Eminent Domain: An Austrian Critique

Alex Schroeder
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Introduction

Roughly twelve years ago municipal authorities in New London, CT consented to leveling private property around the future site of a pharmaceutical facility. The intent was to free up space to construct complementary dwellings and offices around the new structure. Years later, the U.S. Supreme Court determined the decision of New London officials was consistent with the United States’ legal architecture, citing that the project was “part of a ‘comprehensive redevelopment plan’ that would provide ‘appreciable benefits to the community.’” The legal justification for this act was grounded in the constitutional principle of eminent domain.

The Takings Clause of the Fifth Amendment to the U.S. Constitution stipulates “…nor shall private property be taken for public use, without just compensation.” This Clause, which has been regarded as something of an equivoque, is such that eminent domain was destined to be a contentious issue in American politics. It was inevitable that this component of the Fifth Amendment would raise two obvious questions, both rooted in semantic ambiguity. First, how does a particular piece of property have to be used for such use to constitute “public use?” Second, what level of compensation is to be considered “just compensation?” While some instances in which eminent domain have been evoked by the authorities have been less detrimental than others, this twofold difficulty presents itself in every case. As will be shown, no clear-cut answers to the “public use” and “just compensation” questions exist.

Eminent domain has been criticized by academics and laypeople across the politico-economic spectrum. Some have focused their attention merely on the more egregious cases, such as Kelo v. City of New London, mentioned above. Others have been
more encompassing in their animadversions of the practice, insisting that the government has a heavy burden of proof if it wishes to justly exploit the principle. In this author’s experience, however, few people contend that eminent domain is necessarily inherently unjust.

The Austrian school of economics has a rich tradition of producing illuminative insights that have provided a strong intellectual justification for freedom, economic liberalism, and private property. The purpose of this paper is to present some of these insights and apply them to eminent domain, in the process demonstrating that it is irreconcilable with individual rights and the principles that govern a free society. In particular, three Austrian contributions to economic thought will be considered: “only individuals choose,” “utility and costs are subjective,” and “private property in the means of production is a necessary condition for rational economic calculation.”

“Only Individuals Choose,” “Public Use,” and Public Property

At the outset of his magnum opus, Man, Economy, and State, Murray Rothbard eloquently provides our foundation:

The first truth to be discovered about human action is that it can be undertaken only by individual “actors.” Only individuals have ends and can act to attain them. There are no such things as ends of or actions by “groups,” “collectives,” or “States,” which do not take place as actions by various specific individuals. “Societies” or “groups” have no independent existence aside from the actions of their individual members.
Rothbard’s assertion is quite enlightening; while on a superficial level it does not seem controversial, he is in fact critiquing a very common practice: speaking of collectives as if they were individuals. The extent to which this error has infiltrated our language is evidenced in part by the “public use” criterion of the Takings Clause.

If groups do not act, precisely what does the stipulation concerning “public use” require? Each individual citizen can be viewed as a member of the public; accordingly, seizing property that is owned and used by one individual or group for the benefit of another individual or group, both partially comprising the public, seems to be a self-defeating endeavor. It would appear that eminent domain necessitates government officials to arbitrarily declare that certain people are to be considered detached, alien elements of society, nonmembers of the public. In other words, it seems the public is simply comprised of those favored by governmental authorities. This author anticipates two rebuttals to this argument, discussed below.

Some would likely employ a counterargument rooted in rudimentary arithmetic. That is, to determine which party is to be truly counted as a part of the public, simply ascertain which of the two is larger. If, for example, the property of a single individual was seized to build a road, bridge, school, offices, which many people would presumably use, such seizure is consistent with the State’s right to use eminent domain and is appropriate. Implicit in this counterargument is the acceptance of interpersonal utility comparisons as valid. Given that the goal of government is to maximize social welfare, goes the argument, harming one person to improve the quality of many peoples’ lives seems perfectly reasonable.
It is nothing of the sort. First of all, there is no possible way any external party could determine the costs of the seizure to the victim, which is required for one to definitively state that they are exceeded by the gains to the beneficiaries.⁴ E.C. Pasour has a strong grasp of this notion:

This cost as it influences choice is based on the decision-maker’s anticipations and cannot be discovered by another person. That is, no one else is capable of accurately assessing the value of the sacrificed alternative by the decision maker. Thus, as recognized and emphasized by the Austrians, the opportunity cost of any activity is inherently subjective.⁵

Given this subjectivity, it becomes quite problematic for any external party to definitively declare that the beneficiaries’ gains from a governmental action exceed the victims’ costs.

In addition to the impossibility of measuring total utility, interpersonal utility comparisons cannot be made, which means one cannot plausibly state that the loss of one is justified by the satisfaction of the many.⁶ That such comparisons can be made is a fundamental assumption in much of mainstream welfare economics. Ludwig von Mises understood that “value judgments a man pronounces about another man’s satisfaction do assert anything about this other man’s satisfaction,” a critique he made in his magnum opus, *Human Action*.⁷ To put it succinctly, “there is no method which would allow us to measure the state of satisfaction attained by various individuals.”⁸ Clearly, if anybody is negatively impacted by an action of government, it is not possible to truthfully demonstrate that this impact was offset by the gains of others.
Another anticipated rebuttal concerns the categorization of the relevant property. Some may contend that, because public property is owned and controlled by the people for the public good, governmental utilization of eminent domain is appropriate if the goal is to replace private property with public property. In light of the Austrian premise that only individuals act, it is reasonable to question exactly what the term “public property” means. While this term supposedly refers to property financed and owned by the taxpaying citizenry, the truth is that, while certainly financed by the public, “the ‘public’ owns no part of the property.”

If ownership is defined as “the ultimate control and direction of a resource,” it becomes essentially impossible for one to “appropriate for his own individual use his aliquot part of ‘public’ property.” This critique of eminent domain is not wholly rooted in the difficulties of public ownership, however. The truth of this dubious assertion, “eminent domain is justified when an area must be cleared for the construction of public property,” can be tested through empirical analysis.

The primary means by which to nullify this assertion is to simply refer to past court cases. Let us analyze *Kelo v. City of New London* for purposes of illustration. In a 5-4 opinion, the U.S. Supreme Court upheld the use of eminent domain, a case in which the city “would replace existing private homes in good condition with private office space and parking lots.” Obviously seized property does not have to be converted into public property for eminent domain to be legally used. What is particularly instructive in this case is the opinion of one of the dissenting judges, Sandra Day O’Connor, who held that “taking of a private property for the benefit of another private party does not constitute public use, unless there is a direct public benefit, such as the elimination of a blighted area.” That is, upon first glance the decision may appear to be an anomaly, a
close case that under similar circumstances could go the other way in the future. In reality, at least one dissenting member of the court believed that one private party benefitting from government’s forcible confiscation of another’s private party’s property is acceptable. It is therefore unambiguous that property for the “public use” is not tantamount to public property.

The details hereinbefore do not address another fundamental issue: “public property” is not by necessity any more conducive to individual well-being than private property, and may even be less so. Rothbard states that “government ownership means simply that the ruling officialdom *owns* the property.”¹³ He further expounds on one potential pitfall of public ownership:

> It is curious that almost all writers parrot the notions that private owners, possessing time preference, must take the “short view,” while only government officials can take the “long view” and allocate property to advance the “general welfare.” The truth is exactly the reverse. The private individual, secure in his property and in his capital resource, can take the long view, for he wants to maintain the capital value of his resource. It is the government official who must take and run, who must plunder the property while he is still in command.¹⁴

Against the backdrop of both a reasoned analysis and empirical evidence, it would appear that there are no objective criteria by which one can determine if a new project will be for “public use.” In other words, such determinations are arbitrary within the context of the relevant legal framework. Unfortunately, this framework is sufficiently ambiguous to allow for highly questionable governmental actions, such as in New
London. The victims of eminent domain can take comfort in the fact that they will receive “just compensation,” but this stipulation only leads to further questions.

What Constitutes “Just Compensation”?  

The qualification that “just compensation” must be provided to the owners of seized property may appear to render eminent domain proper to the uninquisitive observer. If the victim is justly compensated, goes the argument, there is nothing about eminent domain that is inconsistent with property rights. Taken at face value, this author sees no problem with this assertion; the appropriate level of compensation must be determined by some means, however. So, what are the just means to establish the just level of compensation?

It is important to be cognizant of a well-known neoclassical critique of this stipulation, which stems from the concept of consumer surplus. Consumer surplus can be defined as “the area under the demand curve and above the price line,” the demand curve being a marginal willingness to pay curve.15 “Just compensation is the fair market value of the property taken,” cites one academic.16 To contend that “just compensation” is the market value of the property taken is to ignore the discrepancy between the value an individual places on his property, and the market value of that property. People maintain their property because, whether consciously or not, the value they place on it exceeds the market value. The former dropping below the latter would function as an incentive to voluntarily offer the property for sale in the marketplace. In the event that the value attached to the property is exactly equal to the market value, the owner would be indifferent between keeping it and selling it. Subjective valuation is stressed by the
Austrians, exemplified by Rothbard’s contention that “it is clear that the determinants of price are only the subjective utilities of individuals in valuing given conditions and alternatives.”\textsuperscript{17} He goes on to emphasize that “there are no ‘objective’ or ‘real’ costs that determine, or are coordinate in, determining price.” Correspondingly, efforts to determine “just compensation” in any manner that does not take into account the owner’s subjective valuation of his property, is invalid.

Those unfamiliar with the concept of demonstrated preference may counter by maintaining that this difficulty can be overcome by simply asking the property owner how much he values his property. To incorporate this practice into eminent domain would be highly impractical, as the owner would presumably overstate this value considerably, hoping to realize greater compensation. Government would find it extremely difficult, if not outright impossible, to honor these statements with commensurate compensation. Setting this consideration aside for the moment, there are relevant insights to be gained from a brief analysis of demonstrated preference. This will facilitate the development of a more robust critique than the neoclassical one presented above.

“The concept of \textit{demonstrated preference} is simply this: that actual choice reveals, or demonstrates, a man’s preferences; that is, that his preferences are deducible from what he has chosen in action.”\textsuperscript{18} It follows from this that the level of compensation an individual would prefer to his property cannot be ascertained until he actually gives up his property for that compensation. Notice also that demonstrated preference renders meaningless the notion of indifference. “If a person is really indifferent between two alternatives,” says Rothbard, “then he cannot and will not choose between them.
Indifference is therefore never relevant for action and cannot be demonstrated in action. "19 Accordingly, if a person attaches a value to his property that is equal to the market value of that property, but nevertheless abstains from selling it, he is not truly indifferent. In this case he prefers the property to the cash.

In light of these reflections, what can reasonably be said about a just level of compensation? Simple: the government can offer a property owner a certain amount of money for his property. If the owner accepts and sells his property to the authorities, the level of compensation is just. If he does not voluntarily sell, the amount should not be considered such. Subsequent governmental confiscation of the property for that amount should be regarded as unjustifiable. Of course, eminent domain does not consist of government merely offering money for a particular piece of property. It by definition entails the forcible taking of property. Moreover, even if the authorities acquiesced and decided to carry out eminent domain on a purely voluntary basis, one is confronted with the issue of the source of government funds. That is, where does government get the money to offer property owners compensation for its public seizures? The answer is taxation, which is in essence a “coerced levy,” realized by means of “coercion and violence.” "20 Unless the State obtains it revenue solely through noncoercive means, which would consist of the citizenry demonstrating its preference for it by paying taxes with no “direct threat of confiscation or imprisonment,” "21 even eminent domain on a voluntary basis is unjust. Naturally, if an organization gains its income noncoercively, and it subsequently uses that income to make an offer to buy a certain property from its owner, we are left with two parties bargaining and trading for mutual gain. We are left with the purely free market, in which there is no place for eminent domain.
Security of Private Property and Rational Economic Calculation

Placing eminent domain under a scrutinizing light pushes one to conclude that its exercise cannot be predicted based on objective criteria, but is rather exploited by public officials in a fairly arbitrary manner. This was recognized over a century ago:

The term “public use,” as used in connection with the right of eminent domain, is not easily defined. The legislature has no power to take the property of one individual and pass it over to another, unless the use to which it is to be applied is for the public benefit. The question of public use is a judicial one and must be determined by the courts.22

The judiciary is ultimately responsible for the interpretation of the two stipulations by which eminent domain is legally qualified. While this is arguably a marginal improvement over leaving its exercise completely subject to the whims of legislative and executive officials, it remains incontrovertible that this openness to interpretation effectively frustrates the efforts of firms and households to engage in the long-term planning necessary to realize their preferred state of affairs. Rothbard’s appreciation of the inextricable relationship between one’s planning and one’s attainment of a desired end is instructive:

His actions in general, and his action in exchange in particular, are always the result of certain expectations on his part, expectations of the most satisfactory course that he could follow. He always follows the route that he expects will yield him the most highly ranked available end at a certain future time (which might in some cases be so near as to be almost immediate) and therefore a psychic profit from the action.23
Upon reflection it becomes quite obvious that, unless economic actors have an impossibly thorough understanding of the relevant judges’ philosophical idiosyncrasies, consumers and workers cannot make the requisite plans to achieve their goals.

This contention can be illustrated by again referring to the controversial decision in New London. It has been documented that Susette Kelo, after whom the aforementioned case is named, had a “deep attachment to her home;” moreover, the Cristofaros, another owner of targeted property, had a “deep affiliation with the Fort Trumbull neighborhood.”24 Such sentiments can be taken as evidence that these two parties remained in their homes to partly attain their “most highly ranked available end,” as Rothbard describes it. That is, maintaining their dwellings can be regarded as part of their respective plans to realize preferred circumstances. The governmental exercise of eminent domain was probably an unforeseeable event they were unable to incorporate into these plans, thereby greatly diminishing the likelihood that these plans would be successful.

The entrepreneur, and how he is affected by the whimsical exploitation of eminent domain, can be viewed as a corollary consideration. Rothbard superbly describes the essence of the entrepreneur:

This process of forecasting the future conditions that will occur during the course of his action is one that must be engaged in by every actor. This necessity of guessing the course of the relevant conditions and their possible change during the forthcoming action is called the act of entrepreneurship.25
Accordingly, coercive government action that functions as an impediment to the effectiveness of this forecasting is detrimental to entrepreneurial activity. It also distorts the market forces that reward the successful entrepreneur, who is normally “the one who has guessed correctly the change in conditions to take place during the action, and has invested accordingly.” Because eminent domain is and must necessarily be exercised arbitrarily, the successful entrepreneur is to an extent a product of chance, as opposed to an exceptionally efficacious forecaster.

That eminent domain can operate as a retardant of successful entrepreneurship is something the supporters of the majority opinion in the New London case likely failed to consider. The case indeed partially hinged on the prediction that it would facilitate “economic development.” Of course, if this justification is put forth the plethora of Austrian literature pertaining to the folly of central planning suddenly becomes pertinent, but that is beyond the scope of this paper. What is important to take away is that “private property in the means of production is a necessary condition for rational economic calculation.” To the degree that eminent domain, which is inconsistent with private property rights, is exercised, this “rational economic calculation” is undermined. This may be why one journalist, reflecting upon the phenomenon in New London, has concluded that “economic development that relies on the strong arm of government will never be the kind to create sustainable growth.”

Concluding Remarks and Considered Recommendation

Perhaps the most unsettling aspect of *Kelo v. City of New London* is the recently publicized fact that the project never materialized. While unrelated to principled
criticism of the city’s decision, this certainly augmented the egregiousness of the circumstances. The event did have the positive effect of motivating people to question whether eminent domain is consistent with an individual’s right to property. Whether consciously or not, these inquisitive critics were probably contemplating some of the Austrian ideas this paper has touched on. The insights that individuals act, value is subjective, and private property is an economic necessity, form the intellectual foundation of a searing indictment of eminent domain. In the past, some had likely taken comfort in the constitutional qualifications that governed eminent domain. However strong this comfort once was, it surely began to deteriorate when the New London authorities initiated efforts to confiscate private property on behalf of another private party. This author has endeavored to show that the Takings Clause is sufficiently ambiguous to allow for such phenomenon.

The terms “public use” and “just compensation” are open to judicial interpretation. Some instances in which eminent domain is exercised are indeed more unjust than others. Because this component of the Fifth Amendment is characterized by equivocal language, it is practically impossible for economic actors to be truly knowledgeable of the relevant legal architecture. Among other problems, this has made it difficult for economic actors to draft and carry out their respective plans to attain desired ends.

Upon consideration of the pertinent facts it is the opinion of this author that, given the existence of a State with such a power, eminent domain should be exercised on a purely voluntary basis. The government, if it is to respect and uphold an individual’s right to property, would ideally only be legally permitted to make an offer to buy a particular
piece of property at a given price. It is inevitable that some, if not most, attempts to use this authority would prove unsuccessful. The irreconcilability of property rights with eminent domain is clear, however:

The government itself is the original holder of the “right of eminent domain,” and the fact that the government can despoil any property holder at will is evidence that, in current society, the right to private property is only flimsily established. Certainly no one can say that the inviolability of private property is protected by the government.31

The strongest refutation of eminent domain may be that if all people had the right to exercise it, “civilization would soon revert to barbarism, and the standards of living of the barbarian would prevail.”32 Austrian sympathizer Ayn Rand often stressed the inextricable relationship between “an objective code of rules” and a peaceful, civilized society.33 As elaborated hereinbefore, eminent domain is inconsistent with both and should be radically reformed or abandoned outright.
Notes


5 Ibid.


8 Ibid., 243.


10 Ibid.


12 Ibid. (italics added)


14 Ibid., 1278-9.


19 Ibid.

21 Ibid.

22 Pocantico Water-Works Co. v. Bird, 130 N.Y. 249, 258, 29 N.E. 246, 248 (1891)


26 Ibid.


32 Ibid.