



**A HAYEKIAN CASE AGAINST
ANARCHO-CAPITALISM:
OF STREET GRIDS, LIGHTHOUSES,
AND AID TO THE DESTITUTE**

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ABSTRACT: Murray Rothbard and other anarcho-capitalists would abolish all governments. Individuals instead would voluntarily subscribe to the services of one of a number of competing private protective associations. This vision is a pipe dream. Building on the ideas of small-government classical liberals such as Friedrich Hayek and Milton Friedman, I first identify some utilitarian programs that, on account of transaction costs, overlapping protective associations could not realistically provide. These include the assembly of land for major public works and the control of air pollution. Second, and more fundamentally, competition among rival protective associations within a given territory would not long endure. On

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account of efficiencies of scale and scope, the provision of governance services is a natural territorial monopoly. Anarcho-capitalists, by imagining a stable system of competing private associations, ignore both the inevitability of territorial monopolists in governance, and the importance of institutions to constrain those monopolists' abuses.

INTRODUCTION

A contrarian streak inspires me, in this invited lecture to the Classical Liberal Institute at NYU School of Law, to defend the utility of governmental endeavors in some domains. Anarcho-capitalists, such as Murray Rothbard, are the chief targets of my remarks. Scholars of an anarcho-capitalist bent imagine a world in which governments have entirely withered away and people mainly coordinate by means of voluntary contracts. Theirs is a utopian fantasy. A government, mistake-prone as it is likely to be, potentially enables the members of a society to prosper. Without the help of governments, New Yorkers would not have had the benefit of, for example, the Brooklyn Bridge, lighthouses, relatively clean air, and welfare programs suited to a geographically mobile society.

As authoritative support for the proposition that governments are potentially useful, I invoke none other than Friedrich Hayek, whose name this Institute bears. Hayek particularly prized negative liberty—freedom from government coercion—and was deeply skeptical of the competence of government bureaucracies. But, as I will show, Hayek was not an anarcho-capitalist, and would have opposed scaling back government to a tiny, night-watchman state.

Although questioning the anarcho-capitalist vision, I should make clear at the outset that I am not a fan of big government. Especially over the course of the twentieth century, the agendas of American governments became far too expansive. At the risk of impoliteness to the host law school, I finger New York City as an exemplar of overreach at the state and local level. The City, at times with the aid of New York State, was an innovator in zoning

regulation (1916), rent control (1920), and the provision of government developed and managed public housing (1934). Each of these policies responds to a real problem and can generate some benefits, but I have devoted much of my scholarly career to contending that the costs of these three particular endeavors commonly overwhelm their good effects.¹ And the central thesis of my book *Order without Law* is that law, and thus the state, is far less influential than many members of the legal profession think it is.² I firmly agree with Peter Leeson that “anarchy works better than you think.”³ However, in some spheres, anarchy does not work better than government. Before criticizing the anarcho-capitalist vision and presenting examples of useful governmental activities, I briefly lay out the pertinent intellectual landscape.

I. TWO STRANDS OF LIBERTARIAN THOUGHT

A. HAYEK AND OTHER CLASSICAL LIBERALS

During the early decades of the twentieth century, most U.S. intellectuals embraced Progressivism. A central tenet of the Progressive movement was that the road to progress lay in the greater centralization of decision-making in the hands of government experts. Hayek’s best-known book, *The Road to Serfdom*,⁴ was published near the end of World War II, when

¹ See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947-54 (1992); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010) (criticizing project-based housing subsidies).

² ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* vii-ix (1991).

³ PETER T. LEESON, *ANARCHY UNBOUND: WHY SELF-GOVERNANCE WORKS BETTER THAN YOU THINK* 1 (2014).

⁴ F.A. HAYEK, *THE ROAD TO SERFDOM* (50th Anniversary ed. 1994) [hereinafter HAYEK, *ROAD TO SERFDOM*].

governmental direction of national economies was at a peak. Hayek's central and Nobel-Prize-worthy assertion in this work was that, in many contexts, central governmental planning is a laughably bad idea.

Would it be desirable, for example, for New York City to appoint a "food czar" to coordinate the essential task of assuring food supply to the city? A Progressive might answer yes. Hayek's implicit answer in *The Road to Serfdom* was an emphatic no. He stressed that no single individual could ever have a complete understanding of a system as complex as New York food supply. An employee of the D'Agostino supermarket chain, the Fulton Fish Market, or a neighborhood bakery would possess fragments of the pertinent knowledge, but each would lack an overall understanding of the entire system. Hayek asserted that the price system nonetheless enabled these decentralized participants to communicate local knowledge of supply conditions and consumer preferences. The owner of a bakery, who would lack a synoptic overview of the entire supply system, could use price information to adjust the bakery's offerings. A food czar, by contrast, would need to assemble global information. In Moscow during the Soviet era, as Hayek would have predicted, the existence of food czars commonly led to bare supermarket shelves. One problem was the Soviet administrators' transaction costs of assembling data. Another was the mediocrity of their decisions, which resulted partly from the overloading of their cognitive capacities.

The Road to Serfdom foreshadowed, by almost two decades, an explosion of interest in the economics of information. In the early 1960s, a seminal article by George Stigler built on Hayek's insight.⁵ And, at around the same time, Ronald Coase's famous article on social costs sparked interest in not only the costs of information, but

⁵ George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

also in other forms of transaction costs.⁶ These contributions soon helped spawn breakthrough scholarship in law and economics, for example, Calabresi and Hirschoff's idea that tort liability should be assigned to those with relatively good information.⁷

Although Hayek was justifiably confident that markets could outperform governments in some contexts, in other domains he explicitly supported government activism. In the various books he published during the three decades that followed *The Road to Serfdom*, Hayek seldom altered his ideas about useful government endeavors.⁸ Hayek explicitly rejected the goal of zero government,⁹ was consistently concerned about potential abuses by private monopolists,¹⁰ favored government provision of public goods that private providers would undersupply,¹¹ supported measured government steps to address externalities arising from private decisions,¹² and advocated some governmental transfer payments to the less fortunate.¹³ Milton Friedman's *Capitalism and Freedom*, a high point of classical liberalism published in 1962, laid out a

⁶ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁷ Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

⁸ F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) [hereinafter HAYEK, *CONSTITUTION*]; F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (3 vols. 1973, 1976, 1979) [hereinafter HAYEK, *LAW, LEGISLATION*].

⁹ HAYEK, *ROAD TO SERFDOM*, *supra* note 4, at 45; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 41.

¹⁰ HAYEK, *ROAD TO SERFDOM*, *supra* note 4, at 42, 215-20; HAYEK, *CONSTITUTION*, *supra* note 8, at 136-37, 264-84; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 64-97 (asserting, however, that a governmental anti-monopoly effort might be a cure worse than the disease).

¹¹ HAYEK, *ROAD TO SERFDOM*, *supra* note 4, at 44-45; HAYEK, *CONSTITUTION*, *supra* note 8, at 259, 375; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 42, 44.

¹² HAYEK, *ROAD TO SERFDOM*, *supra* note 4, at 44; HAYEK, *CONSTITUTION*, *supra* note 8, at 229, 341; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 43.

¹³ HAYEK, *ROAD TO SERFDOM*, *supra* note 4 at 132-34; HAYEK, *CONSTITUTION*, *supra* note 8, at 144, 259, 285-305; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 54-56.

largely similar conception of the potential value of affirmative government.¹⁴

B. ANARCHO-CAPITALISTS

While Hayek and Friedman favored some government, anarcho-capitalists, at the extreme, favor zero. I feature the works of three contributors to the anarcho-capitalist canon. Murray Rothbard, an economist associated with the Austrian School, arguably is the purest exemplar. Rothbard's 1973 book, *For a New Liberty*, explicitly sets the abolition of government as its goal.¹⁵ A book of David Friedman's, Milton Friedman's son, goes almost as far.¹⁶ My third example is Robert Nozick, the most-cited of the trio. Nozick's *Anarchy, State, and Utopia*, published in 1974, is commonly viewed as an endorsement of truncating the state to night-watchman functions.¹⁷

Like Hayek and other classical liberals, anarcho-capitalists tout the importance of protecting individuals' negative liberties. To minimize state compulsion, Rothbard and David Friedman imagine a world in which individuals would govern their interpersonal interactions entirely by means of consensual contracts. These contracts would be enforced not by governments, but by competing private protective associations with whom individuals would have voluntarily contracted.¹⁸ These associations would employ

¹⁴ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

¹⁵ MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* 201 (1973).

¹⁶ DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM* (3d ed. 2014).

¹⁷ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Other significant, and more recent, contributions to the anarcho-capitalist genre include RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* (1998), and EDWARD PETER STRINGHAM, *PRIVATE GOVERNANCE: CREATING ORDER IN ECONOMIC AND SOCIAL LIFE* (2015).

¹⁸ ROTHBARD, *supra* note 15, at 9, 228-34; DAVID FRIEDMAN, *supra* note 16, at 110-16.

arbitration to reconcile differences between, for example, the private firms that would own various roads.

Voluntary contracting, where feasible, is a splendid method of interpersonal coordination. In the absence of fraud and coercion, a contract assures, at least *ex ante*, a Pareto Superior outcome that would benefit both contracting parties. A government program, by contrast, is likely to disadvantage some of the individuals that it affects, for example, some taxpayers called upon to finance it. However, a government program would pass the less-demanding Kaldor-Hicks standard¹⁹ if it were to help its beneficiaries by more than it burdened those it disadvantaged. By applying cost-benefit analysis, government officials could help promote utilitarian outcomes of this sort. In the long run, a government's consistent pursuit of Kaldor-Hicks efficiency across a widely diverse set of contexts would enhance the welfare of virtually everyone.²⁰ Under those ideal circumstances, the government's aggregate activity would comport with normative criteria more demanding than the Kaldor-Hicks cost-benefit test, for example, John Rawls's much-discussed difference principle,²¹ or, possibly, Pareto Superiority itself.

¹⁹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2, at 12-14 (7th ed. 2007).

²⁰ See generally A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407 (1972). An anarcho-capitalist, concerned about maximizing negative liberty, is apt to reject utilitarianism as a normative ideal. See, e.g., DAVID FRIEDMAN, *supra* note 16, at 177; ROTHBARD, *supra* note 15, at 23-24.

²¹ See JOHN RAWLS, *A THEORY OF JUSTICE* 60-65 (1971) (arguing that a person behind a veil of ignorance would reject a societal scheme that failed to serve the interests of the most disadvantaged).

II. THE OTHER-WORLDLINESS OF THE ANARCHO-CAPITALIST VISION

The core appeal of anarcho-capitalism is its steadfast devotion to individual autonomy and the normative ideal of Pareto Superiority. The main problem with the vision is its unrealistic sense of the transaction costs, in a complex setting, that bargainers would incur in contracting with one another. On this score, Nozick is slightly more realistic than both Rothbard and David Friedman.²² Four interrelated doses of reality, presented in roughly increasing order of importance, pinpoint utopian features of the anarcho-capitalist dream.

Many individuals lack capacity to contract. Anarcho-capitalists wish away human frailty. Many people, including minor children and the demented elderly, lack capacity to contract. Legal systems address this issue. Anarcho-capitalist writers seldom even note the problem.

Risks of free-riding. Some individuals, on account of laziness, ineptness, or guile, invariably would decline to subscribe to the costly services that a private protective association or road firm would provide. A government can make free-riding—e.g., the evasion of a tax or toll—a crime, but a private association could not. And, in many contexts, transaction costs would prevent a private firm from detecting and countering free-riders. In these contexts, anarcho-capitalism might unravel.²³

Governance of a territory is a natural monopoly. It is notable that all nations create general-purpose governments that have geographic

²² Nozick senses the inherent advantages of territorial monopolies in governance. NOZICK, *supra* note 17, at 22-25, 118. Rothbard, while noting the possibility that governance is a natural monopoly over a given territory, states that “only a totally free market could decide the matter once and for all.” ROTHBARD, *supra* note 15, at 224. He then proceeds to slight the issue.

²³ Cf. NOZICK, *supra*, at 89-90 (recognizing the risk of free-riding).

boundaries.²⁴ This has been true since the emergence of city-states in Mesopotamia about 5,000 years ago, the first governments in the historical record.²⁵ The virtual universality of this pattern indicates that a monopoly in governance over a particular territory gives rise to major efficiencies of scale and scope in the provision of a variety of goods and services. As Steven Pinker has shown, the emergence of a state capable of controlling crime in a particular area has typically triggered a spectacular decline in violence.²⁶ A territorial monopolist also tends to be a superior provider of physical infrastructure and maintainer of land records. Because individuals benefit from being able to predict how their neighbors will act, there are also territorial efficiencies in the monopoly supply of some legal rules, such as property, tort, and criminal law.²⁷ If multiple protective associations were to compete in the same territory, as anarcho-capitalists envision, these efficiencies of scale and scope would be forgone.

In practice, on account of these efficiencies, either a sole protective association likely would emerge as a monopolist within a given territory, or competing firms in that location would form a cartel. In a review of a William Miller book on Iceland, Richard

²⁴ *But cf.* Bruno S. Frey, *A Utopia? Government Without Territorial Monopoly*, 157 J. INSTITUTIONAL & THEORETICAL ECON. 162 (2001) (decrying this traditional system and exploring alternatives to it). In a federal system, the boundaries of a higher-level government may, of course, subsume the boundaries of several lower-level governments.

²⁵ A Mesopotamian palace complex was located within city walls and housed a reigning monarch. See Robert C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 330-32, 360-61 (1995).

²⁶ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 47 (2011) (describing “Rates of Violence in State and Nonstate Societies”).

²⁷ Territorial efficiencies in adjudication are less plausible. See ROTHBARD, *supra* note 15, at 229 (asserting that adjudication is not a natural monopoly).

Posner asserts that, “The . . . system seems . . . inherently unstable because people have an incentive to form ever larger protective associations, whether based on kinship or on geographical propinquity, until at last one of them achieves a monopoly of force and the state is born.”²⁸ Tyler Cowen similarly argues that a regime of competing protective associations is not a stable equilibrium.²⁹

A homeowner who confronted either a local monopolist or a local cartel would be at least as helpless as a homeowner facing a monopolist government. In the face of monopoly, freedom of contract is a bad joke. In an anarcho-capitalist world, a private firm that controlled local roads or protective services would have the effective power to capture the value of private real estate within the pertinent territory.³⁰ Democratic government, imperfect as it is, provides a better check on strong-arming from above.

The anarcho-capitalists’ most prized examples of spontaneous order themselves indicate the importance of territory in the evolution of governance institutions. The unofficial mining districts that the Forty-Niners established during the California Gold Rush had defined geographic boundaries.³¹ Territory also seems to have mattered, if somewhat less, in Iceland during the era of the Sagas. According to David Friedman, Iceland then was “was divided into

²⁸ Richard A. Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1508 (1992), (reviewing WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING* (1990)); see also Tyler Cowen, *Law as a Public Good: The Economics of Anarchy*, 8 ECON. & PHIL. 249, 250 (1992); John K. Palchaka & Stanley T. Leunga, *No State Required? A Critical Review of the Polycentric Legal Order*, 38 GONZ. L. REV. 289, 304 (2002-2003).

²⁹ Cowen, *supra* note 28, at 258-65.

³⁰ For a less mordant view, see generally Edward Stringham, *Overlapping Jurisdictions, Proprietary Communities, and Competition in the Realm of Law*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 516 (2006).

³¹ Andrew P. Morris, *Miners, Vigilantes and Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581, 598-608 (1998).

four quarters" within each of which nine local chiefs competed in providing religious and political services.³² Friedman depicts the Saga system as one of competing protective associations, and stresses that it survived for three centuries. Icelanders' acquiescence in the eventual elimination of that unusual system, however, suggests instead the efficiencies of a territorial monopoly in governance services.³³

The transaction costs of contracting when affected parties are numerous. Relatedly, in many contexts, potentially coercive coordination by a territorial government would entail far lower transaction costs than would coordination by contract in the absence of government.³⁴ As a result, an anarcho-capitalist society would be less prosperous than a society ruled by a territorially-defined democratic government. The next parts, which feature issues of land assembly, the provision of public goods, the control of air pollution, and the furnishing of social insurance, all illustrate this central point.

III. USING GOVERNMENT COERCION TO EXPEDITE LAND ASSEMBLY

The Brooklyn Bridge and the Manhattan street grid that extends northward from New York University provide two local examples of the merits of government. During the nineteenth century, both were widely heralded. To execute both projects, the city used its

³² David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 404 (1979).

³³ See also Sverrir Jakobsson, *The Process of State-Formation in Medieval Iceland* 8-9 (2009), https://www.academia.edu/1103433/The_Process_of_State-Formation_in_Medieval_Iceland (describing the evolution of exclusive territorial regional governments in Iceland over the course of the thirteenth century).

³⁴ See DAVID FRIEDMAN, *supra* note 16, at 133 (recognizing this possibility).

power of eminent domain. Eminent domain typically entails a government's compulsory purchase of land within its boundaries in return for the payment of a constitutionally required "just compensation."³⁵ Use of the procedure forces a sale, the antithesis of a voluntary contract. Yet the indexes of Rothbard's, David Friedman's, and Nozick's books include no entry for *eminent domain*, an indication of the incompleteness of their visions of how members of an anarcho-capitalist society would overcome coordination problems.

A government commonly uses eminent domain for a public work to quicken the process of land assembly. The problem is familiar. When many parcels are needed and each is known to be crucial to successful completion of the project, an owner for strategic reasons might be tempted to hold out in order to obtain a premium price. The threat of eminent domain greatly reduces this risk. Japan's efforts to complete the second runway for Narita Airport demonstrate the difficulties of consensual land assembly. Narita is Tokyo's primary international aviation hub. In Japan, government powers of eminent domain are relatively weak, and national norms favor consensual contracting, the anarcho-capitalist ideal. For many decades at Narita, a small number of rice farmers have refused to sell parcels lying in the planned path of the airport's second runway. That facility, scheduled for completion in 1978, existed as no more than a stub in 2011.³⁶

Nineteenth-century Manhattanites had less patience. Plans for the Brooklyn Bridge, which eventually opened in 1883, called for roadway approaches roughly one-mile in length on both the

³⁵ See, e.g., N.Y. CONST. art. I, § 7(a).

³⁶ See Mark A. Edwards, *Impediments to Rebuilding in Japan*, PROPERTYPROF BLOG, (April 16, 2011), <http://lawprofessors.typepad.com/property/2011/04/property-law-impediments-to-rebuilding-in-japan.html>.

Manhattan and Brooklyn sides. The owners of the private parcels within each approach numbered in the many hundreds, if not thousands.³⁷ The bridge's sponsors used the power of eminent domain to help acquire these parcels. At best, in the voluntary contracting world of the anarcho-capitalists, the assemblage of land in these approaches would have consumed additional decades. At worst, interest in the building of a bridge to span the East River would have evaporated entirely.

Eminent domain similarly can expedite the opening of useful streets. Manhattan's rectangular street grid stems largely from a map known as the Commissioners' Plan of 1811.³⁸ Government diktats, not voluntary contracts, generated this plan. The key governmental actor was DeWitt Clinton. In 1808, Clinton was serving both as the mayor of New York City and as a state senator in Albany. Prior to that date, the streets of Manhattan had been irregular. The most convoluted street pattern was at the southern tip of the island, where the pioneering Dutch settlers had first congregated. Further to the north, a number of subdividers had subsequently laid out mini-grids, probably with the city's acquiescence. But these mini-grids meshed poorly with one another, creating transportation bottlenecks and numerous lots that were nonrectangular.³⁹

Clinton's maneuverings led to the Commissioners' Plan of 1811. The City eventually ordered, if necessary over private landowners' objections, the compulsory opening of the streets shown on the

³⁷ Historians have yet to provide a thorough account. The best known book on the subject devotes no attention to issues of land assembly. See DAVID MCCULLOUGH, *THE GREAT BRIDGE* (1972).

³⁸ See *THE GREATEST GRID: THE MASTER PLAN OF MANHATTAN 1811-2011* (Hilary Ballon ed., 2012).

³⁹ Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 ALA. L. REV. 463, 468 (2013) (reproducing a revelatory 1842 map of Manhattan streets).

Plan. The Commissioners' Plan, while controversial at the outset, soon won acclaim. For the balance of the nineteenth century, New York politicians steadfastly supported its implementation. The regularity of the planned layout generated many benefits lacking in Manhattan neighborhoods further to the south. The grid opened up faster transportation arteries, facilitated traveler orientation, reduced the number of awkwardly shaped lots,⁴⁰ and lessened boundary disputes.⁴¹ The Plan's regularization of block shapes and lot sizes soon fostered a booming auction market in Manhattan real estate.⁴² The 1811 Plan doubtlessly enhanced property values in the area south of 155th Street, the Plan's northern limit.

A government, of course, can abuse the power of eminent domain. The development agency of New London, Connecticut, did so in the famous *Kelo* case.⁴³ In *The Grasping Hand*, libertarian scholar Ilya Somin documents and excoriates various governmental excesses, especially ones undertaken in the name of "economic development."⁴⁴ At places, however, even Somin grudgingly states that, to overcome holdout problems, a common carrier or public utility such as a pipeline company might warrant being delegated

⁴⁰ The Commissioners rejected "the supposed improvements [of] circles, ovals, and stars," and envisioned a city of "right-angled houses . . . cheap to build." THE GREATEST GRID, *supra* note 38, at 73.

⁴¹ Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 435-36, 450-54 (2011). I do not claim that the 1811 Plan's block sizes, street widths, and open space designations were optimal, but simply that they were better than those further south in Manhattan.

⁴² THE GREATEST GRID, *supra* note 38, at 86-101.

⁴³ *Kelo v. City of New London*, 545 U.S. 469 (2005). In my view, the Connecticut Supreme Court should have prevented, on state constitutional grounds, the taking of Ms. Kelo's house. But, for reasons of federalism, I contend that the U.S. Supreme Court correctly denied her federal constitutional claim. See Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 758 (2009).

⁴⁴ ILYA SOMIN, *THE GRASPING HAND* (2015).

the power of eminent domain.⁴⁵ Richard Epstein, Director of the Classical Liberal Institute at NYU, appears even more willing to entitle a private pipeline company to compel the sale of a right-of-way segment.⁴⁶

IV. THE PROVISION OF PUBLIC GOODS: LIGHTHOUSES AND BEYOND

Some aspects of both the Brooklyn Bridge and the Manhattan street grid fit economists' notions of a "public good." Conventional economic theory holds that markets—i.e., processes of voluntary contracting—undersupply public goods and that a government rightly makes efforts to assure their provision. In contrast to the anarcho-capitalists, Hayek, Milton Friedman, and Somin all have approved affirmative governmental programs to provide these.⁴⁷

A service meets the strictest economic definition of a public good when it is not rivalrously consumed, *and* a private provider could not readily exclude free-riders from consuming it.⁴⁸ Economists have traditionally used the lighthouse as a quintessential example that meets both prongs of this definition.⁴⁹

⁴⁵ *Id.* at 96. *But see id.* at 217-19, 227-28 (touting the possibility of private assembly in these instances).

⁴⁶ When genuine holdout problems exist, Epstein sees a rationale for eminent domain. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 169-75 (1985).

⁴⁷ HAYEK, *ROAD TO SERFDOM*, *supra* note 4, at 44-45; HAYEK, *CONSTITUTION*, *supra* note 8, at 375; HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 41-46; MILTON FRIEDMAN, *supra* note 14, at 30-31; Ilya Somin, *Revitalizing Consent*, 23 *HARV. J.L. & PUB. POL'Y* 753, 759-60 (2000); *cf.* DAVID FRIEDMAN, *supra* note 16, at 139 (conceding the possibility that a national government rightly provides national defense); NOZICK, *supra* note 17, at 21, 90-95 (referring glancingly to the issue of public goods).

⁴⁸ *See* HARVEY S. ROSEN, *PUBLIC FINANCE* 62-64 (2d ed. 1988) (emphasizing the prong of nonrival consumption).

⁴⁹ I thank Steve Shavell for bringing the full literature on lighthouses to my attention.

That the sailing ship *Pinta* had benefited from a lighthouse's beacon while passing a rocky headland would not detract from the value of the same beacon to the *Mayflower*, another ship. And, a light-keeper employing pre-1900 technology who had contracted to provide a light to the *Pinta* could not prevent the *Mayflower* from free-riding on that same light.

Richard and Peggy Musgrave, two pioneers in the field of public finance, distinguished between the *provision* and the *production* of a public good. They noted that a government, while endeavoring to assure the provision of a public good, could turn over the task of producing it to a private firm, which the government would then compensate out of public revenues.⁵⁰ For example, local governments commonly hire private contractors to set off fireworks displays on holidays, and to pave local public streets and sidewalks. But a local government also might use its own employees to maintain some public spaces from which exclusion is not practicable, such as parks and playgrounds.

In 1974, Ronald Coase published an article that challenged the conventional economic wisdom that markets would undersupply lighthouses.⁵¹ Coase reviewed the evolution of lighthouses in Great Britain from 1514 to 1898, and concluded, in a clause that flirted with anarcho-capitalism, that this history showed that "a lighthouse service can be provided by private enterprise."⁵² In the quoted snippet, Coase failed to make the Musgraves' distinction between the provision and production of a public good. As Coase amply demonstrated, British authorities commonly did hire profit-oriented private firms to produce—that is, erect and operate—lighthouses. But, as Coase himself noted in his article, and as many of Coase's

⁵⁰ RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 9 (5th ed. 1989).

⁵¹ R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

⁵² *Id.* at 375.

subsequent critics stressed, British authorities typically compensated those private firms by giving them a share of the tolls that government customs officials had compelled ships entering nearby ports to pay.⁵³ In short, the British system for the provision of lighthouses rested, with rare exception, not on private contractual arrangements, but on compulsory user-fees.⁵⁴ In an anarcho-capitalist Britain, far more coastal vessels would have crashed on the rocks.

Anarcho-capitalists underestimate the difficulties of supplying public goods through voluntary contracts. Consider the supply of roads. Milton Friedman distinguished between thoroughfares from which exclusion would be practicable (limited-access highways), and ones (for example, the streets around Times Square) where toll-taking would be too administratively costly. He advocated privatization of the former, but asserted that transaction costs would bar privatization of the latter.⁵⁵ By contrast, Rothbard and David Friedman, forever purists, advocate the privatization of all streets.⁵⁶ The provision of a street is a natural territorial monopoly on account of the efficiencies obtained when a single actor controls a particular street's maintenance and use. When a private street exists in a homeowners' association or shopping center, for example, developers typically create a governance system through

⁵³ *Id.* at 360, 364-65. In chronological order, the critics of Coase's analysis included David E. Van Zandt, *The Lessons of the Lighthouse: 'Government' or 'Private' Provision of Goods*, 22 J. LEGAL STUD. 47 (1993); Elodie Bertrand, *The Coasean Analysis of Lighthouse Financing: Myths and Realities*, 30 CAMBRIDGE J. ECON. 389 (2006); William Barnett II & Walter Block, *Coase and Van Zandt on Lighthouses*, 35 PUB. FIN. REV. 710, 711 (2007); Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S87 (2011).

⁵⁴ A few British lighthouses survived without government aid. These were voluntarily maintained by hermits and religious orders, whom passing ships rewarded through gift-giving. Van Zandt, *supra* note 53, at 59-61.

⁵⁵ MILTON FRIEDMAN, *supra* note 14, at 30-31.

⁵⁶ ROTHBARD, *supra* note 15, at 202-18; DAVID FRIEDMAN, *supra* note 16, at 70-72.

which the major stakeholders can prevent oppression by the monopolist owning the street.⁵⁷ Privatizing streets, where feasible, thus typically would result in, not the elimination of government, but the creation of new forms of government.

V. THE INTERNALIZATION OF EXTERNALITIES

Legal systems commonly attempt to address the spillover effects, positive or negative, that a party's action may have on others. As Coase recognized in his seminal article on social cost, in the absence of transaction costs, private actors would succeed in internalizing these externalities through contracted bargains.⁵⁸ Given that transaction costs in fact are positive, how should the members of a society deal with externality issues? The problem of air pollution, especially the portion arising from motor vehicle emissions, serves to illustrate the relative merits of anarcho-capitalist and governmental approaches.

To their credit, David Friedman, Rothbard, and Nozick all directly confront the issue of air pollution. But each oddly envisions the internalization of pollution costs through judicial litigation, a position that directly contradicts the anarcho-capitalist wish for a minimal state.⁵⁹

To David Friedman, "The simplest solution . . . is to permit parties injured by air pollution to sue for damages, presumably in class actions by many victims against many polluters."⁶⁰ Simplest?

⁵⁷ See Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. PA. L. REV. 1519 (1982); Thomas J. Terkel, *Reciprocal Agreements in Shopping Center Developments*, 14 ST. MARY'S L.J. 541 (1983).

⁵⁸ Coase, *supra* note 6.

⁵⁹ None of the three expressly states that private arbitral associations, not courts, should instead handle these matters.

⁶⁰ DAVID FRIEDMAN, *supra* note 16, at 99. See also *id.* at 100 (favoring, if air pollution is to be addressed by the executive and legislative branches, emission fees as opposed to government regulations); *id.* at 305-09.

Pity the judges and attorneys who would have to handle the stupendous burden of fact-finding, on issues such as causation and damages, in such a case. A lawsuit in Southern California, *Diamond v. General Motors Corporation*,⁶¹ is the most pertinent precedent. This was a class action for damages from air pollution brought on behalf of all residents of Los Angeles County against 293 named and 1000 unnamed defendant polluters. In affirming the trial judge's dismissal of the case, a panel of the California Court of Appeal said in part, "the number of parties, the diversity of their interests, and the multiplicity of issues all in a single action would make the proceeding unmanageable."⁶² The judges, who had local Hayekian knowledge of what litigation can and cannot accomplish, declined to get involved.⁶³

⁶¹ *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971).

⁶² *Id.* at 642. Even a commentator who favors remedying air pollution by means of multiple-defendant class actions is concerned about the transaction costs involved: "The pollution sources are far too numerous for their proportionate liabilities to be calculated and collected by ordinary judicial processes. The sums collected should presumably be distributed to the local governments, where people who are harmed by the pollution live, in proportion to the harms the people are suffering." W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 672, 675 (1986); see also *id.* at 794-95 (elaborating this idea).

⁶³ In practice, U.S. judges typically permit a class action for damages by victims of air pollution only when the plaintiffs are a territorially circumscribed group, and the defendants are named. See, e.g., *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013) (ruling that Clean Air Act did not preempt a class action for damages under state common law brought by residents living within one mile of defendant's coal-fired electrical generating plant); cf. *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (holding that federal Clean Air Act barred plaintiffs' federal common law public nuisance claim for injunctive relief against five major electric power companies); see generally Phil Goldberg, Christopher E. Appel & Victor E. Schwartz, *The Liability Engine That Could Not: Why the Decades-Long Litigation Pursuit of Natural Resource Suppliers Should Grind to a Halt*, 12 J.L. ECON. & POL'Y 47 (2016) (asserting that legislative branches would better shape anti-pollution policy).

In *For a New Liberty*, Rothbard states that “The remedy [to air pollution] is simply for the courts to return to their function of defending persons and property rights against invasion, and therefore to enjoin anyone from injecting pollution into the air.”⁶⁴ Well, so much for the use of motor vehicles! In an article published almost a decade later, Rothbard returned, in a somewhat more sophisticated fashion, to the issue of air pollution.⁶⁵ To internalize the costs of motor-vehicle emissions, he then envisioned class action lawsuits by pollution victims against the owners of roads, which in his utopia would be private firms.⁶⁶ These lawsuits, as Rothbard conceived them, would be procedural nightmares. He would not permit a class action that would entail the compulsory joinder either of defendants who had not acted in concert, or of plaintiffs who had not voluntarily joined the class.⁶⁷ Monumental transaction costs would ensue. More importantly, if neighboring road firms were to coordinate by contract in order to achieve a geographic scale suited to the control of air pollution, they would be well positioned to evolve into a cartel capable of exacting monopoly rents from motorists.

Nozick tentatively adopted a position that, like Rothbard’s, is insensitive to the transaction costs of litigation: “One solution [to pollution] might be to allow group suits against polluters. Any lawyer or law firm may act for the general public and sue, being required to distribute a proportion of the amount collected to each member of the included public who claims it from them.”⁶⁸

⁶⁴ ROTHBARD, *supra* note 15, at 274.

⁶⁵ Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55 (1982).

⁶⁶ *Id.* at 90-91.

⁶⁷ *Id.* at 94-95.

⁶⁸ NOZICK, *supra* note 17, at 80. *But cf. id.* at 81, n* (expressing doubts about whether his is “the [best] solution to controlling pollution”).

There is an alternative more expeditious than turning the issue of diffuse air pollution emissions over to trial lawyers and general-purpose judges. A government regulatory agency, ideally staffed with specialists knowledgeable about the technical issues, could be authorized to impose mandatory standards on vehicular and smoke-stack emissions, impose emission fees, or establish a system of tradable emission permits. These environmental agencies undoubtedly would err in many instances, and their directives would generate transaction costs of their own. These various costs, however, typically would pale in comparison to those of the anarcho-capitalists' class actions.

VI. SOCIAL INSURANCE FOR A MASS SOCIETY

Anarcho-capitalists bristle at welfare programs that force taxpayers to make involuntary charitable transfers. They instead would provide income security through consensual systems such as private insurance and family and charitable aid. On this issue both Hayek and Milton Friedman do not concur. Institutions suited to a hunter-gatherer band or small rural village may be ill-adapted to a mass society that is urbanized and mobile. In Hayek's words, because too few individuals currently belong to "small groups" capable of taking care of their members, governments rightly pursue "the assurance of a certain minimum income for everyone."⁶⁹ Friedman similarly concludes that voluntary charity does not suffice in "large impersonal communities." In numerous writings, he argued for a comprehensive negative income tax.⁷⁰

⁶⁹ HAYEK, 3 *LAW, LEGISLATION*, *supra* note 8, at 55. For criticism of this stance, see Richard A. Epstein, *Hayekian Socialism*, 58 *MD. L. REV.* 271, 288-99 (1999).

⁷⁰ See, e.g., MILTON FRIEDMAN, *supra* note 14, at 191-95; Milton Friedman, *Negative Income Tax: I*, *NEWSWEEK*, Sept. 16, 1968, at 86. In a conversation with me in November 2016, David Friedman stated that his father actually opposed

Hayek's and Friedman's positions recognize that urbanization has raised the information costs of determining worthiness to receive aid. A pedestrian who refuses to give to a panhandler in a large city can take comfort from the existence of specialists, some of them government functionaries, who are better able to appraise whether a supplicant deserves a transfer payment.

CONCLUSION

A rough proxy for the size of a national government is the percentage of the national output it spends.⁷¹ Econometricians have sought to determine the effect of a nation's percentage of government spending (the x axis) on its per capita national output (the y axis). They find that the resulting curve has the shape of an inverted U. Most studies find that the level of government spending that would maximize per capita output is on the order of 20–30%.⁷² Classical liberals will take comfort that this range is lower than the spending levels currently observed in most developed democracies. But it also is far higher than the anarcho-capitalist dream of 0%.

As these econometric studies indicate, government activity can foster prosperity. A general-purpose government with monopoly governance powers over a circumscribed territory can exploit various efficiencies of scale and scope that would be unexploited if, as anarcho-capitalists would have it, many private protective associations were to compete for customers within that territory. A government, for example, could better control violence, better provide physical infrastructure, better formulate property law, and better fight air pollution.

government welfare programs, but supported a negative income tax on the ground that it would be better than the existing welter of transfer programs.

⁷¹ François Facchini & Mickaël Melki, *Efficient Government Size: France in the 20th Century*, 31 EUR. J. POL. ECON. 1, 2 (2013).

⁷² See *id.* at 3-4 (summarizing the findings of various studies).

Because these territorial efficiencies of scale and scope are momentous, the private associations that the anarcho-capitalists envision would tend either to merge or coordinate in cartel-like fashion. There would be no sovereign to prevent this from happening. While cartelization might help solve some of the private associations' coordination problems, it would imperil the negative liberty that anarcho-capitalists rightly prize. Individuals and households would confront, not only at their current locations but also anywhere else they might move, a monopolist capable of conditioning services on the payment of exorbitant charges or worse. This emergent monopolist would, in effect, have become a state, with leverage to assert a monopoly over the legitimate use of violence within the territory it controls.⁷³ The residents might then strive to create a political system, such as an oligopoly or democracy, to constrain the monopolist.⁷⁴

The anarcho-capitalist dream of zero government is a chimera. Classical liberals should stop wasting their time on it. A better role model is Friedrich Hayek, who sought to limit government to what it does best.

⁷³ This is Weber's much-cited criterion for the existence of a government. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds., 1946).

⁷⁴ See ARISTOTLE, THE POLITICS (Ernest Barker trans., R.F. Stalley rev. trans., Oxford Univ. Press 1995) (c. 335-322 B.C.E.).