University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 7 | Issue 1 Article 9

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Recommended Citation

Nadia E. Nedzel, & Walter Block, *Eminent Domain: A Legal and Economic Critique*, 7 U. Md. L.J. Race Relig. Gender & Class 140 (2007).
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EMINENT DOMAIN: A LEGAL AND ECONOMIC CRITIQUE

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I. INTRODUCTION

This article offers a legal and economic analysis and critique of eminent domain doctrine. Section I gives an overview of the historical development of the concept. Section II continues on to discuss major cases and problems with jurisprudential trends in the Supreme Court's interpretation of the Takings Clause. Section III provides an economic analysis of eminent domain from a libertarian perspective. In Section IV, the article concludes that granting a limited government the power of eminent domain is unnecessary, ill-conceived, and should be eliminated.

II. HISTORICAL BACKGROUND

Plato and other ancient Greek philosophers saw no limits on governmental powers: all ownership interests derived from the ruler's good favor, which could be revoked at will.[1] The concept that governmental powers should be limited, including a limitation on the sovereign's power to take private property, developed out of Western Christian legal tradition, beginning with the concept that church and state should be separate.[2] Grotius, the seventeenth century jurist, originated the concept of "eminent domain."[3] Grotius contended that the state possessed the power to take or destroy property for the public's benefit, but he further believed that when the state so acted, it was obligated to compensate the injured property owner for his losses.[4]

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1. *See generally* PLATO, THE REPUBLIC.

2. *See, e.g.*, 22 *Matthew* 17-21. When asked whether it was lawful to pay taxes, Jesus replied, "Render unto Caesar the things which are Caesar's, and unto God the things that are God's."

3. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11 (4th ed. 1991).

4. *Id.*

Blackstone, too, believed that society had no general power to take a landowner's private property.

> So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road . . . were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.[5]

In practice, however, eighteenth-century colonial legislatures regularly took private property with little or no compensation, sometimes when the owner had failed to develop his property, but more often when the legislature wanted to build a public road.[6] The first state constitutions lacked just compensation clauses, partly because of republican conceptions of property and of rights, but also because the drafters originally had faith in legislatures.[7] Over time, however, the colonials justifiably lost this faith, and gained a new concern for the protection of individual property rights.[8] The Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787, all required just compensation for governmental taking of private property.[9]

Madison incorporated the concept that a government is morally obligated to pay for its interference with private property: "private property [shall not] be taken for public use, without just compensation." Thus, the Fifth Amendment imposes two distinct conditions — two checks — on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation must be paid to the owner.'"[10] Originally, this power applied only to the federal government, but the passage of the Fourteenth Amendment, and subsequent incor-

5. WILLIAM BLACKSTONE, 1 COMMENTARIES *135.

6. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 695 (1985).

7. *Id.* at 700.

8. *Id.* at 700-01.

9. *Id.* at 701.

10. Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2003).

poration of Fifth Amendment protections, expanded its scope to include state and local governments as well.[11]

As initially drafted, the United States Constitution did not include any reference to eminent domain. Nor was the lack of any such mention of concern to those who objected to the document. James Madison drafted the Bill of Rights, including the Fifth Amendment, in an effort to increase the chances of constitutional ratification. The primary concern at the time was that the new federal government would be too strong, and the Bill of Rights was desired as a further check on it. Madison added the Takings Clause because he was keenly concerned with protecting private property rights,[12] and it was adopted in a slightly modified form with little or no debate in Congress.[13]

Apparently the clause was not considered particularly significant because most members of the Constitutional Convention simply doubted that the federal government would exercise its power of eminent domain and that, therefore, consuming time with discussion of this trivial concern would make little sense.[14] Rather, the debate centered around whether or not the Constitution should include a Bill of Rights. Those concerned with the protection of property from the federal government may have found convincing the argument that Madison advanced in Federalist No. 10. Thus, they may have believed that the Bill of Rights, and the Takings Clause it contained, was unnecessary because the structure of the national government as established by the Constitution adequately protected property interests and other rights.[15] A Bill of Rights was superfluous because it would merely state that "we should enjoy those privileges of which we are not divested."[16] The concern on the other side of the debate, however, was that without a Bill of Rights, and even with one, the powers granted to the federal government under the Constitution would inevitably lead to

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11. *See* Chicago, Burlington, & Quincy R.R. Co., v. Chicago, 166 U.S. 226, 233-36 (1897) (holding that the Takings clause applies to the states through the Fourteenth Amendment).

12. *See* JACK N. RACKOVE, ORIGINAL MEANINGS 330-31 (1996).

13. Treanor, *supra* note 6, at 713.

14. *Id.*

15. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 835 (1995) [hereinafter "Original Understanding"].

16. JAMES WILSON, SPEECH (Oct. 6, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 184 (Ralph Ketcham, ed., Signet Classic 2003).

tyranny.[17] Nevertheless, at the time of the ratification, neither side was particularly concerned with the language of the Takings Clause included in the Fifth Amendment.

III. EMINENT DOMAIN AS INTERPRETED BY THE COURTS

The Supreme Court has had three main difficulties in interpreting the Takings Clause, as can be seen by examining jurisprudential trends. The three problems are: (1) deciding when a governmental action constitutes a taking;[18] (2) the definition of public use; and (3) the definition of just compensation. Thus, the Supreme Court has had problems with all three components of the Clause. In all three instances, Supreme Court jurisprudence has succeeded in enlarging the government's powers at the expense of private owners. Each will be examined in turn.

A. Takings

Originally, the understanding of the Takings Clause was that compensation was required when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.[19] In 1922, however, the Supreme Court held that compensation must be provided when a government regulation "goes too far" in diminishing the value of private property.[20] Determining what is "too far" has created a body of law that recent commentators have described as "a mess."[21] The problem is finding a sensible and stable balance between the individual's right to enjoy and use his property against the government's interest in protecting and promoting the health, safety, and welfare of the community.

Generally, the Supreme Court has upheld land use regulations as valid exercises of a government's police power. For example, gov-

17. *See* THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (Dec. 18, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS, *supra* note 16, at 237-56.

18. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (Harvard University Press 1985). Roy Whitehead & Walter Block, *Environmental Takings of Private Water Rights: the Case for Full Water Privatization*, ENVTL. L. REP. 11162-76 (2002).

19. Original Understanding, *supra* note 15, at 782.

20. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

21. Original Understanding, *supra* note 15, at 782; Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 287 (1990).

ernment may always impose taxes, and can impose other serious burdens without compensation — such as zoning decisions that cause properties to precipitously lose value, or which create noisy highways nearby, or which stop an owner from a noxious use. It was against this background that the Supreme Court considered the case of David Lucas and his South Carolina property.[22] Mr. Lucas bought two very expensive beachfront residential lots, intending to build single-family homes on them. However, two years later, the South Carolina Legislature passed a law barring him from erecting any permanent habitable structures on his land, thus instantly rendering his property virtually valueless.[23]

Reasoning that a regulation becomes a taking if it compels the property owner to suffer a permanent physical "invasion" of his property, or "denies an owner economically viable use of his land," or fails to "substantially advance a legitimate state interest," the Supreme Court held that as the law left Lucas's lots without economic value, it was a taking.[24] In *Dolan v. City of Tigard*, the Supreme Court similarly found a taking where a municipal development plan conditioned a building and expansion permit on an existing business owner's dedicating a portion of her property for storm drainage and for a bicycle/pedestrian pathway.[25] In reaching these decisions, the Supreme Court developed a new two-part test: in order *not* to be termed a taking, a permit condition imposed by a government: (1) must have an "essential nexus" to a legitimate state interest; and (2) must be "roughly proportionate" to the projected impact of the proposed development.[26]

Unfortunately, this rule of rough proportionality has led to a morass of cases in the lower courts. In one such case, the Maryland Court of Appeals held that a city's conditioning approval of a subdivision on its sacrificing of an entire residential lot as a recreational space was *not* a taking, a result arguably inconsistent with *Lucas* and *Dolan*.[27] Thus, the new test has led to inconsistent, irreconcilable holdings just as the old one had. There is still no consensus on what constitutes a taking.

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22. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006-7 (1992).

23. *Id.* at 1007.

24. Nicole M. Lugo, *Dolan v. City of Tigard: Paving New Bicycle Paths Through the Thickets of the Fifth Amendment's Takings Clause*, 48 ARK. L. REV. 823, 829 (1995).

25. Dolan v. City of Tigard, 512 U.S. 374, 396 (1994).

26. Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, *in* 1999 ZONING AND PLANNING LAW HANDBOOK 353, 370 (Deborah A. Mans ed. 1999).

27. City of Annapolis v. Waterman, 745 A.2d 1000, 1012 (Md. 2000).

B. Public Use

Historically, the courts have employed two interpretations of the "public use" exception to the bar against governmental takings: a narrow view and a broad one. The narrow view was that property could be taken only if it was to be used by the public in general: this led to the "purpose" line of cases. So, for example, in the colonial era, one constructing a mill under the Mill Acts was granted the power to take a neighbor's land if he compensated the neighbor: "[a]pparently, the contribution of water power to the general well-being and advancement of the public trumped the rights of the private landowner."[28] This power is more or less identical to eminent domain, and such expropriations were upheld as public uses as against challenges that the benefits accrued to private parties.[29]

In the nineteenth century, many decisions held that governments lacked the power to permit the nonconsensual taking of private property for private use, based on natural law theories or on state constitutional language. They held that actual use by members of the public was essential for constitutional permissibility.[30] Thus, an incidental, amorphous benefit accruing to the public after taking land and transferring it to a private party was insufficient to satisfy the "public use" exception to eminent domain: "public use" meant that the government controlled the use of the property or that the entire public had a right to utilize the property in a physical sense.[31]

However, this "use by the public" standard, which was adopted by the majority of the states, became difficult to apply due to a variety of loopholes, limitations, and evasions which courts utilized to allow expanding industrialization and quick exploitation of natural resources.[32] For example, one court found that the construction of a railroad satisfied the public use definition, but another reached the opposite conclusion.[33] The Supreme Court was of little help in defining

28. Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 256-57 (2006); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 501-02 (2006).

29. Lopez, *supra* note 28, at 256-57.

30. Cohen, *supra* note 28, at 505-06.

31. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §164 (1888).

32. Philip Nichols, Jr., The *Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L.REV. 615, 618-24 (1940) (giving details of evasions); *see also* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 24 (1980).

33. *Compare, e.g.*, Aldridge v. Tuscumbia, Courtland, & Decatur RR., 2 Stew. & P. 199, 203 (Ala. 1832) (upholding the exercise of eminent domain for purposes of constructing a

public use. Even when the Supreme Court recognized that state court decisions were a quagmire, the Supreme Court itself used circular reasoning rather than a definition: it stated that an irrigation plan which took land from some farmers to benefit other landowners was consistent with the narrow "public use" definition because "the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use."[34] Consequently, critics concluded that the expansive nature of what counted as a "public use" posed a substantial threat to private property rights.[35]

The second line of cases involved a broader conception of "public use" by deferring to legislatures' definitions of the term.[36] "[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."[37] In other words, the public use is whatever the legislature says it is.

Finally, in its seminal decision *Berman v. Parker*,[38] the Supreme Court abandoned the 'narrow' definition of public use entirely, and defined *public use* as a generalized benefit to the "public welfare": "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."[39] This decision meant that Berman lost his non-blighted commercial property which was to be transferred to another private party simply because it was in an area designated by Congress for redevelopment.[40] A public agency created by Congress's District of Columbia Redevelopment Act had been granted eminent domain powers to acquire blighted areas in DC, and then transfer the condemned properties to private parties who agreed to initiate projects that conformed to their overall redevelopment plan. Berman's business happened to be in that area, though the premises themselves were not blighted.

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railroad), to Pittsburg, Wheeling & Ky. R.R. v. Benwood Iron-Works, 8 S.E. 453, 467 (W. Va. 1888) (reversing a lower court decision to allow a railroad company to condemn land pursuant state statute) (cited in Lopez, supra note 29, at n.132).

34. Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 164 (1896) (cited and quoted in Lopez, *supra* note 28 at 263).

35. Lopez, *supra* note 28, at 260.

36. United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896).

37. *Id.* at 680.

38. 348 U.S. 26 (1954).

39. *Id.* at 33.

40. *Id.* at 34-36.

A subsequent Supreme Court case, *Hawaii Housing Authority v. Midkiff*,[41] similarly allowed the government to acquire land by eminent domain and then transfer it to private parties, though the circumstances were unusual: rather than a blighted area determination as in *Berman*, Hawaii had determined that a "feudal land tenure system," created by Hawaii's traditional aristocracy had distorted the residential property market, and thus governmental seizure and resale to private parties was justified.[42] In reaching its decision, the Supreme Court further entrenched *Berman's* broad basis for testing the constitutionality of a taking: "[we] long ago rejected any literal requirement that condemned property be put into use for the general public,"[43] and the beneficiaries of an eminent domain action need not constitute "any considerable portion" of the community.[44]

The most recent Supreme Court decision in this line, *Kelo v. City of New London*,[45] is fully in keeping with the policies developed under *Berman*. Like many other New England cities, New London was experiencing economic difficulties in the 1990s; one of its primary employers, the Naval Undersea Warfare Center, closed, and the city's population had diminished.[46] A Connecticut state agency identified New London as a "distressed municipality," enabling the New London Development Corporation (NLDC) to use its power of eminent domain to acquire property for development purposes.[47] The NLDC decided that, once acquired, the property would be transferred to Pfizer, Inc., in the hope that it would be "a catalyst to the area's rejuvenation."[48] Several other homeowners challenged the exercise of eminent domain power as a violation of the Fifth Amendment's "public use" stricture.

In this controversial and fragmented decision, the Supreme Court asserted it had "repeatedly and consistently rejected" the narrow test since the end of the nineteenth century. The majority stated that

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41. 467 U.S. 229 (1984).

42. *Id.* at 232. Traditionally, an island high chief controlled the land, assigning it for development to subchiefs, who would then reassign the land to lower ranking chiefs, who would administer the land and govern farmers and other tenants. As a result, forty-nine percent of Hawaii's land was owned by State and Federal Governments, while another forty-seven percent was controlled by the feudal system, causing a severe shortage of land available for housing.

43. *Id.* at 244.

44. *Id.*

45. 545 U.S. 469 (2005).

46. *Id.* at 472.

47. *Id.* at 473.

48. *Id.* Pfizer had plans for a $300 million research facility, and the development was to include a hotel with restaurants and shopping, marinas, a pedestrian "riverwalk," eighty new residences, a new U.S. Coast Guard Museum, and other office and retail venues. *Id.* at 474.

the narrow interpretation had fallen out of favor over the course of time due to the difficulty of its application and the changing needs of society: the narrow test required answers to questions such as "what proportion of the public need have access to the property?" and "at what price?"[49] The City's "carefully formulated" plan was enough of a public use to justify taking the plaintiffs' properties in order to transfer them to other private parties because it was designed to create jobs, increase the community's tax base, and provide residential and recreational use.[50]

Dissenting, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia, and Thomas, argued that the majority essentially deleted "the words 'for public use' from the Takings Clause of the Fifth Amendment."[51] Justice O'Connor also asserted that the plurality had veered from *Berman* and *Midkiff* by upholding an exercise of eminent domain with only remote public benefits.[52] While *Berman* and *Midkiff* involved taking land from private parties and subsequent redistribution to other private parties, the acquisition of the land led directly to a public benefit, regardless of the subsequent transfer: a harmful use was eliminated by the taking to remove blight in *Berman* and to break the land oligopoly in *Midkiff*,[53] but there was no such purpose in *Kelo*.

In a separate dissent, Justice Thomas agreed that *Kelo* erases the "public use" stricture from the Constitution, but condemned the majority opinion even more vehemently than had Justice O'Connor: "[d]efying [the] original understanding that only public necessity could justify violating the 'sacred and inviolable rights of private property,' the Supreme Court replaces the Public Use Clause with a '[P]ublic [P]urpose' Clause, . . or perhaps the 'diverse and Always Evolving Needs of Society' Clause, a restriction that if satisfied, the Supreme Court instructs, so long as the purpose is 'legitimate' and the means 'not irrational.'"[54] Justice Thomas then described the public use basis of the majority reasoning as being against all common sense: a costly urban-renewal project whose stated public use was only a vague promise of new jobs and increased tax revenue, suspiciously agreeable to the Pfizer Inc.[55] Furthermore, Justice Thomas argued, in keeping with

49. *Id.* at 479.
50. *Id.* at 483-84.
51. *Id.* at 494 (O.Connor. J.dissenting).
52. *Id.* at 500-01.
53. *Id.*
54. *Id.* at 506 (Thomas, J. dissenting).
55. *Id.*

the Constitution's common-law background, the clause was intended to be a most-needed limit on the government; the Takings Clause allows the government to take property only if the government owns, or the public has a legal right to use, the property.[56] Neither the narrow nor the broad line of cases correctly followed the original, natural reading of the clause.[57]

Kelo has resulted in widespread debate on the fiscal and ethical consequences of using economic development to justify the exercise of eminent domain. The fiscal concern is that such government-sponsored redevelopment projects are both costly and unsuccessful. In other words, the use of eminent domain to take property from one private entity and give it to another with the aim of promoting economic development is counterproductive as well as unconstitutional.[58] For example, the Washington DC redevelopment project at issue in *Berman* ultimately failed and the legislation creating it was repealed.[59] A similar project in the Poletown area of Detroit, Michigan involving General Motors also failed, leaving a strip of abandoned and burned-out properties instead of the pre-taking busy commercial area.[60] And, Cincinnati's downtown area gained only a municipal parking lot when Nordstrom ultimately backed out of a redevelopment plan. The mere declaration of an eminent-domain-backed redevelopment plan can itself lead to anticipatory "condemnation blight" where properties lose value precipitously in advance of actual exercise of eminent domain power.[61] Furthermore, it is quite possible that an area considered for an economic-development taking would improve on its own through normal market behavior, without the exercise of eminent domain.

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56. *Id.* at 508.

57. *Id.* at 514-15.

58. Art Rolnick & Phil Davies, *The Cost of Kelo*, 20 FED. RESERVE BANK MINNEAPOLIS 2 (June 1, 2006).

59. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 116, 88 Stat. 652 (codified at 42 U.S.C. § 5316 (2000); *see* 42 U.S.C. §§ 1450-1451 (sections omitted pursuant to § 5316); *see also* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 311-14 (Vintage Books 1992) (criticizing urban renewal and public housing programs as "inherently wasteful ways of rebuilding cities").

60. *See* JEAN WYLIE, POLETOWN: COMMUNITY DESTROYED 30 (1989) (discussing effects of the exercise of eminent domain on Poletown); Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARVARD J. L. & PUBLIC POLICY (2005) (same); *see also* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (holding the Poletown taking constitutional), overruled by County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

61. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoire*, 71 MO. L. REV. 721, 757 (2006).

The ethical concern is that promiscuous redevelopment takings lead to nefarious overreaching by legislators acting in concert with large business entities, victimizing private parties and small firms. Specifically, business interests who want to purchase property for redevelopment at low cost will be motivated to persuade legislative bodies to grant them eminent domain support and then use this power to bully smaller businesses and homeowners. In one such case, when a landlord refused to allow an expansion, a Target store secured eminent domain power from the local government and forced its landlord to allow the expansion.[62]

The reverse is also possible: legislative bodies, greedy for additional tax dollars, will use indefensible methods to either cause areas to be blighted or declare them blighted and then grant eminent domain taking powers simply to raise their tax base.[63] One recent case illustrates exactly this sort of overreaching, as well as the potential for fiscal irresponsibility: a city council allegedly hired first one appraiser and then another in an effort to have an aging, working class subdivision in St. Louis declared 'blighted,' so that it could be slated for redevelopment.[64] The council wanted to replace the subdivision with a shopping mall in an effort to increase the city's tax income, and so the World-War II era subdivision was termed 'blighted' despite the fact that the only problems the appraiser could find were bedrooms in some basements, front porches which had settled, and some windows were too small to allow escape in an emergency.[65] Despite the fact that the City Council granted it eminent domain authority, the developer hired to redevelop the area could not secure financing, and so the project eventually failed, leaving a number of home owners caught between a contract to purchase a new home but no purchaser for the old one. [66]

In response to *Kelo* and perceived problems posed by the exercise of eminent domain for economic redevelopment purposes, thirty-two states passed or were in the process of enacting legislation banning economic development as a "public use" within a year of the *Kelo* decision.[67] Even the United States Congress passed a bill preventing

62. *Id.* at 736.

63. Richard A. Epstein, *Kelo: An American Original*, 8 GREEN BAG 355, 359-60 (2005).

64. Peter W. Salsich, Jr., *Privatization and Democratization – Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 755 (2006) (discussing controversy surrounding the exercise of eminent domain with regard to a development project in the St. Louis suburb of Sunset Hills).

65. *Id.* at 757.

66. *Id.* at 755-56.

67. *See* Enacted Legislation, Castle Coalition, *available at* www.castlecoalition.org/legislation/passed/index.html (listing post-Kelo eminent domain legislation).

the use of federal money in connection with a federal, state, or local economic redevelopment taking where private entities would be the primary beneficiaries.[68]

C. Just Compensation

Theoretically, the Supreme Court has interpreted "just compensation" as requiring that the owner of condemned property be put in as good a position pecuniarily as if his property had not been taken;[69] however, the compensation granted is widely recognized as consistently under-compensatory.[70]

Under eminent domain practice, the expropriating agency must first attempt to purchase the property through voluntary negotiation on the open market before resorting to condemnation.[71] Nevertheless, the owner of the property at issue is likely to understand that an eminent domain action is threatened if he refuses to sell on the government's terms, and therefore as a practical matter, even this "free negotiation" has a coercive nature. Once the owner has refused to sell and the agency brings the threatened action, although the condemned owner is theoretically due the full economic value of the property taken, practical difficulties have made it necessary for the courts to develop and follow working rules to enable determination of that value.[72] This particularly concerns holdout landowners whose actions purportedly could drive up the price of the property until the government offers compensation higher than the market price and equal to or greater than

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68. Transportation, treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY 2006, Pub. L. 109-115, Title VII, § 726 (Nov. 30, 2005) ("No funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use: Provided, That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities . . . .").

69. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); United States v. Miller, 317 U.S. 396, 373 (1943); Olson v. United States, 292 U.S. 246, 255 (1934); Campbell v. United States, 266 U.S. 368, 371 (1924); Seaboard Airline R. Col. v. United States, 261 U.S. 299, 304 (1923) (all holding that just compensation requires that the owner be put in substantially the same position pecuniarily as if he would have been if his property had not been taken).

70. Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580 (1995).

71. Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 473 (1976).

72. *See 564.54 Acres of Land*, 441 U.S. at 511; United States v. Cors, 337 U.S. 325, 332 (1949); United States v. Fuller, 409 U.S. 488, 492 (1973); United States ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 280 (1943); *Miller*, 317 U.S. at 375.

the value of the property to the government.[73] The primary "working rule" is that of the "fair market value."[74]

Unfortunately, it has been widely recognized that the "fair market value" scheme fails all three of the basic criteria courts use to judge whether a compensation scheme is effective: it fails to ensure that landowners are fairly compensated for their loss, fails to promote efficient use of the Takings Clause, and does not prevent opportunism.[75] Landowners are systematically under-compensated for the loss of their property. Business owners lose business profits and goodwill, removal costs, litigation costs, appraisal fees, and demoralization costs.[76] Homeowners and neighborhoods are uncompensated for any value that could be attributed to emotional or historical attachment to the property, in addition to litigation costs, appraisal fees, and any other indirect costs.[77]

Additionally, the market value method is inefficient because the government cannot incorporate all of the costs associated with the taking and thus fails to consider opportunity costs. It presumes that the only costs it will pay are the "fair market value" costs, and fails to take into account administrative and litigation costs. The former are astronomical: obtaining legislative authorization of eminent domain power, drafting and filing the complaint, serving process, securing a formal appraisal, etc.[78] Similarly, the latter can also be extremely high. In one California case, a jury awarded a family who paid $878,000 for their property $1,070,000, plus $620,000 in attorney fees.[79] Thus, the Taking cost taxpayers almost twice the value of the property. Third, even assuming that opportunism — rent seeking (as it is sometimes termed)[80] — is something to be discouraged, the fair market calculus is ineffective: generally the fair market value system rules prevent lan-

73. *But see* Bruce Benson, *The Mythology of Holdout as a Justification for Eminent Domain and Public Provision of Roads*, 10 INDEP. REV. 165, 165-94 (2005) (arguing that whatever the "holdout" demands is the market price).

74. *Miller*, 317 U.S. at 374; *564.54 Acres*, 441 U.S. at 511.

75. Nathan Burdsal, *Just Compensation and the Seller's Paradox*, 20 BRIGHAM YOUNG U. J. PUB. L. 79, 82, nn. 14-19 (2005).

76. *Id.*

77. *See id.* at 87-88; *see also* United States v. Bodcaw Co., 440 U.S. 202, 204 (1979) (holding that appraisal expenses and expert witness expenses are not part of the "just compensation" required by the Fifth Amendment).

78. *See* Burdsal, *supra* note 75, at 85, 90; Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77-78 (1986).

79. Burdsal, *supra* note 75, at 90 (citing *Property Rights Victories*, THE ORANGE COUNTY REGISTER, Nov. 26, 2000).

80. *See* Walter Block, *Watch your Language* (Feb. 21, 2000) (critiquing this terminology), available at http://mises.org/story/385.

downers from receiving more compensation than the appraised market value of their property, but encourages opportunistic behavior by administrators, attorneys, and litigants.[81]

Moreover, the market value method is a poorly-defined fiction. Fair market value is properly defined as the price that a willing buyer would pay a willing seller in the open market.[82] The reality in an eminent domain/taking context is that the willing buyer is the government, but there is no willing seller.[83]

> Oftentimes, the state claims it is offering a "fair market value" for the property it seeks to seize, but this is a sham. The market price for something is, by definition, the price that both parties consent to. In a fair market exchange, each party gives up something he values less for something he values more, or else he wouldn't agree to it. It is only through such a voluntary transaction that we can determine what something's market value is in the first place. Market value is not universal, but particular to the assets exchanged in a specific transaction. For any given piece of property, there can be no market value without market exchange.[84]

Thus, the judicial definition of fair market value for purposes of an eminent domain taking is confusing, circular, and based on unsound economic theory. Consequently, as interpreted by the Supreme Court, the Takings Clause has been distorted: neither *taking*, nor *public use*, nor *just compensation*, has any consistent, sensible meaning. At this point, under the United States Constitution as interpreted by the Supreme Court, federal, state, and local governments are effectively free to take or legislate-away any property, pay the owner a paltry sum, and then resell the property to another private entity.[85]

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81. Burdsal, *supra* note 75, at 89.

82. Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1984); *564.54 Acres*, 441 U.S. at 511; Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961); *Miller*, 317 U.S. at 374.

83. Burdsal, *supra* note 75, at 91-92.

84. Anthony Gregory, *The Trouble with "Just Compensation,"* (Dec. 5, 2006), *available at* http://mises.org/story/2379.

85. Happily, state and local governments are free to provide protection higher than that provided in the U.S. Constitution as interpreted by the Supreme Court. See supra note 63-64 (discussing post-Kelo legislation); Whitman, *supra* note 58, at 744 (discussing "heritage value" measure of compensation as provided by Missouri statutes). *But see id.* at 758 (pointing

In part, the antifederalists' fear that we were creating far too powerful a government has come to fruition.[86] Contrary to Madison's original intent, due to inconsistent and politically-driven Supreme Court interpretation, adding the Eminent Domain clause to the Bill of Rights has resulted not in protecting individuals' rights, but in circumscribing them instead. Furthermore, giving the government a vague power to take property from individuals implies that it is capable of determining the public good, thus implying that a country is an enterprise association with a collective goal.[87] This is contrary to the vision of at least some founding fathers, such as Madison who viewed the United States as a commercial republic grounded in a multiplicity of individuals' interests.[88]

IV. AN ECONOMIC ANALYSIS OF EMINENT DOMAIN

According to conventional wisdom, some things will simply be unavailable to us as a society without the governmental employment of eminent domain. Preeminent examples include highways, pipelines, railroads, sewer lines, water pipes, and long tunnels. Why? In all likelihood, the territory required to build these amenities will be in the hands of hundreds, and maybe thousands of different property owners. The odds are that at least one of them will hold out for vast amounts of money if his land is to be used for this purpose, thus threatening the entire enterprise. Even those who only somewhat dislike the coercion necessary to expropriate[89] private property rights are thus likely to acquiesce in such seizures of private property, since for them a world without such long thin things (LTTs) would be scarcely tolerable.

In contrast to conventional wisdom, in our judgment, a system based completely on private property rights where all actions are strictly limited to voluntary ones and thus no land seizure is legal is far preferable to one where coercion is legal, even if the result is that LTTs cannot be built. In other words, for us the motto "justice though the heavens fall,"[90] is relevant to real world public policy analysis — it should not be something that merely garners lip service and is not incorporated into actual decision-making.

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out that the post-Sunset Hills, Missouri legislation would not have benefited owners who had sold their homes under the mere threat of eminent domain).

86. *See supra* text accompanying notes 14-17.

87. MICHAEL OAKSHOTT, ON HUMAN CONDUCT 119, 139, 181, 153-58, 234-5, 286, 315 (Oxford University 2003); *see also* Hayak, *infra* note 109, at 94-98.

88. THE FEDERALIST NO. 10 (James Madison).

89. In Canada, eminent domain is called expropriation.

90. Inscription above the bench of the Georgia Supreme Court.

Happily, however, it is our claim that this stark choice is not one that actually confronts us. We do not have to choose between economic freedom and LTTs. We can, proverbially, have our cake and eat it too. We can retain our longstanding appreciation of private property rights, and, also, have long thin things.

The argument for the necessity of eminent domain goes as follows: any time anyone starts building one of these LTTs the holdout problem will arise. Even though there is an obvious benefit to all, say, 5,000 individual property owners from agreeing to take part as a part owner in the LTT creation, each one has an even greater incentive to be a holdout, because then he can reap even greater benefits.

Having stated the economic case for eminent domain we now move to a refutation of it, beginning by showing that potential holdouts are not likely to hold out for any length of time. Holdouts are likely to recognize the following: (1) the gain to be realized by holding out is minimal; (2) that holding-out will place them in an awkward position vis-à-vis their neighbors; and (3) that even if they persist in holding-out, the likely result is a crooked LTT, not no LTT, because there is likely to be little additional expense to the developer in choosing a less direct route.

A. Holdout Profits

The holdout can reap these even greater benefits *only* if the enterprise goes through to completion. Assume the following values per acre of farmland, of the 5,000 owners stretching, say, between Louisiana and California, where we are thinking of building our new road.

If LTT is not built	$10
If LTT is built	$10,000
Successful holdout	$1 trillion
Unsuccessful holdout	$10

The point here is that the $1 trillion windfall is a will-o-the-wisp. It is theoretical. It does not exist. It will never take place. If a holdout insists upon this ridiculous amount, or anything like it, that will be the end of the project. It simply will not be built.

Therefore, and to the extent to which these 5,000 property owners (and by extension, all such people) are motivated by greed or profit seeking, and not by a desire merely to balk the travel plans of everyone else, this holdout threat is not a serious one as only a small percent of people are anti social in this way. Similarly, only a small

percentage of the citizenry engage in serious crimes such as murder and rape.[91] Most people are decent and motivated not only by self interest in terms of maximizing their own profits or revenues, but even by the good of others or society in general (how else can we account for the widespread practice of charitable giving in the United States).[92] This is perhaps the most important of the points made here. For, if it is stipulated that most people have an overwhelming desire to become richer, not a stubborn desire to reduce everyone else's welfare, then human nature is in *favor* of LTTs being built under a regime of economic freedom (and eminent domain authority is unnecessary).

It cannot be denied that bargaining power will play a role here.[93] The only point being made at present is that the holdout, if he is motivated by greed rather than sheer bloody-mindedness, will realize that if he insists upon the proverbial $1 trillion, he will get nothing from the LTT, since it will not be built. Thus, he will have to settle for a more "reasonable" amount for his land. We move, then, from the horror story of the holdout who prevents the road or pipeline from being built, to one who is merely trying to maximize the value of his land holdings. If the developer offers a flat $10,000 per acre for land that previously was worth $10 per acre, and states that if a single owner demands more he will build elsewhere, it is entirely possible that even the limited bargaining power help by each land holder will greatly decrease.

B. Peer Pressure and the Holdout's Plight

Consider the plight of the holdout. All the neighbors are positively *hungering* for the LTT to come through so that their land can increase in value from $10 per acre to $10,000, in the example given above. There is this one holdout in town demanding the never to be attained $1 trillion. None of the townsfolk will have anything to do with the holdout or his family. Yet, still, provided these other people do not use violence against him, there may well still be some few holdouts, out of our assumed sample size of 5,000. But this phenomenon, alone,

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91. The U.S. has the highest incarceration rate in the world, see study *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf; and it is only 500 per 100,000, http://www.ojp.usdoj.gov/bjs/Glance/incrt.htm.

92. *See Giving Statistics*, *available at* http://www.charitynavigator.Org/index.cfm/bay/content.View/cpid/42 (presenting statistics analyzing the sources of wide-spread charitable giving in the United States).

93. *See generally* Adam Clanton, *Enforcing Individual Rights in an Industrial World: Legal Rules and Economic Consequences*, 4 GEORGETOWN J. L. & PUB. POL. 165, 165-98 (2006).

ought to reduce the number of such holdouts to a more manageable size.

C. Non-Straight or Crooked LTT's

An alternative way of dealing with holdouts is simply to work around them, and this is where crooked or non-perfectly straight LTTs come in. Given that only a *very* small percentage of the population will be motivated to holdout through pure malevolence, if by chance one of them pops up on what would have been a straight LTT route, the developing company can always choose a more circuitous path.[94] That is, they can build around the holdout's property. This option, in itself, is likely to discourage holdouts.

There is such a phenomenon as potential competition. The last thing that the extant railroad wants is a competitor to be built parallel to his own operation, a few miles distant from his own. Once this occurs, the capital value of his holdings will plummet. Therefore, *competition* is in operation even if no such alternative route yet exists. The present railroad will not likely price too high for its services,[95] lest the profits earned thereby tempt a competitor to enter the field.

In like manner, the same considerations apply to the would-be holdout, standing in the way of the LTT development. The last thing such a property owner would want would be for the road or pipeline to be sited elsewhere, in a place such that the demand for his own land would not increase at all. In other words, the holdout faces potential competition from every other landowner whose property could be used by the LTT developer as an alternative to his own. This phenomenon, alone, ought to put something of a spike into the wheels of the holdout.

D. Developer's Expenses in the Absence of Eminent Domain Authority

No great or inordinate expenses would likely have to be undertaken by the firm attempting to build the LTT. It could purchase options to buy land along any given route, at a relatively modest price.[96]

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94. For the argument that private interests will likely be able to build LTTs, and the government is therefore not needed at least in the case of roads, *see* WALTER BLOCK, PRIVATIZE THE HIGHWAYS (forthcoming 2007).

95. We are now assuming a free market environment, where giving bribes to the legislature to prevent entry of alternative firms is not an option.

96. Walter Block & Richard A. Epstein, *Walter Block v. Richard Epstein, Debate on Eminent Domain*, 1 NYU J. L. & LIB. 1144, 1144-69 (2005).

Then, if a holdout refused to cooperate, this company could turn to an alternative route.

Consider *Diagram I.* There are six "curved" paths between the starting and ending points of our road, in, say, New Orleans and San Francisco, in addition to the straight one, A. These six are, respectively B, C, D, E, F and G. The entrepreneur who wants to build a highway or pipeline between these two cities can purchase options to buy land at a relatively modest price. If and when he runs into a holdout demanding an inordinate price, he merely refrains from exercising his options along that one route, and simply reroutes.

DIAGRAM I

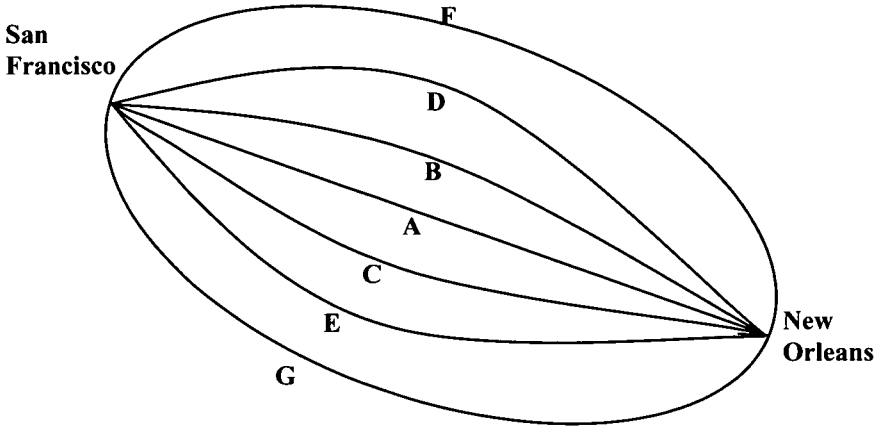
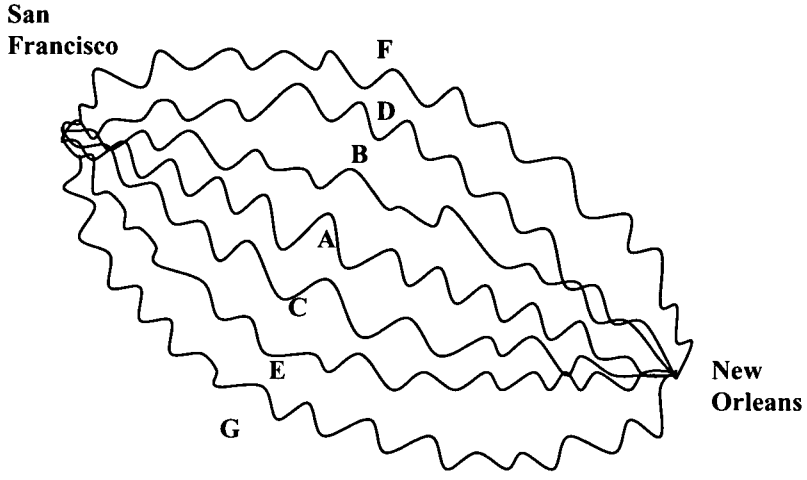


Diagram II furnishes a variation on this theme. Here, instead of "curved" alternative routes, there are jagged or crooked alternative routes as mentioned in the previous section. When a holdout appears an end-run may in this way be made around him and his property. Admittedly, this will be more expensive. Assuming the LTT is a pipeline, additional pumps may have to be placed at the corners in order to keep the oil moving. Or, if the LTT is a road, traffic will have to slow down to accommodate the extra curvature to a greater degree than otherwise on the private road.[97] Nevertheless, as long as the present dis-

97. An example of this is kind of rerouting occurred in Worcester, Massachusetts with the building of U.S. Interstate 290, near exit 11. The road curves around the College of the Holy Cross which was politically strong enough to "hold out" against the straight line development of this thoroughfare that might well otherwise have occurred. See map *available at*

counted capital value of these losses is lower than the amount the holdout is demanding for his land, the LTT project will be undertaken. The additional costs provide an upper limit on what might have to be paid to the holdout.[98]

DIAGRAM II



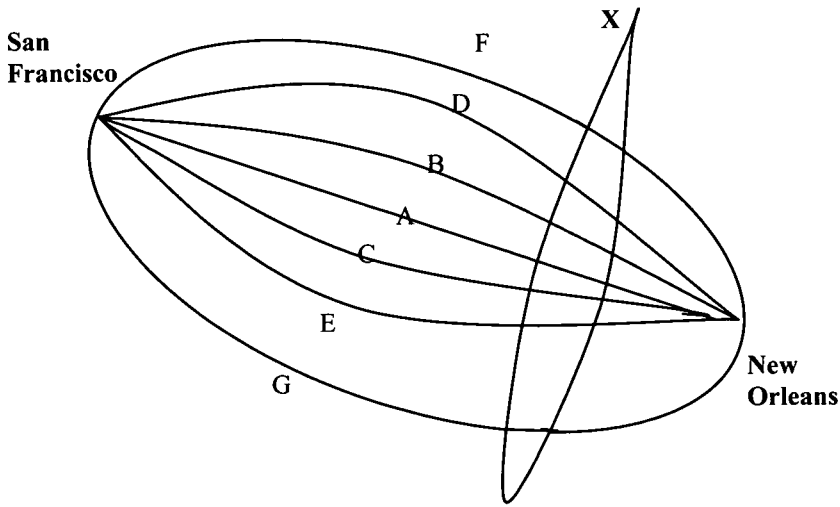
http://www.mapquest.com/maps/map.adp?formtype=address&country=US&pop flag=0& latitude=&longitude=&name=&phone=&level=&addtohistory=&cat=&address=1+College+St&city=Worcester&State=MA&zipcode=01610-2322.

98. It might be thought that the authors of the present paper look upon the holdout as some sort of "enemy." After all, but for him, our case would be easy to make that eminent domain laws are unnecessary in a free society. Nothing could be further from the truth. As it happens, we look upon the holdout with a certain wry approval. Yes, he can be a pest, but his presence is emblematic of the essence of private property rights in a free society. For example, you will never see an edifice constructed under the control of the USSR with a "piece" cut out of it. All such buildings are squares, or regular rectangles. It is evidence of the relative freedom prevailing in the U.S. that every once in a while there will be a high rise edifice with an irregular base. Sometimes, there is (or was) a little house belonging to a holdout in this space. Sometimes, an empty lot. In one case on Canal Street in New Orleans, a Sheraton hotel was built over and around an old drugstore whose owner held out – thus the high-rise was built lacking a pyramidal section in its base, in which nestled the drugstore. Apparently, when the owner died, the heirs sold the property to Sheraton, which promptly tore down the drugstore and filled in the missing piece. Such anomalies bear testimony to protection of property rights and freedom from contract, two concepts which are bulwarks of commercial success in the United States.

E. Extreme Holdouts: The Worst Case Scenario in the Absence of Eminent Domain

The worst case scenario for advocates of our position that LTTs can be built by private enterprise without resort to eminent domain, is the sort of holdout situation depicted in *Diagram III*. Here, the proposed road is to be laid out in an east west direction, and the land owned by the holdout runs north south, overlapping each and every one of the alternative east west routes that might otherwise be followed by the developer. That is, holding X overlaps routes A, B, C, D, E, F, and G.

DIAGRAM III



The first thing to be said about this scenario is that it is an extremely unlikely one. Any firm economically strong enough to own such a large parcel of land is unlikely in the extreme to take on the role of holdout. Much more plausible would be that such an enterprise would want to become partners with the developer, contributing its land in return for an ownership share in the LTT. Nor is it reasonable to assume, at last, that the landowner in this case could hold up the developer for the theoretical $1 trillion. True, the LTT, subject to what follows below, cannot be built without the cooperation of the owner of this strategic parcel, but it is equally true that the development will not take place if the landowner attempts to obtain the entire profits there-

from. No, here there will be a bargaining situation, with economic theory unable to determine each party's shares of the ensuing revenues.

But, even if such a situation were to ensue, the developer is not without a strategy that will likely overcome the holdout's roadblock. Assuming the geographical situation makes it impossible for the LTT to be sited around the holdout's parcel, the developer can still tunnel under his land, or bridge over it.[99] While this would be more expensive than building a road on the surface it, like the crooked LTT, places an upper limit on what the holdout can ask as payment for his property: he cannot expect any more than the cost of this bridge or tunnel.[100]

F. Precluding: Feasibility of the Holdout's Last Defense

Even in the face of a bridge or tunnel, the potential holdout is not without a possible response of his own. He could try to homestead the land above his property,[101] *all* of it, in an attempt to preclude the

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99. Walter Block & Mathew Block, *Roads, Bridges, Sunlight and Private Property Rights*, VII JOURNAL DES ECONOMISTES ET DES ÉTUDES HUMAINES, 351, 351-62 (1996).

100. According the *ad coelum* doctrine, the owner of surface land also owns territory stretching below it, in a decreasing cone shape, all the way down to the center of the earth, and up into the heavens, in an increasing cone shape. But this doctrine is incompatible with the libertarian principle of homesteading. Walter Block, *Homesteading City Streets; An Exercise in Managerial Theory*, 5 PLANNING AND MARKETS 18-33 (Sept. 2002), *available at* http://www-pam.usc.edu/volume5/ v5ila2s1/html; http://www-pam.usc.edu/; Walter Block & Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's "Toward a Better Distribution of Land: The Challenge of Agrarian Reform*, 15 J. NAT. RES. & ENVTL. L. 37, 37-69 (1999-2000); Block & Epstein, *supra* note 96; Walter Block, *Earning Happiness Through Homesteading Unowned Land: A Comment on 'Buying Misery with Federal Land' by Richard Stroup*, 15 J. SOC. POL. & ECON. STUD. 237, 237-53 (1990); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (Kluwer Academic Publishers 1993); JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT, AND END OF CIVIL GOVERNMENT, IN SOCIAL CONTRACT 17-18 (E. Barker ed., Oxford University Press 1948); *see* ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987); Murray N. Rothbard, *For a New Liberty* (1973); Michael Rozeff, *Original Appropriation and its Critics* (Sept. 1, 2005), *available at* http://www.lewrockwell.com/rozeff/rozeff18.html; and thus must be rejected in the free society of which we are speaking. After all, the owner of surface land never came within 500 miles of "mixing his labor" with territory 500 miles below it. For criticisms of *ad coelum*, *see* Rothbard, *supra*. One practical difficulty with *ad coelum* is that air flight would be rendered just about impossible.

101. In the view of John Locke, to homestead virgin territory is to mix one's labor with it, thereby converting it from unowned to owned status. Another way to look at this matter is to ask who has a better title to a bit of land: a person who has been farming it, or someone who has never been involved in using it at all, in any manner. Clearly, the former, at least in this view. *See* Block, *supra* note 100, at 237-53; Walter Block, *Homesteading City Streets: An Exercise in Managerial Theory*, 5 PLANNING AND MARKETS 18-23 (2000); Walter Block, *On Reparations to Blacks for Slavery*, 3 HUMAN RIGHTS REVIEW 53-73 (1999-2000); Walter Block,

LTT firm from bridging over his property, or below, *all* of it, in an attempt to preclude the LTT firm from tunneling under his property.[102] This anticipatory homesteading, however, would be very expensive. For, by definition, the LTT is *thin*, while the property in question is anything but. The holdout, moreover, would be like the first speaker in a debate: however high he built, or however deep he tunneled, the LTT developer would have the option of besting him in either direction. The developer only has to homestead land sufficient for his tunnel or pipeline; the holdout must do so for his *entire* subterranean property. Assume that the holdout wishes to forestall the developer, and he needs a cubic mile to do so. In very sharp contrast indeed, the land mass needed for the Chunnel was far less per mile of length. Thus, the developer has a gigantic advantage over the holdout.

Building an underground blocking wall would of course be cheaper than building an underground cubic edifice, but it would not suffice, for the developer can work around it. Suppose the wall is oriented north south. Then, all the builder of the road or pipeline need do, apart from going under it, is to travel to the end of it, onto someone else's property with their permission of course, thus obviating the entire purpose of the plane. Think of the Maginot Line.

Consider the situation in the opposite direction: above, not below. The impeder would have to build a wall, say, 30,000 feet high into the air the entire width of his property to stop airplane travel. But, if so, then the planes could travel at 35,000 feet.

G. The Advantage of the Surprise

The LTT company has another advantage over the potential holdout: surprise. Only the developer knows where it intends to build.

Walter & Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform,'* 15 J. NAT. RES. & ENVTL. L. 37-69 (1999-2000); Block & Epstein, *supra* note 96, at 1144-69; HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17 J. OF LIBERTARIAN STUDIES 11–37 (2003); N. Stephan Kinsella, *How We Come to Own Ourselves*, Sept. 7, 2006, *available at* http://www.mises.org/story/2291; LOCKE, *supra* note 100, at 17-18; ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987); Michael S. Rozeff, *Original Appropriation and Its Critics* (2005), http://www.lewrockwell.com/rozeff/rozeff18.html.

102. Block & Epstein, *supra* note 96; Walter Block, *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, 8 J. DES ECONOMISTES ET DES ETUDES HUMAINES, 315, 315-326 (1998), *compare to* Gordon Tullock, *Comment on 'Roads, Bridges, Sunlight and Private Property,'* 7 J. DES ECONOMISTES ET DES ETUDES HUMAINES, 589-92 (1996).

There is only so much the holdout can do to preclude *all* LTT options. And, each of these can be *highly* expensive. For example, it is no accident that airplanes reached flying altitudes long before anyone thought to build walls high into the air, in order to be bought off by them. To be fair, however, this argument is specious because such activities would not have been accepted by government courts even assuming such constructions were feasible.

Consider the same argument with regard to downward constructions rather than upward. Assume the owner of a roadway of some 3,000 miles, stretching, say, from Baltimore to Seattle wishes to adopt the role of holdout against any north-south LTT development that wishes to pass under its holdings. It will have to begin by building something or other, down, down, down. How far down? This is unclear and highly problematic, since no matter how deeply it claims land below its surface holdings by such 'homesteading,' all the builder of the north south amenity has to do is undercut him by a few feet.[103] Moreover, and this is the crucial point, the 'defense' will have to protect a perimeter stretching for the entire 3,000 mile length of the extant road.[104] In very sharp contrast, all the 'offense' needs is to find one weak spot: a place along this gigantic distance where either the holdout road owner has not built in a downward direction at all, or has done so only to a shallow depth. Then, it is game over. Imagine one football team which has to defend a line 3,000 miles wide, and another that merely has to break through at any one point,[105] to get an even clearer idea of the enormous difficulties placed upon the holdout.

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103. By how many feet below person A's land must person B build? The libertarian criterion is that B not interfere with the peaceful legitimate use of A of his property. So, again, we ask, how many feet below must B build below A's holdings? It depends upon how solid is the land involved, and what exists on the surface. If we are talking of the island of Manhattan, which is virtually solid rock, where there are buildings on the surface extending no more, typically, than 100 feet underneath, then not too far below at all: the rock is strong enough so that the buildings above will not cave in. If territory near New Orleans is under discussion, then very deep indeed, as well as the extra cost required to prevent water seepage. For this land is swampy (query: where have all the swamps gone? Answer: they have been replaced by wetlands.) If A has an apple orchard, then B cannot get too close to the trees' roots lest he interfere with their growth. If there are only corn plants there, whose roots do not extend down as far, then B can build much closer to the surface.

104. We abstract from the possibilities of making end runs up and down either the Atlantic or the Pacific Oceans.

105. Well, okay, not a single geometrical point. Rather, a distance necessary to accommodate the north-south LTT. For a pipeline, what is this, ten feet? For a four lane highway, perhaps one hundred feet, including shoulders.

H. Specialization and the Division of Labor

Specialization and the division of labor will also give an advantage to the developer, *vis-à-vis* the holdout. The onus and expense of developing new techniques of digging tunnels, and expertise in using old ones, will rest on the side of the developer, not the holdout. Although this seems at first glance to be an advantage for the holdout, this is not the case because the LTT developer will likely specialize in only this type of enterprise, whereas the holdout will be involved, entirely, in a completely different industry; perhaps farming or ranching. Thus, any technological breakthroughs in tunneling will in all likelihood first and to a greater degree mastered by the former than the latter.

Remember, the ethos of homesteading incorporates, at least potentially, a race between the developer and the holdout to see which of them can first build real or preventative tunnels or bridges. Given differential specialization in this sort of thing, the advantage once again lies in the direction of society being able to have LTTs without requiring eminent domain laws.

I. Feint

But this does not even begin to exhaust all the advantages enjoyed by the LTT developer in his 'war' with the holdout. All the developer has to do is make a foray, a feint. He can bruit it about that he is intending to build a road or pipeline, where he has no intention of locating. Immediately, under a fully free enterprise system with no eminent domain and fully wedded to homesteading, all would-be holdouts will be sent a-quivering. They must rush to homestead land below their surface holdings, and *deeply* too, the better to make it impossible for the builder to move in that direction without making payments. This, to say the very least, will occasion vast expenses on holdouts' part. Let a few instances of this "crying wolf" type activity occur, and be publicized, where the holdout went to great expense all for naught, and when the real plan becomes actualized, such people will think twice before acting in this manner.

Indeed, 'holdout' is a misnomer. It implies that the property owner who wishes to make a 'killing' by either altogether preventing,[106] or charging a very high price for his land, needs merely to become a 'holdout.' That is, sit tight, do nothing, wait for the LTT de-

106. A thousand pardons. If the holdout totally prevents the LTT, he garners nothing from his preventative efforts.

veloper to come begging, hat in hand. Nothing could be further from the truth. Very much to the contrary, 'holding out' is by far a more activist practice. The holdout must initiate a very expensive homesteading effort in order to preclude the possibility of someone going under, above, or around his surface land holdings. Better nomenclature, instead of holdout, so as to emphasize this activist or initiatory element, might be 'precluder,' 'forestaller,' 'preventer,' 'prohibiter,' 'rejecter,' or 'stopper.'[107]

There is a strong analogy between these sorts of "games" and the predatory price cutting John D. Rockefeller was accused of in the 1911 antitrust suit against him.[108] According to the conventional wis-

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107. Getting a "stop" in basketball takes great initiative, talent, and athleticism. It is by no means a passive accomplishment.

108. Standard Oil began as an Ohio partnership formed by industrialist John D. Rockefeller, his brother William, Henry Flagler, chemist Samuel Andrews, and silent partner Stephen V. Harkness. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). The period following the war of 1861-1865 was a time of unparalleled growth for the American economy, attributable to several factors: the emergence of national markets for manufactured products, the innovation of new technologies capable of manufacturing goods in larger quantities, the generation of vast amounts of capital necessary for financing this growth, and, most important, a relatively free market economy. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 937-38 (1987). By the late 1870s and early 1880s, companies were seeking ways to obtain relief from unrelenting competition as well as innovating ways to organize and manage increasingly giant enterprises. *Id.* at 939; *see generally Standard Oil Co.*, 221 U.S. 1; *see also* GABRIEL KOLKO, TRIUMPH OF CONSERVATISM (1963). According to most historians, one such enterprise was Standard Oil, which absorbed or obtained control over most of its competition in Cleveland Ohio, and then throughout the northeastern U.S., putting numerous small companies out of business (for the correct view, however, see John McGee, *Predatory Price Cutting: The Standard Oil (New Jersey) Case*, 1 J. L. & ECON. 137, 137-69 (1958)). Rockefeller pioneered the trust as a legally enforceable way to unify control over a large number of corporations: trust certificates for common stock in the different corporations were exchanged among industry leaders, and by virtue of holding this common stock, the trust gained legal control over member corporations. Often a trust resembled a cartel because it concerned itself primarily with price and output decisions, not with the firms' actual operations. Fox & Sullivan, *supra*, at 940.

Negative reaction to the business trusts led to the Sherman Antitrust Act in 1890. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988). Although Ohio successfully sued Standard Oil and compelled the dissolution of its trust in 1892, the company separated off only Standard Oil of Ohio, without relinquishing control. When in 1899, New Jersey changed its incorporation laws to allow a single company to hold shares in other companies in any state, the Standard Oil Trust was legally reborn as a holding company. Eventually, the U.S. Justice Department sued Standard Oil of New Jersey under the Sherman Act, and Standard Oil was forced to separate into thirty-four companies, each with its own distinct board of directors. *Id.* These companies formed the core of today's U.S. oil industry, including ExxonMobil, ConocoPhillips, Chevron, Amoco and Sohio (now BP of North America), Atlantic Richfield, Marathon, and many other smaller companies. *See Standard Oil Co.*, 211 U.S. 1.

For a critique of all antitrust legislation as incompatible with free enterprise and private property rights, see William Anderson, Walter Block, Thomas J. DiLorenzo, Ilana Mercer, Leon Snyman, & Christopher Westley, *The Microsoft Corporation in Collision with Antitrust*

dom, all the advantages lay with Rockefeller. He could cut prices in one area, make up the shortfalls from the other divisions of his gigantic corporation. When the local entity was driven to the wall, Standard Oil would jack up prices there, and use the proceeds to launch yet another price war elsewhere. But as has been eloquently shown, all the target had to do was temporarily shut down. In this way the local price cutter would suffer tremendous losses, and the entire process could not even get underway.[109] In a similar manner, the advantage here, at least initially, appears all on the side of the holdout. All the latter has to do, supposedly, is to costlessly hunker down, and wait to 'pounce' on the LTT developer. Not so, not so! Thanks to the phenomenon of libertarian homesteading, he must take a far more active and expensive role. He must preclude the LTT developer from making an end run (around), an under run (tunnel), and an over run (bridge) around him. There are not one, nor two, but *three* margins on the basis of which the developer can operate. The holdout must defend himself in all these dimensions, and perhaps for naught.

J. Homesteading

What is the precluding holdout going to *do* with the land lying significantly below his surface holdings, in order to demonstrate homesteading? If he merely empties it, e.g., "builds" a big underground hole, the LTT may be placed therein, without any harm to the precluder. That may well be his cheapest course of action, but it will avail him nothing in terms of accomplishing the task he sets for himself. The tunnel will in no way interfere with the big hole in the ground.[110] If he places land mines throughout, making it impossible for anything, ever, to be built there, he is no longer a holdout, even an active one. Now,

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Law, 26 J. SOC. POL. & ECON. STUD. 287, 287-02 (2001); DOMINICK T. ARMENTANO, ANTITRUST: THE CASE FOR REPEAL (1999); Walter Block, *Total Repeal of Anti-trust Legislation: A Critique of Bork, Brozen and Posner*, 8 REV. AUSTRIAN ECON. 35, 35-70 (1994); Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUSTRIAN ECON., 81, 81-96 (1993); Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUSTRIAN ECON. 43, 43-58 (1996); Tom DiLorenzo & Jack High, *Antitrust and Competition, Historically Considered*, 26 ECON. INQUIRY 423, 423-35 (1988); Fred McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775, 775-89 (1991); MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE, (1970); William F. Shugart II, *Don't Revise the Clayton Act, Scrap It!*, 6 CATO J., 925, 925-26 (1987); Fred L. Smith, Jr., *Why not Abolish Antitrust?*, REGULATION 23, 23 (1983).

109. *See generally* John McGee, *supra* note 108.

110. Can the forestaller object that he wants to "contemplate" the big hole, e.g., use it for aesthetic purposes? He cannot. *See* Walter Block, *Homesteading, Ad Coelum, Owning Views and Forestalling* (forthcoming).

he is taking himself out of the realm of a person who wants to cash in big, by threatening to prevent someone else from building a LTT. He is violating the libertarian law prohibiting aggression against non-aggressors. Unless, that is, he posts information attesting to their exact location, so that the rights of other homesteaders (LTT) are not violated. But, then, it is always possible for the LTT to dig deeper. Knowing that, the holdout will be tempted to dig very deep indeed, sowing landmines as he goes. It goes without saying that this would be a very expensive proposition, and perhaps unnecessary, if the LTT is engaging in a feint. It is also a hypothetical so unlikely that it reaches the absurd and laughable.

K. Optimal Number of LTT's

It is entirely possible, and even likely, that there will be fewer miles' worth of LTTs under a regime of full economic freedom than with rampant statism. It is difficult to see how this can be denied. The government can, if it wishes, subject an inordinately large amount of land to expropriation. Its only limit in this regard is that it dare not do so much of it that it risks its own continued power. Reactions to *Kelo* showed that there are limits of tolerance, at least when the land is turned over to private people pursuing private interests, instead of used for "public" purposes.[111]

But rational public policy lies not in the direction of maximizing LTTs. Rather, it is predicated on attaining the *optimal* amount of them. The government is likely to overbuild. For example, consider the case of the 'bridge to nowhere' where a few dozen Alaskans were to have an entire such edifice built for their own personal use.[112] Compared to that, in the absence of eminent domain powers, the market will certainly under-build. But what is the *optimal amount* of LTTs? As with any such question, the proper answer can only emanate from the workings of the *market*.[113] But the free market is defined as the

111. *See supra* text accompanying notes 47-64 (discussing reactions to Kelo). Of course, for the radical libertarian, it might be preferable to use land seizure in this way. At least the land stays in the private sector, always a desideratum. Stephan N. Kinsella, *A Libertarian Defense of Kelo and Limited Federal Power*, Aug. 28, 2005, *available at* http://www.lewrockwell.com/kinsella/kinsella17.html; *see also* Walter Block, *Coase and Kelo: Ominous Parallels and Reply to Lott on Rothbard on Coase*, 27 WHITTIER L. REV. 997, 997-1022 (2006); Richard Epstein, *Blind Justices: The Scandal of Kelo v. New London*, WALL STREET JOURNAL, July 3, 2006.

112. Ronald D. Utt, *The Bridge to Nowhere: A National Embarrassment*, THE HERITAGE FOUNDATION (2005).

113. See the socialist calculation literature on this vital point: PETER J. BOETTKE, CALCULATION AND COORDINATION: ESSAYS ON SOCIALISM AND TRANSITIONAL POLITICAL

concatenation of commercial events based on *private property* and economic freedom. How these institutions can be logically reconciled with expropriation of private property, for *any* purpose, is difficult to say.

There are other problems with eminent domain.[114] These have to be set against, on utilitarian grounds, the diminution of land devoted to LTTs, compared to what would result on the free market. This holds true even if we take as optimal the mileage devoted to them under eminent domain (a heroic assumption). In other words, let us say, *arguendo*, that the ideal percentage of land allocated to LTTs is five percent. Stipulate that under a regime of full free enterprise with no exceptions for expropriation, only three percent of land will be so used. And, crucial point here, that with legal land seizure, this figure goes up to ten percent.

The problem is, this five percent figure has no basis in fact; it is entirely made up, for purposes of illustration. In the real world, only the market offers a non-ambiguous optimal allocation of resources. If, hypothetically speaking, with no government intervention whatsoever, the market allocates seventy percent of the money spent on chalk and cheese to the latter, and thirty percent to the former, well, then so be it; we are justified in claiming that this is the *optimal* allocation of resources. There is simply no other ratio, such as 60-40 or 80-20 that has any basis in fact, and on the basis of which we can criticize the market's 70-30 decision. Presumably, if either of these two other allocations were more in keeping with the preferences of the market actors, there would be forces brought to bear moving society in whatever direction is called for. For example, if 80-20 cheese to chalk were the extant allocation, and 70-30 the ideal one, there would be profits earned in cheese, and losses in the chalk industry, until we approached the optimum.[115] And the same applies to the 'proper' allocation of land to LTTs, and for other purposes.

ECONOMY (2001); Richard Ebeling, *Economic Calculation Under Socialism: Ludwig von Mises and His Predecessors*, in THE MEANING OF LUDWIG VON MISES 56-101 (1993); Friedrich A. Hayek, *Socialist Calculation I, II. & III*, in INDIVIDUALISM AND ECONOMIC ORDER 119-208 (1948); Jeffrey M. Herbener, *Calculation and the Question of Arithmetic*, 9 REV. AUSTRIAN ECON. 151, 151-62 (1996); TRYGYE J.B. HOFF, ECONOMIC CALCULATION IN A SOCIALIST SOCIETY (Liberty Press ed., 1981).

114. *Kelo v. City of New London*, is only the last in a long line of such cases. Kelo v. City of New London, 549 U.S. 469 (2005). *See* Block & Epstein, *supra* note 96; Epstein, *supra* note 63; *Kelo*, 549 U.S. 469; Kinsella, *supra* note 100.

115. It is an Austrian economic insight that the market rarely if ever, and if so only temporarily so, settles at any such optimal point. Rather, tastes and the supply and demand for substitutes and complements of these two goods is always changing. The market, then, is a process, which at all times "aims" at congruency between tastes and supply and demand for

L. Cartels

The argument that LTTs can be built only under a regime of eminent domain is similar to the analysis of cartel breakup. Yes, each cartel member has an incentive to join the cartel. Given proper inelasticity in the relevant range, he can do better by cutting back on production a bit. However, once in the cartel he has a strong incentive to "cheat," to get everyone else to cut back, except himself. While encouraging others to do so, and acting as if he is going along, but all the while refusing to engage in any cutbacks on his own, he can garner even greater profits than by actually fully cooperating in this venture. In that way he can benefit in two different directions, not just one. He gains as a cartel member from the fact that every other member reduces productivity, thus raising price by a greater percentage amount than the loss in quantity. He improves his lot, further, as a cartel "cheater," since he suffers no loss in product brought to market; indeed, he can even increase his output to some degree, as long as he is not so greedy as to completely counteract the cut backs of his partners.

However, successful cartels *do* exist: they are called (large) business firms.[116] Any theory, such as the one that says cartel-like behavior cannot survive, is thus rendered invalid. A common argument holds that cartel action involves *collusion*. For one firm may achieve a 'monopoly price' as a result of its natural abilities or consumer enthusiasm for its particular product, whereas a cartel of many firms allegedly involves 'collusion' and 'conspiracy.' These expressions, however, are simply emotive terms designed to induce an unfavorable response. What is actually involved here is *co-operation* to increase the incomes of the producers. For what is the essence of a cartel action? Individual producers agree to pool their assets into a common lot, this single central organization to make the decisions on production and price policies for all the owners and then to allocate the monetary gain among them. *But is this process not the same as any sort of joint partnership or the formation of a single corporation?*

Let it not be argued that the analogy between the cartel cheater and the holdout is not an apt one. The situations are congruent. The 'cheater' and the holdout each attempt to gain ground at the expense of those with whom, if they cooperate with them, will earn them extra

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items, on the one hand, and allocations of them on the other. RICHARD M. EBELING, MONEY, METHOD, AND THE MARKET PROCESS, (Richard M Ebeling ed., 1990); David Gordon, *What Should Anti-Economists Do?*, in THE MARKET PROCESS: ESSAYS IN CONTEMPORARY AUSTRIAN ECONOMICS (Peter J. Boettke & David L. Prychitko eds., Mises Review 1994).

116. MAN, ECONOMY AND STATE, *supra* note 108, at 572.

revenue. The cheater cooperates with the other cartel members, and then turns around and supposedly stabs them in the back. Precisely the same is true of the holdout. The only way his land can increase in value is if the LTT gets constructed. This requires the cooperation of numerous economic actors. And, yet, the holdout slips the knife into all those others, without whose cooperation the money making LTT cannot be constructed.

The traditional argument is that a cartel is subject to break up from two sources. First, the internal cheating previously discussed: each member has an incentive to look as if he is cutting back on production, but not actually doing so. Second, there is outside entry. If the cartel is successful, profits in the industry will rise. This will attract newcomers, who are anxious to benefit from this success. But as new entry occurs, supply will increase, and profits decrease, until the cartel is no more. However, as Rothbard has shown, given that large firms are but agglomerations of smaller business entities, it cannot be said that all cartels fail.[117]

M. Summary of the Economic Analysis

Let our enthusiasm for the LTT developer *vis-à-vis* the holdout not be misinterpreted as our favoring of the former in contrast to the latter. Did you ever see, gentle reader, a high rise building that was not regularized from a geometrical point of view? Looked at from above, it appeared to be a circle or a rectangle with a little part cut out of it? This is an indication that a real estate developer was unable to convince a recalcitrant holdout to sell his property, and went ahead with construction despite that fact. But a building with a sliver sliced out of it is a testimony to economic freedom. It is imperative for the survival of civilization that private property rights be upheld, and allowing holdouts to, well, hold out, is a necessary part and parcel of that system. Our only point is that it is unlikely in the extreme that protecting the private property rights of the holdout will cost us LTTs.

V. CONCLUSION

The strength of common law is its flexibility and the judiciary's ability to craft different resolutions for different fact patterns, in contrast to traditional civilian jurisdictions where the only sources of law are statutes and regulations. However, this very strength can al-

117. *Id.*

so be a weakness when case law leads to inconsistencies and incoherence. Such has been the situation with eminent domain law. Such inconsistencies and incoherence tend to bring into disrespect all of law. And yet law and the rule of law is what holds us together as a society. It is what distinguishes us from the barbarians. If our civilization is to be protected, at least insofar as jurisprudence is concerned, we must strive mightily to eliminate, or at least radically to reduce, aspects of the law that are given to such capriciousness. Expropriation certainly fits this bill. Nor, the point we have attempted to make in our economic analysis, is eminent domain necessary if we as a society are to be able to enjoy the "long thin things" that, presumably, "justify" governmental takings in the first place. In the absence of eminent domain, governments and private entities will still be able to build long thing things, because holding-out is simply not in any individual's long-term interest. And even were an individual to hold out due to pure meanness, the developer is likely to build over, under, or around his property.

While ancient governments may have been perceived of as all-powerful, since the Enlightenment, the understanding has been that it is the people who ultimately hold power, and it is the people whose rights must be protected. Some of the most important of these rights include the free market, the right to own property, and freedom of contract. Eminent domain has simply proven to be economically unsound, incompatible with these rights, and pragmatically unnecessary. It should therefore be eliminated.