

## **Property, Reciprocal Altruism, and *Kelo v. City of New London***

Behavioral biology, particularly its analysis of reciprocal altruism (a subpart of the social relations behavioral system), and its emphasis on property ownership as a basic human instinct can help us understand *Kelo v. City of New London*,<sup>1</sup> which concerned the application of the Takings Clause of the Fifth Amendment of the United States Constitution. The issue in *Kelo* was whether a taking for economic development was a “public use” under the Takings Clause.<sup>2</sup> The Takings Clause states: “[N]or shall private property be taken for public use, without just compensation.”<sup>3</sup>

New London, Connecticut approved an economic development plan that was “projected to create an excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”<sup>4</sup> New London had seen decades of economic decline including high unemployment, and, in 1996, the federal government had closed the Naval Undersea Warfare Center in Fort Trumbull, which had employed over 1,500 people.<sup>5</sup> In 1998, Pfizer, a major pharmaceutical company, decided to construct a \$300 million dollar facility adjacent to Fort Trumbull.<sup>6</sup> In May 1998, New London created a plan to develop 90 acres of the Fort Trumbull area for commercial, recreational, and residential use.<sup>7</sup> The area included 115 privately-owned properties, as well as 32 acres from the former naval facility.<sup>8</sup> New London approved the plan in January 2000, and it authorized the use of eminent domain to acquire property for the project.<sup>9</sup>

The City commenced condemnation proceedings against nine owners who owned 15 properties in the area, including the house of a person who had lived there since 1918.<sup>10</sup> There was no allegation that the properties were blighted or in poor condition.<sup>11</sup> The owners brought

suit in superior court, and the court ruled in favor of the owners for part of the property (park or marina support), but not another part of the property (office space).<sup>12</sup> The Connecticut Supreme Court held that all the takings were valid, and the United States Supreme Court affirmed this ruling.<sup>13</sup>

Justice Stevens began his opinion by stating the extremes of the Takings Clause:

it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.<sup>14</sup>

Neither extreme was involved in this case.<sup>15</sup> In this case, the taking would be executed pursuant to a carefully considered development plan, but not all the land was to be used by the general public, nor was the land to be used by a common carrier, whose services would be open to all comers.<sup>16</sup>

Rather than requiring that condemned property be put into use for the general public, which the Court had considered impractical, at the end of the nineteenth century, the Court “embraced the broader and more natural interpretation of public use as ‘public purpose.’”<sup>17</sup> For example, in *Berman v. Parker*,<sup>18</sup> the Court had upheld a redevelopment plan that had targeted a blighted area of Washington, even though the particular condemned department store was not blighted itself. The Court deferred to a legislative and agency determination that the area must be planned as a whole.<sup>19</sup> Similarly, the Court had upheld a Hawaii statute under which “fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership.”<sup>20</sup> Concerning this case, *Kelo* declared: “reaffirming *Berman*’s

deferential approach to legislative judgments in this field, we concluded that the State’s purpose of eliminating the ‘social and economic evils of a land oligopoly’ qualified as a valid public use.”<sup>21</sup> Likewise, in *Ruckelshaus v. Monsanto Co.*,<sup>22</sup> the Court upheld the Federal Insecticide, Fungicide, and Rodenticide Act that allowed the Environmental Protection Agency to consider data, including trade secrets, “submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data.”<sup>23</sup> Although the main beneficiaries of the Act were subsequent applicants, the Court found “Congress’ belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition.”<sup>24</sup>

The Court concluded:

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of Federalism, emphasizing the “great respect” that we owe to the state legislatures and state courts in discerning local public needs . . . For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.<sup>25</sup>

Concerning the present facts, the Court concluded that the City’s “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”<sup>26</sup> The Court continued: “Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in the light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirements of the

*Fifth Amendment.*<sup>27</sup>

The Court rejected the owners' argument that it should create a bright-line rule that economic development is not a public use.<sup>28</sup> The Court noted that promoting economic development is a traditional governmental function, and that the Court had upheld similar takings in agriculture and mining that had been important to the states' welfare.<sup>29</sup> The Court also rejected the owners' argument that employing eminent domain for economic development impermissibly blurred the boundary between public and private takings on the ground that a government's pursuit of a public purpose will often benefit private parties.<sup>30</sup> Finally, the Court rejected the owner's contention that the Court "should require a 'reasonable certainty' that the expected public benefits will actually accrue."<sup>31</sup> The Court declared: "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."<sup>32</sup> The Court added: "A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."<sup>33</sup>

Justice Steven's opinion in *Kelo* contravenes basic principles of human behavior—principles which this author thinks the Framers used to draft the Constitution. First, the Supreme Court should not defer to the legislature when fundamental principles are involved. This author believes that behavioral biology supports a Kantian notion of rights—"the view that the rational choice in ethics is always the choice that respects the rights of autonomous persons freely to determine their own destinies, even if this respect is bought at the cost of loss of

happiness or well-being.”<sup>34</sup> Human beings are autonomous because they have the capacity for rational choice.<sup>35</sup> That an individual is mainly determined by the inner workings of his or her mind backs up Kant’s notion that humans should be respected because they can make rational choices. Thus, in matters of basic principle, the Court should not defer to policy decisions of the other branches.<sup>36</sup>

More fundamentally, New London’s taking of private property interferes with the basis of human nature. Property developed as part of humans’ social relations behavioral system,<sup>37</sup> and it is hard-wired into our brains.<sup>38</sup> Thus, “contrary to legal realists, property is a phenomenon that exists apart from any organized government.”<sup>39</sup> Scholars believe that property evolved to avoid harm to individuals,<sup>40</sup> that it developed as a method to control cheating,<sup>41</sup> that it involved territorial possession,<sup>42</sup> that evolved as an incentive to get people to work,<sup>43</sup> and that survival is based on the use of things.<sup>44</sup> Finally, when people have an interest in property, they protect that property and put the property to beneficial use, thus benefitting the community.<sup>45</sup>

Most important for the analysis of *Kelo* is that property evolved as a method to deal with cheating. Professor Richard Dawkins created the notion that genes are selfish—that they are only concerned with their own survival.<sup>46</sup> “The gene is ‘selfish’ in the sense that it is more likely to endure through a line of organisms if it transmits to them qualities that tend to preserve the gene.”<sup>47</sup> Altruism occurs through two mechanisms: kin selection and reciprocal altruism.<sup>48</sup> Kin selection happens because the selfish gene can continue by promoting the success of its relatives who have the same gene.<sup>49</sup> On the other hand, it is improbable that “public-minded altruism” will occur among nonrelatives because of the possibility of cheating.<sup>50</sup> However, reciprocal altruism can *evolve*. Reciprocal altruism, as proposed by Professor Robert Trivers, can be

described as: “I’ll do X for you if you do something X-like for me at some point down the road.”<sup>51</sup> “Reciprocators who help others who have helped them, and who shun or punish others who have failed to help them, will enjoy the benefits of gains in trade and outcompete individualists, cheaters, and pure altruists.”<sup>52</sup> Thus, reciprocal altruism is an act of self-interest.<sup>53</sup> “As reciprocating individuals gained resources over non-reciprocal altruists and therefore outproduced them, genes for traits related to reciprocal altruism spread throughout the population.”<sup>54</sup> Such reciprocal altruism is obviously beneficial to the community and should be protected by the law.<sup>55</sup>

Under Triver’s theory, reciprocal altruism needs three conditions to remain stable and evolve:

1. Small costs to giving and large benefits to receiving;
2. A delay between the initial and reciprocal act of giving, and
3. Multiple opportunities for interacting, with giving contingent upon receiving.<sup>56</sup>

The psychological mechanisms involved in reciprocity include “the capacity to quantify costs and benefits of exchange, compute the contingencies, inhibit the temptation to defect, and punish those who fail to play fair.”<sup>57</sup> These mechanisms require thinking about someone’s future mental state.<sup>58</sup>

Our Constitution is a social contract that is rooted in reciprocal altruism. A social contract is “an arrangement negotiated by rational, self-interested individuals,” which evolved for the protection of individuals.<sup>59</sup> Professor Pinker has written that “[r]eciprocal altruism, in particular, is just the traditional concept of the social contract restated in biological terms.”<sup>60</sup> Other biologists have theorized that our legal institutions developed “to compensate for the fact we are not programmed by biological evolution to behave cooperatively in large groups of non-

kin.”<sup>61</sup>

Part of the social contract that is our Constitution is the protection of property. Similarly, as mentioned above, protection of property is essential to reciprocal altruism and human nature.<sup>62</sup> One of the Constitution’s goals was to protect private property from those who would use governmental mechanisms to appropriate what is not theirs. As Professor McGinnis has observed: “Thus under the Framers’ system, providing public power to a continental people paradoxically was an attempt to protect wealth created by private enterprise from public expropriation.”<sup>63</sup> He has added: “If property is natural to man, a government that ignores the interests of mankind in property and exchange does so at its own peril.”<sup>64</sup>

In ruling that a taking for economic development did not violate the Takings Clause, Justice Stevens violated these basic principles of human nature, as well as the Framers’ carefully-balanced social contract. The government has taken property from one individual and given it to another. Instead of the government protecting private property, the government is being used to appropriate private property. Government is breaking the social contract and encouraging cheating. *All* private property is now subject to condemnation after *Kelo*, a result that is not consistent with human nature because it interferes with security in property.

Property rights are not based on a utilitarian, cost-benefit analysis.<sup>65</sup> For example, the property right to prevent trespass to land is absolute; it does not depend on a cost-benefit analysis that the trespass would or would not be beneficial to society.<sup>66</sup> As one scholar as noted, “when the government has broad eminent domain powers that can be ‘lent’ to commercial actors, property is no longer protected by a ‘property rule’ requiring voluntary transactions, but instead by a ‘liability rule’ that permits nonconsensual transfer at judicially determined prices.”<sup>67</sup>

Accordingly, economic development takings where the government takes property from an innocent party and awards it to another party who can make better use of it are not justified. While the new use might create a bigger pie and produce favorable externalities, such as better business in the neighborhood, such takings go against our basic instincts concerning the sanctity of property.<sup>68</sup> Eminent domain under such circumstances constitutes immoral coercion of innocent parties.<sup>69</sup> Utilitarian considerations should not trump basic human rights.

The Framers knew what they were doing when they put “public use” instead of “public purpose” into the Takings Clause. This allowed the government to take property (for just compensation) when the government needed it, but it prevented the government from overreaching by taking property when it was for the benefit of private individuals. This was part of the Framers’ protection against factions—factions using the government for their individual gain.<sup>70</sup> Notably, under the economic development theory, private property is being redistributed to persons with influence in the political process, such as large corporations.<sup>71</sup>

In addition, this violation of the social contract can affect the individual initiative that the Framers wanted to protect and that is part of human nature. As Professor McGinnis has noted: “Such redistributive efforts decrease the incentives to engage in productive activity because some of the property created will be taken by others.”<sup>72</sup> In addition, as Donald Elliot has stated, “What a person is willing to do or how much of a particular activity a person will engage in is often dependent on his or her perception about what others in the community are doing.”<sup>73</sup> Moreover, “relative control over resources is important to [human’s] reproductive success.”<sup>74</sup> Finally, there is biological basis to fairness.<sup>75</sup> Professor Stake has written, “the property instinct connects with an instinct for equity in reciprocal exchanges and thus can be seen as one part of a sense of

fairness or justice.”<sup>76</sup> In sum, by reading “public purpose” for “public use” and deferring to legislative wisdom, the Court has read the Takings Clause out of the Constitution, and it has developed a notion of human nature that is contrary to science and the Framers’ intent.

Scott Fruehwald. Neurojurisprudence Website. Last updated December 26, 2009.

1. 545 U.S. 469 (2005).
2. *Id.*
3. U.S. Const. Amdt. 5.
4. *Kelo*, 545 U.S. at 472.
5. *Id.* at 473.
6. *Id.*
7. *Id.* at 473-74.
8. *Id.* at 474.
9. *Id.* at 475.
10. *Id.*
11. *Id.*
12. *Id.* at 475-76.
13. *Id.* at 476.
14. *Id.* at 477.
15. *Id.*
16. *Id.* at 478.
17. *Id.* at 479-80.
18. 348 U.S. 26 (1954).
19. *Id.* at 34.

20. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).
21. *Kelo*, 545 U.S. at 482.
22. 467 U.S. 986 (1984).
23. *Id.* at 1014.
24. *Kelo*, 545 U.S. at 482.
25. *Id.* at 483.
26. *Id.*
27. *Id.* at 484.
28. *Id.*
29. *Id.*
30. *Id.* at 485.
31. *Id.* at 478-88.
32. *Id.* at 488.
33. *Id.*
34. JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 71 (rev. ed 1990); *see also* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 425 (2002).
35. MURPHY & COLEMAN, *supra* note 34, at 77-79.
36. In her *Kelo* dissent, Justice O'Connor declared: "But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting); *see also Kelo*, 545 U.S. at 518 (Thomas, J., dissenting) ("Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional property interests in real property." (Citation omitted)); Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 47 (2006) ("It is most implausible that the Framers intended to defer to legislatures to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights.").

37. “The term behavior system refers to functionally and causally related behavior patterns and the systems responsible for them.” MICHAEL MCGUIRE AND ALFONSO TROISI, *DARWINIAN PSYCHIATRY* 60 (1998).
38. Jeffrey Evans Stake, *The Property ‘Instinct,’* 359 *PHIL. TRANSACTIONS ROYAL SOC’Y LONDON* 1763, 1763 (2004) (“[B]asic components of property preceded formal institutions; fundamental principles of property are embedded in the human brain.”); *see also* Thomas W. Merrill & Harry E. Smith, *Law and Morality: Property Law: The Morality of Property*, 48 *WM. & MARY L. REV.* 1849, 1894 (2007) (“The points establish, we believe, that property rights must be moral rights if they exist at all, and that the moral right to property is not qualitatively different from those moral rights we describe as human or civil rights.”); Herbert Gintis, *The Evolution of Private Property*, 64 *J. ECON. BEHAV. & ORG.* 1, 15 (2007).
39. John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 *J. CONTEMP. LEGAL ISSUES* 211, 222 (1997).
40. Stake, *supra* note 38, at 1763 (“Rivals can reduce the costs of competition by adopting strategies for determining the outcome of fights without physical damage.”); *see also* Gintis, *supra* note 38, at 3.
41. MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* 24 (2006).
42. Gintis, *supra* note 38, at 2 (“[P]reinstitutional ‘natural’ private property has been observed in many species, in the form of the recognition of territorial possession.”).
43. PINKER, *supra* note 34, at 290.
44. Morris B. Hoffman, *The Neuroeconomic Path of the Law*, 359 *PHIL. TRANS. R. SOC. LOND. B.* 1667, 1675, n.3 (2004).
45. *See* MICHAEL S. GAZZANIGA, *HUMAN: THE SCIENCE BEHIND WHAT MAKES US UNIQUE* 154-55 (2008).
46. PINKER, *supra* note 34, at 199; *see generally* RICHARD DAWKINS, *THE SELFISH GENE* (1976).
47. Bailey Kuklin, *Peril Invites Rescue: An Evolutionary Perspective*, 35 *HOFSTRA L. REV.* 171, 179 (2006).
48. *Id.* at 181.
49. *Id.* at 182-83.
50. PINKER, *supra* note 34, at 255; *see also* HAUSER, *supra* note 41, at 311 (“For Darwin, being nice to someone else at personal cost made little sense in light of the logic of natural selection.”).

51. HAUSER, *supra* note 41, at 254.
52. PINKER, *supra* note 34, at 255.
53. HAUSER, *supra* note 41, at 311.
54. McGinnis, *The Human Constitution*, *supra* note 39, at 217.
55. Kuklin, *supra* note 47, at 195; Stake, *supra* note 38, at 1763 (“[A] body is more likely to survive if its brain is equipped with rules of property incorporating ESSs [evolutionary stable systems] for reducing the cost of allocating resources among competitors.”); TIMOTHY H. GOLDSMITH, *THE BIOLOGICAL ROOTS OF HUMAN NATURE* 119 (1991) (“Because we are social creatures living in groups, no individual’s interest can be realized without some cooperation from other members of the group.”).
56. HAUSER, *supra* note 41, at 254.
57. *Id.* Professor Pinker similarly noted that among human’s cognitive faculties is “[a]n intuitive economics, which we use to exchange goods and favors. It is based on the concept of reciprocal exchange, in which one party confers a benefit on another and is entitled to an equivalent benefit in return.” PINKER, *supra* note 34, at 221.
58. HAUSER, *supra* note 41, at 216.
59. PINKER, *supra* note 34, at 285; *see also* HAUSER, *supra* note 41, at 411. As Professor Pinker has stated: “Peaceful coexistence, then, does not have to come from pounding selfish desires out of people. It can come from pitting some desires—the desire for safety, the benefits of cooperation, the ability to formulate and recognize universal codes of behavior—against the desire for immediate gain.” PINKER, *supra* note 34, at 169.
60. PINKER, *supra* note 34, at 285; *see also* HAUSER, *supra* note 41, at 274.
61. E. Donald Elliot, *Law and Biology: The New Synthesis*, 41 ST. LOUIS L.J. 595, 609 (1997); *see also* McGinnis, *The Human Constitution*, *supra* note 39, at 218 (“[T]he innate tendency to be reciprocally altruistic provides a strong foundation on which to erect institutions to enforce obligations that serve mutual self-interest.”).
62. McGinnis, *The Human Constitution*, *supra* note 39, at 222 (“[P]roperty itself is an essential aspect of any human society.”).
63. *Id.*
64. *Id.* at 222; *see also* Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20, 24 (1998) (“Strong feelings surround the sense of ownership and any attack on its inviolability generates visceral reactions at the

expense of rational, unbiased inquiry.”) Professor Julia Mahoney has noted that “*Kelo* sparked a conflagration of outrage. . .” Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 104 (2005). She has continued: “This anger may be especially acute in settings where the acquired property is to be transferred to developers or other commercial interests, thereby creating an opportunity for profit-seeking firms to acquire property for less than they would have to pay in a negotiated purchase.” *Id.*

65. Merrill & Smith, *supra* note 38, at 1851. They add that “we will argue that the forms of utilitarianism that undergird modern law and economics which assume a degree of plasticity of property and have underplayed the information and coordination problems present in core property situations are inconsistent with the nature of the rights in question.” *Id.* at 1856-57.

66. *Id.* at 1871-74.

67. Mahoney, *supra* note 64, at 106.

68. And, a stretched reading of the Constitution. The Takings Clause says public use, not public purpose. U.S. CONST. Amend. V.

69. Merrill & Smith, *supra* note 38, at 1882-84.

70. As Professor Goldsmith has noted: “Human history is largely the record of struggles for control of resources by one group at the expense of others.” GOLDSMITH, *supra* note 55, at 120. Similarly, Professor Sandefur has declared: “Whenever government has power to redistribute benefits and burdens between constituents, interest groups will compete for control of that power in order to secure benefits for themselves or to impose burdens on their competitors.” Sandefur, *supra* note 36, at 34.

71. Justice Thomas has pointed out that economic development eminent domain disproportionately affects poor and minority communities. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting). For examples of eminent domain abuse, see Sandefur, *supra* note 36, at 35.

72. McGinnis, *The Human Constitution*, *supra* note 39, at 222. Notably, the redistribution with economic development eminent domain is usually from those with less resources to those with more resources. As Justice O’Connor noted in her dissent to *Kelo*, “the founders could not have intended this perverse result.” *Kelo*, 545 U.S. at 505.

73. Elliot, *The New Synthesis*, *supra* note 61, at 611.

74. McGinnis, *The Human Constitution*, *supra* note 39, at 223; *see also* Coletta, *supra* note 64, at 69 (“Economic stability similarly reinforces a sense of personal stability as well as a feeling of well-being and security.”).

75. Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 441 (2005); *see also* HAUSER, *supra* note 41, at 84; Douglas A. Terry, *Don’t Forget About*

*Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 CONN. L. REV. 477, 507 (2002) (“In a situation in which an individual suspects that the distribution is not in accord with a particular distributive rule, he may experience a feeling of moral outrage (that’s not fair). This quick and simple Darwinian algorithm, and its accompanying strong emotional response, is adaptive because [a] hunter gatherer who is not quick to complain about the distribution of meat will find his or her objections addressed to a pile of gnawed bones.”) .

76. Stake, *supra* note 38, at 1164.