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COASE AND *KELO*: OMINOUS PARALLELS AND REPLY TO LOTT ON ROTHBARD ON COASE

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COASE AND *KELO*: OMINOUS PARALLELS AND REPLY TO LOTT ON ROTHBARD ON COASE

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In its *Kelo* decision, the Supreme Court upheld Connecticut's decision to use its eminent domain powers to take property from one set of private owners and give it to another set of private owners.[1] The State defended this plan on the grounds that the former group of owners was using its property in a less efficient manner than would the latter.[2] There are ominous parallels between this decision, which amounts to no more than thinly veiled theft, and the works of Ronald Coase and the "Law and Economics" movement spawned by his 1960 publication.[3] To wit, this philosophy can be used to buttress *Kelo*. Indeed, we need look no further than this literature for a spirited albeit entirely wrong headed notion that courts are justified in ruling, in property rights disputes, not in favor of the historical owners, but rather on the side of those they think can make the "best use" of the property; e.g., so as to maximize economic welfare, or economic efficiency, or the gross domestic product (GDP), or as in *Kelo*, all of them plus the tax base.[4] This topic is addressed in part I of this paper.

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1. *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005).
2. *See id.* at 2658.
3. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).
4. 125 S. Ct. at 2658.

Part II turns to a defense of Coase by Lott.[5] Coase argued that in the zero-transactions-costs world it did not matter, at least as far as resource allocation was concerned, which of two parties to a dispute over property rights was the winner.[6] And that in the positive transactions costs world, the proper role of the judge was to maximize wealth, and that this could be done by finding in favor of the most efficient user of the property under dispute, the one who would have ended up with it in the zero transactions cost scenario.[7] Rothbard disputed Coase on both of these points.[8] Lott disagreed with the Rothbardian position.[9] This part of the present paper defends Rothbard against the criticisms of Lott.

I. COASE AND *KELO*: OMINOUS PARALLELS[10]

A. *INTRODUCTION*

This part of the paper is devoted to the thesis that there is an ominous parallel between Coase and *Kelo*.[11] There is a strong similarity, because both this economic-philosophical treatise, and the Supreme Court decision of 2005, support the proposition that when there is a dispute over property rights, it should be settled on the basis of societal wealth maximization, or GDP enhancement, or economic efficiency, or so as to expand the tax bases as much as possible, rather than in favor of whoever holds title to the property in question and thus

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5. *See* John R. Lott, *A Note on Law, Property Rights, and Air Pollution*, 3 Cato J. 875 (Winter 1983-84) (available at http://www.cato.org/pubs/journal/cj3n3/cj3n3-15.pdf) (accessed May 15, 2006).

6. *See* Coase, *supra* n. 3.

7. *Id.* at 16.

8. Murray N., Rothbard, *Law, Property Rights, and Air Pollution*, 2 Cato J. 55 (Spring 1982) (reprinted in *Economics and the Environment: A Reconciliation* (Walter Block ed., The Fraser Institute, 1990); also reprinted in *The Logic of Action Two: Applications and Criticism from the Austrian School* 121-170 (Edward Elgar Publishing Ltd., 1997) (available at http://www.mises.org/rothbard/lawproperty.pdf) (accessed May 15, 2006))).

9. Lott, *supra* n. 5, at 875.

10. Peikoff used the phrase "ominous parallels" in the title of his book of that same name. *See generally* Leonard Peikoff, *The Ominous Parallels* (Stein and Day Pub. 1982).

11. *See Kelo v. City of New London*, 125 S. Ct. 2655 (2005); Coase, *supra* n. 3.

is the rightful owner.[12] This is ominous in that it is only the historical based genesis of property that deserves to be considered a property rights system at all. A legal regime that will alter property titles willy-nilly in favor of those who the Court in its far less than infinite wisdom decides is the most efficient user of the property in question does not even deserve the honorific, private property rights system. Rather, it is the absolute, total, and complete abnegation of any such institution.

In section B I review Coase. Section C is devoted to an examination of *Kelo*, to determine if it is indeed based on the work of Coase, the Nobel Prize winner in economics in 1991.[13] I make the case in section D that what these two bodies of thought have in common, their "ominous parallels," spell the death knell for civilization as we have known it. In section E I discuss how the Coaseans, the followers of the master, fare in this regard. And conclude part I of the paper in section F.[14]

B. *COASE*[15]

According to Coase, there are two basic possible states of the world.[16] In the first, transactions costs, defined as the cost of finding people to bargain with, setting up a contract, monitoring it, adjudicating it, etc., are zero, or at the very least substantially below the

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12. *See id.*

13. The Nobel Found., http://nobelprize.org/economics/laureates/ (last updated Oct. 10, 2005).

14. There is an interesting debate concerning the implications of *Kelo* for federalism and decentralization. As this discussion is peripheral to our present interests, we content ourselves with merely noting it. *See generally* Stephan Kinsella, *Woops, They Did It Again (Bad Supreme Court! Bad! Bad!)*, http://blog.mises.org/blog/archives/003745.asp (June 23, 2005); N. Stephan Kinsella, *A Libertarian Defense of* 'Kelo' *and Limited Federal Power*, http://www.lewrockwell.com/kinsella/kinsella17.html (June 28, 2005); Roderick T. Long, *Federalism and the Bill of Rights: The Pros and Cons of* Kelo, http://www.lewrockwell.com/long/long14.html (July 8, 2005); Tibor R. Machan, Kelo v. New London City, CT, *versus the Free Society*, http://groups.msn.com/TiborsPlaceontheWeb/general.msnw?action=get_message&mview=1&ID_Message=1311 (July 6, 2005); Ron Paul, *Lessons From the* Kelo *Decision*, http://www.lewrockwell.com/paul/paul259.html (July 5, 2005).

15. For another attempt to link Coase and *Kelo*, *see* Frank Speiser, *Imminent Eminent Domain: Paying Tribute in Collectivist Society*, http://www.strike-the-root.com/51/speiser/speiser1.html (June 28, 2005).

16. *See generally* Coase, *supra* n. 3.

possible benefits of the commercial endeavor.[17] Here, it does not matter how the judge rules between two contending parties in terms of resource allocation.

Suppose there is a dispute between a railroad emitting dust, sparks, and smoke particles, for example, and a farmer whose nearby haystacks are being ruined. Assume that a smoke prevention device costing seventy-five dollars would completely ameliorate the problem, and that the damage to the agriculturalist is one-hundred dollars if not addressed in this manner.

There are only four possibilities. First, if the court rules in favor of the railroad, the farmer will pay the polluter, say, ninety dollars to install the device, even though the law (the judicial finding) does not compel him to do so. The farmer will garner ten dollars (one-hundred dollars he saves in straw, minus the ninety dollar bribe) while the railroad will gain fifteen dollars (the ninety dollar bribe minus the installation cost of seventy-five dollars). Total wealth will register at twenty-five dollars.

Second, if the court comes down on the side of the farmer, he will save one-hundred dollars, at the cost of seventy-five dollars to the railroad, with society (the two of them) again twenty-five dollars to the good. So, the judicial decision *does not matter* in terms of whether the smoke prevention device will be installed or not.[18] However, Coase's analysis is open to criticism because it fatally assumes that the farmer, in this case, has the wherewithal to make the ninety dollar bribe. If he does not, that is if the hay is only of psychic, not market value, he cannot make this payment, and, thus, even in the zero transactions costs world, the judge's opinion will determine resource allocation.[19]

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17. *Id.* at 15-16.

18. Or, more generally, how resources will be allocated.

19. Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. Libertarian Stud. 111, 112 (1977) (available at http://www.mises.org/journals/jls/1_2/1_2_4.pdf (accessed May 15, 2006)).

For a criticism of Block on this point, *see generally* Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, in *Time, Uncertainty, and Disequilibrium* 97 (Mario Rizzo ed., D.C. Health and Co. 1979).

Block replied with Walter Block, *Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz*, 8 Rev. Austrian Econ. 61 (1995). This was followed up by Harold Demsetz, *Block's Erroneous Interpretations*, 10 Rev. Austrian Econ. 101 (1997). And finally with Walter Block, *Private-Property Rights, Erroneous Interpretations, Morality, and Economics: Reply to Demsetz*, 3 Q. J. Austrian Econ. 63

According to Coase:

> I now turn to the case in which, although the pricing system is assumed to work smoothly (that is, costlessly), the damaging business is not liable for any of the damage which it causes. This business does not have to make a payment to those damaged by its actions. I propose to show that the allocation of resources will be the same in this case as it was when the damaging business was liable for damage caused.[20]

Matters are very different, for Coase, in the high transactions cost (or real) world. Here, the judicial finding very much matters for resource allocation, for there can be no post-judgment reallocation of resources; whatever emanates from the court will not be able to be undone by the marketplace.[21] For example, to continue using the numerical illustration above, third alternative, if the court rules in favor of the farmer, he will insist upon the installation of the smoke prevention device; and this is "good" for society, as seventy-five dollars will have been spent in order to garner a savings of one-hundred dollars, for a pure gain of twenty-five dollars.

However, in the fourth and last case, suppose the bench decides in favor of the railroad. It will refuse to install this machine. Will the farmer be able to bribe the railroad into doing so as he did before in the previous example? After all, the gain to agriculture will be one-hundred dollars, the loss to the transportation industry only seventy-five dollars. Surely the two sides can come together? They *cannot*, since we are now assuming either an infinitely high transactions cost world, or, at least, one in which the expenses of transacting such arrangements are much higher than any gains that could be made (think

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(2000).

For criticism of Coase along similar lines see Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Coase and Posner*, 3 Euro. J. L. & Econ. 265 (1996); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 Hamline L. Rev. 229 (1989); Gary North, *The Coase Theorem: A Study in Economic Epistemology* (Institute for Christian Economics 1992) (available at http://freebooks.entrewave.com/freebooks/docs/a_pdfs/gnct.pdf (accessed May 16, 2006)); Murray N. Rothbard, *supra* n. 8; and Edward Stringham, *Kaldor-Hicks Efficiency and the Problem of Central Planning*, 4 Q. J. Austrian Econ. 41 (2001).

20. Coase, *supra* n. 3, at 6.

21. *Id.* at 15-16.

hundreds of railroads, and thousands of farmers, and the practical impossibility of bringing them all into an agreement).

In such a situation it is imperative for Coase that the judge make the "correct" decision, in favor of the farmer, given our numerical example.[22] His advice to the bench is that it rule in such a manner such that resources are allocated "rationally," the GDP is maximized, and in our example, as we have seen, in favor of the farmer.[23]

For Coase, it is simply not true that the railroad is the instigator of a trespass, or a property rights violation, and that the farmer is the innocent victim.[24] Rather, it is a reciprocal problem. Yes, if the trains were not running, there would be no problem with the haystacks. But also, and equally true for Coase, were the haystacks not located where they are, then the engines would not be problematic.[25] In his words:

> The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous article the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighbouring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops. What answer should be given is, of course, not clear unless we know the

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22. *Id.* at 19.
23. *Id.*
24. *See id.*
25. *See id.* at 2.

> value of what is obtained as well as the value of what is sacrificed to obtain it. To give another example, Professor George J. Stigler instances the contamination of a stream. If we assume that the harmful effect of the pollution is that it kills the fish, the question to be decided is: is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible.[26]

Note that Coase's views on reciprocality can be given both a positive *and* a normative interpretation. That is, my claim is that this author means his thesis to be taken in both ways.

In the former case, Coase in effect is predicting that judges *will and have* decided cases as if reciprocality is the proper relation.[27] That is, in his terminology, the results of these lawsuits can be interpreted as the court seeing not that A is criminally violating the rights of B, and penalizing the former, but rather as if plaintiff and defendant are on the same legal plane.[28] Thus, the legal remedy is not to punish the evil doer, for there is no such thing in these cases. Rather, given that both parties are innocent, the desiderata is to decide the case in favor of the person who *would have* (contrary to fact conditional) enjoyed the resource in the zero (or low) transactions costs world. Namely, award the property right to the most "efficient" user of it, and ignore the property rights in question.

But it is also possible to interpret Coase in a normative manner. To wit, that the judge, if he is to be rational, *should* look at these cases in such a way. That is, the jurist *should* realize that there is no right and wrong, no good and bad in any of these cases. Rather, Coase is calling upon him to decide these cases such that wealth is maximized, rather than justice be done.[29] In effect, despite who wins the case, no injustice can be perpetrated, since justice is not an issue here.

C. *KELO*

The *Kelo* decision does not mention Coase.[30] Nevertheless, it is informed by that article to its very roots. Do I go so far as to say that

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26. *Id.* (citations omitted).
27. *See id.*
28. *Id.*
29. *See id.*
30. *See generally Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

the judicial authors of *Kelo*, in failing to cite Coase, were guilty of at least failure to acknowledge a source, and, at worst, of plagiarism? I do not. My thought is that Coase has so completely permeated the legal profession – this article is the most cited in all of the economic literature – that no such citation was needed.[31]

In this case, a private organization, the New London Development Corporation (NLDC), expropriated land from several homeowners in order to upgrade their property into a shopping mall, office center, and other amenities.[32] It cannot be denied that this was done with the permission and encouragement of the city government of New London, Connecticut; they thought it would bring more taxes to their coffers.[33] Nevertheless, it was a *private* non-profit group that was the actual land thief.[34] This is hardly the first case on record of the United States judiciary riding roughshod over private property rights, for purposes not even alleged to be on behalf of public use (such as roads, tunnels, and bridges).[35] Yet it is perhaps the most blatant, in that there was much less of a fig leaf of public use involved than ordinarily.[36]

Justice Thomas distinguishes "public use" from "public purpose."[37] He states:

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31. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751 (1996) (reporting that Coase, with 1741 citations, is far ahead of the next most cited article which only has 968 citations).

32. *Kelo*, 125 S. Ct. at 2658-60.

33. *Id.* at 2659.

34. *Id.* at 2659; *see also* Stephen Bainbridge, *They Can't Take That Away From Me . . . Unless They Can*, TCS Daily (June 24, 2005) (available http://www.tcsdaily.com/article.aspx?id=062305C (accessed May 16, 2006)).

35. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233, 235 n. 3 (1984) (forcing a landlord to give property titles to tenants to promote an egalitarian scheme of redistribution); *Berman v. Parker*, 348 U.S. 26, 28-34 (1954) (the taking of an apartment house for urban renewal to combat slums, even though it was conceded that this specific dwelling was sound).

36. *See generally* Walter Block, *Road Socialism*, 9 Int. J. Value-Based Mgt. 195 (1996) (available at http://walterblock.com/publications/road_socialism.pdf (accessed May 16, 2006) (For a critique of eminent domain even in the case of highways and streets)); Richard A. Epstein & Walter Block, Debate, *Epstein vs. Block: Do We Really Need Eminent Domain?* (U. Chi. Sch. L., May 13, 2004), in ___ N.Y.U. J. L. & Liberty ___ (forthcoming 2006) (copy on file with *New York University Journal of Law & Liberty*; audio version available at http://www.mises.org/media.aspx?action=showname&ID=443).

37. *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting).

> This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."[38]

It seems particularly egregious to many commentators that it was a private concern, not a governmental one, which was responsible for the land theft of eminent domain in this case. Kinsella provides an alternative to this viewpoint:

> For the libertarian, the main concern is to reduce the number or likelihood of such acts of theft; and to minimize the harm done when it does occur. But once a person's land is taken, it is hard to see how he suffers extra harm due to the way the state uses the property – whether they use it to build a road, or military base, or sell it to Costco. In fact, some libertarians might prefer that their land be transferred to private hands for peaceful purposes such as a mall or strip center or condo instead of being used by the inefficient state.[39]

Consider this statement by Justice O'Connor: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[40]

Think in terms of the railroad and the farmer in Coase and any two claimants for land in any of these cases decided by the Supreme Court. Can we not just "hear" Coase in the background opining that it is not a matter of right and wrong, not an issue of property rights, that *all* of these contending parties are in a relationship of "reciprocality" with one another, and that the justice *should* rule in favor of that party such that GDP or the tax base, or some other desiderata be maximized?[41]

This insight of O'Connor's is couched in terms of *Kelo*, but with a little poetic license we can also read it as an utter rejection of the Coasean philosophy:

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38. *Id.* at 2677-78.

39. Kinsella, *A Libertarian Defense of* 'Kelo' *and Limited Federal Power*, *supra* n. 14, at [¶ 6].

40. *Kelo*, 125 S. Ct. at 2676 (O'Connor, Scalia & Thomas, JJ., dissenting).

41. *See* Coase, *supra* n. 3.

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims,[42] the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.[43]

Justice O'Connor is precisely correct in her anticipation that *Kelo* would likely have negative repercussions on the poor. There is a large body of literature attesting to the fact that "urban renewal" made possible only by eminent domain, actually amounts to " ' "Negro removal." ' "[44]

However, there are exceptions to this general rule. In a delicious bit of irony, or perhaps poetic justice, there is a movement afoot to do unto the majority Judges of the Supreme Court in *Kelo* what they have done to the losing plaintiffs in this case; they are trying to use eminent domain to expropriate the homes of all those responsible, starting with Justice Souter.[45]

Here is Justice O'Connor's minority report again:

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner

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42. *See* John Fund, *Property Rights Are Civil Rights: Opposition to the* Kelo *Decision Crosses Racial and Party Lines* [¶¶ 2, 3, 7], http://www.opinionjournal.com/diary/?id=110006941 (July 11, 2005) (making the point that the victims will tend to be poor and black).

43. *Kelo*, 125 S. Ct. at 2677 (O'Connor, Scalia & Thomas, JJ., dissenting).

44. *See id.* at 2687 (Thomas, J., dissenting); Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962* 7-8 (MIT Press 1964). *See also* http://www.google.ca/search?hl=en&q=negro+removal&btnG=Google+Search&meta= (accessed May 16, 2006); *Kennedy's Vast Domain: The Supreme Court's Reverse Robin Hoods* [¶ 8], http://www.opinionjournal.com/editorial/feature.html?id=110006862 (June 24, 2005).

45. Ron Strom, *This Land Was Your Land: Supreme Court Justice Faces Boot from Home? Developer Wants 'Lost Liberty Hotel' Built upon Property of David Souter*, http://worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=45029 (June 28, 2005).

> who will use it in a way that the legislature deems more beneficial to the public—in the process.[46]

No truer words have ever been said. There has been such a sense of outrage at the injustice of the majority opinion in *Kelo* that the Pfizer Company, which had been thought to have been involved in the Connecticut eminent domain controversy, took pains to distance itself from it.[47]

D. *THE OMINOUS PARALLELS*

Having set out Coase in section B and *Kelo* in section C, I now turn to consider their similarities.

Here is an insight from the *Economist* that puts the similarity in context:

> Put simply, cities cannot take someone's house just because they think they can make better use of it.
>
> Otherwise, argues Scott Bullock, Mrs. Kelo's lawyer, you end up destroying private property rights altogether. For if the sole yardstick is economic benefit, any house can be replaced at any time by a business or shop (because they usually produce more tax revenues). Moreover, if city governments can seize private property by claiming a public benefit which they themselves determine, where do they stop? If they decide it is in the public interest to encourage locally-owned shops, what would prevent them [from] compulsorily closing megastores, or vice versa? This is central planning.[48]

Precisely. Suppose this quote from the *Economist* did not mention *Kelo*, but rather Coase. Would that have made any difference to the truth of the contention? Not at all. This sentiment applies to both, equally.

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46. *Kelo*, 125 S. Ct. at 2671 (O'Connor, Scalia & Thomas, JJ., dissenting).

47. Pfizer Inc., *Pfizer Statement on Eminent Domain*, http://www.pfizer.com/pfizer/are/news_releases/2005pr/mn_2005_0627.jsp (accessed May 16, 2006).

48. Economist.com, *Eminent Domain: Despotism by Stealth* [¶¶ 17-18], http://www.economist.com/World/na/displayStory.cfm?story_id= 3672769 (Feb. 17, 2005).

There is in effect a "reciprocal" relationship between Kelo and her embattled fellow property owners, on the one hand, and on the other hand those who would pillage them and steal their land under cover of legal authority. If Coase were sitting on the Supreme Court it is difficult to avoid the conclusion that he would have voted, enthusiastically, for the majority. Why? Not so much that he is concerned with enhancing the "tax base." Rather, that he would take this as a proxy variable with maximizing GDP, or wealth, or "efficiency" in his terms.[49] Just as he rules in favor of the hypothetical railroad, or farmer, depending upon his assumption as to which is the more efficient user of the rights to pollute or to prevent pollution, so too would he come down on the side of whichever of the contending parties for any real estate would more greatly enhance its value.[50]

E. *THE COASEANS*

The number of Coaseans is not quite as large as the number of grains of sand on all the beaches of the world, but in the fields of law and economics, they have cut quite a swath. It is fair to say that this school of thought is totally dominant in these two academic disciplines, and particularly in the sub-field that combines them both. It will be impossible to measure all of the practitioners in this regard against the *Kelo* litmus test, but let us consider the views of at least a few of the more prominent members.

1. *Richard Posner*[51]

According to this author:

> The only justification for eminent domain is that sometimes a landowner may be in a position to exercise holdout power, enabling him to obtain a monopoly rent in the absence of an eminent domain right. The clearest example is that of a right of way company, such as a railroad or a pipeline, which to provide service between two points needs an easement from every single one of the intervening landowners. Knowing this, each landowner

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49. *See* Coase, *supra* n. 3, at 3-8, 29-34.

50. *Id.*

51. Posner and Coase, of course, have their differences. However, for present purposes, there are no distinctions to be drawn between these two University of Chicago professors.

> has an incentive to hang back, refusing to sell to the right of way company except for an exorbitant price. Each hopes to be the last holdout after the company has purchased an easement from every other landowner—easements that will be worthless if it doesn't obtain an easement from that last holdout.
>
> . . .
>
> Right of way companies are not the only private enterprises that can make an argument for the use of the eminent domain power. The argument is available in other cases in which a large number of separately owned contiguous parcels have to be acquired for a project that will create greater value than the parcels generate in their present use. It is impossible to tell from the opinions in the *Kelo* case whether that was such a case. Pfizer had decided to build a large research facility adjacent to a 90-acre stretch of downtown and waterfront property in New London and the City hoped that Pfizer's presence would attract other businesses to the neighborhood. The plaintiffs' residential properties were on portions of the 90-acre tract earmarked for office space and parking, and it might have been impossible to develop these areas for those uses if the areas were spotted with houses (the plaintiffs owned 15 houses in all in the two areas).[52]

There are difficulties with this position. First of all, Posner has an incorrect view of monopoly.[53] The only way anyone can attain a monopoly position, profit or rent it matters not, is through a government grant of privilege; e.g., if the state prohibits competition. How does Posner know when a "holdout" problem occurs? He offers us no criteria on the basis of which this can be determined. Every purchaser, of anything, at any time, would like to buy on better terms than those for which he finally settles. Similarly, this author's use of "exorbitant price" is unscientific. "Exorbitant" compared to *what*? Again, we are vouchsafed no objective criterion that will determine whether a price is "exorbitant."[54] Then there is the fact that only a

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52. Richard Posner, *The Becker-Posner Blog: The* Kelo *Case, Public Use, and Eminent Domain* [¶¶ 5, 7], http://www.becker-posner-blog.com/archives/2005/06/the_kelo_case_p.html (June 26, 2005) (emphasis added).

53. Walter Block, *Total Repeal of Antitrust Legislation: A Critique of Bork, Brozen, and Posner*, 8 Rev. Austrian Econ. 35, 55-68 (1994).

54. The clear implication for a statist such as Posner is that if a price is "exorbitant"

moron would "[purchase] an easement from every other landowner."[55] Any sensible entrepreneur, in contrast, would first buy *options*, and then exercise them if and only if *all* of his targets had agreed in advance to sell.[56]

Posner announces it is "impossible to tell" whether *Kelo* describes a situation in which one single large development would be worth more than the present "large number of separately owned contiguous parcels."[57] But the implication is clear: *If* this were the case, then Posner in his role as judge, and Coasean, would indeed rule with the majority in *Kelo*. That is to say, Posner, like Coase, has no more respect for a system of private property rights, at least theoretically, than any cut-purse thief.

Let us consider one more statement by Posner:

> The Court was mindful of the possibility of abuse of the eminent domain power; it made clear that there would not be a public use if all a municipality did was take property from one person and give it to another, with no showing of an increase in overall value.[58]

But, suppose "a municipality . . . [took] property from one person and [gave] it to another, with . . . [a *guaranteed*] showing of an increase in overall value."[59] Then, would this be justified in Posner's view? It is difficult to resist the notion that it would; that Posner would support such a forced transfer of property, under these stipulated conditions. But if so, then his view is open to any number of *reductios ad*

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then the government must step in and force it to be lowered. In the aftermath of Hurricane Katrina there is a movement afoot to stop price "gouging." Posner, presumably, would favor this bit of economic illiteracy. For an antidote to it, *see* http://www.google.com/u/Mises?hl=en&submit.x=0&submit.y=0&&q=price%20gouge (accessed May 16, 2006).

55. Posner, *supra* n. 52, at [¶ 5].

56. Or, he would build a bridge over, or a tunnel under, any such "holdout." *See* Walter Block, *Roads, Bridges, Sunlight and Private Property: Reply to Tullock*, 8 J. des Economistes et des Etudes Humaines 315 (June/Sept. 1998); Walter Block & Matthew Block, *Roads, Bridges, Sunlight and Private Property Rights*, 7 J. des Economistes et des Etudes Humaines 351 (June/Sept. 1996); Epstein & Block, *supra* n. 36; Gordon Tullock, *Comment on "Roads, Bridges, Sunlight and Private Property," by Walter Block & Matthew Block*, 7 J. des Economistes et des Etudes Humaines 589 (Dec. 1996).

57. Posner, *supra* n. 52, at [¶ 7].

58. *Id.* at [¶ 8].

59. *Id.* (emphasis added).

absurdum. For example, rape would be justified if the rapist valued this act more than the victim disvalued it.[60] O.J. Simpson would be justified in murdering his wife if we determine that he derived greater pleasure from this act than she lost therefrom.[61] Of course, all this verges way past being silly, since there is simply no way to make any such determinations. Interpersonal comparisons of utility constitute no less than a basic economic fallacy.[62]

2. *Steven Medema and Richard Zerbe*

According to these authors, "the goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained."[63]

And again: "[T]he goal of such a system is to minimize harm or costs."[64]

It is only in the "real" or high transactions costs scenario that these claims even come into play. For, as we have seen, in Coase's view, on the zero transactions costs assumption, these goals are *always* attained.[65] If the court awards the property rights under contention to the "wrong" man, no problem arises; the "right" one will buy him out.[66] Matters are entirely different in the real world of high transactions costs. Here, no post judicial transfer of rights can easily or possibly be at all affected. Thus, for "efficiency" to be attained, the *court* will have to get it right in the first place. And, what, in turn, does this imply? Of course, for the Coaseans, this means that when there are two parties contending over a given piece of real estate, it must be awarded to the one who can make better or more efficient use of it. Thus, if there is a dispute between a small homeowner and a large

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60. Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Coase and Posner*, 3 European J.L. & Econ. 265, 275 (1996).

61. *Id.*

62. *See* Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, in *The Logic of Action I: Method, Money, and the Austrian School* 211, 225-27 (Edward Elgar 1997).

63. Steven G. Medema & Richard O. Zerbe, Jr., *The Coase Theorem*, in *The Encyclopedia of Law and Economics* vol. 1 836, 836 (Bougdewin Bouckaert & Gerrit De Geest eds., Edward Elgar 1999).

64. *Id.* at 837.

65. *See* Coase, *supra* n. 3.

66. *Id.* at 6-8.

Donald Trump casino, or in Justice O'Connor's words, between a "Motel 6 [and] a Ritz-Carlton,"[67] it is the latter who should and must prevail, property rights be damned.

3. *David Friedman*

This author faithfully reflects Coase's emphasis on the supposed reciprocal nature of property:

> [A]n external cost is not simply a cost produced by the pollutor [sic] and born [sic] by the victim. In almost all cases, the cost is a result of decisions by both parties. I would not be coughing if your steel mill were not pouring out Sulfur Dioxide. But your steel mill would do no damage if I (and other people) did not happen to live down wind from it. It is the joint decision—yours to pollute and mine to live where you are polluting—that produces the cost.[68]

He then answers our question of the farmer vs. the railroad, or the land developers vis a vis Susette Kelo and her neighbors:

"[T]he law should define property in such a way as to minimize the costs associated with the sorts of incompatible uses we have been discussing—factories and recording studios, or steel mills and resorts."[69]

Although he does not address himself, specifically, to the *Kelo* question, there is little doubt that were he to do so, he would vote with the majority if he thought that this was the best way to "minimize the costs,"[70] and with the minority if he thought that GDP could be maximized by allowing the homeowners to keep their property. But either way, he would *ignore* private property rights.

I have a challenge for Friedman, and, indeed, for all other Coaseans. Suppose one man had normal eyesight, and another was completely blind. Would it not be justified for the state to inaugurate a

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67. *Kelo v. City of New London*, 125 S. Ct. 2655, 2676 (2005) (O'Connor, Scalia & Thomas, JJ., dissenting) ("The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

68. David Friedman, *The Swedes Get it Right*, "Nothing Works," [¶ 1], http://www.daviddfriedman.com/Libertarian/The_Swedes.html (accessed May 16, 2006) (reprinted from *Liberty Magazine*).

69. *Id.* at "Coase, Property, and the Economic Analysis of Law," [¶ 3].

70. *Id.*

program of forced eye transfer from the normal two-eyed person to the one who is completely blind? Surely, it would reduce costs, or increase total or social wealth, if both of them had one eye. For the second eye, while beneficial to depth perception, is almost, economically speaking, a mere decoration. It seems clear that the blind man will gain far more from having one eye (sight) than the normal man will lose (better depth perception) from having his number of eyes reduced from two to one.

Suppose a Coasean were on a court charged with deciding the proper ownership of this second eye, which is now located in the head of the normal man. It is difficult to see how he could get out of supporting such a forced transfer. But this is a powerful *reductio ad absurdum* of this entire system.

4. *Richard Epstein*

I readily concede that Epstein disagrees with the *Kelo* decision. He starts off on a very strong note: "Last week's regrettable 5-4 decision in *Kelo v. City of New London* marks a new low point in the Supreme Court's takings jurisprudence."[71]

Or at least he thinks he does. But matters are not so clear, when Epstein declares of Justice Stevens the view that:

> New London had made its case when it asserted, without evidence, that the new projects would both increase tax revenues and create new jobs. It hardly mattered that its projections had been pulled out of thin air and were already hopelessly out of date when the case reached the Supreme Court.[72]

Suppose, however, there *was* "evidence," strong evidence, to the effect that "the new projects would both increase tax revenues and create new jobs"[73] and enhance wealth as well. Suppose the "projections" were not "pulled out of thin air" and were very much up to "date." Then what?

While Epstein is a strong advocate of compensation for takings, he has no principled argument against eminent domain.[74] Indeed, he

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71. Richard A. Epstein, *Blind Justices: The Scandal of* Kelo v. New London [¶ 1], http://www.opinionjournal.com/extra/?id=110006904 (July 3, 2005).

72. *Id.* at [¶ 4].

73. *Id.*

74. *See generally* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard U. Press 1985).

explicitly supports it, and agrees with Posner's view on the supposed "holdout" problem:

> [A]ssume that the owner of a mine (who has no choice on where to dig) can get his ore to market only by ferrying it over scrub lands owned by another individual. That second landowner can demand a huge chunk of the mining profits for his trivial contribution to the overall venture. For over 100 years, the Supreme Court has allowed the state to condemn the obstructing property for the mine owner upon payment of just compensation, here measured by the trivial losses sustained by the obstructing landowner. The net gains from blocking the holdout are huge.[75]

There are several difficulties with this position. First, the owner of the mine does indeed have a choice: he can open a mine anywhere in the world, or not at all. He is no helpless victim. Second, on what basis does Epstein denigrate the contribution of the second landowner as "trivial?" In doing so this University of Chicago professor is taking on the unwarranted role of economic central planner, surely not a comfortable role for him, given his otherwise proclivities toward free enterprise. Third, Epstein supports the Supreme Court's century long practice of land theft, on these spurious grounds, albeit limited to "public purposes," such as lighthouses, military installations, roads, etc.[76] But in doing so he is helping to set up a slippery slope, down which the Supreme Court just slid in *Kelo*.

F. *CONCLUSION*

The Coasean chickens have come home to roost. This applies, as we have seen, to both Coase and the Coaseans. If the public is outraged at *Kelo*, they need look no further than the University of Chicago based "Law and Economics" movement, shaped pretty much entirely by this group of intellectuals and their followers in academia. The populace would be entirely justified in taking such a stance, as these professors provide the scholarly justification for judges running amuck with our sacred and precious private property rights. Coase has provided a "hostile environment" for our traditional values that reject and oppose land theft.

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75. Epstein, *supra* n. 71, at [¶ 6].
76. *See* generally Epstein, *supra* n. 71.

II. REPLY TO LOTT ON ROTHBARD ON COASE

Coase started off the ball rolling in this regard with his claim that there were two possible states of affairs: A world with zero transactions costs,[77] and one with positive (or, indeed, very high) transactions costs.[78] In the former case, he maintained, it would not matter one whit for resource allocation how a judge ruled between contending parties over private property rights; the most efficient user of the property would keep them.[79] Either he would be awarded them by the court, in which case his opponent would not be able to bribe them out of his possession, or the court would award them to the least efficient user, in which case the most efficient user would bribe his legal opponent into allowing him to keep these rights.[80] In the latter case, high transactions costs made it impossible for there to be any post decision reallocation of rights.[81] Then, Coase's advice to the judge was to make the award to the most efficient user of the resource.[82] This was the one who, in the zero transactions cost world, would have ended up possessing the resource under contention. In this way, Coase argued, wealth, or GDP would be maximized, which he saw as the proper goal at which judges should aim.[83]

Rothbard and several of his followers took Coase to task on both these claims.[84] Regarding the zero transaction costs scenario, Rothbard argued that the more efficient user who lost the law suit would only be able to bribe the less efficient user who won it if he had the wherewithal with which to finance it.[85] He need not be assumed to have it, particularly if his more efficient use is in the form of personal psychic benefits,[86] which cannot be converted into cash. Coase had specifically anticipated an objection to his thesis based on wealth

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77. Coase, *supra* n. 3, at 2.
78. *Id.* at 6.
79. *See id.* at 2-6.
80. *Id.* at 6.
81. *Id.* at 15-16.
82. *See id.*
83. *See id.* at 1.
84. *See* Rothbard, *supra* n. 8.
85. *Id.* at 58.
86. *See* Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz, supra* n. 19.

effects, but that was entirely another matter.[87] All this meant was that Coase acknowledged that the court's decisions would necessarily effect the division of wealth between the two contending parties, but had nothing to do with whether or not the loser could bribe the winner into allocating resources in his preferred manner.

As for the high transactions costs world, Rothbard and several of his supporters held up to scorn and derision the notion that the most efficient user of the resource should be given them.[88] First of all, this would thrust the judge into the role of central planner, one for which he was particularly ill suited.[89] Second, there was no way the court could know who was the "better" user of any given resource.[90] Third, every time relative prices changed, there would be a presumption that so

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87. *See* Coase, *supra* n. 3, at 43-44.

88. For critiques of Coase on Rothbardian lines, *see generally* Block, Cordato, North, Rothbard, & Stringham, *supra* n. 19; Block, *Road Socialism*, *supra* n. 36; Timothy D. Terrell, *Property Rights and Externality: The Ethics of the Austrian School*, 2 J. Mkts. & Morality 197 (Fall 1999) (available at http://www.acton.org/publicat/m_and_m/1999_fall/terrell.html (accessed May 16, 2006)).

89. The Austrian side of the socialist calculation debate maintained that *no one* could accomplish any such task in any case. *See generally* Peter J. Boettke, *Why Perestroika Failed: The Politics and Economics of Socialist Transformation* (Routledge 1993); James A. Dorn, *Markets, True and False: The Case of Yugoslavia*, 2 J. Libertarian Stud. 243 (Fall 1978); Richard M. Ebeling, *Economic Calculation Under Socialism: Ludwig von Mises and His Predecessors*, in *The Meaning of Ludwig von Mises* 56 (Jeffrey Herbener ed., Kluwer Academic Press 1993); Nicolai Juul Foss, *Information and the Market Economy: A Note on a Common Marxist Fallacy*, 8 Rev. Austrian Econ. 127 (1995); David Gordon, *Resurrecting Marx: The Analytical Marxists on Freedom, Exploitation, and Justice* (Transaction Books 1990); Ludwig von Mises, *Socialism: An Economic and Sociological Analysis* (Yale U. Press 1951); Morgan O. Reynolds, *The Impossibility of Socialist Economy, Or a Cat Cannot Swim the Atlantic Ocean*, 1 Q. J. Austrian Econ. 29 (Summer 1998); Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 Rev. Austrian Econ. 51 (1991).

90. It is a basic element of Austrian economics that costs are alternatives foregone, and hence *subjective*. *See generally* William Barnett II, *Subjective Cost Revisited*, 3 Rev. Austrian Econ. 137 (1989); James M. Buchanan, *Cost and Choice: An Inquiry in Economic Theory* (Markham 1969); Cordato, *supra* n. 19; Thomas J. DiLorenzo, *The Subjectivist Roots of James Buchanan's Economics*, 4 Rev. Austrian Econ. 180 (1990); Roger Garrison, *A Subjectivist Theory of a Capital-using Economy*, in Gerald P. O'Driscoll & Mario J. Rizzo, *The Economics of Time and Ignorance* (Basil Blackwell 1985); Ludwig von Mises, *Human Action: A Treatise on Economics* (Ludwig Von Mises Institute 1998); Mario J. Rizzo, *The Mirage of Efficiency*, 8 Hofstra L. Rev. 641 (1980); Rothbard, *supra* n. 62.

would property rights. For example, if the point at issue was between the owner of wandering cows, and a neighboring corn field farmer, then when the meat-to-vegetable price ratio is high, the court will likely find for the cowboy, and when low, for the grower. But this is not so much a property rights system as the *absence* of one. And fourth, by refusing to look at the *past* in order to solve this dispute, the Coasean judge opened himself up to all sorts of dilemmas, for example that O.J. Simpson was justified in murdering his wife, and that enslavement and rape are sometimes wealth maximizing, and thus ought to be legalized.[91]

Lott disagreed with the Rothbardian position.[92] It shall be the task of this part of the present paper to subject that article to criticism.

Lott starts off on a strong note: "In fact, the Coase theorem is true by definition. If transaction costs are lower than the grains from agreement and there are no wealth effects, then resource allocation will not be altered by the redistribution of property rights."[93]

Let us start off with a minor criticism first.[94] Claims being true "by definition" are, for the Chicago school oriented empirical scientists, highly problematic. For the Chicago tradition is one of logical positivism.[95] While there are to be sure some methodological differences between Coase and his fellow Chicagoans, one does not go far out on the limb to claim he is surely more of an empiricist than a praxeological Austrian, as implied by Lott.[96]

Now for a major criticism, or, at least, one more relevant to the issue at hand. The phrase "and there are no wealth effects" opens up a can of worms, but it is one, happily, that this author addresses.[97] Lott quite properly notes Rothbard's objection on the ground of " 'psychological factors,' " and offers two possible interpretations of this

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91. Block, *supra* n. 60, at 272.

92. Lott, *supra* n. 5, at 875.

93. *Id.*

94. This is minor only in the present law and economics context. Actually, it is of the first importance in determining whether economics is an empirical or deductive science.

95. Milton Friedman, *The Methodology of Positive Economics*, in Milton Fridman, *Essays in Positive Economics* 1, 7 (U. Chi. Press 1953).

96. *See* Lott, *supra* n. 5.

97. *Id.* at 875.

phenomenon.[98] The first of these, that psychological considerations are merely a different kind of opportunities foregone[99] does not at all apply to Rothbard,[100] whereas the second, the one offered by Block[101] and cited by Rothbard,[102] certainly does.

Let us quote Lott in full on this point, to reduce the possibility of miscommunication:

> This brings us to a second possible interpretation of Rothbard's objection to the Coase theorem. This second argument is advanced by Walter Block (1977) in a paper Rothbard cites.[103] The analogous argument to the railroad and farmer is that while the farmer places this additional $900,000 value on the orchard, he neither "has the money" to pay the railroad up to $1 million (if the railroad's foregone profits were that high) nor would he want to pay that much money, for if he did he would no longer want to own the orchard. If Rothbard meant either one of these points, then the response is simply that he has violated the zero wealth effects assumption of the theorem. That is, the level of his wealth does determine whether the farmer will purchase the nonpecuniary benefits he receives from running the orchard. Wealth effects do not exist in the case of a strictly profit- maximizing firm, but only where individual consumption is occurring as in the case Rothbard mentions.[104]

My problem with Lott's treatment is that he is widening "the zero wealth effects assumption of the theorem" far beyond what Coase himself stipulated; he is in effect making it up as he goes along, in order to protect Coase from legitimate criticism. Coase stated in this regard:

> But as the payment would not be so high as to cause the cattle-raiser to abandon this location and as it would not vary with the

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98. *Id.* at 876.

99. *Id.*

100. *See* Rothbard, *supra* n. 8.

101. *See* Block, *Coase and Demsetz on Private Property Rights*, *supra* n. 19.

102. Rothbard, *supra* n. 8, at 57-58.

103. Lott, *supra* n. 5, at 876. "Rothbard's statement (p. 59, n. 6) that 'there may well be farmers so attached to their orchards that *no price* would compensate them,' leads one to believe that, like Block, he is forgetting Coase's assumption of zero wealth effects." *Id.* at 876 n. 2.

104. *Id.* at 876.

> size of the herd, such an agreement would not affect the allocation of resources but would merely alter the distribution of income and wealth as between the cattle-raiser and the farmer.[105]

What Coase is saying is that while the judge's decision would indeed alter the relative wealth of the two disputants, resource allocation would be invariant with regard to the judge's decision in the zero transactions costs world, or, as Lott would have it, with "[t]ransactions costs . . . smaller than the gains that can be realized by agreement between the parties."[106] The "wealth effect" Coase is talking about is the relative "distribution of income and wealth" between the winner and loser of the court finding.[107]

Lott is attempting to stretch this to cover something never even mentioned by Coase—the issue of whether or not the loser of the court decision would have enough income or wealth with which to finance the bribe to the winner, in case he lost the decision.[108] This is a *very* separate topic from the one concerning the fact that the wealth of the winner will increase while the wealth of the loser will decrease.

Perhaps a numerical example will clarify this crucially important distinction.

Suppose, then, that a poor man and a rich man are contending over the ownership of a flowerpot. The former places a value on it of $1000, while the latter $100. If the judge awards the flowerpot to the poor man, that is the end of the story; the rich man will not attempt to purchase it from him. But suppose that the court finds in favor of the rich man. Now, according to the Coase theory, the poor man, valuing it at $1000, is supposed to be able to buy it from the rich man for some price lying in between these two levels. For example, if the poor man offers the rich man $400 for the flowerpot, both of them will gain. The poor man will profit from the deal to the extent of $600 ($1000-$400) while the rich man will earn $300 on the deal ($400-$100).

But where, pray tell, will the poor man get the $400 with which to purchase this item? We may suppose he is *very* poor, and simply does not have this amount of money at his disposal. Ah, but what about that $1000? He values the flowerpot at this amount, does he not? Yes, he

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105. Coase, *supra* n. 3, at 5.
106. Lott, *supra* n. 5, at 875.
107. Coase, *supra* n. 3, at 5.
108. Lott, *supra* n. 5, at 876.

does. Well, if so, cannot he go to the bank and borrow the $400 necessary to finance the purchase of it from the rich man? Out of his $600 profit, he can certainly pay off his debt, with a significant amount of money to spare. Yes, indeed, he could do so, if this flowerpot *had any value to anyone else; that is, if it had market value.* But suppose that it does *not.* That is to say, the poor man values the flowerpot *not* because of its market value, but simply on the basis of psychic evaluation. This amount of money, $1000, is what he would accept for its *sale*, but he *has* no money of his own. He cannot make the purchase with his own funds. It will *not* serve as collateral the bank will recognize, since no one but the poor man values it at all. Sorry, the rich man values it at $100. But this is entirely irrelevant. The poor man has *no* money at all; nada, zip, bupkes, nothing. For him, the $100 he must pay the rich man for it is an astronomical sum.

There are two ways to reply to Lott on this matter. One, this is simply *not* a "wealth effect" as contemplated by Coase.[109] What that author meant by this phrase was something very different: That he was entirely cognizant that the court's decision would determine the relative wealth of plaintiff and defendant.[110] Two, I concede that this flowerpot—psychic wealth example *is* a "wealth effect." But, then, there are *two different* wealth effects: the one mentioned by Coase, and this *very* distinct psychic income one. There is no way around the conclusion, however; Rothbard and Block discerned a real error in Coase.[111] Lott, in supporting Coase vis a vis Rothbard and Block, is also mistaken.[112]

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109. *See* Coase, *supra* n. 3.

110. *Id.* at 19 (Coase maintained, only, that the allocation of resources, e.g., who would end up with the flowerpot, would be independent of the judicial finding. But this, we can now clearly see, was a mistake. The flowerpot will be retained by the poor man if he is judicially awarded it; if not, he will not have the means to bribe the rich man into giving it to him.).

111. *See* Block, *Ethics, Efficiency, Coasean Property Rights and Psychic Income*, *supra* n. 19; Block, *Coase and Demetz on Private Property Rights*, *supra* n. 19; Rothbard, *supra* n. 84.

112. *See* Lott, *supra* n. 5 (This error committed by Lott is similar to that made by Demsetz, *Ethics and Efficiency in Property Rights Systems & Block's Erroneous Interpretations*, *supra* n. 19. The latter author also criticized Block, *Coase and Demsetz on Private Property Rights*, but was responded to in Block, *Ethics, Efficiency, Coasean Property Rights and Psychic Income: A Reply to Demsetz*, and Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz. See supra* n. 19).

It is more than passing curious that Lott focused mainly on the zero transactions cost world, or where benefits of reallocating resources were greater than such costs.[113] For Coase, this model was the relatively uninteresting one.[114] This Nobel prize-winning economist has long held that the positive transactions cost world, where benefits of reallocating resources were less than such costs, was by far the more interesting one.[115] Here, since transactions costs are so high, the judicial decision is definitive not only for Coasean wealth effects, but for allocational decisions as well. And it is precisely in this model that Coase and the Coaseans have taken their most severe criticisms.[116]

One last point. In the conclusion of his work, Lott states as follows: "In summary, Rothbard's piece is disappointing in that he misunderstands the opposing arguments. The whole debate is especially unfortunate since it is between natural allies (for instance, both stress the subjective nature of cost and that all costs are opportunity costs)."[117]

In my view, nothing could be further from the truth. Of course, it cannot be denied that on *some* issues Coase and Rothbard come out on the same side. Both, for example, favor privatization of the airwaves.[118] But as far as the subjective nature of costs and the doctrine of opportunity costs, the two might as well come from different planets. All throughout Coase there are numerical examples of costs.[119] Rothbard would reject these out of hand as essentially unknowable to third parties such as courts, the very institutions relied upon by Coase to make judgments on the basis of them.[120] It is the same with opportunity costs. These are the next best alternatives foregone whenever one chooses. As such, they are necessary private, and subjective. No judge can know of anyone's opportunity costs.

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113. Lott, *supra* n. 5, at 875.

114. Coase, *supra* n. 3, at 15.

115. *See id.*

116. *See generally supra* n. 88.

117. Lott, *supra* n. 5, at 878 (footnote omitted).

118. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* 98-103 (rev. ed., Macmillan 1978).

119. *See* Coase, *supra* n. 3.

120. Rothbard, *supra* n. 8, at 126.

Yet, it is on the basis of these that the Coase-inspired judge must render his decisions, in the real world of high transactions costs.

III. CONCLUSION

Coase is revered as a strong advocate of private property rights and free enterprise. And, to some degree, this is certainly a correct assessment of his contribution to the field of law. As the old saying goes: "Where there is smoke, there is fire." It would be astounding if a person seen by many as a defender of economic freedom had no claim to such a mantle at all.

However, it has been the burden of this paper to demonstrate that, notwithstanding the fact that he does offer support for capitalist institutions in some regards, this is simply not true of his work on social costs. Here, much to the contrary of the widespread reputation he enjoys as a defender of economic liberty, the very opposite is the case. Coase can clearly and directly be interpreted as support for the horrendous *Kelo* decision, and there is nothing in Lott's defense for Coase that can withstand serious analysis.