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The Takings Clause: The Practical Reasonableness of Kelo v. City of London, Connecticut

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THE TAKINGS CLAUSE:

The Practical Reasonableness of

Kelo v. City of New London, Connecticut

By John P. Burns

Law and Morality

Juris Doctor Candidate, 2016

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Introduction

Throughout Western history, the issue of property distribution has been debated extensively in relation to the intrinsic and instrumental[1] worth of private property. If it is an intrinsic (or basic) good,[2] it may deserve unabridged protection from the government as advocated by Arthur Lee in the midst of the Revolutionary War. "The right of property is the guardian of every other right, and to derive people of this is to deprive them of their liberty."[3] But there may be limitations on this good if it is instrumental in nature, where it is utilized in the promotion of basic values for the individual and the common good.[4] "It is not however, an absolute right- property has always been subject to reasonable statutory and judge-made

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[1] Finnis, John NATURAL LAW and NATURAL RIGHTS, 83 (Oxford University Press, 2ed., 1980) [hereinafter Finnis, NATURAL LAW]. Finnis distinguishes intrinsic goods from instrumental goods as a good which is sought as a basic value, which has self-evident worth to the individual. These are goods are self-evident because their worth "cannot be demonstrated, but equally it needs no demonstration." Finnis, NATURAL LAW at 65. One example is the pursuit of knowledge, which can be defined as knowledge sought for its own sake or "truth for its own sake... we want truth when we want the judgments in which we affirm or deny propositions to be true judgments, or (what comes to the same) want the proposition to be affirmed or denied, or to be affirmed or denied, to be true propositions... " Finnis, NATURAL LAW at 59-60. Instrumental goods (here knowledge) would be one which is speculative, or "useful in the pursuit of some other objective, such as survival, power, popularity or a money-saving cup of coffee." Finnis, NATURAL LAW at 59. Whether property is to be considered an intrinsic or instrumental good will help determine our systemic assessment whether the Takings Clause and *Kelo* decision regarding the clause are morally just.

[2] *Id.* at 83. Finnis describes the basic goods (or basic values) as intrinsic, universally applicable moral judgments concerning seven basic goods promoted through societal law and values. He admits that though there are preferences and motivations which may manifest themselves in different ways across societies, such self-evident values spanning humanity are definitive in accessing the goal of practicable reasonableness. "The universality of a few basic values in a vast diversity of realizations emphasizes *both* the connection between a basic human urge/drive/inclination/tendency and the corresponding form of human good, *and* at the same time the great difference between following an urge and intelligently pursuing a particular realization of a form of human good that is never completely realized and exhausted by one action, or lifetime, or institution, or culture (not by any finite number of them)." Finnis, NATURAL LAW at 84. The seven basic goods according to Finnis are knowledge (*see* note 1 *supra*), life, play, aesthetic beauty, friendship, practical reasonableness, and religion. Finnis, NATURAL LAW at 86-89.

[3] James W. Ely, Jr., THE GUARDIAN of EVERY OTHER RIGHT: A CONSTITUIONAL HISOTRY OF PROPERTY RIGHTS, 26 (3 ed., 2008) [hereinafter Ely, PROPERTY RIGHTS].

[4] Finnis, NATURAL LAW at 154. Finnis describes the common good in the context of his book, as "*a set of conditions which enables the members of the community to attain form themselves reasonable objectives,* or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community." Finnis at 155 (emphasis added). The common good is the heuristic device in which we measure whether the law is just.

regulations. The consequent tension between state power and individual rights is particularly evident in cases of eminent domain…to seize private property without consent."[5]

The eternal dilemma of a free society, it can be argued, is seeking balance between liberty and the common good. Politics, whether through the power of public debate, legislative determinations, or judicial protection of individual rights, is "the very process of finding some equilibrium between these two competing values."[6] The Takings Clause under the Fifth Amendment of the United States Constitution is illustrative of that process and the resulting equilibrium. Under the Fifth Amendment, the Takings Clause states that from no person "private property shall be taken for public use, without just compensation."[7] This balance between individual property protection and the necessity of promoting the common good both constrain the government from infringing on the individual property rights of its citizenry, while simultaneously reserving the power and judgment to use that property in pursuit of the common good.

Though this safeguard was constructed under the Bill of Rights, these rights continuously manifest into controversial issues in American political thought and constitutional jurisprudence. The most recent and substantial issue regarding the Takings Clause was the 2005 Supreme Court Decision, *Kelo v. City of New London, Connecticut*.[8] In its decision, the Supreme Court announced that the second prong of the takings clause reserving takings for public use does not extend to the assignment of property to another private party, if said property will be better used

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[5] Matthew Pickel, *Standing Pat in a Post Kelo World: Preservation of Broad Eminent Domain Power in Kraur v. New York State Development Corp.*, 52 B.C. L. Rev. E-Supplement 257 (2011) [hereinafter: Pickel, *Standing Pat in a Post Kelo World*].
[6] Charles Krauthammer, *Ebola vs. Civil Liberties*, Washington Post, October 16, 2014, http://www.washingtonpost.com/opinions/charles-krauthammer-ebola-vs-civil-liberties/2014/10/16.
[7] U.S. Const. amend. V.
[8] 545 U.S. 469 (2005).

in its new capacity to advance a public purpose.[9] The resulting outcry over this decision in the public and political spheres reflected an important question often at the heart of legal issues: is this moral? Philosopher John Finnis provides us with systematic application of practical reasonableness in deciding whether or not this result is one which produces a moral outcome. Through the application of longstanding notions of the good from philosophers such as Aristotle, Thomas Aquinas, John Rawls, and various thinkers and ideologies which have permeated Western civil society, we can come to a coherent conclusion as to whether individual property is an absolute value, what protections are afforded it, and whether the decision in *Kelo* was one of practical reasonableness.

Part I: A Legal History of the Takings Clause and Its Evolution under the United States Supreme Court

Personal Property and its Madisonian Protection against Government Abuse

In the advent of the American Revolution, colonists in British North America had been continuously subjected to the capricious and arbitrary whims of the Crown and its officers.[10] After the war was won and the Constitution authorized, the Bill of Rights was proposed and ratified to serve as a bulwark in the vanguard of personal liberty, protecting the most important individual rights of the American citizen against egregious abuse of government power.[11] The Takings Clause under the Fifth Amendment was a novel idea in the course of ratification, one which was not proposed by any of the ratifying states, but solely advanced by Virginia Representative and future President James Madison.[12] Madison strongly supported the clause because "it put certain interests above majoritarian determination: when the federal government

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[9] *Id.* at 483.

[10] Wood, Gordon, EMPIRE OF LIBERTY: A HISTORY of the EARLY REPUBLIC, 88 (2009).

[11] *Id.*

[12] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 791 (1995) [hereinafter: Treanor, *The Original Understanding*].

physically took property, compensation was necessarily owed. In other words, physical possession was protected as a liberal right."[13]

Before Madison's amendment, takings law in the United States in its colonial, revolutionary, and initial confederate stages did not require compensation for property taken by the government.[14] "Colonial and early American use of eminent domain were confined mainly to the building of roads, schools, and other public buildings."[15] Charters which established the British colonies did not recognize the individual right of property, only certain procedural rights.[16] These procedures granted colonists a jury decision regarding whether private property taken would be compensated by the Crown, but without any national requirement securing that particular right.[17]

Guaranteeing compensation was no safer during the course of the Revolution, as the necessity for wartime appropriation far outweighed concern for the individual's property value.[18] Out of the independent state constitutions formed during this period, only Vermont and Massachusetts required compensation similar to the form of their progeny Takings Clause. Under the Massachusetts Constitution, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore."[19] While it may be no surprise such clauses originally appeared in New England, where the brunt of British tyranny was born in the antebellum period,[20] the first

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[13] *Id.* at 819.
[14] *Id.* at 785.
[15] Schultz, David *What's Yours Can Be Mine: Are there any Private Takings After Kelo v. City of New London*, 24 UCLA J. Envtl. L. & Pol'y 195, 199 (2006) [herein after Schultz, *What's Yours Can Be Mine*].
[16] *See* Treanor *The Original Understanding* at 787.
[17] *Id.*
[18] William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708 (1985) [hereinafter Treanor, *The Origins and Original Significance]*.
[19] Mass. Const. of 1780, part I, art. X.
[20] Gordon Wood, THE CREATION of the AMERICAN REPUBLIC 1776-1787, 186 (1969) [hereinafter, Wood, THE CREATION].

national attempt to codify the objective that would underlie the Takings Clause was written in the Northwest Ordinance of 1787, which was passed by the Continental Congress to govern northwest territories not yet admitted as states. "Should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."[21] Despite the national concern represented by Congress in the Northwest ordinance, the Constitution and the states ratifying it did not initially place any similar restraint on the new federal government. At least two states had suggested every other amendment in the Bill of Rights, yet none had done so regarding anything similar to the Takings Clause.[22] The diminutive James Madison provided the heavy lifting for the people's protection of property.

Like many of the founders, Madison was a child of the Liberal Enlightenment, which was essential of indoctrinating the notion that government's *raison d'etre* is to protect the individual rights of the citizenry. One of these rights, as famously noted by John Locke in his <u>Two Treatises of Government</u>, is property.[23] In "The Federalist", one of a variety of essays published by Madison, Alexander Hamilton, and John Jay to garner state support for the Constitution,[24] Madison made clear that a government best serving the people and their interests would be one conceived to protect their persons, *and* their property.[25] "Government is instituted no less for

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[21] Treanor *The Original Understanding* at 791.
[22] Treanor *The Origins and Original Significance* at 708.
[23] John Locke, TWO TREATISES OF GOVERNMENT, 137 (Rod Hay, ed., McMaster University Archive of the History of Economic Thought DATE) 1690. ("Man being born, as has been proved, with a title to prefer freedom and an uncontrolled enjoyment of all the rights and privileges of law and Nature, equally with any other man, or number of men in the world, hath y nature a power not only to preserve his *property*- that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.") (Emphasis added).
[24] Ely, PROPERTY RIGHTS at 48-49.
[25] Treanor, *The Origins and Original Significance* at 710.

protection of the property, than of the persons of individuals."[26] In his speech supporting the Bill of Rights, Madison argued that such enumeration of these rights would promote a heighten standard of judicial review, subtly urging justices to "consider themselves in a peculiar manner guardians of those rights."[27] Madison's purpose was to promulgate the right of private property as an inherent right central to the existence of the individual. Such ownership would be a tool to promote independence, human flourishing, and foster a sense of purpose and being in the citizens of the nascent republic. "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."[28] Madison's successful promulgation of the Takings Clause protecting personal property from government seizure is a testament to the Enlightenment's concentration on individual rights, and the Founder's abhorrence of centralized and capricious government power. The passage of the Takings Clause under the Fifth Amendment has throughout the last three centuries help secure "life, liberty, and pursuit of happiness"[29] for the American citizen. It has advanced the protection of the individual's right to private property

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[26] THE FEDERALIST, No. 54 (James Madison). The value of THE FEDERALIST cannot be overstated in its accurate reflection of premier political thought in the time of the Framers. Madison and Hamilton, soon to be ardent partisan rivals in the quest for control of the nascent American government, were men who were originally forced to compromise some of their strongest beliefs at the Constitutional convention (Hamilton actually stormed out), only to take up the pen to publish close to one hundred public essays in support of its ratification in the states. They reflected, despite their inherent difference on the scope of the federal government in relation to the individual and the states, the common understanding among the Framers that a stronger, unified central government was necessary to preserve the public good in the midst of the tumultuous failures of the Articles of Confederation. Ely, PROPERTY RIGHTS at 49.

[27] Treanor, *The Origins and Original Significance* at 710.

[28] James Madison, *Property*, in THE PAPERS of JAMES MADISON, 29 (William T. Hutchinson et al. ed., University of Chicago Press, 1962) (1792).

[29] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (Thomas Jefferson's oft celebrated triumvirate of natural rights perhaps best encapsulates the values and views of the Founders of the United States in the throes of their revolutionary transition. The Federal Constitution, later drafted and ratified eleven years later, would prove to be a government framework constructed to promote the penumbra of rights implied by this phrasing, while simultaneously limiting that government from violating them.

while still promoting the cause of the common good, acknowledging the necessity of property takings for certain government endeavors. It is an artful compromise between citizen and republic, still defended to this day.

Supreme Court Jurisprudence in the Twentieth Century: What Constitutes a Taking, and What is "Public Use"?

The development of Takings jurisprudence in the twentieth century reflected the initial challenges brought on by the industrialization of the American economy.[30] The economy grew larger as did the government which supervised it.[31] This expansion in business prompted an increase in government intervention, namely regulatory functions.[32] These regulations affected property, and an updated interpretation of the Takings Clause was necessary to assess when regulations rendered property less valuable or altogether useless, and whether that devaluation required just compensation. The second major development in the Supreme Court over the twentieth century is the Court's assessment of the public use clause. Is it broader than the physical use of property by the public? Can the property simply serve a public purpose?[33] How much deference should be shown to legislatures in determining that purpose? These issues form the bedrock of Takings Clause jurisprudence in the twentieth century Supreme Court.

1. Regulatory Takings and the Value of Property

One of the central issues in Takings jurisprudence over the course of the last two centuries is whether regulation of property which negated or diminished its value could be considered a "taking" under the Fifth Amendment. Few major Takings Clause cases occurred

[30] Ely, PROPERTY RIGHTS at 83.
[31] *Id.*
[32] *Id* at 118.
[33] *Kelo* at 484-485.

for most of the nineteenth century, but with the development of industry and increased regulation in the post-Civil War period entering the twentieth century, property rights were subject to increasing government intervention.[34] In the wake of earlier cases where the majority of judges decided against compensation for property losing value or profit as a result of regulations, a jurisprudence earlier promulgated by then attorney Oliver Wendell Holmes, Jr., took hold after the Supreme Court decision he would later author in *Pennsylvania Coal v. Mahon.*[35]

Early on in his career, Holmes advocated for an understanding of property as value, much like Madison in his essays and overall support for the Takings Clause. He believed that "property is properly viewed as value, not physical possession, and that the Takings Clause should therefore protect more than physical possession."[36] He formed the tidy syllogism "The takings clause protects property. Property is value. Therefore, the Takings Clause protects value."[37] This theory began to reverberate throughout the legal world at the turn of the century. "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property."[38] The seminal Supreme Court case reflecting this theory was *Pennsylvania Coal v. Mahon.*[39] The case centered on the Koehler Act, which prevented companies from mining anthracite coal in land which could cause the subsidence of the housing or structure above. The plaintiffs brought suit as the Act interfered with contracted property already owned for mining operations which the statute rendered worthless.[40] In his majority

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[34] Treanor, *The Original Understanding* at 795.
[35] 260 U.S. 393 (1922).
[36] Treanor, *The Original Understanding* at 782.
[37] *Id.* at 802.
[38] John Lewis, A TREATISE on the LAW of EMINENT DOMAIN in THE UNITED STATES, § 57 (Chicago, Callaghan & Co. 1888).
[39] 260 U.S. 393 (1922).
[40] *Id.* at 413-414.

opinion, Justice Holmes articulated his overall view of the Takings clause, the value of property and public use, and what that means for those who are affected by those regulations:

"It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities where the right to mine such coal has been reversed… to make it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it."[41]

In his opinion, Justice Holmes applies the theories he advocated for nearly thirty years earlier: that once government becomes involved in appropriating private property in a way that either devalues or completely destroys it, the value of that property must be compensated to the owner. Though this regulation exercised under the state police power is valid as a measure to protect the health and safety of the public,[42] it still encroaches on the freedoms of coal miners involved in already-existing contracts. This sentiment echoes the rationalization of James Madison. "The rationale behind the takings clause is that the financial burden of public policy should not be unfairly placed on individual property owners but should be shared by the public as a whole," this way it is safeguarded by "imposing a practical cost limitation on the amount of private property that the federal government can seize for public purpose."[43]

Justice Brandeis challenged Justice Holmes decision in his dissent, namely that the restriction in question "is merely the prohibition of noxious use. The property so restricted remains in the possession of the owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with the paramount rights of the public."[44] Justice Holmes would answer that if this coal was contracted *specifically*

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[41] *Id.* at 414-415.
[42] *Lochner v. New York*, 198 U.S. 45, 53 (1905).
[43] Ely, PROPERTY RIGHTS at 55.
[44] *Id.* at 417.

for use that has now been regulated beyond value. If it were simply a law banning access to mining coal which was not already under contract, there would be no argument to combat the usefulness this law has for the public safety, nor an argument for compensation because the coal in question was nobody's property to begin with. But, once the property rights of the owners are infringed upon as they were in *Mahon*, compensation is necessary under the Constitution.[45] Holmes further addresses "public use" in his opinion. In a similar retort to Brandeis, Holmes does not deny the necessity of eminent domain in advancing the public good, but merely seeks to constrain it:

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change... We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant... the exercise of eminent domain. But the question at the bottom is upon whom the loss of the changes desired should fall."[46]

Justice Holmes recognized that there are circumstances in which eminent domain is necessary to effectuate changes desired by the citizenry for the public use, whether for public safety concerns or a broader pursuit of the common good. But, the enumeration of the takings clause under the Fifth Amendment specifically guards against the government abusing these recognized rationales for property distribution, and secures the defense of those rights through compensation under the Fifth Amendment.

2. The "Public Use" Clause

[45] U.S. Const. amend. V.

[46] *Pennsylvania Coal v. Mahon*, 260 U.S.393, 415-416 (1922).

Thus far we have concentrated on the Takings Clause and the protection afforded individual's private property through just compensation. The second prong of the clause's bulwark against government abuse of property is the guarantee that such property can only appropriated for "public use."[47] The longstanding tradition in Western civil society under Common Law allowed that the government could appropriate private property when necessary to promote the common good, with or without compensation.[48] Individuals were not considered vested owners in the property they possessed, but only as occupants of land granted by the government (or more accurately, the Crown) which could be taken back when necessary. "Such governmental takings generally promoted economic growth: Uncompensated taking of unimproved land reduced the cost of road building, the transfer of ownership of land and bridges to individuals who would use such property productively aided development. A powerful strand of English legal thought, a strand that had its origins in feudal notions of property and kingship, legitimized such redistributions. According to this theory, property was held from the state; the state could therefore limit the individual's ownership claims."[49]

Though the liberal ideology of the Enlightenment that powered the American Revolution facilitated the usurpation of anachronistic notions of title and nobility, the stoic republican virtues lauded by founders such as John Adams, Thomas Jefferson, and Benjamin Franklin fostered an environment in which accumulation of property and wealth were not viewed as the virtuous ends of the nascent American experiment. As for Adams, perhaps the Founder most steeped in the history of the Roman republic and political science,[50] these virtues were the mark of the civil servant and statesman. Adams reviled the extravagance of aristocracy in late

[47] U.S. Const. amend. V.
[48] Treanor, *The Origins and Original Significance* at 696-97.
[49] *Id.*
[50] Wood, THE CREATION at 567.

eighteenth century France where he served as ambassador in the course of and following the Revolution. "Adam's objection stemmed not so much from a puritan background- as often said- but from the ideal of republican virtue, the classic Roman stoic emphasis on simplicity and the view that decadence inevitably followed luxury, age-old themes replete in the writings of his favorite Romans."[51] In what would be the defining paragraph of the American founding, Thomas Jefferson in the Declaration of Independence chose to use the phrase "pursuit of happiness", as opposed to Locke's "estates" when defining the third and most material of the individual rights that governments are erected to protect.[52] Perhaps this was chosen as a means to effectuate the metaphysical understanding of the absolute goods in life beyond material wealth and physical property.[53] Franklin addressed this issue directly in the wake of the state constitutional convention in his native Pennsylvania, debating the virtue of property in the possession of the individual, as well as serving the public good. "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt."[54]

The recognition that the exercise of eminent domain is a necessity for the public good is still coupled with the Founder's inherent distrust of arbitrary and centralized government power, which leads to the designed requirements that not only compensation be provided for the taking of private property, but that the government use that property for public use. The Fifth Amendment, applied to the states through the fourteenth amendment, guarantees that

[51] David McCullough, JOHN ADAMS, 192 (2001) [hereinafter McCullough, ADAMS].
[52] *See* Note 10, *supra.*
[53] Treanor, *The Origins and Original Significance* at 700.
[54] *Id.* quoting Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (ed. 1907).

protection.[55] The question of "public use" is an issue which has dominated the Courts' Takings jurisprudence in the last half of the twentieth century, leading to various conclusions about the powers of state and federal governments to transfer land for *public use.*

These conclusions were developed over time in a long line of cases addressing the issue of transferring property from private owners to or through the government for public use, culminating in the 2005 Supreme Court decision *Kelo v. City Council of New London, Connecticut.*[56] This decision's expansive interpretation of the "public use" clause caused an outcry among the citizenry and various state governments throughout the republic.[57] The case sired a progeny of legislative actions to limit the use of the Takings Clause in various states, as well as executive action in the federal government. The decision contradicted the Court's longstanding interpretation of the clause and justified the most pernicious fears of government overreach and distrust in its ability to promote the common good without injuring the common citizen. In understanding the aberration of the majority's decision regarding "public use", we must first examine the cases which developed the Court's interpretation of it.

3. The "Public Use" Interpretation before *Kelo*

Though it is argued the United States Constitution is one predicated on the concept of liberty,[58] there are equalizing factors within the founding document which constrain the liberty of the individual for greater purposes. The Constitution's greatest strength is its enumeration and limitation of government power, but in that strength lies the implicit concept that the government

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[55] 10 A.L.R. Fed. 2d 407 (Originally published in 2006)
[56] 545 U.S. 469 (2005).
[57] Ely, PROPERTY RIGHTS at 57-58.
[58] Abraham Lincoln, *Address at Gettysburg, Pennsylvania*, 1863, ABRAMHAM LINCOLN: SELECTED SPEECHES and WRITINGS, 405 (Don E. Fehrenbacher, 1992).

is empowered to serve and protect the interests of the public. The Takings Clause is an example of that power.

The powers of the government enumerated in the constitution are coupled with the understanding that such actions taken by the federal government within it sphere of influence are done so to "promote the general welfare."[59] Madison acknowledged this in his formation of the Takings Clause, ensuring that property taken by the government would only be done so to provide for the public use. The Supreme Court has held that the Takings power is a "political necessity…inseparable from sovereignty, unless denied to it by its fundamental law."[60] The Court has gone on to explain such powers are necessary as seen in the Revolutionary War (*supra*) for the subsistence of government and the general public. "The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals… for custom houses, post offices… and other public uses."[61]

To ensure this second tier of protection, the court must examine the public use argument made by the government in such cases. The issue often arises when property is taken by the government and transferred to another private party. In the last half of the twentieth century, the Court has shown deference to the legislature in determining when this kind of property taking is for public use.[62] In *Berman v. Parker*,[63] a challenge was brought by a commercial store owner against a congressional plan exercising eminent domain to seize and condemn private structures in an economically blighted area of Washington D.C., which would transfer that land to private developers. Though the challenger contended that his building did not contribute to the issues

[59] U.S. Const. pmbl.
[60] *Kohl v. United States*, 91 U.S. 367, 372 (1875).
[61] *Id.* at 368.
[62] *Berman v. Parker*, 348 U.S. 26 (1954).
[63] *Id.*

within the area, Congress contended that the entire area needed to be redesigned. Congress determined that:

"...conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose."[64]

Though the land would be transferred to private developers, those developers would be under contract to construct their designs for the neighborhood itself according to the Congress' direction. The legislature found that over half of the five thousand houses in the area were beyond repair and a serious threat to the public's health and safety in Washington, D.C.[65] The Court relied on the legislature's (in this case, Congress) ability and role to make this choice based on its fact finding and policy functions in our tripartite government. "The role of the judiciary in determining whether the eminent domain power is being exercised for a public purpose is an extremely narrow one... It is within the power of the legislature to determine that the community should be a clean, well-balanced as well as carefully patrolled."[66] The challenger ultimately failed as the court decided unanimously that such a plan, on so grand a scale could not be done by piecemeal, "... merely removing existing buildings that were unsanitary or unsightly was insufficient. It was deemed necessary to redesign the whole area to eradicate the case of the

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[64] *Id.* at 28, quoting 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.
[65] Mikkelsen, Scott, *Eminent Domain after Kelo v. City of New London: Compensating for the Supreme Court's Refusal to Enforce the Fifth Amendment*, 2 Duke J. Const. L. & Pub. Pol'y Sidebar 11 (2007) [herein after Mikkelsen, *Eminent Domain after Kelo*].
[66] *Berman v. Parker,* 348 U.S. 26, 33 (1954).

slums, such as the overcrowding of dwellings, the lack of parks…" and other burdens weighing down the local community.[67]

The deferential approach taken by the Court in *Berman* was echoed in both the Supreme and lower courts in the years following. Thirty years after *Berman*, a case arose in Hawaii in 1984 in which the plaintiff challenged the state legislature's Hawaii Land Reform Act. The bill was passed to breakup concentrated land holdings throughout the state which were remnants of the feudal land system dating back centuries before Hawaii's admittance to the Union.[68] Though the act would take land from private parties and disburse it to other private parties, the Court decided unanimously that this action constituted a taking for *public use*. "The people of Hawaii have attempted, much like the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs."[69] In this passage Justice O'Connor echoes the sentiment of Benjamin Franklin and his fellow Pennsylvanians.[70] "In what Professor Gordon Wood has described as a manifestation of one aspect of 'classical Whig republicanism,' a draft of the Pennsylvania Declaration of Rights directed that state laws discourage concentrations of wealth because 'an enormous Proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness, of Mankind.'"[71] The Court in *Midkiff* defers to the legislature in its assessment of the effect these concentrated land holdings had on the market and economy of the state, employing the federalism notion of subsidiarity, that those closest to the problems will create the best

[67] 10 A.L.R. Fed. 2d 407 (Originally published in 2006)
[68] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).
[69] *Id.* at 241-242.
[70] *See* Note 36, *supra*.
[71] William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 700 (1985).

solutions.[72] Though the Court defers to the analysis of the legislature, the burden remains with the legislature to prove that a taking encompassing a transfer of land between private parties must be substantiated with findings to survive the scrutiny of the public use clause. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of the government and would thus be void."[73]

These two cases demonstrate the necessity of government use of land in situations in which that land can be changed to serve the community rather than disable it. But, this does not provide a legitimate rationale in which the government can seize land carte blanche. It must be demonstrated through the fact finding role of the legislature that a property taking is necessary because the current land use is actually detrimental to the common good. Only then can it be deemed suitable for public use. The danger in this approach is the courts' unencumbered deference to the assessment made by the legislature, and whether that deference may be abused to effectuate takings in which land is used in a way the legislature deems most appropriate, as opposed to being limited to remedy existing evils against the public interest.

4. *Kelo* and the broadening of "Public Use"

Shortly before *Midkiff*, the Michigan Supreme Court upheld the city of Detroit's taking of property from private homeowners and small businesses. The property was transferred to General Motors for development of an assembly plant.[74] This decision is distinguished from those above because it takes a step beyond the traditional definition of public use. The Michigan legislature, and subsequently its supreme court, evaluated this taking as a measure to help restore the vibrancy of industrialized Detroit, with the condemned land serving a better purpose in the

[72] Finnis, NATURAL LAW, at 144.
[73] *Midkiff* at 245.
[74] *Poletown Neighborhood Council v. Detroit*, 410 Michigan 616, 631 (1981).

hands of the motor company as opposed to the residents who owned it. "[T]the controlling public purpose in taking this land is to create an industrial site which will be used to alleviate and prevent conditions of unemployment and fiscal distress. The fact that it will be conveyed to and ultimately used by a private manufacturer does not defeat this predominant public purpose."[75] This attenuated purpose diverges from the rationale in *Berman* and *Midkiff*, as there is no showing that the current use of the land is blighted or adversely affects the public interest. This expanded power in the hands of the legislature forms a threat to all privately owned property. "Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's, or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a higher use."[76]

The dissent notes the danger such deference to the legislature can sew, as it goes beyond the scope of public use in its reasoning in this case, and simply decides which way the property can be used best. This is the capricious and arbitrary power the Founders feared and guarded against in the Bill of Rights and the Fifth Amendment. *Poletown* became the antecedent to the Supreme Court Case at the center of this controversy, *Kelo v. City of New London, Connecticut*.[77]

New London, Connecticut was a city which had been run down in recent years. A former booming whale town, the city which had lost much of its business in the industrial age had declined precipitously economically, holding an unemployment rate twice as high as the rest of

[75] *Id.* at 632.
[76] *Id.* at 644 (Fitzgerald, J., dissenting).
[77] *Kelo v. City of New London*, Connecticut, 545 U.S. 469 (2005).

the state, with citizens consistently leaving it in droves.[78] The New London Development Corporation (herein after "NLDC") was a non- profit firm established to help jumpstart the dormant economy of the city.[79] In the wake of the NLDC's plans to develop a new state park, Pfizer Inc. announced that it would build a three million dollar research facility near the park in the Fort Trumbull area.[80] The City went ahead and gave permission to the NLDC to start the plans for both. The area of Fort Trumbull was home to those residences that became the subject of the challenged eminent domain order. The NLDC originally offered to buy the lots that stood in the way of the development plan, but the owners refused.[81] Eminent Domain was then invoked after the homeowners tried to sue the NLDC to save their homes.

The issue in this case is whether the transferring of property from one private entity to another is a valid form of public use. The NLDC argued that the benefits from the Pfizer plant would create jobs, increase tax revenue, and change the complexion of New London from its current state of depression to a competitive and vibrant city.[82] But is that justification enough to satisfy the public use element under *Berman* and *Midkiff*? The majority recognized that there is "no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned *only because they happened to be close to the development area*."[83] Though this is far different from the policy reasoning set forth in the preceding Supreme Court cases, the Court decided in a 5-4 decision that the economic development plan proposed by the NLDC was to be considered public use.[84] The Court, once again, showed deference to the legislature as a policy making body in its determination that "the area was sufficiently distressed to justify a

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[78] *Id.* at 473.
[79] 10 A.L.R. Fed. 2d 407 (Originally published in 2006)
[80] *Kelo* at 495.
[81] *Id.*
[82] 10 A.L.R. Fed. 2d 407 (Originally published in 2006)
[83] *Kelo* at 475 (emphasis added).
[84] *Id.* at 490.

program of economic rejuvenation."[85] And that this program was a "carefully formulated economic development plan that it believes will provide appreciable benefits to the community, including- but, by no means limited to- new jobs and increased tax revenue."[86]

Justice O'Connor, who wrote the majority opinion in *Midkiff*, strongly dissented from the Steven's majority. After distinguishing the acts in *Midkiff* and *Berman* as takings employed to remove the stain of economic and sociological blight, Justice O'Connor reiterated her warning[87] in *Midkiff* that any expansion of government takings would violate the Fifth Amendment: "In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of the public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicated to generate some secondary benefit for the public-such as increased tax revenue, more jobs, maybe even esthetic pleasure."[88] Echoing the dissent in *Poletown*, Justice O'Connor stated "Today nearly all private property is susceptible to condemnation under the Court's theory."[89]

Justice Clarence Thomas also penned a dissenting opinion, largely agreeing with Justice O'Connor while further lamenting the unintended and perverse consequences of this expansive view of public use. He criticized the majority decision which placed the condemned land into the hands of a wealthy and influential drug company, which was only promising benefits not yet realized, and forcibly taking the land from those citizens who were supposedly the intended beneficiary class of this new public use. "Extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor

[85] *Id.* at 483.
[86] *Id.* at 483.
[87] *Midkiff* at 245.
[88] *Kelo* at 501 (O'Connor, J., dissenting).
[89] *Id.* at 504 (O'Connor, J., dissenting).

communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[90] The Takings Clause here is then actually inverted, damaging the common good by actually taking the land out of the hands of the citizenry for an attenuated economic benefit, as opposed to the actual benefit of owning a home. He further challenges the precedent established in *Berman* and *Midkiff*, arguing for a heightened scrutiny of the legislature's decision when "the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes."[91] The Court should not let the state police powers go unbridled behind the guise of public use, or the attenuated "purpose" standard.

Both Justices O'Connor and Thomas's dissenting opinion express their concern of the fact that a "politically influential private party that has captured the political process can rely on government's coercive power to eminent domain to obtain for it land that it could not purchase in a voluntary transaction."[92] They consider this a perversion of the political process, which strips the people of its protection in their last line of defense in our tripartite government, the courts. While both the *Berman* and *Midkiff* decisions were grounded in the fact that the land condemned was not only blighted but actually detrimental to the public good, *Kelo* drastically diverges from this rationale, allowing the majority to side with moneyed interests in opposition to property rights of the citizenry the Fifth Amendment was implemented to protect.[93] If state legislates were to continue this practice unabated by the Courts, then the less powerful, and especially destitute, will forever live with the proverbial wrecking ball of eminent domain hanging over their homes.

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[90] *Id.* at 521 (Thomas, J., dissenting).
[91] *Id.* at 518 (Thomas, J., dissenting).
[92] Zeiner, Carol, *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use,* 28 Va. Envtl. L.L. 1, 2 (2010) [herein after Zeiner, *Eminent Domain Wolves*].
[93] Ely, PROPERTY RIGHTS at 54.

5. The Reaction to *Kelo*

The Court's expansion of deference toward the legislature's assessment of the public use element in *Kelo* has had far ranging effects. "Several scholars, legislatures, and individuals, have objected to Kelo's extension of the power of eminent domain because the ruling has extended the government's power of eminent domain to areas once thought unimaginable."[94] Those participating in this strong reaction emphasized, like the dissenters in *Kelo*, that it is "now possible for government to use eminent domain to deprive law abiding landowners of their well located, and often prime, non-blighted property so it can be transferred to another part with better political connections for that second party's private enrichment in the name of the public benefit and economic development."[95] Mikkelsen argues that under *Kelo's* deferential standard the state legislatures ultimately hold the power of the 5th Amendment in their hands.[96] "We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power. Indeed, many states already impose "public use" requirements that are stricter than the federal baseline."[97] This power would enable the legislature to formulate a response that "should clearly define what qualifies as a public use… The most straight forward manner in which to compensate for the *Kelo v. City of New London* decision is to draft legislation that clearly explains that economic development does not constitute a public use in a state."[98] As of 2008, forty-three states had ratified new laws to combat what they viewed as an abuse of the public use clause in the Kelo decision.[99] Even the federal government via an executive order issued by President George W. Bush limited its takings power under economic

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[94] Mikkelsen, *Eminent Domain After Kelo* at 11-12.
[95] Zeiner, *Eminent Domain Wolves* at 4.
[96] Mikkelsen, *Eminent Domain After Kelo at* 19-20.
[97] *Kelo* at 489.
[98] *Id.* at 21.
[99] Zeiner, *Eminent Domain Wolves* at 13.

development.[100] Oddly enough in a case precipitating *Kelo,* the Michigan Supreme Court in *County of Wayne v. Hathcock*[101] over ruled *Poletown,* with the state constitution subsequently amended after *Kelo* to narrow the public use clause under private takings for economic development.[102] "Indeed, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."[103]

The overwhelming reaction to Kelo is indicative of the value the American people place on property. As Madison intended,[104] the ability to secure one's home promotes an independence necessary for human flourishing and advancement. Though power was reserved to the government for takings, the Fifth Amendment was enacted to curb those takings to necessities of the public good. When the government reaches beyond those constraints, and the judiciary abdicates its authority to rein in the legislature, it will most likely produce an immoral outcome. Is there a way to defend Justice Stevens' majority based on its desired goals? Is the broad reading of "public use" a result in conflict with previous Takings Clause interpretations, or is it just a continuation of the Court's longstanding deferential standard to the legislature, consistent with or country's unique federalism? These are questions which need to be asked and can be assessed in a much broader, singular question: is the *Kelo* decision practically reasonable?

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[100] *James W. Ely, Jr., Post-Kelo Reform: Is the Glass Half Full or Half Empty?,* 17 Sup. Ct. Econ. Rev. 127, 133 (2009) [hereinafter Ely, *Post-Kelo*].
[101] *County of Wayne v. Hathcock,* 471 Mich. 445 (2004).
[102] Ely, *Post-Kelo* at 137.
[103] *County of Wayne* at 482.
[104] *See* Note 28, *supra.*

Part II: The Practical Reasonableness of the *Kelo* Decision and Its Effect on Our Interpretation and Administration of the Takings Clause

The Societal Association of Government, Law, and their Promotion of the Common Good

The formation of society cannot be pinpointed to an exact moment, but its value in advancing the interests of the individual, and therefore fostering an environment to enable the pursuit of the common good cannot, be understated. Within this structure, moral values are shaped and formed starting with the family, and emerging in the greater societal construction which melds together to form a civil cohesiveness, protected by a system of government and The Rule of Law.[105] The law derives from sources which interrelate to form society's understanding of its obligations to the individual and to each other. Natural law, which can be described as law that derives from right and reason, is "in accordance with nature, applies to all men, and is unchangeable and eternal."[106] Natural law is also considered "the universal law... the law of nature. For there is a natural and universal notion of right and wrong, one which all men instinctively apprehend."[107] The natural law therefore shapes the laws which govern society. Without natural law, whether deontological or command driven,[108] the citizenry would face the inherent challenge of constructing rules and empowering authority in which there is no natural premise or predisposition to what is moral.

The formulation of laws which govern a free society, in the United States promulgated and encoded by legislative representatives, are then reflective of the natural law and the self-evident principles it embodies. Therefore the positive law which is handed down from government is "a rule of civil conduct prescribed by the supreme power in a state, commanding

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[105] Finnis, NATURAL LAW at 270.

[106] Cicero, On the Commonwealth, 215-216 (Sabine and Smiths trans. 1950) (51 B.C.).

[107] Aristotle, Rhetoric, 73 (Cooper Translation, 1932) (350 B.C.).

[108] Deontological law is rule driven law, whereas command law is one which derives from God. *See* note 110, *infra*.

what is right, and prohibiting what is wrong."[109] However terse this explanation may be, it is extremely deferential to the government's assessment of deciding what is right and inhibiting what is wrong. This is why law must have a moral basis and drawn on the principles of natural law. Thomas Aquinas, the great Christian philosopher, equated the argument with the command law of the Ten Commandments, proposing that the tablets brought down by Moses from Mount Sinai[110] are "*conclusions* from the primary self-evident principles, that reasons to such conclusions requires good judgment, and that they are many other moral complex and particular moral norms to be followed and moral judgments and decisions to be made, all requiring a degree of practical wisdom."[111] Thus, to assess the moral quality and practical reasonableness of a law or issue arising from that law, we must first look to how it advances moral goods.

The end to these laws is the promotion of the common good. In essence, the common good for society is to secure "a whole ensemble of material and other conditions that tend to favor the realization by each individual in the community, of his or her personal development."[112] The conditions that enable individual flourishing within the community are shaped by the values of justice, authority, and law.[113] As established by Aristotle, man is by nature a political animal, whose state "is a community of some kind, and every community is established with a view to some good: for mankind always act in order to obtain that which they think is good."[114] He argues that the political community within the state is formed to achieve the highest good by promoting the basic goods of those who inhabit it.[115] The pursuance of the good collectively throughout the community is an attempt to create a societal structure, whose

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[109] Lord Blackstone, Commentaries, 44 (1847).
[110] *Exodus* 34:29.
[111] Finnis, Natural Law and Natural Reason, at 101.
[112] Finnis, at 154.
[113] Finnis, at 156.
[114] Aristotle, THE POLITICS, 22 (350 B.C.).
[115] *Id.*

connectivity of values forms the moral foundation at which these communities are formed, and subsequent laws are created. "Human beings, who can survive infancy only nurture, live in or on the margins of some society which invariably extends beyond the nuclear family, and all societies display a favor for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups."[116]

To pursue these goals, the law, and those who create and administer it, must understand what goods are morally necessary to promote a just society. There are basic goods which must be reconciled when laws are promulgated and ratified, ensuring that the positive laws created by the government are partially, if not primarily, based on protecting and advancing these absolute values. "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[117] If that is to be the goal of the government, then what absolute goods must it protect and pursue?

Finnis and the Basic forms of Human Good

One of the most meaningful changes to Thomas Jefferson's draft of the Declaration of Independence was one widely believed to be made by Benjamin Franklin, converting the description of life, liberty, and the pursuit of happiness from "sacred and undeniable", to the more practical declaration that they are "self-evident."[118] A moral good is one that has value for its own sake, and is worth pursuing for its own sake.[119] To formulate this inherent understanding, the individual draws on both his experience and the reason shaped by that experience which pull him toward this good.[120] "The good of knowledge is self-evident,

[116] Finnis, NATURAL LAW at 83.
[117] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).
[118] McCullough, ADAMS at 122.
[119] Finnis, NATURAL LAW at 65.
[120] *Id.* at 64-65.

obvious. It cannot be demonstrated, but equally it needs no demonstration."[121] Knowledge therefore is the first of the basic values of human good. It is not innate, but "the value of truth (knowledge) becomes obvious only to one who has experienced the urge to question, who has grasped the connection between question and answer... and... who likewise could enjoy the advantage of attaining correct answers."[122] Like knowledge, the remaining six goods are based on their self-evident value, which stem from the societal principles that have been formed throughout the centuries of progression in the human institution:

"The universality of a few basic values in a base diversity of realizations emphasizes *both* the connection between a basic human urge/drive/inclination/tendency and the corresponding basic form of human good, *and* at the same time the great difference between following an urge and intelligently pursuing a particular realization of a form of human good that is never completely realized and exhausted by any one action, or lifetime, or institution or culture (nor by any finite number of them)."[123]

The basic forms of human good, therefore, allow the individual to pursue what he may reasonably want to do, want to have, and want to be.[124] This facilitates the moral assessment of one's actions through the form of practical reasonableness, the sixth basic good, and the key function in measuring whether those actions advance the pursuit of the remaining goods. Those goods are: life, knowledge, play, aesthetic experience, sociability, and, religion.[125]

At heart of the *Kelo* decision is the instrumental good of property. As an instrumental good, property is a good utilized in one's life to advance her pursuit of the basic goods. Property is material, whether it is real property as used for grounds of a home, or monetarily speaking

[121] *Id.* at 65.
[122] *Id.*
[123] Finnis, NATURAL LAW at 84.
[124] Finnis, NATURAL LAW. at 97
[125] *Id.* at 86

which facilitates the purchasing of goods (such as food, which is necessary for the subsistence of the good of *life*).[126] Property can be distinguished from absolute goods because it is commensurable with those goods. Absolute goods are incommensurable.[127] There is no proper way to value religion with play, or life with friendship.[128] Yet property, for all the good it helps promote in the world, can be measured against these goods, and will always fall short. If one were to be forced to decide between life and owning a house, the former should always be chosen. A man may be terribly poor, but rich in friendship and love, and therefore as rich as any man in the town.[129] The incommensurability of absolute goods is what helps distinguish them from the intrinsic goods which enable their pursuit. Importantly though, we cannot undervalue instrumental goods. Property may be considered an intrinsic good of the highest order, as it contributes to the facilitation and promotion of human flourishing through these basic goods. Without it, it would be near impossible to pursue some of these goods, and a direct attack on property could therefore result as a direct attack on basic goods. That is the validation of the Takings Clause. It provides private property the utmost protection from majoritarian and government abuse, while simultaneously reserving the right of the government to procure that property because of its instrumental value in the pursuit of the common good.

The absolute goods at stake in *Kelo* are promoted by property, and the subject as to the legitimacy of government limitation on property directly implicates the effect it has on these basic goods, and whether that interferes with the pursuit of the common good. The *Kelo* decision would be one which subverts, in a misguided attempt to advance, the basic goods of life,

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[126] *Id.* at 59.
[127] *Id.* at 114.
[128] *Id.* at 115.
[129] IT'S A WONDERFUL LIFE (Liberty Films, 1946). What I consider the defining American film of 20th century life, Frank Capra's post-war masterpiece pits common man George Bailey against the cruel realities of fate and responsibility every grown man must face. In his darkest hour, he realizes the intrinsic value love, family, and friendship can bring to one's life, which is what makes it all truly wonderful.

aesthetic experience, and sociability. The moral good of life "signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination."[130] The main thrust of the *Kelo* decision was allowing the city council's decision to transfer private property to private party for the economic benefits brought on by commercial development in the area of Fort Trumbull. In its examination of that decision, the majority sided with the legislature validating that this act would promote an increase in jobs, therefore flooding the economy with more money from wages earned by the city's inhabitants, resulting in greater tax revenue which could further empower the government to help revitalize the city.[131] Creating such an environment would enable the public to pursue a course of self-determination in the hope in achieving the good of life.

While this is an arguable assessment, and would be true if the decision actually resulted in this kind of protection of life, it leaves much to be desired. The transfer of property in *Kelo* was based on the mere hope of such benefits, as opposed to the concrete affirmation that they would ensue. Because the value of life is one which fosters an environment which places the citizens in a position favorable to self-determination, we have to consider the position in which this decision places the plaintiffs, as well as all other Americans who are now more susceptible to the leering shadow of eminent domain. "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 who will use it in a way that the legislature deems more beneficial to the public—in the process."[132] Justice O'Connor's key phrasing here is the use of the words "banner" and "vulnerable." Banner signifies that the decision to go forth with this process is one which hides behind the previously established precedent of economic

[130] *Id.* at 86.
[131] *Kelo* at 483.
[132] *Kelo* at 494 (O'Connor, J., dissenting).

development, but fails to meet the analogous circumstances which dictated those decisions in the first place. Distinguished from *Midkiff* and *Berman*, the property at stake in *Kelo* was not blighted (*Berman*), or disproportionality distributed through the feudal class system (*Midkiff*), but property fairly acquired and owned by private individuals who lived in Fort Trumbull in their own houses, with their own families, and to no detriment of their community. These elements almost universally regarded as key components in the pursuit of the good of life, and are drastically subverted when taken away from the individual. The broadening of the standard of "public use" to include better use of property with the attenuated economic effects allow for an encroachment on the good of life for Ms. Kelo and those plaintiffs who lost their homes. Furthermore, along with the deprivation of life for the plaintiffs, the Court's now precedent-setting decision to show such unrestrained deference to the legislature's determination subjects all citizens to the possibility of eminent domain, regardless of how they utilize their property and however essential it may be to their subsistence. "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz–Carlton."[133] Despite the attempts of state legislatures to restrain such acts in the wake of *Kelo,* any legislative body may enact eminent domain after determining that the property in question will be used in a manner more suitable for advancing a public purpose the current owner of that property, and that is a decision which ultimately subordinates the basic good of life, for Ms. Kelo and the American public.

A second basic value at issue in this decision is the value of aesthetic experience. Aesthetic experience is "sought after and valued for its own sake", and "may simply be the beautiful form 'outside' one and the 'inner' experience of appreciation of its beauty. But often

[133] *Kelo* at 503 (O'Connor, J., dissenting).

enough the valued experience is found in the creation and/or active appreciation of some *work* of significant and satisfying form."[134] The majority's rationale for the promotion of aesthetic beauty would be similar to its argument in advancement for the basic good of life: namely taking this land promotes its value for the city, which may result in attenuated benefits such as economic development, which can create a more aesthetically pleasurable town. Once again though, this promotion of the basic good subordinates the same good pursued by the plaintiffs, and at much greater cost. The description of the plaintiffs in the facts of the case read as: "Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago."[135] One need not look far to find the aesthetic beauty of growing up, and living in a house with one's spouse. The affirmation it provides to own a house and raise a family there cannot be understated. It directly concerns the element in which "the valued experience is found in the creation and /or active appreciation of some work of significant and satisfying form."[136] Some people may work their entire life to own a home. Other may find enough success early on to procure that home at a relatively young age, providing benefits to themselves and their families from that point forward. Similarly, it cannot be overstated when that pride is taken away by the choice of a city council. The aesthetic beauty of one's home is something that goes far deeper than outward appearance, and transcends the utility of tax revenue and economic development. In this case, the Court failed to recognize that on the all-important human level, which is at the heart of the protection

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[134] Finnis, NATURAL LAW at 87-88.
[135] *Kelo* at 465.
[136] Finnis, NATURAL LAW at 88.

of the Fifth Amendment. "Property must be secured, or liberty cannot exist."[137] The liberty here at stake is the value of self-determination, which is advanced in the ownership of a home in pursuit of aesthetic beauty, a value which cannot be juxtaposed with city tax revenue.

The basic good in which there is the most strain between the competing arguments in the *Kelo* decision is the good of sociability. This argument will be explored in depth in relation to the Requirements of the Common Good as one of the nine elements of practical reasonableness, namely the goal of pursuing the common good within the community. This effect on this good will ultimately be dispositive in determining the practical reasonableness of the *Kelo* decision.

The Practical Reasonableness of the Kelo *Decision*

Practical reasonableness is one of Finnis's seven moral goods, one which is also at stake in the *Kelo* decision. While there is no preferential treatment among these goods,[138] practical reasonableness "is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out."[139] The classical ethics of Western philosophy advocate that one may only make a practically reasonable decision with the tools of experience and intelligence, incorporating a desire for reasonableness stronger than those desires which may overwhelm it.[140] "The requirements of practical reasonableness generate a moral language utilizing and appealing to moral distinctions employed more or less spontaneously."[141]

1. A Coherent Plan for Life

[137] Ely, PROPERTY RIGHTS at 43 (quoting "Discourses on Davila," in Charles Francis Adams, ed., *The Works of John Adams*, 10 vols. (Boston: Little Brown, 1851).
[138] Finnis, NATURAL LAW at 105.
[139] Finnis, NATURAL LAW at 100.
[140] *Id.* at 101.
[141] *Id.* at 127.

The first step in the analysis under practical reasonableness is recognizing whether the *Kelo* decision possesses a coherent plan for life.[142] This plan is one which promotes a "harmonious set of purposes and orientations... as effective commitments."[143] Living from moment to moment is no rational way to approach life and therefore a plan must be instituted to enable the individual to effectively commit to and pursue a life which promotes the basic values. In *Kelo*, this is not as severely affected as subsequent requirements to practical reasonableness. The decision does promote a coherent plan for life by establishing precedent for other cases going forward, but ultimately negatively affects the coherent plan. Citizens will not be able to formulate such a plan- i.e. gain a good job, start a family, raise a family- with the constant specter of condemnation hanging over their household. If the decision in *Kelo* were to promote the biblical lesson that one should always "remember your last days",[144] the citizen would be able to formulate her plan for life without the constant fear of government interference for an attenuated public benefit. Here, the decision ultimately fails this requirement.

2. No Arbitrary Preferences Amongst Values

In furtherance of these values, one will not have a coherent plan for life if there is any arbitrary preference amongst the seven basic values.[145] While there are obviously goods which may be pursued in favor over others, such as religion for a priest, this decision cannot be made without moral justification. Such theories as John Rawl's "thin theory of the good" which places emphasis on only liberty, opportunity, wealth, and self-evident respect, is an arbitrary exercise in discarding the basic moral values illustrated by Finnis, and therefore inflict the "radical

[142] *Id.* at 103.
[143] *Id.* at 103-104.
[144] *Ecclesiastes* 12:8.
[145] Finnis, NATURAL LAW at 105.

emaciation of the human good."[146] Though one may not pursue certain goods, practical reasonableness does not allow for an arbitrary preference among them. The *Kelo* decision does not violate this rule as the majority opinion, as well as the city council initially making the decision, examines the different good which are pursued in the private transfer of property, and ultimately weighs certain goods against the others in their assessment. While this assessment may be wrong, it does not violate the good of practical reasonableness.

3. No Arbitrary Preferences Amongst Persons

The element regarding arbitrary preference among persons is one which dictates the importance of self-interest when pursuing basic goods (such as life), while measuring one's self in the arbitrary preferences of persons in which there is a selfish or self-centered goal.[147] This does not apply to the decision made in *Kelo*, as it measured the pursuit of common good through both eminent domain and the juxtaposition of the public use clause. Though the Court decided in favor of a decision which would benefit a private party as well as the public,[148] it was done with a calculated, though misinformed evaluation, in which there was no arbitrary preference applied, but a reasoned assessment of the facts.

4. Detachment & 5. Commitment

Detachment and commitment are elements of practical reasonableness as they promote the previous goods by guarding against improperly influenced decisions in pursuit of the good.[149] Detachment enables the individual to guard himself from the perverse tendencies of fanaticism,

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[146] Finnis, NATURAL LAW at 106.
[147] *Id.* at 105.
[148] *Kelo* at 473-474.
[149] Finnis, NATURAL LAW at 110.

while commitment of oneself guards against the corrosive effects of apathy.[150] It would be difficult to apply this element to the *Kelo* decision without delving into the political ideologies of the justices. To keep this assessment of practical reasonableness limited to the facts of the case and the interpretation of the law applied by the judges, this will not be an applicable element save for the assumption that the Supreme Court is both a committed judicial body, detached from the personal attributes of the case, and committed to the American experiment as a republic of laws. It therefore is a positive in the assessment of practical reasonableness.

6. The Limited Relevance of Consequences: Efficiency, Within Reason

Efficiency within reason requires that when acts are measured in a way that dictate a cost-benefit analysis, it can only have a limited application in determining whether that act is practically reasonable. If the analysis is one which decides the good of the act in its entirety, it then becomes unreasonable. In measuring an act by its ultimate consequences, the measurer limits his assessment to the result as opposed to the basic or instrumental goods which are at stake. "Good(s) could be measured and computed in a manner required by consequentialist ethics only if (a) human beings had some single, well-defined goal or function (a 'dominant end'), or (b) the differing goals which men in fact pursue had some common factor, such as satisfaction or desire."[151] The utilitarian determination of justice dictates that one acts morally when he is producing the most good.[152] Whether these actions promote happiness is the ultimate end to producing the most good, and is measured by pitting the usefulness of one action against the other to produce an equation which will ultimately provide the most happiness for the most

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[150] *Id.*
[151] Finnis, NATURAL LAW at 113.
[152] Karen Lebacqz, SIX THEORIES of JUSTICE, 15 (1986) [hereinafter Lebacqz, SIX THEORIES].

people.[153] Act-utilitarianism, the basest form of this theory, presents the most issues for individual rights. "If I am to judge the 'right' thing to do in each instance by calculating what will do the most good *overall*, then there are numerous circumstances in which the 'right' will violate accepted standards of justice," (emphasis added), as well as the individual rights of citizens.[154]

These premises for utilitarian and consequentialist theories of justice are not only false but unrealistic. It is impossible to effectively measure the desires and wants of humanity, even when sized down to a specific community. "What generates the 'conclusions' is always something other than the calculus: an overpowering desire, a predetermined objective, the traditions or conventions of the group, or the requirements of practical reason."[155] This calculation falls short for its lack of empirical authority, and more importantly for its de-emphasis of the individual's natural rights, and the protection of those rights from majoritarian rule. "The concept of rights is not on that account of less importance or dignity: for the common good is precisely the good of the individuals whose *benefit*, from fulfillment of duty by others, is their *right* because *required in justice* of those others."[156] Such rights talk can be traced to the Enlightenment, and that period's ideology had a clear effect on the Framers of the Constitution. "Consistent with the Whig tradition, the framers did not distinguish between personal and property rights. On the contrary, in their minds, property rights were indispensable because property ownership was closely associated with liberty. 'Property must be secured,' John Adams said in 1790, 'or liberty cannot exist.'"[157] While it is debatable as to whether property is an

[153] *Id.* at 16-17.
[154] *Id.* at 22.
[155] Finnis, NATURAL LAW at 117.
[156] *Id.* at 210.
[157] Ely, PROPERTY RIGHTS at 43.

absolute or instrumental good, the protection of the individual's rights against majoritarian (or utilitarian) rule in the Constitution reflect the importance of protecting the individual against the tyranny of the majority. This is expressly in opposition to utilitarianism.

But such rights are also limited. There are no absolute rights in a free society which may not be affected either through reasonable restraint or the benefit of others. Such limitations can be considered: (i) to secure due recognition for the rights and freedoms of others; (ii) to meet the just requirements of morality in a democratic society; (iii) to meet the just requirements of public order in a democratic society, and (iv) to meet the just requirements of the general welfare in a democratic society.[158] These requirements represent an acknowledgement that not all rights are absolute and inviolate, but subject to reasonable limitation. These limitations will promote an efficient balance between the rights of the individual and their promotion of the common good, and reserve to the government the judgment as to the environment necessary to balance those ideals. The theory of subsidiarity[159] advanced by the United States' structural federalism places faith in the states' and local governments' ability (over that of the federal government) to dictate policy at a more informed and intimate level. This confidence could appropriately be justified in a state legislature's determination of exercising eminent domain, especially in the *local* circumstances of the city council's decision precipitating the events of *Kelo*. But in an instance when that decision subverts the basic goods of the citizen (life, aesthetic beauty, sociability) without better serving a greater common good, the Constitution and the Takings Clause stand as a protection against this majoritarian evaluation, whether by the state or federal legislatures.

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[158] Finnis, NATURAL LAW at 213.
[159] *Id.* at 169.

The *Kelo* decision employs the utilitarian calculation. The Takings Clause was instituted to protect the citizen from such rationales of efficiency and utility as expressed in *Kelo*. The elements of the Takings Clause "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."[160] The inability of the plaintiffs in *Kelo* to tilt the political process in their favor led them to seek out the defense of the court, arguably the ultimate arbiter of individual rights in America. Unfortunately, the Stevens majority in *Kelo* opted for the positivist view of law, showing extreme deference to the legislative body which rationalized that the land at issue would be of greater utility in the hands of Pfizer and the NLDC development project.[161] This calculation was made weighing tax revenue and economic development over advancing the common good through the individual's pursuit of the basic values. James Madison's promulgation of the Fifth Amendment was rationalized as a measure to provide a bulwark against majoritarian decisions which impugned the rights and liberties of the people, naming a vestige of rights which would have specific protection provided by the guardians of the courts.[162] The Court effectively abdicated this role in *Kelo*, deferring to the legislature's argument of efficiency over the basic values of life, aesthetic value, and sociability, and therefore subverting practical reasonableness.

7. Respect for Every Basic Value in Every Act

"A first formulation is that one should not choose to do any act which itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of

[160] *Kelo* at 496 (O'Connor, J., dissenting).
[161] *Kelo* at 483 (O'Connor, J., dissenting).
[162] Ely, PROPERTY RIGHTS at 54.

good."[163] This requirement, similar to the arbitrary preferences requirement, places the participant in a position in which he must evaluate his actions in relation to the basic values pronounced here to ensure he is acting in a practically reasonable way. Even though there may be instances in which circumstances render actions negatively affecting basic goods, it can be done so if it is no in a way which is either arbitrary or contrary to the inclination of the participant who may have different options in his actions to avoid that injury.[164] The Court in *Kelo,* though damaging the basic goods of life, aesthetic value, and sociability, do so in a way which also promotes these basic goods in their own fashion. Because they examine the situation and act in an informed way devoid of impulse, this would be considered a positive step in pursuit of practical reasonableness.

8. Following One's Conscience

This requirement is self-explanatory, and again with the presumption that the justices of the Supreme Court are analyzing the law and its effects within the parameters of their conscience, legal mind, and honor, there will be no conclusion that they did differently.

9. The Requirements of the Common Good

As noted earlier, the third basic good affected by the *Kelo* decision is the good of sociability, which has a direct effect on the requirements of community and the goals of the common good. The community is an "ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming-together."[165] There is no competing value between an individual's well-being and the well-being of others, but a common interaction which, if treated

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[163] Finnis, NATURAL LAW at 118.
[164] *Id.* at 119.
[165] Finnis, NATURAL LAW at 135.

properly, will form a strong relationship between individuals for the benefit of community.[166] The issue of sociability here is clear: whether the "public use"[167] of the land taken in *Kelo* is actually *for* public use, or more specifically, *the common good.*

There are three senses to which we must avail ourselves of the common good. The first is the seven basic goods incorporating the individual's freedom to pursue practical reasonableness through actions taken by himself or in collaboration with another.[168] The second is the participation in the goods by any member of the community in exhaustible ways.[169] Lastly, and in this context most importantly, the third sense of the common good is "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonable for themselves the value(s), for the sake of which they have a reason to collaborate with each other (positively and/or negatively) in a community."[170] The common good then becomes an indispensable foundation in all explorations of practical reasonableness, by measuring a specific act's effect on justice, respect for individual rights,[171] authority, the rule of law, and the obligation to obey those laws.[172]

The classifications of justice in the pursuit of the common good are commutative justice and distributive justice.[173] While commutative (or corrective) justice is the positive law governing transactions between individuals, the issue presented in *Kelo* is one of distributive justice. Distributive justice pertains to the issues of the community and distribution within the

[166] *Id.* at 134.
[167] U.S. Const. amend. V.
[168] Finnis, NATURAL LAW at 154.
[169] *Id.* at 155.
[170] *Id.*
[171] *See* Note 149 *supra*.
[172] Finnis, NATURAL LAW at 156.
[173] *Id.* at 164.

state.[174] "At this point we must recall that the common good is fundamentally the good of individuals… talk about benefiting the community is no more than a shorthand (not without dangers) for benefiting *the members* of that community."[175] As those interests of the individual are advanced, so too is practical reasonableness, which, fundamentally, is the possession of the inner integrity and outer authenticity to sustain one's self-constitution and self-possession.[176] These goals are promoted by distributive justice. "It is therefore a fundamental aspect of general justice that common enterprises should be regarded, and practically conducted, not as ends in themselves but as means of assistance, as ways of helping individuals to 'help themselves' or, more precisely, to constitute themselves."[177]

This notion of distributive justice is in line with that of the Philosopher John Rawls, who advocates for an active state interest in increasing the mobility of its citizens via distribution, so long as such distribution was in favor of those in need. "Social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantages members of society."[178] Finnis explores the concept of need, basing the requirements for distributive justice into five categories: need, function, capacity, deserts and contributions, and extent to the creation of avoidable risks of what practical reasonableness requires.[179] By incorporating these basic needs, Finnis recognizes the necessity of distributive justice, but seeks to limit it, as would Aristotle, so not to impinge on the autonomy of the individual. Private property is necessary for the flourishing of the individual,

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[174] Finnis, NATURAL LAW at 186.
[175] *Id.* at 168. (emphasis added).
[176] *Id.*
[177] Finnis, NATURAL LAW at 169.
[178] Lebacqz, SIX THEORIES at 37 (quoting John Rawls, A THEORY of JUSTICE at 151 (1971)).
[179] Finnis, NATURAL LAW at 173-175.

and therefore community, which ultimately will promote practical reasonableness.[180] Beyond that autonomy though, private property may not be horded by the individual but put to common use in efforts to advance the good of community. "The point, in justice, of private property is to give owners first use and enjoyment of their thing and its fruits (including rents and profits), for it is the availability that enhances their reasonable autonomy and stimulates their productivity and care...beyond a certain point, what was commonly available but was justly made private, for the common good, becomes again, in justice, part of the common stock."[181] To regulate this justice, the state must take an active role in its distribution to ensure it reaches those who require it.

The issue of distributive justice is illustrative of the dichotomy in ideology between what today is referred to as liberals and conservatives in American politics, which often may have an impact on, and is greatly impacted itself by, Supreme Court decisions.[182] Classical American liberalism is one which transcends today's "liberals" and "conservatives", fostering an environment in which politics are played between the forty yard lines,[183] fundamentally in agreement on the need for a neutral state, but contrasted by differences over "the role of government and markets."[184] This debate is then boiled down to "how best to enable individuals to pursue their ends for themselves."[185] In essence, it is a debate about pursuing practical reasonableness.

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[180] Finnis, NATURAL LAW at 169.
[181] *Id.* at 173.
[182] Michael J. Sandel, JUSTICE, 218-219 (2009) [hereinafter Sandel, JUSTICE].
[183] Yuval Levin, THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, and the BIRTH of RIGHT and LEFT (2013).
[184] Sandel, JUSTICE at 218.
[185] *Id.*

The extreme response to this approach is embodied by the work of Robert Nozick, whose form of libertarianism would go on to challenge the Takings Clause itself. "Nozick argues that the minimal state is *not* redistributive. Its actions are justified not by principles of redistribution of goods, but by the principle of compensation... Thus no ground has been established by which the state may take from some persons in order to *assist* others."[186] The modern American state, whether through something as simple as taxation or possibly even the Takings Clause, is in direct opposition to Nozick. "Systems of taxation for purposes of redistribution and social welfare are therefore unjust; they amount to the imposition of forced labour and an unwarrantable infringement of a man's rights over his own body, effort, and property, and his rights to not be forced to do certain things."[187] A more tempered version of the conservative ideology is that of Barry Goldwater, former United States senator and Republican Presidential nominee who stated, "How can a man truly be free, if the fruits of his labor are not his to dispose of, but are treated, instead, as part of a common pool of public wealth?"[188]

The decision in *Kelo* fails both of these models of liberalism. For the Nozick conception of distributive justice (and the less extreme version of the American conservative's interpretation of minimal government interference), the property in Fort Trumbull that was condemned was property duly purchased and raised by the petitioners, giving them an inviolable claim to that land use against government intervention. If Nozick were to take the Fifth Amendment at face value via the theory of positive law, this transfer is in direct opposition to the requirements of both public use, and arguably just compensation, as the fair market price cannot be measured against its sentimental value. "So-called 'urban renewal programs provide some compensation

[186] Lebacqz, SIX THEORIES at 55.
[187] Finnis, NATURAL LAW at 186.
[188] Sandel, JUSTICE at 219.

for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes."[189] The Court's decision goes beyond the constraints of civil society and contract law, as well as violates the parameters set by the Bill of Rights, which Nozick may argue to be the law of the land which protects immutable private transactions. The Rawlsian approach, and to a further extent Finnis and Aristotle, are equally violated. While the state maintains a role to distribute property when the necessary requirements are met to help the indigent constitute themselves, this form of public takings actually achieves the reverse. By deferring to the city council and its interpretation of "public use", the Court allowed a taking validated only by attenuated economic benefits for a poor community, which ironically was engineered by directly taking land from the poor, and equally powerless.[190] This action then inverts the concept in which the state may procure private property for the benefit of the common good, when the individuals most in need of public use are losing the very land they live on in name of that use. The City Council's choice to evaluate public use by measuring the actual "usefulness" of property left itself no choice but to place it in the hands of a multinational corporation, rendering its constituents powerless to challenge that determination. "Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[191] The human flourishing of the plaintiffs, and all citizens now subject to the specter of condemnation, will be hindered, if not permanently disabled, when the government is allowed to violate the public use element of the Takings Clause. This is in direct

[189] *Kelo* at 521 (Thomas, J., dissenting).
[190] *Id.*
[191] *Kelo* at 521 (Thomas, J., dissenting).

contrast to the notion of common good, in which the set of conditions that "enables the members of a community to attain for themselves reasonable objectives"[192] will be devastated.

In further assessment of the good of sociability, the pursuit the common good is often hindered with the problems of coordination.[193] There are often many competing views within community as to how best pursue the common good. Because of this problem, there can be a disconnect between individuals, whether brilliant or dim, as to how best approach these problems.[194] Authority then becomes essential to coordinate among these members and manage the proposed means necessary to solve these problems.

"[I]n the political community, there must be decisions about the management and use of natural resources, about the use of force... and about the many other problems of reconciling aspects of justice with each other, and of reconciling human rights with each other, and with other 'conflicting' exercises of the same right and with the public health, the public order and the like."[195]

To make these coordination decisions there must be either unanimity or authority.[196] Considering the fact that unanimity is often a byproduct of oppressive regimes, our constitutional system relies on the authority and the power granted to it by law. The Takings Clause is a solution to the competing values of private property use between citizens and the citizenry. The legislature, or in the facts here the city council, must adhere to its authority when making decisions to solve coordination problems within the public. The City Council and NLDC saw fit

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[192] Finnis, NATURAL LAW at 155.
[193] *Id.* at 231.
[194] Finnis, NATURAL LAW at 231.
[195] *Id.* at 232.
[196] *Id.*

to implement this taking to further the interests of the community by solving the coordination problems which had plagued the area of New London: failing economy, low tax revenue, etc.[197] Such decisions though must be shaped by the law, specifically in this case the Takings Clause. The legislature, and later the Supreme Court, rationalized its decision regarding the constraints of the Takings Clause by broadening its interpretation of public use.[198] Such an interpretation is damaging to the authority of the legislature, but more specifically the Court. The role of the Supreme Court is to defend the rule of law, and to ensure the protection of the rights of the citizenry under that law. The Court's broad interpretation of "public use"[199] in this sense circumvents the constraints of the Fifth Amendment to limit takings of private property to pursuit of the common good. "If we are to call these stipulations 'laws', and their obligation 'legal', so far they touch and bind any mere subject, why should we not call them laws and their obligation legal so far they touch a person who also rules?"[200] The *Kelo* decision is then a direct attack on authority, as authority not only fosters the environment of leadership to solve coordination problems, but further binds those who are designated to promulgate, enforce and defend the law.

The authority necessary to solve coordination problems is granted by the people to the government through the law. A plausible argument supporting the pursuit of the common good in measuring the practical reasonableness of the *Kelo* decision is the issue of law in the decision, and the procedural soundness of the process. Unfortunately though, that is not enough. "The central case of law and legal system is the law and legal system of the complete community, purporting to have authority to prove comprehensiveness and supreme direction for human behavior in that community, and to grant legal validity to other normative arrangements affecting

[197] *Kelo* at 473-474.
[198] *Id.* at 482-483.
[199] U.S. Const. amend. V.
[200] Finnis, NATURAL LAW at 264.

the members of that community."[201] To solve coordination problems within the community there are five distinct aspects of law which must be achieved: 1) that the law brings definition and clarity to help promote predictability of consequence in human actions; 2) that the law was duly proposed and adopted; 3) that the community can understand these laws to shape their own action without the need for the courts; 4) a function of *stare decisis* to establish precedent and detachment in adjudication; and 5) the practical gaps in issues facing coordination within the everyday acts of the community have been addressed.[202] These five formal features of law shape the further requirements of The Rule of Law, which is the legitimate form under which societies will operate and further flourish.[203] The eight desiderata (requirements) for this law to legitimately govern is: 1) rules are prospective; 2) not impossible to comply with; 3) promulgated; 4) clear; and 5) coherent with one another; 6) sufficiently stable; 7) orders applicable to relatively limited situations meet these elements; and 8) those with authority who make the laws are accountable, and administer the laws justly.

The point of these five elements and eight desiderata is to promote practical reasonableness through the virtue of human interaction and community.[204] These features and requirements of predictability and reason affirming the Rule of Law are advanced by the United States Constitution, and subsequent authorities within the individual states. "The motive of constitutional devices such as the so-called 'separation of powers' is characteristically expressed not merely by reference to the unjust schemes of arbitrary, partisan, or deposit rulers but also appeal to the positive good of a certain quality of association and interaction between the ruler

[201] *Id.* at 260.
[202] Finnis, NATURAL LAW at 268-269.
[203] *Id.* at 270.
[204] *Id.* at 272.

and the ruled."[205] The *Kelo* decision satisfies the procedural requirements of the desiderata. In this situation, all facets of the Constitutional order are turning, as the legislature (the New London City Council) made the decision, the citizens appealed that decision to the courts, and the Supreme Court settled the issue. The Supreme Court was sufficiently detached from the situation and evaluated the legislative decision on the merits, extending its standard of deference to the legislature established in previous cases. Along with this deferential standard, the Court simultaneously acknowledges the function of federalism within our system by placing the onus on the state legislatures to strengthen the protection provided by the Takings Clause in their own interpretation of public use.[206]

But the most striking issue in the decision regarding its effect on the Rule of Law is its attack on predictability, and *stare decisis*. Though it can be argued *Kelo* is just the next step in broadening the public use interpretation by the court established in *Berman* and *Midkiff*,[207] the expansive interpretation subjects citizens to constant doubt about the safety of their homes from eminent domain. "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property."[208] This kind of unpredictability is exactly what the Rule of Law is sought to guard against, preventing the usurpation of individual rights for the whims of the ruling class, despite however systematically legitimate the decision was made. "The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of

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[205] *Id.*
[206] *Kelo* at 514.
[207] Ilya Somin, *Libertarianism and Originalism in THE CLASSICAL LIBERAL CONSTITUION*, Vol. 8 N.Y. Journal of Law and Liberty, 1045, 1050-1051. (2014).
[208] Kelo at 503 (O'Connor, J., dissenting).

manipulation."[209] Both the legislature's and judiciary's positing law[210] in *Kelo* does not advance the prospect of human flourishing, but renders the citizenry's property rights weakened and nebulous for the future. This undermines justice and fairness, and therefor directly subverts sociability and practical reasonableness.

The Supreme Court's decision subverts the common good further by pursuing its obligation to the law through its will as opposed to its pursuit of the good through the *imperium*. The city council's choice, and supporting Supreme Court decision, to expand the public use clause in condemning public property for private benefit in Fort Trumbull was an exercise of their will in pursuit of the common good. Both bodies of government allowed their respective decision to be governed by the means, as opposed to the end, or *imperium*, to which they were drawn.[211] The Takings Clause is a law that was created primarily to protect the private property of citizens. The Court's decision to ignore that *imperium*, and seek an avenue through judicial gymnastics to circumvent the restraints of the public use clause by rationalizing its broad interpretation as a "public purpose"[212] is directly in opposition to the reasonableness drawn by the imperium of advancing human flourishing.[213] "Aquinas regards human movement not as the effect of a push (whether from within or from an external agent...), but rather as a person's response to the attraction of (something to be considered) good."[214] In this exercise of judicial will, the Supreme Court never stopped to think not only how it could achieve its end, but whether or not it should. This undermines the theory of legal obligation and the practical reasonableness of *Kelo*.

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[209] Finnis, NATURAL LAW at 273.
[210] *Id.* at 290.
[211] *Id.* at 338-339.
[212] *Kelo* at 484-485.
[213] *Id.*
[214] Finnis, NATURAL LAW at 336.

This subversion of the desiderata of the Rule of Law is substantively unjust. A law or decision may be unjust if it has a 1) defect in authorship; 2) defect of intention; 3) defect of form; or a 4) substantive injustice.[215] As noted in the preceding paragraphs, there is no procedural issue with the *Kelo* decision. Its injustice directly derives from Court's substantive attack on the basic goods by "appropriating some aspect of the common stock, or some benefit of common life or enterprise, to a class not reasonably entitled to it on any criteria of distributive justice, while denying it to other persons, or by imposing on some burden from which others are, on no just criterion, exempt."[216] This description illustrates the issues of the *Kelo* decision as described earlier relating to its perversion of distributive justice. But how can that be rectified? The plaintiffs in *Kelo* have obeyed the law as to which they are obligated. Despite petitioning first the legislature to protect their homes, and then the judiciary to guard their rights under the Fifth Amendment, the decision was made and there homes were lost. But, in the face of a law and legal decision which has robbed them of their homes, the petitioners *Kelo* chose not so subvert this law and therefore the common good. "The obligation is to comply with the law… for it is not based on the good of *being* law abiding, but only on the desirability of not rendering ineffective the just parts of the legal system."[217] Through the obligation exhibited by the petitioners to adhere to an unjust law, the constitutional system of the United States, and therefore the Rule of Law, was not subverted. On the contrary, the responses throughout state legislatures to the *Kelo* decision perhaps saved others from substantive injustice regarding the Takings Clause. Nonetheless, the injustice of the Court's decision subverts the Rule of Law.

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[215] *Id.* at 352-53.
[216] *Id.* at 353-354.
[217] *Id.* at 361.

One of the further requirements beyond the eight desiderata is the "independence of the judiciary, the openness of court proceedings, the power of the courts to review the proceedings and actions not only of other courts but of most other classes of official, and the accessibility of the courts to all, including the poor."[218] The judiciary in this case abdicated it duty to the public by failing to provide a check on the legislative branch, enabling a broad and manipulative interpretation of the public use clause to undermine the protections afforded the citizenry through the Fifth Amendment. This is a direct subversion of the practical reasonableness promoted through Rule of Law in its pursuit of the common good.

The Takings Clause has promoted sociability since its inception, namely taking into the consideration the necessary conditions to advance the goals of community through the protection and transfer of private land for public use. It was established in our nascent republic almost three centuries ago that private land would be required to promote the common good. But, when considering the importance of private property, and the autonomy and practical reasonableness it supports, the Framers instituted due process to protect the individual's rights from abusive government action. The *Kelo* decision ultimately ignores these restraints, and directly subverts the good of sociability by violating the public use clause, and neglecting the principle that to promote the common good, the good of the individual must first be secured and promoted in of itself. Considering the result of the case for the plaintiffs' in *Kelo*, and all other citizens subject to this expanded eminent domain power, sociability has been severely subverted.

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[218] Finnis, NATURAL LAW at 271.

The decision of *Kelo v. City of New London, Connecticut*[219] in its subversion of the basic goods of life, beauty, and sociability, is not practically reasonable.

Conclusion

"It is therefore a fundamental aspect of general justice that common enterprises should be regarded, and practically conducted, not as ends in themselves but as means of assistance, as ways of helping individuals to 'help themselves' or, more precisely, to *constitute* themselves."[220] The promotion of human flourishing begins with one's self, the immediate space around her, and then permeates throughout her community, ultimately extending to the civil society, and finally the international community.[221] In order to constitute human flourishing, one must have the freedom to pursue the basic goods through practical reason. The *Kelo* decision subverts the basic goods of life, aesthetic beauty, and sociability. The Rule of Law, namely here the Constitution and the Takings Clause, secures the instrumental good of property for the individual to pursue these basic goods free from unjust interference by both the state and federal government. The *Kelo* decision is not practically reasonable because it robs the individual of that autonomy. It misinterprets the Takings Clause's goal of reserving the government's right to access private property for the benefit of the common good, and directly subverts the individual's autonomy and self-constitution in an attack on these conditions which enable the individual, and therefore the community, to attain for themselves reasonable objectives in pursuit of the basic values. The Supreme Court's decision in *Kelo v. City of New London, Connecticut* is not practically reasonable, and therefore immoral.

[219] 545 U.S. 469 (2005).
[220] Finnis, NATURAL LAW at 169 (emphasis added).
[221] *Id.* at 144.