings. Not surprisingly, bloodshed has resulted, and the uncertainty of property rights has brought Zimbabwe's economy to a standstill. Similar stories of undefined property rights plague the developing world, where the problem can be accredited to the "electoral advantages of allowing a majority of citizens to dispossess a minority, the very politics of faction that Madison warned about in the Federalist Papers, No. 10" (see McChesney 2003).

Eminent Domain

How can we combat factional behavior and prevent the powers of government from being used to take and redistribute property rights? The framers of the U.S. Constitution were keenly aware of the problems associated with the tyranny of the majority. Madison, in particular, was convinced that in a democracy where majority rules, minority factions were of little threat, but he worried about the potential for democratic majorities to take from minorities.

To be sure, his concerns were well founded, but in today's massive government the potential for special interest reallocating must also be dealt with. In a national setting as large as the United States, voters are often rationally ignorant about what their democratically elected representatives are doing. It is costly to follow every vote taken by senators and congressmen. Also, because most programs concentrate relatively large benefits on one group and diffuse the costs over the entire population, no one really notices the cost of any single program. Hence, politicians can cater to

minority special interest groups by redistributing wealth in their favor.

To better understand the implications for property rights, consider the role of the government's power of eminent domain—its ability to acquire property for public use so long as it follows legal procedures and pays just compensation. Recognized public uses for which the power of eminent domain may be used include acquiring land for schools, parks, roads, highways, subways, public buildings, and fire and police stations, to mention a few. A key attribute of eminent domain is that the government can exercise its power to take property even if the owner does not wish to sell his or her property.

When government seeks to acquire land, it usually does so by entering the voluntary market like any other party, but potential sellers may try to get higher than competitive market prices by threatening to hold up the acquisition. Consider, for example, governmental acquisition of land for a highway. If the proposed highway cuts through the land of multiple landowners, any one of the landowners may refuse to sell unless he is paid a higher-than-market-value price. This type of holdout problem provides the rationale for eminent domain power (see Epstein 2003).

Though constrained by the takings clause of the U.S. Constitution (the Fifth Amendment), abuse of eminent domain power can occur because the definition of what constitutes public use is ambiguous. The term *public use* has been interpreted very broadly by the courts. A project need not be actually open to the public to constitute a public use. Instead, generally only a public benefit is required. Suppose, for instance, that a city uses its eminent domain power to acquire property from one business and transfers it to another in the name of redevelopment. Is this a legitimate public good, or is it simply a transfer of property rights from one owner to another?

Several egregious examples were documented by the Castle

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Coalition (www.castlecoalition.org 2002) in a report entitled “Government Theft: The Top Ten Abuses of Eminent Domain, 1998–2002.” These include an example from New London, Connecticut, wherein a private development organization used the government’s eminent domain power to condemn more than a dozen properties, including the home of an eighty-two-year-old woman, to construct an office park. In Marum, Kansas, the city condemned the property of one car dealership to allow a neighboring car dealership to expand. The city of Riviera Beach, Florida, has used its eminent domain power to force 5,000 residents from residential property in order to develop commercial and industrial sites.

An example with a brighter ending comes from Lancaster, California. The Lancaster city council voted to condemn space in a shopping center occupied by a 99 Cents Only store to make room for the expansion of a Costco store. Costco Wholesale Corporation had operated in the mall for a decade before 99 Cents Only opened shop in 1998. Immediately after 99 Cents Only opened, Costco told the city that it needed to expand into the 99 Cents Only space or it might leave the city. In June 2000, city officials voted to condemn the 99 Cents Only store site. The store sued, arguing that the city had violated its Fifth Amendment rights. It won the case when U.S. District Court Judge Stephen V. Wilson blocked any future attempt to take the 99 Cents Only store for private purposes, writing that “the evidence is clear beyond dispute that Lancaster’s condemnation efforts rest on nothing more than the desire to achieve the naked transfer from one private party to another. Such conduct amounts to an unconstitutional taking purely for private purposes.” In this case, the transfer was stopped, but not without cost to the 99 Cents Only store.

Even without condemnation the potential for regulation diminishes the value of a property. When the Tahoe Regional Plan-

ning Agency (TRPA) established zoning rules that prevented Bernadine Suitum from building on her property, the highly valued Tahoe property declined in value. Mrs. Suitum had to go all the way to the U.S. Supreme Court to win the right to even file a lawsuit against the planning agency. The TRPA sought to bypass its constitutional mandate to compensate Mrs. Suitum by giving her “transferable development rights,” thinking she could sell these rights to a third party for a portion of the market value. Mrs. Suitum did not want to get involved in the complex scheme; rather, she wanted the TRPA to honor its duty and pay her the compensation she deserved. After six years of litigation, the U.S. Supreme Court ruled in *Suitum v. Tahoe Regional Planning Agency* 520 U.S. 725 (1997) that Mrs. Suitum had a right to be heard by a court and that she was entitled to full compensation for the taking of her property. Though the court ruled in Mrs. Suitum’s favor, this case served as a wake-up call to those who thought they were immune from takings.

Richard Epstein (2003) elaborates on the potential for takings in the context of privately inheld lands—private lands surrounded by government lands. Inholders can easily be deprived of the value of their property if the agency controlling the surrounding lands denies access. Easements give the inholder some protection against this type of taking, but with the vagaries of politics, such easements can end up “being an incomplete treaty between two warring tribes” (Epstein 2003). The right of a private inholder to use a government-owned dirt road, for example, creates multiple questions regarding the nature of the entitlement, such as what type of vehicles are allowed on the road or whether the inholder can make repairs to the road and, if so, under what government supervision. As owner of the surrounding land, the government is able to take a portion of the inholder’s property value.

The precarious nature of the inholder’s rights demonstrates the threats to private property associated with the government’s

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ownership of land. This scenario has been played out frequently on property in the western United States, where numerous in-holdings exist and where environmental groups are pressuring government to acquire additional public lands. As this acquisition increases, the conflict between public and private ownership increases the likelihood that government coercion will result in the factional tyranny that Madison feared.

To make the takings problem worse, it is often difficult to determine what constitutes just compensation given that land is not homogeneous. The object of compensation is to put the owner of the publicly acquired property “in as good a position pecuniarily as if his property had not been taken” (*Olsen v. United States* 292 U.S. 264, 1934). If eminent domain procedures worked perfectly, the amount of compensation given to the private property owner would be set at a level where the private property owner would be indifferent between the land he held and the payment he received. Interpretations of takings law, however, frequently ignore this fundamental concept by refusing to compensate for the total amount of loss resulting from government action. This result, according to Epstein (2003), “leads to profound allocative distortions: The lower prices stipulated by the government lead to an excessive level of takings, which in turn increases the size of government relative to what it should be, and thereby alters for the worse the balance between public and private control.”

Conclusion

Government can play a positive role in defining and enforcing private property rights. It can maintain law and order, lower the overall cost of this protection, and eliminate the free rider problem in providing protection. Doing so requires that government have coercive power, which in turn creates a double-edged sword. The same coercive power that protects private property can be

used to take private property, especially if done in the name of the public's safety and welfare. As explained in the introduction to the *Economic Freedom of the World* report (Fraser Institute 1996):

The fundamental function of government is the protection of private property and the provision of a stable infrastructure for a voluntary exchange system. When a government fails to protect private property, takes property itself without full compensation, or establishes restrictions that limit voluntary exchange, it violates the economic freedom of its citizens.

It might be possible to reduce the potential for such violations by not allowing the government to acquire any property at all, but this would require sacrificing benefits that may come from governmental ownership. The obvious example would be military property, but others include administration buildings, historic monuments that may have intrinsic preservation value, and public highways where private toll roads are infeasible. Nonetheless, by more carefully limiting the purposes for which governmental property can be acquired, the potential for uncompensated or undercompensated takings could be reduced.

A stricter interpretation of the takings clause of the U.S. Constitution provides another potential limit on governmental takings of private property. As Madison realized, judicial review can provide "an impenetrable bulwark against every assumption of power in the Legislative or Executive" (*Annals of Congress* 457, 1789). As we have seen over the years, however, it is one thing to assert that judicial review will provide this bulwark, and another for the courts to strictly interpret the takings clause.

The remaining question, addressed in chapter 5, is whether or not the protection of property rights can be maintained to promote continued prosperity. The modern property rights movement is fueled by the belief that property rights in the United

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States are being eroded in favor of legislated and regulated controls. If so, what are the prospects for reestablishing the sanctity of property rights necessary for ensuring freedom and continued improvements in human welfare and progress?