

## Kelo's Moral Failure

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## KELO'S MORAL FAILURE

Laura S. Underkuffler\*

### INTRODUCTION

Today we are celebrating the work of Frank Michelman, a towering figure in the American legal academy. Many scholars have written important works in the fields of constitutional law and constitutional theory. However, even in this august company, Frank Michelman stands out. He is, by anyone's calculation, one of the most influential constitutional scholars of the twentieth and twenty-first centuries.

In these remarks, I will explore the intersection of Frank Michelman's work and "takings" law or the question of constitutional restraints on the taking of private property by government.<sup>1</sup> Of all fields of contemporary constitutional law, this is one of the most contested. In particular, the question of whether government can take private property for whatever ends it deems to be justified has galvanized the opposition of citizens and political actors. In the now-famous *Kelo*<sup>2</sup> case, decided in June 2005, the United States Supreme Court upheld the taking of modest private homes for the purpose of commercial and residential economic redevelopment. Although the issue of government condemnation powers had smoldered for years, this very high-profile and decisive opinion by the Court ignited a firestorm of controversy.<sup>3</sup>

Some of the reaction to the *Kelo* decision might be discounted as unjustified popular hysteria, fueled by politicians and interest groups with agendas that have little to do with the merits of the question. However, the breadth and depth of the visceral public reaction—from groups as diverse as property-rights activists, populists, advocates for racial minorities and the poor, and small-business organizations—cannot be so easily or expediently discounted. Something about this decision tapped a universally raw nerve, beyond the usual concerns about winners and losers in politics and government.

Much ink has been expended in the search for different doctrinal or policy tests that might address the *Kelo* problem.<sup>4</sup> As worthy and necessary as these efforts are,

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<sup>1</sup> "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>2</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>3</sup> See, e.g., John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1; Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20; Ronald Smothers, *In Long Branch, No Olive Branches*, N.Y. TIMES, Oct. 16, 2005, at NJ6; William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

<sup>4</sup> See, e.g., Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An*

I will argue in these remarks that we must look elsewhere for the heart of the matter. Rather, as Michelman's work so powerfully suggests, *Kelo's* continuing aftermath is the result of a deeper, substantive concern about structural inequalities that are inherent in this and other exercises of law's coercive powers. In other words, the challenge presented by *Kelo* is not simply a problem of public policy run amok; it is the question of the *legitimacy* of government power when used against dissenters.

### I. THE FOUNDATIONAL ISSUE

In a recent article that explores what we might call the social paradox of law, Michelman begins with the following observation. In any land where government prevails, "people wake up each day to find in place effectively compulsory regulations of social life—we call them 'laws'—with which the publicly supported authorities in the land predictably will demand everyone's compliance."<sup>5</sup> This is true even though "[n]o one who thus is subject to the laws of a country has chosen these laws for himself."<sup>6</sup> Whatever the precise history of how a law came to be, of one thing we can be certain: because of the processes of negotiation, compromise, and majority rule, no law will be "effectively . . . chosen by the actions of any single one of the individuals who are called upon to abide by it."<sup>7</sup>

Thus, Michelman writes, "arises . . . the question of political justification or legitimacy."<sup>8</sup> We must "supply a *moral warrant* for the application of collective force in support of laws produced by nonconsensual means, against individual members of a population of presumptively free and equal persons."<sup>9</sup> We are presumptively committed, through the idea of self-government, to "the freedom, the dignity—of persons."<sup>10</sup> If we are to honor this commitment, we must "find a form of political association, a set of arrangements for lawmaking, in which each individual human being remains or becomes his or her own governor, providing from within his or her own will and

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*Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783 (2006); David Schultz, *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 (2006); Brett D. Liles, Note, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369 (2006); Eric Rutkow, Case Comment, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261 (2006).

<sup>5</sup> Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 22–23 (2003) [hereinafter Michelman, *Social Rights*].

<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 13 (1999) [hereinafter MICHELMAN, *BRENNAN*].

judgment the direction and regulation of his or her own [destiny]."<sup>11</sup> We must, in short, strive to achieve "an ideal of personal self-government in politics."<sup>12</sup>

The institutional difficulties that this ideal presents are, of course, immediately apparent. As Michelman asks, "How is everyone to regard himself or herself as self-governing through social and institutional transactions from which many have dissented and in which in any event there is no real chance that any single person's own vote, or speech, or other considered political action decided the outcome?"<sup>13</sup> We could take the easy way out, maintaining—for instance—that the self-governing ideal is realized through the simple right to vote, through the "voice" of representative government, or through some other proceduralist answer. However, Michelman maintains that such answers beg the question. Obviously, laws in a democracy are derived from procedures to which "we" (the voters) have agreed, making those laws, in that sense, ones to which we have personally consented. This, however, does not answer the question of why, *from a moral perspective*, the losers in this process should be bound and continue to be bound—a different and deeper "question of political justification or legitimacy."<sup>14</sup>

In an effort to answer this question, Michelman begins with the work of John Rawls. Rawls has written that a moral warrant for law's coercive force requires that acts of government be acceptable, in principle, as "reasonable and rational."<sup>15</sup> In Michelman's view, this is an unabashedly substantive requirement whose content is drawn both from the normative dimension of democratic ideals<sup>16</sup> and from contractarian ideas of political justification.<sup>17</sup> If, as posited above, we believe in "the freedom and equality of each and every individual," then "potentially coercive political acts [must] be acceptable from the standpoints of each . . . of countless persons" who express "rational conflicts of interest[s] and vision[s]."<sup>18</sup> This does not mean "that every discrete act of lawmaking [must] pass a test of rational acceptability to every supposedly reasonable inhabitant of a modern, plural society."<sup>19</sup> Rather, it means that the substantive, foundational principles of the governmental regime must be ones that justify the commitment of citizens to those laws that are the products of government.<sup>20</sup>

Many substantive, foundational principles of government might be suggested; the one that Michelman identifies as particularly important could be termed the *principle of equally respected participation*. To deserve our rational support, a governmental system must be "designed to constitute and sustain every person (at least every person who so chooses on fair terms) as a competent and respected contributor to political,

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<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> Michelman, *Social Rights*, *supra* note 5, at 23.

<sup>15</sup> *Id.* (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1996)).

<sup>16</sup> See MICHELMAN, BRENNAN, *supra* note 10, at 33.

<sup>17</sup> See Michelman, *Social Rights*, *supra* note 5, at 23.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 24.

<sup>20</sup> See *id.* at 24–25.

social, and economic life.”<sup>21</sup> Only if this kind of equality is honored in theory and in fact can a governmental system claim a moral grounding which is “sufficiently regardful of . . . everyone’s interests and status as free and equal persons.”<sup>22</sup> Only if this kind of equality is honored in theory and in fact can a demand for the compliance of citizens be justified.

What the principle of equally respected participation might require—for instance, in material-resource terms—is a difficult question with which Michelman has extensively grappled.<sup>23</sup> When it comes to the exercise of government condemnatory powers, as illustrated by *Kelo* and like cases, the meaning of this principle, I will maintain, is much simpler. As Michelman suggests in his early work, and as I shall amplify here, the disregard of community—more pointedly, the *selective* disregard of community—that is exhibited by government in these cases violates the principle of equally respected participation.<sup>24</sup> Indeed, the pervasive unease that we feel about the results in these cases is our own intuitive recognition that these exercises of coercive government power fail the requirements of this moral warrant.

## II. THE TAKINGS QUESTION

The question of the justness of collective decisions to take private homes for general economic redevelopment has been around for a long time. More than twenty years ago, Michelman delivered the annual John Randolph Tucker Lecture<sup>25</sup> at the Washington and Lee University School of Law about this question, centering on the then-infamous *Poletown*<sup>26</sup> case. He began by quoting an essay by William Safire, which appeared in *The New York Times*, entitled *Poletown Wrecker’s Ball*.<sup>27</sup> *Poletown*, a district in Detroit, was described by Safire as “a living, breathing neighborhood . . . so named because many of its residents are of Polish extraction. Its small houses, candy

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<sup>21</sup> *Id.* at 26.

<sup>22</sup> *Id.* at 25 (emphasis omitted).

<sup>23</sup> See, e.g., *id.* at 33–34; Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik*, 14 S. AFR. J. HUM. RTS. 499 (1998); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. For an excellent review of this strain of Michelman’s work, see André van der Walt, *A South African Reading of Frank Michelman’s Theory of Social Justice*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 163, 179–96 (Henk Botha et al. eds., 2003).

<sup>24</sup> See *infra* notes 60–64, 68–71 and accompanying text.

<sup>25</sup> See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) [hereinafter Michelman, *Constitutional Right*].

<sup>26</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

<sup>27</sup> William Safire, *Poletown Wrecker’s Ball*, N.Y. TIMES, Apr. 30, 1981, at A31; see Michelman, *Constitutional Right*, *supra* note 25, at 1097.

stores, churches, add up to what urban planners would call a community.”<sup>28</sup> “This living, breathing, neighborhood,” Michelman writes,

is the projected site of a new General Motors plant promising 6,000 badly needed jobs for the economically distressed city. For the sake of those jobs, the city is using its eminent domain powers to acquire the site[] from owners who . . . do not wish to sell . . . . The taking will leave the ex-owners in possession of monetary “just compensation” but bereft of homes and neighborhood.<sup>29</sup>

The decision to condemn the Poletown neighborhood was upheld by the Michigan Supreme Court on several grounds.<sup>30</sup> Economic development, the Court observed, is a vital government objective.<sup>31</sup> Private commercial parties are often best situated to realize this objective. Courts cannot, and should not, second-guess such decisions.<sup>32</sup>

*Poletown* was overturned by the same court some twenty-three years later.<sup>33</sup> Although this was done on the ground that *Poletown*'s understanding of “public use” (as a state constitutional matter) was too broad,<sup>34</sup> there is little doubt that it was influenced by a widespread perception of *Poletown*'s fundamental injustice.

*Poletown*—as a case—may now be dead, but its approach to eminent domain has continued. For instance, in the *Kelo* case, the targeted community was the Fort Trumbull area of New London, Connecticut.<sup>35</sup> With help from the State, “an integrated development plan” featuring a waterfront conference hotel, restaurants, marinas, office and retail space, and other upscale projects was drafted.<sup>36</sup> Properties to be acquired by eminent domain and razed included the residents’ (plaintiffs’) modest, well-kept, waterfront houses.<sup>37</sup>

“The disposition of this case,” the United States Supreme Court’s majority began, “turns on the question [of] whether the City’s development plan serves a ‘public purpose.’”<sup>38</sup> In this, courts must give broad deference to legislative judgments.<sup>39</sup>

<sup>28</sup> Safire, *supra* note 27.

<sup>29</sup> Michelman, *Constitutional Right*, *supra* note 25, at 1097.

<sup>30</sup> See *Poletown*, 304 N.W.2d at 460.

<sup>31</sup> See *id.* at 458–59 (noting that the state constitution provides that health and general welfare are a public concern to be addressed by the legislature and that unemployment and revitalizing a community’s economy are public purposes).

<sup>32</sup> See *id.* (holding that when the avowed purpose is public and adequate procedures have been followed, judicial review is at an end).

<sup>33</sup> See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

<sup>34</sup> See *id.* at 785.

<sup>35</sup> See *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

<sup>36</sup> See *id.* at 473–74.

<sup>37</sup> See *id.* at 475.

<sup>38</sup> *Id.* at 480.

<sup>39</sup> See *id.*

Quoting the *Berman* case,<sup>40</sup> which dealt with the use of eminent domain powers for urban renewal, the Court observed that it is not a court's job "to determine whether a particular housing project is or is not desirable."<sup>41</sup> This is particularly true because "[t]he values [that public welfare] represents are spiritual as well as physical, aesthetic as well as monetary."<sup>42</sup> "Those who govern the City [of New London] were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."<sup>43</sup>

There are many ways to approach the correctness, or justness, of the *Poletown* and *Kelo* decisions. One way, Michelman writes, is to evaluate whether such decisions properly protect the "property" rights safeguarded by the United States Constitution.<sup>44</sup> For instance, "property" (for constitutional purposes) may be the property owner's reasonable "investment-backed expectations."<sup>45</sup> Or it may be those interests that are protected by "existing rules or understandings that stem from an independent source such as state law."<sup>46</sup> Or it may be what the "ordinary observer" or "man on the street" believes should be protected.<sup>47</sup>

All of these formulations reflect the view that constitutionally cognizable property rights (and, indeed, property rights generally) are understood in terms of reliance-based or expectation-based interests.<sup>48</sup> The institution of property, in this view, is "responsive to the values of security and regularity" that are valued by individuals.<sup>49</sup> As such, the question of the (moral) acceptability of the impairment of property should use the same template. Whether an impairment of property is acceptable will depend on whether there is "a violation of, or departure from, the rules as they stood when the reliance arose."<sup>50</sup> If, for instance, title to land is held in a way that is expressly subject to collective power, the taking of that land (and the payment of compensation) is an acceptable risk for owners.

When evaluated in this light, the *Poletown* and *Kelo* decisions would seem, at first blush, to be both correct and just. The owners in both cases bought these homes and

<sup>40</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>41</sup> *Kelo*, 545 U.S. at 481 (quoting *Berman*, 348 U.S. at 33).

<sup>42</sup> *Id.* (quoting *Berman*, 348 U.S. at 33).

<sup>43</sup> *Id.* at 483.

<sup>44</sup> See Michelman, *Constitutional Right*, *supra* note 25, at 1098.

<sup>45</sup> See, e.g., *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978).

<sup>46</sup> See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>47</sup> See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 100–03 (1977).

<sup>48</sup> See Michelman, *Constitutional Right*, *supra* note 25, at 1103 (suggesting these two additional ways to view property rights).

<sup>49</sup> *Id.* at 1102.

<sup>50</sup> *Id.*

maintained them in the context of existing laws and understandings, including the power of eminent domain. They knew, from the beginning, that title could be taken (and compensation paid) if necessary for collective interests. Whatever reliance they expended, or expectations they harbored, were over-shadowed by this power. Reliance interests beyond those grounded in the guarantees of regular procedures (which were afforded) and economic compensation (which was given) were unfortunate or sadly naive, perhaps, but—in any event—not a part of the institution of property.

As much as we might want to believe that statement of reliance interests, however, something—in *Poletown* and in *Kelo*—seems wanting. Something sticks in the craw. *Perhaps* development is a worthy governmental goal. *Perhaps* the owners of these homes knew that they owned, in a sense, at the pleasure of their neighbors. *Perhaps* they were paid for their economic loss. Isn't there still something—something important, something vital—that is missing?

In fact, political reliance interests held by citizens are more than the limited interests we have recognized thus far as part of protected property. As John Hart Ely wrote in *Democracy and Distrust*, and as Michelman reminds us, we are caught between “two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other.”<sup>51</sup> The only way to reconcile this tension, if indeed it can be reconciled, is for those who review the products of government to make sure that “the opportunity [for minorities] to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has [not] been unduly constricted.”<sup>52</sup>

Therein lies the rub. Were the rights to political participation of the residents of *Poletown* and *Fort Trumbull* acknowledged and valued? In other words—in the terms that we previously established—were the actions of government in these cases undergirded by the moral warrant of *equally respected participation*?

To assess these questions, we must begin with a reminder of the social and political significance of property in human lives. In the United States (as elsewhere), single-family houses, apartment buildings, farms, restaurants, office buildings, and other physical places are more than human structures. They are more than simple shelters or wealth-generating investments. They provide the *spaces* we inhabit, the realities in which we live, and the identities that comprise our individual, social, and political lives. It is because of physical property (our place of residence) that we are entitled to vote, to participate in local or state governance, and to exercise all of the rights and privileges of citizenship. It is through the places that we live that we have social networks, economic means, and (generally) any hope of political influence. Property rights, in the sense of land, houses, businesses, and other groundings in physical place, provide

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<sup>51</sup> *Id.* at 1109 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86–87 (1980)).

<sup>52</sup> ELY, *supra* note 51, at 77.



the location, the means, the “material foundation” (in Michelman’s words) for social and political expression and self-determination.<sup>53</sup> In short, the ability to possess physical property and the ability to participate in the political process are linked deeply and irrevocably.

When seen in this light, the destruction of neighborhoods for economic redevelopment purposes has clear and severe consequences for the residents’ continued, fair, and effective political participation. “Just consider,” Michelman writes, “how the obliteration of Poletown and the rupture of its society, with or without payments . . . to the former inhabitants, may bear on their identity and efficacy as participants” in the polity.<sup>54</sup> A similar observation could be made regarding the residents of Fort Trumbull or any other community that is razed in the name of the common good. This does not mean that every public project that destroys a thriving community is necessarily illegitimate. It *does* mean, however, that these crucial interests of affected residents—interests that are essential to the foundations of our consensual political system—must weigh very heavily in the calculation.<sup>55</sup>

If we look at the *Poletown* decision, it is startling what short shrift—if, indeed, any shrift—is given to affected residents’ rights regarding the protection of community and its political participatory interests. In the *Poletown* opinion, we hear much about “promot[ing] industry and commerce,” “adding jobs and taxes,” “rehabilitat[ing] . . . blighted areas, and fostering urban redevelopment.”<sup>56</sup> We read about careful consideration of whether “the power of eminent domain [can be used] to condemn one person’s property to convey it to another private person in order to bolster the economy.”<sup>57</sup> In answer to this concern, the Court cited “substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate . . . sites to implement the project.”<sup>58</sup> In sum, “the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object” of the legislature’s authorization.<sup>59</sup> As for the displaced residents’ interests, they were discussed by the Court only in connection with a state statute that protected “natural resources”—a term which, “[by] its plain meaning, . . . does not encompass a ‘social and cultural

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<sup>53</sup> See Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher’s Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 298–99 (1980).

<sup>54</sup> Michelman, *Constitutional Right*, *supra* note 25, at 1113.

<sup>55</sup> See *id.* at 1112–13.

<sup>56</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457–58 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

<sup>57</sup> *Id.* at 458.

<sup>58</sup> *Id.* at 459.

<sup>59</sup> *Id.*

environment.”<sup>60</sup> In other words, the residents’ interests in the continuance of community—for all purposes—are simply not legally cognizable.

As noted above, the Michigan Supreme Court has since abandoned the *Poletown* case.<sup>61</sup> However, the courts’ general failure to recognize residents’ vital interests in fair and effective political participation, and the impact of community-destroying eminent domain projects on those interests, has continued. For instance, when the United States Supreme Court addressed the virtually identical questions of public power in the *Kelo* case, the residents’ interests in social and political community were given no more serious consideration. “The disposition of this case,” the majority opinion began, “turns on the question [of] whether the City’s development plan serves a ‘public purpose.’”<sup>62</sup> “It is within the power of the legislature to determine that the community should be beautiful . . . , spacious . . . , [and] well-balanced . . . .”<sup>63</sup> This economic development plan would “provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”<sup>64</sup>

The irony, of course, is that the “community” to which the *Kelo* Court refers is not the “community” of the displaced residents. It is the “larger” community of other city, state, or national residents, who desire beautification, tax revenues, high-end restaurants, waterfront shops, and other benefits. The interests of the community which pre-exist the destruction required to create those benefits are simply not a part of this “community” calculation.

In defense of the *Kelo* decision, it must be remembered that the question at issue in that case was whether such projects should be stopped as a matter of federal constitutional mandate.<sup>65</sup> The United States Constitution is, by anyone’s reckoning, an incredibly blunt instrument for attempting to strike as complex and factually sensitive balancing of interests as cases of this kind demand. In addition, and perhaps even more critically, the “public use” requirement of the Fifth Amendment—under which the exercise of eminent domain in *Kelo* was challenged—has applications far beyond this setting. Exercises of eminent domain, against titles to land or other property, are only one small part of the vast field of potential “takings” of property by government. If the Court in *Kelo* had adopted a restrictive, court-enforced understanding of the permissible exercise of government power in this case, it would have been obligated, as a doctrinal matter, to apply that understanding when adjudicating other claims—including those that are purely regulatory in nature. As the majority stated, “[t]here is . . . no principled way of distinguishing economic development [as a scrutinized category] from the other public purposes that we have recognized.”<sup>66</sup> Second-guessing by courts of

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<sup>60</sup> *Id.* at 460.

<sup>61</sup> *See supra* text accompanying note 33.

<sup>62</sup> *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

<sup>63</sup> *Id.* at 481 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

<sup>64</sup> *Id.* at 483.

<sup>65</sup> *See id.* at 472.

<sup>66</sup> *Id.* at 484.

the legitimacy of the public-purpose determinations that underlie environmental regulations, commercial regulations, workplace regulations, agricultural regulations, and thousands of other regulations would hardly be a desirable or workable outcome.<sup>67</sup>

Does this mean that the moral warrant of equally respected participation, which must ground the coercive exercise of government power, is simply non-cognizable as a legal matter in these cases? In fact, there is a ready avenue for the recognition of this value, as Michelman's article twenty years ago suggests.<sup>68</sup> The core of the *Poletown* case, the *Kelo* case, and other similar cases is *the protection of property*, whether by constitutional, political, or other means. As a legally enforceable matter, we already recognize property's psychologically protective, physically exclusionary, and economic investment functions.<sup>69</sup> Why not also its physicality, its material foundation for social and political participation?

In addition, there is another related and very potent issue here: whether the destruction of property—and the resultant undermining of residents' political, social, and economic lives—is a risk extended equally to all, or is, as a structural matter, extended only to a particular class of persons. Whatever the theoretically equal risk that all community members face from economic revitalization projects, the “goals” that these projects seek—and the politics of wealth—mean the certain privileging of some over others. If our goal is “new jobs and increased tax revenue,” or “beautiful . . . , spacious . . . , [and] well-balanced” spaces,<sup>70</sup> there is little doubt how the trailer park or the older, “run-down” neighborhood will fare as compared with a development of half-million-dollar homes with manicured lawns and gardens. Indeed, we might muse, it is *not* that the role of physical property in social and political life is unrecognized by politicians and courts; it is simply that this is recognized for some and not for others. The wealthy did not lie awake in their beds with worry after the *Poletown* case was rendered; the owners of luxury shore-front homes do not quake after *Kelo*. The truth is that the risks and price of eminent domain do not fall on those whose land already exemplifies the “values” that we seek or whose voices are amplified by wealth, political connections, and power. They fall on those whose communities are (as a “factual” matter) “nothing special,” “detrimental to progress,” “expendable,” or otherwise less worthy than others, and who (for this and other reasons) lack social, economic, and political power.

Indeed, it is this *certain knowledge* of selective risk that underlies the reality of the structural, political exclusion that characterizes *Poletown* and *Kelo*. It is also this certain knowledge of selective risk that fuels our inner and abiding feeling of injustice. Justice O'Connor, in her dissent in *Kelo*, observed that “*all private property is now*

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<sup>67</sup> See, e.g., *id.* at 482 (discussing the Court's prior upholding of the Federal Insecticide, Fungicide, and Rodenticide Act against Fifth Amendment “public use” challenges).

<sup>68</sup> See Michelman, *Constitutional Right*, *supra* note 25, at 1098–99.

<sup>69</sup> See, e.g., LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 19–20 (2003).

<sup>70</sup> See *Kelo*, 545 U.S. at 481, 483.

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.<sup>71</sup> Theoretically, this might be true. But in actuality, we know better.

### CONCLUSION

It is a price of democratic government that some people will win and others will lose. However, as Michelman so brilliantly argues, democracy is more than a purely procedural conception.<sup>72</sup> It is “a substantive social norm—a prescription for how to treat people . . . in view of their interests (in self-government).”<sup>73</sup> Democracy demands that government meet the requirements of a moral warrant for the use of collective force.<sup>74</sup> It demands that we be mindful of the interests of everyone, and the status of everyone, as free and equal persons.<sup>75</sup>

There are few examples of collective force that match the government's taking of individuals' homes and the obliteration of living neighborhoods. In such cases, the need to meet the requirements for democracy's moral warrant are extraordinarily high. At the very least, we must acknowledge and value the profound interests in community and participation that such actions destroy. We must also reject a structuring of the goals and powers of the eminent domain game in a way that makes certain communities assumed and certain losers.

Our inner and unshakable feeling of injustice in the *Poletown* and *Kelo* cases is rooted in the knowledge that, in these cases, this moral warrant failed. It failed because the residents' interests in social and political community were never acknowledged as a part of the legal process. It failed because the collective goals that were identified were stacked against the communities of some, and graciously exempted the communities of others. It failed because the political and economic processes, which generate such plans, were structured against those without money or influence. It failed because there was no hint, in these cases, that any of this was or should be any kind of moral question.

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<sup>71</sup> *Id.* at 494 (O'Connor, J., dissenting) (emphasis added).

<sup>72</sup> See MICHELMAN, BRENNAN, *supra* note 10, at 42.

<sup>73</sup> *Id.* at 43.

<sup>74</sup> See Michelman, *Social Rights*, *supra* note 5, at 23.

<sup>75</sup> See *id.*