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Governments almost everywhere enjoy the unilateral power to acquire private property for vital public aims. Constraints upon this power take several forms. First, the law may restrict the government aims or objectives that motivate a taking of private property. Obtaining ground for public works such as roads and parks may be less controversial than takings to allow the expansion of a private golf course or to make way for rows of condominiums and private shops. Second, judicial or administrative oversight can help ensure that fair compensation is paid to private owners. Third, and related to the first two, are the procedural protections in place to examine the aims of government and the proposed compensation to private owners for their property. A fourth, more esoteric constraint on eminent domain (also known as condemnation, expropriation or compulsory purchase) examines whether certain government actions, although not falling within the more recognizable varieties of government takings, nevertheless amount to a taking requiring the payment of just compensation. A government’s regulations, for example, might be so destructive of an owner’s use and enjoyment rights, that an “inverse condemnation” ought to be recognized. Recognizing these “regulatory takings” limits the reach of eminent domain.

Political and fiscal contraints on the power of eminent domain also have an important function. Fiscal contraints derive from the size of a government’s purse. Because compensation must be paid to property owners whose property is taken, government revenues curb the government’s ability to spend funds on the acquisition of private property, whether by means of arm’s length negotiations or via condemnation. A government only has so much money to spend in acquiring property.

Political considerations also play a role in a government’s eminent domain actions. The unpopularity of a particular project or taking certainly weighs
upon a government decision maker’s willingness to assert the power of eminent domain against a property owner. As a government’s ability to maximize available revenues increases, the check of fiscal restraints diminishes, and political limitations upon the power of eminent domain may prove unsatisfactory where the property owner is politically marginalized. Indeed, the democratic political process can represent a threat to the overreaching of eminent domain powers where elected leaders are tempted to implement takings against politically marginalized property owners in order to curry favor with more influential commercial interests such as developers. Accordingly, the legal limitations on eminent domain powers – procedural safeguards, superintendency over public objectives, and fair compensation – become more important than political/fiscal constraints.

One of the primary concerns with eminent domain is “protecting the little guy” from the government’s takings power. A second concern with the scope of eminent domain powers can be located in economic aims. The existence – not just the exercise – of the government power of eminent domain impacts valuation and property use decisions. Investments in property will necessarily take account of the risk of the property becoming the subject of a condemnation. Predictably, then, economic theorists such as Richard Posner and John Coates have engaged with eminent domain in numerous ways. In theory, if a government were required to completely indemnify a property owner upon the exercise of eminent domain, nearly all concerns would evaporate. If compensation is “so complete that the owner is indifferent between keeping the property and getting the compensation” then the property owner will be equally happy whether his property is taken or not (again, at least in theory). But the law seldom requires complete indemnification: moving costs and subjective valuations may not be included, for example. Moreover, high transaction cost settings and “hold outs” such as where large numbers of contiguous parcels are required (e.g., for a military base) can skew things considerably. Indeed, the demand created by the government’s need for a scarce resource such as parcels in particular location will drive up the fair value of those parcels. Should this appreciation be included in the calculation of fair compensation?

The importance of the fine points of eminent domain rules is difficult to overstate, impacting as they do both individual property rights and societal economic principles. Although a power which necessarily exists in

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