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A FUNDAMENTALLY ALIENABLE RIGHT:# HOW THE KELO DECISION PUT A PRICE ON THE RIGHT TO PROPERTY

BRIAN M. MOON*

INTRODUCTION

Given its composition, its methodological preferences, and its recent focus on preserving its public image and legitimacy, the Supreme Court, if given the opportunity to revisit eminent domain, will likely reevaluate the contours and internal disagreements of the right to property as understood by the Founders and expressed in the Constitution. Eminent domain—the practice involving governmental taking of private property for just compensation—is seemingly one of the few rare instances in modern judicial conversation in which the traditional judicial and political expectations and disagreements between the originalists and living constitutionalists are seemingly subverted and inconsistent with socio-political expectations.[1] This is because eminent domain hinges on fundamental jurisprudential disagreements dating back to before the Founding of the nation. These nuanced disagreements regarding the scope of the government's enumerated right to reach into private property formulate the contours of the discussion relating to *real property* rights and address how the judiciary should approach its balancing of individual rights and the public welfare. Keeping consistent with the history, tradition, and original intent of the Founders and founding-era thinkers, the government's right to condemnation is bound and limited by the plain text of the Fifth Amendment—not by arbitrary and subjective standards of "public benefit" as relied upon by the majority in *Kelo v. City of New London* —as the Government's powers of

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[1] U.S. CONST. amend. V.

condemnation and eminent domain are strictly delineated and limited under both theories of natural law and positive law.[2]

This paper will attempt to unpack the contours and jurisprudential underpinnings of the Court's current interpretation and application of the Takings Clause of the Fifth Amendment.[3] There will first be a discussion on the history of eminent domain, how it has progressed since the founding of our nation, and how the Court has come to its current approach and understanding of the Takings Clause and the right to property. This segment will mostly draw from *Kelo v. City of New London*[4], a controversial case where the Court held that a residential neighborhood could be taken to supplement private corporate interests under the guise that private economic development would constitute a legitimate *public use*.[5]

Afterwards, this paper will foreground the writings and theories of John Locke and Thomas Hobbes to highlight earlier conceptions of "private property" that likely informed Founding-era thinking about the relationship between the state and private property. There will be discussion on how the guarantees to "Life, Liberty, and Property" under the Fifth and Fourteenth Amendments are inherently contradicted by the just compensation clause of the Fifth amendment which—in practice—asserts a non-negotiable price and mandates the ultimate involuntary sale of an individual's private property.[6] It will be argued that the true contours and intent of the Founders are hidden within this contradiction and thus draw from both Locke and Hobbes—the two thinkers that have respectively theorized on property rights within the conflicting disciplines of natural and positive law.

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[2] *Kelo v. City of New London*, 545 U.S. 469, 490 (2005).
[3] U.S. CONST. amend. V.
[4] *Kelo*, 545 U.S. at 489.
[5] *Id.*
[6] U.S. CONST. amends. V, XIV.

While there will be points in the discussion where the preferences of Originalist and Living Constitutionalist jurists will play a peripheral role in outcome and approach, this paper will mainly attempt to discuss how applied judicial preferences transcend cursory disagreements on Constitutional methods and instead rely on the fundamental jurisprudential and philosophical assumptions and discussions under Lockean and Hobbesian theory that underly the intent and interpretations which gave credence to the right to property. The discipline of formalism will be brought in to better dissect the preferences of the justices and how the Court's deviation from the Court's established formalist approach to condemnation has brought it too far from the original intent of the Takings Clause of the Fifth Amendment under the Constitution.

Discussion over modern day concerns over eminent domain will be addressed throughout the paper and will ultimately attempt to predict how the court will react if it ever decides to reconsider its approach to eminent domain. There will be a discussion on the modern political aspects of eminent domain and ultimate discussion on how our courts and legislatures can better interpret the Takings Cause to better align with the intentions of the jurisprudential thinkers, founders, and the ideas that served as blueprints to the drafting of our Constitution.

I. HISTORY AND DEFINITIONS PERTAINING TO EMINENT DOMAIN

Government Takings—in their purest literal terms—are lawful under the Constitution and have helped shape the contours and legacy of private property rights vis-à-vis the government.[7] However, like most enumerated rights and privileges guaranteed by the Constitution, a deeper reading uncovers the reality that even rights held to be ineffable; have limits, boundaries, and tradeoffs. Governmental takings often take form in one of two ways—(1) they can manifest as

[7] U.S. CONST. amend. V.

explicit takings, when an overt act of governmental condemnation is used to justify the taking, or (2) an *implicit taking* (often referred to as converse condemnation, or regulatory takings), where a taking results because a regulation or policy compromises the property owner's reasonable investment backed expectations to property ownership.[8] For the sake of this discussion, all analysis will focus on *explicit takings* as the string of cases leading to the *Kelo* decision hinge on the government's explicit enumerated rights to condemn property as prescribed by the Fifth Amendment. Implicit takings through regulations and taxes, while contentious, are not issues that fit into this paper's narrow discussion on the Takings Clause's three step analysis.

The Takings Clause found in the Fifth Amendment of the Constitution asserts that, "No person shall be…deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*."[9] The language of the Fifth Amendment does not directly address the rights of the individual but acts to affirmatively limit the scope of actions the state can take against its citizens.[10] While these results may seem to be one in the same, there is a critical distinction that must be addressed and understood to truly unpack the purpose of the Takings Clause of the Fifth Amendment.

To assume that limitations on the sovereign equate to the establishment of rights of the individual is a foolhardy perception analogous to the hypothetical notion that limitations on certain types of weapons that are to be used during times of war equate to the opposing participant's right to not get harmed. This hypothetical fails for obvious reasons. Similarly, while the Takings Clause acts to preserve private property from the most aggressive, irrational, and indiscriminate of governmental takings, its language does not indefinitely preserve the private citizen's right to their

[8] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
[9] U.S. CONST. amend. V.
[10] *Id*.

property. Instead, it acts as a conditional affirmation and as a set of guardrails for the government's ability to condemn and seize the property of its private citizens. However, the founders and framers of the Constitution inserted conditions so that the state's condemnation powers could only be invoked if it met specific and narrow criterion.[11] While government holds the power to take, it must do so within the guardrails set by the Constitution and other requirements enacted by legislatures.

A. Criterion of the Takings Clause

The Takings Clause breaks down into three distinct elements, all of which must be met to justify a taking. There must be (1) *private property* taken for (2) *public use* and the private citizen must be (3) *justly compensated.*[12]

1. Private Property

The Courts have defined the right to *property* to entail both the "vulgar and untechnical" manifestations of the ownership of "physical things" and have also defined property rights to, "…denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." [13] This discussion of land rights avoids many of the intricacies of defining property. For this discussion, the key definition for "property" will simply be the combination of the right to own "things" and more specifically land and the rights to control said property. These control rights are defined to be the rights associated with possession and the right

[11] *Id*.
[12] *Id*.
[13] *United States* v. *General Motors Corp*., 323 U.S. 373, 377 (1945).

to sell or dispose when desired.[14] This prong's analysis, while complex in some contexts, will be defined narrowly and assumed to be satisfied in the below discussion.

2. PUBLIC USE

Most of the contemporary discussion in the past couple decades revolving around eminent domain has been around the notion of "Public Use". While the application and definition of the term will be expanded in a later section, there are two generally understood camps of thought pertaining to its meaning. A narrower approach focuses the government's takings to a limited number of justifications while a broader approach adopted by more liberal courts permit takings under more attenuated justifications.[15]

Under the narrower interpretation, the public has an actual use or actual right to use the condemned property.[16] The benefits tend to be more immediate and direct. Conversely, under the broader interpretation of the term, the taking of property and ultimate condemnation can be more attenuated from the direct advantage or benefit to the public.[17] The broader approach often evokes comparisons to property redistribution and private development. Under this approach, the public is not per se guaranteed the right to use the land.[18] This has been a substantial point of contention in the Court and has led to many decisions that have sparked both celebration and controversy.[19] Further unpacking regarding such justifications will occur at a later part of the discussion.

Regardless of which interpretation a court may use to uphold the government's taking, the *Kelo* majority ironically asserted "…that without a bright-line rule nothing would stop a city from

[14] *Id*. at 378.
[15] *Kelo*, 545 U.S. at 491 (O'Connor, J., dissenting).
[16] *Id*.
[17] *Id.*
[18] *Id*. at 497.
[19] *Id*. at 498.

transferring citizen A's property to Citizen B for the sole reason that Citizen B [would] put the property to a more productive use and thus pay more taxes."[20] A taking for the sake of a "one-to-one" title transfer between private citizens is unlawful and unconstitutional.[21]

3. JUST COMPENSATION

"Just compensation" has also been addressed by the courts and has generally been found to be satisfied with the gravamen of "fair market value".[22] However, "just compensation" does not equate to *full* compensation.[23] This is because market value does not consider value outside of what the marginal owner may attach to their property.[24] In essence, the government simply assumes that all individuals see their property as pieces of investment and not parcels of land in which the intrinsic value of comfort, convenience, and sentiment may be considered in calculating inherent value to the landowner. [25] As such, many owners are "… 'intramarginal' meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs…" they value their property at more than fair market value. [26] Although such property owners may be hurt and be put at an objectively unfair position when the government takes their land, limited confiscation is still permitted provided that the taking is for public use."[27]

Recent governmental takings have shown the Court's willingness to abandon the "intramarginal" factors and have instead shown the attempt to apply what it sees to be the only

[20] *Kelo*, 545 U.S. at 485.
[21] *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659; See *Bauman v. Ross*, 167 U.S. 548, 598
[22] *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 466

relevant factor—Fair Market Value.[28] While the incorporation and consideration of the "intramarginal factors" would undoubtedly produce the most equitable outcome for private citizens, the court seems content with exclusively considering "fair market value" in its condemnation analyses.[29] This likely as the introduction of the "intramarginal factors" would likely lead to complications and higher costs for the government. Admittedly, it is hard to put a price on comfort and sentimental value. But it is for this exact reason why the courts should reconsider the use of the intramarginal factors in its analyses. Although the government is required to act in good faith by adhering to local statutes, negotiating with the property owner in good faith, and accurately describing the property that is being taken, it is still acting as both the broker and the buyer. As such, the very nature of eminent domain gives the government an advantage in the deal. Is it possible for the government to truly deal in good faith when it often refuses the opposing party any considerations outside of "fair market value" and leaves no room for the opposing party to refuse the deal?

This invokes the possible assertion that the courts see the private right to property to be one that is superseded by governmental interests. In essence, the right to property is one that is secondary and ultimately exists at the leisure of the government. The private property rights of the individual and the interests of the government are not valued nor viewed equally in the eyes of the court. The Just Compensation prong as an essential to understanding the Takings Clause will be raised at points throughout this paper to better understand "public use" but will not be the key focus of this limited discussion which mainly hinges on the question of "public use".

[28] *United States v. 3727.91 Acres of Land*, 563 F.2d 357, 361 (8th Cir. 1977).
[29] *Id.*

B. THE ROAD TO KELO

> *Of course, in a system in which prior decisions are authoritative, no opinion can leave total discretion to later judges. It is all a matter of degree. At least the very facts of the particular case are covered for the future. But sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common-law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.*
>
> *--Justice Antonin Scalia: The Rule of Law as a Law of Rules*[30]

Judicial debate regarding eminent domain has been a part of the court's docket since 1875. The first significant eminent domain case heard by the Supreme Court, *Kohl v. United States,* was a case in which the government moved to condemn private property for the construction of a customs house and a post office building.[31] Justice Strong, writing for the majority asserted that eminent domain "…is essential to [the government's] independent existence and perpetuity."[32] The Court, acknowledged eminent domain as a creature of necessity that existed separate from—and paramount to—the right to property.[33] For the early court, there is an obvious hierarchy of rights and in the case of eminent domain, it prioritized the condemnation rights of the government over the citizen's right to their private property. However, in the early cases, the interests of the government were inherently intertwined with the interests of the public. There were no abstract goals nor were there strained justifications. The public simply needed certain facilities to function properly and effectively, and the government stepped in to provide these broadly applicable amenities and facilities. Yes, it may have come at the cost of an individual property owner, but the

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[30] Antonin Scalia (1989) "The Rule of Law as a Law of Rules," *University of Chicago Law Review*: Vol. 56: Iss. 4, Article 1. At 1177.
[31] *Kohl v. United States,* 91 U.S. 367, 371 (1875).
[32] *Id*. at 371.
[33] *Id.* at 372.

government's utilitarian approach seemed to dictate that the interests of the broad public and their ability and right to use certain facilities could outweigh the property rights of the individual.

Notwithstanding Justice Strong's—strong—assertions of governmental interest, the contours of eminent domain during the time of the ruling were relatively moderate and seemed to be guided by constraint and an adherence to formalist principles. Justice Scalia in *The Rule of Law as a Law of Rules* summarizes the goals of formalism with a simple assertion: "Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision."[34] The formalist, while tentatively accepting incremental and deliberate change, is skeptical of broad judicial discretion and activism.

1. Early Takings Under Kohl

The court in *Kohl* was focused on preserving the government's rights to condemn private property for the purpose of building governmental facilities like "…forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public use" but as one of the earliest cases dealing with eminent domain, it moved to draw the very rudimentary contours of the government's power of condemnation.[35] The *Kohl* court, as the first court to address this issue, had the responsibility of enumerating the first set of justifications for a taking under the Fifth Amendment. This list, while not exhaustive, gave a glimpse into the *Kohl* court's approach to what it considered ripe for condemnation keeping consistent with the Constitution.[36] Nowhere in the decision was there room allotted for judicial discretion. All the uses

[34] Scalia, supra. note 29, at 1177.
[35] *Id*. at 371.
[36] *Gwathmey v. United States,* 215 F.2d 148, 157 (5th Cir. 1954).

listed by the court were things that would directly and predictably lead to public benefit (i.e.: defense and safety) or would be facilities in which the public would be able to use and maintain. To the *Kohl* court, it was of paramount importance to limit the justifications to those analogous to those that Justice O'Connor would later reference in her dissenting opinion in *Kelo.*[37]

2. Enforcement of Constitutional Powers

As a natural, yet incremental development to the rule established in *Kohl*, the court next upheld on numerous occasions that the government had the authority of condemnation whenever it was necessary or appropriate to use the land in the execution of any Constitutional powers.[38] However the court had once again reiterated the formalist perspective that, "the responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right."[39] Once again, there is a clear focus on limiting discretion and limiting application of eminent domain. The Court, to put further emphasis on its regulation on condemnation highlighted the importance of keeping separate the interests of the government and the public from that of private corporate interests.[40] It recognized the reality that corporate and public interests often conflict. While this notion would be challenged in *Kelo* and ultimately read into law by the majority's holding that corporate economic development can lead to a broader "public use", the approach of the Supreme Court in the late nineteenth century served as a benchmark for the narrower interpretation of approach to the concept of *public use*.[41]

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[37] *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).; citing See, *e.g.*, *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 70 L. Ed. 162, 46 S. Ct. 39 (1925); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, 67 L. Ed. 1186, 43 S. Ct. 689 (1923).
[38] *Kohl* at 371.; *Cherokee Nation v. Kansas Railway*, 135 U.S. 641, 656; *Chappell v. United States*, 160 U.S. 499.
[39] *United States v. Gettysburg Electric Railroad Company,* 160 U.S.668, 680 (1896).
[40] *Id*.
[41] *Kelo*, 545 U.S. at 485.

3. Initial Understanding of "Public Use"

The "public use" requirement, until *Kelo* and other modern cases, was often satisfied only when condemnation would facilitate the operation and construction of public utilities and functions or as later established, would be used as a means for combatting an identified harm arising from the use of the property.[42] The Court made great efforts at attempting to curb the expansion of the takings power and applied it narrowly. Condemnation was often, if not exclusively, reserved for governmental purposes that fit into the narrowest of state goals and for powers solely enumerated to the government by the Constitution. In *United States v. Chandler-Dunbar Co.*,[43] the court upheld the use of eminent domain for the purposes of facilitating use of navigable waters.[44] The government relied on the holding of *Gibson v. United States*[45], which reiterated that all navigable waters are constitutionally under the control of the federal government.[46] As such, it was the right of the federal government to reference its Constitutional power to satisfy the "public use" prong of the condemnation analysis.[47] The general jurisprudential assumption was that state exercise of powers delegated to the government by the Constitution qualified as public use. In essence, the execution of the Constitution and the government's power is inherently for the "public use". Courts have recognized that it is the sole power of Congress and the government to determine when its "…full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."[48] Once again, the court seems to allude to the fact that the right to private property is secondary to the exercise of powers reserved to the government that point towards public use. Yet this power was only evocable under narrow and specific circumstances.

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[42] *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).
[43] *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 67 (1913).
[44] *Id.* at 68.
[45] *Gibson v. United States*, 166 U.S. 269, 271 (1897).
[46] *Id.*
[47] See also *United States v. Great Falls Manufacturing Company*, 112 U.S. 645, 647 (1884).
[48] *Gilman v. Philadelphia*, 70 U.S. 713, 725 (1866).

4. Complications of "Just Compensation"

The case *Albert Hanson Lumber Co. v. United States*[49] serves as a companion case to *Chandler-Dunbar Co*. as it operates with similar facts but focuses conversation on the "Just Compensation" requirement of the Takings Clause.[50] The Court, after a lengthy analysis, held that the statutorily prescribed compensation was reasonable and was not in violation of the just compensation prong of the takings clause.[51] Although the court did not use terms such as "fair market value", the analysis it undergoes is indicative of such considerations. Although the court found that the value of replacement would likely be over double the purchase price, the court found in this case that the price paid by the owner of the condemned property was a fair value for compensation.[52] Although contentious, the court still attempted to stay true to formalist analyses to best interpret the language and scope of the takings clause. The court looked at established law and precedent as the sole guide and blueprint to its analysis. No further balancing of equities or questions of "fairness" considered through judicial discretion were factors the court used to come to its conclusion. The *public use* was thus still contained to government and public interest.

5. New Deal Condemnations

During the New Deal Era, the government's condemnation power—like most governmental powers—perhaps experienced its largest expansion as the FDR courts moved swiftly to uphold condemnation for the sake of disaster prevention, protection of essential industry, and war preparation. During World War II, the assistant Attorney General called the Lands Division the "the biggest real estate office of any time or any place," as it oversaw the acquisition of more

[49] *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 582 (1923).
[50] *Id*.
[51] *Id*. at 589.
[52] *Id.*

than twenty-million acres of land.[53] While empirically more aggressive and expansive, the court still made conscious efforts to restrict the definition of *public use* to uses exclusive related to either the war effort or the preservation of essential industries. Private property was condemned and turned into airports and naval stations.[54] Land was condemned for war material manufacturing and storage.[55]

Government condemnation for historic and nature preservation reasons was another expansion of the doctrine. However, even though these were technically expansions when compared to the early justifications in *Kohl* or *Chandler-Dunbar Co.*, these justifications were well within the bounds of the narrower interpretation of the *public use* prong of the Takings Clause as they led to direct benefits and uses for the public. *United States v. Eighty Acres of Land in Williamson County* [56] involved a taking for the purpose of preventing erosion.[57] *Morton Butler timber Co. v. United States*[58] involved a taking for the purpose of creating national parks.[59] *Barnidge v. United States*[60] involved a taking for historic site preservation for land involved with the Louisiana Purchase.[61] *U.S. v. 480.00 Acres of Land*[62] involved a taking for the expansion of Everglades National Park and the creation of a national nature preserve.[63] Concrete benefits in which the public could use the new facilities or benefitted greatly from increased security or stability are inherent benefits that satisfy the *public use* requirement.

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[53] U.S. Department of Justice, Environment and Natural Resources Division, *History of Federal Use of Eminent Domain*, https://www.justice.gov/enrd/history-federal-use-eminent-domain (last visited Apr. 26, 2023).
[54] *Cameron Development Company v. United States* 145 F.2d 209, 211 (5th Cir. 1944).
[55] *General Motors Corporation v. United States*, 140 F.2d 873, 874 (7th Cir. 1944).
[56] *United States v. Eighty Acres of Land in Williamson County,* 26 F.Supp. 315 (E.D. Ill. 1939).
[57] *Id*.
[58] *Morton Butler timber Co. v. United States*, 91 F.2d 884 (6th Cir. 1937).
[59] *Id*.
[60] *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939).
[61] *Id*.
[62] *U.S. v. 480.00 Acres of Land*, 557 F.3d 1297 (11th Cir. 2009).
[63] *Id.*

6. DELIBERATE AND INCREMENTAL CHANGE

In more recent developments, the courts have begun to entertain more abstract justifications for *public use* in cases dealing with blight, like *Berman v. Parker*[64], yet still restrained the expansion within the justification of combatting a legislatively identified harm.[65] Blight, is a condition in which "…public health, morality, peace and quiet, law and order" may be compromised.[66] In *Berman* the court found the government's argument that the condemned area was a "slum" and its existence was "injurious to the public health, safety, morals and welfare" to be persuasive.[67] This development was a product of the chain of cases addressing the notion of blight.[68] This exception to the public use doctrine green-lit the government's power to take blighted properties.[69] The standard of blight has often been challenged for being too abstract and deferential to the state.[70] However, It can still be argued that the application of the blight standard is still within the Formalist method as—while it still does give discretion to the states—it requires the courts to impartially apply the blight standards codified by the legislature. There is still a clear distinction and separation of power between the courts and the legislatures.

In many municipalities, the legislature has been given "…enough latitude to wield the blight stamp so that 'virtually any property first the bill' for the blight designation.[71] For instance, in *Goldstein v. New York State Urban Development Corp.*, New York's judiciary deferred to state condemnation and seizure of an area that dissenting Judge Robert Smith identified as a "normal

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[64] *Berman v. Parker,* 348 U.S. 26, 35 (1954)
[65] *Id.*
[66] *Id*. at 32; see *Noble State Bank* v. *Haskell*, 219 U.S. 104, 111 (1911).
[67] *Schneider v. District of Columbia*, 117 F. Supp. 705, 724-725 (1953).
[68] *Berman*, 348 U.S. at 35; See also *N.Y.C. Hous. Auth. V. Muller*, 1 N.E.2d 153 (N.Y. 1936) (establishing the blight exception to the public use doctrine of the Fifth Amendment).
[69] *Id*.
[70] Paula Franzese, *Reclaiming the Promise of the Judicial Branch: Toward a More Meaningful Standard of Judicial Review as Applied to New York Eminent Domain Law*, 38 Fordham Urb. L.J. 1091 (2011).
[71] *Id*. at 1099.

and pleasant residential community."[72] The project in this case sought to condemn a private neighborhood for the development of a new stadium for the Brooklyn Nets franchise.[73] The New York Court of Appeals admitted that "…[they] are doubtless [and] correct that that the conditions cited in support of the blight finding at issue do not begin to approach the severity the dire circumstances of urban dwelling described by the *Muller* court in 1936."[74]

While many condemnation actions under the justification of blight have been successful due to the judiciary's deference to the state, many other actions have been found to either be an abuse of discretion or an unjustified taking.[75] As such, more confined courts have been vigilant against justifications of blight and have, at times, moved against the state interest.[76] However, the platitude that the "concept of public welfare is broad and inclusive" has come from this string of cases.[77] Such notions have opened up the door for cases like *Hawaii Housing Authority v. Midkiff* in which the Takings Clause was used to break up land oligopolies.[78] This acceptance of more abstract justifications and an introduction of the *public welfare* sub-prong under the *public use* requirement may seem to muddy the conversation and open the door for more state level deference and interpretation. However, such takings, although they resulted in a transfer of private property between private entities was constitutional as they attempted to remedy an ill which the legislature sought to address. In other words, condemnation was a means to resolving an identified issue. It itself was not the goal.

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[72] *Matter of Goldstein v. New York State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (Smith, J., dissenting).
[73] *Id*.
[74] *Id*. at 171; *see also N.Y.C. Hous. Auth. V. Muller*, 1 N.E.2d 153 (N.Y. 1936) (introducing the blight exception to the public use doctrine).
[75] *Centene Plaza Redevelopment Corp. v. Mint Properties,* 225 S.W.3d 431 (Mo. 2007).
[76] *Id*.
[77] *Berman*, 348 U.S. at 33; see also *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 424 (1952).
[78] *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984).

As mentioned prior, the biggest differentiating factor between the earlier, more contained applications of eminent domain and the more modern justifications is that recent developments have resulted in the transfer of private property from one private individual or entity to another. The government is no longer the recipient and the title holder, manager, or the foreman of the condemned property. While such takings could constitute a legitimate governmental purpose under limited applications, they may nonetheless lead to a slippery slope in which the longstanding restriction on the use of condemnation for reallocation of private property between private entities if lines are not clearly established. A mere taking with the justification that another entity would better use the condemned property is neither lawful nor constitutional. This reality goes against the early court's assertion and justification that governmental takings are permitted as it is not tainted by private industry.[79]

In an ideal world, the judiciary would have been consistent in its formalist reading and incremental expansion of the Fifth Amendment. Yet however much the court may have strayed from the initial interpretation of the takings clause under *Kohl*, it had generally respected the contours of the "Public Use" requirement and such expansions of the power for government to take were deliberate, incremental, and within the general intentions correctly set by the court in *Kohl*.

Kelo enters the story, not as an incremental expansion of the Fifth Amendment like its preceding cases but comes as a fundamental challenge to the definition of "public use"; a challenge to the cautious tradition of Fifth Amendment interpretation; and a challenge to the original intentions of the Founders and the Constitution.

[79] *United States v. Gettysburg Electric Railroad Company,* 160 U.S. 668, 680 (1896).

II. KELO V. CITY OF NEW LONDON: AN EXPANSION OF THE PUBLIC USE DOCTRINE

In 2000, the city of New London, Connecticut approved a development proposal submitted by a private developer "…which, in the words of the Supreme Court of Connecticut, was 'projected to create more than 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[80] New London sits at the junction of the Thames River and the Long island Sound in southeastern Connecticut.[81] While a valuable location, the city was labeled a "distressed municipality" by state agencies in the late 1990's.[82] This area however was never labeled as a "blighted" zone by the government and thus failed to even meet the board justification raised in *Berman*.[83] These conditions led the government to target the city, and particularly its Fort Trumbull area, for what it labeled as an "economic revitalization" program.[84]

In preparation for the development project, the city's development agency—NLDC—purchased property from willing sellers and moved to use the power of eminent domain to condemn and acquire the remainder of the necessary properties in Fort Trumbull from those unwilling to sell.[85] NLDC's plan was to invite Pfizer Inc.'s development project to build an alleged $300 million research facility on a site near Fort Trumbull.[86] The city's proposal claimed that the condemned neighborhoods of Fort Trumbull would be "revitalized" to complement the introduction of the new facility and would include amenities such as a Riverwalk, a new Coast Guard Museum, and a parking lot for its proposed commercial district.[87] The city intended the

[80] *Kelo*, 545 U.S. at 472.
[81] *Id*. at 473.
[82] *Id*.
[83] *Id*. at 483.
[84] *Id*. at 473.
[85] *Id*. at 472.
[86] *Kelo*, 545 U.S. at 473.
[87] *Id*. at 474.

development plan to capitalize on and supplement the arrival of Pfizer and the new commercial traffic it was projected to attract.[88] In essence, the Fort Trumbull area was to be condemned and bulldozed to become an accessory district to the expected Pfizer facility. While the government was successful in many of its negotiations for property acquisition, petitioners Susette Kelo and her neighbors refused to negotiate.[89] As a result, the government commenced condemnation proceedings against Kelo and eight other petitioners.[90]

Kelo was a long-time resident of the Fort Trumbull area since 1997 and made extensive improvements to her house, which she valued for its comfort and view of the marina.[91] Petitioners sued the city claiming that the taking of their properties would violate the "public use" restriction of the Fifth Amendment.[92] While successful in the lower Superior Court, Petitioners lost an appeal in the State Supreme Court.[93] Petitioners appealed to the Supreme Court of the United States where the court granted certiorari to determine whether economic development satisfies the "public use" requirement of the Fifth Amendment's Takings Clause.[94] The court ultimately held that condemnation of the area was constitutional.[95]

Fast forward to 2023, the over 90-acre Fort Trumbull area now sits barren and is now home to a colony of feral cats.[96] Pfizer Pharmaceuticals revoked their plans to build their facility in the area and so the Fort Trumbull area, once deemed a "distressed municipality" is no longer a municipality at all.[97] No retail stores have come in, no parking lot has been made, no new scenic

[88] *Id*.
[89] *Id*. at 475
[90] *Id*.
[91] *Id.*
[92] *Kelo*, 545 U.S. at 475
[93] *Id.*
[94] *Id*. at 476-477
[95] *Id*. at 489
[96] *Id.*
[97] *Id.*

trails have been constructed, and no museum has been built.[98] Although the court in 2005 would not have been aware of the ultimate fate of the Fort Trumbull area, the 5-4 liberal majority still ruled in favor of the government on the grounds of judicial deference to the legislature and asserted that use of "…eminent domain to promote economic development are certainly matters of legitimate public debate."[99] *Kelo* is significant not only because of its result on the local Fort Trumbull area, but because it represented an expansion of the court's interpretation of the "public use" doctrine. With the court's assertion that it must defer to the state's judgment on the concept of *public welfare*, it effectively nullified the tradition and definition of "public use" as crafted for eminent domain since *Kohl* in 1875.[100] While States have always had a level of deference as they could strengthen requirements for the "public use" doctrine, they were still generally bound by the restrictions of the Fifth Amendment's language.[101]

Dissenting Justices in *Kelo* have deferred to the ultimate assertions of Justice Chase, who in the 1798 case *Calder v. Bull* stated that a "…law that takes property from A, and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it."[102] Justice O'Connor reminds the court that the court must begin any analysis of the Constitution with the presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added."[103] Justice O'Connor further asserts that while the Takings Clause presupposed and authorizes the Government's power to take private property without the owner's consent, the just compensation requirement spreads the cost of condemnation and this "prevents the public from

[98] *Kelo*, 545 U.S. at 489
[99] *Id.*
[100] *Kohl,* 91 U.S. at 371 (1875).
[101] *Kelo*, 545 U.S. at 489.
[102] *Caler v. Bull*, 3 U.S. 386, 461 (1798)
[103] *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting); citing *Wright* v. *United States*, 302 U.S. 583, 588 (1938).

loading upon one individual more than his just share of the burdens of government."[104] Ultimately, the public use requirement imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit their property for public use, but not for the benefit of another person.[105] The dissenting justices conclude that this requirement promotes fairness as well as security.[106]

As alluded to in an earlier section, the court recognizes that there have generally been three identified categories of takings that comply with the public use requirement, notwithstanding the fact that boundaries between these categories may not always be so clear.[107] Justice O'Connor identifies the first to fall under the "transfer of private property to public ownership—such as for a road, a hospital, or a military base.[108] The second category is the "transfer of private property to private parties, often common carries, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium".[109] Justice O'Connor however goes on to concede that the "public ownership" and "use-by-the-public" tests are oftentimes too constricting and impractical when defining the scope of the Public Use Clause.[110] The Dissent posits that as a result of this impracticality and in the shadow of cases such as *Berman* and *Midkiff*, the court had adopted a third category that allowed in certain limited circumstances the taking of property to serve a public purpose even if the property is destined for subsequent private use.[111]

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[104] *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting); citing *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 325 (1893); see also *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).
[105] *Kelo*, 545 U.S. at 497 (O'Connor, J. dissenting).
[106] *Id.*; citing *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002) (holding "The concepts of 'fairness and justice' . . . underlie the Takings Clause").
[107] *Kelo*, 545 U.S. at 497 (O'Connor, J. dissenting).
[108] *Id.* citing See, *e.g.*, *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 70 L. Ed. 162, 46 S. Ct. 39 (1925); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, 67 L. Ed. 1186, 43 S. Ct. 689 (1923).
[109] *Kelo*, 545 U.S. at 498 (O'Connor, J. dissenting); citing See, *e.g.*, *National Railroad Passenger Corporation* v. *Boston & Maine Corp*., 503 U.S. 407, 118 L. Ed. 2d 52, 112 S. Ct. 1394 (1992); Mt. *Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 60 L. Ed. 507, 36 S. Ct. 234 (1916).
[110] *Kelo*, 545 U.S. at 498 (O'Connor, J. dissenting).
[111] *Id.*; See, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984).

However, although this third category may seem consistent with the majority opinion of *Kelo*, the dissent astutely points to a critical distinction which the Kelo case failed to reconcile. In *Berman* and *Midkiff*, the court emphasized the importance of deferring to legislative judgment about public purpose, in other words, there was a larger societal harm that the legislature had identified.[112] It just happened to be that taking through condemnation was the most effective remedy to the identified societal harm. Dissenting Justices acknowledged that because courts are ill equipped to evaluate the efficacy of purposed legislative initiatives, [the judiciary] rejects as unworkable the idea of courts' "deciding on what is and is not a governmental function and… invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proven impracticable in other fields."[113] Yet for all the emphasis on deference, *Berman* and *Midkiff* defaulted to the notion that "a purely private taking could not withstand the scrutiny of the public use requirement [as] it would serve no legitimate purpose of government and would thus be void."[114]

The Court's holding in *Berman* and *Midkiff* were thus faithful to the underlying intent of the Public Use Clause.[115] In both these cases, the original use of the properties inflicted affirmative harm on society.[116] In *Berman,* this harm was blight.[117] In Midkiff, this harm was an oligopoly resulting from extreme wealth[118]. In both cases, the respective legislatures found the elimination of the property use was necessary to remedy the harm.[119] *Kelo* does not fall within such category as the Fort Trumbull area was not declared a blighted zone and was not actively causing a harm

[112] *Kelo*, 545 U.S. at 499 (O'Connor, J. dissenting).
[113] *Id.*
[114] *Midkiff*, 467 U.S. at 245.
[115] *Kelo*, 545 U.S. at 500 (O'Connor, J. dissenting).
[116] *Id*.
[117] *Berman,* 348 U.S. at 35.
[118] *Midkiff*, 467 U.S. at 245.
[119] *Kelo*, 545 U.S. at 500 (O'Connor, J. dissenting).

which the legislature sought to remedy. Ultimately, in an analysis of a taking, especially one in which property is taken for private use, there must be a larger superseding harm that the legislature intended to eliminate. It is safe to assume that mere desire to construct an accessory district for a pharmaceutical company does not satisfy such requirements.

States are constitutionally allowed to impose stricter requirements for condemnation as the Fifth Amendment existed merely as a bare minimum threshold that states are required to meet.[120] However, *Kelo* effectively removed this minimum threshold and opened the door for more attenuated justifications so long as the courts were able to satisfy the nebulous justification of *public welfare* and economic development. The court itself stated that the "…concept of the public welfare is broad and inclusive…. The values it represents are spiritual as well as physical, aesthetic as well as monetary."[121] The aftermath of *Kelo* is indicative of the judiciary's current disconnect with the intent of the Takings Clause, the will of the legislature, and the popular opinion as at least forty-three states including Connecticut, as a direct response to *Kelo*, have refined their legislation to more properly and justly protect private property rights as guaranteed by the Constitution.[122]

Most states, in direct response to *Kelo,* have amended their eminent domain statutes to narrow and better enumerate the appropriate grounds for condemnation and for their exercise of the takings power.[123] Many states have also used their legislatures and state constitutions to limit the use of eminent domain for economic development.[124] Others have gone as far as to pass constitutional amendment to make takings under a justification of economic revitalization

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[120] *Kelo*, 545 U.S. at 489 (O'Connor, J. dissenting).
[121] *Berman,* 348 U.S. at 35; See *Day-Brite Lighting, Inc*. v. *Missouri*, 342 U.S. 421, 424 (1952)"
[122] Justice John Paul Stevens, *Judicial Predilections*, Address to the Clark County Car Ass,n (Aug. 18, 2005), in 6 NEV. L.J. 1, 4 (2005) (viewing "the public outcry that greeted Kelo," stating that the backlash to the opinion itself "is some evidence that the political process is up to the task of addressing" eminent domain reform).
[123] See Ala. Code § 24-2-2 (2000); Fla. Stat. Ann. § 73.013(1) (West 2006); Ky. Rev. Stat. Ann. § 416.540 (West 2005); Mo. Ann. Stat. § 523.271(1) (West 2002); 35 Pa. Cons. Stat. Ann. § 1702 (West 1997).
[124] *Gallenthin v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007).

impermissible and unconstitutional.[125] Furthermore, as further evidence of the public's disapproval of the *Kelo* decision, voters in ten states during the 2006 November elections—only a year after the *Kelo* decision—approved ballot measures restricting governmental takings powers.[126]

Ultimately, this introduction of the *public welfare* prong under the *public use* requirement of the Takings Clause takes the teeth out of the protections against overzealous state action as guaranteed by the Fifth Amendment. The court has effectively covered the Takings Clause—which was once definite and used to either provide a broad public benefit or to fight an identified societal harm—with a veil of ambiguity and judicial discretion.

III. LOCKE AND THE NATURAL RIGHT TO PROPERTY

John Locke is widely accepted as one of the key figures of authority regarding the jurisprudential underpinnings of the Founding of the Constitution and the rights enumerated in the Bill of Rights. Locke fundamentally believed in the individual's right of property to his own persons—that is a person has ownership of himself.[127] "The labor of his body" and the "works of his hands" belonged to the individual.[128] To Locke, property rights were inherently tied with natural rights—rights guaranteed by nature and morals—and were not the products of positive law.[129] By this belief, he often pushed the notion that private ownership was established when the individual's works and efforts supplemented property.[130] Prescribing to the existence of natural

[125] See Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561, 591 (2008) (noting that Louisiana and South Carolina have resorted to constitutional amendment to reform takings law).
[126] *Id*. at 601; see also Nat'l Conf. of State Legislatures, Property Rights Issues on the 2006 Ballot, NCSL (Nov. 12, 2006), http://www.ncsl.org/default.aspx?tabid=17595 (noting that Louisiana's measure received fifty-five percent of the vote while South Carolina's measure received eighty-six percent of the vote).
[127] John Locke, *Two Treatises of Government* §5.27 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).
[128] *Id.*
[129] *Id.* at §5.26.
[130] *Id*.

laws, Locke believed in the principal of sufficiency: a principle that asserts that because the world is owned by all individuals, individual property is only justified when and if it can be shown that no one is made worse off by the appropriation of the property.[131]

Locke—as a natural law theorist and the forefather of libertarianism—often pushed the existence of a pre-political, pre-legal, and pre-contractual state of nature that was governed by natural rights and morals.[132] However, the pragmatist within Locke understood the fundamental role that government played for the polity and the individual.[133] Taxation and the establishment of the government was not a threat to the individual's right to property, but a necessary institution that, if properly and justly established, would be a fundamental safeguard of such rights.[134] Robert Nozick, in his Lockean interpretations, asserted Locke as accepting the state's power of taxation and control as justified necessities and the products of the consent of the majority.[135] Nozick notably painted Locke as a libertarian who believed that government does not have the right to take property for the use of the common good without the consent of the property owner.[136] Although taxation and the taking of property are not identical, they both operate under a unified premise through a Lockean lens. Ultimately, property rights are supreme, and the government must establish a narrowly tailored justification for a taking of property.[137]

James Tully, on a separate note, claimed that Locke's interpretation of natural laws assumed that the natural property rights of an individual are no longer relevant and that no such constraints on governmental takings existed.[138] In other words, Tully interpreted that natural law

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[131] *Id*. at §2.27.
[132] *Id.* at §5.26.
[133] *Id*. at §11.140.
[134] *Id*.
[135] ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 180 (Basic Books 1974).
[136] *Id*.
[137] *Id*.
[138] JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* (Cambridge Univ. Press 1980).

itself put restrictions on natural rights to temper behavior that may harm society.[139] Natural law itself restricts affirmative harm to the public even if the harm arises out of the practice of an individual's natural rights.[140]

Jeremy Waldron, synthesized the interpretations of Nozick and Tully and argued that Lockean property rights—deriving from natural rights—are confined by the role and scope of the government, yet the legislature, having power to interpret and codify natural law could limit the scope of such rights to mitigate harm and externalities.[141] Popular interpretations of Locke thus indicate his likely inclination to temper property rights if it is done so with the confined and limited goal of affirmatively remedying a social harm.[142]

Locke, although a firm believer in the separation of powers, notably put more weight and credence on the legislature as he believed that the judiciary was nothing more than a vestigial branch who's unelected members were not suited to address questions of policy.[143] To Locke, the judiciary's power to interpret was not one that was on the same level as that of the legislature's "supreme" power to legislate.[144] While Locke was not opposed to having distinct judicial institutions, he did not see the power of interpretation as a distinct and equal power to that of the legislature.[145] Locke states that positive laws "are only so far right, as they are founded on the law of nature, by which they are to be regulated and interpreted."[146] All this seems to indicate that Locke would likely have been more persuaded by the originalist and formalist disciplines had he elaborated on judicial method as prototypical originalist and formalist method is often self-

[139] *Id*. at 69-71.
[140] *Id.*
[141] JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 149-53 (Oxford Univ. Press 1988).
[142] *Id*.
[143] Locke, supra note 126, §2.88-89.
[144] *Id*.
[145] I*d.* at §2.88–89.
[146] *Id.* at §2.12.

restrained and seldom attempts to deviate from already established powers deriving from a clearly set delineation of powers and limitations.[147] To Locke, it was never the role of the court to do the job of the legislature and the prime objective of the legislature was the codification of natural law through the consent of the majority.[148] Under Lockean principles, the Amendments in the 43 states to further protect property rights in the wake of *Kelo,* would be more controlling and binding than the holding of a court of nine justices ultimately split 5-4 on ideological lines.

When delving into Lockean theories on property and the separation of powers, one cannot help but notice consistencies between Locke's theories and the dissenting assertions in *Kelo*. Justice O'Connor, writing for the dissent, honed on the notion of the separation of powers and highlighted the inadequacies of the judiciary in making policy determinations regarding eminent domain takings. Locke's Libertarian tendencies seemed to suggest that takings are lawful under natural law so long as they are limited and are essential for the social good.[149] Therefore, Locke permitted taxation at its very fundamental and honest core.[150] This is consistent with American tradition, and it is apparent that the Founders too had a similar perspective. Additionally, like Locke, the dissent's deference to the legislature evokes a certain understanding that the government of The People, by The People, would best appreciate and understand the needs and restrictions on the government. It must be reiterated that Justice Chase in 1798—mere two decades after the founding—argued that the type of taking that would happen over two centuries later in *Kelo* was not something that would pass the legislature as it would be against the interests of society.

[147] *Id*.
[148] *Id.*
[149] *Id.*at §11.140.
[150] *Id.*

Furthermore, under Lockean theory, The taking in *Kelo,* would likely even fail the "just compensation" requirement of the Fifth Amendment as, for Locke, the subjective intramarginal factors tied with a property as previously discussed would likely be an analog for the "work of one's hands" and so such takings would be unjust as the current state of eminent domain neglects such calculations for the "just compensation" requirement of the Fifth Amendment.[151] These factors have yet to be considered in the "just compensation" calculus the Court engages in for its eminent domain analyses.

Locke's focus on property, like the language of the Fifth Amendment, is one ultimately tethered to the public interest.[152] It is likely that Locke, guided by his spoilage limitation and sufficiency proviso, would find the takings in *Berman* and *Midkiff* to be legitimate regulations on private property as they are vehicles and tools for fighting a larger societal harm identified by the legislature and the people. This conclusion lends itself to the restrictions on the accumulation of property raised by Locke in *Two Treatises.*[153] Many scholars assert that Locke placed two notable restrictions on the accumulation of property in the state of nature: (1) that one may only appropriate as much as one can use before it spoils[154]; and (2) that one must leave "enough and as good" for others.[155] *Berman* was a case in which a taking and ultimate reallocation of property was permitted as it was in response to blight, and *Midkiff* was a case in which the legislature sought to remedy a hostile oligopoly.[156] Blight, as found in *Berman* is reminiscent to the spoilage of land while the taking in *Midkiff* resembles an attempt at enforcing Locke's sufficiency restriction. These two

[151] *Id*. at §2.28.
[152] *Id.*at §9.92.
[153] *Id*. at §5.38.
[154] *Id.* at §5.31.
[155] *Id.* at §2.27.
[156] *Berman*, 348 U.S. at 35; *Midkiff,* 467 U.S. at 245.

justifications were cited and upheld by the Dissent in *Kelo* as permissible for the purposes of a taking.[157]

While some may blanket Locke as an avid opponent of governmental reach into private property, it might be a more fruitful endeavor to label him as a libertarian that understood that certain societal ills require the remedial hand of the government.[158] This is how the dissent in *Kelo* ultimately justified *Berman* and *Midkiff*. Yes, on its surface, the takings in these cases led to the reallocation of private property to another private entity for private use, but this was in the name of remedying identified societal harms. Locke would have permitted the takings under *Berman* and *Midkiff* as they were the embodiment of the spoilage limitation and the sufficiency restriction that he embraced in *Two Treatises*.[159] For Locke, these are the only lawful justifications for a governmental regulation on property.

It is likely that had Locke been around for the *Kelo* decision, he would have made a similar argument as the one voiced by the dissenting justices. *Kelo's* outcome and the justification of the majority is inconsistent with Locke's interpretations on the state of nature and is thus unlawful and unjust. *Kelo* was never a case premised with the intent of fixing a societal harm. Since the beginning it was nothing more than a case predicated on bringing a self-predicted, self-proclaimed economic benefit to a hypothetical constituency and for the economic advancement of Pfizer. Had the court found the Fort Trumbull area to be blighted or otherwise a threat to public welfare, it would have been ripe for condemnation.[160] Yet the court and the legislature failed to find any affirmative justification hinged on the premise of fighting a societal harm. No such distinctions

[157] *Kelo*, 545 U.S. at 489 (O'Connor, J. dissenting).
[158] Locke, supra note 126, §11.140.
[159] *Id.* at §5.38.
[160] *Kelo*, 545 U.S. at 463 (O'Connor, J. dissenting).

were made, and the ultimate justification simply revolved around the nebulous justification of "economic development". As the dissent astutely concluded, this was merely a situation in which the government simply gave "…to an owner who will use [the land] in a way that [it] deems more beneficial to the public."[161] *Kelo* is thus inconsistent with Lockean principles and may thus be at odds with the original intent of the Founders.

IV. HOBBES AND THE DEMOCRATIC SOVEREIGN

Thomas Hobbes, is often celebrated as one of the forefathers of the modern social contract theory and heralded as one of the largest proponents for the role of the sovereign and the power of the state.[162] Hobbes asserted that the state of nature is a condition where there is no inherent right to property as "all men have a right to everything, it is impossible to conceive of this political authority as protecting men's natural rights to property."[163] Unlike his classical contemporaries, Hobbes asserted the sovereign to be the very institution and coercive authority in which private property relations originated.[164] In *Leviathan*, Hobbes stated that because "…the opinions of men differ concerning *meum* and *tuum*," it inherently, "…belongs to the chief power to make some common rules for all men and to declare them publicly, by which every man may know what may be called his, what another's."[165]

The application of Hobbes's claims in the American context could be argued to be a substantial kink in this conversation as Hobbes was an avid anti-revolutionary while the United States, by its very nature, was a nation born from political dissidence and sedition against the very

[161] *Kelo*, 545 U.S. at 460 (O'Connor, J. dissenting).
[162] THOMAS HOBBES, *LEVIATHAN* ch. XV (Richard Tuck ed., Cambridge Univ. Press 1991).
[163] *Id.*
[164] *Id*. at XVII.
[165] THOMAS HOBBES, *DE CIVE* 77 (Richard Tuck ed., Cambridge Univ. Press 1991).

crown which Hobbes defended. Hobbes's interpretation on the state of nature, however, like most sociopolitical theories, is ripe for application in all settings and times. Yes, it is likely that Hobbes would never have fathomed the establishment let alone the founding of American Democracy, yet his works played a peripheral role in the conception of that very institution. While Hobbes is not often cited for directly influencing the founders to the extent of Locke, he nonetheless laid the foundation for thinkers like Voltaire, Rousseau, Kant, and Montesquieu whom the Founders drew great inspiration. Hobbes's *Leviathan*, whether as a blueprint or a warning, had helped to birth and shape the American "Sovereign".

Thomas Paine, in his political pamphlet *Common Sense* asserted that "In America, the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other".[166] The Constitution, by its very nature is *the* sovereign document that—while protecting the rights of the individual—simultaneously served to draw the contours of the government's power. The American "Sovereign"—The People—enumerated restrictions on their established government to curb its otherwise unlimited power. In the language of the Fifth and Fourteenth Amendment, the Constitution established a right to property and enacted restrictions on the government.[167] The American government is nothing more than a vessel, an agent, of "We the People"—the American "Sovereign". Although this conclusion may be circular in nature, it is this very contradiction that defines American Democracy. Sovereign rule in the American tradition derives from the people, not from a self-imposed despot nor from the acts of their governmental agents.

Under the Hobbesian assumption that all property rights derive from the Sovereign—The Constitution, being the "Sovereign" law—drew clear guardrails and borders around its absolute

[166] THOMAS PAINE, COMMON SENSE 3 (1776).
[167] U.S. CONST. amends. V, XIV.

power and granted its citizens with a right to property which could only be deprive under the limits of the Fifth Amendment. One of the fundamental justifications for the adoption of formalism is the notion that formalist methodology provides a framework of predictability.[168] Predictability and stability are not products of discretion. They are products of established rules and precedent. It is thus probable that Hobbes, as a champion of societal stability, would have preferred a judiciary inspired by formalist methodology.

Hobbes, in opposition to the Lockean view of the judiciary, posited that the existence and role of the court was sacrosanct to the survival of the social contract as the judiciary was given the role of "… hearing and deciding all controversies which may arise concerning law, either civil or natural, or concerning fact. For without the decision of controversies, there is no protection of one subject against the injuries of another…"[169] To Hobbes, the Judiciary was the ultimate arbiter as it was a vessel for the equal, just, and predictable application of the laws of the sovereign. Once again, to Hobbes, the guarantees of security and consistency were the hallmark protections in which the social contract between society and the sovereign ultimately hinged.[170] Security and predictability—not the abstract idea of liberty—were what ultimately promulgated the need for delegated private property in Hobbes's commonwealth.[171] Hobbes's understanding of liberty, while wholly a product of positive law, still evoked an adherence to more abstract ideas of consistency, equity, and autonomy. Hobbes asserted that "annexed to the sovereignty is the whole power of prescribing the rules whereby every man may know what goods he may enjoy, and what actions he may do, without being molested by any of his fellow subjects: and this is it men call

[168] Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175.
[169] Hobbes, supra note 161, XVIII.
[170] *Id.*
[171] *Id.*

propriety *[property]*."[172] To Hobbes, it was the Court, an agent of the sovereign, that guaranteed the fair and predictable application of laws that was the progenitor of social stability.

In parity with Hobbes's preference for an assertive yet restrained judiciary, the Court since *Kohl* had made attempts at maintaining a level of consistency and adherence to stare decisis. Yes, general understanding and application of government condemnation had evolved in the nearly hundred-fifty years since *Kohl*, but the courts had made honest attempts, even during the New Deal era, to keep governmental takings within the bounds of "incremental change".[173]

The majority's conclusion in *Kelo*, however, would likely not survive Hobbes's understanding of property rights and its relationship with the sovereign. It must be reiterated that the goal of Hobbes's social contract was to create a commonwealth in which the Sovereign interceded the rights of property of the individual with the intent of preventing conflict or "war".[174] "War", while it can be war in the literal term, is more widely accepted as being a stand in for the conflicts that may arise from the inherent confusion of human nature.[175] Hobbes would probably view the deviation from established stare decisis in *Kelo* as a distasteful subversion of the expectations of the individual—that is, the Court, independent of the legislature and the consent of "The People", unilaterally expanded the accepted meaning of "public use".

As identified by Justice O'Connor, the only circumstances in which takings were permitted prior to *Kelo* were when there was a "transfer of private property to public ownership" or when "transfer of private property to private parties, often common carries, [to] make the property available for the public's use", or to fight a legislatively identified harm.[176] Cases of condemnation,

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[172] *Id.*
[173] *Id.*
[174] Hobbes, supra note 161, XVIII.
[175] *Id.* at XIII
[176] *Kelo*, 545 U.S. at 489 (O'Connor, J. dissenting).

were determined on the basis of if the unique facts of the cases fit under one of these three defined categories. *Kelo,* with the introduction of a new discretionary "public benefit" standard, dissolved the previously established justifications for condemnation and handed over full arbitrary discretion to the judiciary. With this new standard, condemnation would be justified so long as the court hinged a "public benefit". This lack of stability would be tantamount to anarchy in the eyes of Hobbes.

Ultimately, while Hobbes' views on the law are not entirely consistent with all the tenants of formalism, his views did nonetheless share stark similarities and possibly suggested a strong preference towards formalist methodology. Hobbes understood the law as a self-contained system of rules and principles that were created by the "sovereign" to maintain order and prevent conflict. In a Hobbesian paradigm, the state is created by individuals who, when left to their own devices, are in a state of perpetual war and conflict with each other. Hobbes identified property to be one of the main causes of conflict and so questions of property, especially relating to takings, were likely to be dealt with the highest levels of scrutiny in the most delicate and deliberate of ways.[177] Conflict is minimized when the law is consistent and predictable. It is possible that for this very reason that the American Sovereign, The People, and their Constitution put in place the protections of private property in the Fifth Amendment.

It is arguable that Hobbes, in line with his assertions in *Leviathan,* would likely have endorsed the role of the American Judiciary in maintaining this stability when dealing with questions of property. As such, insofar as dealing with the question of eminent domain, especially in the context of *Kelo*, Hobbes would likely have endorsed the formalist method for its ability to provide consistency and predictability, as the nature of American democracy focuses on the

[177] Hobbes, supra note 164, 77

interests of "The People"—the simultaneous sovereigns and subjects of Hobbes's social contract, and that very people drafted a constitution to protect their rights against arbitrary governmental takings.

CONCLUSION

Justice Scalia best summarized how we ought to approach the question of condemnation and eminent domain when he reminded us that as "…the law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time."[178] If one holds the theories of Locke and Hobbes to be persuasive authority on Founding-era thinking and the ultimate drafting of the Constitution—one ought to accept that the government's right to condemnation and eminent domain were drafted and guaranteed under a formalist tradition. Formalism is not a suggestion, but a mandate when approaching the delicate question of eminent domain.

This brings us back to the initial claim that the guarantees to *Life, Liberty, and Property* are an oxymoron in the face of the Takings Clause. Notwithstanding this uncomfortable conclusion, as we have uncovered the contours of the clause through the Lockean and Hobbesian predispositions to the origins of the right to property, we have discovered how this apparent contradiction ultimately defines the American legal tradition at large. American law is the collision point between natural law and positive law. The Constitution, while in a critical lens is a document of full of ambiguity and contradictions—is nonetheless perfectly imperfect.

[178] Antonin Scalia: *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175-81 (1989).