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Opening Remarks

Roger J. Marzulla

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Thank you, and good afternoon. I'll have to say that we didn't have any get-togethers like this symposium when I was at Santa Clara some thirty-five years ago. You all have come a long way since the old days, and I join Matt in congratulating you on putting together a program that focuses squarely on an issue that has sparked fires across the country. I'd like to explore with you today why *Kelo*[1] is such a hot issue.

To put this issue into context, it is important to understand that as recently as 20 years ago there was virtually no debate on property rights; it was a musty, back-of-the-library topic fit only for a few professors and maybe a law review article or two. In the 1980s, I was sort of known as the property rights guy around the U.S. Justice Department—always bringing up this obscure subject that nobody else really wanted to talk much about. Even so, with the support of Attorney General Meese, we had a few modest successes in the lower courts, and President Reagan did sign an executive order dealing with property rights (EO 12,630). The Justice Department also filed *amicus* briefs in some of the key cases—the *First English* case,[2] *Williamson County*,[3]

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1. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

2. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). *First English* held that temporary takings denying a landowner all use of his or her property are not different in kind from permanent takings, and require compensation just as permanent takings do. *See id.* at 318. It also held that the just compensation clause is self-executing, and entitles a landowner to bring an inverse condemnation action in order to secure that compensation. *See id.* at 321.

3. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

MacDonald v. Yolo County,[4] and so forth.

Nevertheless, at that time our goal was pretty modest, I think: that when we said "Fifth Amendment," the automatic association would be something other than "privilege against self-incrimination". But the problem with setting modest goals is that you often achieve them. Today, I think that we can safely say that we've accomplished that goal; I think that there's nobody in the room who is going to leave without understanding that the Fifth Amendment also has a just compensation clause that says, "nor shall private property be taken for public use, without just compensation."

Still, the obscure stirrings of the property rights movement back in the 1980's hardly explains why the Santa Clara Law Review has organized this symposium today, and why the *Kelo* decision has generated such interest. In short, the question is: "Why the fuss?" If the *Kelo* case really simply confirmed what we'd all known from *Berman*[5] and *Hawaii Housing Authority v. Midkiff*: [6] that "public use" in the Fifth Amendment really means "public purpose." That public purpose is, of course, as broad as the powers of government, and is fundamentally measured by a rational basis test, a test which has a very slim (approaching zero) role for the judiciary.[7] So I ask again why, twenty years after *Midkiff*, are we holding this symposium? And where were you all twenty years ago when the public use definition was fixed by the Supreme Court in *Midkiff*?

The great thing about a rhetorical question is that you also get to answer it. I'd like to exercise that prerogative by suggesting that the *Kelo* case was the right set of facts at the right time. I'd like to think that the many people that have worked in the property rights field over the twenty years since *Midkiff* to bring to the public's attention the importance of our property rights might all have had something to do with today's symposium, and that perhaps now we are at a point where we recognize that the right to the ownership of property—particularly of property which constitutes a home, a community—is tied together with the fundamental notion of individual liberties. That is, property rights are integrated

4. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).
5. Berman v. Parker, 348 U.S. 26 (1954).
6. 467 U.S. 229 (1984).
7. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540-43 (2005).

into our fundamental notion of what a community is and what a person is. And that to the extent that government intervenes in those very precious (and to some people both constitutionally protected and, some might even say, bordering on sacred) rights, that government's intrusions must be carefully examined, and in a proper world, they also ought to be limited.

I'd like to touch on three topics today: the constitutional law implications of *Kelo*, the social implications, and the economic implications.

I touch first on constitutional law because I thought I heard that first panel talking about the eminent domain clause of the Constitution. Can somebody give me the cite for the eminent domain clause in the Constitution? Right—there is none. In a constitutional law structure, we, the people, have by compact—by contract—delegated to the government certain essential powers. And we look to that Constitution to determine what those powers are. We look to the words of the contract. I submit that it is a dangerous thing to start recognizing inherent sovereign powers, powers that we the people didn't give to the central government that are necessarily unlimited precisely because there are no words describing them, because we never actually gave them to the central government.

Now, you might say as a matter of practicality, the government must have eminent domain powers. And you might say that the Fifth Amendment recognizes there are eminent domain powers; hence, the reference to public use. I would concede both of those points. What I would add, however, is that it is a most difficult and extraordinary undertaking for the Supreme Court, interpreter of the written Constitution (*Marbury v. Madison*),[8] to launch into defining the nature and extent of a power (the eminent domain power), which is not even delegated to the central government in our Constitution.

Sure, you might say, "Come on everybody knows that you can't write everything down. There must be some fundamental sovereign powers that just aren't mentioned, but are assumed." But cannot the same be said of the fundamental sovereign power to lay and collect taxes? That's

8. 5 U.S. (1 Cranch) 137 (1803).

in the written Constitution. How about the power to raise an army? Isn't that a pretty sovereign power? But it's in the Constitution, too. What about the power to establish post offices and build post roads? That's there, too.

So let me highlight for you initially the challenge, the difficulty, and ultimately the danger to a constitutional system in which we are cut loose from the moorings of our written constitution and start discovering powers in the central government that are not delegated to it by that constitution. Necessarily, those powers are unlimited. The Fifth Amendment, just to respond to the argument that someone will make, certainly does reference the right to just compensation when property is taken for public use. It recognizes that property, of course, can be taken for public use, but it certainly does not define or give to the government that power. Rather, like the other provisions of the Bill of Rights, it is in fact a limitation upon the exercise of that power. So I suggest to you that the first point, and perhaps one of the reasons that some of us are stirred up about the *Kelo* decision, is precisely because it reminds us that we may not have protections against inherent powers which aren't granted to the government in the Constitution in the first place. Okay, that's the constitutional law part of my presentation; this is the law review symposium after all.

Let's move on to social implications. What do I know about social implications? Well, I guess I know one thing and that is that the great debate over *Kelo* is the great debate between libertarianism on the one hand—that is, people who focus upon the rights of the individual—and utilitarianism on the other, or people who focus upon the accomplishment of social goals.

Are there any Trekkies in the audience? You may remember the guiding principle for the Vulcans was that the needs of the many outweigh the needs of the few. It was a strictly utilitarian approach that said that we've got to sacrifice the individual for the benefit of society as a whole. I suggest to you that that is not the foundation upon which our government was based. Rather, our government was based on the Lockean notion of the individual being paramount, of a government not having inherent powers, not having powers that are passed on by divine right or otherwise through lineage. Our Constitution is predicated on the fundamental

concept of a government which has only the powers delegated to it by the people, not one having powers that infringe upon the inherent and natural rights of the individual. And that's why it seems to me that the Supreme Court two hundred years ago in *Calder v. Bull*[9] could say, to take property from *A* and give it to *B* is against reason and justice. And you'll note that that's how Justice O'Connor starts her dissent in *Kelo* as well.[10]

But notice that the Supreme Court did not say taking property from *A* and giving it to *B* is against the Constitution; the Court said that it is against reason and justice. And I think what that reflects is a notion that the protections of our constitutional system—the structure and the underlying premises of our constitutional system—recognize that the individual ought not be made to sacrifice his or her rights, at least unnecessarily, for the public good. Where do you strike that balance? That's perhaps the topic for next year's symposium.

Finally, let's go to the third point, which is the economic impact, the unintended consequences, some of which Matt talked about, and just a few others of which I'd like to identify. First of all, I am hardly the expert and can't really add too much to the discussion of whether so-called economic development projects, whatever they may be, are good or bad, whether they make money or lose money. What I find in taking a look at a couple of these litigations involving baseball and football stadiums in New York and Washington, D.C., where there are big fights over that right now, is you bring in your accountants, they bring in their accountants, somebody brings in the guys who used to work for Enron, and you can probably get any answer you want as to whether or not economic development projects are actually economically good or bad.

In fact, it seems to me that most of the time this debate, on its face about economics, is fundamentally the same argument as the one we just discussed—that between the utilitarians and the libertarians. It's the argument between the economy interveners—we'll call them the planners—and

9. 3 U.S. (3 Dall.) 386 (1798).

10. Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting).

the free market folks. That is, do you believe that gentrification, or the updating and improvement of the buildings and facilities and businesses with the jobs they bring and so forth, is good or bad? This is the Walmart/Costco question, and indeed it obviously poses the fundamental conundrum that Matt referred to: gentrification, by its very nature, is upscaling and upheaving; it means moving out the current residents to make way for the "gentry."

Now, here's the question I suggest needs to be dealt with in the context of this discussion of economic impact: to what extent does government have the right to choose economic winners and losers? To what extent should the government of New London, Connecticut, be involved in helping a corporation build a hotel, build condominiums, build whatever, at the expense of Suzette Kelo and her neighbors? Certainly there are economic benefits to someone, but often those benefits are gained at the expense of someone else. So it takes us back to the macro question: is it economically beneficial? Maybe yes, but as to certain individuals, are there losers—economic losers as well as social losers? I think the answer is yes. It seems to me that in the end, the question to focus on is: how much of our constitutional liberty are we willing to concede in an effort to achieve what we believe is going to end up an economically beneficial project in a given circumstance.

To catalyze this discussion, I will throw out one thought. Benjamin Franklin, railing against some of his more apathetic fellow citizens at the time of the Revolution, commented that "Those who are willing to give up their liberty in the pursuit of their security deserve neither". Thank you.