

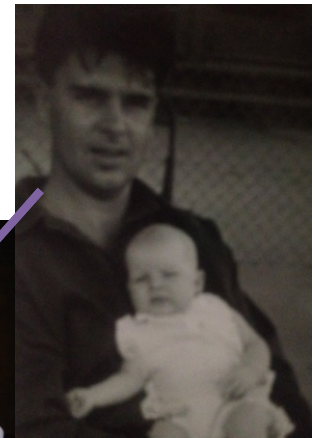
The Genealogy of Eminent Domain

Nick Dancaescu GrayRobinson P.A.



What's With the Genealogy?

- Study of our relationship to ancestors and relatives help understand who we are and why we are. Same here today.
- We'll look at:
 - Eminent Domain's Ancestry (How we got here)
 - Eminent Domain's Cousins and Siblings (a trip around the world)
 - Just like families, concept has many ancestors

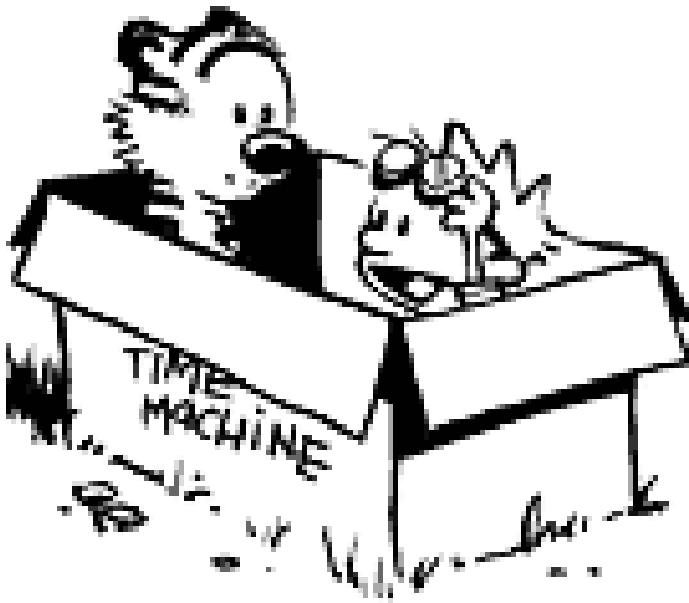


“WHERE DID I COME FROM?”



The facts of life without any nonsense and with illustrations.

Time Machine alllll the waaaaayyy
back



(maybe not this far . . .)

Evolution of Law in Society

- **Pre Legal Society** - no established non-violent method of dispute resolution. Works in small groups, but when density reaches a certain point there are too many people who don't know each other and a more formal system is needed.
- **Proto Legal Society** has rules as well as some limited procedures for handling disputes. Few distinctions between rules (social standards), and laws (linking specific acts to specific consequences). Transition phase where large portions of dispute resolution still comes down to 'might makes right.'
- **Legal Society** –Society has codified rules and systems in place for punishment of violation of these rules. A major part and reason for these rules is protection of property rights.

Pre- Legal Society



- “Might Makes Right”
- No rules
- No one to complain to or to enforce rights
- No property rights to enforce



Before the Law

Law of “Donk”



Crocodile Dundee

Transitions into proto-legal Society

- Kowloon Walled City, Hong Kong
 - Formerly most densely populated place on Earth
 - Police would not enter
 - Informal rules and understandings developed organically
 - Demolished in mid '90s



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Move into early “Society”

- **Sea Change was birth of Agriculture.**
- **Agriculture means staying put.**
 - Intensive labor – want confirmation your work will be rewarded
- **Necessitated rules:**
 - How to get ownership of something
 - How to prove ownership of something
 - How to transfer ownership of something
 - How to protect Ownership of something.
- **Birth of property law**
- **Also necessitated rules to keep us safe from each other**

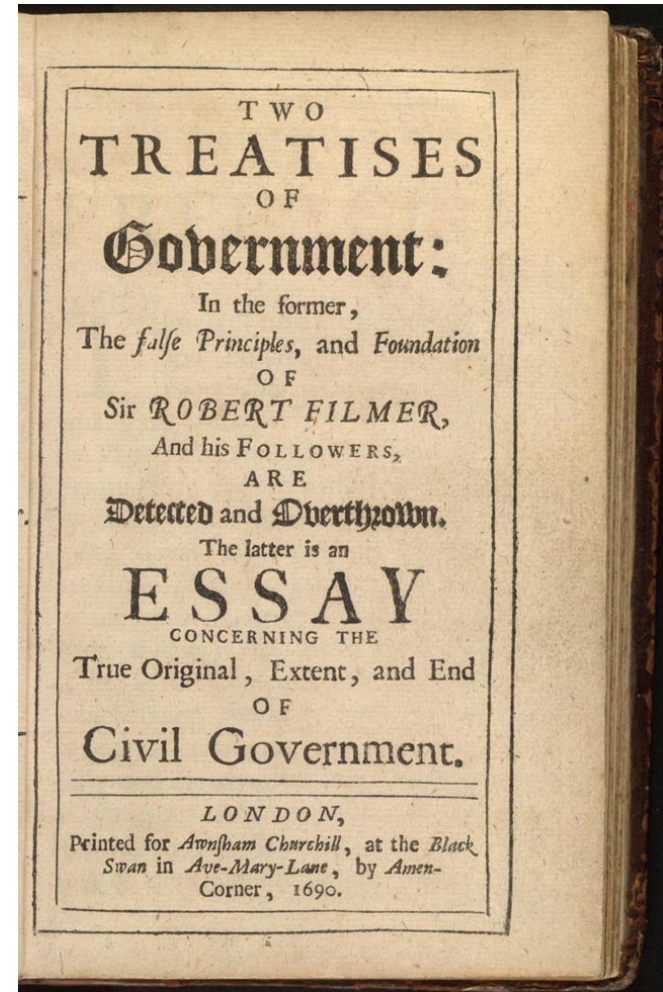


Why do we have Civil Society?

- Pooling of resources.
- ‘Civil society exists solely because men band together and surrender their rights of punishing those who injure his property to the state.’
- Of the rights man retains, civil society exists to protect those rights (particularly property rights).

Society Exists Solely to Protect Our Property

- The evolution of society is the evolution of property law
- If I don't "own" something, there is no need to punish someone for taking it from me
- The first property laws were designed to create systems of ownership and repercussions for violating others' ownership



John Locke *Treatises on Government*

The Birth of Law



Ten Commandments and Property Rights

- Initially 'rules' which had only divine enforcement
- Gradually became foundation of laws – enforced by man
- Stealing, murdering, bearing false witness
 - All 'taking' crimes
 - Taking property (stealing)
 - Taking life (murder)
 - Taking right to justice (bearing false witness)

Laws Emerged to Solve Recurring Problems

- My neighbor was killed. How do I know I won't be killed?
- My neighbor's bread/goat/wagon/gold was stolen. How do I know mine won't be stolen?
- Someone moved into my neighbor's house. How can he prove it is his?

Early Problem Solving - Sumeria

- Urukagina, the king of the Sumerian city-state Lagash, established the first laws that forbade compelling the sale of property in the 24th Century B.C.E. (approx. 4,500 years ago).
- ‘If the poor does not wish to sell, the powerful man (the rich man or the priest) cannot force him to do so.’
- Possibly the oldest recorded Property laws protecting owners from compelled sale.



Fragment of an Urukagina inscription.

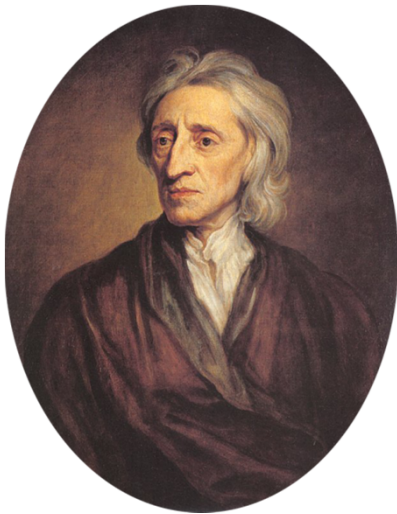
Growth of Property Rights - Egypt

- In Egypt, it was understood that all land was owned by the Pharaoh.
- Nevertheless, procedures evolved so property could still be bought and sold between private parties in private legal transactions.
- Agriculture needs security



WHAT IS PROPERTY?

LAND + TOIL



John Locke



But to keep that property sacred requires civil society to recognize that right and protect it.

Thomas Hobbes: “How can anybody call anything his own?” “My own can only truly be mine if there is one unambiguously strongest power in the realm, and that power treats it as mine, protecting its status as such.”

Greece

- As usual, everything begins in Greece



Greece



- Typical family in ancient Greece lived on a small farm. Cultivation of land demands security from seizure by others.
- Movable property could be owned by anyone, Immovable (real) property could be owned only by citizens.
- Proof of ownership accomplished through ‘recording’, had *misthosis* (leases) and *encechyron* (mortgage/pawning).

Evolution of Law in Society

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Roman Republic

- Major growth in the law, and especially property law.
- Conquered lands divided and given to veterans. These pensions (*praemia*) were the first land grants and brought huge tracts of land quickly into the Roman system of property ownership.
- Where disputes to property arose, the *Corpus Iuris Civilis* created '*in rem*' proceedings.
- To the Romans, '*In Rem*' meant an action to enforce an absolute right- defensible against everyone else (like property right.) Contrast with relative rights (like those created in a contract.)

Roman Property Law

- Property disputes were actions *in rem*.
- Only *Res corporalis* were subject to an action *in rem*.
- Other ‘things’ under Roman property law (outside a *res*)
 - *Res nullis* – that which is not yet the subject of rights
 - *Res divini iuris* – things unknowable/property belonging to the gods
 - *Res communes* – that which belongs to all people, like the air and the oceans
 - *Res publicae* – that owned by the public and could be used by people of the state.
 - So how were those famous roads obtained and maintained?

Res Publicae and the Twelve Tables

- Civic duty as set forth in the 12 tables
- TABLE VII: (7) 'Holders of property along a road shall maintain the road to keep it passable; but if it be passable, anyone may drive his beast or cart across the land wherever he chooses.'



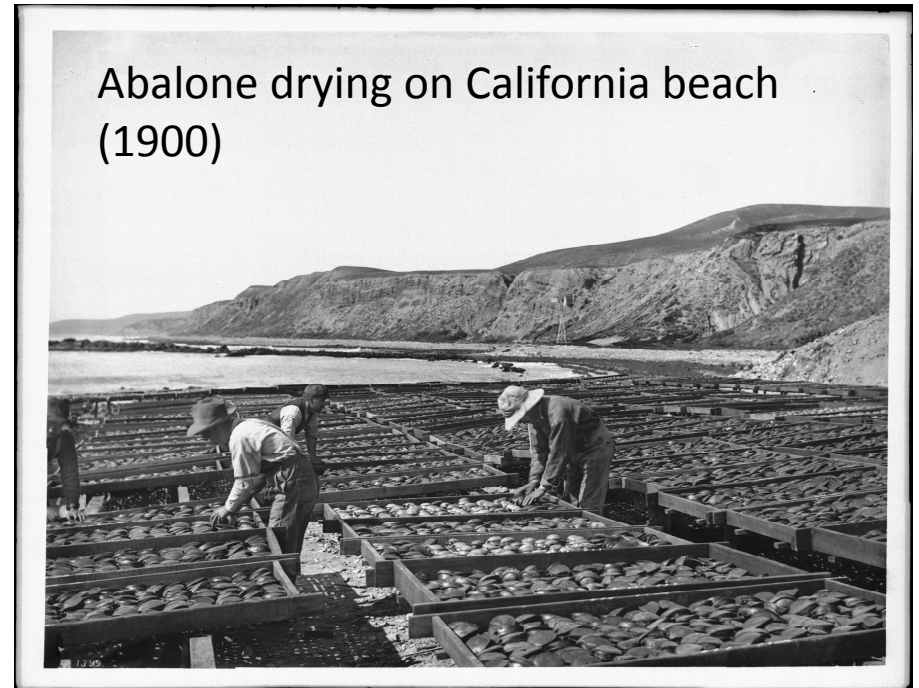
Roman Road and Roman Road network in Romania and Balkans

The Problem of 'Unowned' Property (*Res Publicae/Res Nullis*)

Where no laws govern the *res publicae* (or *res nullis*), only social norms can be govern use. Roman times, you were expected to treat *res publicae* a certain way.



Bison skulls
(Midwest U.S. 1870s)



Abalone drying on California beach
(1900)

If those social norms break down, individuals acting in their self-interest behave contrary to the societal interest by depleting the resource.

So Who's Guarding the Commons?

- Aristotle: "[T]hat which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual."
- 1968 Garrett Hardin Article describing this social dilemma as the "Tragedy of the Commons"
- One reason for the gradual move away from 'unowned' lands towards state-owned lands.
- State can enforce abuse of the commons.



Converting *Res Nullis* to *Res Corporalis*

- How does 'stuff' enter the property system?
- First step in creating property rights is 'capture.'
 - Romans converted conquered lands to pensioned land grants that could then be sold/willed.
 - Catching fish/hunting.
 - Picking up shells on the beach.

Capture and Foxes

- *Pierson v. Post*
- Famous 1805 New York opinion.
 - Hunter (Post) expended lots of energy chasing the fox.
 - Pierson, allegedly knowing the fox was being chased, killed it and took it away.
 - Court held that ‘reducing that in *ferae naturae* to capture’ created the rights.
 - Pursuit and expending energy is not enough.



Winslow Homer – the Fox Hunt

RES NULLIS and LAW OF CAPTURE BECOMES LAW OF CONQUEST

- **Tee-Hit-Ton Indians v. U.S.**
348 U.S. 272 (1955)
- Tlingit tribe sought compensation for timber removed from tribal lands in Tongass National Forest, Alaska.
- Competing roots of title:
 - Original Indian title as recognized by the Court of Claims
 - Title obtained by Russia and sold to the U.S. under 'Seward's Folly'
 - 'Conquest Title'



Tongass National forest

"This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained."

Congress has never 'given' Indians title to the land they occupy – no compensation owed.

Head Scratchers from *Tee-Hit-Ton*

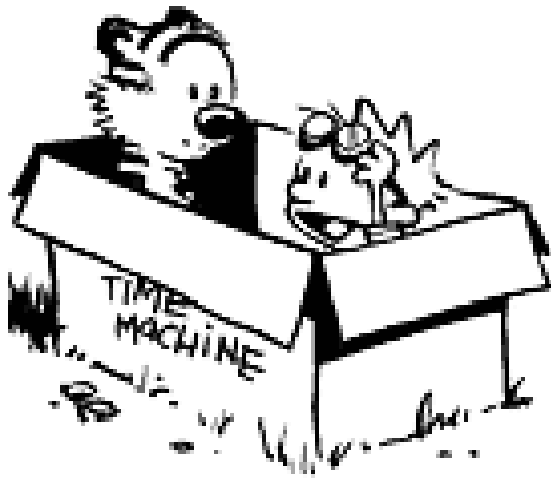
- Court uses Russian arrival as the 'conquest' which acts as the root of Western title.
- Russia entered into treaties with Tlingit recognizing Tlingit title to areas and letting them keep their lands.
- Seems pretty basic that Russia could not sell the U.S. what Russia did not own.
- In fact, the treaty/sale to the U.S. exempted certain lands in Alaska from the sale, including some Indian lands and land owned by Orthodox Church

NOW WHERE?

How we got to “nor shall private property be taken for public use, without just compensation.”

- STEP 1 (already covered) Create ‘private property.’
 - Early property law focused on securing, proving and defending property rights against other citizens.
- STEP 2: Create concept of state owned property (as opposed to *res communes* and *res publicae*)
- STEP 3: Make ‘taking’ an unacceptable action without conditions.
 - Up through the rise of landed gentry in England, history seems to presume the sovereign could always take land without reason or compensation.
- STEP 4: Mandate ‘public use’ as a condition.
- STEP 5: Mandate ‘just compensation’ as a condition.

So what about rights against the
Sovereign?



FAST FORWARD TO
THE NORMAN
CONQUEST



F.W. Maitland Letter (October 1905)

“I have often wondered where the Americans found their eminent domain – or rather how they came to borrow just this from the continental sources. Has it ever struck you that what protected us [England] against this was the completeness of our feudalism? Unquestionably we all hold of the King, but the lord has no right to “expropriate” the tenant. Just because there is supreme landlordship there is no eminent domain in the foreign sense.”

- Maitland was absolutely wrong.

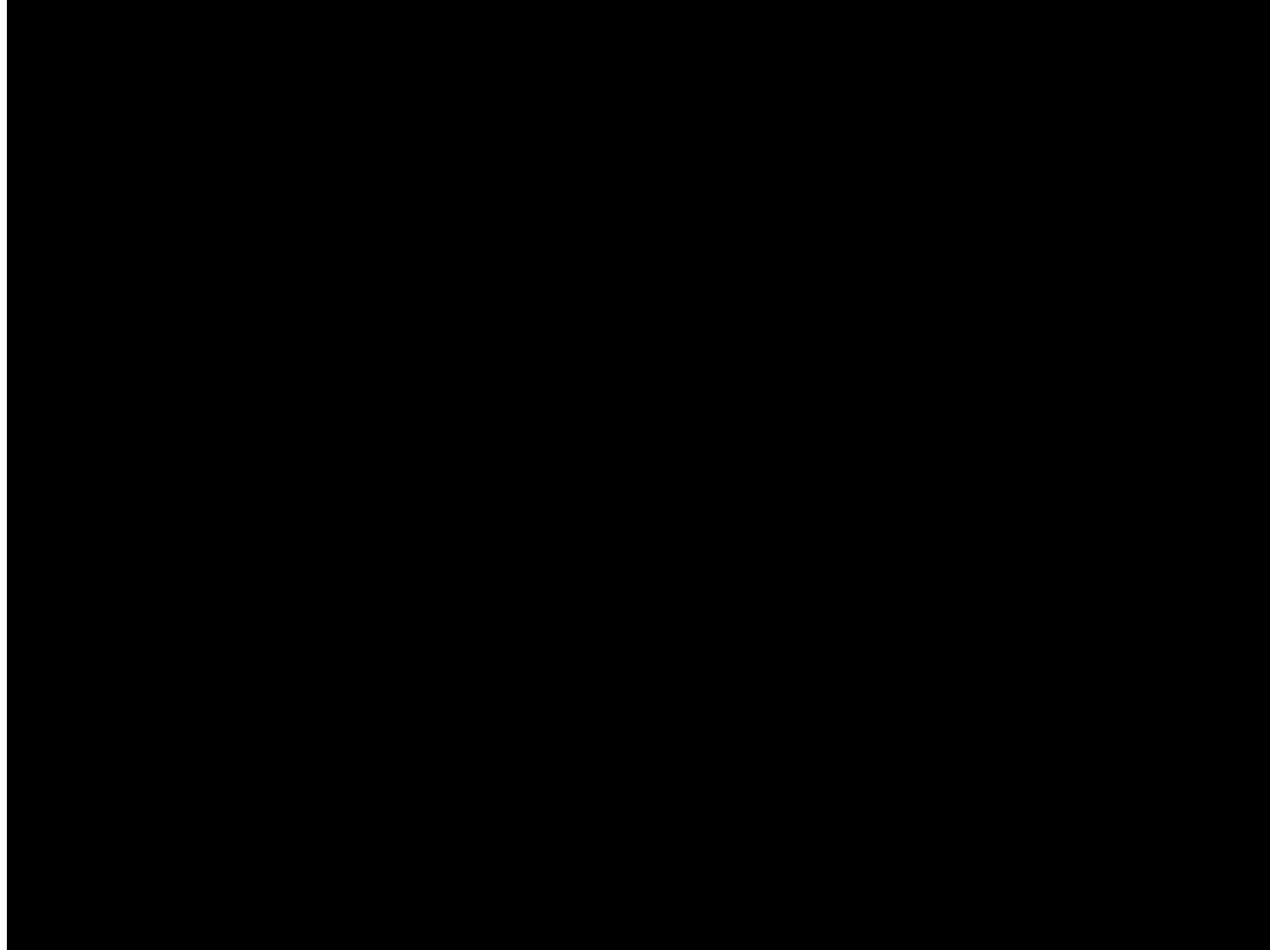
WILLIAM THE CONQUEROR

- Using the law of conquest, converted basically all lands in England to Crown owned in 1066.
- Granted lands to war chiefs, church and others, but retained “eminent” title.
- King had supreme right to all land in England.
- Did what they wanted’ took what they wanted.



William the Conqueror doing his thing.

Kings Tried to take What they Wanted
– Conflict with the Barons and Knights



Post Battle of Hastings England

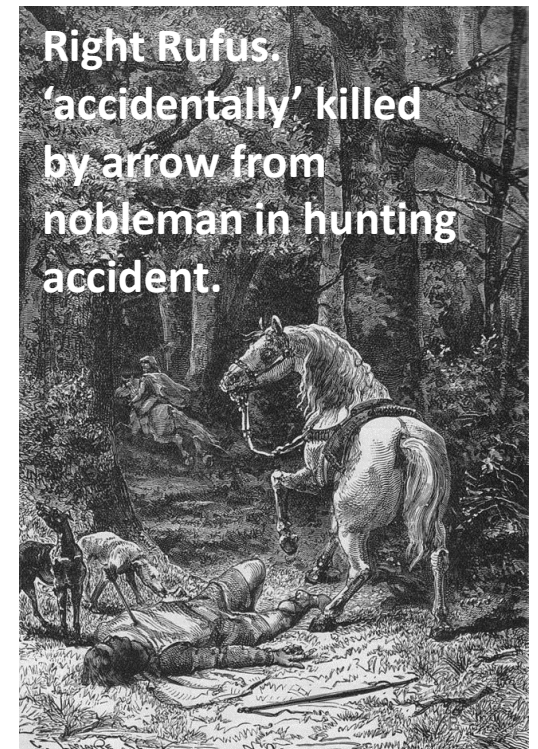
After William the Conqueror died, wave after wave of Norman baron revolts kept the Crown busy.

- William Rufus (1088, 1091 & 1095)
- Henry I (1101) . . .
- Stephen (1136, 1138, 1139 -1154)
- Henry II (First Baron War 1173-1174)
- Richard the Lionheart (whole reign – he was out on crusade)
- 1209-1212, 1215
- And on and on.
- Every revolt ended in seizure of Baron lands and cost the crown money and concessions to the barons who rallied to his side.
- Henry I signed the Charter of Liberties in 1100 as part of his coronation charter to establish “a government in accordance with the principals of justice and the established laws of England.”
- Did not intend to, and did not, live up to promises

Wrong Rufus



Right Rufus.
'accidentally' killed
by arrow from
nobleman in hunting
accident.



SAME OLD STORY

- For 200 years, constant struggle between Barons and King
- Kings took what they wanted –sometimes as part of questionable ‘quests.’
- Barons saw land taken from other barons - concerned about being on wrong side of the Crown
- Constantly being taxed – money, armies and sometimes land.
- What protects us?



Magna Carta

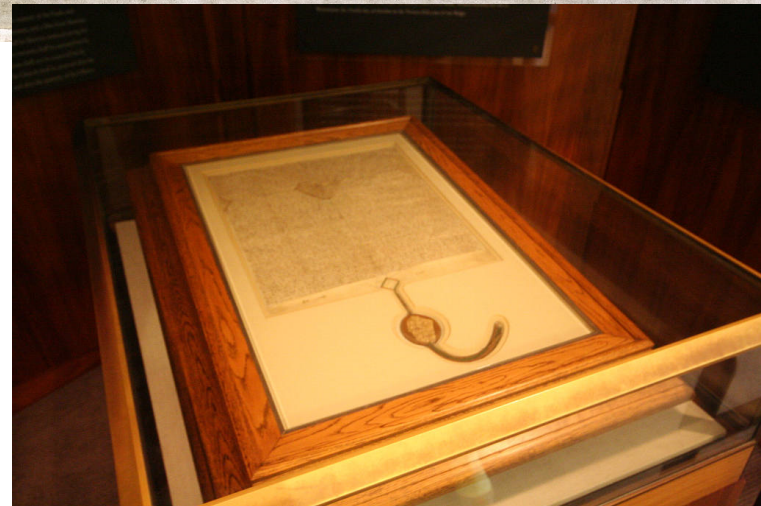
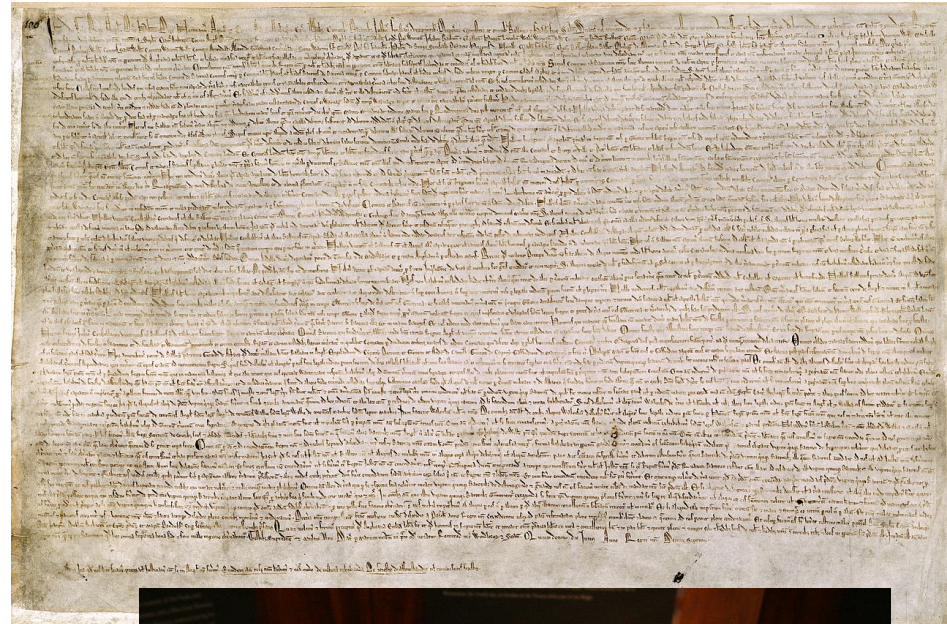
- 13th century
- Barons have had enough
- January 1215, barons make an oath that they would "stand fast for the liberty of the church and the realm", and they demanded that King John confirm the Charter of Liberties (which Henry I had signed but ignored).
- John's back against the wall.



King John signing the Magna Carta

MAGNA CARTA

- In reality, a treaty between land barons and the king.
- Opposed 200 years of greedy Kings.
- Chapter 29:
- “No Freeman shall be taken, or imprisoned, or be disseized of his freehold . . . But by lawful judgment of his Peers or the Law of the Land.”



MAGNA CARTA

- Compensation not a condition precedent
- Jury of peers decides whether land can be seized (or 'law of the land')
- As late as 1427, English statutes did not require payment, just necessity.
- If parliament wanted compensation, the statute would specify (no overarching constitutional entitlement).

What's In a Name?

- "eminent domain" was taken from the legal treatise *De Jure Belli et Pacis*, written by the Dutch jurist Hugo Grotius in 1625,[2] which used the term dominium eminens (Latin for supreme lordship) and described the power as follows:
- "...The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property."

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STEP 2: Create concept of state owned property (as opposed to *res communes* and *res publicae*)



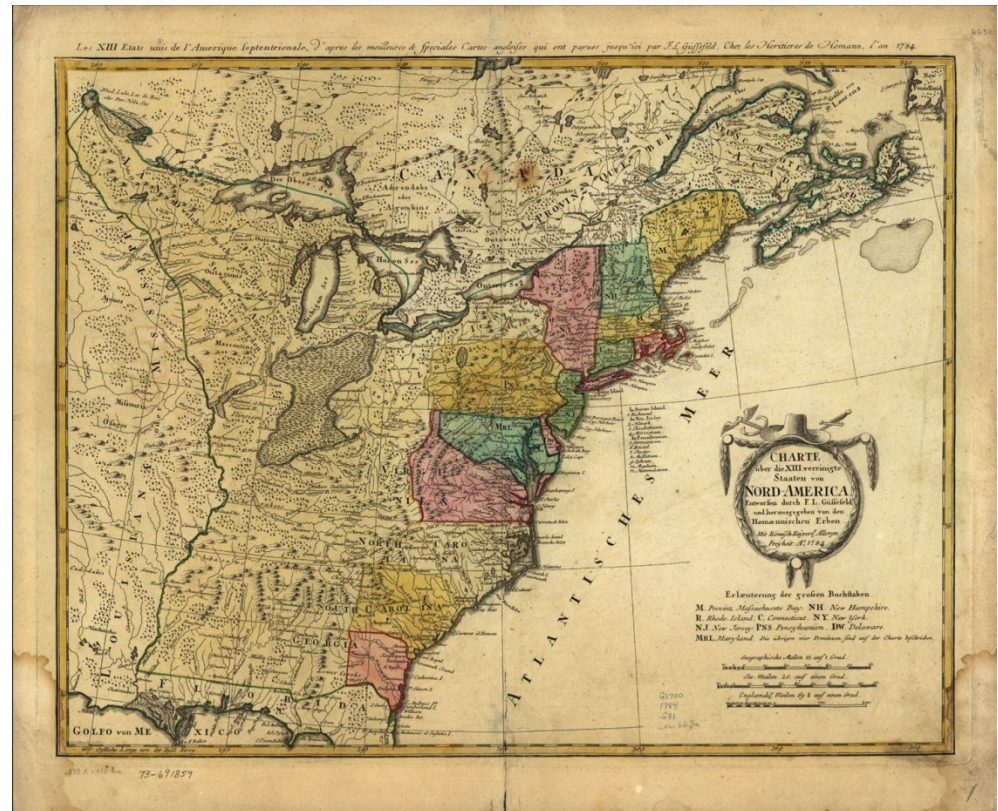
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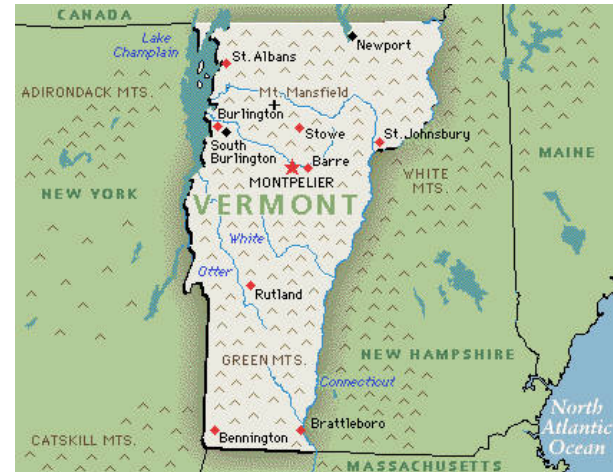
OVER THE POND

- Early American law used condemnation to make private roads public, drainage and mills.
- Customary to pay compensation, but no requirement (often not paid for unimproved land, due to vast amount of *Res Nullis* land available.)
- Nearly all colonies allowed for taking of raw land without compensation for roads.
- Land could only be taken where a jury or legislature determined appropriate, and that body could determine if compensation was appropriate.



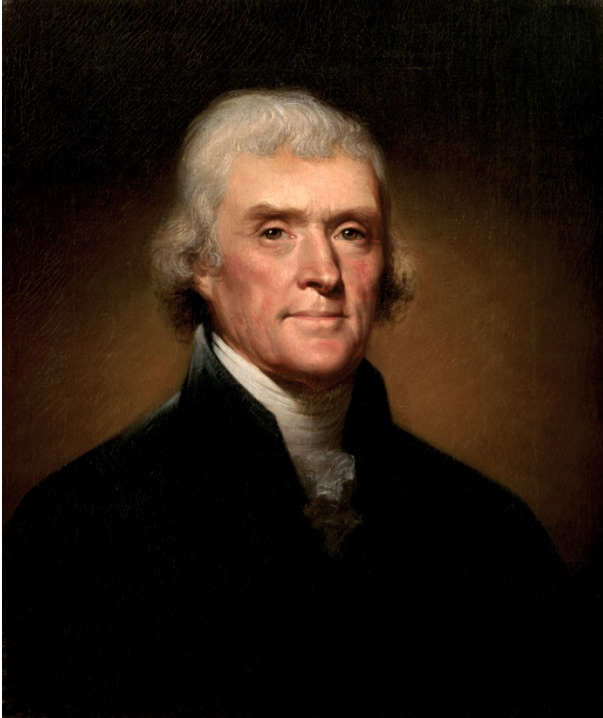
No Eminent Domain Protections.

- Declaration of Independence
- Articles of Confederation
- Colonial Charters
- State Constitutions
- Federal Constitution
- Requirement of compensation first shows up in Vermont and Massachusetts Constitutions of 1777 and 1780.
- Also drafted into Northwest Ordinance (1787)

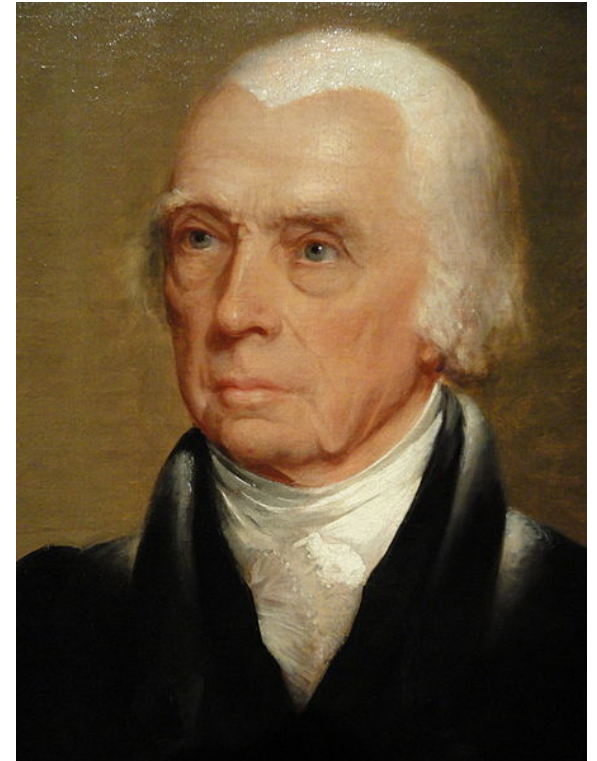


Vermont – Thanks for the Maple Syrup, scenic fall pictures and constitutional protections of private property.

Jefferson v. Madison



- Jefferson argued for absolute ownership of land – get rid of tennets of feudalism.
- Madison – Property Rights are holy, but compromise must be made.
- Madison drafted right to compensation into the 5th Amendment in 1789.



"A Government is instituted to protect property of every sort.... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."

MEANWHILE, BACK IN EUROPE . . .

- French Revolution overthrows monarchy.
- Article 17 of the Declaration of the Rights of Man and of the Citizen (1791):



No one "may be deprived of property rights unless a legally established public necessity required it and upon condition of a just and previous indemnity."

Controversy Time

- Every other provision in the bill of rights was requested by at least two states, none requested a just compensation requirement.
- So why is it in there?
- Some speculate it was Madison's 'poison pill'
- What we know about Madison:
 - Virginian and slave owner
 - Some argue 'just compensation' requirement was self-serving protection to avoid federal seizure of slaves.

FEDERAL EMINENT DOMAIN?

- Between birth of the Country and the Civil War, essentially no Federal eminent domain without state consent.
- Scholars argue it was uneasy détente between both sides over the slavery issue.
- If Federal Government had power to ‘take property’, why not ‘take’ all the slaves?
 - Cases like *Pollard’s Lessee*, 44 U.S. 212 (1845) and *Strader v. Graham* 51 U.S. 82 (1850) pushed notion that Em Dom was state right, not Federal power.
- In 1772 in England, Edward Long wrote that if England emancipates its slaves “it ought to recompense [the master] for the loss he is compelled to sustain.”



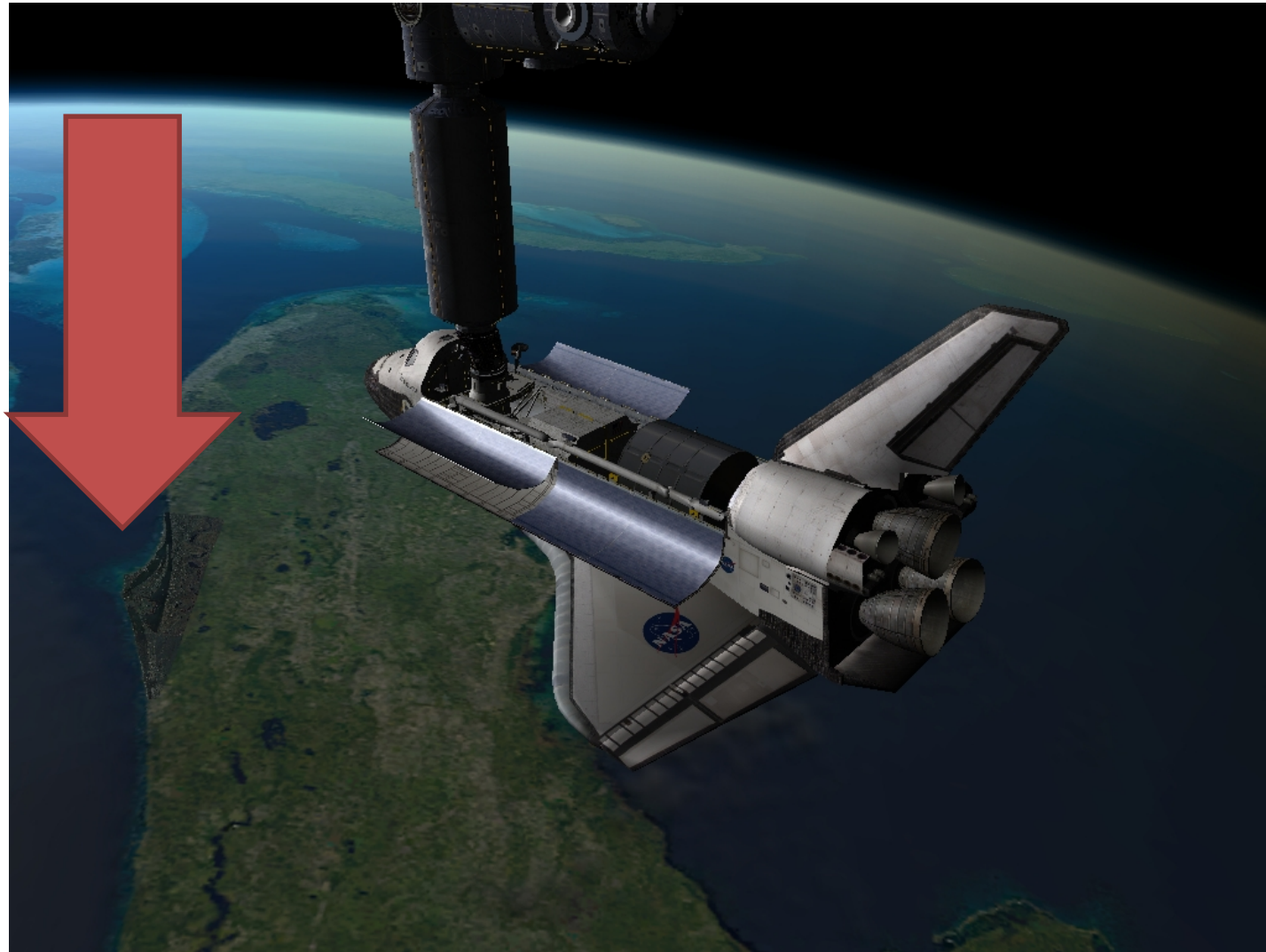
FEDERAL EMINENT DOMAIN?

- Wasn't until the Civil War that we saw exercise of Federal Eminent Domain without state consent
 - 1864 arsenal in Illinois followed by war cemetery in West Virginia in 1867.
 - Not surprising. Two things changed:
 - 1. Strongest opponents to federal power of eminent domain had just seceded.
 - 2. Necessity to prepare country for War.
 - Joel Parker (Harvard Law Professor) argued against Jefferson Davis' position that Constitution was more than a compact by citing eminent domain's place in the constitution as an attribute of a powerful federal government.
- In 1868 Federal Court ruled "[i]t is an incident of sovereignty of the United States, and a right recognized in the [Takings Clause] . . . That it may take private property for public use." *Avery v. Fox*, 2 F. Cas. 245 (C.C.W.D. Mich. 1868).
- In 1875, it became the undisputed law of the land in *Kohl v. United States*, 91 U.S. 367 (1875) when the U.S. took land in Cincinnati for a post office.

Eminent Domain Since Civil War

- “Attribute of sovereignty.” *Boom Co. v. Patterson*, 98 US 403 (1879).
- Federal Power since then used to:
 - create Gettysburg Battlefield Memorial (*Gettysburg Electric Railway*, 160 U.S. 668 (1896))
 - Supply water to D.C. (*Great Falls Manuf.* 112 U.S. 645 (1884))
 - War materials (*Sharp*, 191 U.S. 341 (1903))
 - Shenandoah, Mammoth Caves, Great Smokey Mountains, U.S. Border Control, D.C. Subway, Everglades, Big Cypress, Redwoods National Forest and . . .

NASA KENNEDY SPACE CENTER



Back to the States

- *Chicago, B. & Q. Railroad Co. v. Chicago* (1897) held that the Fourteenth Amendment extends the effects of the 5th Amendment to the states.



GENEALOGY 2.0 – AROUND THE WORLD

- U.S. isn't the only country with this tradition. What's called Eminent domain in the U.S. is:
 - “Compulsory purchase” in
 - England
 - Europe
 - India
 - New Zealand
 - “Compulsory acquisition” in
 - Australia
 - “Expropriation” in
 - South Africa
 - Canada

Indian Constitution

- Art 31 **Compulsory acquisition** of property –
 - (1) No person shall be deprived of his property save by authority of law.
 - (2) No property shall be compulsorily acquired or requisitioned save for a **public purpose** and save by authority of a law which provides for acquisition of the property **for an amount which shall be fixed by such law**; and no such law be called in question in any court on the ground that the amount so fixed is not adequate. (not quite ‘just compensation’)

South Africa: The World's Youngest Constitution (Sect. 25)

1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

2) Property may be expropriated only in terms of law of general application :
a. for a public purpose or in the public interest; and
b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including :
a. the current use of the property;
b. the history of the acquisition and use of the property;
c. the market value of the property;
d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
e. the purpose of the expropriation.

South African Constitution (Cont'd)

4) For the purposes of this section:

- a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- b. property is not limited to land.

5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

9) Parliament must enact the legislation referred to in subsection (6).

Fundamental Human Right

- Article 17 of the UN Charter:
 - Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.
- European Convention on Human Rights (Article 1):
 - “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”
- The African Charter on Human and Peoples' Rights (ACHPR) (Article 14):
 - “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

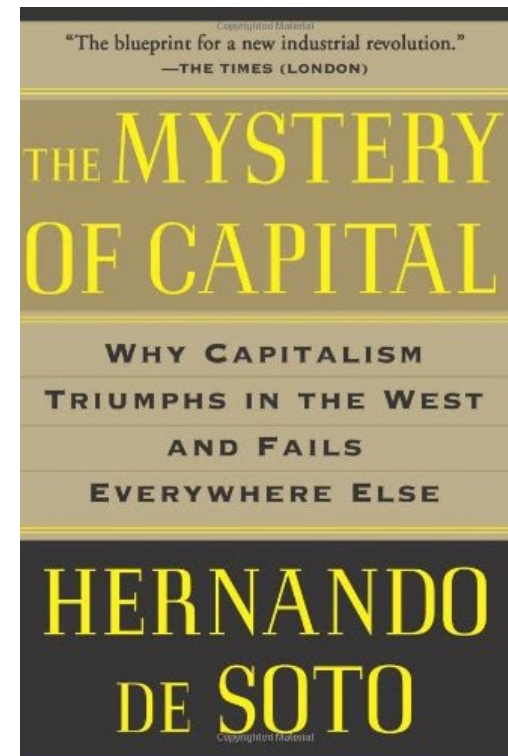
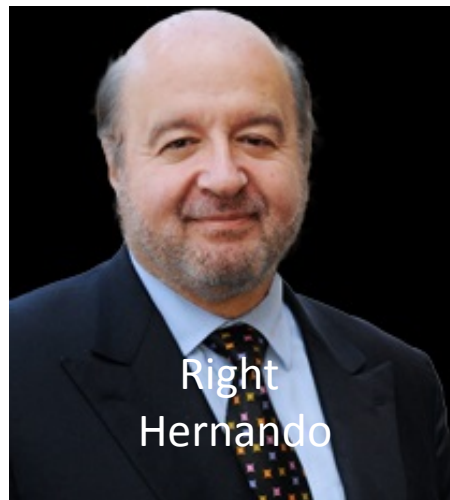
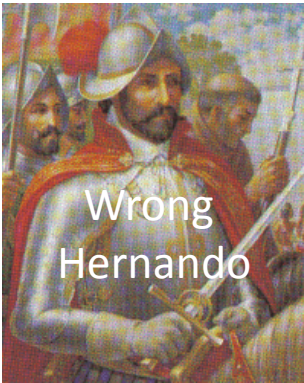
International Law

- Article 21 of the American Convention on Human Rights:
 - "(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.(2) **No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.** (3) Usury and any other form of exploitation of man by man shall be prohibited by law."

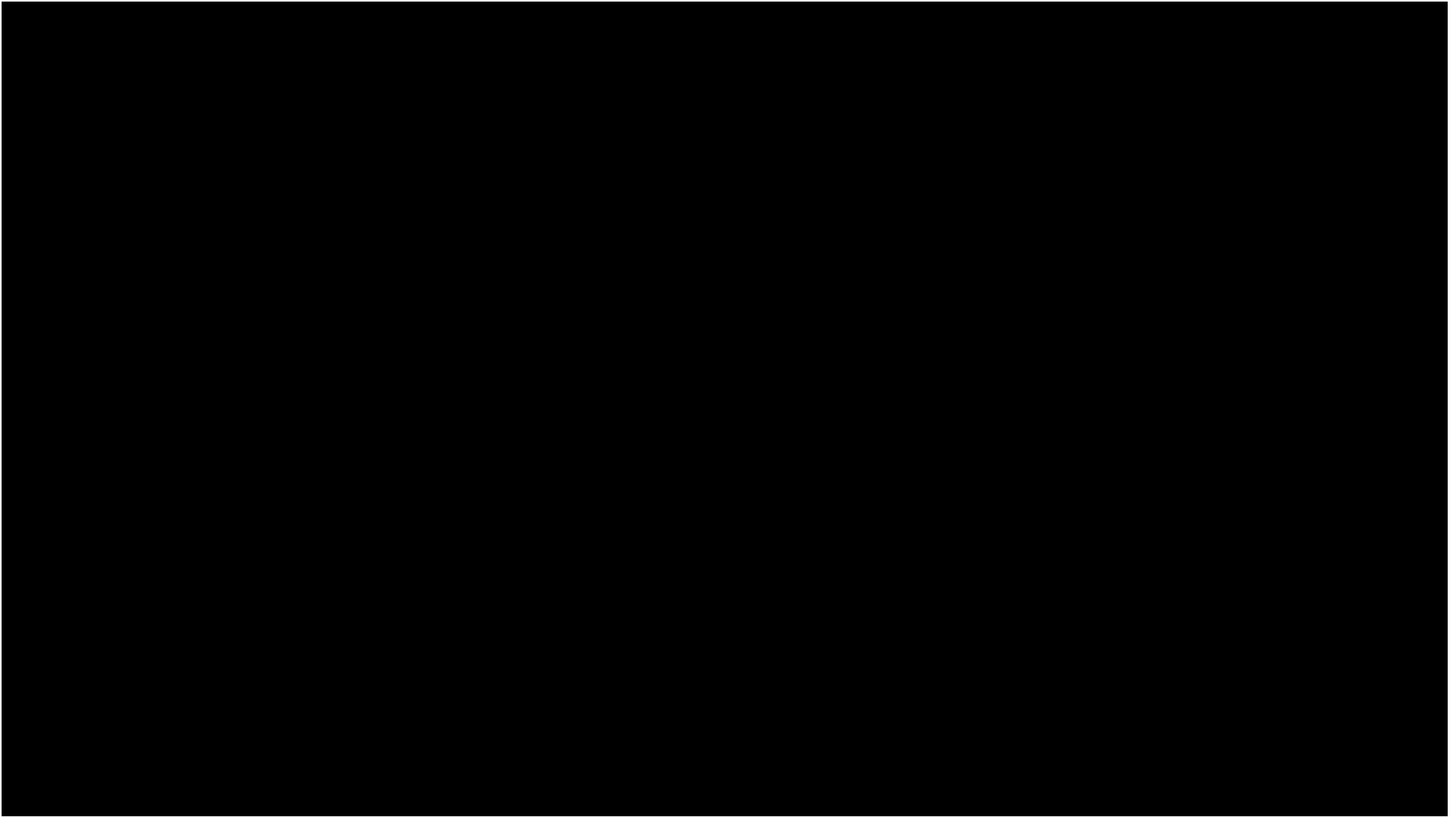
Why is it so widespread?

Why does it matter?

- Security in Property is fundamental to growth of a society.
- Hernando de Soto:

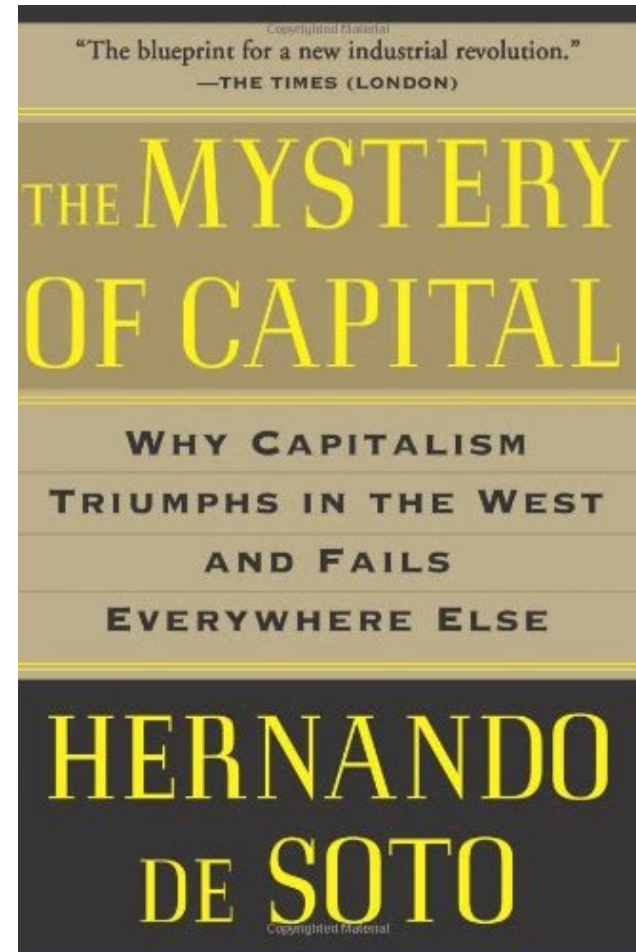


Hernando De Soto



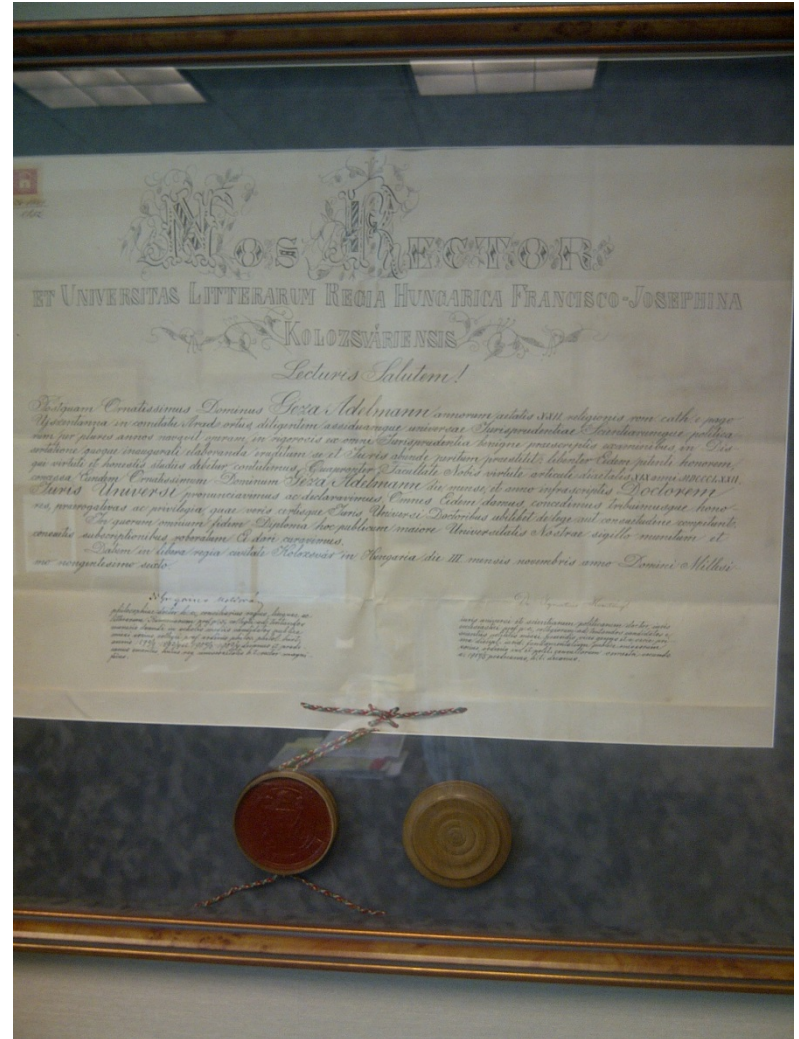
Mystery of Capital

- Differences between the developed world and the developing world has nothing to do with ethnicity, work ethic or access to natural resources
- The difference is the system, and particularly the system protecting property rights
 - Why invest in your business if the government can seize it without compensation?
 - Why expand your house if they're just going to tear it down?
- Where do Westerners go to get capital to start new projects?
 - Secured debt (mortgages)
 - If you can't prove you own something and pledge it as collateral, who would lend to you?



Why it Matters – My Family Tree

- In the early 1800s our family rafted down the Danube from Germany to Western Romania.
 - “Donauschwaben”
- My great grandfather, Geza Adlemann, obtained his law degree from the Universita Regia Francisco Josefina (King Franz Josef University) in the Austro-Hungarian Empire in 1906.
- Besides being the only lawyer in Pancota, Romania, he was also a successful vintner.



110 year old law degree from a country that doesn't exist

Compulsory Acquisition without Compensation

“Our Party, the Russian Social-Democratic Labour Party of the Bolsheviks, has proposed in a carefully worded resolution that *property* in the land be vested in the people as a whole. Consequently, *we are opposed to any* seizure of land as private property. . . . The landed estates must be confiscated *immediately*, that is, private ownership of them must be abolished *immediately* and *without compensation*.”

- V.I. Lenin Pravda No. 61, June 2 (May 20), 1917



Expropriation Without Compensation

- In 1947, Romania officially became a Communist state.
- “Expropriation of large land properties was launched by Law 187/1945 and expanded by Decree 83/1949 and Decree 92/1950 which nationalized without compensation residential units ‘to deprive exploiters of an important exploitation instrument’, ‘develop the socialist economic sector’ and ‘administer the housing sector degraded by the sabotage of the bourgeois exploiters.’”

- Lavinia Stan The Roof over Our Heads:
Property Resitution in Romania

The Vineyard

- In the “People’s” hands, no one has primary responsibility
 - See Tragedy of the Commons
- Went from: TO:



No Land, No Security, No reason to Stay

- Our entire family left (along with hundreds of thousands of others)
- Emigration “brain drain” sets these countries back
 - (PhD, Doctor, Business people, Lawyer, Inventors all came to the West)



Iron Curtain in Czechoslovakia

Attempts to Fix the Problem

- The 1990 Czecho-slovak 'Law on Relieving the Consequences of Property Injustice' returned 70,000 small businesses and houses nationalized from 1955 to 1961, and the 1991 'Law on Extrajudicial Rehabilitation' returned property expropriated prior to 1955.
- All of Eastern Europe is going through same difficulty because of a bad idea.
- Now, multiple 'roots of title' must be reconciled, balanced and weighed.

Closing Thoughts:

- Right to Property is Grandfather to Rights of Man
 - Richard Overton - "An Arrow against all Tyrants" (1646):

"To every individual in nature is given an individual **property by nature not to be invaded or usurped by any**. For everyone, as he is himself, so he has a self propriety, else he could not be himself; and of this no second may presume to deprive of without manifest violation and affront to the very principles of nature of the rules of equity and justice between man and man. Mine and thine cannot be, except this. **No man has power over my rights and liberties, and I over no man.**"