Property Rights: Eminent Domain and Regulatory Takings Re-Examined

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What are the appropriate powers of the state with respect to private property rights and how should those powers be limited? This volume of essays takes up that perennial issue.

Private property rights are one of the significant components of a free society, and constitutional protection of such property is seen as foundational to a well-ordered society that respects the dignity of the individual. A system of well-defined and enforced rights also is important for economic growth.

Property rights are not absolute, however. If the state is to have resources sufficient to carry out its constitutionally defined functions it must have the power to tax. There are other areas where almost all constitutional democracies have limited the rights of holders of property. One of the most common is eminent domain, which allows the state to expropriate property for the public good under certain conditions. Another is the regulation of property, where such regulations are again justified by the public's interest in how property is used. Fire and building codes and zoning are examples of the many ways in which property is regulated.

Eminent domain is generally seen as a necessary power for the state to overcome holdout problems. If the government is trying to build a road, site a dam, or plat a street, a single property owner can hold up the entire project by refusing to sell or by holding out for a price that captures all of the societal gain from the project. Thus, as expressed in the Fifth Amendment to the United States Constitution, the power to take private property is allowed. The founders also had clear concerns, however, that such power might be misused, so the Amendment specifies that the taking must be for public use and just compensation must be paid.

Regulation of property passes constitutional muster under the police power provisions of both the federal and state constitutions. The fact, however, that both eminent domain and regulation of private property are constitutional does not give precise definition to exactly how far those powers extend or how they are limited. The use of eminent domain and regulation has expanded rapidly in the last several decades, leading to considerable controversy over whether the powers are being appropriately used.

The volume *Property Rights: Eminent Domain and Regulatory Takings*

Re-Examined, enters the debate at this point. The chapters in the book are based on papers written for a 2007 conference, and the conference was, at least in part, occasioned by the 2005 Supreme Court decision, *Kelo v. City of New London*. In that case the Court held that unblighted property could be condemned by a city and the property could be transferred to a private entity, which would carry out an economic development project.

The *Kelo* decision was not the first to allow condemnation under eminent domain to be used to transfer power from one private owner to another, but the decision strengthened the power of government enough that a substantial backlash ensued. As a result many states passed property rights protection statutes in an effort to provide more stringent limits on the power of eminent domain.

With the rise of the environmental movement, regulatory takings of property rights also grew rapidly after 1970. Previously zoning laws had been the main controversial use of the power to regulate, but the host of environmental rules in the Clean Air Act, the Clean Water Act, and the Endangered Species Act vastly expanded the reach of the state.

This book, a set of thirteen chapters, is primarily an argument that the power of the state over property rights has extended too far and a revision of the powers of eminent domain and regulation of property is desirable. One chapter examines the content of the state level backlash movements and concludes that the legislation passed in 16 states does not provide much of a restriction on the use of condemnation powers. On the other hand, 10 states passed referendums designed to limit takings and those look to be more effective.

Originally eminent domain powers in the United States Constitution and in most state constitutions had a rather narrow conception of where the use of such power would be appropriate. In particular, the conception of public use in the Fifth Amendment meant that projects would be open to the public. Roads were one of the main justifications of use of condemnation to avoid holdout problems. Over time, however, public use came to mean public purpose, public benefit, or public welfare.

It is easy to see how the change in the definition of public meant substantial expansion of the power of government. Several chapters detail how local governments came to use the concept of redevelopment of an area of their city as a justification for condemnation of property. Redevelopment plans originally focused on what were termed "blighted areas," but that term was nebulous and allowed municipalities considerable freedom of action. For instance, a part of a city could be "functionally obsolete," meaning that homes with one bathroom could be considered blighted (p. 32). The *Kelo* decision further expanded government powers by removing the necessity of finding blight and stating that the existence of a city development plan was sufficient grounds to justify the taking of

private property on the behest of a private developer.

Various chapters point out the implications that flow from the expansion of the concept of public use. First, cities will most likely target housing and retail establishments that are below the median value of property because tax revenue will be increased by taking the property and converting it to a use that has a higher assessed value. Therefore city governments would push for the use of condemnation beyond the possible efficiency gains from the lowering of transaction costs. They stand to receive a tax windfall if condemnation succeeds.

Second, the fact that urban blight is the primary justification of condemnation means that eminent domain powers often harm the poor and minorities who live in such areas. Redevelopment plans usually foresee the replacement of lower priced housing with large-scale shopping malls, five star hotels, or big box retail stores.

Third, the fact that most redevelopment is carried out by private entities who receive the property rights after condemnation means that rent seeking is encouraged. Developers have strong reason to develop close relationships with city councils, press for a redevelopment plan that will allow them to receive property at a below market price, and profit from the development.

These impacts are not trivial. Between 1998 and 2002 there were over 10,000 cases where eminent domain powers were threatened or used for private development (p. 182). In California about 80 percent of municipalities have a redevelopment agency (p. 93).

All in all it appears that the market failure arguments that justified condemnation under the power of eminent domain ignored the other side of the coin, the possibility of government failure in using that power.

Regulatory takings face an even more significant problem than eminent domain takings. When the use of property is regulated in a way that reduces its value, no compensation need be paid, as long as the property owner retains any value of the property. This court ruling gives massive powers to government agencies to restrict the use of property, often far beyond what is necessary to protect the public from harm or to provide a public good.

Jonathan Adler, the author of the chapter on environmental regulatory takings, argues that agencies that restrict property rights for ecological reasons should pay for the reduction in value to the property owner out of their agency budget. Such payment would, in effect, force taxpayers to compensate landowners for the provision of environmental amenities such as endangered species habitat and wetlands. Compensation can be justified on both equity and efficiency grounds. It only seems fair that if the general public wants certain amenities provided that they rather than the landowner should pay for such provision. And, agencies would have an incentive to look for the lowest cost ways of providing species habitat

or other environmental goods if they paid a price for them.

In conclusion, if one wants a strong case for scaling back the powers of eminent domain and regulation of property rights this volume is a good place to start. In a few cases the arguments shade into removing such powers entirely from government, but most of the authors see a purpose in enabling government to use its power over property rights in certain ways. But they believe those powers have grown far beyond what is justifiable. The one problem with the book is that there is not a coherent set of policy changes that are obvious, but this lack of agreement is to be expected from a volume with multiple authors.

Christian economists will find *Property Rights: Eminent Doman and Regulatory Takings Re-Examined* helpful in understanding the appropriate role of government from both an equity and efficiency perspective. Justice or equity issues abound in the discussion of eminent domain and regulatory takings. Efficiency focuses on moving resources to their highest valued use. The power of government over private property rights, in a world of positive transaction costs, has the potential to aid in the effective allocation of resources. How extensive that power should be is well treated in this volume. ■