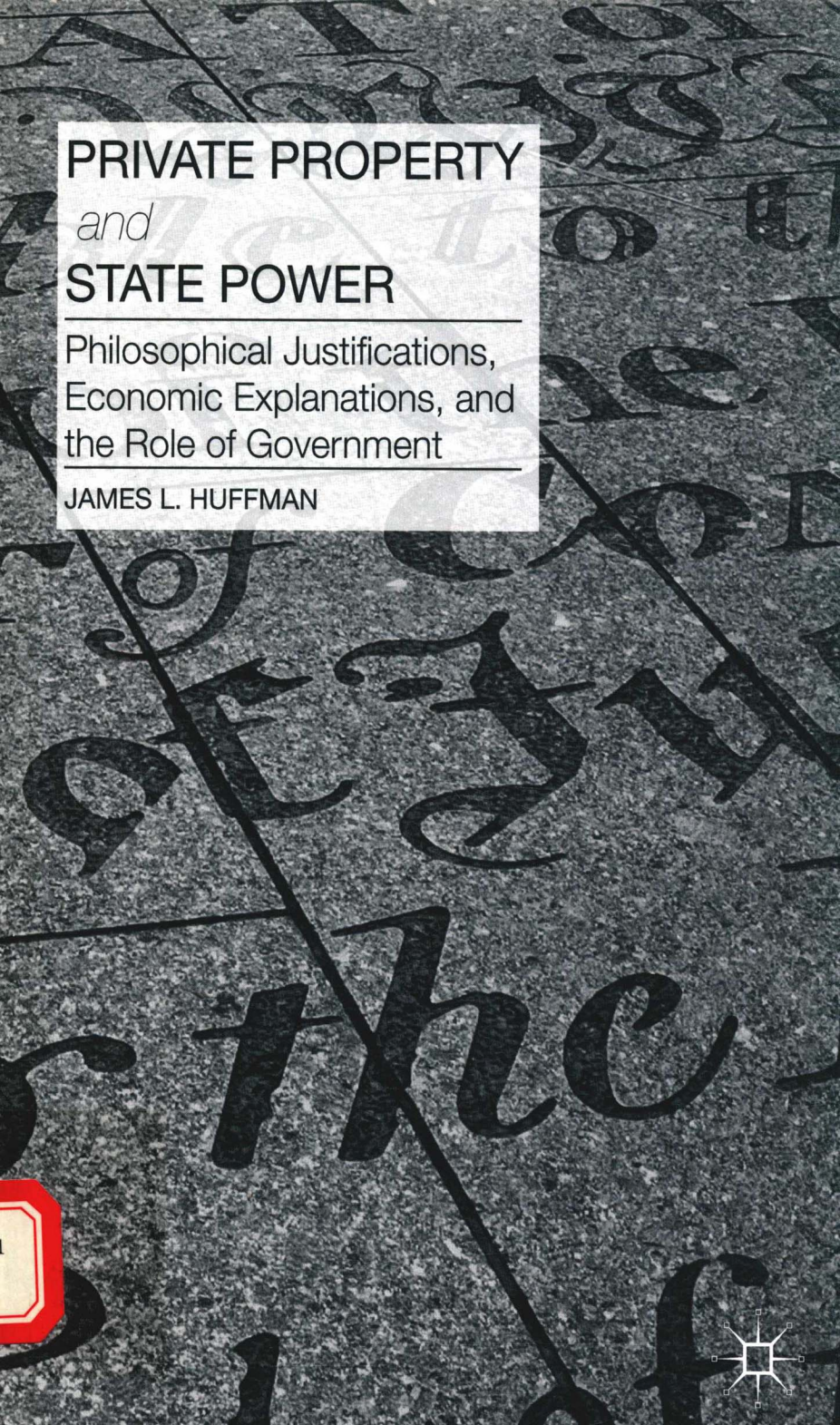
PRIVATE PROPERTY *and* STATE POWER

Philosophical Justifications, Economic Explanations, and the Role of Government

JAMES L. HUFFMAN



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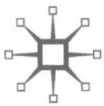

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Private Property and State Power

Preface

At least a few of my academic colleagues will be puzzled, if not chagrined, that I have written a book about property. As they might point out, in four decades of teaching law students I have never taught a basic course in property law. As a result, particularly given that it has been five decades since I took a course in property law, I am rusty at best on the arcane intricacies of the law of property.

But this is not a book about property law. This is a book about the ubiquitous social institution of property, and about government's role as definer, enforcer, and regulator of legal rights in property. It is written for non-experts, much as I imagine I might begin a course in property law. Law students are, after all, non-experts at the beginning.

It is important that non-experts understand the law. If they do not, the law will never achieve its purpose of defining and regulating relations among people. At the same time, it is essential that experts in the law—lawyers, judges, and law professors—understand how the law and legal institutions are perceived by non-experts, the people Bruce Ackerman once labeled "ordinary observers." "Ordinary observers" are the people who own property, enter into contracts, apply for permits, execute wills, and generally rely on the law to regularize their relations with others and with government. Sometimes they consult experts, but more often they rely on their ordinary understanding of the law.

In this book I endeavor to speak to both experts and "ordinary observers." The reader will find human stories, both true and hypothetical, that describe what property is and how, simultaneously, it is made possible and threatened by government. The reader will also encounter philosophy, economics, history, and lawyer-like accounts of private property

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and government powers—complete with scholarly citations in endnotes. All told, this book is something of a hybrid, conceived in the belief that experts and non-experts can come to a mutually advantageous understanding of one of our nation's most fundamental social institutions.

But I have much bigger ambitions than just facilitating communication and understanding between property lawyers and their prospective clients. Experts and non-experts alike are all citizens and some are government officials. As citizens, and as government officials, their interests often diverge from their interests as property owners or property lawyers. As property owners people generally expect government protection of their property, while as citizens they often seek government actions that will burden the property of others. Government officials, usually property owners themselves, have significant power to limit and even redistribute the property of their fellow citizens. Sometimes that power is exercised in the interest of fairness and the public good, but often it is exercised for private and special interest advantage.

Given government's responsibility to promote the public welfare and its dual role as protector and regulator of private property, citizens and government officials alike will benefit from an understanding of the essential role of property in the efficient use of scarce resources, not to mention its importance to the security and liberty of the individual. People of all political persuasions surely must favor efficient over wasteful use of scarce resources, and even the most ardent redistributionist will want to understand how best to maximize aggregate wealth, lest there be little to redistribute.

In a very real sense, this book and its companion volume, *Property Rights and the Constitution,* are the products of 40 years of teaching. I have learned much from the thousands of students I have encountered over those years and from colleagues at Lewis & Clark and many other institutions. Not least of all I have learned that people have strong biases and preconceptions. A challenge for any teacher is to break through those obstacles to learning. I am grateful to those excellent teachers in my past who exposed my biases and taught me that keeping an open mind is a lifelong challenge.

There is no denying that this book reflects a point of view. There is no avoiding that. But it is a point of view distilled over many years and, I hope, one open to refinement or change in response to evidence and persuasive argument. What appears in these pages is the present state of my thinking and understanding. Readers will judge for themselves whether I am on the right track. For now, I believe I am.

My first exposure to one of the core theoretical frameworks reflected in this book came when I had the good fortune to study law and economics with Ronald Coase. I was then convinced that he had it all wrong. Several years of attempting to explain to myself Coase's errors led me to conclude, albeit always tentatively, that he was right all along.

Other teachers, colleagues, and students, too many to mention, have influenced my thinking over the years. In addition to my long association with Lewis & Clark Law School, I have also benefitted from associations with many organizations, most importantly the Hoover Institution. I am grateful for the support of the Hoover Institution's John and Jean De Nault Task Force on Property Rights, Freedom and Prosperity, and particularly to the Task Force's co-chairs Terry Anderson and Gary Leibcap. I am also in the debt of Lynn Williams and Tami Gierloff of Lewis & Clark's Boley Law Library for always prompt and reliable research assistance, Joseph Westover for excellent editorial and citation assistance, and my daughter Claire for sharing her teenage computer expertise. Of course I am also indebted to Claire's siblings Kurt, Erica, Spencer, and Meg, each of whom is computer savvy far in excess of their father and all of whom have been an inspiration in all that I do. And to my wife Leslie Spencer, who has been always supportive and who taught me by example that often one can say more by saying less.

Contents

Chapter 1

Introduction

Every person on the planet possesses private property, even if it is nothing more than the shirt on one's back and the food one consumes, and even if the political regime a person is subject to has declared that there is no such thing as private property. Things that can be used or enjoyed by only one or a few people at a given point in time belong, as a practical matter, to those using or enjoying them at that moment.

It might be objected, particularly by lawyers and others experienced in the formalities of the law, that the foregoing assertion is nonsense. The shirt and food could well belong to others, or to no one. The wearer of the shirt and the consumer of the food could have borrowed or stolen them from their rightful owners, or they could have found them abandoned by the roadside. True enough. These are the sorts of questions we have lawyers and judges to sort out, and over the centuries we have developed a labyrinth of property laws to determine whether those who use and enjoy things are the rightful owners.

These are important questions, but they are not the concern of this book or of its companion volume, *Private Property and the Constitution: State Powers, Public Rights, and Economic Liberties.* Who owns what is the subject of many a property law treatise. The assertion in the opening paragraph, a claim I elaborate on at some length in Chapter 3, is only that private property is inevitable. Simple physics dictates that most things

can be used, occupied, enjoyed, or consumed by a finite number of people (often a single person) at any given moment in time. That means there must be social understandings about which person or people will "own" a particular thing at a particular time. This understanding could range from the intricate complexities of modern property law, to custom, to reluctant yielding to brute physical force.

Saying that everything belongs to everybody, or that the state or the community owns some or all things, will not change the simple physics. There must be some system of rules or customary practices for determining who those people will be—whether the de facto owners are the rightful owners.

Of course there are things, like air and water, which can be used or enjoyed simultaneously by literally millions of people, but, as we have learned the hard way, too many people emitting pollutants into the air or boating on the public waters can negatively affect the health or enjoyment of others. So we regulate air pollution and grant permits to commercial and recreational boaters, which is really an official recognition that polluters may pollute within the regulatory limits and that some people, but not others, can boat on the "public" waters.

Although the physics of occupation, use, and enjoyment makes some system of private property necessary even in the case of resources in infinite supply, few if any resources valued by humans are actually limitless. As in the examples of air and water, seemingly abundant resources can be scarce in particular locations, especially densely populated locations. Thus, scarcity amplifies the need for a system of rules establishing which individuals have the right to use particular resources at particular times.

Whether the system of rules is called private property, common property, public property, or whatever label we choose to attach, there is no avoiding that the ultimate question to be answered, pursuant to whatever the controlling rules may be, is who gets to use what resources at a particular point in time. In other words, any system of rules for the use, occupation, and enjoyment of things will define the legal relationships among people with respect to things (including intangible things like stocks, bonds, patents, copyrights, and goodwill).

In the deep recesses of human history, there are no doubt examples of small and isolated communities in which this necessary system of property rules was purely customary. But it is difficult to imagine any community in which there were not occasional disagreements about the rules or their application to particular situations. In those circumstances, there needed to be a person or persons whose interpretation of the property rules was authoritative and determinative of the outcome of the dispute. We could call these interpreters and enforcers of the rules whatever we like, but almost everywhere in the modern world we recognize them as instrumentalities of the state and its many subsidiaries.

Thus, private property and what Robert Nozick called the "minimal state"[1] are an inevitable part of any system for the allocation of scarce resources. A few hardcore libertarians might object that we could do without the state by relying on private covenants to establish rules of resource use and systems for dispute resolution, but the reality in the United States and elsewhere is that the state exists as the ultimate authority on property rights and their enforcement.

In every society the laws and customs of private property are influenced by culture and history. But they are also of our own design. Contrary to the nineteenth-century beliefs of thinkers like Karl Marx in politics, Auguste Comte in sociology, and Herbert Spencer in economics, human history is not linear. As legal scholar Grant Gilmore observed several decades ago,[2] legal systems and other social institutions reflect human choice, not destiny or something resembling Darwinian, biological evolution. While the natural rights tradition in American constitutional law invites the claim that private property is a gift from God, the reality is that the rules and institutions we rely upon in allocating property rights are significantly of our own choosing.

If we are to choose well, meaning if we are to choose laws and institutions that promote our societal ambitions, we must understand what the alternatives are and how they work. We must understand how different property systems affect relationships among people with respect to scarce resources. How do people respond to the incentives presented by different

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rules for use, occupation, or consumption of those resources? What are the consequences of alternative roles for the state in the administration of property rules and in the direct control of resource use? The rules and institutions we embrace will significantly affect human welfare and freedom, as well as the environment and resources base on which future generations will depend.

This book and its companion volume examine the integral relationship between private property and the state. In recounting property rights disputes in Hawaii, Connecticut, and Oregon, Chapter 2 demonstrates the tension between the state's role as definer and enforcer of property rights and the threats state power poses for property rights. Chapter 3 provides a layman's explanation of property and the various forms of property that exist in the United States and other common law countries. Chapter 4 summarizes a wide range of philosophical justifications for (and critiques of) private property and Chapter 5 examines economic theories that seek to explain the real-world consequences of reliance on a system of private property. Chapter 6 discusses the role of the state, with an emphasis on the tension inherent in being definer and enforcer of property rights on the one hand and regulator of property rights on the other.

The second volume, *Private Property and the Constitution: State Powers, Public Rights, and Economic Liberties*, examines the constitutional protections designed to limit the negative effects of state regulations of private property and thus minimize the tension between the state's two essential functions.

Chapter 2

Property and Government: An Unavoidable Tension

Private property is both dependent on and threatened by government. Government establishes and enforces the rules of property ownership and use, defines the scope and content of property rights, and through its courts resolves disputes over those rights. At the same time, government regulations place limits on private property and sometimes have the effect of destroying much of its value. It is an unavoidable tension.

There are those who contend that property systems can exist entirely by private agreement—that government is unnecessary, even an obstacle, to an effective private property regime. But private agreements are contracts and contract depends on government. Government establishes and enforces the rules of contract. Of course, those who argue that government is unnecessary to property generally take the same view of contract.

To be sure, there is much in life, even modern, globalized life, that depends only on trust and a handshake. But human nature assures that more is usually needed. A few folks can't be trusted. Even those who can be trusted will sometimes disagree about what they agreed to. Trustworthy, well-intentioned people cannot anticipate every eventuality. They cannot provide by contract for every contingency and for every possible conflict that may later arise regarding the boundary between one property right and another. It is true

they can contract a third party to resolve such future disagreements, but centuries of experience demonstrate, even in small communities, that the third party will quickly become some form of what we think of as government. Certainly, private contract and property regimes have existed, and it is interesting to speculate about how they might work on a more expansive scale, but the reality in the United States is that our system of private property is heavily dependent on government.

At the same time, the greatest threat to property is government. All of the nation's thieves and mafia dons combined pose less of a threat to private property than your average county government. This is not because county governments are filled with talented crooks more ruthless than the mafia. To the contrary, most government officials are sincere and devoted public servants intent on providing for the health, safety, and welfare of the public. But they have enormous powers at their fingertips. In addition to defining and enforcing property rights, they can tax, regulate, and take property by eminent domain. Separately or together, these powers are sufficient to destroy private property rights unless constrained in some way. In the American system of government the constraints are only two: the will of the majority and the constitutions of the state and federal governments.

Thus there is an unavoidable tension between property and government. Property depends on government, yet much of what government does can have serious impacts on the value, security, and privacy of property. Three stories will illustrate the tension.

THREE TALES IN WHICH PRIVATE PROPERTY AND GOVERNMENT COLLIDE

A Problem in Paradise

In the 1960s, the Hawaii Legislature decided that all was not perfect in the newest American state. Although many Hawaiians owned their homes, few of them owned the underlying land. Half of the land in the state was owned by the

Federal and State governments. Most of the remainder was owned by 72 landowners. On the island of Oahu, where most of Hawaii's population resides, 22 landowners held nearly three quarters of the private lands. This concentration of private lands in very few owners was the product of a feudal-like system dating back to the settlement of the Hawaiian Islands by seafaring Polynesians from the western Pacific Ocean. For each island there was a royal high chief, the *ali i nui*, who controlled all the land and assigned subchiefs to arrange for the use of those lands. Individuals occupied and farmed the land with the approval and at the discretion of the subchiefs. There was no private property in land, at least not for ordinary people.

By whatever theory royalty originally controlled Hawaii's lands, there was no doubt that their 72 successors held clear title to the land when Hawaii became a state in 1959. The new Hawaiian legislators took the view that this concentration of land ownership adversely affected the economy of the State and the health, welfare, security, and happiness of the people of the State. Worse yet, said the legislators, "[i]f the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people."[1]

In the face of these perceived threats to the state and its people, the Hawaii Legislature enacted The Land Reform Act of 1967.[2] Under the Act, tenants living in single family homes in housing tracts of at least five acres could petition the Hawaii Housing Authority to condemn the land on which their houses sit. After a hearing to determine that condemnation of the leased land would serve the public purposes of the Land Reform Act, the Housing Authority could acquire all or some of the lots at prices determined in a condemnation trial or agreed to between the lessees and lessors. The lots would then be sold to interested tenants, leased back to tenants not wishing to purchase, or sold to other individuals. No individual could purchase more than one lot and the

Housing Authority was not permitted to make a profit on the sale. As a practical matter, the money used to compensate the large landowners came from the tenants who chose to purchase their lots. The state collected the payments from the purchasers and passed it on to those whose lands had been condemned.

This was not land reform in the style of uncompensated expropriations that have occurred in many countries of the world. The large landowners of Hawaii were paid for their lands. Nevertheless, they were forced to sell and thus unhappy with the Land Reform Act and the powers it gave the state to condemn their land. One of the largest landowners in the state was the Bishop Estate that controlled all of the lands that had once belonged to Princess Bernice Pauahi Bishop, the great-granddaughter and last lineal descendant of Kamehameha the Great, the first monarch of Hawaii.

Princess Bernice's will established a perpetual charitable trust for the establishment and support of the Kamehameha Schools for the education of children of native Hawaiian ancestry. The trustees of the Bishop Estate filed suit in federal district court. Their case, *Hawaii Housing Authority v. Midkiff*,[3] challenged the state's authority to condemn the property of one private owner and transfer it to another. The estate claimed, among other things, that the Hawaii Land Reform Act violated the US Constitution's 14th Amendment due process clause that had nearly a century earlier been held to require state compliance with the 5th Amendment's clause prohibiting the taking of private property except for a public use and only with just compensation.[4] The District Court ruled against Princess Bernice's estate, who appealed to the 9th Circuit Court of Appeals.[5] The appellate court reversed the lower court, calling the Hawaii law "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."[6] This, the court said, was precisely what the public use clause was meant to prevent.

The US Supreme Court then granted Hawaii's petition for review. In addition to the filings of the two parties to the case, five friend of the court (*amicus*) briefs were filed.

Not surprisingly, 28 states joined on a single brief in support of the position of the State of Hawaii. Three briefs were filed in support of the Bishop Estate trustees, only one of which addressed the property rights of the landowners. Of the other two, one was filed by organizations providing assistance to Native Hawaiians who claimed that the Bishop Estate trust existed to serve the interests of all Native Hawaiians and was thus already in a public use,[7] and the other by what was described as a fourth branch of Hawaii's state government, the Office of Hawaiian Affairs, which claimed that the maintenance of the trust's interest in its land was an important substitute for the traditional relationship between Native Hawaiians and the land.[8] A fifth *amicus* brief was submitted by a Native Hawaiian group, taking no position on the outcome of the case, but seeking to educate the court on the circumstances of Native Hawaiians as "a landless people in the country of their forefathers."[9]

Writing for a unanimous court,[10] Justice O'Connor concluded that the "people of Hawaii had attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs."[11] The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries, said O'Connor, "does not condemn that taking as having only a private purpose."[12] As the term is used in the 5th Amendment, then, public use does not mean that government must assume ownership of the property it takes or that the public must have access. It means only that the government must have a *public purpose* for exercising its power of eminent domain.

Making Way for Development in New London

In 1998, Pfizer, Inc., announced plans to build a global research facility on a site adjacent to the Fort Trumbull neighborhood of New London, Connecticut. This was very good news for the once thriving New London, long in economic decline since the shuttering of textile factories and the closure of a US naval base. The city had a higher unemployment rate

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