

Kelo v. New London:
Economics and Ethics

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May, 2007

* Will graduate from UNC-Charlotte with a B.S. in economics: May, 2007, and is pursuing his J.D. at UNC-Chapel Hill School of Law, fall 2007. I would like to thank Dr. Peter Schwarz for his many insightful thoughts as well as his practical guidance, and would also thank Dr. Eddy Souffrant, and Dr. David Hartgen for their comments and thoughts.

1. Introduction

A flurry of opposition followed the Supreme Court's 2005 decision of *Kelo v. New London*. The case, in essence, opened the door for government to condemn private property and redistribute it to private developers, in the name of "public use." Economic efficiency was given as the overriding justification for this type of government takings, in spite of supporting evidence that is best described as ambiguous. But the negative reaction to *Kelo* goes much deeper than just objections to immediate economic efficiency. The reaction to *Kelo* implies some sense of moral repugnance and philosophical disagreement. Rather than concluding that a collective "feeling" of fairness (the conclusion some philosophers resort to) commands this response, it may be more correct that the reaction is based upon an ingrained (and rational) sense of efficiency that rules behavior within social contracts.

This paper examines the intersection of the economic and philosophical arguments surrounding the Supreme Court case, *Kelo v. New London*. The structure is as follows: First, a short history of private property rights and the capitalist tradition are presented, to give a background for the reaction. Second, an overview of the reactions to the case is presented. Third, the economic arguments surrounding eminent domain and *Kelo* are outlined. Finally, the reaction to *Kelo* is presented from a "social contract" perspective, and some concluding remarks follow.

2. Property

The institution of private property is lengthy and involved, and the literature addressing both its ethical and economic importance abounds.¹ Credit for the "modern" formal and legal definition of private property is given to the Romans. Galbraith notes in his book *Economics In*

Perspective, “If Roman economic comment was slight, it was, nonetheless, the Roman genius to identify and give form to the institution that, more than any other, would be central to personal gratification, economic development, and political conflict in the centuries to come” (1987, p.19). Property had been given legal standing by the Romans, and it was the Romans who first formally defined the comprehensive “bundle” of legal rights to possess, exclude, alienate, use, profit, and abuse private property as one wishes (Pound, 1939, p.78). Henceforth, intrusion on private property has always required a compelling justification, subject to the strictest scrutiny. This is not to say, however, that the relation of property to man and government has not changed at all. One recent change, for example, is the freedom to quickly alienate and transfer one’s property. Up until the middle ages, as Robert Heilbroner notes, “A medieval nobleman in good standing would no more have thought of selling his land than the governor of Connecticut would think of selling a few counties to the governor of Rhode Island” (1953, p.16).

Defining property did not end with the Romans, and although fundamentally the same, the idea of what constitutes property has undergone a number of slight revisions throughout the years. One important clarification that concerns the purposes of this paper originates with John Locke. The main contribution that Locke provides is summarized by an explanation of his use of the term “natural rights.” This view entails viewing property as existent independent of government creation or recognition.

Locke’s impact on the definition and conceptualization of property in the modern age has been tremendous. Prior to Locke, property had been viewed as a state-created institution; without government, property did not exist. The Locke position essentially turns that view on its head, and proposes that property is the source of government. His claim is that property exists independent of government. Locke imagines a pre-government world in a “state of nature,”

where property exists only as the result of a mixture of a man's labor with nature. Government exists, according to Locke, only to support and police the rights which belong to its citizens. This Lockean position is bolstered by "natural law and the doctrine of natural rights" (West, 2003, p.21). Numerous groups have latched on to the corresponding idea of natural rights, even before Locke put his argument forward in *Two Treatises of Government*. The French Physiocrats, the forerunners to modern economic thought, recognized that "natural laws governed the operation of the economy and that although these laws were independent of human will, humans could objectively discover them – as they could the laws of the natural sciences." (Collander & Landreth, 1994, p.50). In addition, this position on property falls neatly in line with the constitutional concept that government is obligated to protect those natural, fundamental human rights, regardless of any specific enumeration of which rights require that protection.² The important point to emphasize is that social institutions, such as property, are governed by natural laws that exist independent of human creation or recognition. They exist and government, founded to uphold these laws, must then protect the corresponding rights. Edwin West concludes, on the Lockean role of government, "Men will consequently find it practical to consent to a social contract forming a government that is primarily a trustee for its citizens" (2003, p.21).

Ayn Rand may have been the most passionate modern supporter of the individualist, natural law position. Her views, at least regarding property, were not radically different from those of Locke or other natural law proponents. The important addition that Rand makes is her appeal to the masses. Today the finer points of her philosophy are debated as loosely reasoned and inconsistent; she has been rejected and labeled by increasingly emboldened ethicists as supportive of *laissez-faire* economics, a term used to criticize her, but something to which she

would probably agree. Nevertheless, Rand's novels have achieved mass appeal and have spoken to the American public about their individual freedom and rights, especially relating to property. Her influence is extraordinary; over 25 million copies of her books have been sold, and that number is growing at more than 400,000 per year (Ayn Rand Institute, 2007). Her influence has not been limited to the masses; Alan Greenspan, former chair of the Federal Reserve, is counted as one of her closest friends. Her writings have done much to inculcate popular sentiment in favor of strong individual property rights.³

3. Reactions

The popular opposition to *Kelo* type rulings is not slight. According to the National Conference of State legislatures, over 31 states have passed laws limiting eminent domain for economic development. The degree of the reactions range from state constitutional amendments, to defining "public use," to requiring greater public notice (National Conference, 2006). An article in the Saint Louis Federal Reserve's *The Regional Economist* supports these claims and provides a review of current reactions to eminent domain. They conclude that the opposition to the ruling is large, and that a "...vast majority of Americans disagreed with the courts ruling" (Garrett and Rothstein, 2007). Included in the reference lists for both the NCLS and the St. Louis Federal Reserve is literature by lobby groups such as The Castle Coalition, The Institute for Justice, and The Reason Foundation⁴. These are admittedly biased groups presenting their opposition, but it should be noted that if there is large support in favor of the ruling, it is relatively silent.

One interesting spin on the issue of individual rights comes from John Ryskamp in *The Eminent Domain Revolt* (2007). He approaches *Kelo* not as just a violation of the Fifth

Amendments Public Use clause, but as a wholesale violation of civil liberties and rights, under the 14th Amendments Due Process clause. He argues that housing, above and beyond other property, enjoys a special place as a civil liberty, on the same level as freedom of speech and free exercise of religion. This claim may be supported by the Constitutional prohibition against quartering troops in private homes, found in the Third Amendment. Although his book is strongly biased towards the libertarian camp, Ryskamp brings up an important point. The opposition to *Kelo* rests on traditional individual-rights arguments, but more than that, a home is not *just* property. Takings in *Kelo* violate individual rights on two levels: the right to own and possess property, and the right to one's housing. This makes this type of takings especially repugnant.

Alvin Roth provides an interesting look at repugnance as a constraint on markets. He observes that repugnance is a real constraint on markets, "every bit as real as the constraints imposed by technology or by the requirements of incentives and efficiency" (2007, p.4). He cites examples of limitations placed on markets for human organs, slavery, and lending money for interest. Putting the above in terms of repugnance as a constraint on markets, or perhaps in this case, repugnance as a constraint on the anti-market, we see similar constraints. Legal intervention is beginning to limit the use of eminent domain, on the state-level, as well as the private. One example of the private reaction comes from John Allison, CEO of BB&T bank. From a news-release dated January 26, 2006:

BB&T Corporation today said it will not lend to commercial developers that plan to build condominiums, shopping malls and other private projects on land taken from private citizens by government entities using eminent domain. The commercial lending policy change comes in the wake of *Kelo v. City of New London*, a controversial Supreme

Court decision in June that said governments can seize personal property to make room for private development projects. The court's ruling cleared the way for an expansion of eminent domain authority historically used primarily for utilities, rights of way and other public facilities. "The idea that a citizen's property can be taken by the government solely for private use is extremely misguided, in fact it's just plain wrong," said BB&T Chairman and Chief Executive Officer John Allison (2006).

How many other private institutions will follow suit in this dramatic manner remains to be seen, but it should be clear that popular support for Ms. Kelo's position is strong. This is not to say that these views are universal, and it is important to remember that contemporary popular opinion should not always or perhaps ever, determine what is ethical. This reaction does seem to indicate, however, that claims of improving society's overall welfare through eminent domain may be founded on shaky assumptions, since society at large does not want this kind of "improvement."

The Lockean interpretation of property is not without opposition. There are some major differences in the way property is construed in relation to government and owners. Many can be dismissed as auxiliary arguments, not affecting the basis of his main claim, but some have serious merit.⁵ One of the most fundamental attacks on Lockean property rights comes from Jeremy Bentham. He holds that, "Natural rights were dangerous metaphors ("nonsense on stilts") based upon capricious and subjective feelings" (West, 2003, p.29). He proposed that government created and maintained property. His general supposition, however, has deeper implications for policy other than just those concerning property rights. Bentham's contention that natural rights were nonsense led him to conclude that government-created rights must therefore be the reality. If government is the creator of these rights, what should be their purpose? To answer this

question, Bentham says that “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure” (West, 2003, p.30). Bentham argues that government intervention must follow an “agenda,” based upon maximizing net social pleasure, and minimizing pain. Quite paradoxically, government should obey “natures...two sovereign masters,” but “natural rights,” which arise from natural law (or perhaps natural “sovereign masters”) are nonsense. It seems that what Bentham is really doing is replacing one ethic of individual ownership with another of social pleasure maximization, *vis à vi* government action. It is important to remember that in the world of Bentham, the ethic of his pleasure-maximized utopia (“the greatest happiness for the greatest number”) comes first; above the happiness of any single individual, and far above conventional notions of justice.⁶

The modern day support for Bentham is relatively less vocal. In fact, support for Bentham specifically is drowned out by support for a more complex, but not necessarily opposing, set of ideologies, referred to as environmentalist ethics. The positions vary; Epstein refers to it as the “civic virtue” position, Linton Caldwell and Kristin Schrader-Frechette in *Policy for Land* give a moderated view, calling for more responsible land use, which they conclude comes most easily by regulation and reformulating public sentiments towards land. They put the controversies over land policy in terms of “public rights versus private needs,” rather than “private rights versus public needs” (1993). Again, the focus is on environmental issues and not simply public versus private ownership. Their main focus is environmental sustainability and protection, an issue that is not always in line with Benthamite utilitarianism. Government control, even for environmental ideals, does not always pan out. A short examination of Chinese land policy and environmental quality speaks to this. The weak point of the Utilitarian position is illustrated; government may well aspire to provide the best solution to

the problem, but so often the solutions fail, leaving us with the third, fourth or fifth best.

Recognizing that some failure is not an option, but a reality, it seems wise to adopt the system that minimizes the costs of failure; this is the nature of market *equilibria*.

“Maximizing pleasure,” as Bentham says, is good. Economics theory of consumer behavior says that more is better than less, and rational individuals will attempt to maximize utility.⁷ The problem with Bentham, however, is that he rejects the usefulness of Adam Smith’s “invisible hand” in allowing individuals to maximize their own utility for the good of everyone. Instead, he contends that the very visible and very heavy hand of the government is the solution. Its function as creator of property makes it aptly suited to properly distribute and manage many properties for the public good. This can be dangerous; while government can aid in allocating resources efficiently, this is not typically the case. Problems of imperfect information, conflicts of interest, and some would say incompetence, abound. Empirical evidence from the former Soviet block can attest to the efficiency of government resource allocation. In addition, there is no need for this type of government intervention. “The invisible hand” has proven its ability to produce economic growth, and by utilitarian calculations, increased “welfare,” time and place over again. With all this, the importance of strong individual property rights cannot be understated; they are the basic building blocks that support the capitalist system and the basis of trade. Seen emerging here is a dichotomy between socialism and capitalism. Before agreeing with Bentham, questions about society’s value of the freedom of choice should be raised.

The issue is not settled. Although *generally* government intervention and regulation in private markets is looked down upon in capitalist societies, there are some occasions where government rightfully has a place. Individuals do not operate in a vacuum; to facilitate the controversies and problems that will inevitably arise out of the Lockean world of nature,

governments are created. The degree and function of government intervention is explained well by Richard Epstein. He illustrates that there is a certain amount of private benefit that arises independent of government, from the state of nature. The extent of government action should exist first to ensure the security of those private rights. He then goes on to illustrate the second use of government, to bring additional social gains from political organization, by providing public goods for added social benefit. The first function of government, however, should only be preceded by the second in special circumstances, and with great care (Epstein, 1985, p.3-6).

The relationship between individualist and natural rights sentiments with *Kelo* is important. This is because *Kelo* represents a case where the government places its second function, in Epstein's terms, above its first. The ethics of individual ownership are violated, but as noted earlier, government use of its right to forcefully purchase property is sometimes necessary. This normally occurs only under certain conditions, most regularly for providing goods of legal "public use" or economically speaking, "public goods." *Kelo*, however, represents a situation where eminent domain was used not for a public good, or even traditional notions of "public use," but rather for a reallocation of property from individual use to a more profitable private developer's use. This seems to be a movement towards Benthamite utilitarianism, rather than market capitalism. Although the Court purports to continue the support of "public use," it in effect only requires that public use confer some incidental public benefit greater than preexisting conditions. In dissent Justice O'Connor notes that using the Court's incidental "public use" logic, "the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power" (dissent, *Kelo v. New London*, 2005). In essence, the Courts argument is that more people will be made better off, even if just incidentally better off, with the eminent domain action than without it. It will produce a

more socially efficient outcome; “the greatest happiness for the greatest number,” regardless of justice or individual rights.

4. Economics

Efficiency, an economic concept, is well suited to evaluating the usefulness of eminent domain. Some claim that economics, as a science, is value-free; it only evaluates what is, not what should be. This is a noble concept, but not true in practice. Efficiency is the economist’s ethic, and the pursuit of “optimal” output is paramount in economic analysis. The most useful working definition of efficiency may be the Kaldor and Hicks efficiency criterion, where an outcome is more efficient if those that are made better off by a transaction are made sufficiently better off that they could, in theory, compensate any losers from the transaction.⁸ In other words, there must be a net social gain from a transaction for it to be efficient. This concept of efficiency is easily carried over to analysis of eminent domain, or any transaction, in evaluating its ability to improve welfare. It seems to be a small leap from economic conceptions of efficiency creating “net social gains” to improving social welfare (or pleasure, as Bentham might phrase it). This is a dangerous notion. Efficiency may be related to social welfare, but using it as the lone proxy for welfare maximization is incorrect. Additional criterion for evaluating immediate social welfare must be considered. These include equity, justice, and numerous other ethical criteria. Making this distinction clear is important especially in terms of *Kelo*, where there appear so many other ethical and moral concerns.

Government intervention in markets is generally accepted by economists for two reasons. The first is to provide a public good. As noted earlier, public goods are those that would not exist in the market place without government supply. They are characteristically non-excludable and

non-rival. Some eminent domain action may fall under the first case, in situations where government must acquire property to provide goods. Examples may include roads, bridges, and the curiously contentious lighthouse. These involve two components, government supplying goods, and government acquiring property for those goods. However, this use of power is less controversial here. The second case for necessary government intervention comes when a market failure has occurred. *Kelo* type eminent domain takings would fall under the second use of eminent domain. The Court recognizes that its definition of “public use” is significantly less stringent than typical “public goods” definitions⁹, but maintains that the *Kelo* decision is nonetheless justifiable because it will allow economic development to occur that would otherwise be precluded by the non-sale of *Kelo*’s property because of a market failure. This is typically referred to in economic literature as “the holdout problem.”

Patricia Munch provides some background information for this problem (1985). Referring to Figure 1 (p. 22), there are N identical parcels of land available. If all parcels are purchased over a long period of time, the purchase price for all properties should be equal, since they are identical parcels of land. This supply curve of non-contiguous parcels of land is shown by MC_m . The assumption is that as one buyer attempts to accumulate all N properties in a short amount of time and in a contiguous and developable block, the reservation price of each additional seller will rise, well above the individual market value (MC_m), to the mean of the reservation prices, represented by MC_a . This higher curve represents the additional value of having all pieces put together in a developable “block,” and if the buyer can pay each seller his own reservation price, then MC_a is the buyer’s marginal cost curve. This would be an efficient outcome, with Q_c parcels sold. But, because of strategic behavior, bargaining, and the like, the buyer may be forced to pay all owners the reservation price of the owner with the highest

reservation price. A monopsony situation arises, and the buyer will only acquire Q_a parcels. This would be inefficient and the welfare loss from this situation, assuming this MVP curve, would be represented by W . However, eminent domain does not always fare well in this analysis either. If eminent domain power is granted, then the buyer will want to buy Q_{ed} properties, because MC_m will become the buyers new marginal cost curve. Welfare loss here is B ; this is not efficient because of social opportunity costs of accumulating contiguous parcels are not evaluated in determining the sale price of the land. The larger problem becomes apparent when N units of land are the minimum necessary for development to occur. At this point MVP, the “demand curve”, is discontinuous and becomes infinitely elastic for the N th unit. If the discontinuity occurs at some point below MC_b , the development will not occur and would result in the abandonment of otherwise efficient development. Based on this above discussion, it appears that although both eminent domain and the market can result in losses to social welfare, eminent domain has a special ability to resolve many of the issues associated with land accumulation for development.

The obvious problem with eminent use here is that while eminent domain may correct a market failure, its efficient use requires that the government correctly value property so as to eliminate social losses represented by W and B . Imperfect information and conflicts of interest are initial objections to government intervention. Terrence Clauretie, William Kuhn, and R. Keith Schwer present empirical data on the reliability of government compensation (2004). They evaluate prices paid for property taken with eminent domain in Clark County, NV, and compare price paid to prices predicted through a fairly standard hedonic pricing method based on surrounding house prices. Their results indicate a curious relationship between property value and compensation. It appears that higher-value properties receive more than market value, while

lower-value properties receive less than market value. These results bolster arguments made by Justice Thomas in his dissent to *Kelo*, which proposes that eminent domain of this sort will further aggravate inequitable land distribution (dissent, *Kelo v. New London*, 2005). Clauretie, et al, emphasize that their data should not be generalized to other areas and note that it does not take into account administration and litigation costs.

Alternatives to reducing valuation problems have been explored. According to Munch, the social losses from either eminent domain or hold-outs are ambiguous. However, there may be a solution, at least in reducing the social losses from eminent domain. Eminent domain essentially undervalues property taken together in contiguous pieces because “just compensation,” even if it is correctly correlated to market prices of individual pieces, does not take into account the aggregate value of the individual parcels when put together. Amnon Lahavi and Amir Licht envision a new model for compensating landowners (2007). They propose that for each eminent domain action, a special purpose development corporation (SPDC) be set up, which owns condemned land and leases rights to private developers. The landowners whose land had been condemned would be given a choice: either receive normal “just compensation” under current law, or receive shares of stock in the SPDC. This enables the landowners to receive possible additional compensation, up to some market determined value of the SPDC, arrived at on the stock market. Lahavi and Licht point out that this would more closely link the amount of compensation with real market values. In addition, it appears that this pricing method would also reduce the number of otherwise unviable developments from instigating eminent domain action. Any additional rents that would have been realized with eminent domain are redistributed back to the original owners. Because developers would be forced to lease the land from the SPDC at some market determined price, they would be forced to conduct more careful feasibility studies

to determine if their development would actually be profitable.

Transaction costs are a significant component of the efficiency of the hold-out problem. Both markets and government suffer from high transaction costs. Because the losses from either eminent domain or the hold-out problem may be ambiguous, as Munch points out, transaction cost analysis may provide some insight into where each institution, markets or government, will fail the least. The notion that transactions costs should be minimized follows the logic that Ronald Coase presents in his frequently cited “The Problem with Social Cost.” In the world of second bests, with market and government failure due to positive transactions costs and imperfect information, this analysis can be crucial in evaluating which system would be most efficient. So an important question is which institution, government or markets, minimize these costs?

Eugene Kontorovich provides some insight for eminent domain transaction costs, in terms of “liability” or “property” rules, terms familiarized by Calabresi and Melamed in *The Cathedral* (Kontorovich, 2005). Kontorovich argues that the government adopts a liability rule because it reduces transaction costs. Under a property rule, negotiations would have to occur with each individual property owner, and issues like the hold-out problem would arise. The rationale for a liability rather than property rule, however, hinges on the uniqueness of the property to be taken. Kontorovich says, “ In short, it is the lack of close substitutes for the desired property that allows for hold-up,” and goes on, “Thus the Takings Clause’s liability rule is a necessary response to a particularly severe holdout problem – but it is also an overbroad response that exceeds the transaction cost rationale.” While Kontorovich is referring to government takings for explicitly public use, the same would seem to apply for the *Kelo* types. So far, the only transaction costs mentioned are associated with market failure. The government

solution also has significant costs.

Transactions costs related to government are likely significant. In adding up the costs, we must include enforcement costs, litigation and court costs, transfer costs, and many other costs associated with government land takings. The valuation of these costs may vary from case to case and how to best represent these costs would require additional research.

5. Social Contracts

The concept of a social contract governing human behavior is not new, but in many discussions the mechanics of use are regarded as largely unquantifiable. The norms that govern such contracts, indeed the contracts that define rights to property, liberty, civil rights, etc., are thought to have originated from a variety of sources, two of which are Locke's "nature" and Bentham's government. These are typically represented as abstract and indefinable; their creation is mysterious, coming from thin air, religion, or complicated assumptions on human behavior.

There is a more pragmatic approach to analyzing the source of these rights, and in turn, how to efficiently promote the correct public policy regarding property. Socio-biologists Robert Axelrod, Anatol Rapoport, and others have attempted to show by computer simulation the rise and fall of species through the "iterated prisoners dilemma."¹⁰ Ken Binmore in *Natural Justice* takes this same approach to analyze the current notions of "fair" social contracts and their development. He takes a biological-evolutionary stance, showing through a series of games how the development of morals and rights is a natural phenomenon consistent with evolutionary biology. While the evolutionary perspective may have made Locke uneasy, the logic describing the starting point of society is essentially the same.¹¹ Binmore places all players in an "original

position,” similar to Locke’s “state of nature.” The underlying assumption of behavior maintains self-interested rationality, and is based on John Rawl’s *Theory of Justice*, where individuals are asked to decide the structure of society as if behind a “veil of ignorance,” as if their position in society would then be determined entirely at random. Empathy and altruism are then explained as a logical reaction to the possibility of one’s entirely random position in society being the last position. Binmore then goes on to show that, in his words, “people will only honor the toss of a coin that falls to their disadvantage if the alternative is worse” (2005). Again, this is strikingly similar to Locke’s conjecture that the social system arises to create that “worse alternative,” to protect rights. The system arises not as some sort of extra-rational human nature, but it is rational in and of itself. Paradoxes like the Prisoners Dilemma seem to contradict this, but one important and well recognized component that justifies rational moral behavior is the repeatability of the game. As “players” (members of society) interact in the “game” (the game of societal life), they assume that there are an infinite (or at least an indeterminate, but large) number of rounds of interaction. If this is the case, Binmore shows that players will cooperate in the long run to avoid alternative “punishment.” One illustration, among many, that Binmore gives is titled the TIT-FOR-TAT cooperation method, which allows two players to sustain cooperation through the prisoners’ dilemma. This concept comes from Axelrod’s *Evolution of Cooperation*, and is important because it shows the long-term aspects of cooperation, in contrast with short term gains (Binmore, 2005). Reciprocity is shown to be rational and sustainable in the long-term.

By placing the social contract in these terms it should be a small step to see that efficiency as discussed thus far is inadequate. Even if altering property rights in the short term achieves efficiency, as it very well may, there is a larger, dynamic concept of efficiency that must be evaluated. In addition, by using this explanation of the structure of society, the

assumption of a rational and self-interested individual is upheld. Alan Hamlin, in an essay on institutions and morality, notes "...If one allows oneself the power to [re]specify motivations in any manner at all, it is trivial to 'explain' any form of behaviour at all" (2003).

What insight does the evolution of the rational social contract bring to *Kelo*? It seems that the problem with *Kelo*, judging by the reaction to the case, goes much deeper than just concerns about short-term efficiency. But the concern is not so neatly captured by a conceptual desire for "morality" or "fairness," either. These often leave out concepts of self-interest. Evaluating in the long run may highlight some of the more negative costs not fully realized in the immediate time period. There is some mixture of both, and trying to separate efficiency out of the ethics of *Kelo* may be neither productive nor easy. Long-term effects must be evaluated, with regard for the existing social structure of rational individuals.

6. Conclusion

Kelo v. New London is complicated. Legally, the question is fairly straightforward: does economic development constitute "public use?" But the ethical implications that this case raises are not so straightforward. As shown, approaching the case from an entirely ethics-based perspective ignores the important efficiency concerns associated with land development in large societies. At the same time a one-handed economic efficiency approach, as novel as this idea may seem, ignores important concerns about equity and fairness. Additionally, while the economic approach can prescribe the conceptual state of efficiency, the real world application of where eminent domain is efficient has been difficult to identify. Ken Binmore points out that the two are not mutually exclusive concepts. Indeed, some of the base ideas of fairness and justice have imbedded in themselves a certain sense of efficiency, if only evaluated in the long-run.

Kelo is a case where those social norms that have been long established are violated by the institution formed to protect those norms. Efficiency then should be evaluated in the dynamic sense; the long-run effects of the deterioration of property rights would give a more revealing look at the true costs of *Kelo* type policies. While static situations are easy to evaluate in traditional economic terms, the dynamic-efficiency of takings requires a much more rigorous analysis. In the meantime, care must be taken when dealing with property rights such as are dealt with in *Kelo*. The efficiency effects in the short term may be ambiguous, but decisions are entirely reversible. The efficiency effects of altering the structure of property relations in the long-run may have more catastrophic effects; changing the fabric of the social contract is a difficult and risky activity. Even cathedrals can fall when their foundations are shaken too violently.

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- West, Edwin G. (2003) "Property Rights in the History of Economic Thought," in Terry L. Anderson and Fred S. McChesney, eds., *Property Rights*, Princeton, NJ: Princeton University Press.

Figure 1.
Welfare Costs of Assembly with and without Eminent Domain

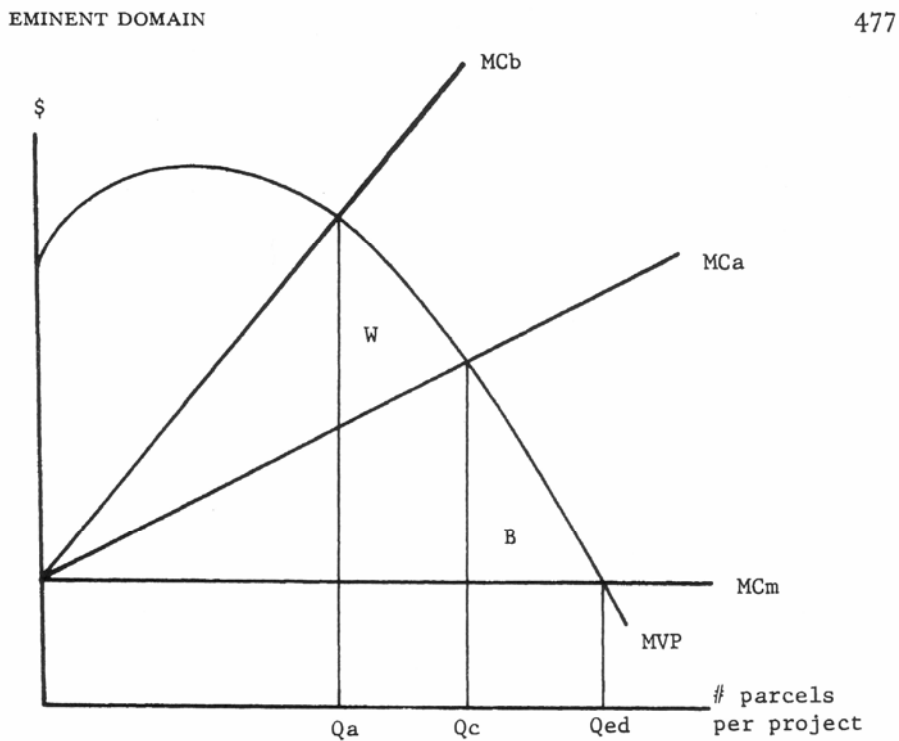


FIG. 1.—Welfare costs of assembly with and without eminent domain

(Munch 477)

Endnotes

¹ For more on the early history of property rights, see:

McCaffery, Edward – “Must We Have the Right to Waste?” in *New Essays in the Legal and Political Theory of Property*. 2001. New York: Cambridge University Press, p.78

Bethell, Tom *The Noblest Triumph: Property and Prosperity through the Ages*. 1998 New York: St. Martin's Press.

² It is interesting to note that the bill of rights, an addition to the U.S. Constitution, was received with some hostility because it was thought that listing specific rights might decrease protection of unlisted rights. Alexander Hamilton supported this argument. For a discussion of the legal issues associated with natural law and “fundamental rights” see: Rossum, Ralph and G. Alan Tarr *American Constitutional Law II: The Bill of Rights and Subsequent Amendments*. 2003. Belmont, CA: Wadsworth, pp.49-62

Storing, Hebert J. “The Constitution and the Bill of Rights,” in Robert A. Goldwin and William Schambra, eds., *How Does the Constitution Secure Rights?* 1985. Washington, D.C.: American Enterprise Institute.

³ Although many of Ayn Rand’s views are found to be controversial in contemporary thought, her position on natural law and rights, although stated more forcefully than most, falls right in line with earlier writers on the topic. She says “Reality exists as an objective absolute – facts are facts, independent of man’s feelings, wishes, hopes, or fears. Reason is man’s only means perceiving reality.” She goes on “...America’s political philosophy was based on a man’s right to his own life, to his own liberty, to the pursuit of his own happiness...America and capitalism are perishing for lack of a moral base. The destroyer is Altruism...Altruism holds that no man exists for his own sake...the political expression of altruism is collectivism or *statism*, which holds that man’s life and work belong to the state – to society, to the group, the gang, the race, the nation.” (p.4) Ayn Rand’s philosophical views on property and the objectivity of natural law and rights can be found in *The Voice of Reason: Essays on Objectivist Thought*. 1988. New York: NAL Books, div of Penguin Books.

⁴ For more information about each of these groups, see <http://castlecoalition.org> , <http://ij.org> , <http://reason.org>. The decision is also opposed by these groups : <http://cato.org> , <http://naacp.org> , <http://aarp.org>

⁵ For a more discussion of other objections to the Lockean property right perspective, see: Epstein, Richard A. Op Cit, pp. 7-18, and West, Edwin G. Op Cit, pp. 20-42.

⁶ One interesting critique of this utopian world is given by Ursula K. Le Guin (1979) “The Ones Who Walked Away From Omelas,” in *The Wind’s Twelve Quarters*, New York: Harper & Row.

⁷ It should be said that Bentham’s idea of maximizing utility is very different from utilitarians who followed him. John Stuart Mill borrowed many ideas from Bentham, but a crucial difference comes in Mill and other utilitarians focus on individual utility maximization, rather than maximizing utility of the entire society by means of government.

⁸ A more inclusive reading says “The Kaldor-Hicks efficiency criterion maintains that an allocation or reallocation of entitlements to resources is efficiency enhancing if (1) it makes at least one person better off, and that person (together with other “winners”) could afford *in theory* to fully compensate everyone made worse off by the allocation and still be left with a net increase in their welfare (Kaldor Efficiency); and (2) those made worse off by the allocation or reallocation could not afford to bribe those who gain into forgoing the allocation or reallocation without suffering an even greater loss in welfare (Hicks Efficiency). From Cole, David and Peter Grossman. *Principles of Law and Economics*. (2005). Upper Saddle River, NJ: Pearson Education Inc. pp. 11-12.

⁹ A technical discussion of the distinction between private and public goods can be found here:

Davis, Otto and David Whinston “On the Distinction Between Public and Private Goods” *The American Economic Review*, Vol. 57, No. 2, pp. 360-373

¹⁰ Found in Robert Axelrod, (1987) "The Evolution of Strategies in the Iterated Prisoner's Dilemma," in Lawrence Davis (ed.), *Genetic Algorithms and Simulated Annealing*. London: Pitman, and Los Altos, CA: Morgan Kaufman, pp. 32-41.

¹¹ It should be noted that this is not Binmore's thought at all; in fact, he denies the relationship between his own theory of social contracts and justice and Locke's on property. The differentiation that he makes is negligible, but is made on page 25 of his *Natural Justice*, op cit. He attacks Locke's position as the same sort of fanciful creation of rights out of thin air as some many other philosophers. It seems this is only based on the reasoning that Locke does not recognize evolution as the creator of those rights, but rather some external power. Locke never implies, however, that any external power is actively changing or setting those rights. Also Locke's contemporary political and religious situation should be taken into account.