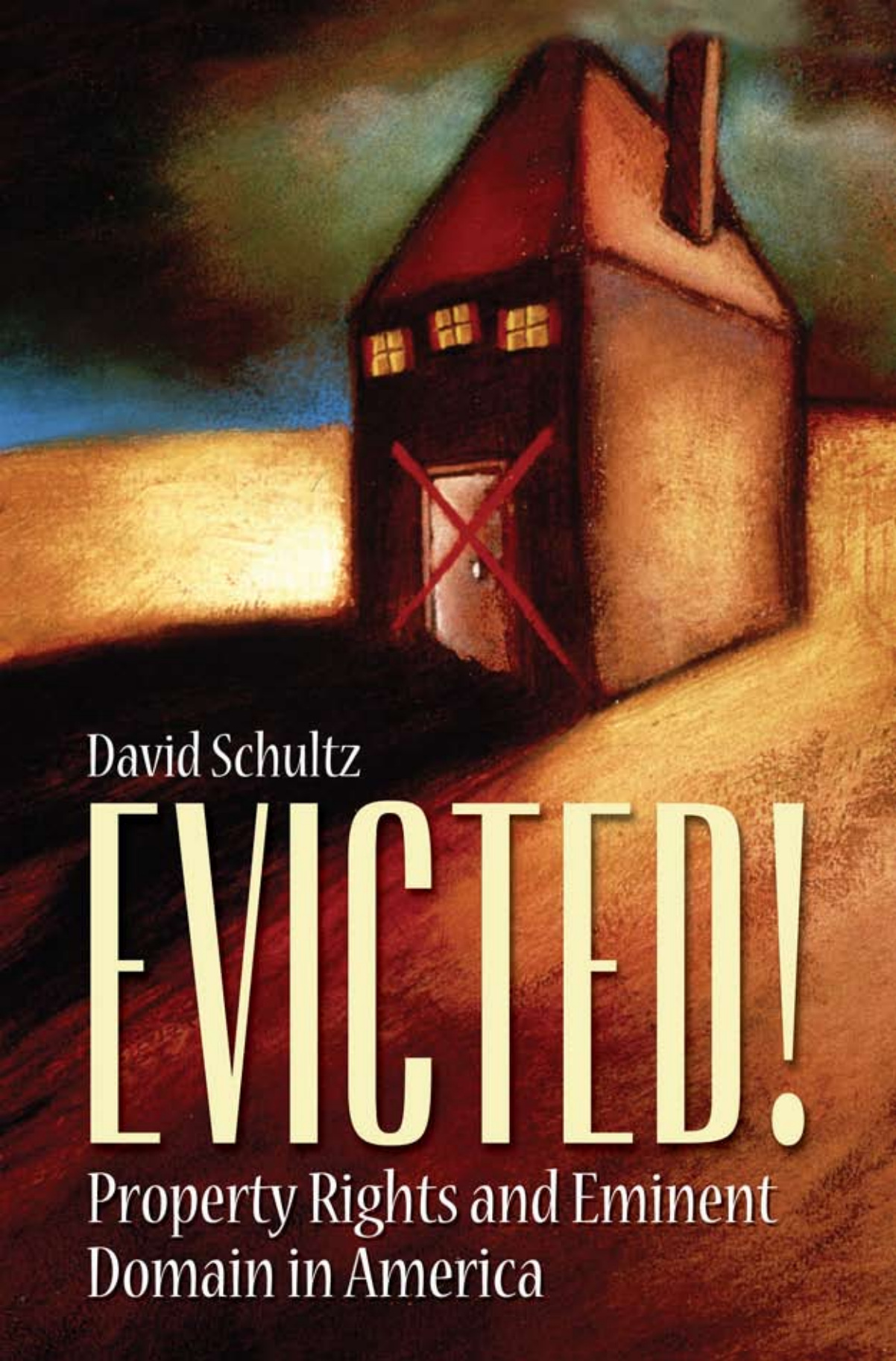
David Schultz
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Contents

CHAPTER ONE

Why Should Anyone Care about Eminent Domain?

Rick: How can you close me up? On what grounds?
Renault: I'm shocked, *shocked* to find that there is gambling going on here!
Croupier: Your winnings, sir.
Renault: Oh, thank you very much.

—*Casablanca* (1942)

The topic of eminent domain rarely is the subject of dinner time or cocktail party conversation. Eminent domain—the power of the government to take private property for some public use—does not generate much interest or excitement for most people. Instead, talk of this topic is generally confined to a select group of individuals in rarified settings. It might be government lawyers seeking to acquire some property to build a school, widen a highway, or perhaps even to remove some eyesore or unsafe building. Or it might be the topic of conversation among real estate appraisers who are seeking to determine the fair-market value of a piece of property that the government may wish to acquire. Or perhaps it might even be brought up in a first-year law school property or constitutional law class where students are quizzed about ownership rights, the Bill of Rights, or some other arcane topic. Whatever the context, discussion of eminent domain is rarely a front page news story or the subject of much political debate and controversy.

Yet the 2005 U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), upholding the use of eminent domain to take private property from one owner and give it to another in order to promote economic development, exploded the topic into the mainstream and pop culture. Much in the same way the character Renault (played by Claude Rains) in the movie *Casablanca* was shocked that there was gambling afoot in his city, others were similarly shocked that the government had the power to take the property of some and give it to others in order to facilitate economic development. The Court's decision shocked and angered many, producing an enormous outcry in the media. Even though the decision did not make any new law in the sense that the government had long had the authority to take private property for economic development and other purposes, the reaction to the *Kelo* decision was a surprise. The backlash drew new attention both to property rights that individuals hold in their houses, and to the power of the government to take one's house to serve community interests. It also invented a new rallying cry for property rights advocates—''eminent domain abuse.''

Prior to and as a result of the *Kelo* decision, ''eminent domain abuse'' conjured up ages of governments bulldozing homes and forcing people out on the streets. Big bad government was teaming up with big bad big business and rich fat cats bent on screwing over the little guy. It was about David versus Goliath, the sanctity of a home, the challenge to the American dream, and a threat to the adage that one's home is one's castle.

Suzette Kelo, the homeowner in the *Kelo* case, became the poster child for eminent domain abuse. Books such as *Eminent Domain: Use and Abuse*, published by the American Bar Association, in part told Ms. Kelo's story.[1] Other titles such as *Bulldozed: ''Kelo,'' Eminent Domain, and the American Lust for Land*, and *Little Pink House: A True Story of Defiance and Courage*, also recounted the saga of Ms. Kelo, painting her the victim and little guy (or woman) defending her home against big bad government and the evil Pfizer Pharmaceutical Company.[2] After *Kelo*, numerous states passed laws seeking to make it harder for the government to take private property, at least perhaps single-family homes, for economic development purposes. State and local governments banned the taking of owner-occupied homes, barred the use of eminent domain for economic development, or sought to limit the concept of a ''public use'' to ''traditional government

functions'' or purposes such as to build schools or highways. Other laws increased the compensation owners were entitled to receive for their property or stipulated additional hearings or hoops that the government had to jump through before it could take property. Even some in Congress sought to adopt laws that would make future *Kelo*s impossible. Overall, the backlash against *Kelo* was intense and angry.

The criticism of *Kelo* stated that what we were facing in America was ''eminent domain abuse.'' By that was meant somehow government had run amuck and its use of eminent domain was simply the most visible sign that Big Brother had won. Now for the first time the government could oust us from our homes. If it could do that, what's next? Take away our guns or other personal freedoms? *Kelo* was the embodiment of a big, bloated, oppressive government that picked on individual freedoms. In addition, many advocates representing the poor and people of color also saw the decision as a form of the chickens coming home to roost. They argued that the government had always been using eminent domain as a form of ''urban removal'' directed at racial minorities and the less affluent. It was used to break up their neighborhoods to build roads or highways or to otherwise take their property and give it to affluent whites. In short, eminent domain was a major tool encouraging gentrification of many communities across the country.

But *Kelo* was also a story about special interest politics and the evils of what happens when government and big business team up together. In the case of the Kelos, the City of New London, Connecticut, wanted their property in order to provide parking and other amenities for Pfizer Pharmaceuticals in an industrial park. New London was economically depressed and desperate, with an eroding tax base, a loss of jobs and population, and the flight of businesses from their community. There was also a fear that Pfizer would soon flee and the creation of the industrial park would be a way not only to retain existing industries but also to expand employment opportunities. The taking of the Kelos' property simply looked like a form of corporate thuggery, with the government doing Pfizer's bidding.

Similarly, back in the early 1980s when the City of Detroit was economically reeling from the job losses and the hemorrhaging of the automobile industry, it capitulated to the demands of General Motors to use its eminent domain authority to provide land for a

new assembly plant or face the prospect of the auto giant going elsewhere to expand. As a result, in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (Mich. 1981) the Michigan Supreme Court upheld the City of Detroit's use of its eminent domain authority to level a city neighborhood, relocate 1,362 households, and acquire more than 150 private businesses in order to accommodate the desire of General Motors Corporation to build a new assembly plant on 465 acres of land.[3] On top of this land acquisition, the City of Detroit also provided more than $200 million in tax breaks and other subsidies to GM to support this project, only to find the promised creation of 6,000 new jobs to be illusionary.[4]

Kelo and *Poletown* highlight the unsolved problem of eminent domain—how to prevent corporate thuggery.[5] By that, what are the checks to prevent powerful corporate interests from blackmailing politicians into using the government's takings power to further private interests? Political economist Charles Lindblom once described the marketplace as prison.[6] Governmental entities and the political decision-making process are an island embedded within a larger economic sea that leaves in the hands of private economic players the power to make business investment decisions. Developers can use this tool—invest or withhold investment and flee from a jurisdiction—if they do not secure the benefits they desire from a community. Such a threat has been successful in corporations extracting tax credits and breaks for business relocation decisions even though the empirical evidence suggests such incentives are minor factors affecting the location of facilities. Similarly, sports teams use the threat of relocation along with fan base loyalty to wrestle new publicly financed stadiums from cities and other local governments.

The point here is that there is a well-trod path of eminent domain being used on behalf of powerful interests to secure their needs, with the occasion of *Midkiff* takings (the breaking up land monopolies to benefit tenants, as will be discussed later in the book) the exception to the rule. What perhaps infuriated the Kelos and other families in Connecticut so much was not simply that their property was being taken, but that they felt they were being ganged up on by developers, a corporate giant, and the city. For the Kelos, as well as many others across the country who see developers and city officials working together to push them out of their homes, the problem is that democracy has

broken down and they see no way that the political process is going to listen to them or respect their voice. The Kelos, no doubt, thought they were the victims of thuggery.

Yet underlying the numerous reasons various parties were upset with the *Kelo* decision, it also struck a nerve in American pop culture. At its core, the view captured was ''our home is our castle'' and that we should be able to do what we want with it. No one should be able to tell us what we can do with our property, especially our home, and no one should be able to force us out of what, for most of us, is our most prized and important possession. In fact, home ownership typifies a common (but, as we will see, an incorrect) perception about property rights. That perception is that if I own something it is *mine* and I have a right to do anything I want with it. When the Kelos lost their home they lost their castle, so to speak, and millions of people across America identified with them and fretted that they too could be the victims of eminent domain abuse. Thus, the *Kelo* decision prompted a flurry of books advocating for the enhanced or renewed protection of property rights.

Yet when one cuts through all the hype, hysteria, and hullabaloos surrounding *Kelo*, there is one basic question: Are property rights and eminent domain irreconcilably in conflict? In order to answer that question, several other issues need to be addressed. First, what is ''property'' and what rights do we have to things that we own? Second, are ownership or property rights as fragile as many commentators claim? Third, what is ''eminent domain'' and what type of power does the government have to take property? With that question, there are issues surrounding why the government takes property. What does the law or the Constitution say about this power? Are there any limits to eminent domain? Is there a process that must be followed when the government takes private property for its use? Additionally, given the reaction to *Kelo*, one can also ask if the decision forged any new ground. Did it, for example, make new law and declare a new principle that *now*, for the first time, government could take property for economic development reasons, or was the government always able to do that, or when did the government acquire the power or authority to do that? Finally, perhaps a last question to ask: was there overreaction to *Kelo*? Was the case misunderstood? Did the courts not get it when it came to property rights or did legislators, owners, and the media simply engage in

a knee-jerk response to the decision? Finally, perhaps the most important questions are ''what is eminent domain abuse?'' and ''does it exist?'' These and perhaps others are all good questions.

This book seeks to cut through all the misinformation about eminent domain and answer the above questions. It aims to offer a comprehensive discussion of eminent domain. It will also discuss how eminent domain has changed from the earliest days of the United States and show how it has been an important tool for a variety of governmental purposes, including economic development. In providing this discussion, the book will show if and how *Kelo* was a major change in the law and whether—as Renault pretended to be in *Casablanca*—we should have been shocked by that decision. The discussion is also meant to provide important detail and explanation of the deeper issue underlying this topic, specifically what ''property'' is and what rights owners have in it. There is no way one can discuss or explain eminent domain without defining ''property'' and what ownership means.

In order to accomplish the above tasks, the book breaks down the topic of eminent domain. Chapter 1 provides an overview of property law, explaining what it means to have property and what we can own. This discussion addresses topics that are often covered in law school such as when or how something becomes one's property. But, more important, the discussion weaves between what people think property is and what the law says it is. The goal here is comprehensive: provide explanation of why we have property and what it means to us both personally and legally.

Chapter 2 discusses the limits on property ownership, not only what rights are associated with ownership but also what limitations. The primary focus here is historical; how has property been viewed over the course of American history? Despite the rhetoric describing property as an absolute ''right,'' this right has always been subject to limitations. Much of the discussion here will focus on the often huge gap between American political rhetoric that describes property as absolute and the reality of law and practice that have found significant limits on ownership rights. In effect, just because it is your property does not mean you can do whatever you want with it.

Chapter 3 is a general history of eminent domain as it evolved from medieval England and came to the United States, which will explain conceptually and in practice what eminent domain is and why governments have the power to take private property. The

discussion here in many ways is philosophical in the sense that it addresses questions about the nature of government and why it even exists. Eminent domain is discussed in terms of the broader purposes of government alongside of what powers it needs in order to protect individuals and secure the public good. The reason for this chapter is simple—to clarify why governments do what they do and where the regulation of property may fit in.

Chapter 4 provides a constitutional history of eminent domain in America. It focuses on the takings clause of the Fifth Amendment of the Bill of Rights, seeking to explain what the constitutional mandates or says about eminent domain. Clearly, one chapter cannot provide an exhaustive historical analysis of this topic, but this one does offer a discussion of the major cases and historical trends affecting power of the government to take private property. The chapter serves as perhaps the ''greatest hits'' of eminent domain law, seeking to show its evolution over time and leading up to *Kelo*. Among the major points to be discussed is how eminent domain has long been an important and often aggressively used tool to promote a variety of public goods, including the building of railroads, public highways, and schools, and even to promote economic development. In fact, the chapter will underscore that many of the major accomplishments and milestones of this country required the use of eminent domain.

Chapter 5 turns specifically to a discussion of the public use justification for the taking of private property. One of the criticisms of *Kelo* both before and after it was decided was that the courts and the law failed to provide adequate protection for property rights. The chapter will concentrate on looking at a series of decisions prior to *Kelo* that gave many property rights advocates hope that the U.S. Supreme Court would become a more vigilant advocate for property rights, and why then the Court failed to do that in *Kelo*.

Chapter 6 is a description of the eminent domain process. It starts with the assumption that the government wants to take your home. What would it have to do (at least prior to *Kelo*) to do that? The chapter examines the steps in the eminent domain process. It looks at the three conditions that government must meet to take property, ascertaining (1) what constitutes a taking, (2) what is considered a valid public use, and (3) what constitutes just compensation for the taking. Among the topics emphasized will be what techniques are employed to determine the value of your

home. The discussion reviews the legal requirements for the use of eminent domain but, more important, it examines how economic development, land use regulation, and eminent domain must all be understood as part of a broader planning process within the political process. The chapter essentially provides a primer or summary about what shall be called the ABCs of the eminent domain process.

Chapter 7 sets the legal context for the *Kelo* case and discusses it in the context of two other property rights cases also decided by the Supreme Court that year. But it looks at *Kelo* as part of a broader political agenda to defend property rights and limit the scope and role of the government in the economy. The overall purpose of this chapter is to cut through the rhetoric and really determine what the Court said in *Kelo*, what the case meant, and to what extent it changed the law to make it easier to condemn your property. Did *Kelo* really make new law and set a new precedent? Addressing this issue is the purpose of the chapter.

Chapter 8 examines the aftermath of *Kelo*. It looks at the reaction to the case politically and legally, especially in terms of the new laws that were adopted to make future *Kelo*s impossible. The chapter will in part examine several court cases (at the state level) before *Kelo* seeking to understand how well judges and courts were able to reach out and protect property owners facing eminent domain. One perhaps surprising answer is that, contrary to claims of rampant eminent domain abuse and feverish land grabs by local developers, courts are actually quite good at smoking out abuses and protecting property rights. The chapter will also then make a different argument that the eminent domain abuses that came out in *Kelo*, and which new laws sought to address missed the real problem. Specifically, the real abuse in *Kelo* and in many eminent domain cases or scenarios is what shall be called ''corporate thuggery,'' the teaming up of local corporate interests with the government to press the agenda of the former at the expense of the public or other landowners.

Finally, the conclusion provides some recommendations regarding what is right and what is wrong with the current use of eminent domain laws. A major question to ask is whether eminent domain law needs to be fixed and do we need to place new limits on the ability of the government to take property in order to protect our rights? This chapter assesses the current debates in eminent domain law and offers some ideas on what is good or

bad in current law and what needs to be done to remedy it. In effect, the chapter asks whether eminent domain abuse exists, what it is, and what can be done to address it. More specifically, can eminent domain and property rights be reconciled? The simple answer here is that critics of eminent domain have articulated the wrong problem. The issue is not whether eminent domain and property rights can be reconciled. It is whether eminent domain and individual rights can be reconciled. The answer here is yes.

Overall, the book perhaps reaches both a middle ground and takes a different path when it comes to thinking about eminent domain. On the one hand, it rejects more hysterical assertions or fears of eminent domain abuse and instead argues that eminent domain is an important and powerful tool to further the public good if it is properly employed. A wrecking-ball approach to vastly limiting eminent domain power (as current efforts seem to call for) is antidemocratic and will certainly cost taxpayers a lot of money in the long run. However, eminent domain is subject to abuse and the corporate thuggery problem, and some limits need to be imposed on the way eminent domain is used so that local governments are not merely pawns of broader interests when seeking to use this power.

My interest in this topic dates back to the early 1980s when I served as a city director of code enforcement in New York enforcing state and local housing and zoning laws. In doing that job, I became interested both personally and professionally in why we have housing laws and how governments legitimately limit property rights. This interest was further reinforced through employment with an organization that worked with low-income individuals and people of color to help organize them to defend their communities. Later, when writing a dissertation in the late 1980s, I explored the topic of eminent domain. Thus as a professor, housing and economic planner, and scholar, I have studied land use issues. Overall, this book and its observations are the product of 25 years of thinking about eminent domain and how to balance the rights of owners and the community with the needs to occasionally take property to promote important social objectives. My hope is that this book, unlike many of the others that reach a fever pitch when it comes to discussing eminent domain and property rights, will bring these many years of reflection to an examination of this topic.

CHAPTER TWO

It's My Property and I Will Do What I Want with It

(with apologies to Lesley Gore)
It's my party, and I'll cry if I want to.
—''It's My Party'' as sung by Lesley Gore

What is property and what rights are attached to something I own? Perhaps this is the most fundamental question that needs to be asked when trying to understand the power of eminent domain. The reason for this is that if the power of eminent domain, as stated in the Fifth Amendment to the U.S. Constitution, is the authority to take private property for a public use, then one needs to understand what property is. Think about it. If something cannot be owned, then it cannot be considered property.

If one were to consider the world around us, there are many things that might possibly be objects of property. For example, our house or home is our property, as are our cars, trucks, television sets, computers, and clothes that we wear. However, what about things such as the air around us, a contract to buy a house, a lease, a possible inheritance in a will, or an IOU that a friend gives you after borrowing money? Are they property? Unlike the first set of items mentioned, which were tangible or real, this second list is less ''real'' and more intangible. One can touch a house, car, a television, or a computer, but can one really touch a contract, lease, or IOU beyond the paper it is written on? But what if the IOU is verbal and not even written on a piece of paper? Does that render it even less of a form of property than if

it was written down on a piece of paper? For many, the IOU might be a valuable form of property, much in the same way that a contract for something in the future, such as medical care or Social Security, might constitute some type of property. But unlike a physical object that one can hold and possess, these other items cannot really be held in a physical way. Are they property?

Now think about some other things about us. Do we own our bodies? Can we buy and sell body organs or parts? How about blood? Human eggs or sperm? If we consider them property, then perhaps we should be allowed to sell them. In some ways, slavery was once based upon the notion that humans could be property, bought and sold no differently than buying or selling any other object. Additionally, think about your household pet. Do you own your cat and dog? Are pets simply property in the same way that cows or pigs raised for food are considered property? The simple answer from the perspective of the law is yes, all these entities are property, or at least have historically been considered to be forms or types of property.

But even if there is an agreement that something is property, what can one do with it? If we think about property in an ordinary sense that many people adopt, owning something means I can do whatever I want with it. Lesley Gore sang in the 1960s, ''It's my party and I'll cry if I want to.'' For some, owning something implies ''it's my property and I'll do what I want with it.'' This means I can hoard it, use it up, sell it, trade it, exclude others from using it, and perhaps even blow it up. To own something means I can do whatever I want with it. Yet that is not necessarily the case. I own my pets, for example. Can I torture or kill them as I want? What about my body? If I own it, cannot I sell it or any parts of it? Should I not be able to sell my body as prostitutes do, or sell blood or plasma as many individuals? What about selling a body organ such as a kidney? If our bodies are our property, then why not permit all these actions?

But beyond looking at property in one's body or pets, think about other forms of property and what you might be able to do with something you own. I can buy and sell my house. However, can I use my house in a way that disturbs others? What if I own a gun? Guns are property, but can I use them in ways to hurt others? The answer, of course, is no. There are

limits to ownership depending on what type of property one is discussing.

Answering the questions regarding what property is and what rights I have over things that I own is the touchstone for understanding eminent domain. But understanding what property is is not easy. Literally there are tens of thousands of books, articles, and laws that try to clarify what it is. If one had time to review all this material it would be clear that there is no one fixed definition of property. *Property* as a concept has multiple meanings. Property can also be divided up into different forms of property, and property or ownership has associated with it many different forms of rights. Property may also be historically and culturally specific. At different times in history and across different cultures, what is considered property has had distinct meanings.

In law school, property law is generally a required class when one is a ''1L,'' or a first-year student. Law school classes seek to examine and clarify what property is, at least in the United States, by discussing what property means from a legal point of view. Yet property also has other meanings beyond the law, extending to cultural and political perspectives. But from a legal point of view, property can be understood as containing many different forms and rights.

WHAT IS PROPERTY AND WHERE DOES IT COME FROM?

As a starting point one might ask: Where do property rights come from? Although this is a good historical and anthropological question, ultimately it may not be possible to answer it. The reason for that is that the concept of property that we are familiar with in the United States traces its legal origins back to English common law. There, the law about ownership and who could own what evolved over time, giving it the particular characteristics that many individuals in the United States have come to understand. The rules of English common law are different from those of other European countries, and they also stand in stark contrast to theories of property found elsewhere in the world.

For example, the rights to property in ancient Rome were very different than in modern America.[1] To own something, such as a burial plot or a religiously sacred spot, did not grant one the ability to exclude others from using the property in some cases. But

more important, when settlers first arrived in North America during the fifteenth and sixteenth centuries, they encountered what they perceived to be land either not owned by anyone or owned by the various Native Americans who occupied the continent (the same was true also for Central and South America). These two perceptions about the status of the land led to two different actions, even if the results were the same. In one instance, where it was perceived that no one owned the land, the British (and the French and Spanish) claimed the land to be theirs.[2] Since the land was considered wild, unoccupied, or unclaimed, they followed traditional practice under British law and they declared it theirs and subject to the English Crown. Native Americans who may have occupied the land were then forcibly removed or slaughtered as the Europeans viewed them as trespassers or invaders upon their now-claimed property.

The other approach that settlers took was to purchase the land from the Native Americans. History books in the United States long chronicled the story of Peter Minuit purchasing the island of Manhattan from Native Americans for beads and trinkets worth just a pittance. In exchanging the beads and trinkets, the Dutch believed they were purchasing the rights to the land, including sole use or occupation, and the right to dispose of the property any way they wanted, including excluding the Native Americans from it. However, it is not clear that this is what the Native Americans thought. For them, the earth was not something that could be owned or possessed in the same way that someone owned or possessed a piece of personal clothing. The lands of the earth were something that one used, and the exchange of beads and trinkets was not a selling of Manhattan to the Europeans, but perhaps instead merely recognition that they could also peacefully use the lands alongside the Native Americans. Simply put, the Native Americans did not have the same conceptions of property as did the Europeans—they did not legally own the earth and therefore could not legally sell it. Or, to put it in modern legal analysis, they did not have legal title to the property and therefore could not convey it. (One could also say that in contract law terms there was no legal contract to sell the island because the Dutch and the Native Americans did not have a ''meeting of the minds'' regarding the terms of the contract and therefore there was no valid agreement, even if the Native Americans could sell the land.)

The point of this discussion is twofold. First, the rules of property appear to be different across cultures and time. Or at least anthropological studies and history seem to suggest that.[3] Second, the discussion of the Native Americans and property leads to the question about how property rights are initially acquired. Both of these questions point to an important distinction between possession and property.

As children, we chanted ''possession is nine-tenths of the law'' when something was found or, more important, when we wanted to hoard a toy and not share it with someone else! Claiming that possession was nine-tenths of the law meant that since we held it in our arms, we owned it and therefore it was ours. While our chants meant little (except to the extent that we dared someone else to take the toy away from us), the phrase had a ring of truth to it, in that it spoke to an important distinction between possession and property rights.

Possession of something seems to imply physical control over something. I possess a piece of property because I can defend it and prevent others from using it. This simple type of possession might be limited to the physical might and strength that I have, and it might also be limited to the amount of geography that I can easily defend. However, this type of possession is very unstable. There is no certainty that what I possess today will be held tomorrow. Possession is subject to my ability to hold something against all outsiders.

Possession contrasts with property. With property, at least the way it has evolved in the West and in the United States, my ownership conveys certain rights. What these rights are shall be discussed below, but my property means that the law legally recognizes my possession and it or, rather, the state or the government will protect my ownership. This means that an individual's rights to some property are not limited to the physical ability to defend and control the land. Instead, I can leave the property or acquire more acres than I can physically defend, and the property will still be mine. If someone seeks to take it away from me I can call the police to have that person removed, or I can go to court to have him evicted or charged with trespassing. Property rights, while perhaps initially and subsequently connected or related to possession, are more secure and certain than is mere possession of something.

How, then, did property as a legal convention come about? There are many theories about this and it could take an entire book alone to discuss the various ideas about its origins. However, a handful of theories can best capture the different approaches taken.

The first theory is that property is simply a social convention or tradition grounded in habit. David Hume, a famous eighteenth-century British philosopher, described property as the product of habit and convention in his *A Treatise of Human Nature.*[4] Hume, like many of his contemporaries, sought to explain the origin of society. This included discussing why laws exist, why they should be obeyed, and who should be entitled to rule a country. His writings occurred at a time when the power of kings was being questioned and parliaments and popular governments were beginning to develop. One popular tool for describing the origins of society and its rules was an appeal to a ''social contract.'' Some writers argued that there had been a time when there were no laws or government.[5] At some point and for some reason, individuals gathered to create society by way of a social contract, or an agreement among individuals to create a society, government, and rules to order both. The parallel might be to think of social contracts as a form of constitutional convention. For many social contract theorists, property rights were a product of these conventions.

David Hume criticized the social contract thinking along several scores. First, he argued that such a contract was a historical and anthropological fiction. He doubted that there was some such point that could be described as presocial and that then there was some express agreement to form a society and a set of rules. Instead, rules of justice, societies, and governments were the product of habit and convention.[6] This means that people simply came to accept over time some relationships, including what was considered to be just and fair. Moreover, Hume criticized the idea of a social contract as simply a ''convention.'' The entire idea of forming an agreement and keeping one's word to obey it is also a social convention.[7] Thus, social contract theorists who argued that the social contract created society would also have to explain how these contracts came to be created and accepted as binding. There is almost a reduction to the absurd here. To agree to a social contract, one must first need to create the concept of a contract, and that would imply creating the concept of agreements,

which would imply creating the concept of keeping agreements, and so on.

Hume's alternative proposal was that society was the product of habit and convention. This is also true with property. Property arises first out of a security of possessions that is gradually respected by others.

> After this convention, concerning abstinence from the possessions of others, is enter'd into, and every one has acquir'd a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of property, right, and obligation. The latter are altogether unintelligible without first understanding the former. Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain'd the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man's property is some object related to him. This relation is not natural, but moral, and founded on justice. Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both. As our first and most natural sentiment of morals is founded on the nature of our passions, and gives the preference to ourselves and friends, above strangers; 'tis impossible there can be naturally any such thing as a fix'd right or property, while the opposite passions of men impel them in contrary directions, and are not restrain'd by any convention or agreement.[8]

Property rights, for Hume, arise out of natural possession of objects. At some point the rules of justice come to respect our possession of property. This means we no longer have to keep it within physical possession at all times and be on constant patrol to protect it from all intruders. Property rights are conventional, but they are also respected and protected by society and government.

A second theory of property is critical of it as an institution. Specifically, property along this perspective is viewed as some sort of evil institution. Pierre-Joseph Proudhon, a famous nineteenth-century anarchist, once wrote a book with an answer that captured this sentiment—*Property Is Theft!*[9] Modern Western

conceptions or beliefs that property is illegitimate can be traced to eighteenth-century French philosopher Jean-Jacques Rousseau, a social contract theorist who tried to explain the origin of society by appealing to an ancient compact reached among individuals. This compact, too, created the institution of property, thereby making it, as Hume said, a human or social convention. But property for Rousseau was not depicted in a positive light. Instead, property, along with all of society and government, were described in his *Discourse on the Origins and Foundations of Inequality* (often referred to as the *Second Discourse*) as a trick by the rich and powerful over the poor.

> The first man who, having enclosed off a piece of land, got the idea of saying ''*This is mine*'' and found people simple enough to believe him was the true founder of civil society. What crimes, what wars, what murders, what miseries and horrors would someone have spared the human race who, pulling out the stakes or filling in the ditch, had cried out to his fellows, ''Stop listening to this imposter. You are lost if you forget that the fruits belong to everyone and the earth belongs to no one.'' It seems very likely that by that time things had already come to the point where they could no longer continue as they had been. For this idea of property, which depends on many previous ideas which could only have arisen in succession, was not formed in the human mind all of a sudden. A good deal of progress had to take place—acquiring significant industry and enlightenment, transmitting and increasing them from one age to the next—before arriving at this last stage in the state of nature. So let us resume these matters further back in time and try to gather under a single point of view this slow succession of events and knowledge, in their most natural order.[10]

For Rousseau, the original social contract and the property that it created was the first step in the gradual and eventual enslavement of individuals. Elsewhere in the *Second Discourse*, Rousseau sees the first step in creation of property as leading to even further social conflicts and distinctions. The institution of property leads to the family, with current family relations also based on artificial distinctions and inequalities.

> This was the age of a first revolution which led to the establishment and differentiation of families, which introduced a form of property, and from which perhaps arose many quarrels and fights.